

## FATALITY LAW UPDATE

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The focus of this paper is to provide an overview of the cases which have dealt with assessing damages for fatal accidents. The paper begins with a brief overview of the legislation and issues that are typically dealt with when assessing damages for fatalities. If you are already well versed in this area of law, you may wish to skip forward to the portion of this paper which discusses the cases that have developed this area of law over the past year.

### OVERVIEW OF FATALITY LAW ISSUES

As set out in s. 38(1) of the *Trustee Act*<sup>1</sup>, where there is a fatal accident the estate does not have a right to claim general damages for either the death or the loss of life of the deceased:

Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the Family Law Act.

Nonetheless, the *Family Law Act*<sup>2</sup> (“FLA”) provides that certain family members of a person suffering a fatal accident may have a right of action for both pecuniary and non-pecuniary damages:

#### *Right of dependants to sue in tort*

61. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

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<sup>1</sup> R.S.O. 1990, c. T.23

<sup>2</sup> R.S.O. 1990, c. F.3

*Damages in case of injury*

(2) The damages recoverable in a claim under subsection (1) may include,

- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
- (b) actual funeral expenses reasonably incurred;
- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

*Contributory negligence*

(3) In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed.

Who May Advance A Claim

As set out in s. 61(1) of the *FLA*, claims for damages arising out of a fatal accident may only be made by the spouse, children, grandchildren, parents, grandparents, and siblings of the deceased.

Family Law Act Claims – s. 61(1) – Pecuniary Losses

Assessment of the pecuniary loss arising out of a fatal accident will typically focus on the income that had been earned by the deceased, to the extent it would have been of benefit to the surviving *FLA* plaintiff. As such, these claims are only likely to be successful if advanced by a family member who was living with the deceased, or who was clearly dependent on the deceased's income.

In assessing the value of such claims, the Courts will first seek to determine what percentage of the deceased's income was to the benefit of a particular *FLA* claimant. Typically, for a spouse, this has been set at 70% of the deceased's income where the deceased was the sole breadwinner, and at between 60-65% where there have been two incomes. This is referred to as the "dependency factor". The dependency factor for each child is normally assessed at 4% of the deceased's income. Note that there is usually a further reduction for contingencies, such as the likelihood of the spouse marrying in the future. See, for example, *Ashley Estate v. Goodman*<sup>3</sup>, where there was a 5% contingency reduction of the future dependency losses, even though the Court noted that it was unlikely the plaintiff would remarry. Keep in mind that where the fatality is *not* the result of a motor vehicle accident, there would be a gross up on damages for

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<sup>3</sup> 1994 CarswellOnt 4132 (Ont. C.J. (Gen. Div.)) at para. 29.

dependency loss, as well as for lost household services (discussed below) to offset the taxation of these damages, provided the Court does not favour a structured settlement.<sup>4</sup>

As you will see in *Isildar v. Kanata Diving Supply*<sup>5</sup>, which is discussed below, adjustments can be made to the dependency factor where the evidence suggests a better approach.

#### Family Law Act Claims – s. 61(2)(b) – Funeral Expenses

It goes without saying (but I will say it nonetheless) that sooner or later, everyone is going to need a funeral. Nonetheless, where death is caused by a fatal accident, *FLA* plaintiffs are entitled to be reimbursed for their reasonable funeral expenses by the tortfeasor. Why? Because the *FLA* says it is so. Query what would happen in a situation where the deceased had already purchased their own burial plot.

#### Family Law Act Claims – s. 61(2)(e) – Loss of Care, Guidance, and Companionship

The proper approach for determining non-pecuniary losses under the *FLA* was set out in *Kollaras (Litigation Guardian of) v. Olympic Airways S.A.*<sup>6</sup>:

1. In order for a claim to succeed, there must be actual loss of care, companionship and guidance;
2. While the *Family Law Act* is remedial in nature, some measure of judicial restraint appears to be the order of the day;
3. No damages can be awarded for grief, sorrow or mental anguish by reason of an injury sustained by a relative;
4. Each claim must be assessed on its particular facts, although, a judge may have regard to:
  - (i) the age, mental and physical condition of the claimant;
  - (ii) whether the injured party lived with the claimant and, if not, the frequency of family visits;
  - (iii) the intimacy and quality of the claimant's relationship with the injured party;
  - (iv) whether or not the claimant is emotionally self sufficient; and
  - (v) the joint life expectancy of the claimant and the injured party...

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<sup>4</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.116

<sup>5</sup> (2008), 168 A.C.W.S. (3d) 444 (Ont. S.C.J.).

<sup>6</sup> [1999] O.J. No. 1447 (Ont. Gen. Div.), at para. 92

## **FATALITY LAW CASES FROM THE PAST YEAR**

### 1. **Matthews Estate v. Hamilton Civic Hospitals**<sup>7</sup>

This was a medical malpractice action. The plaintiff, Godfrey Randolph Matthews, was a 68 year old man who went in for brain surgery in November of 1994. Through the alleged negligence of one of the defendant doctors, Mr. Matthews was left with serious and permanent neurological damage. He lived for a further ten and a half years, but he was unable to communicate during this time. Nonetheless, there was evidence accepted by the Court that he was a least somewhat aware of his surroundings.

Although no liability was found due to causation issues, damages were assessed by Justice Spiegel.

#### a) Claims of the Estate

General damages were claimed on behalf of Mr. Matthews through his estate. The Court accepted that Mr. Matthews was not only partially aware of his surroundings, but specifically aware of his pain and ongoing disability. General damages were assessed at \$180,000. Interestingly, Justice Spiegel noted that had this case been before the Court within a few years of the 1994 surgery, general damages likely would have been considerably less, to account for a reduced life expectancy. Having outlived his life expectancy post surgery, the Court was able to assess these damages based on the actual amount of time he suffered with his disabilities.

#### b) Family Law Act Claims – s.61(2)(d) Services Provided/Loss of Income

##### (i) *Global v. Hourly Rate*

There was a major issue in this case dealing with how the provision of services to Mr. Matthews by his family ought to be assessed. The defendants relied on two previous cases, including *Desbiens*, in support of their position that compensation for the services provided by the family ought to be assessed on a global basis, taking into account the nature, quality and duration of care provided.

In this case, the Court rejected the global approach in favour of an hourly rate. However, Justice Spiegel indicated that in other cases, where there is a lack of precise evidence regarding the amount of time expended and the nature of the services provided over and above what would ordinarily have been performed by a family member, the global approach may be appropriate, as it had been in *Desbiens v. Mordini*<sup>8</sup>.

The lesson here, as always, is that your clients should be instructed to keep accurate records of their services, including time spent and the nature of the services provided.

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<sup>7</sup> (2008), 170 A.C.W.S. (3d) 650 (Ont. S.C.J.).

<sup>8</sup> (2004) O.J. No. 4735 (Ont. S.C.J.).

(ii) *Value of Services*

The focus of the assessment was on the value of the services provided, with a view to the cost of replacing the care provided with similar care available on the open market. Of the three sons who provided care for Mr. Matthews, only one had any medical training. Nonetheless, evidence accepted by the Court showed that Mr. Matthews' sons were able to acquire medical skills through observing medical professionals in the hospital, reading and inquiry, and most importantly by "on-the-job" experience. Consequently, the Court held the care provided by the sons was at least as skilful as would have been provided by a Registered Nurse ("RN") and perhaps even a medical doctor.

The defendants argued that, even so, none of the three sons would have been able to earn income commensurate with a professional (RN) hourly rate. This too was rejected, as to accept this argument would arbitrarily discriminate against lower wage earners by limiting the value of the care provided.

Justice Spiegel went even further, indicating that the value of the services should not be reduced "because the family members did not have sufficient financial means to hire professional caregivers." Justice Spiegel noted that an assessment of future care is clearly based on the cost of obtaining appropriate level of care in the market place. He stated:

I see no principled reason why the assessment should be significantly different merely because the services have already been rendered. Otherwise, where sophisticated care is being provided by family members, it would be in the defendant's interest to delay the trial as long as possible so as to avoid the more onerous impact of an award for future care costs.

Assessment of the care provided was therefore based on the hourly rate of an RN.

c) Family Law Act Claims – s.61(2)(e) Loss of Care Guidance and Companionship

(i) *Claims of Mrs. Matthews*

Mr. Matthews' widow was completely blind<sup>9</sup>. Although Mr. Matthews was himself partially blind, the court found that his sight was in effect, the shared sight of the couple. They had been married for over thirty years at the time of the surgery. Mr. Matthews was responsible for gardening, some of the cooking, mowing the lawn and vacuuming the house. He would also go to the market on the weekends to buy fresh produce for cooking family meals. In assessing Mrs. Matthews' non-pecuniary damages, the Court took into account her lack of sight, as well as Mr. Matthews inability to communicate with his family for the ten years he survived. Mrs. Matthews non-pecuniary damages were assessed at \$100,000.

Keep in mind the factors outlined in *Kollaras* to be applied when assessing non-pecuniary *FLA* claims. It is quite clear that no damages are to be awarded for grief, sorrow or mental anguish. Consequently, this assessment must be viewed simply as an assessment of the loss of care,

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<sup>9</sup> Mrs. Matthews' age is not discussed in the case, and according to defence counsel, she would not divulge this information during examinations for discovery.

guidance and companionship that Mrs. Matthews would have received from the time of the surgery until the time of his expected death (his life-expectancy but for the surgery was not discussed in the case, but it would not likely have been significantly different than his actual age at his death, 78). One can only assume that Mrs. Matthews' reliance on her husband's limited sight played heavily into this assessment.

(ii) *Claims of Children and Grandchildren*

The Court took into account the close-knit nature of this family, and awarded non-pecuniary damages to each of Mr. Matthews' three sons at \$50,000. The two grandchildren were each awarded \$7,500.

2. *Isildar v. Kanata Diving Supply*<sup>10</sup>

a) Family Law Act Claims are Derivative in Nature

This case involved a fatal diving accident. The Court found that although the defendant dive shop and its instructors fell below the standard of care, Mr. Isildar, 28 years old at the time of his death, had signed a valid waiver and consequently, there was no liability on the defendants vis-à-vis the deceased.

Nonetheless, Mr. Isildar's widow and infant son brought an action pursuant to s. 61 of the *Family Law Act*. The Court recognized the well established principle that *Family Law Act* claims are derivative in nature. Justice Rocco cited with approval the Ontario Court of Appeal's decision in *Riddell v. Slattery Estate*<sup>11</sup>, which considered a claim brought under s. 60 of the predecessor legislation, the *Family Law Reform Act*<sup>12</sup>:

In our opinion, the right of action of the parents, brother and sisters of the deceased person under s. 60 of the Family Law Reform Act is purely a derivative action depending on the entitlement of the deceased to personally maintain an action for damages in the circumstances of the accident if he had not been killed.

Since the waiver would have precluded Mr. Isildar from bringing an action had he survived, his family was not able to bring a derivative claim resulting from the same occurrence.

b) Family Law Act Claims – s. 61(2)(e) Loss of Care Guidance and Companionship

(i) *Claims of Mrs. Isildar*

Although the waiver precluded the *Family Law Act* claims, the Court proceeded with an assessment of damages.

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<sup>10</sup> (2008), 168 A.C.W.S. (3d) 444 (Ont. S.C.J.).

<sup>11</sup> [1988] O.J. No. 566 (Ont. C.A.).

<sup>12</sup> R.S.O. 1980, c. 152, s.60 (now s.61 of the *Family Law Act*).

Two years prior to the accident in 2003, the deceased had immigrated to Canada with his wife. A young son was born shortly before the accident. Although Mrs. Isildar had been a lawyer in Turkey, she had not found employment in Canada and was primarily a homemaker and caretaker of their infant son. She had not learned to speak any English, and had no family or friends in Canada.

Following the accident, she spent about a year in Canada tending to her late husband's estate, before falling ill and returning to Turkey. She eventually returned to working as a lawyer, albeit on a reduced basis as there was evidence suggesting she had a low tolerance for stress. Furthermore, she had not become involved in any conjugal relationships since her husband's death, and the Court accepted evidence that Turkish culture would view her as being "tainted for marriage".

Her damages were assessed at \$75,000.

(ii) *Claims of Infant Son*

Mr. Isildar's son was only three months old when he lost his father. The Court again took note of the fact that it was unlikely that Mrs. Isildar would remarry, and consequently, it was not likely that there would be a man who may choose to stand in *loco parentis*.

The infant son's damages were assessed at \$50,000.

c) Family Law Act Claims – s. 61(1) Pecuniary Losses

According to evidence accepted by the Court, Mr. Isildar would have worked until age 60, the average age of retirement for university educated men.<sup>13</sup> A final finding on future loss of support was left pending submissions on the basis of a retirement age of 60, as the parties had not provided this evidence to the Court during the course of the trial.

Nonetheless, the decision did make two significant findings on how the loss of support would be calculated. First, the Court found that the traditional approach of assigning a dependency factor of 70% for a spouse and 4% for a child where there is only one income underestimates the cost of raising children. On the basis of evidence provided by the plaintiff's economic loss expert, a revised approach was taken whereby Mrs. Isildar's would be assigned a dependency factor of 56.7% and the infant plaintiff would be assigned a dependency factor of 18.9%. However, the Court also found that the Isildars likely would have had another child two years later, at which point, Mrs. Isildar's dependency factor would be further reduced to 50%. Once the infant plaintiff reached 21 years of age, Mrs. Isildar's dependency factor would then be increased to 68.3%.

Second, a workforce participation discount was applied. Taking into account that the deceased was 28 years old at the time of his death and employed in the technology sector, the Court determined the appropriate workforce participation discount factor to be 13.5%.

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<sup>13</sup> No detail in the decision is provided about the study relied upon for this finding. However, with the removal of mandatory retirement at age 65, one could rightly question whether this finding would still be applicable in the near future.

### 3. Madonia v. Stevens<sup>14</sup>

This was a medical malpractice action in which a woman was misdiagnosed by a physician and provided treatment that led to a fatal injury. The deceased widower brought an action seeking both pecuniary and non-pecuniary damages under the *Family Law Act*. Claims were also advanced for non-pecuniary damages on behalf of the two children and three grandchildren of the deceased.

The Court found that, but for the actions of the defendant, Mrs. Madonia would have lived for two more years.

#### a) Family Law Act Claims – s. 61(1) Pecuniary Losses

Both Mr. Madonia and Mrs. Madonia were pensioners. Assessing the pecuniary loss as it related to the deceased's pension was done conventionally. Mrs. Madonia had been receiving approximately \$12,000 per year under her pension. Given that there were two household incomes, a dependency factor of 60% was applied. On the basis of a two year life expectancy, damages for the loss of the deceased's pension was assessed at \$14,261.

Dealing with Mr. Madonia's pension presented a more interesting issue. According to the terms of his pension, his annual pension income would be reduced by 1/3 upon the death of either himself or his wife. The defendants argued that Mr. Madonia's pension loss should be calculated by determining the amount of lost pension and applying the dependency factor to arrive at the number.

In rejecting this approach, the Court noted that the loss of pension income to Mr. Madonia was contractual in nature and was therefore a direct loss. No cases were found in which a dependency factor had been applied to direct losses. Consequently, the damages were assessed at \$15,941, the actual loss of pension income as a result of his wife's death.

There was also an award made for loss of domestic services. Here, evidence confirmed that Mrs. Madonia did the cooking and most of the house cleaning, as well as the gardening. She was also in charge of their grocery shopping. There was no evidence that they had any plans or need to move to an assisted living environment. Damages were assessed at \$30 per week, 50 weeks per year, over two years for a total of \$3,000.

#### b) Family Law Act Claims – s. 61(2)(e) Loss of Care Guidance and Companionship

In assessing the non-pecuniary losses for each of the plaintiffs, Justice Coates cited cases where there were similar findings of fact with regard to the nature and quality of the relationship between the claimant and the deceased as guideposts to the assessment of damages in this case.

The findings of fact with respect to Mr. Madonia's claim were that he had been married to the deceased for over 50 years, they had a very close relationship, she was responsible for most of the housekeeping and yard work, and since her death, he had become very lonely and withdrawn.

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<sup>14</sup> [2008] O.J. No. 5434 (S.C.J.).

Taking into account that she was expected to live two years beyond her death, non-pecuniary damages for Mr. Madonia were assessed at \$50,000

Both Mrs. Madonia's children were found to have also had a very close relationship with their mother, and were awarded \$20,000. All three grandchildren were also found to have had a close bond with their grandmother. Two of the three were awarded \$7500. The third grandchild was found to have a particularly close relationship with his grandmother, sleeping over at her house twice a month and otherwise spending a great deal of time with her. He was awarded \$12,500.

c) Family Law Act Claims – s. 61(2)(b) Funeral Expenses

Damages were awarded for the funeral expenses incurred (\$10,428.13) and the cost of the burial plot (\$5,529.23). An additional claim was advanced for the cost of a funeral dinner hosted for out of town guests. Although the defendants took the position that this expense was not properly recoverable, the Court found this to be a reasonable expense and awarded an additional \$1,693.66.

4. **Dower v. United Lumber & Building Supplies Co.**<sup>15</sup>

This was a summary judgment motion. The action arose out of a fatal workplace accident. A claim was advanced by the mother of the deceased under the *Family Law Act*.

As a Schedule 1 employee, the deceased and his "survivors" would be precluded from bringing a claim against the defendant employer under the *Workplace Safety and Insurance Act*<sup>16</sup> (the "WSIA"). The definition of "survivors" under the *WSIA* does not include a parent of the employee.

Prior to bringing the motion, the defendants made an application to the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), which determined that Mrs. Dower was neither a "dependant" nor a "survivor" within the meaning of the *WSIA*. WSIAT held therefore that no provision in the *WSIA* removed Mrs. Dower's right to commence an action under s. 61 of the *Family Law Act*.

At the summary judgment motion, the defendants took the position that Mrs. Dower's claims under s. 61 of the *FLA*, being derivative in nature, were precluded as her son would not have been able to advance any claim had he survived. Nonetheless, Justice Allen rejected this argument, finding that the WSIAT has exclusive jurisdiction to determine whether the *WSIA* removes the right of any party to bring an action, and dismissed the motion.

Significantly, the WSIAT was not asked, and did not determine whether the Estate or the deceased son could have advanced a claim. It seems quite clear that had the WSIAT made a ruling on ability of the Estate to advance a claim, the summary judgment motion would have been successful.

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<sup>15</sup> [2008] O.J. No. 1618 (S.C.J.).

<sup>16</sup> 1997, S.O. 1997, c. 16, Sch. A.

## 5. *Fidler v. Chiavetti*<sup>17</sup>

This is an action arising out of a fatal motor vehicle accident. The family members of the deceased brought an action under the *Family Law Act*, which included claims for lost income and health care costs of the surviving family members. A trial was held to determine whether these damages could be recovered. The case does not discuss the merits of these claims. Consequently, it is unclear how these damages arose in the context of a fatal accident.

Nonetheless, the first issue the Court faced was whether the loss of income and health care costs of the plaintiffs were recoverable. Here, Justice Walters cited the majority opinion of Justice Laskin in *Macartney v. Islic*<sup>18</sup>, which determined that the list of the heads of damage set out in s. 61(2) of the *Family Law Act* is not exhaustive, but rather illustrative. Indeed, this section provides that the recoverable damages “may include...” Consequently, it was determined that both lost income and health care expenses of *FLA* claimants are recoverable, provided the trier of fact is satisfied that such damages are suffered as the result of the injury or death giving rise to the claim.

The second issue was whether health care expenses, even if *recoverable*, were nonetheless precluded by the *Insurance Act*<sup>19</sup>. As provided by s. 267.5(3) of the *Insurance Act* :

Despite any other Act and subject to subsection (6), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for expenses that have been incurred or will be incurred for health care resulting from bodily injury arising directly or indirectly from the use or operation of the automobile unless, as a result of the use or operation of the automobile, the injured person has died or has sustained [a threshold injury].

The Court held that since the family members were not the “injured person” contemplated by the *Insurance Act*, they were precluded from advancing such claims. Significantly, the Court specifically left open the possibility that similar claims which do not arise from a motor vehicle accident could be advanced. The plaintiffs were permitted to proceed with their claims for lost income.

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<sup>17</sup> (2008), 92 O.R. (3d) 219 (S.C.J.).

<sup>18</sup> (2000), 46 O.R. (3d) 641 (Ont. C.A.).

<sup>19</sup> R.S.O. 1990 c. 18 as amended.