BY ROBERT BEN

DEATH DURING PERSONAL INJURY LITIGATION: A RE

Death is complicated, especially in personal injury litigation. What happens when an elderly (or for that matter, any) plaintiff dies in the midst of an ongoing lawsuit? What substantive, procedural, evidentiary and ethical considerations arise?

Transmission of Interest

At common law, subject to certain exceptions such as claims in contract, a personal right of action died with the person: *actio personalis moritur cum persona.*

This harsh result has been remedied by statute. Section 38(1) of the *Trustee Act* now provides that the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person (except libel and slander) in the same manner and with the same rights and remedies to which the deceased would have been entitled if living, and that any damages recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life.[1]

The action maintained by the estate is not a new cause of action but, rather, the deceased's cause of action transmitted to the estate. The *Trustee Act* only preserves the right to sue that had already vested in the deceased prior to death.

Stay and Continuation of Proceedings

Procedurally, the plaintiff's personal injury lawsuit is automatically stayed upon death pursuant to Rule 11.01 of the *Rules of Civil Procedure.*

The stay can be lifted by an Order to Continue under Rule 11.02. Any "interested person" may, on filing an affidavit verifying the transmission of interest, obtain, without notice to any other party to the proceeding, an Order to Continue the proceeding on a simple requisition from the court registrar.

Rule 11.03 provides that where an Order to Continue is not obtained

within a reasonable time, the defendant may move to have the action dismissed for delay.

Generally, an Order to Continue can only be sought by a person who is legally entitled to administer the deceased plaintiff's estate and to exercise the fiduciary obligations of such a position, which includes the determination of whether or not to maintain the litigation which becomes an asset of the estate.[2]

Impact of Death on Measure of Damages

The measure of damages recoverable by the estate in a survival action is different than had the plaintiff survived. The estate's claim is circumscribed by section 38(1) of the *Trustee Act* in that no damages are allowed "for the death" or for "loss of expectation of life" if the death results from the tortious injury.

The wide exclusion "for the death" effectively proscribes recovery of damages for any prospective losses the deceased plaintiff might have otherwise claimed. Damages for future medical, rehabilitation and care expenses, as well as for future loss of income earning capacity and other future economic losses are, for example, not recoverable.[3]

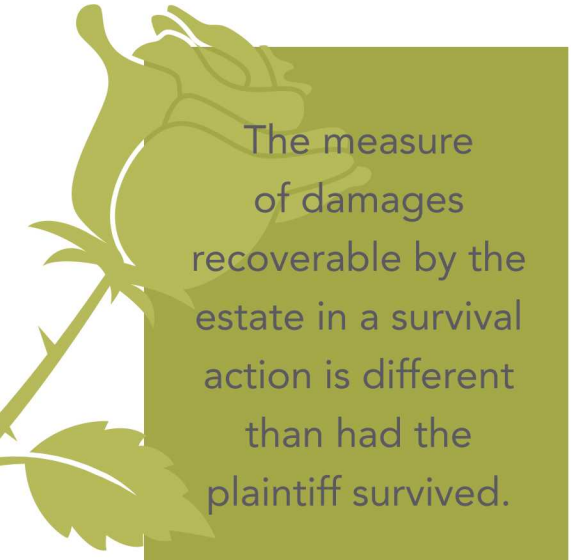
Limiting the estate's damages to the actual pecuniary losses suffered by the deceased up to the moment of death makes sense given that damages are generally intended to be compensatory in nature. As one judge explained, "damages for the cost of future care are awarded [*inter vivos*] on the assumption that such care will be provided" and while the survival legislation "preserves an existing right of action, [it] does not quantify it. In quantifying it, [one] cannot ignore the fact that…there can be no expenditure at all for future care. The effect of the [survival legislation] is to preserve the action as if the plaintiff had not died, it is not to quantify the loss as if she were still alive."[4]

Damages for loss of future income or other future economic losses are likewise, and justifiably, not recoverable for any period beyond the plaintiff's death. This is so whether the death ensued from the tortious injury or from an entirely unrelated cause.

In the former case, the rationale appears to be threefold: the estate can have no interest in distributing what

would have been its future wealth; the law has no interest in furnishing gratuitous bonuses to surviving relatives;[5] and, any eligible dependents may make their own derivative claims under section 61 of the *Family Law Act* for the loss of monetary support the deceased would have provided had the plaintiff survived.

In the latter case (where death ensues from a non-tortious cause), none of the future losses are, as a matter of causation, attributable to the tortfeasor and therefore he cannot be liable for those losses.



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Pecuniary losses incurred by the estate itself (as opposed to the plaintiff while living) are not recoverable where incurred after the date of death. Funeral expenses are an example, as this represents expenses the estate would have to make in any event at some point in time (although these expenses can be recovered by eligible survivors pursuant to right of action conferred upon them by the *Family Law Act*). Where the estate is merely paying an expense incurred by the plaintiff before death, such expense will be recoverable.

Non-pecuniary damages such as those for the plaintiff's pain, suffering, and loss of amenities (damages for the loss of expectation of life being expressly excluded by section 38(1) of the *Trustee Act*) are limited in the same way as pecuniary damages: the relevant period of loss for the purposes of assessment of damages becomes that period from the date of the plaintiff's injury to the date of the plaintiff's death. The aim of these non-pecuniary general damages, after all, is to provide a measure of solace depending on the nature and duration of the loss actually felt. It follows that, in cases where the plaintiff dies instantly, or during a period of unconsciousness in which the plaintiff could not actually experience pain and suffering, there can be no compensatory damages.

In cases of personal injury arising out of motor vehicle accidents, section 267.5(8.1.1.) of the *Insurance Act* expressly provides that the statutory deductible from any award of non-pecuniary damages does not apply, provided the injured plaintiff dies as a direct or indirect result of the accident.

The *Trustee Act* is silent on the recoverability of aggravated, exemplary of punitive damages. The general principle governing aggravated damages is that they are not awarded in addition to general damages but, rather, increase those damages after taking into account any aggravating features of the case.[6] Accordingly, there appears no reason to bar recovery of such damages by the estate provided the assessment is made only up to the date of death.

Exemplary and/or punitive damages are non-pecuniary damages, the purpose of which is to punish and deter the defendant and others engaging in tortious conduct. While these damages are not compensatory in nature, they are nonetheless recoverable by the deceased plaintiff's estate.[7] As noted by one author, "Once the law has accepted the wisdom of punishing the defendant by a payment to an individual, there seems no justification for letting him off scot-free if the plaintiff dies, for the award is not to compensate the plaintiff but is solely a recognition of the law's need to impose a financial burden on the defendant in the the interests of society."[8]

Death Before Discovery

Needless to say, a plaintiff's death before discovery can negatively impact the estate's ability to prove a claim, depending on the issues in dispute. If, for example, the deceased plaintiff's anticipated evidence was crucial to establishing liability for damages, the plaintiff's death is highly problematic.

In certain rare cases, where the deceased plaintiff has made prior out-of-court statements, such statements might be admissible at trial under a number of traditional exceptions to the rule against the admissibility of hearsay. For example: written declarations made in the course of a business duty provided they were made contemporaneously with respect to objective facts; statements in public documents; and, written or oral declarations against interest.[9]

Another rare exception to the hearsay rule is the admissibility of a deceased plaintiff's testimony given in a prior adjudicative proceeding.[10] The court may permit evidence given by a deceased plaintiff in a prior proceeding provided: the adverse party in the prior proceeding had the opportunity to cross-examine the deceased; the question in issue in the current and prior proceeding is substantially the same;

and, the current and prior proceeding were between the same parties.[11]

Hearsay evidence that does not fall under these traditional exceptions may still be admitted under the so-called principled approach if indicia of reliability and necessity are established on a *voir dire* at trial.[12] Death will usually meet the necessity requirement. The reliability requirement will generally be met by showing that: there is no real concern about whether the statement is true or not because of the circumstances in which it came about; or, that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested by means other than contemporaneous cross-examination.

If the plaintiff has filed affidavit evidence in connection with interlocutory proceedings in the lawsuit, the court may allow the estate to introduce all or part of the affidavit at trial subject to considerations of weight.[13]

Death After Discovery but Before Trial

When the plaintiff dies after giving evidence on examination for discovery but before trial, the *Rules of Civil Procedure* contemplate the deceased plaintiff's own discovery evidence being read into evidence at trial by the estate despite the usual prohibition against doing so.

Rule 31.11(6) provides that where a person examined for discovery has died or is unable to testify because of infirmity or illness or other enumerated reasons, any party may, with leave of the trial judge, read into evidence all or part of the evidence given on examination for discovery as the evidence of the person examined to the extent that it would be admissible if the person were testifying in court.

In deciding whether to grant leave, the trial judge shall consider the extent to which the person was cross-examined on the examination for discovery, the importance of the evidence in the proceeding, the general principle that evidence should be presented orally in court, and "any other relevant factor".

Even if the court permits the deceased plaintiff's own discovery evidence to be read into evidence by the estate at trial, the evidence is still subject to evidentiary rules concerning admissibility. Hearsay and a deponent's "belief" may be relevant for the purposes of discovery yet inadmissible at trial.

Once a trial judge exercises her discretion to admit the deceased plaintiff's own discovery evidence as part of the estate's case, it remains within the trial judge's power to determine what if any weight should be given to it, having regard to the circumstances under which the evidence was obtained, and taking into account the effect any absence of cross-examination might have on the quality of the evidence.

Taking Evidence Before Trial

In a situation where there is a possibility that the plaintiff will die before or become too infirm to testify at trial, it is imperative to take the plaintiff's evidence before trial.

Rule 36.01 of the *Rules of Civil Procedure* provides that a party who intends to introduce evidence of a person at trial may, with leave of the court or the consent of the parties, examine the person on oath or affirmation before trial for the purpose of having the person's testimony available to be tendered as evidence at the trial.

Where the other parties do not consent, the court will in its discretion grant leave after taking into account: the convenience of the person to be examined; the possibility that the person will be unavailable to testify at the trial by reason of death, infirmity or sickness; the possibility that the person will be beyond the jurisdiction of the court at the time of the trial; the expense of bringing the person to the trial; whether the witness ought to give evidence in person at the trial; and, any other relevant consideration.

Pursuant to Rule 36.02, if leave is granted for a pre-trial taking of evidence, the plaintiff may be examined, cross-examined and re-examined in the same manner as a witness at trial. Pursuant to Rule 34.16, the examination shall be recorded and transcribed in the usual way. Under Rule 34.19, on consent or by court order, the examination may be recorded by videotape or other similar means, and the tape or other recording may be filed for the use of the court along with the transcript. However, under Rule 36.04(7), the transcript and/or videotape or other recording need not be read or played at trial unless a party or the trial judge requires it.

Death While Offer to Settle Open for Acceptance

What happens in the situation where the plaintiff dies while a defendant's offer to settle remains open for acceptance?

Where the plaintiff's lawyer has instructions to accept the defendant's offer but only does so after, and without disclosing, the plaintiff's death to the defendant, there is no enforceable settlement.[14] The lawyer's authority to accept the offer is revoked on his client's death and, because the offer could only be in respect of claims which the

deceased plaintiff could have pursued personally (which are distinct from and based on different considerations than the estate's claims), the parties to the purported settlement cannot be said to have been *ad idem*.

In such circumstances, the plaintiff's lawyer ought to disclose the plaintiff's death before purporting to accept the offer in order to allow the defendant an opportunity to withdraw it. The defendant is entitled to rely on the allegations in the Statement of Claim and if there has been a material change of circumstances since the filing of that claim, the defendant is entitled to know.[15]

The plaintiff's lawyer also cannot make an offer to settle knowing, but not disclosing, his client has died and then purport to enforce the settlement against a defendant who has unwittingly accepted it.[16] The death causes a substantial factual and legal change which obliges the plaintiff's lawyer to inform the defendant. Moreover, it appears that the court will exercise its equitable jurisdiction to relieve against a unilateral mistake (such as a defendant accepting a presumed living plaintiff's offer to settle) particularly in circumstances where it can be shown that the plaintiff's lawyer knew, or must have known, of the defendant's mistake yet remained silent and hurriedly concluded a settlement on the mistaken terms. The court will consider it unconscionable to allow the settlement agreement to stand in such circumstances.[17]

Failing to disclose the plaintiff's death also likely runs afoul of the lawyer's professional and ethical duties. Although the lawyer's function as advocate is openly and necessarily partisan, and the lawyer is not obliged (except as required by law) to assist an adversary or advance matters harmful to the client's case, the lawyer has a concomitant duty to not knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, suppressing what ought to be disclosed, or knowingly misrepresenting the client's position in the litigation or the issues to be determined in the litigation.[18] Lawyers must be careful to avoid any conduct that could be viewed as actively misleading the opposite party through omission or active misrepresentation particularly with respect to a material fact such as the plaintiff's death.

Arguably, the situation is different where the plaintiff's lawyer believes his client's death may be imminent but the plaintiff has not yet died. At least one court has found that the plaintiff's lawyer does not have a duty to disclose his client's suspected imminent death in the midst of settlement negotiations as, until the plaintiff dies, there is no actual change in the nature of the claims being advanced.[19] In these circumstances, the plaintiff's lawyer is under no duty to assist an adversary or raise matters derogatory to his client's case.

Death After Settlement but Before Court Approval

Where a plaintiff under legal disability (i.e. a child or a person lacking legal capacity) enters into a settlement of her

claims, the settlement is not binding until court approval is obtained from a judge under Rule 7.08 of the *Rules of Civil Procedure*. What happens to the settlement if the plaintiff dies before the necessary court approval is obtained?

The answer is the settlement is nonetheless binding. This is the case even if the settlement is stated as being "subject to court approval". Court approval is not a true condition precedent to the settlement. Court approval, while legally imposed upon the parties, is designed specifically to protect the interests of the party under disability.[20]

This is justifiable in that although the plaintiff's post-settlement death may eliminate the need for compensation for future costs of care, for example, the plaintiff's death does not create a new situation that should not have been contemplated by the parties. Life expectancy is but one of many contingencies that parties settling personal injury claims are bound to take into account when determining the worth of the claim and the unexpected death of the plaintiff does not remove the entire foundation for the agreement.

Death During Trial

Where the plaintiff dies during the course of trial (a matter which surely must be disclosed to the court), the action is stayed until it is continued by the estate. The measure of recoverable damages will be limited to those allowed under the *Trustee Act*. If the plaintiff dies before giving crucial evidence, the only resort is to seek to introduce any prior out-of-court statements, testimony in prior proceedings, or earlier affidavit evidence by the plaintiff, as discussed above.

Death After Trial but Before Judgment

It is a longstanding principle of law that a litigant should not be prejudiced by an act of the court. Based on this principle, in cases where the plaintiff has died after the conclusion of argument at trial but before judgment has been entered (i.e., while under reserve for the convenience of the court), courts have entered judgment *nunc pro tunc* as of the date argument concluded[21] and without regard for the plaintiff's intervening death. The plaintiff's cause of action merges in the judgment. The judgment debt becomes an asset of the estate.[22]

Death After Judgment but Before Appeal

Where the plaintiff dies after judgment but before appeal, the court may re-assess damages by admitting fresh evidence of the plaintiff's intervening death.[23] Where a notice of appeal has been filed in time and, pending the appeal, a supervening event occurs such as to "falsify" the previous assessment of damages, the court will be more ready to admit fresh evidence because, until the appeal is heard and determined, the proceedings are still pending and finality has not been reached.[24] As noted by the court, "it would affront common sense if we shut our eyes to the fact of death" because the future damages which the judge awarded were intended as compensation for the injured person herself over a period the judge thought she would suffer those losses.

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NOTES

[1] This proviso is not, however, in derogation of any rights conferred by Part V of the *Family Law Act*, meaning that while the plaintiff's estate may only recover damages for losses incurred to the time of death, certain statutorily eligible family members may maintain claims for their losses from the date of the plaintiff's death.

[2] *Godkin Estate v. Mtm Financial Services (London) Corp*, 1999 CanLII 14810 (ONSC)

[3] *Balkos v. Cook,* 1990 CanLII 6743 (ONCA)

[4] *Lankenau v. Dutton*, 1988 CanLII 3153 (BCSC)

[5] K. Cooper-Stephenson and E. Adjin-Tetty, *Personal Injury Damages in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2018) at p. 1035

[6] *Norberg v. Wynrib*, 1992 CanLII 65 (SCC)

[7] *Plester v. Wawanesa Mutual Insurance Company*, 2006 CanLII 17918 (ONCA)

[8] H. Street, *Principles of the Law of Damages* (London, 1962) at 139

[9] John Sopinka, Sidney Lederman and Alan Bryan, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999 at p. 201ff

[10] *Sopinka, supra*, at p. 278ff

[11] *Aujla v. Hayes*, 1997 CarswellOnt 1824 (Ont. C.A.)

[12] *R._-v. Khelawon*, 2006 SCC 57

[13] *Leclerc v. St. Louis* (1984), 47 O.R. (2d) 584 (Div. Ct.)

[14] *MacKenzie v. Carroll* (1974), 53 DLR (3d) 699 (Ont. HC)

[15] *Ibid.*

[16] *Moss v. Chin* (1994), 120 DLR (4th) 406 (BCSC)

[17] *Ibid.*

[18] Rule 5.1-1 of the *Rules of Professional Conduct*; See also: *McCallum Estate v. Trans North Turbo Air (1971) Ltd.*, [1978] NWTJ No.1 (SC)

[19] *Hodder Estate v. Insurance Corp. of Newfoundland Ltd.*, 2002 CanLII 53985 (NLSC)

[20] *Re Wu Estate*, 2006 CanLII 16344 (ONCA)

[21] *Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429, 2007 SCC 10 (CanLII)

[22] *Harvey v. Harte,* 1999 CanLII 19024 (NL CA)

[23] *Harvey, supra; Monahan Estate v. Nelson*, 2000 BCCA 297 (CanLII)

[24] *Harvey, supra*