LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

PECUNIARY LOSS AND THE *FAMILY COMPENSATION ACT*

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970. The mandate of the Commission is to:

> "take and keep under review all the law of the Province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law...."

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TO THE HONOURABLE COLIN GABELMANN
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON PECUNIARY LOSS AND THE *FAMILY COMPENSATION ACT*

When a person is wrongfully injured by another, but the injuries do not prove to be fatal, the main focus of the law is compensating that person for loss arising from the injuries, although others close to the injured person may also suffer loss. When a person is wrongfully killed legislation shifts the law's concern more directly to compensating at least some who are affected by the death. In British Columbia, the legislation is called the *Family Compensation Act*. It is almost 150 years old.

Through the vigilance of the courts, assisted by an increasingly specialised bar, many of the principles of compensation for loss arising from personal injury and fatal accident have continued to evolve to reflect contemporary views. But this is not true of all aspects of this body of law. A review of recent cases reveals a series of inconsistencies and anomalies in the law, attributable in large measure to the fact that entirely different theories of compensation apply depending upon whether or not a person's injuries prove to be fatal.

In this Report we recommend replacing the *Family Compensation Act* with new legislation that will rationalize rights of recovery for pecuniary loss suffered by a relative or dependent of a person who is wrongfully injured or killed by another.

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CHAPTER I INTRODUCTION: COMPENSATION AND THE FAMILY

A. Compensation

When one person is injured others may also suffer financially and emotionally. Members of the victim's family, for example, are often called upon to contribute time and money for the care of the victim and serious injuries frequently cause grief and place strain on family relationships. The injury of a loved one can have traumatic consequences, altering lives tragically and permanently.

The law acknowledges only a few exceptions to the general principle that the injured person alone is entitled to compensation. Sometimes, for example, the injured person may add the financial claim of a family member to the action, and receive damages in trust.[1] Emotional injuries, however, are not generally compensable at common law.

When the injuries prove fatal different rules govern rights of recovery. Claims on behalf of the deceased (usually brought by the deceased's personal representative) are limited,[2] while some family members are entitled to recover compensation directly from the wrongdoer, for the loss of the financial support the deceased could have been expected to provide.[3] Children are also entitled to damages under another head, for the loss of what is inadequately described as a parent's guidance, care and companionship.[4]

B. Scope of this Report

1. THIRD PARTY RIGHTS AND FATAL AND NON-FATAL INJURIES

Measuring damages for family compensation is a highly technical exercise and parts of the process are still undergoing judicial development. For the most part, courts are well placed to refine the principles of damage assessment in family compensation cases, through the reconsideration of precedent, case by case.

On a broader level, some issues of policy have arisen upon which further legal development by the courts seems to be foreclosed and, if change is needed, it must be introduced through legislation. Our research has identified three aspects of the law governing the recovery of pecuniary loss that require reconsideration and possible legislative restatement:

- compensation is available to a child for the loss of a parent in a fatal accident case. The loss experienced by a child in some *non-fatal* cases, may be just as extreme but, even so, compensation for the loss is unavailable. Should compensation be available on this head in at least some non-fatal injury cases?

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1. *Donnelly* v. *Joyce*, [1974] Q.B. 454 (C.A.); *Teno* v. *Arnold*, [1978] 2 S.C.R. 287; *Hall* v. *Miller*, (1989) 41 B.C.L.R. (2d) 46 (C.A.). A relational claim may also exist for a one-man company employing the victim that suffers loss as a result of the injuries: *Everett* v. *King*, [1982] 1 W.W.R. 561 (B.C.S.C.); *Zeeb* v. *Purser*, [1990] B.C.D. Civ. 3359-18 (C.A.); *Turchak* v. *Patel*, [1992] B.C.D. Civ. 3397-06 (S.C.), *add'l reasons* [1992] B.C.D. Civ. 3596-05 (S.C.); *Chiu Estate* v. *Lang*, (1993) 37 A.C.W.S. (3d) 1215 (Ont. Ct. Gen. Div.); *Nattras* v. *Dlezal Estate*, (1994) 45 A.C.W.S. (3d) 82 (B.C.S.C.). But not for a business partner: *Burgess* v. *Florence Nightingale Hospital*, [1955] 1 Q.B. 349; or a creditor: *Roshard* v. *Spielman*, [1991] B.C.D. Civ. 3359-08. The law also once allowed an employer, husband or parent to recover for loss of *servitium* (lost services) resulting from the injury to, respectively, an employee, wife or child. In the case of the husband, damages could also be recovered for loss of *consortium* or companionship. But damages for these kinds of losses in non-fatal accident cases are no longer available in British Columbia: *see Report on Intentional Interference With Domestic Relations* (LRC 68, 1983); *Report on the Action Per Quod Servitium Amisit* (LRC 89, 1986); *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 75. Courts, however, routinely make sizeable awards in fatal accident cases for loss of home assistance: for recent examples *see Chung Estate* v. *King*, (Oct. 23, 1992) Lawyer's Weekly 13-4; *Birch* v. *Wilts*, [1992] B.C.D. Civ. 3659-03 (S.C.), *add'l reasons* [1992] B.C.D. Civ. 3380-03 (S.C.).

2. An action brought by the deceased's personal representative cannot recover compensation for some losses that the victim might have recovered, such as for pain and suffering, loss of expectation of life, and loss of future earnings: *Lankenau* v. *Dutton*, (1988) 27 B.C.L.R. (2d) 234, *aff'd* 55 B.C.L.R. (2d) 218 (C.A.); *West* v. *Morgan*, (1987) 28 E.T.R. 138 (B.C.C.A.).

3. The claim is brought by the deceased's personal representative on behalf of the family members: *Family Compensation Act*, R.S.B.C. 1979, c. 120, s. 3, although in some cases, the family members can bring the claim on their own behalf.

4. The loss of parental care, education, training, guidance, example and encouragement is characterized as pecuniary in nature: *Vana* v. *Tosta*, (1968) 66 D.L.R. (2d) 97 (S.C.C.).

- when third parties reasonably incur expenses on behalf of an injured person, those expenses are recoverable when the injuries are *not fatal*. Different rules of recovery apply when the victim's injuries prove to be fatal. Should the fatal accident rules be restated?

- who should be able to bring claims for compensation in fatal accident cases?

2. THE WORKING PAPER

A consultative document (*Working Paper on Pecuniary Loss and the Family Compensation Act*) was published in late 1992. It was circulated widely for comment.

The comment received was polarized. Basically, three separate viewpoints emerged:

- No changes should be made to the law.

- Any changes to the law should promote compensation on a no-fault basis.

- The law should be revised to provide compensation for more heads of loss experienced when a family member is fatally or non-fatally injured.

The consultative document expressly confined its inquiry to issues other than the recovery of non-pecuniary losses. Nevertheless, not unexpectedly, much comment we received was occupied with this issue.

3. SUMMARY

Misconceptions occasionally seemed to surround suggestions for change set out in the consultation paper. People commented extensively on matters that were not proposed. Negative introductory remarks in some submissions, for example, were often followed by almost complete agreement with the list of suggested changes.

What factors might have led to these misconceptions? We believe it is due in part to perceptions surrounding the *Family Compensation Act*. Some see opening the Act for the purposes of fine-tuning aspects relating to compensation for pecuniary loss as inevitably leading to revising the principles that govern compensation for non-pecuniary loss, an issue whose longstanding controversial nature was confirmed by the correspondence we received.

For convenience, and to avoid any possibility of confusion, we have summarized the recommendations made in this Report in two locations. Chapter VI contains a list of specific recommendations. The recommendations are then summarized in the form of a table, listing each suggested change and the results that would flow from implementing them. The Table is to be found in Appendix B.

CHAPTER II

FAMILY COMPENSATION AND FATAL ACCIDENTS

A. Fatal Accidents: The Common Law Position

Before legislation changed matters in 1846, courts in England could not award compensation for the death of a human being.[1] The common law's position was certainly hard on the deceased's family, and matters became worse as industrialisation in England led to new hazards and involved people in increasingly more dangerous occupations.

Families left without support often had to depend upon private charity, the parish or the workhouse. An ancient idea was employed to provide the deceased's family with some funds. Any property involved in causing a person's death (referred to as a deodand, which means "an accursed thing") was forfeit to the King's Almoner for charity. While funds generated by the sale of deodands were not legally earmarked for anyone in particular, the moral claims of the deceased's family were recognised.[2]

B. The *Fatal Accidents Act*

In England, the *Fatal Accidents Act, 1846*,[3] popularly referred to as *Lord Campbell's Act*, was enacted to allow courts to provide some members of a deceased's family with compensation. The Act is based on a simple theory. An action is brought by the deceased's personal representative on behalf of the deceased's close family: the spouse, children and parents of the deceased.[4] The action is to recover pecuniary loss suffered by the family members as a result of the deceased's death.[5]

Any doubts about the primary effect of the statute were settled in the first decade of its operation. The decision to limit recovery to pecuniary loss, for example, was confirmed within six years of the legislation's enactment by a panel of the House of Lords that included Lord Campbell.[6] The decision rested largely on two reasons: (i) the belief that it was impossible to place a value on non-pecuniary loss, and (ii) the prohibitive cost of such awards to the responsible party, since the Act applies equally "to the little tradesman who sent out a horse and cart in the care of an apprentice."[7]

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1. *Baker* v. *Bolton*, (1808) 1 Camp. 493, 170 E.R. 1033, where Lord Ellenborough said, "In a civil court the death of a human being cannot be complained of as an injury." The only exception was if the cause of action was in contract: *see* Goudy, *Essays in Legal History* (1913) 216-227. It has been suggested that Ellenborough's views were based on a misconception: Holdsworth, *A History of English Law*, vol. 3, 333-335, 676-677; *cf.* Winfield, (1936) 14 Can. B. Rev. 639, arguing that the legal position had been clear for many centuries.

2. Deodands are discussed in greater detail in the Working Paper: *see* Chapter II. An interesting perspective on this area of the law is to be found in: Cornish and Clark, *Law and Society in England, 1750-1950* (1989) 503.

3. (1846), 9 & 10 Vict., c. 93.

4. The Act provides that stepchildren and stepparents are also included in the deceased's close family.

5. The assessment is based on amounts the deceased might have devoted to the support of the dependent--the "pecuniary advantage" lost by reason of the deceased's death--and is not restricted by actual amounts paid before death, nor measured by reference to the deceased's legal obligation to provide support: *Franklin* v. *South E. Railway Co.*, (1858) 3 H. & N. 213, 157 E.R. 448 (Ex. Div.); *Dalton* v. *S. E. Railway Co.*, (1858) 4 C.B. (N.S.) 296, 140 E.R. 1098 (C.B.); *Proctor* v. *Dyck*, [1953] 2 D.L.R. 257 (S.C.C.); *St. Lawrence and Ottawa Railway Co.* v. *Lett*, (1886) 11 S.C.R. 422. For convenience, however, we describe the recovery of damages as being for "lost support." Another action may be brought by the personal representative on behalf of the deceased's estate to recover some losses incurred by the deceased up to the date of death. In British Columbia, this is under the *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66(2), which is discussed in Chapter III.

6. *Blake* v. *Midland Ry.*, (1852) 18 Q.B. 93, 118 E.R. 35.

7. *Ibid.*, at 111 (Q.B.).

C. The (British Columbia) *Family Compensation Act*

1. GENERALLY

Lord Campbell's Act has served as a model for legislation enacted in most of the Canadian provinces, including British Columbia, and many American states. It will mark its hundred and fiftieth anniversary in two years.

The British Columbia version of the Act is only a marginally brushed up version of the 1846 legislation.[8] The few differences reflect the adoption of modern drafting conventions,[9] some local inspiration and the borrowing of later English refinements, but these changes affect neither the broad outlines of the legislation nor its operation.[10]

Sometimes antiquity alone is good reason to review legislation to ensure that it continues to operate satisfactorily. Both the Act, and the initial judicial interpretations of it that shaped its operation, reflect social and legal policy of the last century. The objectives set for the legislation may no longer be appropriate today.

2. DAMAGE ASSESSMENT

Some parts of the legislation have been subject to continual scrutiny and development by the courts and, consequently, have been reshaped by contemporary legal principles. This process is most evident in the area of damage assessment. Much judicial activity has centred on assessing pecuniary loss.

The activity reflects, among other factors, an increased awareness of various economic issues, the changes that are being made in other areas of loss assessment, and the skills of an increasingly specialized bar. Some examples of recent issues considered by the courts:

- determining appropriate levels of compensation where the deceased provided services but earned no income, or was not yet earning income,
- the application of prejudgment interest to an award,
- whether aggravated, exemplary or punitive damages can be awarded,
- the need for professional management of a large award and the circumstances in which it is recoverable,
- the interplay of various positive and negative contingencies, such as: prospects of career advancement; the state of the deceased's health and how it would have affected employment but for the death; the prospect of the claimant spouse's remarriage or future changes in the claimant's need for support; how long the relationship would have lasted; and the likely duration of the joint lives of the deceased and the claimant had the deceased not been injured,

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8. The B.C. legislation is set out in Appendix A. Federal legislation provides a cause of action where the fatality occurred at sea: *Canada Shipping Act*, R.S.C. 1985, c. S-9, ss. 646-647. As to the relationship between federal and provincial legislation in this context, *see Shulman (Guardian ad litem of)* v. *McCallum*, (1993) 79 B.C.L.R. (2d) 393 (C.A.) *aff'g* (1991) 58 B.C.L.R. (2d) 199 (S.C.) (application for leave to appeal to the S.C.C. dismissed, *Bulletin of Proceedings*, May 19, 1994).

9. The Act has been revised cosmetically on two occasions, most recently in the 1979 statute revision. The first modern revamping of the Act was carried out in 1958: *see An Act for Compensating the Families of Persons Killed by Accidents*, S.B.C. 1958, c. 16.

10. The B.C. Act provides direction when a personal representative is not appointed to bring the action and when the wrongdoer has also died; permits the recovery of funeral proceeds, which an English court held to be unrecoverable in the absence of legislation in point: *Dalton v. S.E. Railway Company*, *supra* n. 5; confirms the non-deductibility of insurance proceeds, again in response to an adverse judicial decision; sets out how to plead the action, how to deal with payments into court and whether common law spouses should be able to maintain a claim under the legislation. The last amendment was in response to one of our recommendations: *Minor Report on Standing of a Common Law Spouse to Apply under the Family Compensation Act* (LRC 63, 1983).

- how (and when) to take into account collateral benefits,
- compensating for the loss of one or both parents, and
- adjusting for the impact of taxation on the damage award.[11]

3. WHO MAY CLAIM?

The *Family Compensation Act* allows a deceased's child, parent or spouse to claim. Each of these words is given an extended meaning. A child includes a stepchild and a person to whom the deceased stood in *loco parentis*.[12] A parent includes a grandparent and a stepparent. Stepparent is also given an extended meaning and includes:[13]

> ...a person who lives with the parent of a child as the husband or wife of the parent for a period of not less than 2 years and who contributes to the support of the child for not less than one year.

A spouse includes someone not married to the deceased if they lived together as man and wife for not less than two years.[14]

The use of terms which are given extended meanings reflects the drafting style adopted in the original English legislation. It is clear, however, that the legislation tries to capture the idea of claimants who would have been part of the deceased's close family, including those in a *de facto* parent/child or spousal relationship. In order to qualify under the legislation, they must also have been in a position of financial dependency on the deceased because, if not, no loss recognized by the law exists.

Whether any changes are required concerning who may apply under the Act for lost support is considered later in this Report.

4. NON-PECUNIARY LOSS

(a) Emotional Injuries

When a family member is injured or killed, not all loss is financial. There are also emotional injuries. The loss of a parent, child or spouse can have many long lasting and serious consequences, none of which, strictly speaking, has a monetary component.

In this respect, the law distinguishes between grief and nervous shock. The sadness a person feels as a result of another's injury or death is not compensable. An exception is made for nervous shock that flows from the injury. Another exception to the rule arises for the loss of a parent.

The principles of recovery for nervous shock are in the process of development by the courts[15] and, for that reason, are not further considered in this Report.

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11. *See Report on Standardized Assumptions for Calculating Income Tax Gross-Up and Management Fees in Assessing Damages* (LRC 133, 1994), which is based on the work of a special advisory committee chaired by Finch J.A.

12. In B.C., no distinction can be drawn by reference to whether or not a child's parents were married when the child was born: *Law and Equity Act*, R.S.B.C. 1979, c. 224.

13. S. 1.

14. An unmarried spouse is not a claimant under the Act, however, if the relationship ended more than one year before the deceased's death: s. 1.

15. Limits are placed on when a person may claim compensation for nervous shock arising from injury to another. The injury must not only be foreseeable, but there must be a sufficient degree of proximity linking the tortious act and psychiatric illness. In this context, proximity embraces at least three factors: the relationship between the plaintiff and the injured person; the time between the event and the onset of the illness; and how close the plaintiff was to the scene of the accident. Moreover, nervous shock is distinguished from grief by the requirement that the plaintiff's experience must have been so alarming, horrifying or frightening that it caused a blow to the nervous system. There is at least one recognized area where there is clinical evidence of the effects of "nervous shock" and that is "post traumatic stress disorder." Unless nervous shock (as defined by the law) can be established, a person is not entitled to compensation for the emotional wrench caused by injury to, or the death of, a child or spouse.

(b) Loss of a Parent

Curiously, while refusing the claims of other family members, the courts have managed to award damages to a child for non-monetary loss arising from the death of a parent.[16] These damages are not related to the grief that the child may feel from the parent's death, but to the losses of guidance, care, and companionship, which are characterized as being pecuniary in nature, perhaps on the theory that they are services the parent provides the child.[17] If there is a ground to distinguish between compensating children for the loss of a parent and compensating other family members, it is that a child suffers more than an emotional loss. The loss of a parent may affect all aspects of the child's development. The words used by the courts to describe the nature of the claim make this clear. In *Vana* v. *Tosta*, for example, Spence J. describes the loss in these terms:[18]

> ...these two children under these circumstances suffered the pecuniary loss from their mother's early death without the care, education and training (and I would also add the guidance, example and encouragement) which only a mother can give.

In British Columbia, compensation to a child for the loss of guidance, care and companionship is assessed by reference to a conventional amount, but the amount is adjusted having regard to the age of the child and the nature of the relationship with the parent.[19] There is a conflict of authority as to how damages for loss of a parent are affected where the remaining parent remarries, or the child is adopted.[20]

For many years, the conventional award hovered around $10,000. In 1986, the British Columbia Court of Appeal adjusted this amount to $25,000 in a case where the jury actually awarded $30,000. The award was allowed to stand because, in the circumstances, it could not be said to be inordinately high.[21] A 1991 decision suggested that the reference point should now be $30,000.[22]

While the courts grant a child an award for these kinds of loss if the parent dies, no damages are available if the parent lives. In one case, the evidence established that the injuries the father suffered had caused personality changes that were actually destructive of the relationship with the child. Even so, the court held that an award of damages on this head could not be made and, from the statements made in this decision, it seems equally clear that the same result would follow if the person's abilities to fulfil a parental role were even further diminished by, for example, being rendered comatose.[23] The court recognized the inconsistencies in legal policy, since a child may suffer a loss of guidance, care and companionship whether the injured family member lives or dies. Nevertheless, it was concluded that the issue required the attention of the legislature.[24]

The need for legislation on this point is another issue pursued later in this Report.

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16. *St. Lawrence and Ottawa Railway Co.* v. *Lett*, *supra*, n. 5; *Vana* v. *Tosta*, (1968) 66 D.L.R. (2d) 97 (S.C.C.).

17. *See*, *e.g.*, *Wannamaker* v. *Terry*, [1956] O.W.N. 588 (Ont. C.A.). It has also been suggested that the S.C.C. decision in *Lett* (the Canadian case that first endorsed compensation on this head for children for the loss of a parent) was based on the social context that existed in 1885: "It is difficult, more than 80 years later, to understand all the factors which influenced the Court in affirming this award, although I think it can safely be said that children at that time were much more dependent on the education which was received in the home than they are today when education at the public expense is available to all:" *Vana* v. *Tosta*, *supra*, n. 16 at 109, *per* Ritchie J. In contrast, the statutory regime in Ontario separates pecuniary losses from those for care, comfort and guidance: *see* the Report of the Ontario Law Reform Commission on *Compensation For Personal Injuries and Death* (1987) 20.

18. *Supra*, n. 16 at 117.

19. *See*, *e.g.*, *Nattras* v. *Dolezal Estate*, (1994) 45 A.C.W.S. (3d) 82 (B.C.S.C.) where adult children living away from home each received a nominal sum of $3500 for loss of a parent's guidance.

20. For a review of the cases, *see Tompkins (Guardian ad litem of)* v. *Byspalko*, (1993) C.C.L.T. (2d) 179 (B.C.S.C.).

21. *Plant* v. *Chadwick*, (1986) 5 B.C.L.R. (2d) 305 (C.A.).

22. *Selcho (Guardian ad litem of)* v. *Laminski*, [1991] B.C.D. Civ. 3381-01 (S.C.).

23. *Porpaczy* v. *Truitt*, (1990) 49 B.C.L.R. (2d) 132 (C.A.).

24. *Ibid.*, *per* Carrothers J.A., 136.

CHAPTER III

THIRD PARTY RECOVERY IN FATAL AND NON-FATAL CASES

A. Pecuniary Loss: Some Distinctions

The term "pecuniary loss" is usually taken to mean financial loss as opposed to loss not measurable in money (which is referred to as "non-pecuniary loss"). There are many ways to categorize pecuniary loss. Distinctions might be drawn, for example, between income loss and out-of-pocket expenses. Services required as a result of the injury might form another category and business losses another still.

With respect to third party rights that arise when a family member is injured, however, the current law draws a single line, dividing loss into two categories. The line separates lost support and lost services from all other kinds of pecuniary loss.

1. Lost Support and Lost Services

People financially dependent upon another suffer an obvious loss when injuries diminish or eliminate the supporter's income. Similarly, people who depended upon another to provide various services (such as those provided by a homemaker) suffer a financial loss when an injured person is no longer able to carry out these tasks.

For non-fatal injuries, the law views the loss as being that of the injured person alone. If, however, the injuries are fatal, legislation allows third parties to recover compensation for both lost support and lost services.

2. Recovering Other Kinds of Pecuniary Loss

The law governing the recovery of third party loss, other than lost support and lost services, is of relatively recent origin. The applicable legal principles are divided into two groups: (1) those that apply to non-fatal accidents, and (2) those that apply to fatal accidents.

Non-fatal accidents: a third party is entitled to recover some kinds of pecuniary loss incurred on behalf of the victim.[1] These claims can be sizeable. In one case, for example, a third party claim was valued at over $100,000[2] and, in another, at over $500,000.[3]

The kinds of claims the law currently allows relate generally to expenses assumed by the third party on behalf of the victim. A person for example, might pay for prescriptions or nursing care, saving the victim from incurring the expense. This kind of claim would be recoverable from the wrongdoer. Another category of loss relates to services rendered by a third party to the victim. In some cases, for example, a parent might take a leave of absence from work to look after an injured child. The person who caused the injury will also usually be responsible for compensating the volunteer in these kinds of cases.

Fatal accidents: Not many fatal accident cases have dealt with the recovery of pecuniary loss (other than support) by third parties. The legal position is slightly obscure, and complicated by how the law requires claims to be advanced. There are two methods:[4]

- a claim under the *Family Compensation Act*, and

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1. These claims are usually brought on behalf of the third party by the victim.
2. *Leach (Guardian ad Litem of)* v. *Glada*, [1992] B.C.D. Civ. 3389-38 (S.C.).
3. *Cogar Estate* v. *Central Mountain Air Services Ltd.*, (1993) 72 B.C.L.R. (2d) 292 (C.A.). In neither *Leach* nor *Cogar*, however, was the claim allowed.
4. There is, possibly, a third method, suggested in *Lankenau* v. *Dutton*, (1992) 55 B.C.L.R. 218, 235 (C.A.) *aff'g* (1988) 27 B.C.L.R. (2d) 234, where Southin J.A. did not rule out the possibility of a direct right of action.

- a claim advanced on behalf of the third party by the deceased's personal representative (under the *Estate Administration Act*[5]).

(a) Family Compensation Act

The British Columbia *Family Compensation Act*[6] retains the original legislative phrasing used in 1846 to describe recoverable loss when a family member is involved in a fatal accident: it is referred to as "damages proportioned to the injury resulting from the death to the parties respectively." It is not a very clear way to express the idea that a claimant can recover damages that arise after a family member dies but, it must be emphasized, only if they result *from the death*.

This formulation, as interpreted by the courts, includes loss of support but excludes pecuniary loss not attributable to the death. Many kinds of loss or expense arise before the victim dies and are caused not by the death but by the victim's injuries. In *Cogar Estate* v. *Central Mountain Air Services Ltd.*, for example, the court held that costs of searching for the deceased after an aircraft accident were not attributable to the death and, therefore, not recoverable under the Act.[7] The way the *Family Compensation Act* is drafted means that losses like the costs of an air search, or more common examples such as work foregone to look after or nurse the victim and expenses paid on behalf of the victim, are not recoverable under it.

The Act has been patched up to provide that some kinds of pecuniary loss, even though they do not, strictly speaking, arise from the death, are recoverable. The B.C. Act allows funeral expenses to be recovered.[8] The B.C. Act also allows claimants to recover medical and hospital expenses incurred as a result of the accident leading to the deceased's death.[9]

(b) Estate Administration Act

(i) Subsection 66(2)

The *Estate Administration Act* allows the deceased's personal representative to recover various kinds of loss:

5. R.S.B.C. 1979, c. 114, s. 66(2).

6. R.S.B.C. 1979, c. 120.

7. *Supra*, n. 3; *see also Toronto Railway Company* v. *Mulvaney*, (1907) 38 S.C.R. 327.

8. In the absence of an express provision, funeral expenses would not be recoverable because everyone must eventually incur funeral expenses and therefore it cannot be said they result from the wrong that caused the deceased's death: *Dalton* v. *S.E. Railway Company*, (1858) 4 C.B.(N.S.) 296, 140 E.R. 1098.

9. Subs. 3(8).

> 66(2) The executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, including an action in the circumstances referred to in subsection (4), except that recovery in the action shall not extend
>
> (a) to damages in respect of physical disfigurement or pain or suffering caused to the deceased;
>
> (b) if death results from the injuries, to damages for the death, or for the loss of expectation of life, unless the death occurred before February 12, 1942; or
>
> (c) to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died,
>
> and the damages recovered in the action form part of the personal estate of the deceased; but nothing in this section shall be in derogation of any rights conferred by the *Family Compensation Act*.

The section confines recovery to "loss or damage to the person or property of the deceased." Are these words broad enough to support a claim for loss suffered by a third party on the deceased's behalf? On this point we find a difference of judicial opinion.

The issue was considered by the British Columbia Court of Appeal in the *Cogar Estate* case mentioned above.[10] The deceased was presumed to have perished in an aircraft accident, although neither the deceased nor the aircraft were ever located. After the "largest air-sea search ever conducted in this country"[11] failed to locate the deceased, the family began an ultimately unsuccessful private search which cost almost $500,000 (U.S). The widow sought to recover this amount from the company that operated the airline. The court rejected the claim:[12]

> In my opinion, the claim under the *Estate Administration Act* must fail. I do not think it can be said this damage is "to the person or property of the deceased" as those words are used in the section. The legislature has chosen to limit the recovery under the Act to "loss or damage to the person or property of the deceased." I am unable to see how these words can encompass expenses to find the body of the deceased in circumstances such as these.

On this analysis, it would appear that most kinds of third party loss arising in fatal accident cases are not recoverable, at least not under the *Estate Administration Act*.[13]

(ii) The Donnelly v. Joyce Principle

Donnelly v. *Joyce*[14] is an English non-fatal accident case that allowed a plaintiff to claim compensation for family members who assumed expenses on the plaintiff's behalf. The defendant argued that a wrongdoer should not be responsible for such a claim unless there was a contract binding the injured person to compensate the third party. The English Court of Appeal rejected the argument. The plaintiff was awarded compensation on behalf of those who had assumed or alleviated aspects of the plaintiff's loss.

The court in the *Cogar Estate* case does not appear to have considered whether the third party claim could have been brought by the deceased's personal representative based on the *Donnelly* v. *Joyce* principle. Another, slightly earlier, decision of the British Columbia Court of Appeal has considered that point.

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10. *Supra*, n. 3 at 311.

11. Ibid., at 294, *per* Hollinrake J.A.

12. *Ibid.*, 311, *per* Hollinrake J.A., who also observed that the *Estate Administration Act* claim was first being raised on appeal. At trial, the claim had been founded under the *Family Compensation Act*, as to which, see further below.

13. The result might have been different had the *Estate Administration Act* claim been raised at first instance. Moreover, some kinds of loss might still qualify as "loss or damage to the person or property of the deceased." *E.g.*, the person responsible for the accident may also have caused damage to the deceased's motor vehicle. The deceased's personal representative would certainly be able to recover costs incurred in having the car repaired. Compensation might also be available if the vehicle was gratuitously repaired by a relative of the deceased.

14. [1974] Q.B. 454 (C.A.).

In *Lankenau* v. *Dutton*,[15] the plaintiff, as a result of negligent medical care, became a quadriplegic whose life was sustained on a ventilator. For the remaining four years of her life, her parents (and other relations) spent many hours caring for and comforting her. One of the claims brought by the daughter was compensation for the parent's services. The daughter died before damages could be assessed.

The trial judge held that the personal representative could continue the proceedings, subject to the limitations set out in subsection 66(2) concerning the kinds of damages that are recoverable after the plaintiff dies. The trial judgment was later appealed, but not on this point. An award was made in favour of family members for their services. The quantum of the award, among other issues, was challenged in the appeal. Counsel for the personal representative argued in the appeal factum that the *Donnelly* v. *Joyce* principle applied and that the award should have been for a greater amount:[16]

> 35. A narrow focus on services with an accountant's eye misinterprets the true role and function of the activities of the parents. They fulfil a "need" created by the Defendant.
>
> 36. The *Donnelly* v. *Joyce*...form of recovery is a further elaboration of the mitigation principles enunciated above. These activities--performed by the Plaintiff's relatives--mitigate the pain and suffering and other compensable heads of damage inflicted by the Defendant's tort.

The Court of Appeal declined to interfere with the award. The *Lankenau* case suggests that pecuniary loss arising because of "loss or damage to the person or property of the deceased" may be recovered by the deceased's personal representative on behalf of third parties, just as an injured person may do so on behalf of third parties in non-fatal accident cases.

(iii) A Comparison

The two decisions appear to be at odds. Can they be reconciled? Neither head of damage (rescue or nursing services) seems to be "loss or damage to the person or property of the deceased." Each is made necessary because of injury to the person. At least upon initial examination it appears that both claims for compensation should receive similar treatment: either both claims are maintainable under s. 66(2) or neither is.

The distinction, possibly, might lie in the reference to the *Donnelly* v. *Joyce* principle. The *Donnelly* case, it may be argued, represents a broadening of what the law regards as damage or loss to person or property. Perhaps *Lankenau* should be viewed as a reconsideration of the ambit of s. 66(2) in terms of the revision that has taken place in England and Canada[17] concerning modern principles of personal injury compensation. There is at least some reason to expect that future courts will prefer the position adopted in *Lankenau*.

There is also at least some possibility that future courts will confine *Cogar Estate* to its special facts. One reason subsequent courts may discount the weight to assign to the case is the amount in issue. It may very well be that the Court of Appeal concluded that incurring a further half a million dollars in costs was unreasonable, in light of the public funds spent on the earlier exhaustive search. Possibly the court's decision might have been different if

- the further amount spent had been more modest,
- it could be established that the second search reasonably explored avenues inexplicably neglected in the first search, or

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15. *Supra* n. 4. *See also Tompkins (Guardian ad litem of)* v. *Byspalko*, (1993) 16 C.C.L.T. 179 (B.C.S.C.) where the court allowed a claimant under the *Family Compensation Act* to recover special damages that would have been recoverable by the deceased's estate because the claimant was the sole beneficiary of the deceased's estate.

16. (1991) 55 B.C.L.R. (2d) 218, 234 (C.A.).

17. Since *Thornton* v. *Board of School Trustees (Prince George)*, [1978] 2 S.C.R. 267; *Teno* v. *Arnold*, [1978] 2 S.C.R. 287.

- there had been no prior search at all.

From this perspective, there is no conflict with *Lankenau*, a case which clearly did not concern a duplication of expenses.

3. REVISING THE PRINCIPLES: PECUNIARY LOSS IN FATAL ACCIDENT CASES

It is not surprising to find that there is some doubt about the recovery of heads of pecuniary loss (other than lost support and lost services) in fatal accident cases, because this is a relatively recent feature of the law in non-fatal accident cases as well. Historically, courts have hesitated to compensate third parties, as Fleming describes:[18]

> The most ingrained opposition is against recovery for injury to relational interests. Generally, the law has considered itself fully extended by affording compensation only to persons immediately injured, such as the accident victim himself, without going to the length of compensating also third persons who, in consequence, incur expenses or lose their livelihood, support or expected benefits from their association with him. The reason for this is not so much that these claims are for pecuniary detriment as that the burden of compensating anyone besides the actual casualty is feared to be unduly oppressive because most accidents are bound to entail repercussions, great or small, upon all with whom he had family, business or other valuable relations.

It is only over the past 20 years that courts have made such awards in non-fatal accidents. One might naturally expect a similar reconsideration of principle would be delayed in a different, although related area of the law where the court's jurisdiction is derived almost entirely from nineteenth century legislation.

The decision of the Court of Appeal in *Lankenau* purports to place recovery of third party loss in fatal accident cases on the same footing as recovery in non-fatal accident cases. This seems like a sensible policy. If a third party is able to recover compensation for pecuniary loss while the personal injury victim survives, what reason can be put forward for cutting off rights of recovery when the personal injury victim dies? The consultation paper suggested broadening the categories of pecuniary loss that third parties could recover. We received no negative comment on the general policy (although procedural questions were raised). It is our conclusion that, as a matter of general principle, third party pecuniary loss should be recoverable in fatal accident cases (essentially legislation would confirm what appear to be emerging principles of law).

The following section addresses the procedural issues raised by our correspondents and the next Chapter examines in more detail what kinds of pecuniary loss should be recoverable.

4. PROCEDURE

In British Columbia, third party claims are brought by the injured person or, where the injuries are fatal, the victim's personal representative. One action is brought instead of separate actions for each claimant.[19]

When Ontario enacted legislation in 1978[20] to deal with fatal and non-fatal accidents, the legislation required that a claim by a third party also had to include the claims of all other third parties. This led to problems because it made it very easy (in fact it virtually required) that trivial claims be brought with those that were more substantial. The position has now been changed to require each person to bring a

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18. *The Law of Torts*, (7th ed., 1987) 162-3.

19. For fatal injury cases, *see* s. 6 of the *Family Compensation Act*; *Kitto* v. *Hanson*, (1991) 58 B.C.L.R. (2d) 265 (C.A.); *Batke Estate* v. *White*, (1992) 70 B.C.L.R. (2d) 226 (S.C.). An action under the *Family Compensation Act* is ordinarily brought by the deceased's personal representative. If six months passes and the personal representative fails to do so, a claimant may bring an action, which will be on behalf of all other claimants: *Kitto*, *ibid.*

20. *Family Law Reform Act*, S.O. 1978, c. 2. The policy of this portion of the legislation was carried forward in the *Family Law Act*, S.O. 1986, c. 4. See now the *Family Law Act*, R.S.O. 1990 c. F.3.

separate action. Apparently this has had the desired result, discouraging claims by those suffering only minor or nominal loss.

There are some criticisms, however, that can be made of the requirement for separate actions. Even if all of the actions are consolidated so that there is only one hearing, the practice must inevitably lead to increased costs because separate pleadings will have to be prepared, filed and served. Each party will be responsible for professional fees and expenses. Many British Columbians are concerned because legal proceedings are already very costly to undertake. Very convincing grounds must exist before it can be expected to find general agreement that new legislation should increase the costs of bringing a matter before a court. Many may doubt whether the concern over trivial claims qualifies as a sufficiently compelling reason, particularly since there are less costly options that might provide the necessary controls.

The real cause of difficulties in the Ontario legislation was the apparent requirement that a representative action had to be brought on behalf of everyone who conceivably had a claim.

A majority of those who commented on the consultation paper were of the view that only a single action should be brought by the victim or the victim's personal representative, and this action would advance the claims of third parties that arose as a result of the victim's injuries. Upon further consideration of this issue, we agree that the usual rule should be to require that all claims be brought in a single proceeding.

There is no reason to believe that the problems that arose in Ontario, which seem to have concerned, primarily, rights of recovery respecting non-pecuniary loss, would be duplicated here. Moreover, it is not clear to us that small claims for expenses should be difficult to recover, nor take up much court time. For example, there should be little difficulty including a claim on behalf of the victim's aunt who has assumed some of the responsibilities for the victim's expenses, such as the cost of home nursing for several days. In our view, it would make much more sense for small claims like these to be included in the victim's action rather than brought in separate proceedings.

Even if, occasionally, a nominal claim takes up a disproportionate amount of time, it is our view that the costs associated with it will be far less than the expense necessarily incurred if all litigants are required to commence separate proceedings in all cases.

The current approach for recovering third party loss (which is to require the principal victim, or the victim's personal representative, to bring the claim on behalf of the third party) works well enough. It is possible to build on this structure to accomplish the necessary changes to the law. It is our conclusion that:

(a) legislation should set out appropriate heads of loss properly belonging to a third party,

(b) as a general rule, compensation should be recovered for the third party in a proceeding brought by the personal injury victim or the personal injury victim's personal representative.[21]

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21. Of course, where there are reasons militating against cooperation, it should be possible for a third party to proceed separately. It appears that a court already enjoys a sufficient jurisdiction to allow separate proceedings in suitable cases, even where the law requires, as a general rule, that claims be brought in a single proceeding. We have been unable to locate any cases in which a third party sought to proceed separately from the principal claim in a non-fatal accident case. The issue, however, has arisen in fatal accident cases. The *Family Compensation Act*, s. 3(4), requires the deceased's personal representative to advance claims on behalf of all potential beneficiaries in a single action. Unsurprisingly, in some cases the claimants are unable to cooperate. Two recent reported cases record court-approved steps to deal with hostility between claimants. In *Batke Estate* v. *White*, *supra* n. 19, Master Grist allowed claimants to have separate counsel at the trial. In *Guss* v. *Daigle*, (1992) 79 B.C.L.R. (2d) 29 (S.C.), Master Joyce observed: "In my view this is an unusual situation and a situation that is forced upon the parties..." and granted an application for an order allowing the parties to have separate representation, file separate statements of claim and conduct separate discoveries. The report of the case provides no information on the actual circumstances. In denying an appeal from Master Joyce's order, Josephson J., at 30, referred to a rule of practice discussed by the Chief Justice in *Canada (A.G.)* v. *C.P.*, (1981) 30 B.C.L.R. 230, [1981] 6 W.W.R. 473 (S.C.). The rule of practice is that plaintiffs who sue together must be jointly represented. The case involved a dispute about a railway right-of-way over aboriginal lands. Josephson J. said: "The

(continued...)

The next Chapter considers in more detail the kinds of pecuniary loss that should be recoverable by third parties in fatal and non-fatal accident cases.

21. (...continued)
rule identified by the Chief Justice is a rule of practice, as he noted, that can be set aside by special leave. That is what Master Joyce did after a careful consideration of the circumstances of this particular case and the possible prejudice to both sides depending on the nature of his order."

CHAPTER IV

REFORM: WHAT LOSS SHOULD BE RECOVERABLE?

A. Introduction

This Chapter considers the kinds of loss that should be recoverable, and by whom, when a family member is wrongfully injured or killed by another. The examination necessarily involves, first, a consideration of the kinds of loss currently acknowledged to be recoverable and then, second, a consideration of whether some heads of loss should be subtracted or added to this list.

B. Pecuniary Loss

There are three general categories of pecuniary loss that someone can incur when another is injured or killed:

- pecuniary loss incurred relieving the victim of expenses the victim could have recovered from the person responsible for causing the injuries,
- personal expenses or loss, and
- business loss.

Relieving the victim of expenses the victim could have recovered from the person responsible for causing the injuries: the victim might need a nurse, or must pay for medicine or transportation or incur any number of expenses in convalescence. Another person will often voluntarily nurse the victim or pay bills as they arise. The courts have recognized over the past two decades that these kinds of pecuniary loss are ordinarily recoverable by the victim (usually on behalf of, or in trust for, the one who relieved the victim of these expenses).[1]

Personal expenses or loss: a person might suffer financial losses that are unrelated to those that would have been recoverable by the deceased from the wrongdoer. For example, a family member wishing to provide the injured person with care, comfort and companionship might have to travel or miss work. Some expenses are recoverable if they answer the victim's needs, where for example they are incurred in order to provide nursing care. Other expenses that are technically unrelated to the victim's loss, however, are not. Costs such as those incurred by a mother travelling from Toronto to her dying daughter in Victoria are usually considered unrecoverable.[2]

Business loss: those in a business relationship with an injured person may also suffer financial loss. Injury to one member of a professional dancing team, for example, will remove the other's livelihood.[3] A company or business that depends upon the skills or experience of the injured person may be unable to find a replacement at any cost. A common example arises when, because of injuries, a person can't pay debts.

With respect to loss falling into the last of these categories--business loss--the law is firmly against its recovery from the wrongdoer, largely for pragmatic reasons. Most people have financial ties or links with others. Sometimes these ties will be substantial and recorded in formal contractual agreements. A very important person, for example, may have a retinue of employees providing more or less exclusive

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1. *Supra*, Chapter I, n. 1. Originally it was necessary to enter into a formal contract which placed upon the victim the binding obligation to reimburse the third party before the costs could be sought from the wrongdoer, but this position was eventually rejected, first in England and then in Canada.

2. In a few cases, courts have awarded compensation for expenses like these where it was established that they aided in the victim's recovery, or were related to the care of the victim: *see*, *e.g.*, *Moody* v. *Windsor*, (1992) 64 B.C.L.R. (2d) 83 (S.C.); *Gawa* v. *Horton*, (1982) 37 B.C.L.R. 130 (S.C.); *Roos* v. *Myers Motor Co.*, (1968) 68 D.L.R. (2d) 488 (Ont. H.C.).

3. *Burgess* v. *Florence Nightingale Hospital*, [1955] 1 Q.B. 349.

services (the person, for instance, may engage a professional team consisting of a lawyer, agent, accountant, and employ a personal secretary or chauffeur). The arrangement may not be noticeably less complex than that of many businesses with their employees. Even less august members of the community, however, usually have wide-spread financial links with others in the community: a barber, a grocer, a pharmacist, a gardener, and so on may all be able to establish some degree of financial relationship with an injured person.

Anywhere along the spectrum of possible kinds of commercial links, it may be a simple matter to establish a direct relationship between the victim's injuries and another's financial loss. In cases like these, it may seem that the law should provide compensation. Considering the matter from a broader perspective, however, it is clear that problems will arise if injury to a financial relationship will support a claim for compensation as a matter of course, simply because so many kinds of financial interests may be affected when a person is injured.

The principles applied by the law in determining whether or not damages should be awarded dictate that business losses should not be recoverable.[4] In many cases, the reason given is that the losses are unforeseeable, or too remote, for the law to insist that a person responsible for injuring another provide compensation for them. In other cases, even if the loss is foreseeable, it is of such a nature that it raises an obligation to obtain insurance against the risk.[5]

While it is clear that business loss should not, as a matter of course, be recoverable, it is equally clear that the kinds of loss involving payments made on behalf of the victim should be. The fact that a third party assumes responsibility for an expense that the victim otherwise would have

(a) had to incur as a result of the injuries, and

(b) been able to recover from the wrongdoer

should not operate to limit the wrongdoer's responsibilities. It should be a matter of importance for the law to see that the third party is reimbursed.[6]

Cases in British Columbia, however, divide on when such an award can be made. One line of cases holds that an award to, or on behalf of, a third party is only available where the care-giver assumed duties that constituted essentially a full-time occupation exceeding normal duties expected from a person in that relationship with the victim. The other line of authority would allow compensation to be awarded for all necessary services rendered by a relative, even those customarily provided by family members.[7] The maximum award that can be made for services is the cost of obtaining the services outside the family.[8] In our view, the second line of authority is to be preferred. There is no reason why a relative who provides services made necessary by a person's injuries should not receive compensation. To hold otherwise is to require a volunteer to relieve the wrongdoer of liability.

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4. An exception is made where there is an identity of interest between the injured person and a business, usually where a person operates a business through a closely held company. In these cases, the court may consider losses suffered by the company to be, in reality, the losses of the personal injury victim: *see, e.g.*, *Turchak* v. *Patel*, [1992] B.C. D. Civ. 3397-06 (S.C.); *see also Everett* v. *King*, (1982) 34 B.C.L.R. 27 (S.C.); *Chiu Estate* v. *Lang*, (1993) 37 A.C.W.S. (3d) 1215 (Ont. Ct. Gen. Div.).

5. Recent legal developments allow for the recovery of some kinds of economic losses suffered by a third party under a contract that cannot be performed because of a wrong committed by a person against another party to the contract: *see C.N.R.* v. *Norsk Pacific Steamship Co.*, (1992) 91 D.L.R. (4th) 289 (S.C.C.). Even so, the policy is clear that, while there may be recovery in some cases, it is only in special circumstances. The usual rule requires people to self-insure against the possibility of loss.

6. The same justification underlies principles of subrogation, which will often apply in these kinds of circumstances, although their application is sometimes severely limited by technical positions grafted on the law through its common law development.

7. The authorities are discussed at length in *Crane* v. *Worwood*, [1992] 3 W.W.R. 638 (B.C.S.C.); *see also Graham* v. *Kada*, [1993] B.C.D. Civ. 3388-14 (S.C.); *West* v. *Cotton*, [1993] B.C.D. Civ. 3389-52 (S.C.).

8. Such an award was made, *e.g.*, in *Macdonald (Guardian ad litem of)* v. *Neufeld*, [1994] 2 W.W.R. 113 (B.C.C.A.), where the victim's mother was a physical and occupational therapist.

It is certainly foreseeable that close friends and relations of a person will be affected by the victim's serious injuries, and there are many reasonable expenses that may be incurred to care for or provide comfort for the victim over and above what might be expected from health care workers. A distinction, of course, must be drawn between a casual acquaintance who spends money to come for a visit and the spouse, parent or life-long friend who drops everything to come to a person's death bed.

Ontario legislation allowing for the recovery of third party losses lists, among others, the following classes of recoverable expenses:[9]

> (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...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...

The legislation mixes together a third party's personal losses and those a third party incurs on behalf of the victim, but it is clear that various kinds of expenses, particularly travel expenses, are recoverable from the wrongdoer even if, strictly speaking, they are not losses actually suffered by the victim.

The consultation paper suggested that a reasonable allowance for these kinds of expenses, provided they are reasonably incurred, should be recoverable under British Columbia legislation. Most of our correspondents endorsed this position. Three suggestions were made for amending the proposal:

- it was suggested that it would be better if legislation listed specific categories of recoverable loss (as the Ontario legislation does), rather than set out a general right of recovery,
- it was suggested that for loss arising in connection with motor vehicle accidents, recovery be made available on a no-fault basis, and
- it was suggested that compensation should be recoverable only for loss above a certain threshold:

> ...the expenses must be for the benefit of the victim, be reasonably incurred, and be for expenses beyond that which would otherwise be expected of the third party in the circumstances.

The first suggestion--of specifically identifying recoverable loss--is well taken. Legislation setting out a general right of recovery might well operate as an invitation to explore new heads of loss. We think the Ontario model (set out above) is a good one and endorse it.

The second suggestion is discussed in a separate section below.

The third point--the need for a threshold--is probably a reference to the current controversy in the courts as to when voluntarily rendered services are compensable. One group commenting on the consultation paper preferred those cases which confine recovery by holding that many voluntary services, even though they removed the need to engage another to perform them, are of a kind which is expected from friends and family and therefore not compensable. It is a position consistent with general views

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9. *Family Law Act*, R.S.O. 1990, c. F.3, s. 61(2). Nova Scotia has enacted legislation based on the Ontario model: *An Act to Amend Chapter 100 of the Revised Statutes, 1967, the Fatal Injuries Act*, S.N.S. 1986, c. 30. The Alberta Law Reform Institute has also proposed that Alberta legislation should be amended to allow these kinds of losses to be recovered: *see* Report No. 66, *Non-Pecuniary Damages in Wrongful Death Actions--A review of Section 8 of the Fatal Accidents Act* (1993).

held by some about most forms of collateral benefits: the extent to which a collateral benefit exists, it should go to reducing the liability of the wrongdoer.[10]

On the other side of this issue, it might be argued that both lines of authority recognize some kind of threshold. Where the loss is minimal there are factors at work concerning damage assessment which are essentially self-limiting. Moreover, the way loss is assessed to compensate for voluntary efforts--ordinarily not on an hourly basis but in a lump sum--makes it difficult to see the justification for introducing a threshold which would appear to be based on some mathematical model for compensation that simply does not exist.

In any event this is an issue that we think can be left to the courts, provided the legislation is drafted appropriately. The Ontario model speaks of "reasonable" compensation. What is reasonable will depend upon the circumstances.

The Commission has concluded that legislation should allow third parties who suffer the following items of loss (in addition to those already listed in the *Family Compensation Act*) to recover compensation:

- actual expenses reasonably incurred for the benefit of the person injured or killed,
- a reasonable allowance for travel expenses actually incurred in visiting the person during treatment or recovery,
- 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.

C. Claimants

It is fair to ask whether limits need to be placed on the class of persons entitled to look to the wrongdoer for compensation for these additional kinds of pecuniary loss. The view was expressed in the consultation paper that restrictions on those entitled to claim compensation for these kinds of loss are unnecessary. There is no reason to relieve the wrongdoer of ultimate responsibility for these losses.

Not everyone who commented on the consultation paper agreed. A submission from one group, in particular, argued that only those persons currently listed as claimants under the *Family Compensation Act* should be entitled to recover compensation for these additional heads of loss. Otherwise the new legislation would only produce further, unnecessary, litigation.

We have reconsidered the issue, but remain of our earlier view for a number of reasons. First, in non-fatal accidents, there is currently no limit on who may claim these kinds of loss. The claimant is required, of course, to establish that the item of loss has been suffered. Since this approach seems to work well enough in non-fatal accident cases, it is difficult to see why protective measures suddenly become necessary when the accident proves to be fatal.

Moreover, all of these claims are subject to a natural limitation: it must have been reasonable to have incurred the loss or expense, a factor that will often turn on the closeness of the relationship between the claimant and the victim. There is no need to stipulate in advance the necessary degree of relationship, since that is a question that will depend on the circumstances. The victim may, for example, have a closer relationship with a friend than with a blood relation. Loss incurred by a visit from a neighbour may be entirely reasonable, while a visit from a brother might be wholly unnecessary.

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10. A view adopted by McLachlin J. in dissent in *Cunningham* v. *Wheeler*; *Cooper* v. *Miller; Shanks* v. *McNee*, [1994] 1 S.C.R. 359.

D. Grief Counselling

There are practical responses to bereavement that can be addressed through an award of damages. Counselling is often an invaluable help to those grieving over the loss or injury of a family member, but it is a head of damage that is not commonly referred to in family compensation cases.[11] In our view, there will be circumstances where it will be entirely appropriate for a court to include in a damage award an amount identified with the costs of grief counselling (and of other medical treatment, including the purchase of prescriptions)[12] that is reasonably required by a person to deal with or adjust to the circumstances that exist when a family member is injured or killed.

Compensation in this area is not likely to be excessive. While professional help is costly--psychologists, for example, may charge as much as $100 an hour for their services so that one visit a week for a year brings the claim up to $5200--many will be helped by a much shorter course of therapy.[13]

Who should be able to claim damages on this head? Currently, claimants under the *Family Compensation Act* are listed by ties of blood or marriage, but other kinds of *de facto* family relationships are recognized (step relationships, for example, and people who cohabit in a relationship of some permanency). Even so, it is a confined list. Many people may be close to the injured person and seriously affected emotionally by the injuries and yet not embraced by the categories of current claimants. The focus of the current legislation is on financial dependency, but financial ties are not a sure guide to the emotional bonds that may exist.

Would it be practical to provide that anyone who reasonably requires counselling may claim damages on this head? We fear that adopting this option would raise the spectre of numerous claims being brought by friends, neighbours and relations. Many people will be distraught when someone close to them is seriously injured. Should they all be entitled to claim?

There is a need to be realistic over what can be accomplished through the law. Expanding the list of claimants very far beyond those who normally can apply under fatal accident legislation risks overburdening the courts, and insurers, with many claims. Even so, the list of those entitled to claim lost support is not sufficiently inclusive. One option is to expand the list by also allowing an application for damages for grief counselling by anyone who was part of the injured or deceased person's domestic household, on the theory that those who lived together are most likely to suffer seriously when one of them is injured or killed.

Comment on the discussion of these issues in the consultation paper was mixed. One group opposed to this item of recovery argued:

> Bereavement is a fact that everyone must face. [There is]...a wealth of resources in the community to assist people in bereavement at very little or no cost.

While these observations are true enough, this group may have overlooked that this kind of compensation, as another submission noted, is currently available, although not commonplace:[14]

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11. Damage awards for counselling are, however, sometimes made in personal injury cases, in favour of the victim (and sometimes for the victim's family). *See, e.g., Grimard* v. *Berry*, (1992) 102 Sask. R. 137 (Q.B.); *Janik* v. *Snyder*; *Janyk* v. *Mustafa*, (1992) 33 A.C.W.S. (3d) 416 (Ont. Ct. Gen. Div.); *Whatley* v. *Badshah*, [1991] B.C.D. Civ. 3389-45 (S.C.); *Wintle* v. *Piper*, [1992] B.C.D. Civ. 3388-14 (S.C.). Compensation for counselling is also a familiar item of damage awards in other contexts, such as cases involving claims for compensation arising from a sexual assault. *See, e.g., H.(S.)* v. *L.(R.G.)*, (1993) 85 B.C.L.R. 232 (S.C.).

12. Courts have, *e.g.*, made awards to allow herbal remedies to be purchased on the basis that an injured person is entitled to make reasonable choices about how money should be spent to speed recovery: *see Corrigan* v. *Yiu*, [1993] B.C.D. Civ. 3389-63 (S.C.).

13. *See, e.g., Grimard* v. *Berry*, *supra*, n. 11, where the award for counselling twice a month for a year amounted to $2400.

14. We were also advised that ICBC is considering a revision to Part 7 of the *Regulations to the Insurance (Motor Vehicle) Act* to formalize the availability of an award for grief counselling in injuries arising from motor vehicle accidents.

...[the cost of grief counselling] is already paid by ICBC in some cases of death or catastrophic injury...

Moreover, community services often depend upon the availability of public funds which, in the past several years, has been diminishing. A number of important community-based services are no longer available for this very reason, underscoring the importance of allowing a court, in an appropriate case, to make a suitable award for grief counselling.

One group thought that claims for grief counselling should only be allowed where the expenses had actually been incurred and then only up to a statutory maximum dollar amount.[15]

While we see the sense of this approach, it will be the necessary result in most cases simply because of the normal delay in British Columbia between accident and trial. Moreover, it is our view there is no need to restrict a court from considering whether further counselling will also serve a useful purpose.

We remain convinced that legislation should confirm that courts can make awards for compensation for grief counselling, in both fatal and non-fatal cases. Our concern is that this head of damage should not be available in every case, but only where it can perform a useful function in consoling the grief stricken. We have considered additional refinements but do not suggest any be adopted. Although we propose that legislation provide generous tests to determine whether a person has status to apply for compensation, this position is based firmly on the proposition that standing does not equate with need. Not everyone who can apply for compensation will be entitled to it.

It is the Commission's conclusion, consequently, that in both fatal and non-fatal accident cases, a court should be able to award damages to pay for grief counselling or other treatment to

(a) a person listed as a claimant under the *Family Compensation Act*, and

(b) a person who was part of the deceased's domestic household

if the counselling or treatment is reasonably necessary to assist in adjusting to the injury or death of the victim.

E. No Fault Recovery

Some commentators suggested that for most, if not all, of these kinds of losses, compensation could be delivered on a no fault basis. Part 7 of the *Regulations to the Insurance (Motor Vehicle) Act* already delivers some parts of compensation on a no fault model.

We are not opposed to the no fault delivery of many kinds of compensation, but our concern in this Report is with rationalizing the assessment of damages when, because one person is injured or killed, third parties suffer loss. As such, the issues are not confined to motor vehicle accidents.

We also have a reservation concerning whether, in motor vehicle accident cases, compensation for grief counselling should be included as a Part 7 benefit. The legislation currently provides that where Part 7 benefits are not paid (because they are not claimed) the value of the unpaid benefits are nevertheless to be deducted from the judgment the claimant eventually receives. A psychologically injured person should not be deprived of compensation aimed at helping that person deal with those injuries simply because the injured person failed to abide by the administrative rules of a crown operated insurance company.

15. The Alberta Law Reform Institute recommended restricting recovery to counselling expenses already incurred: *supra*, n. 9, at 30.

F. When a Parent is Injured

In fatal accident cases, the court may award a child compensation for the loss of the parent's guidance, care and companionship. The award is made under the *Family Compensation Act*.

As mentioned earlier,[16] two British Columbia decisions have dealt with a child's right to compensation arising from the non-fatal injury of a parent. In the first case, *Dhaliwal* v. *Morrisette*,[17] a Supreme Court judge awarded damages by analogy to the fatal accident cases:[18]

> ...no logical distinction can or should be drawn between the death of a mother and her being rendered physically and mentally incapable of raising her child in a normal fashion.

The second case, *Porpaczy*, reached the British Columbia Court of Appeal.[19] It held that the *Dhaliwal* case was wrongly decided: the court has no jurisdiction to award compensation on this head. The court also observed that whether the law is to be revised to allow a damage award for non-pecuniary loss in these circumstances is a question that must properly be decided by the legislature.[20]

The consultation paper that preceded this Report suggested revising the *Family Compensation Act* to allow a "child" to:

> ...recover compensation for loss of guidance, care and companionship arising from injury to a "parent" where the parent's injuries are of a kind that, in substance, the loss suffered by the child is comparable to the loss that would have occurred if the parent's injuries had been fatal.

(As discussed earlier, the *Family Compensation Act* gives both "child" and "parent" an extended meaning, to include most relationships where an adult assumes parental responsibility for a child).

One group was opposed to allowing this head of recovery in non-fatal accident cases, for the same reasons that have been raised generally against awarding compensation to third parties for non-pecuniary losses.

Another group thought that almost any injury suffered by a parent would affect the relationship between the parent and child. Even a minor whiplash injury, for example, may make a parent moody and withdrawn, adversely affecting a child. This group argued in favour of making compensation available in virtually all cases where personal injuries interfere with the parent/child relationship.[21]

One group that agreed in principle with the proposal in the consultation paper offered the following comments in support of restricting recovery to situations where the injured parent, after a reasonable period of healing time, was completely unable to provide care, guidance and companionship:

> ...the award should not be available where the parent, while unable to provide all that could be provided prior to the injury, is nonetheless providing some, albeit in a changed fashion.....[T]o suggest that an injured person is unable to provide such care, guidance and companionship is insulting, and contrary to the current understanding of the independence of the disabled.

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16. *See* Chapter II.
17. (1981) 32 B.C.L.R. 225 (S.C.).
18. *Ibid.*, *per* Munroe J, at 227.
19. *Porpaczy* v. *Truitt*, (1990) 49 B.C.L.R. (2d) 132 (C.A.).
20. *Ibid.*, at 136 (*per* Carrothers J.A.) and at 138 (*per* MacFarlane J.A., Macdonald J.A. concurring).
21. Such awards are possible in Ontario: *see, e.g., Scott* v. *Sobczuk*, (1993) 38 A.C.W.S. (3d) 77 (Ont. Ct. Gen. Div.), where the plaintiff was awarded compensation for suffering during formative years due to the physical and psychological difficulties the plaintiff's mother experienced from three accidents.

The position with respect to compensation for loss on the death of a parent is well established and seems to have the general support of the community. It would appear, consequently, that the inability of the law to provide compensation for the similar losses that might arise in non-fatal cases should be corrected.[22]

We would be content at this point to see a modest change in the law relating to compensation for loss of care, guidance and companionship, without embracing wide open recovery, as one group advocated, or restricting such recovery, as another suggested. If it is appropriate to award compensation for the loss of a parent's care, guidance and companionship, it should not matter whether the cause of the loss is the parent's death or injury. In some cases, the parent's survival will cause the greater harm. Possibly that was the situation in the *Porpaczy* case where the parent's brain injuries resulted in a personality change that was destructive of the relationship with the child.

Restricting recovery in non-fatal accident cases to those situations where the loss is comparable to the loss that would have occurred had the parent's injuries been fatal should insure the claim is not raised in every case. We are content to leave the application of this principle to the courts which are well placed to determine where the line in non-fatal accident cases should be drawn, between cases where compensation on this head should be recoverable and those where it should not be.

G. Conclusion

The conclusions we have reached in the preceding discussion about the kinds of losses that should be recoverable would, once translated into law, tend to ensure that for the most part (other than for the recovery of compensation for lost support and lost services) parallel rights of recovery for third party claimants exist whether a family member lives or dies from injuries wrongfully caused by another.

22. It is difficult to place a value on a loss which is, by definition, non-pecuniary. It is a problem, however, that has been addressed for some years in the context of fatal injuries and the experience gained there will undoubtedly assist where a parent's injuries are not fatal. There will be some differences in approach, of course. In fatal injury cases, the court's focus will be on the loss of the relationship with the deceased. In non-fatal injuries, it will be on how the relationship has changed (although in some cases of very serious injury, such as brain damage or coma, the change will amount to a complete loss of the relationship). Nevertheless, experience acquired and principles developed in one sphere will assist in the other.

A. Current law

The single issue considered in this Chapter is whether the *Family Compensation Act* has correctly identified the people who should be entitled to maintain a claim to recover lost support in fatal accident cases.

B. Who Should be Able to Claim?

1. DEPENDENCY

The *Family Compensation Act* lists people entitled to make a claim under the legislation. The list includes people who would ordinarily be in a close family relationship with the deceased.[1] Because the nature of the claim is based on the fact of dependency, however, not every listed claimant will be entitled to damages. The Act protects only those supported by the deceased or, had the deceased survived, those who would likely have been supported.

Those who actually depended upon the deceased for support have no claim unless they are mentioned in the Act. Under the current list, for example, a niece who was financially dependent on the deceased has no claim unless it can be established that the deceased not only supported the niece but also assumed the role of parent (in this way, the niece would have status as someone to whom the deceased stood in *loco parentis*).[2] Similarly, while a separated spouse supported by the deceased may claim because a separated spouse still qualifies as a spouse, a divorced former spouse receiving maintenance has no standing under the Act.[3]

Defining rights by status or reference to a legally recognized relationship must inevitably limit those who may apply. It is true that any list based on those to whom a deceased is ordinarily under an obligation to support will, by and large, ensure that most people who suffer a loss of support will be entitled to a remedy. Even so, where the basis of the Act is to restore lost support, it is not obvious why the fact of dependency alone should not be a sufficient ground for bringing a claim.

One concern, possibly, is to prevent dubious claims from being brought. Another is determining the level of dependency that should justify compensation. Isolated acts of charity, for example, are not evidence of dependency. In some cases it might be difficult to distinguish between continuing support and the occasional gift, particularly where the deceased's acts in either case are entirely voluntary.

In the consultation paper, it was proposed that:

> The list of persons able to claim lost support under the *Family Compensation Act* should include anyone who was financially dependent on the deceased.

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1. These relationships may alter over time by, *e.g.*, divorce or adoption. Apparently status is determined when the wrong occurs. A later change in status does not affect the ability to apply, although it may have some affect on determining compensation: *Manning (Guardian ad litem of)* v. *B.C. (Minister of Transportation and Highways)*, (1993) 77 B.C.L.R. (2d) 189 (S.C.).

2. *Antoine* v. *Larocque*, [1954] O.W.N. 641, *aff'd* [1955] O.W.N. 134 (C.A.); *Royal Trust Co.* v. *Globe Printing Co.*, [1934] O.W.N. 547 (C.A.). A relationship based on *loco parentis*, however, is useful, since it would cover circumstances of informal adoptions, or adoptions carried out under the customs of different cultures: *see, e.g.*, *Casimel* v. *I.C.B.C.*, (1993) 82 B.C.L.R. (2d) 387 (C.A.).

3. *See also Amatnieks* v. *Benkis Estate*, (1992) 46 E.T. R. 204 (Ont. Ct. Gen. Div.), which involved cohabitants living together as man and wife but without a sexual relationship. The Ontario legislation was able to recognize the applicant as a dependent. The relationship would not have supported a claim under the B.C. *Family Compensation Act*.

Some correspondents either saw no need to depart from the current list of claimants under the Act or feared other problems from determining status by reference to dependency. It was suggested, for example, that such a change in the law would:

- lead to dubious, exaggerated claims,
- cause problems in determining the appropriate level of compensation that required compensation,
- lead to no improvement in the law, because almost all deserving claims are currently satisfied,
- lead to awards in situations where, because there was no legal requirement to pay support, the obligation could have been terminated at any time.

There is some evidence that fraudulent claims in motor vehicle insurance cases are on the increase, which lends weight to these concerns. Even so, the conclusion that the Act currently covers all those to whom the victim owes a legal duty of support is incorrect. People entitled under formal agreements or court orders are most certainly not able to claim.

Another group criticized our conclusions for entirely opposite reasons. It did not think there should be any restriction on standing to bring an action under the *Family Compensation Act* and urged a position where anyone with a reasonable expectation of pecuniary benefit that had been lost because of the injuries would be entitled to apply. While concerns about unsupported and exaggerated claims must surely argue against revising the law in this way, we recognize that there may be some situations where meritorious claims might be foreclosed such as, for example, where a divorced or separated spouse has a claim for maintenance which has not been pursued when the fatality occurs.

We remain of the view that family compensation legislation is defective to the extent that it does not protect someone who was financially dependent on the deceased.

If it is a real concern that courts will not be able to identify legitimate claims for lost support, there are options for easing the task. Legislation could, for example, allow only people who were financially dependent on the deceased for a defined period of time to sue for lost support. Where there is some degree of permanence in the arrangement to pay support, it may be inferred that the deceased regarded the obligation as a continuing one and, consequently, the claimant has suffered a real loss for which the wrongdoer should be responsible.

Our view is that there is no need to adopt a refinement like this. The courts are well placed to distinguish between legitimate and false claims. The circumstances will indicate whether or not the deceased's death severed a relationship of dependency which would likely have continued. In some cases, maintenance paid for a relatively short time before the deceased's death may be more likely to continue than a relationship of financial dependency of a longer duration, so that the history of the relationship, while relevant, is not the only criterion by which the claim for support should be judged.[4] A person who puts a niece or nephew through college is probably unlikely to continue contributing once the dependent is able to earn an income. On the other hand, the person who contributed monthly to the upkeep of the disabled child of a deceased brother or sister left impoverished by the sibling's death might be expected to regard the commitment as a lifelong obligation. It is questions like these that are best dealt with by the courts on a case by case basis.

2. FINANCIAL DEPENDENCE UNDER AN AGREEMENT OR COURT ORDER

4. *See, e.g., Bruneau* v. *Clearwater*, [1992] B.C.D. Civ. 3379-02, *add'l reasons* [1993] B.C.D. Civ. 3359-13 (S.C.).

(a) Generally

In at least one group of cases, the evidentiary problem of establishing financial dependence will be slight, even if the dependency is of recent origin. These are the cases involving people to whom the deceased is under a legal obligation to support. The deceased may have entered into an agreement, for example, or have been subject to a court order, requiring the payment of support for a separated spouse, a former spouse or a child.

Sometimes these dependents will qualify under other headings. A separated spouse, for example, because the marriage remains in good standing, has status under the Act. A former spouse, on the other hand, cannot currently apply under the Act for lost support. The new category, consequently, would extend rights of recovery in that case. Similarly, a child of the deceased might be entitled to support under a court order, but the child would be entitled to recover lost support in any event because the deceased was the child's parent or stepparent or stood in *loco parentis* to the child. Sometimes, however, a person who does not stand in one of these relationships will still be obligated to pay support to a child so that, again, this new category would extend rights of recovery.

Two issues arise where a claimant is entitled to support under an agreement or court order. The first issue relates to valuing the lost support. The second concerns problems that may arise if the agreement or court order is binding on the deceased's estate.

(b) Valuing the Lost Support

Under the *Family Compensation Act*, the assessment of future lost support is based on levels of support established before the deceased's death. Amounts actually spent by the deceased are the starting point for the calculations.

Where the claimant's entitlement is founded on a court order or agreement, the court order or agreement will set out the levels of support, but the deceased may not have regularly observed the legal obligation. In some cases, the deceased may have refused to cooperate, requiring the supported person to bring enforcement proceedings from time to time. In other cases, circumstances may have changed (the supporting person may have suffered financial setbacks, or the supported person's requirements may have increased or decreased), and different levels of support may have been paid without revising the agreement or applying for a variation of the order.

For whatever reason, there will be circumstances where the actual amounts of support paid will differ from those set out in the agreement or court order. Which standard should be referred to when assessing a wrongdoer's liability under the *Family Compensation Act*?

Currently, under the Act, the court does not look to the highest standard of support that might have been available for the claimant. The assessment depends upon the portion of the deceased's income that is actually used for that purpose and amounts that would likely have been used in the future, had the wrongful death not occurred. It is difficult to see why the wrongdoer should be required to compensate for lost support at a higher (or lower) level than was actually paid.[5]

The consultation paper suggested that legislation should be revised by adding a provision comparable to the following:

5. Moreover, allowing such a discrepancy to the usual principles that apply under the *Family Compensation Act* has the potential to cause conflict. If the wrongdoer's liability is limited by the amount of money available to the deceased to satisfy claims for support, assessing loss by reference to levels set out in a court order may subtract from the amounts available for other claimants. Should all claims abate proportionally in such a case? Adopting the usual rules ensures that such a conflict cannot arise.

> Despite an agreement or court order for the payment of support, the person's lost support must be determined by
>
> (a) reference to the level of support actually paid by, or recovered from, the deceased during the deceased's lifetime, and
>
> (b) the level of support that probably would have been paid by the deceased had the wrong causing the death of the deceased not occurred.

A submission on behalf of one group agreed and further suggested that it would be useful to set these principles out as of general application to claimants under the Act. The point is well taken. Our chief concern was that people whose dependency derived from an agreement or court order be subject to the same principles that apply to other applicants. Legislation which sets out a uniform standard for determining levels of dependency is more likely to achieve this result than legislation that seems to set out special rules for special classes of applicants.

Another group felt that the proposal would cause evidentiary problems, but did not oppose the suggestion in principle, provided all claimants were, as we have concluded earlier, required to bring their claims in a single law suit.

Another group disagreed with the proposal:

> ...the Commission has proposed to significantly limit, or alternatively eliminate, the opportunity for a dependant to avail himself or herself of certain remedies which would otherwise be available. For example, to assess an entitlement solely on the amounts actually paid by a family member in default of a Court Order or valid agreement, the Commission ignores the remedial enforcement possibilities for maintenance arrears available under legislation such as the *Family Relations Act*...

Our correspondents may have overlooked the fact that it would also be open to a court to take into account the possibility that enforcement options would be effective. A court would be able to do this under limb (b) described above, which speaks of "the level of support that probably would have been paid by the deceased had the wrong causing the death of the deceased not occurred." If there is any doubt on this score, however, it can be removed by revising paragraph (b) to refer to support "paid by, *or recovered from*, the deceased..." to ensure that it parallels paragraph (a), which already incorporates the idea that a claimant may have been obliged to take enforcement proceedings.

It is difficult to see an alternative to paragraph (b). The court must take into account many factors when examining future support. One contingency is the possibility, for example, that maintenance levels would be varied in the future, up or down. It does not make sense to suggest that courts must guess about future events, but ignore past experience. Suppose that the injured person was unemployed before the accident, was unable to pay maintenance, and the probability was that maintenance could never again be paid at the stipulated levels. We do not think a court would be justified in ignoring this information in assessing the wrongdoer's liability.

We think the same standards for determining compensation under the Act must apply for all claimants, even those whose entitlement is based on a court order or agreement. Revising legislation should state that entitlement under the Act must be determined by reference to amounts actually paid by the deceased as well as amounts the deceased would likely have paid in the future, had the death not occurred.

(c) If the Deceased's Estate Must Continue to Pay Support

Agreements and court orders often anticipate the supporting person's death and make arrangements for the continued payment of support after that event. There are a variety of ways that have been adopted for seeing to the needs of the supported person, such as:

- the supporting person might make a will that either leaves property to the supported person or provides for the purchase of an annuity in favour of the supported person,

- the supported person might be entitled to realize on security (such as a mortgage) when the supporting person dies,

- insurance might have been obtained, which is payable to the supported person in satisfaction of any obligation to maintain, or which is payable to the estate or a third party to fund continued payments to the supported person.

If the agreement or court order is to survive the death of the supporting person, what should happen when the supported person recovers lost support from the wrongdoer? Unless the matter is addressed in legislation, it would appear that the supported person would remain entitled to support in accordance with the order or the agreement.

In some cases, the law allows a plaintiff to recover from a wrongdoer compensation for loss that is also off-set by other sources, such as insurance. In other, defined cases, however, compensation from a collateral source reduces the wrongdoer's liability.[6]

We agree that in fatal accident cases the fact that a claimant continues to have the right to claim support from the deceased's estate (or through some other arrangement such as insurance) should not operate to reduce the wrongdoer's liability. Nevertheless, problems might arise where the rights of support continue unabated. A claim against the estate might diminish the claims of others.

Example: the deceased dies leaving a spouse and a former spouse. The former spouse has a court order for maintenance. Both of their claims for lost support are dealt with under the Family Compensation Act. The former spouse asserts a continuing right to maintenance from the deceased's estate. If that right is enforceable, it will diminish the share of the surviving spouse.

It is our view that

- where a person's rights of support are based on a court order or an agreement with the deceased, and

- the person receives a judgment under the *Family Compensation Act* for lost support

then rights of support against the estate should abate in accordance with recovery under the judgment. If, for example, the judgment is satisfied in full, the person should have no further right to claim support from the estate.[7]

While it is easy enough to identify the general principle, there are some difficulties in determining how far it should apply to the various kinds of arrangements that might be made to ensure the continued payment of support after the payer's death. In some cases, for example, a transfer of property, an

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6. *Ratych* v. *Bloomer*, [1990] 1 S.C.R. 940. Basically, the view is that if the plaintiff has suffered no loss, there is no claim against the wrongdoer. *E.g.*, if the employer continued to pay wages to the injured plaintiff, even though the plaintiff was unable to work, the plaintiff has not suffered a loss on that head. In contrast, if the plaintiff's loss is compensated by privately arranged insurance, the view is that such an arrangement should not benefit the wrongdoer. There was some uncertainty in the law concerning whether the plaintiff must have directly paid for the insurance, or whether various employment benefits provided by an employer in exchange, *e.g.*, for lower wage expectations, would qualify under the private insurance exception. This question has now been resolved by the S.C.C., which applied the private insurance exception to an extended range of employment benefits: *Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee*, [1994] 1 S.C.R. 359. A special rule applies in fatal accident cases. The *Family Compensation Act* provides that damage assessment may not take into account any money paid under an insurance policy: s. 3(7).

7. Of course, the person would retain the right to recover any arrears that accumulated before that time. And, in keeping with the rights enjoyed by other claimants, entitlement under the *Family Compensation Act* should not affect rights against the estate under other legislation, such as the *Wills Variation Act*, R.S.B.C. 1979, c. 435, or the *Estate Administration Act*, R.S.B.C. 1979, c. 114.

insurance policy or a testamentary gift will not be earmarked as having any connection with the support obligation.

The consultation paper suggested that legislation provide for an abatement of the principal obligation (to pay support), but leave collateral arrangements in place. Under this approach an obligation under an agreement to pay monthly support after the supporting person's death, or which requires the estate to purchase an annuity to discharge a support obligation, would abate in proportion to recovery under the *Family Compensation Act*. But entitlement under an insurance policy in favour of a supported person, or a testamentary gift which is not specifically said to be in satisfaction of support obligations, would remain unaffected.

Most of our correspondents agreed. Two submissions were opposed. One group concluded that the extent to which there were benefits to satisfy an obligation should reduce the wrongdoer's liability because, essentially, the dependent suffers no loss:

> Payments to a dependent on the supporting person's death are routinely provided for to protect the dependent in the event of the supporting person's death; estates may be structured for such payments. If those provisions take effect, there is no loss of support; the payments should not be duplicated. Recovery under the *Family Compensation Act* should not be permitted if there is no loss. Further, the ability of the estate to continue to pay support after the victim's death should be exhausted before the Act can be used to make up any shortfall.

In fact, it is very difficult in most cases to set up arrangements where an estate continues to pay support after the supporting person's death, since any arrangement will postpone completing the administration of the estate. The deceased's personal representative must usually make some sort of arrangement whereby a lump sum is either paid to the dependent in satisfaction of the obligation or set up in trust. Or an annuity might be purchased. Any of these arrangements would allow administration to be completed.

In most cases, on our correspondent's suggested approach, the dependent's rights of support will be satisfied from the dependent's rights of inheritance. This strikes us as an unsatisfactory result, particularly since as a general rule it is well settled that the acceleration of an inheritance by a person's death does not affect the wrongdoer's liability to compensate for lost support. A different position exists where the victim's death does not affect the income earned by the deceased. Where, for example, income is derived entirely from an investment that continues to generate income after the death, there would be no loss of support.[8] But this is a relatively unusual situation and should not form the basis for a rule of general application.

The second group voiced concerns about the need for legislation that applies uniformly, whatever the financial arrangement put in place to protect a supported person's dependency:

> This proposal would leave undisturbed an obligation satisfied by alternative provisions (such as the transfer of real property by will, to a dependant) not specifically referenced as having been made in satisfaction of a maintenance obligation. The institution of this recommendation would set up a class distinction between dependants in very real circumstances. An inequity would arise by design--in effect structured and created solely by the peculiar designation of a disposition under a testamentary instrument.

But this group had no answer to the dilemma and concluded:

> [The Commission's conclusion] is, in our submission, unsupportable and somewhat arbitrary, thereby warranting further study and consideration to develop a more equitable approach to the issue of abatement.

8. *Courtemanche* v. *Armstrong*, [1993] B.C.D. Civ. 3369-01 (S.C.).

As we see it, any solution to this problem will be arbitrary. The issue really turns upon whether it is a problem serious enough to deserve attention, notwithstanding the fact that any solution will have to operate in an arbitrary fashion. We think it is.

(d) Conclusion

We have concluded that any person who depended upon the deceased for financial support during the deceased's lifetime should have standing to claim under the Act. A dependent should not be required to satisfy some threshold of dependency to bring the claim. As with any claimant, however, the level of compensation will depend upon the facts of the case.

The consultation paper suggested legislating special rules for assessing dependency where support was paid under a formal agreement or court order. On reflection, the rules suggested are really of general application and revising legislation should treat them as such. There is, however, a need for a special rule where a dependent recovers compensation under fatal accident legislation and is still entitled to look to the deceased's estate for continuing financial support.

3. CLAIMS BY PARENTS

Recovery depends upon proof that support was lost. Parents cannot usually prove loss of support arising from the death of a child unless the child was actually contributing to their support. For many years, it was rare to see a case where a parent was successful in advancing such a claim under fatal accident legislation.

In some recent cases, however, judges have been prepared to make these awards in special circumstances: where there is sufficient evidence that the family was of a culture where children were expected to provide parents with lifelong support.[9]

It was suggested to us that these cases proceed upon an unjustifiable distinction in the law. Principles of damage compensation for the loss of a child should not depend upon the cultural differences of the claimants:[10]

> ...Speaking as counsel who has had to advise families, both white and Asian, in tragic circumstances, phrases such as "utter madness" come to mind to describe the current state of the law. I do not know a single lawyer who can explain the current state of the law to bereaved families and convince them it makes sense.

Some have suggested that the motivating factor that has led to this development is a perceived need to compensate for the law's failure to award damages for the non-pecuniary loss suffered by parents on the death of a child.[11]

While the examples are compelling, they are also consistent with the principle underlying the *Family Compensation Act*, which is to compensate a surviving dependent of the deceased for lost support. Consider two other examples, involving the death of a person who leaves a surviving spouse and children.

In each case the deceased has the same income. In Case A, however, the deceased spends most of the income on personal matters, and leaves only a small amount for the family. In Case B, the deceased spends all of the income on the family. The levels of recovery under the *Family Compensation Act* will be based on the amount devoted to dependents. A study of cases may not suggest a grouping that follows

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9. *See, e.g., Bains* v. *Hansra*, (1992) 72 B.C.L.R. (2d) 262 (C.A.); *Lian* v. *Money*, (Unreported B.C.S.C. Decision, Apr. 28, 1994); *Lai* v. *Gill*, [1980] 1 S.C.R. 431; *Fong* v. *Gin Bros.*, [1990] B.C.D. Civ. 3377-01 (S.C.); *Tai* v. *Brown*, [1992] B.C.D. Civ. 3382-01 (S.C.); *Pluta* v. *Orton*, [1984] B.C.D. Civ. 3382-01 (S.C.); *Makhani* v. *Laing*, [1981] B.C.D. Civ. 3382-03 (S.C.).

10. Aaron Gordon, "Damages for Loss of a Child," The Verdict (Feb. 1993) 40, 41.

11. *Ibid.*

cultural divisions. But even if there were some statistical evidence that people of different cultural backgrounds spend their incomes in different ways, it would appear to be irrelevant to the central point, which is that the *Family Compensation Act* is aimed at compensating for the support that has been lost because of a fatal accident.

If our correspondent's major concern is that the Act is deficient to the extent that it does not allow a court to compensate for non-pecuniary losses, it is worth observing that amending those principles would not cure this "anomaly" in the calculation of lost support. The calculation of lost support would still turn on the purely evidentiary issue of the portion of the deceased's resources that would have been devoted to dependents.

CHAPTER VI SUMMARY OF CONCLUSIONS

A. Introduction

The Commission has arrived at a number of conclusions on possible changes to the law. This Chapter summarizes the suggestions for amending the law.

The reforms considered in this Report involve amending legal rules that apply to both fatal and non-fatal accidents. Introducing them into the *Family Compensation Act* would significantly alter the ambit of the legislation and probably require fairly extensive redrafting of its current provisions.

A revision of the Act risks opening questions which have long been resolved in cases decided under it. Even so, the principles under review in this Report should, for the most part, operate consistently for both fatal and non-fatal accident cases. It would make sense, consequently, for reforming legislation to take the form of a single statute. This is the approach Ontario adopted, for example, when it restated personal injury principles in legislation. We would prefer to see a single statute address both fatal and non-fatal accident cases.

B. Summary of Recommendations

We have reached the following conclusions:

1. Terminology

For convenience we assign the following meanings to "claimant" and to "injured person:"

(a) "claimant" means a third party who has a relational claim in the sense that loss is suffered as a result of injuries wrongfully inflicted on another person.

(b) "injured person" means a person wrongfully injured or killed.

2. New Legislation

New legislation should be enacted to replace the *Family Compensation Act*, and to restate rights claimants have when an injured person survives the injuries.

3. Claimants

Except as noted in the following recommendations, the new legislation should allow claims in fatal and non-fatal accident cases only by those people who are currently able to make a claim in fatal accident cases under the *Family Compensation Act*.

4. Representative Proceedings in Fatal Accident Cases

The current procedure followed for protecting relational third party rights in fatal accident cases remains fundamentally sound. The new legislation should require a claimant to pursue a claim through the injured person's personal representative.[1]

5. Representative Proceedings in Non-Fatal Accident Cases

The current procedure followed for protecting relational third party rights in non-fatal accident cases remains fundamentally sound. The new legislation should require a claimant to pursue a claim through the injured person.[2]

6. Lost Support and Lost Services in Fatal Accident Cases

(a) The new legislation should carry forward the current policy with respect to claims for lost support and lost services. While claimants should be entitled to compensation for lost support and lost services when the injured person dies, no such claim should exist while the injured person lives.

(b) The list of persons able to claim compensation for lost support and for lost services under the new legislation should include anyone who was financially dependent on the deceased.

(c) The new legislation should carry forward the current policy about assessing lost support. A claimant's lost support in any case, including circumstances where the claimant's entitlement to support from the injured person is based on an agreement or court order, must be determined by

(i) reference to the level of support actually paid by, or recovered from, the deceased during the deceased's lifetime, and

(ii) the level of support that probably would have been paid by or recovered from, the deceased had the wrong causing the death of the deceased not occurred.

(d) Where a person's rights of support are based on a court order or an agreement with the deceased, and the person receives a judgment under the new legislation for lost support, then rights of support against the estate should abate in accordance with recovery under the judgment. Nothing in the new legislation, however, should affect rights against the estate under other legislation, such as the *Wills Variation Act* or the *Estate Administration Act*.

7. Pecuniary Loss (Other than Lost Support)

The new legislation should allow in fatal and non-fatal accident cases claims against the wrongdoer to be brought on behalf of any person who suffers the following items of loss or expense:

(a) actual expenses reasonably incurred for the benefit of the person injured or killed;

(b) a reasonable allowance for travel expenses actually incurred in visiting the person during treatment or recovery;

1. As to the court's ability, in suitable cases, to allow separate proceedings or separate representation within the same proceedings, see Chapter III, nn. 19 and 21.

2. Subject to the court's ability, in suitable cases, to allow separate proceedings or separate representation within the same proceedings: ibid.

(c) 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.

(It is contemplated that claimants would still be able to recover funeral and medical expenses as they currently can under the *Family Compensation Act*.)

8. Guidance, Care and Companionship

The new legislation should allow, in a non-fatal accident case, a "child" to recover compensation for loss of guidance, care and companionship arising from injury to a "parent" where the parent's injuries are of a kind that, in substance, the loss suffered by the child is comparable to the loss that would have occurred if the parent's injuries had been fatal. ("Child" and "parent" should be given the same expanded meanings they have under the *Family Compensation Act*.)

9. Grief Counselling

The new legislation should allow, in both fatal and non-fatal accident cases, a court to award damages to pay for grief counselling or other treatment to

(a) a person listed as a claimant under the *Family Compensation Act*, and

(b) a person who was part of the deceased's domestic household

if the counselling or treatment is reasonably necessary to assist in adjusting to the injury or death of the victim.

C. Acknowledgements

A number of members of the Commission's legal staff were involved with this project and we would like to take this opportunity to thank Elizabeth Liu, Simon Thompson and Kirstin Murphy each of whom carried out portions of the research for the consultation paper and earlier discussion drafts.

We would also like to record our indebtedness to the individuals and groups who considered the consultation paper and took the time to make formal submissions and meet with us to discuss directions for revising the law.

APPENDIX A

FAMILY COMPENSATION ACT

R.S.B.C. 1979, c. 120

Interpretation

1. In this Act

"child" includes

(a) a person to whom the deceased stood in *loco parentis*, and

(b) a person whose stepparent was the deceased;

"parent" includes grandparent, stepparent;

"person" means a natural person;

"spouse" means

(a) a husband or wife of the deceased, or

(b) a person who lived with the deceased as the husband or wife of the deceased for a period of not less than 2 years ending no earlier than one year before the death of the deceased;

"stepparent" includes a person who lives with the parent of a child as the husband or wife of the parent for a period of not less than 2 years and who contributes to the support of the child for not less than one year.

Action for death by wrongful act, neglect or default

2. When the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages for it, any person, partnership or corporation which would have been liable if death had not ensued is liable in an action for damages, notwithstanding the death of the person injured, and although the death has been caused under circumstances that amount in law to an indictable offence.

Procedures for bringing action

3. (1) The action shall be for the benefit of the spouse, parent or child of the person whose death has been caused, and shall be brought by and in the name of the personal representative of the person deceased.

(2) The court or jury may give damages proportioned to the injury resulting from the death to the parties respectively for whose benefit the action has been brought. The amount recovered, after deducting any costs not recovered from the defendant, shall be divided among the before mentioned parties in shares as the court or jury by their judgment or verdict shall find and direct, or as may be determined by the court on motion for judgment or further consideration.

(3) If there is no personal representative of the person deceased, or, there being a personal representative, no action has been brought within 6 months after the death of the deceased person by and in the name of his personal representative, the action may be brought by and in the name or names of all or any of the persons, if more than one, for whose benefit the action would have been if it had been brought by and in the name of the personal representative.

(4) Every action brought shall be for the benefit of the same person or persons as if it were brought in the name of the personal representative.

(5) If a defendant in any action desires to pay money into court in satisfaction, the defendant may pay the money into court in one sum as compensation to all persons entitled to recover damages in the action, without specifying the shares into which, or the parties among whom, it is to be divided under this Act.

(6) If the money is not accepted and an issue is taken by the plaintiff as to its sufficiency, and the court or jury finds it sufficient, the defendant is entitled to a verdict on that issue.

(7) In assessing damages there shall not be taken into account any money paid or payable on the death of the deceased under any contract of assurance or insurance.

(8) In an action brought under this Act, damages may also be awarded for

(a) any medical or hospital expenses which would have been recoverable as damages by the person injured if death had not ensued; and

(b) reasonable expenses of the funeral and the disposal of the remains of the deceased person,

if these expenses have been incurred by any of the parties for whom and for whose benefit the action is brought.

Contents of statement of claim

4. In the action the statement of claim shall contain the names, addresses and occupations of the person or persons for whose benefit the action is brought.

Action may be brought against estate of deceased person

5. (1) When any person dies who would have been liable in an action for damages under this Act had he continued to live, then, whether he died before or after or at the same time as the person whose death was caused by wrongful act, neglect or default, an action may be brought and maintained, or, if pending, may be continued, against the personal representative of the deceased person, and the damages and costs recovered in the action are payable out of the estate of the deceased in the same order of administration as the simple contract debts of the deceased.

(2) If there is no personal representative of the deceased person appointed in the Province within 3 months after his death, the court may, on the application of a party intending to bring or continue the action, and on notice, if any, to other parties either specially or generally by public advertisement as the court directs, appoint a representative of the estate of the deceased person for the intended or pending action and to act as defendant in it. The action brought or continued against the representative appointed and all proceedings in it shall bind the estate of the deceased in all respects as if a duly constituted personal representative of the deceased were a party to the action.

Only one action shall lie

6. Not more than one action shall lie for the same subject matter.

APPENDIX B

TABLE: COMPARING THIRD PARTY RIGHTS OF RECOVERY FOR FATAL AND NON-FATAL ACCIDENTS

Category	*Fatal Accident? (FCA)*	*Non-Fatal Accident? (NFA)*	*Suggested Changes*	*Result*
Third Party claim: lost support	Available (if a listed claimant under the *FCA*)	Not Available	No Change	Inconsistent
Third Party claim: lost services	Available (if a listed claimant under the *FCA*)	Not Available	No Change	Inconsistent
Third Party claim: out-of-pocket expenses	Recently recognized (claimed by deceased's personal representative)	Available (claimed by p.i. victim)	Confirm developing *FCA* position	Parallel
Third Party claim: services rendered by third party	Recently recognized (claimed by deceased's personal representative)	Available (if over and above labour expected to be volunteered) (claimed by p.i. victim)	Confirm developing *FCA* position	Parallel
Third Party claim: non-pecuniary loss	Not Available (unless nervous shock, post traumatic stress, or child for loss of parent)	Not Available (unless nervous shock or post traumatic stress)	Change *NFA* position to allow child to claim for loss of parent	Parallel