INSTITUTE OF LAW RESEARCH AND REFORM

THE UNIVERSITY OF ALBERTA

EDMONTON, ALBERTA

REPORT NO. 24

SURVIVAL OF ACTIONS

AND

FATAL ACCIDENTS ACT AMENDMENT

April 1977

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ACKNOWLEDGMENTS

The Alberta Law Foundation has made a grant to the Institute for the purpose of this project.

We are much indebted to a committee appointed by W.M. Mustard, Q.C., then Alberta Vice-President of the Canadian Bar Association, for the purpose of reviewing our Working Paper on Survival of Actions. They gave us freely of their time and effort and their views were most useful. The committee was composed of Nina L. Foster and Rostyk Sadownik of Edmonton, and David Tavender, Neil Wittmann and George Stewart of Calgary.

We appreciate also the assistance of those who commented on our Working Paper. They were the Honourable S. Bruce Smith, Mr. Justice J.H. Laycraft, John G. Fleming, L.A. Johnson, R.L. McKinnon, and L.W. Drewry.

Vijay K. Bhardwaj of the Institute's legal staff had the carriage of this project after the Working Paper, and was responsible for the drafting of this Report and draft legislation.

REPORT ON
SURVIVAL OF ACTIONS AND FATAL ACCIDENTS ACT AMENDMENT

I
INTRODUCTION

In 1974 a solicitor who was disturbed by the law as set out in Crosby v. O'Reilly, [1974] 6 W.W.R. 475 (S.C.C.) wrote the Institute suggesting that we consider whether the claim for damages for loss of expectation of life should be abolished. We agreed that that was a proper subject for consideration. Because that question had appeared to be the only controversial question standing in the way of the adoption of the Uniform Survival of Actions Act we decided to consider also the broader question of the adoption of that Act.

In 1975 we issued a Working Paper. It was published in the Alberta copies of an issue of the National, the newspaper of the Canadian Bar Association. The comment we received, while thoughtful, was small in volume. We therefore took the further step of consulting a committee appointed for that purpose by the Alberta Branch of the Canadian Bar Association. The views of those whom we consulted are divided, but the Institute was impressed by the feeling that the grief and loss of survivors, particularly parents, of persons whose death is caused by negligence should be recognized by pecuniary compensation. For reasons which we will discuss we think that the claim for damages for loss of expectation of life, as well as other non-pecuniary loss, should be abolished, but because of the feeling we have mentioned our basic recommendation will include a provision for *solatium* or compensation for bereavement.

We will firstly discuss the claim for damages for loss

of expectation of life and the claim for loss of amenities which is often asserted under similar circumstances.

II
EXISTING LAW

1. The Common Law, Legislative Change and the Claim for Loss of Expectation of Life

Survival legislation in Alberta which is now found in sections 51 to 53 of the Administration of Estates Act, R.S.A. 1970, c. 1 was originally borrowed from Statutes of Ontario (1886) 49 Vic. c. 16 and has formed part of our law since 1903. Its purpose is to abrogate the common law rule which said that death of either wrongdoer or victim put an end to causes of action in tort. The rule is often expressed by the Latin maxim *actio personalis moritur cum persona*. The maxim is not strictly accurate because the rules did not apply to actions on contract, and even in tort there were exceptions, e.g., where the wrongdoer died and his estate had profited from the wrongdoing as in Phillips v. Homfray (1883) 24 Ch. D. 439.

This common law rule must be distinguished from the rule in Baker v. Bolton (1808) 1 Camp. 493 which says it is not an actionable tort wrongfully to cause the death of another. The Fatal Accidents Act has changed the common law on this point, but only to the extent of creating a cause of action in favour of specified dependants who can show pecuniary loss from the death.

The Ontario Act of 1886 was a pioneer statute in providing for survival of actions. We are of the view that the purpose was to provide for survival of existing causes of action, not to give the victim's estate an action for the wrongful causing of death. In England v. Lamb (1918) 42

O.L.R. 60 the victim was killed almost instantly. His administrator brought action for $2,000 damages for negligently causing death. There were no dependants so no claim was possible under the Fatal Accidents Act. The plaintiff based his action on the Trustee Act. Middleton J. held that the Act was passed to prevent the wrongdoer escaping liability by reason of death of the person injured, and not for the purpose of creating a new right of action. It left unaffected the rule in Baker v. Bolton.

As far as we can determine, it never occurred to anyone in Alberta or any other province before 1937 that legislation of this kind gave to the victim's estate a cause of action in which the estate could recover under such heads of damage as loss of expectation of life, pain and suffering or what has come to be known as "loss of amenities." Apart from England v. Lamb we know of no case in which the victim's estate brought action against a person who had wrongfully caused the victim's death.

Long ago an Alberta case held that a living victim who could show that the injury to him had reduced his life expectancy, was entitled to have his damages increased because of this factor. In McGarry v. Canada West Coal Company (1909) 11 W.L.R. 597 the victim obtained judgment for damages from personal injuries, but the full court ordered a new trial because the damages were excessive. By this time the victim had died and the action was continued by his estate. The new trial came on before Stuart J. He held that he had to consider the facts as they were in the victim's lifetime and he awarded $600 for loss of expectation. He was of the opinion however, that had the victim not obtained judgment in his lifetime the estate could not have claimed for such matters as loss of expectation, pain and suffering or permanent injury.

The predecessors of the sections in the Administration of Estates Act were never used as the basis of a separate cause of action by the victim's estate until certain developments took place in England in the mid-1930s. In 1934 Parliament passed the Law Reform (Miscellaneous Provisions) Act, 24 & 25 Geo. 5, c. 41. It provided generally for survival of causes of action. This legislation was in substance like our Trustee Act, which as already stated, we had had since 1903 and Ontario since 1886, and was the predecessor of the sections in the Administration of Estates Act. In 1935 the Court of Appeal in Flint v. Lovell made the same ruling that Mr. Justice Stuart had made in 1909, namely that in an action by a living person, it is open to him to show that his life expectancy has been reduced, and if he does so, this is a proper item in assessing his damages (Flint v. Lovell, [1935] 1 K.B. 354). This case, of course, had nothing to do with the 1934 Act.

Then in 1937 came Rose v. Ford, [1937] A.C. 826. In that case a 23-year old woman, injured by the defendant's negligence, had a leg amputated two days later and died after another two days. Her estate brought action on the basis of the loss of leg, pain and suffering, and loss of expectation of life. The House of Lords upheld an award under each of the second and third heads, but not for the loss of leg. This would have meant duplication. Neither the amount of the award nor the basis of calculation was in issue. However Lord Roche commented:

> I would add that I confess to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and, by becoming common form, may result in the inflation of damages in undeserving cases, or, more probably, may become stale or ridiculous, to the detriment of real and deserving cases, such as the present.

In Benham v. Gambling, [1941] A.C. 157 the House of Lords held that the compensation is for loss of the victim's happiness, and that in actions by the estate the amount of the award should be kept to a moderate figure, which was fixed at £200.

More recently, the House of Lords in 1968 held that because of inflation, the "conventional sum" should be increased to £500 (Yorkshire Electricity Board v. Naylor, [1968] A.C. 529).

Rose v. Ford made an immediate impact in Canada, for it showed that survival legislation like Alberta's had a hidden potential. The first reported case in Alberta is Batog v. Mundy, [1939] 2 W.W.R. 1, which held, doubtless correctly, that our legislation was in effect the same as England's. The award was $3,000.

Throughout Canada a steady stream of cases began to flow through the courts. However there was considerable opposition, and before long every common law province except Alberta and Manitoba had abolished claims for loss of expectation of life. As a consequence nearly all the decisions have been from Alberta and Manitoba. The issue has been that of quantum. Benham v. Gambling had a restraining effect in England, but judgments in Manitoba rejected Benham v. Gambling and held that awards should be higher than the amount allowed in that case. (Anderson v. Chasney, [1949] 4 D.L.R. 71, per Coyne and Adamson JJ.A.: judgment was affirmed in the Supreme Court of Canada, [1950] 4 D.L.R. 223 but quantum was not considered). This judgment influenced later cases, both in Manitoba and Alberta, until Bechtold v. Osbaldeston, [1953] 2 S.C.R. 117 from Alberta. The trial judge had awarded $10,000 and the Appellate Division had reduced this to $7,500. In upholding the judgment for $7,500, the Supreme Court said that Canadian courts should follow the principle

of Benham v. Gambling, even though the final award in that case was considerably larger than in Benham.

Examples of awards made in Alberta since Bechtold are:

$3,000 in Carl v. Steinhauer (1956) 20 W.W.R. 520 (App. Div.).
$2,500 in Flynn v. C.P.R. (1957) 22 W.W.R. 131 (trial: the action failed but the court assessed the damages).
$5,000 in Ure v. Fagnan, [1958] S.C.R. 387.
$7,500 in Ciniewicz v. Braiden (1965) 52 W.W.R. 111 (App. Div.).
$4,000 in Constable v. Ulan (1969) 70 W.W.R. 171 (App. Div.)

In the recent case of Crosby v. O'Reilly the defendant admitted liability. The assessment of damages was before a jury. The trial judge thought it improper to indicate the amount of awards in other cases. He told the jury that the award should be neither nominal nor exorbitant. It should be moderate, fair and reasonable. The jury awarded $90,000. (The proceedings on assessment of damages are unreported.) On the defendant's appeal, the court pointed out that $7,500 had become the upper limit in Alberta, but because of the decline in the value of the dollar the upper limit should be $10,000. Thus the judgment was reduced to that amount (Crosby v. O'Reilly, [1973] 6 W.W.R. 632). The plaintiff appealed to the Supreme Court of Canada. Speaking for the full court of nine judges, Chief Justice Laskin dismissed the appeal. However he differed somewhat from the Appellate Division in his view as to the proper course the judge should take in directing the jury and said:

> Rather than fix the direction as one of law governing the upper limit of an award, the trial judge should direct the jury, in the light of the

> evidence respecting the deceased in all of his or her qualities, mode of life and prospects in the light of age and physical condition, that a figure beyond a particular sum, which may be less than $10,000, may be regarded as excessive. (Crosby v. O'Reilly, [1974] 6 W.W.R. 475 (S.C.C.) at p. 478).

In the later case of Milberry v. Pollock (1975) 56 D.L.R. (3d) 713 (Man.) the trial judge thought that the judgment of the Supreme Court of Canada in Crosby v. O'Reilly left it open to the court to award a larger sum than the conventional limit suggested by the Appellate Division in the same case. He, therefore, awarded $20,000 to the plaintiff under the Trustee Act, R.S.M. 1970, c. T160, for the death of his wife who was 56 years of age. The Manitoba Court of Appeal reduced that amount to $6,500 ([1976] 2 W.W.R. 481) and observed that the principles to be applied in assessing damages for shortened expectation of life where deceased's death resulted from a tort under survival legislation are those set out in Benham v. Gambling together with the guidelines contained in Gayhart v. Registrar of Motor Vehicles (1956) 6 D.L.R. (2d) 474 (Man. C.A.) and Crosby v. O'Reilly. Under these principles the most important factor is the prospect of happiness, considered as an objective factor, and life expectancy is a supplementary element. Moreover, because the uncertainties of life are greater for youth than for older persons, young persons are not necessarily entitled to greater damages. Very moderate figures should be chosen for these awards.

2. Loss of Amenities

At this point it is convenient to refer to the head of damage usually called loss of amenities but which is more accurately described as loss of faculty or capacity. It refers to loss of capacity to enjoy life because of physical injury. Typical instances are paraplegia, brain damage, loss of a limb and permanent unconsciousness. In West v. Shephard,

[1964] A.C. 326 two views emerged. One is that loss of amenities is analogous to loss of an asset and this is the main basis for compensation, whether or not the victim is conscious of his loss. This is called the "objective" approach. The other view is that the objective element should receive less emphasis and that where the victim is conscious and able to appreciate his loss the subjective element should be a larger factor in the assessment of damages. The objective approach results in larger damages, at least in cases where the victim has been rendered a "vegetable." In West v. Shephard a bare majority favoured the objective approach. The Supreme Court of Canada followed this judgment in The Queen v. Jennings, [1966] S.C.R. 532 while the High Court of Australia in Skelton v. Collins (1966) 115 C.L.R. 94 agreed with the minority in West. In all these cases the victim was alive and was the plaintiff.

We have described these cases on loss of amenities to lay the ground work for the question, does a claim for loss of amenities survive to the estate when the victim has died? In British Columbia, where the claim for loss of expectation has been abolished, the trial judge held in Child v. Stevenson, [1972] 6 W.W.R. 140 that the estate of each of the three victims was entitled to compensation for the victims' loss of amenities. Each was a teen-aged boy who died in a matter of seconds after the accident. The British Columbia statute excluded damages for loss of expectation but not for loss of amenities. Thus the trial judge concluded that the estates could recover under the latter head. He felt obliged to follow Jennings and to apply it in a claim by the estate. The Court of Appeal set aside the judgment, holding that the claim for loss of amenities does not survive. The original survival provision as enacted in 1934 excluded damages for disfigurement and pain and suffering. Then in 1942 an amendment provided that where death results from the

injuries, no damages are recoverable for the death or for loss of expectation of life. The Court of Appeal held that this amendment is effective to exclude claims for loss of amenities, which had not been recognized as a head of damages when the amendment was passed (Child v. Stevenson, [1973] 4 W.W.R. 322).

In Crosby v. O'Reilly, counsel for the plaintiff requested the trial judge to direct the jury that in deciding on the amount of damages, it would be proper to take into consideration loss of amenities of life as well as loss of expectation. He declined. Both the Appellate Division and the Supreme Court of Canada held that this was correct. To allow such a claim would be duplication of the award for loss of expectation.

Suppose, however, the victim had lived for a year, or six months, or one month. Would an award to the estate for loss of amenities be a duplication of the award for loss of expectation? Where the plaintiff is alive and brings his own action, he can claim under both heads, and the award for loss of amenities may well be much more than that for loss of expectation of life. This was the case in West v. Shephard. In Andrews v. Freeborough, [1967] 1 Q.B. 1 the English Court of Appeal dealt with the question posed above. The defendant negligently struck an eight-year old girl. She survived for almost a year, never having regained consciousness. Her father, as administrator, brought action under the 1934 Act. The trial judge gave £500 damages for loss of expectation and £2,000 damages "in respect of the actual injuries and consequent loss of amenities." The Court of Appeal, by a majority and with some reluctance, and recognizing the artificiality of any given award, upheld the trial judge. The award is not to be reduced to a "conventional" award, as in the case of loss of expectation.

The Supreme Court of Canada dealt with the same problem in Hartman v. Fisette (1976) 66 D.L.R. (3d) 516 (S.C.C.). The defendant negligently struck Mrs. Hartman who was 81 years of age. She survived for two years and eight months after the accident dying after commencement of action but prior to the trial. The trial judge found that Mrs. Hartman was a very active woman prior to the accident and was incapacitated thereafter. As a result of the accident she was critically ill from multiple injuries to her spine, head, knee-joint and foot. Respiratory difficulty had to be alleviated by a tracheotomy. Two expert surgeons testified that Mrs. Hartman would have been aware of pain and discomfort. The trial judge awarded special damages of $12,467.08 and $12,000 general damages which included:

$2,000 for pain and suffering;
$5,000 for loss of amenities of life for the period between the accident and death;
$5,000 for loss of expectation of life.

The Court of Appeal reduced the general damages to $6,000 comprising,

$1,000 for pain and suffering;
$5,000 for both loss of amenities and loss of expectation of life.

The Supreme Court of Canada held that:

(i) the trial judge and the Court of Appeal had erred in making any allowance for loss of expectation of life, there being no evidence to show that the accident caused or contributed to death, and

(ii) the Court of Appeal erred in reducing the award for pain and suffering and for loss of amenities.

The Supreme Court award was as follows:

$2,000 for pain and suffering;
$5,000 for loss of amenities;
nothing for loss of expectation of life because there was no evidence which could establish that the deceased's life span had been curtailed as a result of her injuries.

Under the Uniform Act the deceased's cause of action would survive but the head of damage for loss of amenities, like that for loss of expectation, would clearly fail, whether or not death was instantaneous.

3. Existing Legislation in the Provinces

We shall now sketch the legislation of each common law province in connection with the right of the victim's estate to claim damages for non-pecuniary loss. The provinces can be put into different categories.

(1) Provinces that exclude all non-pecuniary loss

New Brunswick: Survival of Actions Act 1969, c. 19. This is the Uniform Act, so section 6 limits recovery to pecuniary loss, and in particular excludes punitive or exemplary damages, damages for loss of expectation, pain and suffering, or physical disfigurement. (Now, R.S.N.B. 1973, c. 518; section 5).

Newfoundland: Survival of Actions Act 1962, No. 30. Section 4 is in essence the same as Uniform section 6 except that the only specific exclusion of relevance here is for punitive or exemplary damages. However section 11 says the Act does not apply "to an action for . . . damages for physical disfigurement, pain or suffering caused to a deceased

person." This Act was passed a year before adoption of the Uniform Act. (Now, R.S. Nfld. 1970, c. 365; section 4).

Nova Scotia: Survival of Actions Act, R.S.N.S. 1967, c. 298. Section 3 is in essence the same as Uniform section 6, though Nova Scotia does not specifically exclude physical disfigurement.

(2) Provinces that have specific exclusions, including loss of expectation

British Columbia: Administration Act, R.S.B.C. 1960, c. 3. Section 72(2) permits actions by the victim's estate except that recovery shall not extend (a) to damages for physical disfigurement or pain or suffering, or (b) if death results from the injuries, to damages for the death or for the loss of expectation of life. Clause (b) was added to the section in 1942, and is like Ontario's 1938 amendment. Child v. Stevenson, which we have discussed earlier, held that this legislation bars a claim for loss of amenities.

Ontario: Trustee Act, R.S.O. 1970, c. 470. Section 38(1) is in substance the same as the original 1886 section, save that it includes a proviso, enacted in 1938, that "if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life . . . ."

Prince Edward Island: Survival of Actions Act 1955, c. 17. Section 3 excludes exemplary damages and damages for loss of expectation of life. (Now, R.S.P.E.I. 1974, c. S-13).

(3) Provinces that exclude damages resulting in death

Saskatchewan: Trustee Act, R.S.S. 1965, c. 130. Section 58 is basically the same as Alberta's section 51, as one would

expect because both sections come from the old Trustee Ordinance. However, Saskatchewan made a change in the original wording when the statutes were revised in 1920. The change was to limit the scope of the section to injuries to the person not resulting in death (Trustee Act, R.S.S. 1920, c. 75, s. 45). These words remain in section 58.

In Jensen v. C.N.R., [1942] 3 D.L.R. 694, Bigelow J. held that the underlined words exclude claims for loss of expectation.

No other province uses Saskatchewan's wording. British Columbia and Ontario both say that if death results from the injuries no damages shall be allowed for the death. An exclusion in these words does not seem to be as wide as Saskatchewan's.

(4) Provinces that make no exclusion for non-pecuniary loss

Alberta: Administration of Estates Act, R.S.A. 1970, c. 1. Section 51 confers a cause of action on the victim's estate. It is in substance the same as the 1903 section, and the only exclusion is cases of defamation.

Manitoba: Trustee Act, R.S.M. 1970, c. T-160. Section 55(1) provides for survival of all causes of action, whether victim or wrongdoer dies, with the exception of actions for defamation, malicious prosecution, false imprisonment and false arrest. Then there is a proviso that in an action by the victim's estate for a tort causing death, exemplary damages are excluded.

III
PROPOSALS FOR CHANGE

1. Damages for Loss of Expectation of Life

We think that the estate's claim for damages for loss of expectation of life should be abolished. By its very nature it cannot go to the person who has suffered the injury because he is dead; it must be a windfall for others who may be creditors, non-dependant beneficiaries or dependant beneficiaries. It is against the whole conception of the common law to compensate a person who has not suffered. Secondly, the amount of the award is artificial and continues to create problems as Naylor, Crosby v. O'Reilly and Milberry v. Pollock show. Thirdly, the award does not help dependants because if they are beneficiaries of the estate the sum they receive is deducted from the amount they are entitled to under the Fatal Accidents Act.

We think that the arguments in favour of retention resolve into three.

The first argument is that the injured party suffered a loss and at the time of his death had a claim which was his property and should go to his estate with other property. We do not think that this argument is valid in relation to a claim which is not based upon any tangible loss to the deceased or to his estate and which by its nature cannot go to the deceased.

The second argument is that the natural feelings of the survivors call for some pecuniary recognition. We accept that argument. It is not, however, an argument in favour of an award of damages which may or may not benefit the bereaved. As a recognition of those injured feelings, the claim for loss of expectation of life is a mere fiction.

The third argument is that the wrongdoer should be punished, and it is often put in the form "it should not be cheaper to kill than to maim." We do not think that a head of damages which is otherwise unjustified should be retained for punitive reasons. The place for punishment is the Criminal Code, and in criminal proceedings the punishment can be related to the gravity of the offence. Nor will an insured wrongdoer be effectively punished; see Prather v. Hamel (1976) 66 D.L.R. (3d) 109 (Alta. App. Div.).

Recommendation #1

That the estate's claim for damages for loss of expectation of life be abolished in Alberta.

We recognize that a consequence of this recommendation is that the plaintiff's recovery of damages for loss of expectation of life will depend on his surviving to judgment, which is a matter of chance. We recognize also, that on the one hand, that state of the law may put pressure upon a plaintiff to sue early, and, that on the other, it may provide some inducement to a defendant to delay matters. We think, however, that these adverse consequences will in many cases be counterbalanced by the availability of the compensation for bereavement which we will propose, and that in any event they are preferable to the consequences of the existing state of the law.

2. Damages for Loss of Amenities

The arguments for abolition of the estate's claim for damages for loss of expectation of life apply equally to the estate's claim for loss of amenities.

Recommendation #2

That the estate's claim for damages for loss of amenities be abolished in Alberta.

3. Damages for Pain and Suffering

Here again the claim for pain and suffering being personal to the deceased, all the arguments for abolition of the estate's claim for damages for loss of expectation of life or loss of amenities apply equally.

Recommendation #3

That the estate's claim for damages for pain and suffering be abolished in Alberta.

4. *Solatium* or Compensation for Bereavement

We have said that the feelings of bereaved relatives should be recognized. The idea of awarding compensation for bereavement is not a novel one. In Scotland, certain close relatives of a person killed negligently, particularly in road and industrial accidents, may sue at common law for reparation, claiming not only in respect of the loss of support sustained by them in consequence of the death, but also for *solatium* or damages for bereavement, in respect of their grief and lacerated feelings. Lord President Inglis described the foundation of the claim *(solatium)* in Eisten v. North British Ry. (1870) 8 M. 980, at page 984 as being

> . . . partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination, our law has held that a person standing in one of these relations to the deceased may sue an action like this for solatium where he can qualify no real

damage and for pecuniary loss in addition where such loss can be proved.

It is not in any sense a derivative right as is that given by the Act of 1934 in England to the executors of the deceased "if the deceased himself could have sued had he survived." The claim of the relatives for *solatium* is not to any extent derived by succession from the deceased; it belongs to them in their own separate and independent right.

In its Report on the Law Relating to Damages for Injuries Causing Death (1973), the Scottish Law Commission recommends the replacement of the dependents' right of *solatium* by a head of damages entitled "loss of society." It is designed to acknowledge the non-pecuniary loss suffered by the spouse, parent or child of the deceased. The Commission recommends that the award should be available to the same class of children who are entitled to claim for patrimonial loss. It further recommends that the damages be worked out by the courts.

South Australia, in 1940, Ireland, in 1961 and The Northern Territory of Australia in 1974 adopted the concept of *solatium* in the form of provisions for a limited entitlement to damages for non-pecuniary loss in wrongful death cases. A number of states in the United States of America today have express statutory allowance of damages for mental anguish and loss of companionship.

In South Australia, the right of recovery is limited to parents in respect of the death of an infant and to the surviving spouse of the deceased. The Wrongs Act Amendment Act of 1974 provides that damages are not to exceed $3,000 in respect of an infant and $4,200 in respect of a spouse.

In Ireland the legislation is more widely drawn. The remedy is given to any member of the family and this class is widely defined. It is given to any member of the family "who suffers injury or mental distress." The total amount awarded for "mental distress" is limited to £1000 by the Civil Liability Act, 1961.

In the Northern Territory of Australia the Compensation (Fatal Injuries) Ordinance 1974 provides that damages in an action under the ordinance may include "*solatium.*" However, no fixed or upper limit for *solatium* is provided.

In England the Law Commission in its Report on Personal Injury Litigation-Assessment of Damages (1973) has recommended the adoption of the *solatium* or damages for bereavement. It has recommended that the parents of an unmarried minor child who is killed by another's wrong should be entitled to recover the sum of £1000 from the wrongdoer in an action under the Fatal Accidents Act. If both parents are included in the claim, each should be awarded £500. It has recommended that where a person is killed by the wrongful act of another, the surviving spouse should be entitled to recover £1000 from the wrongdoer in an action under the Fatal Accidents Act as damages for bereavement.

Under the present law of Alberta the spouse and children of a deceased person whose death has been caused by negligence are usually dependants and usually have a cause of action under the Fatal Accidents Act. Even though there is no provision for recovery of damages for lacerated feelings or grief or bereavement, the award of damages for loss of support to some extent does act as a balm even for them. However, we think they should also be compensated for bereavement though we think that the right to compensation should be limited to spouse and minor children.

The parents of children whose death is caused by negligence normally do not have an action under the Fatal Accidents Act for lack of dependency and will receive money only if the child's estate recovers damages and the parents inherit. This aggravates their sense of indignation and grief. We think that parents should also have a right of action for compensation for bereavement against the wrongdoer. One member of our Board felt that parents of unmarried

children whose death is caused by negligence should be compensated for bereavement: that the parent's recovery should not be limited to the death of minor children only so as to cover a case such as Crosby v. O'Reilly. We do not think, however, that it should extend too much past the time during which the parent is customarily involved in the care and nurture of the child and, for want of a better choice, would draw the line at the age of majority. The purpose of this remedy would be to provide the parents with solace and consolation as far as money can provide these and not to compensate them for the money they expended on bringing up the child. We do not think that the claim should be extended to anyone other than parents, spouse and children.

Recommendation #3

(1) An action shall lie against a wrongdoer for recovery of damages for bereavement resulting from death caused or contributed to by the fault of the wrongdoer,

(2) Every such action shall be for the benefit of

(a) the wife or husband,

(b) the parent or parents if the deceased is a minor, and

(c) the minor children

of the person whose death has been wrongfully caused.

The next question is how the compensation should be fixed. We think that it must be recognized that, just as the damages now fixed for the loss of expectation of life are conventional and artificial, so will be the compensation for bereavement which we are recommending. We do not think for example that a discussion of the quality of the happiness of the deceased person is edifying or instructive. We do not

wish to set off a new round of litigation to establish the limits of a new cause of action and the measurement of damages under it. We think that the best thing to do is to fix upon a conventional sum and establish it by statute.

The amount of the award must, as we have said, be artificial and arbitrary. A money payment may be a recognition of feelings of grief, but it cannot give true compensation. It appears to us that to allow $3,000 for the parents, $3,000 for the spouse, and $3,000 for the children would be generally in line with the awards which are being made, and we recommend that the amounts be fixed accordingly. In the case of parents, the $3,000 would be divided equally between them and simiarly in case of children $3,000 would be divided equally between them.

We recognize that some parents, spouses and children may not in fact be grief stricken at the death of the deceased person, and that to those persons the money may come as a windfall. That of course is the present situation so far as the claim for damages for loss of expectation of life, loss of amenities and damages for pain and suffering is concerned. We think that the consequences of requiring them to come into court to prove their grief as a condition of recovering compensation would be worse than the consequences of the occasional windfall.

We think that the amount should be subject to reduction to the extent of the responsibility of the deceased for the injury which caused the death. That is the case under the Fatal Accidents Act now, and it is also the case in connection with the claims for damages for loss of expectation of life and for loss of amenities and pain and suffering.

Recommendation #4

(1) The amount of the damages for bereavement shall be as follows:

(i) for a wife or husband of a deceased spouse, $3,000,

(ii) for a parent or parents of a deceased minor child, $3,000, which shall be divided equally between them,

(iii) for a minor child or children of a deceased parent, $3,000, which shall be divided equally between them.

(2) The court shall award to the parties for whom the action has been brought, damages for bereavement in the amounts set out in recommendation (4)(1) reduced in the proportion to which the fault of the person whose death has been so caused contributed to the injury resulting in his death.

The final question is the form of the legislation. The Fatal Accidents Act now deals with claims by close relatives, though on a different basis. We think that the claim which we recommend should be incorporated into the Fatal Accidents Act and that the procedural provisions of that Act should apply.

Recommendation #5

That the proposed claim for damages for bereavement be included in the Fatal Accidents Act and that the provisions of that Act, where appropriate, should apply.

We believe that the award of damages for bereavement is a very personal award and therefore feel that a subsisting claim for damages for bereavement should not survive to the estate of a parent, spouse or minor child.

Recommendation #6

That a claim for damages for bereavement should not survive to the estate of a deceased parent, spouse or minor child.

5. Uniform Survival of Actions Act

We now turn to the Survival of Actions Act proposed by the Uniform Law Conference. We think that it should be enacted. Apart from the controversial questions which we have already discussed, its principal effect would be to introduce order into the law. Section 10 of this Act can be omitted because the question of limitation of actions is dealt with in the Limitation of Actions Act.

Recommendation #7

That the Uniform Survival of Actions Act be enacted except for section 10.

6. Sections 51 to 55 of the Administration of Estates Act

The repeal of sections 51 and 53 of the Administration of Estates Act is necessary to give effect to our recommendations. Sections 52, 54 and 55 will be redundant.

Recommendation #8

That sections 51 to 55 inclusive of the Administration of Estates Act be repealed.

IV

CONCLUSION

We attach as Appendix A to this report a draft Survival of Actions Act. It is the Uniform Act with section 10 deleted and with the addition of provision for the repeal of

sections 51 to 55 of the Administration of Estates Act, and embodies our recommendations for the abolition upon death of the heads of damages for loss of expectation of life, loss of amenities and pain and suffering and for the general tidying up of the law on survival of actions. We have carried forward the $500 funeral allowance in section 7 as we have thought it best not to become involved with proposals for an increase which may well be justified but which would also involve an amendment to section 8 of the Fatal Accidents Act.

We attach as Appendix B a draft of amendments to the Fatal Accidents Act which embody our recommendations for compensation for bereavement.

We attach as Appendix C a draft of the Fatal Accidents Act as it would appear after the incorporation of our recommendations in the present Act.

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BY: _____
CHAIRMAN

_____
DIRECTOR

April, 1977

APPENDIX A

THE SURVIVAL OF ACTIONS ACT

1. This Act may be cited as "The Survival of Actions Act."

2. In this Act "cause of action" means the right to institute a civil proceeding and includes a civil proceeding instituted before death, but does not include a prosecution for contravening a statute, regulation or by-law.

3. (1) All causes of action vested in a person who dies after the commencement of this Act, other than causes of action in respect of

   (a) adultery,

   (b) seduction, or

   (c) inducing one spouse to leave or remain apart from the other,

   survive for the benefit of his estate.

   (2) The rights conferred by subsection (1) are in addition to and not in derogation of any rights conferred by The Fatal Accidents Act.

4. All causes of action subsisting against a person who dies after the commencement of this Act survive against his estate.

5. Where damage has been suffered by reason of an act or omission as a result of which a cause of action would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there is deemed to have been subsisting against him before his death whatever cause of action as a result of the act or omission would have subsisted if he had not died before or at the same time as the damage was suffered.

6. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing, the damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, pain and suffering or physical disfigurement, or for the loss of amenities.

7. Where the death of a person was caused by the act or omission that gives rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent on his death, except that there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased not exceeding Five Hundred Dollars in all, if those expenses were, or liability therefor was, incurred by the estate.

8. Every cause of action that survives under this Act and every judgment or order thereon or relating to the costs thereof is an asset or liability, as the case may be, of the estate for the benefit of which or against which the action was taken or the judgment or order made.

9. (1) Where a cause of action survives against the estate of a deceased person, and there is no personal representative of the deceased person against whom such an action may be brought or continued in this Province, a court of competent jurisdiction, or any judge thereof, may,

   (a) on the application of a person entitled to bring or continue such an action, and

   (b) on such notice as the court or judge may consider proper, appoint an administrator ad litem of the estate of the deceased person.

   (2) The administrator ad litem is an administrator against whom such an action may be brought or continued and by whom such an action may be defended.

   (3) The administrator ad litem as defendant in any such action may take any steps that a defendant may ordinarily take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person.

   (4) Any judgment obtained by or against the administrator ad litem has the same effect as a judgment in favour of or against the deceased person, or his personal representative, as the case may be, but it has no effect for or against the administrator ad litem in his personal capacity.

10. The Crown is bound by this Act.

11. Sections 51, 52, 53, 54 and 55 of The Administration of Estates Act are repealed.

(NOTE: This Act is based on a model Act recommended by the Uniform Law Conference of Canada.)

APPENDIX B

THE FATAL ACCIDENTS ACT AMENDMENT ACT

1. The Fatal Accidents Act is hereby amended.

2. Section 2 is struck out and the following is substituted:

   2.(1) In this Act, except in section 9,

   (a) "child" includes son, daughter, grandson, granddaughter, stepson, stepdaughter, and illegitimate child;

   (b) "parent" includes father, mother, grandfather, grandmother, stepfather and stepmother.

   (2) In section 9 of this Act,

   (a) "child" means son, and daughter, whether legitimate or illegitimate.

   (b) "parent" means mother, and father.

3. The following sections are added after section 8:

   9. Where an action is brought under this Act the court shall in addition to or in the absence of any other remedy and without evidence of damage give damages for bereavement as follows:

   (1) to a wife or husband of a deceased spouse, $3,000,

   (2) to the parent or parents of a deceased minor whose death is the subject matter of the action, $3,000, to be divided equally if the action is brought for the benefit of both, and

   (3) to the minor child or children of a deceased parent whose death is the subject matter of the action $3,000, to be divided equally among all the minor children for whose benefit the action is brought.

   10. Section 9 applies only where a death occurs on or after the commencement of this section.

   11. Any cause of action conferred on any person by section 9 shall not, on the death of that person, survive for the benefit of his estate.

APPENDIX C

THE FATAL ACCIDENTS ACT

Chapter 138

(as it would read if amended by the proposed Fatal Accidents Act Amendment Act, Appendix B)

Short title

1. This Act may be cited as *The Fatal Accidents Act*.

Definition

2. (1) In this Act, except in section 9,

(a) "child" includes son, daughter, grandson, granddaughter, stepson, stepdaughter, and illegitimate child;

(b) "parent" includes father, mother, grandfather, grandmother, step-father and stepmother.

(2) In section 9 of this Act,

(a) "child" means son, and daughter, whether legitimate or illegitimate;

(b) "parent" means mother, and father.

Action for damages

3. When the death of a person has been caused by such wrongful act, neglect or default as would, if death had not ensued have entitled the injured party to maintain an action and recover damages in respect thereof, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

Persons entitled to benefits

4. (1) Every such action

(a) shall be for the benefit of the wife, husband, parent, child, brother or sister of the person whose death has been so caused, and

(b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in every such action the court may give to the parties respectively for whom and for whose benefit the action has been brought such damages as the Court thinks proportioned to the injury resulting from the death.

(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then 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 or in the name of the executor or administrator.

(3) Every action so brought shall be for the benefit of the same person or persons and is as nearly as possible subject to the same regulations and procedure as if it were brought by and in the name of the executor or administrator.

Limitation of actions

5. Not more than one action lies for and in respect of the same subject matter of complaint.

Death of person liable for damages

6. (1) Where a person dies who would have been liable in an action for damages under this Act had he continued to live, then, whether he died before or after or at the same time as the person whose death was caused by wrongful act, neglect or default, an action may be brought and maintained or, if pending, may be continued against the executor or administrator of the deceased person.

(2) Where neither probate of the will of the deceased person mentioned in subsection (1) nor letters of administration of his estate have been granted in Alberta, a judge of the Supreme Court or a judge of the district court, as the case may require, may, on the application of any party intending to bring or to continue an action under this section and on such terms and on such notice as the judge may direct, appoint an administrator *ad litem* of the estate of the deceased person, whereupon

(a) the administrator *ad litem* is an administrator against whom and by whom an action may be brought under subsection (1), and

(b) a judgment in favour of or against the administrator *ad litem* in any such

action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect whatsoever for or against the administrator *ad litem* in his personal capacity.

Insurance moneys

7. In assessing damages in an action brought under this Act, there shall not be taken into account a sum paid or payable on the death of the deceased under a contract of assurance or insurance.

Funeral expenses

8. Where an action has been brought under this Act there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased (not exceeding $500 in all) if those expenses were incurred by any of the persons by whom or for whose benefit the action is brought.

Damages for bereavement

9. Where an action is brought under this Act the court shall in addition to or in the absence of any other remedy and without evidence of damage give damages for bereavement as follows:

(1) to a wife or husband of a deceased spouse, $3,000,

(2) to the parent or parents of a deceased minor whose death is the subject matter of the action, $3,000, to be divided equally if the action is brought for the benefit of both, and

(3) to the minor child or children of a deceased parent whose death is the subject matter of the action $3,000, to be divided equally among all the minor children for whose benefit the action is brought.

10. Section 9 applies only where a death occurs on or after the commencement of this section.

11. Any cause of action conferred on any person by section 9 shall not, on the death of that person, survive for the benefit of his estate.