

the community

A Matter of Family

For most people, family is at the heart of what matters most in life. Losing a loved one – a sibling, spouse, child, grandchild, parent or grandparent – can be a devastating and life-altering experience.

Imagine adding to this grief the knowledge that your loved one’s death is the result of another person behaving harmfully or recklessly.

Causes of wrongful death range from reckless driving to poor medical care to faulty use of equipment. When these preventable circumstances contribute to the death of a loved one, the family’s grief and suffering are compounded by outrage.

For the families in this report, and others thrust into dealing with a wrongful death in British Columbia, matters become even more painful and frustrating if they seek advice on possible legal avenues to find justice. They discover that current legislation fails to provide for all the losses—emotional, financial and beyond—resulting from the wrongful death of their child, parent, sibling, spouse or other relative.

The current *Family Compensation Act (FCA)* governs in cases of wrongful death and the *Act* takes into account the direct financial losses resulting from death. However, it fails to acknowledge the multi-layered collective experience of affected families. Children, seniors and people with disabilities who may not represent a measurable financial loss, for example, are among the classes of people whose lives are not fully “valued” or respected after they die.

BC’s laws make a further unjust and unjustified distinction between wrongful acts that lead to injury and wrongful acts that lead to death: the injured and their families can seek full compensation, but the families of deceased victims cannot.

Striving to Make Things Right

For these reasons, BCCPD along with the Coalition Against No-Fault (CANF) and the Trial Lawyers Association of BC (TLABC), are seeking a new wrongful death Act in British Columbia. A new act is needed to enable family members who suffer the loss of a loved one due to the harmful actions of others to obtain a full measure of justice.

For more than two years, this has been a coordinated quest by our three organizations—though calls for change have been sounding out in this province for decades. We are hopeful that the BC government will become a leader among Canadian provinces and territories by creating a just and modern wrongful death Act.

A BC-based circle of advocacy and support for grieving families has emerged in recent years. In the summer of 2005, representatives from BCCPD, CANF and TLABC met with a group of these families and were deeply affected by their experiences. We knew this

Burnaby-based lawyer Don Renaud says, “The public has no idea the law in this area is so inadequate. The lives of children, people with disabilities and seniors are valueless in the eyes of the law.”

A Brief History

It has been over 160 years since *Lord Campbell's Act* (1846) was created as a way to reform unjust laws and thereby enable families to obtain justice after the wrongful deaths of their loved ones. However, it limited access to justice in a drastic way—even though it was an attempt to right the wrongs created by far earlier decisions (*Higgins v. Butcher* in 1607 and *Baker v. Bolton* in 1808). This inadequate Act became the model for wrongful death legislation throughout the Common Law world. Today, in some parts of Canada, the legislation is known as the *Fatal Accidents Act*. In British Columbia, it remains the *Family Compensation Act*.

Throughout history, various pieces of legislation referred to damages and the entitlement of dependents, but the nature and extent of damages were not specified. And damages in wrongful death cases have been restricted to the loss of financial benefits to those left behind. These “pecuniary losses” involve a benefit or advantage that can be measured in dollars, such as financial support, services or contributions. Under these forms of legislation, the nature and extent of allowable damages are so limited as to make access to the courts a practical impossibility.

Many provinces in Canada have amended the laws set out by *Lord Campbell's Act*, though none has done so sufficiently to provide proper or fair compensation for all people impacted by the death of a loved one. BC has not made any amendments to this Act which pre-dates the province's existence—and confederation. Society, on the other hand, has changed significantly since the mid-1800s and the legislation of today must reflect this reality.

was a crucial issue for our organizations to address. We worked together to understand the issue and prepare alternative proposals for wrongful death legislation in our province. The families formed a group to represent their interests and help coordinate their goal of legal change in BC: the Wrongful Death Law Reform Group (WDLRG).

A Time for Change

As it stands, BC's legislation is based on an 1846 Act from Britain (please see A Brief History on this page): a law which does not recognize forms of loss other than those causing a direct financial impact. This leaves families without the legal means to seek justice when the wrongful death of their loved ones leads to a loss of guidance, care and companionship or for the damage caused by stress, anguish and grief. Moreover, in cases where wrongful actions lead to injuries that eventually cause death, the law does not provide for the pain and suffering that occurs from the period between the date of injury and the eventual death. We believe this is untenable and unjust, particularly because the law most affects people who are at one of the most vulnerable points in their lives and most deserving of social support.

The families, BCCPD, CANF and TLABC are on solid ground with their collective goal. Public polling conducted in 2005 revealed that 77% of citizens support changing the law to allow for greater compensation to families of those killed due to the negligence or recklessness of others.

The current legislation has barred a countless number of families from seeking justice after the wrongful death of their loved ones. The families included in this report are only a fraction of those affected. Sadly, and without reason, nothing has been done to right this wrong for over 100 years.

The BC Government's Review

In the fall of 2006, CANF wrote to BC Attorney General Wally Oppal and circulated a media release to spell out the need for new legislation to govern in cases of wrongful death. CANF met with a representative of

the Attorney General's Ministry who is directly involved with this issue. The meeting was very positive and a consultation paper was circulated within a few weeks, as promised by the representative.

In June 2007, the BC government invited public consultation and set out to review the existing *Family Compensation Act*.

BC Needs a New Act

British Columbia needs a very different legal paradigm for cases of wrongful death. For this reason, BCCPD, CANF and TLABC are advocating for a new wrongful death law, rather than recommending changes that will “tinker” with the *Family Compensation Act*. We believe these changes are necessary and long overdue—more than 100 years overdue, in fact.

The goal is to create legislation for our province that enables innocent families to seek fair compensation for all of their losses. In order for this to be realized, changes need to be made with regard to the eligibility of claimants and the nature and extent of compensation permitted under the new law.

We propose the following as a definition for any new piece of legislation governing wrongful death:

- A. The court, notwithstanding any other damages that may be awarded, may award damages generally to the decedent's estate and /or survivors for:

 1. solace and bereavement
 2. personal anguish
 3. emotional stress
 4. loss of companionship, comfort, love and affection
 5. loss of advice, counsel, guidance, protection and care
 6. the decedent's mental anguish, pain and suffering from the date of injury to death**
- B. The court may also award punitive damages to the decedent's estate for wilful, wanton or reckless conduct shown by a preponderance of evidence.**

This leaves families without the legal means to seek justice when the wrongful death of their loved ones leads to a loss of guidance, care and companionship or for the damage caused by stress, anguish and grief.

Other improvements needed

- At present, the *Family Compensation Act* provides that children, parents and spouses of wrongful death victims can be compensated for financial losses, but not for non-financial losses. However, it prohibits siblings, step-siblings – or others who relied on a deceased victim financially – from being compensated for care, maintenance or education, or who were entitled to support by way of agreement or court order. BCCPD and its partners on this campaign propose that all of the latter cases be included in a new act.
- The law should clearly recognize that even cases of severe injury, rather than death,

After meeting some of the families in the Wrongful Death Law Reform Group, Margaret Birrell, said " These families were willing to come out and work for change while knowing they would not receive any direct benefits from amendments made. It is a huge generosity of spirit."

could cause a loss of guidance, care and companionship.

- In cases where punishment of the wrongdoers is warranted, provisions should exist that allow both punitive and aggravated damages to be pursued by the surviving family members.
- Compensation for a loss of guidance, care and companionship requires an assessment of each individual set of circumstances, rather than being fixed or a one-size-fits-all amount.
- Where appropriate, expenses should be recoverable and costs should be available in instances where defendants are unwilling to be reasonable with regard to settlement offers.

by Ben Doyle

Conclusion

The families who shared their stories for this report know that they will not reap any benefits from a new law. However, they are passionate about the need for a law that will allow families in the future, who lose loved ones as a result of wrongful acts, to be compensated fully for their grief and associated losses.

BCCPD, along with CANF and TLABC, believe that fundamental legislative change around wrongful death is long overdue. We urge the provincial government to continue the dialogue with us, and other concerned groups, through its consultation process. □