NON-PECUNIARY *FAMILY LAW ACT* DAMAGES IN FATALITY CASES

The assessment of non-pecuniary *Family Law Act* damages for the loss of guidance, care, and companionship has long been a conundrum. As stated by Nordheimer J. in *Hechavarria v. Reale*[1]: "No amount of money could ever replace the contribution which a loved one makes to the people around him or her." This article will focus on the assessment of these damages in the context of fatality cases; however, there is no reason why the parameters discussed herein could or would not equally apply to non-fatality cases.

The Ontario Court of Appeal's "Big Three"

In three landmark cases, released over the course of two decades, the Ontario Court of Appeal has offered litigants some parameters for the range of non-pecuniary *Family Law Act* awards.

The first key decision was in the matter of *To v. Toronto Board of Education*,[2] wherein the Ontario Court of Appeal set out what was, thereafter, considered to be the high watermark for non-pecuniary *Family Law Act* claims. Following the death of a 14-year-old involving equipment at his school's gymnasium, the jury awarded $100,000 in non-pecuniary damages to each parent and $50,000 to his sibling. The Ontario Court of Appeal observed that the Courts had not imposed a rough upper limit to these claims in the way the Supreme Court had done for general damages claims in *Andrews v. Grand & Toy Alberta Ltd*., nor had the Ontario legislature imposed a statutory cap.[3] While the Ontario Court of Appeal reduced the sibling's award to $25,000, it refused to intervene with the jury's award to the parents. Nevertheless, the Court remarked that $100,000 "might be viewed as being at the high end of an accepted range of guidance, care and companionship damages."[4]

The second key decision was in the matter of *Fiddler v. Chiavetti*,[5] wherein the Ontario Court of Appeal confirmed that to determine the current high-end for non-pecuniary awards, inflation should be applied. Following the death of a young female in a motor vehicle collision, the jury awarded $200,000, $50,000, and $25,000, respectively, to the mother, father, and sibling. The Ontario Court of Appeal interfered only with the mother's award. In doing so, it adopted *To* and allowed that the jury would have awarded the mother the high-end of damages ($100,000) but then added inflation to that sum based upon the consumer price index *as at the date of loss* (January 2005). Consequently, the mother's award was reduced to $125,000.

The third key decision was in the matter of *Moore v. 7595611 Canada Corp.*,[6] wherein the Ontario Court of Appeal inherently endorsed a new high-end for non-pecuniary *Family Law Act* damages. Following the death of a 24-year-old in a house fire, the jury awarded each parent $250,000. The consumer price index as at the date of loss (November 2013) was 123, such that the adjusted "*To* number" would have approximated $147,500. The Ontario Court of Appeal acknowledged that

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[1] 2000 CanLII 22711 (ONSC) at para. 11.
[2] 2001 CanLII 11304 (ONCA).
[3] *Ibid*. at para. 29.
[4] *Ibid*. at para. 37.
[5] 2010 ONCA 210 (CanLII).
[6] 2021 ONCA 459 (CanLII).

the jury's award of $250,000 was high but did not consider the amount to be so inordinately high as to shock the conscience of the Court or to be wholly erroneous. The appeal was dismissed.

Non-Pecuniary *Family Law Act* Awards in Fatality Cases since Moore

There have been relatively few reported decisions in fatality (or, frankly, non-fatality) cases since the release of *Moore*. Below is a summary of reported *fatality* decisions, which have not been adjusted for inflation for purposes of this 2024 paper*:*

- In *Zarei v. Iran*,[7] a case arising from a commercial aircraft being shot down, the judge awarded each of five family members (a parent, a spouse, and a sibling) $200,000.

- In the *Estate of Mary Fleury et al. v. Olayiwola A. Kassim*,[8] a medical malpractice case, the judge awarded $100,000 to the surviving spouse. While this award may seem to be on the lower end, relative to *Moore*, the involved couple was of advanced age (ages not specified, but they were grandparents) and the deceased suffered from health issues as a result of her underlying cancer. As such, the case may be distinguishable from an award that may otherwise be granted to the spouse of a younger or previously healthier deceased.

- In *Smith v. Islamic Republic of Iran*,[9] another case arising from the downing of the same commercial aircraft as in *Zarei*, the judge awarded $200,000 to each surviving parent and spouse and $150,000 to each sibling.

- In *Thompson v. Handler*,[10] a medical malpractice case involving the death of a woman (whose age was not specified, but one might estimate to be in her 40's), the judge awarded $100,000 to her spouse of ten-years and $85,000 to each child.

- In *Fletcher v. Coyle*,[11] an undefended summary judgment motion in a nursing negligence case, the judge awarded $40,000 and $25,000.00, respectively, to the surviving child and grandchild. These are fairly low awards; however, the deceased was 76 years old and suffering from dementia, weakness, and several chronic illness.

- In *Sutherland et al. v. Booth*,[12] a medical malpractice action involving the death of a 27-year-old who lived with her parents, the judge dismissed the action on liability. His Honour indicated that had he found in favour of the Plaintiffs, he would have awarded $75,000 to each parent, $40,000 to the sibling, and $20,000 to the grandfather. This case appears to be an anomaly and, unfortunately, the judge did not provide any insight into His Honour's analysis, nor was any damages evidence reviewed in the decision. Of particular interest would be why the (presumably relatively young) sibling's award was merely double that of the grandfather who had died just four years after the incident.

[7] 2021 ONSC 8569 (CanLII).
[8] 2022 ONSC 2464 (CanLII).
[9] 2023 ONSC 4420 (CanLII).
[10] 2023 ONSC 5042 (CanLII).
[11] 2023 ONSC 6757 (CanLII).
[12] 2024 ONSC 127 (CanLII).

- In *Gill et al. v. Toor et al.*,[13] a motor vehicle case involving the death of a Sikh teenager who lived with three generations of family, the jury awarded $300,000 to the mother, $100,000 to the father (who had died before trial, 9 years post-loss), $125,000 to each adult sibling, $100,000 to a live-in grandparent, and $50,000 to each live-out grandparent. Although this paper is focusing on non-pecuniary awards, it is worth mentioning that the jury also awarded $1.5 million for the combined loss of financial support and household services. Further, the evidentiary basis of that award was largely non-expert based (though an expert accountant did the calculations). Rather, reputable members of the Sikh community were called to give evidence about cultural expectations.

In summary, while we have yet to see a dramatic shift in non-pecuniary *Family Law Act* awards since *Moore*, the trend does appear to be slightly in favour of Plaintiffs. In particular, and although *Moore* did not involve the assessment of a surviving sibling's claim, there appears to be a trend towards higher sibling awards in recent years. A trend that was likely long overdue.

For further papers and presentations on the assessment of all headings of *Family Law Act* damages in tort cases, fatalities and otherwise, please visit: https://trlaw.com/directory/deanna-gilbert/.

[13] Toronto. CV-15-3609-00 (Ont.Sup.Ct.).