ADVANCING PECUNIARY AND NON-PECUNIARY CLAIMS UNDER THE *FAMILY LAW ACT*

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INTRODUCTION

When a victim has been injured, the *Family Law Act*[1] entitles certain family members to claim damages of their own. Sections 61 to 63 of the *FLA* are the key provisions. In some cases, *FLA* claims can be significant. This paper will provide an overview of some "main considerations" when advancing *FLA* claims; focus on "bigger ticket" pecuniary claims; and summarize a few cases in which higher sums for non-pecuniary claims have been awarded.

INITIAL CONSIDERATIONS

Who Can Advance *FLA* Claims?

Subsection 61(1) sets out which family members may advance *FLA* claims. It 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.

In other words, section 61 is limited to immediate family members; however, there is some breadth in the definitions. For instance, a "parent" need not be biological so long as

[1] R.S.O. 1990, c. F.3 [the *FLA*].

he or she has "demonstrated a settled intention to treat a child as a child of his or her family."[2] Further, a "spouse" is defined four ways for purposes of this section[3]:

1. two persons who are married to each other;
2. two persons who have entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right;
3. two persons who are not married to each other and have cohabited continuously for a period of not less than three years; or
4. two persons who are not married to each other and have cohabited in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Note as well that the relationship must be in existence as of the date of loss. You cannot "marry into" a lawsuit.

What Types of *FLA* Claims May Be Advanced?

Both pecuniary and non-pecuniary claims may be advanced. The relevant provision, subsection 61(2), states:

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

[2] *Ibid*. at s. 1.
[3] *Ibid*. at ss. 1, 29.

Is there a Statutory Deductible for *FLA* Claims?

Section 267.5 of the *Insurance Act*[4] provides for a deductible to apply to non-pecuniary *FLA* claims in some circumstances. It should be noted from the outset that this section only applies to motor vehicle cases. There are not deductible provisions relating to slip and fall cases, medical malpractice, or other non-mva cases.

Pursuant to subsection 267.5(7)(3) of the *IA*, the amount for damages for non-pecuniary loss under section 61(2)(e) of the *FLA* to be awarded against a "protected Defendant"[5] shall be reduced by $15,000.00. Subsection 267.5(8), however, states that this deductible does not apply if the amount for damages for non-pecuniary loss would exceed $50,000.00 in the absence of that subparagraph. In other words, if the loss of guidance, care, and companionship is assessed at $30,000.00, the claimant will only receive $15,000.00. Conversely, if the claim is assessed at $51,000.00, the claimant will receive $51,000.00.

A further exception to the deductibility rule now applies to fatality cases. Pursuant to *Bill 16, Creating the Foundation for Jobs and Growth Act, 2010*, an amendment to the *IA* was made in 2010 removing the deductible in cases where the family member died as a result of the crash. Subsection 267.5(8.1.1) of the *IA* now states that the deductible provisions do not apply for "non-pecuniary loss awarded in respect of a person who dies as a direct or indirect result of an incident that occurs after August 31, 2010."

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[4] R.S.O. 1990, c. I.8 [the *IA*].
[5] Protected Defendants include: the owner of an automobile, the occupants of an automobile, and any person present at the scene.

What Other Considerations Ought to be made before Advancing an *FLA* Claim?

Three other issues that counsel ought to consider before determining whether it is advisable in the circumstances to include an *FLA* claim are addressed below.

The first issue to consider is Court approval. Court approval of a minor's settlement is required even when the minor has not been injured or if the claims do not ultimately surpass the statutory deductible (i.e. even if the minor is to receive $0 from the settlement). Given the costs and delays often associated with obtaining Court approval, it would be advisable for counsel to seriously consider the likely value of a minor's *FLA* claims before obtaining instructions from the minor's guardian to advance such claims. This assessment involves consideration of the nature of the pre-incident relationship between the two family members, the severity of the injuries, any income lost, and/or the extent of any services rendered (the latter two being unlikely in the case of a minor).

The second issue to consider is the risk of inconsistent statements. Just like any other Plaintiff, *FLA* claimants may be required to be examined for discovery and/or testify at trial. Apart from increasing the legal costs to the file, there is a risk that the *FLA* claimant could undermine the main Plaintiff's case. Consider the scenario where the injured Plaintiff testifies that she has been unable to return to any household chores since the crash, but then her husband testifies that she is still able to do most things around the house but at a slower pace. A cost-benefit analysis should be undertaken from the outset to determine if the value of the *FLA* claim is likely to outweigh the risks it may bring to the case.

The third issue to consider is Retainers and instructions. It is important to remember that a signed Retainer should be obtained from *each* client, whether a main or derivative claimant. There are professional rules to follow regarding joint retainers. It is not sufficient to have only the main Plaintiff sign the Retainer. In the same vein, it is not sufficient to obtain a signed Direction from only the injured Plaintiff to settle or dismiss the action; written instructions must be obtained by each client. In many cases, families can be large and dispersed across Canada. Again, a cost-benefit analysis should be undertaken before haphazardly including every possible family member in the claim.

"BIGGER TICKET" PECUNIARY CLAIMS: S. 61(2)(D)

Overview

Recall that subsection 61(2) commences with the following preamble:

> The damages recoverable in a claim under subsection (1) may include…

Subsection 61(2)(d) states:

> 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.

Loss of Income

In the matter of *Macartney v. Warner*[6], the Ontario Court of Appeal confirmed that it was appropriate for a family member to claim his or her own income loss as a result of a death or injury suffered by a family member. The facts in *Macartney* were that the parents of a

[6] (2000), 46 O.R. (3d) 641 (C.A.) (CanLII) [*Macartney*].

deceased crash victim alleged that, as a result suffering from "nervous shock" over their son's death, they were unable to return to work. They sought to recover their income loss claims, pursuant to subsection 61(2).

Not only did the Court confirm that their income loss claims were tenable at law[7], the Court went further to confirm that a psychological diagnosis was not required so long as the test for causation was met[8] (i.e. bereavement or assisting the injured family member may be sufficient to trigger an award).

In the matter of *Fiddler v. Chiavetti*[9], the Ontario Court of Appeal addressed the type of evidence required in order to prove an income loss claim pursuant to subsection 61(2)(d). In *Fiddler*, the mother of a deceased accident victim had been unable to return to work. The evidence adduced at trial consistent only of lay witnesses; there was no expert actuarial evidence, nor any documentary support as to her past wages. The Court of Appeal rejected the defence submission that actuarial evidence was required. Laforme J.A., speaking for the Court stated[10]:

> Thus, Debbie Fiddler's failure to provide expert evidence in connection with her wage loss claim is not fatal. While it was open to Ms. Fiddler to adduce expert evidence, she chose to prove her loss of income without doing so and left it to the jury to make its own calculations. Although it is customary that expert evidence is called in this regard, I can find no reason to conclude that it is a legal requirement to do so.

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[7] *Ibid*. at para. 66.
[8] *Ibid*. at para. 64.
[9] [2010] O.J. No. 1159 (C.A.) [*Fiddler*].
[10] *Ibid*. at para. 65.

Services Rendered

Subsection 61(2)(d) also specifically provides for a claim to be made for the value of services rendered. The two issues that commonly arise in the context of a services claim are: i) whether the services were reasonably required (especially in the context of in-patient care) and ii) the method for quantifying the value of those services.

i. Are Services Rendered to an In-Patient Compensable?

A dispute often arises over whether family members can seek to recover the value of services rendered to a family member who was, at the time, an in-patient at a hospital/rehab facility/ long-term care facility, *over-and-above* the (gratuitous) care that was provided by the facility's staff. There is both judicial and arbitral authority in support of such claims.

In the matter of *Bannon v. McNeely*[11], the husband of a spinal cord patient sought to recover damages for the services rendered to his wife during the periods she was hospitalized and in a rehab facility. The claim was allowed by Binks J., who stated[12]:

> …For five months he was in these institutions on a daily basis feeding his wife and assisting her in every conceivable way knowing that the nursing staff, however excellent, could not achieve this and this was a major contribution in terms of nursing…
>
> …there is no comparison between the quality of care he gives his wife on an intimate loving basis and any care she could receive from paid assistants.

[11] [1995] O.J. No. 539 (Gen.Div.).
[12] *Ibid*. at paras. 89-90.

In the matter of *Till v. Walker*[13], family members advanced claims for services rendered during a six week period of hospitalization. The claim was allowed by Ground J., who stated:

> …The more compelling authorities do, however, in my view support the proposition that parents or relatives should be compensated for care given to a patient in hospital in that courts seem to acknowledge that the intimate care and support provided is a crucial part of recovery, separate from the standard care…it seems to me that such compensation should be regarded as coming within the value for services performed under clause (d).

In the matter of *Bellavia and Allianz Insurance Company of Canada/ING*[14], the injured person undisputedly required 24 hour attendant care. As such, his accident benefits insurer paid for him to be admitted to a long-term care facility. His family members sought to recover attendant care benefits over-and-above the cost of the accommodations. The attendant care benefits were granted by Arbitrator Killoran, who stated:[15]

> I find that the Bellavia family has been performing those very tasks relating to personal care that the attendant care DAC assessment report concluded that Mr. Bellavia required, in addition to the services performed by Baycrest…The tasks performed by Mr. Bellavia constitute reasonable and necessary attendant care services. I cannot fault the Bellavia family for choosing to perform some of the services, which are also offered by Baycrest, in order to guarantee prompt, high quality care for Mr. Bellavia.

In the matter of *Haimov and ING Insurance Company of Canada*[16], family members were granted attendant care benefits despite the patient being hospitalized. Arbitrator Murray highlighted some examples of services rendered by the family above-and-beyond what was performed by staff including, but not limited to: grooming, helping the patient with

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[13] [2000] O.J. No. 84 (Sup.Ct.).
[14] FSCO A05-000807 (21 February 2006); aff'd Appeal P06-00010 (15 December 2006).
[15] *Ibid*. at 8.
[16] FSCO A05-002734 (9 May 2007).

his splints, tending to problems with the feeding tube, assisting with bowel management, and ensuring that staff were promptly alerted to medical emergencies.

ii. How Are the Services Quantified?

In the context of a tort claim, there is often the further issue of determining the appropriate method for quantifying the value of these services. The defence generally advocates a non-actuarial global over an hourly rate approach, in the likelihood that it would yield a lesser figure. There is, however, judicial support for the quantification of services on the basis of hourly rates.

In the matter of *Cartaginese v. Castoro*[17], Boland J. calculated the value of services rendered by a mother to her injured daughter at the rate of $18.00/hour.[18] The rate was deemed to be "a fair average hourly rate in line with the present cost of attendant care services received in the Toronto area."[19] This is a 1995 decision, so inflation/updated rates will need to be applied for future cases.

In the matter of matter of *Matthews Estate v. Hamilton Civic Hospitals*[20], Spiegel J. rejected several arguments put forth by the defence and calculated the value of attendant care services rendered by family members using hourly rates. His Honour stated[21]:

> The defence submits that hourly rate models produce a misleading illusion of reliability and should be avoided. They cite the case of *Dube (Litigation Guardian of) v. Penlon Ltd.* where Zuber J. choose to compensate past

[17] [1995] O.J. No. 142 (Gen.Div.).
[18] *Ibid*. at para. 113.
[19] *Ibid*. at para. 106.
[20] [2008] CanLII 52312 (Ont.Sup.Ct.).
[21] *Ibid*. at paras. 182-183, 189, 191-194.

care using a global figure. They also rely on my decision in *Desbiens v. Mordini*, where I awarded Mrs. Desbiens a global sum for the care provided to her husband up to the date of trial. However, in both cases and in other cases where the global approach was used, there was no precise evidence regarding the amount of time expended and the nature of the services provided over and above what would ordinarily have been performed by the family member.

In such situations a lump sum approach may be reasonable and indeed necessary. However, the circumstances of this case are different. There is ample evidence to support the amount of time spent and the nature of the services provided. Clearly, if Mr. Matthews had not been incapacitated his sons would not have provided any of these services for him; thus all of the services provided were necessitated solely as a result of his injury. In these circumstances, to use the global approach would be inappropriate.

…

The plaintiffs submit that the primary caregiver's services should be valued at the agency hourly rate of a RN because the complex and unpredictable nature of the care required demanded the skills of an RN. The defence contends that regardless of the quality of the services provided that it would be improper to compensate family members who were not professionals at a professional rate. I do not agree. It is the nature and quality of the services provided and their value to the person injured rather than the professional qualifications of the provider that should govern the assessment. I therefore accept the plaintiffs' submission.

…

The defence also submits that the court must consider the fact that Mr. Matthews' sons would not likely have earned anywhere close to an amount that would be awarded calculated on the basis of a professional hourly rate. That may very well be so. However, I do not think that this should be a limiting factor in assessing the value of their services.

To limit the award to the amount of income or potential income lost by a claimant would undervalue high quality and skilful services provided by low income or unemployed family members. This would unfairly discriminate against such persons solely on the basis of their economic status.

Moreover, if the family had in fact hired professional caregivers, they would have been entitled to claim "the actual expenses reasonably incurred" under s. 61(2) (a). I see no reason why the damages assessed should be significantly less because the family members did not have sufficient financial means to hire professional caregivers.

I would also observe that a claim for future care is clearly based upon the anticipated cost of obtaining the appropriate level of care in the

> marketplace. I see no principled reason why the assessment should be significantly different merely because the services have already been rendered. Otherwise, where sophisticated care is being provided by family members, it would be in defendant's interest to delay the trial as long as possible so as to avoid the more onerous impact of an award for future care costs.

Spiegel J. used the rate of $30.00/hour, rather than the average agency rate of $42.00/hour on the rationale that agency rates would implicitly build-in overhead costs and profit, which would not be applicable in circumstances where care is provided by the family.

Accordingly, when advancing a claim for services rendered by family members, three considerations apply. First, it is important to provide some particulars as to the types of services that were provided and the approximate frequency. Second, the hourly rate ought to be based upon the current average agency rates, less a discount (a discount of approximately 30% was employed in *Matthews*). Third, the type of services and/or level of injury will influence whether RN, RSW, or PSW agency rates ought to be used as the base wage.

Other Pecuniary Claims

Although the specific issue in *Macartney*[22] was about a loss of income claim, the decision may also be cited for purposes of advancing other pecuniary claims not specifically enumerated in subsection 61(2). Lasken J.A. highlighted the fact that since the subsection uses permissive language (i.e. "*may* include"), the Legislature did not mean

[22] *Supra*, note 6.

for the ensuing list of categories of pecuniary losses to be exhaustive[23]. Similarly, in his concurring decision, Morden J.A. stated[24]:

> Accordingly, I would not confine claims for loss of income only to those specifically provided for in s. 61(2)(d). I think our responsibility should be to read the legislation as providing for a coherent and internally consistent scheme of compensation.

Section 61 is often relied upon to advance dependency claims for the income/financial support and/or household services that would have otherwise been provided to/benefitted a family member, but for the death of another family member.[25] These claims can be significant; however, they will not be addressed in greater detail herein, as a full paper could be written about this sub-topic, alone. By way of brief overview, claims for the loss of financial support and/or household services may include, amongst other issues, consideration of:

- the approach to determining the surviving Plaintiff's loss of support claim (e.g. the sole dependency approach vs. the cross-dependency approach)[26];
- the extent to which, if at all, the quantification of the claims should take into account positive or negative contingencies (e.g. re-marriage of surviving spouse, layoff or market turns that would have impacted deceased's income, the health of the surviving Plaintiff or deceased, etc.);
- the extent to which, if at all, the services claim should be deducted for the "exclusive use" of household services (i.e. the extent to which the deceased performed household services solely for his or her benefit)[27].

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[23] *Ibid*. at para. 54.
[24] *Ibid*. at para. 82.
[25] *Fiddler*, supra note 8 at para. 58.
[26] See *Neilsen v. Kaufmann*, [1986] CanLII 2717 (O.C.A.).
[27] See *Johnson v. Milton (Town)*, [2006] O.J. No. 3232 (Sup.Ct.) and *Wilson v. Beck*, [2011] O.J. No. 3175 (Sup.Ct.).

NON-PECUNIARY CLAIMS: S. 61(2)(E) OF THE *FLA*

Overview

Recall that subsection 61(2)(e) permits damages for:

> 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.

In the absence of serious injury or death, non-pecuniary awards are generally fairly modest. Family members are often appalled when they are told what the loss of a loved one is "worth". Further, the Ontario Court of Appeal has set out a high water mark for non-pecuniary claims, although that watermark is subject to inflation.

The "High Watermark" Cases: *To* and *Fiddler*

In the landmark decision of *To v. Toronto Board of Education*[28], the Ontario Court of Appeal indicated that the upper range for non-pecuniary *FLA* damages ought to be $100,000.00. In *To*, the parents of a deceased minor were each awarded this figure. The Court took into account evidence demonstrating that the family was tight-knit and also cultural factors (Asian) which supported the closeness of the family. The deceased's 11 year old sister was awarded $25,000.00.

The Ontario Court of Appeal's second landmark decision on the issue of a high watermark for non-pecuniary *FLA* damages was *Fiddler*[29]. In *Fiddler*, the Court of Appeal reaffirmed its comments in *To* about $100,000.00 being the high watermark;

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[28] (2001), 55 O.R. (3d) 641 (C.A.) [*To*].
[29] *Fiddler*, supra note 9.

however, it clarified that inflation ought to be applied to that figure[30]. As such, the Court of Appeal reduced the jury's award of $200,000.00 to the mother of the deceased to $125,000.00. The sister of the ceased was awarded $25,000.00.

Case Summaries

Below is a summary of cases in the last ten years in which relatively high non-pecuniary *FLA* amounts were awarded (as compared with other cases). Both the actual amount awarded to Plaintiff and the updated figure as of November 2013 (rounded to the nearest $5.00), incorporating inflation, will be listed. The cases are presented as most to least recent.

Vokes Estate v. Palmer[31]

- Facts: Fatality of female survived by her husband and daughters, ages 5 and 3.
- Husband: $90,000.00 ($92,405.00)
- Children: $117,000.00 ($120,125.00) and $135,000.00 ($138,605.00)

MacNeil (Litigation guardian of) v. Bryant et al[32]

- Facts: Fifteen year old girl suffered catastrophic injuries.
- Mother: $152,500.00 ($163,535.00)
- Father: $117,500.00 ($126,000.00)
- Sibling: $42,500.00 ($45,575.00)

Wilson v. Beck[33]

- Facts: Fatality of 34 year old male, survived by his partner of 20 years and their kids, who ranged from ages 6 months to 10 years at the date of loss. By the time of trial, the wife had re-married.

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[30] Following the Court of Appeal's decision in *Fiddler*, if inflation were calculated from the $100,000.00 award in *To*, that figure would approximate $135,000.00 as of November of 2013. Interestingly, despite the Court of Appeal's indication that this is to represent the high watermark for non-pecuniary *FLA* damages, higher awards have been granted. The inflation calculation referred to in this footnote, and all others to be referred to in this paper, were prepared using the inflation calculator on the McKellar Structured Settlements website: http://www.mckellar.com/resources.

[31] [2012] CanLII 510 (O.C.A.). Judgment of Judge sitting with jury initially released in June 2011, and was upheld.

[32] Unreported. Endorsement of Howden J. released in May 2009.

[33] [2011] CanLII 1789 (Ont.Sup.Ct.). Decision released in July 2011.

- Spouse: $85,000.00 ($87,125.00)
- Each Child: $65,000.00 ($66,625.00)
- Mother: $30,000.00 ($30,750.00)
- Father: $20,000.00 ($20,500.00)

Sandhu (Litigation guardian of) v. Wellington Place Apartments[34]

- Facts: Two year old boy suffered catastrophic injuries.
- Each Parent: $100,000.00 ($113,680.00)
- Sibling: $100,000.00 ($113,680.00)

Stephen v. Stawecki[35]

- Facts: Fatality of 47 year old male, survived by a 61 year old woman with whom he had been co-habiting for 2 ½ years but had been dating for 4 years.
- "Spouse": $70,000.00 ($80,390.00)

Wright v. Hannon[36]

- Facts: Fatality of 54 year old man, survived by daughters ages 18 and 14.
- Each Child: $50,000.00 ($56,215.00)

Robinson Estate v. Hogg[37]

- Facts: Fatality of 66 year old man.
- Spouse: $75,000.00 ($86,295.00)
- Child: $25,000.00 (28,765.00)

Hechavarria v. Reale[38]

- Facts: Fatality of 53 year old woman.
- Spouse: $85,000.00 ($108,230.00)
- Each Child: $30,000.00 ($38,200.00)
- Each Sibling: $12,500.00 ($15,915.00)

CONCLUSION

When being retained, particularly in a case involving a fatality or catastrophic injury, it is incumbent upon counsel to determine whether there are any family members for whom viable pecuniary or non-pecuniary claims ought to be advanced, and to obtain written

[34] [2008] O.J. No. 1148 (C.A.). Jury initially delivered its decision, which was upheld, in January 2006.
[35] [2005] CanLII 25118 (Ont.Sup.Ct.); aff'd [2006] CanLII 20225 (O.C.A.). Trial decision released in July 2005.
[36] [2007] CanLII 240 (Ont.Sup.Ct.). Decision released in January 2007.
[37] [2005] CanLII 22223 (Ont.Sup.Ct.). Decision released in June 2005.
[38] [2000] CanLII 2277 (Ont.Sup.Ct.). Decision released in November 2000.

instructions from those individuals. In some cases, the value of these claims can significantly increase the overall claim for damages. In less serious cases, the cost and risks of pursuing such claims may outweigh their likely value.

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