

Alberta Doctors' Digest

Putting a price on grief

Aristotle is famously credited for stating that “the law is reason, free from passion.” While lawyers and the judiciary certainly strive to achieve such stoicism in their respective professions, this is not always the case.

Historically, emotion has played a role in judicial determinations, most notably in the area of compensation for injury caused by another. Damage awards, while intended to be objective measures of loss, cannot avoid bringing subjective elements into play. This has resulted in legislative guidance to assist the courts by creating damage awards or by putting limits, or “caps,” on damage awards. One example of such guidance comes from the legislative amendments regarding compensation for family members in wrongful death claims.

To put this discussion into context, in a recent court decision, the plaintiff sued a physician, a hospital and other individuals involved for funeral expenses, the cost of health services, counselling and other claims after the death of the plaintiff's infant son (alleged to have been caused by one or more of the defendants). After suffering a nervous breakdown, the plaintiff brought an application to amend her claim to include additional damages for personal, psychological, psychiatric and emotional injuries suffered as a result of the events of the labour and delivery, the extent of the infant child's medical challenges as a neonate and his death. The plaintiff also sought damages for loss of income, loss of earning capacity, cost of care and cost of future care because of the breakdown.

The application was dismissed by the applications judge largely because the claim constituted a new cause of action against the defendants which was arguably out of time, citing the *Limitations Act*. However, the discussion in the decision did bring into focus the question of damages available to a third party arising from the death of a relative.

In Alberta, pursuant to the *Fatal Accidents Act, RSA 2000, c F-8* (the “FAA”), when the death of a person has been caused by a wrongful act, neglect or default that would typically entitle the injured individual to a lawsuit and recover damages while alive, certain family members are entitled to recover not only damages but also expenses outlined under the FAA. Children, spouses and parents of the deceased are also entitled to bereavement damages for “grief and loss of the guidance, care and companionship of the deceased person” for a fixed sum of \$82,000, or \$49,000 to each child of the deceased. Thankfully, unlike in other lawsuits, the deceased's family are not required to prove their grief to receive the set bereavement damages under the FAA.

While such a limitation is certainly difficult for those who have suffered such a tremendous and unfortunate loss, and while one could argue that it is impossible to put a price on grief, interestingly the entitlement to any damages (as exists under the FAA) was not always available in Canada.

Despite dating back thousands of years, the law did not really respect the sanctity of life until very recently. For example, both slavery and child labour laws were not properly

abolished in Britain until the mid-1830s and even later in the United States. The concept of equal rights for every citizen was not even law until over a century later.

To emphasize the law's lack of empathy, in the early 1800s, the common law also prohibited families from pursuing actions against wrongdoers for causing a wrongful death. This meant that while a victim who was injured could sue for damages, no one could sue the wrongdoer if the victim succumbed to their injuries.

The reasoning behind this jurisprudence appears partially rooted in the ancient Latin maxim "actio personalis moritur cum persona," that is, "a personal cause of action dies with the person." The rationale was that the court should not meet the needs of a deceased person as they no longer had needs to be met.

Secondly, the court did not believe that a deceased's victim's dependants were entitled to financially recover from a wrongdoer's actions because, as one English law Lord wrote, "In a civil Court, the death of a human being could not be complained of as an injury."

Such legal theories appear to originate from the "felony-merger doctrine," wherein conduct that resulted in death was typically handled in criminal courts and seen as a public wrong, thereby extinguishing private remedies to the victim's family. Practically speaking, such principles allegedly originated from the understanding that most wrongful deaths occurred from robberies or murder, leading to the wrongdoer being ultimately executed or at the very least having their assets seized by the Crown, which often left nothing for the victim's family anyway.

Public opinion in the mid-19th century ultimately shifted the law's stance on this as the Industrial Revolution and the expansion of the railway brought forward more workplace deaths, resulting in more destitute families. The fact that it was cheaper for an employer to kill rather than injure a worker left a particular foul taste in the public's mouth and reform was subsequently demanded.

In Canada, in 1884, the Northwest Territories adopted fatal accidents legislation, which subsequently became law in 1905 in Alberta after its creation as a province. However, as with any piece of legislation, the *FAA* was subsequently interpreted by the court in different ways and ultimately limited recoverability for victims' dependents. In the 1950s, only around \$3,000 was awarded to dependants for the loss of expectation of life.

In the late 1970s, public criticism mounted again, and parents voiced their shock over the insultingly low damages provided to compensate them for the death of a child. The *FAA* was ultimately amended again, and a new category for non-pecuniary damages was created, compensating families for "grief and loss of guidance, care and companionship." However, the damages only extended to children of deceased parents if the child was (1) a minor or (2) between 18 and under 26, unmarried and not living with a cohabitant.

After the creation of the *Charter of Rights and Freedoms*, however, various parents and children challenged these limitation provisions under the *FAA* in the courts, arguing that the limitation on age violated the plaintiffs' equality rights under section 15(1) of the *Charter*, given that parents' or a child's grief did not lessen merely based on the age of the victim or dependant. The courts ultimately agreed and subsequently struck these age requirements.

Now, per section 8 of the *FAA*, spouses and adult interdependent partners can now seek compensation for grief and loss of the guidance in the amount of \$82,000, so long as they were not living separately or apart at the time of death. As stated previously, parents and children can also seek damages without providing evidence and without any limitation on age.

While the statute is something that none of us ever want to rely on, the *FAA* at least now provides families with some recourse and provides the courts with some certainty. And while damages for bereavement were not always allowed, lawmakers have attempted to listen to the public and make changes accordingly. No doubt this area of the law will continue to evolve.

Editor's note: The views, perspectives and opinions in this article are solely the author's and do not necessarily represent those of the AMA.

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