ALBERTA LAW REFORM INSTITUTE

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

Report For Discussion No. 12

June 1992

ISSN 0834-9037
ISBN 0-8886-4176-1

ALBERTA LAW REFORM INSTITUTE

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ACKNOWLEDGEMENTS

This Report represents a difficult subject matter for two reasons. First, it deals with the effect of recommendations which we made as a smaller part of a previous report on survival of actions. Second, it is a topic which deals with the operation of legal principles in the highly charged circumstances of wrongfully caused death.

Janice Henderson-Lypkie is the Institute counsel in charge of this project. She has had the difficult task of balancing the analysis of the law and the recommendations, at the same time as gathering the views and reactions of people who have been involved, either as persons affected or as advisors to persons affected, by the tragic circumstances with which the Report deals.

We have been greatly assisted by those persons, mentioned throughout the Report, who have shared their experiences with us. The interviews which we conducted allowed us to see the effects of the workings of the law in a very practical and personal way. We acknowledge with gratitude the information which was shared with us.

It is the Institute's hope that the topic has been dealt with in a rational but sensitive way. The Institute is indebted to Janice Henderson-Lypkie for the quality of her research and the sensitivity which she has brought to the issues on which these recommendations have been made.

INVITATION TO COMMENT

This Report for Discussion sets out the Institute's tentative views for discussion and comment. The Institute will reconsider its views and prepare its final report and recommendations in light of comments received.

Comments should be in the Institute's hands by December 1, 1992. Comments in writing are preferred. Oral comments may be made to Janice Henderson-Lypkie. Her telephone number is (403) 492-1798.

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PART I — SUMMARY

Scope of the report

This report for discussion is about two things. The most important one is compensation to surviving family members for the grief and loss of guidance, care and companionship caused by the wrongful death of a close family member. These are known as damages for non-pecuniary loss. The other is compensation to family members for out of-pocket expenditures and loss of earnings incurred by family members as a result of the injury and death.

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

Existing law

The *Fatal Accidents Act* governs the right of surviving family members to recover damages from the person whose wrongdoing caused the death of the deceased person. The Act defines which family members have a right to bring an action for damages and the type of damages that will be awarded. Originally, the Act only provided for damages for the loss of financial benefits that the surviving family members could have expected to receive from the deceased person. In 1967, the Act was amended to allow a court to also award damages sufficient to cover the reasonable expenses of the funeral and the disposal of the body. In 1979, section 8 of the Act was enacted to allow a court to give close family members damages for bereavement.

Section 8 empowers the court to award:

* $3,000 to the deceased's parents to be shared equally if the action is brought for the benefit of both parents,

* $3,000 to the deceased's spouse, and

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

Section 8 has caused much public dissatisfaction, particularly in cases of wrongful death of children. In such cases, the parents do not suffer the loss of financial benefits as a result of their child's death. All that is available is the $3,000 damages for bereavement and funeral expenses. Parents who suffer the tragic loss of a child due to the wrongdoing of another find the $3,000 insulting.

Recommendations — Out-of-pocket expenses and loss of earnings

Recovery of out-of-pocket expenditures is currently limited to funeral expenses. This category should be expanded to include all expenditures that are a direct and foreseeable consequence of the injury and death. We recommend, therefore, that section 7 of the Act be amended to allow recovery of:

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

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

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

- fees paid for grief counselling provided to any claimant.

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

Recommendations — Non-pecuniary damages

Chapter 7 of this report sets out the policy arguments for and against awarding non-pecuniary damages in wrongful death actions. We conclude that damages for the entire non-pecuniary loss should be compensable and, therefore, recommend that a court be entitled to award damages for grief and loss of guidance, care and companionship to certain family members.

Money damages will not buy happiness for parents who have lost their children. These damages cannot even measure the injury suffered by a parent upon the death of a child. They can recognize in a significant way the catastrophic deprivation that the parent has suffered and the injury that that deprivation has inflicted on the parent. No damages or insignificant damages add to the injury by suggesting that society does not regard the parents' suffering as worth anything. What is wrong with section 8 is not that it recognized the injury suffered by a parent upon the wrongful death of a child, but that it does not do so in a way that has meaning today.

How should the amount of non-pecuniary damages be established? It could be done by the court. This would allow flexibility and assessment of the loss suffered by the individual involved. However, it would require families to give evidence to support their claim for non-pecuniary damages. They would be forced to relive the trauma of the loss of their loved one in an adversarial situation, thus aggravating their feelings. This is undesirable. The report recommends that the amount to be paid be established by statute and awarded without evidence of damage so that family members will not have to testify in court as to the degree of their suffering and the nature of their relationship with their lost family member.

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

(1) $40,000 damages to the spouse or cohabitant of the deceased person. If the spouses are separated at the time of the death, damages for grief and loss of guidance, care and companionship would not be awarded.

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

* the deceased minor child, or

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

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

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

The levels of damages should be reviewed by Lieutenant Governor in Council at least once within each 3-year period and should be amended by regulation when necessary.

We have evaluated how these recommendations will affect automobile insurance premiums. The increase in automobile insurance premiums that would result from these proposals is not excessive or unjustifiable.

Conclusion

The tentative proposals made in this report are an attempt to wrestle with an almost insoluble problem, that is, how to provide money awards for losses that are non-pecuniary. They are an attempt to provide a significant recognition of those losses. We are laying them out for discussion and comment so that our final recommendations will take into account the views of as many people as possible.

PART II — REPORT FOR DISCUSSION

CHAPTER 1 — INTRODUCTION

A. Purpose and Scope of the Project

There are times when the tragedy of an event is so overwhelming that little can be done to console those who experience it. The senseless death of a close family member is such a tragedy.

When the death results from the wrongdoing of another, the legal system must deal with the aftermath. The nature of the conduct dictates the legal response. If the wrongdoing of the person who killed the deceased is deserving of sanction, criminal proceedings are brought. If the wrongdoer failed to live up to the standard of care imposed by law and thereby killed the deceased, the survivors will look to the civil law for their remedy. Wrongful conduct can trigger criminal proceedings or civil proceedings or both. In unusual situations, an inquiry may be held to determine the cause of the death or deaths and to make recommendations to prevent such tragedies from reoccurring.

Society's response to wrongful death is complex. Families, understandably, focus on the enormity of their loss. The law, in contrast, must often focus on the degree of fault causing that loss. For example, a minor lapse in a driver's attention can kill a pedestrian. The challenge for the law is to respond in a way that balances the loss with the degree of fault, without appearing in any way to trivialize that loss.

This report looks at only one aspect of how society deals with wrongful death. It does not concern the criminal law, or no fault systems like workers compensation. It deals only with those cases where a civil action can be brought because of a wrongful death. It focuses on the scope of damages the law will award in such cases.

In the face of wrongful death, the civil law must answer this question: how much compensation should be given to relatives of persons killed due to the wrongdoing of others? The answer has varied over time. In ancient times the answer was none. Since the mid-1800s, the answer has been that the wrongdoer should compensate certain relatives for pecuniary loss but not for non-pecuniary loss. Pecuniary loss is the loss of financial benefit. Non-pecuniary loss

encompasses all the emotional injury one experiences upon the death of a family member, including shock, grief, sorrow, and loss of love, affection, guidance, care, companionship, comfort and protection.

Traditionally, non-pecuniary loss suffered by reason of a wrongful death of another has not been compensable. In 1979, Alberta moved from the traditional position by enacting section 8 of the *Fatal Accidents Act*.[1] This section requires the court to award damages for bereavement to certain close relatives of the deceased. The maximum recovery for damages for bereavement is $9,000.[2] The section has generated significant criticism since its enactment, especially in the situation of a child's death.

This report will consider this section in the context of the more general question of whether non-pecuniary damages should be compensable, and if so, the best method of doing this. It will also deal with whether claimants should be able to recover all out-of-pocket expenditures made as a result of the injury and subsequent death, and earnings lost by the claimants immediately after the death. It does not deal with the current measure of pecuniary damages in wrongful death actions.

B. Consultation

The subject of this report is one on which we expect to receive a wide range of opinions. In an effort to learn of as many of those opinions as possible, we have interviewed a variety of people. We have spoken to parents whose children died in motor vehicle collisions caused by the wrongdoing of others. We have spoken to parents who have not suffered the loss of a child. We have spoken to lawyers who act for grieving families and those who act for defendants

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

2 Assume a married person with children dies. The section empowers the court to award:

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

If the deceased is a child, the parents receive $3,000 damages for bereavement.

and defendants' insurers. It is our hope that this consultation has given us a better understanding of the problem and has assisted us in making tentative recommendations for reform in this area.

We retained Mr. Gordon Barefoot, partner with the firm of Ernst & Young, to review the statistical analysis presented in this report. We are grateful for his helpful suggestions and evaluation.

C. Terminology

In this report we define certain terms as follows:

1. **Claimant**: Claimant is a person who has a cause of action by reason of a wrongful death statute. All wrongful death statutes restrict the category of claimant to include certain relatives. The class of relatives who are claimants, however, does vary among statutes.

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

3. **Pecuniary damages**: Pecuniary damages are awarded as compensation for pecuniary loss. The method of calculating pecuniary damages in wrongful death actions will be reviewed briefly in Chapter 3.

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

5. **Non-pecuniary loss**: As explained above, non-pecuniary loss is a term we use to encompass all the emotional injury one experiences upon the death of a family member. It includes shock, grief, sorrow, and loss of love, affection, guidance, care, companionship, comfort and protection.

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

D. Outline of the Report

Chapter 2 outlines the development of wrongful death legislation. Chapter 3 contains a discussion of the existing law of damages in wrongful death actions. The need for reform is presented in Chapter 4. Chapter 5 contains a summary of the opinions of the people we have consulted. Chapter 6 presents the statistics that relate to this topic. Chapter 7 analyzes the conflicting policy considerations. Chapter 8 contains draft legislation that incorporates the tentative recommendations made in this report.

CHAPTER 2 — THE DEVELOPMENT OF WRONGFUL DEATH LEGISLATION

A. Introduction

The law of torts is about civil wrongs. A tort is a wrong committed by a wrongdoer that causes injury to another person. The wrong may be an intentional act or omission. Or the wrong may be negligence, that is, a failure to live up to the standard of care that the law imposes upon the wrongdoer in favour of the other individual. The injury may be physical injury to the victim, injury to the victim's property, injury to victim's reputation, or injury to the victim's economic interests. If the injured person can prove that the wrongful conduct was of a kind that the law recognizes as a tort and that the injured person suffered an injury, the courts will required the wrongdoer to pay compensation for the injury to the injured person. The injury is sometimes called "damage". The compensation is usually called "damages".

Traditionally, the courts did not award damages for wrongful physical injury or death to anyone but the person injured or killed. They also did not recognize the grief and loss inflicted upon the survivors as a legal wrong committed by the wrongdoer against the surviving relatives. To overcome this deficiency in the judge-made law, legislatures enacted wrongful death statutes that confer upon certain surviving relatives of a person wrongfully killed a right to sue the wrongdoer to recover damages. This right to sue is known as a cause of action. The cause of action arises only if the deceased, had he or she lived, could have sued the wrongdoer in tort for the personal injuries suffered as a result of the conduct of the wrongdoer. Yet, the damages awarded under these statutes measure the loss of the survivors, not the loss of the deceased.

In this chapter, we outline the development of wrongful death statutes in Canada. We begin with the decision of *Baker* v. *Bolton*, which triggered legislative action.

B. The Rule in *Baker* v. *Bolton*

Our law is based on the English judge-made common law. It is therefore necessary to refer to the decisions of English judges. In 1808, the English judge

Lord Ellenborough gave his decision is the case of *Baker* v. *Bolton*[3]. He held "[i]n a civil Court, the death of a human being could not be complained of as an injury". The result is that until a statute says otherwise, anyone who suffers loss as a result of the death of another cannot sue the wrongdoer who caused the death. Before the enactment of wrongful death statutes, dependents could not sue the wrongdoer when they lost the support of a breadwinner. Death even bars actions that one person could have brought had the other person been injured but not killed. For example, a father can bring an action for the loss of the services of his child, but only if the loss of services resulted from non-fatal injuries suffered by the child. Loss of services caused by the death of the child is not actionable.[4]

Although Lord Ellenborough does not give any authority for his statement, most legal scholars agree that the origin of the rule is found in the felony-merger doctrine.[5] Tanfield J. first described this doctrine in 1607 in *Higgins* v. *Butcher*[6], as follows:

> If a man beats the servant of J.S. so that he dies of the battery the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost.

The underlying policy was that misconduct resulting in death of another involved the commission of a public wrong, which extinguished all private remedies arising as a result of the death.[7] The public interest was given more importance than that of the individual. Put another way, the King's desire to

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3 (1808), 1 **Camp.** 493, 179 E.R. 1033 (Nisi Prius).

4 *Osborn* v. *Gillett* (1873), **L.R. 8 Ex.** 88.

5 See *Admiralty Commissioners* v. *S.S. Amerika*, [1917] A.C. 39 (H.L.); *Monaghan* v. *Horn* (1882), 7 S.C.R. 409 per Ritchie C.J.; W.S. Holdsworth "The Origin of the Rule in *Baker* v. *Bolton*" (1916) 78 Law Q.Rev. 431; W.S. Malone "The Genesis of Wrongful Death" (1964) 17 Stan. L. Rev. 1043.

6 (1607), Yelv. 89.

7 See Bramwell's dissent in *Osborn* v. *Gillett*, *supra*, note 4.

obtain the felon's goods and lands (which in those days went to the Crown when the felon was convicted) was more important than the right of any individual to recover damages.

At first, the felony-merger doctrine established in *Higgins* v. *Butcher* met with strong approval. However, beginning in 1625 there were cases that held that a conviction of felony did not extinguish a cause of action in trespass.[8] By 1873 it was clear that the fact that the conduct complained of amounted to a felony did not stop civil proceedings for damages. At most, the felony was only a defence if the action was brought against the supposed criminal before prosecution. The felony only suspended the right to sue for the wrong to the person; it did not take away the right.[9]

Logic would dictate that if the conduct complained of did not amount to a felony, the felony-merger doctrine would not apply. Also, if the felony-merger doctrine was never the law of the country or if the doctrine was discarded, it would seem that *Baker* v. *Bolton* should not be followed. Yet, logic did not prevail in this area of the law. The result is that the rule in *Baker* v. *Bolton* applies even though the conduct complained of did not amount to a felony, and even though the felony-merger doctrine was never the law in a particular country or was discarded.

C. Enactment of Lord Campbell's Act—1846

Until the industrial revolution, wrongful death usually meant death by violence. This was the domain of the highwayman and thief. Even if the murderer was found out and arrested, suing him or her was of little benefit. The murderer was quickly put to death and all his or her land and personal goods forfeited to the Crown. With the industrial revolution, however, came the railways and factories and the many deaths caused by these new machines. The wrongdoer was no longer a destitute highwayman, but a wealthy corporation whose indifference and neglect frequently caused extreme hardship.[10] English

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8 W. Holdsworth, *History of English Law*, 5th ed. (London: Sweet & Maxwell, 1942) volume III at 332-33.

9 *Osborn* v. *Gillett*, *supra*, note 4.

10 Wex. S. Malone, "The Genesis of Wrongful Death" (1964) 17 *Stanford Law Review* 1043.

society began to realize that: "It is an hard law that no recompense is given to a man's wife for killing of him."[11]

In 1846, the English Parliament responded to society's concern by enacting *An Act for Compensating the Families of Persons killed by Accidents*,[12] more commonly known as Lord Campbell's Act. The preamble to the act read:

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

The act allowed the executor or administrator of a deceased person to bring an action for the benefit of the wife, husband, parent and child of the deceased.[13] It applied only if the deceased could have sued the wrongdoer for damages for the injury. The jury could award "such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought".[14] The action on behalf of the family was available "notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony".[15]

D. Adoption of Lord Campbell's Act by the Provinces of Canada

All Canadian provinces, except Quebec, enacted legislation patterned after *Lord Campbell's Act*.[16] In 1884, the Northwest Territories, which then included

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11 William Shephard, *England's Balme* (1657).

12 9 & 10 Vic., c. 93. This statute will be referred to as Lord Campbell's Act.

13 The Act defined "parent" to include father, mother, grandfather, grandmother, stepfather, and stepmother. "Child" included son, daughter, grandson, granddaughter, stepson, and stepdaughter.

14 Lord Campbell's Act, s. 2.

15 Lord Campbell's Act, s. 1.

16 Upper Canada was the first province to introduce legislation identical to Lord Campbell's Act, doing so in 1847. Other provinces and territories

(continued...)

Alberta, first introduced such legislation as *An Ordinance Respecting Compensation to the Families of Persons Killed by Accidents* (No. 12).[17] This became the law of Alberta when it became a province. In 1922, the Alberta legislature enacted legislation that was identical to the Northwest Territories Ordinance. In 1928, the Alberta legislature changed the name of the statute to *The Fatal Accidents Act*. Alberta has had fatal accidents legislation ever since that time. The present enactment is the *Fatal Accidents Act*, R.S.A. 1980 c. F-5, which—but for a few amendments and more modern language—is similar to Lord Campbell's Act.

Canadian wrongful death statutes are commonly called the *Fatal Accidents Act*.[18]

E. Comparison of Canadian Wrongful Death Statutes

All Canadian wrongful death statutes have certain things in common. First, each statute creates a cause of action that is to be brought by the executor or administrator of the deceased for the benefit of all claimants—usually close relatives of the deceased. Each statute creates a remedy for each claimant, not for

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[16](...continued)
followed suit. The existing legislation is found in these statutes:

* Alberta, *Fatal Accidents Act*, R.S.A. 1980, c. F-5
* British Columbia, *Family Compensation Act*, 1979 R.S.B.C., c. 120
* Manitoba, *Fatal Accidents Act*. C.C.S.M. 1987, c. F-50
* New Brunswick, *Fatal Accidents Act*, R.S.N.B. 1973, c. F-7 as am.
* Newfoundland, *Fatal Accidents Act*, R.S.N. 1970, c. 126 as am.
* Nova Scotia, *Fatal Injuries Act*, R.S.N.S. 1989, c. 163
* Ontario, *Family Law Act*, R.S.O. 1990, c. F-3
* Prince Edward Island, *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5
* Saskatchewan, *The Fatal Accidents Act*, R.S.S. 1978, c. F-11
* Northwest Territories, *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3
* Yukon, *Fatal Accidents Act*, R.S.Y 1986, c. 64

Article 1056 of the Quebec Civil Code creates a cause of action similar to that created by Lord Campbell's Act. However, there is some confusion as to the historical precedent for Article 1056.

[17] O.N.W.T. 1984, No. 12

[18] *Supra*, note 16.

the family as a class.[19] Second, the cause of action only arises if the deceased person, had he or she lived, would have had the right to sue the wrongdoer. Third, the damages are compensation for the loss suffered by the claimant as a result of the death of the deceased person. The damages are not those that the deceased person would be entitled to, had he or she survived.[20]

The differences between the statutes are found in the definition of claimants and the type of damages awarded under each statute.

Section 2 of the *Fatal Accidents Act*, R.S.A. 1980, c. F-5 allows a court to:

> . . . give to the persons respectively for whose benefit the action has been brought *those damages that the court considers appropriate to the injury resulting from the death.*

British Columbia,[21] Newfoundland,[22] Saskatchewan[23] and the Northwest Territories[24] have similar provisions. The wording used in all these statutes is very similar to that found in Lord Campbell's Act. Courts have interpreted such legislation to allow for pecuniary damages only. Manitoba,[25] New Brunswick,[26] Ontario,[27] Prince Edward Island[28] and the Yukon[29] has legislation that allows the claimant to recover their **pecuniary** loss resulting from the death of the

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19 *Pym* v. *Great Northern Railway Company* (1863), 4 **B. & S.** 397, 122 E.R. 508 (Ex.).

20 *Ibid.*

21 *Family Compensation Act*, 1979 R.S.B.C., c. 120, s. 3(2).

22 *Fatal Accidents Act*, R.S.N. 1970, c. 126, s. 5.

23 *The Fatal Accidents Act*, R.S.S. 1978, c. F-11, s. 4(1).

24 *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3, s. 3(2).

25 *Fatal Accidents Act*, C.C.S.M. 1987, c. F-50, s. 3(2).

26 *Fatal Accidents Act*, R.S.N.B. 1973, c. F-7, s. 3(2).

27 *Family Law Act*, R.S.O. 1990, c. F-3, s. 61(1).

28 *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, s. 6(2).

29 *Fatal Accidents Act*, R.S.Y. 1986, c. 64, s. 3(2).

deceased. The wording used in these statutes merely codifies older case authority that interpreted statutes patterned after Lord Campbell's Act.

A claimant cannot recover damages for non-pecuniary loss unless the governing statute specifically says so. Provinces that do compensate for some element of non-pecuniary loss are Alberta, Manitoba, Ontario, Nova Scotia and New Brunswick. Nova Scotia has the clearest legislation concerning recovery of non-pecuniary damages. The Nova Scotia *Fatal Injuries Act* contains a provision similar to section 2 of the Alberta *Fatal Accidents Act*. It goes further, however, and defines damages to mean pecuniary and non-pecuniary damages, which include:[30]

> (d) an amount to compensate for the loss of guidance, care and companionship that a person for whose benefit the action is brought might reasonably have expected to receive from the deceased if the death had not occurred.

The law governing recovery of pecuniary and non-pecuniary damages in wrongful death actions is the subject of Chapter 3.

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30 *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, s. 5(2)(d).

CHAPTER 3 — DAMAGES FOR WRONGFUL DEATH

A. Assessment of Damages in Wrongful Death Actions

(1) First Came Pecuniary Damages

Soon after the English Parliament enacted Lord Campbell's Act, the courts began to wrestle with how damages would be assessed under the Act. In *Blake* v. *Midland Railway*,[31] the court held that in awarding damages under the Act the jury could not consider the sorrow, grief, or mental suffering experienced by the widow. The jury could only award damages for injuries of which a pecuniary estimate could be made. The court did not have to come to this result because the wording of the Act is so general. Yet, in the absence of legislative intervention,[32] this has been the law in England and Canada ever since.[33]

In *Blake* v. *Midland Railway* the court came to its decision on the basis of the interpretation of the wording of the statute. It held that the language of the statute was more appropriate to "a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to sooth the feelings". It concluded that the English Parliament would not have given the jury the difficult task of calculating and apportioning the solatium to different family members without some guidelines. It was also afraid that if damages were recoverable for grief and sorrow, there would be a serious risk of "damages being given to the ruin of the defendant". As will be discussed later, these are some of the arguments still raised in opposition to recovery of non-pecuniary damages in wrongful death actions.

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31 (1852) 18 Q.B. 35.

32 The legislative intervention will be discussed in detail later in this chapter.

33 See *Franklin* v. *South Eastern Railway Co.* (1858), 3 **H. & N.** 213, 157 E.R. 448 (Ex.); *St. Lawrence & Ottawa Railway Co.* v. *Lett* (1885), 11 S.C.R. 422; *Taff Vale Railway Co.* v. *Jenkins*, [1913] A.C. 1 (H.L.); *McGee* v. *Smith* (1964), 48 D.L.R. (2d) 476 (N.S., S.C.A.D.); *Vale* v. *R.J. Yohn Construction Co. Ltd.* (1970), 12 D.L.R. (3d) 465 (Ont. C.A.); *Alaffe* v. *Kennedy* (1973), 40 D.L.R. (3d) 429 (N.S., SCTD); *Keizer* v. *Hanna and Buch*, [1978] 2 S.C.R. 342; *Rowe Estate* v. *Hanna* (1989), 71 Alta. L.R. (2d) 136 (Q.B.)

Other courts were quick to follow this lead and also confined damages to losses that are of a pecuniary nature.[34]

It soon became clear that damages are not measured on the basis of the deceased's legal obligation to support the claimant.[35] In fact, the claimant need not be financially dependent upon the deceased.[36] Also, there is no need for the claimants to prove that they enjoyed any benefits bestowed by the deceased during his or her lifetime. Prospective pecuniary loss is recoverable.[37] The test to be applied is:[38]

> It is sufficient if it is shown that the claimant had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive which has been disappointed by his death.

By virtue of this test, compensation is given for loss by reason of the deceased not being alive. This is narrower than loss by reason of the deceased's death. The test precludes recovery for funeral expenses,[39] lost earnings[40] or other expenses reasonably incurred by the claimant as a result of the death of the

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34 *Blake* v. *Midland Railway, supra,* note 31; *Franklin* v. *South Eastern Railway Co., supra,* note 33, *Dalton* v. *South Eastern Railway Company* (1858), **4 C.B. (N.S.)** 296, 140 E.R. 1098 (Common Bench); *Pym* v. *Great Northern Railway Co., supra,* note 19.

35 *Franklin* v. *South Eastern Railway Co., supra,* note 33; *Dalton* v. *South Eastern Railway Co., ibid*; *Proctor* v. *Dyck,* [1953] 2 D.L.R. 257 (S.C.C.).

36 *Proctor* v. *Dyck, ibid.*

37 *Franklin* v. *South Eastern Railway Co., supra,* note 33; *Taff Vale Railway Co.* v. *Jenkins, supra,* note 33; *Proctor* v. *Dyck, supra,* note 35, *McGee* v. *Smith, supra,* note 33.

38 *Proctor* v. *Dyck, supra,* note 35 at 261. This test was first set out in *Blake* v. *Midland Railway, supra* note 31 and *Franklin* v. *South Eastern Railway Co., supra,* note 33. It is repeated throughout the Canadian decisions dealing with this issue.

39 *Dalton* v. *South Eastern Railway Co., supra,* note 34; *Pym* v. *Great Northern Railway, supra,* note 19; *Clark* v. *London General Omnibus,* [1906] 2 K.B. 648 (C.A.); *Toronto Railway Company* v. *Mulvaney* (1907), 38 S.C.R. 327.

40 *Barnett* v. *Cohen and others,* [1921] 2 K.B. 461.

deceased.[41] Only damages for the loss of benefits that would have accrued had the deceased lived are recoverable.

Also, medical expenses incurred between the time of injury and death are not recoverable.[42] Neither are the travel costs incurred in attending the deceased between the time of injury and death.[43]

A further constraint on the test is that the pecuniary benefits to be derived from the deceased's remaining alive must be attributable to the family relationship, and not a debtor-creditor relationship which has previously been established between the claimant and the deceased.[44]

The pecuniary loss is determined by " balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death".[45] Unless excepted by statute,[46] the claimant must account for any financial benefit arising from the death. Such benefits include any inheritance received from the deceased's estate, excluding household assets.[47] Most wrongful death statutes

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41 *Toronto Railway Company* v. *Mulvaney, supra,* note 39 and *Smith* v. *Cook* (1981), 33 O.R. (2d) 567 (H.C.J.).

42 *Mayer* v. *Prince Albert,* [1926] 4 D.L.R. 1072 (Sask. C.A.) and *Duggan* v. *Harnish and Poirier,* [1955] 3 D.L.R. 860 (N.S.S.C. in banco).

43 In *Flaherty's Estate* v. *Flynn and Buckle* (1976) 10 Nfld. & P.E.I.R. 72 (Nfld. S.C.), the court acknowledged that the parents' costs of travelling to and from the hospital was not properly a claim brought under the *Survival of Actions Act* by the estate or the *Fatal Accidents Act.* Nevertheless the judge allowed this claim on the basis that the parents could have recovered these expenses had the child survived, and they should not be deprived of them by his death. The court ignored *Baker* v. *Bolton.*

44 *Smith* v. *Cook, supra,* note 41 and *McGregor on Damages,* 15th ed. (London: Sweet & Maxwell, 1988) at para. 1549.

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

46 An example of such an exception is found in s. 6 of the *Fatal Accidents Act* dealing with insurance proceeds paid on death.

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

provide that the court must not take into account insurance proceeds when assessing damages.

There is no need to get into the mathematical detail of quantifying damages under the *Fatal Accidents Act*. In many ways it is similar to the assessment done when a court awards damages for future care or loss of future earnings. K.D. Cooper-Stephenson and I.B. Saunders summarize the general concepts in their treatise entitled *Personal Injury Damages in Canada*[48] as follows:

> The quantification of damages for loss of pecuniary benefit involves:
>
> 1. *Period of loss* — Determination of the period during which the loss of pecuniary benefit has been and will be sustained.
>
> 2. *Level of benefit* — Estimation of the weekly, monthly or annual pecuniary benefit which the dependants would have received but for the death, and the subtraction of certain offsetting pecuniary advantages.
>
> 3. *Apportionment of Collective Losses* — Appropriate division of those benefits which were somehow shared among the dependants (as distinct from individual benefits which enured to a particular dependant alone).
>
> 4. *Contingencies* — Estimation of the reduction, if any, to be make on account of the contingencies of life.
>
> 5. *Interest and Inflation, The Discount Rate* — Determination of the appropriate discount rate to take account of projected inflation and the investment interest to be received on the lump sum damages, and also to the effect of national and industrial productivity.

Pecuniary loss can take several forms: loss of income, loss of valuable services, and loss of accumulated wealth available for inheritance.[49]

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[48] (Toronto: Carswell, 1981) at 419.

[49] K.D. Cooper-Stephenson and I.B. Saunders, *ibid.* at 419.

(2) Then Came Recovery of Certain Out-of-pocket Expenses

The fact that a claimant could not recover funeral expenses and other reasonably incurred out-of-pocket expenses from the wrongdoer offended many. As a consequence, all provinces with wrongful death statutes amended the statute to allow for recovery of certain out-of-pocket expenditures made by the claimants as a result of the death of the deceased. These out-of-pocket expenditures are awarded in addition to pecuniary damages.

(a) Funeral expenses

All Canadian provinces that had wrongful death statutes amended the statutes to allow the claimants to recover funeral expenses they incurred as a result of the death of the deceased. In 1967, Alberta did so by allowing claimants to recover "reasonable expenses of the funeral and the disposal of the body of the deceased" up to a maximum of $500 if the claimants incurred these expenses.[50] In 1979, the $500 ceiling was removed.

The reported decisions do not usually disclose disputes over the payment of funeral costs and they do not detail which items fall within this category. However, on occasion the defendant has disputed the amount claimed as funeral expenses. Two decisions give some guidance on the meaning of funeral expenses. In the Newfoundland case of *Flaherty's Estate* v. *Flynn and Buckle*[51], the court construed funeral expenses as covering:[52]

> the necessary and reasonable cost of acquiring and preparing the grave, the undertaking costs, the costs of church funeral services and the appropriate bordering and marking of the grave.

In the Australian case of *Public Trustee* v. *Bednarczyk*,[53] the court held:

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50 *An Act to amend The Fatal Accidents Act and The Trustee Act*, S.A. 1967, s. 22, and now see *The Fatal Accidents Act*, R.S.A. 1980, c. F-5, s. 7.

51 *Supra*, note 43.

52 *Ibid.* at 77.

53 [1959] S.A.S.R. 178 at 180.

> The word "funeral" is usually taken to comprehend the disposal of human remains, including accompanying rites and ceremonies, that is to say, the procedure of, and appertaining to, burial or cremation, in the course of which the body is prepared for burial and conveyed by cortege to the necropolis. Such initial stages as acquisition of burial plot, public notice, obtaining a certificate of death, permission to cremate or bury, will form part of the procedure and the cost will be funeral expenses.

Most wrongful death statutes allow claimants to recover reasonable funeral expenses. This concept was best dealt with in *Flaherty's Estate* v. *Flynn and Buckle*, as follows:[54]

> The court, free of the emotion of the situation, makes an allowance solely on the basis of what is reasonable — what is the least amount which should be spend to provide an appropriate coffin and tombstone, consistent with the dignified and fitting disposition of human remains, and the marking of the final resting place, without consideration however to elaborations which surviving relatives may understandably desire to display their love and affection.

The courts recognize that some claimants purchase an expensive coffin and elaborate tombstone as an expression of their love and affection for the deceased. Although it may be therapeutic for the claimants to do so, they cannot recover the additional costs from the wrongdoer. Such a claim is—in a way—a claim for damages for grief for which no compensation is available in most jurisdictions.

Claimants can recover funeral expenses even if they cannot pursue a pecuniary loss claim. But the claim for funeral expenses is subject to deduction of any inheritance received from the estate of the deceased other than those expressly excluded by the Act, such as insurance proceeds.[55]

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54 *Supra*, note 43 at 77.

55 *Stanton and Another* v. *Ewart F. Youlden, Ltd.*, [1960] 1 All E.R. 429 (Q.B.) and *Lombard* v. *Phillips* (1965-69), 5 N.S.R. 482 (N.S.S.C. in banco).

(b) Other out-of-pocket expenses

Recovery of other out-of-pocket expenses incurred as a result of the death is restricted. Alberta, Manitoba, New Brunswick, Newfoundland and the Yukon limit recovery of out-of-pocket expenses to funeral expenditures. The remaining provinces (excluding Quebec) and the Northwest Territories allow recovery of funeral expenses plus other types of expenditures, which include:

(a) any medical or hospital expenses which would have been recoverable as damages by the person injured if death had not ensued,[56]

(b) out-of-pocket expenses reasonably incurred for the benefit of the deceased,[57]

(c) a reasonable allowance for travel expenses incurred in visiting the deceased between the time of the injury and death,[58]

(d) where, as a result of the injury, a person for whose benefit the action is brought provided nursing, housekeeping or other services for the deceased between the time of the injury and the death, a reasonable allowance for loss of income or the value of the services,[59]

(e) where the proceeding is brought or continued by the personal representative, an amount not exceeding $500 toward the expenses of taking out administration of the estate in this province.[60]

No province or territory allows claimants to recover the cost of grief counselling or loss of earnings incurred during the grieving process. This probably reflects the common law rule that damages for grief are not compensable.

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56 British Columbia, Saskatchewan, Northwest Territories.

57 Nova Scotia and Ontario.

58 Nova Scotia and Ontario.

59 Nova Scotia and Ontario.

60 Prince Edward Island.

(3) Then Came Non-pecuniary Damages In Some Provinces

Until 1978, Canadian courts did not award non-pecuniary damages in wrongful death actions. Lord Campbell's Act and the Canadian wrongful death statutes patterned after it were interpreted as creating a cause of action for recovery of pecuniary damages only. Since 1978, five Canadian provinces have amended their wrongful death statute to allow for recovery of certain types of non-pecuniary damages: damages for bereavement, grief, or loss of guidance, care and companionship. Damages for loss of guidance, care and companionship do not include damages for grief (which is the same as damages for bereavement).[61]

Non-pecuniary damages in wrongful death actions will be discussed in more detail later in this chapter.

(4) Overview of Compensable Damages in Wrongful Death Actions in Canada

At present, non-pecuniary damages are not compensable in several provinces. Claimants bringing an action in those provinces can only recover pecuniary damages, as defined by the case law, and certain out-of-pocket expenses allowed by statute.[62] In other provinces, certain elements of non-pecuniary loss is compensable, along with pecuniary loss and certain out-of-pocket expenses.[63]

B. Damages for Wrongful Death of Children

(1) Measure of Pecuniary Damages

The general principles governing assessment of pecuniary damages apply to cases involving the wrongful death of children. What pecuniary advantage would the parents have received if the child had lived? The court estimates what the child would have given the parents in money or money's worth over a certain period and deducts from this the costs the parents would have paid in

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61 *Mason* v. *Peters* (1982), 139 D.L.R. (3d) 104 at 118 (Ont. C.A.).

62 These provinces include British Columbia, Saskatchewan, Prince Edward Island, and New Brunswick.

63 These provinces include Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland.

maintaining the child over this period. The difference is the pecuniary advantage. We shall refer to this as the "wages less keep" measure of damages.

The following authorities more fully describe this measure of damages. In *Schroeder et al.* v. *Johnson and Chaudierre Transport Ltd.*, parents brought an action under *The Fatal Accidents Act*, R.S.O. 1937 for damages suffered by them by reason of the death of their 11 year old son. The court held:[64]

> The plaintiffs' claim must be assessed on a cash basis of what benefit they could reasonably have expected to receive if the deceased boy had continued to live, and had been willing to contribute to the support of his father and mother when and after he became 16 years of age. From any such benefit must be deducted the cost of the boy's board and lodging until he became 16 years of age, less such amount as the deceased could have earned out of school hours until he became 16. All the uncertainties of life must be taken into consideration in arriving at an assessment. The deceased might have been killed, or died from disease. The plaintiffs, or one of them, might have died. The deceased might have left home at 16, and refused any support to either of the plaintiffs.

In *Guitard et al.* v. *MacDonald et al.*, the New Brunswick Supreme Court, Appeal Division held:[65]

> While it may be harsh, the mental suffering of the parents is not an element for consideration in assessing damages: see *McGee v. Smith* (1965), 48 D.L.R. (2d) 476 at p. 479. The loss should be assessed on a credit and debit basis, the amount which the child could be expected to contribute to his parents and the home on the one side and the cost of supporting the child on the other. If the estimated contributions of the child exceed the cost of his support, his parents are entitled to the difference as damages but, if the reverse is true, they cannot recover anything.

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64 [1949] 4 D.L.R. 64 (Ont. H.C.) at 64.

65 (1970), 14 D.L.R. (3d) 252 at 254.

In *Vale* v. *R.J. Yohn Construction Company Ltd.*, the Ontario Court of Appeal analyzed the adequacy of a charge to the jury in a case involving the wrongful death of a five year old child. The court held:[66]

> . . . it was the duty of the trial judge to charge the jury that in determining the compensation or damages of the parents in that regard, all they could consider was loss in dollars and cents, the pecuniary loss to parents having in mind all the uncertainties of life, and that they must not allow the parents anything for what is called solatium or loss due to their great affection for the child, or for any loss other than that of strict financial benefit of which they were deprived by the child's death.

The court faces a very difficult task of assessment when the deceased is very young at the time of death. In such cases there is no evidence to indicate what kind of person he or she would have grown into, the expected level of earnings, his or her disposition to the parents and so on. There is no facts from which a court can draw an inference of probable benefit. For this reason the parents' claim fails.[67] It is "pressed to extinction by weight of the multiplied contingencies".[68] It is impossible to demonstrate a reasonable expectation of pecuniary benefit when the parents lose a baby in arms.[69]

Parents succeed only if there is a reasonable probability of pecuniary advantage. They fail if there is only a speculative possibility of pecuniary advantage.[70] The younger the child, the more reasonable probability merges into speculative possibility.[71]

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66 *Supra*, note 33 at 465-66.

67 *Nickerson* v. *Forbes* (1955), 1 D.L.R. (2d) 463 (N.S. S.C.A.D.).

68 *Barnett* v. *Cohen, supra*, note 40.

69 *Alaffe* v. *Kennedy, supra*, note 33.

70 *Nickerson* v. *Forbes, supra*, note 67; *Guitard et al.* v. *MacDonald et al, supra*, note 65; *Alaffe* v. *Kennedy, supra*, note 33.

71 *Nickerson* v. *Forbes, supra*, note 67.

The financial position of the parents is also relevant. Courts conclude that poor parents are more likely to receive financial contributions from their children than are well-to-do parents.[72]

(2) Cases Involving Death of Children

A comparison of the cases in which the parents have recovered damages for death of their children and those in which they have not illustrates the difficulty many parents today have in proving that they would have received a pecuniary benefit had their child lived. A review of the case law is found in Appendix A.

C. Can a Claimant Recover Damages for Loss of the Guidance, Care and Companionship of a Deceased Person?

(1) American Law

A strict construction of the pecuniary loss — which is found in the earlier interpretations of American wrongful death statutes — excludes recovery for everything but loss of money and support. Many American courts have held, and some still hold, that society and companionship are not in the nature of services, are incapable of measurement, and are not proper elements of damages recoverable under pecuniary loss statutes.[73] Nonetheless, the majority of American states are moving away from the old position and allowing recovery in wrongful death actions for such losses.[74]

The change has come about in several ways. Some state courts have expanded the definition of pecuniary loss to include loss of society and

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72 *Guitard* v. *MacDonald , supra,* note 65, and *Morrisette* v. *Salagubas and Hosaluk* (1984), 32 Sask. R. 25 (Q.B.).

73 S. Speiser, *Recovery for Wrongful Death 2d,* (New York: The Lawyers Co-operative Publishing Co. 1975) at 308-12.

74 For a summary of existing American law see John F. Wagner Jr., *Recovery of Damages for Loss of Consortium Resulting From Death of Child—Modern Status* 77 A.L.R. 4th 411.

companionship.[75] In other states, the legislatures have amended the statutes to allow for such recovery.[76] Some statutes provide that pecuniary loss includes loss of guidance, care and companionship. Other statutes allow the courts to award non-pecuniary damages for loss of guidance, care and companionship. In other states, the courts have reinterpreted the wording of the statute in order to abandon the pecuniary loss measure of damages. For example, until 1983, Texas courts interpreted the phase "actual damages by designated survivors in the event of the death of a child" as restricting recovery to pecuniary loss only. In *Sanchez* v. *Schindler*,[77] the Texas Supreme Court reinterpreted these words to allow for recovery of both pecuniary damages and non-pecuniary damages such as mental anguish and loss of society and companionship.

In addition, in *Sea-Land Services, Inc.* v. *Gaudet*[78] the United States Supreme Court held that damages for loss of society and companionship are recoverable in a maritime wrongful death claim.[79] The Supreme Court broadly defined society to include love, affection, care, attention, companionship, comfort and protection. The court recognized that the loss of a loved one's society is a grave loss and justified it as an element of damage on the basis that a majority of the states allowed such a recovery under the interpretation of their wrongful death statutes.[80]

What is the explanation for the change? It began with some courts' dislike of the idea that the wrongdoer who destroyed the home and took away the

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75 Such states include California, Michigan, Minnesota, Montana, Pennsylvania., South Dakota, Virgina, and Texas. See Speiser, *ibid.* at 318, footnote 3 and update.

76 Legislation allowing recovery for loss of companionship has been introduced in the following states: Alaska, Arkansas, Florida, Hawaii, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Nevada, North Carolina, West Virginia, Wisconsin and Wyoming. See Speiser, *ibid.* at 317, footnote 98 and update.

77 (Tex 1983) 651 S.W. 2d 249.

78 (1974), 414 U.S. 573.

79 The Supreme Court first recognized the existence of a maritime wrongful death claim at common law in *Moragne* v. *States Marines Lines, Inc* (1970) 398 U.S. 375.

80 Speiser, *supra*, note 73 at 319-22.

support and society that the survivors were entitled to, should escape liability for that injury on the ground that these things were too intangible to be recognized.[81] In time this dislike grew into the recognition that society, care and companionship are services that have financial value that can be measured and compensated.[82]

The catalyst for change was the Michigan Supreme Court decision in *Wycko* v. *Gnodtke*[83] given in 1960.[84] Although most courts have not gone as far as this decision suggests, they were influenced by this decision. The case involves an action by parents under the Michigan wrongful death statute for injury suffered as the result of the death of their 14 year old son. The statute limited the award of damages to probable pecuniary loss to the beneficiaries. There was a difference of opinion among the eight judges resulting in a majority decision and a minority decision.

The majority reiterated that in the past the pecuniary loss suffered by parents was calculated by taking the hypothetical earnings of the child and subtracting the speculative cost of rearing. This is the "wages less keep" measure of damages also used by the Canadian courts. It then asked why the English judges in the 1850s had interpreted Lord Campbell's Act in this way. The majority held:[85]

> The rulings reflect the philosophy of the times, its ideals, and its social conditions. It was the generation of the debtors prisons, of some 200 or more capital offenses, and of the public flogging of women. It was an era when ample work could be found for the agile bodies and nimble fingers of small children.

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81 See *Miller* v. *Southern P. Co.* (1915) 266 Mo 19, 178 SW 885, which is discussed in Speiser, *supra*, note 73, at 320.

82 Speiser, *supra*, note 73 at 321.

83 (1960), 105 N.W. (2d) 118 (S.C. Mich.). Ten years after *Wycko* v. *Gnodtke*, the Michigan Supreme Court abandoned the reasoning in *Wycko*, when it reaffirmed the strict pecuniary loss rule in *Breckon* v. *Franklin Fuel Co.* (1970), 174 N.W. 2d 836. Two years later the same court overturned *Breckon* and reaffirmed the principles in *Wycko*. See *Smith* v. *Detroit* (1972), 202 N.W. 2d 300.

84 Speiser, *supra*, note 73 at 537.

85 *Wycko* v. *Gnodtke*, *supra*, note 83 at 120-21.

> Defoe's England was not long past. He noticed with approval that at Colchester and in the Tauton clothing region "there was not a child or in the villages round it of above five years old, but, if it was not neglected by its parents and untaught, could earn its bread". Halevy writes that the "number of children employed in factories was so great in proportion to the adults that it was out of question to restrict the working hours of children without restricting at the same time the hours of adults. . . .". The atrocities visited upon those boys and girls it is reported in the Encyclopedia of the Social Sciences, "literally driven to death in the mills, form one of the darkest chapters in the history of childhood".

The majority concluded that in such times, it was not surprising that the courts interpreted Lord Campbell's Act to require pecuniary loss and that this pecuniary loss was calculated by a "wages less keep" measure of damages. "At that time loss meant only money loss, and money loss from the death of a child meant only his lost wages. All else was imaginary. The only reality was the King's shilling."[86]

The majority held that the "wages less keep" measure of damages should not continue in modern society. In the opinion of these judges, it is absurd to follow precedent that is based on a societal view that "value of life of a child must be measured solely by standards of the day when he peddled the skills of his hands and the strength of his back at the factory gates". Since society's values have changed and child labour is no longer allowed, the court should not follow the old precedents.

The majority then discussed how it should estimate the pecuniary loss suffered by parents as a result of the wrongful taking of their child's life. It equated the pecuniary loss to the pecuniary value of the life. The pecuniary value of a life is a compound of many elements, including:[87]

(1) expenses of birth, of food, of clothing, of medicines, of instruction, of nurture, and of shelter,

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86 *Ibid.* at 121.

87 *Ibid.* at 122.

(2) value of mutual society and protection, in a word companionship, and

(3) in unusual cases, the loss of the expectation of excess wages over keep.

Scholars refer to this measure of damages as the investment measure of damages.[88]

The majority was quick to point out that parents could not recover damages for the sorrow and anguish caused by the child's death because the Act forbids this.

The defendant argued that it was impossible to value the life of a human being and therefore no value should be placed on it at all. The majority forcefully rejected this argument. It equated such delicacy to an argument that would prevent distribution of food to the starving because the sight of hunger is sickening. The majority recognized that a life was lost and thought its duty was to, as best as it could, put a fair valuation on it.

The majority concluded as follows:[89]

> The fiction now employed as the measure of pecuniary loss should be abandoned. It perpetuates an attitude towards the value of a child's life completely repudiated by modern legislation and the enlightened child-welfare policies of this jurisdiction. It does violence to the intent of the act, which is to grant a recovery whenever a death "of a person" is caused by the wrongful act of another. The child is a

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[88] Compare the Ontario Supreme Court, Appellate Division decision in *Piper* v. *Hill*, [1923] 4 K.L.R. 1175 in which the court held at 1176-77:

> There has been a great tendency in these cases, . . . for juries to forget that their duty is not to estimate the value of the life of the child, but to endeavour to ascertain from the evidence what sum there is a reasonable ground of expectation that the child might, if he had not met with this accident, have contributed towards the support and maintenance of his parents on whose behalf the action has been brought.

[89] *Wycko* v. *Gnodtke*, *supra*, note 83 at 124.

> person and is not to be read out of the act by judicial acquiescence in the Chief Baron's theory that his life has no pecuniary value save as that of a wage-earner. The bloodless bookkeeping imposed upon our juries by the savage exploitations of the last century must no longer be perpetuated by our courts.

The result was that the Supreme Court of Michigan affirmed a damage award of $14,000 for the loss of a 14 year old boy who helped his father and brothers run a farm.

Most American jurisdictions have not gone so far as to allow parents to recover the cost of raising their child to the time of death. However, this decision prompted many state courts to reinterpret their wrongful death legislation to include loss of companionship as a pecuniary loss. Of course, there are some courts that reject the logic of the decision and declare that it is up to the legislature to make such a change, but these are in the minority.[90]

(2) Canadian Law

When discussing whether a claimant can recover damages for the loss of the guidance, care and companionship of the deceased, one must distinguish between the different statutes. We will first deal with the statutes that restrict damages to pecuniary loss and then deal with those statutes that also allow damages for loss of guidance, care and companionship.

Before beginning this discussion, we shall examine the meaning of "guidance, care, and companionship". This was first done by Justice Linden in *Thornborrow* v. *MacKinnon*.[91] Guidance includes the education, training, discipline and moral teaching. Guidance usually is given by a parent to a child, but the reverse can be true. Care includes feeding, clothing, cleaning, transporting, helping and protecting another person. Care can be bestowed on any member of the family, regardless of age. The degree of care received depends on the circumstances of the family member. Companionship is the experience of sharing one's life with another. As Justice Linden wrote, ". . .

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90 For example, see *Boland* v. *Greer* (1980), 409 N.E. (2d) 116 (C.A. Indiana).

91 (1981), 123 D.L.R. (3d) 124 (Ont. H.C.J.).

companionship with one's children is one of the most prized of human experiences. To lose that is one of life's greatest losses".[92]

(a) Where the statute does not specifically provide for recovery of loss of guidance, care and companionship

(i) Loss of a parent

The pecuniary loss for which damages may be recovered is not necessarily restricted to the loss of money or property. As early as 1885, the Supreme Court of Canada recognized in *St. Lawrence & Ottawa Ry. Co.* v. *Lett*[93] that a child may suffer a pecuniary loss as the result of the loss of a mother's care, education and training. The Court recognized that it might be difficult to estimate in money the loss a child may sustain because of the death of a mother. Nonetheless, this is no reason to deny recovery. Nor is the fact a claim of this type might lead to an investigation of the quality of the mother a reason to deny recovery. The Court should not deny recovery in deserving cases just because in some doubtful cases the investigation might be unpleasant. It is for the claimants to decide whether to bring a claim of this nature.

In *Lett*, the Court made it clear that damages for loss of society and companionship could not be assessed in money and, therefore, were unrecoverable.[94]

Three years after this decision, the Privy Council rendered its decision in *Grand Trunk Ry. Co. of Canada* v. *Jennings*.[95] In this case, the Privy Council held that in the case of the death of a man who has no means of his own and who earns nothing, the wife and children could not suffer a pecuniary loss as a result of his death. If the value of the moral training and guidance provided by a mother and father is the same, *Jennings* is authority for the proposition that loss

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92 *Ibid.* at 132.

93 (1885), 11 S.C.R. 422.

94 *Ibid.* at 429-32 in which the Court cites with approval American authorities which hold that loss of society and companionship are "incapable of being defined by any recognized measure of value".

95 (1888), 13 A.C. 800 (P.C.).

of care, education and training is a non-pecuniary loss. It therefore contradicts *Lett*.

Until 1968, many thought that *Jennings* was the law in Canada. Nevertheless, in *Vana* v. *Tosta*[96] the Supreme Court of Canada rejected its reasoning. The Court affirmed that *St. Lawrence & Ottawa Ry. Co.* v. *Lett* was good law in Canada, notwithstanding the *Jennings* decision and Australian and New Zealand jurisprudence that held that loss of care and guidance is a non-pecuniary head of damage. The Court also held that lower courts should not award a conventional sum (that is one determined by law without reference to the facts of the case) to children for the loss of their mother's care and guidance. The award should depend on the facts.

Today, whenever a child sues for the wrongful death of a parent under a statute that restricts recovery to pecuniary loss only, a claim is made for damages for loss of care, education and training. This is also described as loss of care and guidance.[97]

In Alberta, the leading case is the decision of the Court of Appeal in *Coco* v. *Nicholls*, in which Justice Moir held:[98]

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[96] [1968] S.C.R. 71.

[97] In *Campbell Estate* v. *Varanese* (1991), 279 A.P.R. 104, the Nova Scotia Supreme Court Appeal Division explained how loss of a parent's guidance and care can result in pecuniary loss to the child. At page 4 it held:

> The cases indicate the difficulty of translating loss of care, guidance and companionship into money. These are not elements of a pecuniary nature. Yet, the impact of them can have pecuniary consequences. In the case of children, particularly young children, these benefits received from a parent can be of great value. The parental contribution to a child's personality, sense of value, sound judgment and good moral standards have a potential of great pecuniary impact over a lifetime. It is impossible to measure this with any precision but it must be recognized in most cases as more than nominal, in these days more than $10,000.

[98] (1981), 31 A.R. 386 at 391.

> This head of damage has not always been recognized in Alberta. It is most difficult to put a money value on such losses. However, it is not to be a conventional award or that will amount to an error in principle. Likewise, it is not to be over-emphasized or it will lead to very high awards out of proportion to any real pecuniary loss sustained.

In comparison to other provinces that restrict recovery to pecuniary damages, Alberta courts give very moderate awards to a child for loss of a parent's care and guidance.[99]

(ii) Loss of a spouse, child or sibling

To date, Canadian courts have been unwilling (in contrast to their American counterparts) to interpret loss of guidance, care and companionship as a pecuniary loss. The one exception, as noted above, is a child's loss of a parent's guidance and care. Most of the authorities conclude that the loss of the guidance and care of a spouse, child or sibling is a non-pecuniary loss and, therefore, not compensable, unless a statute says otherwise.[100]

The only line of authority that appears to take the law further is the decisions of the Prince Edward Island Court of Appeal given in *Reeves' Estate* v.

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[99] In British Columbia, the courts award a conventional sum for loss of a parent's care and guidance, and in the usual case the award is $20,000: *Plant* v. *Chadwick* [1986] 6 W.W.R. 131 (B.C.C.A.). Alberta awards are much smaller. See: *Coco* v. *Nicholls, ibid.*—four children lose their mother. For loss of guidance and care of mother court awards: $6,000 (6 year old), $3,000 (12 year old), $1,000 (16 year old), 0 (18 year old). *Neufeld* v. *Scott* (1982), 37 A.R. 409 (Q.B.)—three sons lose father one month after mother dies. Six year old receives $2,500; 14 year old receives $5000; 16 year old receives $5,000. *Chamberland* v. *Fleming and Brost* (1984), 54 A.R. 291—10 year old boy receives $2,500 for loss of father's guidance and care. *Flett Estate* v. *Way-Mat Oilfield Services Ltd. et al.* (1988), 63 Alta. L.R. (2d) 387 (Q.B.)—18 month old child receives $20,625 for loss of guidance and care of father who was deeply involved with infant son. *O'Hara* v. *Belanger* (1989), 69 Alta. L.R. (2d) 158—10 year old boy suffered loss of stepfather who stood in *loco parentis* to child. Court awarded $11,250 for loss of care, guidance and moral training.

[100] *Smith* v. *Cook, supra,* note 41; *Beauchamp* v. *Entem Estate,* (1986), 51 Sask. R. 99 (Q.B.); *Rowe Estate* v. *Hanna, supra,* note 33.

Croken.[101] Yet, the second decision given by this court in the action[102] seems to cancel the effect of its first decision. Parents sought damages under the Prince Edward Island *Fatal Accidents Act* for the wrongful death of their 11 year old son. The claim included, among other things, damages for loss of their son's care, guidance, companionship and encouragement. The defendant argued that this was not a measure of damage compensable under the Act because it was not a loss of a pecuniary benefit.

The Court of Appeal was first asked to determine a question of law, namely:[103]

> Is a claim by the parents and brother and sister of a deceased child for damages for the loss of care, guidance, companionship, and encouragement, as a result of the death of the child a valid head of damages under the *Fatal Accidents Act*, S.P.E.I. 1978, C. F-41.

The Act provided that damages would be limited to the loss of **pecuniary benefit** or the reasonable expectation of **pecuniary benefit** resulting from the death of the deceased. Since this was only a determination of a question of law, the court did not apply the law to the facts of the case.

The court held that brothers and sisters were not claimants under the Act, but the parents were. It also reaffirmed that damages for loss of a sentimental nature, such as feelings of grief, are not recoverable.

The real issue was what is meant by pecuniary benefit. Is pecuniary benefit restricted to actual and ascertainable financial loss or does it include the intangible loss brought about by the death of the child? The parents argued that if the child's loss of the guidance and care of a parent can result in pecuniary loss, the reverse must also be true. The Court of Appeal accepted this argument. It viewed the *St. Lawrence & Ottowa R. Co.* v. *Lett* and *Vana* v. *Tosta* decisions as holding that the intangible injury caused by the destruction of the parent-child

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101 *Reeves' Estate* v. *Croken* (1985), 162 A.P.R. 240 (P.E.I.C.A.); but see *Reeves' Estate* v. *Croken* (1989), 240 A.P.R. 109 (P.E.I. S.C.T.D.) overruled by *Reeves' Estate* v. *Croken* (1990), 262 A.P.R. 298 (P.E.I.C.A.).

102 *Reeves' Estate* v. *Croken* (1990), *ibid.*

103 *Reeves' Estate* v. *Croken* (1985), *supra*, note 101 at 241

relationship could result in pecuniary loss. "[W]here there will be detriment to the child, there will equally, where the circumstances are reversed, be a parallel detriment to the parent, equally compensable, and therefore a loss of pecuniary benefit within the meaning of the Act."[104]

The court was faced with the statements in *Lett* that loss of companionship was not a pecuniary loss. It side-stepped this by saying that there was little difference between care and guidance (recoverable under *Lett*) and care, guidance, and companionship (recoverable under section 60(2)(d) of the Ontario *Family Law Reform Act*). Also, it disagreed with the Ontario case law saying that this section allowed the court to award damages for a non-pecuniary loss. It thought that section 60(2)(d) merely codified the existing common law.[105]

The end result was that the court held that a claim by parents of a deceased child for damages for the loss of care, guidance, companionship and encouragement was a valid head of damages under the *Fatal Accidents Act*. Loss of a child's care, guidance and companionship could be a loss of a pecuniary benefit.

When the matter came to trial,[106] the trial judge found that the parents suffered no pecuniary loss if one applied the "wages less keep" measure of damages. Nonetheless, he examined decisions interpreting section 60(2)(d) of the *Family Law Reform Act* (Ontario) and, on the basis of these, awarded $25,000 for loss of guidance, care and companionship.

In time the Prince Edward Island Court of Appeal considered the issue of level of damages. It overturned the damage assessment made by the trial judge and denied recovery of any damages. The court held that the measure of damages for the loss of the son's care, guidance and companionship is only the amount of money the claimants have lost or will likely lose as a result of that deprivation. It then quoted with approval the decision in *Guitard* v. *MacDonald*, which sets out the "wages less keep" measure of damages. On the facts in *Croken* case, the family had suffered no pecuniary loss because the child would not have

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104 *Ibid.* at 246.

105 The Ontario Court of Appeal decision in *Mason* v. *Peters*, *supra*, note 61 must not have been brought to the court's attention.

106 *Reeves' Estate* v. *Croken* (1989), 240 A.P.R. 109 (P.E.I., S.C.T.D.).

been a financial benefit to the parents over their lifetime. The child was not providing financial support to his parents at the time of his death. Nor was he providing care, guidance or companionship of a type that the family would have to purchase elsewhere after his death.

The court stated that recovery of non-pecuniary damages must come by legislative action, not judicial intervention.

This result suggests that the first decision of the court did not change the earlier case law. Loss of valuable services has always been seen as a pecuniary loss.

(b) Where the statute does provide for recovery of loss of guidance, care and companionship of a deceased person

(i) Ontario, Manitoba and Nova Scotia

In 1978, Ontario was the first province to introduce legislation that allowed claimants to recover damages for loss of guidance, care and companionship in a wrongful death actions.[107] In 1980, Manitoba introduced similar legislation,[108] followed in 1986 by Nova Scotia.[109] The difference in the wording of the acts created certain problems. In Ontario and Manitoba it was unclear whether damages for loss of guidance, care and companionship were restricted to pecuniary loss or whether damages could be awarded for non-pecuniary loss. In Nova Scotia, the legislation stated that damages could be recovered for both pecuniary and non-pecuniary loss.

In Ontario, the legislation reads as follows:

> 61.—(1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have

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107 *Family Law Reform Act, 1978*, S.O. 1978, c. 2, s. 60, *Family Law Reform Act*, R.S.O. 1980 c. 152, s. 60, *Family Law Reform Act, 1986*, S.O. 1986, c. 4, s. 61.

108 *An Act to Amend The Fatal Accidents Act and The Trustee Act*, S.M. 1980 c. 5, s. 1; now *Fatal Accidents Act*, R.S.M. 1987, c. F-50, s. 3(4).

109 *An Act to Amend Chapter 100 of the Revised Statutes, 1967, the Fatal Injuries Act*, S.N.S. 1986, c. 30, and see *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, s. 5(2)(d).

> been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their **pecuniary loss** resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (2) The damages recoverable in a claim under subsection (1) may include:
>
> . . .
>
> (d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

Only Ontario allows relatives of injured persons to claim for loss of guidance, care, and companionship. Manitoba and Nova Scotia restrict such claims to relatives of deceased persons. Furthermore, brothers and sisters do not have a wrongful death claim in these two provinces.

Initially, there was conflicting case law on the issue of whether the section quoted above merely codified the existing law found in *Vana* v. *Tosta* or whether it expanded it.[110] In *Mason* v. *Peters*,[111] the Ontario Court of Appeal resolved this conflict. It summarized the old law and discussed the often criticized result that occurred when courts applied the "wages less keep" measure of damages in cases involving wrongful death of a minor child. It concluded that what is now section 61(2) extended the old law to include recovery for loss of guidance, care and companionship on a **non-pecuniary** basis.

It came to this conclusion for the following reasons:

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110 Compare *Thornborrow* v. *MacKinnon, supra,* note 91 and *Chitale et al.* v. *Sandford et al.* (1980), 1 A.C.W.S. (2d) 309.

111 *Supra,* note 61. In this case the court adopted the reasoning of Justice Linden set out in *Thornborrow* v. *MacKinnon.*

(1) Section 61(2) is evidence of the legislature's intent to give greater recognition to the interest in family relations and to "provide greater protection against wrongful disturbance or destruction of that advantageous relationship". The section is aimed at repairing those losses which cannot ordinarily be equated in money value. The loss of guidance, care and companionship is such a loss. Although it sometimes can constitute economic value, such as in *Vana* v. *Tosta*, in most cases the connection is usually difficult to trace.

(2) Section 61(1) provides for recovery of any type of loss that is pecuniary. If damages for guidance, care and companionship were only recoverable if they were a pecuniary loss, section 61(2)(d) would have no useful purpose. If such losses were pecuniary, they would already be recoverable.[112]

(3) Section 61(2)(d) is designed to accommodate non-pecuniary awards for family losses. Its purpose is to overcome the result of the old case law dealing with wrongful death of minor children. This new measure of damages recognized the child as an integral part of a family unit, not simply a source of funds or services, and provides "an effective basis for more realistic and just damages".

The Manitoba Court of Appeal has also interpreted legislative amendments as extending damages recoverable under the *Fatal Accidents Act*. "A claim under section 4(4) then becomes a compassionate allowance unrelated to pecuniary measurement".[113] Yet, the Manitoba Court of Appeal has taken a different tack on the assessment of such damages. In Ontario, the quantum of damages for loss of care, guidance and companionship depends on the facts of each case.[114] The Manitoba Court of Appeal has held that the judiciary must establish modest

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112 This is in direct conflict to what the Saskatchewan Queen's Bench held in *Beauchamp* v. *Entem's Estate*.

113 *Rose* v. *Belanger*, [1985] 3 W.W.R. 612 at 621. The Manitoba reaffirmed this position in three subsequent cases: *Lawrence* v. *Good*, [1985] 4 W.W.R. 652, *Charbonneau* v. *Huff* (1985), 34 Man. R. 278, *Larney* v. *Friesen*, [1986] 4 W.W.R. 467.

114 *Mason* v. *Peters*, *supra*, note 61 at 118: "In any given case, the amount of compensation will depend on the facts and circumstances in evidence in the case."

conventional awards and must award them in all but the most unusual of cases.[115]

This issue was brought before the Manitoba Court of Appeal several times. Yet, the Court said in no uncertain terms that it was not going to follow the Ontario method of calculation.[116] Justice Monnin justified his position as follows:[117]

> It may be as an expression of sympathy, of humanity towards our fellow citizens, that judges award cold cash to those who have suffered that type of loss. Sympathy as a mode or a means of compensation is always a bad advisor and an unreliable guide. When dealing with imponderables, one should do so with great hesitation, especially when one is not spending or awarding one's own funds but those of another person or of a corporation. Of necessity, awards of this type are arbitrary and in **the nature of an unexpected windfall for the beneficiary**. It is nearly always impossible, if not actually impossible, to start re-evaluating someone else's happiness and to provide him or her with adequate monetary compensation for the loss of that happiness as a result of the death of a loved one. How can anyone determine the cash value of a human life? That is the reason—as well as for the sake of some uniformity between awards—that the various amounts granted to beneficiaries must be calculated modestly. Otherwise, depending on who the trier of fact is and depending on the quantum of evidence discussing happiness or unhappiness of another person's life, these amounts can vary from very little to astronomical figures. The warning which has been clearly given to all triers of fact is to deal with all of them with moderation and then courts will achieve some modicum of uniformity. [emphasis added]

We do not agree that the damages paid to family members who lose the companionship of a loved one are a windfall. The family members have suffered an irreparable and destabilizing loss, not an "unexpected good fortune". No

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115 *Rose* v. *Belanger, Lawrence* v. *Good,* and *Larney* v. *Friesen,* all *supra,* note 113.

116 *Larney* v. *Friesen, ibid.*

117 Per Monnin C.J. in *Larney* v. *Friesen, ibid.* at 471.

money will ever make up for this loss. The damages awarded are a recognition of this loss and in no way are a windfall.

Other members of the Court of Appeal explained their decision as follows:[118]

> The problem with assessing an amount to be paid for loss of companionship is that, unless conventional figures are worked out, trials are likely to become filled with evidence of the worth or lack of worth of the deceased's life, of the nature of the relationship and the quality of the companionship given in life. This inquiry is likely to be futile. It would subject the grief of relatives of the deceased to the court process of examination and cross-examination to see whether one amount or another should be awarded for loss of companionship. This would be a hardship on all of the parties. Hence, it seems to me that evidence on this issue should be limited.

The Manitoba Court of Appeal has set a conventional sum of $10,000 for the loss of a spouse.[119] They also awarded a mother $10,000 for the loss of the companionship of a 19 year old girl who had left home. The brother and sister of this girl each received $2500 in damages for loss of companionship.[120] The court has not set a conventional sum for the death of a small child.

Nova Scotia courts have not taken the Manitoba approach of awarding conventional sums; they award damages on a case by case basis.[121] In *Morrell-Curry* v. *Burke*,[122] the Nova Scotia Supreme Court, Trial Division reviewed *Arnold* v. *Teno*,[123] a decision in which the Supreme Court of Canada established

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118 Per O'Sullivan and Matas in *Larney* v. *Friesen*, *ibid.* at 472.

119 *Rose* v. *Belanger* and *Lawrence* v. *Good*, both *supra*, note 113.

120 *Larney* v. *Friesen*, *ibid.*

121 *Morrell-Curry* v. *Burke* (1989), 92 N.S.R. (2d) & 237 A.P.R. 402, affd. (1989) 94 N.S.R. (2d) & 247 A.P.R. 399 (N.S. S.C.A.D.), leave to appeal to S.C.C. dismissed 107 N.R. 239; *Campbell Estate* v. *Varanese*, *supra*, note 97.

122 *Ibid.*

123 [1978] 2 S.C.R. 287.

the approach to awarding compensation for non-pecuniary damages. In the *Teno* case, the Court determined that it should have regard to the social impact of very large and non-compensating awards for non-pecuniary damages for physical injuries. The Court feared that such awards would make insurance premiums prohibitive for all but the rich. Yet, the Court rejected the idea of confining non-pecuniary damages to an arbitrary and conventional sum. The purpose of damages for non-pecuniary losses was to provide some substitutes for these amenities, not to compensate for the losses (which was impossible to do). Since uniformity was desirable, as well as flexibility to meet different needs, the Court set an upper figure for the most serious loss of amenities.

The trial judge in *Morell-Curry* thought that this was also a good approach to awarding non-pecuniary damages for loss of guidance, care and companionship. He held:[124]

> I agree with defendant's counsel that awards made for loss of guidance, care and companionship must be kept within reasonable bounds and not be fixed by feelings of compassion for the survivor which could result in awards so high that society could not afford the motor vehicle insurance to pay for them. In cases under the *Fatal Injuries Act*, realistic awards are made as compensation for the loss of financial support of the deceased. However, the grief suffered by the survivor is not compensable. There must be an actual loss of guidance, care and companionship. The award should be such as to provide reasonable compensation for that actual loss. As in the cases of serious disability decided by the Supreme Court of Canada such as *Arnold v. Teno*, the compensation for loss of guidance, care and companionship should have some degree of uniformity although I am not suggesting a maximum. However, as noted by the Ontario Court of Appeal, the award to Mr. Nielsen of $40,000 was at the high end of the scale as were the awards to her mother [$10,000], brothers and sisters; the surviving family members in that case were very dependent on Mrs. Nielsen. In most cases, it is impossible to make an accurate assessment of damages under this head. The primary compensation for the surviving spouse is the award to replace the benefit of the lost income as in the cases of total disability.

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124 *Morrell-Curry* v. *Burke, supra*, note 121 at 409-10.

The *Morrell-Curry* case involved the wrongful death of a husband who was survived by his wife of 11 months and his parents. The court awarded damages under this head of $10,000 to the wife and $2,500 to each parent. He noted that the parent had suffered much grief as a result of the loss of the son, but this was not compensable.

This approach was affirmed by the Nova Scotia Court of Appeal,[125] and leave to appeal to the Supreme Court of Canada was denied.

(ii) Exercise of court discretion in Ontario, Manitoba and Nova Scotia

It is useful to set out the amounts which the Ontario, Manitoba and Nova Scotia courts have awarded as non-pecuniary damages for loss of a deceased persons' guidance, care and companionship. The list shows how Canadian courts are exercising their discretion in this area. For convenience, we compare child death actions and adult death actions separately.

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125 *Ibid.*

Damage Awards for Loss of Guidance, Care and Companionship — Adult Death Cases

Name and Year of Case	Age and Sex of Deceased		Damages Awarded		
			Spouse	Children	Parents
Ontario *Levesque v. Lipskie* (1991), 80 D.L.R. (4th) 243	40	male	not specified	not specified	$15,000 (F) $10,000 (M)
Nielson v. Kaufmann (1986), 54 O.R. (2d) Ont. C.A.	40	female	$40,000	$20,000 $30,000 (sons)	$10,000 (M) $5,000 (Br) $5,000 (Sis)
Frawley v. Assettine (1990), 70 D.L.R. (4th) 536		young female	$28,000	$35,000 (son)	$15,000 (F) $26,000 (M) $12,000 (GM) $8,000 (Br)
Nova Scotia *Morrell-Curry v. Burke* (1989), 92 N.S.R. (2d) 402, aff'd by N.S.C.A. Dec. 1/89	24	male	$10,000		$2,500 (M) $2,500 (F)
Campbell Estate v. Varanese (April 26, 1991) Action No. 02320 (N.S.C.A.)	28	male	$20,000	$10,000 (4 yr. old child) $10,000 (8 yr. old child)	
Manitoba *Lawrence v. Good* [1985] 4 W.W.R. 652 (Man. C.A.)	46	female	$10,000		
Rose v. Belanger [1985] 3 W.W.R. 612 (Man. C.A.)		young female	$10,000	$10,000 (son)	

F = father M = mother
Br = brother Sis = sister
GM = grandmother

Damage Awards for Loss of Guidance, Care and Companionship — Child Death Cases

Name and Year of Case	Age of Deceased	Damages Awarded		
		Mother	Father	Sibling
Mason v. Peters (1982) 39 O.R. (2d) 27	11	$45,000	———	$5,000
Reidy v. McLeod (1986) 54 O.R. (2d) 661 (Ont. C.A.)	16 16	$20,000 $30,000	$15,000 ———	$5,000 $10,000
Norris v. Stewart	20 16	$15,000 $15,000	$15,000 $15,000	$25,000 $25,000
Crupi v. Royal Ottawa Hospital (1986) 12 C.P.C. (2d) 207 (Ont. Dist. Ct.)	18 (slow learner)	$5,000	$5,000	$2,500
Wilkinson v. Shannon (1987) (brother suffered from cerebral palsy)	11	$5,000	$0	$3,500
Koncovy v. Hodulik	23 (medical student)	$24,000	$24,000	$8,000
Zdasiuk v. Lucas	24 (PhD student in Biochem)	$20,000	$17,500	$5,000
Hamilton v. CNR (1991) 80 D.L.R. (4th) 470	9	$50,000	———	$10,000
Gervais v. Richard (1984) 48 O.R. (2d) 191	16	$12,000	$10,000	$1,500 $3,000 $4,500 $6,000 $6,000

——— — no claim made by father
$0 — quantum of award

Six mothers received damages in the range of $15,000 to $30,000. Two mothers received $45,000 or more. Three mothers received less than $15,000. Five fathers received damages between $15,000 and $24,000. Two fathers received less than $15,000. One father received zero.

These awards reveal that the Ontario, Manitoba and Nova Scotia courts have continued the Canadian tradition of awarding moderate non-pecuniary damages.

(iii) New Brunswick

A recent New Brunswick reform addressed the problem of damages for the wrongful deaths of children who are minors or adults still dependent on their parents. In 1986 legislation amending the *Fatal Accidents Act* was passed.[126] It came into force on February 15, 1988. The new subsections provide:

> 3(4) Where an action has been brought under this Act for the benefit of one or more parents of the deceased and the deceased is a child
>
> (a) under the age of nineteen, or
>
> (b) nineteen years of age or over who was dependent upon one or more parents for support,
>
> there may be included in damages
>
> (c) to the parents, where paragraph (a) applies, or
>
> (d) to the parents upon whom the deceased was dependent, where paragraph (b) applies,
>
> an amount to compensate for the loss of companionship that the deceased might reasonably have been expected to give to the parents and an amount to compensate for the grief suffered by the parents as a result of the death.
>
> 3(5) An amount included in the damages under subsection (4) shall be apportioned among the parents in proportion to the loss of companionship incurred and grief suffered by each parent as a result of the death.

The New Brunswick courts have considered this section on one occasion only since the legislation came into force. We discuss this decision in detail under the topic of damages for grief.

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126 *An Act to Amend the Fatal Accidents Act*, S.N.B. 1986, c. 36.

D. Can Claimants Recover Damages for Grief, Sorrow, Mental Suffering or Mental Anguish?

(1) American Law

American jurisprudence distinguishes between loss of society and companionship on the one hand, and mental anguish, grief, and sorrow on the other. When dealing with the former, the courts ask: What would the deceased, had he or she lived, have contributed in terms of support, assistance, training, comfort, consortium and so on to the claimants? When dealing with the latter, the question is: What deleterious effect has death had upon the claimants?[127] Only a handful of states allow recovery in a wrongful death action for mental anguish, grief, or sorrow. Of these, most restrict recovery to mental anguish, which is seen as something more than normal grief and sorrow.[128]

In the United States, as in Canada, a parent can sue for damages if the parent witnessed the death of the child or saw the aftermath of the accident causing the death and, as a result, suffered from a recognized psychiatric illness. Yet, this is not a wrongful death action; it is a personal injury action.

(2) Canadian Law

(a) Grief, sorrow or mental anguish

The Canadian authorities also distinguish between loss of companionship, on the one hand, and grief and sorrow, on the other. The Ontario Court of Appeal referred to the difference in these concepts in *Mason* v. *Peters*[129] as follows:

> Given the realities of modern family life, the probable cost of raising and educating a son or daughter today exceeds by far the probable pecuniary value of any services they may render or financial contributions they may make in the future to parents or relatives. Whatever the situation may have been in earlier times when children were regarded as an economic asset, in

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127 Speiser, *supra*, note 73 at 326-27.

128 *Ibid.* at 326-37.

129 *Supra*, note 61 at 111.

> this day and age, the death of a child does not often constitute a monetary loss or one measurable in pecuniary terms. The most significant loss suffered, apart from the sorrow, grief, and anguish that always ensures from such deaths, is not potential economic gain, but deprivation of the society, comfort and protection which might reasonably be expected had the child lived—in short, the loss of the rewards of association which flow from the family relationship and are summarized in the word "companionship".

Claimants can recover non-pecuniary damages in Ontario, Manitoba and Nova Scotia for the loss of the deceased person's guidance, care and companionship.[130] Parents can recover non-pecuniary damages in New Brunswick for loss of a dependent or minor child's companionship.[131] Claimants cannot recover non-pecuniary damages for grief and sorrow under any wrongful death statute,[132] except Alberta and New Brunswick. Even in Alberta and New Brunswick only certain claimants can recover damages for bereavement or grief.

Sub-sections 8(1) and (2) of the Alberta *Fatal Accidents Act* read as follows:

> 8(1) In this section,
>
> (a) "child" means a son or daughter, whether legitimate or illegitimate;
>
> (b) "parent" means a mother or father
>
> 8(2) If an action is brought under this Act, the court shall, without reference to any other damages that may be awarded and without evidence of damage, give damages for bereavement of
>
> (a) $3,000 to the spouse of the deceased person,

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130 *Family Law Reform Act, 1986*. S.O. 1986, c. 4, s. 61(2)(e); *The Fatal Accidents Act*, C.C.S.M. 1987, C. F50, s. 3(4).; *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, s. 5(2)(d).

131 *Fatal Accidents Act*, R.S.N.B. 1973, c. F-7, s. 3(4).

132 See the common law authorities discussed earlier.

(b) $3,000 to the parent or parents of the deceased child, to be divided equally if the action is brought for the benefit of both, and

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

This section requires an Alberta court to award the parents $3,000 damages for bereavement upon the wrongful death of a child of any age. This sum is divided between the parents. Damages for bereavement of $9,000 are awarded in the event of death of a married spouse with surviving spouse, minor children, and parents. The court must award $3,000 to the surviving spouse, $3,000 to be shared by all the minor children of the deceased, and $3,000 to be shared by the deceased's parents. The damage award is made without proof of bereavement. This eliminates the need of close family members to testify on the issue of grief and sorrow.

Section 3(4) of the New Brunswick *Fatal Accidents Act*[133] empowers a New Brunswick court, in certain circumstances, to award an amount to compensate for loss of companionship or to compensate for grief. Only certain parents can receive these kinds of damages. The parents must have lost a child who is under the age of 19 years. Alternatively, the parents must have lost a child 19 years of age and older who is still dependant on one or more of the parents for support. The section leaves the amount of damages to the discretion of the court. The New Brunswick section has a much narrower class of persons who can claim under the section,[134] but it has potential for much higher awards.

Since the New Brunswick sections came into force, the court has interpreted the section only in the case of *Nightingale* v. *Mazerall*.[135] In this case

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133 R.S.N.B. 1973, c. F-7.

134 Alberta gives damages for bereavement to spouses, parent who lose a child of any age, and minor children who lose parents. New Brunswick only gives damages for grief to parents who lose minor children or dependant children.

135 (November 8,1990), St. Johns No. S/C/1342/88 (N.B.Q.B.). overruled at (1991) 87 D.L.R. (4th) 248 (N.B.C.A.).

parents lost their two children, aged 6 years and 9 months, in a motor vehicle accident. The defendant admitted liability for the accident, which occurred when the defendant's vehicle struck the family vehicle from behind. The parents sued under the *Fatal Accidents Act*[136] for damages to compensate them for loss of companionship of their children and for grief suffered by the parents.

The parents were loving and caring parents who were devastated by the loss of their children. In order to document their suffering, both the parents and a psychologist testified at the trial. The psychologist described a typical grief response and then evaluated the parent's response to the loss of their children. In a typical situation, the active grief stage lasts for three years. The active grief stage involves shock, numbness and disorientation while the parents work through the grief and begin to reorganize their lives. Thereafter, periods of peacefulness increase. The mother was successfully working through the active grief stage, while the father was having more difficulty. He did not like to talk about the loss and maintained a facade that he was alright. This is a typical response of men who wish to avoid the pain. The birth of a new daughter was seen as a positive sign for the couple. In the opinion of the psychologist, the parents were not going to experience a complicated grief response.

In total, the trial judge awarded each parent $60,000, plus interest and costs. He thought he was entitled to award damages for loss of care, guidance and companionship. This is puzzling because the statute only refers to loss of companionship. In any event, the trial judge thought the loss of care and guidance of the two young children was too remote in this case. He awarded each parent $5,000 for the loss of the companionship of each child. He awarded $50,000 damages for grief to each parent for the loss of their two children because, in his opinion, the New Brunswick legislature had introduced the amendment to allow a court to award substantial damages for grief. He increased the award somewhat because the parents suffered the loss of two children. He declined to be more specific because this was a case of first impression.

The trial judge's assessment of amount of damages was overturned on appeal.

The Court of Appeal outlined the basis on which damages for grief and loss of companionship should be evaluated. The opinion of members of the

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136 R.S.N.B. 1973, c. F-7.

Court were divided on two key issues: (1) Does the legislation require that damages for grief be assessed for each parent, independent of the other? (2) Should damage awards for grief be conventional or dependant on the facts of the case?

The majority interpreted the section as requiring a court to assess damages under both heads of damage for each child and then to apportion the amounts between the parents. It will be the rare case indeed when the damages for grief were not divided equally between the parents.

The majority found nothing in the Act that suggested substantial damage awards must be given. It thought the relevant criteria called for modest conventional awards for grief. The criteria considered by the majority were:

* The award cannot be compensatory or reparative, not can it be accurate.

* The award must be objective. It should not reflect sympathy, punishment or the means of the defendant. The court should not place a premium on protestations of misery. There will be some human elements to consider, but these should be kept to a minimum because the court must guard against being misled by the emotions evolved.

* The courts must consider non-pecuniary damage awards made in other cases.

* The courts must consider the socio-economic impact of such awards. [Here the court is referring to increased insurance premiums.]

* The awards should promote predictability and certainty. This will ensure that parents who might find it objectionable and demeaning to express their grief in a court room will receive the same compensation as those who can more easily express their emotion.

These criteria should also be considered when awarding damages for loss of companionship. Additional considerations will include age and health of child, and general living circumstances of the family. Yet, since the section only provides compensation for loss of a child under the age of 19 (or over if dependant), compensation for loss of companionship covers only those first 19 years of child's life, (except in situations of dependency).

The majority held that the two children would have provided companionship to their parents up to age 19. The court awarded damages of $15,000 for loss of companionship of the 6 year old and $20,000 for loss of companionship of the 9 month old. It also thought the parents had suffered no more grief for losing two children than one. $15,000 damages for grief was awarded for each child. Each award was divided between both parents. Each parent recovered $32,500.

The minority judge thought that there must be an evaluation of the loss of companionship and grief suffered by each parent, independent of the other. In his opinion, the fact that different people reacted differently to grief dictated this result. He rejected a conventional reward approach because assessing grief must inevitably require an investigation into the parents' feelings. If the legislature had wanted to establish a conventional award, it would have done so in the statute.

He thought the trial judge's assessment of damages for grief was excessive. He would have reduced the award to $35,000 for each parent. He did not think there were grounds to interfere with the trial judge's assessment of damages for loss of companionship. He would have awarded a total of $45,000 to each parent as damages for grief and loss of companionship of the two children.

(b) Aggravated damages or exemplary damages

In *Campbell* v. *Read*,[137] a family whose son died in tragic circumstances sought aggravated damages under the *Family Compensation Act*, which is the wrongful death statute of British Columbia. The estate of the son sought aggravated damages and exemplary damages. The sad facts were as follows. While crossing a street, the son was hit by a vehicle driven by Read. Without stopping, Read left the boy on the road and drove from the scene. Later, a vehicle driven by Smithingale ran over the boy. The son died from his injuries. Both drivers were intoxicated at the time of the accident.

Aggravated damages compensate the plaintiff for harm done to him that is aggravated by the defendant's wrongful conduct. Generally, such damages are for such things as humiliation, distress and degradation. Exemplary damages are awarded when the defendant's wrongful conduct is so inexcusable or

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137 [1988] 3 W.W.R. 236 (B.C.C.A.).

reprehensible that it merits condemnation by the court and are intended to deter others from behaving in the same way.

The court held that the executor could not bring an action under the *Family Compensation Act* for aggravated damages. Claims under this Act are restricted to pecuniary loss and benefits that the parents would have received had the son lived. To grant aggravated damages to the parents would require the court to include in the phrase "injury resulting from death" damages for anguish and sorrow experienced by the parents. This the court cannot do. Also, the aggravated injury sustained by the son was personal to him and was not a loss suffered by the family and not recoverable in a fatal accident act claim.

The estate also wished to bring an action for exemplary damages and aggravated damages. Section 66(2) of the Estate Administration Act allows certain actions to survive the death of the deceased. The section reads as follows:

> 66(2) The executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies, as the deceased would, if living, be entitled to . . .

Subsection (2)(a) goes on to exclude recovery for damages in respect of physical disfigurement or pain or suffering caused to the deceased.

The court concluded that exemplary damages did not come within the category of "loss or damage to person or property of the deceased". Therefore, such a claim does not survive the death of the son. Although an action for aggravated damages does come within this category, it is excluded by subsection (2)(a). The court could not conceive of a claim for aggravated damages that would not arise from physical disfigurement or pain or suffering caused to the deceased.

E. Can Claimants Overcome the Inability to Recover Damages Under the *Fatal Accidents Act* for Death of a Child by Having the Child's Estate Sue for Loss of Future Wages?

When a child's injuries extinguish his or her capacity to work, the child is able to recover damages from the wrongdoer for lost future earnings. The lost future earnings are based on the life expectancy the child had before the accident,

not on the reduced life expectancy brought about by the accident.[138] The number of years his or her life is shortened by the injuries are referred to as the "lost years".

If a child dies instantaneously or shortly after he or she suffers the injuries, can the child's estate sue for lost earnings in the lost years? For a short time in England, the answer to this question was yes. The relevant authority was two English House of Lord decisions decided in the late 1970s and the early 1980s. In *Pickett* v. *British Rail Engineering Ltd.*,[139] the House of Lords held that an injured plaintiff could sue for loss of earnings based on his or her pre-accident life expectancy. No longer would a plaintiff be denied recovery for wages that would have been earned in the lost years. (As noted above, this is also the law in Canada.) A few years later the court dealt with the issue of whether this type of claim survived for the benefit of the estate of two young men who died almost instantaneously. In *Gammell* v. *Wilson and others*[140] the House of Lords came to the conclusion that it did. In 1982, the English Parliament abolished an estate's right to sue for "any damages for loss of income in respect of any period after that person's death".[141]

Can an estate bring an action for lost wages under the Alberta *Survival of Actions Act*?[142] The applicable sections of this Act are:

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

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138 *Andrews* v. *Grand and Toy (Alta.) Ltd.*, [1978] 2 S.C.R. 229.

139 [1979] 1 All E.R. 774 (H.L.).

140 [1981] 1 All E.R. 578 (H.L.).

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

142 R.S.A. 1980, c. s-30.

> 6. If the death of a person was caused by an act or omission that gives rise to a cause of action, the damages will be calculated without reference to a loss or gain to his estate as a result of his death, but reasonable expenses of the funeral and the disposal of the body of the deceased may be included in the damages awarded, if the expenses were, or liability for them was, incurred by the estate.

If the reasoning in *Gammell* v. *Wilson* is accepted, section 6 would not preclude the claim.

The next question is whether section 5 precludes the action. Is the loss of wages for the lost years an "actual financial loss to the deceased or his estate"? In *Galand and Estate of Galand* v. *Stewart*,[143] Justice Bielby held that the estate's claim for future wages was something other than an "actual financial loss". She came to this conclusion on the basis of Justice Stevenson's decision in *James* v. *Rentz*[144] and the definition of actual. Justice Stevenson had held that "actual financial loss" did not include future losses which might or might not arise and which could not be specifically quantified. The Shorter Oxford English Dictionary defines "actual" as "existing in act or fact; real, existing or acting at the time; present". A claim for losses, such as future wages, that might have arisen in the future would not be a claim existing at the time or at present.

The result is that in Alberta the estate of a deceased person cannot sue for the wages that would have been earned had the deceased person lived.

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143 (1991), 82 Alta. L.R. (2d) 377 (Q.B.).

144 (1986), 27 D.L.R. (4th) 724.

CHAPTER 4 — THE NEED FOR REFORM

A. Introduction

Section 8 of the *Fatal Accidents Act* requires Alberta courts to award stated damages for bereavement. Alberta courts are unable to give any other type of non-pecuniary damages in wrongful death actions. In this chapter we shall review the beginnings of section 8 and how Albertans have received the section. We will then examine the need for reform of non-pecuniary damages in wrongful death actions.

B. The Beginnings of Section 8 of the *Fatal Accidents Act*

In April of 1977, the Alberta Law Reform Institute[145] ("Institute") issued Report No. 24, Survival of Actions and Fatal Accidents Act Amendment. The major focus of the report was the reform of survival legislation and the adoption, for the most part, of the Uniform Survival Legislation Act.

The creation of section 8 was a spin off of Report No. 24. The Institute reviewed the arguments in favour of retaining the estate's right to sue for loss of expectation of life. One argument in favour of retaining the action was "that the natural feelings of the survivors call for some pecuniary recognition".[146] The Institute accepted that argument. Nonetheless, it did not think that the estate's action for loss of expectation of life should be used as an indirect method of benefitting the survivors. The Institute recommended abolition of the estate's action for loss of expectation of life and creation of a cause of action that would allow certain survivors to be directly compensated for their bereavement.

The Institute recommended that only certain claimants, being the immediate family members, be allowed to sue for damages for bereavement. The Institute discussed this topic as follows:[147]

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145 The Alberta Law Reform Institute was then known as The Institute of Law Research and Reform.

146 Institute of Law Research and Reform, Report No. 24, *Survival of Actions and Fatal Accidents Act* at 14.

147 Report No. 24 at 18-19.

> Under the present law of Alberta the spouse and children of a deceased person whose death has been caused by negligence are usually dependants and usually have a cause of action under the Fatal Accidents Act. Even though there is no provision for recovery of damages for lacerated feelings or grief or bereavement, the award of damages for loss of support to some extent does act as a balm even for them. However, we think they should also be compensated for bereavement though we think that the right to compensation should be limited to spouse and minor children.
>
> The parents of children whose death is caused by negligence normally do not have an action under the Fatal Accidents Act for lack of dependency and will receive money only if the child's estate recovers damages and the parents inherit. This aggravates their sense of indignation and grief. We think that parents should also have a right of action for compensation for bereavement against the wrongdoer .... The purpose of this remedy would be to provide the parents with solace and consolation as far as money can provide these and not to compensate them for the money they expended on bringing up the child. We do not think that the claim should be extended to anyone other than parents, spouse and children.

The Institute recommended that Alberta establish the amount of damages in legislation. The logic leading to this recommendation is instructive. It was:[148]

> We think that it must be recognized that, just as the damages now fixed for the loss of expectation of life are conventional and artificial, so will be the compensation for bereavement which we are recommending. We do not think for example that a discussion of the quality of the happiness of the deceased person is edifying or instructive. We do not wish to set off a new round of litigation to establish the limits of a new cause of action and the measurement of damages under it. We think that the best thing to do is to fix upon a conventional sum and establish it by statute.

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148 Report No. 24 at 19-20.

> The amount of the award must, as we have said, be artificial and arbitrary. A money payment may be a recognition of feelings of grief, but it cannot give true compensation. It appears to us that to allow $3,000 for the parents, $3,000 for the spouse, and $3,000 for the children would be generally in line with the awards which are being made, and we recommend that the amounts to be fixed accordingly. In the case of parents , the $3,000 would be divided equally between them and similarly in the case of children $3,000 would be divided equally between them.
>
> We recognize that some parents, spouses and children may not in fact be grief stricken at the death of the deceased person, and that to those persons the money may come as a windfall. That of course is the present situation so far as the claim for damages for loss of expectation of life, loss of amenities and damages for pain and suffering is concerned. *We think that the consequences of requiring them to come into court to prove their grief as a condition of recovering compensation would be worse than the consequences of the occasional windfall.* [emphasis added]

The Institute also recommended that the legislation become part of the *Fatal Accidents Act*, because that Act already dealt with claims by close relatives, but on a different basis.

The Alberta government acted on the Institute's recommendations by enacting *The Survival of Actions Act*[149] and section 8 of the *Fatal Accidents Act*. Section 8 of the *Fatal Accidents Act* came into force on January 1, 1979. Section 8 embodies the Institute's recommendations, except for one change. Although the Institute recommended that parents have a cause of action for damages for bereavement only for the wrongful deaths of minor children, the legislature created a cause of action for the wrongful deaths of children of all ages.

Report 24 focused on the reform of survival legislation and did not deal with the inadequacy of damages awarded in cases of wrongful death of children. The problem of inadequacy of damages for death of children is briefly acknowledged and the right to recover damages for solatium or bereavement in other countries is canvassed. There is no discussion of allowing recovery of non-pecuniary damages for the loss of companionship of a child or any other method

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149 R.S.A. 1980, c. S-30.

of addressing the problem of damages in child wrongful death cases.[150] Perhaps this is explained by the focus of the report and the historical development of Canadian reform of wrongful death legislation. In 1977, the Canadian move towards non-pecuniary damages for wrongful death of family members had not yet begun.

C. Reaction to Enactment of Section 8

Despite the Institute's good intentions, section 8 has not been well received. It has turned out to be a lightning rod for discontent. In 1981, The Alberta Academy of Trial Lawyers made the first focused attack on section 8. Robert White, then president of the Academy, wrote an editorial in the Edmonton Journal accusing the government of valuing life at $3,000. His group supported a regime in which the court would assess damages for grief on a case by case basis.

W.H. Hurlburt Q.C., then Director of the Institute, responded with an editorial supporting the section. He argued that the value of life cannot be equated with money. He also highlighted the difficulty of families having " to go to court and testify, and be cross-examined as to what kind of a child she was, or as to the depths of her affection for her". He also noted that if the $3,000 becomes inappropriate, the legislature can change it. This will avoid forcing a family to litigate to the Supreme Court of Canada to learn what the upper limit for grief will be.

The debate did not end there. Since 1979 the Alberta government has received a series of letters from parents who have lost children due to the wrongdoing of others. Down to the last parent, each despises the section and calls for change. Most of these parents describe the section as insulting.

Over the years we have had several lawyers suggest that section 8 is unconscionable. Many others have asked for revision of section 8.

Another group that has focused attack on section 8 is Parents Against Impaired Drivers (PAID). A recent publication of PAID contains an article outlining 7 arguments in support of repeal or amendment of section 8.

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150 The only mention of such jurisdictions is found at page 17: "A number of states in the United States of America today have express statutory allowance of damages for mental anguish and loss of companionship".

Section 8 is never long out of the newspapers. Whenever a child dies due to the fault (or alleged fault) of another, the press writes about the accident and mentions the limitations created by section 8. They often say that parents are limited to recovering $3,000 plus funeral expenses in the case of wrongful death of children. Of course, this is not true in all cases. In unusual situations the parents may also have a pecuniary loss claim. However, it is true in cases of death of young children.

Enough said. Section 8 has generated outrage. Few people advocate repeal of section 8. Most advocate increasing the statutory amount or advocate a move to court discretion for non-pecuniary damages in wrongful death actions.

D. The Need For Reform

Inflation has eroded the significance of the statutory level of damages for bereavement to a point where the award is insulting to those who receive it. This alone would justify a review of the statutory level. Yet, the outrage generated by the section, especially in the case of the death of minor children, demands a broader review of non-pecuniary damages in wrongful death actions. The outrage stems from the critics' belief that the law does not attempt to evaluate the true loss and suffering of the surviving relatives. Critics of section 8 are unable to understand why the surviving relatives' suffering is seen as insignificant. They ask why a person who suffers a whiplash injury due to the wrongdoing of another receives larger non-pecuniary damages for his or her suffering than grieving relatives of the deceased. They are also aware of substantial non-pecuniary damages awarded in wrongful death actions brought in other provinces.

There is a need for people to understand how the law came to this point, the options for reform and the advantages and disadvantages of each option. We must critically analyze whether non-pecuniary losses should be compensable at all in wrongful death actions, and if so, how this is best done.

Such an analysis must answer this question: How much protection should the law give to relatives of persons killed due to the wrongdoing of others? The answer depends upon what Alberta society demands for protection from the wrongdoing of others. This hinges on an understanding of where the recovery of damages is "halted by the barrier of commercial sense and practical

convenience".[151] These questions lead to others. What policies support compensation for destruction of family ties? What policies militate against such compensation? Which policies should be served? Which elements of non-pecuniary loss should be compensable: grief, or loss of guidance, care and companionship, or both, or neither? Will any amount, no matter how large, be insufficient? If non-pecuniary losses are to be compensable, which system should be adopted? Should the damages be established by court discretion or by legislative enactment? What are the advantages of each method? If the legislature establishes the sum, what should this sum be? How will it affect insurance premiums? Is the effect on insurance premiums tolerable?

We examine these questions in the following chapters.

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151 *Lambert* v. *Lewis*, [1980] 1 All E.R. 978 at 1006.

CHAPTER 5 — CONSULTATION

A. The Need For Consultation

Section 8 began as a spin off from a reform initiative aimed at creation of the *Survival of Actions Act*.[152] The Institute was guided by its own sense of appropriateness on the issue of damages for bereavement. At this time more public input is needed. The outcry over section 8 arises in cases involving death of a child. Therefore, our consultation focused on this situation. To obtain such input we have spoken to families who have lost children due to the wrongdoings of others. We have spoken to other families. We have spoken to lawyers.

B. Parents

(1) Parents Who Have Lost Children Due to the Wrongdoing of Another

Institute counsel interviewed six families (four couples and two mothers) who had lost children due to the wrongdoings of another. The purpose of the interviews was twofold. First, to get factual information on the financial ramifications of the child's death. Second, to get the parents' views on reform. This section contains an overview of the comments received.

Death of a child can have wide ranging financial consequences for the family involved. For some families, the major financial consequence was the burial expenses. For others, the major financial consequences were lengthy periods of inability to work and loss of future opportunities. The following financial consequences were experienced by at least one (and sometimes all) of the families:

* *funeral expenses* which include payment for plot, casket, burial clothes, funeral home services, church soloist, flowers, reception
* *long distance phone charges* to notify relatives and friends of the death
* *travel costs* paid so grandparents could attend funeral

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152 R.S.A. 1980, c. S-30.

* *loss of earnings for period necessary to arrange and attend funeral*

* *lost earnings* for days spent in attendance of preliminary hearing, trial and appeal of criminal charges laid against the wrongdoer

* *increased cost of child care for siblings*

* *counselling* for parents and siblings. The cost of this is $85-100 per session. One family saw a counsellor regularly for two and a half years.

* *loss of earnings due to reduced ability to work* For some this involved cutting down the number of hours of work or loss of commissions due to reduced ability to perform. Others were simply unable to work for an extended period. This period varies, but in one case it lasted for nearly a year.

* *depleted savings*. Both parents in one family were unable to work for 9 months. They lived on their savings over this period of time.

* *loss of employment*. One father attributes his loss of employment to death of his child. He also felt new employers were unwilling to hire him because of the tragedy he had experienced.

* *loss of value of a scholarship*. One mother was working towards a master's degree on a scholarship. Due to her reaction to the death of her daughter, she was unable to complete the degree. The result was the loss of the benefit of the scholarship.

* *loss of future advancement*. The same mother had been accepted to do a doctorate degree. She has had no desire to pursue this since the death of the child. This training would have led to a high income position.

* *loss of corporate profits*. One grief stricken parent was unable to manage her travel company for about one year after the death of her daughter. During this time, the travel company operated at a loss. The same company had made a profit in the 6 years preceding

the death of the child. The parent attributes the loss to her absence. There was no downturn in the economy at that time.

* *loss of earnings for stress leave.* This was never more that 2 weeks. The families often leave home over the Christmas period because they cannot deal with the memories.

* *$20,000 loss of equity in home* resulting from quick sale of acreage located next door to acreage owned by driver who caused death of parent's son

Some of these expenses are expected, others are not. They serve to emphasize that the financial consequences to a family arising from the death of a child can be significant. Yet, for the most part, parents do not recover any of these losses. The exception is recovery of funeral expenses.[153]

Section 7 of the *Fatal Accidents Act* allows parents to recover the money they spend to cover the "reasonable expenses of funeral and the disposal of the body of the deceased". Yet, some insurance companies interpret this phrase very restrictively. Some refuse to pay for long distance toll charges incurred when the family notified relatives and friends of the death. In one case, the insurance company refused to pay for the flowers and food served to relatives immediately after the funeral. Insurance companies also determine what is reasonable. They look carefully at the cost of the funeral. If they consider it unreasonable, they may refuse to pay anything.

All the parents were insulted by section 8 and their inability to recover significant damages for the death of their child. They were angry and unable to understand why Alberta has this atrocious law.

All the parents interviewed thought that the wrongdoer should reimburse them for all expenditures and loss of earnings. As one parent put it: Why should I be out one penny because this idiot killed my son?

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153 Only one family has received anything for lost wages. The family's lawyer thought it had more to do with the fact the mother was then the President of People Against Impaired Driving, than the law. There is clear authority that parents cannot recover under the *Fatal Accidents Act* for wages lost due to death of a child.

None of these parents was receiving financial contributions from their child at the time of death. Loss of the child is not a financial loss. This surprises no one. The true loss is strictly emotional. They have lost the ability to share their child's life and have suffered incredibly as a result. No family detailed the nature of their relationship with their child. Yet, their anger and sorrow over the child's loss filled the room. These parents demand non-pecuniary damages for the loss of their child. In their view, if the law agrees that they have suffered a serious loss, the law should compel the wrongdoer to pay significant damages. The wrongdoer should be responsible for the harm he causes. This should be true when a child is injured and when a child is killed. The law should not ignore or trivialize their suffering and loss.

The parents' views diverge on the question of options for reform. Five parents wanted the damages for grief (or loss of guidance, care and companionship) to be quantified by statute. They thought the litigation process would be too destructive and emotionally draining. Two parents thought quantum should be in the discretion of an administrative board. Three parents were undecided, although they showed some preference for a discretionary system because this would deal with each family's special circumstances. Seven parents indicated that the law might be better if it did not deal with damages for grief but gave damages for loss of guidance, care and companionship. One woman preferred this head of damage because it emphasizes the value of the relationship that was destroyed and the qualities of the child. Yet, many still wanted the statute to quantify the amount.

During the interview counsel asked each parent to assume that their only option was to raise the quantum of damages for grief set out in section 8. Counsel then asked them to recommend a new level of damages. The responses given were as follows:

* $20,000-30,000
* unable to set figure
* $40,000-50,000
* $10,000
* $25,000-35,000
* $50,000

This coincides with their declarations that they do not want the money to spend to make them happy. Of all the people in this world, they know that this cannot

be done. They demand a significant amount of money as recognition of their devastating loss.

(2) Other Parents

Institute counsel also interviewed 5 parents who had not lost their children. Each of these parents thought that the wrongdoer should pay compensation to the parents for the loss he or she caused. Each thought that compensation should be paid for the out of pocket expenses, loss of earnings, and for the emotional or non-pecuniary damages suffered by the parents. There was a difference of opinion on how the law should deal with recovery of such losses.

Three of the parents thought the amount of damages for non-pecuniary loss should be established by statute. They did not want to subject the parents to drawn out litigation. One parent thought that court discretion was better. She thought that each family was unique and should be treated as such. Another parent also preferred court discretion but thought that if the recovery under such a system was moderate, as it is now in Ontario and Manitoba, she would prefer that legislation establish the amount of damages. In her opinion, suing to recover such small sums would not be worth it.

For three parents, it did not matter which elements of non-pecuniary loss were compensable. They wanted to see one damage award for such loss. One parent preferred compensation for loss of guidance, care and companionship, but not for grief. Another parent preferred recovery for both grief and loss of guidance, care and companionship.

Not one parent supported the idea that parents should be allowed to recover cost of raising the child to time of death.

Counsel asked each parent to assume that the only option was to increase the quantum of damages for bereavement established in section 8. Under this option they would establish the quantum as follows:

- \$50,000 for two parents, \$40,000 for single parent
- \$30,000
- \$20,000
- \$100,000
- \$15,000 - \$20,000

The sums marked * were in addition to recovery for out of pocket expenses and loss of earnings. The sum marked + is in addition only to funeral expenses.

Four parents thought that the wrongdoer should reimburse the grieving parent for loss of earnings and all out of pocket expenses, including funeral expenses and cost of counselling. Three of these parents thought that reasonable limits should be set on recovery of loss of earnings. One thought all loss of earnings should be recoverable. The fifth parent supported compensation for such items. Yet, he preferred a system that would deal with such losses by increasing the statutory amount. He did not want to invite litigation of such items.

C. Lawyers

During this project, Institute counsel interviewed 10 lawyers. Eight of the lawyers primarily act for plaintiffs in personal injury cases and two are defence counsel. The plaintiffs' counsel included Stewart Baker, Terry Kulasa, Ron Cummings, Bev Larbalestier, Lucille Birkett, Carole Kozyra, and Timothy Sax. Defence counsel included Peter Costigan and John Hope. Institute counsel interviewed more plaintiff's counsel than originally planned because she was invited to meet with six litigators of the Cummings, Andrews firm. The following is a brief summary of the views expressed by these lawyers.

All these lawyers find section 8 insulting and advocate change. All confirm that clients are shocked when told what they can recover for the death of a child. Clients see the law as callous and uncaring because they see no attempt to evaluate their true loss. All the lawyers, but one, advocate that parents should be able to recover non-pecuniary damages for death of a child, as well as any out-of-pocket expenses they incur (including loss of earnings). They disagreed on the exact nature and amount of the damages.

One lawyer advocates repeal of section 8. He believes the law is better served if grief is not compensable in damages. Nonetheless, he would award a lump sum of $20,000 to cover out of pocket expenses incurred by parents who lose a child through the wrongdoings of another. He strongly opposes any reform that would lead to litigation on the quantum of damages for grief or loss of guidance, care and companionship.

The other lawyers believe that parents should receive damages that reflect the non-pecuniary loss suffered by reason of the death of the child. One lawyer dislikes a system in which damages for loss of guidance, care, and companionship are in the discretion of the court. He prefers the Alberta approach of awarding damages for bereavement. Two lawyers thought that it would be better to award damages for loss of guidance, care and companionship because this might be more palatable to parents. Both wanted such damages to be established by the legislature and not the courts. Still others thought a distinction could not realistically be made between grief and loss of guidance, care and companionship. In their view, these are so intertwined that it is best for the law to give one lump sum for non-pecuniary damages.

Institute counsel asked each lawyer to assume that the only option was to increase the quantum of damages for bereavement established in section 8. The figures chosen are diverse:

* the figure must be increased, but the lawyer expressed no opinion on what it should be. An award of $10,000-$15,000 is unlikely to be much better than $3,000.

* legislation should establish a graduated scale of damages for bereavement ranging from $5,000 to $17,000. The younger the child, the more the damages would be.

* $100,000.

* $200,000. Five lawyers thought that the injury suffered by the parent who loses a child is as serious as injury suffered by a quadriplegic. They would take the upper limit of non-pecuniary damages for paraplegics as a good measure of the parents' loss. This is around $200,000.

* $75,000. One lawyer thought that the non-pecuniary injuries suffered by grieving parents were not the same as the non-pecuniary injuries suffered by a quadriplegic. She argued that parents in time accept the loss of a child and learn to live without that child. She thought the injuries suffered by the parent were most similar to injuries suffered in

post-traumatic stress syndrome cases.[154] The upper limit for these type of injuries is $75,000. She thought that was a better comparison.

All the lawyers wanted the statutory level of damages to be adjusted annually for inflation.

Each lawyer rejects judicial determination of non-pecuniary damages—be it damages for grief or damages for loss of guidance, care and companionship. The reasons given were:

1. Exposing parents to an adversarial litigation system will only aggravate their grief. This is unpleasant litigation for everyone involved: the parents, the lawyers and the judge. It is defence counsel's role to accentuate the negative. Would defence counsel be able to do this without belittling or upsetting the family? Unlikely.

2. In this context, discretionary damages may promote litigation. Will parents feel compelled to hold out for the maximum recovery? Will they think they have failed the lost child if they do not receive damages that are near the upper limit?

3. The normal citizen is non-litigious and does not want to become involved in a law suit. Discretionary damages will force the parents to sue to get anything.

4. Why prolong the parents agony for little gain? Even if the parents recover $60,000 at trial, out of this must come fees of $15,000. The difference between a $20,000-$30,000 award set by statute and $45,000 is not worth the agony of a trial.

5. Assessment of damages for grief would be difficult, especially over the first few years when the court is determining the range of recovery. It is better for the legislature to struggle with the policy considerations once, than to have a court do it on a case by case basis.

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154 Some of the post-traumatic stress syndrome cases involve situations in which parents have witnessed the accidental death of a child. See *Kwok* v. *B.C. Ferry Corporation* (1987), 20 B.C.L.R. (2d) 319 (S.C.).

6. Damage awards for grief will be too dependent on the judge's previous experience.

7. In post-traumatic stress syndrome cases it is difficult for the client to discuss his suffering. Denial seems to be a part of the injury. This may be the same for grief.

8. It is distasteful for the court to measure grief on a case by case basis. Does someone grieve less because he does not express his emotion in public? How do you prove that you cried for days and days while you were home alone?

CHAPTER 6 — LAW REFORM IN CONTEXT

No discussion of reform can take place in isolation. This is especially true for reform of section 8 of *Fatal Accidents Act*. To understand the problem, we must be aware of the following:

* the yearly number of accidental deaths that occur in Alberta
* the frequency of payment in Alberta of damages for bereavement by insurance companies
* death benefits paid under Alberta and Ontario automobile insurance policies
* the ongoing debate about the utility of a no fault system of compensation for individuals injured in motor vehicle accidents and the present concern over rising automobile insurance premiums

A. Accidental Death Statistics

Each year Vital Statistics (A Division of Alberta Health) publishes the *Vital Statistics Annual Review*, which, among other things, identifies the number and cause of accidental deaths that occur in Alberta.[155] For Alberta residents who die in accidents that occur in Alberta, the age of the deceased and the cause of the death is published. For non-residents, only the cause of death is published. For our purposes, we define vehicle accidents to include:[156]

* Railway accidents
* motor vehicle traffic accidents
* motor vehicle non-traffic accidents
* other road accidents

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155 Since 1985 this review has contained an expanded list of selected causes of death. For example, before 1985, accidents and adverse effects were broken into two categories: (1) motor vehicle accidents, and (2) other accidents and adverse effects. Beginning in 1985 these two categories were broken into 29 categories.

156 From 1985 and on the annual review gives the number of accidental deaths resulting from each of these causes. For convenience, we treat them as one category.

* water transport accidents
* air and space transport accidents, and
* vehicle accidents not elsewhere classified.

We draw a distinction between deaths caused by vehicle accidents (as defined above) and other accidental deaths that result from the following causes:

* accidental poisoning
* accidental falls
* fire
* lightning
* drowning
* suffocating caused by choking
* hand guns
* explosives
* acids
* electricity
* adverse effects of drugs
* misadventures during medical care, abnormal reactions and late complications
* other

The accidental death statistics can be summarized as follows:

year	vehicle accidents causing death (Alberta residents)	vehicle accidents causing death (Non-residents)	accidental deaths caused by other events (Alberta residents)	accidental deaths caused by other events (Non-residents)	total number of accidental deaths occurring in Alberta (Alberta residents)	total number of accidental deaths occurring in Alberta (residents and non-residents)
1980	598	87	486	34	1084	1205
1981	612	93	430	21	1042	1156
1982	466	48	437	39	903	990
1983	411	30	410	25	821	876
1984	439	37	420	18	859	914
1985	546	57	337	12	883	952
1986	552	55	350	13	902	970
1987	527	40	342	18	869	927
1988	466	46	356	11	822	879
1989	497	50	393	23	890	963

These statistics assist us in determining the maximum that would be paid under section 8 in the event of accidental death of Alberta residents and non-residents. This figure is determined by assuming that there is a payout in each fatality and that $9,000 is paid in each case. These assumptions are wrong because in the case of some accidental deaths no one is at fault and in case of others the payout will be less than $9,000. For example, in the case of an unmarried person with no children, but with surviving parents, a payout of $3,000 is made. Nonetheless, it is useful to know the upper limit. In 1989, the upper limit would be (963 * $9,000) or $8,667,000.

Since reform may involve increasing damages recoverable for parents who lose minor children, it is useful to know the number of minor children who die by reason of accident each year. Unfortunately, the statistics do not allow us to know these figures exactly. What we can determine is the number of Alberta residents of the age of 19 or younger who die by reason of accident. The statistics are as follows:

year	total number of accidental deaths (Alberta residents)	age 0-19 Alberta residents (vehicle accidents)	age 0-19 Alberta residents (other causes)	age 0-19 Alberta residents (total number of deaths)	ratio of 0-19 to total fatalities caused by accident (Alberta residents)
1980	1084	183	88	271	25.0%
1981	1042	188	93	281	27.0%
1982	903	109	58	167	18.5%
1983	821	93	65	158	19.2%
1984	859	95	55	150	17.5%
1985	883	126	50	176	19.9%
1986	885	128	45	173	19.5%
1987	869	128	59	187	21.5%
1988	822	112	43	155	18.9%
1989	890	101	60	161	18.1%

B. Insurance Industry Statistics

The Insurance Bureau of Canada ("Bureau") is a voluntary association with about 100 insurance company members. These companies provide 85% of the general insurance written in Canada each year.[157] The Bureau:[158]

> collects insurance statistics, provides actuarial analysis to member companies, drafts policy forms, manages inter-company agreements on claims settlements, monitors legislation and works with governments and government departments in the development of new legislation.

It was our hope that the Bureau would have statistics that would assist us in evaluating how section 8 presently affects insurance premiums, and how recovery of non-pecuniary damages in wrongful death actions has affected automobile insurance premium levels and other liability insurance premium levels in provinces in which such damages are awarded. Unfortunately, this information is unavailable from the Bureau. It has no statistics on the first point, and it is too soon to know how recovery of non-pecuniary damages in wrongful death actions brought in Ontario, Manitoba, Nova Scotia and Newfoundland has

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157 Insurance Bureau of Canada, *Facts* (1991) at 4.

158 *Ibid.*

affected insurance premiums in those provinces. The Bureau advises that claims of this type take time and cannot be offset with short term premium adjustments. Any justifiable adjustment must be made over the long term. This adjustment is not known at this time.

The Bureau did advise of the number of death benefits paid under vehicle insurance policies by Alberta insurers in 1989. As will be discussed in the next section, death benefits are paid under automobile insurance policies in the event of death of specified persons regardless of who caused the accident. There were 153 private passenger automobile death claims, 18 for commercial vehicles and 5 for private passenger motorcycles. These figures do not include death claims which may have occurred under third party liability coverage since insurers do not report this information to the Bureau. (Insurers will pay damages to the surviving family of a deceased person when the insured is liable for the death. This type of coverage is known as third party liability coverage.)

The result is that although we know the total number of accidental deaths that occur in Alberta, we do not know how often damages for bereavement are paid by insurers. This has forced us to calculate the effect of new proposals by making certain assumptions. In Chapter 7, we make certain recommendations for change and then analyze how the recommended changes will affect automobile insurance premiums.

C. Death Benefits Paid Under Automobile Insurance Policies

Section 313 of the *Insurance Act*[159] and the Automobile Accident Insurance Benefits Regulations (Alta. Reg. 352/72), as amended, determines the accident benefits paid under Alberta automobile insurance contracts. Section B of every automobile insurance contract provides the accident benefits established by this section and regulation. These benefits are paid no matter who caused the accident, and therefore are known as no fault benefits.

Under Section B — Accident Benefits, the insurer agrees to pay certain death benefits in respect of *insured persons* who die by reason of an accident arising out of the use or operation of an automobile. For this purpose, *insured persons* include:

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159 R.S.A. 1980, c. I-5.

(a) every person while an occupant of the described automobile

(b) the insured and immediate family[160] while an occupant of another automobile (with certain exceptions)

(c) any pedestrian who is struck by the described automobile

(d) the named insured and his or her immediate family who is struck by any other automobile while not the occupant of an automobile (ex. insured is crossing the street and gets hit by an automobile)

If the head of the household[161] or other spouse dies, the insurer pays the death benefit to the surviving spouse. If there is no surviving spouse, the insurer pays the death benefit to the surviving *dependent relatives.*[162] If there is no surviving spouse or dependent relatives, no amount is payable. The insurer pays the death benefit to the head of the household when a dependent relative dies. If the head of the household does not survive the dependent relative, it is paid to the surviving spouse. Nothing is paid in respect of death of the dependent relative when neither parent survives.

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160 We define immediate family to include the following relatives who are living with the insured at the time of the accident: spouse, children of the insured who are under the age of 18, children 18 years or over who, because of mental or physical infirmity, is principally dependent upon the parents for financial support. Children who are 18 years of age and are attending university would not be a dependant relative within this definition. Often these children will be named insureds.

161 "Head of household" is defined as the member of a household with the largest income in the year preceding the date of the accident.

162 Dependent relatives are defined as persons:

(a) under the age of 18 years for whose support the head of household or the spouse of the head of household (or both of them) is legally liable and who is dependent upon either or both of them for financial support, or

(b) 18 years or over and residing in the same dwelling premises as the head of household who, because of mental or physical infirmity, is principally dependent upon the head of household or the spouse of the head of household (or both of them) for financial support.

The insurer will pay up to $1,000 for funeral expenses, the cost of an ambulance plus the death benefit. The death benefit depends on the age and status of the deceased. Let's consider each case separately:

(a) *Head of household:* If the spouse making the most money dies, the death benefit consists of three sums: principal sum of $5,000; 20% of the principal sum for each survivor other than the first; and 1% of the sum of these two amounts to be paid each week for 104 weeks. Assume the highest earner dies and leaves a spouse and three children. The death benefit is $5,000, plus $3,000, plus a weekly payment of $80 (to be paid for 104 weeks). The total money received by the surviving spouse will be $16,320.

(b) *Spouse who works in the home or earns less than other spouse:* If the spouse who earns less dies, the death benefit is $5,000.

(c) *Dependent Relatives:* The insurer pays a death benefit of $500 if a child up to the age of 4 years dies. One thousand dollars is paid in respect of death of a child 5 to 9 years old. Fifteen hundred dollars is paid in respect of death of a child 10 to 17 years old. One thousand dollars is paid in respect of dependent relative between 18 and 69 years of age. No death benefit is paid in respect of a child who is 18 years of age or older and not a *dependent relative.*

The case which seems to attract no death benefits is the unmarried child who lives at home with his parents and is a named insured under the policy, but is not a dependent relative because he is not mentally or physically dependent on his parents. A child living at home and going to university would fit this description. Since such a child is not a dependent relative, he or she would fall into the category of head of household. Since he or she would have no surviving spouse or dependent relatives, the insurer would not pay any death benefit.

A common law spouse, as defined in section 313(10) of the *Insurance Act,*[163] receives death benefits if the deceased leaves no surviving spouse. The common law spouse receives the same level of benefits that would have been paid to a spouse.

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163 *Supra,* note 159.

All benefits paid under Section B constitute, to the extent of the payment, a release by the recipient of any claim he or she has under the *Fatal Accidents Act*.[164] The amount of the death benefits are set-off against any damages awarded under this Act.

The Alberta death benefits are small in comparison to the death benefits paid under the Ontario automobile insurance policy. In Ontario, when the insured dies, $25,000 is paid to the spouse and $10,000 is paid to each surviving dependant who was a dependent at the time of the accident. If there is no surviving spouse, the $25,000 is divided equally among the dependents of the deceased. This is in addition to the $10,000 each is entitled to receive. When a dependent dies, 10,000 is paid to the person upon whom the deceased was dependent (typically the parent). The payments are higher if Optional Benefit 1 has been purchased. Then the sums are $50,000 and $20,000.[165] Also, expenses incurred for funeral expenses up to $3,000 are paid (the sum is $7500 if Optionional Benefit 1 is purchased).

Dependent is defined to include any person who is principally dependent for financial support on the other person or the other person's spouse. This would include children 18 years or older who are still financially dependent on their parents.[166]

D. Debate over Utility of a No Fault System for Personal Injury Caused by Motor Vehicle Collisions

In 1990, the Minister of Consumer and Corporate Affairs, the Honourable Dennis Anderson, became concerned about recent increases in automobile insurance premiums. He asked the Alberta Automobile Insurance Board ("Board") to conduct a study to "determine whether there was a problem of premium instability in automobile insurance and if so, whether the cure was to modify the tort and no fault features of the existing automobile system".[167] On

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164 *Insurance Act, ibid.*, s. 321.

165 O. Reg. 273/90 No-Fault Benefits Schedule.

166 *Ibid.* at s. 3(2).

167 Alberta Automobile Insurance Board, *A Study of Premium Stability in Compulsory Automobile Insurance*, (1991) V. 1 at 13.

September 12, 1991, the Board presented its report entitled *A Study of Premium Stability in Compulsory Automobile Insurance* ("Study") to the Minister.

The Board determined that there is a pricing problem in the automobile industry at the present time. Since 1985, the loss cost (total amount of losses and loss adjustment expenses for a given year divided by the number of vehicles insured) for third party liability has exceeded the average automobile insurance premiums paid by Albertans for this coverage.[168] Market competition dissuaded insurers from seeking increases in insurance premiums until 1989. Increases were also sought in 1990. The Board expects insurance premiums to rise over the next five years to correct for accumulated premium deficiencies and expected increases in bodily injury costs.[169] The Board also concluded that the tort system overcompensates individuals with minor personal injuries and undercompensates individuals with serious personal injuries.

Premium stability can be achieved in one of two ways: premiums increases or cost containment. The Board examined methods of reducing future premium costs. The first method is the reduction of the number and severity of accidents. The Board recommends several methods the government could adopt to accomplish this. The second method is "to modify the automobile insurance system to reduce the amounts paid to traffic victims".[170] The Board has put forth 3 options that should be considered if the Alberta Government wishes to reduce future premium costs by reducing the amount paid to traffic victims.

Option 1 consists of modest reform to the existing tort system and no fault features of Section B of an automobile insurance policy. Option 1 would limit an injured plaintiff's recovery of non-pecuniary damages to everything above the first 10,000.[171] It would also increase the maximum recovery for non-pecuniary

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168 *Ibid.*, figure 9 at 31 and discussion at 37-8.

169 Some press commentators do not accept the Board's assumption that bodily injury costs will continue to increase. One reporter noted that the number of accident injuries in 1983 was 19,237 and the number of accident injuries in 1989 was 19,753. The number of registered vehicles went up about 10 percent. (Marc Lisac, "Government already under fire" Edmonton Journal, (October 11 or 12, 1991)). Also, the number of deaths caused by motor vehicle accidents has decreased consistently since 1980.

170 Study, *supra*, note 167 at 4.

171 *Ibid.* at 120.

damages to $300,000. The Board estimates that this option would produce savings of about $34-40 of loss costs per insured automobile in 1990.[172] Option 1 also includes moderate increases of no fault accident benefits in Section B of automobile insurance policies. For example, the principal death benefit for the head of the household would increase from $5,000 to $10,000. Also, funeral benefits would increase to $3,000. These modest increases to no fault benefits would still lead to savings of $32 per automobile in relation to the 1990 product.

Option 2 is of same mold as Option 1, but the no fault benefits are of much greater value.[173] Depending on whether the income replacement benefits are primary or secondary, savings to the 1990 product would be $24-27 per automobile.[174]

Option 3 is an Ontario style threshold no fault system with the same enhanced no fault benefits of Option 2.[175] The tort system would still apply to serious injury claims and fatal accident cases. Under option 3 only those severely injured would have the right to claim non-pecuniary damages. If Option 3 were implemented, the premium savings for 1990 would be $65-72 per vehicle (depending on whether the income replacement benefits were primary or secondary).[176]

Shelly Miller is counsel to the Board. She advises that the Board did not consider how Option 1 would affect recovery of damages for bereavement under section 8 of the *Fatal Accidents Act*. The focus of the study was to eliminate recovery in cases of minor personal injury. Personally, she does not think fatal accident claims for non-pecuniary damages should fall within the $10,000 deductible proposed by Option 1. Death is *the* most serious injury; it is not the minor injury case targeted by Option 1.

It is too early to say whether Option 1, 2, or 3 will find favour with Albertans or the government. Nonetheless, the study affects our project

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172 *Ibid.* at 121.

173 *Ibid.* at 126.

174 *Ibid.* at 127.

175 *Ibid.* at 128.

176 *Ibid.* at 128-29.

indirectly. It demonstrates that the present Minister of Corporate and Consumer Affairs is very sensitive to the level of automobile insurance premiums paid by Albertans. Any proposals for increased damages must be justifiable to Albertans and to the government.

We are aware of the ongoing debate over the utility of a no fault automobile insurance regime. Some may think that a no fault automobile insurance regime is close at hand for Alberta and, therefore, changes to section 8 of the *Fatal Accidents Act* will be of no avail. This is not so. First of all, the *Fatal Accidents Act* applies to all deaths caused by the wrongdoing of another. This involves more than automobile accidents caused by negligent conduct. Moreover, Alberta may choose a threshold no fault system like the one operating in Ontario. In Ontario death is outside the no fault system and, therefore, the Ontario wrongful death statute still governs wrongful death actions. Finally, we think it is better to deal with the law as it presently is and not to delve into the realm of speculation on what might happen in the future.

CHAPTER 7 — POLICY ANALYSIS

A. Introduction

In this chapter we analyze whether non-pecuniary loss should be compensable in wrongful death actions. Since the outrage over section 8 arises in the cases of wrongful death of children, we begin with such cases. The analysis involves answering these questions:

- What is the nature of injury suffered by parents?
- Should scope of recovery be expanded to include all out-of-pocket expenses and loss of earnings?
- Should any non-pecuniary loss of parents be compensable?
- Which elements of non-pecuniary loss should be compensable?
- Should the amount of damages awarded for such loss be established by court discretion or statute?
- If it is established by statute, what should the amount be?

This analysis then leads to recommendations for reform in respect of damages for wrongful death of children.

The next step is to determine whether those recommendations are appropriate for cases involving death of a spouse or death of a parent. If not, how should cases involving death of a spouse or parent be treated?

B. Wrongful Death of Children

(1) Nature of the Injury Suffered by Parents

NON-PECUNIARY LOSSES

- shock, agony, grief and sorrow
- loss of the child's love, affection, guidance, care, companionship, comfort and protection for rest of parent's life

PECUNIARY LOSSES

- value of the services and financial support the child would have given the parents during their life, had the child lived

OUT-OF-POCKET EXPENDITURES AND LOSS OF EARNINGS

- expenses incurred in burying the child, conducting funeral service and having friends and family gather immediately after the funeral
- loss of earnings for period during which parents make funeral arrangements and attend funeral
- loss of earnings for period in which parent is unable to cope with life due to loss of child
- other expenditures necessitated by death including counselling for family members, moneys spent to take stress leave, and other such sums.

(2) Should Any Element of the Parents' Injury be Compensated?

(a) Pecuniary damages

Since our review does not deal with the measure of pecuniary damages, we propose no change in this area. The measure of pecuniary damages would continue to be calculated in child death cases by applying the "wages less keep" test.

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

At present, section 7 of the *Fatal Accidents Act* allows the court to award damages in the amount "sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased if those expenses were incurred by any of the persons by whom or for whose benefit the action is brought". The *Fatal Accidents Act* must be amended if parents are to recover other out-of-pocket expenditures made as a result of the injury and death of the child and the parents' loss of earnings. As we learned by interviewing the parents who have lost a child, the financial consequences are wide ranging. The issue is whether parents should be able to recover all or some of the losses they suffer as a result of the death of the child.

An issue of this type is not new to the law. Judges and legal scholars have addressed the same issue in the area of tort law. In that context, the courts had to decide whether the wrongdoer must compensate his victim for all the damage caused no matter what its nature? The courts had to accommodate two conflicting policies. One is the need to promote freedom of action. The other is the need to protect individuals from harm. The law promotes freedom of action, while, at the same time, protecting individuals from harm by allowing the injured person to recover compensation for loss that is foreseeable and not too remote. This does not result in full compensation for the injured person in every case because to do so would create an unwarranted deterrence of freedom of action. It does allow for compensation for loss likely to result from the negligent conduct. At the same time, it allows people to act without fear of paying compensation for things they cannot foresee. It balances the need for freedom of action with the need to protect individuals from harm.

We think that this balance should also be sought when deciding which losses the parents should be able to recover in wrongful death actions. Foreseeability and remoteness must play a role. Parents who have lost children due to the senseless conduct of a drunk driver may find this position unpalatable. This is understandable. Nevertheless it must be remembered that not every fatality is caused by conduct that is criminal. The law in this area must be designed for every situation.

The expenditures that might foreseeably arise will depend upon the circumstances of the death. If death is not instantaneous, certain expenditures may arise between the time of injury and death. These might include the cost of the ambulance, medical or hospital expenses incurred in treating the child, and other expenditures that would be for the benefit of the child between the time of injury and death. After the death, the parents will pay for the funeral expenses. Funeral expenses will include the following:

- the cost of notification of death,
- the cost of disposal of the body,
- a funeral ceremony and subsequent gathering of relatives and friends,
- transportation costs of bringing immediate family members to the funeral, and
- the costs of a funeral plot and headstone.

In some situations the parents will take unpaid leave to arrange for and attend the funeral. One can also expect that some parents will seek grief counselling as a result of the death. This will be a further expenditure. Some parents may be unable to work for periods of time. The question is which of these losses should be recoverable.

As a minimum, we think parents should be able to recover expenditures they make that are a direct and foreseeable consequence of the injury and death of their child. We would include the following items in this category:

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

(ii) a reasonable allowance for travel expenses incurred in visiting the deceased between the time of injury and death.

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

(iv) fees paid for grief counselling provided to the parents and their surviving children.

Recovery will be allowed only if these expenses are incurred by the parents.

Item (i) includes such expenditures as ambulance fees, any medical or hospital expenses incurred, and other expenditures that would be for the benefit of the deceased between the time of injury and death. Items (i) to (iii) are recoverable in at least one province in Canada. We have expanded the wording of recovery of funeral costs. It is our hope that the new wording will signal recovery for all related funeral items and avoid any distasteful squabbling over such items.[177] Item (iv) is something new. We strongly believe that grief counselling is an item that should be compensable. Not every family will choose to engage a grief counsellor, but for those that do, it is very important in their

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177 One parent advised that the wrongdoer's insurance company refused to pay for the flowers displayed at the funeral because the funeral home did not order the flowers. We hope that the new wording will avoid this position taken by the insurance company.

adjustment to the tragedy. It is not an expense that should be born by the parents. Their need for counselling is a direct result of the wrongdoer's conduct.

More difficulty arises in determining whether two other expenditures should be recoverable. The first is the cost of bringing certain relatives to the funeral. The other is lost earnings. Most relatives will attend the funeral at their own expense. Yet, it will not be unusual in the case of death of a young child for the parents to pay for their other children to come home to attend the funeral. There may also be cases in which the parents must pay for the grandparents to attend the funeral. Should these costs be compensable? We invite comment on this issue.

INVITATION TO COMMENT

Should parents be reimbursed for the cost of bringing grandparents and siblings of the deceased to the funeral where such relatives cannot afford to come using their own means?

There was also a difference of opinion on whether parents should recover lost earnings. There will often be some loss of earnings for arranging and attending the funeral.[178] Yet, a loss of earnings claim could cover several months. In one family both parents were unable to work for nine months. This represented an income loss of over $70,000. Those who oppose recovery of earnings think that it will only encourage people to stay at home and grieve. They think this is bad for survivors and, therefore, do not support recovery for loss of earnings. Others believe that grief can be so crippling that work is impossible for some and that such persons should be able to recover their loss. One parent expressed this view:[179]

> 5) The sudden, inexplicable loss of a child, spouse or parent is incapacitating. Parents need much more time to grieve than is allowed by labour laws or by one's bank account. When a person can he held criminally negligent and, therefore, legally responsible for that

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178 Some employers will pay full wages for this period, some will not.

179 People Against Impaired Driving, *When Impaired Driving Hurts You* (1991) at 30.

death, then that person should also be held financially responsible to a realistic extent.

One possible solution is to allow damages for loss of earnings up to a certain maximum period, say a few months. This would keep the recovery reasonable and would assist in most cases. There is a question whether it will encourage people to stay home for this period. Is this desirable or not? Many people will not have the luxury of staying home to deal with their grief. Money and job demands will not allow it. Others may. Others may simply be incapacitated by grief and have no choice.

Another question is whether parents should be able to recover from the wrongdoer the earnings lost between the time of injury and death of the child? In one case we are aware of, the son received a head injury in a motor vehicle accident and was in a coma for three and a half weeks before he died. His parents attended on him for this period and the father, who was self-employed, lost significant income. Should such earnings loss be compensable? This could be done by allowing the period for compensable earnings loss to begin from the moment of injury. In a case of instantaneous death, it would make no difference. Yet, where the injury precedes the death by several weeks, it will.

In principle, we are not opposed to allowing parents to recover loss of earnings occasioned by the attendance upon the child between time of injury and death and loss of earnings occasioned by grief caused by the death of the child. Any such recovery should be restricted to a maximum of a few months earnings per parent. Yet, by creating this head of damage, the parents will have to prove that their grief prevented them from working for a certain period. It will put the parents grief on trial and we are not inclined to do this. For this reason, we do not recommend that loss of earnings be recoverable. This is a tentative recommendation only. We invite comment on this issue.

INVITATION TO COMMENT

Should parents be compensated for loss of earnings occasioned by attending child between time of injury and death and loss of earnings occasioned by grief caused by death of child? Should there be a limit on such compensation?

Many other financial losses were suffered by the parents we interviewed. The losses ranged from loss of future advancement to sale of home at below market value.[180] These losses fall into the remote category and should not be compensable.

The mechanics of making the suggested changes depends on who should be able to recover such expenditures. If recovery of such expenditures is restricted to those claimants who can recover damages for bereavement,[181] a new section will have to be created. If recovery of such expenditures is extended to all claimants,[182] then section 7 of the Act, which presently deals with the right of claimants to recover out-of-pocket expenditures, must be amended. We think everyone who has a claim under the Act should be allowed to recover such expenditures. Section 7 of the Act should be amended to include such claims.

RECOMMENDATION 1

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

7. Where an action has been brought under this Act, the damages that may be awarded include:

(a) actual expenses reasonably incurred for the benefit of the deceased person from time of injury to death,

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

(c) the reasonably necessary expenses of the funeral and the disposal of the body of the deceased,

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180 Parents sold their home quickly because the wrongdoer who negligently killed their son lived next door to them.

181 This includes spouses, minor children and parents.

182 An action brought under the *Fatal Accidents Act*, R.S.A. 1980, c. F-5 is brought for the benefit of the wife, husband, parent, child, brother or sister of the deceased person. "Child" includes a son, daughter, grandson, granddaughter, stepson, stepdaughter and illegitimate child. "Parent" includes a father, mother, grandfather, grandmother, stepfather and stepmother.

including all things supplied and services rendered in connection therewith, and

(d) fees paid for grief counselling provided to any claimant,

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

(c) Non-pecuniary loss

As discussed in Chapter 3, currently parents recover compensation for only a few elements of the total loss. They receive reimbursement for "reasonable expenses of the funeral and disposal of the body" and $3,000 damages for bereavement. The "wages less keep" theory usually negates recovery for the value of the child's services and financial support.

To our minds it is beyond question that the true loss of these parents is non-pecuniary. The financial consequences are simply not comparable to the non-pecuniary loss.[183] This is what one expects and this is what Institute counsel witnessed when they interviewed the parents who had lost a child. Should the wrongdoer compensate the parents for these non-pecuniary losses? Although we touched on this issue in Report 24,[184] the scope of our analysis must be broadened. Our starting point is the recognition that "monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one".[185] We will set out the policy considerations in favour of and against recovery of damages for non-pecuniary losses. We conclude that parents should recover damages for non-pecuniary loss. Later, we discuss the methods

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183 This is not to say that the financial consequences are insignificant. In some cases the loss of wages exceeded 12 months.

184 By recommending the enactment of section 8, we recognized a need to compensate parents for their bereavement. The purpose of section 8 was to provide the parents with solace and consolation as far as money can provide these. It was not intended that the money compensate the parents for the money they spent in raising the child.

185 G.H.L. Fridman, *The Law of Torts*, Vol. I (Toronto: Carswell, 1989) at 402-03. In this quotation the author is discussing non-pecuniary losses in the context of personal injury actions. The comment equally applies to non-pecuniary losses in the context of wrongful death actions.

of allowing recovery for such damages and comparisons that might assist in establishing the amount.

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

First, courts and juries are unable to measure in money the grief of relatives or the loss of guidance, care and companionship. Any damage award is arbitrary and does nothing to alleviate the loss suffered.

Second, juries will award extravagant awards out of sympathy for the survivors.

Third, high non-pecuniary damage awards for death of children would impose damages out of proportion to the negligent conduct complained of.

Fourth, since many of the wrongdoers will be insured drivers, this will place a large burden on insurers, and eventually upon their customers. Non-pecuniary damage awards for death of children will lead to excessive insurance premiums.

Fifth, it is distasteful to put grief on a sliding scale or to examine the quality of a parent-child relationship.

Sixth, such damages really place a value on human life. The policy of the law is that human life is priceless and cannot become the subject of judicial computation.[186]

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[186] Many of these policy arguments are eloquently presented in *Kansas P. R. Co.* v. *Miller*, wherein the court held:

> Upon what known principle can the mental sufferings of survivors be estimated? If the family is large, and the grief proportional to its size, then the damages would be immense. If the family was small, but the grief was boundless, how could it be compassed? How could a jury estimate the relative mental strength of a widow and twelve children? Furthermore, it would involve a minute scrutiny in the personal relations of all parties. Affection would

(continued...)

Let us examine each of the arguments in detail.

First Argument — Doing the impossible: Is it really true that courts cannot measure damages for grief or loss of guidance, care and companionship? Courts routinely award damages in post traumatic stress syndrome cases and nervous shock cases. They give non-pecuniary damage awards to quadriplegics, recognizing ". . . an award of non-pecuniary damages cannot be "compensation". There is simply no equation between paralysed limbs and/or injured brain and dollars."[187] It is no more difficult to award non-pecuniary damages for these type of injuries than it is for grief or loss of guidance, care and companionship. As one American judge held in *Re Sincere Navigation Corp.*:[188]

> The distinction between the pain of a broken arm and the pain of a broken heart is judge-made. It must be doubted that a jury deemed competent and able to evaluate the exquisite anguish of a compound fracture of the femur would find it more difficult to fix just compensation for a cup filled with widow's tears.
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> . . .

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[186](...continued)

> have to be measured by a graduated scale. An account would have to be taken of the familiarity which existed between the deceased and the survivors. If a confirmed drunkard, or a person of vile associations, the grief at his departure might not be so poignant. If the widow had wearied of her lord, or the husband of his wife, death might be a joy instead of an anguish. How determine the duration of this mental suffering or the degree of its intensity? When a large number of survivors were found, an inquiry would have to be instituted into the feelings of each. This certainly might, in many instances, tend to scandal and disgrace. Neither the interest of the litigants nor the policy of the law could be subserved by such a course. None of the difficulties are encountered in estimating the mental suffering in the case of one suing for direct injuries to himself; his relations to others are in no sense material: it is a personal, not a relative suffering.

[187] *Arnold* v. *Teno, supra,* note 123 per Spence J.

[188] (1971), D.C. LaO 329 F. Supp. 652.

> Human experience, as well as the literature of psychiatry and psychology bear abundant evidence of the debilitating effect of grief and the resultant depression. It is certainly no less real, and no more difficult to appraise, than the "mental and physical pain and suffering" attendant upon personal injury that is awarded those who survive, or the pain and suffering prior to death that is recoverable as part of the death action here.

A similar view is expressed by Justice Rice in his minority opinion in *Mazerall* v. *Nightingale*.[189]

Finally, courts in the United States, and now in New Brunswick, are able to quantify damages for grief. Courts in Ontario, Manitoba and Nova Scotia award non-pecuniary damages to parents for loss of a child's guidance, care and companionship. Courts in New Brunswick award non-pecuniary damages to parents for loss a child's companionship.

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

One parent wrote this:[190]

> 7) It is an unforgivable and cruel insult when we are told that "no amount of money can bring back your child". That's not news to us. But a reasonable amount of compensation would mean that someone is sorry. The courts must indicate that children are of value, not only to their families, but to society in general.

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189 *Supra*, note 135.

190 *When Impaired Driving Hurts You, supra*, note 179 at 30-31.

Mr. Justice Robins, speaking for the Ontario Court of Appeal in Mason v. Peters, summarized these injustices as follows:

> The rules governing damages in child-death cases have long been the subject of critical comment, Fleming, for instance, described their impact on these cases as "repulsive". As matters stand, awards compelled by the pecuniary loss concept, fairly viewed, neither recognize the real nature of the injury sustained by surviving members of the family nor reflect the gravity of their loss. Whatever else may be said, there is no denying that the aphorism "it is cheaper to kill than to injure" holds greater validity here than in any other branch of the law of torts.

Second Argument — Awards guided by sympathy: At one time the courts had little control of jury awards, and fear of excessive awards was justified. In Canada today, this is an imaginary fear. Most often it is a court, not a jury that determines the amount of compensation to be awarded for the injury. The Canadian tradition is to award moderate non-pecuniary damages. Certainly, the awards made by Canadian courts to a parent for loss of a child's guidance, care and companionship have not been excessive.[191]

There is the possibility of excessive damages if a jury establishes the amount of compensation for non-pecuniary losses. Yet, the courts are able to control such awards. An example of the court's control of a jury is found in *Hamilton et al.* v. *Canadian National Railway et al.*[192] In that case, the jury awarded a mother $150,000 for loss of her nine-year-old girl's guidance, care and companionship. The Ontario Court of Appeal viewed the award as excessive and substituted an award of $50,000, this sum being the highest award for that head of damage that had yet been made.

Moreover, if a statute establishes the amount of damages for non-pecuniary loss, the fear of extravagant awards evaporates.

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191 Most parents receive in the $15,000 to $30,000 range. The highest award to date has been $50,000. Refer to Chapter 3 for a more detailed discussion of court awards of this nature.

192 (1991), 80 D.L.R. (4th) 470 (Ont. C.A.)

Third Argument — No proportion: Some argue that recovery of large non-pecuniary damages in wrongful death actions will make recovery out of proportion to the wrongful conduct complained of. One might begin by asking whether payment of $3,000 plus funeral expenses is in proportion to negligent driving resulting in the death of a child. We think not. Significant non-pecuniary damages is in proportion to the negligent conduct complained of. Although negligence comes in many forms, from momentary inadvertence to the alcoholic stupor, in a large number of motor vehicle accidents the cause of the accident is not momentary inadvertence. Avoidable conduct leading to motor vehicle accidents resulting in death and more severe injuries includes: speeding, driving while intoxicated, failing to yield, failing to stop at a stop sign and so on.[193]

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

Our analysis will be restricted to automobile insurance premiums because information necessary to analyze other kinds of insurance premiums is not available to us. As noted in Chapter 6, statistics are available on accidental deaths not relating to vehicles, but those deaths often do not give rise to a law suit, and even where they do, it is often speculative to assume that liability insurance is involved.

The experience in other provinces is instructive. Ontario, Manitoba, and Nova Scotia all award non-pecuniary damages to parents for loss of a child's

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193 For a useful discussion of statistical studies of causes of motor vehicle accidents see C.J. Bruce, "The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature" (1984) 6 *Law & Policy* 67. See also Alberta Transportation and Utilities, *Alberta Traffic Statistics 1989*, Table 4.2.

guidance, care and companionship. New Brunswick awards non-pecuniary damages to parents for grief and loss of a dependant child's companionship. Significant, but not excessive, awards are made to each parent under this head of damages. Insurance premiums have not reached the sky in those provinces.

The statistics on accidental death do provide some assistance. We know that there were 1,297,804 insured vehicles in Alberta in 1989.[194] We also know that in the same year 520 people were killed in Alberta in motor vehicle traffic accidents or motor vehicle non-traffic accidents. Four hundred and seventy two were Alberta residents and 48 were non-residents. Ninety seven of the Alberta residents were 19 years of age or younger.[195]

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

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

194 Alberta Automobile Insurance Board, *Supra*, note 167, V. 1 at 17. This statistic is presented in the Board's analysis of the cost of automobile insurance to Alberta motorists.

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

At the end of this chapter, we will do a more sophisticated analysis of how the proposed reform will affect automobile insurance premiums and take into account certain loadings.

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

The real question is not whether insurance premiums will increase as a result of higher non-pecuniary damages, but what Albertans are willing to pay so that damages of this nature can be recovered in deserving cases. We think the Institute's role is to propose reform in this area based on sound principle and sensitivity to insurance premium levels. We expect some comment from insurers as to the effect of the proposals on insurance premiums.

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

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

Sixth Argument — Wrong to value human life: In theory, damages for grief and loss of guidance, care and companionship of the child are damages awarded for injury and harm suffered by the parents. These damages are not a measure of the value of the child. The argument is that, in practice, many people do not or can not make this distinction. They associate such damages with the value of the child. The basis of the association is that the better the child, the closer the relationship, and the greater the suffering of the parent. Our law has always propounded the view that human life is priceless. Therefore, some argue that damages of this nature place a value on human life and this is to be discouraged.

None of the parents interviewed thought Alberta should deny recovery because allowing recovery would leave the impression that the law is valuing a human life. Not one parent thought that this was a sufficient reason for repealing section 8. Some thought awarding damages for the parents' suffering did not relate to the value of the child. Others were more concerned that no recovery by the parents left the impression that the child had no value. All thought that the more significant the sum, the better the impression left by the law.

Damages awarded to a parent for non-pecuniary loss cannot and do not measure the value of the child's life, which is priceless. They cannot even measure the injury suffered by a parent from the death of a child. The most that they can do is to recognize in a significant way the catastrophic deprivation that the parent has suffered and the injury that that deprivation has inflicted on the parent.

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

Section 8 of the *Fatal Accidents Act* recognizes that the wrongful act that has resulted in the death of the child has inflicted harm upon the parent that cannot be valued in money. To repeal the section would suggest that society does not regard the parents' suffering as worth anything. It would leave the parent without any recognition of that suffering. It would suggest that the parents' suffering was without significance in the eyes of the law. What is wrong with section 8 is not that it recognizes the injury suffered by a parent upon the wrongful death of a child, but that it does not do so in a way that has meaning today.

In our opinion, the wrongdoer should compensate parents for the non-pecuniary loss suffered by the parents upon the death of the child caused by the wrongdoing. Later, we will deal with the options for providing such non-pecuniary damages and the method of establishing the amount of such damages.

RECOMMENDATION 2

The *Fatal Accidents Act* should, as it now does, allow parents to recovery non-pecuniary damages from the wrongdoer whose wrongdoing caused the death of the parents' child. The nature, scope and method of quantifying such damages should be reconsidered.

(3) Compensation for Non-pecuniary Loss

(a) Methods of compensating for non-pecuniary loss

A variety of legal methods exist that provide compensation for non-pecuniary loss suffered by a parent as a result of the wrongful death of a child. Other methods could be proposed. The methods differ on the elements of non-pecuniary loss that are compensable. Some jurisdictions compensate for grief; others compensate for loss of guidance, care and companionship. Others compensate for both heads of non-pecuniary loss. The method of establishing the amount to be awarded under the various heads of damage also varies. The amount can be established by statute, or it can be left to the discretion of the court. The court's discretion can be unlimited or it can be limited by a statutory maximum level. We summarize the available options in the following chart. The highlighted options are those for which no precedent exists.

1. **No recovery for non-pecuniary losses such as grief or loss of companionship and society**
   - British Columbia
   - Saskatchewan
   - Prince Edward Island

2. **Only damages for grief/bereavement**
   - non-pecuniary damages for loss of guidance, care and companionship are not compensable.

   - court discretion
     - maximum imposed by statute
     - unlimited discretion
       - pre-1976 Scottish law (damages for solatium)
   - statutory amount
     - Alberta — $3,000
     - England — £7,500

3. **Only damages for loss of guidance, care and companionship/society**
   - no damages for grief and sorrow
   - majority of states have this head of damages
   - in some states recovery is still limited to pecuniary loss; in other states it is non-pecuniary head of damages

   - court discretion
     - maximum imposed by statute
       - Wisconsin — $50,000 limit
     - unlimited discretion
       - Ontario
       - Manitoba
       - Nova Scotia
       - Massachusetts & many other states
       - 1976 and on — Scotland (loss of society and guidance)
   - statutory amount

4. **Damages for grief and loss of guidance, care and companionship/society**
   - 8 U.S. states fall within this category. Result comes through changes to statute or judicial re-interpretation of existing statute

   - court discretion
     - maximum imposed by statute
       - Kansas — 1975? $25,000 limit
     - unlimited discretion
       - New Brunswick
       - Ohio
   - statutory amount

(b) Which elements of the parents' non-pecuniary loss should be compensable?

As discussed in Chapter 3, the majority of provinces that do award non-pecuniary damages in wrongful death actions limit recovery to damages for loss of guidance, care and companionship. Damages for grief and sorrow are not compensable in Ontario, Manitoba, or Nova Scotia.[196] Alberta has taken the unusual road of awarding damages for bereavement, but not damages for loss of guidance, care and companionship. New Brunswick awards damages for grief and loss of companionship.

American legislation and jurisprudence makes similar distinctions, although some states go into more detail. For example, the Kansas Civil Procedure Code Section 60.1904 empowers a court or jury to give damages for: (1) mental anguish, suffering or bereavement (2) loss of society, companionship, comfort, or protection, (3) loss of marital care or attention, (4) loss of filial care or attention, and (5) loss of parental care, training, guidance, or education. A close examination of these categories show that they fall into damages for grief or damages for loss of guidance, care and companionship. Category (1) is grief. Category (2) is loss of companionship. Categories (3) to (5) fall within guidance and care. Kansas empowers the court or jury to give damages for the entire non-pecuniary loss suffered by parents.

Should the wrongdoer compensate the parents for the entire non-pecuniary loss or just certain elements of this loss? Should the parents recover damages for grief, or damages for loss of the child's guidance, care and companionship, or both? In our minds, it is unrealistic to compensate one element of the loss, but not the other. The law should compensate the parents for the entire non-pecuniary loss. The grief is real. The loss of the child's guidance, care and companionship is real. Why ignore one? This is not to say that establishing the amount is easy. It is not. It was also not easy for the Supreme Court of Canada to establish an upper limit for non-pecuniary damage awards in personal injury cases. It is not easy to establish damage awards for non-pecuniary damage in child abuse cases.[197] We do not see damages for grief or loss of the child's guidance, care and companionship as posing a different problem.

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196 Provinces with this position are Ontario, Manitoba and Nova Scotia.

197 See the recent decision of Madame Justice Veit in *B. (A.)* v. *J. (I.)* (1991), 81 Alta. L.R. (2d) 84.

As will be discussed in the next section, the difficulty parents might have in giving evidence of their non-pecuniary loss may be an argument in favour of having a statute establish the amount of compensation for non-pecuniary loss. It is not a sufficient reason to deny recovery of damages for grief altogether.

RECOMMENDATION 3

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

(c) Court discretion or legislative enactment?

In one sense, it does not matter what you call the non-pecuniary damages. The parents interviewed thought there should be some compensation for emotional injury, call it what you want. The key issues are whether the amount of compensation for the loss will be established by court or statute, and if established by statute, what will be the amount. In this section, we will discuss the issue of whether the amount should be within the court's discretion or established by statute.

Canadian courts have already addressed this issue in the context of awarding non-pecuniary damages for loss of guidance, care and companionship. The Manitoba courts were quick to establish conventional sums that would be awarded in all but exceptional cases. The Ontario courts, on the other hand, thought each case should be dealt with on a case by case basis. All the arguments put forth in Manitoba for conventional sums suggest the case for a statute-made conventional sum. The arguments accepted by the Ontario courts support court discretion.

The arguments that support conventional awards are:

* It is impossible to determine the cash value of a human life. For this reason the amounts awarded must be modest. Courts should guard against sympathy when making such awards, because it is an unreliable guide.[198]

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198 *Larney* v. *Friesen, supra,* note 113, per Chief Justice Monnin.

* Loss of the guidance, care and companionship of a loved cannot be equated with cash. When giving damages for imponderables, the court should do so with great hesitation, "especially when one is not spending or awarding one's own funds but those of another person or a corporation".[199]

* Modest conventional awards lead to uniformity of awards. This encourages settlement of actions.[200]

* If assessment is made on a case by case basis, trials will become filled with evidence of worth or lack of worth of deceased's life. The inquiry will be futile and offensive.[201]

* The trial process will subject the grief of the relatives to examination and cross-examination. This is undesirable.[202]

Those that support awards dependent on the evidence argue:[203]

* All families are different and conventional awards do not take the difference into account. The court has yet to discover the average family to which a conventional award might be given.[204]

* Thus far, awards for this type of loss have not been large in comparison to other heads of damage in personal injury actions. If exceptions are going to be allowed from the conventional award because of exceptional circumstances, the court might just as well consider each case in detail.

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199 *Ibid.*

200 *Ibid.*

201 *Larney* v. *Friesen, supra,* note 113, per O'Sullivan and Matas.

202 *Ibid.*

203 *Charles Handbook on Assessment of Damages in Personal Injury Cases* (Toronto: Carswell, 1990) at 69.

204 *Nielsen* v. *Kaufmann* (1986), 54 O.R. (2d) 188 (Ont. C.A.) at 200.

* A conventional award will ultimately result in overcompensation or undercompensation. Excessive awards can be controlled by appeal courts.

Let us consider these arguments. The first two arguments in favour of conventional sums are really arguments against non-pecuniary damage awards in wrongful death actions. We have already refuted these arguments in the earlier discussion of policy. Yet, we reiterate two points. First, non-pecuniary damages in wrongful death actions compensate the parents for their suffering and loss. These damages are not a measure of the value of the child's life. Second, the suffering and loss experienced by the parents are imponderables, but this does not mean that damages should not be given. All awards for non-pecuniary damages give money for imponderables. Money will not give the quadriplegic the use of his limbs any more than money will bring back the child. In wrongful death actions, all the money will do is make the parents life more bearable. The money will not buy happiness. It will not help the parents work through their grief. But, it will remove the harm done by the present law. We view the existing law as a further factor aggravating the sense of grief experienced by the parents. All non-pecuniary damages can do is remove this aggravation and let the parents get on with the natural grieving process. It is like letting the parents start from 0 instead of -10.

We now consider the rest of the arguments and explain why some are more persuasive. Let us begin with the advantages that flow from court discretion. Court discretion offers flexibility. No doubt Alberta courts would be quick to establish upper limits, as in Ontario, or conventional awards, as in Manitoba. Yet, there would still be some ability to deal with exceptional situations. In addition, courts could adjust their awards to inflation, which the government has shown no desire to do with section 8. Court discretion also would deflect criticism from the government. It will be the courts, and not the government, that will have the difficult task of setting the amount of compensation for such injury. It will be the courts, and not the government, that will be criticized if the awards are inadequate.

Court discretion would eliminate any possibility of a windfall recovery by a parent who does not suffer grief or loss of guidance, care and companionship upon the child's death. However, while parents can become alienated from their children, even those parents will normally suffer grief at their child's untimely death. There are also parents who after a divorce have no contact with their children. Yet, it is one thing to abandon a child and another to make money from

their death when you have already severed that bond. We are not convinced that the possible number of windfall recoveries dictates a need for court discretion. The choice between court discretion and a damage award established by statute should depend on other more compelling considerations.

We are also not concerned that courts will be guided by sympathy and make excessive awards. This simply will not happen in Canada.[205] Appeal Courts will control the level of awards, as they do in personal injury cases involving non-pecuniary damages. In any event, fear of outrageous awards could be dealt with by a legislative cap on the court's discretion. This is now done is a few American states.

With court discretion also come certain disadvantages. One potential disadvantage of court discretion is that the courts will give too little for these non-pecuniary damages. We cannot predict how the Alberta courts might exercise such discretion. There exists the possibility that Alberta courts might adopt insignificant conventional levels for non-pecuniary damages in these circumstances.

Other disadvantages arising from court discretion are the greater difficulty in evaluating risk and the cost of litigating such issues. With a statutory fixed amount it would be easier for insurance companies to evaluate their risk and to set insurance premiums accordingly. There will also be no litigation on the issue of quantum of non-pecuniary damages, and this will translate into reduced legal fees for parents and insurers.

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205 The Canadian tradition of modest non-pecuniary damage awards is illustrated in *Mazerall* v. *Nightingale, supra,* note 135. Two young children, aged 6 years and 9 months, were killed in a motor vehicle collision caused by the negligence of the defendants. The parents sued for damages for grief and loss of companionship. The trial judge awarded each parent $60,000 under these heads of damage. The New Brunswick Court of Appeal thought the awards excessive and reduced the awards. The court awarded damages for grief of $15,000 for each child. It awarded $15,000 for the loss of companionship of the 6 year old child and $20,000 for the loss of companionship of the 9 month old child. The court thought that these damages should be divided equally between the parents. The end result was that each parent received $32,500 for grief and loss of companionship of their two children. This is hardly a sum that one can consider excessive in the situation addressed by the court.

Removing litigation over the amount of non-pecuniary damages in actions involving wrongful death of children will have the following effect. Since so few parents have a pecuniary damage claim in the event of the death of their child, the only issues are whether the defendant was liable for the death, and if so, the amount of non-pecuniary damages and amount of out-of-pocket expenditures. Lawyers specializing in motor vehicle accident litigation advise that in many wrongful death actions liability is not disputed. The facts clearly show the defendant breached the duty of care he or she owed to the deceased. In these situations, compensation set by statute would leave nothing in dispute on the question of non-pecuniary damages. The matter of out-of-pocket expenditures could be resolved between the family and the adjuster, with little input from a lawyer. This is often what happens today in child death cases. The lawyers we interviewed thought this was desirable. These lawyers wanted the damages to go to the families and not to legal costs. It was their view that lawyers should be involved only when there are complicated pecuniary damage claims or where liability is in dispute.

The unsettling disadvantage of court discretion is that litigation of these issues may do more harm to the parents than good. This is a very paternalistic view. Should the law not let the parents themselves decide if they want to subject themselves to this process? One has to assume that families make these decisions in Ontario, Manitoba, Nova Scotia and New Brunswick. For some parents it is very important that they have a forum for showing the qualities of the child they have lost. They seek some declaration that what they lost is special. Litigation on the issue of level of non-pecuniary damages for loss of the guidance, care and companionship of the child provides this forum. Yet, parents who litigate must relive the trauma of loss of their child and must subject themselves to an adversary situation. The parents would have to testify as to the nature of their relationship with the child.[206] It is the job of defence counsel to

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[206] See "Recovery of Damages for Loss of Consortium Resulting from Death of Child—Modern Status" *supra*, note 74. At pages 445-46 the author lists factors American courts consider when measuring a claimant's damages for loss of a child's companionship and society. The factors are:

* age, health and personality of the child
* the nature of the child's relationship to the claimants
* the nature of the child's relationship to other family members
* the child's living arrangements in relationship to the claimants, including consideration of any continuous absences

(continued...)

accentuate the negative. This can only infuriate the parents involved in litigation of this nature.

At the end of the day, we conclude that the damage awards that one would expect under a court discretion model are simply not worth submitting parents to the litigation process. In our view, litigation on the issue of amount of damages for grief and loss of the child's guidance, care and companionship would aggravate the parents loss and extend the grieving period.[207] This should be avoided. The advantages of court discretion do not outweigh this disadvantage.

RECOMMENDATION 4

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

(d) Setting the statutory level of damages for non-pecuniary loss

Let us now be as wise as Solomon and establish the statutory amount. This figure will be the damages awarded for the grief and loss of guidance, care and companionship occasioned by the wrongful death of the child. We will propose one sum, to be divided between both parents if there are more than one. As is now the case with section 8, the damages would be awarded "without evidence of damage". This will ensure that parents do not have to testify on these

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[206](...continued)

* common interests of the child and the claimants in hobbies, scholarship, art, religion, or social activities
* the child's participation in family activities
* the child's participation in community activities
* the child's habit of tendering aid, solace, comfort when required
* the child's ability and habit of rendering advice and assistance in financial matters, business activities, and the like
* the claimant's age or life expectancy
* the claimant's character, intelligence, interests and personality

[207] For the other reasons for avoiding court discretion, refer to earlier discussion of interviews with lawyers.

emotional issues. It would be an award for non-pecuniary loss only. It would not relate in any way to the financial consequences flowing from the death.

We must establish the figure through logic and intuition. The sum must be significant enough to reflect the seriousness of the parent's suffering; an insignificant sum will only trivialize the injury suffered by the parents. It must be empathetic, not insulting. It must be justifiable within the context of existing non-pecuniary damage awards made in other areas of the law. This means it should not be so large as to imply that parents are receiving too much in comparison to others who suffer non-pecuniary damages. A sum somewhere in the range of $25,000 to $60,000 would meet these criteria.

We suggest a figure of $40,000, to be divided between both parents if there are more than one. We do not pretend that we used a scientific method to determine this amount. We arrived at it after thinking long and hard about this problem and by listening to the parents we interviewed. We then searched for other damage awards or models that could convince us the sum was neither too high or too low. The other types of awards and models we considered were:

1. *Awards for loss of guidance, care and companionship made in Ontario*

The table found at page 45 of Chapter 3 tabulates damage awards made in ten reported Ontario decisions dealing with death of unmarried children. The range of awards was $5,000 to $50,000. The average award to the mother for loss of the child's guidance, care and companionship is $22,900.00. Two awards were $45,000 or greater. Six awards fell into the $15,000 - $30,000 range. One award was $5,000. The average award for the father is $15,250. Five of these awards were in the $15,000 - $24,000 range. One award was $5,000.

When both parents sue as a couple, each parent receives an award for loss of guidance, care and companionship.

Members of P.A.I.D. were very aware that in Ontario courts were giving parents large damage awards for loss of a child. They thought this should be the case in all of the provinces.

2. *Economist's measure of damages for the wrongful death of a child*

Christopher Bruce, a Professor with the Department of Economics, University of Calgary, has proposed a new measure of damages for the wrongful death of a child. His model assumes that today, due to the wide availability of birth control and abortion, parents choose to have children because they believe that the benefits which children will provide will exceed the costs.[208] Working from this assumption, he concludes that the minimum benefit of a child is equal to the costs of raising a child. He also assumes that parents derive pleasure from the child's companionship and accomplishments and, therefore, parents will continue to receive benefit even after the children leave home and the costs have been expended.

Under his model, the measure of damages equals lost benefits less saved costs of raising the child.[209] Using certain assumptions, the model suggests that damages should be assessed "at approximately $60,000 following the death of the family's first child, and at approximately $35,000 following the death of any other child".[210] Although he recognizes that a judge may well be reluctant to make

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208 Christopher Bruce, "Measure of Damages for Wrongful Death of a Child" (1987) 66 *Can. Bar Rev.* 344 at 346. He supports his assumption by noting that the hypotheses which follow from the assumption have been verified in a large number of empirical tests conducted in many countries.

209 At page 348, he gives a simplified example of how the calculations are made:

> For example, assume that the $150,000 costs of raising a child are spread equally over the first twenty years of its life; that is, assume that those costs are $7,500 per year. Assume also, for simplicity, that the benefits obtained from that child are expected to amount to $5,000 per year for 30 years. If the child is killed at age twelve, the parents will "save" (8 times $7,500) $60,000 in costs but will lose (18 times $5,000) $90,000 in benefits.

His actual calculations are much more sophisticated. Since parents spend more at different stages of the child's life, he estimates expected costs up to certain ages. He then does calculations making various assumptions on when the parents will receive the benefits from the child.

210 He personally thinks that the best assumptions are that benefits exceed costs by 25% and that 25% of the benefits arise after the child leaves home. Using those assumptions he considers most realistic, the model suggests the figures set out in this sentence. See 359 of the article.

a lower award of damages for a second child, he thinks the model will assist judges in determining the proper measure of damages.

Other economists criticize this approach because it is so difficult to measure "psychic income". They suggest that the measure of damages should be the cost of raising a replacement child to the age of the deceased child at death.[211] They see this as preferable to Bruce's model because the damages would allow parents to bear and raise another child if they chose to.

They wrote this:[212]

> In view of the above discussions and on both efficiency and justice grounds, it would seem imperative that the courts attempt to measure the loss suffered by parents in the tortious death of their child. By declining to award any damages (higher than nominal damages) on the grounds that such awards are speculative is to equate the price of a child as zero. Clearly this cannot be so. It is hoped that the economic perceptions offered here may lead to a reconsideration in law.

We do not accept that the figures produced by these economic models are valid answers to our questions, and we have not relied upon these economic models and the figures they produce. Nonetheless, we consider it appropriate to describe them for the purposes of completing the picture.

3. *Rewriting history: what would estate's claim for loss of expectation of life be worth now?*

We have wondered why section 8 precipitated the waive of criticism it did. Why did parents not complain when they got nothing for non-pecuniary loss, as was the case before section 8 was enacted? Did the fact that they were the beneficiaries of the estate's action for loss of expectation of life satisfy them? Lawyers suggest that the amounts recovered by the estate were sufficiently large that they did not insult the parents. Section 8 reduced the amount received by parents. This reduction may have sparked the criticism.

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211 E. Quah and W. Rieber "Value of Children in Compensation for Wrongful Death" (1989) 9 *International Review of Law and Economics* 165.

212 *Ibid.* at 179.

If one can assume that the recovery for loss of expectation of life was acceptable to parents, it is useful to know what that amount would be today. In 1974, the Supreme Court of Canada established that $10,000 would be the upper limit in most cases where an estate was seeking damages for loss of expectation of life. By using the consumer price index as a guide, we estimate that $10,000 in 1974 dollars is worth $30,000 in 1990 dollars. Parents of young children would have been the beneficiary of the intestate child. Each would receive approximately $15,000 today.

Another possible explanation for the reaction to section 8 is that Albertans are aware that parents in some other provinces receive significantly higher damage awards in the case of the wrongful death of a child. Ontario was the first province to allow parents to recover for non-pecuniary loss suffered by reason of the wrongful death of the child. This legislation came into force in 1978. Perhaps knowledge of this type of reform in other provinces fuels their discontent.

4. *Personal opinions of parents*

We are influenced by the views of the parents whom counsel have interviewed. This includes parents who have lost their child and those who have not. As discussed in Chapter 5, each parent was asked to assume that their only option was to increase the amount set out in section 8. All but one parent chose a figure less than $50,000. By doing this each parent was grappling with what award parents should be given for the non-pecuniary damage they had suffered. For convenience, we again list the awards chosen by the parents.

Parents who have lost children

* $20,000-30,000
* unable to set figure
* $40,000-50,000
* $10,000
* $25,000-35,000
* $50,000

Other Parents

* $50,000
* $30,000
* $15,000-20,000

* $20,000
* $100,000

Each parent thought that the award they chose should be in addition to out of pocket expenses and loss of earnings of the parents.

Parents are not looking for a windfall here. Their choice of amount confirms that they want recognition of their loss, not the money. Nonetheless, the sum must be significant. Otherwise, the parents will see the law as failing to address their loss.

5. *Damages for Bereavement under Fatal Accidents Act, 1976 (England)*

In 1991, the Lord Chancellor increased the statutory level of damages for bereavement from 3,500 pounds to 7,500 pounds. Using the exchange rates in effect on December 3, 1991, it takes $15,525 (Can.) to buy 7,500 pounds. This is an indication of what another jurisdiction considers appropriate as damages for grief.

6. *Post-traumatic stress syndrome cases and nervous shock cases*

Stedman's Medical Dictionary (25th ed.) defines post-traumatic stress syndrome to mean:

> a disorder appearing after a psychologically traumatic event, characterized by symptoms of re-experiencing the event, numbing of responsiveness to the environment, exaggerated startle response, guilt feelings, impairment of memory, and difficulties in concentration and sleep.

Post-traumatic stress syndrome may develop after the plaintiff has been injured or has witnessed the death or severe injury of a close family member. This syndrome can range from minor to severe. People who suffer such symptoms for a period of three years are treated by Canadian courts as having suffered a moderate injury and receive awards in the range of $20,000 to $30,000 for such an injury.

Grieving parents experience many of the same symptoms even if they did not witness the death of their child. In one case, a psychologist who had studied

the field of bereavement testified that the active grief period for parents who lose a child is usually three years. The evidence of this psychologist was:[213]

> . . . the active grief stage lasts into the third year and thereafter periods of peacefulness increase. The active period involves shock, numbness and disorientation while a person works through their grief to reorganize their lives.

Although post-traumatic stress syndrome cases are not direct comparables to a normal grief response, they are worthy of consideration because of the similar symptoms experienced in both situations.

An adequate level of damages can only be arrived at with the input of a wide cross section of Albertans. Our figure should be seen as a starting point for debate, not as something already decided. We have put considerable thought into this difficult choice. In the process, we have discovered two things. First, choosing the amount is very difficult. Second, one's choice is affected by very personal considerations. We hope that this report will generate discussion and lead to an appropriate amount, be it $40,000 or some other sum.

RECOMMENDATION 5

When a cause of action exists, the amount of compensation should be $40,000 for the loss of each child.

(4) Should Parents be Able to Recover Non-pecuniary Damages for the Death of an Adult Child?

Currently, courts award damages for bereavement of $3,000 to surviving parents of the deceased, no matter what the age of the deceased. This should not continue to be the case if the award is increased to $40,000. The law should compensate those individuals who have the closest relationship with the deceased at the time of death. The parents will have the closest relationship with the child when the child is still living at home and for those years when he or she is still dependant upon the parents. In time, other people—such as a spouse or children of the deceased—will have the closest relationship. The child-parent relationship

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213 *Nightingale* v. *Mazerall* (Nov. 8, 1990), St. John N. S/C/1342/88 (N.B.Q.B.) at 2.

is always important. Yet, there is a need to balance principle with economic reality. Excessive insurance premium increases should be avoided. Those closest to the deceased should be compensated for their non-pecuniary loss. In an effort to serve both these goals, we recommend that some, but not all, parents be entitled to sue for non-pecuniary loss.

Where should the line be drawn? There are several possibilities. The cause of action could exist for: (1) parents of minor children, (2) parents of minor children and dependent children, (3) parents of unmarried children, (4) parents of children up to a certain age, say 25 years of age, or (5) some combination of these. The line should not be drawn at the age of majority, because it denies recovery in too many deserving situations. If the line is drawn at financial independence, damages would be awarded for the wrongful death of a adult disabled child who is financially dependant upon the parents. Since the relationship between such a child and the parents will likely be very close for the child's entire life, this is desirable. Nonetheless, drawing the line at financial independence introduces an element of uncertainty in respect of when the dependency ended.

We prefer that the line be drawn to include all parents of minor children and unmarried children who are 18 years of age or older but who have not reached their 26th birthday. We choose 25 years of age as the outer limit of dependence. By 25 years of age most children should be finished their education and be close to financial independence. This period should encompass the time in which the child-parent relationship is the closest personal relationship in the child's life. The certainty of a fixed age is preferable to the flexibility and vagueness created by the dependency delineation.

The suggested reform will give the following results. The parents will have a cause of action for non-pecuniary damages if the child who dies is unmarried and has not reached his or her 26th birthday. Both the spouse of the deceased and the parents of the deceased would have a cause of action where the deceased was a minor. If the deceased was 18 years of age or older, the spouse of the deceased would have a claim for non-pecuniary damages, but not the parents of the deceased.[214]

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214 We will discuss the claim of a spouse later in this chapter.

RECOMMENDATION 6

Non-pecuniary damages of $40,000 should be awarded to parents of the deceased when:

(a) the deceased is a minor child, or

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

C. Wrongful Death of a Spouse, Cohabitant or Parent

The cases involving wrongful death of children provoke the most outrage. This is to be expected. It is only in such cases that amount received by the surviving family is so insignificant. In the case of loss of a spouse or loss of a parent of a minor child, damages for loss of future support are significant. There is no outcry over the $3,000 damages for bereavement in these cases. This suggests to us that an award of significant damages appeases the surviving spouse and children. Nonetheless, reform of section 8 cannot deal exclusively with damages for wrongful death of children. It must go further and consider cases involving death of a spouse and death of a parent.

(1) Loss of a Spouse

(a) Should the non-pecuniary loss of the surviving spouse be compensable?

Let us begin by considering the happy marriage. The death of a spouse in such a situation will generate the same kinds of injury as suffered by parents who lose children.[215] The spouse will incur pecuniary loss, out-of-pocket expenses,

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215 L. Goldberger and S. Breznitz, *Handbook of Stress, Theoretical and Clinical Aspects* (New York: Macmillan Publishing, 1982). Chapter 21 contains a life events scale measuring the stress caused by various events experienced in life. The top ten most stressful events, with loss of a child rated as the most stressful, were:

Rating	Event
1	Child died

(continued...)

shock, grief, and loss of love, affection, guidance, care, companionship, comfort and protection. The pecuniary loss will usually be more significant, but the non-pecuniary loss will be very similar. At present, the spouse can recover his or her pecuniary loss, $3,000 damages for bereavement, plus reimbursement of funeral expenses. Pecuniary loss can be one of three types: loss of income, loss of valuable services, and loss of accumulated wealth available for inheritance. In the wrongful death action brought under the *Fatal Accidents Act*, damages for loss of the spouse's guidance, care and companionship are not compensable.

The emotional injury suffered by a loving spouse will be no different than that suffered by parents who lose a child.[216] For reasons already given, we think that the wrongdoer should compensate close family members for the emotional injury suffered due to the wrongful death of the deceased. It is contrary to principle to allow parents to recover damages for emotional injury, but not a spouse or minor child who suffers the same injury. The wrongdoer should compensate the spouse for grief and loss of the deceased spouse's guidance, care and companionship. The amount of damages may be different, and there may have to be some further refinement to avoid windfalls, but the guiding principles should be the same.

The interaction between damages in wrongful death actions and the common law action of loss for consortium must be examined. Consortium includes companionship, love, affection, mutual services, and sexual intimacy.[217] At the common law, a husband could seek damages for loss of consortium when

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[215](...continued)

2	Spouse died
3	Physical illness
4	Went to jail
5	Divorce
6	Birth of first child
7	Unable to get treatment for an illness or injury
8	Convicted of a crime
9.5	Relations with spouse changed for the worse, without separation or divorce
9.5	Found out that cannot have children
11	Released from jail.

[216] As will be discussed later, we have no information to suggest that this proposal will make insurance premiums excessive.

[217] *Best* v. *Samuel Fox and Co. Ltd.*, [1951] 2 All E.R. 116 at 124-26, aff's [1952] A.C. 716 (H.L.).

his wife was injured by reason of the negligent conduct of another. When the injury resulted in death, the husband could claim for loss of consortium from the moment his wife was injured until her death.[218] Since death of a human being could not be complained of as an injury in a civil court,[219] loss of consortium brought on by death was not compensable.

Historically, a wife had no action for loss of her husband's consortium. Section 43(1) of the *Domestic Relations Act*[220] extends an action for loss of consortium to the wife. The section reads as follows:

> 43(1) When a person has, either intentionally or by neglect of some duty existing independently of contract, inflicted physical harm on a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable to an action for damages by the married person in respect of the deprivation.

There is conflicting authority on whether this section also allows a spouse to recover damages for loss of consortium for the period after death. In *McGinn* v. *A. All-Pave Parking Lot Services Ltd.*[221] and *Hurd* v. *Hodgson*,[222] a judge of the Alberta Court of Queen's Bench awarded a surviving spouse damages for loss of consortium for the period after death. It is unclear whether in these cases counsel brought *Baker* v. *Bolton* to the attention of the presiding judge. In *O'Hara* v. *Belanger*,[223] another judge of the same court held that no claim can be made for loss of consortium after death. This judge interpreted section 43(1) of the *Domestic Relations Act* as extending an action for loss of consortium to the wife, but not otherwise altering the common law action of consortium. *O'Hara* v. *Belanger* has been appealed to the Alberta Court of Appeal, which is likely to resolve the conflict between these decisions.

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218 *Baker* v. *Bolton*, *supra*, note 3.

219 *Ibid.*

220 R.S.A. 1980, c. D-37.

221 (1986), 47 Alta. L.R. (2d) 331 (Q.B.).

222 (1988), 61 Alta. L.R. (2d) 36 (Q.B.).

223 (1989), 69 Alta. L.R. (2d) 158 (Q.B.).

A claim for damages for loss of consortium is often joined with a claim for damages under the *Fatal Accidents Act* but is a different cause of action, and the two should not be confused. Any amendment to the *Fatal Accidents Act* allowing for recovery of non-pecuniary damages for grief and loss of the guidance, care and companionship of the spouse must supersede any action for loss of consortium for the period after death.

There are two reasons for having the *Fatal Accidents Act* deal with the rights of all close family members to seek non-pecuniary damages in wrongful death actions. First, it is better to have all the claims of this type governed by one statute. Second, it also enables the legislature or court to consider how all of these claims should be treated in relation to one another. This is especially important if the legislature chooses to set the amount of damages by statute rather than leaving it to the discretion of the courts.

If the Court of Appeal holds that section 43 of the *Domestic Relations Act* allows a spouse to claim damages for loss of the society and comfort of a deceased spouse, we recommend that section 43 be amended so that it does not. The whole subject should be dealt with by the *Fatal Accidents Act*.

(b) Court discretion or statutory amount?

The question of whether the damages should be established by the court or by statute is more difficult in this area because of the higher likelihood of windfalls. Although we believe that most parents will suffer emotional injury upon the death of their child, we do not have the same conviction when it comes to spouses. If the court assesses damages for grief and loss of guidance, care and companionship, there will be no cases of windfall. Where statute sets the amount, there will be cases of windfall. A statutory amount is only acceptable for the loss of a spouse if some attempt is made to reduce the incidences of windfall. Several possibilities come to mind. First, the statute could create a rebuttable presumption of grief and loss of guidance, care and companionship. The defendant could then, in the appropriate case, introduce evidence to show that the surviving spouse incurred no such loss. Second, the statute could disallow recovery of damages for grief and loss of guidance, care and companionship where the spouses were separated at the time of death. This is a less refined technique, but it has the advantage of keeping grief and loss of guidance, care and companionship out of the litigation arena. For this reason, we prefer the second alternative.

Actual out-of-pocket expenses should be recoverable even if the spouses are separated at the time of death. As long as a spouse made the expenditures, it matters not whether they cared about the deceased spouse or not.

RECOMMENDATION 7

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

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

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

(c) Establishing the statutory amount of damages

As is always the case, establishing the statutory amount is the greatest problem. On average, Ontario courts award higher damages for loss of a spouse's guidance, care and companionship than they do for loss of a child's guidance, care and companionship. To date, the highest award for loss of a spouse's guidance, care and companionship has been $40,000. A husband who was very dependent on his wife for support and financial management received this award. The conventional sum in Manitoba for loss of a spouse's guidance, care and companionship is $10,000. We prefer the Ontario approach to damage awards under this head. The conventional sum established by the Manitoba Court of Appeal borders on the insulting.

We suggest that the amount of compensation for grief and loss of guidance, care and companionship of the spouse be set at $40,000. Again, we emphasize that our approach is not scientific. We suggest this sum for several reasons. First, over a lifetime a spouse will normally receive many benefits from the guidance, care and companionship of the other spouse. Second, there is some benefit in having parallel awards for loss of a spouse and loss of a child. Third, the average award in Ontario for loss of a spouse's guidance, care and companionship is approximately $25,000. It is quite possible that Ontario courts

would make larger awards if grief were compensable in that province as well as loss of guidance, care and companionship. We think, however, that the Ontario decisions establish a range of awards that gives general support for a total statutory award of $40,000.

RECOMMENDATION 8

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

(2) Loss of a Cohabitant

In June of 1989 the Institute issued Report No. 53 entitled *Towards Reform of the Law Relating to Cohabitation Outside Marriage.* In that report we recommended that cohabitants be "included in the list of relatives entitled to sue for loss of expectation of pecuniary benefit and also in the list entitled to claim damages for bereavement".[224] For the purposes of the *Fatal Accidents Act*, we defined cohabitant to mean:

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

We recommended that the court have the discretion to apportion the damages for bereavement between any spouse or cohabitant, but that in such cases the damages awarded would not exceed the damages that would have been awarded if there were one spouse or one cohabitant.

We reiterate these recommendations, with one change that affects situations in which the deceased had a surviving spouse and a cohabitant. In such situations the deceased and the surviving spouse must have been living separate and apart for several years. The separation of the spouses will extinguish the surviving spouse's claim for non-pecuniary damages. Damages for grief and loss

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224 Alberta Law Reform Institute, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, Report 53 at 32.

of the guidance, care and companionship of the deceased person will be awarded to the cohabitant. The result is that under the proposed scheme there is no need for the court to have the discretion to apportion the damages between the spouse and cohabitant.

This altered recommendation would bring the following results. If the spouses were living together at the time of death of the deceased, the surviving spouse would recover non-pecuniary damages for grief and loss of guidance, care and companionship of the deceased. If the deceased was not married but had a cohabitant as defined above, the cohabitant would recover such damages. If the deceased had a spouse (but no cohabitant) and was living separate and apart from the spouse, the surviving spouse would NOT recover damages for grief and loss of the deceased person's guidance, care and companionship. If the deceased was living separate and apart from his spouse and had lived with another person for three years preceding death, the cohabitant (and not the spouse) would recover damages for grief and loss of the deceased's guidance, care and companionship.

RECOMMENDATION 9

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

(3) Loss of a Parent

(a) Should the non-pecuniary loss suffered by a child be compensable?

At present, children of all ages can sue for the wrongful death of a parent. Recovery depends on the age of the child. All minor children share between them $3,000 as damages for bereavement. Children of the age of majority or older recover nothing for grief. Children of all ages can recover damages for any pecuniary loss they sustain as a result of the death of the parent. Pecuniary loss will be loss of support, loss of inheritance, loss of valuable services (including loss of a parent's guidance and care). The claim for damages for loss of a parent's guidance and care usually ends at the age of majority, unless the child is dependent upon the parent by reason of mental disability. Lawyers advise that the rule of thumb used by courts to quantify the pecuniary loss suffered when a

child loses his parent's guidance and care is (18 - age of child) * ($1,500). A very young child would receive the most under this head of damage.

There are three provinces in which the courts award non-pecuniary damages to children for the loss of a parent's guidance, care and companionship. In these provinces the former procedure of awarding children "pecuniary damages" for loss of a parent's guidance and care has fallen by the boards. This probably reflects the artificiality of describing the loss of a parent's guidance and care as pecuniary. We assume that this would be the tack taken by Alberta courts if the *Fatal Accidents Act* was amended to allow recovery for non-pecuniary damages.

For reasons already given, we propose that in the case of the wrongful death of a parent, the wrongdoer compensate the child not only for the child's pecuniary loss, but also for grief and loss of the guidance, care and companionship of the parent. As will be discussed next, we would limit recovery of non-pecuniary damages to minor children and children who are 18 years of age or older and who have not reached their 26th birthday.

(b) Should all children have the right to seek non-pecuniary damages in the event of wrongful death of their parent?

In Ontario, Nova Scotia, and Manitoba children of all ages can sue for the wrongful death of a parent. Yet, there is no reported decision in which grown-up children have sued for the loss of the guidance, care and companionship of their parent. The cases typically deal with claims of minor children. This probably reflects the nature of the loss. It is difficult to lose a parent, no matter at what age. Yet, the injury is far worse when a young child loses a parent.

We think it is reasonable to limit the cause of action for grief and loss of guidance, care and companionship of a deceased parent to children who are of such an age that the parent-child relationship is still the most important personal relationship in the child's life. This class would include all minor children and unmarried children 18 years or age or older and who have not reached their 26th birthday. By limiting the category of children by age, we are excluding recovery of non-pecuniary damages by the older dependant child who is 26 years of age or older. We think the certainty obtained by limiting the class to children of a certain age and marital status is preferable to using a dependency test that creates uncertainty but would include such older dependant children.

Children of all ages will still be able to pursue any claim they have for pecuniary loss, such as loss of inheritance or support.

(c) Court discretion or statutory amount?

For reasons already given, we suggest that statute establish the amount of damages. We believe that the majority of children will suffer grief and loss of guidance, care and companionship upon the death of a parent. Even though there are parents who do not provide these benefits to their children, these parents are the exception and not the rule. The amount should not be left to the discretion of the court just to ensure that these "windfall" cases do not occur.

The damages would be awarded without evidence of damage. This will eliminate the need for the children to testify as to the grief they experienced and the guidance, care and companionship they have lost.

(d) Statutory amount

In the case of children, we propose that the statute establish the amount of compensation for grief and loss of the guidance, care and companionship of the parent at $25,000 per child, up to a maximum of $50,000 for all claims by children under this head of damage. In the case of infants, the largest portion of the award would be for loss of the parent's guidance, care and companionship. The older the child becomes, the larger the component for grief becomes. A legislative cap of $50,000 serves two purposes. It reflects the fact that larger families will have a better support group to deal with such a tragedy. It also acts as a reasonable limit on damage claims.

An award of $25,000 for this type of injury is modest. In other provinces in which non-pecuniary damages for loss of a parent's guidance, care and companionship are recoverable, the damage awards range from $10,000 to

$35,000.[225] No award is made for grief. An award of $25,000 for grief and loss of guidance, care and companionship is on the conservative side.

RECOMMENDATION 10

In the case of the wrongful death of a parent, $25,000 damages for grief and loss of the guidance, care and companionship of the parent should be awarded to each of the minor children of the deceased and to the unmarried children of the deceased who are 18 years of age or older and who have not reached their 26th birthday. But if there are 3 or more such children, $50,000 should be awarded, to be divided equally among such children. The damages would be awarded without evidence of damage.

D. Regular Review of Statutory Level

Inflation can have a vicious bite. Albertans may consider an amount as adequate in 1992 but derisory in 2002. This was the experience with the $3,000 limit now set by section 8 of the *Fatal Accidents Act*. Also, public opinion on what is adequate non-pecuniary damages can change. Either of these reasons calls for review of the statutory amount of damages on a periodic basis. The review should not be yearly because frequent changes can lead to hurt feelings on the part of families who received lower awards. We propose that the Lieutenant Governor in Council review the amount of damages not less than every three years and increase them upwards by Order in Council when necessary.

RECOMMENDATION 11

The Lieutenant Governor in Council should review the statutory amount of damages not less than every 3 years

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[225] *Nielson* v. *Kaufman* (1986), 54 O.R. (2d) (Ont. C.A.)—$20,000 and $30,000 damages for loss of companionship, guidance and care awarded to two sons for wrongful death of 40 year old mother; *Frawley* v. *Assettine* (1990), 70 D.L.R. (4th) 536—$35,000 awarded to infant for death of mother; *Campbell Estate* v. *Varanese, supra,* note 97—4 year old and 8 year old awarded $10,000 each for loss of father's companionship, guidance and care; *Rose* v. *Belanger, supra,* note 113—$10,000 awarded to young son for loss of mother.

and increase the amount by Order in Council when necessary.

E. The Effect of These Proposals on Automobile Insurance Premiums

In this section, we analyze how our proposals will affect automobile insurance premiums. A similar analysis is not possible for other types of liability insurance because of insufficient information. Yet, our proposals will have the most effect on automobile insurance premiums. Accidental deaths that occur in the home, on farms and in the workplace do not usually give rise to a law suit.

Incomplete information hampers our analysis of the effect of these proposals on automobile insurance premiums. We cannot say to the penny how our proposals will affect automobile insurance premiums. Yet, we can use intelligent assumptions to approximate the effect these proposals will have. However, we stress that these calculations are done for the limited purpose of assessing the maximum impact and not for exact rating purposes.

Our analysis deals with 1989 because this is the only year for which we know the number of insured vehicles in Alberta. That year is an appropriate choice for the analysis because the number of deaths caused in 1989 by motor vehicle traffic and non-traffic accidents is very close to the average number of deaths caused by such accidents during the years 1987-89.

The fatalities that could trigger liability that is insured by the standard automobile insurance policy are fatalities caused by motor vehicle traffic accidents or motor vehicle non-traffic accidents. The number of accidental deaths that happened in Alberta in 1989 found at pages 47 to 49 of *Vital Statistics Annual Review 1989*. Using this source, we extract the following information:

DEATHS CAUSED BY MOTOR VEHICLE TRAFFIC AND NON-TRAFFIC ACCIDENTS IN 1989

Age of Deceased	0-19	20-54	55+	Non-residents	Total
motor vehicle traffic accidents					
involving collision with train	5	11	6	1	23
involving collision with another motor vehicle	40	100	56	25	221
involving collision with pedestrian	12	22	21	2	57
involving collision with other vehicle or object	4	13	1	0	18
not involving collision on highway	15	63	9	9	96
motor vehicle traffic accident of unspecified nature	20	40	15	11	86
Total	96	249	108	48	501
motor vehicle non-traffic accidents	1	14	4	0	19
Total number of fatalities caused by motor vehicle traffic and non-traffic accidents	**97**	**263**	**112**	**48**	**520**

To estimate how our recommendations will affect automobile insurance premiums, we must do the following. First, we must determine the age distribution of the people who died in motor vehicle traffic and non-traffic accidents. Then we must estimate the number of fatalities that would be caused by the wrongdoing of another that would trigger coverage under a standard automobile insurance policy. Then, we must make some assumptions on the amount of non-pecuniary damages that would be paid in each such case. Finally, using the appropriate formula, an estimate of premium increase per vehicle can be made.

To determine the age of all persons killed in motor vehicle traffic accidents, we assume that the age distribution of the non-residents is the same as Albertans.

Using this assumption, we conclude that the people who died in 1989 in motor vehicle traffic and non-traffic accidents fell into these age groups:

0-19 years of age	107 fatalities
20-54 years of age	289 fatalities
55 years of age or older	124 fatalities
total	520 fatalities

Some of the 520 fatalities would not give rise to a claim for non-pecuniary damages that would be covered by an automobile insurance policy. Fatalities that would not give rise to a claim fall into several different categories:

(1) The Workers Compensation Board reports that in 1989 there were 42 work related fatalities involving a vehicle. These deaths fall under the umbrella of the no-fault workers compensation scheme and the majority of these deaths will not trigger a claim for non-pecuniary damages.[226]

(2) Certainly, a number of drivers who died in motor vehicle traffic and non-traffic accidents were the cause of their own death. Here we are thinking of the case of a single vehicle accident in which the sole occupant, the driver, dies, or the case of a multi-vehicle collision in which the deceased driver is solely responsible.

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[226] These 42 fatalities fall into three categories: (1) the worker caused his or her own death, (2) another worker's conduct resulted in the death of the deceased person while both were employed in an industry to which the *Workers' Compensation Act*, R.S.A. 1980, c. W-16 applies, and (3) the worker is killed by the conduct of someone other than an employer or worker employed in an industry to which the Act applies. The Act prohibits the surviving family members of the deceased worker from suing in cases falling within category (2), but not cases falling within category (3). For fatalities falling into the third category, the surviving family members of the deceased worker have a right to sue the wrongdoer under the *Fatal Accidents Act*, but the Workers' Compensation Board is subrogated to this right of action. This means the Board can pursue the action against the wrongdoer and can deduct from any sums recovered the amount the Board must pay to the deceased worker's dependents. Any excess is paid to the surviving family members. A lawyer with the Board advises that approximately 20-25% of fatalities involving vehicles that trigger workers' compensation would give rise to a subrogated action by the Board. See ss. 17, 18 of the Act.

The publication entitled *Alberta Traffic Collision Statistics, 1989* suggests that this category will encompass a significant number of the 520 fatalities.

(a) Table 3.1 of that publication describes injuries and fatalities by Road User Class for 1989. It indicates that in that year, 487 people were killed in traffic collisions.[227] Of these people, 255 were drivers, 149 were passengers, and 59 were pedestrians, and 24 fell into other categories.

(b) Table 4.2 describes the actions of drivers involved in fatal collisions and non-fatal injury collisions. There were 649 drivers involved in fatal collisions. 42.2% of these drivers were driving properly. Driver error or misjudgment was attributed to 57.8% of drivers involved in fatal collisions. Running off the road, driving left of centre, failing to observe traffic control device and travelling at unsafe speed were the most frequently identified driver action that contributed to fatal collisions.

(c) Table 7.15 indicates that for drivers in fatal collisions involving trains, 64.3% of the drivers failed to observe traffic control devices and 21.4% failed to yield the right of way.

(d) Table 5.3 lists the point of impact on vehicles involved in fatal collisions. Of the 656 such vehicles in which the point of impact was specified on the collision report, the point of impact was rollover for 106 vehicles.

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[227] There is a small discrepancy between the statistics reported by Vital Statistics and those reported by Alberta Transport. The *Vital Statistics Annual Review 1989* reports that there were 501 fatalities caused by motor vehicle traffic accidents that occurred in Alberta in 1989. *Alberta traffic collision statistics 1989* published by Alberta Transportation and Utilities reports that there were 487 people killed in traffic accidents that occurred in Alberta in 1989. Vital Statistics gathers its information from Vital Statistics Information Terminal System. Alberta Transportation and Utilities gathers its statistics from police reports filed for each traffic collision. In our analysis, we use the larger statistic of 501 fatalities caused by motor vehicle traffic accidents.

(3) There will also be accidents in which driver error is not the cause of the collision resulting in death of a pedestrian or bicyclist.[228]

(4) There will be other accidents which cannot be attributed to anyone's fault. A car that strikes a wild animal on the highway falls into this category.

(5) There will be others in which the deceased was contributorily negligent and, therefore, the damages will be reduced accordingly. For example, if the deceased is found 20% contributory negligent, the award is reduced by 20%. If the deceased is found 80% contributory negligent, the award is reduced by 80%. A significant number of drivers who died in motor vehicle traffic accidents will be contributorily negligent.

Taking into account these statistics, the net result is that a significant number of these fatalities would not give rise to a claim for non-pecuniary damages, and in another significant number of cases the recovery would be reduced by reason of the contributory negligence of the deceased. Factoring in these considerations, we estimate that a maximum of 70% may involve a claim, and at least 30% will involve no claim. We also assume that the deaths in which there are no claims are spread proportionally over the age categories.

The result is that, using conservative estimates, claims for non-pecuniary damages could be made in the following fatalities:

0-19 years of age	75
20-54 years of age	202
55 years of age or older	87
total	364

To determine the maximum amount of non-pecuniary damages that could be paid out through automobile insurance in these cases we make certain assumptions. Assume that every person who died under the age of 19 was unmarried. Assume everyone between the ages of 20 and 54 was married with two children who were minors, or unmarried and younger than 26 years of age. Assume everyone between 55 years of age and older is survived by a spouse but the children are married or older than 25 years of age.

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228 See *Alberta traffic collision statistics 1989, ibid.* Tables 8.5 and 8.11.

The increase in premiums is then a matter of calculating the total non-pecuniary damages that would be paid and dividing it by the number of insured vehicles in Alberta in 1989. (In 1989 there were 1,297,804 insured vehicles in Alberta.)[229] This figure must then be increased to take into account such factors as commissions and premium tax. We do not include a gross-up for general administration or loss adjustment because these costs are presently covered by existing premiums.[230]

(0-19)	75 * $40,000 =	$3,000,000
(20-54)	202 * $90,000 =	$18,180,000
(55+)	87 * $40,000 =	$3,480,000
		$24,660,000

The maximum insurance premium increase per vehicle attributable to the non-pecuniary damage awards alone is this sum divided by the number of insured vehicles in Alberta.

$$\frac{\$24,660,000}{1,297,804} = \$19.00$$

To account for commissions of 12% and premiums taxes of 3%, one uses this formula:[231]

$19.00 * 1.14 (commissions) * 1.04 (premiums taxes) = $22.53

Using estimates that assume the maximum award of non-pecuniary damages for all age categories, we estimate that the premium increase per vehicle would be no higher than about $22.

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229 Alberta Automobile Insurance Board, *supra*, note 167, V. 1 at 17.

230 Currently insurance companies incur costs in adjusting claims for damages for bereavement. The costs of determining liability should not increase just because the amount of compensation for non-pecuniary loss increases. Even if it does, we do not anticipate that an increase in these costs would be significant. We hope to receive some comment on this point.

231 One industry representative suggested a gross-up of 33%. Since this includes a gross up for general operating expenses and loss adjustment, we have not used this figure. Instead, we use a gross-up of 18.5%.

This analysis gives us a rough idea of how the automobile premium per vehicle will be affected by the recommendations. We do not expect that these will be the exact figures. If we have underestimated the number of drivers who die by reason of their own misjudgment, the premium increase will be less. Also, there will be a significant number of fatalities in which we have assumed that $90,000 non-pecuniary damages would be awarded when, in fact, the award would be something less than this. For example, we have assumed that every person 20 to 54 years of age will leave a spouse and two or more children able to recover non-pecuniary damages. This will not be true in a significant number of cases because many of those persons will not be married or not have children.

The increased recovery of out-of-pocket expenditures should also result in an increase of automobile insurance premiums. Yet, the largest out-of-pocket expenditure will be the funeral costs and this is already covered by the current level of automobile insurance premiums. The additional expenditures that would be recoverable under our recommendations will not be large.[232] We do not anticipate that every family will undergo grief counselling because only a small portion of families we interviewed sought such counselling. For these reasons, we would not anticipate a very significant increase as a result of the additional expenditures that would be recoverable under the proposed reform.

We recognize that this is a simplistic approach to a complicated matter. Yet, our assumptions give a reasonable approximation of the effect the proposed reform would have on automobile insurance premiums. Realizing that the actual increase will likely be less than that suggested above, we do not think that the increase in automobile insurance premiums that would result from our proposals would be excessive or unjustifiable. There are compelling policy reasons for awarding non-pecuniary damages in wrongful death actions. The statistics do not suggest that the resulting automobile insurance premium increases would be so large as to justify retaining the law as it is at present.

It may be that a policy decision could be made to restrict reform to the cases of wrongful death of young children. There is no doubt that substantial non-pecuniary damages could be awarded to parents of young children with very little increase in automobile insurance premiums. We estimate that in 1989 there were 107 people under the age of 20 who died in motor vehicle traffic or non-

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232 Industry representatives estimate that medical expenses and travel expenses would be $1,000 per wrongful death.

traffic accidents. We estimate there were a total of 168 people who were 24 years of age or younger who died in such accidents.[233] In 1989 there were 1,297,804 insured vehicles in Alberta.[234] Assume that in the case of each fatality, the person totally responsible for the accident and ensuing death is insured by an automobile insurance policy. If the parents of each deceased person under the age of 20 together received $40,000 non-pecuniary damages, Alberta automobile insurance premiums would have to be increased by $3.30 per automobile to cover payment of such damage awards. If the parents of each deceased person under the age of 25 together receive $40,000, the automobile insurance premium increase would be $5.18. Even if the premiums were increased further to account for premium taxes (3% on premiums) and commissions (12% on premiums), the premium increase resulting from non-pecuniary damage awards to parents of young children would be small.

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233 In 1989, children of the age of 0 to 19 years accounted for 21.2% of the total number of resident Albertans who died in motor vehicle traffic accidents that occurred in Alberta. For the age group 0 to 24, the percentage is 33.55. We assume the age distribution of non-residents is the same as for Alberta residents. We estimate that 10 of the non-residents who died in motor vehicle traffic accidents that occurred in Alberta would be between the ages of 0 - 19. We estimate that 16 of the non-residents would have been between the ages of 0 - 24. The result is that there were 107 (97 residents + 10 non-residents) people under the age of 20 years who died in motor vehicle traffic and non-traffic accidents in 1989. There were 168 (152 residents and 16 non-residents) people under the age of 25 years who died in motor vehicle traffic and non-traffic accidents in 1989.

234 Alberta Automobile Insurance Board, *Supra*, note 167, V. 1 at 17.

CHAPTER 8 — PROPOSED LEGISLATION

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

1. In this Act,

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

7. Where an action has been brought under this Act, the damages that may be awarded include:

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

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

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

(d) fees paid for grief counselling provided to any claimant,

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

8(1) In this section,

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

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

(2) If an action is brought under this Act, the court shall, without reference to any other damages that may be awarded and without

evidence of damage, give non-pecuniary damages for grief and loss of the guidance, care and companionship of the deceased person of

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

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

(i) the deceased minor child, or

(ii) the deceased unmarried child who died when 18 years of age or older and who had not reached his or her 26th birthday,

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

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

(i) a minor, or

(ii) unmarried and 18 years of age or older and who has not reached his or her 26th birthday,

but if there are three or more such children, $50,000 to be divided equally among the children.

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

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

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

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

9. The Lieutenant Governor in Council shall review the levels of damages prescribed by subsection 8(2) at least once within each 3-year period following the proclamation of the subsection and may, by regulation, prescribe the damages to be awarded.

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 1

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

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

RECOMMENDATION 2

The *Fatal Accidents Act* should, as it now does, allow parents to recovery non-pecuniary damages from the wrongdoer whose wrongdoing caused the death of the parents' child. The nature, scope and method of quantifying such damages should be reconsidered.

RECOMMENDATION 3

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

RECOMMENDATION 4

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

RECOMMENDATION 5

When a cause of action exists, the amount of compensation should be $40,000 for the loss of each child.

RECOMMENDATION 6

Non-pecuniary damages of $40,000 should be awarded to parents of the deceased when:

(a) the deceased is a minor child, or

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

RECOMMENDATION 7

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

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

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

RECOMMENDATION 8

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

RECOMMENDATION 9

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

RECOMMENDATION 10

In the case of the wrongful death of a parent, $25,000 damages for grief and loss of the guidance, care and companionship of the parent should be awarded to each of the minor children of the deceased and to the unmarried children of the deceased who are 18 years of age or older and who have not reached their 26th birthday. But if there are 3 or more such children, $50,000 should be awarded, to be divided equally among such children. The damages would be awarded without evidence of damage.

RECOMMENDATION 11

The Lieutenant Governor in Council should review the statutory amount of damages not less than every 3 years and increase the amount by Order in Council when necessary.

APPENDIX A

The cases discussed in this appendix were all decided under wrongful death statutes that, through judicial interpretation or specific wording of the statute, limited recovery to pecuniary damages. Non-pecuniary loss was not compensable.

A. Recovery of Pecuniary Damages

1. *Franklin* v. *The South Eastern Railway Company*:[1] An old and infirm father sued under Lord Campbell's Act for the loss of his 23-year-old son. The son was of good health and had assisted his father in the past by performing work for which the father was paid. The Exchequer court held that the father had proven he had a reasonable expectation of benefit from the continuance of his son's life, but that damages of 75 pounds were excessive. A new trial was ordered to determine the amount of damages.

2. *Dalton* v. *The South-Eastern Railway Company*:[2] Parents sued under Lord Campbell's Act for damages suffered as a result of the death of their 27-year-old son. The son had a good relationship with his parents and in the past had supplied food and money to his parents. The yearly value of these gifts was around 20 pounds. The defendant argued that the parents could only recover if they had some legal right of support from the son. The court rejected this argument. The jury must determine if the parents had a reasonable expectation of pecuniary advantage had the son remained alive. If so, damages should be given for this loss. The court affirmed the jury's award of 120 pounds for pecuniary loss, but overturned the jury's awards for funeral expenses and the cost of mourning.

3. *Taff Vale Railway Company* v. *Jenkins*:[3] Parents sued under Lord Campbell's Act for damages for loss of their 16-year-old daughter who was killed in a railway accident. At the time of her death, the daughter was two months away from finishing her apprenticeship as a dress maker. She was "exceptionally clever" at her work and planned to open her own business and work from her

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1 (1858), 3 H. & N. 213, 157 E.R. 448 (Exch.).

2 (1858), 4 C.B. (N.S.) 296, 140 E.R. 1098 (Common Bench).

3 [1913] A.C. 1 (H.L.).

parents' home when she completed her apprenticeship. The parents supported their daughter, who had never contributed to her parent's support during her lifetime. The daughter did assist with household tasks and helped her mother from time to time in her green grocer's shop.

The defendant admitted liability but argued that the parents had suffered no loss because the daughter had not contributed to her parents' support during her lifetime. The Court rejected this argument. It held that damages for prospective loss can be given under Lord Campbell's Act. Furthermore, prospective loss can be assessed even though the child had not paid anything to her parents during her lifetime. In this case, there was evidence to support an inference that the parents had lost a pecuniary advantage. The reasonable expectation of pecuniary advantage need not be based on the fact that the child had contributed to the parents support in money or money's worth.

4. *Piper* v. *Hill*:[4] This litigation arose from death of a 6 year old boy. The executor of his estate brought an action on behalf of the parents under *The Fatal Accidents Act*, R.S.O 1914 for damages, cost of funeral expenses and hospital expenses. The jury awarded damages of $1200. The court said that the jury's duty is not to estimate the value of the life of the child, but to determine if there is a reasonable expectation that the child might, had he lived, have contributed to the support and maintenance of his parents. The cost of raising the boy until 16 years of age was $300 - $400 per year. Since the boy was small for his age there was a greater chance that he would have died before others of his age. The court reduced the award to $400 and refused to give any award for funeral expenses or hospital bills. It quoted with approval several cases that showed that the trend in Ontario was against such extravagant claims as put forth in this action. [If the defendant had not gratuitously paid for the hospital expenses, as he did, the parents could not have recovered these expenses under the Act.]

5. *Schroeder* v. *Johnson and Chaudierre Transport*:[5] The parents sued for compensation for the injury which they had suffered by reason of the wrongful death of their 11 year old son. The father testified that he intended to educate the son until he was 16 years old and then have the son seek employment. The court concluded that at 16 years of age the deceased would have been unskilled, and his income would be small. He would not have contributed a significant amount

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4 [1923] 4 D.L.R. 1175 (Ont. S.C.A.D.).

5 [1949] 1 D.L.R. 64 (Ont. H.C.).

to his parents, and probably nothing after he married. The court awarded damages of $750 plus funeral expenses. At the time the father was earning $130 per month, and the mother earned $45 per month.

6. *McGee* v. *Smith*:[6] Parents sued under the *Fatal Accidents Act*. R.S.N.B. 1952, c. 82 for the loss of their 12-year-old daughter. She did housework and babysat for her parents. The trial judge held that her assistance to her parents would likely have increased over the seven or eight years after her death. The Appeal Division affirmed the trial judges award of $1,200.

Once again, the court affirmed that in assessing damages the court cannot consider the mental suffering of the parents. The assessment of damages depends on the facts and "in part, must be a matter of estimate, or even conjecture or . . . in the nature of guess work". It also held:[7]

> The absence of any pecuniary benefit accruing to the parents during the lifetime of a child is not necessarily a bar to their claiming compensation because of the death of that child. Prospective pecuniary advantage is a sufficient foundation upon which to found a valid claim, provided it is established that there was a reasonable expectation of pecuniary advantage of parents if the child had lived. It is not necessary for the deceased child to have actually earned money or money's worth.

7. *Guitard* v. *McDonald*:[8] In this case, parents sued under the *Fatal Accidents Act*, R.S.N.B. 1952, c. 82 for the death of their eight-year-old son. The Act provided that "the reasonable expectation of pecuniary benefit from the continuance of the life of the deceased, shall not be estimated for a period exceeding 10 years". The child was in grade one at the time of his death. He was a member of a poor family. The oldest child brought home $25 per week. The family expected the son to go to school until he was 16 and then find a job.

The court assessed damages on basis of the pecuniary benefit or advantage the parents could reasonably have expected to receive from their child, had he

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6 (1964), 48 D.L.R. (2d) 476 (N.B., S.C.A.D.).

7 *Ibid.* at 479.

8 (1970), 14 D.L.R. (3d) 252 (N.S. S.C.A.D.).

lived, within 10 years after his death. Mere speculative possibility of benefit is insufficient. There must be a reasonable probability of pecuniary advantage. Mental suffering of parents is not an element for consideration in assessing damages.

The court then discussed the "wages less keep" measure of damages. This discussion is quoted above. The court held that it was impossible for any child in two years to earn a sum equal to the cost of his keep over 8 years plus $2500. The court reduced the damage award to $1,000, to be shared by the parents.

8. *Smith* v. *Cook*:[9] In this case, the parents and grandparents of 25-year-old Bruce Smith sued under *The Fatal Accidents Act*, R.S.O. 1970 c. 164 for damages suffered as a result of his death. The parents and grandparents had assisted the deceased in buying a farm. The parents and the son had a mutually supportive relationship.

The court reaffirmed that under *The Fatal Accidents Act*, damages are limited to the pecuniary benefits the claimants might reasonably have expected to receive from the deceased had he lived. There are three constraints on the scope of damages. First, the loss must be pecuniary in nature. Second, the loss must relate to benefits that would have been derived from the continuance of the deceased's life. Third, the benefits that would have been derived from the continuance of the life must be attributable to the family relationship.

The court held that loss of the guidance, care and companionship of a deceased is a non-pecuniary loss (except in the case of a claim of young children on the death of a parent) and, therefore, is not compensable under *The Fatal Accidents Act*.

The court interpreted the Act as providing compensation for loss by reason of the deceased not being alive. This is narrower compensation than loss by reason of the death. No damages can be awarded for the out-of-pocket expenses reasonably incurred by the parents on behalf of the son's estate. Funeral expenses would be unrecoverable for the same reason, except for specific legislative provisions.

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9 (1981), 33 O.R. (2d) 567 (H.C.J.).

The father was the guarantor of a loan made to the son. The son had made all the payments on the loan up to the time of his death. The creditor looked to the father for payment of the loan since the son's estate had insufficient funds to pay creditors. The father was unable to recover this loss as damages under the Act for two reasons. First, the money paid by the father under the guarantee was not related to the pecuniary benefits the father would have derived had the son lived. Second, the outstanding debt owed by the son to the father was not attributable to the family relationship, but to the relationship of debtor-creditor.

The grandparents had made an interest free loan to the grandson, which was not recoverable against the deceased's estate. The court held that the grandparents could not recover damages under the Act for this loss. The reasons were the same as those that prevented the father from recovering on the guarantee.

The court awarded the mother $6,000 and the father $4,000 as damages for the loss of gratuitous services and future financial assistance that the parents would have received had the son lived. The parents, both of moderate means, had separated a few years before the accident. In this period, the son had helped his mother with the yard work and given her a blank cheque for gas money. He and his father together had an interest in a few animals. The court concluded that in light of the son's past attitude and the mutually supportive relationship he shared with his parents, it was reasonable to expect that had he lived he would have continued to provide his mother with his services and to assist both parents as much as he could during their retirement.

9. *Morrisette* v. *Salagubas and Hosaluk*:[10] The claimants' 13 year old son died when he was thrown from a truck that was being pursued by a police car. The parents sued for damages under the *Fatal Accidents Act*, R.S.S. 1978, c. F-11 for the wrongful death of their son. The court affirmed that the parents must establish that they suffered a loss of a pecuniary benefit.

The parents were of poor health and were on social assistance. The son gave money to them from time to time, did household chores, had a paper route, and did odd jobs for his neighbours. His parents expected him to continue to assist them. Since the parents were poor, they could expect him to provide more

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10 (1984), 32 Sask. R. 25 (Q.B.).

assistance to them than they would receive if they were wealthier. The court awarded damages of $3,000 to each parent, plus funeral expenses.

10. *Beauchamp* v. *Entem Estate*:[11] A widow rented 7 quarter sections of farm land to her eldest son and sold to him the farm machinery. The son gave a promissory note to the mother as security for payment of the purchase price of the farm machinery. For several years, the son ran the farm, repaired the farm buildings, assisted his mother in her banking and helped raise his younger siblings. After the eldest son was killed in an automobile accident, the mother sued under the *Fatal Accidents Act*, R.S.S. 1978, c. F-11 for damages arising from his death. She sought damages for:

(1) loss suffered because of termination of lease of farm land
(2) loss of opportunity to collect the balance owing for purchase of the farm machinery, and
(3) loss of the deceased's services in conducting her affairs and loss of his counsel and guidance in dealing with problems related to the family.

This case contains a good summary of the principles governing the assessment of damages in wrongful death actions. The damages recoverable are restricted to the amount of the pecuniary benefit which the claimant might reasonably have expected had the deceased lived. There is no need for the claimant to show she was financially dependent upon the deceased. All the claimant must show is a reasonable expectation of pecuniary benefit. Actual pecuniary benefit during the lifetime of the deceased is not a condition precedent to recovery of damages. Also, the lost benefit must be attributable to the family relationship.

After the oldest son's death, the mother rented the land to another son. She alleged that she had lost money as a result of the termination of the lease arrangement due to the death of the deceased. The court held that the mother had not proven that her income had fallen due to the inexperience of her younger son. The only financial consequence resulting from the termination of lease with the deceased related to insurance and repair of farm buildings. The younger son rented the land but did not repair the buildings or insure them. The court

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11 (1986), 51 Sask. R. 99 (Q.B.).

awarded $3,000 damages for the loss arising from the loss of the insurance and building repairs.

The court followed *Smith* v. *Cook* and held that except in the case of claims of young children on the death of a parent, the loss of a family member's guidance, care and companionship is a non-pecuniary loss and, therefore, not compensable. In this case, the court concluded that there was evidence that the mother's loss of the son's guidance, care and companionship would probably result in a pecuniary loss to the mother. Yet, it felt bound by *Vana* v. *Tosta* to hold that such a loss was not compensable. The court admitted that it had difficulty in rationalizing how the law characterized the loss of a parent's guidance and care as pecuniary in nature while, on the other hand, it characterizes loss of a child's guidance and care as non-pecuniary.

The court also denied damages for the mother's inability to recover the debt owing under the promissory note for payment of the machinery purchase price. The mother's inability to collect the entire debt was not attributable to the family relationship between mother and son. Rather, it was attributable to the creditor-debtor relationship that existed.

The mother recovered damages for the funeral expenses incurred, less the $300 death benefit paid under the *Automobile Accident Insurance Act*.

11. *Gill Estate (Gill) et al.* v. *Greyhound Lines of Canada Ltd.*:[12] A father and seven-year-old girl died when a Greyhound bus collided with the automobile in which they were driving. The court held that the father was 80% at fault and the bus driver 20%. The mother sought damages under the *Family Compensation Act* for wrongful death of the husband and daughter.

The mother did not speak English. The daughter had helped look after the younger children. Her mother was training her to do housework (as was the custom in India) and expected the daughter to help her learn English. The court awarded the mother $10,000 for loss of the daughter because the daughter's assistance to the mother would have increased over time. The court was quick to point out that the daughter's assistance would have been substantially greater than the average in Canadian families.

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12 (1987), 21 B.C.L.R. (2d) 325, aff'd. (1989), 40 B.C.L.R. (2d) 73 (B.C.C.A.).

The actual recovery was reduced by 80% to reflect the father's contributory negligence.

B. No Recovery of Pecuniary Damages

1. *Barnett* v. *Cohen and Others*:[13] A father sued under the English *Fatal Accidents Act* for the loss of his four-year-old child. He sought damages for:

(1) loss of reasonable expectation of pecuniary benefit from the deceased boy if he lived,

(2) burial expenses,

(3) expenses incurred in employing a watcher upon body of dead child (Jewish tradition)

(4) father's loss through having to abstain from business for a space of time after his death.

The court held that the father had not proved that he had a reasonable expectation of pecuniary benefit had the child lived. The child was only four years old and was subject to all the risks of disease, accident and illness. The cost of educating him would have been a substantial burden. The boy might not have turned out to be useful man. He could not be expected to contribute to his father's support because his father had a substantial income of his own. Also, the father was in poor health and might not live long. The whole matter was "beset with doubts, contingencies and uncertainties".

The court also denied recovery for burial expenses, expenses in procuring a watcher, and the father's loss of income.

2. *Nickerson* v. *Forbes*:[14] Parents sued under the *Fatal Injuries Act*, R.S.N.S. 1923, C. 229 for death of their adopted daughter, who was five years old at the time of her death. The court held that there must be facts from which a jury can infer that the parents have a reasonable expectation of future benefit had the child lived. In the case of a very young child, these facts do not exist because

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13 [1921] 2 K.B. 461.

14 (1955), 1 D.L.R. (2d) 463 (N.S., S.C.A.D.).

the age and conduct is insufficient to indicate the child's future earnings or willingness to contribute to the support of the parents. The Appeal Division held that in this case, the trial judge was justified in withdrawing the question of damages from the jury. The parents recovered nothing.

3. *Alaffee* v. *Kennedy*:[15] Claimant sued under the *Fatal Injuries Act*, R.S.N.S. 1967, c. 100 for the wrongful death of his wife and four-month-old son. When denying recovery of damages for the loss of the son, the court held at page 437:

> While I express my regret and shock at the terrible circumstances that gave rise to the action I am bound to find that the prospect of pecuniary benefit or advantage to flow from the son had he lived, to the father, is at best a speculative possibility. There is nothing, in the evidence, to indicate the probability of pecuniary benefit or advantage, giving rise to disappointment by his death. This part of the plaintiff's claim must be dismissed. Unfortunately, in the case of a baby in arms it appears impossible to demonstrate reasonable expectation of pecuniary benefit.

4. *Farnham Estate* v. *Glass*:[16] In this case parents sued under the *Fatal Accidents Act*, R.S.A. 1970, c. 138 for loss of their 20-year-old son. The son's estate also sued for loss of expectation of life. The Alberta Court of Queen's Bench awarded $12,000 to the estate for loss of expectation of life. The parents recovered nothing under the *Fatal Accidents Act*. At page 83 the court held:

> Now, dealing with the other Act, the *Fatal Accidents Act*, R.S.A. 1970, c. 138: it only affords entitlement to damages for loss of pecuniary benefit. In this case, there is no evidence of loss of pecuniary benefit. This young man was 20 years of age. He was just about to embark on his life's career. He was working, he was self-supporting. There is no evidence that there was any pecuniary loss to the parents. The only basis upon which damages can be assessed under the *Fatal Accidents Act* is for pecuniary loss to

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15 (1973), 40 D.L.R. (3d) 429 (N.S, S.C.T.D.).

16 (1978), 15 A.R. 176 (Q.B.).

dependants, and there simply are none in this particular case.

5. *Smith* v. *Cook*:[17] As discussed above, the parents and grandparents were unable to recover from the wrongdoer the debts owed by deceased that could not be paid by the estate.

6. *Dueck* v. *Mensink*:[18] Parents sued under the *Family Compensation Act*, R.S.B.C. 1979, c. 120 for the death of their son. The parents were the owners of a stonemasonry company. The son worked for the company for wages less than normally paid to a stonemason. The parents claimed that their loss was what the company had lost, namely:

(1) the immediate loss of $3,000 incurred in the few months immediately following the death,

(2) the loss of the son's contribution to the company over a three year period (valued at $15,000), and

(3) a permanent loss of $10,000.

The trial judge awarded the parents damages of $28,000 on the basis that the company's loss was in fact that of the parents.

The Court of Appeal dismissed the parents' claim for pecuniary loss because the parents did not prove that as a result of the death they had received $28,000 less from the company. Also the Court refused to award damages for pecuniary loss to the parents on the basis of the following: (1) the son's agreement to run the company after the father went into semiretirement and (2) on the Dutch tradition that children assist their parents upon retirement. The parents were only able to recover the funeral expenses.

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17 (1981) 33 O.R. (2d) 567 (H.C.J.).

18 [1981] 5 W.W.R. 136 (B.C.C.A.).

7. *Beauchamp* v. *Entem Estate*:[19] As discussed above, the mother was unable to recover damages for the loss she suffered by being unable to obtain payment on a promissory note her deceased son had given to her.

8. *Rowe Estate* v. *Hanna*:[20] In this case parents and a surviving sister sued under the *Fatal Accidents Act*, R.S.A. 1980, c. F-5 for the wrongful death of an 18-year-old daughter. The daughter had done housework for the mother on every second weekend. The court denied the family's claim for loss of society and comfort, loss of future income assistance and loss of household services. The court held that on the evidence before it there was no basis in law for recovery of such amounts. The court does not outline the argument made by the plaintiff in support of recovery of damages for loss of society and comfort.

The court also dismissed the mother's claim for nervous shock because it was not foreseeable. The mother had not witnessed the accident or the aftermath's of the accident.

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19 (1986) 51 Sask. R. 99 (Q.B.).

20 (1989), 71 Alta. L.R. (2d) 136 (Q.B.).