

INNOVATIVE TECHNIQUES FOR THE FATALITY TRIAL

A. INTRODUCTION

The fatality trial presents special challenges to Plaintiffs' counsel to overcome our judiciary's conservatism in awarding damages in wrongful death cases. Perhaps fearful that awards would significantly increase as they have in the United States, our judicial system has kept them suppressed. If emotions and our natural sympathies that flow from wrongful death claims were allowed into the courtroom then some would argue that awards would spiral out of control. As Plaintiffs' counsel what we have to do so to speak is to push the envelope and get these awards to be more reflective of the loss. The loss of a loved one will weave its way into the survivors' lives in many different ways. When we ignore the emotional and real effect that the loss has on the survivors we are living a fiction as we are constricted in what we can present to a jury in such a claim. Thus the presentation of such claims on behalf of Plaintiffs requires that we develop and implement innovative techniques to allow the Court (jury) to appreciate the complete loss of the surviving claimants.

B. A RETROSPECTIVE LOOK

Perhaps as a starting point a glimpse at the law and some of the seminal cases would be helpful. At common law the infliction of death did not create a civil liability. It seemed that the cause of action for personal injury died with the injured party. The sad but undeniable reality of Ontario law was captured by the aphorism that it is cheaper to kill than to injure. To a large degree the loss of a loved one was not seen to be a compensable loss.

In time, Canadian jurisdictions enacted various forms of legislation. The Ontario *Fatal Accidents Act* (1911) marked the first step towards a formal legislative scheme for compensating family members of persons who lost their lives as a result of another's tortious actions. At that time there was no award permissible for non-pecuniary claims.

The *Fatal Accidents Act* remained in force until March 31, 1978, when it was replaced by the *Family Law Reform Act*. (now the *Family Law Act*). Section 61 of that statute provided for non-pecuniary claims arising out of a wrongful death. Section 61 states:

Right of dependants to sue in tort

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 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. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25); 2005, c. 5, s. 27 (28).

Damages in case of injury

(2) The damages recoverable in a claim under subsection (1) may include,

- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
- (b) actual funeral expenses reasonably incurred;
- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

(e) 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. R.S.O. 1990, c. F.3, s. 61 (2).

Initially there was some controversy over whether or not an award for the loss or guidance, care and companionship was strictly a pecuniary loss or whether it included non-pecuniary losses as well. The controversy arose as a result of the fact that it was specifically set out in the Act that it provided for compensation for “pecuniary loss”. This debate was settled in *Mason v. Peters* (1982), 39 O.R. (2d) 27, where Robins J. clarified that Section 61(2)(e) included damages for non-pecuniary loss. He said:

“Whatever the situation may have been in earlier times when children were regarded as an economic asset, in 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 for the sorrow, grief and anguish that always ensues 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 rewards of association which flow from the family and are summarized in the word ‘companionship’”.

Despite advancements in the law, Ontario courts were not openly accepting of these new heads of damages and they were met with resistance. This was evident in the reasons for judgment delivered by Dickson J. in the seminal decision of *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229. Dickson J. stressed the difficulty of determining a monetary value for non-pecuniary losses. He pointed out that there was no market for such things as pain and suffering and expectation of life and that no amount of money could fully compensate a claimant in a personal injury or fatal accident case for their non-pecuniary losses. The inability to place a

concrete monetary value on awards for non-pecuniary damages left a degree of uncertainty within the Canadian legal system. Dickson J. therefore felt that this uncertainty necessitated the development of conventional awards for non-pecuniary losses. He feared that to leave these types of awards unregulated would create a breeding ground for excessive claims and corresponding excessive awards. Unfortunately for Plaintiffs, conventional has come to mean modest and by lay standards inadequate, trivializing the value of a life.

C. THE OPENING ADDRESS

In view of what I have said, it goes without saying that fatality cases should be tried with a jury absent a statutory prohibition or a very compelling reason. Let us approach the presentation of the fatality case from the opening statement as a starting point. We would all like to imagine every juror weeping in empathy with the survivors at the end of a spirited opening. However we know that our judges will feverishly guard against allowing sympathy to enter the Courtroom.

In *Hall v. Schmidt*, [2001] O.J. No. 4274, Ferguson J. was critical of Plaintiffs' counsel's opening address in a fatality trial. He essentially felt that amongst other things counsel was attempting to inject emotion to the jury in order to garner sympathy. In contrast, in the Court of Appeal decisions of *Creasor v. Cadillac Fairview Corp.* [2000] O.J. No. 4217 and *Khazzaka Auto Body v. Commercial Union Assurance Co. of Canada*, [2002] O. J. No. 3110, the Court accepted comments made by Plaintiffs' counsel in jury addresses which seem undistinguishable from some of those in the *Hall* case. Nonetheless, creative care must be used in the opening to

maximize its effect. Unlike other cases where considerable time is spent in outlining the individual's injury, in fatality cases the time is spent outlining the relationship of the deceased with their family. In order to appreciate this relationship and its underpinnings one must outline the deceased's life to put it in its proper context. A simple narrative of the facts of the deceased's life and how it intertwined with the claimants' lives will show the jury without telling them. As Plaintiffs' counsel, we are challenged to push the boundaries of acceptable comments in jury addresses within the constraints set out in the case law. The law will not develop in this area unless we accept the challenge.

The theme of your case will be the relationships that existed between the deceased and your clients. Ask yourself how have your clients' lives been changed since their family member's death and what are their compensable losses. If the evidence of the family is carefully organized, it can be presented as a compelling story of how your clients' lives have been irrevocably changed. Given the personal and profound nature of the evidence the family will give at trial, it is much more likely that their evidence will come through as planned than in many other types of cases.

Counsel should not shy away from the opportunity to persuade the jury in your clients' favour when you address them. In many respects, the task should not be that difficult. It is hard to imagine a type of case in which it would be easier to gain sympathy among the average juror

than in a fatality case. Juries do not need to be told to be sympathetic nor should they be told, they will find it on their own.

Ferguson J. held in the *Hall* case that it is improper to suggest to the jury that the basis for the Plaintiffs' damages are the value of the deceased's life, rather it is the loss of the deceased's "guidance, care and companionship" to the Plaintiffs. When you think about it, "guidance, care and companionship" are really the foundations of any family relationship, i.e., the care that a parent provides to a child, the care that an adult child provides to their elderly parent, the guidance that a parent provides to his/her child, the guidance that an older sibling provides to a younger one, the companionship that exists between any two types of family members. Put another way, if you had to summarize in a few words what you would lose if a member of your family were taken from you, it is suggested that it would not be much different than the loss of his or her guidance, care and companionship. In other words how can you tell the story of the loss without understanding who the deceased person was how his or her death has impacted the survivors' lives.

I recommend that you review a number of the written works in this area which provide a more detailed overview of jury addresses. 1

D. DAMAGES

Loss of Care, Guidance and Companionship

The concern for uncertainty in the law, arisen from the possibility of inconsistent awards being granted for non-pecuniary losses, foreshadowed in *Andrews*, materialized in awards in fatality cases for loss of care, guidance and companionship.

Although subsequent decision makers have voiced concerns similar to those of Dickson J. in *Andrews*, there has yet to be a strict conventional award for non-pecuniary damages established for fatal accident cases. Instead a case by case approach has been taken in deciding appropriate awards for the loss of care, guidance and companionship and it is this case by case approach that has lead to a significant disparity in the awards. The particular circumstances of each family's situation is considered and damages are to be awarded accordingly. The awards are to be granted based on what is fair and reasonable.

The law in respect of the awards of non-pecuniary damages was thoroughly reviewed by then Associate Chief Justice Osborne in *To v. Toronto Board of Education* (2001) O.J. No. 3490. In that case, the Court of Appeal upheld a jury award of \$100,000.00 to each parent for the loss of care, guidance and companionship arising from their teenage son's death but reduced the sister's claim from \$50,000 to \$25,000. The approach taken by the Court of Appeal was to review the highest and largest awards and apply an inflation factor. The Court then recognized some special circumstances that existed and upheld the award. It is somewhat discouraging , however, to

think that despite employing innovative techniques the Court of Appeal has effectively “capped awards” for loss of care, guidance and companionship. I realize that there are probably jury awards that have crept up to the bar as set in *To* or perhaps exceeded it. I am convinced that with juries we can keep pushing this bar higher and higher.

Interestingly in *Snushall v. Fulsang* 78 O.R. (3rd) 142 the Court of Appeal approved the principle in *Howes v. Crosby* [1984] 45 O.R. (2d) 449, set by MacKinnon A.C.J.O. that if an award for damages is too high or low by 50 percent that the damages are inordinately high or low and the award may be set aside. The principle in *To* coupled with the *Snushall* case gives us room to increase these awards substantially. For example, it could be argued that if we apply an inflation factor and the 50% ,that a judgment on facts similar to *To* could be as high as \$180,000 for the loss of a child to a parent. In contrast, in *Macartney v. Warner* (2000) O.J. No. 31, where the jury was dismissed, the Court of Appeal upheld the trial judge’s award of only \$25,000.00 to the mother and \$15,000 to the father.

What this means is that there is still room for the innovative trial lawyer to strategically take the circumstances faced by their clients and place it above and beyond norm. We must take the deceased person and make them extraordinary. By doing so we will be able to show that their family members have suffered an unusually significant loss as a result of the untimely death of their loved one and are thus entitled to a higher award of damages.

Counsel in *To* succeeded in successfully demonstrating how the situation faced by their clients was exceptional and thus deserving of a more generous award for the loss of care, guidance and companionship. They showed the importance of a son being the first born in a Chinese family and the expectations and responsibilities that come with it which explained how the loss experienced by this family was particularly severe. Counsel stressed how as the first born son, the deceased was expected to excel in his education and his career and then later to provide financial and social support for his parents. Plaintiffs' counsel also demonstrated how the deceased played an important role in his family's business, as his parents did not read English.

The challenge faced by trial lawyers today practising in this area, is to create innovative strategies that will allow them to take the accepted monetary range for an award for loss of care, guidance and companionship beyond what was considered reasonable in leading cases like *To* and *Mason*. By choosing not to impose conventional awards or not to set a cap on the amount recoverable the courts have left the door open for counsel to push the limits and edge up the amounts recoverable in fatal accident cases.

Demonstrative Evidence

In most instances Plaintiffs' counsel will think of using demonstrative aids as a way of assisting in establishing liability or to portray the injuries, treatment and future complications that a Plaintiff may have due to a tortious act. Demonstrative evidence, however, could also be used in fatality claims. Videos and photographs of the deceased in times with their family and friends can be used to create emotion, showing the deceased as a real person and how they interacted with their family. As most of the law on evidence in this country has come from the criminal

system, we need to look at criminal cases to help us be creative in using demonstrative evidence in fatality cases.

The leading case on the use of demonstrative evidence is *R. v. Careemer and Cormie* [1968] 1 C.C.C. 14 (N.S.S.C. Alp. Div.). McKinnon J. outlined the following three step test in that case that would have to be met in order to allow demonstrative evidence to be used:

1. That the item being shown accurately represents the facts;
2. It is done in fairness and without any intention to mislead;
3. There is verification on oath by a person capable to do so that they are accurate.

That test has been adopted in further cases, most notably in *Draper v. Jacklyn* [1970] S.C.R. 92 and *R. v. Maloney* (No. 2) 29 C.C.C. (2d). In *Draper*, the Supreme Court, adopted the three step approach. The Court also indicated that the use of the evidence will not only be a question of fairness that truly reflects the facts, but also whether its inclusion would have a prejudicial effect that would outweigh its probative value.

In *R. v. Trakas* [2007] O.J. No. 3240, the Crown in a criminal negligence causing death case, attempted to have the post-mortem autopsy photographs of the deceased entered as exhibits. McIsaac J. applied the test as set out in *R. v. Careemer and Cormie* and *Draper v. Jacklyn*. In dealing with its probative value, he noted that the photographs were intended to corroborate the Crown's anticipated evidence of the Pathologist that the deceased was struck in a manner that was consistent with a very high speed. As speed was at issue in the trial the photographs were

therefore presumptively admissible. In relation to the prejudicial potential effect they might have, the Defence argued that the photographs were horrific in nature and that they would emotionally overwhelm the jury thereby hindering their ability to consider all of the issues which would result in an unfair trial. McIsaac J. was dismissive of the Defendant's argument on the basis that it was premised on a mistrust of the jury. As a compromise he allowed half of the photographs to be admitted as exhibits. Of note, he quoted the following from McKinnon J. in *R. v. Baptiste* [2000] O.J. No. 1639:

“I expressed the view at the beginning of these proceedings that a modern day jury, a jury in the year 2000, will have been subjected to images that are far more gruesome and grotesque than juries in earlier times. This is because of the plethora of these images which fill the television and movie screens, and at the same time, fill the pages of popular fiction. I observe that times have changed in terms of what the average citizen is exposed to in terms of the grotesque.”

I would submit that the introduction of photographs of a dead body into evidence would be more prejudicial to a Defendant in a criminal case than it would to a Defendant in a civil fatality case.

In a fatality case the use of family photographs and videos of the deceased interacting with the family when he or she was alive is important to show the relationship the deceased had with his spouse, parents, siblings and children. The Defence will certainly argue that they are not probative of any issue and will only generate sympathy for the family members. It should be argued that their use is not to create prejudice to the Defendant but to help a jury understand what the family has lost by actually seeing how they interacted with each other. It should be remembered, as McIsaac J. indicated, that a party does not become prejudiced solely because they have some mistrust of a jury.

The Dependency Loss

This is the loss that is experienced by the survivors as a result of loss of the deceased's contribution to the net family income over their lives. In that regard, Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.* [1978], 83 D.L.R. 3(b) addressed it most appropriately as follows:

“We must now gauge more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but loss of earning capacity of which compensation must be made.”

The dependency loss claim should be presented similarly along the lines one would present an individual's loss of future earnings. The dependency loss can have numerous aspects to it especially if there are surviving children.

The first item that needs to be presented and proven is the deceased's projected future income. To prove this loss, lay witnesses such as the deceased's employer, workers, friends and acquaintances can be considered in being called in order to provide the Court with a fair and realistic view of the deceased's working life. We have to bring the deceased's lost future back to life in some manner. To calculate that loss a number of experts could be used to establish the future career path and income stream that would have flown from it. Not only should an economist or actuary be used to perform hard calculations, but a vocational expert can also be used in order to determine the person's career direction and what that individual may have earned. An interesting case on this note is the Alberta case of *Millott Estate v. Reinhard* [2001]

A.J. No. 1644. In that case Fraser J. was dealing with the death of a 43 year old male who had been married for 10 years and had two children. The unusual aspect was at the time of the accident he was undergoing a retraining program in Hotel and Restaurant Management due to a workplace compensation claim. The Plaintiff's called a number of experts in particular a vocational expert to testify how the deceased might have progressed substantially in the hotel industry. The evidence of an economic expert then provided a number of scenarios for the future growth of income. Fraser J. agreed that this opinion evidence was useful and that it assisted him in making the finding that the deceased would have advanced considerably in the hotel industry. I would recommend that you study and follow the productivity gains of certain occupations in the economy. Wages are rising and will continue to rise in excess of a mere predictable inflation rate. A productivity factor of even one percent can produce a substantial increase in projecting a loss. There are a number of social scientists and economists who are prepared to effectively argue for this premise and testify.

In order to put forward a future growth theory, Plaintiffs' counsel must rely on how the deceased was progressing in his or her position as well as addressing their previous work history. When putting forth this claim it is important to document and ensure that all relevant education and work history is obtained. In my view, one of the best gauges to predict one's future is to look at their past history of accomplishments. By doing so it will be easier for the trier of fact to base an award on greater growth of the deceased's income.

In calculating the actual loss, counsel will need to have an economist who has the expertise to address any potential contingencies. Defence counsel may argue that even if the deceased's future income stream is accepted that negative contingencies should be applied including divorce, remarriage and reduced life expectancy. Concerning the possibility of remarriage and divorce, again a social science expert could be utilized. The fact that the couple may have children will have an impact on that issue. Cultural and religious circumstances should also be considered which may affect the contingencies that are used. A Judge will most likely apply some form of a contingency to these scenarios.

Reference should also be made to the Family Law Act in appropriate cases to establish dependency losses, especially where there was the real prospect of divorce. Consideration should be given to obtaining guidance and assistance from a family law expert who can testify as to spousal obligations if indeed there was a divorce. With the introduction of the Spousal Support Advisory Guidelines ("SSAG") a few years ago, the courts have been provided with a valuable tool for determining the often difficult task of an appropriate quantum of spousal support. There is a computer program named Chequemate that most family law lawyers have and which is probably available at your local law library. Chequemate incorporates the SSAG and will provide lawyers with a range of spousal support awards both in terms of quantum and duration. This is an analysis that should be explored to see how the suggested support award compares to a dependency award calculated by the traditional formulae. Counsel should have a basic understanding of the SSAG when exploring this area as the spousal support amounts are heavily

dependent on the duration of the relationship and the age of the parties. Some adjustments may need to be made when doing your comparative analysis on account of these factors.

The pecuniary loss of children in relation to dependency of a lost parent is more easily calculated. There will always be certain assumptions made that address what a dependent may be entitled to once they turn 18 years of age. Various scenarios including post-secondary education must be considered as this will usually be another pecuniary loss for the child.

The Child Support Guidelines (“CSG”) are another tool that may prove useful in quantifying a child’s dependency loss. The CSG is a table that lists the presumptive amount with very limited exceptions, of child support based on the payor’s income and the number of children. Again, a comparative analysis of the amount of child support that would be payable in your clients’ circumstances if the deceased and his or her spouse had separated, may be a persuasive argument if the figures are more favourable to your clients’ case. The CSG are available through the provincial government’s website.

Remarriage

A remarriage contingency is generally applied to both loss of dependency and loss of housekeeping capacity awards. Probably the most important thing you can do on this issue is to carefully prepare your clients (i.e., not just the surviving spouse) for questioning about this issue on Examinations for Discovery and at trial. When dealing with the issue at trial, counsel should

explore the available statistical evidence or arguments that reduce the likelihood of remarriage for your client. You can utilize the social sciences for these statistics, such as:

- Only about 16% of people whose first spouse dies, remarries. ²
- Even if your client has said that he or she intends to remarry, the court should still consider whether your client's expectations are reasonable (see *Parsons Estate v. Guyner* (1998), 162 DLR (4th) 390).
- Over 20% of Canadians who remarried had left their second spouse within an average of 7.6 years. ³
- age is an important factor in remarriage. Most female widows have been married 10 years or more and the large majority of them (84%) do not remarry if this is the case. Similarly, older female widows (those over 40) are less likely to remarry: only 10% of them do. ⁴
- Minimize the financial benefits that your client may gain from the new relationship (e.g., a low income earning potential of the new spouse; any disability that may impact on the new spouse's future earning capacity; support obligations of the new spouse in relation to previous relationships or the new spouse's age, if applicable).
- Factors that militate against your client remarrying (e.g., client's age, number of eligible people in the area where they live, lack of a social network).
- The possibility that even if your client does remarry, it is not likely to be until his or her children have grown older.

If there is going to be a contingency for the possibility of remarriage, there should also be a contingency applied for the possibility of divorce of the remarried state. Again, there will likely be some statistics that favour your argument in this area. Some important findings in this area are:

- the deterioration of household economic circumstances greatly increases the instability of cohabitation.⁵ This is all the more relevant nowadays given recent economic events.
- months previously spent in cohabitation tend to lower the probability of marriage.⁶

Survivor's Pecuniary Loss

Normally counsel thinks of the surviving spouse in a fatality case as having the sole pecuniary loss outside of the dependency loss. However, counsel should at least consider that other family members may suffer a loss as well. Children who are employed may have a short term loss of income and a dependent relative who has had to take on the role of a parent to surviving children may also have their own past and future wage loss. Proving the survivor's wage loss claim involves a number of factors. As a small list, counsel should consider the following in proving this loss:

- age
- sex
- economic family background
- education and vocational history

- family, in particular sibling's education and vocational history
- personality traits
- past joint family responsibilities with the deceased.

The manner in which the survivor's pecuniary claim is proven will likely have two aspects: the actual impact the accident has had on the survivor's earning capacity due to their own emotional difficulties and a reduced earning capacity due to increased family responsibilities. Notably in the *Macartney* case, the Court of Appeal held that the Plaintiffs were entitled to make a claim for loss of income under Section 61(1) of the *Family Law Act*. This allowed surviving family members to make their own claim for loss of income in situations where they themselves have suffered psychological injury due to the loss of their loved one.

Where a surviving spouse was employed and parenting duties were shared between spouses counsel will want to emphasize the survivor's employment and work history as well as their intentions. Evidence that will be required will include the calling of family friends, the employer, fellow employees and of course an expert who can make a hard calculation of that loss. The actuarial calculation of the loss will be affected by contingencies dealing with consumption rates and what percentage of the income would have been shared in the family household. Evidence of savings, RRSP contributions and the family's lifestyle can all be very helpful in establishing evidentially what the proper calculation should be.

Loss of Economic Opportunity

A further, or alternate approach counsel can take in addressing pecuniary losses of a surviving family member is a loss of economic opportunity or loss of a capital asset. This heading of damage would be asserted in situations where it is extremely difficult if not impossible to calculate the surviving spouse's future wage loss. The basis of this type of claim is to compensate the surviving spouse for a loss of economic opportunity that they now suffer due to either increased family responsibilities or having had their earning potential impacted in some other way. A novel way to address the loss of economic opportunity is the approach taken by the British Columbia Court of Appeal. In that jurisdiction the Courts have approached the loss of economic opportunity as really being a loss of a capital asset. The concept is that the individual is no longer whole and may have lost the emotional ability to perform premium work. Of note is the case of *Mazzuca v. Ealexaks* [1995] B.C.J. No. 2128. In that case the British Columbia Supreme Court noted that the loss of a Plaintiff's emotional capabilities of performing premium work was deemed to be a loss of a capital asset. This was affirmed by the British Columbia Court of Appeal and seems well suited for an individual who may have been involved in entrepreneurial self-employment ventures. The survivor's increased parental responsibilities and increased emotional issues due to the deceased's death may very well have an impact on their ability to take on future endeavours. It is a question of whether or not your client's ability to earn income has been impacted even in circumstances where it is not entirely clear what that loss would be.

Huddart J., of the British Columbia Court of Appeal, in *Rosvold v. Dunlop* [2001] B.C.J. No. 4 addressed the loss clearly by stating:

“In sum, the accident rendered Mr. Rosvold less capable of earning income from all types of employment, less attractive as a business partner, unable to take advantage of business opportunities that might

otherwise have been available to him, and thus less valuable to himself as a person capable of earning income in a competitive labour market. He is entitled to compensation for that loss of earning capacity viewed as a capital asset.”

Although the British Columbia cases were dealing with Plaintiffs who had been injured, there is no reason why this approach cannot be taken in a fatality case as the Plaintiff is also entitled to be fully indemnified for their pecuniary loss.

Household and Child Care Services

Counsel should not just look at the actual surviving spouse’s pecuniary loss but also the loss of household and child care services. Under that heading, evidence as to the surviving spouse’s time and interaction with the family will be quite relevant as well as will obtaining some form of analysis of what the deceased’s contribution to the household was over and above the obvious pecuniary aspect. In that regard an occupational therapist could be retained to go into the surviving family’s home to document and outline the services that the deceased provided for which the survivors should be compensated. Pitfield J. in *Foster v. Perry* [2005] B.C.J. No. 1874 of the British Columbia Supreme Court provided a useful analysis for quantifying the loss of household and child care services. In that action the deceased was a 39 year old married truck driver with two children aged 12 and 8. Pitfield J. indicated that it was necessary to compensate for the loss of services had the deceased survived and that it was not simply a question of providing a replacement cost. In that regard he stated the following:

“Mrs. Foster and the children must be compensated for the value of the loss of household services provided to them by Mr. Foster. The children must also be compensated the value of the loss of childcare services that

would have been provided by Mr. Foster had he survived. The awards are not dependent upon the likelihood of replacement costs being incurred. Rather, the award is an attempt to monetize the value of the deceased contribution to the household”
[*Jung v. Krimmer* [1987], 15 B.C.L.R. (2d) 90 (S.C., varied on other grounds) [1990], 47 B.C.L.R. (2d) 145 (C.A.)]

In that case, proving the loss involved calling evidence of the spouse in estimating how much time was spent by the deceased with the family as well as evidence about the amount of time the deceased worked. Pitfield J. also noted that the quantification of such damages was a matter of being fair and reasonable and refrained from trying to do a precise calculation based upon some mathematical formula.

Future Care

The loss of a child can go well beyond just the loss of care guidance and companionship. In certain circumstances one can foresee that there may be a form of future care that is lost as well. The premise would be that the loss of a child, depending upon the family’s economic, social, and religious background, may create a loss if it was expected that the child would provide assistance to their elderly parent in later years. It appears that when this issue has been considered it has been rolled into the general loss of care, guidance and companionship claim but there is no reason why it should not be treated as a distinct loss in appropriate cases.

This issue was referred to in *Reidy v. McLeod* 47 O.R. (2d) 313. In that case, Bowlby J. remarked that the issue of care given to an elderly parent is very real and can be associated with cultural,

ethnic and societal elements. In that regard, he stated:

“It is not just in oriental or other ethnic societies or environments that this ultimate repayment for love given can be seen; but, to an ever-growing extent in the western culture as well. The ‘care and guidance’ given to the elderly parent is hopefully to be less and less fortified to the ‘old age home’, but preserved in the atmosphere where it flourishes and is not stunted by loneliness. In my view, this fact was not lost sight of by the framers of the legislation.”

To put forward such a claim individually or in part of the overall award for loss of care, guidance and companionship, counsel should consider using social science experts who specialize in human social behaviour to help establish this type of loss. For some cultures an expert may be able to put forth the premise that an elderly parent is taken into the child’s family home. This not only has a companionship aspect to it, but also a pecuniary aspect in that the parent would incur significant costs if a nursing home were now the only option available. Consideration should also be given if the deceased was the primary caregiver to a disabled or elderly family member in which case an additional cost to the family will be incurred in order to replace those caregiving services.

In situations where the adult is already taking care of an elderly parent, quantification of the loss will be easier. In those circumstances where the parent would have to be placed in a home, quotations for costs could be obtained and in the event that another family member has to take on the responsibility of caring for the parent it would create a loss much akin to a quantum merit claim for that individual.

Loss of Inheritance

Before pursuing a claim for loss of inheritance, Plaintiffs' counsel should consider whether the defence can advance a valid counter argument that the Plaintiffs have enjoyed a benefit from an "acceleration of the estate", i.e., they have received the estate earlier than they would have had the deceased lived to their normal life expectancy. The Plaintiffs would have to show that if not for the deceased's premature death, he or she should have built up a larger estate that would have been available to the beneficiaries and therefore the beneficiaries have been deprived of the benefit of this increase in the estate.⁷ Professor Bruce of the University of Calgary opines that in most cases these two factors will offset one another and that whether one factor will outweigh the other tends to be fact specific in each case.⁸ Some courts have found it difficult to determine whether these two competing arguments offset one another and have refused to award damages in these circumstances. In other cases such as *Jung v. Krimmer* [1990] B.C.J. No. 1529 it has been held that it offends common sense to say that the deceased's death created a net pecuniary gain to the Plaintiffs. Such courts have accordingly refused to rely solely on the mathematical calculations and have awarded damages.⁹

The Estate

In some circumstances, the deceased may have survived the initial accident and suffered significant injuries. In cases such as these, counsel should be careful when preparing their pleading that the Estate of the deceased makes its own individual claim under the *Trustee Act*. There is no reason for counsel not to include the Estate in these types of circumstances. In

addition to general damages, the Estate's claim may also have a past loss of income aspect to it if the deceased was employed.

Punitive and Aggravated Damages

Further, depending on the circumstances of the tortious act, counsel should also consider making a claim for punitive and aggravated damages. They should especially be considered where a Defendant has not already received appropriate punishment in criminal law. The Defendant's behaviour after the incident may also be relevant. In *McIntyre v. Grigg* [2006] O.J. No. 4420 the Court of Appeal modified but upheld a punitive damage award against a Defendant who was operating his motor vehicle after drinking excessively. The Plaintiff was a pedestrian who suffered serious injuries and the Court of Appeal allowed punitive damages because the Defendant's conduct was found to be deliberate and intentional in that he drank excessively before operating his motor vehicle. Further, although he had been convicted for careless driving, the Court did not feel that was adequate enough punishment to prohibit the awarding of punitive damages. It should also be noted that in that case a standard automobile insurance policy responded to the Plaintiff's claims for punitive and aggravated damages.

Counsel should also keep in mind that Section 3(6) of the *Victim Bills of Rights Act* allows for the payment of legal fees in a civil action on a substantial indemnity basis where the Defendant was convicted criminally.

Conclusion

As you can see there are numerous techniques that Plaintiffs' counsel can use in a fatality trial to overcome the constraints that we face. Undoubtedly, more techniques will emerge that will assist us in trying to fully indemnify families who have lost a loved one prematurely.

DAVID F. SMYE, Q. C.

1. Adair, *On Trial: Advocacy Skills Law and Practice* (Markham: LexisNexis Canada Inc., 2004).

Lubet, Block and Tape, *Modern Trial Advocacy: Canada*, Second edition (Notre Dame: National Institute for Trial Advocacy, 2000).

Olah, *The Art & Science of Advocacy* (Toronto: Carswell, 1995).

Oatley, McLeish, *The Oatley-McLeish Guide to Personal Injury Practice in Motor Vehicle Cases* (Looseleaf) (Aurora: Canada Law Book).

Oatley, *Addressing the Jury: Achieving Fair Verdicts in Personal Injury Cases*, 2nd Edition (Aurora: Canada Law Book, 2006).

2. Warren Clark and Susan Crompton, "Till Death do us Part? The Risk of First and Second Marriage Dissolution" (Summer, 2006) *Canadian Social Trends*, 25.
3. *Ibid.*
4. Cara L. Brown, *Damages: Estimating Pecuniary Loss* (Aurora: Canada Law Book, 2007) at p. 7-56.1.
5. *Ibid.*
6. *Ibid*, p. 7-56.2.
7. Klar, Linden et al, *Remedies in Tort* (Looseleaf) (Toronto: Carswell) at p. 27-162.65-27-162.66.
8. Christopher Bruce, *Assessment of Personal Injury Damages*, Fourth Edition, (Markham: LexisNexis Canada Inc., 2004) at p. 71-72.
9. Klar, *supra* at 27-162.74-27.162.75.