



CBABC BRIEFING NOTE

FAMILY COMPENSATION ACT

Current to August 31, 2014

EXECUTIVE SUMMARY

Proposed change requested:

The CBABC recommends that the *Family Compensation Act* (“Act”) be amended to provide for bereavement damages in the event of a death of a family member caused by the wrongdoing of another person or entity.

Reason for change:

The current failure of the law to recognize such losses is offensive and inexplicable to BC families who experience such tragedies, fails to reflect modern-day accepted norms as to basic fairness in a tort system, and is out of line with the law in most jurisdictions in Canada.

The Legislation and Law Reform Committee (LLRC) of CBABC reviewed existing legislation in other jurisdictions and proposals by others for changes in BC (See Appendix A). The LLRC identified three areas in which legislation in other Canadian jurisdictions and proposals for reform from British Columbia differ in approach, and made three recommendations regarding the approach which should be taken in British Columbia on those issues. Those recommendations have been endorsed by the CBABC Executive Committee.

1. Class Of Claimants For Bereavement Damages

The class of who may claim for both pecuniary and non-pecuniary loss in the event of a wrongful death could include broadly defined concepts of spouse, parent and child, as well as other family members including step-relationships, grandparents/grandchildren, adoptees and persons who stood in loco parentis. The majority of the LLRC was in favour of adopting a broader approach to this issue following the lead of several other Canadian jurisdictions.

2. Bereavement Damages Set By Legislation or By Court

Other provinces in Western Canada have set statutory amounts for recovery of non-pecuniary damages for bereavement, including grief and loss of guidance, care and companionship. For example, in Alberta a spouse or parent is entitled to bereavement damages of \$82,000, while a child is entitled to damages of \$49,000. The amounts in Saskatchewan and Manitoba are lower.

The alternative approach is to leave the amounts for such damages at large. That would require a claimant in any case to prove to an evidentiary standard exactly the sort of grief that was suffered and the extent to which the claimant has lost guidance, care and/or companionship. There is the potential to earn a higher recovery – but there is also a risk that a conservative judge or jury might award less.

The at-large approach has the benefit that where the circumstances dictate, the amounts can go higher – for example, if the deceased suffers in pain for an extended period of time and is cared for by the claimant. Fixed amounts, on the other hand, have the advantage of encouraging settlement and affording more certainty to insurers. The majority of the LLRC was in favour of the specified amounts approach.

3. Punitive Damages Set By Court

Historically, punitive damages have not been available in Canada in cases of wrongful death. The Court of Appeal in British Columbia made that clear in the *Allan Estate (Executors of) v. Co-Operators Life Insurance Co.*, 1999 BCCA 35. The New Brunswick legislature has specifically authorized claims for punitive damages by statute, while legislation in other jurisdictions has remained silent on this issue. The Alberta Court of Appeal in *Steinkrauss v Afridi*, 2013 ABCA 417, recently suggested that in that province, even in the absence of any statutory authority, punitive damages may be awarded in appropriate circumstances. The majority of the LLRC was of the opinion that punitive damages can play an appropriate role in some cases, that our courts have been appropriately cautious in making such awards, and as a result LLRC would support giving statutory authority to award punitive damages.

Legislative Session for enactment: Fall 2014 or Spring 2015

In force date once enacted: On Royal Assent

Stakeholder engagement:

A diverse range of stakeholders are in agreement in principle that the Act be changed, including BC Coalition of People with Disabilities and the Trial Lawyers Association of BC.

Evidence-based policy development:

In 1994 the Law Reform Commission of British Columbia (now British Columbia Law Institute) recommended to the government that the Act be replaced.

In 2007, the Ministry of Justice released a Green Paper on the Act seeking feedback from stakeholders and the public for reform to the Act. The government conducted a broad-based consultation but did not make changes to the Act.

Alberta, Saskatchewan and Manitoba, for many years, have had similar legislation to what the CBABC is proposing.

The CBABC's proposal is similar to the 2011 private members bill introduced by B.C. Liberal MLA Ralph Sultan.

Proposed Changes Affect:

The CBABC proposed amendments are consistent with the government's Families First Agenda and would benefit the 1.2 million families in BC. There are about 331 fatal motor vehicle accident victims each year in BC.

CBABC's proposed change is at no cost to government.

CBABC's change would modernize the Act and place BC in harmony with legislation in Alberta, Saskatchewan and Manitoba.

Financial implications of change: May impact insurance rates

Impact on *Freedom of Information and Protection of Privacy Act (FOIPPA)*: None

BRIEFING NOTE

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Reason for change:

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The Legislation and Law Reform Committee (LLRC) of CBABC reviewed existing legislation in other jurisdictions and proposals by others for changes in BC (See Appendix A). The LLRC identified three areas in which legislation in other Canadian jurisdictions and proposals for reform from British Columbia differ in approach, and made three recommendations regarding the approach which should be taken in British Columbia on those issues. Those recommendations have been endorsed by the CBABC Executive Committee.

1. Class Of Claimants For Bereavement Damages

The class of who may claim for both pecuniary and non-pecuniary loss in the event of a wrongful death could include broadly defined concepts of spouse, parent and child, as well as other family members including step-relationships, grandparents/grandchildren, adoptees and persons who stood in loco parentis. The majority of the LLRC was in favour of adopting a broader approach to this issue following the lead of several other Canadian jurisdictions.

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The alternative approach is to leave the amounts for such damages at large. That would require a claimant in any case to prove to an evidentiary standard exactly the sort of grief that was suffered and the extent to which the claimant has lost guidance, care and/or companionship. There is the potential to earn a higher recovery – but there is also a risk that a conservative judge or jury might award less.

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Legislative Session for enactment: Fall 2014 or Spring 2015

In force date once enacted: On Royal Assent

Stakeholder engagement:

A diverse range of stakeholders are in agreement in principle that the Act be changed, although the CBABC is narrower in scope.

In 2008, the BC Coalition of People with Disabilities (BCCPD) advocated a wrongful death accountability statute to replace the current Act. The BCCPD proposal was supported by the Trial Lawyers Association of BC.¹

In 2011, the TLABC published a draft *Wrongful Death Accountability Act* to replace the current Act.²

Both the BCCPD and TLABC propose replacing the current Act with a *Wrongful Death Accountability Act*, a new statute that would provide damages for:

- bereavement, personal anguish, emotional stress, loss of companionship, comfort, love and affection, loss of advice, counsel, guidance, protection and care, the decedent's mental anguish, pain and suffering from the date of injury to death; and
- punitive damages.

¹ "in their name: the call for a wrongful death act in BC" (2008)(http://www.bccpd.bc.ca/docs/intheirname_fullcolweb.pdf).

² See <http://www.protectingjusticeforbc.org/justice-wp/wp-content/uploads/WRONGFUL-DEATH-ACCOUNTABILITY-ACT-SEPT-20111.pdf>.

Evidence-based policy development:

In 1994 the Law Reform Commission of British Columbia (LRC) (now British Columbia Law Institute) recommended to the government that the Act be replaced for both fatal and non-fatal accidents.³ The LRC recommended broadening the heads of damages to go beyond bereavement damages. The LRC recommended damages for:

- lost services and loss of support in fatal accident cases;
- pecuniary damages;
- guidance, care and companionship for non-fatal accident cases; and
- grief counseling in both fatal and non-fatal accident cases.⁴

The LRC drafted a new Act based on its recommendations. The government did not act on the LRC recommendations.

In 2007, the Ministry of Justice released a Green Paper on the Act asking three questions of stakeholders and the public:

1. Should the list of eligible claimants under the *Family Compensation Act* be expanded?
2. Should non-fatal injuries of a family member be included under the *Family Compensation Act* – or only fatal injuries?
3. Should the scope of damages allowed under the *Family Compensation Act* be changed?⁵

The government conducted a broad-based consultation but did not make changes to the Act.

In 2010 and 2011, the government made minor amendments to the Act.⁶

In 2011, B.C. Liberal MLA Ralph Sultan introduced a private members bill, *Family Compensation Act Amendment Act, 2011* (Bill M 213).⁷ Like the Alberta statute, Bill M 213 amended the Act to provide for bereavement damages. Bill M 213 did not proceed past First Reading.

Alberta, Saskatchewan and Manitoba provide for bereavement damages.

³ Report on Pecuniary Loss and the Family Compensation Act (No. 139)(1994)
(http://www.bcli.org/sites/default/files/LRC139-Pecuniary_Loss_and_the_Family_Compensation_Act.pdf).

⁴ *Supra* at pages 30-32.

⁵ Ministry of Attorney General, Justice Services Branch, Civil and Family Law Policy Office, Green Paper: Reforming British Columbia's Family Compensation Act (June 2007)
(http://www.llbc.leg.bc.ca/public/Pubdocs/bcdocs/414944/ReformingBC_FamilyCompAct.pdf)
at page 2 (“BC Green Paper”).

⁶ See section 47 of *Miscellaneous Statutes Amendment Act (No. 2), 2010*, S.B.C. 2010, c. 6 (Bill 11)
(http://leg.bc.ca/39th2nd/3rd_read/gov11-3.htm) and section 340 of *Family Law Act*, S.B.C. 2010, c. 25 (Bill 16)
(http://leg.bc.ca/39th4th/3rd_read/gov16-3.htm).

⁷ First Reading June 2, 2011 (http://leg.bc.ca/39th3rd/1st_read/m213-1.htm).

In Alberta, section 8 of the *Fatal Accidents Act*, R.S.A. 2000 c. F-8 provides a claim for fixed damages of \$82,000 for grief and loss of guidance, care and companionship to a spouse or adult interdependent partner, parent of any age (split if there are two parents), and \$49,000 to a child of any age of a deceased person killed by a wrongdoer⁸. A child is defined as a son or daughter, and a parent as a mother or father.⁹ Section 9 of the Alberta *Fatal Accidents Act* requires the government to review the bereavement amounts every 5 years to determine whether they need to be adjusted. The results of the review must be presented to the Alberta Legislative Assembly.¹⁰

In Saskatchewan, section 4.1 of the *Fatal Accidents Act*, R.S.S. 1978, c. F-11 provides for fixed damages for a spouse, child or parent of a deceased for grief and loss of guidance, care and companionship:

- \$60,000 to the spouse of the deceased person;
- \$30,000 to each parent of the deceased person; and
- \$30,000 to each child of the deceased person.¹¹

A spouse includes a husband or wife, or a person with whom the deceased cohabited as spouse continuously for two years, or a relationship of some permanence, if they are the parents of a child. Child includes a son, daughter, stepson, stepdaughter, adopted child, and a person to whom the deceased stood in loco parentis. A parent includes a father, mother, stepfather, stepmother, a person who adopted a child, and a person who stood in loco parentis to the deceased.¹²

In Manitoba, section 3.1(2) of the *Fatal Accidents Act*, C.C.S.M. c. F50 provides a claim for fixed damages for loss of guidance, care and companionship to a spouse, common law partner, or person receiving support from the deceased:

- \$30,000 to each of the spouse of the deceased, the common-law partner of the deceased and the support recipient of the deceased and to each parent and child of the deceased; and
- \$10,000 to each family member of the deceased.¹³

⁸ See <http://canlii.ca/en/ab/laws/stat/rsa-2000-c-f-8/latest/rsa-2000-c-f-8.html> and section 7(2) of the *Statutes Amendment Act, 2013* (No. 2)(Bill 38) amending section 8 of the *Fatal Accidents Act* to place revised fixed damages from the regulation to the statute (in force May 1, 2013) (http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-038.pdf). The effect of Bill 38's amendments is to require any revision of the fixed damages to be made, every 5 years, by the Alberta Legislative Assembly, not by regulation set by Cabinet.

⁹ Alberta Justice and Solicitor General, Review Of Damage Amounts Under Section 8 Of The Fatal Accidents Act: A Discussion Paper (May 2012). (http://justice.alberta.ca/programs_services/law/Documents/FAA-Discussion-Paper-May-2012.pdf)("Alberta Discussion Paper") at page 12.

¹⁰ Alberta Discussion Paper at page 1.

¹¹ See <http://canlii.ca/en/sk/laws/stat/rss-1978-c-f-11/latest/part-1/rss-1978-c-f-11-part-1.pdf>.

¹² Alberta Discussion Paper at page 12.

¹³ See <http://canlii.ca/en/mb/laws/stat/ccsm-c-f50/latest/ccsm-c-f50.html>.

Damages are also provided to children under 18, parents and family members. Family members include: children 18 or over, stepchildren, persons to whom the deceased stood in *loco parentis*, stepparents, persons who stood in *loco parentis* to the deceased, siblings, grandparents and grandchildren.¹⁴

Proposed Changes Affect:

The CBABC's proposed change is consistent with the government's Families First Agenda by protecting families.¹⁵

The change could potentially affect the 1.2 million families in BC.¹⁶ On average, there are about 331 fatal motor vehicle accident victims each year in BC.¹⁷ It is not known the average annual number of non-motor vehicle fatal accident victims.

The change corrects the current unfairness for not compensating families for bereavement damages. The change maintains the goal of Act "to minimize the economic impact on the lives of people who were financially dependent on a family member that has been wrongfully killed."¹⁸

The change sets non-discretionary limits in the Act; this increases the certainty and lessens the administrative burden on the courts. The change does not require a party to prove damages, so it "[a]voids putting emotional pain on trial, which may support the healing process".¹⁹

The change is minor; there is no new statute. The change does not expand to include non-fatal accident cases or broad heads of damages. The change has no affect to procedural law, no change to the jurisdiction of courts and little or no affect to presentation of evidence in court.²⁰

¹⁴ Alberta Discussion Paper at page 12.

¹⁵ See <http://www.familiesfirstbc.ca/>.

¹⁶ See Statistics Canada, 2011 Census of Population, Statistics Canada Catalogue no. 98-312-XCB2011024 (<http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/tbt-tt/Rp-eng.cfm?TABID=2&LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=01&GID=910719&GK=1&GRP=1&PID=102075&PRID=0&PTYPE=101955&S=0&SHOWALL=0&SUB=0&Temporal=2011&THEME=89&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0>).

¹⁷ ICBC, "5 year average from 2008 to 2012 in Quick Statistics: Fatal accidents" (http://www.icbc.com/about-ICBC/news_room/icbc_stats#).

¹⁸ BC Green Paper at page 1.

¹⁹ BC Green Paper at page 12.

²⁰ Proof of damage is not required; proof of relationship with the fatal accident victim would be required in order for family members to be entitled to damages. That proof would likely be in the form of sworn affidavits, with certified copies of birth certificates and/or marriage licenses, attached to the affidavits and admitted into evidence before the court. The burden of adducing that evidence would fall to the claimants, not the court or the government.

The change results in no cost to government. There are no changes to the Rules of Court or operation of the courts.

The change is a new amendment so there is no governing case law. There is no conflict with the Canadian Charter of Rights and Freedoms. The change does not impose new offences, fines, administrative penalties. The change does not require increased enforcement or administrative burden by government. Enforcement for the change is by court order.

The change would not create additional case loads for the courts since the change is an additional head of damage, not a separate cause of action. The change provides for fixed damages without need to prove damage so no extra time and resources are needed to adduce evidence in court to prove damage.

The change is consistent with legislation in Alberta, Saskatchewan and Manitoba.

Financial implications of change: May impact insurance rates. Data is not currently available for BC. Regarding motor vehicle fatal accidents, the 2012 Alberta Discussion Paper stated:

In 1993, the Alberta Law Reform Institute estimated that its proposals to increase the amount of damages from \$3,000 to \$40,000 and \$25,000 would result in a premium increase per vehicle of no more than \$22. As complete information was not available, the analysis was based on a number of assumptions, but at the time the insurance industry agreed that the analysis was reasonably accurate.²¹

Impact on *Freedom of Information and Protection of Privacy Act (FOIPPA) (Legislative Privacy Impact Assessment per s. 69(5.1) FOIPPA):*²² Personal information will be collected, used and disclosed as a result of the change, but FOIPPA is not applicable since section 3(1)(a) and (b) of FOIPPA excludes court records from FOIPPA.²³

²¹ Alberta Discussion Paper at page 10.

²² Section 69 (5.1) of FOIPPA states that the legislative Privacy Impact Assessment must be submitted to the minister responsible for FOIPPA for review during the development of any new project, program or activity, system or proposed enactment, or when making changes to an existing one (http://www.cio.gov.bc.ca/local/cio/priv_leg/documents/foippra/LPIA%20-%20Nov%202013.doc).

²³ See http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96165_00.

APPENDIX A MATRIX: WRONGFUL DEATH LEGISLATION

Introduction

This Matrix: Wrongful Death Legislation compares the wrongful death legislation across Canada with the current BC *Family Compensation Act* (FCA).²⁴

The comparators with the FCA are:

- BC Liberal MLA Ralph Sultan's private members bill, *Family Compensation Act Amendment Act, 2011* (Bill M 213)(Sultan);²⁵
- Alberta *Fatal Accidents Act*, R.S.A. 2000 c. F-8 (Alberta);²⁶
- Saskatchewan *Fatal Accidents Act*, R.S.S. 1978, c. F-11 (Saskatchewan);²⁷
- Manitoba *Fatal Accidents Act*, C.C.S.M. c. F50 (Manitoba);²⁸
- Ontario *Family Law Act*, RSO 1990, c F.3 (Ontario);²⁹
- Québec *Civil Code of Québec*, LRQ, c C-1991 (Québec);³⁰
- New Brunswick *Fatal Accidents Act*, SNB 2012, c 104 (New Brunswick);³¹
- Nova Scotia *Fatal Injuries Act*, RSNS 1989, c 163 (Nova Scotia);³²
- Prince Edward Island *Fatal Accidents Act*, RSPEI 1988, c F-5 (PEI);³³

²⁴ See http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96126_01. Recent minor amendments are in section 47 of *Miscellaneous Statutes Amendment Act (No. 2), 2010*, S.B.C. 2010, c. 6 (Bill 11) (http://leg.bc.ca/39th2nd/3rd_read/gov11-3.htm) and section 340 of *Family Law Act*, S.B.C. 2010, c. 25 (Bill 16) (http://leg.bc.ca/39th4th/3rd_read/gov16-3.htm).

²⁵ First Reading June 2, 2011 only (http://leg.bc.ca/39th3rd/1st_read/m213-1.htm).

²⁶ See <http://canlii.ca/en/ab/laws/stat/rsa-2000-c-f-8/latest/rsa-2000-c-f-8.html> and section 7(2) of the *Statutes Amendment Act, 2013 (No. 2)*(Bill 38) amending section 8 of the *Fatal Accidents Act* to place revised fixed damages from the regulation to the statute (in force May 1, 2013) (http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-038.pdf). The effect of Bill 38's amendments is to require any revision of the fixed damages to be made, every 5 years, by the Alberta Legislative Assembly, not by regulation set by Cabinet.

²⁷ See section 4.1 in <http://canlii.ca/en/sk/laws/stat/rss-1978-c-f-11/latest/part-1/rss-1978-c-f-11-part-1.pdf>.

²⁸ See section 3.1 in <http://canlii.ca/en/mb/laws/stat/ccsm-c-f50/latest/ccsm-c-f50.html>.

²⁹ See sections 61-63 in <http://canlii.ca/en/on/laws/stat/rso-1990-c-f3/97624/rso-1990-c-f3.html>.

³⁰ See Article 1457 in <http://canlii.ca/en/qc/laws/stat/lrq-c-c-1991/106980/lrq-c-c-1991.html> and solatium doloris, a compensable head of moral prejudice in Quebec civil law, per *Augustus v. Gosset*, [1996] 3 S.C.R. 268 (<http://canlii.ca/en/ca/scc/doc/1996/1996canlii173/1996canlii173.html>). See also, Government of Alberta, Review Of Damage Amounts Under Section 8 Of The Fatal Accidents Act A Discussion Paper (May 2012) at p. 12 (http://justice.alberta.ca/programs_services/law/Documents/FAA-Discussion-Paper-May-2012.pdf).

³¹ See section 3 in <http://canlii.ca/en/nb/laws/stat/snb-2012-c-104/103966/snb-2012-c-104.html>.

³² See section 5 in <http://canlii.ca/en/ns/laws/stat/rsns-1989-c-163/51676/rsns-1989-c-163.html>.

- Newfoundland and Labrador, *Fatal Accidents Act*, RSNL 1990, c F-6 (Newfoundland);³⁴ and
- Canada *Marine Liability Act*, SC 2001, c 6 (Canada).³⁵

Like BC, none of the territories provide bereavement damages:

- Northwest Territories *Fatal Accidents Act*, RSNWT 1988, c F-3;³⁶
- Nunavut *Fatal Accidents Act*, RSNWT (Nu) 1988, c F-3;³⁷ and
- Yukon *Fatal Accidents Act*, RSY 2002, c 86.³⁸

The matrix is current to January 21, 2014.

The topics for comparison in the matrix are:

- class of claimants for bereavement damages;
- bereavement damages set by legislation;
- bereavement damages set by court;
- expenses damages set by court; and
- punitive damages set by court.

Class of Claimants Bereavement Damages

For purposes of analysis, the provisions of each statute as to who are claimants entitled to bereavement damages is broken down into four categories:

- no application;
- narrow application;
- mid application; and
- broad application.

Narrow application would include 3 degrees of separation in the relationship to the deceased person:

- spouse;
- parent; and
- child.

The Sultan proposed statute is an example. Alberta is also an example.

³³ See section 6 in <http://canlii.ca/en/pe/laws/stat/rspei-1988-c-f-5/77445/rspei-1988-c-f-5.html>.

³⁴ See section 6 in <http://canlii.ca/en/nl/laws/stat/rsnl-1990-c-f-6/82438/rsnl-1990-c-f-6.html>.

³⁵ See section 6 in <http://canlii.ca/en/ca/laws/stat/sc-2001-c-6/78611/sc-2001-c-6.html>.

³⁶ See <http://canlii.ca/en/nt/laws/stat/rsnwt-1988-c-f-3/70223/rsnwt-1988-c-f-3.html>.

³⁷ See <http://canlii.ca/en/nu/laws/stat/rsnwt-nu-1988-c-f-3/87480/rsnwt-nu-1988-c-f-3.html>.

³⁸ See <http://canlii.ca/en/yk/laws/stat/rsy-2002-c-86/108876/rsy-2002-c-86.html>.

Mid application would include 4 degrees of separation in the relationship from the deceased person:

- spouse;
- parent;
- child; and
- other family member.

Ontario, Québec and Prince Edward Island are examples.

Broad application would include 4 degrees of separation in the relationship to the deceased person with broad definitions of who is a:

- spouse;
- parent;
- child;
- other family member, including step relationships, grandparents/grandchildren, adoptees and persons who stood *in loco parentis* to the deceased and to whom the deceased stood *in loco parentis*.

Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador and Canada are examples of this approach.

A more detailed analysis of the provisions within each of these jurisdictions is set out in Schedule B.

Damage Types

Damage types are:

- bereavement damages;
- damages for reasonable expenses; and
- punitive damages.

Bereavement Damages

Bereavement damages across Canada typically include damages for grief and loss of guidance, care and companionship.

Currently, 3 jurisdictions permit bereavement damages fixed by statute. They are:

- Alberta:
 - \$82,000 to a spouse or adult interdependent partner;
 - \$82,000 to a parent of any age (split if there are two parents); and
 - \$49,000 to a child of any age of a deceased person;³⁹

³⁹ Section 8 and see <http://canlii.ca/en/ab/laws/stat/rsa-2000-c-f-8/latest/rsa-2000-c-f-8.html> and section 7(2) of the *Statutes Amendment Act, 2013 (No. 2)*(Bill 38) amending section 8 of the *Fatal Accidents Act* to place revised fixed damages from the regulation to the statute (in force May 1, 2013) (http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-038.pdf). The effect of Bill 38's amendments is to require any revision of the fixed damages to be made, every 5 years, by the Alberta Legislative Assembly, not by regulation set by Cabinet.

- Saskatchewan:
 - \$60,000 to the spouse of the deceased person;
 - \$30,000 to each parent of the deceased person; and
 - \$30,000 to each child of the deceased person;⁴⁰

- Manitoba:
 - \$30,000 to each of the spouse of the deceased, the common-law partner of the deceased and the support recipient of the deceased;
 - \$30,000 to each parent of the deceased;
 - \$30,000 to each child of the deceased; and
 - \$10,000 to each family member of the deceased.⁴¹

The proposed Sultan statute would have provided:

- \$75,000 to spouse of the deceased, unless the spouse was living separate and apart from the deceased person at the time of death;
- \$75,000 to the parents of the deceased divided equally;
- \$45,000 to each child of the deceased.⁴²

Fixed damages are set by jurisdiction either in the statute or regulation. With fixed damages, there is no need for a trial to prove damages; judges have no discretion to increase or decrease the quantum of the damages.

Where bereavement damages are not fixed by legislation, judges may award damages after a trial where damages are proven.

Damages For Reasonable Expenses

Damages for reasonable expenses across Canada typically include damages for:

- expenses incurred for the care and well being of the deceased, such as medical and hospital expenses;
- travel and accommodation expenses;
- funeral expenses; and
- grief counseling.

In BC, the FCA only provides for funeral and medical expenses.⁴³

⁴⁰ Section 4.1 in <http://canlii.ca/en/sk/laws/stat/rss-1978-c-f-11/latest/part-1/rss-1978-c-f-11-part-1.pdf>.

⁴¹ Section 3.1(2) in <http://canlii.ca/en/mb/laws/stat/ccsm-c-f50/latest/ccsm-c-f50.html>.

⁴² Adding a new section 3(10) and (11) to the *Family Compensation Act* in http://leg.bc.ca/39th3rd/1st_read/m213-1.htm.

⁴³ Section 3(9).

Punitive Damages

Unlike compensatory damages such as bereavement damages and reasonable expenses, the Supreme Court of Canada has held that punitive damages are awarded by courts for the purposes of “retribution, deterrence and denunciation” to address conduct that departs “markedly from ordinary standards of decency — the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court’s sense of decency” per *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 at paras. 62 and 63.⁴⁴

New Brunswick is the only jurisdiction to permit punitive damages. Section 17 of its *Fatal Accidents Act* provides that “exemplary or punitive damages may be awarded in appropriate cases, but if the damages are awarded, they are for the benefit of the estate of the deceased.”⁴⁵

⁴⁴ See <http://canlii.ca/en/ca/scc/doc/2006/2006scc30/2006scc30.html>.

⁴⁵ See Footnote 9.

**SCHEDULE A
MATRIX
WRONGFUL DEATH LEGISLATION ACROSS CANADA**

| JURISDICTION | CLASS OF CLAIMANTS FOR BEREAVEMENT DAMAGES | BEREAVEMENT DAMAGES SET BY LEGISLATION | BEREAVEMENT DAMAGES SET BY COURT | EXPENSES DAMAGES SET BY COURT | PUNITIVE DAMAGES SET BY COURT |
|-----------------------|--|--|----------------------------------|-------------------------------|-------------------------------|
| FCA | × | × | × | ✓ | × |
| Sultan | Narrow | ✓ | × | × | × |
| Alberta | Narrow | ✓ | × | ✓ | × |
| Saskatchewan | Broad | ✓ | × | ✓ | × |
| Manitoba | Broad | ✓ | × | ✓ | × |
| Ontario | Mid | × | ✓ | ✓ | × |
| Québec | Mid | × | ✓ | ✓ | × |
| New Brunswick | Broad | × | ✓ | ✓ | ✓ |
| Nova Scotia | Broad | × | ✓ | ✓ | × |
| PEI | Mid | × | ✓ | ✓ | × |
| Newfoundland | Broad | × | ✓ | ✓ | × |
| Canada | Broad | × | ✓ | ✓ | × |
| Yukon | × | × | × | ✓ | × |
| Northwest Territories | × | × | × | ✓ | × |
| Nunavut | × | × | × | ✓ | × |

SCHEDULE B

JURISDICTIONS PROVIDING BEREAVEMENT DAMAGES TO ELIGIBLE CLAIMANTS

The issue of who are claimants entitled to damages can be analyzed as:

- No application;
- Narrow application;
- Mid application; and
- Broad application.

NO APPLICATION

Currently, the law does not provide for any application of bereavement damages in:

- British Columbia;
- Yukon;
- Nunavut; and
- Northwest Territories.

NARROW APPLICATION

Narrow application would only include 3 degrees of separation in the relationship to the deceased person: spouse, parent and child.

Alberta, in section 8 of its legislation, provides bereavement damages to:

- spouse or adult interdependent partner;
- parent of any age where a parent is a mother or father of the deceased (split if there are two parents), and
- child of any age, defined as a son or daughter of the deceased.

In the Sultan proposed statute, provides bereavement damages to:

- spouse of the deceased whether married or living with deceased in a marriage-like relationship, for a period of at least 2 years ending no earlier than one year before the death of the deceased, unless the spouse was living separate and apart from the deceased person at the time of death;
- parents, grandparents or stepparents of the deceased divided equally;
- child, defined as a person to whom the deceased stood in role of parent and person whose stepparent was the deceased, of any age of the deceased.

MID APPLICATION

Mid application would include 4 degrees of separation in the relationship from the deceased person: spouse, parent, child and other family member.

In Ontario, in Part 4 (sections 61-63) of its legislation, permits a claim for bereavement damages to:

- spouse, defined as married to the deceased or a person cohabiting with the deceased for three years or in a relationship of some permanence if they had a child;
- parent and grandparents;
- children and grandchildren; and
- brothers and sisters of the deceased.

Section 61 has been considered by the Ontario Court of Appeal in *McIntyre v. Grigg*, 2006 CanLII 37326 (ON CA).⁴⁶

In Québec, in Article 1457 of its legislation and per *Augustus v. Gosset*, [1996] 3 SCR 268, the courts have awarded damages similar to bereavement damages to:

- spouses, including common law spouses and separated spouses;
- parents and grandparents;
- children; and
- siblings; and
- aunts.

In Prince Edward Island, in sections 1(f) and 6 of its legislation, permits a claim for bereavement damages to “dependants” who are defined as:

- surviving spouse of the deceased;
- child or grandchild of the deceased;
- parent of the deceased;
- spouse of a child, grandchild or parent of the deceased;
- person divorced from the deceased who was dependent upon the deceased for maintenance or support at the time of deceased's death or who was entitled to maintenance or support under any contract or judgment of any court in this province or elsewhere; and
- any other person who for a period of at least three years immediately prior to the death of the deceased was dependent upon the deceased for maintenance and support.

⁴⁶ See <http://canlii.ca/en/on/onca/doc/2006/2006canlii37326/2006canlii37326.html>.

BROAD APPLICATION

Broad application would include 4 degrees of separation in the relationship to the deceased person with broad definitions of who is a:

- spouse;
- parent;
- child;
- other family member, including step relationships, grandparents/grandchildren, adoptees and persons who stood *in loco parentis* to the deceased and to whom the deceased stood *in loco parentis*.

In Saskatchewan, in sections 2 and 4.1 of its legislation, permits a claim for bereavement damages to a:

- spouse, except spouse living separate and apart from the deceased at the time of the deceased's death, "spouse" defined as wife or husband of the deceased, person with whom the deceased cohabited as spouses (continuously for a period of not less than two years or in a relationship of some permanence, if they are the parents of a child;
- parent but not grandparent, "parent" defined as father, mother, stepfather, stepmother, a person who adopted a child, and a person who stood *in loco parentis* to the deceased;
- child, but not grandchild, "child" defined as son, daughter, stepson, stepdaughter, adopted child, and a person to whom the deceased stood *in loco parentis*;

In Manitoba, in section 3.1 of its legislation, permits a claim for bereavement damages to a:

- spouse
- child defined as a son or daughter of the deceased who, at the time of the death of the deceased, was under the age of 18 years;
- family member defined as:
 - son or daughter of the deceased who, at the time of the death of the deceased, was 18 years of age or over;
 - step-son or step-daughter of the deceased, or a person to whom the deceased stood *in loco parentis*;
 - step-mother or step-father of the deceased, or a person who stood *in loco parentis* to the deceased; and
 - brother, sister, grandson, granddaughter, grandfather or grandmother of the deceased;
- parent defined as mother or father of the deceased.

In New Brunswick, in sections 1 and 6 of its legislation, permits a claim for bereavement damages to:

- "child" includes a son, daughter, grandson, granddaughter, stepson, stepdaughter, an adopted child and a person to whom the deceased stood in the role of parent;
- "parent" includes a father, mother, grandfather, grandmother, stepfather, stepmother, adoptive parent and a person who stood in the role of parent to the deceased;
- "spouse" includes:

- cohabitant to whom the deceased, at the time of his or her death, owed an obligation to provide support under subsection 112(3) of the *Family Services Act*;
- cohabitant to whom the deceased, at the time of his or her death, would have owed an obligation to provide support under subsection 112(3) of the *Family Services Act* but for the fact that the cohabitant was not substantially dependent upon the deceased for support; and
- former spouse, including a former cohabitant to whom the deceased, at the time of his or her death, was providing support or was obliged to provide support.

In Nova Scotia, in sections 2 and 5 of its legislation, permits a claim for bereavement damages to a:

- "child" includes son, daughter, grandson, granddaughter, stepson and stepdaughter;
- "common-law partner" of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least one year immediately preceding the death of the individual;
- "parent" includes father, mother, grandfather, grandmother, stepfather and stepmother;
- "spouse" means either of a man or woman who are married to each other.

In Newfoundland and Labrador, in sections 2 and 6 of its legislation, permits a claim for bereavement damages to a:

- "child" includes a son, daughter, grandson, grand-daughter, step-son, step-daughter, an adopted child and a person to whom the deceased stood in the place of a parent;
- "parent" includes a father, mother, grandfather, grandmother, step-father, step-mother, an adoptive parent and a person who stood in the place of a parent to the deceased; and
- "partner" means either of 2 persons who have cohabited in a conjugal relationship outside of marriage:
 - for a period of at least 2 years; or
 - for a period of at least one year, where they are, together, the biological or adoptive parents of a child.

In Canada, in sections 4 and 6 of its legislation, permits a claim for bereavement damages where the deceased's death relates to navigation and shipping to a "dependant" defined as a:

- son, daughter, stepson, stepdaughter, grandson, granddaughter, adopted son or daughter, or an individual for whom the injured or deceased person stood in the place of a parent;
- spouse, or an individual who was cohabiting with the injured or deceased person in a conjugal relationship having so cohabited for a period of at least one year; or
- brother, sister, father, mother, grandfather, grandmother, stepfather, stepmother, adoptive father or mother, or an individual who stood in the place of a parent.

END