COALITION AGAINST NO-FAULT IN BC

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Family Compensation Act Reform
c/o Civil and Family Law Policy Office
Justice Services Branch
British Columbia Ministry of Attorney General
PO Box 9222 Stn Prov Govt
Victoria, B.C. V8W 9J1

sent by e-mail to: CFLPOFamilyComp@gov.bc.ca
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To: Attorney General Wally Oppal, Director Nancy Carter and Ministry Staff,

Re: **Response to Consultation on *Family Compensation Act* Reform**

> The Coalition Against No-Fault (CANF) submits the following in response to the Government of British Columbia's consultation on *Family Compensation Act* reform. CANF elected to respond in the form of a narrative rather than provide a point-by-point response to the 12 questions set out for submission online. CANF chose to respond this way due to a concern that the Ministry's discussion paper, along with the 12 questions, will fail to take this consultation far enough. That is, CANF contends that new and vastly improved wrongful death legislation needs to be enacted, instead of merely having the existing *Family Compensation Act* adjusted or tweaked.

In short, CANF supports restoration, preservation, and protection of the dignity of the individual. To that end, CANF supports tort principles and their application to the assessment of damages in all civil actions.

CANF opposes restrictions on the assessment of damages which prevent innocent victims of wrongdoing from obtaining a full measure of justice. Such restrictions include reductions in damages based on caps or deductibles, as well as denial of damages based on the category of victim or type of loss. Such restrictions impair restoration of the dignity of the individual by providing only partial justice, and often no justice, in the event of loss.

Our coalition supports the view that the seeking of justice is a primary function of society. Therefore, it is the duty of government to enact legislation which corrects errors in Common Law that lead, or have led, to injustice.

Historically, errors in English Common Law led to an unjust departure in principle between assessments of damages in injury cases and assessments of damages in death cases. Attempts by 19th-century legislators to correct these errors were inadequate and might have been shaped by special interests rather than principle. In matters involving wrongful death, English Common Law has been imported and blended with older inadequate legislation. CANF opposes these errors in law, particularly because they grant civil immunity to wrongdoers (tortfeasors) based upon the death of their innocent victims. Instead, CANF advocates in favour of wrongful death legislation which clears the way for finders of fact to assess damages in the event of wrongful death, based upon principles parallel to those used to assess damages in injury cases.

A plausible theory for the divergence in principle between injury and death cases is rooted in the influence of the old British Felony Merger Doctrine. By this doctrine, as the punishment for murder was execution of the felon together with forfeiture of their property to the Crown, nothing remained for recovery from the wrongdoer by way of a civil action for damages. As a result, civil actions under that scenario were extinguished.

Questions as to whether the right of action in death cases was lost or merely suspended, or whether the restriction extended to non-felonious death, were erroneously settled in *Baker v. Bolton* (1808) 170 Eng. Rep. 1033. In that case, the plaintiff's wife had been killed in a stagecoach rollover. Nevertheless, a statement of law, which has been blindly followed ever since, established that there is not any right at Common Law to recover civil damages for the wrongful death of a person. From there, we have the legal hole in which activities that resulted in a person's injury would result in a civil remedy, but activities that resulted in a person's death would not.

The harsh consequences of the Common Law rule should have been dealt with legislatively by simply abrogating the authority of *Baker v. Bolton* and eliminating the divergence in principle between injury and death cases. Instead, in 1846, England adopted the *Fatal Accidents Act*, more commonly referred to as *Lord Campbell's Act*. Back then, the expansion of railways had led to an increase in accidental deaths. Reform was called for and required. However, the political clout of the railway barons was significant. As a result, the legislation was watered-down, permitting recovery only for economic loss and only to a limited class of familial dependants. Some have stated, facetiously or otherwise, that railcars were designed to have passengers sleep with their heads toward the front of the train, so they would be killed rather than merely injured in a derailment.

The watered-down English legislative scheme was largely adopted in each Canadian province. Through the years, not one province has done anything more than tinker with its provisions.

The BC Ministry of Attorney General's Green Paper suggests entirely new wrongful death legislation may be in order to replace the current *Family Compensation Act*. However, the paper then goes on to pose a series of questions as to which types of claims for damages should be permitted. Our coalition is concerned that this approach will lend itself toward a policy direction seeking some alterations but not significant reform. If justice is the aim but subsequent legislative changes miss the mark, the exercise is at risk of being next to meaningless. We make this assertion because there is not any basis for compromise when it comes to civil rights. And it

would be inexcusable to leave an imbalance of rights between individuals who suffer a wrongful injury and those who suffer due to a wrongful death. Instead, it remains CANF's position that meaningful reform would entail enacting a wrongful death act which corrects the divergence in principle between damages for wrongdoing leading to injury and wrongdoing leading to death.

By way of this consultation process, CANF seeks a result in which wrongdoers are held responsible for all damages they cause. Responsibility and accountability of individuals are key to this position. Immunity for those who cause harm cannot be justified, whether the immunity is partial or total. If only exploring whether non-economic damages should be allowed and to what degree, the scope is limited to answering only if wrongdoers should continue to be protected and, if so, to what extent. Instead, a starting point for meaningful reform would be an abrogation of the Common Law ruling in *Baker v. Bolton*, as mentioned. This would also call for amendment of ancillary legislation, such as the *Estate Administration Act*.

Judges and juries should be at liberty to assess damages against wrongdoers as they see fit, with respect to each situation as it presents itself and regardless as to whether the tort led to injury or death. There is not another way for the dignity of the individual to be restored, preserved and protected.

It is not helpful to enter into a policy debate about the cost of grief or solace. The facts of each individual case merit proper attention. Conversely, imposing a compensation template takes away from recognizing the uniqueness of the life that a wrongdoer has terminated.

It is not the place of any legislature to establish a one-size-fits-all dollar figure in wrongful death cases, nor is it practical to set codes with criteria. Each case must be decided on its own merits and with respect to all issues, including non-economic damages, punitive damages and matters regarding the remoteness/entitlement of the claimants.

It is impossible to place perfect dollar amounts on death cases, just as it is impossible to do so in injury cases. However, it is clearly unjust to prohibit judges and juries from doing their best to make dollar-figure determinations simply because it is a difficult task to carry out.

Consider a high-profile case from the United States, where the Goldman family would not have had access to justice against OJ Simpson, by way of a civil action, had the murder of their son taken place in British Columbia rather than California.

Immunity for the wrongful deaths of children, the disabled and the elderly in our province should no longer be allowed or at all tolerated. For example, it is horribly unjust that a street-racer who kills a child should be protected from civil action simply due to the inadequate way our law is structured. In injury cases, the existing parameters are more than adequate to address the concerns of insurers who must accept the conduct, as well as the premiums, of policyholders. It is always open to insurers to argue that conduct is not adequately regulated in order to ensure or encourage safety.

Our laws should seek to reduce instances of wrongdoing by encouraging responsible behaviour across the board. The concept of accountability – in concert with obligations following a disastrous event – seems to be a principle that is already appreciated by our elected officials. For example, BC Premier Gordon Campbell was reported (CBC, July 26, 2007) to assert that the people responsible for the recent oil spill in Burnaby would pay the cleanup costs.

Success can be assessed when looking at jurisdictions that choose to deal with harm-causing matters thoroughly. For example, holding a cell phone while driving will become illegal in California in 2008, but dealing with the issue does not seem to be on the horizon in most other jurisdictions. And responsible behaviour should not only be the expectation for end-users of products but also for manufacturers. Consider, for example, that the horsepower of cars, SUVs and trucks has risen at an alarming rate. Today, the average horsepower of passenger cars is nearly twice what it was 20 years ago. Also, many of the new family cars are as ridiculously overpowered as sports cars. Case in point, the acceleration speed of a Corvette made 10 years ago can be obtained in a 2008 Toyota Camry with a 268hp engine, i.e. from zero to 60 in 5.8 seconds. The horsepower war within the auto industry is shamelessly marketed to youth, as cigarettes once were, providing another stark indication that responsible business practices cannot be counted upon. Therefore, it is imperative that our laws provide proper remedies in response to bad behaviour, recklessness and other harmful events.

In Canada, our hospital/medical system provides additional reasons to curb harmful practices and attitudes. The Canadian Institute for Health Information recently estimated that 24,000 people die in Canadian hospitals annually from in-hospital adverse events. Disturbingly, a lame tort system which offers immunity in wrongful death cases has contributed to this disaster.

Black humourists among insurance lawyers defending auto-crash cases are known to joke that if a driver runs down a pedestrian, the driver should back the car up and finish the victim off. With the same perverse reasoning, insurance lawyers defending doctors and hospitals joke that their clients should bury their mistakes. Though it is understood that honourable professionals in any field would not really wish harm, let alone fatal harm, on innocent people, it is clear that the failings of our current laws are the cause of such perverse statements.

A move to aggressively approach issues of professional conduct, as well as behaviour among individual citizens, will save lives and money. Sadly, nothing seems to happen quickly unless there is a financial imperative. Nevertheless, and to be clear, CANF wants proper care to be taken and made regardless of the motivation. It is hoped that harm-prevention is primarily the result of a desire and willingness to take proper care and encourage mutual respect among people. However, if some actions and attitudes cannot be changed due to a sense of responsibility alone, a fear of litigation should indeed exist, though this can only be the reality in British Columbia if our laws and legislators make it so.

CANF reiterates that the rule in *Baker v. Bolton* should be abolished/abandoned and we propose an untying of the hands of justice along the following lines (as outlined on the next page and in previous correspondence with the BC Ministry of Attorney General).

A. The court, notwithstanding any other damages that may be awarded, may award damage 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.

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