DAMAGES UNDER THE *FAMILY LAW ACT*: A BRIEF PRIMER & UPDATER

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PRIMER

As part of any personal injury action, the immediate family members (spouse, children, grandchildren, parents, grandparents, and siblings) of the injured person may "piggy back" onto the injured Plaintiff's action by advancing their own claims pursuant to section 61 of the *Family Law Act*[1]. Pursuant to section 61(2) of the *Family Law Act*, the types of claims that may be advanced include:

> (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
> (b) actual funeral expenses reasonably incurred;
> (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
> (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

The non-pecuniary claims that may be advanced under subsection 61(2)(e) *may* be subject to a statutory deductible pursuant to section 267.5(8.4) of the *Insurance Act*[2] if the following circumstances are present:

1. the case arose from a motor vehicle accident (i.e. as opposed to a slip and fall);

2. the Defendant is "protected" within the meaning of the *Insurance Act* (i.e. Defendant was a driver or owner of the involved vehicle, or someone who was present at the scene of the accident);

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1 R.S.O. 1990, c. F.3.
2 R.S.O. 1990, c. I.8.

3. the *Family Law Act* damages do not pass a certain monetary threshold (see below); and

4. the *Family Law Act* damages arise from an injury sustained by the primary Plaintiff (i.e. as opposed to arising from a fatality).

With respect to #2 above, a municipality, for example, is typically an "unprotected Defendant" in most personal injury actions arising from motor vehicle accidents. When a municipality is sued in the context of a motor vehicle case, the allegations against the municipality are often ones for negligent road/signage design, maintenance, and/or repair. Consequently, the municipality would not get the benefit of the *Insurance Act* protections, such as the application of the statutory deductible.

With respect to #3 above, the monetary threshold at which the statutory deductible is eliminated from application increases each January with inflation (as does the amount of the deductible). As of January 2018, the monetary threshold is $63,304.51 and the deductible is $18,991.67. In other words, if a *Family Law Act* claimant's claim for loss of guidance, care, and companionship were assessed to be worth $50,000.00, then that *Family Law Act* claimant would actually only recover $31,008.33 ($50,000.00 less $18,991.67).

For a more detailed explanation of the types of claims that can generally be advanced under section 61(2) of the *Family Law Act*, some legal considerations surrounding those claims, and a sense of the range of the damages typically awarded, please see two companion articles written by this author entitled *Advancing Pecuniary & Non-Pecuniary Claims under the Family Law Act* and *Damages Under the Family Law Act: an Updater*. The present article is meant to provide a brief updater respecting *Family Law Act* claims,

based upon case law released since the last of the two companion articles in October of 2017.

UPDATER

i. Can You "Marry Into" a *Family Law Act* Claim?

It is generally accepted that in order to advance a claim under the *Family Law Act*, the claimant would have had to qualify as a spouse, child, grandchild, parent, grandparent, or sibling of the injured Plaintiff *as of the date of loss*. There are good policy reasons from preventing someone from "marrying into" a *Family Law Act* claim. In the recent decision of *Doucet v. The Royal Winnipeg Ballet*[3], however, the Court was prepared to consider circumstances under which this general rule may not apply.

The *Doucet* decision arose from an application to certify a class action brought by the students of a ballet school who alleged that the resident photographer sexually assaulted them, breached his fiduciary duty, and breached their privacy. The "dependents" of the student Plaintiffs also sought to form a sub-class to advance claims under the *Family Law Act* for their own losses sustained as a result of the damages suffered by the students. The representative Plaintiff for this "dependents class" was not a spouse of the representative student at the time that the student was at the ballet school, so the defence argued that the *Family Law Act* claim was untenable. Perrel J. concluded that the *Family Law Act* claim may be viable and stated[4]:

> It is true that L.K. would not qualify as a spouse under s. 61(1) of the *Family Law Act* at the time when Ms. Doucet was a student at the school. It is also true that one cannot "marry into" a derivative claim under the Family Law Act.

3 [2018] ONSC 4008 (Sup.Ct.) (CanLII) [*Doucet*].
4 *Ibid*. at para. 144.

> However, some of Ms. Doucet's certified causes of action may have been perfected, after Ms. Doucet left the school; for example, the wrongdoings associated with breach of confidence and the breaches of the privacy torts may have perpetrated quite recently and they may be ongoing wrongs. Assuming either to be the case, Ms. Doucet would be injured under circumstances where she would be entitled to recover damages while she was L.K.'s spouse and L.K. as a spouse would be entitled to recover for her own pecuniary loss arising from Ms. Doucet's injuries. Thus, it is entirely possible that L.K may be entitled to maintain an action under the Family Law Act.

Consequently, *Doucet* might have "opened the door" to arguments that where there is an "ongoing wrong", the date by which a potential claimant must be considered a "spouse" (or other immediate family member) may not have crystallized on the date of the initial loss. It will be up to lawyers to consider what types of claims might trigger the concept of an "ongoing wrong". Consider, for example, a breach of contract of a long-term disability policy would be considered an ongoing wrong, since the policy would otherwise may monthly benefits; or whether a claim for aggravated damages might arise from some type of "ongoing wrong" in the circumstances of the case, such as a failure to pay a benefit.

ii. Can You Advance a *Family Law Act* Claim after the Two Year Limitation Period?

The general limitation period applicable to personal injury actions is two years from the date of the incident, subject to discoverability[5]. Since *Family Law Act* claims are derivative to the main action, generally, those claims must also be issued within the two year limitation period. There may be some cases, however, where a *Family Law Act* claim may be advanced beyond the two year limitation. One such case was the recent matter of *Malik v. Nikbakht*.[6]

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5 *Limitations Act, 2002*, S.O. 2002, c. 24 Sched. B at s. 4-5. Per s. 6-7, there are exceptions if the Plaintiff was under a disability by virtue of being a minor or incapable at the time of the incident.
6 [2018] ONSC 2816 (Sup.Ct.) (CanLII) [*Malik*].

Malik arose from a motor vehicle accident, in which a father and his three children all sustained injuries. Each person, including the father, advanced personal injuries claims within the two year limitation period. Long after the two year limitation period had expired, the father sought to amend the Statement of Claim to add claims brought pursuant to the *Family Law Act* for the losses that he had sustained as a result of the injuries suffered by his children. Master Wiebe granted the motion and, in doing so, explained how the circumstances of this case compared and contrasted with other cases addressing this same limitation issue[7]:

> I found the facts in *Bazkur* decision very much the same as in the case before me. In *Bazkur* a wife moved for leave to amend her Statement of Claim to add an FLA section 61 damages claim arising from the injuries her husband suffered in the subject motor vehicle accident. Her husband was a passenger. Master McAfee at first instance denied the motion as she found that the claim was a separate cause of action and was statute barred. On appeal to the Divisional Court, Justice Moore overturned this decision. He relied on the Supreme Court of Canada decision in *Cahoon v. Franks*, [1967] CarswellAlta 48 (S.C.C.) wherein the plaintiff moved after the limitation period had expired to amend a Statement of Claim that had claimed property damage. The amendment sought to add a claim for personal injuries. The Court allowed the amendment holding that the proposed amendment did not add a new cause of action; it simply added a new head of damages. Similarly, Justice Moore in *Bazkur* found that the amendment adding the FLA section 61 claim was simply the addition of a new head of damages to an action in negligence. I find that the facts of the case before me are the same as the facts in *Bazkur*, namely a motion by the father some 4 ½ years after the motor vehicle accident to add an FLA claim for damages arising from injuries suffered by the children, who were passengers in the car.
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> I found that the cases Ms. Yang relied upon did not conflict with the *Bazkur* decision. They all had distinguishing features. In *Giroux v. Pollesel*, (2012) ONSC 2203 (Div. Crt.), a plaintiff, who was injured in a motor vehicle accident, obtained leave from a judge to add family members to the action more than six years after the accident. The Divisional Court dismissed the appeal from that decision. In the course of his decision, Justice Matlow

7 *Ibid*. at para. 4.

> confirmed that the FLA section 61 claims of the family members, while "derivative" in nature from the underlying claim of the injured family member and fail if the underlying claim fails as a result, are separate causes of action with their own limitation periods arising when the damage is discovered or discoverable. I draw a distinction between the added family plaintiffs in *Giroux* who are not otherwise injured parties and whose only cause of action is the FLA section 61 claim, and the plaintiff in *Bazkur* who is otherwise injured and is seeking to add his damage claim under FLA section 61 claim to the other heads of damage he has claimed in relation to his existing and timely claim in negligence against the tortfeasor. In the latter case, Justice Moore's decision makes sense.

iii. What is a Recent Example a Non-Pecuniary *Family Law Act* Award?

In the previously issued companion articles, examples were provided of recent *Family Law Act* damages awards. Few awards have been published since October of 2017[8]; however, the matter of *Servello et al. v. Canon et al.*[9] provides a good example of recent damages awards for various types of *Family Law Act* claimants.

Servello was an action issued by a 46 year-old male, his wife of 23 years, his mother, and his children. The action was against an osteopath as a result of knee injections received by the male Plaintiff that led to an infection, surgery, and debilitating chronic pain that affected his ability to spend quality time with his family, go on vacation, and take his children to their extracurricular activities. Healey J. granted the following awards pursuant to subsection 61(2)(e) of the *Family Law Act*:

- to the spouse: $30,000.00;
- to the parent: $20,000.00;
- to each child: $7,500.00.

8 Most personal injury cases are jury actions, so the damages awards are only published on-line if there is an appeal or reference to the awards within a judge's threshold motion decision.
9 [2017] ONSC 6118 (Sup.Ct.) (CanLII) [*Servello*].

For further information on *Family Law Act* claims and the assessment of damages, see the author's previous articles found at: https://www.thomsonrogers.com/directory/deanna-gilbert/#publications.