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Fatality Claims

Mediating the fatality claim – the principled approach

How "unpaid work" impacts wrongful death claims

A look at coroner's inquests

ESTATE

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CLAIMS

While the breadth of damages is wide, the merits of advancing an estate claim can be more than just financially beneficial

No amount of money can ever compensate a family who has lost a loved one to negligence. However, that does not mean that the defendant should pay less than the full amount permitted by law.

It is especially important to claim all possible heads of damage in a fatality case since general damages are so low, and since the deceased's future loss of income claim is converted from a loss of all future gross income, to a financial dependency claim. The latter examines net income, and makes large reductions because of economic theories that presume the deceased would have spent a lofty percentage of his or her income on himself.

One way to augment the claim on behalf of the family, in appropriate cases, is by advancing claims of punitive, aggravated or exemplary damages, or a claim on behalf of the estate for the pain and suffering of the decedent. For the former group of damages, the law is unresolved whether such claims are viable; for the latter, the law is established, but the range that might be awarded is broad.

Dealing first with the issue of punitive and aggravated claims, the Ontario Court of Appeal has yet to pronounce whether an estate trustee can advance such a claim. Its interpretation of the *Family Law Act* in *Lord v. Downer*[1] precludes family members from bringing actions for punitive, aggravated or exemplary damages. The plaintiffs brought the claim which arose

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from a murder in a parking garage. The court began with the common law, which historically precluded family members from claiming for damages arising from the death of a family member caused by negligence. The court then traced English legislative history which first introduced fatal accidents legislation (*Lord Campbell's Act,* 1846 c.93). The court proceeded to examine and the Ontario legislation, the *Family Law Act* (formerly the *Fatal Accidents Act,* 10 Vict., c.6, 1847), with a particularly close reading of s. 61 of the *Family Law Act.* It concluded that pecuniary damages were not allowed because they are not compensatory. The court found that aggravated damages were not allowed, although compensatory, because the dependants could not be considered the victims of the tort, and because damages cannot be claimed for grief, sorrow and mental anguish, which aggravated damages are akin to if not identical.

Not long after *Lord,* the Superior Court was asked to determine whether an estate trustee could advance a claim for punitive damages. Surprisingly, the answer was maybe.

George v. Harris[2] involved the tragic 1995 shooting of Dudley George by an OPP officer at Ipperwash Provincial Park. Dudley's brother, Donald, was the estate trustee. The defendants moved to strike portions of the claim seeking punitive damages.

Epstein, J. considered jurisprudence from British Columbia that found the estate incapable of advancing a claim for punitive damages. Nevertheless, the court was of the view that in cases where pressing matters of policy are raised in the pleadings, or where the statute does not lend itself to crystal clarity in its interpretation, such cases should be resolved on a full and open airing of the issues at trial.

LaForme, J. followed the *George* decision in *Tizard Estate v. Ontario,*[3] and refused to strike the plaintiff's claim prior to a full hearing of the issue at trial. Accordingly, at least for now, pleading punitive damages in the right case, on behalf of the estate, will not be struck. However, one would want to be certain that the facts are strong as any given case could establish the law on the subject in Ontario.

The estate trustee is the last viable party to have a claim for punitive, aggravated or exemplary damages in fatality cases. Given the purpose which these claims advance, such as punishing abhorrent conduct, there is a strong policy argument that someone has to be able to bring such claims. Otherwise such conduct goes unpunished where the victim is killed rather than injured.

A distinct head of damages, for which there is no debate about legitimacy, is a claim for pain and suffering on behalf of the deceased for the time period between the tortious incident and death. This was affirmed in *George v. Harris,* and is not new law.

Damages for such injuries vary widely, depending on whether they are assessed by a judge or jury, how long the deceased survived, the age of the deceased at the time of death, whether the negligence was the direct cause of death or a contributing or aggravating factor, and how much suffering the person likely endured before death.

It is fair to assume that a jury would be hard-pressed to place a "zero" beside the question, "In what amount do you assess the deceased's damages for pain and suffering in the moments before he died?" There is no down-side to advancing such a claim. It would be very difficult for defence counsel to maintain credibility and likability were

he or she to suggest that the number should be zero.

The case law on this subject reveals a wide range of damage awards:

In 1954, in *McEllistrum v. Etches,*[4] the Ontario Court of Appeal awarded $500 for the pain and suffering of a young boy who darted out into traffic and was killed. In 2012 dollars that is $4,300.

In *O'Rourke v. Arnprior Agricultural Society*[5] a 13-year-old boy died in a horse race. He was unconscious from the moment of his fall to his death. The court awarded $1,000. In current dollars that equates to $4,500.

In 1978 the Court of Appeal in *Hill Estate v. Ethier,*[6] upheld the jury's award of $12,321 ($40,043 today) to a woman who died two months after a car accident from a pre-existing brain tumour aggravated by the accident.

In 2007, *Rich v. Lingard*[7] awarded $80,000 in general damages to a plaintiff who sustained shoulder and chest pain from a car crash that left him unable to do housework or return to his job as a mechanic for the 15 months between his accident and the day he died of unrelated heart problems.

In *Higgins Estate v. Security One Alarm Systems Ltd.,*[8] the court awarded $55,000 in non-pecuniary general damages. The deceased was a 78-year-old woman who had suffered a stroke, and did not receive assistance for 48 hours, despite having alerted her alarm company. She had surgery, which included amputation of her thumb. She had a second stroke 30 days later and died. In 2012 dollars, the award would amount to $68,500.

In *Wei Estate v Dales,*[9] a middle-aged PhD student died of tuberculosis. Liability was not established at trial, and an appeal was ultimately dismissed. Nevertheless, the trial court assessed damages at $5,000 for the suffering of Mr. Wei over a five-month period.

As can be seen, the breadth of awards is wide, and varies largely with the circumstances. But even where the claim may be modest, there is merit to advancing one. At an absolute minimum, doing so acknowledges the harm and makes those negligent responsible.

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NOTES

[1] *Lord v. Downer* [1999] O.J. No. 3661 (ON CA)

[2] *George v. Harris* [2001] O.J. No. 3447

[3] *Tizard Estate v. Ontario* [2001] O.J. No. 4087

[4] *McEllistrum v. Etches* [1954] O.J. No. 247 (ON CA)

[5] *O'Rourke v. Arnprior Agricultural Society* (1975), 4 O.R. (2d) 622

[6] *Hill Estate v. Ethier* [1978] O.J. No. 639

[7] *Rich v. Lingard* [2007] O.J. No. 5136

[8] *Higgins Estate v. Security One Alarm Systems Ltd.* [2001] O.J. No. 2447

[9] *Wei Estate v. Dales* [1998] O.J. No. 1411, [2000] O.J. No. 2753 (ON C.A.)