



ABC'S of Family Law Damages

Right of Dependents to Sue in Tort



61 (1) 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. R.S.O 1990, c. F.3, s. 61 (2)

(2) The damages recoverable in a claim under subsection (1) may include,

- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
- (b) Actual funeral expenses reasonably incurred;
- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- (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. R.S.O 1990c. F.3, s. 61 (2)

Contributory Negligence

- ◆ (3) In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed. R.S.O. 1990, c. F.3 s. 61 (3)

Offer to settle for global sum

- ◆ 62 (1) The defendant may make and offer to settle for one sum of money as compensation for his or her fault or neglect to all plaintiffs, without specifying the shares into which it is to be divided. R.S.O. 1990, c. F. 3, s. 62 (1)

Apportionment

- ◆ (2) If the offer is accepted and the compensation has not been otherwise apportioned, the court may, on motion, apportion it among the plaintiffs. R.S.O. 1990, c. F. 3, s. 62 (2)

Payment before apportionment

- ◆ (3) The court may direct payment from the fund before apportionment. R.S.O. 1990, c. F. 3, s. 62 (3)

Payment may be postponed

- ◆ (4) The court may postpone the distribution of money to which minors are entitled. R.S.O. 1990, c. F. 3, s. 62 (4)

Assessment of damages, insurance

- ◆ 63 In assessing damages in an action brought under this Part, the court shall not take into account any sum paid or payable as a result of the death or injury under a contract of insurance. R.S.O. 1990, c. F. 3, s. 63

Who can Claim

(PART III Support Obligations)

- Spouse
- Children
- Grandchildren
- Parents
- Grandparents
- Brothers
- Sisters

STEP-FAMILY

- Locos Parentis
- Kerelechuk Case

Objective

1. Actual Expenses
2. Funeral Expenses
3. Reasonable Allowance for Travel Expenses
4. Nursing, Housekeeping, or other services
 - i. Reasonable allowance for loss of Income; OR
 - ii. Value of the services



Subjective

- 61 (2)(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.

R.S.O 1990, c. F.3, s. 61 (2)



DAMAGES for the LIVING

Changes

- ◇ Relationships changes
- ◇ Activity changes
- ◇ Relationship dynamics
- ◇ Loss of independence
- ◇ Care guidance
- ◇ Companionship

To Sue or Not To Sue

- ◇ Consent
- ◇ Is there a loss
- ◇ Auto Deductible
- ◇ Court Approval
- ◇ Parents in childhood Sexual Assault



F.L.A. IN FATALITIES

Loss of a Child



· *Moore v. 7595611 Canadian Corp.*, 2021 ONCA 459

· *To v. Toronto (City) Board of Education*, [2001] O.J. No. 3490 (ONCA)

· *Fiddler v. Chiavetti* [2010] O.J. No. 1159 (Ont. C.A.)

· *Osman v. 629256 Ontario Ltd.* [2005] O.J. No. 2689

· *Kerelchuk v. Kerelchuck* unreported



FATALITIES: LOSS OF A PARENT

- ◆ *Vokes Estate v. Palmer (Litigation Guardian)* [2011] O.J. No. 3935, Affirmed 2012 ONCA 510
- ◆ “*Social Justice: Law should offer real compensation to children who lose parents*”; Law Times, 15 October 2012
- ◆ *Wilson v. Beck*, 2011 ONSC 1789

- ◆ *Wright (Litigation Guardian of) v. Hannon* [2007] O.J. No. 53
- ◆ *Kerelchuk v. Kerelchuck* unreported

FATALITIES: LOSS OF A SIBLING



◆ *Bunting v. Li*, [2000] O.J. No. 3490 (Ont. C. A.)

◆ *MacDonald Estate v. Duncan* 2015 ONSC 7135

◆ *To v. Toronto (City) Board of Education*, [2001] O.J. No. 3490 (ONCA)

◆ *Kerelchuk v. Kerelchuck* unreported

◆ *Fiddler v. Chiavetti* [2010] O.J. No. 1159 (Ont. C.A.)

SOLE DEPENDANCY, CROSS DEPENDENCY, LOSS OF HOUSEKEEPING SERVICES etc.

- ◇ In a fatality case, the goal is to provide the survivors sufficient funds to allow them to enjoy the same standard of living they would have enjoyed had the deceased lived. From a dollars and cents point of view, we do this by looking at the income the person would have earned that would be available to the family, and the household services that he/she would have provided for the family.
- ◇ As some of a person's earnings would be spent solely to benefit themselves (i.e., some food, clothing, sports, etc.), only a portion is truly available to the family. This portion/percentage available to the family is the 'dependency rate'. That is, the dependency rate is the portion of the deceased's income that would have benefited the surviving spouse and dependent children.
- ◇ Realistically, the dependency rate would be different for every family. To calculate the rate for a specific family would require a detailed analysis of the family's income and expenses. Obviously, this would be a very time consuming, difficult, and costly analysis. Also, many/most families would not have detailed records of their spending to really do this properly. Fortunately, there are statistics available, and rules of thumb have been accepted in the courts. Historically, this has been that 30% of a person's income is spent on themselves and 70% is available to the family. (I note that Christopher Bruce's text "Assessment of Personal Injury Damages", sixth edition currently suggests 28% and 72%. In our calculations, we typically still use the 30%/70% numbers). These rates are adjusted for each dependent child. The rule of thumb is 4% per child. Therefore, the 30/70 rule of thumb would become 26/74. (Note - we typically calculate the 4% separate from the 70%.) Rule of thumb is to allow for up to 3 dependent children.
- ◇ To determine the survivors' loss of dependency income, we then apply the appropriate dependency rate to the deceased's expected after-tax earnings. After-tax earnings are used presumably since it is only after-tax earnings that would be available to the family.

SOLE DEPENDANCY, CROSS DEPENDENCY, LOSS OF HOUSEKEEPING SERVICES etc. - continued...

- ◆ In a family where there is only one breadwinner, we use the “sole dependency” method. That is the deceased was the family’s sole source of income. Assuming the deceased’s after-tax net income was \$100,000 per year, and using the rule of thumb of 30/70, the claim under the sole dependency method would be \$70,000 per year ($\$100,000 \times 70\%$) for the surviving spouse, plus an additional 4% (or \$4,000) for each dependent child.
- ◆ The ‘cross-dependency’ or ‘modified sole dependency’ methods come into play when there are two breadwinners (i.e. both spouses) in the family.
- ◆ The cross-dependency method is based on the assumption that each spouse contributes to the family (including to the other spouse). Therefore, some of the surviving spouse’s income was spent on the deceased. This expenditure would no longer be required, and thus “saved” by the surviving spouse.
- ◆ The cross-dependency calculation is to add the two spouses’ net incomes together, take 70% of that total, and then reduce that amount by 100% of the surviving spouse’s net income. This is because, 100% of the survivor’s income is still available to the family. Assuming the deceased’s net income was \$100,000 and the survivor’s was/is \$25,000, the calculation would be:
$$= 100,000 + \$25,000 = 125,000 \times 70\% = \$87,500 - \$25,000 = \$62,500$$

The dependency loss would be \$62,500 per year.
- ◆ However, there are some issues and concerns with this method. For example, what if the lower income spouse is the deceased. The calculation would now be:
$$= 100,000 + \$25,000 = 125,000 \times 70\% = \$87,500 - \$100,000 = \$(12,500)$$

Therefore, no loss. The surviving spouse is actually better off financially now that the spouse is dead. The courts tend to call this *reductio ad absurdum*. (I guess they still love Latin).

SOLE DEPENDANCY, CROSS DEPENDENCY, LOSS OF HOUSEKEEPING SERVICES etc. – continued...

- ◆ The courts have accepted that in certain cases, rather than use the cross-dependency method, the ‘modified sole’ dependency method is used.
- ◆ In such cases, the sole dependency method is used, but the dependency rate is ‘modified’ to reflect the fact that there is ‘some savings’. The rule of thumb is to modify the dependency rate to 40%/60%.
- ◆ Based on this, with the \$100,000 deceased, the calculation of loss would be:
 - = \$60,000 (\$100,000 x 60%), with no reduction for the surviving spouse’s income.
- ◆ But, if the lower income spouse died, there is still a loss. The calculation would be:
 - = \$15,000 (\$25,000 x 60%), with no reduction for the surviving spouse’s income.



SOLE DEPENDANCY, CROSS DEPENDENCY, LOSS OF HOUSEKEEPING SERVICES etc. – continued ...

Loss of household services

- ◆ The claim for a loss of household services is the attempt to replace the value of the household services that the deceased provided to the family. This would likely be very different in all families. Generally, I believe the surviving spouse is interviewed by a specialist in the area (occupational therapist?) who prepares a report of the services and time spent (possibly with estimated cost values) by the deceased for the family. This is then projected into the future and discounted like a future care cost report. If specific data is not available, we can refer to statistics for the ‘average’ time spent by a person in this regard.



Claims Outside of s.61 of the *Family Law Act*



- ◆ Damages for Mental Distress Arising from the Loss or Injury of A Family Member
- ◆ The Case Law
- ◆ Evidence Required for Claim
- ◆ Scope of Damages

Nervous Shock: Witness to the Accident

- ◇ Mother, father and daughter in accident
- ◇ Mother was badly injured, with a substantial part face and head torn away
- ◇ Father had psychiatrist's diagnosis of nervous shock and traumatic neurosis (\$20,000 damages)
- ◇ Daughter had diagnosis of moderate depression and chronic anxiety (\$50,000 damages)

Nervous Shock: Witness the Aftermath



- ◇ *E.R. McLoughlin v. O'Brian*, [1982] 2 All 298
- ◇ Father and 3 children in accident.
- ◇ Mother rushes to hospital.
- ◇ The impact of what she heard and saw caused extreme nervous shock resulting in psychiatric illness.
- ◇ “As regards to proximity to the accident, it is obvious that this must be close in both time and space...Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the "aftermath" doctrine one who, from close proximity, comes very soon upon the scene should not be excluded.”

Nervous Shock: Witness the Aftermath of the Accident

- ◆ *Szeliga Estate v. Vanderheide*, [1992] O.J. No. 2856
- ◆ 2 sisters were in an accident; one was killed and the other severely injured
- ◆ The third sister attended the hospital immediately after the accident to identify the body and suffered PTSD as a result of seeing the body.
- ◆ The proximity analysis was done by the court



Saadati v. Moorhead, 2017 SCC 28

-Issue: is it strictly necessary, in order to support a finding of legally compensable mental injury, for a claimant to adduce expert evidence or other proof of a recognized psychiatric illness?

-Also: Formal, separate consideration of certain dimensions of proximity is not necessary. “temporal”, “geographic” and “relational” considerations might well inform the proximity analysis to be performed in some cases.

-The test is whether there is a “close and direct” relationship which is the hallmark of the common law duty of care.

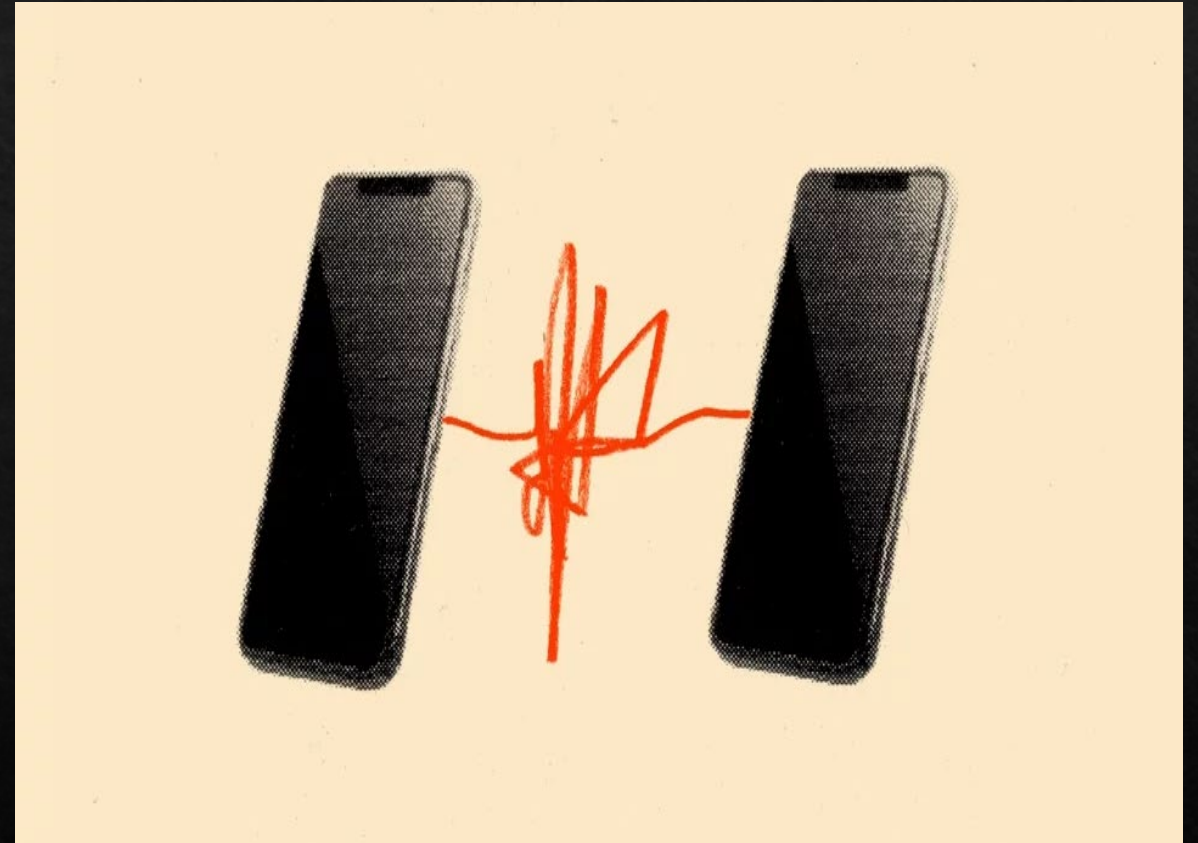
Not A Witness to the Injury or Aftermath?

- ◆ *Snowball v Ornge*, 2017 ONSC 4601
- ◆ Paramedic dies in air ambulance crash.
- ◆ Parents did not witness accident or aftermath.
- ◆ Unsuccessful R. 21 motion brought by defendant.



Witness by Phone?

- ◇ *Labrosse v. Jones et. al.*, 2021 ONSC 8031
- ◇ Daughter was in an MVA and called her mother immediately afterwards
- ◇ Hearing vs. seeing is an artificial distinction which *Saadati* rejected.



Cheryl Ann Yelland, Estate of Gerald Coulson v. Sunrise North Senior Living

- ◇ 2018 Jury case
- ◇ Mother's body was found hanging off her bed, her neck still trapped between her mattress and a device attached to its side called a Halo Safety Ring.
- ◇ Mid-trial ruling- duty owed to son who came to the nursing home and saw the strangulation marks.



Moore v. 7595611 Canada Corp., 2021 ONCA 459

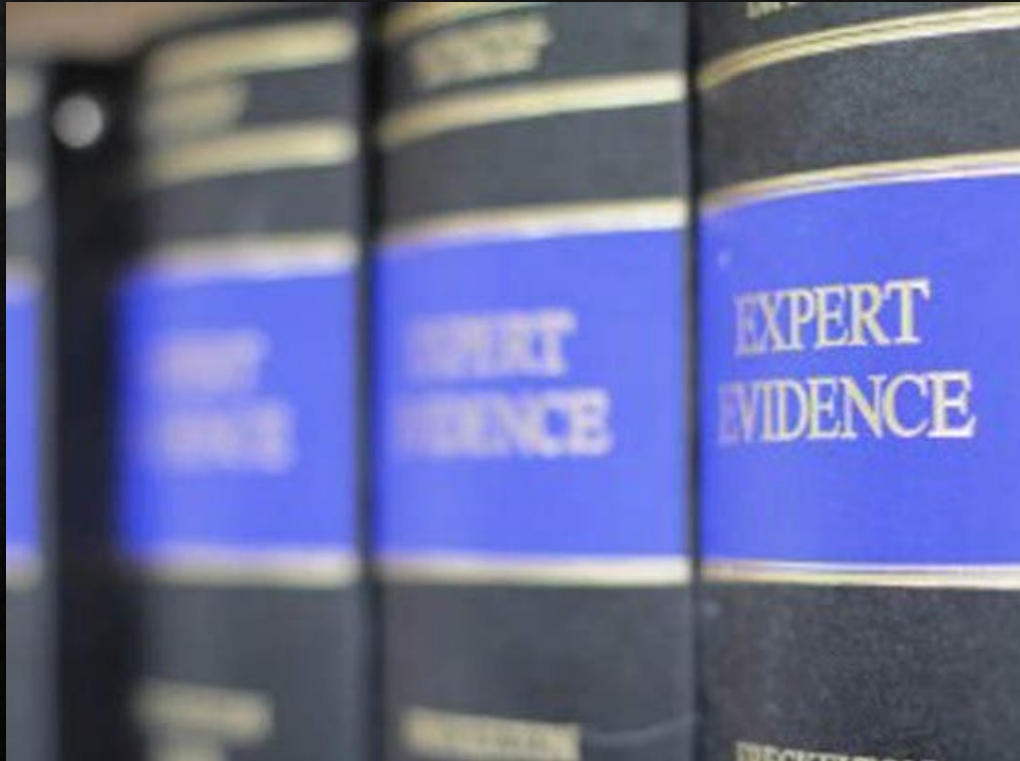
- ◇ 2021 Jury case
- ◇ Daughter burned in apartment fire
- ◇ Parents witnessed seeing their only child with third-degree burns over half of her body, parts of her body disintegrating, and watched Alisha go through cardiac arrest multiple times. Ultimately, the parents had to make the decision to remove Alisha from life support.
- ◇ Parents suffered an injury beyond mere grief at the loss of a child

Evidence Required to Prove a Claim

- ◇ Expert evidence is not required
- ◇ A recognizable psychiatric illness is not required
- ◇ The disturbance must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that come with living in civil society (Saadati)



Evidence Required to Prove a Claim (cont..)



- ◇ Expert evidence is helpful
- ◇ In *Moore* there was clear expert evidence that the mother “suffered a marked deterioration in her mood and daily functionality ... and has also experienced passive suicidal ideation with previous serious contemplation of ending her own life”, while the respondent father “is now experiencing exacerbated PTSD symptoms with persecutory anxiety”.
- ◇ *Sanson v. Paterson* and *Sanson v. Security National Insurance*, 2022 ONSC 2972, showcases the type of evidence needed to prove “invisible injuries”
- ◇ Expert evidence: Litigation experts and Participant experts
- ◇ Lay witnesses: friends, clients, colleagues and her partner about the palpable and dramatic changes in Ms. Sanson following the collision

SCOPE OF DAMAGES



In Moore, the jury made the following damages awards:

1. Mental distress: \$250,000 to each parent;
2. Future costs of care for the respondent father: \$174,800; and
3. Future costs of care for the respondent mother: \$151,200