

DAMAGE AWARDS FOR WRONGFUL DEATHS OF YOUNG CHILDREN

Historically in Canada when an individual died, there was no cause of action for losses suffered by those who knew the individual.¹ This common law rule was replaced by fatal accidents legislation designed to compensate the deceased's dependents for the losses they suffer as a result of the death. Generally, the purpose of this legislation is to put the dependents in the position they would have been in had the victim not been wrongfully killed. The claimants are often called "dependants" by judges and writers, and the value of the claim is often called "lost dependency" or "lost support."² These phrases, however, are not always apt as a claim may be made by a relative named in the statute for losses incurred by death that could not, without straining the language, be described as lost dependence or lost support.³

The first Act that allowed relatives of people killed by the wrongdoing of others to recover for damages was commonly referred to as *Lord Campbell's Act*.⁴ Actions were brought in Ontario under *Lord Campbell's Act*, such as *Ricketts v Markdale (Village)*⁵ where a seven-year-old child died due to the defendant's negligence. The court awarded \$400 (approximately \$13,460 in 2022) to the parents.⁶ Ferguson J briefly looked at evidence that prior to the accident the child lived at home with his parents and performed valuable services of various kinds for them, and with increasing years his services would have been still more valuable to them.⁷ However, Ferguson J stated it did not seem to be necessary to show evidence that any pecuniary benefit had been actually received from the deceased.⁸ Robertson J also briefly looked at the evidence that the child helped out at home and the parents had a reasonable

¹ *Baker v Bolton* (1808), 1 Camp 493 (HL).

² SM Waddams, *The Law of Damages*, (Toronto: Thomson Reuters, 2021) at §6.1.

³ *Ibid* at §6.1.

⁴ *Fatal Accidents Act 1846* (UK), 9 & 10 Vict, c.93.

⁵ (1900), 31 OR 610 (H Ct J).

⁶ *Ibid* at 626.

⁷ *Ibid* at 617.

⁸ *Ibid* at 625.

expectation that he would have been a help and assistance to his parents for many years to come.⁹

Ontario started to create its own legislation modeled after *Lord Campbell's Act*.¹⁰ In one case, \$300 (approximately \$9,361 in 2022) was awarded to the parents of a four-year-old child after the defendants negligently killed him.¹¹ Meredith CJ said that although he had not found any case in which an award of damages has been made in the case of a child so young as the deceased child in this case, it was impossible to say that, as a matter of law, his being of such tender years precluded the plaintiff from obtaining the benefit of the Act.¹² Some of the justices were hesitant to award damages for a child so young due to the fact that the damages recoverable under the Act were to be given in respect of some pecuniary loss only. However, it was settled law that pecuniary benefit or advantage need not have been actually derived by the beneficiary previous to the death. The younger the child is, the more difficult it is to determine whether there is such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money and to estimate the damages which should be awarded.¹³ The evidence in the case was that the infant killed was a bright and capable boy, both mentally and physically.¹⁴

In *Piper v Hill*, an award of \$1,200 (approximately \$20,162 in 2022) was reduced to \$400 (approximately \$6,720 in 2022) by the appellate court for the parents of a six-year-old boy after the defendant negligently killed him.¹⁵ The court reduced the award as they found nothing in the evidence to suggest that the parents had any expectation of receiving support from the child.

Maclaren JA cites another English case's discussion of the death of a young child, "He might or

⁹ *Ibid* at 629.

¹⁰ See *An Act Respecting Compensation to the Families of Persons Killed by Accident and in Duels*, RSO 1897, c. 166; *Fatal Accidents Act*, RSO 1914, c. 151.

¹¹ *McKeown v Toronto RW Co* (1909), 19 OLR 361 (CA).

¹² *Ibid* at 369.

¹³ *Ibid*.

¹⁴ *Ibid* at 374.

¹⁵ (1922), 53 OLR 233 (SC (AD)).

might not have turned out a useful young man. He would have earned nothing till about sixteen years of age. He might never have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other... The whole matter is beset with doubts, contingencies, and uncertainties... Upon the facts of this case the plaintiff has not proved damage either actual or prospective.”¹⁶

The rule in these earlier cases was that a reasonable expectation of pecuniary benefit was necessary. Accordingly, there were many cases in which claims were dismissed as revealing a mere speculative possibility of benefit.¹⁷

Current fatal accidents legislation varies by province and, therefore, recovery varies by province. In Ontario, the legislation governing this is the *Family Law Act*.¹⁸ Section 61(1) states:

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.¹⁹

Section 61(2) states that the damages recoverable in a claim under subsection (1) may include, (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.²⁰ This implies that if a child dies, their parents, grandparents, brothers and sisters are entitled to recover, and one of the damages recoverable is the loss of guidance, care and

¹⁶ *Ibid* at para 11.

¹⁷ See *Pedlar v. Toronto Power Co* (1914), 30 OLR 581 (SC(AD)) (child of 2); *Cashin v. Mackenzie*, [1951] 3 DLR 495 (NSSC) (child of 5); *Craig v. Canadian Northern Pacific Railway Co*, [1934] 1 D.L.R. 484 (BCSC) (child of 6).

¹⁸ RSO 1990, c. F.3 [FLA].

¹⁹ *Ibid* at s 61(1).

²⁰ *Family Law Act* RSO 1990, c. F.3, s 61(2).

companionship. Note that aunts and uncles have tried to make claims under the Act and have been denied.²¹

Do the cases brought under Ontario's legislation tend to follow suit with the historical cases? In some cases, awards have been made without proof of any definite expectation of financial benefit.²² Other cases have insisted, in the absence of such proof, that there should be no award.²³ With reference to the death of young children, it was said in one case that the claim will usually be "pressed to extinction by the weight of multiplied contingencies", but several Canadian cases have made awards.²⁴

When awarding damages claims for the deaths of slightly older children, courts tend to point to special evidence to award high damages. For example, in *Mason v Peters*,²⁵ the Ontario Court of Appeal upheld awards of \$45,000 (approximately \$156,731 in 2022) to the mother and \$5,000 (approximately \$17,414 in 2022) to the sister of an eleven-year-old boy. This exceptional award was the result of the unusually close bond between the disabled mother and her son and the probability that he would have provided her with emotional and financial support throughout her life. In *To v Toronto (City) Board of Education*,²⁶ \$100,000 (approximately \$154,913 in 2022) was awarded to each parent and \$50,000 (approximately \$77,456 in 2022) was awarded to the sister of a fourteen-year-old boy. This was because he was an excellent student, neither of his parents spoke English so he helped them a great deal with their business and personal correspondence and his relationship with his sister was described as "almost paternal." In *Moore v 7595611 Canada Corp*, the Court of Appeal upheld an award of \$250,000 to each parent for the

²¹ See *Zarei v Iran*, 2021 ONSC 8569.

²² Waddams, *supra* note 2 at §6.8.

²³ *Ibid.*

²⁴ *Ibid.* See *Guitard v MacDonald* (1970), 14 DLR (3d) 252 (NBSC App Div) (eight-year-old son); *McKeown v Toronto Ry Co* (1908), 19 OLR 361 (CA) (four-year-old child); *Courtemanche v McElwain*, [1963] 1 OR 472 (CA) (seven-year-old).

²⁵ (1982), 39 OR (2d) 27 (CA).

²⁶ (2001), 55 OR (3d) 641 (CA).

loss of care, guidance and companionship when their twenty-four-year-old daughter died.²⁷ The parents each had strong relationships with their daughter and she provided them with love, affection, emotional support, and more.²⁸

When it comes to very young children, there is a lack of the types of evidence the court can consider to justify a high damage award. This begs the question of whether there is consistency in principle among damage awards for these kinds of deaths.

In *Sandhu (Litigation Guardian of) v Wellington Place Apartments*,²⁹ the court upheld an award of \$100,000 (approximately \$132,495 in 2022) to each parent and a brother in respect of severe injuries to a two-year-old child. The court said that while the awards were high, they were well supported on the evidence due to the special closeness of the family.³⁰ In the recent case *Rodrigues v Purtill*,³¹ two parents were awarded \$130,000 (approximately \$148,779 in 2022) each in damages for the loss of care, guidance and companionship for the death of their five-month-old son. The judge considered that the relationship was short, but significant and his loss over their lifetime was significant.³² He was to be their last child for them and represented for them the opportunity to educate and enjoy the love, comfort and society they expected had he lived.³³ Both of these cases pointed to the close relationships between the child and the claimants when awarding damages.

CONCLUSIONARY THOUGHTS

In the older cases, we typically saw one damage award to be split between the parents. In modern cases, we now see much larger awards being given to *each* parent. Even after accounting

²⁷ 2021 ONCA 459 [*Moore*].

²⁸ *Ibid* at para 32.

²⁹ 2008 ONCA 215.

³⁰ *Ibid* at paras 36-37.

³¹ 2018 ONSC 3102, *aff'd* 2019 ONCA 740.

³² *Rodrigues v Purtill*, 2018 ONSC 3102 at para 105.

³³ *Ibid*.

for inflation, the damage awards given out in the 21st century are much larger than earlier awards. In older cases, we also saw that a reasonable expectation of pecuniary benefit was necessary, and the awards given sought to recover this pecuniary loss. Now we see the loss of guidance, care and companionship being compensated. Each case must be considered in light of the evidence material to the guidance, care and companionship claims in that case.³⁴ This case-by-case approach to the quantification of damages for loss of guidance, care, and companionship will necessarily result in damages awards that will fluctuate. Yet, we do see cases where parents are awarded large damage awards for deaths of very young children, which have less evidence as to the guidance, care and companionship provided by the child than cases where older children die. For example, the damage award in *Rodrigues* is much higher than the other damage awards discussed with very little reasoning as to *why*. The parents in that case would have been unlikely to be able to recover if the case had occurred in the early 1900s. These could be the first pieces of evidence of a new trend in law to award higher damages for the wrongful deaths of children, without necessarily requiring “special” evidence.

³⁴ *Moore*, *supra* note 27 at para 28.