

**LAW REFORM COMMISSION OF BRITISH COLUMBIA**

**Working Paper No. 69**

**Pecuniary Loss and the *Family Compensation Act***

This Working Paper is circulated for criticism and comment. It does not represent the final views of the Commission.

It would be appreciated if comments could be submitted by April 30, 1993.

November, 1992

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

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### *Introductory Note*

This paper discusses ideas and suggestions for changing the law.

Public consultation is an important part of preparing sound recommendations for changing the law. The Commission will not make its final recommendations for changes in the law in the topic under review in this paper until the public has a chance to comment.

We would like to have your views, criticism and advice. If the paper does not address your particular concerns, please tell us.

Comments we receive are treated as public documents, although you may request confidentiality.

Public consultation ends April 30, 1993. If you wish to comment, you should do so as soon as possible.

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**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 may 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.<sup>1</sup> 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,<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup>

**B. Scope of this Working Paper****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. It is this process in which the genius of the

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<sup>1</sup> *Donnelly v. Joyce*, [1974] Q.B. 454 (C.A.); *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*, [1988] B.C.D. Civ. 3389-22 (S.C.). But not for a business partner: *Burgess v. Florence Nightingale Hospital*, [1995] 1 All E.R. 511; or a creditor: *Roshard v. Spielman*, 11991 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 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) 34 A.C.W.S. (3d) 1046 (B.C.S.C.).

<sup>2</sup> 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 (CA.); *West v. Morgan*, (1987) 28 E.T.R. 138 (B.C.C.A.).

<sup>3</sup> 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. In some cases, the family members can bring the claim on their own behalf.

<sup>4</sup> 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.).

common law is most clearly evident. The courts are well placed to refine the principles of damage assessment in family compensation cases, through the reconsideration of precedent on a case by case basis.

On a broader level, several issues of policy have arisen upon which further legal development by the courts seems to be foreclosed and, if there is a need for change, it must be introduced through legislation. This Working Paper is concerned with these general issues of policy. They can be simply summarized in the form of a single question: Different principles apply to determine the rights of recovery of a member of the injured person's family, depending upon whether the injured person lives or dies. To what extent is it possible (and desirable) to revise the law so that it operates consistently in both events?

Before considering these issues, it is necessary to explore the features of the current law and how it developed, subjects that are pursued in the next two Chapters.

## 2. Non-pecuniary Loss

It is also useful to say a few words about issues that are not being considered in this Working Paper.

The main focus of fatal accidents legislation is to provide compensation for pecuniary losses and the exceptions to this principle are few. Compensation for a non-pecuniary loss such as grief resulting from the death of a loved one is not generally available.

These kinds of losses have been considered by the Commission in past projects.<sup>5</sup> Compensation for non-pecuniary loss has been viewed sceptically, primarily on the ground that an award of money can seldom perform a useful function to off-set the loss. One issue not considered in this project, consequently, is whether to expand the categories of non-pecuniary loss for which compensation is available.<sup>6</sup> This Working Paper considers compensation for non-pecuniary loss only to the extent that the issue touches our principal concern: to determine the extent to which third party rights, whether they arise from the death or injury of a family member, should operate consistently.<sup>7</sup>

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<sup>5</sup> See, e.g., *Report on Intentional Interference With Domestic Relations* and the *Report on the Action Per Quod Servitium Amisit*, *supra*, n. 1; as well, see *Report on Breach of Promise of Marriage* (LRC 64, 1983).

<sup>6</sup> See Appendix C, however, where materials on compensation for non-pecuniary losses are set out.

<sup>7</sup> It is a matter of concern, however, that the ability of the courts to develop legal policy relating to compensation should not be limited or foreclosed. The current position under fatal accidents legislation in British Columbia, which restricts compensation to pecuniary losses, but makes an exception for the loss of a parent, is entirely judge made. Although unlikely, the courts may possibly revise principles for assessing damages, as they have in other areas of the law where compensation for non-pecuniary losses, once unavailable, is now more widely recognized as a legitimate category of loss. See, e.g., *Reeves' Estate v. Croken*, (1988) 162 A.P.R. 240 (P.E.I.C.A.) although the position has been modified by *Reeves' Estate v. Croken*, (1990) 262 A.P.R. 298 (P.E.I.S.C.-C.A.). See further the discussion in Appendix C. See also, for a thorough discussion of these issues, Alberta Law Reform Institute, Report for Discussion No. 12, *Non-Pecuniary Damages in Wrongful Death Cases — A Review of Section 8 of the Fatal Accidents Act* (1992). Of particular value is the empirical research conducted by the Institute about the views held by families who have suffered a loss which brought them into contact with fatal accident legislation.



**A. Compensation When the Victim Dies: The Common Law Position**

*Lord Ellenborough: "In a civil court the death of a human being cannot be complained of as an injury."*<sup>1</sup>

Although it has been suggested that Lord Ellenborough's opinion in *Baker v. Bolton* was based on a misconception,<sup>2</sup> this statement of the law held true for the first half of the 19th century.<sup>3</sup> 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. *Baker v. Bolton* concerned a mishap on a stagecoach, in which a publican's wife was killed. Progress, in the form of the steam engine, soon provided even more deadly forms of public transportation.

**B. Deodands**

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" or 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. As the practise developed, the owner, rather than let the goods be sold, would ordinarily pay an amount assessed by the coroner's jury that investigated the death. The money raised in this way would be passed along to the deceased's family.

Whether a deodand was forfeit was a question that did not initially turn on issues of fault. The money was payable even if the owner was blameless. Curiously, in time it was held that deodands were not forfeit where the accident was caused by the fault of the owner (because in these cases it was likely the owner might face criminal charges).<sup>4</sup>

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<sup>1</sup> *Baker v. Bolton*, (1808) 1 Camp. 493. 170 E.R. 1033.

<sup>2</sup> Holdsworth, *A History of English Law* (vol.3) 333-335, 676-677; cf. Winfield, (1936)14 Can. B. Rev. 639 who suggests that the position had been clear for many centuries.

<sup>3</sup> The only exception was if the cause of action was in contract: See Goudy, *Essays in Legal History* (1913) 216-227.

<sup>4</sup> A very 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.

The value placed on a deodand was very often nominal (usually measured in shillings) and seldom bore much relationship to the object's real value. Money raised through deodands did not go very far.

The social problem was addressed in the 1830's.<sup>5</sup> More realistic values were placed on deodands and this occurred at a time when progress was not only responsible for increasing the numbers of destitute families, but used more expensive devices in the process. Where a person died in a train accident, for example, the amount forfeited might be valued in hundreds of pounds. The problem was now sufficiently serious to catch the attention of commercial interests.

Business's first response was to wage a legal war against deodands and, at the very least, limit the values placed on them. Courts, more sympathetic to commerce than the unfortunate families, were moved by various technical arguments to quash the verdicts of the coroner's jury. One invalidating ground, for example, was the failure to prove the time of the accident. Any doubt about when the accident occurred raised similar doubts concerning the identification of the deodand.<sup>6</sup>

The clash of ancient ideas and technical legal analysis was brought to an end in England by the *Fatal Accidents Act*, enacted in 1846. It is difficult to say whether the primary reason for enacting it was an enlightened social perspective or owed more to commercial self-interest but, whatever the true motive, the legislation was undeniably a necessary part of the legal substructure of an industrialized nation.<sup>7</sup> Human nature runs true, however, and for a while after the new legislation was passed, some continued to long for the good old days of the deodands.<sup>8</sup>

### C. The *Fatal Accidents Act*

The *Fatal Accidents Act, 1846*<sup>9</sup> is popularly referred to as *Lord Campbell's Act*.<sup>10</sup> It is based on a simple theory. An action is brought by the deceased's personal representative on behalf of

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<sup>5</sup> Cornish and Clark credit, among others, a crusading Middlesex coroner, Thomas Wakley M.P., with bringing this about: *Ibid.*, 502-3.

<sup>6</sup> *Ibid.*, 502-3.

<sup>7</sup> Until superseded in part by workers compensation legislation.

<sup>8</sup> *Supra*, n. 4, 504.

<sup>9</sup> (1846) 9 & 10 Vict. c. 93. The Act is set out in Appendix A.

<sup>10</sup> Two chapters away from it is the *Small Debts Act, 9 & 10 Vict. c. 95*, which occupies almost 50 pages of the statute books for dealing with debts of less than 20 pounds. In contrast, *Lord Campbell's Act* barely spills over onto a second page. The difference in length is attributable to either a wonderful economy in drafting achieved with the latter legislation, or the relative degrees of importance Parliament attached to each.

the deceased's close family: the spouse, children and parents of the deceased.<sup>11</sup> The action is to recover pecuniary loss suffered by the family members as a result of the deceased's death.<sup>21</sup>

Any doubts about the primary effect of the statute were settled in the first decade of its operation. The limitation 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.<sup>13</sup> The decision rested largely on two reasons: (i) the impossibility of assessing non-pecuniary loss, and (ii) the prohibitive cost of making such awards since the Act applies equally "to the little tradesman who sent out a horse and cart in the care of an apprentice."<sup>14</sup>

## D. The (British Columbia) *Family Compensation Act*

### 1. Generally

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

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<sup>11</sup> The Act provides that stepchildren and stepparents are also included in the deceased's close family.

<sup>12</sup> 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.); *Dutton v. S. E. Railway Co.*, (1858) 4 C.B. (N.S.) 296, 140 E.R. (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, e. 114, s. 66(2), which provides:

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 to physical disfigurement or pain and 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 form of the legislation is, in part, a reaction to a 1937 decision of the House of Lords: *Rose v. Ford*, [1937] A.C. 826, [1937] 3 All E.R. 359 which held that the estate could recover damages for pain and suffering, and for loss of expectation of life. Claims on these heads, however, are now foreclosed by operation of the legislation. Other provinces face difficulties in the light of another decision of the House of Lords, *Gammell v. Wilson*, [1982] A.C. 27, [1981] 1 All E.R. 578, which held that the estate could recover lost future earnings, but the B.C. legislation addresses this issue.

<sup>13</sup> *Blake v. Midland Rly.*, (1852) 18 Q.B. 93, 118 E.R. 35.

<sup>14</sup> *Ibid.*, at 111 (Q.B.).

The British Columbia version of the Act is only a marginally brushed up version of the 1846 legislation.<sup>15</sup> The few differences reflect the adoption of modern drafting conventions,<sup>16</sup> some local inspiration and the borrowing of later English refinements, but these changes affect neither the broad outlines of the legislation nor its operation.<sup>71</sup>

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 continue to shape its operation, reflect social and legal policy of the last century, and the objectives the legislation seeks to meet may no longer be appropriate today. Is a full scale review of the legislation in order, or need only parts of it be reexamined?

## 2. Damage Assessment

Some parts of the legislation have been subject to continual scrutiny and development by the courts and, consequently, have been re-shaped 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;<sup>81</sup>
- the application of prejudgment interest to an award;<sup>91</sup>
- whether aggravated, exemplary or punitive damages can be awarded;<sup>20</sup>

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<sup>15</sup> The B.C. legislation is set out in Appendix B. Federal legislation provides a cause of action where the fatality occurred at sea: *Canada Shipping Act*, R.S.C. 1985, c. S-9. As to the relationship between federal and provincial legislation in this context, see *Shuiman v. McCallum*, (1991) 58 B.C.L.R. (2d) 199 (S.C.), leave to appeal granted (1991) 61 B.C.L.R. (2d) 66 (C.A.).

<sup>16</sup> 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.

<sup>17</sup> 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 on point: *Dalton v. South-Eastern Railway Company*, (1858) 4 C.B. (N.S.) 296, 140 E.R. 1098; 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).

<sup>18</sup> *Grant v. Jackson*, (1986) 68 B.C.L.R. 212 (C.A.); *Scarff v. Wilson*, (1988) 33 B.C.L.R. (2d) 290 (C.A.) (appealed to the Supreme Court of Canada, but not on this point [1989] 2 S.C.R. 776).

<sup>19</sup> *Killeen v. Kline*, (1982) 33 B.C.L.R. 225 (C.A.).

<sup>20</sup> *Campbell v. Read*, [1988] 3 W.W.R. 236, (1988) 43 C.C.L.T. 262 (B.C.C.A.).

- the need for professional management of a large award and the circumstances in which it is recoverable;<sup>21</sup>
- the interplay of various positive and negative contingencies, such as: 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<sup>22</sup> or future changes in the claimant’s need for support;<sup>23</sup> 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;
- how (and when) to take into account collateral benefits;<sup>24</sup>
- compensating for the loss of one or both parents;<sup>25</sup> and
- adjusting for the impact of taxation on the damage award.

Since there are no prohibitions on judicial innovation with respect to assessing compensation for loss, it is not clear that there is any need for legislative intervention in this sphere.<sup>26</sup>

### 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*.<sup>27</sup> A “parent” includes a grandparent and a stepparent. “Stepparent” is also given an extended meaning and 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

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<sup>21</sup> *Watkins v. Olafson*, (1989) 39 B.C.L.R. (2d) 294 (S.C.C.); *Mandzuk v. Vieria*, (1986) 2 B.C.L.R. (2d) 344 (C.A.); *Just v. The Queen*, [1992] B.C.D. Civ. 3389-03 (S.C.).

<sup>22</sup> *Lake v. Callison Outfitters Ltd.*, (1991) 58 B.C.L.R. (2d) 99 (S.C.).

<sup>23</sup> *Bruneau v. Clearwater*, [1992] B.C.D. Civ. 3779-02 (S.C.).

<sup>24</sup> *Dickson v. Roy’s Midway Transport Ltd.*, (1989) 60 D.L.R. (4th) 99 (N.B.C.A.) (adoption by a wealthier family); *Newport v. Fondstad*, [1986] B.C.D. Civ. 3381-01 (C.A.) (acceleration of inheritance); *Muldrew v. Harris*, (1988) 29 B.C.L.R. (2d) 67 (C.A.) (pension benefits paid to survivor as a result of the death).

<sup>25</sup> *McDermott v. Ramadanovic Estate*, (1988) 27 B.C.L.R. (2d) 45 (S.C.); *Coe Estate v. Tennant*, (1988) 31 B.C.L.R. (2d) 236 (S.C.).

<sup>26</sup> One area where attention is called for is the calculation of the income tax gross-up on damages, since the calculation of it is a technical, non-legal matter that depends upon selecting from a number of equally relevant assumptions. Since the process is difficult, and calls upon expertise in the fields of economics and actuarial science, it is not clear that the courts should have to deal with it. Moreover, there has recently been a call for legislative intervention on this point: see the decision of Finch J. in *Public Trustee v. Asleson*, (1992) 62 B.C.L.R. (2d) 78 (S.C.). We have constituted a special advisory committee to consider this issue.

<sup>27</sup> 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.

A spouse includes someone not married to the deceased if they lived together as man and wife for not less than two years.<sup>28</sup>

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.

One issue pursued in this Working Paper is whether any changes are required concerning who may apply under the Act for lost support.

#### 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, have 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. Nervous shock, however, is.

##### (b) *Nervous Shock*

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. When applied to nervous shock arising from the injury to another the proximity embraces at least three factors: the relationship between the plaintiff and the injured person;<sup>29</sup> 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.

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<sup>28</sup> 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. This definition was adopted in response to our *Minor Report on Standing of a Common Law Spouse to Apply Under the Family Compensation Act* (LRC 61, 1983). See *Johanson v. Hughesman*, (1991) 58 B.C.L.R. (2d) 141. See also *McEvoy v. Ford Motor Company*, (1992) 63 B.C.L.R. (2d) 397 (C.A.), which holds that "spouse" includes a person who lived as husband and wife with a person who was married to someone else. The case also, incorrectly in terms of the legislation, suggests that there can only be one claimant as a "spouse." The legislation does not have that limitation and there is no need for it because the claim is limited by the amount of money spent by the deceased on the spouse before the fatal accident, and which, but for the fatality, would have been made available for the claimant in the future.

<sup>29</sup> In *Bechard v. Haliburton Estate*, (1992) 10 C.C.L.T. (2d) 156 (Ont. C.A.), however, it was held that the absence of a family relationship between the plaintiff and the gravely injured person did not bar recovery.

Finally, although the door is not completely closed on the argument, to satisfy the test of physical proximity it would appear that the plaintiff must have been present at the accident.<sup>03</sup>

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. Many people find this legal position difficult to accept.

(c) *An Exception: 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.<sup>31</sup> 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.<sup>32</sup> 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 and, as such, there is a real loss that is assessable in terms of money. 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:<sup>33</sup>

. . . 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. 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

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<sup>30</sup> *Rhodes Estate v. C.N.R. and Via*, (1991) 50 B.C.L.R. (2d) 273 (C.A.). See, however *Alcock v. Chief Constable of South Yorkshire Police*, (1991) 3 W.L.R. 1057 (H.L.) where the possibility of compensation was considered for relatives who watched the Hillsborough grounds disaster on television. The claims were disposed of because the relationships between the claimants and the victims were not sufficiently close to justify compensation.

<sup>31</sup> *St. Lawrence and Ottawa Railway Co. v. Lett*, *supra*, n. 12; *Vana v. Tosta*, (1968) 66 D.L.R. (2d) 97 (S.C.C.).

<sup>32</sup> 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. 31 at 109, *per* Ritchie J. In contrast, the statutory regime in Ontario separates pecuniary losses from those which are for care, comfort and guidance and, consequently, the loss is characterized as essentially non-pecuniary: see, e.g., the Report of the Ontario Law Reform Commission on *Compensation For Personal Injuries and Death* (1987) 20.

<sup>33</sup> *Supra*, Chapter I, n. 4, 117.

award was allowed to stand because, in the circumstances, it could not be said to be inordinately high.<sup>34</sup> A 1991 decision suggested that the reference point should now be \$30,000.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

The need for legislation on this point is one of the issues pursued later in this Working Paper.

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<sup>34</sup> *Plant v. Chadwick*, (1986) 5 B.C.L.R. (2d) 305 (C.A.).

<sup>35</sup> *Selcho v. Laminski*, [1991] B.C.D. Civ. 3381-01 (S.C.). Several provinces have enacted legislation that allows the court to award damages for non-pecuniary loss. These are referred to in Appendix C.

<sup>36</sup> *Porpaczy v. Truitt*, (1990) 49 B.C.L.R. (2d) 132 (C.A.).

<sup>37</sup> *Ibid.*, per Carrothers JA.. 136.



## CHAPTER III

## THIRD PARTY RIGHTS OF RECOVERY IN FATAL AND NON-FATAL CASES

### A. Introduction

Currently, if the victim survives injuries wrongfully caused by another, losses suffered by the victim's family and friends are pursued, if at all, through the victim. If the victim dies, some, but not all, third parties suffering a loss are given direct rights of action against the wrongdoer to recover lost support.

The law determines whether a third party may recover compensation by reference to three main factors: the kind of loss; whether or not the victim's injuries are fatal; and, if fatal, whether the third party is listed as a claimant under the *Family Compensation Act*.

It is not altogether clear that the factors the law compels the courts to consult provide a rational, or even a useful, reference point for determining when to compensate a third party for loss occasioned by the injury to a family member. For example, while death will certainly present a real loss, the sense of loss may be equally deep if the victim survives the injuries, but is left physically or mentally scarred by them. And cases where a family member dies are no less likely than those involving nonfatal accidents to lead to situations in which others must assume financial responsibility for various matters. The line between life and death is not a realistic one for determining whether or not others related to the victim in one way or another may suffer appreciable loss. There would appear to be a need to address third party rights with more consistency than is achieved by the approach currently adopted by the law.

The Commission is charged by its constituting legislation<sup>1</sup> with rationalizing and modernizing the law, as well as simplifying it. It would be possible to conduct separate examinations of the law governing third party rights when a victim survives injuries, and those rights when the victim dies, proposing necessary amendments to ensure the law operates in a consistent and sensible fashion in these two different spheres. In this context, however, this approach is one likely to preserve the current complexity of the law and render more difficult the development of a set of principles that apply equally, or at least operate in harmony, in fatal and non-fatal cases.

Consequently, the first issue to consider is whether it is possible to deal with third party rights in a unified fashion. Two options exist for bringing third party rights into line:

1. allowing a deceased's estate to enjoy all of the rights that the deceased had while alive (under this approach consistency would be achieved, essentially, by requiring third parties to pursue their claims through the victim or the victim's estate); or

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<sup>1</sup> *Law Reform Commission Act*, R.S.B.C. 1979, c. 225, s. 2.

2. allowing third parties to proceed even if the victim survives the injuries (under this approach, third parties would have direct rights of action in both fatal and nonfatal cases).

## **B. Should Death Alter Legal Rights?**

At common law, death was regarded as terminating most legal rights (other than those under a contract)<sup>2</sup> enjoyed by the deceased while alive. It was, in many respects, a very unsatisfactory rule.

A person who dies is quite likely to leave behind obligations, to family members, creditors and business associates, that cannot be satisfied unless everything owed the deceased can be recovered. Five hundred years of legislation have made such inroads that not much of the rule remains. Legislative changes (in the 14th and 19th centuries) allowed the personal representative to sue for injury or damage to the deceased's property.<sup>3</sup> In 1934, legislation allowed the personal representative to recover pecuniary loss suffered by the deceased up to the time of death.<sup>4</sup> As a result, in British Columbia the old rule is almost gone.<sup>5</sup>

It would not be very difficult to take the final step and simply say that any right enjoyed by the deceased before death may be pursued by the personal representative for the benefit of the deceased's estate. In fact, this option was recommended by the Ontario Law Reform Commission.<sup>6</sup>

## **C. Making the Estate Whole**

### **1. Whose Loss?**

While the victim lives, the law views all of the loss as the victim's. Family members must look to the victim for compensation. When the victim dies, the family looks to the wrongdoer. Since a different theory supports rights of recovery in each case, different principles apply to

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<sup>2</sup> See Holdsworth, *A History of English Law* (vol. 3) 583-585.

<sup>3</sup> The 14th C. legislation allowed the deceased's personal representative to recover compensation for injuries to the deceased's personal property: 4 Ed. III. c. 7. The 19th C. legislation allowed the personal representative to recover damages for injuries to the deceased's real property: *Civil Procedure Act, 1833*, 3 & 4 Will. IV, c. 42, s. 2.

<sup>4</sup> The *Law Reform (Miscellaneous Provisions) Act, 1934*, 24 & 25 Geo. V. c. 41, B.C. enacted similar legislation the same year: see *An Act to amend the "Administration Act," S.B.C. 1934*, c. 2.

<sup>5</sup> It survives only to the limited extent that damages are not recoverable for such claims as (a) the deceased's pain and suffering and other non-pecuniary loss; (b) money that would have been earned had the deceased survived; (c) defamation; and (d) some statutory remedies (such as under the *Privacy Act*, R.S.B.C. 1979 c. 336, s. 5) which expressly provide that the remedy does not survive the death of the claimant.

<sup>6</sup> *Report on Compensation for Personal Injuries and Death* (1987). See also Report No. 134, 1992, *Report on the Effect of Death on Damages*, Scottish Law Reform Commission.

determine appropriate compensation. The wrongdoer's responsibilities, consequently, vary depending upon whether the deceased survives the injuries.

Making the estate whole has at least one advantage over the current law: it would ensure the same principles apply to determine compensation whether or not a victim's injuries are fatal. The wrongdoer's responsibilities would remain constant.

Reform of this kind would simplify the law. Since the individual losses of family members become irrelevant, for example, the value of a claimant's dependency, assessed by weighing numerous contingencies, would not have to be considered.<sup>7</sup>

## 2. Problems

Several difficulties can be discerned at once with the option of making the estate whole. Family loss will not be directly compensated. Instead, family members must look to the deceased's estate and depend upon the arrangements made by the deceased by will or, failing that, rights arising on an intestacy. In some cases, consequently, those who are currently entitled to compensation will find themselves without a remedy while others may be "overcompensated," simply because a will, or the rules of intestate succession, do not necessarily correspond to the loss and needs of the deceased's family.<sup>8</sup>

Another difficulty (although it may also represent an improvement in the law) would be the altered position if the deceased died leaving lots of debts. The *Family Compensation Act* cannot be used to collect debts left unpaid at the deceased's death. Moreover, awards under the *Family Compensation Act* to the deceased's family cannot be seized by the deceased's creditors, if the estate were permitted to recover the deceased's loss, however, creditors would be able to look to the estate in priority to family members for the money they are owed. It is certainly good policy that creditors be paid, but it is difficult to find an appropriate balance between their interests and those of family members who may be left destitute by the deceased's death.<sup>9</sup>

## 3. Tentative Conclusion

It is open to question whether there is any need to depart from the general approach of the *Family Compensation Act*, which allows claimants to recover their loss directly from the person

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<sup>7</sup> Another possible advantage is that making the estate whole removes any incentive a defendant may have to delay proceedings in the hope that liability will ultimately be reduced by the victim's death: Scottish LRC, *supra*, n. 6. It would be embarrassing indeed if the law actually provides such an incentive, but there is no evidence to support the proposition. We would welcome comment on whether defendants do, in practice, delay proceedings in these circumstances.

<sup>8</sup> Of course, to use a term like "compensation" is meaningless in this context. Succession rights have nothing to do with compensating for loss, even though some aspects of the law attempt to protect those who were dependent upon the deceased for support: *e.g.*, *Wills Variation Act*, R.S.B.C. 1979, c. 435; *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 111.

<sup>9</sup> In the circumstances, of course, there may be more than enough funds to satisfy the claims of dependents and creditors. Where that is not the case, it would be possible for legislation to protect the deceased's dependents. Legislation, *e.g.*, could make a damage award to the estate immune to the claims of creditors, although it is not clear that immunity would be the best policy since a creditor also has an interest that has been prejudiced by the wrongful accident. Moreover, a damage award in favour of a surviving victim would not be protected from the claims of a creditor. Why should a different position apply if the injuries are fatal?

who wrongfully causes the death of a family member. While a case can be made out that there are advantages to be derived from discarding the *Family Compensation Act* in favour of a new theoretical structure for compensation, it is not an overwhelming one. Furthermore, potential improvements in the law would be counter-balanced by serious disadvantages that arise from making the estate whole. In some cases, for example, sizeable damage awards may be paid for no real purpose (where, for example, the deceased had no family or dependants).<sup>10</sup> In other cases, needy dependants will be undercompensated. Moreover, there is no reason why problems highlighted in recent years cannot be addressed directly within the dimensions of the current legislation.

The *Report of the Osborne Inquiry into Motor Vehicle Accident Compensation in Ontario*<sup>11</sup> was published just about the same time as the Ontario Law Reform Commission finished its work in this area. The *Osborne Report* concluded that a case had not been made for departing from the Ontario position and adopting new legislation which would allow the deceased's estate to recover all loss arising from death or injury.

Notwithstanding our preliminary views, the issue discussed above is an important one and we welcome comment on it. Is there any reason why death should terminate various rights once enjoyed by the deceased? Is it sensible to channel rights to family compensation through the injured party (or the injured party's estate)? Or does the law's current approach for third party rights in fatal accident cases remain fundamentally sound?

## **D. Third Party Rights of Recovery for Non-fatal Injuries**

### **1. Potential Conflict Between the Rights of Third Parties and the Victim**

The second option for ensuring that, as far as possible, third party rights operate consistently whether or not a victim's injuries are fatal is to extend third party rights of direct recovery for non-fatal injuries.

The practical reason the law distinguishes between fatal and non-fatal injuries is that where the victim survives the policy is to make the victim whole (to the extent that is possible through an award of damages). It is only when the victim dies, because legal rules remove the deceased's estate from the picture, that the plight of third parties comes into focus.

This legal position seems designed with two ends in mind. First is the question of how to deliver compensation. If the victim is made whole, third parties can look to the victim for the compensation they deserve. If the victim dies, they can look directly to the wrong-doer. Framed

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<sup>10</sup> On this point, it may be argued that the identity of the deceased's successor should not affect the wrongdoer's liability. Is it possible to say that a distant relative or, where the property escheats, the state, is less worthy than a closer relation?

<sup>11</sup> "*Osborne Report*" (1988)393-5. It was this Report which led to the introduction in Ontario of legislation to provide compensation on a no-fault basis for losses arising from automobile accidents.

in this way, the issue is really how to deliver compensation. It has little to do with the question of whether the third parties have actually suffered loss.

The second goal would appear to be to minimize conflicts between claimants. The law, in its current form, ensures that there is no competition between a third party and the victim over rights of recovery.

It is reasonable for the law to ensure that a third party's claim cannot deprive the victim of full compensation for loss. It seems clear, consequently, that while claimants should be entitled to compensation for lost support when the victim dies, no such claim should exist while the victim lives. However, there are categories of pecuniary loss which are not suffered by the victim, but by the third party, whether or not the victim survives the injuries. If

- (a) there is general agreement that some kinds of loss are recoverable by third parties in cases of fatality,
- (b) these kinds of loss exist even if injuries prove to be nonfatal, and
- (c) allowing their recovery in non-fatal cases would not restrict the victim's rights of recovery

a reasonable case can be made that third parties should have direct rights of action in non-fatal cases. Ontario, in fact, amended its law some time ago to allow third parties direct rights of recovery in non-fatal cases.

The key to the issue, consequently, is whether extending third party rights in non-fatal cases would prejudice the claims of the victim. The balance of this section explores this issue, putting aside until the next Chapter any detailed consideration of the particular kinds of pecuniary loss a third party might be allowed to recover directly from the wrongdoer.

## 2. Pecuniary Loss and Non-fatal Injuries

Even under the current law, a third party is entitled to recover some kinds of pecuniary loss incurred on behalf of the victim. The claim is usually brought on behalf of the third party by the victim. These claims can be sizeable. In one case, for example, a third party claim was valued at over \$100,000.<sup>12</sup>

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.

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<sup>12</sup> *Leach (Guardian ad Litem of) v. Glada*, (1992) 33 A.C.W.S. (3d) 243 (B.C.S.C.).

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.

Since these kinds of claims are separate from the victim's, relating as they do to expenses which the victim would have had to have incurred but did not, they cannot subtract from the victim's ability to recover compensation for actual loss. There is no risk of intruding on the damages payable to the victim.

### 3. Competing Judgments

A related, but different, issue might arise after the assessment of damages, at a time when the third party and the victim each have their separate judgments. The judgment debtor may be unable to satisfy both judgments in full (although usually the presence of insurance means that all claims will be met). A possibility of conflict between a third party and the victim exists if not all judgments can be satisfied. But there is some doubt in our minds about whether the law should subordinate the third party's judgment to that of the victim.

As a matter of policy, the law recognizes few differences between judgments. Generally, any judgment creditor is free to take appropriate steps to enforce the claim.

Where the judgment debtor is insolvent, federal bankruptcy legislation provides a structure for satisfying claims from the bankrupt's estate and it is here that some priorities among particular classes of claims are established to promote specific objectives. Crown claims, for example, are given an enhanced status, as are the claims of the bankrupt's landlord. But these kinds of exceptions are few. For the most part, judgment creditors rank equally.<sup>13</sup>

Provincial legislation also sets out a kind of pre-bankruptcy regime, under which judgment creditors may share ratably in any proceeds recovered in execution.<sup>14</sup> Singling out third party judgments for special attention would seem to be inconsistent with the general policy that applies under the law governing the enforcement of judgments.

Moreover, there will be (usually rare) cases where the third party's action is the more deserving of the two. Who should have priority between an unemployed person, who convalesces for a month after being injured, and the devoted aunt who supports and cares for the victim? Suppose the victim's claim is for \$2000. The aunt's claim is for \$10,000 and (to further tip the balance) the sum represents her life savings.

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<sup>13</sup> There would likely be constitutional obstacles to provincial legislation setting out any order priorities among different classes of judgment creditor's in federal bankruptcy matters.

<sup>14</sup> See, e.g., *the Creditor Assistance Act*, R.S.B.C. 1979, c. 80 which provides that where judgment creditors issue writs of execution within a defined time frame, they will participate on a pro rata basis monies recovered by any individual execution.

An arbitrary policy of subordinating a third party's claim cannot address these kinds of issues. If it is concluded that distinctions must be drawn between the claims of different kinds of judgment creditors, it might be imagined that the legislative rules to achieve a satisfactory balancing of the kinds of interests involved would have to be intricate and detailed.

More commonly, the third party claim will be minor, compared with the victim's losses. Consequently, any scheme of subordination will usually represent little improvement over the existing structure which requires rateable sharing between the judgments where the judgment debtor is unable to satisfy all claims in full.

It is our tentative view that the policy to avoid conflict over compensation between a victim and a third party applies only to determine the kinds of loss a third party may claim separately from the victim. But once their claims are reduced to judgment, they should rank equally.

#### 4. When a Parent is Injured

To this point, our discussion has not focused on particular kinds of loss. Moreover, since third parties can, in one way or another, usually recover pecuniary loss in non-fatal cases, it might seem that little would be accomplished if legislation were to confirm that third parties have direct rights of recovery from the wrongdoer in the kinds of cases under discussion. In fact, there are dramatic distinctions drawn by the law about the kinds of loss recoverable by (or on behalf of) a third party, depending upon whether the victim lives or dies.

We have in mind the legal principles that determine compensation for losses available when a child's parent is wrongfully killed (the single instance where the law allows a person to recover non-pecuniary loss arising from the injury to family member) and those which apply when the parent survives the injuries.

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 in the last Chapter, 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 Morrisette*,<sup>15</sup> a Supreme Court judge awarded damages by analogy to the fatal accident cases:<sup>16</sup>

. . . 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.

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<sup>15</sup> (1981) 32 B.C.L.R. 225 (S.C.).

<sup>16</sup> *Ibid.*, per Munroe J. at 227.

The second case, *Porpaczy*, reached the British Columbia Court of Appeal.<sup>17</sup> It held that the *Dhaliwal* case was wrongly decided: the court has no jurisdiction to award compensation on this head. Whether the law is to be revised to allow a damage award for non-pecuniary loss in these circumstances is properly matter for the legislature.<sup>81</sup>

In our view, if it is appropriate to award compensation for 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 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 father's relationship with the child.

The position with respect to compensation for loss on the death of a parent is well established and would seem 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. This is one matter that would be addressed by enacting legislation which allowed third parties to recover defined loss in fatal and non-fatal accident cases. The law could be revised to provide that a child is entitled to compensation for loss of guidance, care and comfort 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.<sup>19</sup> This formulation would allow a court to award of compensation where the impairment of the parent/child relationship is significant, as it was in *Dhaliwal* or *Porpaczy*. It is our tentative conclusion that this is a necessary change in the law, but it is one upon which we particularly invite comment.

## E. Summary

It is our tentative conclusion that the current distinctions about rights of recovery drawn by the law by reference to whether the case involves a fatal or non-fatal accident are unjustifiable. Of the methods available for ensuring that third party rights of recovery operate in a consistent fashion, the one that appears best suited for British Columbia is legislation which provides third parties with direct rights of recovery.<sup>20</sup>

In many respects, however, this tentative conclusion simply focuses on the mechanics of ensuring that rights of recovery are determined in a rational fashion. Revising legislation must

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<sup>17</sup> *Porpaczy v. Truitt*, (1990) 49 B.C.L.R. (2d) 132 (C.A.).

<sup>18</sup> *Ibid.*, at 136 (*per* Carrothers JA.) and at 138 (*per* MacFarlane JA., Macdonald JA. concurring).

<sup>19</sup> 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.

<sup>20</sup> Providing for direct rights of recovery need not multiply litigation. Methods of pursuing related claims are discussed in Appendix D.



also set out with some precision the kinds of losses that should be recoverable. This subject is discussed in the next Chapter.

**A. Introduction**

The British Columbia *Family Compensation Act*<sup>1</sup> 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 not caused by the death but the victim’s injuries. For example, costs of searching for a missing deceased person are not recoverable under the Act.<sup>2</sup> Two more common examples are: work foregone to look after or nurse the victim and expenses paid on behalf of the victim. The way the *Family Compensation Act* is drafted means that these losses are not recoverable under it. Some kinds of pecuniary losses, however, may be recovered by the victim’s estate on behalf of the third party who actually Incurred them, on the same principles that apply when the victim survives the injuries.<sup>3</sup>

The interpretation of the *Family Compensation Act* is narrow and in keeping with the approach to statutory construction typically adopted by 19th century courts. A modern court permitted to consider the issue free of precedent might not be willing to adopt such a narrow view of the ambit of the legislation. By this time, however, the meaning of the legislation is so fixed that no change of policy may be anticipated unless introduced through amendments to the Act.

This Chapter considers the kinds of loss that should be recoverable by a third party 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. As discussed in the last Chapter, it is our tentative conclusion that (except with respect to

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<sup>1</sup> R.S.B.C. 1979, c. 120.

<sup>2</sup> See, e.g., *Mazloom v. Central Mountain Air Services Ltd.*, [1990] B.C.D. Civ. 3359-13 (S.C.), *aff’d* [1992] B.C.D. Civ. 3359-09 (C.A.); nor are they recoverable by the estate: *Cogar Estate v. Central Mountain Air Services Ltd.*, (1992) 35 A.C.W.S. (3d) 314 (B.C.C.A.). *Toronto Railway Company v. Mulvaney*, (1907) 38 S.C.R. 327.

<sup>3</sup> See, e.g., *Lankenau (Estate) v. Dutton*, (1988) 27 B.C.L.R. (2d) 234, *aff’d* 55 B.C.L.R. (2d) 218 (C.A.); see also *supra*, Chapter 1, n. 1. The Act has been patched up to provide that in addition to loss arising from death, a claimant can recover medical and hospital expenses incurred as a result of the injuries. The B.C. Act also allows funeral expenses to be recovered. In the absence of an express provision, these are not recoverable because, eventually, everyone must incur funeral expenses and therefore it cannot be said they result from the wrong causing the deceased’s death.

support) third parties should have similar rights of recovery whether the accident is fatal or non-fatal. Consequently, a very convincing case must be made out before a distinction should be drawn between rights of recovery in fatal and non-fatal cases.

## **B. Pecuniary Loss**

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

- (a) pecuniary loss incurred relieving the victim of expenses the victim could have recovered from the person responsible for causing the injuries,
- (b) personal expenses or loss, and
- (c) 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).<sup>4</sup>

*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, such as providing nursing care. Other expenses that are technically unrelated to the victim's loss, however, are not. The costs incurred by a mother travelling from Toronto to her dying daughter in Victoria, for example, are usually unrecoverable.<sup>5</sup>

*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.<sup>6</sup> 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.

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<sup>4</sup> 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: *see, e.g., Donnelly v. Joyce*, [1974] Q.B. 454 (C.A.); *Teno v. Arnold*, [1978] 2 S.C.R. 287.

<sup>5</sup> 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.); *Hackney v. Chubey*, (1981) 13 M.V.R. 84 (Sask. Q.B.).

<sup>6</sup> *Burgess v. Florence Nightingale Hospital*, [1955] 1 All E.R. 511.

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 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 widespread 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, but considering the matter from a broader perspective 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 these kinds of loss should not be recoverable. 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.<sup>7</sup>

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.<sup>8</sup>

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<sup>7</sup> 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. Even so, the policy is clear that recovery in these cases is not open ended. The usual rule is to self-insure against the possibility of loss. See *C.N.R. v. Norsk Pacific Steamship Co.*, (1992) 91 D.L.R. (4th) 289.

<sup>8</sup> 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. Nevertheless, cases in British Columbia 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 giving third party assumed duties that constituted essentially a full-time occupation that went beyond the normal duties flowing from the relationship with the victim. The other line of authority does not limit the circumstances where the value of necessary services rendered by the relative may be awarded by the court. The authorities are discussed at length in *Crane v. Worwood*, [1992] 3 W.W.R. 638 (B.C.S.C.). The maximum award that can be made for services is the cost of obtaining the services outside the family. In our tentative 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

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 lifelong friend who drops everything to come to a person's death bed.

Ontario introduced legislation in 1978 that allows for the recovery of third party losses. The legislation lists, among others, the following classes of recoverable expenses:<sup>9</sup>

- (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. In our tentative view, a reasonable allowance for these kinds of expenses, provided they are reasonably incurred, should be recoverable under British Columbia legislation.

To summarize: (putting aside for a moment lost support) a claimant should be entitled to recover from the wrongdoer the following kinds of pecuniary loss that arise on the injury or death of a family member:

- (a) loss incurred relieving the victim of expenses the victim could have recovered from the wrongdoer, and
- (b) a reasonable allowance for loss or expense reasonably incurred in providing the victim with care, comfort and companionship.

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should not receive compensation. To hold otherwise is to require a volunteer to relieve the wrongdoer of liability.

<sup>9</sup> *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 tentatively proposed that losses under these headings should be recoverable: see Report for Discussion No. 12, *Non-Pecuniary Damages in Wrongful Death Actions — A Review of Section 8 of the Fatal Accidents Act (1992)*.

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.<sup>10</sup> In our tentative view, restrictions on those entitled to claim compensation for loss under item (a) are unnecessary. There is no reason to relieve the wrongdoer of ultimate responsibility for these losses. Losses under item (b) 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. Our views on this issue, however, are not fixed and we will reconsider the matter in the light of comment received on this Working Paper. Please let us know your views.

### C. Grief Counselling

As we said at the outset, an issue not pursued in this Working Paper is whether, when a person's death is wrongfully caused, family members should be entitled to compensation for losses that are non-pecuniary in nature.<sup>11</sup> The death of a relation or close friend can be traumatic, and the trauma can be life-long. No one would deny that these kinds of non-pecuniary losses can be significant. The current policy of the law against compensating for them is premised on several reasons, but the strongest of these is that a damage award is unlikely to serve any real purpose. It cannot replace what has been lost.

Nevertheless, 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.<sup>12</sup> In our tentative 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) 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.<sup>13</sup> We would welcome suggestions about other services that might also assist a bereaved family.

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

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<sup>10</sup> The question of who should be entitled to recover loss of support is considered in Chapter V.

<sup>11</sup> See, however, the exception made for a child who has lost a parent, discussed in the last Chapter.

<sup>12</sup> 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., *Gilmard v. Berry*, [1992] S.J. No. 275 (Q.B.); *Janik 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.J. No. 1414 (S.C.).

<sup>13</sup> The Alberta Law Reform Institute also proposed that compensation for this should be recoverable: recommendation 1, Report for Discussion No. 12 (1992).

visit a week for a year brings the claim up to \$5200 — many will be helped by a much shorter course of therapy.<sup>41</sup>

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 the legislation risks overburdening the courts.

It is our tentative view that legislation recognizing this head of loss must also define reasonable parameters for those who may claim. 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 person's domestic household, on the theory that those who lived together are most likely to suffer seriously when one of them is injured.

We welcome comment on whether such an approach would be workable. 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, at this point, do not suggest any be adopted. Although we tentatively propose that legislation provide generous tests to determine whether a person has status 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. e there other controls that revised legislation will require?

## **D. Summary**

The tentative 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

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See, e.g., *Grimard v. Berry*, *supra*, n. 12, where the award for counselling twice a month for a year amounted to \$2400.

part parallel rights of recovery for third party claimants exist whether a family member lives or dies from injuries wrongfully caused by another.

As mentioned in the last Chapter, however, legislation should clarify the extent to which any overlap is permissible with claims for compensation being advanced by or on behalf of the victim. As a general principle, a third party's claim should not in any way affect, limit or duplicate the victim's rights of recovery.

The kinds of damages for which a third party may claim are based on this policy. In every case, a third party's pecuniary (and non-pecuniary) losses are separate from those of the victim. As discussed in the last Chapter, it is for this reason that third party rights of recovery in fatal and non-fatal cases should differ in only one respect: a third party may claim loss of support only when the victim's injuries prove to be fatal, because that is the one head of loss which would otherwise overlap with the claims of the victim.<sup>15</sup>

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*Brancati v. Maillet*, (1989) 68 O.R. (2d) 704, 715.



**A. Current law**

In its current form, the *Family Compensation Act* allows claimants to recover support lost when a family member dies. We tentatively concluded earlier that it would be inappropriate to make support recoverable should the family member survive the injuries. A change in policy on this point would either require the wrongdoer to pay for the same loss twice over, or result in reducing the victim's rights of recovery to the extent the claimants were successful. Neither of these positions is defensible. For so long as the victim survives, the ability to recover lost income, or damages for the lost ability to earn income, should remain solely the victim's.

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 for support.

**B. Who Should be Able to Claim?****1. Dependency**

The *Family Compensation Act* lists those claimants who are entitled to recover lost support. But the nature of the claim is based on the fact of dependency. Not every listed claimant will be entitled to damages. The Act benefits 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 on 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*).<sup>1</sup> Similarly, while a separated spouse supported by the deceased may claim — because a separated spouse still qualifies as a spouse — a divorced spouse receiving maintenance has no standing under the Act.

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.

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<sup>1</sup> *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.).

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, but 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.

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 tentative 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.<sup>2</sup> 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.

In our view, family compensation legislation is defective to the extent that it does not protect someone who was financially dependent on the deceased.

## 2. Financial Dependence under an Agreement or Court Order

### (a) *Generally*

In at least one group of cases, the evidentiary problem of blishing financial dependence will be slight, even if the ~pendency is of recent origin. These are the cases involving dependency 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 child.

In some cases, these people 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

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<sup>2</sup> See, e.g., *Btuneau v. Clearwater*, [1992] B.C.D. Civ. 3379-02 (S.C.).

category, consequently, 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.

Two issues arise where a claimant is entitled to support under an agreement or court order. The first issue relates to the lost support. The second concerns problems that may arise if the agreement or court order is binding on the 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.<sup>3</sup> 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.

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<sup>3</sup> 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.

(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 directs that an annuity be purchased 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.<sup>4</sup>

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.*

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<sup>4</sup> *Raytch 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 insurance, the view is that such an arrangement should not benefit the wrongdoer. Even so, unless the plaintiff directly contributes to the insurance premiums, a deduction will be made: *Cunningham v. Wheeler*, (1992) 64 B.C.L.R. 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.

It is our view that

- (a) where a person's rights of support are based on a court order or an agreement with the deceased, and
- (b) 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.<sup>5</sup>

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 insurance policy or a testamentary gift will not be earmarked as being in connection with the support obligation. It is our tentative view that the legislation can provide for an abatement of the principal obligation (to pay support), but collateral arrangements must be left in place. Consequently, an obligation under an agreement to pay monthly support after the supporting person's death, or which directs that an annuity be purchased to discharge a support obligation, should 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, should remain unaffected.

### 3. Tentative Conclusion

Our tentative conclusion is that any person who depended upon the deceased for support during the deceased's lifetime should have standing to claim under the Act. As with any claimant, however, the level of compensation will depend upon the facts of the case. While we have tentatively rejected the option of requiring a dependent to satisfy some threshold of dependency to bring the claim, we welcome comment on the issue.

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<sup>5</sup> (2d) 62 (C.A.) (although this issue may soon be reconsidered by the S.C.C.: see *Shanks v. McNee*, S.C.C. Bulletin of Proceedings, Oct. 2, 1992. 22863 and 22860). 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). Suggestions have been made for changing parts of the law relating to collateral benefits (to provide a general rule that collateral benefits are deducted from any award or settlement arising from a personal injury claim): *Legislative Initiative Consultations Between I.C.B.C. and the Canadian Bar Association and the Trial Lawyers Association of B.C.*, Sept. 8, 1992.

## A. Consultation

This Working Paper has explored aspects of fatal accident legislation. Two issues have been its principal concern: (1) the extent to which the legislation provides adequate compensation for pecuniary loss? and (2) the degree to which it is possible to parallel third party rights to recover loss arising when a person is injured, in fatal and non-fatal accident cases.

The Commission has arrived at a number of preliminary conclusions on possible changes to the law upon which we would welcome information and advice. The next section summarizes the tentative proposals for amending the law.

We would also welcome comment on whether the *Family Compensation Act* should be redrafted. Despite the modifications introduced over the past century and a half, it is largely in its original form, and aspects of the legislation operate entirely by reference to cases decided under it. For example, the Act is silent about how the deceased's contributory negligence should affect an award to a family member for support, although the issue has been settled by the courts.<sup>1</sup> There would be some merit, consequently, in restating the principles upon which compensation is awarded in plain and modern language. On the other hand, the legislation operates in a largely straightforward way. Most questions about its operation have been answered, and a revision risks reopening long-settled issues. Please let us have your views on this question.<sup>2</sup>

## B. Summary of Tentative Proposals

### 1. Fatal and Non-Fatal Accidents

- The Family Compensation Act should apply in both fatal and non-fatal accident cases.

### 2. Pecuniary Loss (Other than Lost Support)

- The *Family Compensation Act* should allow (in fatal and non fatal accident cases) any person who incurs the following kinds of loss or expense to recover them from the wrongdoer

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<sup>1</sup> The position is that the award for support is reduced by the proportion of fault for which the deceased was responsible, although the claimant's costs are not affected by the deceased's contributory negligence. An interesting variation on this issue is the extent to which the claimant's actions contributed to the deceased's death should affect rights of recovery: see, e.g., *Chong v. Good Taste Meat Supply Ltd.*, (1992) 66 B.C.L.R. (2d) 187 (C.A.), although it would seem that analysis predicated on contributory fault is inappropriate in such a situation. If the claimant shared some degree of fault, it would be as tortfeasor.

<sup>2</sup> Depending upon the comment received in this Working Paper, final recommendations for changes to the legislation may require such substantial amendments in the drafting that a general revision will be necessary in any event.

- (a) loss or expense incurred relieving the victim of expenses the victim could have recovered from the wrongdoer, and
- (b) losses or expenses reasonably incurred in other ways for the benefit of the victim which are a reasonable response to the injury or death, such as providing the victim with care, comfort and companionship.

### 3. Guidance, Care and Companionship

- The *Family Compensation Act* should 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.

*(Comment: The Family Compensation Act gives the words “child” and “parent” extended meanings. A grandchild, stepchild, or a child in a relationship of loco parentis with the injured person would also be entitled to apply.)*

### 4. Bereavement

- 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.

### 5. Lost Support

- The *Family Compensation Act* should allow lost support to be recoverable only in fatal accident cases.
- The list of persons able to claim lost support under the *Family Compensation Act* should include anyone who was financially dependent on the deceased.

*[Comment: We use the term “support” to refer generally to the kinds of damages for pecuniary loss currently being awarded under the Family Compensation Act. Other terms have been used to describe these damages, such as “dependency.”]*

## 6. Court Orders and Agreements About Support

- (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.

*(Comment: A separated spouse, a former spouse, a defacto spouse who the deceased never married, or a child might have a court order or an agreement requiring the deceased to pay support. The entitlement to lost support of other claimants under the Family Compensation Act is determined by reference to actual support paid and amounts which likely would have been paid had the death not occurred. The same principles should apply to someone whose entitlement is based on a court order or agreement.)*

- An obligation of an estate under a court order or agreement to pay support to a person should abate to the extent that the person recovers compensation for lost support from the person causing the deceased's death.

*[Comment: Nothing in revising legislation, however, should affect rights against the estate under other legislation, such as the Wills Variation Act or the Estate Administration Act*

## 7. Proceedings

- As a general rule, it should be open to the parties to bring all related actions in a single proceeding.
- There should be no obligation, however, to include all claims in a single proceeding.
- A person who chooses to proceed independently of the principal claim should be required first to give notice to the victim (or the victim's estate) before commencing a separate proceeding.
- A failure to give notice should not affect the validity of the separate proceeding, but a court should be able to make an appropriate order to avoid any prejudice to the principal claim.

*[Comment: The suggestions for changing the law set out under this heading are discussed in Appendix D.]*

## C. Invitation for Comment



This Working Paper is being circulated for discussion. Comments on any aspect of the Commission's work are welcomed. The proposals set out above are ideas for changing the law. Final recommendations to the Attorney General will be formulated in the light of advice, comment and criticism we receive on this Working Paper.

## APPENDIX A

### LORD CAMPBELL'S ACT CAP. XCIII.

An Act for compensating the Families of Persons killed by Accidents  
[26th August 1846]

WHEREAS no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That whensoever the Death of a Person shall be 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 in respect thereof, then in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided amongst the before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct.

III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint; and that every such Action shall be commenced within Twelve Calendar Months after the Death of such deceased Person.

IV. And be It enacted, That In every such Action the Plaintiff on the Record shall be required, together with the Declaration, to deliver to the Defendant or his Attorney a full Particular of the Person or Persons for whom and on whose Behalf such Action shall be brought, and of the Nature of the Claim in respect of which Damages shall be sought to be recovered.

V. And be it enacted, That the following Words and Expressions are Intended to have the Meanings hereby assigned to them respectively, so far as such meanings are not excluded by the Context or by the Nature of the Subject Matter; that is to say, Words denoting the Singular Number are to be understood to apply also to a Plurality of Persons or Things; and Words denoting the Masculine Gender are to be understood to apply also to Persons of the Feminine Gender, and the Word “Person” shall apply to Bodies Politic and Corporate; and the Word “Parent” shall include Father and Mother, and Grandfather and Grandmother, and Stepfather and Stepmother; and the Word “Child” shall include Son and Daughter, and Grandson and Granddaughter, and Stepson and Stepdaughter.

VI. And be it enacted, That this Act shall come Into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that Part of the United Kingdom called Scotland.

VII. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this Session of Parliament.

## APPENDIX B

### *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, maybe 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 C

### NON-PECUNIARY LOSS

#### A. The Current Rule

In the nineteenth century, it was decided early on, a deceased's dependants would not be entitled to compensation for their non-pecuniary loss, such as the grief or sense of deprivation felt by the death of a loved one. There were a number of reasons for adopting this position.

First, of course, was the fact that legislation had just permitted the recovery of financial losses, and damages for these kinds of losses might often be substantial. Concern over the costs to the "wrongdoer," insurers and society in general of satisfying an award probably contributed to a decision not to compensate for non-pecuniary loss.<sup>1</sup> Moreover, non-pecuniary loss was regarded as being impossible to quantify, and it was not clear that an award on that head would serve any useful purpose.

The reluctance to award compensation for non-pecuniary loss may also have been another facet of the view that damages could not provide "perfect" compensation and would not be awarded on that basis. While no one is prepared to pretend that damages can make an injured person whole, today the assessment of them is often based on detailed actuarial calculations with the view of coming as close to that goal as possible. Since the early 1970's, personal injury litigation in general and fatal accident cases in particular have become increasingly sophisticated, and great care is taken in setting out in detail the evidentiary base necessary to support a full and technical assessment of damages.

Over the past 150 years a shift is noticeable in the general policy of the law as it relates to the awarding of damages for non-pecuniary loss. Awards for non-pecuniary losses are available in many situations, even though admittedly difficult to quantify in money. Such losses are regarded as real and, recognizing that money is not a reasonable substitute for what has been lost does not change the fact that it is usually the only substitute. For example, courts routinely allow the direct recovery of non-pecuniary loss where someone suffers personal injuries. Moreover, other cases have arisen where the law is prepared to award damages for disappointment.

Many examples concern broken contracts. In a series of cases,<sup>2</sup> people whose vacations were ruined have been allowed damages to compensate for what is essentially non-pecuniary loss. Another group of cases have involved newlyweds who were awarded damages because a

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<sup>1</sup> *Supra*, Chapter II, n. 14.

<sup>2</sup> *Jarvis v. Swan Tours Ltd.*, [1973] Q.B. 233; *see also Stedman v. Swan Tours*, (1951) 95 S.J. 727 (C.A.); *Keks v. Esquire Pleasure Tours Ltd.*, [1974] 3 W.W.R. 406; *Elder v. Kuppe*, (1974) 53 D.L.R. (3d) 705 (N.S.T.D.); *Jackson v. Horizon Holidays Ltd.*, [1975] 3 All E.R. 92; *Fuller v. Healey Tpt. Ltd.*, (1978) 92 D.L.R. (3d) 277 (Ont. Co. Ct.).

photographer failed to take wedding pictures, or who did so badly.<sup>3</sup> Similarly, compensation has been awarded for social gatherings spoiled when a person failed to keep a contract,<sup>4</sup> and for the loss of a pet whose death was caused by the carelessness of airline employees.<sup>5</sup>

Even where the law is unprepared to award compensation directly for non-pecuniary loss, the emotional injuries serve to swell the award for financial loss. The best examples here are in the realms of defamation<sup>6</sup> and wrongful dismissal,<sup>7</sup> but there are many other examples, such as false imprisonment,<sup>8</sup> nuisance<sup>9</sup> and trespass cases. Wrongfully cutting down another's trees, for example, diminishes both aesthetic values and the property owner's privacy, and compensation for the loss is not, strictly speaking, aimed solely at pecuniary loss.<sup>10</sup>

Not all damage awards are aimed at compensation. In some cases where the defendant has acted in a particularly high-handed manner, the courts may make awards for aggravated, punitive and exemplary damages, which are acknowledged to have a non-pecuniary component.<sup>11</sup>

If the loss of one's good name is worth a sizeable damage award (assessed at least in part by taking into account non-pecuniary considerations), and even privacy is felt worth protecting by an award of money that may far exceed the pecuniary loss suffered or that will be suffered, then it is difficult to argue that injuries to family relationships are not equally deserving of legal protection. The current legal position is an inherited one and, in some respects, appears to be out of step with the contemporary application of legal policy respecting compensation for non-pecuniary loss as it has been developed and refined in other contexts.

Judging from submissions made to us, it would appear that some support exists among British Columbians for the view that compensation should be available for non-pecuniary loss suffered by family members. The chief argument against is a practical one: the fear that the cost of such awards would be prohibitive. Since it can be expected that the majority of cases where this issue arises will involve insurance, a change in the law on this point will directly affect insurers and have an impact on the cost of insuring against risk. Would the costs be out of line?

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<sup>3</sup> *Wilson v. Sooter Studios Ltd.*, (1989) 55 D.L.R. (4th) 303 (B.C.C.A.); *Diesen v. Samson*, (1971) 1 S.L.T. 49.

<sup>4</sup> *Dunn v. Disc Jockey Unlimited Co.*, (1978) 87 D.L.R. (3d) 408; *Kelan Homes v. Smith*, B.C.D. Civ. 984-01 (S.C.).

<sup>5</sup> *Newell v. Can. Pac. Airlines Ltd.*, (1976) 74 D.L.R. (3d) 574 (Ont. Co. Ct.).

<sup>6</sup> *Munro v. Toronto Sun*, [1982] 21 C.C.L.T. 261 (Ont. H.C.); *Snyder v. Montreal Gazette Ltd.*, (1978) 87 D.L.R. (3d) 5. *aff'd.* [1988] 1 S.C.R. 494 (Que.).

<sup>7</sup> *Voris v. I.C.B.C.*, (1989) 36 B.C.L.R. (2d) 273 (S.C.C.).

<sup>8</sup> *Freeman v. Corp. of the District of West Van.*, B.C.D. Civ. 1460-02 (S.C.).

<sup>9</sup> *Medomist Farms v. Surrey*, (1991) 62 B.C.L.R. 168 (C.A.).

<sup>10</sup> See, e.g., *Kates v. Hall*, (1991) 53 B.C.L.R. (2d) 322; *Timpauer v. Coffey*, B.C.D. Civ. 4094-03 (S.C.); *Goodwillie v. Frank*, [1992] B.C.D. Civ. 4094-01 (S.C.).

<sup>11</sup> *Huff v. Price*, (1991) 51 B.C.L.R. (2d) 282 (C.A.).



Would British Columbia residents be prepared to pay a higher premium so that insurance coverage extends to these kinds of risks?

This Working Paper is being circulated widely among persons in the insurance industry and we welcome their advice on this issue.

Alberta,<sup>12</sup> Manitoba,<sup>13</sup> Ontario,<sup>14</sup> Nova Scotia<sup>15</sup> and New Brunswick<sup>16</sup> all allow for the recovery of non-pecuniary loss (although in each province the law is differently structured, and the experience in New Brunswick is very recent).<sup>17</sup> Even so, there is not much information concerning the costs of these awards. It must be expected that in those jurisdictions where a conventional, arbitrary amount is awarded, the overall impact of the compensation for non-pecuniary loss is not significant. Where, however, damage assessment is at large, the possibility of significant awards suggests that the societal costs of these awards may be appreciable.

Ontario, for example, has dealt with awards for non-pecuniary loss to family members in fatal and non-fatal Injuries for the past 16 years. Its experience provides probably the most useful points of comparison. But even in that jurisdiction, data is scanty. We are assisted by the information set out in the Osborne Report on the costs of awards (for pecuniary and non-pecuniary loss) made to family members under the Ontario legislation. The Osborne Report made the following observations:<sup>81</sup>

Insurers and others have made submissions complaining that there have been too many claimants seeking recovery under subsection 61(2)(e); that many claimants have successfully advanced claims of a minor or trivial nature; and that in the aggregate the awards have been costly. Three different proposals have been put forward to limit recoveries for loss of guidance, care and companionship. One proposal is to restrict recovery only to those losses of guidance, care and companionship that are either

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<sup>12</sup> *Fatal Accidents Act*, R.S.A. 1980, c. F-5, s.8. The Alberta approach has been reconsidered by the Alberta Law Reform institute in Report for Discussion No. 12, *Non-Pecuniary Damages in Wrongful Death Actions — A Review of Section 8 of the Fatal Accidents Act (1992)*. The institute tentatively proposes that damages both for grief and for loss of guidance, care and companionship should be made on an objective basis (\$40,000 to a spouse or cohabitant, \$40,000 to a parent of a minor child, and \$25,000 to a minor child). The Report for Discussion is a thorough examination of the law and makes a persuasive case for law reform.

<sup>13</sup> The *Fatal Accidents Act*, C.C.S.M., c. F-50, s. 3(4).

<sup>14</sup> *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 60(2)(d), amended: *Family Law Act*, R.S.O. 1990, c. F-3, s. 61(2)(e).

<sup>15</sup> The Nova Scotia legislation was amended in 1986 to follow the Ontario example: *An Act to Amend Chapter 100 of the Revised Statutes, 1967, the Fatal Injuries Act*, S.N.S. 1986, c. 30.

<sup>16</sup> *Fatal Accidents Act*, R.S.N.B. 1973, c. F-7, as amended by S.N.B. 1986, c. 36.

<sup>17</sup> Two different models have been adopted for awarding compensation for non-pecuniary loss in fatal accident cases. Some jurisdictions simply set out a conventional amount which may be awarded: see, e.g. Alberta. English legislation also adopts this approach: *Fatal Accidents Act 1976*, s. 1A(3) (the sum awarded for damages for bereavement was increased to £7500 from £3500 by the *Damages for Bereavement (Variation of Sum) (England and Wales) Order 1990*, S.I. 1990 No. 1575). The other model is to leave the issue of damages at large. It is this approach which is being applied in Ontario, Manitoba, Nova Scotia and New Brunswick. In Manitoba, courts have generally made moderate awards on this head: *Rose v. Belanger*, [1985] 3 W.W.R. 612 (C.A.); *Lawrence v. Good*, [1985] 4 W.W.R. 652 (C.A.); *Charbonneau v. Huff*, (1985) 34 Man. R. 278; *Larney v. Friesen*, [1986] 4 W.W.R. 467 (C.A.). In contrast, courts in Ontario and New Brunswick have awarded substantial sums: see, e.g., *Nightingale v. Mazerall* (Jan. 18 (1991) *The Lawyer's Weekly* (N.B.Q.B.)): parents suffered severe (but normal) grief response to deaths of 2 children in a car accident. \$50,000 each (for grief) plus an additional \$20,000 for loss of companionship.

<sup>18</sup> *Supra*, Chapter III, n. 11 at 388-390.

serious or permanent. A second proposal involves restricting the eligible claimants to household members. A third proposal is to provide for conventional awards.

Surprisingly, insurance company complaints about awards for loss of guidance, care and companionship have been made without any empirical data to indicate the aggregate cost of these awards for family law claims.

Mr. Justice Osborne considered information derived from a survey of claims under the Ontario legislation, which established that insofar as numbers of claims are a guide, those on behalf of family members represent only a small percentage of all claims. Consequently, the statistical evidence does not suggest that satisfying these claims has involved excessive cost. But this approach can provide only a very rough estimate of what the actual costs may be.

## **B. Matters of Detail**

The cost of providing compensation for non-pecuniary loss in fatal injuries is only one of several concerns. On a more practical level, those opposed to awarding compensation on this head also point to the practical difficulties of assessing the loss.

### **1. Measuring The Loss**

The fact that courts are prepared, in a wide variety of situations, to compensate for non-pecuniary loss, does not in the least ease the process of assessment. Simply put, money is an inadequate substitute for these kinds of losses.

In the context of personal injuries, the Supreme Court of Canada said that damages for non-pecuniary loss do not replace what has been lost, but are aimed at providing solace.<sup>19</sup> This view, called the “functional approach,” does not help identify a reasonable award for non-pecuniary loss. It is a reason for holding that damages on this head must be moderate. In combination with the articulation of a new theory for making these awards, the Supreme Court of Canada also held that damages for non-pecuniary loss must be subject to an upper limit, set at \$100,000. In 1978, that amount, adjusted for inflation, currently exceeds \$200,000.

A recognition of the difficulties of assessing non-pecuniary loss have led some jurisdictions to set out in legislation a modest, conventional amount which may be awarded. As such, the award is aimed less at providing solace than performing a symbolic function, the recognition that there has been a loss.

We have some familiarity with this issue in our own province, because awards are made to children for the loss of a parent’s guidance, care and companionship. Similarly, in Ontario, the courts are empowered to award a wide list of family members compensation for their non-pecuniary loss. The courts base the award not on blood or legal ties in the sense that someone in a

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<sup>19</sup> *Andrews v. Grand and Toy*, [1978] 2 S.C.R. 229; *Thornton v. Prince George*, [1978] 2 S.C.R. 267; *Teno v. Arnold*, [1978] 2 S.C.R. 287.

particular relationship will automatically qualify for compensation,<sup>20</sup> but on the closeness of the relationship itself. A claimant who lives in another province and has little contact with the deceased may receive little, if any, compensation for grief, while a person who lived in the deceased's household and had daily contact is more likely to receive a generous amount. In both British Columbia and Ontario, it is clear the appellate process has been effective in ensuring that awards for non-pecuniary loss in fatal accident cases are awarded on a principled, largely predictable, basis. Even so, cases demonstrate some pressure towards enlarging the size of these awards.

## 2. What Relationships Might Be Protected?

The death of a loved one will certainly affect different people in different ways. But, it is safe to say, the closer the relationship with the deceased, the more likely it is that the person will suffer grief and other non-pecuniary loss deserving of some form of compensation.

No finite list based on ties of blood or marriage can hope to encompass all who might be deeply affected by another's death, which suggests that legislation might simply allow anyone who suffers non-pecuniary loss as a result of another's death to bring the claim. But this would be an undesirable approach for several reasons. It would involve the courts in difficult assessments of relationships to determine whether a person had sufficient reason to be saddened by the victim's death and the loss of the relationship occasioned by it. It would also make much more difficult the already demanding task of assessing non-pecuniary loss. These factors suggest that it would be prudent to restrict the class of persons permitted to claim compensation for non-pecuniary loss.

Persons in a close family relationship with an injured person are those most likely to suffer grief and other kinds of non-pecuniary loss as a result of the injuries. Typically, these will be the relationships between parents and children, between spouses and between people in similar kinds of relationships resulting from cohabitation and informal adoptions.

Currently, the *Family Compensation Act* allows a number of people, defined by their relationship to the deceased, to recover their lost support from the wrongdoer. While the manner in which the relationships is referred to in the legislation is not particularly concise or, for that matter, clear, it generally encompasses those many think should be entitled to assert claims to recover non-pecuniary loss. Paraphrased, this is the list:

- (1) a child for the loss of a parent or grandparent
- (2) a spouse for the loss of a spouse
- (3) a parent for the loss of a child

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<sup>20</sup>

See, e.g., *Nielsen v. Kaufman*, (1986) 54 O.R. (2d) 188.

- (4) a grandparent for the loss of a grandchild
- (5) persons in comparable *de facto* relationships (the Act embraces step relationships, those in a relationship of *loco parentis* and a man and woman cohabiting as if they were husband and wife).

Two further tests for determining a close relationship are missing from this list. Those the deceased voluntarily supported or helped support (that is, someone who was dependent on the deceased)<sup>21</sup> and anyone living in the same household as the deceased, might likely suffer non-pecuniary loss deserving of compensation. If it were decided to allow awards to be made generally to compensate for non-pecuniary losses suffered by third parties, consideration might be given to adding these two criteria to the list.

It is important to underscore that simply satisfying the necessary relationship would not entitle the claimant to compensation. While the loss is non-pecuniary, there must necessarily be loss, a point well made in an Ontario case, *Nielsen v. Kaufmann*:<sup>22</sup>

The existence of the relationship covered by the section only gives the right to make the claim. Although essentially non-pecuniary in character, there must be an actual loss of care, companionship and guidance. A brother of a deceased, for example, who lives in Vancouver and who has not seen the deceased, who lives in Toronto, for 20 years, although they exchange Christmas cards and a telephone call a year, would not, in our view, be entitled to any compensation. Undoubtedly, there would be grief and sorrow and a sense of loss but, under the circumstances recited, there would be no loss compensable under the section. This is not to minimize the importance of the section but, as we have stated, the mere fact of the relationship does not, or itself, establish the right to some compensation.

Many people might have lived with the deceased with no real grounds for making a claim. The relationship with a child of an out-of-town friend who has moved in to attend college would be unlikely to support a claim. On the other hand, other relationships may have the kinds of emotional attachments, the loss of which, when severed by death, can be expected to cause the deepest grief.

The suggestions set out in the Working Paper do not include broadening the court's ability to award compensation for non-pecuniary loss to third parties in fatal accident cases. Even so, we welcome comment on these issues, to guide us in the preparation of our final report to the Attorney General.

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<sup>21</sup> The Act embraces many people who would qualify on this basis, such as a child or a person in a relationship of *loco parentis*. But the formulations adopted in the Act allow gaps. *E.g.*, a niece supported by the deceased did not qualify as someone in *loco parentis* since the deceased assumed no parental role toward the niece: *Antoine v. Larocque*, [1954] O.W.N. 641. *aff'd*, [1955] O.W.N. 134 (C.A.). *See also Royal Trust Co. v. Globe Printing Co.*, [1934] O.W.N. 547 (C.A.), where the deceased has supported a sister of sub-normal intelligence. A dependency test helps satisfy this situation.

<sup>22</sup> *Supra*, n. 20.

## APPENDIX D

### REFORM: REPRESENTATIVE OR SEPARATE ACTIONS

#### A. Representative Actions

##### 1. The Current Law

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.<sup>1</sup>

##### 2. The Ontario Experience

When the Ontario legislation was first enacted, it 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 separate action. Apparently this has had the desired result, and has discouraged claims by those suffering only minor or nominal loss.

##### 3. Problems with Requiring Separate Actions

There are some criticisms, however, that can be made of requiring separate actions. Even if all of the actions are consolidated so that there is only one hearing, the practise 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.

##### 4. Tentative Proposal

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<sup>1</sup> For fatal injury cases, e.g., see s. 6 of the *Family Compensation Act*; *Kitto v. Hanson*, (1991) 58 B.C.L.R. (2d) (C.A.); *Batke Estate v. White*, (1992) 70 B.C.L.R. (2d) 226 (S.C.).

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. The statute formerly provided:<sup>2</sup>

62.(1) where an action is commenced under section 60, the plaintiff shall, in his statement of claim, name and join the claim of any other person who is entitled to maintain an action under section 60 in respect of the same injury or death and thereupon such person becomes a party to the action.

(2) A person who commences an action under section 60 shall file with the statement of claim an affidavit stating that to the best of his knowledge, information and belief the persons named in the statement of claim are the only persons who are entitled or claim to be entitled to damages under section 60.

A practise which simply allowed the victim (or the personal representative) to bring third party claims without the obligation to include everyone, should not cause difficulties. 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 in including a claim on behalf of the victim's aunt who has assumed some of the responsibilities for the victim's expenses, like 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.

## **B. Separating the Actions**

### **1. The Need for Notice**

Problems of cooperation may arise from time to time and it would be inappropriate for the law to require a victim to wait until a third party is ready to proceed. It makes sense for the law to adopt a general rule favouring the joining of all related claims in a single proceeding, but some method should also be available to allow a third party to proceed separately.

We have given some thought to a procedure under which the third party could simply issue a separate writ, but it is important for the Injured person to be kept informed of legal proceedings involving the main claim (if only so that steps are not mistakenly taken advancing the third party's interests in two separate actions). One method of avoiding any doubt on the matter would

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<sup>2</sup> *Family Law Reform, R.S.O. 1980, c. 152.*

be to require the third party to give notice to the injured person before commencing a separate proceeding.<sup>3</sup> It is our tentative conclusion that this procedure should be adopted.<sup>4</sup>

## 2. A Failure to Give Notice

A person may overlook an obligation to notify, or the circumstances may make it inconvenient to give notice (the writ may be about to expire, for example). Should a failure to give notice prevent the person from proceeding? Should the proceedings be regarded as a nullity? These seem to us to be very harsh consequences, particularly where the omission may have been entirely innocent.

In most cases, there will be little or no prejudice to the main claim and, if there is, it is the sort of matter which can be addressed by a postponement to consider the implications of the separate proceedings. Some costs might have been increased by the failure to give notice. But a problem like that can be addressed by imposing an obligation to indemnify on the person who failed to give notice.

The court has this kind of jurisdiction under the Rules of Court, but only where those involved are parties in the same proceedings:

### **Costs arising from improper act or omission**

57(14) where anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or the registrar may order

- (a) that any costs arising from the act or omission not be allowed to the party, or
- (b) that the party pay the costs incurred by any other party by reason of the act or omission.

The Rule would not seem to go far enough to protect parties who, as a result of the omission, have incurred increased costs in a separate proceeding. It might be desirable, consequently, to amend the Rules on this point.<sup>5</sup>

## 3. Severance

Where claims are initially joined, it should be open to the court to allow the severance of a third party's claim that, for one reason or another, is inconvenient to pursue at the same time as

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<sup>3</sup> Since a proliferation of legal proceedings is a matter of concern, it might also make sense to require a third party to obtain the permission of the court to issue a separate writ. Such a requirement would reinforce the policy that, as a general rule, a single proceeding should be brought except for good reason. But a leave application is a procedure which must necessarily add to the expense of the litigation. For this reason, we do not propose that this feature be added to our law, but we welcome comment on the issue.

<sup>4</sup> Should there be an obligation to give notice where the principal claim has been commenced, and the third party's claim has not been added to it? It would seem that in this circumstance there can be no prejudice to the victim if the third party proceeds separately because the victim has, necessarily, decided that the omitted claim must be pursued separately. Even so, it would not be difficult to give notice in these circumstances and, moreover, because the third party's claim is based on the principal action, knowledge of the separate proceedings is something it would seem should be made available to the victim (or the victim's estate).

<sup>5</sup> See also *Young v. Young*, (1991)50 B.C.L.R. 1 (CA.) which disavows the court's jurisdiction to order a person who is not a party to the proceedings to pay costs where that person is the real litigant, or has improperly "maintained" (in the sense of financed) the litigation.

the principal claim. The court is already empowered to make such an order under the Rules of Court.<sup>6</sup>

#### 4. Amendments to the Rules of Court

The discussion above canvassing some of the procedural issues that arise from reform measures contemplated in this Working Paper suggests that for the most part the Rules of Court already allow the courts sufficient scope to deal with the issues that might arise. Even so, in at least two respects — the significance of a failure to give notice, and the court’s ability to make an order to avoid prejudice to the victim or the victim’s estate that might otherwise arise from failing to give notice — may require amendments to the Rules of Court.

Amendments to the Rules of Court are properly matters that require the consideration of the Rules Committee. Our final conclusions, insofar as they relate to procedural issues, will not be arrived at without first seeking the advice of the Rules Committee.

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Rule 5(6).