

Setting Up For Success: The OTLA Guide to
Medical Negligence Practice IV

**The ABCs of *Family Law Act* Claims and their
Preparation for Trial in Medical Malpractice Actions**

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Friday, January 27, 2006

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Introduction

Principally, the key factors in the assessment of *Family Law Act* claims in a personal injury action, and for the purpose of this paper, a medical malpractice action, are the extent and duration of the loss, and the valuation of associated losses and expenses, applied within the framework of suitably adjusted amounts for inflation. Pecuniary and non-pecuniary losses may be claimed. Over the years the quantum of awards for loss of care, guidance and companionship have tended to be modest, however, the impact of juries and their continued persistence in awarding significant amounts under this head of damage is effecting the range of awards in a positive direction.

Claims by family members resulting from the injury or death of the victim are governed by the *Family Law Act*, R.S.O. 1990 c.F.3 (hereinafter "FLA")

General Principles

Section 61 of the FLA, specifically subsections 61(1) and 61 (2)(e) govern who is entitled to an award of damages and the basis for that award. Section 61(1) identifies that spouses, children, grandchildren, parents, grandparents, brothers and sisters can be

awarded damages pursuant to an FLA claim. These limitations were broadened in the Court's decision in ***Miron v. Trudel***¹, where it was held that the legislation has been extended to include unmarried life-partners.

Generally speaking, the requisite family relationship must have existed at the time of the incident. However, there are cases in which the claimant was not an eligible FLA claimant at the time of the incident, but became so afterwards. These decisions are based on the grounds that the FLA should be interpreted liberally so as to give the effect intended, ie. encouraging and strengthening the role of family in society.² For example, in ***Espinosa v. Garisto***,³ the Court concluded that a child *en ventre sa mere* at the time the principal cause of action arose could bring a claim pursuant to section 61 of the FLA.

If a family member meets the requirements of subsection 61(1); pursuant to subsection 61(2)(e) they can sue for the loss of "guidance, care and companionship" which they may reasonably have been expected to receive from the injured party had the injury not occurred. Essentially, subsection 61(2)(e) is available whenever the claimant is psychologically distressed over a loss of quality in family relations.⁴ It is important to note that pursuant to subsection 61(3) of the FLA, the victim's contributory negligence or failure

¹ (1995), 124 D.L.R. (4th) 693 (S.C.C.)

²*Mason v. Peters* (1982), 139 D.L.R. (3d) 104 (Ont. C.A.)

³(1986), 38 A.C.W.S. (2d) 155 (Ont. H.C.)

⁴*Schmidt v. Sharpe* (1983), 27 C.C.L.T. 1 (Ont. H.C.)

to mitigate can effect recovery.⁵ Ultimately, the damage amounts awarded are conventional, subject to the evidence advanced and the impact of inflation. If there is no proof of loss then an award will not be granted,⁶ and where the loss appears small damages will be correspondingly modest.⁷ However, where evidence warrants it, damages can be quite substantial.

As discussed, FLA claims may be brought where fatal injuries have occurred. A claim may be brought where the death is caused by the fault or neglect of another. Damages are assessed by reference to loss with a focus on what the claimants' position would have been but for the death and to restore that position so far as possible.

An action undertaken pursuant to the FLA is derivative in nature or dependant on an action that may be brought by the injured person or his/her estate. The award of damages for an FLA claim are based on the compensatory principle and include the duty to mitigate. Some cases have defined these principles. For example, in ***Levesque v. Lipskie***⁸, it was concluded that the duty to mitigate has not been extended to the requirement that the claimant seek employment to compensate for income loss following the death of a family member, if the claimant was not employed outside the home or a

⁵*Brain v. Mador* (1985), 32 C.C.L.T. 157 (Ont. C.A.)

⁶*Moore v. Cooper Canada Ltd.* (1990), 2 C.C.L.T. (2d) 57 (Ont. H.C.)

⁷*Heney v. Ontario Superintendent of Insurance* (1983), 1 C.C.L.I. 68 (Ont. H.C.)

⁸(1991), 80 D.L.R. (4th) 243 (Ont. C.A.)

source of income prior to the incident. Additionally, as identified in *Macartney v. Warner*⁹, the Ontario Court of Appeal, in a motor vehicle accident case, concluded that the FLA claimants could maintain an action for loss of income resulting from the death of their son, in association with their claim for nervous shock.

Pecuniary Losses

In an FLA claim, there are a number of heads of damages relating to pecuniary loss including: special damages, future loss of shared family income, future loss of family work, future loss of wealth and family expenses.

The following is a brief summary of the applicable principals of each sub-head of pecuniary damages:

Special damages: Cover all pre-trial pecuniary losses that are reasonably incurred and legally attributable to the defendant

Future loss of shared family income: Encompasses what the deceased would have spent out of revenue in the post-trial phase during a natural life-span on the dependants' cost of homemaking of a family including not only their basic necessities but also amenities and enjoyments of life, taking into account for the relevant period of loss. The decedent's revenue includes potential income from all sources including pre and post retirement earning periods.

Future loss of family work: Encompasses all gratuitous activities which would have been carried out on behalf of dependants, in and around the home.

Future loss of wealth: Covers all capital assets which dependants would have derived from the deceased but for the death. Usually this claim in effect represents loss of inheritance, but may also include assets which would have

⁹(2000), 46 O.R. (3d) 641 (Ont. C.A.)

been obtained during a deceased's lifetime.

The appropriate approach to take in the assessment and valuation of income loss of a surviving spouse was established in **Nielsen v. Kaufmann**¹⁰. The Court concluded that the sole dependency approach was to be used, however, if the circumstances involved a two income earning family, the sole dependency approach was to be adjusted somewhat. It was held that:

“The fact that there are two “breadwinners” in the family skews the applicability of the “conventional” principle and figures somewhat. Those figures are based on a male breadwinner as the sole support of the family. The trial judge does not appear to have considered how the “conventional” figures might be affected when there is a two-wage-earner family. It must be assumed that in such families some portion of the husband's income goes to the wife or vice versa. That portion remains with the survivor.”¹¹

The Court ultimately lowered the dependency factor from 70% to 60% to adjust the sole dependency calculation for two income earning families. The result is a modified sole dependency approach. This approach was followed and applied in **Hechavarría v. Reale**.¹²

It is has been established, and is universally accepted, that the cost of hiring reasonable services on a commercial basis to replace loss of domestic services or to value the loss of services represented in a damage award for loss of household services and/or

¹⁰(1986), 54 O.R. (2d) 188 (Ont. C.A.)

¹¹*Ibid*, at page 198.

¹²(2000), 51 O.R. (3d) 364 (Ont. S.C.J.)

child care is an allowable claim. The value of the loss will be assessed on a case-by-case basis, dependant upon a number of factors and contingencies, including sickness, injury, remarriage, the maturation of children and whether the deceased or injured spouse worked outside of the home and outside assistance was normally required prior to the incident that gave rise to the injury or death.

The Courts have considered a number of unique circumstances in assessing and awarding pecuniary losses. To cite an example, in *Newman Estate v. Swales*,¹³ the surviving husband sought his loss for the value of care that his deceased spouse would have provided, but for her death. Despite the fact that expert evidence was not provided relating to the valuation of these losses, the Court concluded the difficulty in assessing a loss does not relieve the court of its responsibility in that respect. The Court awarded Mr. Newman an amount for past pecuniary loss and awarded a sum for cost of future care identifying that consideration was given to Mr. Newman's precarious health and likelihood of the need for residential care in the future.

In awarding damages, consideration has also been given to monetary support provided to family members on a regular basis prior to the incident. In *Wei Estate v. Dales*,¹⁴ the Court granted the parents of the deceased loss of support from the date of death until the date of the reasons for judgment. The deceased had previously provided

¹³[2002] O.J. No. 2288 (Ont. S.C.J.)

¹⁴[1998] O.J. No. 1411, as affirmed [2000] O.J. No. 2753 (Ont. C.A.)

his parents a minimal annual support. It is important to note, however, that this award was taken into consideration when the Court awarded the parents a damage award for loss of care, guidance and companionship.

Non-pecuniary Losses

Non-pecuniary loss is assessed based on the loss of care, guidance and companionship. Awards under this head of damage have consistently been modest, however, more recently, when the nature of the case warrants it, more significant quantum amounts have been awarded. It is needless to say, however, that these awards in no way satisfactorily compensate claimants for their losses.

In determining the quantum of damages, the Court in *Newman Estate v. Swales*,¹⁵ outlined a non-exhaustive list of factors to be taken into account (this list references factors to consider when the victim is deceased):

- The age and mental and physical condition of the claimant;
- Whether the deceased lived with the claimant, and if not the frequency of the visits;
- The intimacy and quality of the claimant's relationship with the deceased;
- The claimant's emotional self-sufficiency;
- Whether the deceased's spouse has remarried; and,
- The deceased's and the claimant's joint life expectancy, or the probable length of time the relationship would have endured.

The proper approach to take in assessing damages for the loss of care, guidance

¹⁵ [2002] O.J. No. 2288 (Ont. S.C.J.) at para. 214.

and companionship was established in *Nielsen v. Kaufmann*¹⁶ by the Ontario Court of Appeal. It was established that in assessing this head of damage the particular family circumstances in each case must be taken into account by the trier of fact and that awards should not be based on an accepted “conventional” approach. The application of this decision and approach has resulted in a broad range of assessments that will likely continue to expand if juries are permitted to assess these damages.

A Sampling of Cases: Quantum Ranges for Loss of Care, Guidance and Companionship

The following is a sampling of awards either assessed or granted to FLA claimants in medical malpractice actions for the loss of care, guidance and companionship.

In *Wilson Estate v. Bryne*, the deceased, Mrs. Wilson had undergone a laparoscopic cholecystectomy and the surgeon had negligently severed the common bile duct. Discovery and correction of the error were delayed and Mrs. Wilson suffered strokes as a result of her deteriorating condition. A couple of years later, Mrs. Wilson was diagnosed with cancer, unrelated to the original surgery, and later died. The Court awarded the surviving husband \$40,000.00, each child \$20,000.00 and each grandchild \$3,000.00 for loss of care, guidance and companionship.

¹⁶*Ibid, supra*, at note 10.

In ***Wei Estate v. Dales***,¹⁷ the action was dismissed, but damages were assessed. In this case, the deceased, Mr. Wei, suffered from pulmonary tuberculosis, and was treated; however, gastrointestinal complications arose, Mr. Wei was diagnosed with hepatitis, and ultimately died. The Court assessed the awards for loss of care, guidance and companionship as follows: \$75,000.00 for the surviving spouse, \$35,000.00 for the surviving daughter, who had lost her father at a young age, and \$5,000.00 each for the deceased's parents.

In ***Holder v. Greater Niagara General Hospital***¹⁸, the infant plaintiff was born without vital signs and was subsequently revived, but suffered from oxygen deprivation prior to birth. As a result the infant plaintiff was permanently disabled, and unable to walk, sit, talk or communicate and was fed by a tube. She is dependant on others for her care for the rest of her life. The action was dismissed, however, damages were still assessed. In this case the Court concluded that the exceptional and extraordinary efforts of the parents should be recognized and assessed an appropriate award at the high end of the range for claims of this nature. The Court assessed that an award of \$70,000.00 for the mother and \$60,000.00 for the father for loss of care, guidance and companionship would be justified.

¹⁷[1998] O.J. No. 1411, as affirmed [2000] O.J. No. 2753 (Ont. C.A.)

¹⁸ [1997] O.J. No. 6354 (Ont. Gen. Div.), as affirmed [1999] O.J. No. 4129 (Ont. C.A.)

In ***Dann v. Chiavaro***,¹⁹ the infant plaintiff sustained severe and permanent damage, being left blind and profoundly mentally handicapped, as a result of a delayed diagnosis of pneumococcal meningitis. In this case, the mother was awarded \$50,000.00 and the father \$30,000.00 for loss of care, guidance and companionship. The Court diminished the award for the father as he is not the caregiver for the infant plaintiff on a daily basis, and in this sense the impact is not as great as it is for the infant plaintiff's mother.

In ***Crawford v. Penney***,²⁰ due to negligent treatment during birth the infant plaintiff sustained severe and permanent brain injuries as a result of oxygen deprivation. The infant plaintiff's parents were awarded \$80,000.00 for loss of care, guidance and companionship.

Clearly, the range for damages awarded to FLA claimants for the loss of care, guidance and companionship, in medical malpractice actions, in both fatal and non-fatal cases is broad, and is determined on a case-by-case basis.

Awards for loss of care, guidance and companionship in other types of personal injury cases have driven the bar higher. In ***Hechavarria v. Reale***²¹, a wife and mother died as a result of injuries she sustained in a motor vehicle accident. The husband was awarded

¹⁹[1996] O.J. No. 1912

²⁰[2003] O.J. No. 89 (Ont S.C.J.), as affirmed at [2004] O.J. No. 3669 (Ont. C.A.)

²¹(2000), 51 O.R. (3d) 364 (Ont. S.C.J.)

\$85,000.00 for the loss of care, guidance and companionship, her children were awarded \$30,000.00 each and her sisters were awarded \$12,500.00 each.

To v. Toronto Board of Education²², represents the most significant finding of the Ontario Court of Appeal to date for an award of general damages. In this case, the parents of the deceased were awarded \$100,000.00 and the sister was awarded \$25,000.00 for loss of care, guidance and companionship.

Damages to Consider when the Deceased's Estate is Included as a Party

In personal injury actions, and specifically medical malpractice actions, where the negligence results in a death, the Trustee or representative of the estate may bring an action on behalf of the deceased's estate. A number of heads of damage are considered with this type of claim. Damages to compensate the deceased for pain and suffering are often awarded. In awarding these damages the intention is to compensate the person for physical and mental suffering, and for loss of enjoyment of life caused by the defendant's act or omission. Age, occupation, injuries suffered and the effect on a person's quality of life are all relevant factors in determining the proper range of damages.²³

In ***Wilson Estate v. Byrne***, the deceased, Mrs. Wilson, had undergone a

²²(2001), 55 O.R. (3d) 641 (Ont. C.A.)

²³*Wilson Estate v. Byrne*, [2004] O.J. No. 2360 (Ont. S.C.J.), para 109.

laparoscopic cholecystectomy and the surgeon severed the common bile duct. Discovery and correction of the error were delayed and Mrs. Wilson suffered strokes as a result of her deteriorating condition. A couple of years later, Mrs. Wilson was diagnosed with cancer and later died. In assessing Mrs. Wilson's general damage claim the Court found that prior to her surgery Mrs. Wilson was an active person who enjoyed a full life of working and caring for her family and after surgery Mrs. Wilson became a different person physically, emotionally and cognitively. It was held that although Mrs. Wilson was diagnosed with cancer only a short time later and died as a result of that illness, given the impairment and suffering as a result of the complications from surgery, that her pain and suffering was significant, she had experienced a loss of amenities and a loss of enjoyment of life that began following surgery and continued for the balance of her life. Consideration was given to the intervening diagnosis of cancer, however, Mrs. Wilson was awarded general damages for pain and suffering in the amount of \$75,000.00.²⁴

In ***Newman Estate v. Swales***,²⁵ the Court awarded the Newman Estate \$60,000.00 for pain and suffering, having regard to Mrs. Newman's suffering before diagnosis and the devastating effect of cancer over the final 22 months of her life. In a more extreme case, ***Stell v. Obedkoff***,²⁶ the plaintiff's general damages were assessed at \$135,000.00 for a four and a half year struggle with cancer. The Plaintiff, however, was alive at the time of

²⁴*Ibid*, at paras. 110-111

²⁵[2002] O.J. No. 2288 (Ont. S.C.J.)

²⁶[2000] O.J. No. 4011 (Ont. S.C.J.)

trial.

Claims for income loss by the deceased through their estate are also considered. In ***Wilson Estate v. Byrne*** the Court compensated Mrs. Wilson for her income loss during the period that she would have been working after the surgery and prior to the onset of chemotherapy for her cancer treatment.²⁷ Both positive and negative contingencies are often considered in association with this head of damages. For example, in ***Wei Estate v. Dales***²⁸ the Court considered positive contingencies, including the fact that Mr. Wei would have been better than average in his career due to his training and work ethic. The Court did not apply this positive contingency as it was required to consider the fact that Mr. Wei had difficulty with English and this may have effected his success. However, the Court also did not consider other negative contingencies including risk of unemployment and job change as it was evidenced that there were ample opportunities for employment in Mr. Wei's field.

Care costs are also a head of damage to consider in this type of claim. The Courts have considered when an award for services provided by a spouse is permitted. In ***Bystedt v. (Guardian ad litem of) Hay***, [2001] B.C.J. No. 2769 (S.C.) as referenced in ***Wilson Estate v. Byrne***, the Court held that an award may be made for services provided by a spouse outside the normal range of duties and which would have been done by a

²⁷*Ibid, supra*, note 23 at para. 115.

²⁸[1998] O.J. No. 1411, as affirmed [2000] O.J. No. 2753 (Ont. C.A.)

hired third party if the spouse did not perform these duties. The following factors are to be considered in the assessment of past care, or claims made by the estate of the deceased:

- Services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- If the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- The maximum value of these services is the cost of obtaining the services outside of the family;
- Where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- Quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services; and,
- The family members providing the services need not forego other income and there need not be payment for the services rendered.²⁹

Out-of-pocket expenses are also recoverable by the estate in this type of action. Some interesting arguments have been developed by counsel in the past. For example, in ***Newman Estate v. Swales***,³⁰ in addition to some general travel and funeral expenses, counsel claimed costs for Mrs. Newman's move to England. She had moved to England due to limitations with treatment options and to be near her children. These expenses included the purchase of a vehicle, reimbursement for rent that would have been received from the apartment she already owned in England and moved into, the cost of renovating the apartment and the cost of furnishing the apartment. The Court concluded that the loss

²⁹*Ibid, supra*, note 23 at para. 117.

³⁰[2002] O.J. No. 2288 (Ont. S.C.J.)

of rental is an accommodation expense that would have been incurred in some fashion in any event and is therefore not recoverable. However, they accepted Mrs. Newman's evidence that the principle reason for the purchase of the vehicle was to get to her treatments and allowed this expense. The evidence also persuaded the Court that the renovations to the apartment were reasonable necessary to Mrs. Newman's comfort during her periods of confinement and would not have otherwise been done and awarded their cost. Additionally, some furniture costs were deemed a necessary expense of relocating overseas and the cost of these expenses was awarded.

Preparation and Development of an FLA Claim Prior to Trial

An important decision to be made at the onset of the action is whether, on balance, it is of benefit to the FLA claimant to pursue a claim. This is assessed on a case-by-case basis. A number of factors need to be considered including: the value of the claim balanced by the cost consequences if the case is not successful, the evidence to support the claim, the credibility of the claimant and how they will present on the stand if the matter proceeds to trial. That having been said, once the decision has been made to proceed with the claim it is imperative that a thorough and complete investigation and valuation of the claim is conducted.

The most important evidence in support of a FLA claim will come from those who lived with the injured or deceased. It is important that these parties are thoroughly

prepared and will provide clear and convincing evidence. Any other parties who can comment on the Plaintiff's relationship with family members may also make good witnesses. Assessments will have to be made on their ability to present the evidence, especially if the action will be tried in front of a jury. Consideration should also be given to the impact of using demonstrative evidence such as photographs or videotapes of the injured/deceased interacting with family members.

The loss of financial support through lost income of a deceased person is an important factor to consider in developing FLA claims, especially in reference to the surviving spouse. This is determined following the same principles that apply when determining the future income loss of an injured plaintiff. Determining the loss is the fundamental step in the valuation of a financial support claim. Once this has been established, further assessments, such as present value calculations can be made.

When calculating the value of a claim for lost household services, an economist should be retained if the estimated value is more than minimal. He or she should be provided with details about the household income, the functions of each member in terms of household services and a measure of household expenses. With this information, an economist will be able to determine an annual loss as a result of the death. Once this amount is determined, an actuary can calculate the present value of the loss.

The amounts determined for both loss of income and loss of household services generally are not awarded in full. Only amounts that would have been of benefit to the

claimant will be awarded. The economist will be able to establish a dependency rate where the proportion of total income and household services lost will be recoverable. The amounts received by surviving dependants is an amount that is net of income tax. As identified in **McPherson v. Bernstein**,³¹ the quantum of an award for household services will depend on the following:

- 1) The period during which the victim's life would have been prolonged by earlier diagnosis and treatment
- 2) Any diminishment of the victim's ability to perform and provide those services by reason of any cancer that they would have had, in this case, even if the problem had been diagnosed and treated earlier.

As always, positive and negative contingencies will also have to be considered. For example, in the case of a surviving spouse, consideration has to be given to the fact that a divorce may have occurred or that the surviving spouse would have predeceased the victim. Additionally, an important consideration is the possibility of the remarriage of the surviving spouse. However, defence will have to show that an economic benefit would be or has been derived from the same. For example, in **Wei Estate v. Dales**,³² consideration was given to this very issue. In this case, it was the evidence of the surviving spouse that in her culture it is frowned upon for a widow to remarry, and if she did remarry she would be isolated from her family and friends. She also testified that she had no intention to

³¹[2005] O.J. No. 2162 (Ont. S.C.J.) at para 225.

³²[1998] O.J. No. 1411, as affirmed [2000] O.J. No. 2753 (Ont. C.A.)

remarry. As a result of this evidence, and the absence of any evidence of possible remarriage put forward by the defendants, this contingency was not taken into consideration.

Out-of-pocket expenses are an important consideration in an FLA claim. These expenses should be assessed carefully, with special attention to a detailed and thorough assessment, and included in the damages claim. Another consideration should be quantifiable losses by survivors when the victim is deceased. Often times, this type of calculation will require the expertise of an accountant.

Conclusion

The development of an FLA claim can in some instances be as complex as that of the primary claimant in an action. The decision to proceed with an FLA claim and the number of family members to include is an important one. In making this decision it is necessary to consider the evidence, the claimant, and both the legislation and how it has been interpreted, as well as the current standard of the law. However, once the decision is made, it is imperative that a thorough and complete investigation and valuation of the claim is conducted.