Quantifying Loss of Consortium

Chesley F. Crosbie, Q.C.
Jessica A. Dellow
Ches Crosbie Barristers
169 Water Street, 4th Floor
St. John's, NL A1C 1B1
(709) 579-4000
www.chescrosbie.com
ccrosbie@chescrosbie.nf.net

I. Introduction

When a person is injured as a result of a third party's negligence the injured party's family may also suffer losses. Frequently these losses will be non-pecuniary in nature and chief among the family members suffering a related loss may be the spouse of the injured party. A remedy for non-pecuniary losses may lie in advancing a claim for loss of consortium on behalf of the spouse of the injured party or, in the case of wrongful death actions, loss of care, guidance and companionship.

II. The status of consortium claims in Atlantic Canada

In *Power v. Moss* (1986), 38 C.C.L.T. 31 (N.L.T.D.), para. 66, Justice Aylward adopted the following definition of consortium:

> Consortium refers and relates to rights emanating from a marriage relationship. The Canada Law Dictionary defines consortium as "The term used generally in matrimonial law as denoting companionship, love, affection, comfort, mutual services, sexual intercourse — all belonging to the marriage state — taken together".

The claim is for losses suffered by the spouse of the injured party and, historically, was limited to actions brought by a husband for the loss of the services of his wife. As Canadian society evolved courts were required to reconsider the underpinnings of a cause of action which denied a remedy to women. The treatment of loss of consortium in Atlantic Canada has varied somewhat from province to province. With the exception of Newfoundland and Labrador, however, the trend appears to be towards doing away with such claims.

The cause of action has been abolished by statute in both New Brunswick and Prince Edward Island: *An Act Respecting Compliance of the laws of the Province with the Canadian Charter of Rights and Freedoms,* S.N.B. 1985, c. 41, s. 4(8); *Family Law Reform Act,* R.S.P.E.I. 1974, c.F-2.1, s. 61.1.

In Nova Scotia there are conflicting authorities. In *Blotnicky v. Oliver* (1988), 84 N.S.R. (2d) 14 (N.S. T.D.), Justice Hallett was asked to award a plaintiff wife damages for loss of consortium.

Justice Hallett declined to follow *Power v. Moss, supra*, preferring the reasoning of the Saskatchewan Court of Queen's Bench in *Shkwarchuk et al v. Hansen and Tillman* (1984), 34 Sask. R. 211 (Q.B.) which chose to reject this ground of claim altogether rather than extend it to wives. Justice Hallett's reasoning is found at para. 49, where his lordship held:

> …In *Shkwarchuk et al. v. Hansen and Tillman* Mr. Justice MacLeod found that, considering the historical anomaly that a husband had a claim for loss of consortium but a wife did not, he had two choices; that is, either extend the claim to the wife or terminate the husband's common law right as being inconsistent with the *Charter*. He concluded that the better alternative was to do away with the husband's common law right to claim for loss of consortium. It would seem to me that the decision in the *Shkwarchuk* case is a more rational conclusion than the decision in *Power v. Moss* to extend the right to claim for lost consortium to a wife. I have reached this conclusion because, pursuant to s. 52 of the *Charter*, any law which is inconsistent with the provisions of the *Charter* is of no force and effect. The common law right of a husband to claim for loss of consortium while a wife could not is inconsistent with the *Charter* and therefore is of no force and effect. Apart from that, the right to claim for loss of consortium was based on an outmoded concept that a husband had a proprietary interest in his wife and should be compensated for loss of her consortium under certain circumstances. That is an unacceptable view of the marriage relationship. There is no longer any rational basis, if there ever was one, upon which to ground a claim for loss of consortium. Such a claim should not be extended. [Citations omitted]

Blotnicky was followed in *Baker et al v. Pleasant* (1989), 89 N.S.R. (2d) 301 (N.S. S.C.) and in *Y (C.M.) (Guardian ad litem of) v. Dangov,* 1992 CarswellNS 503 (S.C.).

On the other hand, in *Burstall v. Parlee*, 1988 CarswellNS 321 (T.D.), $3,500 was awarded to the male plaintiff for loss of consortium. Grant J.'s reasons on this point do not address whether or not the claim ought to be done away with. In dealing with this aspect of the claim the trial judge noted that following the horse riding accident which injured the plaintiff's wife, the plaintiff and his wife stopped having intercourse for about four to five months, resumed having sexual intercourse and then ceased in 1987. There were also some household duties that the wife used to perform, but could no longer. Most recently Mr. Justice Duncan, in the context of approving an infant settlement, approved an amount payable to the parents of an injured child for loss of consortium: *Saulnier v. Tynski,* 2009 CarswellNS 474 (T.D.). The parents in that case had their marriage breakup, the judge approved payment of a global amount for loss of consortium and the contributions the parents had made to the infant plaintiff's care during his first years of life: *Saulnier,* paras. 16-19.

In Newfoundland and Labrador the claim for loss of consortium continues to exist and has been extended to wives: *Power v. Moss* (1986), 38 C.C.L.T. 31 (T.D.). In that case the plaintiff wife was awarded $2,000 for loss of consortium. She did not testify, but there was evidence before the Court that her husband was hospitalized for a period of approximately 2 months following the accident, that he was depressed, tires easily, finds it difficult to adjust to his disability, that he was a good family man and spent a great deal of time at home. The judge also noticed that his facial appearance is disfigured.

In *Robinson v. Pearlgate Lanes Ltd.,* 1995 CarswellNfld 283 (T.D.), damages for loss of consortium were provisionally assessed at $5,000. The wife claimed that her spouse, following a slip and fall, had become aggressive and hostile towards her and had rendered him impotent.

III. An alternative to claiming loss of consortium: loss of companionship

(i) The statutory claim

Some Canadian jurisdictions have modified their wrongful death statutes to allow a spouse to claim for loss of companionship. Prince Edward Island and Nova Scotia are examples of two such jurisdictions: *Fatal Accident Act,* R.S.P.E.I. 1988, c. F-5, s. 6(3)(c); *Fatal Injuries Act,* R.S.N.S. 1989, c. 163, s. 5(2)(d). For these provinces, a spouse has a claim for a loss which .

PEI's *Fatal Accident Act,* s. 6(3)(c) does not appear to have been judicially considered. However, prior to the provision coming into force a judge awarded the parents of a deceased child the sum of $25,000 for loss of guidance, care and companionship: *Reeves Estate v. Croken* (1989), 77 Nfld. & P.E.I.R. 109 (T.D.), rev'd (1990), 84 Nfld. & P.E.I.R. 298 (C.A.). Although the award was reversed on appeal (on the basis that no such claim existed at common law), it provides some guidance as to the appropriate quantum of such a claim.

Nova Scotia's *Fatal Injuries Act,* s.5(2)(d) has been considered and applied. *Murray Estate v. Advocate Contracting Ltd.,* 2001 CarswellNS 426 (S.C.) provides a summary of cases awarding damages for loss of care, guidance and companionship and the principles applicable to such an award. The young husband in that case was awarded $65,000 for the loss of his deceased wife's companionship.

(ii) The common law claim: *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 239 (S.C.C.)

Newfoundland and Labrador and New Brunswick have not enacted provisions which allow a spouse to claim for loss of companionship: *Fatal Accidents Act,* R.S.N.B. 1973, c. F-7, s. 3; *Fatal Accidents Act,* R.S.N.L. 1990, c. F-6. While one might be tempted to conclude that such a claim cannot therefore be made, there is a strong judicial tendency to recognize grief and emotional injury as compensable. In *Augustus v. Gosset*, 1996 CarswellQue 914 (SCC), para. 24, the Supreme Court confirmed that *solatium doloris* or injury to feelings is a type of moral prejudice compensable in Quebec law. The Court of Appeal majority had determined that the mother of the deceased who was shot by police should receive $15,000 on this head of loss, and $50,000 according to Fish, J.A. The matter of quantum was remitted to the Court of Appeal for reassessment, with a suggestion that $25,000 might be considered ($32,175 adjusted for inflation). The matter appears to have settled.

The deficiencies of Canadian wrongful death statutes have been remedied, and the law surrounding guidance, care and companionship loss has been fundamentally reformed by the case of *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 239 (S.C.C.). The Supreme Court of Canada noted that historically in maritime law, damages in relation to fatal accidents were restricted to pecuniary loss only. It is clear that the Supreme Court of Canada in *Ordon Estate* intended to reform the law concerning a non-pecuniary head of loss which had not before been recognized by maritime law. At paras. 12, 13 and 14:

> The action was brought by the parents, brothers, sisters and infant daughter of Grant Perry for loss of guidance, care and companionship and for pecuniary loss." [Emphasis added]

The Court confirmed that the loss of guidance, care and companionship for which the availability of compensation was being considered, was a variety of non-pecuniary loss:

> [31] Following its consideration of the applicability of the various provincial statutes, the Court of Appeal dealt with the classes of plaintiffs eligible to bring claims and the types of losses for which they could recover.
>
> [32] The court found that, although a claim for loss of guidance, care and companionship cannot be brought under the Family Law Act (in light of the foregoing analysis), such a claim may be brought under the Canada Shipping Act. The Court held that, even if the word "damages" in s. 647 of the Canada Shipping Act did not originally refer to damages for this variety of non-pecuniary loss, Canadian maritime law is not frozen or static, and should develop to allow for such a claim in conformity with contemporary concepts of loss resulting from wrongful death." [Emphasis added]

The Supreme Court of Canada posed the question whether Part V of the Ontario *Family Law Act* extends to federal maritime law jurisdiction, but ultimately declined to answer that question, preferring to pose the following issue:

> We must first consider whether there already exists within Canadian maritime law a cause of action which permits dependants of a person killed or injured in a boating accident to recover damages for the resulting loss of guidance, care and companionship.

The Court further in para. 98 answered that no existing common law rule permitted either personal injury or fatal accident claims for damages for lost guidance, care and companionship of a non-pecuniary nature. At para. 100, the Court posed the next question:

> Whether the common law rules barring recovery in both instances should be judicially reformed to allow claims for damages for loss of guidance, care and companionship. . . . We agree with the Court of Appeal for Ontario that they should.

The highest court considered that the Court of Appeal was correct to acknowledge that "contemporary conceptions of loss include the idea that it is truly a harm for a dependent to lose the guidance, care and companionship of a spouse, parent, child, etc.": para. 101. The Supreme

Court of Canada also observed that the majority of provinces in Canada have enacted provisions for recovery under this head of damages.

At para. 102, the Court proceeded expressly to find that all tests for judicial reform of Canadian non-statutory maritime law were met, and began the paragraph as follows:

> It is unfair to deny compensation to the plaintiff dependants in these actions based solely upon an anachronistic and historically contingent understanding of the harm they may have suffered. This is true both for the fatal accident claimants and for the personal injury claimants. In this light, we are of the view that changing the definition of "damages" within the context of maritime accident claims is required to keep non-statutory maritime law in step with modern understandings of fairness and justice, as well as with the "dynamic and evolving fabric of our society". . . ." [Emphasis added]

IV. Conclusion

Courts and legislatures in Atlantic Canada have demonstrated an unwillingness to recognize loss of consortium as a wrong deserving of a remedy through either abolishment of the cause of action or the award of token amounts.

The value of human relationships, particularly the spousal relationship, has been recognized in PEI and Nova Scotia. There is also reason to conclude that the common law in New Brunswick and Newfoundland and Labrador, which do not by legislation permit non-pecuniary claims for loss of guidance, care and companionship, has simultaneously been reformed by the pronouncements in *Ordon Estate*. The Supreme Court has imposed liability; it remains for the courts of provinces such as Newfoundland and Labrador and New Brunswick to find liability, by recognizing and declaring it.