ALBERTA LAW REFORM INSTITUTE

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NON-PECUNIARY DAMAGES IN WRONGFUL DEATH ACTIONS — A REVIEW OF SECTION 8 OF THE *FATAL ACCIDENTS ACT*

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

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Translating a sensitive topic into the provisions of a legislative proposal is never an easy task. When the underlying research requires the review of painful and difficult events the task is even more problematic. The Institute is fortunate to have had the input of many people in this project, from people affected directly by fatal accidents to those whose business is peripherally affected. We acknowledge the time and contribution provided by those persons. The counsel in charge of the project is Janice Henderson-Lypkie. Both the report for discussion and this report reflect the thoroughness and depth of her research and the sensitivity with which the proposals have been developed, discussed with the community and presented to the Board. The Board too has considered these issues with its usual balance, insight and desire for principled proposals.

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PART I — SUMMARY

SCOPE OF THE REPORT

This report is about two things. The most important is compensation to surviving family members for the emotional suffering caused by the wrongful death of a close family member (i.e. damages for non-pecuniary loss). The other is compensation to family members for out-of-pocket expenditures and loss of earnings incurred by family members as a result of the injury and death.

This is only one aspect of how society deals with wrongful death. The report does not deal with compensation to surviving family members for the loss of financial benefits that would have been received from the deceased person. It does not deal with criminal law. It does not deal with systems such as workers' compensation that compensate surviving family members regardless of whether the death of the worker was caused by anyone's fault. Other parts of the law apply to these areas.

EXISTING LAW

In 1979, the Alberta Legislature enacted section 8 of *Fatal Accidents Act*, which allows certain close family members to recover damages for bereavement in wrongful death actions. The essential elements of the scheme created by section 8 are:

- The law should recognize the emotional suffering of close family members which arises upon the wrongful death of the deceased.

- The family members should have a cause of action against the wrongdoer for damages for bereavement. They should not be compensated indirectly as beneficiaries of a remedy available to the estate of the deceased.

- The amount of damages awarded for bereavement should be established by statute.

- The amount of damages for bereavement will be:
  - $3,000 to the deceased's parents to be shared equally if the action is brought for the benefit of both parents,
  - $3,000 to the deceased's spouse, and
  - $3,000 to the deceased's minor children to be shared equally if the action is brought for the benefit of more than one minor child.

- The court can award these amounts without evidence of damage—that is, there is no need for close family members to testify in court that they suffered grief and agony as a result of the death.

NEED FOR REFORM

Section 8 has caused much public dissatisfaction, particularly in cases of wrongful death of children. In such cases, most parents cannot establish the loss of financial benefits as a result of their child's death. All they can recover from the wrongdoer is $3,000 for bereavement plus funeral expenses. Many parents find the $3,000 insulting.

In June, 1992, the Alberta Law Reform Institute issued Report For Discussion No. 12, which discussed how the law came to be this way and made tentative recommendations for reform. The responses criticized the level of damages established by section 8, not the other elements of the scheme created by the section. Most commentators believe that the wrongdoer should compensate the close family members, in so far as money can do this, for the emotional suffering they experience because of the wrongful death. In addition, most commentators wish to keep grieving families out of the litigation arena on the issue of non-pecuniary loss, and, therefore, support statutory quantification of the amount of damages and the recovery of such damages without the need to produce evidence of the emotional suffering. Almost everyone rejected the existing level of damages as totally inadequate and supported a significant increase.

RECOMMENDATIONS — DAMAGES FOR NON-PECUNIARY LOSS

Our recommendations would bring about four significant changes in respect of recovery of damages for non-pecuniary loss in wrongful death actions. First, we change the terminology to describe more accurately what is being compensated. The new term is "damages for grief and loss of the guidance, care and companionship of the deceased".

Second, we raise the levels of damages to those set out in the report for discussion—which found broad support among those who responded. The levels are:

(a) $40,000 to the spouse or cohabitant of the deceased person, but if the spouses are separated at the time of death, such damages would not be awarded,

(b) $40,000 to the parent or parents of:
  (i) the deceased minor child, or
  (ii) the deceased unmarried child who, at the time of death, was 18 years of age or older and had not reached his or her 26th birthday and was not living with a cohabitant,

  to be divided equally if the action is brought for the benefit of both parents, and

(c) $25,000 to each child of the deceased person who, at the time of the death of the deceased person, is:
  (i) a minor, or
  (ii) unmarried and 18 years of age or older and has not reached his or her 26th birthday and is not living with a cohabitant.

"Cohabitant" is defined as a person of the opposite sex to the deceased who lived with the deceased for the 3-year period immediately preceding the death of the deceased was during that period held out by the deceased in the community in which they lived as his or her consort. This definition has proven functional when used in other Alberta statutes.

Third, we redefine the category of claimants who could recover damages for non-pecuniary loss. The recommended category includes those individuals who have the closest relationship with the deceased at the time of death. To serve this policy, but at the same time avoid unacceptable insurance premiums increases, we restricted the category of parent who can recovery. We chose the 26th birthday as the age cut-off that will adequately identify the period in which the unmarried child's relationship with the parent is the child's closest personal relationship. Although the child-parent relationship is always important, the natural period of closeness between a parent and child will be displaced when the child establishes his or her own family or through the process of the child's independence. Most people are on their own by age 26, and many will have married. After marriage or a lengthy period of cohabitation, it will be the spouse or cohabitant and the children of the deceased who have the closest personal relationship with the deceased, and who, therefore should recover damages for non-pecuniary loss. In addition, we expanded the ability of children to recover damages for non-pecuniary loss upon the wrongful death of a parent.

Fourth, we recommend that the Lieutenant Governor in Council review the statutory amounts of damages at least once every 5 years and change the amount by Order in Council when necessary.

RECOMMENDATIONS — OUT-OF-POCKET EXPENDITURES AND LOSS OF EARNINGS

Recovery of out-of-pocket expenditures is presently limited to funeral expenses and most commentators agreed that recovery should be expanded to include expenditures that are a direct and foreseeable consequence of the death.

We recommend that section 7 of *Fatal Accidents Act* be amended to allow recovery of a reasonable allowance for:

(a) expenses incurred for the care and well-being of the deceased person between the time of injury and death,

(b) travel expenses incurred in visiting the deceased between time of the injury and death,

(c) necessary expenses of the funeral and the disposal of the body of the deceased, including all things supplied and services rendered in connection therewith, and

(d) fees paid for grief counselling that were provided for the benefit of the wife, husband, parent, child, brother or sister of the person deceased

if those expenses were reasonably incurred by any of the persons by whom or for whose benefit the action is brought.

We have refined our proposals so that the expenses claimed are recoverable only when it was reasonable to incur them and the expenses are reasonable in amount.

We do not recommend that loss of earnings for the period after the death be recoverable. Understandably, some parents may be unable to work for a period after the tragedy and, in some cases, this may result in substantial loss of earnings. Yet, a claim of this nature would have to be supported by evidence that the loss of earnings resulted from incapacitating grief. We do not wish to put their grief on trial.

PHILOSOPHY UNDERLYING THE RECOMMENDATIONS

Damages for non-pecuniary loss in wrongful death actions will not buy the surviving family members happiness. At best it will make their lives somewhat more tolerable. Yet, it will serve the purpose of giving recognition to the seriousness of their loss. In personal injury matters, tort law gives damages commensurate with the severity of the injury. No award or an insignificant award for their grief and loss of guidance, care and companionship of the deceased is a signal to the surviving families that the law sees their loss as minor, trivial or non-existent. This further aggravates their loss. A significant award removes this aggravation by recognizing the severity of their suffering.

We think the law should acknowledge the grief and loss of guidance, care and companionship suffered by the surviving family members, yet, allow them to deal with the tragedy without the intrusive inquiries that would flow from litigation. Grief over the loss of a close family member is an extremely difficult matter to deal with in any event and litigation on such issues can only repeatedly focus the family member's thoughts on the events leading to the death, the funeral and the loss. This will impede the natural grieving process, which in itself is harmful. This will happen because of the nature of the litigation and even caring counsel on both sides of the law suit cannot prevent this. Close family members should not be exposed to examination or have to testify on the nature of their grief and the quality of the relationship they have lost.

There is a price to be paid for keeping caring families out of the litigation arena on issues of grief and loss of guidance, care and companionship. The price is the loss of discretion and flexibility. This is acceptable if the statutory regime still compensates the majority of people who would have received compensation under the discretionary system. We think that in most cases our proposals will give proper recognition to and compensation for grieving family members. We also recognize that in situations of wrongful death, money compensation can never be adequate.

We have evaluated how these recommendations will affect automobile insurance premiums, which will be the insurance premium most affected by these recommendations. The increase in automobile insurance premiums that would result from these proposals is not excessive or unjustifiable.

PART II — REPORT

CHAPTER 1 — INTRODUCTION

A. History and Scope of the Project

When death results from the wrongdoing of another, the legal system must deal with the aftermath. For nearly 150 years, Canadian statutes have allowed surviving family members to bring an action against the wrongdoer to recover pecuniary damages that they suffer as a result of the death of the deceased. It is only in the last 15 years that Canadian jurisdictions have asked whether the family members should also recover damages for their emotional suffering. This project addresses this question.

In June of 1992, the Alberta Law Reform Institute ("Institute") issued Report for Discussion No. 12, *Non-pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act* ("report for discussion"). That report looked at only one aspect of how society deals with wrongful death. It dealt with those cases where a civil action could be brought because of a wrongful death. It focused on the scope of damages the law should award in such cases and made recommendations for change in respect of such damages. It did not deal with the criminal law or no fault systems like workers compensation.

The report for discussion was widely circulated to the people who had suffered the loss of a child due to the wrongdoing of others, to the insurance industry, and to lawyers. A total of 21 individuals and groups responded to the report for discussion, 18 in writing and three orally.

This report will reconsider the policy issues addressed in the report for discussion in light of the comments and make our final recommendations on non-pecuniary damages for immediate family members in wrongful death actions.

B. Terminology

In this report, we adopt the terminology used in the report for discussion. For ease of reference, we once again set out the defined terms, which are as follows:

1. **Claimant**: a person who has a cause of action under a wrongful death statute. (A cause of action is the right to sue.) All wrongful death statutes restrict the category of claimant to certain relatives. The class of relatives who are claimants, however, does vary among statutes.

2. **Pecuniary loss**: loss of the financial benefits the surviving relatives would have received if the deceased person had lived. Pecuniary loss, as used in this report, does not encompass out-of-pocket expenditures or income lost by the surviving relatives immediately after the death.

3. **Pecuniary damages**: damages awarded as compensation for pecuniary loss.

4. **Out-of-pocket expenditures**: expenditures made by reason of the injury and subsequent death of the deceased. They include funeral expenses, medical expenditures made for the benefit of the deceased between the time of injury and death, grief counselling and so on.

5. **Non-pecuniary loss**: the emotional injury one experiences upon the death of a family member. It includes shock, grief, sorrow, and loss of love, affection, guidance, care, companionship, comfort and protection.

6. **Non-pecuniary damages**: damages awarded as compensation for non-pecuniary loss.

7. **Compensation**: When we discuss compensation for non-pecuniary loss, "compensation" means recovery for an imponderable and intangible thing for which there is no money equivalent. Money is awarded for non-pecuniary loss because it serves a useful function, but with the knowledge that the money is not reparative.

C. Outline of the Report

Chapter 2 summarizes the contents of the report for discussion: the existing law, the need for reform and the recommendations for reform made in that report. Chapter 3 contains a summary of the comments made in respect of the report for discussion. Chapter 4 considers the new developments that have arisen since the report for discussion was issued. Chapter 5 contains our final recommendations and draft legislation.

CHAPTER 2 — REPORT FOR DISCUSSION

A. THE EXISTING LAW

Those readers looking for a detailed discussion of the history of wrongful death legislation and assessment of damages in Canadian wrongful death actions should refer to Chapters 2 and 3 of the report for discussion. We provide only a brief summary of the present Alberta law in this chapter.

In Alberta, the *Fatal Accidents Act*[1] governs the right of surviving family members to recover damages from the person whose wrongdoing caused the death of the deceased person. This Act allows the executor or administrator of a deceased person to bring an action for the benefit of the wife, husband, parent, child, brother or sister of the deceased. The cause of action arises only if the deceased could have sued the wrongdoer for damages for the injury. The court can award "those damages that the court considers appropriate to the injury resulting from the death".[2]

Originally, claimants could only recover damages for pecuniary loss. The courts measure a person's pecuniary loss by " balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death".[3] Unless excepted by statute, the claimant must account for any financial advantage arising from the death. Such advantages include any inheritance received from the deceased's estate, excluding household assets.[4] The Act provides that, in assessing damages, the court must not take into account a sum payable on the death of the deceased under a contract of insurance.[5]

This measure of damages results in significant awards of pecuniary damages in the case of wrongful death of income earners.

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1 R.S.A. 1980, c. F-5.

2 *Ibid* at s. 3.

3 *Davies* v. *Powell Duffryn Associated Collieries, Ltd.*, [1942] A.C. 601 per Lord Wright at 612.

4 S. M. Waddams, *The Law of Damages*, 2d ed. (Toronto: Canada Law Book, 1991) at 6-22 to 6-29.

5 *Fatal Accidents Act*, R.S.A. 1980, c. F-5, s. 6.

The general principles governing assessment of pecuniary losses apply to cases involving the wrongful death of children. What pecuniary benefit would the parents have received if the child had lived? The court estimates what the child would have given the parents in money or money's worth over a certain period and deducts from this the costs the parents would have paid in maintaining the child over this period.[6] The difference is the pecuniary benefit that the parents would have received from the child. We refer to this as the "wages less keep" measure of damages.

In time, the Alberta Legislature amended the Act to allow recovery of other types of damages. It amended the Act in 1967 to allow for recovery of the reasonable expenses of the funeral and disposal of the body. It added section 8 to the Act in 1979 to allow a court to give certain close family members damages for bereavement, as follows:

- $3,000 to the deceased's parents to be shared equally if the action is brought for the benefit of both parents,
- $3,000 to the deceased's spouse, and
- $3,000 to the deceased's minor children to be shared equally if the action is brought for the benefit of more than one minor child.

There is no need for these close families members to testify as to their emotional suffering because the Act requires the court to award damages for bereavement without such evidence.

B. THE NEED FOR REFORM

Section 8 of the *Fatal Accidents Act* has not been well received by Albertans. It has been criticized by lawyers, parents who have lost children due to the wrongdoing of others, and by members of the public.[7]

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6 *Schroeder et al.* v. *Johnson and Chaudierre Transport Ltd.*, [1949] 4 D.L.R. 64 (Ont. H.C.); *Guitard et al.* v. *MacDonald et al.* (1970), 14 D.L.R. (3d) 252 (N.B. S.C.A.D.); and *Vale* v. *R.J. Yohn Construction Company Ltd.* (1970), 12 D.L.R. (3d) 465 (Ont. C.A.).

7 See report for discussion at 59-60.

As we said in the report for discussion, the levels of damages provided by section 8 have not changed since the section was introduced in 1979. Inflation has eroded the significance of the statutory levels of damages for bereavement to a point where the award is insulting to those who receive it. This alone would justify a review of the statutory levels. Yet, the concern generated by the section demands a broader review of non-pecuniary damages in wrongful death actions.

The inadequacy of the levels of damages established by section 8 is particularly glaring in the case of the wrongful death of a child. In today's world, the "wages less keep" measure of pecuniary damages ensures that most parents do not have a claim for pecuniary damages upon the wrongful death of their child. The cost of raising children usually far exceeds what the child would have given the parent in money or money's worth had that child lived. The result is that in Alberta, the damages that can be recovered by parents upon the wrongful death of their child are, in most cases, limited to $3,000 for bereavement plus funeral expenses. All grieving parents find this unacceptable because it is simply a token payment and recognized by all as such.

This result is unsatisfactory because the levels of damages bear no reasonable relation to the true loss and suffering of the surviving family members. No one would argue that a person who recovers from a minor injury suffers more than a grieving parent who has lost a child. Yet, at present the law awards more money for the pain and suffering experienced because of the minor injury than it does for the emotional suffering experienced by the grieving parent. Critics of section 8 are unable to understand why the surviving relatives' suffering is seen as so insignificant. They are also aware of substantial non-pecuniary damages awarded in wrongful death actions brought in other provinces.

There is less criticism of section 8 when recovery of damages for bereavement is in addition to a sizeable recovery of pecuniary damages. This is often the result in cases of death of an adult income earner. Yet, the fact still remains that section 8 as it now reads does not adequately address the emotional suffering of the surviving family members of any deceased person.

C. Recommendations Made in the Report for Discussion

Under this heading we will give a summary of the recommendations made in the report for discussion. Chapter 3 contains a more detailed discussion of

these recommendations and how each recommendation was received by the commentators.

(1) Out-of-pocket expenditures and loss of earnings

The *Fatal Accidents Act* presently restricts recovery of out-of-pocket expenditures to funeral expenses. This category should be expanded to include all expenditures that are a direct and foreseeable consequence of the injury and death. We therefore recommended for discussion purposes that section 7 of the *Fatal Accidents Act* be amended to allow recovery of:

- actual expenses reasonably incurred for the benefit of the deceased person between time of injury and death,

- a reasonable allowance for travel expenses incurred in visiting the deceased person between the time of injury and death,

- the reasonably necessary expenses of the funeral and disposing of the body, including things supplied and services rendered in connection therewith, and

- fees paid for grief counselling provided to any claimant.

Understandably, many parents are unable to work immediately after the tragedy. This results in substantial loss of earnings in some cases. We were not opposed in principle to recovery of loss of income by parents for a short period, say a few months, after the death of a child. Yet, we did not make this recommendation because proof would be required that their loss of earnings resulted from the incapacitating grief and we did not wish to put their grief on trial.

(2) Damages for non-pecuniary loss

In the report for discussion, we went back to first principles and examined whether anyone should be able to recover damages for non-pecuniary loss arising from a wrongful death. We examined the policy arguments in favour of and against recovery of such damages. We concluded that certain close family members should recover damages for non-pecuniary loss and we discussed the methods by which this could be done.

The traditional arguments against recovery of non-pecuniary damages (both damages for grief and loss of guidance, care and companionship) are as follows.

> First, courts and juries are unable to measure in money the grief of relatives or the loss of guidance, care and companionship. Any damage award is arbitrary and does nothing to alleviate the loss suffered.
>
> Second, juries will award extravagant awards out of sympathy for the survivors.
>
> Third, since many of the wrongdoers will be insured drivers, this will place a large burden on insurers, and eventually upon their customers, and will lead to excessive insurance premiums.
>
> Fourth, it is distasteful to put grief on a sliding scale or to conduct the necessary examination of the parent-child or spousal relationship.
>
> Fifth, such damages really place a value on human life. The policy of the law is that human life is priceless and the value of a lost life cannot become the subject of judicial computation.
>
> Let us examine each of the arguments.

First Argument — Doing the impossible. Is it really true that courts cannot measure damages for grief or loss of guidance, care and companionship? Courts routinely award damages in post-traumatic stress syndrome cases and nervous shock cases. Non-pecuniary damage awards are made to quadriplegics, recognizing ". . . an award of non-pecuniary damages cannot be "compensation". There is simply no equation between paralyzed limbs and/or injured brain and dollars."[8] It is no more difficult to award non-pecuniary damages for these type of injuries than it is to award damages for grief or loss of guidance, care and companionship.

Courts in the United States, and now in New Brunswick, are able to quantify damages for grief. Courts in Ontario, Manitoba and Nova Scotia award

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[8] *Arnold* v. *Teno*, [1978] 2 S.C.R. 287 at 332 (Spence J.). In this quote Spence J. uses "compensation" in the sense of making one whole.

non-pecuniary damages to close family members for loss of the deceased's guidance, care and companionship. Courts in New Brunswick award non-pecuniary damages to parents for loss of a child's companionship.

The money awarded to close family members for non-pecuniary loss will not buy them happiness. At best, it will serve to make their lives somewhat more tolerable in the circumstances. It also serves the purpose of emphasizing the seriousness of their loss. They experience a devastating loss. They know that our tort law gives damages commensurate with the severity of the injury. No award or an insignificant award for their non-pecuniary loss is a signal to them that the law sees their injury as minor, trivial or non-existent. This aggravates their injury. Their sense of justice demands significant compensation from the wrongdoer for the serious injury he or she has dealt them.

One parent wrote this:[9]

> 7) It is an unforgivable and cruel insult when we are told that "no amount of money can bring back your child". That's not news to us. But a reasonable amount of compensation would mean that someone is sorry. The courts must indicate that children are of value, not only to their families, but to society in general.
>
> Mr. Justice Robins, speaking for the Ontario Court of Appeal in Mason v. Peters, summarized these injustices as follows:
>
> > The rules governing damages in child-death cases have long been the subject of critical comment, Fleming, for instance, described their impact on these cases as "repulsive". As matters stand, awards compelled by the pecuniary loss concept, fairly viewed, neither recognize the real nature of the injury sustained by surviving members of the family nor reflect the gravity of their loss. Whatever else may be said, there is no denying that the aphorism "it is cheaper to kill than to injure" holds greater validity here than in any other branch of the law of torts.

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[9] People Against Impaired Driving, *When Impaired Driving Hurts You* (1991) at 30-31.

Second argument — Awards guided by sympathy. At one time the courts had little control of jury awards, and fear of extravagant awards was justified. In Canada today, this is an imaginary fear. Most often it is a court, not a jury that determines the amount to be awarded for the injury. The Canadian tradition is to award moderate non-pecuniary damages. Certainly, the awards made by Canadian courts to a parent for loss of a child's guidance, care and companionship have not been extravagant.[10]

There is the possibility of extravagant damages if a jury establishes the amount of compensation for non-pecuniary losses. Yet, the courts are able to control such awards.[11] Moreover, if a statute establishes the amount of damages for non-pecuniary loss, the fear of extravagant awards evaporates.

Third Argument — Excessive insurance premiums: No one wants to design a law that would increase insurance premiums to such an extent that they are not affordable. On the other hand, it is incorrect to assume that the opening of a new head of damage or the increase of awards under a certain head of damage will lead to excessive premiums. Statistics govern this debate. How many people die each year in Alberta by reason of accident? How many of these fatalities would result from the wrongdoing of another? How many wrongdoers would be insured for such liability? Unfortunately, we do not know how many fatalities are caused by the fault of another and we do not know how many of the wrongdoers would be insured for their wrongdoing. Therefore, we must make a less refined analysis of how insurance premiums will be affected by increased non-pecuniary damages in wrongful death claims.

Our analysis is restricted to automobile insurance premiums because information necessary to analyze other kinds of insurance premiums was not available to us.[12] Statistics are available on accidental deaths not relating to vehicles, but those deaths often do not give rise to a law suit, and even where they do, it is often speculative to assume that liability insurance is involved.

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10 Most parents receive in the $15,000 to $30,000 range. The highest award to date has been $50,000.

11 For example, see *Hamilton et al.* v. *Canadian National Railway et al.* (1991), 80 D.L.R. (4th) 470 (Ont. C.A.).

12 See report for discussion at 94-96 and 124-31.

The statistics on accidental death do provide some assistance. We know that there were 1,297,804 insured vehicles in Alberta in 1989.[13] We also know that in the same year 520 people were killed in Alberta in motor vehicle traffic accidents or motor vehicle non-traffic accidents. Four hundred and seventy two were Alberta residents and 48 were non-residents. Ninety seven of the Alberta residents were 19 years of age or younger.[14]

If we make the extreme assumption that in the case of each of these 520 fatalities, an Albertan is totally liable and is insured by an automobile insurance policy, we get some idea of how different awards of non-pecuniary damages will affect insurance premiums. The premium increase in the table is the amount necessary to pay for the increased damage awards. (At this point, we do not deal with whether there should be further loadings for such factors as operating costs, loss adjustment, premium tax and commissions.)

non-pecuniary damages paid in the event of death of one person	**premium increase per vehicle (97 deaths) 0-19 years Alberta residents**	**premium increase per vehicle (472 deaths) all ages Alberta residents**	**premium increase per vehicle (520 deaths) all ages residents & non-residents**
$100,000	7.47	36.32	40.07
$50,000	3.73	18.18	20.03
$40,000	2.99	14.55	16.03
$30,000	2.24	10.91	12.02
$20,000	1.49	7.27	8.01
$9,000		3.27	3.61
$3,000	0.22		

13 Alberta Automobile Insurance Board, *A Study of Premium Stability in Compulsory Automobile Insurance* (1991), V. 1 at 17. This statistic is presented in the Board's analysis of the cost of automobile insurance to Alberta motorists.

14 These statistics are discussed in greater detail at the end of this chapter as part of a more sophisticated analysis of how the proposed reform will affect automobile insurance premiums.

Later on in this report, we consider a more sophisticated analysis of how the proposed reform will affect automobile insurance premiums and take into account certain loadings.

The chart reveals that non-pecuniary damages can be increased without making automobile insurance premiums prohibitive for Albertans. Significant non-pecuniary damage awards could be given to the parents of minor children at a minimal increase in automobile insurance premiums. The premium increase is most pronounced when non-pecuniary damages are recoverable in every fatality. Yet, reform can take place with a corresponding increase in premiums that would be acceptable to Albertans.

The real question is not whether insurance premiums will increase as a result of higher non-pecuniary damages, but what Albertans are willing to pay so that damages of this nature can be recovered in deserving cases.

Fourth Argument — Distasteful sliding grief scale: Some argue that damages for grief should not be given because it is distasteful to put grief on a sliding scale. Others argue that a court should not place a monetary value on loss of guidance, care and companionship. They view this as tantamount to putting a monetary value on the quality of a relationship. Different damage awards for loss of guidance, care and companionship suggest to some differing values of human beings.

It is no doubt difficult for all involved to hear testimony of the grief suffered and the quality of relationship that existed between the claimant and the deceased. The tragedy saddens all who learn of it. Yet, this reaction to the tragedy is no justification for denying recovery for non-pecuniary damages. Surely awarding nothing for such losses is more distasteful than having to put grief and guidance, care and companionship on a sliding scale. Society can accept that the quality of relationships varies and that death causes different reactions. The difficulty in dealing with matters of grief and loss of guidance, care and companionship is an argument for a conventional award for such losses but is no justification for awarding nothing.

Fifth Argument — Wrong to value human life: In theory, damages for grief and loss of guidance, care and companionship of the child are damages awarded for injury and harm suffered by the parents. These damages are not a measure of the value of the child. The argument is that, in practice, many people do not

or can not make this distinction. They associate such damages with the value of the child. The basis of the association is that the better the child, the closer the relationship, and the greater the suffering of the parent. Our law has always propounded the view that human life is priceless. Therefore, some argue that damages of this nature place a value on human life and this is to be discouraged.

We do not think that Alberta should deny recovery of damages for non-pecuniary loss in wrongful death actions because some people will misunderstand what is actually being compensated. No matter how people view these type of damages, the more significant the award, the better the impression left by the law.

Money awarded to a close family member for non-pecuniary loss cannot and does not measure the value of the deceased person's life, which is priceless. It cannot even measure the injury suffered by the close family member from the death of the deceased person. The most that it can do is to recognize in a significant way the catastrophic deprivation that the family member has suffered and the injury that that deprivation has inflicted on the family member.

The grief and injury suffered by one person from the death of the other depend upon the closeness of the relationship between them. A person may be saddened by the death of a venerated public figure or that of an acquaintance. But a parent is stricken by the death of a child and suffers grievous injury.

Section 8 of the *Fatal Accidents Act* recognizes that the wrongful act that has resulted in the death of the person has inflicted harm upon the close family members. To repeal the section would suggest that society does not regard their suffering as worth anything. It would leave the family member without any recognition of that suffering. It would suggest that their suffering was without significance in the eyes of the law.

We concluded that section 8 is right in recognizing the emotional injury suffered by close family members upon the wrongful death of the deceased, but that it does not do so in a way that has meaning today. We recommended that the *Fatal Accidents Act* be amended to give the court the power to award damages for grief and loss of guidance, care and companionship to certain family members. We abandoned the term "bereavement" because it is not commonly understood in today's society.

We then asked this question: How should the amount of damages for non-pecuniary loss be determined? It could be done by the court. This would allow flexibility and assessment of the loss suffered by the individual involved. However, it would require families to prove they suffered grief and loss of guidance, care and companionship of the deceased. They would be forced to relive the trauma of the loss of their loved one in an adversarial situation, thus aggravating their feelings. In our view, this is undesirable. In the report for discussion, we tentatively recommended that the *Fatal Accidents Act* determine the amount of non-pecuniary damages. We also recommended that court should award the damages without evidence of grief and loss of guidance, care and companionship. This will ensure that family members will receive compensation for their suffering and loss without having to testify in court as to the degree of their suffering and the nature of their relationship with their lost family member.

We also recommended in the report for discussion that only family members who are likely to have the closest family relationship with the deceased person should be allowed to recover damages for grief and loss of guidance, care and companionship. The amounts recommended by the report for discussion for consideration were as follows:

(1) $40,000 to the spouse or cohabitant of the deceased person. If the spouses are separated at the time of the death, these damages would not be awarded.

(2) $40,000 to the parent or parents of:

- the deceased minor child, or
- the deceased unmarried child who died when 18 years or age or older and who had not reached his or her 26th birthday.

This sum would be divided equally if the action is brought for the benefit of both parents.

(3) $25,000 to each child of the deceased person who, at the time of death, is a minor or unmarried and 18 years of age or older and who has not reached his or her 26th birthday. If there are three children or more, $50,000 would be awarded to the children and divided equally among them.

We recommended that the Lieutenant Governor in Council review the amount of statutory damages at least once within each 3-year period and amend the amount by regulation when necessary.

The report for discussion evaluated how these recommendations would affect automobile insurance premiums. The evaluation revealed that the increase in automobile insurance premiums that would result from these proposals would be about $22 per vehicle per year.[15]

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[15] See report for discussion at 124-31.

CHAPTER 3 — RESPONSE TO THE REPORT FOR DISCUSSION

A. OVERALL RESPONSE

The report for discussion generated response from a wide segment of society: an economist, parents who have lost children, People Against Impaired Driving,[16] Allstate, the Insurance Bureau of Canada,[17] Canadian Insurance Claims Managers' Association and lawyers. A total of 21 individuals and groups responded to the discussion report, 18 in writing and 3 orally.

For the most part, the recommendations were well received. People Against Impaired Driving found the proposals to be extremely fair and were satisfied with them. The proposals were also generally well received by the insurance industry commentators,[18] although they expressed concerns about particular recommendations. Many lawyers and several parents who have lost children due to the wrongdoing of others also voiced support for the recommendations.

Most of the commentators agree that close family members should be able to recover non-pecuniary damages from the wrongdoer whose wrongdoing caused the death of the deceased. One person argued that the law should **not** award damages for non-pecuniary losses in wrongful death actions because he thought that non-pecuniary loss of this type was something that cannot really be compensated. One person thought that the deceased's estate should have a claim for hedonic damages (ie. loss of enjoyment of life) similar to that allowed in some

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16 People Against Impaired Driving (PAID) is a "non-profit organization whose objective is to provide victim support and to encourage members of the government and judicial systems to recognize public concern about impaired driving." Most of its members are people who have lost a close family member because of the wrongdoing of another. See PAID, *When Impaired Driving Hurts You* (1991).

17 The Insurance Bureau of Canada is a voluntary association with about 100 insurance company members. These companies provide 85% of the general insurance written in Canada each year. It collects insurance statistics, drafts policy forms, and works with governments in the development of new legislation: See Insurance Bureau of Canada, *Facts* (1991) at 4.

18 We will use this term to refer to the Insurance Bureau of Canada, Allstate, and the Canadian Insurance Claims Managers' Association, Northern Alberta Chapter.

American states. The other commentators supported the award of non-pecuniary damages for grief and loss of guidance, care and companionship in wrongful death actions. There was also general support for expanded recovery of out-of-pocket expenditures.

Commentators strongly supported specifying by statute the amount of damages for grief and loss of guidance, care and companionship, although some thought that the recovery by parents who have had no contact with their children should be expressly excluded.

Most of the commentators, including the Insurance Bureau of Canada and Allstate, agreed that the sum of $3,000 for bereavement is inadequate. With the exception of a few commentators, there was general support for the recommended sums. Allstate and the Insurance Bureau of Canada considered the recommended sums to be adequate and not excessive. People Against Impaired Driving also found the recommended sums acceptable. Of those arguing for higher sums, one lawyer suggested that the $40,000 figure be increased to $50,000. Two grieving parents thought $1,000,000 would only go part way to compensate them for their suffering. One group of lawyers that responded was divided in opinion varying from support for the proposals to support for the existing level of damages.[19]

The Insurance Bureau of Canada and Allstate both thought that our estimate of the automobile insurance premium increase that would result if our recommendations were implemented was reasonably accurate.[20]

The recommendations that attracted the most comment were those concerning grief counselling and the delineation of claimants who would be entitled to recover damages for their emotional suffering. These issues will be discussed in detail under the next heading.

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[19] There were five lawyers in this group. One supported $40,000. One supported $20,000. Two supported $3,000 to $5,000. One expressed no opinion.

[20] As will be discussed later, they took exception to some of our assumptions but did agree with the final result.

B. SPECIFIC SUGGESTIONS

As we have said, most of the commentators supported expanded recovery of out-of-pocket expenditures and recovery of non-pecuniary damages in wrongful death actions. However, some had concerns about specific recommendations. We will address each of these concerns.

(1) Loss of earnings

(a) Position taken in the Report for Discussion

In the report for discussion,[21] we did not recommend that loss of earnings of parents or other close family members be recoverable because to do so would force them to prove that their grief prevented them from working for a period. We think that this is undesirable.

(b) Comments

Allstate considers a parent's loss of income to be too speculative and of such a nature as to promote litigation and delay settlements. The Insurance Bureau of Canada also agrees that earnings lost by the parents during the mourning period should not be recoverable.

In contrast, Christopher Bruce, Professor of Economics, University of Calgary, thought it all too clear that parents will lose time from work as the direct consequence of the death of their child. He thought it was equally clear that they should be compensated for this loss. He thought the law should give the parents the automatic entitlement to two weeks or a months pay, whether they return to work or not. He argues:

> Even if it is distasteful to require parents to provide evidence of grief to support a loss of wages claim, it is hard to justify denying the opportunity to do so to those parents who feel strongly that the death of their child has caused sufficient anguish that they were unable to return to work within the one-month period. Let those who are unable to face the consequence of making such a claim refrain from doing so; but this is not reason to deny the cause of action for all parents.

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[21] See report for discussion at 86-87.

One of the grieving fathers we interviewed attributes the loss of his $80,000 a year job to the wrongful death of his son. He thinks that parents should present their claim for financial loss to a review board three to four years after the death of the child. It is only at this time that, in his opinion, the true financial loss will be known.

People Against Impaired Driving did not make an argument in favour of recovery of this type of loss and it was supportive of the recommendations made in the report for discussion.

(c) Analysis

It is useful to compare a claim for loss of income in personal injury actions and wrongful death actions. The plaintiff in a personal injury action who seeks to recover loss of income must prove that the injuries suffered prevented him or her from working for the period in which income was lost. The defendant may dispute the claim where the defendant believes that the plaintiff could have returned to work sooner than he or she did. It is up to the judge to hear the evidence, judge the seriousness of the injury, and decide if that injury would prevent the plaintiff from returning to work during the period for which loss of income is claimed. In these cases the nature of the injury and the plaintiff's reaction to that injury are examined. This is routinely done in personal injury actions.

In a wrongful death action, parents could be given the right to sue for loss of income. The parents would have to prove that they suffered grief and that this grief prevented them from returning to work. The court would have to hear evidence of how the parents grieved, how this affected them physically and mentally, and why the parents were unable to return to work. It would be the same examination courts conduct in personal injury actions, but here the injury is grief. A court would not assess damages for grief, but it would be forced to examine the grief and determine the effect of the grief. The evidence that would have to be led would be the same as if parents had to prove their grief in order to obtain non-pecuniary damages.

There is no doubt grief will incapacitate some parents, and they will be unable to continue their employment for a period. Proving that the loss of income was directly attributable to the grief may not be difficult to do for the two

or three weeks following the death of the child. The difficulty of proving the claim increases with the length of the absence from work.

Those that support a claim for loss of income argue that it should be left to the parents to decide whether they wish to subject their grief to such scrutiny. Those that oppose such a claim argue that it will bring into the court evidence of grief, which is undesirable, and will only delay settlements as people struggle to determine when a grieving parent should return to work. The middle ground is to let parents recover up to a maximum of one month's wages since it will not be difficult to prove that grief was incapacitating for the one month after the death. Yet, this really does not address the serious cases when the parents are unable to work for long periods.

In our opinion, the examination of the parents' grief or the grief of other close family members by a court is undesirable. There is benefit to the individuals involved and society as a whole if evidence of grief is kept out of the court room. Moreover, the true loss of these parents is the grief and loss of the guidance, care and companionship. The financial consequences are simply not comparable. We think it more important that the law focus on compensation for the non-pecuniary loss. If the law creates a right to recovery of adequate damages for non-pecuniary loss and out-of-pocket expenditures, there is no need to go further when to do so would bring about the undesirable consequence of examination of grief on a case by case basis. Therefore, we do not recommend that such claims be recoverable.

(2) Cost of bringing relatives to the funeral

The report for discussion raised this question: Should parents be reimbursed for the cost of bringing grandparents and siblings of the deceased to the funeral where such relatives cannot afford to come using their own means? We took no position on this issue but did ask for comments.

Only one person answered this question. He thought that it would be too difficult to identify those relatives who could not afford to come and, therefore, he did not support recovery of such items as a separate category of damages. Yet, he did support a lump sum award of $20,000 which would cover any out-of-pocket expenditures the family members might make. At the same time, he did not support recovery of non-pecuniary damages.

As we mentioned in the report for discussion,[22] tort law does not provide full compensation for the injured person in every case because to do so would create an unwarranted deterrence of freedom of action. The law promotes freedom of action, while, at the same time, protects individuals from harm by allowing injured persons to recover compensation for loss that is foreseeable and not too remote.

In our opinion, the cost of bringing relatives to the funeral is too remote to justify recovery. For this reason, we do not recommend that such costs be recoverable. The fact that few people supported recovery of such costs also underlies our position.

(3) Out-of-pocket expenditures

(a) Position taken in the Report for Discussion

For the purpose of discussion, we recommended that:

> Section 7 of the *Fatal Accidents Act* should be amended to read as follows:
>
> 7. Where an action has been brought under this Act, the damages that may be awarded include:
>
> (a) actual expenses reasonably incurred for the benefit of the deceased person from time of injury to death,
>
> (b) a reasonable allowance for travel expenses incurred in visiting the deceased between time of injury and death
>
> (c) the reasonably necessary expenses of the funeral and the disposal of the body of the deceased, including all things supplied and services rendered in connection therewith, and
>
> (d) fees paid for grief counselling provided to any claimant,
>
> if those expenses were incurred by any of the persons by whom or for whose benefit the action is brought.

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[22] See report for discussion at 83-84.

On the whole, there was wide support for increased recovery of out-of-pocket expenditures of the types proposed. Specific concerns will be discussed in the next sections.

(b) The proposed section 7(a): expenses for the benefit of the deceased

The insurance industry commentators were concerned that the proposed section 7(a) would include a claim for the cost of insured services under s. 58 of the *Hospitals Act*,[23] commonly referred to as a claim for hospital benefits. Section 58 allows the injured person to recover from the wrongdoer the cost of hospital benefits on the same basis as if the injured person had been required to pay for the cost of hospital benefits. The Minister of Health is subrogated to this right of recovery and is the ultimate beneficiary of such a claim.

The proposed section 7(a) of the *Fatal Accidents Act* will not include a claim for hospital benefits for two reasons. First, the proposed section 7(a) will only include expenses incurred by the family for the benefit of the deceased. The hospital benefits recoverable under section 58 of the *Hospitals Act* are provided to the injured person by the Canadian health care system at no cost to the injured person or his or her family.[24] Furthermore, the cause of action that is created by

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23 R.S.A. 1980, c. H-11.

24 *Graff* v. *Wellwood*, [1991] 5 W.W.R. 661 (Sask. C.A.). When discussing whether the parents of a deceased child could bring a claim for hospital expenses under s. 4(2) of the *Fatal Accidents Act* of Saskatchewan, the majority held:

> These expenses were not incurred nor paid by the persons entitled to benefit under the Fatal Accidents Act. Since s. 4(2) of the Act permits recovery of such [medical or hospital] expenses only "if those expenses have been incurred by any of the parties for whom and for whose benefit the action is brought", they are not recoverable under that Act. Nor does The Saskatchewan Hospitalization Act, R.S.S. 1978, c. S23, extend the right of recovery of such expenses to beneficiaries under The Fatal Accidents Act. Thus, the right to recover these expenses died with the deceased and are not recoverable. There is nothing for the Minister of Health to be subrogated to.

(continued...)

section 58 is for the injured person and not for surviving family members. If the injured person dies as a result of his or her injuries, the claim for hospital benefits received between injury and death survives for the benefit of the deceased's estate.[25]

The Insurance Bureau of Canada suggests that claimants be allowed to recover expenses reasonably incurred for the benefit of the deceased that are not recoverable through other sources such as medical and health plans. The proposed section 7(a) will only allow claimants to recover such expenses if the claimants actually incur such expenses. So if another party paid for expenses that were for the benefit of the deceased, the claimants could not recover this from the wrongdoer. The Insurance Bureau of Canada is concerned with the situation in which the parents have paid for a recoverable item and can recover this from both the wrongdoer and some insurance plan. Similar issues arise in personal injury actions where the courts must determine when a wrongdoer can pay less because of insurance coverage or generosity of others. We do not think that the proposed legislation need deal with this matter. The existing law in respect of collateral benefits should determine this issue. This is also a developing area of the law that the courts are better able to address.

There was some concern that claimants might incur significant expenses for the benefit of the deceased person between the time of injury and death. This may be so, but the statistics suggest that such circumstances do not arise often. The accidental death statistics published by Vital Statistics list all accidental deaths in which death occurs within 30 days of the accident. Vital Statistics advises that it is a rare event for deaths to occur outside this period. Most often the death is instantaneous or follows within a few days of the accident.

The Canadian Insurance Claims Managers' Association raised this question: If the deceased was in a service occupation and had a number of service contracts outstanding, would the defendant be responsible for any expenses incurred in ensuring that these contracts were completed? The answer to this concern is that the estate of the deceased person would be able to sue to recover financial loss

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[24](...continued)
As will be discussed later, the Alberta *Survival of Actions Act* allows the claim for hospital expenses to survive for the benefit of the deceased person's estate.

[25] *James* v. *Rentz* (1986), 27 D.L.R. (4th) 724 (Alta. C.A.) and *Graff* v. *Wellwood*, *ibid.*

suffered by the deceased during the period between injury and death. It would be the estate that would sue the defendant to recover such a loss. The idea behind the proposed section 7(a) is that any expenses incurred by the family for the care and well-being of the injured person be recoverable. It is not intended to cover expenditures made for the benefit of the person's business. Nevertheless, it is possible that the wording of the proposed section 7(a) could be interpreted too broadly. This concern is best dealt with through a rewording of the proposed section 7(a). We recommend, therefore, that the proposed wording be replaced with "expenses incurred for the care and well-being of the deceased between time of injury and death."

(c) The proposed section 7(b): travel expenses

The Insurance Bureau of Canada and Allstate have no problem with recovery of travel expenses incurred in visiting the deceased between time of injury and death as long as it is limited to immediate family members. Grandparents, cousins, aunts, and uncles should, in their view, be excluded. One lawyer was also concerned how this subsection would operate in situations in which the injured person lay in a coma for a lengthy period before death.

The *Fatal Accidents Act* enables the deceased's personal representative to bring an action for the benefit of the wife, husband, parent, child, brother or sister of the deceased person. Parent includes father, mother, grandfather, grandmother, stepfather and stepmother. Child includes a son, daughter, grandson, granddaughter, stepson, stepdaughter and illegitimate child. Only those for whose benefit the action is brought can recover the type of expenses listed in the proposed section 7 and then only when those people incurred those expenses. This would restrict recovery of travel expenses to the immediate family and grandparents. Aunts and cousins and more distant relatives would have no claim.

This is an effective limitation for claims of this kind, and we see no need to go further to exclude grandparents or step-parents from this type of claim.

We believe that the courts will be able to determine what are reasonable travel expenses in situations where the injured person lies in a coma for a period before death. A judge would look at several factors to determine the issue of reasonableness, including:

- whether the presence of the family members might in some way assist the victim from coming out of the coma,

- the overall cost of the travel expenses, and

- the length and duration of the coma.

One must again remember that these situations do not arise with any frequency. Death usually occurs within 30 days of injury in situations of accidental death.

(d) The proposed section 7(c): funeral expenses

No commentator opposed the recovery of funeral expenses or the new wording we have chosen.

(e) The proposed section 7(d): grief counselling

Allstate fears that counselling may go on for an indefinite period and be expensive. It is also concerned that the proposed section does not require proof of the need for counselling. The Insurance Bureau of Canada argues that the increased limits for non-pecuniary damages are intended to provide compensation for the grief associated with the fatality and should be used to pay for grief counselling.

We do not agree that the $40,000 non-pecuniary damages should be used to pay for grief counselling. Grief counselling in this context is nothing more than medical treatment. It would be contrary to principle to argue that the non-pecuniary damages received for a whiplash injury should be used to pay the physiotherapist. It is wrong in principle to make the same argument in respect of grief counselling.

The risk that this head of recovery of expenditures will lead to excessive costs is small. Most people whose close family member is killed by the negligence of another do not seek grief counselling. They are able to deal with their grief through use of other resources. Those that do must undergo counselling, pay for it, and then seek recovery from the wrongdoer. There is no incentive to incur fees just to increase the amount that the wrongdoer must pay. As a further safeguard, we will redraft our proposed section 7(d) so that only fees for grief counselling that are reasonable can be recovered.

(4) Non-pecuniary damages for the wrongful death of a child

(a) Should parents receive compensation for non-pecuniary loss resulting from the wrongful death of a child?

By far the majority of commentators supported recovery of non-pecuniary damages by parents for grief and loss of the child's guidance, care and companionship. They also wished to keep parents out of the litigation arena on such issues[26] and found the $40,000 level of damages satisfactory. Since there was such broad support for recommendations 3, 4 and 5 and for the reasons given in the report for discussion, we adopt these as part of our final recommendations.

Some argue that the award of damages for non-pecuniary loss should be dramatically higher. We have not taken this position for the following reasons. Reform must take place within the context of Canadian tort law, and our law has traditionally given modest amounts of damages for non-pecuniary loss. In fact, the Supreme Court of Canada has created a cap on damages of this type. An award of damages for grief and loss of guidance, care and companionship of the deceased child must be justifiable when compared with Canadian non-pecuniary loss awards for other catastrophic losses. In addition, we must emphasize that these damages are not a measure of the value of the child's life. They are compensation for the grief and loss of the child's guidance, care and companionship suffered by the parents.

Awards of damages for non-pecuniary loss in wrongful death actions serve two functions. They may make the parents' lives more tolerable in the situation. They also serve as society's recognition of the catastrophic deprivation that the parents have suffered and the injury that this deprivation has inflicted on the parent. We think the $40,000 level of damages adequately serves these two functions and is justifiable when compared to other Canadian awards for grief and loss of the guidance, care and companionship.

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[26] The tentative proposals for reform of section 8 of the *Fatal Accidents Act* as set out in the report for discussion were based on the idea that damage awards for non-pecuniary loss in wrongful death actions should be made without evidence of emotional suffering. Most commentators gave strong support to this concept.

(b) Which parents should receive such compensation?

Concern did arise with respect to recommendation 6, where we suggested the recovery of $40,000 as non-pecuniary damages by parents of the deceased when:

(a) the deceased is a minor child, or

(b) the deceased is an unmarried child who is 18 years of age or older and who has not reached his or her 26th birthday.

The Insurance Bureau of Canada suggests that non-pecuniary damages for wrongful death of a child be awarded to the parents only when the child is living with the parents at the time of death. This position is based on the idea that there will be a greater loss of the child's guidance, care and companionship if at the time of death the child is still at home. Allstate suggests that non-pecuniary damages for wrongful death of a child be awarded to a parent only when, at the time of death, the child was living with the parent, or was financially dependent on the parent. This would avoid a windfall payment in situations where the parent had no contact with the child or the child lived in a household with the separated spouse and was not financially dependent on the parent.[27]

We think that the proposal of the Insurance Bureau of Canada is too restrictive because many children will leave home when they attain the age of majority. The practical result will be recovery of damages only in the event of wrongful death of a minor child. In England, non-pecuniary damages in wrongful death actions are only awarded to parents who lose minor children. This has proven unsatisfactory.[28] Parents suffer grief and loss of the guidance, care and companionship from the death of a 17 year old or a 24 year old child. Although the proposal of Allstate is somewhat broader, we do not support the

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[27] Letter received from Allstate.

[28] In recent years, several large scale disasters have highlighted the problem. In one accident, many young people were drowned when a barge capsized. It offended the English public when damages were paid to the parents of minor children but not to parents of children who had reached the age of majority. A similar problem arose in the Hillsborough soccer stadium disaster. The English government has asked The Law Reform Commission to consider the issue of recovery of non-pecuniary damages in wrongful death actions.

uncertainty that a financial dependency test would introduce. The problem of using financial dependency or minority as the test is they do not adequately determine when death will trigger grief or loss of guidance, care and companionship. Grief flows from love of the child and this does not depend on age of the child or on whether that child is still financially dependant upon the parents.

Why then should compensation be available only if the child dies before reaching the age of 26? We think this is a reasonable balance between principle and economic reality. The law should compensate those individuals who have the closest relationship with the deceased at time of death but at the same time avoid unacceptable insurance premium increases. To serve both policies, some restriction on the category of parent who can recover is needed. Although the child-parent relationship is always important, the natural period of closeness between a parent and child will be displaced when the child establishes his or her own family or through the process of the child's independence. Most people are on their own by age 26, and many will have married. After marriage, it will be the spouse and the children of the deceased who have the closest personal relationship with the deceased, and who, therefore, should recover the non-pecuniary damages. We think this age cut-off will adequately identify the period in which the unmarried child's relationship with the parent is the child's closest personal relationship.

What offends members of the public are situations in which there is no meaningful compensation for some family member in the wake of a wrongful death. In the case of older children, the victim's immediate family will usually receive compensation. The concern over the present law arises because no one receives adequate compensation in the event of the wrongful death of an unmarried child. This should be avoided where possible. The smaller the number of wrongful deaths that do not trigger compensation for non-pecuniary losses, the better.

The insurance industry commentators have correctly pointed out that we have overlooked the situation where the deceased unmarried child would have cohabited with another person for 3 years or more. The recommendations in the report for discussion would allow parents of a child under the age of 26 and a cohabitant of that child all to seek non-pecuniary damages upon the wrongful death of the child. This was not our intention. We will, therefore, amend our recommendations so that in the case of a deceased child who has not reached his

or her 26th birthday but has lived with a person of the opposite sex for 3 years or more, the cohabitant (and not the parents) would have the claim for non-pecuniary damages. Having said this, if the government does not create a cause of action for cohabitants under the *Fatal Accidents Act*, then the parent should recover such damages as long as the child falls within the specified age and is unmarried.

We have suggested that the age of the child at time of death determine whether the parents of the deceased have a claim for non-pecuniary damages. One lawyer suggested that the determinative factor be the age of the child at time of injury, not time of death. He is concerned that the child will be injured while he is 25 years of age and die soon after he has reached his 26th birthday. One must remember that what is being compensated for is grief and loss of the child's guidance, care and companionship. This does not occur until death and, therefore, it is age of the child at time of death that is key.

(c) Windfall recovery by neglectful parents

In the report for discussion, we considered whether the court or statute should establish the amount of non-pecuniary damages that would be awarded upon the wrongful death of a child. We recognized that court discretion would guard against the possibility of a windfall recovery by a parent who does not suffer grief or loss of guidance, care and companionship upon the child's death. Yet, we did not think that the possible number of windfall recoveries dictated a need for court discretion. On the basis of this and other considerations, we recommended that the amount of non-pecuniary damages for loss of a child be $40,000 and that this sum should be divided equally between the parents if the action is brought for the benefit of both parents.

Although most commentators thought that the amount of damages should be established by statute, two lawyers were concerned that our recommendations would allow abusive parents or parents who had abandoned their children to recover non-pecuniary damages in the event of the death of their child. They thought that the legislation should be drafted to avoid this result. Can we fine tune the proposed legislation to prevent such objectionable recovery? Or, is the risk of an occasional unjustified payment the price that must be paid to ensure that the grief of loving parents is not the subject of litigation?

To meet this concern about unjustified payments, the court would have to have the discretion to refuse to make an award to an undeserving parent. The ways in which such a discretion might be given include:

1. Dividing the damages between the parents as the court sees fit.

2. Dividing the damages equally between the parents if the child was living with both parents at the time of death, and in all other situations giving the court discretion to apportion the damages between the parents.

3. Dividing the damages equally between the parents unless it can be shown that to do so would be offensive, in which case the court can apportion the damages unequally between the parents or decline to award damages of this kind to one or both parents.

4. Dividing the damages equally between the parents unless one or both of the parents:

   (i) abandoned or deserted the child, or

   (ii) allowed the child to be brought up or were compelled to have the child brought up by another person or by a school or institution for such a length of time and under such circumstances as to satisfy the court that it would be offensive to award that parent damages for grief and loss of guidance, care and companionship of the deceased child.[29]

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[29] We have taken some of this wording from s. 59 of the *Domestic Relations Act*. This section deals with when a court should refuse to give custody of the child to a parent. The section reads as follows:

> 59 When a parent or other responsible person has
>
> (a) abandoned or deserted his minor, or
>
> (b) allowed his minor to be brought up by another person or by a school or institution at the expense of that other person or at the expense of the institution for such a length of time and under such circumstances as to satisfy

(continued...)

> Under this option, the court would have the discretion to award the entire $40,000 to the caring parent or, in the case of two undeserving parents, to award nothing.
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> [We considered adding another category for parents who had sexually or physically abused their child. Yet, by making such a category, it becomes an inquiry in every child death case and this is undesirable. Nonetheless, if one can assume that the known child abuser no longer lives with the child, then subsection 4(ii) should deal with this circumstance. For example, if Social Services has removed a child from the home because of child abuse, then this should be a situation in which the child is being brought up by another person and the circumstances are such as to make it offensive to award damages for grief and loss of companionship to the abusive parent.]

The options differ in the degree of discretion given to the court. The wider the discretion that can be exercised by the court, the wider the examination of the parent-child relationship. Yet, one of the advantages of establishing the amount of non-pecuniary damages by statute is to avoid the examination of the parent-child relationship. The challenge is to limit the court's discretion to those extreme situations in which the awarding of the damages would offend the public conscience.

We reject the first two options because the discretion is simply too broad. The third option would lead to litigation as to when the court considers it offensive to deviate from the rule of equal division between parents. Of the options, the fourth option creates the narrowest examination of the parent-child relationship. The question is whether it sufficiently narrows the exercise of discretion. The disadvantage of the fourth option is that it may be an invitation for separated spouses to fight over the division of damages and rekindle past bitterness.

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[29](...continued)

> the court that the parent or other responsible person was unmindful of his parental duties,
>
> the Court shall not make an order for the delivery of the minor to the parent or other responsible person unless the Court is satisfied that an order for the delivery of the minor would be for the welfare of the minor.

After considering these options, we are not convinced that the windfall recoveries one would exclude justify opening up examination of each parent-child relationship. We think the majority of parents will grieve over the loss of their child and that the number of parents who abandon their child and later sue for the wrongful death of a child will be small. Whenever a court has discretion to refuse to award damages in certain situations, this becomes an issue that must be examined in every child death case. Should caring parents who have lost their child be subjected to inquiries that are designed to learn if they have been unfit parents? Will this not just create more anger and bitterness? Adjusters themselves do not wish to become involved in such an examination because of the bitterness it creates.[30] Although we recognize that there will be situations in which undeserving parents recover non-pecuniary damages for the death of the child, we do **NOT** recommend that the court have the discretion to refuse to award non-pecuniary damages to an undeserving parent or parents where the action is brought for the benefit of that parent or parents. This, in our view, is the price one pays to keep caring parents out of the litigation arena on issues of grief and loss of guidance, care and companionship.

Before leaving this topic, we should discuss one further matter. The proposed legislation will direct the court to award damages for $40,000 to the parent or parents of the child and to divide those damages equally if the action is brought for the benefit of both parents. If a parent has severed the parent-child relationship by his or her conduct and does not choose to sue for non-pecuniary damages, the executor will bring the action in the name of the caring parent. If a parent has abandoned the child and the parent's whereabouts is unknown, the executor will have no instructions to proceed with the action on that parent's behalf. The defendant is entitled to pay the parent for whose benefit the action is brought. Any dispute as to whether the executor should have included the parent who has abandoned the child will be an issue between the parents and will not delay the settlement of the payment by the wrongdoer or the insurer. Practical matters may assist in preventing certain windfall recoveries from arising.

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[30] One person favoured statutory quantification of non-pecuniary damages because of his working experience in Ontario. Under the Ontario laws, the court can award damages to parents for the loss of a child's guidance, care and companionship. This involves an examination of the quality of the parent-child relationship. When such a claim is made adjusters routinely obtain information about the quality of the relationship by making inquiries of the parents, their neighbours and friends. It causes great bitterness on the part of the parents. This person thought it best to avoid such investigations.

(d) Should there be an unequal division of damages when one parent is the custodial parent?

One lawyer thought that if the child is living with both parents at the time of death, the damages should be divided equally, but if the child lives with only one of the parents, the custodial parent should receive two-thirds of the damage award. He would divide the damages equally among parents who have joint custody of the child. He would give the court the power to depart from the presumed division, but only if compelling and extraordinary circumstances are shown.

He thought this would reflect society's view that the custodial parent would suffer a greater blow over loss of the child.

We cannot support this position. The underlying message from such unequal divisions is that the non-custodial parent does not love the child as much as the custodial parent. This is untrue. It would be extremely offensive to many divorced parents who, while not having custody of the child, have a close and caring relationship with their child. We think that damages should be divided equally between the parents, even where one parent has custody of the child.

(5) Non-pecuniary damages for wrongful death of a spouse

Recommendations 7 and 8 of the report for discussion were received with approval by most commentators. These recommendations provided:

(1) The wrongdoer should be compelled to pay a spouse damages for grief and loss of the guidance, care and companionship of the deceased spouse.

(2) Where the spouses are living together at the time of death, damages should be awarded without evidence of grief or loss of guidance, care and companionship.

(3) Where the spouses are separated at the time of death, the surviving spouse should not recover damages for grief or loss of guidance, care and companionship of the deceased spouse.

(4) The *Fatal Accidents Act* should establish that in cases of wrongful death of a spouse, the amount of damages to be awarded to the

surviving spouse for grief and loss of guidance, care and companionship of the deceased spouse is $40,000.

Two lawyers thought the category of spouse who would be entitled to such damages should be expanded. One lawyer suggested that only divorce should end a spouse's claim for non-pecuniary damages. The other noted that some spouses living separate and apart should still be entitled to non-pecuniary damages. In his opinion, cause of separation and length of separation should be relevant factors.

The fact that spouses are living separate and apart signals a significant breakdown of the marital relationship. To award non-pecuniary damages to a spouse for the wrongful death of the other spouse after marital breakdown is undesirable. Certainly, in the majority of cases, the loss of guidance, care and companionship must differ between a separated couple and a couple that is living together at the time of death. Grief may flow from the death of a separated spouse, but will it be of the same intensity as grief that will flow in situations in which the spouses are living together? To enable a separated spouse to recover damages for grief and loss of guidance, care and companionship of the deceased spouse, the legislation would have to give a court the discretion to determine if grief was in fact experienced. This would create uncertainty and place the quality of the relationship on trial. We do not see the need for this.

The insurance industry commentators would like the statute to define "living separate". We do not think that this is necessary because the meaning of "living separate and apart" has been exhaustively considered in the matrimonial law area.

(6) Non-pecuniary damages for wrongful death of a cohabitant

While most commentators supported recovery of non-pecuniary damages by cohabitants, one lawyer strongly opposed such recovery. He was particularly concerned that our proposals would allow damages to be paid to a cohabitant of the same sex. We pointed out that the definition of "cohabitant" included only persons of the opposite sex. In contrast, others expressed strongly held views that there should be equal rights for same sex cohabitants and cohabitants of the opposite sex.

The draft legislation defines "cohabitant" as:

> . . . a person of the opposite sex to the deceased who lived with the deceased for the 3 year period immediately preceding the death of the deceased and was during that period held out by the deceased in the community in which they lived as his consort.

At page 49 of Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, we explain how we came to propose this definition. We said:

> We defer to the experience of the administrators of the Workers' Compensation Act in this area. We accordingly recommend that a term of years be retained to form part of the definition of common law spouse for the purposes of the Workers' Compensation Act. For reasons expressed in our Issues Paper No. 2, we feel it essential that the definition of common law spouse under the Fatal Accidents Act be consistent with that under the Workers' Compensation Act and we so recommend. In the further interests of consistency, we recommend that the definition of common law spouse for the purposes of both the Fatal Accidents Act and the Workers' Compensation Act correspond with that adopted in the Employment Pension Plans Act wherein a spouse is defined so as to include a person of the opposite sex who lived with that other person for the three year period immediately preceding the relevant time and was, during that period, held out by that other person in the community in which they lived as his consort.

Several lawyers disliked the use of the term "consort". They thought "consort" meant husband and wife, but they were not certain. One lawyer asked: If cohabitants live as husband and wife but tell everyone they are not married, does this mean they are not cohabitants as defined by the statute? Why is it necessary that they hold each other out as a consort? Another lawyer thought the 3 year period was too long. He suggested a one or two year period.

"Consort" has three definitions according to the Compact Edition of the Oxford English Dictionary, which are as follows:

1. a partner, companion, mate; a colleague in office or authority

2. a ship sailing in company with another, and

3. A partner in wedded or parental relations; a husband or wife, a spouse.

The first definition is the one used in the definition of "cohabitant". Nevertheless, "consort" is open to misinterpretation.

The proposed definition of "cohabitant" is one presently found in the *Employment Pensions Act* and is working well for the purposes of that Act. The need to have been "held out by the deceased in the community in which they lived as his consort" has been interpreted as requiring more than a transient relationship, but there is no need to be held out as husband or wife. For the sake of uniformity and because the definition has been proven as satisfactory in practice, we do not make any recommendations for change of this definition, although the term "consort" has a decidedly old-fashioned ring to it.

(7) Non-pecuniary damages for wrongful death of a parent

There was general support for the recommendation in the report for discussion that in the case of the wrongful death of a parent, $25,000 for grief and loss of the guidance, care and companionship of the parent should be awarded to each of the minor children of the deceased and to the unmarried children of the deceased who are 18 years of age or older and who have not reached their 26th birthday. There was more divergence of opinion about the recommendation that if there are three or more such children, a maximum of $50,000 should be awarded to be divided equally among such children.

The insurance industry commentators would like to see further restriction on the category of child who could recover such damages. They would restrict recovery to children residing with the parent at the time of death and to children financially dependant upon the deceased parent. We find this too restrictive because it excludes too many children who will suffer grief and the loss of the guidance, care and companionship of the deceased parent. It also adds an element of uncertainty not found with the age categories. Moreover, the category of child who can recover damages upon the death of a parent should be the same as the category of child whose death would give rise to a claim by the parent. The goal is to give compensation to parents and children at the time in their lives in which the parent-child relationship is likely to be the closest personal relationship of the child.

We think that one change should be made in the category of children who could claim such damages. The category should not include those children who are cohabitants, as defined in the proposed legislation. This would put married children and unmarried children who are cohabitants on an equal basis.

Several commentators thought that each child within the specified class should receive $25,000 and that the cap of $50,000 should be removed. The arguments made to support this position are:

- It is unfair to treat young children from a large family differently than young children from a smaller family.

- This differential treatment is contrary to section 15 of the Charter

- The $50,000 cap is unlikely to save much money in any case and has the undesired result of suggesting that the grief and loss suffered by young children from large families is somehow worth less than the grief and loss of young children from families in which there are only one or two children.

- Larger families do not necessarily have a better support group to deal with such a tragedy.

After further thought, we must agree that larger families do not necessarily have a better support group to deal with the tragedy of wrongful death of a parent. The question then becomes whether the $50,000 cap can be justified on the basis that it serves a reasonable limit on damages. Or, will the size of families in today's society by itself serve as a reasonable limit on damages of this type? Again, after further thought, we believe that there is no need for the $50,000 cap because the average family size will effectively impose such a limit. We, therefore, would alter our recommendations on this point. Our final recommendation is that each child within the specified age category should receive $25,000, irrespective of family size.

Most commentators found the $25,000 non-pecuniary damages for loss of a parent to be satisfactory. A few lawyers thought that $40,000 non-pecuniary damages should be awarded to a child for the wrongful death of his or her parent. The support for the $25,000 causes us to reaffirm this recommendation.

(8) Review of statutory amounts

In the report for discussion, we recommended that the Lieutenant Governor in Council review the statutory amounts at least once every 3 years. The Insurance Bureau of Canada and Allstate would like to see the sum reviewed every 5 years. This is acceptable to us. The purpose of the recommendation is to ensure that the Lieutenant Governor in Council review the statutory amounts periodically to take into account inflation or changing public opinion. The 5-year period will also reasonably serve this purpose. We so recommend.

(9) The effect of these proposals on automobile insurance premiums

An analysis of how our proposals will affect automobile insurance premiums is set out in detail at pages 124-31 of the report for discussion, and we refer interested parties to that report. Using estimates that assumed the maximum award of non-pecuniary damages for all age categories, we calculated that the premium increase per vehicle that would result from recovery of non-pecuniary damages under our proposals would be no higher that about $22 per vehicle per year.

The Insurance Bureau of Canada said:[31]

> With respect to costing, although we disagree with some of the statistical data used to develop your estimate of $22.53 as the average cost per vehicle of implementing revisions, the $22.53 appears reasonable. We feel you should have allowed a higher factor for insurer loss and operating expenses, but this would be offset by the fact that you did not include commercial vehicles in calculating the number of insured vehicles in the province.

We do not think that the changes we have adopted in this report affect our analysis of the effect of the proposals on automobile insurance premiums. When doing our analysis, we assumed that for the year 1989, the wrongful deaths of 364 people would trigger claims under an automobile insurance policy. We also assumed that within this group the deceased persons between the ages of 20 and 54 were married with two children who were minors, or unmarried and younger than 26 years of age. This assumption tends to overstate the effect of our

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[31] Letter received from the Insurance Bureau of Canada.

proposals and, therefore, removing the $50,000 cap on recovery of non-pecuniary damages for death of a parent should not affect the analysis. The fact is that two children families are very common. The situations in which the deceased person had no children will offset the situations in which the deceased person had more than two children.

The increased recovery of out-of-pocket expenditures will also result in an increase of automobile insurance premiums. We were unable to estimate what this increase might be because we did not have the necessary data. Yet, the largest out-of-pocket expenditure will be the funeral costs and this is already covered by the current level of automobile insurance premiums. As discussed earlier, we do not anticipate that every family will undergo grief counselling because only a small proportion of the families we interviewed sought such counselling. For these reasons, we do not anticipate a very significant increase as a result of the additional out-of-pocket expenditures that would be recoverable under the proposed reform.

We again stress that these calculations are done for the limited purpose of assessing the maximum impact and not for exact rating purposes. We also note that insurers will continue to be entitled to set-off Section B Benefits[32] paid to family members pursuing a wrongful death claim. The effect of this is not dealt with in our analysis but will reduce the actual premium increase that will result from the proposed reform.

C. UNDERLYING PHILOSOPHY

At this point, we wish to discuss in a more general manner the philosophy that underlies our recommendations. We think it is essential for the future success of reform in this area that it be understood exactly what the law can and cannot do in providing compensation for emotional injury resulting from the wrongful death of a parent, child or spouse.

Non-pecuniary damages in wrongful death actions will not buy the surviving family members happiness. At best it will make their lives somewhat more tolerable. Yet, it will serve the purpose of giving recognition to the seriousness of their loss. In personal injury matters, tort law gives damages

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[32] Section B of every automobile insurance contract provides for payment of accident benefits on a no fault basis. These benefits include certain death benefits that are described in detail in the report for discussion at 75-78.

commensurate with the severity of the injury. No award or an insignificant award for their grief and loss of guidance, care and companionship of the deceased is a signal to the surviving families that the law sees their loss as minor, trivial or non-existent. This further aggravates their loss.

We think the law should acknowledge the grief and loss of guidance, care and companionship suffered by the surviving family members, yet, allow them to deal with the tragedy without the intrusive inquiries that would flow from litigation. Grief over the loss of a close family member is an extremely difficult matter to deal with in any event. Litigation on such issues can only repeatedly focus the family member's thoughts on the events leading to the death, the funeral and the loss. This will impede the natural grieving process, which in itself is harmful. This will happen because of the nature of the litigation and even caring counsel on both sides of the law suit cannot prevent this. Close family members should not be exposed to examination or have to testify on the nature of their grief and the quality of the relationship they have lost.

There is a price to be paid for keeping caring families out of the litigation arena on issues of grief and loss of guidance, care and companionship. The price is the loss of discretion and flexibility. This is acceptable if the statutory regime still compensates the majority of people who would have received compensation under the discretionary system. We think that in most cases our proposals will give proper recognition to and compensation for grieving family members. We also recognize that in situations of wrongful death, money compensation can never be adequate.

There will be others that will grieve over the loss of the deceased, such as step-parents and siblings, who will not be compensated under these proposals. Yet, we cannot support a fully discretionary system that compensates all who can prove grief and loss of guidance, care and companionship. In our opinion, it is better to compensate those who, in the majority of cases, have the closest relationship with the deceased and keep caring families out of litigation arena on

such issues.[33] This is where we think the recovery of damages "is halted by the barrier of commercial sense and practical convenience".[34]

We found support for the recommended sums. Yet, society's expectations may change over time and such changes ought to be reflected in the legislation. The amount of the damages established by the statute must be continuously monitored by the government and kept in line with the expectations of Albertans. If this does not happen, the problem of adequate compensation for non-pecuniary damages in wrongful death actions will arise again in the future.

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[33] Nor do we think that it would be wise in include step-parents or siblings in our statutory scheme. The quality of the relationship between step-parents and stepchildren and the quality of relationship between siblings varies to such a degree that it is not possible to create a statutory scheme of compensation.

[34] See report for discussion at 60-61. This quotation comes from *Lambert* v. *Lewis*, [1980] 1 All E.R. 978 at 1006.

A. THE ESTATE'S CLAIM FOR LOSS OF WAGES OR LOST EARNING CAPACITY

(1) *Galand Estate and Galand* v. *Stewart*

In the report for discussion, we considered whether a child's estate could sue for loss of wages for the period after death.[35] The issue is whether that claim survives for the benefit of the child's estate. The issue is relevant to our discussion because, if the claim survives, it may put money into a child's estate which will go to surviving family members.

The applicable sections in the *Survival of Actions Act* are:

> 2. A cause of action vested in a person who dies after January 1, 1979 survives for the benefit of the estate.
>
> 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 the loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable.

On the basis of Justice Bielby's decision in *Galand and Galand Estate* v. *Stewart*, we concluded that the estate could not pursue such a claim. Justice Bielby held that a claim for future wages was not an "actual financial loss" and, therefore, did not survive for the benefit of the child's estate.[36]

On December 31, 1992, the Alberta Court of Appeal overturned this decision.[37] The majority of the Court held that "actual" as used in section 5 did not exclude future loss. It said that in common usage, "actual" is rarely used in

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[35] This claim is also referred to as loss of earning capacity. See: Jamie Cassels, "Damages for Lost Earning Capacity: Women and Children Last" 71 *Can. Bar Rev.* 445 at 447-48.

[36] See report for discussion at 53-55.

[37] *Galand and Galand Estate* v. *Stewart* (31 December 1992) Appeal #9103-0782-AC (Alta. C.A.).

the sense of "not future". The majority also rejected the argument that it is against public policy to allow an estate to seek such damages.

At pages 6 and 7 of the decision, Justice Cote discussed the conflicting policy arguments as follows:

> Many commentators have questioned the policy of handing money to persons who are not dependents because of the loss to the deceased. They say that that is a windfall to the beneficiaries of the estate, and is not compensation. The purpose of damages for torts is compensation, not punishment they add. When the cause of action for loss of expectation of life was discovered shortly after England passed survival of actions legislation in 1934, those criticisms arose promptly. Examples of these criticisms may be found in these authorities: [authorities omitted] . . . Eventually the criticisms of survival bore fruit in Canada and England. Hence the present s. 5 quoted above and its equivalents elsewhere. They bar survival of <u>non</u>-financial claims, such as loss of expectation of enjoyment of life.
>
> Some people meet those criticisms of survival of causes of action head on. They say that they are an unsound criticism of any kind of inheritance, for all inheritances are just as much windfalls. . . . That objection to all inheritances is the explicit basis of the Wright criticisms of survival, . . . And those criticisms of survival are an argument against any kind of survival of actions. Yet our legislation allows most causes of action to survive. In this case I do not find it necessary to resolve that clash between those opposite philosophies, particularly on a motion to strike out.
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> Instead, there is a simpler answer. One can easily imagine a situation in which the executor and beneficiary of the deceased is the only close kin of the deceased, and is much younger than the deceased. He is the natural and only beneficiary, though he is not a dependent and so cannot sue under the *Fatal Accidents Act*. The deceased may well not have spent all his earnings, but instead steadily saved the excess. That is true of many people. Therefore, the deceased's earnings steadily augmented his estate. In such a case, the premature death of the deceased clearly deprived the beneficiary of part of his inevitable

> inheritance, (though giving it to him earlier). There is a plain financial loss. This is no more a windfall to the beneficiary than would be the inheritance itself if the deceased instead lived out his full span of years. Needless to say, how precisely to calculate such damages has no relevance to the policy behind such survival of a cause of action, still less to striking out a pleading for want of a cause of action.

After considering the public policy arguments, he concluded (at page 8) as follows:

> Therefore, I cannot agree with the blanket rule suggested by the chambers judge or the defendants. Sometimes an estate can and should recover for tortious loss of earnings or earning capacity of the deceased. One may compare *Pickett v. Br. Rail Engl, supra*, where the plaintiff successfully sued for curtailed earnings from shortened life, and this was affirmed on appeal after his death. I interpret the words "actual financial loss" in s. 5 of the Act to cover at least some such cases, both as a matter of policy, and as a matter of English language. There is no reason to deny such legislation the usual fair, large and liberal interpretation. No canon of construction demands a narrow or picky interpretation of survival legislation.
>
> I do not say whether such claims are good in the case of the death of young children without a job or other source of income. And if they are, I do not say whether the damages should be nominal, substantial, arbitrary, or capped. Nor do I say that the policy clash briefly referred to above is irrelevant to any of those questions. Those questions may be decided another day. They will be decided much better in cases with real evidence.

He then distinguished the decisions interpreting similar legislation in other provinces in which the opposite result is reached.

Justice Cote also thought there was a separate ground for dismissing the application. A claim should not be struck out because it is contrary to existing law where there is a growing body of law that might cause a higher court to overrule older authorities.

In his dissenting opinion, Justice Harradence outlined the history of section 5 of the *Survival of Actions Act* and the authorities that have considered similar sections. He concluded that the section serves two purposes: (1) to avoid any duplication of damages that might arise if dependants could sue under the *Fatal Accidents Act* and the estate could sue for loss of earnings during the "lost years", and (2) to avoid benefitting persons succeeding to the estate who, not being qualified dependants, were deliberately excluded by Lord Campbell's Act and similar legislation. Having reached this conclusion, he would have affirmed Justice Bielby's decision and struck the paragraph in the statement of claim seeking damages for lost earning capacity for the period after death. However, his view did not prevail.

(2) History of section 5 of the *Survival of Actions Act*

In 1963, the Conference of Commissioners on Uniformity of Legislation in Canada recommended that all provinces adopt the *Uniform Survival of Action Act*. In 1979 Alberta did so by enacting the *Survival of Actions Act*, which, but for a few matters, was based on the Uniform Act.[38] Section 5 of the Alberta Act, which was interpreted in *Galand Estate*, has its origin in the Uniform Act.

The report on which the Uniform Act is based considered whether the Uniform Act should exclude an action for loss of wages after death. It said:[39]

> 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.

It is clear that the Commissioners thought that estates should not be able to pursue a claim for compensation for expected earnings after death. The decision of the Court of Appeal in *Galand Estate* has proven them wrong on this point.

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[38] In enacting this Act, the Legislature was adopting the recommendations made by this Institute in Report No. 24, *Survival of Actions and Fatal Accidents Act Amendment*. Except for a few matters, the Institute recommended that Alberta enact the *Uniform Survival of Actions Act*.

[39] See the 1961 Proceedings of the Commissioners at 110.

(3) The English experience

In *Gammell* v. *Wilson and others*,[40] the House of Lords held that a claim for wages that would have been earned in the period after death did survive for the benefit of the estate of the deceased. Nevertheless, they were quick to condemn the result that they had reached and called for legislative action. Their concern over the result arose for several reasons. First, there was the possibility that a wrongdoer would have to pay twice. This would happen only when the dependants who sued under the *Fatal Accidents Act* were different than the beneficiaries of the estate. Second, they disapproved that the parents, as beneficiaries of the estates, would receive much more than was recoverable under the *Fatal Accidents Act*. Third, they thought that estimating loss of wages for the lost years in a case in which the deceased was not middle-aged became too much of a guessing game.

In *Gammell*, the estate sued for loss of earnings of a 15-year old boy who had been working for a year. His parents also brought an action under the *Fatal Accidents Act* to recover the pecuniary loss they had suffered as a result of the death of the son. The court awarded £6,656 to the estate for the son's loss of earnings. The court valued the benefits that the parents would have received from the child had he lived at £2,000. From this, the court deducted what the parents had received from the child's estate (being the £6,656). The result was that the parents received nothing under the *Fatal Accidents Act*. The measure of pecuniary loss under the *Fatal Accidents Act* is what a claimant would have received had the child lived less the value of any benefit the claimant receives from the child's death.

In *Connolly* v. *Camden and Islington Area Health Authority*,[41] the estate of a small child sought damages for the loss of earnings for the period after death. The court found that there was insufficient evidence to establish a loss of wages claim.

The English Parliament acted on the House of Lords' request for legislative action made in *Gammell* by amending the English survival legislation to ensure

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40 [1981] 1 All E.R. 578 (H.L.).

41 [1981] 3 All E.R. 250 (Q.B.).

that an estate could not sue for damages for loss of earnings in respect of a period after the person's death.[42]

(4) What will be the Alberta experience?

It is too soon to know how Alberta courts will treat the estate's claim for loss of wages or earning capacity for the period after death.

The child's estate will argue that the court must assess the estate's claim for loss of wages or earning capacity for the period after death in the same manner as it assesses such a claim brought by a young child who, because of the injuries suffered, will never work during his or her lifetime. Such a problem was dealt with by the Supreme Court of Canada in *Arnold* v. *Teno*[43] where the Court had to assess the loss of income claim brought by a four and one-half year old girl who suffered severe brain injury. The court was unwilling to dismiss her claim for loss of wages merely because there was no evidence of work history or scholastic ability.

Those opposing the estate's claim will argue that there is no reliable basis for assessing the prospective loss of earnings of a young child and there is no need to do this where the family members have a cause of action under the *Fatal Accidents Act*.

(5) How does *Galand Estate and Galand* v. *Stewart* affect reform of the *Fatal Accidents Act*?

Notwithstanding this new development, we think the Alberta Legislature should act on our recommendations and amend the *Fatal Accidents Act* to allow certain close family members to recover non-pecuniary damages from the wrongdoer in wrongful death actions. We think the reform is needed and that our recommendations provide a fair solution to this most difficult of problems. The *Fatal Accidents Act* is the best place to deal with compensation of grieving parents. To allow a child's estate to recover damages for lost earning capacity for the period after death is only an indirect method of providing compensation to the parents.

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42 *The Administration of Justice Act, 1982*, U.K., 1982, c. 53, s. 4.

43 *Supra*, note 8.

One cannot but speculate that if the parents had a remedy under the *Fatal Accidents Act* that truly reflected the nature of the injury they suffer, that they would not have to seek redress through the estate. History shows that parents who have suffered the wrongful death of a child have for hundreds of years sought redress from the wrongdoer, no matter what the current state of the law has been at any particular time. Parents unsuccessfully went to the English Court of Appeal,[44] the Supreme Court of Canada[45] and the Supreme Court of the United States[46] on the issue of whether *Baker* v. *Bolton*[47] was correctly decided. That decision prevented parents from bringing an action for the loss of services of the child for the period after death. When it became clear that the courts were not going to change this decision, parents sought redress under the wrongful death legislation. In time, the courts decided that non-pecuniary damages would not be awarded under Canadian wrongful death statutes and it became apparent that few parents suffer provable pecuniary loss as a result of the death of the child. Then parents sought redress in personal injury law and recovery of damages for "nervous shock". Parents were successful in situations in which they witnessed the death of the child. Parents who had not witnessed the death and had no redress under the wrongful death legislation looked to the child's estate as a means of pursuing the wrongdoer. For a time, parents argued that the child's estate could seek damages for loss of expectation of life.[48] When this claim was abolished by statute, several parents argued that the child's estate

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44 *Osborne* v. *Gillett* (1873), 8 L.R. 88 (Exch.) and *Clark* v. *London General Omnibus Company, Limited* (1906), 2 K.B. 649 (C.A.). The same issue was litigated in *Admiralty Commissioners* v. *S.S. Amerika* (1917), but the matter was brought by an employer, not a parent.

45 *Monaghan* v. *Horn* (1882), 7 S.C.R. 409.

46 In the early cases, the Supreme Court of the United States followed *Baker* v. *Bolton* (1808), 1 **Camp.** 493, 179 E.R. 1033 (*Nisi Prius*). Yet, it reversed itself on this point in the area of marine law in its decision in *Moragne* v. *States Marine Lines, Inc.* (1970), 398 U.S. 375.

47 (1808), 1 **Camp.** 493, 179 E.R. 1033 (Nisi Prius).

48 Alberta was one of the last provinces to enact legislation that ensured that a claim for loss of expectation of life did not survive for the benefit of the estate.

could seek damages for loss of earnings or earning capacity for the period after death.[49]

The pressure to find remedies in other areas of the law would recede if the *Fatal Accidents Act* allowed the court to award damages to parents for the non-pecuniary loss they suffer as a result of the death of the child. It is time the law dealt fairly with this difficult topic.

Nonetheless, the development of the estate's claims for loss of wages or earning capacity for the period after death must be monitored. If the courts award substantial amounts for such claims, family members could, in the future sue for non-pecuniary damages under the *Fatal Accidents Act* and be beneficiaries of any loss of wages claim the estate is able to recover. If this possibility materializes the Legislature will have to consider whether this is desirable or not.

B. TIMING OF IMPLEMENTATION OF REFORM

The Insurance Bureau of Canada and Allstate were particularly concerned that the reform take place in such a manner as to promote stability of automobile insurance premiums, which are increasing at this time because of other problems in the insurance industry.[50] They want the Alberta Legislature to take this into account when deciding on the timing of reform.

It may be reasonable to coordinate the effect of the new provisions with short term premium increases caused for other reasons. Nonetheless, adequate compensation for grieving family members, especially in the case of the wrongful death of a child, has been a problem for the law since the early 1800s. This problem is long standing, causes trouble every day and should be rectified as soon as is practicable. The public wants a just solution and the law should provide one.

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49 *Galand Estate and Galand* v. *Stewart* is an example of such litigation. See also *Balkos Estate* v. *Cook* (1990), 75 O.R. (2d) 593 (Ont. C.A.) and *Graff* v. *Wellwood*, [1991] 5 W.W.R. 661 (Sask. C.A.).

50 For a discussion of these problems see Alberta Automobile Insurance Board, *A Study of Premium Stability in Compulsory Automobile Insurance* (1991).

CHAPTER 5 — FINAL RECOMMENDATIONS AND DRAFT LEGISLATION

A. FINAL RECOMMENDATIONS

In light of the comments made in respect of the report for discussion, we have decided to adopt in substance Recommendations 2, 3, 4, 5, 7, 8, and 9 made in the report for discussion, and make modifications to Recommendations 1, 6, 10 and 11 as discussed in Chapter 3. Our final recommendations are as follows:

RECOMMENDATION 1

Section 7 of the *Fatal Accidents Act* should be amended to read as follows:

7. Where an action has been brought under this Act, there may be included in the damages awarded a reasonable allowance for:

(a) expenses incurred for the care and well-being of the deceased person between the time of injury and death,

(b) travel expenses incurred in visiting the deceased between time of the injury and death,

(c) necessary expenses of the funeral and the disposal of the body of the deceased, including all things supplied and services rendered in connection therewith, and

(d) fees paid for grief counselling that were provided for the benefit of the wife, husband, parent, child, brother or sister of the person deceased

if those expenses were reasonably incurred by any of the persons by whom or for whose benefit the action is brought.

RECOMMENDATION 2

The *Fatal Accidents Act* should continue to allow parents to recover non-pecuniary damages from the wrongdoer whose wrongdoing caused the death of the parents' child. The nature and scope of such damages and method of quantification should be reconsidered.

RECOMMENDATION 3

The *Fatal Accidents Act* should empower the court to grant parents non-pecuniary damages for grief and loss of the guidance, care and companionship of the deceased child.

RECOMMENDATION 4

The *Fatal Accidents Act* should establish the amount of non-pecuniary damages for grief and loss of the guidance, care and companionship of the deceased child. The damages would be awarded without evidence of grief or loss of guidance, care and companionship.

RECOMMENDATION 5

When parents are entitled to non-pecuniary damages, the award should be $40,000 for the loss of each child.

RECOMMENDATION 6

Parents should be awarded non-pecuniary damages of $40,000 when:

(a) the deceased is a minor child, or

(b) the deceased is an unmarried child who

- **is 18 years of age or older, and**

- has not reached his or her 26th birthday, and
- at the time of death was not living with a cohabitant.

"Cohabitant" means a person of the opposite sex who lived with the deceased for the 3-year period immediately preceding the death of the deceased and was during that period held out by the deceased in the community in which they lived as the deceased's consort

RECOMMENDATION 7

(1) The wrongdoer should be compelled to pay a spouse damages for grief and loss of the guidance, care and companionship of the deceased spouse.

(2) Where the spouses are living together at the time of death, damages should be awarded without evidence of grief or loss of guidance, care and companionship.

(3) Where the spouses are separated at the time of death, the surviving spouse should not recover damages for grief or loss of guidance, care and companionship of the deceased spouse.

RECOMMENDATION 8

The *Fatal Accidents Act* should establish that in cases of wrongful death of a spouse, the amount of damages to be awarded to the surviving spouse for grief and loss of guidance, care and companionship of the deceased spouse is $40,000.

RECOMMENDATION 9

A cohabitant should be included within the list of specified relatives entitled to claim damages for grief and loss of guidance, care and companionship of the deceased person under the *Fatal Accidents Act.*

RECOMMENDATION 10

In the case of the wrongful death of a parent, $25,000 damages for grief and loss of the guidance, care and companionship of the parent should be awarded to:

- **each of the minor children of the deceased, and**
- **each of the unmarried children of the deceased who, at the date of the parent's death:**
  - **is 18 years of age or older, and**
  - **has not reached his or her 26th birthday, and**
  - **was not living with a cohabitant.**

The damages would be awarded without evidence of grief and loss of guidance, care and companionship.

RECOMMENDATION 11

The Lieutenant Governor in Council should review the statutory amounts of damages at least once every 5 years and change the amount by Order in Council when necessary.

B. PROPOSED LEGISLATION

These recommendations would result in revised sections 1, 7 and 8 of the *Fatal Accidents Act*. The amended sections could read as follows:

1 In this Act,

(c) "cohabitant" means a person of the opposite sex to the deceased who lived with the deceased for the 3 year period immediately preceding the death of the deceased and was during that period held out by the deceased in the community in which they lived as his or her consort.

7 Where an action has been brought under this Act, there may be included in the damages awarded a reasonable allowance for:

(a) expenses incurred for the care and well-being of the deceased person between time of injury and death,

(b) travel expenses incurred in visiting the deceased between time of the injury and death,

(c) necessary expenses of the funeral and the disposal of the body of the deceased, including all things supplied and services rendered in connection therewith, and

(d) fees paid for grief counselling that were provided for the benefit of the wife, husband, parent, child, brother or sister of the person deceased

if those expenses were reasonably incurred by any of the persons by whom or for whose benefit the action is brought.

8(1) In this section,

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

(b) "parent" means a mother or father;

(2) If an action is brought under this Act, the court shall, without reference to any other damages that may be awarded and without evidence of damage, give damages for grief and loss of the guidance, care and companionship of the deceased person of

(a) $40,000 to the spouse or cohabitant of the deceased person,

(b) $40,000 to the parent or parents of:

(i) the deceased minor child, or

(ii) the deceased unmarried child who, at the time of death, was 18 years of age or older and had not reached his or her 26th birthday and was not living with a cohabitant,

to be divided equally if the action is brought for the benefit of both parents, and

(c) $25,000 to each child of the deceased person who, at the time of the death of the deceased person, is:

(i) a minor, or

(ii) unmarried and 18 years of age or older and has not reached his or her 26th birthday and is not living with a cohabitant.

(3) Notwithstanding subsection (2), the court shall not award damages for grief and loss of guidance, care and companionship of the deceased person to the spouse if the spouse was living separate and apart from the deceased person at the time of death.

(4) Where at the time of death the deceased person was living separate and apart from the spouse and was living with a cohabitant, the court shall award damages under subsection (2)(a) to the cohabitant and not to the spouse.

(5) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of his estate.

(6) Subsection (2) applies only where the deceased person as the case may be, died on or after (effective date of amendment).

9 The Lieutenant Governor in Council shall review the levels of damages prescribed by subsection 8(2) at least once within each 5-year period following the proclamation of the subsection and may, by regulation, prescribe the damages to be awarded.

C.W. DALTON
A. FRUMAN
W.H. HURLBURT
D.P. JONES
J.C. LEVY
B.L. RAWLINS

J.L. FOSTER
A.D. HUNTER
H.J.L. IRWIN
F.A. LAUX
P.J.M. LOWN
A.C.L. SIMS

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CHAIRMAN

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DIRECTOR

May 1993