



**SHOULD A CLAIM FOR LOSS OF A CHANCE OF  
FUTURE EARNINGS SURVIVE DEATH?**

**Consultation Memorandum  
No. 4**

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William H. Hurlburt, Q.C., one of the Institute's counsel, has carriage of this updated project on one aspect of survival of actions. He has prepared this Consultation Memorandum and we are grateful for the clarity of this analysis and speed of preparation of the document.

## PREFACE AND INVITATION TO COMMENT

Comments on this consultation memorandum should be in the Institute's hands by November 30, 1997. Comments in writing are preferred. Our address is:

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The reader's opinion will be much more useful to the Institute if we understand the reasons for it. We would therefore very much appreciate it if any comments and opinions could be accompanied by reasons. If a comment or opinion is based on the acceptance of any of the arguments set out in this Consultation Memorandum, it would be sufficient to indicate the argument that has been accepted, though such an indication would not preclude the reader from making their own statement of reasons.

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# SHOULD A CLAIM FOR LOSS OF A CHANCE OF FUTURE EARNINGS SURVIVE DEATH?

## Consultation Memorandum

### I. INTRODUCTION

This Consultation Memorandum solicits the reader's views and comments on the following question: should a deceased person's estate be entitled to claim damages from a wrongdoer for the loss of the deceased person's chance of future earnings? To put the question another way: should a claim for damages for the loss of a chance of future earnings survive the death of the person who has suffered the loss?

The fact situation that gives rise to this question is as follows:

- (1) A person has a chance of future earnings.
- (2) A wrongful act deprives the wronged person of that chance.
- (3) The wronged person dies.

In *Duncan Estate v. Baddeley et al.*<sup>1</sup> the majority of the Court of Appeal held that the claim should survive the wronged person's death, that is, the Court answered the question yes. They awarded damages to the wronged person's estate against the wrongdoer for the loss of the chance. In so doing, they interpreted secs. 5 and 6 of the *Survival of Actions Act* as permitting the award. However, this interpretation of the Act is not inevitable, and it is possible that the question may fall for decision by the Supreme Court of Canada in this<sup>2</sup> or a future case. It is

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<sup>1</sup> (1997) 196 A.R. 161; (1997) 145 D.L.R. (4th) 708 (Alta. CA). Kerans and Cote JJA constitute the majority. Lieberman JA dissented. Page references in the text are to the Alberta Reports.

<sup>2</sup> An application for leave to appeal to the Supreme Court of Canada was filed on June 3, 1997.

desirable that the legislation make it clear either that the claim survives the wronged person's death or that it does not.

We therefore think that the policy question whether or not a claim for damages for the loss of a chance of future earnings should be canvassed and answered, and we propose to canvass and answer it. This Consultation Memorandum is the vehicle for our consultation.

## II. BACKGROUND

### A. The Common Law

Two common law rules are relevant:

1. Damages could not be recovered from a wrongdoer for causing death.
2. A cause of action in tort was extinguished by the death of the person who had the right to sue on it.

These two rules prevented the estate of a deceased person from claiming damages from a wrongdoer which a living injured plaintiff could claim. The two rules earned the reproach that “it is cheaper to kill than to maim”. It seemed unfair that a deceased victim should not be compensated where a living victim would be compensated, and it seemed unfair that a wrongdoer should get off without paying merely because the victim died.

### B. Statutory reforms

#### (1) Enactment of early survival-of-actions statutes

Statutes were enacted to cure the perceived injustice of the common law rules. The early statutes merely said that a cause of action survived death, usually with one or more exceptions, actions for libel and slander being the Alberta exceptions. Many statutes were later amended to exclude some particularly personal heads of damage, including, for example, damages for pain and suffering, for the loss of expectation of life, and for the loss of “amenities” or the enjoyment of life.

#### (2) Alberta Survival of Actions Act

In 1977, this Institute, in its Report No. 24, *Survival of Actions and Fatal Accidents Amendment*, recommended the adoption of almost all of the *Uniform Survival of Actions Act*<sup>3</sup> including the Uniform Act’s counterparts of secs. 2, 5 and 6 of the present *Alberta Survival of Actions Act*. In 1978, the Legislature enacted the

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<sup>3</sup> The *Uniform Survival of Actions Act* was adopted by the Conference of Commissioners on Uniform Provincial Legislation (now the Uniform Law Conference) as a model for legislation by the provinces and territories: 1963 Proc. CCULC 28, 136. The *Uniform Act* is also included in *Consolidation of Uniform Acts*, Uniform Law Conference as #45-1.

present Act,<sup>4</sup> which largely but not completely implemented the Institute's recommendations.

Secs 2, 5 and 6 of the *Survival of Actions Act* read as follows:

- 2 A cause of action vested in a person who dies after January 1, 1979 survives for the benefit of his estate.<sup>5</sup>
- 5 If a cause of action survives under section 2, only those damages that resulted in actual financial loss to the deceased or his estate are recoverable and, without restricting the generality of the foregoing, punitive or exemplary damages or damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable.<sup>6</sup>
- 6 If the death of a person was caused by an act or omission that gives rise to a cause of action, the damages shall be calculated without reference to a loss or gain to his estate as a result of his death, but reasonable expenses of the funeral and the disposal of the body of the deceased may be included in the damages awarded, if the expenses were, or liability for them was, incurred by the estate.

So,

- (1) all causes of action survive the death of the person in whom they are vested, but
- (2) the damages that can be recovered
  - (a) are to be limited to "actual financial loss" to the deceased or to the estate, and

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<sup>4</sup> 1978 S.A. c. 35, now R.S.A. 1980 c. S-30.

<sup>5</sup> The Uniform Act would have excluded from survival causes of action in adultery, seduction and inducing one spouse to leave another. The Alberta Act does not exclude them.

<sup>6</sup> The *Uniform Survival of Actions Act* used the words "actual pecuniary loss" instead of "actual financial loss", a change which does not change the meaning of sec. 5. Otherwise secs. 5 and 6 follow the Uniform Act.



(b) are to be calculated, except for specifically-listed items, without reference to any loss or gain to the estate as a result of the death.

In the Duncan case, the majority of the Court of Appeal held that the loss of a chance of future earnings

- (a) is an “actual financial loss” so that damages for it are not excluded by sec. 5, and
- (b) is a loss to the *deceased* rather than a loss to the *deceased’s estate* so that sec. 6 does not require that damages shall be calculated without reference to it.

The Court’s interpretations are contrary to the view of the Conference of Commissioners on Uniformity of Laws in Canada, the drafters of the Uniform Act. The report of the Alberta Commissioners on which the Conference acted<sup>7</sup> made the following statement:

At least one of the provinces excludes damages for death and compensation for expected earnings subsequent to death. We think this exclusion is not necessary because these items are not included in the first place; they are not surviving rights.

The draft Uniform Act prepared by the Alberta Commissioners in 1962 contained a specific exclusion from survival of “loss of expectancy of earnings subsequent to death” as sec. 6(1)(f), but the Commissioners’ note said that they recommended the restrictions in the draft “except (f) (taken from B.C.) which we think is not recoverable anyway”.<sup>8</sup> That is to say, they thought that “loss of expectancy of earnings subsequent to death” would not be included in “actual pecuniary loss” and therefore saw no need to make a specific exclusion. The final draft of the Uniform Act did not include exclusion (f), and, as the Conference acted on the Alberta Commissioners’ report, it may be inferred that the deletion was made because the Conference agreed with their views.

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<sup>7</sup> See the Report of the Alberta Commissioners, *The Survival of Actions Act*, 1961 Proc. CCULC 110.

<sup>8</sup> 1962 Proc. CCULC 86.

The question whether a claim for loss of a chance of future earnings should survive a wronged person's death was not discussed in the Institute's Report No. 24 which led to the enactment of the *Survival of Actions Act*. The Institute made the same assumption as the Conference, that is, that the words "actual pecuniary loss" in the *Uniform Survival of Actions Act* did not include the loss of a chance of future earnings, and consequently that an Alberta *Survival of Actions Act* based on the Uniform Act would exclude the claim for damages for loss of a chance of future earnings.

The question for discussion, however, is not what the Conference, the Institute or the Legislature intended, nor is it whether or not the Court of Appeal's interpretation of the *Survival of Actions Act* is right. The question is what the law should say on the point.

### **C. Statute law of other provinces and the territories**

Six other Canadian provinces and territories, New Brunswick, Newfoundland, Nova Scotia, PEI, Saskatchewan and Yukon, restrict the damages recoverable by an estate to "actual pecuniary loss" or "actual financial loss". All but two of these (Newfoundland and Nova Scotia) also provide for the calculation of damages without reference to a loss or gain to the estate, and Manitoba also has that provision. Two provinces, British Columbia and Saskatchewan specifically prohibit the recovery by an estate of damages for the deceased person's loss of future earning capacity.

### **III. POLICY DISCUSSION**

#### **A. What has the deceased person lost?**

The loss or damage under discussion is sometimes characterized as “loss of future earnings”. Use of this term suggests that future earnings existed or were inevitable at the time of the wrong done to the plaintiff, but this is not so: there is no way of knowing whether and how much a person will earn in the future. Alternatively, the loss or damage is sometimes characterized as “loss of earning capacity” or “ability to earn”. Use of this term suggests that “earning capacity” or “ability to earn” is inbuilt into an individual, but there is at most a certain kind of interaction between the individual’s qualities and their environment—continued health and the availability of jobs, for example—that may or may not make a person’s services or entrepreneurial qualities of value at a given future time. The three terms—“loss of future earnings”, “loss of earning capacity” and “ability to earn”—are at best imprecise and are likely to lead to mislead.

In the Duncan case, Kerans JA said at page 163:

“...in my view the settled law is that a claim for loss of any future earnings is to be assessed on a simple probabilities basis, as a loss of a chance”.

This reflects the reality of the situation. It seems to us that the most accurate designation of what the wronged person loses is “a chance of future earnings”, and we will use that term throughout this Consultation Memorandum.

#### **B. Policy Arguments**

##### **(1) Purpose of this section**

We will attempt here to set out the opposing arguments and counter-arguments in an objective way so that the reader will have a basis for considering the policy question.

##### **(2) Arguments**

###### **(a) *Damages for loss of a chance of future earnings should be allowed: basic argument***

The basic argument in favour of allowing a deceased person’s estate to claim for damages for loss of a chance of future earnings is as follows:

- (1) The chance of future earnings has value to the possessor.

- (2) The wrongdoer's wrongful act deprives the wronged person of that chance.
- (3) On ordinary legal principles and on grounds of justice, the wrongdoer should compensate the wronged person for the loss of the chance.
- (4) The wrongdoer should not be allowed to escape paying for a wrong on the mere grounds that the wronged person has died.

Note that the wrongful conduct in the Duncan case was negligence. The argument would also apply in the case of an intentional tort and might be considered to be stronger.

***(b) Damages for loss of a chance of future earnings should not be allowed: basic argument***

The basic argument to the contrary is as follows:

- (1) The primary purpose of awarding damages should be to compensate persons who have suffered loss.
- (2) By the very nature of things, an award of damages for the loss of a chance of future earnings cannot compensate a deceased person or be enjoyed by a deceased person; the loss is purely personal and has had no effect on the estate which the deceased person leaves.
- (3) If the person who has suffered the loss has died, the damages must necessarily go to someone who did not suffer the loss, which is contrary to ordinary legal principle and to justice.

***(c) Allowing damages for loss of a chance of future earnings will confer a windfall on the persons entitled to the proceeds of the deceased person's estate***

***(i) Argument for the proposition***

Another way in which the basic argument against allowing an estate to claim for the loss of a chance of future earnings is sometimes put is that

“...there are some items of damage that are in a different category. Like claims for adultery, seduction and enticement, they are peculiarly personal. Compensation

for pain and suffering, disfigurement and loss of expectation of life and heavy damages for defamation, false imprisonment and malicious prosecution are the main examples. To allow them to the victim's estate as one would allow them to the victim himself is to give to the estate a windfall".<sup>9</sup>

This view would restrict the estate to claims for pecuniary losses. It would exclude, among other things, claims for the loss of a chance of something that might arise in the future to which there is no right and no entitlement based on an existing right.

**(ii) Argument against the proposition**

The other side of the "windfall" argument, which restates the basic argument in favour of allowing the claim, appears in the following passages:

While we have a system of law which allows a man to bequeath property to his adult children or to other beneficiaries, there would seem to be no reason why those rights which are damage claims should not also be bequeathed.<sup>10</sup>

In my view, if the test for the validity of the award is whether the fruits of the suit shall go to the personal account of the victim, it would matter not whether the claim for Duncan is for the loss of his ability to earn or the loss of his automobile. Any claim of any sort that survives will not go to the deceased.<sup>11</sup>

**(d) It should not be "cheaper to kill than to maim"**

It is often said that it should not be "cheaper to kill than to maim", that is, it is morally offensive that a wrongdoer should pay less for causing death, which is the greatest injury of all, than they would pay for causing a lesser injury.

Two replies are made to this:

- (1) Tort damages are primarily about compensation, and making it as expensive to kill as to maim is not a purpose of tort law.

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<sup>9</sup> W.F. Bowker, *The Uniform Survival of Actions Act*, (1964) 3 Alberta Law Review 197, 199.

<sup>10</sup> J.H. Laycraft, *Survival of Claims for Loss of Expectation of Life*, (1964) 3 Alberta Law Review 202, 203.

<sup>11</sup> Per Kerans JA, *Duncan v. Baddeley*, at page 165.

- (2) It is not a principle of the law, nor should it be, that a deceased person's estate should recover as much as if the person had not died. For example, a wrongdoer whose wrongful act renders a wronged person quadriplegic may have to pay for the wronged person's lifetime care, but will escape with much lower damages if the wronged person dies before obtaining judgment.<sup>12</sup> The reason why the law makes it more expensive to maim in such a case is that the damages will do all that can be done to ameliorate the loss to the wronged person. That reason does not apply if the wronged person is dead.

***(e) Awarding damages only if the wronged person lives until judgment is recovered is arbitrary***

An unqualified bar against recovery of damages for a deceased person's loss of a chance of future earnings will have effect

- (a) if the wronged person dies immediately,
- (b) if the wronged person dies later without having recovered a judgment for damages.

It will also have effect

- (c) if the death occurs because of the wrongdoer's wrongful act, or
- (d) if the death is due to some other cause.

Any justification for an unqualified bar will have to apply to any of these cases, not just case (a).

In the Duncan case, at page 174, Cote JA points out

- (1) a plaintiff who lives until settlement or judgment is entitled to claim damages for loss of the chance of future earnings.

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<sup>12</sup> See Klar, Tort Law, 2nd ed., Carswell 1996, 380-381, speaking in another context: "...damages for serious personal injuries are generally higher than damages awarded in case of death".

- (2) if the claim for damages for loss of a chance of future earnings does not survive the plaintiff's death,
  - (i) if the plaintiff dies the day before they obtain judgment for the damages, they have lost the right to claim damages, while
  - (ii) if the plaintiff dies the day after they obtain judgment for the damages their death will not reduce the damages or make the damages unavailable to the estate.
- (3) The wrongdoer may thus benefit from managing to drag out the litigation long enough to give the plaintiff time to die before judgment.

The general response to this argument is the basic argument that the governing principle is that the claim for damages ought not to survive the wronged person's death and that the factual consequences of applying that principle should be accepted.

However, if it is thought

- (a) that it is right in principle to provide that a claim for damages for the loss of a chance of future earnings should not in general survive the death of the wronged person, but
- (b) that the distinction between wronged persons who live until judgment and wronged persons who do not is arbitrary and inappropriate,

it would be possible to provide that if the wronged person, in their lifetime, commences action for damages for loss of a chance of future earnings, the claim will survive their death. The arbitrariness complained of would be minimized, though it would not be entirely removed as death the day before a statement of claim is issued would extinguish the claim while death the day after the statement of claim is issued would not. No doubt such a proposal would offend against the general principle that damages should not be allowed after death (the correctness of which principle is assumed for the discussion of this point), but it might be accepted in order to avoid the consequences outlined above.

**(f) Denying damages for the loss of a chance of future earnings leads to invidious class distinctions**

Kerans JA, at page 166 of the Duncan case, says that allowing the estate of a wealthy person to claim the value of the deceased's Cartier watch, while denying the "working man" the right to claim the loss of their ability to earn, which he equated with capital, would make an invidious class distinction. We do not follow this proposition. Both a wealthy person and a "working man" are likely to have personal property. Both a wealthy person and a "working man" are likely to have a chance of future earnings. The "working man's" Timex and modest wage expectations are both likely to be less valuable than the wealthy person's Cartier and their chance of earning a lavish salary and receiving lavish benefits. We do not see any invidious discrimination against the "working man" in narrowing the categories in which both can recover. Indeed, allowing damages for the loss of a chance of future earnings would tend to discriminate against people who have reached normal retirement age and who are not likely to have much chance of future earnings, but we do not think that that is an argument against allowing the claim.

**(g) Damages for loss of a chance of future earnings are hypothetical and artificial**

An argument sometimes raised against allowing damages for the loss of a chance of future earnings is the extremely hypothetical and artificial nature of the loss. The courts must estimate the incalculable. They must consider what the deceased person might (not would) have done had they lived over a period of many years and what the income from their activities might (not would) have been. They must consider how much to deduct from the award for living expenses, or, alternatively, work out what the deceased person might have saved. They must allow for taxes on the potential earnings. Reading the authorities on the assessment of damages for the loss of a chance of future earnings is a dismal process.

Two answers may be made to this argument:

- (1) The courts do not decline to assess damages based on uncertain future events merely because the assessment involves "guesswork" and the use



of a “crystal ball”,<sup>13</sup> and the assessment of damages for the loss of a chance of future earnings is merely one kind of case in which this can be done.

- (2) There are cases in which a well-established individual has a high probability of earnings over a considerable period of time.
- (3) The courts assess damages for the loss of a chance of future earnings for living plaintiffs. That being so, it can be argued that there is no reason to refuse to assess the same damages when the plaintiff has died.

**(h) Allowing damages for loss of a chance of future earnings may be needed to support the deceased person’s family and give them financial recognition of their loss**

This is not an argument which was made in the Duncan case. We think, however, that we should point out that the law now does something about both the financial and emotional losses of the family of a person whose death is caused by a wrongful act.

The *Fatal Accidents Act*<sup>14</sup> gives families the following recourse:

- (1) Under sec. 3, a court may give to the wife, husband, cohabitant, parent, child, brother or sister of a deceased person damages against a wrongdoer who caused the death. The damages are to be “those damages that the court considers appropriate to the injury resulting from the death”. This effectively enables the persons mentioned make a direct claim against the wrongdoer for the loss of their financial expectations from the deceased person, so that it is not necessary to get money into the estate in order to protect them from that loss.
- (2) Under sec. 8, a court must, without evidence of damage, give damages of

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<sup>13</sup> “I suppose it is true that we guess. Indeed, Chief Justice Dickson in *Andrews v. Grand and Toy* used the image of the “crystal ball” to emphasize the difficulties. but we guess in rational terms, not by intuition or emotion...” Per Kerans JA, in Duncan, page 168-169.

<sup>14</sup> R.S.A. 1980 c. F-5.

- (a) \$40,000 to the spouse of a person whose death is caused by a wrongful act;
- (b) \$40,000 in total to parents if the deceased person was a minor child or was under 26 years of age and neither married nor living with a cohabitant; and
- (c) \$25,000 to each child of the deceased person who was a minor child or was under 26 years of age and neither married nor living with a cohabitant.

These damages are for grief and loss of the guidance, care and companionship of the deceased person, and are in addition to all other damages.

Note that these provisions of the *Fatal Accidents Act* do not found an argument that damages for a loss of a chance of future earnings should not survive the wronged person's death: they merely counter a possible argument based on the desirability of seeing to the financial wellbeing of the wronged person's family and dependants.

# LIST OF ISSUES

We invite comment and opinions about the following issues:

## ISSUE No. 1

**As a general rule, should a claim for damages for the loss of a chance of future earnings survive death?**

## ISSUE No. 2

**If the answer to Question (1) is no,**

- (a) should such a claim survive death if the death was caused by an intentional wrong?**
- (b) should such a claim survive death if the plaintiff commences action in their lifetime?**

## ISSUE No. 3

**Does it make a difference whether or not the deceased person's death was caused by the wrongful act which caused the loss of a chance of future earnings?**

*The reader's opinion will be much more useful to the Institute if we understand the reasons for it. We would therefore very much appreciate it if any comments and opinions could be accompanied by reasons. If a comment or opinion is based on the acceptance of any of the arguments set out in this Consultation Memorandum, it would be sufficient to indicate the argument that has been accepted, though such an indication would not preclude the reader from making their own statement of reasons.*