# THE FATAL ACCIDENTS ACT *OF MANITOBA*: *DEATH OF A PART-TIME WORKING MOTHER*

David R. James*

## I. Pleadings and Parties

In Manitoba, *The Fatal Accidents Act*[1], sets out a statutory cause of action. Subsection 3(1) reads:

> 3(1) Where the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, is liable for damages, notwithstanding the death of the deceased, even if the death was caused in circumstances amounting in law to culpable homicide.

In addition to damages for funeral and related expenses provided under subsection 4(3), the *Act* describes two kinds of damages available to the survivors:

> 4(2) Subject to subsection (3), in every such action such damages as are proportional to the pecuniary loss resulting from the death shall be awarded to the persons respectively for whose benefit the action is brought.
>
> 4(4) Where an action has been brought under this Act, there may be included in the damages awarded an amount to compensate for the loss of guidance, care and companionship that the deceased, if he had lived, might reasonably have been expected to give to any person for whose benefit the action is brought and in making an apportionment under subsection 11(1) the judge shall apportion those damages among the persons who might reasonably have been expected to receive the guidance, care or companionship if the deceased had lived.[1a]

Before 1980, a fatal accidents claim included a claim under *The Trustee Act*[2], by a personal representative of the deceased, for estate expenses and for damages for "loss of expectation of life". The 1980 amendment of *The Trustee Act* now limits such a claim to the recovery of funeral expenses:

> 55(1) All actions and causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying, continue in or against his personal representative as if the representative were the deceased in life; but in any action brought or continued under authority of this section by the personal representative of a deceased person for a tort causing the death of the person, the damages recoverable for the benefit of his estate do not include any exemplary damages *or damages for loss of expectation of life* and shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included. (Emphasis added)[2a].

The *Act* clearly allows a claim by an illegitmate child by virtue of the broad definition of "child" in section 2(a). On the other hand, subsection 4(1) limits the class of claimant survivors by using the particular words "wife" and "husband". At best, "wife" or "husband" might be adjudicated

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* B.A. (Hons.), LL.B. presently practising as an associate with the firm of Simkin, Gallagher. Thanks to Prof. John Irvine of the University of Manitoba for his encouragement and assistance with revisions.

1. *The Fatal Accidents Act*, R.S.M. 1970, c. F50 (hereinafter referred to as the *Act*).

1a. Subsection 4(4) was added in S.M. 1980, c.5, s.1.

2. *The Trustee Act*, R.S.M., 1970, c. T160.

2a. The emphasized words were added by S.M. 1980, c.5, S.2.

to include a common-law wife and a common-law husband. Such a "wife" is defined by the cases to be a woman living with a man where there is an agreement to marry, and the man has a present legal capacity to marry[3]. Therefore, if the man is killed in circumstances where a claim may be made under the *Act*, and this deceased was survived by an estranged spouse and their children, as well as a companion with whom he was living at his death, and with whom he had had a child, the second woman could not claim under the *Act* (though the illegitimate child could), because she would not meet the definition of a "wife". As the absence of dependency is not fatal to a claim for pecuniary loss under subsection 4(2) one would have thought that its presence would bring a claimant within the ambit of the *Act*. Furthermore, the Legislature recognizes a subsisting obligation by the deceased to this unmarried mother by way of section 11 of *The Family Maintenance Act*[4].

In Ontario, the wide definition of "spouse" for the purpose of domestic obligation, is extended to such a spouse's right to bring a claim under the fatality provisions of family maintenance legislation.[5] In Manitoba, however, one would be hard-pressed to claim through the illegitimate child, all the pecuniary loss which that child's mother will suffer by virtue of the wrongful death of the father who was maintaining the mother prior to his death. It is unlikely that the jurisprudence, supporting the right of a friend or relative to claim through the child for the expenses of assisting that child, has developed to such an extent as to effectively overcome the implicit exclusion of dependent companions from the class of claimants.

## II. Historical Introduction

At common law, " . . . the death of a human being could not be complained of as an injury. . ."[6]. Notwithstanding the discomfort of the judiciary at such an anomaly (where it could be said that it was to the tortfeasor's benefit to have killed the victim rather than to have merely injured the victim), it was not until the adoption of *The Fatal Accidents Act* of England, in 1846 (referred to as Lord Campbell's Act) that relief was available to survivors. The statutory origin of the cause of action is explained in *Thomas* v. *Winnipeg Electric Railway Co., Ltd.*[7], where the demurrer of the Defendant to the Statement of Claim was allowed because the Plaintiff failed to plead the statute (in this case, *An Act respecting Compensation to Families of Persons Killed by Accident,* R.S.M. 1913, c. 36).

The early statutes were imprecise in their description of the damages available to claimants. In the case of *St. Lawrence & Ottawa Railway Company* v. *Lett*[8], followed in *Vana* v. *Tosta*[9], the Canadian statute under

3. *Blanchett* v. *Hansell*, [1943] 3 W.W.R. 275 (Man K.B); aff'd 52 Man. R.1, [1944] 1 W.W.R. 432 (C.A.).
4. *The Family Maintenance Act*, S.M. 1978, c. 25 (Chap. F20)
5. See *Family Law Reform Act*, R.S.O. 1980, c.152, ss. 14, 60(1); see *infra* n.82.
6. *Baker* v. *Bolton* (1808), 1 Camp. 493, 170 E.R. 1033 (per Lord Ellenborough).
7. [1917] 1 W.W.R. 1346 (Man. K.B.).
8. (1885), 11 S.C.R. 422.
9. [1968] S.C.R. 71.

consideration simply provided that " . . . the Judge or jury may give such damages as they think proportioned to the injury, resulting from such death . . " In that case the deceased was a fifty-three year old wife and mother with nine children ranging in age from eleven to thirty with five of the children still living in the parents' home. Chief Justice Sir W.J. Ritchie proceeded on the principle that "a reasonable expectation of pecuniary advantage" was necessary to sustain the action. Indeed the concurring judgments of Mr. Justice Henry and Mr. Justice Gwynne were very explicit in pointing out respectively that, (a) Lord Campbell's Act was never intended to give the survivor any right to recover damages except for a specific pecuniary loss, and (b) damages were not recoverable by a husband upon the ground of his merely being deprived of his wife *(per quod consortium amisit)*, or by children upon the ground of their merely being deprived of their mother. The injury shown must not be merely sentimental but must be a substantial injury. The Chief Justice said the following:

> I must confess myself at a loss to understand how it can be said that the care and management of a household by an industrious, careful, frugal and intelligent woman, or the care and bringing up by a worthy loving mother of a family of children, is not a substantial benefit to the husband and children; or how it can be said that the loss of such a wife and mother is not a substantial injury but merely sentimental is, to my mind, incomprehensible. And if the injury is substantial, the only mode the law could provide for reimbursing the husband and children is by a pecuniary compensation, and so, in my opinion, in the eye of the law, the injury is a pecuniary injury . . .
>
> The evidence in this case shows that the husband was receiving benefits and advantages from the services of his wife capable of pecuniary computation, and had such reasonable expectation of pecuniary benefit from the continuance of such services by the continuance of the wife's life as would entitle him to damages under the statute; and, as to the children, I agree with Mr. Justice Armour that there is an education in religion, morals and virtue which, owing to the peculiar confidence inspired by the relationship of mother and child, can be imparted to the children by the mother alone; I think that such education is a benefit and advantage to the child and is capable of being estimated in money, and that the deprivation of a mother's superintendence and care of the children, occasioned by the death of the mother, is a pecuniary loss to the children. Although those children, or some of them, being still under age, may have passed from mere childhood, they were still in a position where a mother's care and supervision and moral, physical and intellectual training was, if possible, more important, more necessary, more valuable to them, and more difficult to be supplied, than in the case of very young children.[10]

It follows, therefore, and this will be explored in the next part of this paper, that it is under the head of pecuniary damages in subsection 4(2) of the *Act* that the motherhood and home care services often performed by a wife and mother, will be granted.

Before the clear legislative distinction between "pecuniary loss" (s.4(2)) and "intangible loss" (s.4(4)) was promulgated in 1980, the efforts of the courts to give awards under the heading of a "relationship loss", had given rise to confusion. In the pre-amendment decision of *Sonsie* v. *Freier*,[11] Mr. Justice Huband concurring in part, cited the principles in *St. Lawrence & Ottawa Railway Company* v. *Lett*[12] in assessing the amount, if any, to be

10. *Supra* N. 8, at 435; see also *Johnson et al.* v. *Sorochuk, Stephens* v. *Sorochuk*, [1941] 1 W.W.R. 445 (Alta. S.C.); *Tarasoff* v. *Zielinsky (1921), 59 D.L.R. 177, [1921] 2 W.W.R. 135 (Sask. C.A.).*

11. (1980), 6 Man. R. (2d) 277 (C.A.); allowing in part *Sonsie* v. *Freier*, Man. Q.B., unreported June 22, 1979 (Wright, J.).

12. *Supra* N.8.

awarded "under the rubric of loss of care, education and training of a parent". His Lordship acknowledged the practice of awarding a single lump sum rather than a repeating annual amount and applied the *Lett* test of finding a "substantial injury" which can be made over into a money judgment. It is submitted that under the present statute, those services performed by the deceased which can be capitalized, including loss of home care services and that aspect of guidance which may affect the future earning capacity of a child, fall under the head of pecuniary loss; and it is the "loss of care, guidance and companionship" injury (under s.4(4)) which is ordinarily compensated by way of a single lump sum. Prior to the present *Act*, which declared or clarified the distinct feature of care, guidance and companionship, the courts appear to have legislated an intangible loss factor. But it must be noted that the intangible but genuine losses sought to be compensated were recognized, as in the *Lett* case, where the injury was "substantial". Such a loss was capitalized and did not fall into the new lump sum award, which rarely exceeds a modest amount. Surely for a "substantial injury" there must be substantial damages. These can only flow in a fatal accidents claim where the loss becomes part of the capitalized amount, as was the original judicial intention when the Court first recognized a duty to place an annual value on calculable but gratuitous services and guidance.

It is important therefore to recognize that the test of substantial injury applies to the "pecuniary loss" head of damages (s.4(2)). Query, whether because the *Act* says, "... there may be included in the damages awarded ..." (s.4(4)), the legislature thereby intended that presently these damages can be added to the yearly calculation and capitalized? This result is logical when it is recognized that any contingency factor is applied to the capital sum and not the yearly sum (see part III.G, *infra* "Contingency factors ...").

In *Lett*, the puisne Justices stipulated that there was to be no award founded on *solatium*. However, with the advent of subsection 4(4) of the *Act* (care, guidance and companionship), shock and grief, while perhaps not in themselves remediable, they inevitably indicate the profundity of the loss of companionship and guidance. In this regard the observation of the judge in *Farley et al.* v. *Buchanan*[13], where plaintiff claimed for his lost wife, is apt:

> They were devoted to each other and Mr. Farley's intense and debilitating grief has overshadowed his physical injuries.

Upon acknowledging that no compensation is allowed for grief or *solatium*, Mr. Justice Bowlby went on to say:

> But although semantically to eliminate the presence of the consideration of grief while considering the just monetary award for the loss of the companionship of a child, one has to have the deceptive skill of a "Houdini" to honestly deny its presence.[14]

13. (1982), 17 Man. R. (2d) 426 at 427 (Q.B.).
14. *Reidy et al.* v. *McLeod et al.* (1984), 47 O.R. (2d) 313 at 318 (S.C.).

## III. Pecuniary Loss: *The Fatal Accidents Act* S.4(2)

### A. Meaning of Pecuniary Loss

The twentieth century has seen a developing sophistication in the judicial assessment of damages under the fatality statutes. The largest development has been in the area of capitalization and the leading case therein is *Nance* v. *British Columbia Electric Railway Company*[15]. The following principles had at that point evolved:

1. The court must determine what amounts the deceased would have contributed to the claimants during his expected lifetime; and
2. The court must also determine the amount of the deceased's expected lifetime savings which would have devolved on the claimants, with or without a will.

A "rough" calculation is then necessary as follows:

(a) Determine the life expectancy of the deceased.

(b) In the case of a husband, determine what sums were earned and given for the support of the claimant wife.

(c) Multiply (a) by (b) but apply a discount factor due to the benefit received in having a capital sum to replace future loss.

(d) Deduct the amount of the benefit of an accelerated inheritance, as the future earnings are received prematurely.

(e) Reduce that capital sum in cases of early death or enstrangement and remarriage.

(f) Add the amount that the husband would have saved during his expected lifetime which would devolve on the family, while discounting this amount by the benefits of present capitalization and other normal contingencies. However, one should add the annual interest that would have accrued during the husband's expected lifetime.

These calculations become more difficult in the case of the wrongful death of a nonworking wife. But in *Haines et al.* v. *Williams*,[16] the plaintiff husband was awarded a capitalized sum by demonstrating the pecuniary value of the services rendered by the deceased. The wife was sixty-six years of age and in poor health so it was decided that but for her death, the services would have been rendered for a further five or six years.

It is trite to say that the issue is not that of dependency of the claimant but, "[I]t is sufficient if it is shown that the claimant had a reasonable expectation of deriving pecuniary advantage from deceased's remaining alive . . ."[17]. In *McNichol* v. *Mardell*[18] it was held that whether or not the

15. [1951] 2 W.W.R. (N.S.) 665 (J.C.P.C.).
16. [1933] 1 W.W.R. 644 (B.C.S.C.).
17. *Proctor* v. *Dyck*, [1953] 2 D.L.R. 257 at 261 (S.C.C.).
18. [1984] 5 W.W.R. 177 at 190 (Alta. C.A.).

lost housekeeping services were replaced by the husband, the loss is still palpable.[19] Thus the loss of services was added to the loss of income and then capitalized. In *McNichol* where there were no children the Court calculated $1,500 on an annual basis for the loss of services; in *Coco* v. *Nichols*,[20] $3,000 per annum was assessed for houskeeping services where the deceased wife worked part-time and left behind a husband and four children between the ages of six and eighteen years. In *Heid* v. *Stanchuk*,[21] a capitalized sum was given for "housekeeping, bookkeeping, general ranch services, and personal earnings . . .". The defendant cannot suggest a reduction in the award by virtue of services provided gratuitiously by friends or relatives to replace the case of the deceased, because " . . . it is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party."[22]

More recently in *Lawrence et al* v. *Good*,[23] upon hearing evidence from a professor in the Faculty of Human Ecology (formerly called home economics), Mr. Justice Scollin awarded $50,000 under the head of "loss of practical services". The final award was in excess of $185,000. The sum of $50,000 was loosely capitalized from an assessment that the annual loss was valued at about $4,000. The fatal accident claim was described as an "arcane sweepstakes".

The Ontario Court of Appeal has considered it erroneous for a trial judge to hear evidence from experts as to the homemaking contribution of the average Canadian housewife.[24] In *Franco et al.* v. *Woolfe at al.*,[25] the husband's entitlement to compensation for "loss of household services" was affirmed, but the relevant evidence was the deceased wife's actual contribution combined with evidence of the cost of replacement by a professional homemaker. This evidential stricture is unfair because the "average Canadian housewife" keeps a time-log through her spokespersons in the Faculty of Human Ecology, while the deceased probably does not. This decision has also been critcised by Messrs. Cooper-Stephenson and Saunders, in *Personal Injury Damages in Canada*.[26]

## B. Projecting Average Earnings

In projecting expected future average earnings the court considers evidence of increased earnings or potential increased earning power. In *Chapman* v. *Verstraete*,[27] the Court accepted evidence that, although at the time of her death the wife was working part-time as a teacher, she had

19. See also *Coco et al.* v. *Nicholls et al.* (1981), 31 A.R. 386 (C.A.); *Davies* v. *Powell Duffryn Assoc. Collieries Ltd.*, [1942] A.C. 601, [1942] 1 All E.R. 657 (H.L.).

20. *Ibid.*

21. *Heid* v. *Stanchuk, Man. Q.B., unreported Nov. 15, 1979, Man. D. 3384-01 (Hamilton, J.).*

22. *Supra* n. 9, at 75 (per Spence, J.).

23. *Lawrence et al.* v. *Good*, Man. Q.B. unreported, Jan. 20, 1984. (presently under appeal and corss-appeal to Man. C.A.).

24. See contra *McNichol* v. *Mardell*, [1983] 3 W.W.R. 299 (Alta Q.B.); appeal allowed on different grounds [1984] 5 W.W.R. 177 (Alta. C.A.).

25. (1976), 12 O.R. (2d) 549 (C.A.); rev'ing in part (1974), 6 O.R. (2d) 227 (H.C.).

26. Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) 436.

27. [1977] 4 W.W.R. 214 (B.C.S.C.).

intended to work full time in the subsequent school year; damages were assessed accordingly.

In *Clement* v. *Leslies Storage Limited*[28] the Manitoba Court of Appeal increased damages from $35,000 to more than $92,000 as the trial judge (Morse, J.) had deducted from damages the inheritance received by the children from their deceased parents' estate. Mr. Justice O'Sullivan determined that, in accordance with *Nance*,[29] the judge erred in offsetting the loss of a share in the parent's earnings from the income derived from the parents' estate. Once the calculation of earnings expendable on claimants has been made, a deduction may be made of the beneficiaries' interest in the deceased's estate. As well, the amount the deceased would have saved from his earnings and the proportion thereof which the family would have likely inherited should be included in the calculation. As was noted by Mr. Justice O'Sullivan, in many cases the deduction for acceleration of the beneficiary's interest in the deceased's estate is offset by the aniticipated increase of the estate had the deceased lived longer.

Finally, on the question of calculating average earnings, it should be noted that in the *Sonsie* case [30], Mr. Justice Hall, speaking for the majority, allowed an increase for unreported income while assessing projected earnings.[31]

## C. Income Tax

In *Keizer* v. *Hanna*,[32] Mr. Justice Dickson, speaking for six of the nine members of the Supreme Court of Canada, discussed at some length the method for calculating average earnings. In fatalities claims, average earnings are calculated whereas, in personal injuries claims, the lost capacity to earn income is calculated. Therefore, in calculating average earnings a deduction for income tax is made; once the annual average earnings are capitalized the sum is then "grossed up" for the impact of future income tax on earnings from the capital sum awarded. The nature of this calculation is, as noted, quite different in personal injury claims. In *Andrews et al.* v. *Grand & Toy Alberta Ltd. et al.*,[33] Mr. Justice Dickson noted that the loss of capacity to earn, and not the loss of future earnings, is in question in personal injuries claims; thus, tax consequences are not an issue. The *Keizer* case is not a good example of how the calculation for tax on the capital sum is "grossed up" as the Plaintiff limited the claim to a stipulated amount of $100,000 which was in fact approved by the Supreme Court of Canada. The capitalized expendable annual earnings net of taxes was projected to be $95,000; this amount was then "grossed-up" to the final award.

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28. *Clement* v. *Leslies Storage Ltd.*, Man. C.A. unreported, Jan. 24, 1979, Man. D. 3378-01.
29. See *Kassam* v. *Kampala Aerated Water Co. Ltd.*, [1965] 2 All E.R. 875 (J.C.P.C.); *Taylor* v. *O'Connor*, [1971] A.C. 115, [1970] 1 All E.R. 365 (H.L.).
30. *Supra* n. 11, at 280.
31. See also *Lawrence et al* v. *Good*, *supra* n. 23.
32. [1978] 2 S.C.R. 342.
33. (1978), 83 D.L.R. (3d) 452 (S.C.C.).

## D. Discount for Personal Use

In *Vana* v. *Tosta et al*,[34] another important Supreme Court of Canada case dealing with fatalities, a forty-seven year old husband claimed for the death of his thirty-seven year old wife, who left two children, who at the time of her death, in 1963, were twelve and ten. The wife's earnings totalled only about $1,500 per year and the husband was a man of moderate means. The wife had put aside $200 a year from her earnings for the future benefit of the two children; this was reflected in the children's award. However, as to the question of a standard reduction of the remaining $1,300 for the amount which the wife would use for her own maintenance Spence, J., for the majority, stated:

> It must be realized that what she expended out of the balance for her own maintenance was, under the circumstances of a moderate income family, a contribution to what would ordinarily have been provided by her husband. The husband was under the duty of supporting his wife in accordance with their circumstances in life, and the case cannot be considered as one where the earnings of the wife which she retained for herself were quite apart (sic.) from any contribution made by her husband for her support, but rather as one where her earnings in part contributed to her support as well as to that of the balance of the family and the loss of those earnings was, therefore, a pecuniary loss to the husband.[35]

As the Court concluded that the earnings would all be used for the family, it did not reduce its assessment of annual average earnings by the amount used by the wife on herself. This was followed in *Chapman et al.* v. *Verstraete et al.*, where Mr. Justice Toy of the British Columbia Supreme Court concluded that Mr. Justice Spence,

> . . . was saying that for moderate income families, a working wife's salary was almost a 100% contribution to the husband as every dollar paid by the wife represented an amount that the husband was not going to have to pay. However, Spence J.'s judgment leaves unanswered the problem where the aggregate incomes of two breadwinners exceed the "needs" of the family unit.[36]

Subsequently, Mr. Justice Spence had occasion to rule on the manner in which personal use deductions should be minimized in families "living in such modest circumstances". In *Gehrmann* v. *Lavoie*,[37] His Lordship ruled that the British Columbia Court of Appeal erred in charging against deceased's income, the full $80 per month the deceased was paying for his car, as members of his household needed the car. Further, in overruling the deduction of some 40% of $2,856 per year from the deceased's income of $7,000 for personal use, as not being available to survivors, His Lordship said:

> Robertson, J.A., allotted the amount of $238 per month out of the late Mr. Gerhmann's income as being attributable to his own maintenance and living costs. It would seem that such an allotment in the case of a man whose gross earnings were only a little over $7,000 a year and who was maintaining a wife and three children in a remote area in British Columbia were altogether out of accord with reality. Families living in such modest circumstances invariably find that a far larger part of the bread-winner's income goes to the support of the

34. *Supra* n. 9.
35. *Spura* n. 9, at 75-76.
36. *Supra* n. 27, at 223.
37. (1975), 59 D.L.R. (3d) 634.

whole unit of man, wife and children than in the case where the man's income is larger and the amount thereof necessary to support the household is relatively much smaller.[38]

Presently in Manitoba a case is before the Court of Appeal which will have a great impact on the issue of compensation to family members where the deceased is not the sole family income earner. It is suggested by Defendants in both *Lawrence et al* v. *Good*,[39] and in *Rose* v. *Belanger*,[40] that where there was more than one income flowing to family members at time of the death, a personal discount percentage should be applied against the aggregate family income (not just the postulated income of the deceased), to establish the "fair" allowance for personal use. In the case of a part-time working mother in which her income is a fraction of that of the full-time working surviving spouse by discounting the joint income by 25-30% the family will, at least, have not suffered financially from the loss of the second salary. Indeed, the family may have saved money.

Example:
Lost annual income of deceased mother $10,000
Income of surviving spouse $30,000
Defendants' suggested calculation for discount from deceased's earnings to account for her personal use:
($30,000 + $10,000) 30% = $12,000 = personal use
$10,000 (wife's income) − $12,000 = ($2,000) = pecuniary loss to family)

Thus, there is no lost income to the family on the death of the part-time worker. This method was rejected in *Lawrence et al* v. *Good*, but applied in *Rose* v. *Belanger*.

In *McNichol* v. *Mardell*[41] a kind of compromise was reached: the added purchasing power of a second income was acknowledged, but the loss to the family was found to be only 25 per cent of the amount remaining from the gross income after the deduction of income tax and personal expenses (40 per cent). It is unclear why the survivors were not entitled to 75 per cent of the income; however, the court had discussed the savings to the family by not having to maintain the deceased. The family benefit principle from *Vana* v. *Tosta* is neither referred to nor applied.

Leaving aside such comments as might be made about the conscionableness of such a "hardened argument"[42], these calculations overlook the principle stated by the Supreme Court of Canada in *Vana* v. *Tosta et al.* and *Gehrmann et al.* v. *Lavoie*, about moderate income families. The writer would suggest that the aggregating of family income before calculating personal use subverts certain additional basic principles established in tort compensation law. Firstly, in fatalities compensation, claiming survivors need only prove an expectation of pecuniary benefit; such expectation need

38. *Ibid* at 638.
39. *Supra* n. 23.
40. *Rose* v. *Belanger*, Man. Q.B. unreported, Dec. 13, 1983 (appeal has been heard, with judgement reserved).
41. *Supra* n. 18, at 182-190.
42. See the trial judgment, *Supra* n. 24 at 303 (per. Agrios, J.).

not be founded in a dependency by survivors on the deceased's earnings.[43] Thus, where the major income earner husband claims for the loss of his wife's subsidiary income, the use to which the family applied or would have applied the wife's money, is irrelevant to the right to claim for the lost money. As well, on the wife's death, a greater portion of the husband's income must be expended on necessaries and less on luxuries. This was recognized in *Burgess* v. *Florence Nightingale Hospital for Gentlewomen Management Committee,*[44] where it was found that the joint (or aggregate) living expenses of two (or more) persons living together would be less than the sum of living expenses were each person to be living apart. That saving, by the death of an income-earner in a family with more than one income, is a lost benefit compensable in law; but again, having the greatest meaning in moderate income family circumstances.

Secondly, and largely unstated in the jurisprudence, is the principle that damages for pecuniary loss should be calculated by projecting a future predicated on a presumption of the continued survival of the victim, a kind of *restitutio in integrum.* In this way the substantial benefits that would have been conferred by the deceased in the future are established. These include, among other things, the deceased's future annual average earnings, with or without factors for diminishment or increase in productivity; the likelihood of the deceased's retirement; and the deceased's capacity to continue the level of unpaid beneficial domestic services that she contributed in the past. These are all dependent on her age, health aptitude and character. Death in the family reality is ignored, in order to postulate a future unaffected by the Defendant's wrong, so that the survivors' true loss can be measured without providing to the Defendant an acknowledgement of the death caused by illegal behaviour. Similarly, in fatality or injury cases, the Defendant cannot seek to have services donated by relatives to ameliorate the loss set off against the loss.[45] Further deductions from the award for lost family earning power for sums as might be received collateral to the death, cannot be sought. Examples of these are employment disability plan benefits,[46] and death benefits payable under other legislative schemes[47] or through life insurance policy benefits.[48] It is said that such benefits have not been provided to lighten the burden of the Defendant's wrong; better Plaintiffs should collect lost income twice, than allow unearned indemnities to Defendants.

This argument, calling upon survivors to deduct from their claim future expenses saved as a result of the deceased's death, if accepted in any degree, can advance ineluctably one subtraction heaped upon the other, until it will be advised that defendants should plead set-off so that the amount of purported savings to families becomes a discrete trial issue. Leaving aside the principle of *ex turpi causa non oritur actio*, and set-off being in the nature

43. *Supra* n. 17.
44. [1955] 1 All E.R. 511 at 519 (Q.B.).
45. *Supra* n. 9, at 73-76.
46. *Chan* v. *Butcher & Collins*, [1984] 4 W.W.R. 363 (B.C.C.A.)
47. *Canadian Pacific Ltd. et. al.* v. *Gill et. al.* (1973), 37 D.L.R. (3d) 229 (S.C.C.).
48. *The Fatal Accidents Act*, R.S.M. 1970, c. F50, s.7.

of a cross-action, the error in this approach is chillingly demonstrated by infant fatality cases, like *Lai et al.* v. *Gil et al*[49] and *Thornborrow* v. *McKinnon.*[50] In these cases, were the Courts to measure the probable cost to the family providers of maintaining the deceased child up to the time of the child's foregone independence, there would be such amounts found to off-set the compensation awarded to survivors, as would negate the damages. This would apply whether these amounts were calculated in part for future pecuniary loss, as in *Lai,* or for lost companionship, as in *Thornborrow.* Allowing the tortfeasor to benefit from this disgusts the imagination. Although the Legislature provided that actions under *The Act*[50a] should be for the benefit, *inter alia*, of ". . . parent . . . brother, and sister, or any of them," it would be a dead letter if these survivors had to render a financial accounting in order to prove a net entitlement, (i.e. lost companionship *minus* so many Christmas and birthday presents unpurchased).

In *Franco et al.* v. *Woolfe et al.*, the learned trial judge entertained this reasoning, of establishing a net entitlement with respect to the death of a 13 month old boy, as follows:

> When considering damages for the loss of an infant, I do not think modern concepts postulate that infants are worthless or that they are human beings with no prospect of returning benefits to parents who have reared them. Today I do not think the law says that the cost of rearing an infant exceeds the benefits to the parent that may be expected thereafter. For every inconsiderate child there is another who repays in a variety of ways. In this respect one must recognize the constantly reducing age of retirement from work forces, the increased life expectancy of the parents, and their need for assistance, guidance and support in much the same manner that their child needed that support earlier . . . no less than $1,000.00 can be awarded . . .[51]

Before criticising this reasoning which was apparently supported in *Mason* v. *Peters,*[52] it must be admitted that the $1,000 will increase in value to compensate for pure pecuniary loss by the time the child would have reached the age of "returning benefits" to his surviving father. However, the predicament invited by treating the infant, or any other deceased, as a consumer of survivors' income was not recognized. Surely, to balance such a reasoning, if Corey Franco had been 18 years old at the time of his wrongful death, and on the verge of "returning benefits" to his father, then the father should be able to claim his costs of having maintained Corey to this expectant age, because the defendant would have prevented any return from occuring. The writer would suggest that the tortfeasor is less exposed when killing a child of tender years, not on the above reasoning, but firstly, because there would be more scope for contingency deductions since the child may grow to be unproductive or may die from other causes; and secondly, because, as noted, the judgement award can be discounted by virtue of the heightened value of present receipt of a future pecuniary loss.

In summary, the survivors' own past and future income has no bearing on the question on their loss except to the degree that this income describes

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49. [1980] 1 S.C.R. 431.
50. (1981), 32 O.R. (2d) 740 (H.C.).
50a. See s.4(1).
51. (1974), 6 O.R. (2d) 227 at 236 (H.C.); see also *supra* n. 25.
52. (1982), 39 O.R. (2d) 27 at 33 (C.A.).

the family's economic station. The deceased's income earning capacity, in that future imagined without her death, is an income in a family scenario where the deduction for her personal use should be only those anticipated expenditures necessary to earn the postulated income. Positive regard must be paid to the benefits conferred on the family by the degree to which the deceased's expenditures on herself from her income, free up for general family use, remaining family income. To the extent that the deceased had relieved the family, with her income, of the burden of maintaining her with other family income, the family has a compensable pecuniary loss, as such relief was stolen by her death.[53] It is a morbid irony, that these principles must be restated, in order to neutralize the suggested calculation of savings to the survivors, said to result from their having received an unsolicited benefit, through the Defendant's tortious *(ex turpi)* eliminating of a consumer of family provender.

### E. Increases for Projected Productivity

*Lewis* v. *Todd et al.*,[54] was the unanimous judgment of Mr. Justice Dickson dealing with quantum of damages in the wrongful death of a thirty-two year old police officer leaving a twenty-seven year old wife and three children between five and nine years of age. The average gross income was calculated to be $14,100, and with a 40% discount for personal use the annual value of dependency was $8,460. There was then considerable discussion by the Court as to the appropriate discount rate to be used (this will be discussed later in this paper); but having approved the trial judge's assessment of a 4.25% discount rate on the capital sum arrived at, Mr. Justice Dickson further approved the reduction of the discount rate a further 2% to take account of productivity, since a police officer would have obtained increases in income as his career progressed.[55]

Similarly, in *Chapman et al.*. v. *Verstraete et al*,[56] Mr. Justice Toy projected and accepted plaintiff's counsel's submission of $14,000 per year as the wife's average anticipated salary, because while she had earned minimal amounts prior to her death, she intended to return to work full time as a teacher. The Judge then calculated the starting salary as at September of 1974, to be $11,267 when she would have gone to full time work if she had not died in April of 1974; but by the time of trial it would have increased due to merit increases set out in the teachers' union agreement. It is noted that in *Chapman* this resulted in an increase in the annual average earnings before capitalization, but in *Lewis* v. *Todd*,[57] it was taken account of by reducing the discount rate imposed on the capital sum.

### F. The Application of the Discount Rate to the Capital Sum

Once the average annual prospective earnings adjudged to be available to survivors during the expectancy of life has been capitalized, the Court will then consider what is variously called the capitalization rate or discount rate:

53. *Supra* n. 9.
54. [1980] 2 S.C.R. 694; overruling (1979), 5 C.C.L.T. 167 (Ont. C.A.).
55. [1980] 2 S.C.R. 694 at 712.
56. *Supra* n. 27.
57. *Supra* n. 54.

> What rate of return should the Court assume the appellant will be able to obtain on his investment of the award? How should the Court recognize future inflation? Together these considerations will determine the discount rate to use in actuarially calculating the lump sum award.[58]

The Court recognized that present interest rates in the 1970's should not be used without an allowance for future inflation as that would be unfair to the Plaintiff. Strangely, in the cases before the Supreme Court of Canada the evidence adduced at trial gave rise to capitalization rates in excess of 5%. A good deal of controversy has resulted from the way in which these figures have been accepted by the Court, but generally the basic principle of applying a discount rate to the capitalized sum is appreciated by the commentators.[59] In each case it will fall to the trial judge to assess the economic and actuarial evidence adduced in calculating the discount rate:

> 'It is important, I think, that the court affirm the principle that the discount rate is normally a factual issue which will turn on the evidence advanced in individual cases.'[60]

## G. Contingency Factors Assessed Upon The Capital Sum

In *Keizer* v. *Hanna*[61] the trial judge did not make any percentage reduction of the capital sum for contingencies, and this was approved on the facts in the Supreme Court of Canada. Mr. Justice Dickson cites the various contingencies considered by the trial judge, with approval:

(a) Possibility of remarriage;

(b) Possibility of widow's death before expiry of joint expectancy;

(c) Possibility of deceased's dying under other circumstances prior to expiry of said joint expectancy;

(d) Possibility of deceased's husband retiring before expiry of joint expectancy;

(e) Acceleration of inheritance to widow — bearing in mind likelihood of increased inheritance in event death had not occured;

(f) Possibility the infant child may not be a burden to the father or require additional benefits for the full period of his calculated working life.[62]

Mr. Justice Dickson felt that so long as the trial judge considered the various appropriate contingencies there was no error where the judge found no

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58. *Andrews* v. *Grand & Toy Alberta Ltd.*, *supra* n. 33 at 471.

59. See D. Gibson, "Repairing the Law of Damages" (1978), 8 Man. L.J. 637; Braniff and Pratt, "Tragedy in the Supreme Court of Canada: New Developments in the Assessment of Damages for Personal Injuries" (1979), 37 U. of T. Fac. L. Rev. 1; Feldthusen and McNair, "General Damages and Personal Injury Suits: The Supreme Court's Trilogy" (1978), 28 U. of T. L.J. 381; Rea, "Inflation, Taxation and Damage Assessment" (1980), 58 Can. Bar. Rev. 280; Lipnowski, "The Economist's Approach to Assessing Compensation for Accident Victims" (1979), 9 Man. L.J. 319; Cherniak and Sanderson, "Tort Compensation — Personal Injury and Death Damages", [1981] L.S.U.C. 197; and for a practical commentary and model actuarial report see, Sigurdson, "Actuarial and Economic Evidence and Personal Injury and Fatal Accident Litigation", [1981] I. Pitblado Lect. 45.

60. Cited by Mr. Justice Huband in *McLeod infra* n. 63 from *Lewis* v. *Todd supra* n. 54.

61. *Supra* n. 32.

62. *Ibid* at 349.

substance in the considerations. Similarly in *McLeod* v. *Palardy*,[63] Mr. Justice Huband found on the particular facts of the case that the trial judge did not err in determining not to apply a contingency deduction to the capitalized sum (the capitalization having been calculated in accordance with actuarial tables on expectancy of life which in themselves take into account some contingencies). Mr. Justice Huband accepts the following guideline from *Thornton* v. *School Trustees of School District #57 (Prince George)*:

> The imposition of a contingency deduction is not mandatory, although it is sometimes treated almost as if it were to be imposed in every case as a matter of law. The deduction, if any, will depend upon the facts of the case, including the age and nature of employment of the plaintiff.[64]

The remarriage contingency is the most questionable area of analysis, both factually and theoretically. The Court is called upon to assess the likelihood of the surviving spouse's remarriage, which to the extent that such a likelihood is found to exist, must reduce the capital award for pecuniary loss. Somehow this analysis has escaped the application of the principle that ". . . a wrongdoer cannot claim the benefit of services donated to the injured party."[65] Is it that when a survivor *remarries*, such services as are performed by the new spouse are not "donated", but are, rather, legally imposed? The age and appearance of the survivor appear to be the traditional tests for assessing the contingency. A powerful expression of disdain for the judicial function imposed by this kind of analysis can be found per Phillimore, J. in *Buckley* v. *John Allan and Ford (Oxford) Ltd.*[66] In *Maitland et al.* v. *Drozda et al.*,[67] new evidence was permitted on the appellate level because the surviving wife had remarried subsequent to the trial, and an issue was directed to be tried at trial level in order to determine what reduction in damages, if any, should be made by virtue of the remarriage. A reduction to the amount otherwise awarded under the heading of pecuniary damages is by no means inevitable. Evidence of remarriage standing alone does not affect an award, because there must be evidence of an expectation of financial benefit flowing from the liaison or prospective liaison.[68]

It is the writer's view that this contingency factor needs to be reconsidered carefully. Whereas generally, in assessing the damages available to the surviving spouse one measures the loss by reference to what would have been received, tangibly and intangibly, should the deceased not have been tortiously killed, the remarriage factor reverses this order and assumes the death of the victim for purpose of assessment, thereby giving a benefit to the defendant in allowing the defendant to seek advantage from the assumption of death. The search for remarriage prospects also defeats the convenient

63. (1981), 10 Man. R. (2d) 181 (C.A.).
64. (1978), 83 D.L.R. (3d) 480 (S.C.C.)
65. *Supra* n. 9.
66. [1967] 1 All E.R. 539 at 542; approved by Spence J. in *Keizer* v. *Hanna supra* n. 32.
67. [1983] 3 W.W.R. 193 (Sask. C.A.).
68. See *Mercer* v. *Sijan* (1976), 14 O.R. (2d) 12 at 18 (C.A.).

rule that the injured person's action is complete, though procedurally inchoate, at the time of the death.[69]

On a different issue, determining that it is an error of law to regard the ability of the defendant to pay as a relevant consideration, Mr. Justice Dickson (as he then was), stated the basic principle as follows:

> The correct principle is proper compensation for the injuries suffered by the victim. The exact amount in any particular case must be determined from the evidence presented by the parties at trial. Fairness to the defendant is achieved not by a reduction for ability to pay, or by arbitrary slashing of the award, but by assuring the plaintiff's claims are legitimate and justifiable.[70]

## H. Management Fees

In the large award cases over $300,000 relating to young injured persons, a management fee has been awarded on top of the capitalized sum, so that in the case of *Arnold* v. *Teno et al*[71] was awarded and in *Fenn et al.* v. *City of Peterborough et al.*;[72] in a similarly large award, a management fee of $25,000 was allowed. However, in *McLeod* v. *Palardy*[73] no management fee was awarded where the total award was initially in the range of $264,000 but was then reduced through contributory negligence.

## I. Pre-judgment Interest

Another feature of *Mcleod* v. *Palardy*[74] is the discussion of prejudgment interest. In *Lewis* v. *Todd*,[75] interest was allowed on the award made from the time of trial, which was the first point at which evidence of the prevailing investment rates was adduced, to time of payment; but the interest was awarded as part of the total sum rather than as interest on the sum. This latter provision of making it part of the sum awarded follows from the approval in *Lewis* v. *Todd* of the Ontario Court of Appeal judgment in *Fenn et al.* v. *City of Peterborough et al.*[76] There appears, however, to be no discussion of prejudgment interest prior to trial and from the time of the incident. This is explained by the fact that projected annual average earnings are calculated as at the time of death and multiplied by the life expectancy as at the time, in order to arrive at the capital sum, so the survivors' loss between the death and the trial date is filled by the application of the full expectancy multiplier to expendable earnings; and the discount rate should only be applied from the date of trial.[77]

This situation will remain as above in Manitoba unless and until prejudgment interest in tort actions is clarified beyond the rather cryptic provision of *The Queen's Bench Act:*

> Interest is payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it.[78]

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69. See *Boarelli* v. *Flannigan*, [1973] 3 O.R. 69 (C.A.).
70. *Supra* n. 64 at 486.
71. (1978), 83 D.L.R. (3d) 609 (SCC).
72. (1980), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (C.A.).
73. *Supra* n. 63.
74. *Ibid.*
75. *Supra* n. 54.
76. *Supra* n. 72.
77. See *Killeen* v. *Kline et al.*, [1982] 3 W.W.R. 289 at 311-316 (B.C.C.A.).
78. C.C.S.M. c. C280, s. 71.

## J. The Effect of Benefits Received Collateral to the Death

Comment has already been made as to the effect that considerations relating to premature receipt of inheritance by the claimant survivors have on the award.[79] The *Act* provides as follows:

> Considerations in assessing damages.
>
> 7. In assessing damages in an action brought under this Act there shall not be taken into account,
>
> (a) any sum paid or payable on the death of the deceased under any contract of insurance or assurance, whether made before or after the coming into force of this Act;
>
> (b) any premium that would have been payable in future under any contract of insurance or assurance if the deceased had survived.
>
> (c) any benefit or right to benefits, resulting from the death of the deceased, under The Workers Compensation Act, or The Social Allowances Act, or The Child Welfare Act or under any other Act that is enacted by any Legislature, Parliament, or other legislative authority and that is of similar import or effect;
>
> (d) any pension, annuity or other periodical allowance accruing payable by reason of the death of the deceased; and
>
> (e) any amount that may be recovered under any statutory provision creating a special right to bring an action for the benefit of persons for whose benefit an action may be brought under this Act.

In a fatalities claim against a party defended by the Manitoba Public Insurance Corporation where the claim is based on a death resulting from a motor vehicle incident, the defendant will inevitably plead subsection 33(5) of *The Manitoba Public Insurance Corporation Act*,[80] which provides as follows:

> 33(5) The liability of any person to whom this section applies for loss, damage, injury, or death of any other person shall be reduced
>
> (a) by the total amount of benefits and insurance money paid or payable in respect of the loss, damage, injury, or death; . . .

"Benefits" are defined in paragraph 33(1)(a) to mean any payment made in respect of death under a plan established under the *MPIC Act*. Looking then to the regulations under the *MPIC Act* in M.R., 333/74, sections 7 and 8, one finds provision for the maximum payment for funeral expenses ($1,500); and secondly, certain stipulated payments for dependants. These payments will very often have been made prior to the trial and, as noted, subsection 33(5) of the *MPIC Act* will be pleaded in order to reduce any award granted in the action. Finally, subsection 56(1) of the *MPIC Act* specifically refers to *The Fatal Accidents Act* and prevents application of section 7 of that Act to the no-fault benefits received by family members under the *MPIC Act* regulations. In Ontario see, *Gorrie et al.* v. *Gill; McRoberts et al.* v. *Gill*.[81]

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79. See part III, B. hereof and *Clement* v. *Leslies Storage Limited supra* n. 28.

80. S.M., c. A180 (hereinafter referred to as the *MPIC Act*).

81. (1975), 90 R. (2d) 73 (C.A.).

## IV. Damages For Loss of Guidance, Care and Companionship (s. 4(4) of *The Fatal Accidents Act)*

The three graces of the statutory intangible loss claim under subsection 4(4) of the Act are guidance, care and companionship. In Ontario the *Family Law Reform Act*,[82] paragraph 60(2)(d) provides in similar fashion as follows:

> (d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred.

And in *Fread* v. *Chislett* it was determined by Mr. Justice Boland that:

> . . . [I]t is clear on the particular facts of this case that the 29-year-old daughter did not suffer any significant loss of guidance, care and companionship, as a result of the death of her mother. The relationship which the daughter enjoyed with her late mother did not involve elements of physical care or guidance. Accordingly, the only claim which the daughter can advance under cl. (d) is a limited claim for loss of companionship.[83]

It follows then that each of intangible loss may be seen as a discreet component and is sufficient in and of iteslf to found an award. Mr. Justice Boland also points out that the addition of the care, guidance and companionship provision displays ". . . . a legislative intention to expand the scope of recovery . . . "[84] On this latter notion of expansion, note the case of *Thornborrow* v. *MacKinnon*[85], where Mr. Justice Linden determined that because of the addition of the care, guidance and companionship provision, a deceased child's survivors may now claim not only pecuniary losses from failed prospects of future care, but also for the non-pecuniary losses of care, guidance and companionship. Mr. Justice Linden said:

> Thus, loss of guidance, care and companionship can be suffered by each member of a family as a result of the death or injury of any other member of that family. Age is irrelevant. It is always in individual matter that must be established on the evidence in each case. This may differ in every family and with each individual in the family. It may be that a parent may consider one of his children a "pain in the neck" and will avoid its company. If that is the case, then there would not be very much evidence of loss. The figure awarded would be low. But in most cases, I would expect that the evidence would show that parents do receive much in the way of guidance, care and companionship from their children, as well as the other way around. There is still no compensation allowed, however, for grief or solatium. The

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82. *Family Law Reform Act*, R.S.O. 1980, c. 152, s-ss. 60(1), 60(2):

> 60(1) Where 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 II, 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.
>
> (2) The damages recoverable in a claim under subsection 1 may include,
>
> (a) actual out-of-pocket expenses reasonably incurred for the benefit of the injured person;
>
> (b) a reasonable allowance for travel expenses actually incurred in visiting the injured person during his treatment or recovery;
>
> (c) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the injured person, a reasonable allowance for loss of income or the value of the services; and
>
> (d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred.

83. (1981), 32 O.R. (2d) 733 at 739 (H.C.J.).

84. *Ibid.*, at 738.

85. (1981), 32 O.R. (2d) 740 (H.C.J.); approved by Scollin J. in *Farley et al.* v. *Buchanan* (1982), 17 Man. R. (2d) 426 (Q.B.).

> compensation awarded is for the heads enumerated, and anything in addition to that which would have been permitted under the common law.[86]

Mr. Justice Scollin in the *Farley* v. *Buchanan* case, in approving the *Thornborrow* v. *MacKinnon* judgment suggests:

> There the learned trial judge gives cogent reasons for concluding that the legislation requires that a new concept of compensation be developed for loss of companionship and that its loss was not to be treated as trivial. I respectfully agree with his conclusion.[87]

In the result, Mr. Justice Scollin awarded $15,000 to the elderly surviving husband for loss of companionship. This is consistent with the comment of Mr. Justice Dicksen in *Lewis* v. *Todd:*

> Third, the award of damages is not simply an exercise in mathematics which a judge indulges in, leading to a "correct" global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the trial judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.[88]

As noted at the commencement of this paper the test of substantial injury does not apply in subsection 4(4) of the Act as, obviously, pecuniary loss or loss of monies worth need not exist before the court can grant an award for the non-pecuniary loss. In the case of *Kugelmass* v. *Natale*[89], various cases are referred to for the scale of awards granted in the 1980s in Ontario. In *Kugelmass* the Court gave $7,500 to the five year old child of the deceased mother. The child had not suffered any serious deprivation and shortly after the death of her mother a step-mother had moved into the void providing the infant with loving care, companionship and guidance. Again, the reasoning, while logical in a regime concerned strictly with compensation, appears to defeat the maxim that a tortfeasor is not to benefit from services donated by a third party. The Court did not award any damages for pecuniary loss in the circumstances. The reasoning in *Adkins et al.* v. *Mintz*,[90] is preferable. In that case the Court rejected the comparison made in, *Fawns* v. *Green & Traders General Ins. Co.*[91] between the remarriage of a widow and the adoption of an orphan as factors to be taken into account in potentially reducing the award. *Adkins* was decided in the era before the advent of non-pecuniary damages, and concerned the tortious death of the mother of an infant plaintiff. The child had been adopted by maternal grand-parents prior to trial. The child's claim survived the adoption both because the child's right of action was complete at his mother's

86. *Thornborrow* v. *MacKinnon, ibid.*, at 748.
87. *Supra* n. 85 at 435.
88. *Supra* n. 54 at 708.
89. (1982), 37 O.R. (2d) 357 (H.C.J.).
90. (1973), 7 O.R., (2d) 102 at 105 (H.C.J.); appeal dismissed without reasons, unrep. March 14, 1974 (C.A.).
91. [1972] 1 W.W.R. 272 (B.C.S.C.).

death, prior to adoption, and because under the collateral benefits rule the plaintiff's receipt of benefit from third parties or from social legislation was "no concern of the defendant." For the latter ground the Court cited the comments of Dubin, J.A. in a personal injury caes, *Boarelli* v. *Flannigan.*[92]

In *Mason* v. *Peters et al.*[93] the Court acknowledged that prior to the guidance and companionship era, where the deceased was an infant, the probable costs of raising a child out-weighed the probable pecuniary benefits that the child might in due course have contributed. The difficulty in this reasoning has already been discussed.[94] But this case was one where an "exceptional" 11 year old boy was killed, leaving behind his crippled and otherwise deserted mother. The defendant contended that where a pecuniary loss cannot be shown, the wording of subsections 60(1) and (2) of the *Family Law Reform Act*[95] of Ontario prevents recovery for loss of "guidance, care and companionship" under that Act. The appeal from an award of $45,000 to the mother (plus $5,000 to the sister) was dismissed, and the Court approved the whole award as falling under the intangible loss head of damages.[96] Noteably, the Ontario legislation is more prone to this rejected argument than the Manitoba equivalent because in Ontario subsection 60(1) says that the named class of survivors "are entitled to recover their pecuniary loss." Subsection 60(2) goes on to describe what damages are recoverable, and here "guidance, care and companionship" are listed. In *Mason* v. *Peters*, on the basis of the remedial nature of the addition of the care, guidance and companionship loss legislation, the Court considered it a discrete head of damages, and of course, one not prone to a macabre accounting-back procedure. Mr. Justice Kennedy agreed in *Charbonneau et al.* v. *Huff et al.*[97], that an award of damages under subsection 4(4) of the *Act* is not dependant on proof of pecuniary loss.

A commentary on the question of whether, in Ontario, the statutory head of intangible damages may stand alone can be found in J.R. Morse & P.W. Kryworuk, "Section 60 of the Family Law Reform Act: . . . ".[98] The writers refer to *Mason* v. *Peters,*[99] and *Hutcheson* v. *Harcourt*[100] as definitive for Ontario on this question. A summary of recent monetary awards may also be found in that paper.

More unsettled is the question of the proper approach in determining the size of the award in this abstruse area. An example on one side of the controversy is *Reidy et al.* v. *McLeod,*[101] where Bowlby, J. gives full vent to the enlargement view of the statutory addition.[102] The deceased was a

92. *Supra* n. 69, at 74.
93. (1982), 39 O.R. (2d) 27 (C.A.)
94. See part III. D. hereof.
95. *Supra* n. 82.
96. *Supra* n. 93, at 40.
97. Unrep. September 12, 1984, Man. Q.B.
98. 27 C.C.L.T. 209 at 219.
99. *Supra* n. 93.
100. (30 June 1983) 20 A.C.W.S. (2d) 177 (Ont. C.A.) (as yet unreported).
101. *Supra* n. 14.
102. *Supra* n. 82.

17 year old youth at the time of his death and left surviving in his Catholic and close-knit family, eight claimants including parents, siblings and grandmother. The Court, between awarding the most to the mother, $50,000, and the least to a 31 year old brother, $2,000, gave a total of $111,500 to the family survivors for their abstract loss.

On the other side is Krever, J. who, in *Gervais et al.* v. *Richard et al.*[103] had to assess compensation for the death of a 16 year old youth who left surviving her, in a "close family", parents and six siblings, the siblings ranging in age from 11 to 20 years. In expressly declining to follow Bowlby, J's approach in *Reidy*, decided two months earlier, Krever, J. said:

> In my view, awards for loss of guidance, care and companionship under subsection (2), Section 60 of the *Family Law Reform Act* must eventually become conventional awards. Finally, and certainly tritely, I say that each case must be decided on its own facts. [104]

Before assessing a contributory negligence deduction Krever, J. gave a total of $45,000 under this head of damages, awarding the most to the Mother ($12,000), and the least to an older brother ($1,500). In neither *Reidy* nor *Gervais* was there pecuniary loss, although in both there were special damages in the nature of funeral expenses. Beneath the polemic the sums are more than merely symbolic, whether treated as approaching a conventional mark, or as directed to individuated restitution.[104a]

It is useful to set out from the *Thornborrow* v. *MacKinnon* case the discussion of the learned trial justice which, as suggested, supports the view taken at the outset of this paper that the addition of the loss of care, guidance and companionship head of damages is an expansion of the common law boundaries:

> In my view the Legislature intended, by s. 60, to go further than merely codify the old law under the *Fatal Accidents Act*, R.S.O. 1970, c. 164, which limited damages for the death of children to pecuniary loss, that is, the potential economic gain that parents may receive from their children by way of support in old age or before. Under that inhuman principle we have seen situations where, because there was no pecuniary loss, nothing at all was awarded for the death of very small children; *Barnett* v. *Cohen et al.*, [1921] 2 K.B. 461; a six-year-old was killed, no award at all given. We have also seen cases where insultingly small sums were awarded for older children; *Courtemanche et al.* v. *McElwain et al.*, [1963] 1 O.R. 472, 37 D.L.R. (2d) 595 (Ont. C.A.). It was no credit to the law that a wrongdoer, who injured a child, paid more damages than one who killed a child. It was said, in a kind of macabre jest that was a stain on our law, that is was better to kill a child than to injure one. This was a sickening situation, which embarrassed anyone who had anything to do with the law in this country. It was an affront to Canadians, who expect their law to be the embodiment of national and civilized thought. Such low damage awards were barbaric, and did not reflect the prevailing views of our society which recognizes that children have a special value that transcends the pecuniary benefits they may some day bestow on their parents.
>
> The Legislature of Ontario meant to rectify that dreadful page of our legal history in the new *Family Law Reform Act*, 1978. Subsection (1) of the Act was a codification of the existing law to an extent, but it also expanded it. For the first time, compensation was allowed generally for family members in cases of injury to one of their relatives. Subsection

103. Unrep. Sept. 17, 1984, Ont. S.C.

104. *Ibid.*, at 23.

140a. As this article goes to print, we should note a very recent and useful contribution to the Ontario jurisprudence, namely Barr J.'s careful judgment in *Borland* v. *Muttersbach* (25 Sept. 1984) 27 A.C.W.S. 333 (Ont. H.C.) (as yet unreported); where the divergent approaches in both *Reidy* and *Gervais* are analysed and a resolution of the conflict attempted.

> (2) was also a codification of the common law, in part, but it was also an extension to include compensation for certain items which were either confusing or not compensated for under the case law. It is clear to me that the words of s-s. (2), "the damages recoverable in a claim under subsection 1 may include", are not meant to restrict the common law in any way, only to explain and enlarge the range of recovery.[105]

Having set out above the principles of enlargement of recovery and the remedial nature of the Act, it is apt to advert once again, in conclusion, to the question of the common law proscription against damages for solace to survivors. The legislated power to award damages for intangible loss invites comparison with the "pain and suffering" aspect of personal injuries awards. The principles stated as regards "pain and suffering" are applicable under the present fatalities legislation where it leaves the non-pecuniary areas of care, guidance and companionship in each case to the Court to assess and quantify. In *Andrews,* Mr. Justice Dickson (as he then was) sets out the preferred approach to "pain and suffering":

> . . . The first, the "conceptual" approach, treats each faculty as a proprietary asset with an objective value, independent of the individual's own use or enjoyment of it. This was the ancient "bot", or tariff system, which prevailed in the days of King Alfred, when a thumb was worth 30 shillings. Our law has long since thought such a solution unsublte. The second, the "personal" approach, values the injury in terms of the loss of human happiness by the particular victim. The third, or "functional" approach, accepts the personal premise of the second, but rather than attempting to set a value on lost happiness, it attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune". "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuinary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way.[106]

The advent of judicial protection regarding care, guidance and companionship for an extended group of claimants has now provided compensation for the injured family unit. Siblings and grandparents were formerly ignored unless able to demonstrate a pecuniary loss. Is this novel category of human relations loss, the law's belated approval of family adhesion beyond mutual tangible support; or is it the Legislature's attempt to prevent family fragmentation, to return to a family centered social network; or, finally, is it the statutory execration of the old approach where it was cheaper to kill, than to injure? It is submitted, that it was not the purpose to apply this head of damage to render more palatable, by topping up, an award made unacceptably low by an arbitrary slashing of deceased's pecuniary value, through an auditing of the deceased's consumption habits.

105. *Supra* n. 85, at 743.

106. *Supra* n. 33. See also, *Rose* v. *Belanger supra* n. 40; *Lawrence et al.* v. *Good supra* n. 23.