



# TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA

## Submission of the Trial Lawyers Association of British Columbia

### Reforming British Columbia's *Family Compensation Act* Submitted, in response, to the BC Ministry of Attorney General

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September 4, 2007

## Introduction

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The Trial Lawyers Association of BC (TLABC), with a current membership of more than 1,000 strong, is a public-service organization dedicated to preserving and protecting the legal rights of individuals, as well as ensuring that victims of injustice have unfettered access to judicial remedies that strive to level the scales of justice. In that capacity, TLABC applauds the initiative of the BC Ministry of Attorney General in reviewing the antiquated and unjust provisions of the *Family Compensation Act*.

It is our view that entirely new legislation should be drafted with a new title, such as *Wrongful Death Act* to reflect the focus on tort law rather than implying that the legislation is intended as a form of social welfare with limited 'State' benefits. As a general principle, we believe wrongful death should be recognized as a tort with damages awarded to as wide a class of claimants as the court finds are reasonably impacted by the death and that all types of damages, including non-pecuniary damages, be permitted in such amounts as the judge or jury decides on a case-by-case basis.

In general terms, it is our view the legislation should direct the courts to mirror the approach taken in non-fatal accident cases when it considers the range of remedies available for compensating the loss. Specifically, we believe general damages should be allowed for grief and other psychological injuries to the survivors, as well as pecuniary damages to treat or assuage those injuries, together with damages for lost income and lost-income-earning capacity to those survivors reasonably impacted by the loss. If the legislature sees fit to itemize such a list of allowable claims, we submit that a clause should be inserted to the effect "and such other losses and expenses as the court considers just," so that the list is not codified to the exclusion of legitimate claims not currently anticipated.

With these general principles in mind, we are pleased to respond to the Ministry's Green Paper in the form of answers to the main questions posed.

## **Responses to Questions Posed in the Ministry's Green Paper**

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Re: **Eligible Claimants**

### **1. Should siblings be explicitly included as eligible claimants in the *Family Compensation Act*?**

We agree that siblings should be included in the *Family Compensation Act*, but should not be automatically entitled to compensation for this connection alone. While it might be necessary to include siblings specifically in the *Act* to ensure they are not left out by judicial interpretation, we believe there should be a clause following whatever list is selected to the effect “and any other claimant reasonably affected by the death.”

Siblings often ‘step up to the plate’ in times of family need and should be compensated for services rendered and disbursements incurred to assist the immediate family in dealing with a tragic loss. Similar to what is known in personal injury law as a ‘care by relative’ claim, siblings should have access to the court to prove that the substitute services they provided were reasonable and necessary to support the family, upon proof such support was required. Claims for compensation might include the market value of nursing services provided to a widow to assist them in coping with their grief and depression for a reasonable period of time, or parenting services to children left alone after the death of the parents.

As with other claimants, upon proof that the tragic loss of their sibling caused a psychological reaction resulting in disability or the need for medication (e.g. anti-depressants), such a claim should be permitted to proceed to the Court for adjudication. In keeping with the goals of tort law, the wrongdoer should bear the burden of all reasonably foreseeable losses of this nature. As with all claims in tort law, proof of fault should continue to be a pre-condition with respect to compensation entitlement.

### **2. Should support recipients be explicitly included as eligible claimants in the *Family Compensation Act*?**

We agree that support recipients should be included as recipients in the *Act*, with the same provisos noted in our answer to question 1.

In our view, it is reasonably foreseeable by a wrongdoer that their wrongful act could result in loss to a divorced spouse.

**3. Should persons dependent on the deceased for a defined period of time be included as eligible claimants in the *Family Compensation Act* and, if so, for what period?**

We believe that persons dependent on the deceased should be permitted to claim for loss of support. However, we are concerned with an arbitrary limitation on the time it might take to qualify as such a claimant. In PEI, the legislation sets an arbitrary three-year dependency prior to the death. This seems unjust as a clear dependency relationship could be established in three months, whereas less-deserving dependency claims might stretch more than three years.

In our view, there should not be any limit, but there should be a requirement of proof as to the dependency itself and the length of time that the deceased would have likely continued to provide support.

**Re: Inclusion of Non-Fatal Injuries**

**4. Should non-fatal injuries be included in the *Family Compensation Act*? If so, should the types of recovery be identical for fatal and non-fatal injury cases?**

Non-fatal injuries are already adequately addressed in tort law and in our view do not need to be included in the *Family Compensation Act*, specifically. The danger we see in including such claims in the *Family Compensation Act* is that the types of claims will be ‘frozen’ in the wording of the legislation without the advantage of incremental judicial policy advancements to reflect unforeseen situations or social development. A case in point is indeed BC’s current *Family Compensation Act*, which has not evolved since *Lord Campbell’s Act* of 1846! It is doubtful that Lord Campbell envisaged such things as same sex marriages when he crafted the *Act* we essentially adopted. Our fear is that legislators often have less courage than the Courts in making just, but controversial, changes in the law.

We believe the *Family Compensation Act* should allow the types of recovery permitted by Courts in non-fatal accidents as an essential part of its reform and updating. To the general public, and many lawyers, there is not any principled justification for refusing non-pecuniary or punitive damages in cases of wrongful death. Indeed, it has been a longstanding and terrible joke among the general public even vaguely familiar with the injustice of the current *Act*, that ‘if you hit someone in a car, you are best to back up and ensure they are dead’ to minimize the civil claims against you. This terrible situation applies most obviously in the death cases of children, who have virtually no value under the current *Act*. Members of the public are always shocked to find that it is simply uneconomic to seek redress against a wrongdoer in the case of death of their children, a loss that most of us find as enormous as catastrophic injury to ourselves.

The *Act* should specifically permit claims for disability and medical treatment arising as a result of grief or depression over the wrongful death to immediate family of the deceased. Most of the public would be shocked that judicial interpretation of our *Act* does not permit recovery, from the person who wrongfully caused the death, for anti-depressant medication

necessary for a spouse in order to cope with the tragic loss. As between the wrongdoer and the innocent surviving spouse, there is not any justification in law or morality for the latter bearing the costs of the wrongful act. In cases of wrongful death, the loss is often sudden and frightening to the surviving spouse, whereas in most cases of natural death, there is a more often an opportunity to prepare for the loss and thereby begin to mitigate the grief reaction.

Perhaps the greatest injustice is the judicial interpretation of the *Act* to exclude any claim for non-pecuniary loss. There is not any justification for denying such a claim to the surviving family members. What is justifiable is their grief and shock, not only over the death itself, but the senseless manner in which it might have occurred. This is often more debilitating than the pain and suffering incurred by many accident victims who survive a car crash. It is particularly unjust to refuse any effective redress for the loss of a child as a result of the negligence of another, even when that negligence approaches criminal culpability which should draw punitive damages.

With regard to punitive damages, one of the goals of tort law is to punish unjust actions civilly which are not addressed by criminal law and to provide a deterrent to the unlawful conduct. This goal is not met in the current *Act*, where punitive damages are permitted against a wrongdoer for egregious wrongs if the victim survives, but are not permitted if the victim dies. Street-racers, or criminals avoiding apprehension, or doctors performing recklessly dangerous surgeries without informed consent, are protected from civil consequences if they kill someone, but not if their victims survive. Rhetorically, we ask: What kind of message is that sending to those wrongdoers? In many of these cases, the conduct is just short of criminal liability and, as a result, there are not any consequences at all. Again, this is shocking to the general public and ought to be shocking to our social conscience – and to those who shape, and indeed draft, public policy.

It is our view that non-pecuniary and punitive damages should be specifically permitted to the surviving family members, including siblings. It would not be available to the divorced spouse of the deceased or others more remotely connected, albeit dependants. The damages should not be capped in any way except as the judiciary sees fit after experiencing the assessment of these damages on a case-by-case basis. We do not see why there would be any more difficulty assessing these damages than assessing damages to surviving victims for pain, suffering and loss of enjoyment of life.

Re: **Damages**

- 5. Should claims for damages for loss of love, guidance and affection be explicitly permitted under the *Family Compensation Act*? If claims for damages for a loss of love, guidance and affection are included in the *Family Compensation Act*, should the language be updated to make it clear that the compensation for loss of love, guidance and affection would be compensation for a financial loss?**

**6. Should claimants other than children be eligible to claim for compensation for lost love, guidance, and affection?**

Assuming general damages are permitted under the *Act* as we propose, this could be included as a category of non-pecuniary damages, although it should be explicitly included as an example of non-pecuniary damages, in addition to grief, depression, and shock.

In the event that non-pecuniary damage claims are permitted, the *Act* should also permit pecuniary claims such as the expense of medical treatment to mitigate against those adverse effects of the wrongful death, and the inability to work while the survivor copes with the loss.

In all cases, if the types of damages recoverable are described to ensure that the courts are directed to consider them, there should be a clause following to the effect “and such other losses and expenses as the court considers just.” Regrettably, it may be necessary to describe losses specifically recoverable in addition to a more expansive phrase, because despite the fairly expansive language in the current *Act*, the courts have not allowed even pecuniary loss to surviving family members to treat such injuries as depression and grief caused by the wrongful death.

**7. Should claims of compensation for quantifiable costs associated with grief be included in the *Act*?**

As with a previous response, we do not see any principled reason why items such as the cost of grief counselling, time off from work or expenses such as anti-depressant medication should be borne by the surviving family members when it was caused by the wrongdoer. The survivors in proximity to the deceased should include the immediate family, as a minimum. They are in a very real sense the victims of the wrong. They should not be compelled to cover the costs of expenses that never would have been incurred had the wrongful act, which led to the death of their family member, not occurred.

We do not support a compensation scheme in this regard that provides fixed, limited benefits to the victims in these cases. Strongly, we support individual access to the courts, including to juries, to determine a remedy suitable for the individual impacted by the wrongdoing. We fear that an automatic payment system would turn into a heartless bureaucracy, benefiting the least deserving at the expense of the truly deserving. We have confidence in the courts to strike the appropriate balance of fairness between the victim and the wrongdoer, on a case-by-case basis.

**8. Should the *Act* allow claims for non-pecuniary damages and, if so, should the amount of recovery be specified or limited in the *Act*?**

We believe that non-pecuniary damages should be permitted for reasons set out in previous answers. We oppose, strongly, a statutory limitation of the amount of damages and strongly support a case-by-case analysis by the courts rather than an arbitrary amount set for each claimant, regardless of merit.

Setting arbitrary amounts to apply in any case is unjust to both the wrongdoer and the victim. It overcompensates the undeserving at the expense of the deserving. For example, a family member could be so alienated from the deceased that they deserve nothing from a jury of their peers, whereas a loving spouse or child could be devastated by the loss to the extent of incapacity. Those situations are not comparable and they lead to disrespect for the law if treated equally.

We do not support a social welfare scheme or a workers' compensation type of administration. Justice should award only those deserving and only where the loss arises out of a wrong. In this and other ways, the common law has inherent checks and balances to avoid excessive or deficient compensation.

## **9. Should the *Act* allow claims for punitive or exemplary damages?**

We reiterate our strong support for a provision in the *Act* that permits claims for punitive damages as a way of providing a justifiable deterrent to both the wrongdoer and those of like-mind and to suppress conduct which might be reckless or morally outrageous but is not punishable by criminal law.

In addition, there are some cases which may attract relatively modest pecuniary loss and, as a result, become an acceptable cost of doing business to those unscrupulous enough to put others repeatedly at risk. These cases can only be addressed adequately through a substantial award of punitive damages.

There is not any legal or moral justification for the difference in treatment between punitive damage claims, often from an identical act, where the victim survives rather than dies. It is illogical to support such claims in wrongful injury when and where we deny them in the event of wrongful death.

## **10. Should the *Family Compensation Act* allow claims for additional financial costs incurred by third parties that result from the death of a loved one?**

We assert that it should be left to the courts to develop, on a case-by-case basis, which costs are recoverable by a limited class of third parties, including the immediate family - siblings, parents and children. To be specific, medication, grief counselling and treatment expenses to deal with the loss or shock should be permitted, in addition to claims for loss of income to those who the wrongdoer could have reasonably foreseen being impacted by the wrongful act, and who are rendered disabled by grief, shock or loss of emotional support.

All expenses should only have such limits as are imposed regularly in our courts with respect to reasonableness for non-fatal accident claims.

TLABC is grateful to the Civil and Family Law Policy Office and the Justice Services Branch of the BC Ministry of Attorney General for undertaking a consultation in this regard. A full and fair process toward effective change in legislation is wholly supported by our association.