

Wrongful Death

A matter of life and death: Urgent call for a new wrongful death statute in B.C. | Sandra Kovacs

By **Sandra Kovacs**

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(August 28, 2017, 8:43 AM EDT) -- In China, there have been reported instances where drivers who have negligently struck and injured pedestrians have subsequently reversed over and intentionally killed those same pedestrians because it is well known under Chinese law that it is cheaper to kill than to injure. While thankfully there have been no similar reported occurrences in British Columbia or elsewhere in Canada, the law here is fundamentally no different.

At common law, there is no right of action whatsoever for wrongful death. While most common law jurisdictions, including Canadian provinces and territories, enacted statutes at the turn of the last century to remedy this harsh reality by providing *some* damages to certain close relations for pecuniary losses arising from the premature wrongful death of a loved one, these damages were mostly restricted to awards for the lost financial support or household services the surviving plaintiff reasonably expected to receive from the deceased, absent-accident.

As such, many families were left with little or no compensation whatsoever if a dependency could not be established between the deceased and the surviving family member claimant.

Several jurisdictions in Canada have since remedied this injustice, too, by introducing further amendments to their fatal accidents legislation. For example, in the West, Alberta and the Yukon have recently updated their statutes to provide bereavement damages for the loss of loved ones, even where no pecuniary loss arises, but the statute-set quantum of those damages remains rather low, at \$82,000 and \$75,000, respectively.

In B.C., the *Family Compensation Act*, RSBC 1996, c.126 has yet to be amended, despite repeated calls for change from distraught families who have been left without compensation for their losses.

While historically B.C.'s courts have found a go-around by awarding damages for the "pecuniary" loss associated with the lost "service" of "love, guidance and affection," the precedential current upper limit of such an award is significantly less than what is statutorily mandated in the Yukon, and the award is available only to surviving children in the event of the premature death of a parent. Thus, in B.C., there remains no meaningful compensation available when economic dependency cannot be established (e.g., for the wrongful death of a child, elder, or sibling).

With the New Democratic Party now in power in B.C., the time is appropriate to once again lobby for new legislation. British Columbia must catch up to its neighbouring jurisdictions and, at a minimum, permit an award of bereavement damages for close family relations.

The policy question, however, is just how much those bereavement damages should be.

When someone loses a loved one in a fatal accident, no amount of money can fully compensate the surviving family member for that devastating loss and the emotional suffering that follows. A parent's grief and suffering over the loss of a child in particular is unimaginable and limitless, but of course, as a matter of public policy, compensation cannot be limitless. However, \$75,000 — the amount now statutorily mandated for a parent in the Yukon for the loss of a child — is, to my mind, arbitrary, insufficient and arguably offensive.

Moreover, the prospect of an award of only \$75,000 may impede families from accessing justice, since it is simply not economical to retain counsel to pursue litigation for that amount where liability is contested.

Perhaps British Columbia can remedy the embarrassment of its tardiness by enacting a statutory amendment that gets it right — by permitting bereavement awards that will be significant enough to provide families with reasonable access to meaningful compensation.

To my mind, the appropriate path forward is to amend B.C.'s statute to allow bereavement damages at large for certain classes of close relations. Instead of setting an arbitrary "one-size-fits-all" quantum for compensation in the statute itself, we should trust and defer to the usual expert for the assessment of those damages: the trier of fact. If we can trust a judge or jury to exercise reasonable discretion in the measure of non-pecuniary damage awards, surely we can trust a judge or jury to reasonably assess the value of bereavement damages, too.

The time is right to call on B.C.'s new provincial government to take long-overdue steps to amend its fatal accidents legislation. To that end, I encourage my friends in the B.C. bar to resume this important conversation with newly appointed Attorney General David Eby and his honourable colleagues in the legislature.

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