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# FATAL ACCIDENT CLAIMS AND DAMAGES IN CANADA

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## I. INTRODUCTION

Actions for damages arising from a fatality contain a number of unique aspects that insurers should be aware of when instructing defence counsel and setting reserves. This paper provides an overview of the types of claims allowed under the laws of the various Canadian provinces and territories. Due to Canada's federal structure, a fatality in one province may not be treated in the same manner as a fatality in another.

## II. CLAIMS MADE BY THE ESTATE OF THE DECEASED

At common law, all claims related to the deceased die with the deceased, regardless of injuries or losses sustained by the deceased's estate or family.[1] This draconian approach was modified by legislation in the nineteenth century to allow for recovery for such losses. All common law provinces and territories now have legislation to allow for claims from the estate and the family members.[2]

### A. Pain and Suffering Between the Dates of Injury and Death

The estate may claim for the pain and suffering felt by the deceased as a result of her or his mortal wounds between the accident and the date of death. There is a wide range of damages based on how long the deceased lived prior to death and how painful her or his injuries were.

### B. Punitive Damages

Punitive damages are not compensatory in nature. Rather, they are akin to a civil fine placed against a tortfeasor who engaged in behaviour that deserves condemnation.

Courts in certain provinces may award punitive damages in favour of the deceased's estate. For example, in New Brunswick, they are allowed under section 17 of the *Fatal Accidents Act*),[3] but such claims have been rejected by courts in Ontario, British Columbia, and Nova Scotia.

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[1] *Baker v. Bolton* (1808), 1 Camp. 493.

[2] Alberta, *Fatal Accidents Act*, RSA 2000, c. F-8 and *Survival of Actions Act*, RSA 2000, c. S-27; British Columbia, *Family Compensation Act*, RSBC 1996, c. 126; Manitoba, *The Fatal Accidents Act*, CCSM, c. F50; New Brunswick, *Fatal Accidents Act*, RSNB 2012, c. 104 (for dependents), and *Survival of Actions Act*, RSNB 2011, c. 227 (for the deceased's estate); Newfoundland and Labrador, *Fatal Accidents Act*, RSNL 1990, c. F-6, and *Survival of Actions Act*, RSNL 1990, c. S-32; Northwest Territories, *Fatal Accidents Act*, RSNWT 1988, c.F-3; Nova Scotia, *Fatal Injuries Act*, RSNS 1989, c. 163, and *Survival of Actions Act*, RSNS 1989, c. 453; Nunavut, *Fatal Accidents Act*, RSNWT (Nu) 1988, c.F-3; Ontario, *Family Law Act*, RSO 1990, c. F.3; Prince Edward Island, *Fatal Accidents Act*, RSPEI 1988, c. F-5, and *Survival of Actions Act*, RSPEI 1988, c. S-11; Saskatchewan, *Fatal Accidents Act*, RSS 1978, c. F-11, and *The Survival of Actions Act*, SS1990-91, c. S-66.1; Yukon, *Fatal Accidents Act*, RSY 2002, c. 86, and *Survival of Actions Act*, RSY 2002, c. 212.

[3] SNB 2012, c. 104.

## III. CLAIMS MADE BY FAMILY MEMBERS OF THE DECEASED

### A. Pecuniary Claims

In several jurisdictions, legislation allows family members to sue to recoup actual expenses incurred as a result of the fatal accident. For instance, section 61 of the Ontario *Family Law Act* allows family members to recover their pecuniary loss resulting from the death. This includes actual expenses reasonably incurred for the benefit of the person killed, actual funeral expenses reasonably incurred, a reasonable allowance for travel expenses, and a reasonable allowance for the value of the housekeeping or care services the claimant provided to the victim before death.

These amounts often make up a fairly small amount of a fatality claim and can be challenged on their reasonableness.

### B. Grief and Bereavement

In some provinces, family members of the deceased may receive damages for grief and bereavement. Damages for grief are authorized by statute in Alberta, Saskatchewan, the Yukon Territory, and Quebec (as well as in the UK).

### C. Loss of Care, Guidance, and Companionship

These damages are awarded to compensate survivors for the "*deprivation of the society, comfort and protection which might reasonably be expected had the* [deceased] *lived -- in short, the loss of the rewards of association which flow from the family relationship and are summarized in the word "companionship"*".[4]

Given the intangible value of family relationships, these awards are difficult to affix with certainty. Some provinces have resorted to legislating tariffs that determine levels of compensation. For example, Alberta's *Fatal Accidents Act*, s. 8,[5] provides the following mandatory awards for "*grief and loss of the guidance, care and companionship of the deceased person*":

1. $82,000 to the spouse or adult interdependent partner of the deceased;
2. $82,000 to the parent or parents or the deceased person divided equally if the action is brought to benefit both parents; and
3. $49,000 to each child of the deceased person.

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[4] *Mason v. Peters*, 1982 CanLII 1969 (ONCA).

[5] *Supra*, note 2.

Saskatchewan also has mandatory damages for these heads of damages in its *Fatal Accidents Act*,[6] but it differs from Alberta in that it allows a far broader range of family members to claim bereavement damages. Alberta only allows children to claim, whereas Saskatchewan allows a "*son, daughter, grandson, granddaughter, stepson,* [or] *stepdaughter*" to assert such claims. Other provinces and territories have their own definitions of which relations to the deceased may claim for loss of care, guidance and companionship, so it is important to check the applicable legislation to determine the scope of the potential claim against the at-fault party.

In provinces that do not have mandated levels of compensation, there are generally-accepted ranges of damages based on the relationship of the claimants to the deceased (*i.e.*, spouse, sibling, child, grandchild). The reason for this categorical approach to awards of this matter was best expressed by Punnett J. in *Panghali v. Panghali*: "*[m]oney cannot buy a suitable replacement for a parent*".[7]

Courts in Ontario have awarded a range of damages under that province's *Family Law Act*.[8] Typically, children of the deceased receive between $40,000 and $50,000, whereas grandchildren are typically awarded between $10,000 and $20,000.

The "*high end of the range*" in Ontario was laid out in *Fiddler v. Chiavetti*,[9] where a mother lost her daughter in a car accident. The Court of Appeal reduced a $200,000 award to $125,000. This figure, of $125,000, is not a hard limit and can be adjusted in future cases to account for inflation.

Other subtle differences exist in this area between jurisdictions. The Alberta and Saskatchewan mandatory systems do not require the family members to prove their suffering, or prove the closeness of their relationships with the deceased. However, the Ontario system permits them to lead evidence in the rare cases where the generally-accepted ranges are insufficient.

### D. Nervous Shock

A deceased's survivors may also bring actions for "*nervous shock*". This is an antiquated term describing a negative psychological reaction to seeing a family member's death. The existing rule was that the family member must either see the death or its immediate aftermath in order to recover for psychological distress stemming from the death. However, a recent decision from the Ontario Superior Court of Justice suggests that rule may be changing to go along with society's increased acknowledgment and understanding of the mental health consequences of such events.

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[6] *Supra*, note 2.
[7] 2014 BCSC 647.
[8] RSO 1990, c. F.3.
[9] 2010 ONCA 210.

In *Snowball v. Ornge*,[10] the crash of a helicopter ambulance that took the life of Christopher Snowball. The family commenced an action in negligence for damages for mental distress. Ornge moved to strike the claim because no right of action exists for mental distress resulting from negligently caused death unless the family members witnessed the accident or its aftermath. Therefore, any mental distress the family members felt was not legally compensable. The Ontario Superior Court of Justice (trial level) allowed the claims to continue. It held that no absolute bar exists against claimants who did not directly witness the injury or its aftermath.

The decision drew inspiration from the Supreme Court of Canada's decision in *Saadati v. Moorhead*,[11] which rejected the use of various considerations, such as geographical and temporal proximity, as absolute bars to the recovery of damages for mental injury in negligence.

Normally, we would not place this much emphasis on a single trial level judgment, but its analysis is firmly grounded the Supreme Court of Canada's reasoning in *Saadati v. Moorhead*, and it is likely to stand as a persuasive precedent.

### E. Dependency Claims

Generally speaking, damages award are intended to put the plaintiff in position she or he would have been in had the tort not occurred. In the case of a claim by a deceased's dependents, the courts strive to award damages sufficient to allow the dependents to continue enjoying the standard of living they would have experienced had the deceased lived.

The heads of damages in a claim by the dependents of the deceased typically include: (1) loss of financial support, loss of household services and child care (*loss of dependency*); (2) loss of inheritance; and (3) management fees and tax gross-up. These topics are discussed in more detail below.

#### E.1 Loss of Financial Support, Housekeeping, and Childcare

Plaintiff's counsel must establish the base year income of the deceased and then use experts to construct the deceased's likely earning growth throughout the rest of her or his life. All education and work history evidence is material to this calculation, as are general statistical averages of similarly-situated individuals.

Plaintiff's counsel must also establish the amount of housekeeping and childcare services the deceased provided to the family unit. It is important to note that the

[10] 2017 ONSC 4601.
[11] 2017 SCC 28.

survivors will still be entitled to the value of these services even if they do not intend to hire third parties to replace the deceased's services and the actual expenditure pattern of the survivors does not offer compelling evidence about the level of services that they wish to replace. Rather, the court will value the services that the family has lost and award damages accordingly.

Once the base year income is calculated, the court must choose the appropriate dependency rate in order to calculate the survivor's entitlement to damages. In general, the dependency rate of one member of a couple is approximately 70% of the deceased spouse's after-tax income. This means that the deceased's contribution to the family unit will be discounted by approximately 30%. This discount reflects the portion of the deceased's labour that only when to her or his own welfare and not the welfare of the family unit.

Though the 70% dependency rate is a general rule of thumb, there are two different approaches used by courts to determining the appropriate dependency rate: the "*sole dependency*" approach and the "*cross dependency*" approach.

The sole dependency approach is a more straightforward calculation that only takes into account the deceased's income. The cross dependency approach, in contrast, assumes that the death of one spouse has provided the surviving spouse with a certain amount of savings that would have been used to pay for items the deceased would have used. One weakness of the cross dependency approach is that it may lead to a nil award if the deceased earned far less money than the survivor (and, therefore, the survivor's "*benefit*" from the death, in the form of reduced expenditures, outstripped the amount of money the deceased brought to the family).

The sole dependency and cross dependency approaches represent the two extremes of calculation. Courts have taken a pragmatic approach in recent years and have used a "*modified sole dependency*" approach. It uses the sole dependency approach, but reduces the rate of dependency in the case of dual-earner households by between 50-70%.

A surviving spouse's dependency upon the deceased may come to an end because of the potential remarriage of the survivor or the possibility that the spouses may have eventually divorced. The probability of these events can be taken into account using generally-available data from Statistics Canada. Most courts take these factors into account, but they are largely unwilling to find that remarriage would completely eliminate all dependency on the decreased spouse. Therefore, courts have normally only reduced dependency awards by nominal amounts to take these possibilities into account.

When awarding damages to a dependent child, courts have taken the approach that the child's dependency on her or his parents ends when she or he reaches the age of

majority.[12] There are two exceptions to this general approach. The first is where parents financially support the post-secondary education of a child.[13] The second is where the children expect to receive valuable services (such as childcare) from their parents. These two exceptions may lengthen the duration of dependency. The plaintiffs will have to lead evidence to prove that they were likely to receive these benefits.

The term of the award for financial dependency is typically the life expectancy of the deceased and the survivor. A dependent child's term is limited to the period of time during which the child would have been financially dependent on the deceased. As discussed above, this may not be limited to the age of 18 or 21 if the child had a reasonable expectation that her or his parents would have provided support during post-secondary education.

### E.2 Loss of Inheritance

In certain cases, the deceased's children may claim for a loss of inheritance. This means those children can be awarded dependency damages up to a certain age, and then a loss of inheritance claim beyond that point. In order to receive loss of inheritance damages, children must provide evidence establishing that the deceased had a pattern of income and savings that would have resulted in a significant estate remaining at the end of what would have been the deceased's natural lifespan (*Panghali v. Panghali*[14]).

Claimants must also prove that they will likely inherit the deceased's estate (or would have inherited it, but for the untimely death). In the recent case of *Higgins v. Arseneau*,[15] the New Brunswick Court of Appeal rejected such a claim, holding that the likelihood the claimants would have inherited the estate was "vanishingly small", since the estate had been set aside in trust for a young disabled family member and could only be collected by the claimants if the disabled family member predeceased them.

The defence's argument to a claim for loss of inheritance is that the survivors benefit from an "*acceleration of the estate*", meaning they obtain the estate sooner than they otherwise would have. The counterargument to this from the plaintiff's perspective is that the deceased, had she or he lived, would have built up a larger estate to pass onto the dependents. These factors must be proven through actuarial evidence and will be balanced against one another by the trial judge.[16] It is worth noting that the Prince Edward Island *Fatal Accidents Act* precludes courts from reducing awards to dependents based on the acceleration of the estate.[17]

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[12] *Lewis v. Todd*, [1980] 2 S.C.R. 694.
[13] *Trudel v. Canamerican AutoLease & Rental Ltd. et al.*, (1976), 9 O.R. (2d) 18 (OHC).
[14] *Supra*, note 7.
[15] 2019 NBCA 21.
[16] See *Killeen Estate v. Kilne*, [1982] B.C.J. No. 2230 (BCCA).
[17] *Fatal Accidents Act*, Chapter F-5 (PEI) at paragraph 7(1)(h).

### E.3 Management Fees and Tax Gross-up

Income tax gross-up is the difference between the value of the lump sum award that is required when no taxes are deducted from investment income and the lump sum award that is required when investment income is taxed. This consideration is only relevant to dependent adults, as persons under the age of 21 are not taxed on investment income earned from an award of damages.[18]

Management fees can be added to the award if the claimant lacks the mental capacity to manage her or his own finances. They can also be added to an award if a mandated discount rate (2.5% in Ontario pursuant to Rule 53.09 of the *Rules of Civil Procedure*) exceeds the rate that an unsophisticated investor could hope to obtain on the market.

## F. Children's Contributions to Parents

If the evidence supports it, parents may be awarded damages for the financial contributions they expected to receive from their deceased children. One particularly interesting aspect of this stems from the Confucian concept of filial piety. In *Sum v. Kan*,[19] the court heard from two experts regarding the practice followed by some families of Chinese descent whereby children make symbolic financial contributions to show respect to their parents. The court found that these contributions can total 10-20% of the child's gross income and were made regardless of the financial need of the parents. There was evidence that the deceased, the plaintiffs' 23-year-old son, followed this tradition. As a result, the court awarded the plaintiffs $13,000 in past support from the deceased and $90,000 in future support.

The concept of filial piety has been examined on other occasions by courts, primarily in British Columbia, and other cases have found that awards given to the parents of deceased children for contributions of this nature can be modified to reflect a number of contingencies. These include whether it was reasonable in all of the circumstances for the parents to expect the payments to continue for the remainder of the parents' lives (*Lian v. Money Estate*[20]) and how adherent the family was to traditional Confucian principles (*Fong Estate v. Gin Bros. Enterprises Ltd.*[21] and *Yu v. Yu*[22]).

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[18] *Income Tax Act (Canada)*, RSC 1985, c. 1 (5th Supp.), s. 81(1)(g.1).
[19] (1995), 8 BCLR (3d) 91 (SC), affirmed 1997 CanLII 4072 (BCCA).
[20] [1996] B.C.J. No. 18 (BCCA).
[21] [1990] B.C.J. No. 1138 (BCSC).
[22] [1999] B.C.J. No. 2801 (BCSC).

## IV. CONCLUSION: PRACTICAL ASPECTS OF ASSESSING FATALITY CLAIMS

As shown above, the defence of fatality claims differs in many respects from the defence of claims for tortious injury. They require an understanding of the unique legislation applicable to each jurisdiction, as well as the rules related to determining the appropriate forum for bringing an action where a tort was committed in one province or territory and the claimant family members reside in another province or territory.[23] Insurers involved in contentious fatality claims will need to retain experts, such as accountants, actuaries, and economists, and it is imperative to obtain sufficient documentation in order to properly instruct those experts. The practicalities of assessing these claims will require close cooperation between defence counsel, the appropriate experts and insurance professionals. All of the circumstances must be taken into account in these emotionally-charged and legally-nuanced files.

[23] The general rule is that the law of the jurisdiction where the tort is committed governs the lawsuit and that the lawsuit ought to be brought in that jurisdiction: see *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.