DAMAGES IN FATALITY CASES: ESTATE CLAIMS

Deanna S. Gilbert
Partner, Thomson Rogers

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INTRODUCTION

A large portion of my practice is devoted to fatality cases. I have previously authored papers[1] on damages that may be advanced by family members pursuant to the *Family Law Act*[2], including claims arising from the death of a loved one. Fatality cases, however, may also include estate claims. An "estate claim" in this context refers to a personal injury claim brought on behalf of the deceased (via the deceased's estate) for damages incurred by the deceased between the tort and the person's death. This paper will review some considerations for Plaintiff counsel when considering advancing estate claims.

EXECUTIVE SUMMARY

- The **proper way to name** the deceased in the title of proceedings is "**X, by his Estate Trustee (or Litigation Guardian – whichever applies), Y**", whereas the "X" is the name of the deceased and the "Y" is the name of his Estate Trustee or Litigation Guardian.
    - *E.g. "JOHN DOE, by his Estate Trustee, Jane Doe*"

- Instructions to proceed with an **estate claim** should be clearly **documented in any Contingency Fee Agreement and/or Direction to Settle**, including signature by the estate trustee or administrator.

[1] https://trlaw.com/resources/non-pecuniary-family-law-act-damages-in-fatality-cases/
https://trlaw.com/resources/damages-under-the-family-law-act-updater-3/
https://trlaw.com/resources/damages-under-the-family-law-act-a-brief-primer-updater/
https://trlaw.com/resources/damages-under-the-family-law-act-advancing-pecuniary-and-non-pecuniary-claims/
https://trlaw.com/resources/damages-family-law-act-updater/
https://trlaw.com/resources/advancing-pecuniary-non-pecuniary-claims-under-the-family-law-act/

[2] R.S.O. 1990, c. F. 3.

- There is an ***ultimate* two-year limitation period from the date of the *person's death*** for advancing an estate claim or any derivative *Family Law Act* claims.

- Estates have been awarded **non-pecuniary damages** for a person enduring as little as **a few hours of pain and suffering** before death.

    - In motor vehicle cases, the **statutory deductible does not apply** to general damages claims brought on behalf of estates.

- Estates can also advance pecuniary claims including, but not limited to **past income loss, out-of-pocket (healthcare/household/other), and/or subrogated claims.**

DETAILED DISCUSSION

Naming the Estate in the Pleadings

Rule 9.01 of the *Rules of Civil Procedure*[3] provides that a personal injury proceeding may be brought by an executor, administrator, or trustee representing an estate. As such, the first step is determining whether the deceased died with a will that identifies a trustee, whether one has otherwise since been appointed by the Court; and, if not, determining an appropriate person to provide instructions to counsel as a Litigation Administrator and who consents to doing so.

If there is an estate trustee, no additional paperwork is required beyond the Statement of Claim. If there is a Litigation Administrator, the Court typically wants a Consent to be filed by the person in addition to the Statement of Claim. The Consent can be a single sentence; it need not include all the information contained, by comparison, in an Affidavit of Litigation Guardian.

Contrary to popular belief, the proper way to name a deceased Plaintiff does *not* involve naming "the estate" or "personal representative" of the deceased, though rule 9.03(2) of the *Rules*

[3] R.R.O. 1990, Reg. 194.

prescribes that doing so shall not be treated as a nullity by the Court (though the title of proceedings would have to be properly amended at some point).

Rather, the proper way to name a deceased Plaintiff is to write: "X, by his Estate Trustee (or Litigation Administrator), Y", whereby "X" is the name of the deceased and "Y" is his Estate Trustee or Litigation Administrator (as the case may be).

Instructions

This may be obvious, but if the estate (via its trustee or administrator) is to be named as a Plaintiff, then it is important to include the estate (properly named, as above) on the Contingency Fee Agreement and to ensure the trustee or administrator signs the retainer. Further, it is equally important to ensure that any Direction to Settle enumerates what the estate is (or is not) to receive and is signed by the trustee or administrator.

Limitation Period Applicable to Estate Claims

Plaintiff counsel should be aware that the applicable limitation period for estate claims is not just governed by the *Limitations Act, 2002*,[4] but also the *Trustee Act*.[5]

Whereas section 5(1)(b) of the *Limitations Act, 2002* permits the discovery principle to extend the basic and presumed two-year limitation period from the date the cause of action arose, section 28(3) of the *Trustee Act* prescribes that an action brought by an executor or administrator of any deceased person for all torts and injuries to the person "shall not be brought after the expiration of two years from the death of the deceased." Section 19(1)(a) of the *Limitations Act, 2002* states that a limitation period under any other Act to a claim to which the *Limitations Act* applies is of no effect *unless* it is an Act listed in the Schedule to the *Limitations Act* – and the *Trustee Act* is so listed.

In other words, where the discovery principle would otherwise extend the two-year limitation period to advance an estate claim, there is an ultimate limitation period for that claim to be brought

[4] S.O. 2002, c. 24, Sch. B.
[5] R.S.O. 1990, c. T.23.

within two years of the date of death. This is an important consideration since *Family Law Act* claims are derivative in nature; meaning, if the estate's claim is barred, so too will be the surviving family members' claims.

Examples where the limitation period may be a real consideration include:

- In a winter maintenance occupiers' liability case, where Plaintiffs often receive late disclosure from a Defendant owner/occupier regarding the existence of a third-party contractor;

- In an impaired driving motor vehicle case, where Plaintiffs often receive late disclosure from a Defendant or through the delayed receipt of a Crown brief concerning the potential involvement of a tavern; and

- In medical malpractice cases, where Plaintiffs may not learn about the potential negligence of another physician or the identity of a nurse until later in the litigation, including discoveries of the existing Defendants.

Where counsel is concerned about running up against the limitation period, it may be prudent to issue the claim against "John Doe," "Company Doe," "Dr. Doe", and/or "Nurse Doe" and later seek to correct the misnomer, as opposed to seeking to add a new Defendant fresh to the lawsuit. Summarizing the case law relevant to that distinction is beyond the scope of this paper, but the key is that the allegations in the Statement of Claim must be made with sufficient particularity for the misnamed Defendant to recognize that the "litigating finger" was pointed at him.[6] Prejudice will also be a factor.

[6] For the sake of brevity, the pronoun his/he will be *arbitrarily* used throughout this paper instead of writing his/he/her/she/they. For a discussion on misnomers, see, for instance, *Ormerod v. Ferner*, 2009 ONCA 697 (CanLII).

Damages

i. Non-Pecuniary Claims

Like any other personal injury claimant, an estate is entitled to advance a non-pecuniary general damages claim for pain, suffering, and the loss of enjoyment of life. For motor vehicle cases, section 267.5(8.1.1) of the *Insurance Act*[7] carves out an exception whereby the statutory deductible does not apply to non-pecuniary claims brought by deceased persons (or to a comparative non-pecuniary claim for loss of guidance, care, and companionship by their surviving family members).

There are not many reported decisions regarding estate non-pecuniary claims, since they are not often advanced. I believe the cases demonstrate that two main factors going towards the assessment of the non-pecuniary claim are:

1. the amount of time the person survived before succumbing to his injuries; and

2. the severity of the physical and/or emotional pain during that time which was caused by the tort.

Below is a *sampling* of caselaw in Ontario (in chronological order, with inflation calculated if more than two years old):

- *Adair Estate v. Hamilton Health Sciences Corp*.[8]
    - Medical malpractice case involving a 66-year-old woman with a history of COPD and bladder prolapse, who developed a small bowel obstruction following an otherwise successful surgical repair of her prolapse. The Court concluded she endured three weeks of abdominal pain and emotional pain from the negligence before dying.
    - Awarded $50,000 (~ $76,000 a/o 2025).

[7] R.S.O. 1990, c. I.8.
[8] 2005 CanLII 18846 (ONSC). Decision in April.

- *Rupert v. Toth*[9]
    - Medical malpractice case involving the delayed diagnosis and treatment of cancer of a 68-year-old (at the time of death). The deceased endured disabling headaches for about six months until the diagnosis. Thereafter, he had surgical repair, which would have been required in any event to treat the cancer, but he died three months later. The judge concluded that apart from the period of headache before the diagnosis/surgery, the patient would not have experienced nearly as much pain in that three-month post-operative period had the surgery been performed sooner (before the tumor became malignant).
    - Awarded $10,000 (~ $14,850 a/o 2025).

- *Matthews Estate v. Hamilton Civic Hospitals*[10]
    - Medical malpractice case involving a 68-year-old who required surgery for a brain tumor, who lived for 10 ½ years (with a devastating brain injury) following the negligence.
    - Awarded $180,000 (~ $253,570 a/o 2025).

- *Vokes Estate v. Palmer*[11]
    - Motor vehicle case where a woman (approximately in her late 30's/early 40's) succumbed to her injuries only a few hours after the collision.
    - Awarded $10,000 (~ $13,465 a/o 2025).

- *Estate of Mary Fleury et al. v. Olayiwola A. Kassim*[12]
    - Medical malpractice case involving the delayed diagnosis of cancer, resulting in the death of a 45-year-old. The judge noted that the Plaintiff had a long, drawn-out death, living for over a year with the knowledge that she was going to die and be deprived of precious time with her family.
    - Awarded $120,000 (~ $129,210 a/o 2025).

[9] 2006 CanLII 6696 (ONSC). Decision in March.
[10] 2008 CanLII 52312 (ONSC). Decision in October.
[11] Unreported. Jury Questions answered on June 14, 2011 (Court File No. 07-062).
[12] 2022 ONSC 2464 (CanLII). Decision in April.

- *Thompson v. Handler*[13]
    - Medical malpractice case involving a patient (who was likely around age 40), who died of an ischemic bowel. She endured nine days of pain and suffering before her death, though the judge noted she was unconscious for much of that time.
    - Awarded $40,000.

- *Fletcher v. Coyle*[14]
    - Nursing fraud/negligence case involving a 76-year-old critically ill woman was admitted to hospital for palliative care, who received inappropriate doses of morphine (too little, then too much). The judge concluded the deceased endured 24 hours of pain and suffering before her death.
    - Awarded $25,000.

I also note, for interest, the case of *Zarei v. Iran*,[15] which involved two missile strikes against a commercial aircraft, 30 seconds apart. It took the plane four minutes to plummet to earth. Each of six estates was awarded $1 million in general damages (~ $1,118,585 a/o 2025); however, this is an outlier case as the judge explained that the cap on general damages set by the Supreme Court of Canada in the trilogy of landmark cases does not apply to intentional/criminal conduct. In a personal injury case, intentional/criminal causes of action do not often arise except, perhaps, in assault or impaired driving cases.

i. Pecuniary Claims

Estates can also advance pecuniary claims like any other personal injury claimant. In practice, where this is most likely to arise includes:

- An income loss claim, especially if there were at least weeks that elapsed between the dates of loss and death; however, bear in mind that in motor vehicle cases, the standard protected Defendant provisions apply (i.e. no income loss of the first week, a 70% cap, etc.);

[13] 2023 ONSC 5042 (CanLII).
[14] 2023 ONSC 6757 (CanLII).
[15] 2021 ONSC 8569 (CanLII). Decision in November.

- Out-of-pocket expenses incurred, for instance, for any healthcare or household assistance; and

- But for in motor vehicle cases against protected Defendants, subrogated claims.

Put rather bluntly: a person's claim dies with the person. As such, there are no *future* income loss or *future* care claims that are brought on behalf of an estate; however, there may be corresponding claims to be advanced by surviving family members. For instance, if a married deceased would have continued earning an income in future but for his death, then his estate will not have a future income loss claim but his spouse will have a loss of dependency claim relating to a portion of the income that the deceased would have earned in future.

OHIP subrogated claims can be in the tens of thousands of dollars even with a short duration of life if there was a lot of diagnostic imaging performed, surgery, and/or ICU or any hospital admission. That said, advancing an OHIP claim does not serve the direct financial interests of the estate, so if there are no other viable non-pecuniary or pecuniary claims to be advanced by the estate directly, then I do not typically recommend naming the estate as a Plaintiff.

Conclusion

Where there is a good case on liability and *Family Law Act* claimants pursing a case in any event, there is generally little downside to including an estate claim. Estate claims do not tend to require a lot of imposition on the grieving family, a lot of work by counsel, or extra costs to the litigation. As such, where I am privy to evidence of a reasonably sustained period of pain and suffering (i.e. *at least hours*, if not longer), especially if there was likely both a physical and psychological component to the suffering, then I will often seek instructions to include an estate claim.

For any questions or comments, Deanna S. Gilbert can be reached at dgilbert@trlaw.com.