

Reform to British Columbia's Wrongful Death Law

Introduction

There is a cultural norm in Canada that every single person is equal under the law of the land. In fact, this view is enshrined in the *Charter of Rights and Freedoms*, “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits by law as can be demonstrably justified in a free and democratic society.” This is a promised principle in the highest legal document of the land. Despite this, British Columbia's outdated wrongful death laws leave many worthless under the law.

Recommended Changes

The *BC Wrongful Death Law Reform Society* has prepared draft legislation that the Society, and its partner organizations encourage the current government to review and introduce in this term of its mandate.

The *Wrongful Death Accountability Act* would be a major advancement over the current system of fatality compensation in British Columbia. This proposed legislation broadens the law to surviving victims who are routinely excluded, such as seniors, people with disabilities, and minors.

In the Appendix of this document are amendments to two pieces of legislation that could be added to a Miscellaneous Statutes Amendment Act. These changes would not require a separate piece of legislation and would have a significant impact on those families affected by a wrongful death.

Facts

British Columbia's legal framework around wrongful death has not significantly changed since the adoption of Lord Campbell's Act in 1846, including the current *Family Compensation Act*. Under the current law, only the financial dependents of familial income earners may bring a meaningful claim for damages against the wrongdoer who caused the death. This is deeply contrary to Canadian values because it leaves surviving family members believing that the love, companionship, and non-pecuniary contributions of their loved ones, although victims of

wrongful death, have no worth under the law. According to the *BC Wrongful Death Law Reform Society*, is that it is “cheaper for a defendant to kill someone than to merely injure them.”

Currently, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Quebec, Prince Edward Island, Newfoundland, and the Yukon allow for non-economic (non-pecuniary) damages relating to loss of companionship. Alberta, Saskatchewan, and New Brunswick go a step further in allowing for punitive damages in egregious circumstances.

Cost

The exact number of those affected by wrongful death every year in BC is hard to determine. Most of those who cause death do so because of carelessness and these motorists, property owners, health professionals, and corporations will be financially responsible for damages by way of liability insurance. In the event of an estimated 1000 individuals killed by tort each year, it is reasonable to expect that few will pursue civil action. If only 200 cases are filed, even fewer will see a payout. 50 payouts per year, using Ontario’s top verdict of approximately \$500,000 as a multiplier, would be just \$25 million annually. This figure will be spread among insurers, mutual defense organizations, and self-insured governments and corporations.

Why Does It Matter?

Imagine that you have just lost your child, parent or your sibling as a result of a motor vehicle crash or avoidable medical error in a hospital. Much more than mere grief, there will be a burning sense of injustice. Then picture going to a legal professional expecting the law will provide a way to right the wrong. But the lawyer tells you that the law in BC provides no practical recourse. You don’t believe the lawyer so you go to another and then another. You get the same reply and begin to feel doubly wronged.

Stories

Catherine Adamson lost her daughter Heidi Klompas in 1997 as a result of a series of medical errors following a car crash in Langley, BC. Catherine said, “Heidi and her friends, along with at least a hundred other teenagers from a variety of high schools, congregated in south Langley. And then, one of the friends from high school ended up driving his car at quite a speed through

the crowd of teenagers. He struck about 17 or 18 teens, killed Ashley Reber instantly, and Heidi and a number of her friends were laying on the road with a variety of broken bones.”

Adamson said that “a sense of justice is proof that someone did something wrong causing a death—and somebody either admitting and apologizing for it or a judge saying you are guilty of, you know, negligence causing death. And we had nothing of that sort. I had correspondence back and forward with the College of Physicians and Surgeons and they just denied there was any wrongdoing, even though the coroner’s report and the Children’s Commission report clearly showed that doctors had made errors, there was no admittance of guilt and there was certainly no apology.”

Family Compensation Act Amendment

In June of 2007 the Ministry of Attorney General Justice Services Branch released a green paper outlining the need for reform of the *Family Compensation Act*. This paper outlined the necessary reforms identified at that time under the previous provincial government. The Civil and Family Law Policy Office wrote this paper and said that the act is “legislation intended to minimize the economic impact on the lives of people who are financially dependent on a family member that has been wrongfully killed.” While this is certainly the case, leading advocates for a wrongful death act would argue that the act should change the eligible claimants to include those under legal age, seniors and people with disabilities. This paper rightfully points out that the average person cannot look at the Act to determine what to expect.

Amounts Specified by the <i>Family Compensation Act</i>	
Pros	Cons
<ul style="list-style-type: none"> • Symbolic function of recognition of loss • Allows for greater degree of certainty • Efficient and administratively simpler • Avoids putting emotional pain on trial, which may support the healing process 	<ul style="list-style-type: none"> • If amount is too low, it may be perceived as insulting • Fails to take individual circumstances into account • Amount must be indexed, or periodic reviews must be done, to avoid a decrease in amount over time

**Source: Ministry of Attorney General Justice Services Branch, Civil and Family Law Policy Office, Reforming British Columbia’s Family Compensation Act, June 2007*

In Conclusion

A new Wrongful Death Act will provide British Columbians with clearly worded legislation that makes available more adequate compensation and sets out the rights of citizens. Its passage would improve access to justice in the province. According to the Society, this proposed legislation “protects creditors by helping ensure that a decedent’s estate has access to adequate damages from which the debts of the wrongful death victim can be settled”. Most importantly, this change ensures that everyone in society is valued under the law in the case of a wrongful death.

**Appendix A – Immediate Possible Amendments for a Miscellaneous Statutes Amendment
Act in the future**

The current Wills, Estates and Succession Act SBC 2009 and the Family Compensation Act [RSBC 1996] could be amended to accommodate the following legislative reforms:

1. All reasonable expenses necessarily incurred by any named survivor for medical services, nursing services, hospital services, burial & memorial services, as well as travel & accommodation expenses rendered for the decedent as a result of the wrong;
2. The present value of future income, benefits or other pecuniary support owing to or anticipated to have been received by a named survivor from a decedent, including but not limited to:
 - a. The loss of financial support reasonably expected to have been provided had the decedent lived;
 - b. The loss of household services reasonably expected to have been provided had the decedent lived;
 - c. The loss of child support, spousal support, alimony or any other financial obligations owing from the decedent to the survivor, whether embodied in an order of court or otherwise; and/or
 - d. The loss of reasonable contributions to the future educational expenses of any survivor;
 - e. All other reasonable pecuniary losses incurred by the survivor arising from the death of the decedent;
3. Reasonable non-pecuniary losses arising from the survivor's loss of the decedent's love, guidance, care, companionship and affection, proportional to the relationship that existed between the survivor and the decedent prior to the decedent's death. A close relationship is presumed for spouse, parents, children, and siblings.
4. Punitive damages may be awarded in appropriate cases of egregious misconduct, but if the damages are awarded, they are for the benefit of the estate of the deceased.
5. If a cause of action survives, damages that resulted in actual financial loss to the deceased or the deceased's estate are recoverable. All reasonable losses arising from the decedent's conscious pain, suffering and disability during the period between the wrong and the

decedent's death, including damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities.

6. There should be no caps on compensation and it should be left to the discretion of the courts based on case law. We believe caps on compensation become entitlement windfalls, rather than discretionary recognition of the distinct value of the individual life wrongfully taken. Further, when caps are implemented, then the legislation must continually be revisited to account for inflation, adding a further unnecessary legislative burden. This can be handled at the discretion of the courts, just as inflation has increased the rough upper limit on non-pecuniary damages set by the Supreme Court of Canada several decades ago.

Appendix B – BC Wrongful Death Law Reform Society’s proposed legislation as written in 2015.

**WRONGFUL DEATH ACCOUNTABILITY ACT
Proposed Legislation – 2015**

Contents

- 1 Definitions*
- 2 Actions for Wrongful Death – Scope*
- 3 Action to be prosecuted on Behalf of Decedent’s Estate – Time Limits*
- 4 Types of Damages Recoverable by Decedent’s Estate*
- 5 Claims of Decedent’s Estate and Beneficiaries to be Consolidated – Notice*
- 6 Time Period for Beneficiaries to Join Estate’s Action – Effect of Failure to Join*
- 7 Types of Damages Recoverable by Decedent’s Beneficiaries*
- 8 Double Counting of Estate and Beneficiary Damages to be Avoided*
- 9 Beneficiaries’ Share of Damage Award to be Paid upon Entry of Judgment*
- 10 Estate’s Share of Damage Award to be Paid into Registry Pending Disposition of Estate*
- 11 Priority Disposition of Estate’s Share of Damage Award to Creditors of Decedent’s Estate – Procedure*
- 12 Residual Disposition of Estate’s Share of Damage Award – Procedure*
- 13 Application of Health Care Costs Recovery Act to Wrongful Death Claims*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Definitions

1 In this Act:

“**beneficiary**” includes

- (a) The surviving spouse of the decedent, whether legal or common-law, and including same-sex relationships;
- (b) The parents of a decedent, including stepparents;
- (c) The children of a decedent, including stepchildren and adopted children;
- (d) The siblings of a decedent, including half-siblings and step-siblings;
- (e) Grandparents of a decedent;
- (f) Grandchildren of a decedent;
- (g) Any person divorced or separated from the decedent who was dependent upon the decedent for maintenance or support at the time of the decedent’s death, or who was entitled to maintenance or support under any contract or judgment of any court in this province or elsewhere;
- (h) Any other person who for a period of at least three years immediately prior to the death of the decedent was dependent upon the deceased for maintenance or support.

“**wrong**” is an intentional or negligent act or omission which is alleged to have been committed by a wrongdoer.

“**wrongdoer**” includes

- (a) Any person, partnership, corporation or other legal entity who is alleged to have committed a wrong; and
- (b) Any person, partnership, corporation or other legal entity responsible at law for a wrong committed by a party referred to in paragraph (a). but does not include
- (c) An employer or worker in respect of a wrong to which the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 would otherwise apply

“**wrongful death**” means any death which is caused by or accelerated by a wrong, or materially contributed to a wrong.

Actions for Wrongful Death – Scope

2 Upon the occurrence of a wrongful death, any wrongdoer which would have been liable in damages to the person and/or their beneficiaries if death had not resulted remains liable to the person’s estate and beneficiaries for damages arising from the death as provided for in this *Act*.

Action to be Prosecuted on Behalf of Decedent’s Estate

3 An action for wrongful death arising under this Act may only be initiated in the name of the decedent’s estate upon direction of the decedent’s executor or administrator.

Types of Damages Recoverable by Decedent’s Estate

4 In any action arising under this Act, damages shall be awarded to the decedent’s estate for:

- (a) All reasonable charges necessarily incurred for medical services, nursing services, hospital services, burial services and memorial services rendered for the decedent as a result of the wrong;
- (b) All reasonable losses arising from the decedent’s loss of income during the period between the wrong and the decedent’s death;
- (c) All reasonable losses arising from the decedent’s conscious pain, suffering and disability during the period between the wrong and the decedent’s death;
- (d) All reasonable losses for pecuniary harms caused to the decedent’s estate on account of death, including but not limited to the net future earnings expectancy that the decedent could have sustained had the wrong not occurred; and
- (e) The punitive, exemplary and/or aggravated damages, if any, which the decedent would have been entitled to recover from the wrongdoer had the decedent lived.

Claims of Decedent's Estate and Beneficiaries to be Consolidated – Notice

5 (1) In addition to the claims brought by the decedent's estate identified in section 4 of this Act, all beneficiaries of the decedent asserting claims for damages arising as a result of the decedent's death shall be permitted to join the estate's action for wrongful death.

(2) Within 30 days of commencing an action under this Act, the decedent's executor or administrator shall cause to be served a copy of originating process in the wrongful death action upon all beneficiaries known or reasonably ascertainable to the executor or administrator at the time of commencing the action.

Time Period for Beneficiaries to Join Estate's Action – Effect of Failure to Join

6 (1) Any beneficiary shall be permitted to join the estate's action as an interested party to the litigation, and to assert claims arising from the death of the decedent in the beneficiary's own name as otherwise provided for by section 7 of this Act, provided that either:

(a) Joinder is made within 90 days of receipt of notice of the estate's action as provided in section 5(2); or

(b) The court finds that joinder will not result in unreasonable prejudice or delay to the parties involved.

(2) Any beneficiary receiving notice of the estate's wrongful death action as provided in section 5(2) who fails to petition the court to join the estate's action shall forfeit their rights to priority payment of claims outside of the decedent's estate as provided for in this *Act*.

(3) Nothing in subsection (2) shall be construed to bar any claim for damages sustained by a beneficiary that could be independently asserted by or against the decedent's estate, notwithstanding the failure of the beneficiary to comply with the provisions of this section.

Types of Damages Recoverable by Decedent's Beneficiaries

7 In their capacity as named parties to an action brought under this Act, beneficiaries of a decedent may be awarded damages arising from the decedent's death for:

(a) All reasonable expenses necessarily incurred by any named beneficiary for medical services, nursing services, hospital services, burial services and memorial services rendered for the decedent as a result of the wrong;

(b) The present value of future income, benefits or other pecuniary support owing to or anticipated to have been received by a named beneficiary from a decedent, including but not limited to:

(i) The loss of financial support reasonably expected to have been provided had the decedent lived;

(ii) The loss of household services reasonably expected to have been provided had the decedent lived;

(iii) The loss of child support, spousal support, alimony or any other financial obligations owing from the decedent to the beneficiary, whether embodied in an order of court or otherwise; and/or

(iv) The loss of reasonable contributions to the future educational expenses of any beneficiary;

(c) All other reasonable pecuniary losses incurred by the beneficiary arising from the death of the decedent; and

(d) Reasonable non-pecuniary losses arising from the beneficiary's loss of the decedent's love, guidance, care, companionship and affection, proportional to the relationship that existed between the beneficiary and the decedent prior to the decedent's death.

Double Counting of Estate and Beneficiary Damages to be Avoided

8 In assessing damages under this Act, the trier of fact shall identify in its final judgment each independent item of damages awarded to a decedent's estate or beneficiaries with sufficient particularity:

(a) To allow for proper distribution of amounts awarded to either the decedent's estate or the named beneficiaries, as appropriate; and

(b) To ensure that duplicative awards to both the decedent's estate and named beneficiaries under the same head of damages are avoided.

Beneficiaries' Share of Damage Award to be Paid upon Entry of Judgment

9 Damages awarded pursuant to an action under this Act to any and all named beneficiaries of the decedent shall be awarded in the name of the beneficiary, and are payable to the beneficiary upon entry of final judgment in the action.

Estate's Share of Damage Award to be Paid into Registry of Court

10 Damages awarded pursuant to an action under this Act to the decedent's estate shall be awarded in the name of the estate, and are payable into the registry of court upon entry of final judgment, for disposition and disbursement further to sections 11 and 12 of this Act.

Priority Disposition of Estate's Share of Damage Award to Creditors of Decedent's Estate – Procedure

11 (1) The executor or administrator of a decedent's estate shall identify a decedent's wrongful death action as an asset of the estate, as consistent with any declaration required by section 111 of the *Estate Administration Act*.

(2) Following payment of any litigation costs, disbursements and/or legal fees owing but unrecovered from the defendant wrongdoer in the underlying wrongful death action, the remainder of the award given to the decedent's estate shall be made available to the decedent's executor or administrator for satisfaction of outstanding claims against the decedent's estate.

(3) Upon approval of a petition to the court pursuant to section 39 of the *Trustee Act*, the court shall instruct the registrar to release funds held in the Registry of Court pursuant to section 10 of this *Act* for the purpose of satisfying creditor claims approved for payment from the assets of the decedent's estate.

(4) All creditor claims against a decedent's estate that are reviewed and approved for payment by an executor or administrator shall first be paid from the residual proceeds of the decedent's estate's wrongful death action until such proceeds are exhausted.

Residual Disposition of Estate's Share of Damage Award – Procedure

12 Upon affirmation to the court by the decedent's executor or administrator that all outstanding creditor claims asserted against the decedent's estate have been satisfied, any residual portion of the estate's wrongful death award remaining shall be distributed as follows:

(a) The residual sum to be released to the decedent's executor or administrator for disposition to the beneficiaries of the decedent's estate.

Application of *Health Care Costs Recovery Act* to Wrongful Death Claims

13 (1) The provisions of the *Health Care Costs Recovery Act*, R.S.B.C. 2008, c. 27, apply to all claims initiated by a decedent's estate pursuant to this *Act*.

(2) Any sums collected pursuant to the *Health Care Costs Recovery Act*, either by the government in its own name or through the claims of the decedent's estate or beneficiaries, shall be remitted to the government upon entry of final judgment in any action brought under this *Act*, consistent with the approach for payment of beneficiary claims identified in subsection 9 above.