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BC laws thwart grieving families

By Rick Ousten

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Children who die as a result of negligence have no value under the province's Family Compensation Act, which is designed to compensate families for income lost due to death resulting from negligence.

Lawyers who work on contingency cannot always afford to take even those cases with a high probability of success. The result is that some cases of negligence are never proven. BC's trial lawyers association is going to ask the provincial government to change all that.

Children who die as a result of negligence have no value in BC courts. Neither do older people who are no longer working.

Under BC's Family Compensation Act, their families can sue the negligent party, but likely will be unable to recover the costs of those lawsuits out of potential damage awards.

"This is an area of law that cries out for reform," says Nathan Smith, a fulltime medical malpractice lawyer.

"It's sad, because people we're dealing with, obviously it's a very important event in their life, a very tragic event, and to sit there and have to reduce it to money and tell them that it's not worth it, is a very difficult thing to do. But I have to tell them I don't make the law, my job is to tell them what it is."

Smith says that, on average, he gets a call every week or so from someone who has reason to believe a loved one died through negligence. But because he relies on contingency fees, to pay for his time and costs, he can't afford to take on the cases, he said.

"If it's the death of a child or the death of an elderly patient, then there's often no economically viable claim," said Smith, a past-president of the Trial Lawyers Association of BC.

Whether they were killed in car accidents in which someone else was at fault, or through acts of medical malpractice, as the law stands now, the courts cannot award their survivors compensation solely for grief or loss.

Large financial awards are granted only when it can be proven that people killed through a negligent act suffered a loss of income upon which their families depend. Hence, children who have not yet started work, and elderly people who no longer work, are deemed to have no “pecuniary” value and there is little or nothing for which to compensate their families.

The result is that some cases of negligence are never proved.

The Vancouver Sun had learned the trial lawyers association will ask the provincial government to change the Family Compensation Act so families can sue for punitive and aggravated damages and awards for grief and loss of companionship.

The association has asked for a meeting with the government in December to push a proposal that BC follow the example of several other provinces that already have laws allowing such suits.

The issue of family compensation and medical negligence was featured Saturday in a Vancouver Sun story on the death of Heidi Klompas, a 17-year-old girl who suffered two broken legs after being hit by a car.

A coroner’s investigator determined she died after globules of fat from the marrow of her bones infiltrated her bloodstream and her brain.

Heidi’s mother, Catherine Adamson, said lawyers have told her that she has grounds for a lawsuit over the death of her daughter, but the cost would be prohibitive.

Smith said it’s a simple matter of economics that he cannot take on a case unless the end result is going to be an award “well into the six figures.”

Figures supplied by the Law Society of BC show lawyers routinely charge contingency fees of up to 40 per cent of the final award in a medical malpractice case.

It has to be that high, said Smith, “because of the costs involved and the time involved and the risk involved, both to the client and to the lawyer, if the lawyer’s doing the case on a contingency basis.

Statistics released by the Canadian Medical Protective Association, the self-insurance company for doctors that is funded mostly by Canadian taxpayers, show that during the past few years, doctors have won three times as many

cases as they have lost. When doctors win, lawyers working for the plaintiff on a contingency basis get paid nothing.

“You’ve done a lot of work that you haven’t been paid for, plus you may have had to front disbursements (payments for documents and other fees) which your client can’t repay,” Smith said.

A BC Supreme Court judge has called the fight between the CMPA and aggrieved parties “an uneven one between a well-funded professional organization on the one hand and the injured party, on the other.”

In a 1996 judgement that centred on whether a 35-per cent contingency fee should be permitted, Justice H.A.D. Oliver noted that “were it not for the existence of the contingency fee system....only the very rich would have the opportunity of pursuing a medical malpractice claim through trial.”

He added: “Contingency fee agreements, sometimes described as the poor person’s key to the courthouse door, are currently the only way by which many a deserving injured individual may procure legal representation in a medical negligence case.”

The trial lawyers association – in a proposal drafted last year by Nanaimo lawyer Chuck Blararu, chairman of the association’s legislative committee – says people should be able to sue for punitive and aggravated damages.

“Despite being non-pecuniary, these damages should be awarded in appropriate circumstances and, in the case of punitive damages, notwithstanding a criminal conviction arising from the same conduct,” it says.

The proposal has been circulated to advocacy groups during the past year and will be given to government in December, association executive director Carla Terzariol said.

The proposal notes that laws in New Brunswick provide for damages to parents for loss of companionship of a child killed in a negligent act. And Alberta’s Fatal Accidents Act awards \$40,000 for the loss of a spouse or a child, and \$25,000 for the loss of a parent, without survivors having to prove they are out of pocket.

Changes in BC’s law would give lawyers the opportunity to prove negligence in court, Smith said.

“I think it is well past time that the law in British Columbia recognize that the death of a loved one is not purely an economic matter, and that it recognize both the loss potential of the individual, and the effect that loss has on members of the family,” he said.