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

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PREFACE
WHAT THIS REPORT DOES AND WHY

Those who suffer loss from wrongful acts should be compensated by damages.
This Report deals with the legal consequences of tragedies. A wrongdoer's wrongful act has caused the death of another person. This is a tragedy for the victim who has died. It is a tragedy for the victim's family members who survive.

A wrongdoer should pay compensation, in the form of money damages, to a victim who is injured by the wrongdoer's wrongful act. The purpose of the compensation is to place the victim, insofar as money can do so, in as good a position as if the wrong had never been committed.

The compensation should go to those who suffer injuries. Money damages for personal injuries can compensate a living victim. Money damages can compensate surviving family members for their loss of economic support from a deceased victim. Money damages can also give recognition to the survivors' hurt and bereavement and for the loss of the deceased victim's companionship and care. Money damages cannot compensate a deceased victim or make a deceased victim's life easier or more comfortable.

The *Fatal Accidents Act* compensates survivors
The *Fatal Accidents Act* provides for the payment of compensation to surviving family members. It does so in two ways. First, it provides that a spouse, child, parent or sibling of the deceased victim can claim damages, that is, money compensation, from the wrongdoer who caused the victim's death. These money damages include compensation for the loss of all financial expectations which the survivors had from the deceased person. Second, the Act provides that a spouse, child or parent can claim from the wrongdoer, as of right, specified amounts of compensation for the loss of the guidance, companionship and care of the deceased person. The survivors do not have to prove any loss. The specified amounts are $40,000 to the spouse; $40,000 to the parents; and $25,000 to a child.

The *Fatal Accidents Act's* way is the best way to compensate survivors. It gives each of them a direct claim against a wrongdoer who has caused a victim's death. The survivors are not dependent on money going into the

victim's estate and, through the estate, to the survivors, a process which may lead to some or all of the survivors losing out. In ALRI's view, the *Fatal Accidents Act* does what is needed for survivors, or, if it does not, it should be changed so that it will. The *Fatal Accidents Act* approach is the right one: the best way to compensate survivors is to give them direct claims against wrongdoers.

Damages are assessed by "looking... into the crystal ball"

This Report is about claims for one kind of money compensation. If an injury shortens a victim's life expectancy, or if it wholly or partially destroys a victim's ability to earn, the courts will award damages to the victim for what is variously called loss of earning capacity, loss of ability to earn, or loss of a chance of future earnings. The award is necessarily a guess about two scenarios, one which is hypothetical and one which lies in the future. The hypothetical scenario is what the victim would have earned throughout their lifetime but for the injury. The future scenario is how much less the victim will earn in view of the injury. The process of deciding on the amount has been appropriately described by one judge as "looking...into the crystal ball."

Damages to an estate do not compensate the victim and are a less efficient way of compensating survivors

The question addressed by this Report is whether, if a victim of a wrongful act dies, the victim's estate should be able to make the same claim for damages for the loss of a chance of future earnings as the victim could have made in their lifetime. The recommendation which the Report makes to the Government, is that the victim's estate should not be able to make such a claim.

The basic reason for the Report's recommendation is that damages for the loss of a chance of future earnings cannot benefit a victim who is not alive to use the money, and they do not replace any property which the victim had. That means that the damages will simply flow through to the beneficiaries or creditors who benefit from the estate, who have not suffered any loss (except for surviving family members who will be compensated under the *Fatal Accidents Act*). The need to compensate a living victim and provide them with the money necessary to maintain an appropriate lifestyle justifies a crystal-ball award of damages to the living victim for the loss of a chance of future earnings. In ALRI's view, the law should not go to the same lengths to provide money for the benefit of whoever claims through the victim's estate.

If there were no better way to compensate surviving family members, the payment of damages to a victim's estate might be necessary. However, direct awards of damages under the *Fatal Accidents Act* are a better way to compensate them.

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PART I — SUMMARY OF REPORT

1. Reason for report

Under the common law, a person who is injured by a wrongful act can claim money damages from the wrongdoer as compensation for earnings which the injured person might have received in the future but will not have a chance of earning because of the injury. These damages may be substantial. The damages are variously said to be for loss of earning capacity, loss of the ability to earn, or loss of future earnings. In our view, what is lost is a chance of future earnings.

Section 2 of the *Survival of Actions Act*[1] provides that "a cause of action vested in a person survives for the benefit of his estate." Section 5, however, provides that "only those damages that resulted in actual financial loss to the deceased or his estate are recoverable."

When the *Survival of Actions Act* was enacted in 1978, it was thought that the loss of a chance of future earnings is not an "actual financial loss." It was, therefore, thought that s. 5 would prevent a deceased injured person's estate from claiming damages for the loss of future earnings, that is, it would prevent such a claim for damages from surviving the death of the injured person. However, in *Duncan Estate* v. *Baddeley*,[2] the Court of Appeal of Alberta held that a loss of earning capacity, or a loss of a chance of future earnings, is an "actual financial loss" under s. 5 and that the claim for damages therefore survives and can be brought by the deceased injured person's estate.

The question addressed by this report is what the policy of the law should be: should a claim for damages for the loss of a chance of future earnings survive the death of the injured person, or should it not? When the

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[1] R.S.A. 1980, c. S-30.

[2] *Duncan Estate* v. *Baddeley* (1997), 196 A.R. 161, 50 Alta. L.R. (3d) 202, 145 D.L.R. (4th) 708 (C.A.) [hereinafter *Duncan* v. *Baddeley*]. All references below are to the report in the Alberta Reports.

question is answered, the *Survival of Actions Act* should be amended so that the Act will clearly reflect its intention.

2. Reasons and conclusions

This report gives reasons for a number of conclusions about questions which are raised in the discussion.

First, the basis for awarding money damages for the loss of a chance of future earnings is and should be compensation for the injured person.

Second, money damages cannot compensate a deceased person, and a deceased person's loss of a chance of future earnings has not caused any loss to the deceased person's estate, so that, if the injured person has died, damages for the loss of a chance of future earnings cannot go to compensate anyone.

Third, justice does not require that damages for the loss of a chance of future earnings be awarded for any purpose other than compensation. More specifically, justice does not require that such damages should be awarded to punish the wrongdoer (or an employer, partner, car-owner or insurer of the wrongdoer who actually pays the damages); justice does not require that a deceased person's estate should be able to recover damages merely because the deceased person could have obtained a judgment if they had lived until the trial of a lawsuit claiming the damages; and justice does not require an award to be made to a deceased person's estate on the grounds that the chance of future earnings is a "working-man's" capital.

Fourth, justice to surviving family members does not require that an estate be able to claim damages for the deceased person's loss of a chance of future earnings. Under the *Fatal Accidents Act*, prescribed lists of surviving family members can recover damages for the loss of expected financial support or services from the deceased person and for grief and the loss of guidance, companionship and care. That is the direct way and the effective way to do justice to survivors.

Fifth, a chance of future earnings is not heritable property, and property doctrines do not require that a secondary right – a claim for damages for the

loss of a chance of future earnings – be heritable when the chance on which it is based is not heritable.

Sixth, in order to assess damages for the loss of a chance of future earnings a court must, in the words of Chief Justice Brian Dickson, "gaze...into the crystal ball;" engage in "speculation;" rely on actuarial evidence the reliability of which is "illusionary" in relation to a specific case; and engage in "arbitrary" determinations. Such a process is justifiable in order to ensure that a living plaintiff is properly compensated, but it is not justifiable when the damages cannot go to compensate a living person.

The report then states in general terms what, in ALRI's view, the law should be. A claim for damages should survive if the damages will compensate an injured person or the injured person's estate. The test is whether the loss for which damages are claimed is actual, in the sense of being factual or real as opposed to potential, and whether the loss is financial, in the sense of being or pertaining to a money or property loss which will affect the injured person's heritable property. The loss of a chance of future earnings may be characterized as "actual", but as a "financial loss," in ALRI's view, it is only potential. As we have said above, in ALRI's view, damages for the loss of a chance of future earnings awarded to the estate of the injured person will not be compensation to the injured person, and the injured person's heritable property is the same whether or not the injured person has suffered the loss.

For these reasons, the report concludes that s. 5 of the *Survival of Actions Act* should be amended to provide that a claim for damages for the loss of a chance of future earnings should not survive for the benefit of a deceased person's estate. The amendment should apply in all cases in which the cause of action arises after the amended section comes into force.

PART II — REPORT

A. History and Conduct of Project

In April 1997 the Court of Appeal delivered its judgment in *Duncan* v. *Baddeley*,[3] in which the Court held that a claim for damages for what it variously characterized in the judgments as loss of ability to earn,[4] loss of earning capacity[5] and loss of future earnings,[6] survives the death of the person who has suffered the loss. Shortly thereafter, ALRI decided to undertake a project to determine whether or not the claim should survive, though, for reasons given later in this report, we think that it should be characterized as a claim for damages for the loss of a chance of future earnings.

ALRI undertook the project for two reasons. The first was that *Duncan* v. *Baddeley* reversed the policy on which s. 5 of the *Survival of Actions Act* was based. That reversal suggested that the subject should be reconsidered to determine whether it is the original policy or the policy of *Duncan* v. *Baddeley* which should be the policy of the law. The second was that it now appears that s. 5 can be interpreted in at least two different ways and should be amended so that it will clearly reflect whichever policy is adopted.

In August 1997 ALRI issued Consultation Memorandum No. 4, *Should a Claim for Loss of a Chance of Future Earnings Survive Death?* In December 1997, after submissions raised the question of possible duplication between damages awarded to an estate for the loss of a chance of future earnings and damages awarded to surviving family members under the *Fatal Accidents Act*, ALRI circulated a supplementary memorandum entitled *Will Damages*

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[3] *Ibid.* The majority judgments were delivered by Kerans J.A. and by Côté J.A., the latter of whom concurred with Kerans J.A. and delivered supplementary reasons. Lieberman J.A. dissented, holding that the intention of the Legislature was to eliminate the claim of a victim who dies instantaneously, and that such a victim does not suffer an "actual financial loss."

[4] *Ibid.*, per Kerans J.A. at para. 7, referring to *Galand Estate* v. *Stewart* (1992), 135 A.R. 129, [1992] 6 Alta. L.R. (3d) 399, [1993] 4 W.W.R. 205, which foreshadowed *Duncan* v. *Baddeley*.

[5] *Ibid.*, per Côté J.A. at para. 62.

[6] *Ibid.*, per Kerans J.A. at para. 2. Para. 3 refers to "the future loss of earnings."

for a Lost Chance of Future Earnings Duplicate Damages for Loss of Dependency?

ALRI sent copies of Consultation Memorandum No. 4 to a number of lawyers who frequently engage in personal injury litigation on behalf of plaintiffs and to lawyers who more frequently act for defendants. We invited comment from the chairs of the sections of the Canadian Bar Association, Alberta Branch who might be expected to be interested in the topic. We also advised the legal profession generally of the existence and availability of Consultation Memorandum No. 4 through the Benchers' Advisory. We sent copies to some organizations of the insurance industry. We received 16 responses, which reflect a broad division of opinion as to whether or not the claim should survive. These responses canvassed the issues thoroughly and we think that, as a result, we are in a position to formulate recommendations.

B. Question Addressed By This Report

Under the common law, a person whose chance of future earnings is extinguished or reduced by the wrongful act of another has a claim for damages against that other person. The injured person may also have a claim for the damages against someone other than the person who committed the wrongful act, who may be innocent of wrongdoing but is legally responsible for the wrong, such as the employer or partner of a wrongdoer, the owner of a car which has caused damage, or the distributor of a faulty product manufactured by another.

As we have said above, when the *Survival of Actions Act* was enacted in 1978, it was thought that the effect of s. 5 was that a claim for damages for the loss of a chance of future earnings was not an "actual financial loss" as the term is used in s. 5 and therefore would not survive the death of the person who suffers the loss. It was the intention of the Conference of Commissioners on Uniformity of Law in Canada (now the Uniform Law Conference of Canada), which drafted the *Uniform Act* on which the *Survival of Actions Act* was based, that the claim would not survive. It was also the intention of this Institute (then the Institute of Law Research and Reform), which , in our 1977 Report 24, *Survival of Actions and Fatal Accidents Act Amendment*, recommended the adoption of most of the *Uniform Act*, that the claim would not survive. The Legislature accepted ALRI's recommendation

and enacted the *Survival of Actions Act* recommended by ALRI with some changes which are not relevant to the subject of this report.

However, in *Duncan* v. *Baddeley*, the Court of Appeal held that a loss of earning capacity was an "actual financial loss", so that the estate of the claimant could bring an action for damages for the loss. The Court based its decision on its interpretation of s. 5 of the *Survival of Actions Act*, but the members of the majority clearly thought that their decision reflects the appropriate legal policy.

This report is not about the interpretation of s. 5. Rather, it is about the policy which the law should adopt. The question which it addresses is therefore this: should a deceased person's estate be entitled to claim from a wrongdoer or other responsible person damages for the loss of the deceased person's chance of future earnings? That is, should a claim for damages for the loss of a chance of future earnings survive the death of the person who has suffered the loss? The discussion applies to intentional torts as well as to negligence.

This is a fairly narrow, though important, legal question. To understand its significance and the factors which should be taken into account in working out an answer to the question it is necessary to outline the legal background against which it arises.

C. History and Development of the Law of Survival Of Actions

1. Rule against survival of personal actions

The common law of England and Canada included a rule that a "personal action", including an action for damages in tort, did not survive the death of the person entitled to bring the action, so that the deceased person's estate could not sue a wrongdoer, or anyone responsible for the wrongdoer's acts, for a personal injury to the deceased person. The rule applied whether or not it was the wrongful act which caused the victim's death. The effect of the rule was to deny to beneficiaries and creditors of a victim's estate the benefit of claims for damages for personal injuries suffered by the victim.

2. Survival legislation

a. First round of survival legislation

The rule against the survival of personal actions was perceived as unjust. In 1886, Ontario introduced legislation to reverse it.[7] The Ontario section was widely copied in Canadian provincial and territorial legislation, including s. 11 of the Ordinances of the Northwest Territories 1903 (2nd session) which became part of the law of Alberta. Section 11 was continued in Alberta's Trustee Act[8] and later in the Administration of Estates Act.[9] Section 51 of the latter Act was to the same legal effect as the 1886 Ontario section. Section 51 read as follows:

> 51. (1) The legal representative of the estate of a deceased person may maintain an action for any tort or injury to the person or to the real or personal estate of the deceased except in cases of defamation, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do.
>
> (2) The damages when recovered form part of the personal estate of the deceased.

It will be seen that the section did not create a cause of action or head of damages for wrongfully causing death.[10] No such cause of action or head of damages existed before the section was enacted. The effect of the section was to provide for the survival of any claims which existed at the death of a deceased person and to give the deceased's estate any remedies which the deceased could have claimed if living. Section 51 and its counterparts were, however, very significant provisions, covering, as they did, all tort claims except defamation claims.

For a long time it was not realized in Canada that the survival section caused the survival of a number of claims for damages for non-pecuniary losses which could be asserted by living plaintiffs. These included claims for the loss of expectation of life, loss of amenities, and pain and suffering.

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[7] *Statute Amendment Act*, S.O. 1886, c.16, s.23, which substituted a new s. 8 in *The Revised Statute Respecting Trustees and Executors and the Administration of Estates.*

[8] R.S.A. 1922, c.220, s.28.

[9] R.S.A. 1970, c.1.

[10] In *England* v. *Lamb* (1918) 42 O.L.R. 60, it was argued that the Ontario section had created a right of action for causing death, but the argument failed.

In 1934, England adopted survival legislation similar to the Canadian provisions.[11] It was soon realized there that an action could be brought on behalf of an estate for the loss of the deceased person's expectation of life,[12] though the English courts awarded only moderate conventional amounts of damages. The English example was soon followed in Canada, but Canadian courts made larger awards. In *Crosby* v. *O'Reilly*,[13] the Supreme Court of Canada upheld an award of $10,000 for loss of expectation of life which the Alberta Appellate Division had substituted for a jury award of $90,000. The Supreme Court observed that, while the Appellate Division had not been right in saying that $10,000 was the upper limit, a trial judge should instruct a jury in light of the circumstances, "that a figure beyond a particular sum, which may be less than $10,000, may be regarded as excessive." The assessment of damages for loss of expectation of life involved an assessment of the degree of happiness the deceased person would have been likely to experience.

Claims under the survival section were also made by estates for deceased persons' loss of "amenities", that is, the loss of capacity to enjoy life because of physical injury. Claims for loss of amenities for periods before death survived victims' deaths under the survival legislation. In *Crosby* v. *O'Reilly*,[14] however, the Supreme Court of Canada held that the assertion of a claim for loss of amenities for a period after death was a "duplication of the recognized claim for shortened expectation of life, even if it be the case that in a living person situation loss of the amenities of life may call for a larger award than would be given for loss of expectation of life alone." This suggests that the claim for damages for loss of amenities for the period after death survived under the survival legislation but could not be asserted along with a claim for damages for loss of expectation of life.

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[11] *Law Reform (Miscellaneous Provisions) Act*, 24 & 25 Geo. 5, c. 41.

[12] See, e.g., *Flint* v. *Lovell*, [1935] 1 K.B. 354 (C.A.), *Rose* v. *Ford*, [1937] A.C. 826 (H.L.), *Benham* v. *Gambling*, [1941] A.C. 157 (H.L.), *Yorkshire Electricity Board* v. *Naylor*, [1968] A.C. 529 (H.L.).

[13] (1974), [1975] 2 S.C.R. 381, [1974] 6 W.W.R. 475.

[14] *Ibid.*

b. The Uniform Survival of Actions Act

By the early 1960s, provincial legislation, according to the Conference of Commissioners on Uniformity of Legislation in Canada (now the Uniform Law Conference of Canada), showed "a considerable variation in the causes of action that are allowed to survive for the benefit of and against estates."[15] In 1963, the Conference adopted a Uniform *Survival of Actions Act* and recommended its enactment by the provinces.[16] The Uniform Act is important to the present discussion because the present Alberta *Survival of Actions Act* is based on it.

The Uniform Act provides that, with a few exceptions, all causes of action "vested in a person" survive the death of the person. However, it goes on to say that "only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable", and it specifically excludes from recovery "punitive or exemplary damages or damages for loss of expectation of life, pain and suffering or physical disfigurement, or for the loss of amenities".

At the time of the adoption of the Uniform Act, living plaintiffs were able to assert claims for loss of earnings or earning capacity or ability. The Uniform Act does not refer specifically to such claims. The Alberta Commissioners, whose reports to the Conference of Commissioners resulted in the adoption of the Uniform Act said in their 1961 report:[17]

> 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.

That is, claims for damages for the loss of "expected earnings subsequent to death", are not specifically excluded by the Uniform Act because the Commissioners thought that they were not included in its general terms.

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[15] *Proceedings of the Forty-Third Annual Meeting of the Uniform Law Conference of Canada* (Regina: ULCC, 1961) Appendix L at 108.

[16] *Proceedings of the Forty-Fifth Annual Meeting of the Uniform Law Conference of Canada* (Edmonton: ULCC, 1963) Appendix Q at 136-38.

[17] *Supra* note 15 at 110.

c. The Alberta Survival of Actions Act

In 1977, this Institute (then known as the Institute of Law Research and Reform) recommended that Alberta adopt the Uniform *Survival of Actions Act*.[18] The Institute's report did not make any specific reference to claims for damages for loss of earnings or earning capacity, but it was the Institute's view at the time that the loss of earnings or earning capacity was not included in the term "actual pecuniary loss" and that a claim for damages for such a loss would therefore be excluded from the claims that would survive the death of a claimant.

In 1978, the Legislature enacted the *Survival of Actions Act*.[19] Secs. 2 and 5 of the Act are as follows:

> 2 A cause of action vested in a person who dies after January 1, 1979 survives for the benefit of his estate.[20]
>
> 5 If a cause of action survives under section 2, only those damages that resulted in actual financial loss to the deceased or his estate are recoverable and, without restricting the generality of the foregoing, punitive or exemplary damages or damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable.

It will be seen that:

(1) Under s. 2, all causes of action survive the death of the persons in whom they are "vested." The term "vested" is not defined but presumably includes every cause of action which a deceased person could have enforced at the time of their death.

(2) However, under s. 5, the estate of a deceased person cannot recover damages under a surviving vested cause of action unless "the damages" resulted[21] in "actual financial loss."[22]

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[18] See Institute of Law Research and Reform, Report 24: *Survival of Actions and Fatal Accidents Amendment Act* (Edmonton: ILRR, April 1977).

[19] S.A. 1978, c.35, now R.S.A. 1980, c. S-30.

[20] The Uniform Act would have excluded from survival causes of action in adultery, seduction and inducing one spouse to leave another. The Alberta *Act* does not exclude these causes of action.

[21] "Damages" do not result in loss. Rather, they are compensation for loss. The wording of the section is therefore not entirely apt. It is, however, clear that what the section means is

(continued...)

These are the provisions which were interpreted in *Duncan* v. *Baddeley*.[23]

d. Other jurisdictions[24]

The Alberta, New Brunswick, PEI, and Yukon survival statutes restrict the damages recoverable by estates to actual pecuniary or financial loss and make no specific reference to damages for the loss of a chance of earnings; the interpretation of Alberta's s. 5 in *Duncan* v. *Baddeley* is therefore relevant to all of those jurisdictions. The Nova Scotia section permits recovery only of "damages that have resulted in actual pecuniary loss to the estate." [25]The Newfoundland survival statute restricts recoverable damages to "actual monetary loss to the estate", but provides that the damages recoverable are to be calculated in the same manner as if the deceased person were living and had brought the action. The British Columbia and Saskatchewan survival statutes specifically exclude damages based on future earnings. The Manitoba, Northwest Territories and Ontario survival statutes provide for survival of actions in general terms with no specific restriction to actual financial loss and no specific exception for damages for loss of a chance of future earnings; however, the Ontario Court of Appeal has held[26] that a claim for damages for "loss of future earnings or loss of earning capacity" is a claim for "damages...for the death" of the deceased person which is precluded by s. 38(1) of the *Ontario Trustee Act.*

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[21] (...continued)
that damages cannot be recovered for a loss which is not an "actual financial loss."

[22] Section 5 substituted "financial" for the word "pecuniary" which was used in the Uniform Act. The substitution did not change the meaning of the section.

[23] Section 6, which provides in effect that a surviving claim is to be calculated without reference to a gain or loss to the estate, was also interpreted by the Court of Appeal. No issue arises from the Court's decision that s. 6 does not apply to a claim for damages for the loss of a chance of future earnings or earning capacity. The reason the Court gave for that decision is that the loss is a loss to the deceased person and is not a special claim by the estate.

[24] The survival statutes referred to in this paragraph are as follows: *Survival of Actions Act,* R.S.A. 1980, c. S-30; *Estate Administration Act,* R.S.B.C. 1996, c.122, s. 59(2); *The Trustee Act.*, R.S.M. 1987, c. T-160, s.53(1); *Survival of Actions Act,* R.S.N.B. 1973, c.S-18, ss.5(1), 5(2); *Survival of Actions* Act, R.S.N 1990, c. S-32, s.4, s.11(g); *Survival of Actions Act,* R.S.N.S. 1989, c. 453, s.4; *Trustee Act,* R.S.N.W.T. 1988, c. T-8, ss.31-33; *Trustee Act,* R.S.O. 1990, c.T.23, s.38(1); *Survival of Actions Act,* R.S.P.E.I. 1988, c.S-11, ss.5(1), 5(2); *Survival of Actions Act. S.S.1990-1991 c. S-66.1, s.6. Survival of Actions Act,* R.S.Y. 1986 c. 166, s.5.

[25] See *infra* note 65.

[26] *Balkos* v. *Cook* (1991) 75 O.R. 593,597, per Catzman J.A. giving the judgment of the court.

The United Kingdom survival statutes applicable to Scotland and England exclude damages in relation to future earnings.[27]

D. History and Development of Claims of Survivors Under the *Fatal Accidents Act*[28]

1. Common law

The common law had another rule about the consequences of death. It was that one person could not recover damages from another person for causing the death of a third. This rule meant that a dependant or other person who was likely, but for a deceased person's death, to receive financial benefits from the deceased person, could not recover damages from a wrongdoer who caused the deceased person's death. The rule also prevented dependants or family members from recovering damages for bereavement and any loss of non-pecuniary benefits which they might suffer by reason of a victim's death. This rule, in combination with the rule against the survival of personal actions, prevented dependants and family members from recovering damages resulting from a deceased person's death either directly, or indirectly through the deceased person's estate, so that they had no recourse at all for the wrongful death of the deceased.

2. The "dependency" claim under the *Fatal Accidents Acts*

The rule that one person could not recover damages from another for the death of a third was partly revoked long before survival legislation was enacted. The instruments of partial revocation were the *Fatal Accidents Act* 1846 (U.K.) and the Canadian provincial and territorial legislation which copied it or followed the same pattern. Alberta inherited the legislation from the Northwest Territories, and it is now included in the *Fatal Accidents Act* RSA 1980 c. F-5.

Sections 2 and 3 of the Alberta *Fatal Accidents Act* provide, in effect, that specified close family members of a person whose death has been caused by a wrongful act can recover damages from the wrongdoer or other responsible person, though only if the deceased person could themself have

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[27] *Damages (Scotland) Act*, 1976, 1976 S.U.K., c 13, s. 2; *Administration of Justice Act*, 1982, 1982 S.U.K., c. 53, s. 4.

[28] The history and interpretation of the *Fatal Accidents Act* is canvassed much more thoroughly in ALRI's Report for Discussion No. 12, *Non-Pecuniary Damages in Wrongful Death Actions – A Review of Section 8 of the* Fatal Accidents Act (Edmonton: ALRI, 1992)

recovered damages, and subject to deduction for the deceased person's contributory negligence. A claim for such damages is commonly referred to as a "dependency" claim, though it is not necessary to show actual dependency.

The damages recoverable under the "dependency" claim under ss. 2 and 3 are "those damages that the court considers appropriate to the injury resulting from the death." The damages that the court considers appropriate generally relate to the financial contributions and services that the listed family members could reasonably have expected to receive from the deceased person but for the wrongfully-caused death.[29]

The family members who can now claim damages under the Act are children, husbands and wives, 3-year heterosexual cohabitants held out as consorts, parents (including step-parents) and grandparents, brothers and sisters.

3. Claims for grief and loss of guidance, care and companionship

In our 1977 report, *Survival of Actions and Fatal Accidents Act Amendment*, this Institute recommended specifically that claims for damages for loss of expectation of life be excluded from surviving the death of the claimant. The Institute recognized, however, that these damages were often the only source of what might be perceived as compensation for, or as recognition of, the loss occasioned to the immediate family by, the wrongful death of a deceased person. This was particularly likely to be true in the case of the death of a child who had not amassed an estate and was not a source of support to the parents for the loss of which they could claim compensatory damages. The Institute therefore recommended, and the Legislature accepted the recommendation,[30] that an award of damages for bereavement be made available to members of a deceased person's immediate family on the basis of the family relationship without proof of loss. It recommended that the total amount awarded be in specific amounts which were thought to reflect the

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[29] In *Hu* v. *Wang* (1997) 197 A.R. 386, 47 Alta L.R(3d) 77, the Alberta Queen's Bench held that the damages under the *Fatal Accidents Act* could include damages for the loss of a chance to emigrate to Canada, the loss having been caused by the death of a deceased person who was the son of one plaintiff and the father or another. It was the economic aspect of the loss, however, which appears to have been the basis of the decision.

[30] *Survival of Actions Act,* S.A. 1978, c.35, s. 11, amending the *Fatal Accidents Act*, *inter alia*, by adding s. 9, which later became s. 8 of the *Fatal Accidents Act* RSA 1980 c. F-5.

amounts that had previously been awarded to estates for loss of expectation of life.

The amounts of damages for bereavement prescribed by the 1977 Act were considered too low. In 1994, following a further report of ALRI,[31] the *Fatal Accidents Act* was further amended to provide for more substantial compensation for what s. 8 of the Act now characterizes as "grief and loss of guidance, care and companionship of the deceased person."[32] Under s. 8 as it now stands, where death is caused by wrongful conduct $40,000 is payable to the spouse of the deceased person (unless separated), or to a 3-year heterosexual cohabitant of the deceased person who was held out as the deceased person's consort; $40,000 is payable to the parents of the deceased person if the deceased is a minor child or, being between 18 and 26 years of age, was not living with a cohabitant; and $25,000 is payable to a child of the deceased person who is a minor or, being under the age of 26, was not living with a cohabitant. Section 8(2) of the Act requires the court to award these sums "without reference to any other damages that may be awarded and without evidence of damage."

4. Relationship between estate claims and survivor claims

The "dependency" claims of surviving family members depend on, among other things, the expected earnings of the deceased person. So do estate claims for the loss of a chance of future earnings. There is therefore a possibility that, if both claims are allowed by law, a wrongdoer or other responsible person may be compelled to pay damages to the deceased person's estate for the loss of expected earnings of the person and may also be compelled to pay damages to the dependants for the loss by them of the benefit of all or part of the same expected earnings. The courts have traditionally dealt with this possibility by requiring persons who assert "dependency" claims under the *Fatal Accidents Act* to bring into account sums

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[31] Report 66, *Non-Pecuniary Damages in Wrongful Death Actions – A Review of Section 8 of the Fatal Accidents Act*, ALRI, 1993.

[32] S.A. 1994 c. 16 s. 5.

received from the deceased person's estate by reason of the wrongful act.[33] We will discuss this subject more completely below.[34]

E. Effect of the Present Law Relating to Death Wrongfully Caused

The relevant present law may be summarized as follows:

1. A deceased person's estate cannot recover damages from a wrongdoer for wrongfully causing the person's death.

2. A deceased person's estate can sue on any cause of action "vested" in the deceased person.

3. In an action on any such cause of action, however, a deceased person's estate cannot recover damages except for "actual financial loss" to the deceased or to the estate, and specifically cannot recover damages for, among other things, loss of expectation of life or loss of amenities.

4. If *Duncan* v. *Baddeley* is rightly decided, a claim for damages for the loss of a chance of future earnings is a claim for damages for "actual financial loss", so that a deceased person's estate can claim such damages; that is, the claim survives the death of the deceased person.

5. A child, spouse, 3-year heterosexual cohabitant held out as a consort, parent, step-parent, grandparent, brother or sister of a deceased person is entitled to claim damages from a wrongdoer who has caused the death of the deceased person, based on the claimant's reasonable expectations of future financial contributions or services from the deceased person. These are referred to as "dependency" claims but do not depend on actual dependency.

6. The husband or wife of a deceased person, or a 3-year heterosexual cohabitant who has been held out as the deceased person's consort, is entitled, without evidence of loss, to claim fixed statutory amounts of

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[33] In the recent case of *Brooks and Brooks Estate* v. *Stefura* [1998] A.J. 731, online: QL (AJ) (Q.B.).

[34] See the discussion under heading J.6. Unless something else is done, if damages for the loss of a chance of future earnings can be claimed by the estate of the injured person, the damages will in some cases duplicate dependency damages under the *Fatal Accidents Act*.

damages from a person who wrongfully caused the death of the deceased person. So is a child or parent if the surviving or deceased child was a minor or, being under 26 years of age, was not living with a cohabitant. The damages are for grief and the loss of guidance, care and companionship.

7. "Dependency" claims are based in part on the deceased person's chance of future earnings, so that if an estate can claim damages for the loss of a chance of future earnings, there will be an overlap and the wrongdoer may have to pay twice for the same element of loss. Where the claimants under the *Fatal Accidents Act* and the beneficiaries under the estate are the same, which is the most common case, the overlap is resolved, at least in part, by setting off against a "dependency" claim benefits received from the estate by the survivor by reason of the wrongful act. Where the estate goes to creditors or other beneficiaries, there can be duplication of damages.

F. Nature and Amount of Claim For Loss of Chance of Future Earnings

1. Nature of the claim

a. Characterization of the claim by the jurisprudence

In cases of personal injury caused by wrongful conduct, the courts award damages to a plaintiff against the wrongdoer or other responsible person for what is variously characterized as loss of "earning capacity", loss of "ability to earn" or "loss of future earnings." The courts have referred to the loss, however it is characterized, as the loss of a present capital asset.[35] The value of the asset, is, however, based on the present value of the earnings which the plaintiff, before the injury, could reasonably have expected to receive during the time of the plaintiff's life expectancy as it stood at that time. If the injury has resulted in the reduction of the plaintiff's life expectancy, the potential earnings which the courts will value include the earnings which the plaintiff could reasonably be expected to have received during the "lost years" as well as during the years of the plaintiff's life expectancy as it stands at the time of the trial. The courts make deductions from the value of the lost earnings to cover various contingencies. The damages awarded will be the present value

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[35] See *R.* v. *Jennings* [1966] S.C.R. 532 at 546, 57 D.L.R. (2d) 644. per Judson J. Judson J. was speaking only for himself. See. also *Andrews* v. *Grand & Toy* [1978] 2 S.C.R. 229 at 257,83 D.L.R. (3d) 452 [hereinafter cited to S.C.R.], per Dickson CJ, speaking for the court. See also per Kerans J.A. in *Duncan* v. *Baddeley, supra* note 2 at para. 10.

of that portion of the earning capacity, ability to earn, or future earnings, that has been lost, less the deductions for contingencies.

The question whether or not a living plaintiff whose life expectancy has been reduced by another person's wrongful act should be awarded damages for the loss of a chance of earnings during the "lost years" is outside the scope of this report. The question addressed by this report is whether, accepting that such damages will be awarded for the compensation of a living plaintiff, the claim should survive the claimant's death for the benefit of the claimant's estate.

b. Characterization of the claim as loss of "earning capacity" or as loss of a "chance"

The term "loss of earning capacity" has received repeated judicial recognition at all levels of courts. We do not think, however, that it reflects the reality of the situation. While the characterization of a loss may not dictate the policy of the law in relation to that loss, we think that, in the interests of proper analysis, care should be taken to recognize what is involved.

To take an example at one extreme, we do not think that a newborn infant, however great the potential of any human being for maturing into an income-earning individual may be, can reasonably be said to have a present earning capacity, capability, faculty or power. At the other extreme, even a middle-aged tenured university professor, while they may have a strong probability of continued earnings, at least over the near term, depends for those earnings not only upon their inbuilt capabilities but also upon their continuing health and the employment environment in which they find themself. The use of the term "earning capacity" suggests that a capability of earning money is a quality which is inbuilt into every individual, including both the newborn infant and the university professor, regardless of the circumstances in which the individual may find themself, a suggestion which we do not think is justified. The same is true of the term "ability to earn."

Sometimes the loss or damage is characterized as "loss of future earnings." Use of this term suggests that, at the time of the wrong done to the plaintiff, future earnings existed in ascertainable amounts, or that their future occurrence was inevitable, but this is not so: there is no way of knowing whether and how much a person will earn in the future or would have earned but for an injury. There is at most an interaction between an

individual's qualities and their environment – continued health and the availability of jobs, for example – that may or may not make a person's services or entrepreneurial qualities of value at a given future time. We think that the three terms – "loss of future earnings", "loss of earning capacity" and "ability to earn" – are at best imprecise and are likely to mislead.

In *Duncan* v. *Baddeley*, Kerans J.A. said this:[36]

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

We agree with this statement. We agree that the claim should be assessed as a claim for the loss of a chance. That is because we think that the claim is a claim for loss of a chance. We think that the best characterization of what an individual has in relation to future earnings is a "chance" – a possibility or probability of something happening: as distinct from a certainty[37] – that the earnings will be received. That is, the individual will receive earnings in the future if they live; if they continue to be in sufficiently good health; if they have or will acquire qualities that will enable them to earn money by making things, by rendering services, or by engaging in entrepreneurial activity; and if they choose to work or otherwise turn those qualities to account. This is a possibility in the case of the infant. It is a probability in the case of the university professor. But in both cases it is a possibility or probability – that is, a chance – that certain events will occur.

This characterization – "a chance of future earnings" – seems to us to be an accurate description of what a person has. Despite the different terminology that has been used, "loss of a chance of future earnings" seems to us to be an accurate description of what the courts have been valuing. The assessment always comes down to what the living plaintiff or deceased person, after allowing for the vicissitudes of life, might have been expected to earn but for the wrongful act that deprived them of that chance. However, we will use the term "earning capacity" when describing the existing law and as an alternative in discussing legal policy. The difference in terminology will not usually lead to a differences in conclusions, but we think it desirable to keep in mind what is the true subject of discussion.

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[36] *Supra* note 2 at para. 4.

[37] *The Oxford English Dictionary*, 2d ed., *s.v.* "chance."

c. Characterization of the loss as a present loss

The courts characterize the loss of earning capacity as a present loss. However, we think that the actual financial loss will be experienced only in the future, when the injured or deceased person does not receive earnings which they would have received but for the injury or death. The assessment of damages measures only what would have fallen in in the future but for the wrongdoing; determining the present value of future earnings merely recognizes that money paid today is worth more than money paid tomorrow.

In *Duncan* v. *Baddeley*,[38] Kerans J.A. drew an analogy between a loss of earning capacity and the loss of future rentals in respect of rental property destroyed by a tortfeasor. We do not think that the analogy is precise. The property of an owner of rental property includes an asset which is realizable in the present and which will become part of the owner's estate if the owner dies. The loss of the rental property is therefore an immediate loss which is experienced in the present. On the other hand, an individual who has earning capacity or a chance of future earnings does not have an asset which is realizable in the present, nor do they have an asset which will become part of their estate if they die. The effect of the loss can be experienced only in the future.

It is true that there is a sense in which the characterization of the loss as a present loss is accurate: an individual does have a prospect or chance of earnings in the future, and death or an incapacitating injury wholly or partially deprives the individual of that prospect or chance in the present. That is the basis of the living plaintiff's claim for loss of earning capacity. However, the characteristics of the asset as outlined in the preceding paragraph are, we think, material to the discussion.

2. Substantial damages are awarded for loss of earning capacity

Awards of damages for lost earning capacity may be substantial. In the 1978 trilogy of Supreme Court decisions, for example, the damages were fixed at $70,000 for a 23-year old apprentice CNR carman;[39] $61,000 for an 18-year

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[38] *Supra* note 2 at para. 7.

[39] *Andrews, supra* note 35.

old boy who had been a high school student at the time of the accident;[40] and $54,000 for a 4 1/2-year old girl.[41] More recently, to take some other examples:

1. In *Toneguzzo-Norvell* v *Burnaby Hospital*[42] the Supreme Court of Canada confirmed the trial judge's assessment of $292,000 in damages for the loss of the earning capacity of a newborn baby who sustained birth injuries, but applied to it a 50% allowance for living expenses, presumably resulting in an award of $146,000.

2. In *Brown et al.* v. *University of Alberta Hospital et al.*[43], Marceau J. of the Alberta Queen's Bench assessed the damages of a 3-month old baby for loss of earning capacity at $196,000.

3. In *Brooks and Brooks Estate* v. *Stefura*,[44] Belzil J. awarded $171,000, subject to set off of *Fatal Accidents Act* dependency claims, in the case of a 37 year old who had been earning $33,000 per year.

The size of awards does not have anything to do with the legal principles involved other than those of the assessment of damages. These amounts do demonstrate, however, that the discussion involves significant legal and economic interests.

G. Should an Estate Be Able to Recover Damages for the Deceased Person's Loss of a Chance of Future Earnings?

The question whether or not a claim for damages for a loss of a chance of future earnings – or for a loss of earning capacity – should survive the claimant's death is controversial. Forceful arguments can be made for saying that the claim should survive. Forceful arguments can be made for saying that it should not.

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[40] *Thornton* v. *Trustees of School District No. 57* (Prince George), [1978] 2 S.C.R. 267, 83 DLR (3rd) 480.

[41] *Arnold* v. *Teno* [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

[42] [1994] 1 S.C.R. 114., 110 D.L.R. (4th) 289.

[43] (1997) 197 AR 237 (Q.B.)

[44] *Supra* note 33.

We think that the discussion should start by addressing a number of basic questions. What is the purpose – or, what are the purposes – of tort damages? Why does the law confer a claim for damages for the loss of a chance of future earnings on a living plaintiff? Do those reasons apply with equal force to conferring the claim on the estate of the person who suffered the injury? Does the doctrine of heritability of property and rights mandate the survival of such a claim? Is the survival of the claim necessary in order to avoid arbitrariness in the law? Is it necessary in order to do justice? For convenience and readability we will deal with these questions under headings which announce our conclusions. After dealing with the questions, we will put forward a Conclusion and Summation on the principal question.

1. Damages for the loss of a chance of future earnings are and should be compensatory

a. The general rule

Tort damages, in our view, are compensation to a victim for the consequences of wrongdoing.[45] We think that that is what the law of tort damages is. It is also what we think the law of tort damages should be. However, in view of *Duncan* v. *Baddeley* we think it necessary to discuss both the existing law and the appropriate policy of the law at some length.

In *Duncan* v. *Baddeley*,[46] Kerans J.A. took issue with the proposition that tort damages are compensatory:

> **[14]** ...those who argue on the basis that tort law is only about compensation must...answer the challenge that some aspects of tort law (e.g. punitive damages) are emphatically about something other than compensation...[47]
>
> **[15]** Arguments based on the notion of compensation assume that the gods have decided that compensation is the talisman for tort recovery. That is a social-policy choice open to the legislators, but it has never been the law. Other values also underpin the law, as explained by Professor Klar in his work **Tort Law** (Carswell) from p.10. And there are other social-policy choices available to the legislature, like the notion of rational maximization of low-risk costs as suggested by the economic theory of the law.

But Dean Klar makes it clear that compensation is the remedy provided by tort law:

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[45] Exceptional cases are dealt with below.

[46] *Supra* note 2 at paras. 14, 15.

[47] We will come back to this point later.

> It is trite to point out that a fault-based compensation law compensates victims only where their injuries have been caused by the fault of others. It is important to stress, though, that compensation, for its own sake, is not the purpose of tort of law but rather the remedy offered by it, after liability based upon fault has been established. The reasons why the law compensates victims of wrongdoing are what accurately describe the objectives of a fault-based civil justice system.[48]

Dean Klar goes on to discuss other purposes of tort law.

In discussing justice, he says that

> [Tort law's] theoretical underpinning – that a wrongdoer who injures another ought to be required to repair the damage and restore the victim – is clearly an integral part of our system of values. [49]

That is, repair and restoration are part of the theoretical underpinning of tort law. These are compensatory notions.

He goes on to say:

> The justice component of traditional tort law principles includes several different, but related, values. It involves the question of fairness, i.e., that *it is fair that a person who causes a loss should repair it.* The punishment of the wrongdoer and the consequent appeasement of the victim are bound up in it. Personal accountability and responsibility, the ability to control one's own destiny and make one's own choices, are values which are meaningful only if one assumes responsibility for one's own choices and actions.[50]

And later, having pointed out that where liability insurance applies it is usually the liability insurer who pays, Dean Klar goes on:

> Looking at the principle of justice from the perspective of the victim, different considerations arise. Notwithstanding who pays for the injuries caused through the wrongdoing of a defendant, *tort law allows victims to be fully compensated for their injuries.*[51]

Dean Klar goes on [52]to discuss other functions of tort law: deterrence, education, and an ombudsman-like function. He refers to other purposes and

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[48] L. Klar, *Tort Law* 2nd ed. (Scarborough: Carswell, 1996) at 10-11.

[49] *Ibid.* at 12.

[50] *Ibid.* [emphasis added].

[51] *Ibid.* [emphasis added].

[52] *Ibid.* at 14-18.

functions that have been put forward for tort law: a grievance mechanism; an "interstitial bonding agent", an "interstitial resolver of individual conflict...in a free, and sometimes turbulent society; a normative function; reduction of occurrence, and severity, of injury-causing events; protecting entitlements; responding to representations; protecting expectations; qualitative reconciliation of individual and social interests; providing relative clear standards of conduct; and reconciliation through a balancing process of competing interests. But, whatever additional functions tort law may perform, its remedy as stated by Dean Klar is compensation.

Kerans J.A. in *Duncan* v. *Baddeley*,[53] was "impressed with the excellent history and analysis offered by S.M. Waddams in his Law of Damages (2nd Ed. 1995)."[54] But Professor Waddams equates damages with compensation. What he says in the preface to the first edition of his work, which is published with the third edition, is this:

> Where compensation in money has to be made for a wrong, a set of principles is needed to govern the assessment of the proper money sum. These principles constitute the law of damages.

And Professor Waddams' chapter on Personal Injuries[55], which appears in a part of his book entitled "Compensatory Damages", commences with these words"

> Compensation for personal injuries involves, to a large extent, compensation for loss that will not yet have occurred at the time of trial. The common law system of assessing damages has always been as a single, once-and-for-all lump sum...

Professor Waddams thus equates damages for wrongs, including personal injuries, with compensation, and his chapter is based on the premise that compensation is the purpose of damages.

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[53] *Supra* note 2 at para. 17.

[54] This work is now in its third edition: S. M. Waddams, *The Law of Damages, 3d ed.* (Toronto: Canada Law Book, 1997).

[55] *Ibid.* at 157, para. 3.10.

A passage from the judgment of Dickson CJ in *Andrews* v. *Grand & Toy Alberta Ltd.*[56], a decision which dealt among other things with damages for the loss of earning capacity, states the basic principle of tort damages:

> The basic principle was stated by Viscount Dunedin in *Admiralty Com'rs v. S.S. "Susquehanna"* [1926] A.C. 655 at p. 661 (cited with approval in *H. West & Son Ltd.* v. *Shephard,* [1964] A.C. 326 at p. 345), in these words:
>
> > ...the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act...
>
> The principle was phrased differently by Lord Dunedin in the earlier case of *Admiralty Com'rs* v. *S.S. "Valeria"*, [1922] 2 A.C. 242 at p. 248, but to the same effect:
>
> > ...in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him.
>
> The principle that compensation should be for full pecuniary loss is well-established: see *McGregor on Damages*, 13th ed. (1972), pp. 738-9, para 1097:
>
> > The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. This is today a clear principle of law.

So, in our view, the tort-law gods have indeed decided that tort damages -- that is, the remedy given by tort law once liability has been established -- are based on compensation, that is, on awarding an amount of money "which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him."

Further, in our view, damages for the loss of a chance of future earnings – or of earning capacity – not only are based on compensation but ought to be based on compensation,[57] that is to say, upon the notion that a wrongdoer or those responsible for a wrongdoer's conduct should make amends to a person

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[56] *Andrews supra*, note 35 at 240. Reference might also be made to the later case of *Watkins* v. *Olafson* [1989] 2 S.C.R. 750 at 757, 61 D.L.R. (4th) 577 at 581 where McLachlin J., delivering the judgment of the Supreme Court, referred at p. 581 to "the fundamental principles upon which the assessment of damages for personal injury are founded – the basic concepts of *restitutio in integrum* and full but fair compensation," and to the judgment of McLachlin J., speaking for the majority, in *Ratych* v. *Bloomer* [1990], S.C.R. 940, 962-963, 981.

[57] *The Oxford English Dictionary*, 2nd ed., *s.v.* "compensation": "2.a. That which is given in recompense, an equivalent rendered, remuneration, amends; 2.b. Amends or recompense for loss or damage."

injured by the wrongful conduct, or, so far as practicable, restore the injured person to the position in which the injured person would have been but for the wrong. We do not see any other appropriate basis for the award of damages under a fault-based system of tort law, or, in particular, for an award of damages for the loss of a chance of future earnings.

b. The exceptions to the compensation principle

In *Duncan* v. *Baddeley*, Kerans J.A., in a passage quoted above, attacked the proposition that tort damages are compensatory on the basis that "some aspects of tort law (e.g. punitive damages) are emphatically about something other than compensation." There is no suggestion in his judgment that *Duncan* v. *Baddeley* is a case for punitive damages; the reference to punitive damages is only to undermine the general proposition that tort damages are compensatory.

Here are a couple of statements from Professor Waddams' book:[58]

> An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose not of compensating the plaintiff but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated, and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages....
>
> The theoretical justification for an award of exemplary damages has long been debated, for it appears anomalous for a civil court to impose what is in effect a find for conduct it finds to be worthy of punishment, and then to remit the fine, not to the State Treasury, but to an individual plaintiff who will, by definition, be over-compensated. The arguments in favour of exemplary damages are that deterrence, as well as compensation, is a legitimate aim of the civil law and that conduct worthy of punishment may often not fall within the scope of the criminal law, or may not be thought to justify prosecution, or if prosecuted, may be insufficiently punished. A reason given more commonly in earlier times than recently is that an award of exemplary damages suppresses the likelihood of duelling and private vengeance.

The existence of punitive damages, of course, proves that not all tort damages awards are merely compensatory. It says nothing, however, to controvert the existence of a rule that damages are to be compensatory except in restricted exceptional circumstances which call for another rule. Indeed, the very existence of a rule permitting non-compensatory damages as an acknowledged exceptional rule shows that the general rule exists; this may be a case in which it is correct to say that the exception proves the rule,

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[58] *Supra* note 54 at 483, paras. 11.10 and 11.20.

either in the sense that it proves that the rule exists, or in the sense that it tests the rule.[59]

Professor Waddams gives additional examples of exceptional kinds of awards[60], including damages measured by benefits derived by defendants from wrongful acts[61], nominal damages and contemptuous damages.[62]

None of these special circumstances apply to cases of loss of a chance of future earnings. In our view, it is the basic principle of damage assessment, which Professor Waddams characterizes as "compensatory," which applies.

c. Conclusion as to purpose of damages for loss of chance of future earnings

In our opinion, for the reasons given above, damages for the loss of a chance of future earnings – or for loss of earning capacity – as a general rule are and should be compensatory, and damages for the loss of a chance of future earnings fall under that general rule, none of the recognized exceptions being applicable.

2. An award to an estate of damages for a deceased person's loss of a chance of future earnings is not compensatory

a. The loss of a chance of future earnings is personal to the victim and its loss does not affect the victim's estate

In *Duncan* v. *Baddeley*,[63] Kerans J.A., in his discussion of s. 6 of the *Survival of Actions Act*, recognized that the loss of a chance of future earnings – or of earning capacity – is a loss to the injured person but is not a loss to the estate:

> I would agree that the section would deprive the estate of a claim if the loss of ability to earn is a loss *to the estate* as a result of the death. But the loss of the ability to earn as I

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[59] *The Oxford English Dictionary*, 2d ed., *s.v. "prove"*: "1. To make trial of, try, test."

[60] Professor Waddams also discusses liquidated damages *supra* note 54, 445 ff. Where these are not invalidated they are of course a remedy contracted for by the parties.

[61] *Ibid.* at 465-470.

[62] *Ibid.* at 477-79, 481.

[63] *Supra* note 2 at para. 23.

> have said is a loss *to the deceased*, not a special claim by his estate. Section 6 forbids special awards to the estate simply for the fact of death.[64]

We agree that the loss is personal to the deceased person. The chance of future earnings, or earning capacity, is not something that the deceased person could dispose of while living or by will, and its loss is not a loss to the estate.[65]

Kerans J.A., in a passage quoted below, used as an example two deceased persons, one whose Cartier watch is destroyed and one whose ability to earn is destroyed. This is a useful example.[66]

Consider first the situation which will exist if no wrongful conduct is involved. The destruction of the Cartier watch will reduce the deceased person's heritable property and will thus reduce the amount of property in the estate, which will accordingly suffer a loss through the destruction of the watch. However, the destruction of the other deceased person's ability to earn will not reduce that deceased person's heritable property and will not reduce the estate.

Consider next the situation which would exist if wrongdoers caused both deaths and the destruction of the Cartier watch, and if each estate is entitled to recover damages from its own wrongdoer. The damages recovered by the first estate for the destruction of the Cartier watch will compensate the estate for the loss of the watch. However, damages recovered by the second

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[64] Section 6 reads as follows:

"If the death of a person was caused by an act or omission that gives rise to a cause of action, the damages shall be calculated without reference to a loss or gain to his estate as a result of his death,... except for funeral and disposal expenses."

[65] In *Lamey* v. *Wentworth Valley Developments Ltd.*, [1998] N.S.J. No. 411, Wright J. of the Nova Scotia Supreme Court distinguished *Duncan* v. *Baddeley* on the grounds that the Nova Scotia counterpart to s. 5 of the Survival of Actions Act provides that "only damages that have resulted in actual pecuniary loss to the estate are recoverable", while Alberta's s. 5 allows "actual financial loss to the deceased or his estate."

[66] In *Galand Estate* v. *Stewart* (1992) 135 A.R. 129, [1993] 4 WWR 205 at para. 24, Côté J.A. used the example of an income-producing machine and said that it is clear beyond question that the wrongful destruction of such a machine would give the deceased a cause of action and a surviving right to full compensation. The difference that we see between an income-producing machine and the income-producing aspects of an individual, is that, unlike the latter, such a machine would be something that could be bought and sold, which would be of value to others, and the loss of which would reduce the individual's estate.

estate for the loss of a chance of future earnings will not compensate the second estate for a loss because the second estate did not suffer a loss through the deceased person's loss of that chance. The damages paid to the second estate will be a windfall to that estate.

While the loss of a chance of future earnings is treated as a present loss, it is defined by events which will occur, or which will not occur, in the future, that is, it is defined by the future non-receipt of income which would have been received in the future but for the wrongful act. The only person who can be said to suffer that loss is the deceased person.

For these reasons, it is our view that the loss of a chance of future earnings is personal to the victim and its loss does not affect the victim's estate. There is therefore nothing for which the estate can be compensated by damages.

b. An award of damages cannot compensate the injured person

By the very nature of things, an award of damages for the loss of a chance of future earnings – or of earning capacity – cannot compensate a deceased person or be enjoyed by a deceased person.

If the claim for damages survives the death of the claimant, the proceeds of the award must inevitably go through the deceased person's estate, which did not suffer the loss, to some person or persons who did not suffer the loss. Damages which cannot go to the person who has suffered the loss and must go to persons who did not suffer the loss cannot, in our view, be compensatory.

In *Duncan* v. *Baddeley*, Kerans J.A. said this: [67]at p. 166:

> The only thing different about this compensation is that we know it will not go directly to the victim personally. It confuses the issue to describe that fact as non-compensatory.

It seems to us that this difference is a difference in kind. Something that will not go to a victim personally cannot compensate the victim for a loss suffered by the victim. Something that will go to a person's estate, which has not

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[67] *Supra* note 2 at para. 14.

suffered a loss, cannot be called compensatory, because there is nothing for which to compensate the estate.

Kerans J.A. said later:[68]

> I would only add that I see no justice in a rule whereby the respondent need not offer compensation because *Duncan* can no longer enjoy it. In my view, what shall happen to the award after it is made is essentially irrelevant in a tort suit. Were that not so, each trial must canvass what likely will happen to the award after it is received. Will the claimant later not enjoy the fruits of his suit because he is bad with money or has some personality defect? These issues have never been seen as part of tort law.

It is quite true that a forecast of what a plaintiff will do with the proceeds of an award of damages is not a legitimate consideration in deciding whether or not a plaintiff is entitled to compensation. But we do not think that the possibility of a plaintiff's future imprudence is a factor of the same kind, for policy purposes, as the fact that an award cannot possibly serve the only purpose for which the law would and should award it, that is, the compensation of the injured person.

An award to an estate therefore cannot, in our view, be justified on the basis of compensation, which, as we have noted, is and, in our view ought to be, the basis of damages for the loss of a chance of future earnings, or of earning capacity. If the survival of the award is to be justified, it must be justified on some other basis.

c. Conclusion

In our opinion, damages for the loss of a chance of future earnings, if they go to a deceased person's estate, will not be compensatory because they will go to the estate, which has not suffered an injury, and cannot go to the injured person.

3. Justice does not require that damages for loss of a chance of future earnings be awarded for any purpose other than compensation

Kerans J.A. did not specifically identify the purposes other than compensation that awards of tort damages may have, nor did he say how any

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[68] *Ibid.* at para. 17.

other purposes would affect the question of survivability. He did say, in a passage which we have already quoted: [69]

> "I would only add that I see no justice in a rule whereby the respondent need not offer compensation because *Duncan* can no longer enjoy it."

This passage appears to recognize that damages are "compensation", but suggests that "justice" is a value which militates in favour of the survival of the claim for damages for the loss of a chance of future earnings. The other member of the majority, Côté J.A., made a more extensive appeal to the justice value:[70]

> **[60]** I wish to close my remarks with what seems to me the most powerful argument for permitting this recovery of damages for the lost earning years.
>
> **[61]** The issue is not limited to cases of instant death. It applies equally to persons who are seriously injured by tortfeasors, linger for some time, and then die of their injuries.
>
> **[62]** Nor is the issue whether there should be substantial damages for lost earning capacity when life expectance is shortened. The Supreme Court has made it plain there is such a head of damages: **Andrews et al. v. Grand & Toy (Alberta) Ltd. et al.**, [1978] 2 S.C.R. 229... . Where the injured person survives until judgment, he is given substantial damages. The fact that he dies the day after judgment does not reduce the damages, nor remove his beneficiaries' right to inherit them. Indeed the very reason for the damages is the accurate foresight that he would thus die young. Nor is that new law: it can be traced back to **Phillips v. L. & S.W. Ry.** (1879), 5 Q.B.D. 78 (C.A.), as **Oliver v. Ashman** shows.
>
> **[63]** Why should the tortfeasor escape scot-free if the plaintiff dies the day before judgment is pronounced.? Worse still, why should the tortfeasor who has made death imminent escape scot free if he manages to drag out the litigation long enough that he produces the very death in question, before judgment?
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> **[64]** In my view, the issues here transcend questions of social utility of inheritance. They involve justice.

There are two "justice" points made here.

First, it is unjust that a wrongdoer will escape scot free, which suggests that damages should be awarded for punitive, or at least moral-disapproval, reasons. Second, it is unjust that a plaintiff who lives until trial will receive damages while a plaintiff who does not live until trial will not. These points and Justice Côté's reference to "questions of social utility of inheritance" are

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[69] *Ibid.*

[70] *Ibid.*, at paras. 60-64.

the only points raised by the majority that are not based on the notion of tort damages as compensatory. We will discuss each of the justice points now and return to inheritance later.

a. Justice does not require that a wrongdoer be punished by an award of damages

As we have said above, we think that tort damages other than punitive damages are and should be compensatory. That is, the only requirement of justice is that a wrongdoer, or a person responsible for the actions of a wrongdoer, should compensate the victim for the loss or injury caused by the wrongdoing. We will, however, stop to discuss the question whether it should be a principle of tort damages that a tortfeasor not be allowed to get off scot free, that is, that damages should be awarded against a wrongdoer as a form of punishment or moral disapproval simply because the wrongdoer has done wrong.

The very use of the term "tortfeasor" or the term "wrongdoer" implies disapproval: the tortfeasor or wrongdoer has done something wrong which should be disapproved of or punished. However, it must be remembered that the range of torts or wrongs of which tort law takes notice extends from the most egregious conduct to commonplace momentary failures to live up to the standard of care of a reasonable person. This point was noted by McLachlin J. in *Ratych* v. *Bloomer*,[71] where she referred to "the modern trend in the law of damages away from a punitive approach which emphasizes the wrong the tortfeasor has committed."

Punitive damages are available for the egregious cases in which the kind of conduct has been described by "a wide variety of colourful words and phrases", including "malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, callous, disgraceful, wilful, wanton, in contumelious disregard of the plaintiff's rights, or in disregard of "ordinary standards of morality or decent conduct."[72] Conduct which can be described in this way may be deserving of punishment by an award of punitive damages which will go to a victim who is already fully compensated by an award of compensatory damages. But in cases which fall short of conduct which can be so described, it would, in our view, be quite

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[71] *Supra* note 560 at 963.

[72] *Supra* note 54 at 491, para. 11.210.

wrong for a court to impose on a wrongdoer what is really a fine payable to a private person without the safeguards of the criminal law. A car driver, for example, may properly be required to pay huge damages to compensate a victim injured by the driver's negligence, although the negligence consisted only of a moment's inattention behind the wheel, but there is no justification in law or in policy for requiring them to do more than is necessary to repair and restore the victim.

It must also be remembered that tort law often imposes vicarious liability for loss or injury on persons who are not themselves wrongdoers, such as employers, partners and car-owners, and that many awards are paid by insurers. While there are good legal reasons for imposing liability on an employer, partner or car-owner who has no personal connection with a tort and no actual responsibility for any systemic failure which caused an injury, and while there may be good reason for requiring insurers to indemnify insureds against liability, those reasons do not extend beyond compensation.

Our conclusion here is that justice is satisfied by compensation, repair or restitution, and does not require that a wrongdoer be punished by an award of damages.

b. Justice does not require an award to be made to the estate of a deceased person on the sole grounds that an award would have been made to a living plaintiff

In the passage quoted above, Côté J.A. said, in effect, that it is unfair that an award will be made if the injured person lives until judgment but will not be made if the injured person dies before judgment. At first blush, making an award if the injured person lives, but not making an award if the injured person dies, seems be treating like cases differently, as the injured person's death does not change the facts which constitute the injury.

But there is, in our view, a fundamental difference in the two cases. Damages paid to a living plaintiff for the loss of a chance of future earnings, or of earning capacity, are compensatory. Damages paid to an estate are not. If there is an anomaly, it is not that a claim for such damages will not survive for the benefit of the estate. Rather, the anomaly is that a judgment based on the claim <u>will</u> survive. The fact that a judgment has been obtained will not make the damages compensatory in the hands of the estate if they would not have been compensatory in the absence of a judgment.

In so saying, we do not suggest that a judgment given in favour of a living plaintiff should become invalid if the plaintiff dies. The judgment has in law changed the nature of the plaintiff's claim from a personal claim to one fully recognized by law, and a rule which invalidated a judgment because of the death of the judgment creditor would have highly inconvenient consequences. A judgment brings a new set of legal doctrines into play, and they are sufficient to justify the anomaly that a judgment survives the death of the judgment creditor although the claim on which the judgment is based would not have survived but for the judgment.

A situation in which an award may be made if an injured person is living but not if they have died is not unique. A plaintiff who, at the time of a trial, is living but is seriously injured, may obtain a judgment covering support for a lifetime that is expected to continue for many years, whereas if the plaintiff dies before judgment no such award will be made. If the forecast of the plaintiff's lifespan turns out to be wrong and the plaintiff dies the day after the judgment becomes final and the money is paid, the defendant will not be able to get their money back. This is also an apparently arbitrary distinction between the legal treatment of a plaintiff who lives to judgment and one who does not that is justified by legal doctrines coming from different directions.

A situation in which an injured person will receive an award if alive but not if dead is not elegant. But elegance should not be purchased either by denying justified relief to a living plaintiff or by allowing an estate to bring an otherwise unjustifiable claim.

Our conclusion here is that justice does not require an award to be made to the estate of a deceased person solely on the grounds that an award would have been made to a living plaintiff

c. Justice does not require an award to be made on the grounds that earning capacity is a "working-man's" capital

Kerans J.A. made a different justice point:[73]

> **[16]** In any event, I want no part of a definition of compensation that puts value on physical but not intellectual capital. Those who argue that I here go beyond

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[73] *Supra* note 2 at para.16.

> compensation.... are driven to say that, if two people are killed by the same tortfeasor, the estate of the wealthy one who never worked in his life but who lost his Cartier watch as well as his life would recover the value of the watch (so the heirs could say that ill wind blew some good) because, of course, the tortfeasor destroyed not just the life but also the property. But the estate of the victim, who is a "working man", and who must rely on his ability to earn, would receive nothing on the ground that to treat the loss of his ability to earn as the loss of property separable from his death would be to go beyond compensation of him and create a "windfall." In my view, to label the claim of the first estate as just compensation and of the second estate as a non-compensatory "windfall" is unwarranted, and reflects certain social attitudes that are not part of the law. In sum, I say that to recognize the capital of the propertied person but not that of the un-propertied person is to make an invidious class distinction, and I want no part of it.

The first thing to note is that we do not suggest that compensation should be restricted to compensation for the loss of physical capital. The distinction that we would make is not between damages for the loss of physical capital and damages for the loss of intellectual capital, but between damages which compensate for loss or injury and damages which do not compensate for loss or injury. An award of damages for the loss of a chance of future earnings is compensation if it compensates, which it does in the case of a living plaintiff. An award of damages is not compensation if it does not compensate, which, in our view, it does not do in cases in which the injured person cannot be compensated.[74]

The next thing to note is that both wealthy and poor people tend to have both physical property and a chance of future earnings. The incidence of people who are so wealthy they do not need to work is not likely to be great, and even a wealthy person who has never worked in their life might well be able to earn in the future. Then, the chance of future earnings of a wealthy person such as a hockey star, a successful entrepreneur, or the chief executive officer of a large corporation may be a hundred times those of a "working man." A "working man" is quite likely to have a watch, if not a Cartier, and is entitled to be compensated for its wrongful destruction. Whatever things of economic value may be lost because of a wrongful act, rich people are likely to have more of them than poor people. The principle of tort damages is that anyone, rich or poor, who suffers a loss from a wrongful act should be compensated for their loss. Anyone, rich or poor, should not receive

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[74] It is, we think, not inappropriate to characterize as a "windfall" to an estate a sum of money which does not compensate the deceased person and which does not replace property which the estate would have had but for a wrongful act. However, we do not think that the debate should centre on whether or not there is a "windfall." We think that the discussion should focus on whether or not an award of damages for the loss of a chance of future earnings is compensation for a loss.

money which cannot be compensation either because they cannot be compensated or because there is nothing to compensate for. Until the whole foundation of tort law is changed, awards, in our view, should be made in order to compensate for loss, not to provide money on grounds of class.

d. Justice to surviving family members should be done under the Fatal Accidents Act and does not require an estate claim for loss of future earnings

The death of a spouse, parent or child often has profound effects on the surviving spouse, children or parents. It may also have a profound effect on other close family members such as siblings, grandparents and grandchildren.

The effect of the deceased person's death may be financial. The deceased person may have been in the habit of contributing to the support of their spouse, children, parents or siblings, or some or all of them may have had reasonable expectations of future benefits, for example, in the case of parents who might reasonably expect their child to support them in old age.[75] In such cases, the death of the deceased person has caused loss to the surviving family members for which they should be compensated by a wrongdoer who has caused the death of the deceased person. One submission which we received gave as a reason for survival of the claim for loss of a chance of future earnings that, in addition to a loss of financial and parental support, remaining family members also lose the chance of inheriting from the deceased person and that allowing the estate to claim damages for the deceased person's loss of a chance of future earnings is one way to compensate for the loss of that chance.

Instead of, or in addition to, financial effects, the effect of the deceased person's death may be intangible and emotional: sorrow for the deceased person; feelings of grief or bereavement; or the loss of what is referred to in the *Fatal Accidents Act* as the "guidance, care and companionship" of the deceased person. In such cases, the surviving close family members have sustained non-economic injuries for which they should be compensated by the wrongdoer. There is also a natural human feeling that the death of a spouse, child or parent should receive recognition by the law, and the only form of

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[75] Or even, as in *Hu* v. *Wang, supra* note 29, in the case of a parent and a child of the deceased person who, because of the deceased person's wrongful death, lost their chances of emigrating to Canada as members of a family class.

recognition which can be made available, apart from criminal penalties, is a money award.

These considerations militate strongly in favour of a legal requirement of compensation to surviving close family members. This is true compensation for a wrong which has caused the survivors personal loss, economic or emotional. One argument that is often made in favour of the survival of a claim for the loss of a chance of future earnings, or earning capacity, is that the award of damages will result in a payment to the estate and in the compensation of immediate family members through the estate, that is, through the will or intestacy of the deceased.

However, if compensation for survivors is – as we think it should be – an objective to be achieved, we do not think that the law should try to achieve it indirectly by allowing the deceased person's estate to obtain an award of damages. For one thing, if the objective is to do one thing – the compensation of survivors – the law should require that thing be done rather than require that something else – the making of an award to an estate – be done. For another, the indirect route will sometimes lead in the wrong direction. If the deceased person's estate is insolvent, the proceeds of an award of damages to the estate will not go to the survivors. Most people leave their property to survivors by will, but a will may not leave the deceased person's property to all of the survivors who should be compensated. If the deceased person's spouse is the sole beneficiary, as is not uncommon, damages will not pass through the estate to the children, parents or siblings who are entitled to compensation. If the spouse and children are all the beneficiaries, damages will not pass through the estate to parents or siblings of the deceased person who have "dependency" claims. If there is an intestacy, parents and siblings will not take if the deceased person left a spouse or child, and the division between spouse and children may not be in proportion to their "dependency" claims. The *Family Relief Act* may result in estate distributions that cover all "dependency" claims, but again it may not.

The direct route to the compensation of survivors is the *Fatal Accidents Act*. That Act provides for compensation for financial losses to surviving spouses, cohabitants, parents and stepparents, children and stepchildren. It provides for additional compensation in specified amounts for grief and loss of guidance, care and companionship to surviving spouses, parents and

children, without proof of loss. As noted above, the specified amounts are: $40,000 to a spouse or cohabitant; $40,000 to a parent or parents; and $25,000 to each child.

The *Fatal Accidents Act* approach has its own difficulties. However, it does provide for compensation for the financial losses and for the intangible and emotional injuries inflicted on the members of the immediate family by the death of the deceased person, and it does recognize the importance of the deceased person and their death. We think that this is the best approach and that if there are deficiencies with it, those deficiencies should be rectified in the *Fatal Accidents Act*. We think that the direct approach is to be preferred to allowing an estate to recover damages as a source of compensation for the survivors.

For these reasons, we think that justice to survivors should be done directly under the *Fatal Accidents Act* and not indirectly and inaccurately through allowing an estate claim for loss of future earnings

4. The policy reasons behind the heritability of property do not apply to a claim for the loss of a chance of future earnings

The basic argument in favour of the survival of a claim for loss of expectation of life, which may be applied to the survival of claims for lost chance of future earnings, has been powerfully stated as follows:

> ...the pain that a victim has experienced in the weeks or months before his death, and the loss of expectation of a happy life, does represent a real and actual damage – a real and actual personal right which has been taken away. When the victim loses his expectation of a happy life, he has suffered something which can be estimated in terms of money, no matter how difficult that process is. *While we have a system of law which allows a man to bequeath property to his adult children or to other beneficiaries, there would seem to be no reason why those rights which are damage claims should not also be bequeathed.*[76]

Professor Waddams has stated the argument as follows:[77]

> ...the purpose of the survival legislation is not to compensate survivors for their own losses – that is the function of the *Fatal Accidents Act* – but to enable the estate to inherit the wealth represented by the deceased's own right of action. This, it is submitted, is no more a "windfall" to the estate than is any inheritance of wealth. If the deceased lives to

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[76] J.H. Laycraft, "Survival of Claims for Loss of Expectation of Life" (1964) 3 Alta. L. Rev. 202 at 203 [emphasis added].

[77] *Supra* note 54 at 515, para. 12.90.

> obtain a judgment (even though it is not satisfied before death occurs), the estate will inherit the right to enforce it in full. It is anomalous that the plaintiff's death just before the trial should have the effect of depriving the estate of wealth represented by a valuable cause of action.

The same view underlies *Duncan* v. *Baddeley*. For example, Kerans J.A. said this:[78]

> I acknowledge that a distinction may be made respecting those heads of damages that are very personal to the victim, especially any award for pain and suffering. That award does not seek to replace lost property but rather to offer some sense of consolation and retributive justice to the victim. There is some logic in the statutory denial of an award in a case where the victim cannot enjoy that consolation or sense of justice. This explains the exception under review, but not its extension to the loss of property.

And later[79]:

> "In my view, the loss of the ability to earn a livelihood is not only real and palpable but can be valued in commercial terms. Indeed, Judson, J., in **Ontario Minister of Highways v. Jennings**, [1966] S.C.R. 532, at 546, described the ability to earn a living as a "capital asset." The conception of this ability as intangible property helped drive the Canadian decision to award damages for its loss. [Reference to *Andrews* v. *Grand & Toy*]. In sum, I agree with Lord Scarman when, in **Pickett v. British Rail Engineering**, [1979) 1 All E.R. 774 (H.L.), he said:
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> > "Whether a man's ambition be to build up a fortune, to provide for his family, or to spend his money on good causes or merely a pleasurable existence, loss of the means to do so is a genuine financial loss."

That is,

(1) A fundamental policy of the law is that "property" is heritable.[80]

(2) A person's claim for damages for the loss of a chance of future earnings – or earning capacity – is a right in the nature of property.

(3) The person's claim should therefore be heritable like other property recognized by law and should go to their estate.

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[78] *Supra* note 2 at para. 9.

[79] *Ibid.* para. 10.

[80] *The Oxford English Dictionary,* 2d ed., *s.v.* "heritable": "1. Capable of being inherited, inheritable."

There is, however another side.

Consider first the nature of a person's chance of future earnings, or earning capacity. In the passage quoted above, Kerans J.A. treated it as property, referring to "the conception of this ability as intangible property", and saying that conception has "helped drive the Canadian decision to award damages for its loss." But a chance of future earnings, or earning capacity, is not like anything that is usually characterized as property, and it does not have the characteristics of property. Consider this statement from Jowitt:[81]

> *In its largest sense* property signifies things and rights considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates, and interests in corporeal things, but also rights such as trade marks, copyrights, patents, and rights *in personam* capable of transfer or transmission, such as debts.

A chance of future earnings, or earning capacity, is not a thing or right. It does not have a money value while its "owner" "possesses" it. While there is a sense it which it has a "capacity of being injured", the same is true of such things as chances of future inheritance, which are not regarded as property the loss of which through the death of the prospective beneficiary gives rise to a claim for damages. It is not ownership, an estate, or an interest in a corporeal thing. It is not a right such as a trade mark, copyright or patent. It is not a right in personam. It is not capable of transfer or transmission. It is not of the same nature as a debt.

A chance of future earnings, or earning capacity, is not a right to which anyone must give effect. No one is obliged to afford another person a chance to earn. A person cannot sell earning capacity or a chance of future earnings. If a person dies, their chance of future earnings or earning capacity does not go to their estate, and no one can succeed to it. Earning capacity has been characterized as an "asset" and even a "capital asset", but it is not an asset that has any of the characteristics of what appears on balance sheets under that heading or on any personal list of assets. What a person has is an aggregation of personal characteristics which, so long as circumstances are and remain propitious, will enable their possessor to earn money. That aggregation of personal characteristics is something which is entirely

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[81] Jowitt's Dictionary of English Law, 2d ed., (London: Sweet & Maxwell, 1977) *s.v.* "property" [emphasis added].

personal to its possessor. It does not fall within the class of property "in its largest sense."

In our opinion, reasoning that commences with the legal notion of property and applies the legal incidents of that notion to earning capacity or a chance of future earnings will go astray. Earning capacity or a chance of future earnings is simply something different from what the law regards as property.

However, if a wrongful act deprives a person of some or all of their chance of future earnings, or earning capacity, the law allows the person to obtain an award of damages against the wrongdoer or other responsible person as a remedy for the personal injury which has been done to the victim. The question that is relevant to the question of survival of actions is whether, after the injury but before a court makes an award of damages, the wronged person's claim for damages is property or wealth which the law should allow to descend to the wronged person's estate. That is, should a secondary claim for damages that arises upon the deprivation of something that is not heritable be itself heritable, thus creating a net addition to the accumulation of heritable property?

We think that the answer is no. A chance of future earnings, or earning capacity, is not property or wealth. It is entirely personal, and a claim for damages for its loss is entirely personal. Its loss has not reduced the injured person's estate. We do not think that the law of succession compels, though it may permit, an affirmative answer to the question of survival. We think that the answer to the question depends on what is really happening here. As we have said earlier, we think that an award to the estate will not be compensatory and will be a bonus over and above the "property" of the deceased person.

For these reasons, we do not think that a chance of future earnings is or should be heritable property or that a claim for its loss is or should be heritable property until the claim has passed into judgment.

5. An award of damages which cannot be properly quantified should be made only in order to compensate a living person

In *Andrews* v. *Grand & Toy*,[82] Dickson CJ used a vivid simile to describe the process of assessing damages for a loss of earning capacity:

> "We must now gaze more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity of which compensation must be made: *The Queen v. Jennings*... A capital asset has been lost: what was its value?

Later, [83]after describing the various contingencies for which allowance should be made – unemployment, illness, accidents and business depression – he said this:

> The figure used to take account of contingencies is obviously an arbitrary one.

He referred to the contingencies taken into account with respect to the cost of future care as "in large measure pure speculation." And earlier,[84]

> The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities....actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer.

In *Duncan* v. *Baddeley*,[85] Kerans J.A. said

> ...the law does not assume that the trier of fact has superhuman powers. We accept that we do not know the future. But we can, nevertheless, realistically attempt to assess the chances of any future event. I suppose it is true that we guess. Indeed, Chief Justice Dickson in **Andrews v. Grand and Toy** used the image of the crystal ball to emphasize the difficulties. But we guess in rational terms, not by intuition or emotion. We seek the help of actuaries, who can tell us by careful application of the laws of chance what is the general likelihood of a future event. We seek the help of statisticians, who can tell us with what frequency some events occur. And we discount any guess by the weakness of the chance that it might occur. This is a daily occurrence in our courts, and it should be well-understood.

In our opinion, Dickson CJ was right in characterizing the process of assessing damages for the loss of earning capacity as looking into a crystal ball; in characterizing the assistance of actuarial science as "illusionary" in

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[82] *Andrews, supra* note 35 at 251.

[83] *Ibid.* at 254.

[84] *Ibid.*, at 236.

[85] *Supra* note 2 at para. 9

relation to the length of time a specific individual will live; and in characterizing allowances for other deductions as "arbitrary" and "more or less pure speculation." A court must multiply one guess (the plaintiff's prospective life-span) by another (the plaintiff's expected annual earnings), by another (a discount rate), and must allow percentage deductions which are almost certain to be inaccurate because the correct allowance would be zero if a contingency is not realized, or 100% if the contingency is realized.[86]

As noted, Kerans J.A. thought that actuaries can give the general likelihood of a future event – presumably the time of the death of the plaintiff – but Dickson CJ characterized the reliability of actuaries' predictions as "illusionary", as they do not speak to the individual sufferer. An actuary can give a reasoned forecast of the average of the number of years that a sufficiently large group of persons then living will live, but that forecast does not make it likely that any one member of the group will live for approximately that period or for any other specific period.

There is a further difficulty. In order to realize future earnings a plaintiff would have had to live. But it costs money to live. So, if an award is made for a plaintiff's future care, or if an award is made to an estate for a deceased's persons loss of a chance of future earnings, it is necessary, in order to arrive at the loss of the plaintiff or deceased person, an allowance for the cost of the plaintiff's hypothetical living. But how to determine the amount of that allowance is a vexed question.

In *Duncan* v. *Baddeley*,[87] Kerans J.A. said this:

> I have already said that the tortfeasor should pay only what is lost. If the tortfeasor kills me, I have lost much, but I have not lost what I would have spent on non-capital items had I lived. A major adjustment to awards of this kind must be made for the off-setting savings during the expected life of the victim; for example, for the savings of personal

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[86] The Supreme Court appears to have said in *R.* v. *Jennings*, *supra* note 35, and in *Andrews* v. *Grand & Toy, supra* note 35 at 251-52, that no allowance should be made for the income tax which the deceased person would have paid on prospective earnings. Kerans J.A. in *Duncan* v. *Baddeley*, *supra* note 2 para. 42, said that an allowance must also be made for the income tax the injured person would have paid on future earnings and seems to suggest that Jennings did not apply and that the Supreme Court should reconsider its position. The point is relevant here but we do not propose to develop it further.

[87] *Supra* note 2 at para. 33. The discussion of the deduction for living expenses continues to para. 44.

> living expenses. That is the rule in **Tongenuzzo-Norvell et al. v. Savein and Burnaby Hospital**, [1994] 1 S.C.R. 114...

Kerans J.A. considered three approaches to determining the amount of the deduction:

1. Limit the award to a calculation of the expected lifetime-savings of the victim. This formula would minimize the award. Kerans J.A. rejected it on the grounds that "[m]y life-savings would not tell one what I spent during my life on my pleasure, as opposed to what I had to spend in connection with the earning of my income."

2. Calculate the offsetting saved expenses using the yardstick of "basic necessities", which Kerans J.A. characterized as "some sort of poverty-line calculation – the amount required to spend to avoid starvation and remain sufficiently healthy to work." This formula would maximize the award. Although he agreed "that, at first sight, what I spend in a given year is what I would not have spent if I had not been around to spend it", he said that the Supreme Court's decision in *Andrews*, though it used the term "basic necessities", meant "the types of expenses that would have been incurred in any event." So, he did not agree with the basic-necessities poverty-line formula either.

3. Calculate the award on the basis of the "available surplus" that the victim would have had, and thus "calculate the expenses that the victim would have incurred in the course of earning the living we predict he would earn", which sum "will vary with the kind of employment, and the state in life of the victim." The "available surplus" would presumably be greater than the "life-savings" of the victim, but would be less than the surplus which would result from the "basic-necessities" formula. Kerans J.A. accepted the "available surplus" formula. When coupled with a deduction for taxes (concerning which Kerans J.A. thought "the chance is about 90 per cent he would pay taxes of in the area of 30 to 40 percent of his income), Kerans J.A. thought that a total deduction of 50% to 70% is suggested by the cases and "is an apt range", though a new trial was granted in order that expert advice might be available on the question.

Perhaps the "available surplus" formula is the best formula that is available. But it requires a remarkable level of abstraction.

Take the case of a living individual who has actual income and actual expenditures, so that we have perfect knowledge of the basic facts of income and expenditure. Even with that knowledge, we do not think that it is possible to ascertain how much of what the individual spends on food is spent in order to keep the individual's income-earning machine functioning and how much of it is really part of the individual's profit from their income which is spent because the individual likes good food and lots of it; or what part of what the individual spends on clothing is spent for the survival of the income-earning machine, what part is spent to earn income by impressing customers, and what part is spent for comfort and to impress friends; or what part of what the individual spends on vacations is spent to maintain the income-earning machine by relieving stresses on it, and how much is for sheer pleasure. When the discussion moves to the hypothetical individual who will never receive the hypothetical income projected for future years or make the hypothetical expenditures projected for those years we think that the calculation loses all touch with reality.

One can sympathize with a court which must determine how much of a hypothetical income is in the nature of profit over and above some part of the hypothetical individual's undifferentiated hypothetical expenditures. The court has to do something. It cannot tell the parties that the job is too difficult to do. But it should be recognized that it is not possible to come up with a result that does anything more than express the court's view as to the amount of compensation that it is reasonable to expect a wrongdoer or other responsible person to pay to an injured person by way of compensation.

It is quite true, as Kerans J.A. said at paragraph 29 of *Duncan* v. *Baddeley*, that the process of assessing future events – which he characterized as "guess[ing] in rational terms, not by intuition or emotion" – "is a daily occurrence in our courts." It is quite true also that it is the process which is gone through in the case of living plaintiffs who claim damages for loss of earning capacity.

Where an injured plaintiff is living, strong arguments can be made for going through a process of guessing at the appropriate amount of damages:

1. There is a risk, which may range from a possibility to a strong probability, that the plaintiff will lose earnings, ranging from small amounts to very considerable amounts.

2. The wrongdoer is responsible for the injury, and a wrongdoer or anyone legally responsible for the wrongdoer's wrongful act should not be heard to say that they should not have to compensate a living plaintiff for a loss for which the wrongdoer is responsible, merely because it cannot be quantified accurately.

3. The plaintiff, who is the injured person, will receive the proceeds of the award.

That is to say, there is a strong policy justification for doing what the law can do to make a living plaintiff whole in case they do suffer an actual loss of earnings.

We do not think that the same policy justification exists with respect to a deceased victim. It is one thing to quantify the unquantifiable in order to compensate the victim of a wrongful act, and to do everything within the power of the law to make that victim whole. It is another thing to go to the same lengths to put into the victim's estate, for the benefit of others, an amount that will almost certainly not bear any real relationship to a loss suffered by the victim themself. A process which requires a court to "gaze ...into the crystal ball"; to engage in "speculation", to rely on evidence the reliability of which is "illusionary"; and to engage in "arbitrary" determinations may be justified when the purpose is to compensate a wronged person. We do not think that it is justified when the purpose is to put money into a wronged person's estate for the benefit of others.

H. Conclusion and Summation on Survival of the Claim for the Loss of a Chance of Future Earnings

We have now gone through the woods tree by tree. It is time to stand back and look at the woods as a whole.

We think that what should be heritable and descend to a deceased person's estate are claims for losses which the *Survival of Actions Act* attempted to describe by using the words "actual financial loss", which we

will also use. What we mean by "actual[88] financial[89] loss" is a loss which is a real financial loss experienced at the time of the loss, as opposed to a potential loss, financial or otherwise. A chance of future earnings is a potential source of financial gain in the sense in which we use the words, not an actual financial component of a person's property or wealth. Its loss accordingly has a potential for adversely affecting the actual financial position of the injured person in the future, but the loss does not affect the injured person's actual financial position at the time of the loss. The same would be true of the loss of a chance of a future inheritance or a chance of winning a lottery which will be held in the future.

An actual financial loss, as we are using the term, involves a loss of wealth or property. An actual financial loss is a loss of something which is heritable and for which compensation can and should be made. We think that it is appropriate that a claim for damages for a heritable and compensable loss should descend to the injured person's estate and to those who are entitled to the benefit of the estate. But where the injured person has died the situation with respect to a claim for damages for the loss of a chance of future earnings is different. The injured person cannot be compensated because they are dead. The injured person's heritable property is the same after the loss of the chance as it was before the loss of the chance so that the loss of the chance of future earnings has not reduced the estate. We do not think that the policy of the law should require a wrongdoer to pay money where there is no loss of heritable property and where there is no one who can be compensated for the loss or restored to their position by the payment of damages.

The analysis can be applied in a number of steps.

First, a person who would have earned money during a certain time period which has expired, but who was unable to earn that money during that time period because of an injury has suffered an actual financial loss. Earnings would have come to them but for the injury, and did not come to them, so that they have had less income for the period than they would have

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[88] *The Oxford English Dictionary*, 2d ed., *s.v.* "actual": "Existing in act or fact....real;--opposed to potential, possible, virtual, theoretical, ideal."

[89] *The Oxford English Dictionary*, 2d ed., *s.v.* "financial": "of, pertaining, or relating to finance or money matters."

had but for the injury. Quantifying the loss requires an assessment of a hypothetical likelihood, that is, that the injured person would have earned the money during the period but for the injury, but this can be done to quite a high degree of probability. The assessment of such damages is done at the time of trial for the time period that has elapsed between the injury and the trial. This step is unexceptionable as it deals with actual experienced financial loss.

The next step is to quantify an injured person's loss of earnings in advance and to make a lump-sum award. The courts are obliged to take this step because, as a matter of law or administration, the law does not require or permit the injured person to come in once in every year or other time period to demonstrate that they have suffered a loss of earnings during that time period. In most cases advance quantification of the loss to any standard of accuracy is impossible because of the imponderables that are necessarily imported into the assessment process. However, given that damages must be assessed once and for all because periodic quantification is not permitted, the courts have to make the assessment in order to compensate the injured person for the periodic losses that the injured person may reasonably be expected to suffer, with deductions for contingencies. The deficiencies of the crystal-ball assessment process have to be accepted because that is the only way that compensation can be made for losses that the injured person can reasonably be expected to experience.

The next step that the law takes is more doubtful, that is, the assessment of damages for the injured person's loss of earnings during the years during which the injured person would have been expected to live but for the injury and is not now expected to live because of the injury, that is the years which are referred to as "the lost years." The crystal-ball assessment is now more uncertain than ever, as it has to base itself on two different expected lifetimes, the one the injured person would have had but for the injury and the one the injured person will have because of the injury. But more than that, the damages are for a loss which, if the assessment of the injured person's actual life expectancy is correct, the injured person will not experience as an actual financial loss because they will be dead. This step can be justified as providing additional compensation to a person who has clearly suffered injury for which they should be compensated.

The final step, and the one under discussion in this report, is the payment to the injured person's estate of damages for the injured person's loss of a chance of future earnings.

We have tried to show a number of things. First, a money payment to the injured person's estate cannot compensate the injured person, to whom no compensation can be made, and they do not compensate the injured person's estate, because compensation in the context of damages is necessarily compensation for a loss or injury and the estate has not suffered a loss or injury. Thus, the damages do not go for compensation to any person, and the *Fatal Accidents Act* is there to provide direct compensation to those who should be compensated. Next, the doctrine of heritability does not require that the injured person's claim for damages for the loss of a chance of future earnings descend to the injured person's estate, because the chance was something peculiarly personal to the injured person which did not involve legal rights or property recognized by law, and its loss was not the loss of an asset that affected the injured person's actual financial position. We have also tried to show that justice cannot be done to a deceased person by an award of damages which must necessarily be enjoyed by others. The reasons for allowing the claim to survive appear to us to be weak at best, and insufficient to justify awarding crystal-ball damages for a loss which will not actually be experienced by the injured person or by the injured person's estate and those who claim through it.

RECOMMENDATION No. 1
We recommend

(1) That a claim for the loss of a chance of future earnings should not survive the death of the claimant.

(2) That s. 5 of the *Survival of Actions Act* be amended to achieve that result.

The substitution for the present s. 5 of the draft s. 5 in Schedule A would give effect to this recommendation.

I. Transitional Provision

The next question is this: to what cases should the proposed amended s. 5 apply?

If *Duncan* v. *Baddeley* is good law, every person who is injured before the amended section comes into force and who suffers a loss of a chance of future earnings will have an existing claim for damages which is capable of surviving the injured person's death. We do not think that the enactment of an amendment to s. 5 should retroactively deprive an injured person of such a claim. We therefore think that the amendment should provide that the amended section applies only to cases in which the cause of action on the claim is based arises after the amendment comes into force.

It follows from this proposal that, if *Duncan* v. *Baddeley* is good law, claims for damages for the loss of future earnings in existence when the amendment comes into force will survive the deaths of the injured persons. This is contrary to our recommendation. However, we think that the principle that changes in the law should as a general rule operate only prospectively should override the principle that such claims should not survive.

RECOMMENDATION No. 2
We recommend that the proposed amended s. 5 of the *Survival of Actions Act* apply only to cases in which the cause of action arises after the amended section comes into force.

The proposed draft of an amended s. 5(3) which appears in Appendix A would give effect to this recommendation.

J. Some Additional Questions

We have set out above the factors and analysis which appear to us to be decisive on the principal question dealt with in this report, that is, whether or not a claim for damages for the loss of a chance of future earnings should survive the injured person. However, submissions which we received raised additional considerations and questions which are relevant and material and which should be raised for consideration. We will discuss them here.

1. Whether the extinguishment of a claim for damages for the loss of a chance of future earnings gives a potential incentive for defendants to delay proceedings, and whether the existence of that potential incentive is sufficient grounds for allowing the claim for damages for the loss of future earnings to survive either at all events or, alternatively, for allowing an a plaintiff's estate to continue such a claim raised in an action commenced during the plaintiff's lifetime.

Under our recommendations, a plaintiff's death will extinguish the plaintiff's claim for damages for the loss of a chance of future earnings. It seems likely that this circumstance will give a defendant an incentive to delay or obstruct an action in order to maximize the chance that the plaintiff will die before trial. Such an incentive, of course, will apply only if the plaintiff is living, and it is likely to be significant only if there is some reason to think that the plaintiff will not survive for a period longer than it will take to dispose of the proceedings.

Let us assume the worst: that some defendants will delay and obstruct lawsuits in the hope that their plaintiffs will die before trial. Let us also assume, as the posed question would not otherwise come up, that we are right in saying that an award to an estate of damages for the loss of the deceased person's chance of future earnings is not justifiable.

Should the existence of a likely incentive to delay and obstruct drive the law to provide awards of damages that are otherwise unjustifiable? We do not think so. We do not think that the imposition of unjustified liability for damages in all cases in which plaintiffs have died should be used as a remedy for the adoption of inappropriate litigation tactics in some cases. The litigation system should provide such remedies. The substantive law should not be distorted for the purpose.

Having said that, we should note that we have little or no evidence about the incidence of such tactics.

The incentive to delay or obstruct existed from the enactment of the *Survival of Actions Act* in 1978 to the publication of the decision in *Duncan* v. *Baddeley* in 1997, as it was thought during that time that a plaintiff's death did extinguish the claim for damages for the loss of a chance of future earnings. At page 11 of our Consultation Memorandum No. 4 we put forward the possibility that a wrongdoer may benefit from managing to drag litigation out long enough to give the plaintiff time to die before judgment, and went on

to raise an issue as to whether, if it is decided that the claim should not survive an injured person's death, an exception should be made if an injured person has commenced action on it during their lifetime, which would extinguish the particular incentive in question. One commentator said: "We all know defence counsel who employ the strategy of "dragging out the litigation" (p.11) hoping the plaintiff will drop the action or die before judgment, and this is highly unjust." Another commentator took the other side of the issue, saying that "such a rule would result in lawyers filing the Statement of Claim in all accident cases the day after they have been retained" to avoid a professional negligence claim, and that "The costs associated with filing a Statement of Claim is not always required." These were the only references by commentators to the possibility of foot-dragging or to the suggestion that an estate could continue a deceased plaintiff's claim for damages for the loss of a chance of future earnings, and we do not think that they establish the existence of a major problem in this regard.

As we have said, an alternative to allowing the claim for the loss of a chance of future earnings to survive in all cases would be to allow an estate to continue a lawsuit commenced by the injured person in their lifetime. Such a provision would not necessarily remove all incentives to delay or obstruct litigation, as a defendant may think that the death of the plaintiff will weaken the evidence available at trial or that an estate may be a less sympathetic plaintiff than a living victim, but it would remove any incentive which would arise solely from the extinguishment of the claim for damages upon the death of the plaintiff.

We do not think, however, that the commencement of an action should effect the survival of the claim for damages for the loss of a chance of future earnings. It would not change the basic situation that damages, if awarded, would not compensate the plaintiff, and would go to other persons who had not suffered loss for which they should be compensated. Everything we have said in this report would apply equally to all cases, whether or not action had been commenced in the plaintiff's lifetime.[90]

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[90] In our Report No. 57, *Section 16 of the Matrimonial Property Act* [Edmonton: ALRI, 1990] we were influenced by the tendency of that section as it then stood to encourage delay and obstruction designed to increase the chance that a claimant spouse would die before trial. Our recommendation was that a deceased spouse's estate should be able to continue a matrimonial property action commenced in their lifetime. There are two differences here.

(continued...)

2. Effect on insurance premiums

One point made against the survival of claims for loss of the chance of future earnings in the submissions we received is that the payment of such claims will require increases in insurance premiums. Not all claims for wrongful death are paid by insurers, but most are, including almost all motor vehicle accident claims that are not under workers' compensation.

In preparing ALRI's Report 56, *Non-Pecuniary Damages in Wrongful Death Actions – a Review of Section 8 of the Fatal Accidents Act*, we conducted an analysis of the probable effect on insurance premiums of the proposals which we ultimately made for the statutory award of damages to spouses, parents and children for grief and the loss of guidance, care and companionship resulting from a wrongfully-caused death. Our conclusion was that the compelling policy reasons for the statutory award overrode the detriment flowing from the likely increase in automobile insurance premiums.

We have not conducted a similar analysis in this case. We have reached our conclusion that claims for the loss of a chance of future earnings should not survive the plaintiff's death on other grounds and without reference to the effect of such claims, if they were to be allowed, on insurance premiums. If a decision is made, either by action or inaction, to leave the rule in *Duncan* v. *Baddeley* untouched, the question of increased insurance premiums would become relevant. However, we doubt that it should be decisive.

As we have argued at length earlier in this report, the basis of tort damages law is that a wrongdoer or other person responsible for the wrongdoer's conduct should compensate an injured person for the injury suffered by the latter. That is, the focus is on the merits of the situation between two parties. It may be that this basis has become unreal, at least in motor vehicle accident situations, because it is not the wrongdoer who pays

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[90] (...continued)
One is that there was significant evidence of foot-dragging under the then s. 16. But, more important, allowing a matrimonial property action to continue after the death of the claimant spouse would avoid the loss of what is in the nature of a property right to which the deceased spouse has become entitled on matrimonial breakdown during their lifetime, subject only to a judicial discretion as to amount, and would better carry out the basic policy of the *Matrimonial Property Act*. Here, in our view, permitting the continuation of a claim for damages for the loss of a chance of future earnings would be contrary to good legal policy.

the compensation but the wrongdoer's insurer, which passes its costs on to the premium-paying public. But until the whole basis of tort law damages is rethought to give effect to the consequences of this reality, we think that the general principles of tort law should apply to the case under discussion. If justice requires that a deceased person's estate recover damages for the loss of a chance of future earnings (which we do not think it does), then the estate should be able to recover the damages, and the insurance consequences will have to be borne.

3. Whether the claim should be allowed on the grounds that it should not be cheaper to kill than to maim

It is often said that it should not be "cheaper to kill than to maim," that is, it is morally offensive that a wrongdoer should pay less for causing death, which is the greatest injury of all, than they would pay for causing a lesser injury. The aphorism raises the spectre of a wrongdoer who, having run a person down and injured them, gains a financial advantage by reversing their automobile to complete the job by running over the injured person again in order to cause death and thus to minimize the wrongdoer's liability for damages.

As we have said above, however, the purpose of tort damages is to compensate an injured person for injuries caused by wrongdoing. It is not the purpose of tort damages (except in the egregious circumstances that attract punitive damages) to punish the wrongdoer or to make a moral point. Those functions are left to the criminal law, and the legal sanctions against killing will be imposed by the criminal law.

Furthermore, there is no principle that it must not be cheaper to kill than to maim. In some cases it is indisputably cheaper to kill than to maim.[91] The largest awards of tort damages for personal injuries go to persons who have been disabled to the extent that they cannot care for themselves and must be cared for by others. In such a case, a wrongdoer or other responsible person will escape with much lower damages if the injured person dies before trial. This results from the working of the compensation principle: awards for future care can go to the compensation of an injured person by providing

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[91] See Klar, *supra* note 48 at 380-81, speaking in another context: "...damages for serious personal injuries are generally higher than damages awarded in case of death."

them with the care that will palliate the effects of their injuries, even though nothing can constitute adequate compensation.

4. Distributive justice

One submission said that the purpose of both the *Fatal Accidents Act* and the *Survival of Actions Act* is political, to leave something to survivors by way of distributive justice; the appropriate concern from the point of view of distributive justice is what classes are justly owed, not what one private party may owe another. In this view, corrective justice, that is, compensation, is not the purpose of the two Acts.

We do not think that the purpose of survival legislation is or should be to transfer wealth from one class of persons – wrongdoers and persons responsible for wrongdoers' conduct – to another class – those who benefit from estates – on the grounds that the deserts of the second class are greater than those of the first and apart from any wrong having been done by a member of the first class to a member of the second. We think that what is behind survival legislation, and rightly so, is the notion that it is unjust that the owner of property or rights should lose them because of the owner's death, including a right to compensation, that is, a right to corrective justice. We have given reasons for saying that, in our view, it is not appropriate to apply the notion of heritability to claims for damages for the loss of a chance of future earnings, but we think that that notion is at the root of survival legislation where the legislation does apply, as the effect of the legislation is to treat claims for damages as part of the property of deceased persons which descends to their estates for distribution among those entitled to receive that property.

It can be argued that awards under the *Fatal Accidents Act* are a form of distributive justice transferring wealth from the class of wrongdoers and responsible persons to the class of surviving members of the deceased person's family. Equally, however, dependency awards can be regarded as compensation for the loss of prospective benefits and s. 8 awards can be regarded as compensation for grief and the loss of guidance, care and companionship.

But, be that as it may, we do not think that there is any reason for the law to hold that the deserts of the class of persons who benefit from estates

are greater than the deserts of wrongdoers and persons responsible for wrongdoers and that because of this imbalance the latter should have to make payments for the benefit of the former as a matter of distributive justice. We think that the tort damages should generally be compensatory and that no ulterior purpose should be introduced into this aspect of tort damages.

5. Whether the possible effect that the loss of a deceased person's chance of future earnings might have on beneficiaries and creditors justifies the award

One submission which we received gave as a reason for allowing the award of damages for the loss of a chance of future earnings that remaining family members, i.e., those who cannot claim the loss of financial and parental support, also lose the opportunity to inherit and this is one way to compensate for that. Somewhat the same line of thought was expressed by Côté J.A. in Galand Estate v. Stewart:[92]

> 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.

A somewhat different but related point was made by one submission, which pointed out that there may be persons affected by death who have an entitlement from the estate, e.g., creditors who have given credit in anticipation of the injured person being alive to earn income with which to repay the credit, and who, of course, have no recourse under the *Fatal Accidents Act*.

We do not think that these examples lead to the conclusion that a claim for the loss of a chance of future earnings should survive the death of the claimant.

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[92] *Supra* note 66 at para. 21.

First, we agree with the general rule stated by Kerans J.A. in *Duncan* v. *Baddeley*:[93]

> In my view, what shall happen to the award after it is made is essentially irrelevant in a tort suit. Were that not so, each trial must canvass what likely will happen to the award after it is received.

We do not think that it would be appropriate for any trial to canvass what will likely happen to an award of damages for the loss of a chance of future earnings in order to see whether or not the proceeds will go to a beneficiary or creditor of the deceased person's estate who has suffered economic loss from the deceased person's premature death. We do not think that it would be appropriate to make or deny an award to an estate because of the merits, or lack of them, of those who will benefit from the estate.

Second, we do not think that the law, instead of inquiring into the individual merits of those who will take under an estate, should allow all estates to recover damages for the loss of chances of future earnings on the grounds that, in some cases which may be few or many, the award will go to beneficiaries or creditors who have suffered economic loss from the deceased person's premature death. The law should not require A to pay otherwise unjustified damages in one case in order to establish a legal principle which will require B to pay justified damages in another case.

Third, as we have said earlier in this report,[94] if the law is to make provision for the payment of damages for economic loss suffered by third parties, it should, in our opinion, do so directly. The *Fatal Accidents Act* gives a direct remedy to the surviving family members listed in the Act. If justice suggests that creditors of insolvent estates, or expectant legatees who are not now included under the *Fatal Accidents Act*, should be compensated for their losses of expectations of future benefits from deceased persons' estates, then they should be brought within the scheme of the *Fatal Accidents Act* or similar legislation, which can be structured so that it will achieve the desired objectives.

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[93] *Supra* note 2 at para. 17.

[94] See above, under J.3(d), "Justice to survivors should be done under the *Fatal Accidents Act* and does not require an estate claim for loss of future earnings."

6. Unless something else is done, damages for the loss of a chance of future earnings will in some cases duplicate "dependency" damages under the *Fatal Accidents Act*

If claims for loss of a chance of future earnings survive, there will be a risk that a wrongdoer or other responsible person will have to pay twice for a deceased person's loss of future earnings. That is because a surviving family member's "dependency" claim under the *Fatal Accidents Act*, which will be paid to the surviving family member, may be based at least in part on the same expected future earnings as the estate's claim for damages. We do not think that this possibility is a bar to allowing a claim for damages for the loss of a chance of future earnings to survive, but it does require some adjustment in the law if it is decided that the claim is to survive.

It would be possible to take the position, and one submission which we received did so, that the wrongdoer, by one wrongful act, committed two different wrongs to two different people or classes of people and should, therefore, be required to pay damages to both even if this would amount to paying twice for the deceased person's loss of a chance of future earnings. We think, however, that a wrongdoer or other responsible person should not have to pay damages more than once for the loss of the chance.

The courts have already taken steps which will avoid overlap and duplication in many cases. Côté J.A. put the present law pithily in *Duncan* v. *Baddeley*:[95]

> [58] Besides, calculation of damages under the **Fatal Accidents Act** traditionally involves a deduction of any accelerated or increased inheritance...

There are complexities in determining what is included in the deduction or set off, but to the extent that a listed family member receives accelerated or increased benefits from the estate because of the wrongful act, the wrongdoer or other responsible person is not required to pay twice for loss of future earnings. This is likely to be by far the most common case, particularly after the application of the *Family Relief Act,* as Côté J.A. noted.[96]

However, if the estate is insolvent, there will be no set off because the survivors will not receive anything from the estate which can be set off

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[95] *Supra* note 2 at para. 58.

[96] *Ibid.* at para. 59.

against their dependency claims. Or those who take under the deceased person's will or intestacy may not be the same as those who have "dependency" claims, particularly as a "dependency" claim does not depend upon actual dependency. For example, an adult child may recover "dependency" damages for the loss of reasonably-expected voluntary financial benefits from a parent during the parent's lifetime, though the parent's will leaves the entire estate to the spouse so that there will be no benefit from the estate to the adult child to be set off. Parents or siblings may also have reasonable expectations of financial benefits from the deceased person during their lifetime, but may have no claim under a will or intestacy. In all of these cases, damages based upon expected future earnings may be duplicated if the law is as stated in *Duncan* v. *Baddeley*. The total numerical incidence of such cases is not likely to be great, but we think that the likely incidence is sufficient to suggest that steps be taken to guard against the duplication of damages based on the loss of expected earnings.

In the recent case of *Brooks and Brooks Estate* v. *Stefura*,[97] Belzil J. effectively reversed the set off. He first held that, in assessing damages for the loss of a chance of future earnings, or earning capacity, expected "obligations" of the deceased person should be deducted from the expected earnings of the deceased person. He then held that the deceased person's support obligations to family members were "obligations" which should be deducted from the expected earnings. This approach poses some analytical difficulties – *Fatal Accidents Act* "dependency" claims, for example, can include expected voluntary benefits which would not have been "obligations" – and we think that it is outside the Canadian mainstream.[98]

The Ontario Law Reform Commission, in its 1987 Report, *Compensation for Personal Injuries and Death*, made another suggestion to deal with the problem of duplication and some other problems. The Commission's

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[97] *Supra* note 33.

[98] Though Professor Waddams, *supra* note 54 at 523, points out that "reduction of the estate's claim by the amount the deceased would have spent on dependants" is a solution that appears in several Australian cases, those cited being *Skelton* v. *Collins* (1966) 114 Commn. L.R. 94 (HC); *Jackson* v. *Stothard* [1973] 1 N.S.W.L.R. 292 (N.S.W.S.C., C.L. Div.); and *Gannon* v. *Gray* [1973] Qd. R. 411. He raises two objections: 1. that such an exclusion of damages would not apply in the case of a living plaintiff; and 2. that it would require a distinction between cases in which the defendant was and was not responsible for the deceased person's death, as reduction of the estate's claim would be justifiable only where an action was available under the fatal accidents legislation.

suggestion was that a claim by the estate for lost "working capacity"[99] be substituted for the *Fatal Accidents Act* claims, and that the proceeds of any damages award for the loss of working capacity be divisible among a dependent spouse, dependent children and dependent parents free of claims by creditors and of estate administration costs. As there would be only one award and one divisible amount, duplication would be avoided. While this solution would in many cases work efficiently, we do not recommend it for Alberta. For one thing, it would not provide the damages for grief and the loss of guidance, care and companionship without proof of damage which are now prescribed by s. 8 of the *Fatal Accidents Act*, nor would it provide for payments to family members in the absence of loss of working capacity, which not every deceased person has. Further, we think that it is better for the law to achieve its objectives directly – in this case through the *Fatal Accidents Act*, making changes in that Act if it is not thought to be working properly – than indirectly through a legal structure which does not sit too easily with usual principles of law. Finally, this solution would end up in some cases with damages going into estates of persons with no spouse, minor or dependent children, or dependent parents.

Another solution, if an estate is to be able to recover damages for loss of a chance of future earnings, would be to provide by statute some means of avoiding the duplication of damages. This could involve a provision that the amount payable by a wrongdoer to a deceased person's estate for such damages would always be set off against the wrongdoer's liability for "dependency" claims under the *Fatal Accidents Act*. Alternatively, it could involve a provision that the amount payable by a wrongdoer under the *Fatal Accidents Act* for "dependency" claims would always be set off against the wrongdoer's liability to the estate. The choice would depend on which claim should be entitled to priority over the other as a matter of legal policy, but each would give rise to problems that would have to be resolved by legislative fine-tuning. A further alternative would be to provide some sort of a formula.

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[99] Under the Commission's usage, "working capacity" would include earning capacity, capacity to give care and guidance, capacity to provide household services, and loss of entitlement under a pension, annuity, or similar instrument.

The problem of the possibility of duplication of damages is not insurmountable. As Côté J.A. pointed out in *Duncan* v. *Baddeley*[100]

> The solution, surely, is to do something about the overlap, not to abolish one of the causes of action or heads of damage.

However, if the law laid down by *Duncan* v. *Baddeley* is to stand, something should be done to avoid the duplication of damages under an estate claim for the loss of a chance of future earnings and a *Fatal Accidents Act* "dependency" claim. As Belzil J said in the *Brooks* case:[101]

> [247] The *Fatal Accidents Act* and the *Survival of Actions Act* are silent on the interrelationship of the two types of claims, and specifically are silent on the issue of which claim has priority in the event that there are insufficient funds to satisfy both claims.
>
> [248] This legal void cries out for legislative clarification.

This discussion is not an argument against allowing the survival of claims for loss of chances of future earnings. The point being made here is simply that, if, contrary to the principal recommendation of this report, an estate is to be able to recover damages for the loss of a chance of future earnings, or earning capacity, some legislative measure should be adopted to protect the wrongdoer or other responsible person against the payment of double damages.

K. Conclusion

For all the reasons given above, ALRI recommends that the law should be clarified to provide that a claim for damages for the loss of a chance of future earnings will not survive the death of the injured person, and that the *Survival of Actions Act* should be amended accordingly.

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[100] *Supra* note 2 at para. 57.

[101] *Supra* note 33 at paras. 247-48.

PART III — LIST OF RECOMMENDATIONS

These recommendations and the accompanying policy decisions were approved by the Board at its meeting in November 1998.

B.R. BURROWS	C.W. DALTON
A. S. DE VILLARS	N.A. FLATTERS
W.H. HURLBURT	H.J.L. IRWIN
P.J.M. LOWN	S.L. MARTIN
D.R. OWRAM	B.L. RAWLINS
N.C. WITTMANN	R.J. WOOD

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CHAIRMAN

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DIRECTOR

December 1998

APPENDIX A

DRAFT SURVIVAL OF ACTIONS AMENDMENT ACT

5 (1) If a cause of action survives under s. 2, only those damages that resulted in actual financial loss to the deceased or his estate are recoverable.

(2) Without restricting the generality of subsection (1), the following are not recoverable:

(a) punitive or exemplary damages,

(b) damages for loss of expectation of life, paid and suffering, physical disfigurement or loss of amenities, and

(c) damages in relation future earnings, including damages for loss of earning capacity, ability to earn or chance of future earnings.

(3) This section applies only to cases in which the cause of action arises after this section comes into force.

APPENDIX B

INDIVIDUALS WHO PROVIDED RESPONSES TO OUR CONSULTATION MEMORANDUM NO. 4

1. Frank de Walle, de Walle & McDonald, Lethbridge
2. Mark C. Freeman, Royal Insurance, Edmonton
3. W. Donald Goodfellow, Q.C., Calgary
4. Walter W. Kubitz, Stengl Everard, Calgary
5. Alan D. Macleod, Q.C., Macleod Dixon, Calgary
6. Don Marshall, Allstate Insurance, Edmonton
7. John G. Martland, Q.C., Bennett Jones Verchere, Calgary
8. Daphne Matthews, President Canadian Insurance Claims Managers' Assoc., Edmonton
9. J.W. McFadzen, Alberta Justice, Civil Law Branch, Edmonton
10. Donald J. McGarvey, McLennan Ross, Edmonton
11. Shelley L. Miller, Q.C., Cruickshank Karvellas, Edmonton
12. Blair A. Petterson, Vernkatraman & Associates, Edmonton
13. Kenneth M. Rowe, Jackson Arlette MacIver, Edmonton
14. Rostyk Sadownik, Wheatley Sadownik, Edmonton
15. Constance I. Taylor & Ronald H. Haggett, Cook Duke Cox, Edmonton
16. J. Philip Warner, Q.C., Bishop & McKenzie, Edmonton