Risible Compensation for the Dead Child

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The authors review the law that applies in the case of awards in wrongful death actions. Such cases may arise where there has been fatality in a driving case involving impairment and/or negligence. It is the authors' view that there is a need to modernize the law in this area, having regard to the historical development of this area of tort law.

Les auteurs révise le droit applicable dans le cas d'octroi de dommages-interêts dans les poursuites pour "wrongful death". De tels cas peuvent se présenter lorsqu'il y a un accident mortel dans une cause de conduite impliquant des facultés affaiblies et/ou de la négligence. L'auteur soutient qu'il est nécessaire de moderniser le droit dans ce domaine en raison du développement historique à ce sujet du droit de la responsabilité délictuelle.

When death results from the wrongdoing of another, courts and legislatures have provided for compensation that is different from compensation in any other type of tort law. When injuries are suffered as a result of the wrongful act of another, damages may be awarded on both pecuniary and non-pecuniary grounds; when death occurs, damage awards are entirely different. The courts in their early days did not recognize the grief and loss inflicted upon the family as a legal wrong committed by the wrongdoer against the surviving relatives. To overcome this deficiency in judge-made law, legislatures and parliaments enacted wrongful death statutes conferring rights upon certain surviving relatives of a person wrongfully killed to sue the wrongdoer and recover damages. A review of the historical development of this area of tort law demonstrates the antiquated principles that govern awards in fatal accident cases and demands revisitation of these principles by modern day courts.

Canada and Great Britain

Legislative action began with the decision of *Baker v. Bolten*[1] where Lord Ellen Borough held that the death of a human being could not be complained of as an injury. The result was, that until a statute said otherwise, anyone who suffered loss as a result of another could not sue the wrongdoer who caused the death. Lord Ellen Borough did not give any authority for his statement. However, most legal scholars believe the origin of this rule was found in the Felony Merger Doctrine.[2] The underlying policy was that misconduct resulting in the death of another involved the commission of a public wrong, which extinguished all private

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[1]E.R. 1033 (*nisi prius*).

[2]See *Monaghan v. Horn* (1882), 7 S.C.R. 409 per Ritchie C.J.

law remedies as a result of the death. Ritchie C.J. in *Monaghan v. Horn* held that:

> No civil action can be maintained at common law for an injury which results in death. The death of a human being, though clearly involved in pecuniary loss, is not at common law the ground of an action for damages, and therefore until the passing of Lord Campbell's Act 9 & 10 Vic., c. 93, there was in England no right of action for the recovery in damages in respect of an injury causing death.[3]

Ritchie C.J. then went on to quote from *Sherman and Readfield on Negligence*:

> Obviously, the deceased person never would have had a cause of action for his own death; therefore none could survive to his legal representatives, even if the law had allowed, as in fact it did not allow, a cause of action for an injury to the person to survive him. The husband or master of the deceased was not allowed to sue, because the only damage recognized by the law was the loss of service during the lifetime of the servant, and the death of the servant, therefore, worked no injury to the master of which the law could take notice.
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> Whatever may be said of the logic of these arguments, it is certain that the conclusions thus reached formed a settled doctrine of the common law. No one, whether as executor, master, parent, husband, wife, or child, or any in any other right or capacity whatsoever could maintain an action for damages on account of the death of a human being.
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> The first reported case of negligence in which the question arose was before Lord Ellen Borough (*Baker v. Bolten*, 1 Camp. 493) who instructed the jury that the plaintiff, who sued for the loss of his wife's services, could only recover for his loss during her lifetime, although her death was caused by the defendant's negligence.[4]

Chief Justice Ritchie then held, as a result of the long-established principle that the death of a human being cannot be complained of as an actual injury, that such action could only be brought under the provisions of the Ontario statute, which is founded upon the principles in *Lord Campbell's Act*.[5] In *Monaghan*, the plaintiff did not proceed pursuant to the Act, and, therefore, the appeal was dismissed with costs.

Mr. Justice Taschereau, in dissent, outlined his view of the absurd position taken by the English common law by relating what he believed to be the doctrine of law being advanced by the defendants in that case. He held:

> The doctrine contended for by the defendant seems to me, moreover, anomalous

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[3]Ibid. at 420.

[4]Ibid. at 421-22.

[5]Ch. 128, Rev. Stats. Ont.

> and unjust. A widow, for instance, has a minor son who is her only support. A physician, whom she has called to attend him for a slight indisposition, gives him a violent and deadly poison instead of a soothing draught. He dies on the spot, and she is deprived, by the gross negligence of this physician, of the only support for existence she had in this world. That she suffers damages by the loss of her son's services till at least he would have been of age, is undeniable. That this physician is the author of these damages is also clear. That these are her damages, not her deceased son's damages, is as clear. Yet, says the defendant, "this mother would have no action against the physician." And why? because he killed her son instead of disabling him only, or only rendering him ill, say, for a month. "But, just because he killed my son" (would think his mother) "I am entitled to heavier damages." "No", says the defendant, "the law exonerates this physician just because he killed your son. Had he disabled him for a short space of time only, you would be entitled to damages, but as he killed him, though he must admit that you suffered damages, and that he caused you these damages, yet the law says that he is not answerable for these damages.[6]

Until the industrial revolution, wrongful death usually meant death by violence. This was the domain of the highwayman and thief. Even if a murderer was found and arrested, suing him was of little benefit. The murderer was quickly put to death and all of his or her land and personal goods were forfeited to the Crown. With the industrial revolution, however, came highways and factories, and also many deaths caused by negligence in the operation of these new machines. The wrongdoer was no longer a destitute highwayman, but now was a wealthy corporation whose indifference and neglect to the plight of injured workers frequently caused extreme hardship.

In 1846, the English Parliament responded to society's concern by enacting an *Act for Compensating the Families of Persons Killed by Accidents*,[7] more commonly known as *Lord Campbell's Act*. This Act allowed the executor or administrator of a deceased person's estate to bring an action for the benefit of the wife, husband, parent and child of the deceased.

This Act applied only if the deceased could have sued the wrongdoer for damages for the injury itself had death not occurred. The jury could award "such damages as they may think apportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit such action shall be brought," pursuant to section 2.

All Canadian provinces, except Quebec which allows such actions under the French civil law, enacted legislation patterned after *Lord Campbell's Act*. In 1884 the Northwest Territories introduced *An Ordinance Respecting Compensation to*

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[6]Above, note 2 at 444.

[7]9 & 10 Vic., c.93.

the Families of Persons Killed by Accidents.[8] In Saskatchewan, this law has evolved into the current *Fatal Accidents Act*.[9] Section 4(1) and 8(1) of the *Fatal Accidents Act* reads as follows:

> 4(1) Every action shall be for the benefit of the spouse, parent and child of the person whose death was so caused, and except as provided by section 8 shall be brought by and in the name of the executor or administrator of the deceased, and in every action such damages may be awarded as are proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before mentioned persons in such shares as may be determined at the trial.
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> 8(1) If there is no executor or administrator of the deceased, or, there being an executor or administrator, no such action is, within six months after the death of the deceased, brought by the executor or administrator, the action may be brought by all or any other persons for whose benefit the action would have been if it had been brought by such executor or administrator.

The legislatures of Alberta, British Columbia, Nova Scotia, and the Northwest Territories have enacted similar legislation. Section 2 of the Alberta *Fatal Accidents Act*[10] in Alberta, section 3(2) of the British Columbia *Family Compensation Act*,[11] section 5 of the Newfoundland *Fatal Accidents Act*,[12] and section 3(2) of the Northwest Territories *Fatal Accidents Act*,[13] all provide provisions similar to Saskatchewan's *Fatal Accidents Act*. The wording used in all of these statutes is very similar to that found in *Lord Campbell's Act*.

One of the premises of this article is that *Lord Campbell's Act* and all of its descendants up to and including current fatal accidents legislation, does not limit awards of damages in fatal accident cases. The courts may make awards as thought appropriate, apportioned to the injury that resulted in the death. There is no mention in legislation as to whether the damages apportioned should be restricted to pecuniary or non-pecuniary loss, or whether any type of pecuniary damages should be restricted as to what is traditionally accepted as a "pecuniary loss". Restrictions are absent in the legislation itself, and only emerged in the case law that followed *Lord Campbell's Act*. Law made by judges can be changed by judges and it is now appropriate to revisit these principles that developed more than 150 years ago.

The first case in which a court began to wrestle with how damages should be

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[8]O.N.W.T. 1884, No. 12.
[9]R.S.S. 1978, c. F-11.
[10]R.S.A. 1980, c. F-5.
[11]R.S.B.C. 1979, c. 120.
[12]R.S.N. 1970, c. 126.
[13]R.S.N.W.T. 1988, c. F-3.

assessed in fatal accident cases was *Blake v. Midland Railway Co.*[14] The Court held in that case that in awarding damages under *Lord Campbell's Act*, an award could not be made with respect to sorrow, grief, or mental suffering experienced by the widow. The Court held that the jury could only award damages for injuries for which a pecuniary estimate could be made. Although the Court in *Blake* did not have to come to this conclusion because the wording of *Lord Campbell's Act* was very general, this has been the law in England and Canada ever since.

The Supreme Court of Canada in *Keizer v. Hanna*[15] dealt with the quantum of damages that should be awarded to a widow where her husband had died in a fatal accident. The Court determined that the appropriate award of damages under *The Fatal Accidents Act*[16] was the pecuniary benefit lost by someone as a result of the untimely death of the deceased. The Court examined the loss of support payments made by the deceased, support payments which could only come out of funds left after deducting the cost of maintaining the husband, including the amount of tax payable on his income. Mr. Justice Dickson stated that:

> The proper method of calculating the amount of damages awarded under *The Fatal Accidents Act* is similar to that used in calculating the amount of an award for loss of future earnings, or for future care, in cases of serious personal injury.[17]

It should be noted that the Supreme Court dealt only with the issue of quantum, and the appeal did not deal specifically with the issue of what may be classed as a pecuniary head of damage under *The Fatal Accidents Act*.

Until the Supreme Court's decision in *Keizer* in 1978, Canadian courts did not award non-pecuniary damages in wrongful death actions. *Lord Campbell's Act* and the Canadian wrongful death statutes patterned after that Act were all interpreted as creating a cause of action for the recovery of pecuniary damages only. It was judge-made law. Since 1978, five Canadian provinces have amended their fatal accident statutes to allow for the recovery of damages for bereavement, grief, loss of guidance, and loss of care and companionship.

Case law has developed general principles governing the assessment of pecuniary damages in cases where children have died in a fatal accident. The court looks at the pecuniary advantage the parents would have received if the child had lived. The court then estimates what monetary and non-monetary benefits the child would have given the parents over a certain period of time and

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[14](1852), 18 Q.B. 35.
[15][1978] 2 S.C.R. 342.
[16]R.S.O. 1970, c. 164.
[17]Above, note 15 at 352.

attempts to quantify these benefits in monetary terms. The court then deducts from this amount the costs the parents would have incurred in maintaining the child over this period. The difference is the pecuniary loss suffered by the parents. This is more commonly referred to as the "wages less keep" measure of damages. It is unfair. It is insulting to parents. Judges and juries should change it.

This method of assessment was applied by the Saskatchewan Court of Appeal in *Sakaluk v. LePage*[18] where Mr. Justice Culliton stated:

> The damages to be awarded, pursuant to the revisions of *The Fatal Accidents Act*, lies to be determined as was stated by Lord Parmoor, when, speaking on behalf of the judicial committee in *Royal Trust Co. v. C.P.R.*, [1922] 3 W.W.R. 24 at 25, 67 D.L.R. 518 (P.C.) he said: "when a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed."

In the *Royal Trust* case, the Judicial Committee of the Privy Council was interpreting the Ontario statute which gave compensation to families of persons killed in fatal accidents as if it were *Lord Campbell's Act*. The Privy Council found that the *Fatal Accidents Act* of Ontario corresponded to *Lord Campbell's Act* in all material ways. Therefore, the only question addressed by the Privy Council was the amount of compensation payable for the benefit of the widow and her son. The Privy Council quoted Lord Watson in *G.T. Ry v. Jennings*:

> It then becomes necessary to consider what, but for the accident which terminated his existence, would have been the reasonable prospects of life, work, and remunerations; and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.[19]

The Judicial Committee of the Privy Council believed that the duty of the Court was to follow the lines laid down in the *Jennings* case and other cases by first estimating as nearly as possible the capitalized value to the widow and child of the share they would have enjoyed of the future earnings and probable savings of the deceased, and to deduct from that sum the amount received for accident insurance and other costs.

In cases like *Sakaluk*, courts are following decisions of the Judicial Committee of the Privy Council in cases like *Royal Trust*, which are rooted in the social and economic conditions of 1922. *Jennings* in turn was relying on case law established soon after the passing of *Lord Campbell's Act* in 1846. The social

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[18][1981] 2 W.W.R. 597 at 600.

[19]*Royal Trust Co. v. C.P.R.* [1922] 3 W.W.R. 24 at 26.

and economic realities of 1846 are vastly different from what we see 150 years later.

The dominant social and economic conditions at the time of the passing of *Lord Campbell's Act* demonstrate how that period is deemed by historians to be the darkest chapter in the history of childhood. Until 1816, there were no child labour laws in England. In 1816, the apprenticeship of parish children under the age of 9 was forbidden, although the underground employment of children under 10 was not forbidden until 1843, just three years before the passage of *Lord Campbell's Act*. The 1840s and 1850s, from which our precedents come, were days when the employment of children under 10 was the accepted practice and their pecuniary contributions to the family were both substantial and provable. When looked upon in this light, it is not unusual that the courts chose to measure damages proportional to the injuries resulting in the death to be based on a wages less cost formula. Other losses were still unreal and intangible. As the Supreme Court of Michigan held in *Wycko v. Gnodtke*:[20]

> Loss meant only money lost and money lost from the death of a child meant only his lost wages. All else was imaginary. The only reality was the King's shillings.

This "reality" is clearly demonstrated in numerous court decisions of the time. When reviewing English case law, the Supreme Court of Michigan in *Wycko* commented on the interpretation of this "reality".:

> The interpretation of the requirement of pecuniary loss found in the early cases, which even today are followed as precedent, reflected the moral and legal standards of their times. In *Bramall v. Lees*, the court considered the case of a 12-year-old girl, negligently killed. Despite the fact that she had attained such age she remained, nevertheless, "living at home" and hence was "peculiarly then a burden to [her] parents." The father, however, succeeded in securing a verdict for 15 pounds. His theory was that in the course of a year or two the child would have gone into a factory "and taken back money as its earnings for the parents." A year or two in the future, however, was held "no sufficient to found an action." A rule nisi for a new trial was granted by the Exchequer Court. We find no further report. Apparently the case was settled on some such basis as the bar of our State so well knows in these child death cases. More fortunate was the father in *Duckworth v. Johnson*. Here a verdict for 20 pounds was obtained "by reason of the son, a boy of fourteen years of age, having been killed by the falling of a wall in consequence of the defendant's negligence." The father, unlike Mr. Bramall, was able to show that his son had been working for two years and a half.[21]

It is again important to remember that it was case law that narrowly defined compensable damage as being damages proportionate to the injury; not the

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[20](1960), 105 N.W. 2d 118 at 121.

[21]Ibid. at 120.

statute itself. This fact was continually recognized by the courts in the 1800s. In *Franklin v. Southeastern Rail Co.*,[22] Pollock C.B., in delivering the judgment of the Court of Exchequer, held:

> The statute does not in terms say on what principle the action given is to be maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what the principle is to be referred to, or to which we are to give effect, is to show what it does not mean for the purpose of ascertaining what it does mean. It is clear that the damages must be shown, for the jury are to give such damages as they think proportionate to the injury. It has been held that these damages are not to be given as a solution but are to be given in reference to pecuniary loss: see *Blake v. Midland Rail Co.* (1). It is also clear that the damages are not to be given merely in reference to the loss of a legal right, where they are to be distributed between relations only, and not to all individuals sustaining such a loss; and, accordingly, the practice has been not to ascertain what benefit could have been enforced by the claimants had the deceased lived, and give damage limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to reasonable expectation of pecuniary benefit, either of a right or otherwise, from the continuance of the life.

Current case law no longer reflects this factual distinction between the statute itself and the cases that interpret it.

Courts today ought to broaden the interpretation of what a pecuniary benefit is and bring *The Fatal Accidents Act* beyond the antiquated and inequitable pecuniary loss rule of wages less keep. Our courts have, in the past, evolved the common law to reflect the current economic and social needs of society. This can be seen in cases like *Fobel v. Dean*[23] where the Saskatchewan Court of Appeal allowed the addition of housekeeping capacity as a compensable measure of damages in personal injury cases. This is also seen in a recent Ontario Court of Appeal decision where it was held that the definition of a spouse, which in the 1850s could be argued to be no more than a man and wife, could no longer be defined in legislation as being that narrowly interpreted. The definition of spouse has evolved to now include homosexuals and lesbians who also are starting to receive benefits under family insurance and other programs. Why is it that the law with respect to these matters can change, yet the court must still rely on the interpretation of *Lord Campbell's Act* given in 1852 in *Blake v. Midland Rail Co.*?[24] In the 1850s, nervous shock would be an imaginary loss and something that could not be claimed. Our courts have the power to expand the interpretation of pecuniary benefits which according to case law is the basis of damages to be awarded under *Lord Campbell's Act* and its descendants. The

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[22][1843-60] All E.R. 849 at 850.

[23][1991] 6 W.W.R. 408.

[24]Above, note 14.

courts can expand the nature of the damage awards without raising the issue of whether compensation is based on pecuniary or non-pecuniary loss. Our present Acts confine the court to awarding such damages as they may think proportionate to the injury that resulted in the death.

From a practical point of view, there is a misguided view in the legal community that there is an unspoken presumption against changing the common law. However, E.A. Driedger in *The Construction of Statutes*,[25] states that a legislation's reasons for precluding new common law developments can erode over time:

> A new legislation could turn out to be inadequate in addressing the mischief at which it was aimed; it could be interpreted by the courts in a manner that limits its usefulness; it could be undermined by poor administration, underfunding or significant social change. Where legislation fails to produce satisfactory outcomes and it appears that a legislative solution is not forthcoming, the courts may tackle the problem through their jurisdiction to change the common law.

Recent Canadian jurisprudence gives courts the power to change the common law. In *Watkins v. Olafson*,[26] Madam Justice McLachlin sets out the Supreme Court's position regarding the ability of the courts to change the common law:

> Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances.

Further, the Supreme Court of Canada in *R. v. Salituro*[27] expanded the ability of the courts to change the common law. Mr. Justice Iacobucci stated: "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country."[28] He went on to say that ". . .the courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society."[29] This idea was also supported by the Supreme Court in *R. v. B. (K.G.)*:

> [The] duty of the courts to review common law rules has a pragmatic basis; courts are best situated to assess the operation of potential

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[25]3d ed. (Markham, Ontario: Butterworths, 1994) at 315.
[26][1989] 2 S.C.R. 750.
[27][1991] 3 S.C.R. 654.
[28]Ibid. at 670.
[29]Ibid. at 678.

deficiencies of common law rules in practical situations.[30]

There is ample precedent for a court to change the common law interpreting existing fatal accidents legislation in order to keep the common law in step with the dynamic and evolving fabric of our society.

THE AMERICAN EXPERIENCE

In 1960, the Supreme Court of Michigan had to deal with the assessment of damages for the life of a child negligently killed in the case of *Wycko v. Gnodtke*.[31] In that case, the deceased, a 14-year-old boy, was walking completely off a highway with some other Boy Scouts. He was killed by an automobile owned by one defendant and driven by another. At trial, the jury awarded approximately $15,000 to the parents of the deceased. The Court had to consider the problem of pecuniary loss suffered by the parents of a deceased child. The law at the time of Michigan, in common with many other jurisdictions, required the subtraction of the speculative costs of raising the child from the hypothetical earnings of the child prior to his majority. The difference is the resultant pecuniary loss.

The Court went into great detail with respect to the history of Michigan law in this area. It noted that *Lord Campbell's Act* was also a predecessor of the American fatal accident Acts. The Court further noted that *Lord Campbell's Act* did not contain the words "pecuniary loss," and that it simply provided that in every action the jury may give such damages as they think proportional to the injury that resulted in the death. Further, the court correctly determined that the leading case was *Blake v. Midland Railway Co.*[32] which interpreted *Lord Campbell's Act* to limit the award of damages in the fatal accident cases to the probable pecuniary loss of the beneficiaries.

The Court then looked at the social and economic conditions that existed at the time, noting that at the time of the passing of *Lord Campbell's Act*, courts were dealing with child labour and a different social environment. The Court found that the only reality at that time was truly that of the King's shillings, and that compensable pecuniary loss was limited to the recovery of wages. The Court commented that:

> They were merely interpreting the statute in accordance with the social conditions of the day, which, presumably, the legislative body had in mind in the enactment of the legislation then under consideration. The rulings reflect the

[30][1993] 1 S.C.R. 740 at 775.
[31]Above, note 20.
[32]Above, note 14.

> philosophy of the times, its ideals, and its social conditions. It was the generation of the debtors prisons, of some 200 or more capital offenses, and of public flogging of women. It was an era when ample work could be found for the agile bodies andd nimble fingers of small children.[33]

The Court commented that in most areas, the development of the law parallels the enlightened consciousness of the people. As an example, the Court referred to the fact that society no longer tolerates the intentional infliction of mental suffering, and that illness from such a cause is no longer seen as imaginary. A combination of influences, all arising from the public condemnation of child labour, has resulted in almost universal state child labour and compulsory school attendance laws.

> Yet there still exists in the law this remote and repulsive backwash of time and civilization, untouched by the onward march of society, where precedents we alone nor tell us that the value of the life of a child must be measured solely by the standards of the day when he peddled the skill of his hands and the strength of his back at the factory gates. We are not unaware of the argument in support of the proposition that legislative silence, subsequent to decisions interpreting a statute, must be construed as legislative acquiescence in the interpretation made. Our thoughts thereon will be found in our concerning opinion in *Sheppard v. Michigan National Bank*. We there expressed the view, with appropriate citation of authority, that a legislature legislates by legislating, not by doing nothing, not by keeping silent.[34]

The Court rejected the child labour measure of pecuniary loss and sought to define the pecuniary loss suffered because of the taking of a child's life. The court continued:

> The pecuniary value of a human life is a compound of many elements. The use of material analogies may be helpful and inoffensive. Just as with respect to a manufacturing plant, or industrial machine, value involves the costs of acquisition emplacement, upkeep, maintenance service, repair, and renovation, so, in our context, we must consider the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter. Moreover, just as an item of machinery forming part of a functioning industrial plant has a value over and above that of a similar item in a showroom, awaiting purchase, so an individual member of a family has a value to others as part of a functioning social and economic unit.
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> This value is the value of mutual society and protection, in a word, companionship. The human companionship thus afforded has a definite, substantial, and ascertainable pecuniary value and its loss forms a part of the "value" of the life we seek to ascertain. We are, it will be noted, restricting the losses to pecuniary losses, the actual money value of the life of the child, not the

[33]Above, note 20 at 120.
[34]Ibid. at 121.

> sorrow and anguish caused by its death. This is not because these are not suffered and not because they are unreal. The genius of the common law is capable, were it left alone, of ascertaining such damages, but the legislative act creating the remedy forbids. Food, shelter, clothing, and companionship, however, are obtainable on the open market, have an ascertainable money value. Finally if, in some unusual situation, there is in truth, or reasonably forthcoming, a wage-profit capability in the infant (an exception of an excess of wages over keep, the measure heretofore employed) the loss of such expectation should not be disregarded as one of the pecuniary losses suffered. In such case, however, the assessment is made as a matter of fact and not of fiction. It is true, of course, that there will be uncertainties in all of these proofs, due to the nature of the case, but we are constrained to observe that it is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very situation his wrong has created.[35]

The Court held that, although in 1846 courts may have thought that anything aside from a wages less keep measure of damages gave the claimants a fictional sum, in today's reality to award the claimants damages on the wages less keep method is to deal with a fiction in which a minor child is still seen as a breadwinner. He is not. The parents' motives in seeking compensation are for loss of love and affection and companionship.

Since the *Wycko* decision of 1960, a number of American states, either by statute or judicial decision, have allowed recovery for the loss of companionship of a child. According to the Texas Supreme Court in *Sanchez v. Schlinder*,[36] 14 jurisdictions in the United States now allow recovery for damages for loss of companionship and society under statutes containing language which traditionally has been interpreted as limiting recovery to pecuniary loss. These states include Arizona, California, Idaho, Illinois, Indiana, Louisiana, Minnesota, Mississippi, Montana, Nebraska, New Jersey, South Carolina, and South Dakota. A further 21 states recognize recovery for loss of society and companionship by statute. However, nine of these statutes were judicially interpreted to include society and companionship. These latter states include Arkansas, Florida, Hawaii, Iowa, Michigan, Virginia, Washington, West Virginia, and Wyoming. Judges doing their duty to society changed the reprehensible and archaic law in this area.

CHANGE OVERDUE

Canadian law should no longer subscribe to the outdated views of the courts of 1852. There is nothing in the Acts themselves that limit the manner in which pecuniary benefits are defined or limit the damages to be awarded to pecuniary

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[35] Ibid. at 122.

[36] 651 S.W. 2d 249 (Tex. 1983).

benefits only. As demonstrated by the Supreme Court of Canada, sufficient authority exists for judges to change or modify the common law to reflect current social and economic trends of society.

Although legislatures may amend fatal accidents legislation to allow for such compensation, they are not required to do so before the courts may begin imposing their own modifications. Ontario, Manitoba, and Nova Scotia are three jurisdictions in Canada that have changed or introduced legislation to allow for the recovery of damages for loss of companionship.

When dealing with the loss of a parent, the Supreme Court of Canada, as early as 1885, recognized in *St. Lawrence & Ottawa Railway v. Lett*[37] that a child may suffer pecuniary loss as a result of the loss of a mother's care, attention, and training. The Court did recognize that, although it may be difficult to estimate in monetary terms the loss a child may sustain because of the death of her mother, that that was no reason to deny recovery. It should be noted, however, that the Court did make it clear that damages for loss of society and companionship could not be assessed in monetary terms and were therefore unrecoverable.

In 1985, the Prince Edward Island Court of Appeal in *Reeves Estate v. Croken*[38] delivered a series of judgments that, although contradictory at times, did set forth some idea of what could be defined as a pecuniary benefit.

The Court in *Reeves Estate* was asked to determine whether a claim could be made by the parents, brothers, and sisters of a deceased for damages for loss of care, guidance, companionship, and encouragement. The Court determined that the real issue was what was meant by the phrase "pecuniary benefit". Was "pecuniary benefit" restricted to actual and ascertainable financial loss, or did it include the intangible loss brought about by the death of a child? The parents argued in that case that if a child's loss of the guidance and care of a parent can result in a pecuniary loss, then the reverse must also be true. The Court of Appeal accepted this argument. It viewed the *St. Lawrence & Ottawa Railway v. Lett* decision as holding that intangible injury caused by the destruction of the parent-child relationship could result in pecuniary loss. In its 1985 decision, the Court held:

> [W]here there will be detriment to the child, there will equally, where the circumstances are reversed, be a parallel detriment to the parent, equally compensable, and therefore a loss of pecuniary benefit within the meaning of the

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[37](1885), 11 S.C.R. 422.

[38](1985), 162 A.P.R. 240 (P.E.I.C.A.); but see *Reeves Estate v. Croken* (1989), 240 A.P.R. 109 (P.E.I.T.D.), reversed (1990), 262 A.P.R. 298 (P.E.I.C.A.), leave to appeal to S.C.C. refused (1991), 286 A.P.R. 270 (note) (S.C.C.).

act.[39]

When the Court had to deal with this matter again in 1989 after a subsequent trial was held, the Court simply looked at the wages less keep measure of damages and held that the child was not providing any care, guidance, or companionship of a type that the family could have had to purchase elsewhere after his death. Although the Prince Edward Island Court of Appeal appeared to backtrack from its decision in 1985, it is clear that care and companionship may be classed as a pecuniary loss to the parents.

It seems strange, that for the purposes of a fatal accident, parents are not recognized as legitimate people who are close enough to their son or daughter to receive the same sort of compensation as would have been available to a spouse had the child been older or married. This minimizes the close personal relationship that a parent has with a child and, in fact, reflects a totally different standard from one that is required in other Canadian legislation such as the *Divorce Act* [40] and the provincial family maintenance and childrens' law Acts, which all state that the parents must act in the best interests of the child. If the parent is to act in the best interests of the child, it is vital that they establish a close personal relationship with the child so that they may understand what the child's best interests are. How can a court and legislature in one instance state that you have to be close to your child and do what you can to act in their best interest, and then, when the child dies as a result of a fatal accident, state that the parents' interest is no better or different from that of any other stranger or third party?

Damages for non-pecuniary loss in fatal accident actions will not buy the family happiness. At best, it will make their lives somewhat more tolerable. However, it will serve the purpose of giving recognition to the seriousness of their loss. In most personal injury matters, tort law measures damages commensurate with the severity of the injury. No award or an insignificant award for the parents' grief and the loss of care and companionship of the deceased child sends a signal to the surviving family that the law sees their loss as minor, trivial or non-existent. This further aggravates their loss. Families are forced to pay for their inquests and lawyers' fees. A significant award removes this aggravation by recognizing the severity of their suffering.

Grief over the loss of a close family member is an extremely difficult matter to deal with in any event and litigation of these issues can only repeatedly focus the family members' thoughts on the events leading to the death, the funeral, and the

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[39]Ibid. at 246.

[40]R.S.C. 1985, c.3 (2nd Supp.).

loss. This impedes the natural grieving process, which in itself is harmful and which is aggravated by the limited value that the law currently places on life in fatal accident situations.

Courts routinely award damages in post-traumatic stress syndrome cases and nervous shock cases. Non-pecuniary damages awards are also made to quadriplegics, recognizing, as the Supreme Court of Canada did in *Arnold v. Teno*[41] that:

> an award of non-pecuniary damages cannot be "compensation". There is simply no equation between paralyzed limbs and/or injured brains and dollars.

It is submitted that it is no more difficult to award non-pecuniary damages for these types of injuries than it is to award damages for grief or loss of care and companionship.

Monetary damages will not buy happiness for parents who have lost their children. These damages cannot hope to measure the injury suffered by a parent upon the death of a child. It can recognize in a significant way, however, the catastrophic deprivation that the parent has suffered, and the resultant injury that this deprivation has inflicted upon the parent. No damages or an award of insignificant damages adds to the injury by suggesting that society does not regard the parents' suffering as being worth anything. The present interpretation of fatal accident legislation in Canada does not recognize the injury suffered by a parent upon the wrongful death of a child.

It is an unforgivable and cruel insult when parents are told that no amount of money can bring back their child. That is not news. But a reasonable amount of compensation would mean that someone is sorry, that someone was forced to compensate. The courts must indicate that children are of value, not only to their families, but also to society in general.

Mr. Justice Robins, speaking for the Ontario Court of Appeal in *Mason v. Peters*[42] summarized the injustice as follows:

> The rules governing damages in child-death cases have long been a subject of critical comment. Flemming, for instance, describes their impact on these cases as "repulsive". As matters stand, awards compelled by the pecuniary loss concept fairly viewed, neither recognize the real nature of the injury sustained by the surviving members of the family, nor reflect the gravity of their loss. Whatever else may be said, there is no denying that the aphorism "it is cheaper

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[41][1978] 2 S.C.R. 287 at 332.

[42](1982), 39 O.R. (2d) 27.

> to kill than to injure" holds greater validity here than in any other branch of the law of torts.

The courts should no longer perpetuate an attitude toward the value of a child's life which has been completely repudiated by modern legislation in other countries and by today's social and economic values. To continue to perpetuate this attitude does violence to the intent of fatal accidents legislation, which is to grant recovery whenever the death of a person is caused by the wrongful act of another. A child is a person, and it is submitted that the courts in fatal accident cases should begin to confirm that the life of a child has a greater pecuniary value than that of a mere wage earner. The repulsive interpretation placed upon existing fatal accidents legislation cries out for change.

Money is more than specie and buying power. Money is recognition. Physically unwell 62-year-old executives working 80-hour weeks care whether their salaries are $700,000 or $500,000 because the extra money is recognition of position, accomplishment, and contribution. Money is a means by which society recognizes the rights and duties of payees and payors. There is no intellectual or jurisprudential justification for excluding monetary compensation for the wrongful death of a child from the pattern of monetary compensation that applies in traditional tort jurisprudence. It is time for change.