Representing Children:
Developing and Defending *Family Law Act* Claims
& Subrogated Claims

By Troy H. Lehman, Oatley Vigmond

As lawyers our main focus is (and should be) on our injured client. But in many cases there can be significant derivative and subrogated claims that need to be advanced. These claims can be large. They are significant to the claimants. And they cannot be forgotten or poorly developed.

Family Law Act Claims
For The Family of an Injured Child

Where a child is seriously injured the whole family suffers. The lives of parents and siblings are up-ended. Parents often have to take time off work to provide care for their injured child. The emotional and financial impact to a family can be very high.

While our focus is rightfully on the injured child we represent we cannot forget to develop claims for their loved ones who have suffered a real loss.

The Types of Damages Recoverable

Section 61 of the *Family Law Act* is a provision all lawyers practicing personal injury law must familiar themselves with. The section provides as follows:

PART V
DEPENDANTS' CLAIM FOR DAMAGES

Right of dependants to sue in tort

61 (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25); 2005, c. 5, s. 27 (28).

Damages in case of injury

(2) The damages recoverable in a claim under subsection (1) may include,

(a) actual expenses reasonably incurred for the benefit of the person injured or killed;

(b) actual funeral expenses reasonably incurred;

(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;

(d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

There are two categories of damages that can be recovered under this provision – non-pecuniary and pecuniary. Section 61(2)(e) provides for compensation for the "loss of guidance, care and companionship." This is the non-pecuniary part of the compensation. Claimants are also entitled to recover their pecuniary loss resulting from the injury or death.

It is important to develop good evidence to support both non-pecuniary and pecuniary claims.

Loss of Care, Guidance and Companionship: The Law

Canadian Courts have been reasonably conservative in quantifying claims for loss of care, guidance and companionship.

Up until recently the high water mark award for the death of a child was the 2001 case of *To v. Toronto Board of Education*[1] in which $100,000 was awarded to the parents of a 14 year old boy. This is a little more than $160,000 in 2023 dollars. In that same case the boy's sister was awarded $25,000 (about $40,000 in 2023 dollars).

The awards to family members for a catastrophic injury to a child are even smaller. In 2023 dollars the high end of the range for parents is between $80,000 and $123,000.[2] The high end of the range for siblings is $25,000 to $30,000.[3]

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[1] 2001 CanLII 11304 (ON CA) | To v. Toronto Board of Education | CanLII

[2] In *Dryden (Litigation Guardian of) v. Campbell Estate* [2001] O.J. NO. 829 (S.C.J.) the parents of a 13 year old with a severe brain injured were awarded $50,000 each ($80,000 in 2023 money). In *Walker v. Ritchie* [2003} O.J. No. 18 (S.C.J.) the parents of a 17 year old with a severe brain injury were awarded $65,000 each ($100,000 in 2023 money). In *Crawford (Litigation Guardian of) v. Penney* [2003] O.J. No. 89 (S.C.J.) the parents of a baby severely brain injured at birth were awarded $80,000 ($123,000 in 2023 money)

[3] In *Butler v. Royal Victoria Hospital* [2018] O.J. No. 2281 (S.C.J.) the twin brother of a baby with a severe brain injury was awarded $25,000 ($30,000 in 2023 money). The other siblings were awarded $20,000 ($25,000 in 2023 money). In *Trajdos v. Bala* [2003] O.J. no 4953 the siblings of a baby with a severe brain injury were awarded $20,000 each ($30,000 in 2023 money). In *Dryden (Litigation Guardian of) v. Campbell Estate* [2001] O.J. No. 829 (S.C.J.) the siblings of a severely brain injured 13 year old were awarded $15,000 ($24,000 in 2023 money).

Fortunately, there has been a relatively recent positive development in the law in relation to these types of claims in *Moore v. 7595611 Canada Corp.*[4] In that case the parents of a young adult were awarded $250,000 each for their loss of care, guidance and companionship. This was an awful case where the daughter was severely burned and clung to life for a few days with her parents at her bedside.

Defence lawyers will tell you that this case turned on its unusual facts with the parents suffering at their daughter's bedside. But remember, loss of care, guidance and companionship is about the loss of the relationship and not about "nervous shock" or psychological injuries to the surviving relative. It is about the loss of the injured or dead person's care, guidance and companionship. Mental distress to the parents was a completely separate head of damages in *Moore*. While the facts of this case and what the parents went through in hospital no doubt influenced the jury in assessing loss of care, guidance and companionship those facts did not drive the Court of Appeal's decision to uphold the award.

Loss of Care, Guidance and Companionship: The Deductible in Auto Case

The *Insurance Act*[5] establishes a deductible on claims for loss of care, guidance and companionship. The quantum of the deductible changes every year with inflation. In 2023 any claim for loss of care, guidance and companionship that is not assessed at more than $73,944.18 is automatically reduced by $22,183.63.

This is an exceptionally unfair part of our law. Imagine a case in which a 12 year old girl suffers a brain injury. She has a 10 year-old sister with whom she was very close. The relationship is significantly impacted by the injury. A jury awards the sister $20,000 thinking it is fair. The jurors walk out of the Courtroom having no idea that the 10 year-old sister will get nothing because the deductible wipes out the award.

The deductible wipes out many otherwise deserved settlements and awards. It means that *Family Law Act* claims only make sense in the most serious of injury claims or where there are pecuniary losses.

Loss of Care, Guidance and Companionship: The Evidence

The size of a settlement or a verdict for any head of damages depends on the evidence. And it is no different with damages for loss of care, guidance and companionship. In order to maximize the compensation to parents and siblings for severe injuries to children we must develop evidence that demonstrates the loss.

Evidence from lay witnesses is some of the most important evidence in a personal injury trial. Bringing real people to the Courtroom to talk about their observations of the plaintiff's impairments goes a long way to persuading a jury. And where you are advancing *Family Law Act* claims in a case of an injured child there needs to be lay

[4] 2021 ONCA 459 (CanLII) | Moore v. 7595611 Canada Corp. | CanLII
[5] R.S.O. 1990, c. I.8, section 267.2.

evidence describing how mom and dad and siblings are impacted. Pictures and videos showing the nature of the relationships before the injury are a must. And it is a good idea to retain a psychologist to do a family impact assessment. If you do not develop good evidence on these claims and treat them as an after-thought you do a real disservice to the family you are trying to help.

Pecuniary Losses for the Family of an Injured Child: The Broad Scope

Section 61 provides for the recovery of any "pecuniary loss resulting from the injury or death from the person." Subsection 61(2) provides some examples of pecuniary loss (expenses reasonably incurred for the benefit of the person injured, an allowance for travel and compensation for services provided to injured person).

In *Macartney v. Warner*[6] the Court of Appeal made it clear that **any** pecuniary loss that results from the injury or death is recoverable. Sub-section 61(2) provides some examples of pecuniary loss but not a full list. Any pecuniary loss that results from the injury is recoverable.

Pecuniary Losses for the Family of an Injured Child: The Evidence

Let's consider the potential economic impact to the parents of a catastrophically injured child.

One or both parents may need to leave the workforce to provide care and support to their child. If the injury is catastrophic a parent may not return to work. The income loss is recoverable. And it should be treated like any other income loss claim. Lay evidence from co-workers or supervisors on the parent's pre-morbid work ethic and potential is helpful. And an accounting report should be obtained for trial.

But what about a stay at home parent who provides attendant care to his or her child? He or she may not be losing income but they are now being both a parent and an attendant care giver. What about someone who works from home and tries to care for an injured child? He or she may not lose income on paper but is now working 16 hours a day to try to juggle both paid work and the real but unpaid work of extraordinary caregiving. Fortunately, section 61 of the *Family Law Act* allows parents to be compensated for providing care. But good evidence is required to support the claim. Engaging a life-care planner to determine the value of the services provided by mom and dad to trial is key to these claims.

And what about a parent who struggles to cope with the very real emotional toll of dealing with a severely injured child? These parents may benefit from personal counselling and family counselling. These are real costs and must be included in a future care report.

Pecuniary Loss When a Child Loses a Parent: The Parents' Income

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[6] 2000 CanLII 5629 (ON CA) | Macartney v. Warner | CanLII

Thus far we have focused on claims by parents and siblings of an injured child. But, of course, there are also cases where a child loses a parent.

In those cases, if properly developed, the pecuniary claims can be significant. Causation can be an issue in relation to some of these claims. Where a child loses a father who is the sole breadwinner the loss of shared family income is clearly and directly related to the death of the father. Causation is clear. But what about a grandparent who retires early to care for her grandchild who has lost her parents but has other emotional issues? Is the loss caused by the death or by the needs of the child? Causation is more challenging here. The key is to develop evidence and arguments to establish that the loss results from the death.

Damages are intended to put plaintiffs in the position that they would have occupied but for the tort. Children obviously benefit from their parents' income. Where a child loses a parent the child loses that part of the parent's income that would have been spent to support the child.

The size of the award depends on the following things:

- How much the deceased parent would have earned;
- How long the child would have been dependent on his or her parents; and
- The method used to calculate what portion of the lost income goes to the dependents.

Just because a 30 year-old mother was earning $30,000 at the time of her death does not mean she would have continued earning $30,000. If it was likely that her income would have gone up then the loss of income should not be calculated at $30,000 a year. The finder of fact must determine what income the mom would have earned but for her death. Obviously, evidence is key to this determination. To get the largest award possible, don't just rely on the tax-returns. Get will-say statements from co-workers and supervisors about her promise and the likelihood of promotion. Get any documentary evidence you can to support the argument that the mother's income would have increased but for her death. Have your accounting expert refer to any statistical evidence that supports higher earnings.

Children benefit from their parents' income until they are no longer financially dependent upon their parents. The age at which dependency stops is something the finder of fact must determine. It isn't the same for every child. Muster the evidence to argue that the kids' who lost their mom would have been dependent long after graduating from high school. This can come from their school records (to prove a likelihood of post-secondary education). It can come from statistical evidence from your accounting expert who can testify that there is a trend towards post-secondary education and children remaining dependent on their parents for a longer period of time. If the child who has lost a parent

has disabilities that would have prolonged the period of dependency muster the evidence to prove this.

The other factor that drives the damages in these claims is the dependency rate. The dependency rate is the amount of the deceased's net income that would have been used up on his or her own costs and the resulting amount left over for the household. There are a few different methods used: the sole dependency method, the modified dependency method and the cross dependency method. The choice of method impacts the award to the surviving parent significantly but does not impact the award to the child.

The sole dependency method is used in cases where the sole income earner in the family passes away. Under that approach it is assumed that the heavy majority of the breadwinner's income goes to the upkeep of the family. Under this method the surviving spouse is awarded 70 per cent of the deceased's net income and each child is awarded 4 to 5 percent per child.

Where both parents are income earners things become more complicated. Before the death the surviving parents' income would have been used, in part, on the deceased. That "savings" results in a credit. The Courts have used the modified dependency method in these cases. Under this method the surviving spouse is awarded 60 percent of the deceased's net income and each child is awarded 4 to 5 percent.

The third method is the cross dependency method. Under that approach the income of the two spouses is added together and treated as a common pool for the expenses of the family. It is assumed that a family of one requires about 70 percent of the income of a family of two to maintain the same standard of living. This method takes 70 percent of the combined income and then deducts surviving spouses' income on the basis that 100 percent of that income is now available solely to the surviving spouse. This approach can be very unfair to a surviving spouse earning much more than the deceased spouse (and can even result in no compensation to the surviving spouse). Again 4 to 5 percent of the lost income is awarded to each child.

It is important to understand these approaches when dealing with any case involving the death of a parent and to engage an accountant to do the calculation.

For a good discussion on these different approaches read 2000 CanLII 22711 (ON SC) | Hechavarria v. Reale | CanLII.

Consider the situation where kids lose both parents. Is there a pecuniary loss where the children's needs are being met by relatives?

The Ontario Court of Appeal has said yes. In 1996 CanLII 1117 (ON CA) | Butterfield (Guardian of) v. Butterfield Estate | CanLII the parents of two children were killed in a car crash. The father was at fault. The children sued him and claimed a loss of income arising from their mother's death. No claim for loss of the father's income could be made since he was at fault. The kids were taken in by an aunt and uncle who took care of

them. The defendant argued that because the kids were being provided for there could no dependency loss in respect of the mom's income. The Court of Appeal awarded the kids 70% of the mom's income dismissing the double recovery argument:

> The Godins are aunt and uncle of the children and although they willingly chose to take the children in and look after them, theirs was no less a gratuitous act motivated by compassion. It follows that the *Ratych* principles have no application. Accordingly, the trial judge was correct in refusing to reduce the dependency claims on account of the benevolence of the Godins.

Pecuniary Loss When a Child Loses a Parent: The Childs' Income

It is trite to say that the death or injury to a loved one can be traumatic on children. In the worst cases the child can end up so psychologically damaged that his or her ability to earn an income in the future may be compromised. So long as there is evidence to link the psychological injury to the death or injury to the loved one this is pecuniary loss recoverable under the *Family Law Act*.

But is not enough to speculate about the loss. Clearly, a solid evidentiary foundation is required to successfully advance such a claim. If there is a concern about a child's future earning capacity it behooves us to retain a child psychologist, child psychiatrist and an educational/vocational psychologist to opine on the diagnosis, prognosis and impact on earning capacity.

Pecuniary Loss When a Child Loses a Parent: Care Costs

Very often in cases involving serious injury or death to a relative a child will need care. It could include care from a psychologist, a social worker, an occupational therapist, tutoring and medications. In auto cases some of this will be covered by the Statutory Accident Benefits. But the needs may go beyond what is available there. Again, if there is a concern about a child requiring significant care it behooves us to engage medical experts and a certified life care planner to determine the future needs.

Pecuniary Loss When a Child Loses a Parent: Loss of Inheritance

Loss of inheritance is something that is recoverable. In 1988 CanLII 4620 (ON CA) | Miller Estate v. Bowness (C.A.) | CanLII the Court of Appeal said that, as a general promosing, the court may properly consider the pecuniary loss suffered by heirs of decedent to the exten that the decedent might have accumulated property during his or her lifetime that would have been passed on to them at the time of his or her natural death. The problem with these claims is that they are, by their nature, speculative. There have been a few cases in British Columbia where reasonably modest awards have been made under this head of damages. See for example, 2010 BCCA 151 (CanLII) | Stegemann v. Pasemko | CanLII

where children were awarded $30,000 for loss of inheritance due to the loss of a father with very high earning potential.

COURT APPROVAL OF FAMILY LAW ACT CLAIMS

Whenever a case involving a minor plaintiff is settled Court approval of the settlement is required under Rule 7 of the Rules of Civil Procedure. The onus is on the moving party to establish that the settlement is reasonable and in the bests in interests of the child and that the legal fees and any plan for investment of the money is reasonable.

These motions are not rubber stamps. Judges look carefully at the materials to determine whether the settlement is fair and reasonable. In 2021 ONSC 467 (CanLII) | Lim v. Jennings | CanLII a settlement for a child was not approved because the moving party failed to provide adequate information on the injuries and prognosis and adequate evidence to establish that the fee being charged was fair and reasonable.

Good counsel put a lot of effort into Court approval motions for injured children. But what about an approval motion for a child who "is only" a *Family Law Act* claimant? Can those motions be less complete or persuasive? The answer is no. Regardless of whether the approvals motion is for an injured child or a child who is a *Family Law Act* claimant the onus remains the same. You need to fully explain the nature of the claim for loss of care, guidance and companionship. You should reference case law on the range of non-pecuniary damages to justify the settlement. And you must fully address whether there are any pecuniary damages and if so, provide full particulars of why the settlement of those claims is reasonable. And it is important to provide information on the fee agreement, the time expended on the claim, the risks taken by the lawyer and anything else relevant to the matter of whether the fee is reasonable.

Subrogated Claims

Subrogation occurs where one party has made a payment for the benefit of another and has a right, either by legislation or contract, to recover the payment from a third party (*ie.* from the tort-feasor).

The most common subrogated claims that we deal with in personal injury law are those by the Ministry of Health (OHIP), by disability insurers and WSIB.

OHIP CLAIMS

Sections 30(1) and 31(2) of the *Health Insurance Act*[7] provides as follows:

> **30** (1) Where, as the result of the negligence or other wrongful act or omission of another, an insured person suffers personal

[7] R.S.O. 1990, c. H.6.

> injuries for which he or she receives insured services under this Act, the Plan is subrogated to any right of the insured person to recover the cost incurred for past insured services and the cost that will probably be incurred for future insured services, and the General Manager may bring action in the name of the Plan or in the name of that person for the recovery of such costs.
>
> **…**
>
> **31** (1) Any person who commences an action to recover for loss or damages arising out of the negligence or other wrongful act of a third party, to which the injury or disability in respect of which insured services have been provided is related shall, unless otherwise advised in writing by the General Manager, include a claim on behalf of the Plan for the cost of the insured services.

Subject to the exception for motor vehicle cases discussed below it is mandatory to include a claim for the Ministry of Health in every personal injury action. Failing to do so can get you sued.

The Ministry of Health does not have a subrogated claim in cases involving personal injuries arising directly or indirectly from the use or operation of an automobile where the defendant(s) is a person who is insured under a motor vehicle liability policy issued in Ontario: see section 30(5) of the *Health Insurance Act*. This provision and the law that interprets it is one that must be familiar to personal injury lawyers. Just because your client was injured in a motor vehicle does not mean there is no subrogated claim.

In the typical auto case of one driver suing another there is no OHIP claim, because the defendant is insured under a motor vehicle liability policy.

But what about a case where a municipality is a defendant for failing to keep a road in a good state of repair? Or a case where a tavern overserves a motorist? Whether or not the Ministry of Health has a subrogated claim in those cases will depend on whether the defendant was insured under a motor vehicle insurance policy. In 2002 CanLII 45036 (ON CA) | Ontario (Ministry of Health and Long-Term Care) v. Georgiou | CanLII the plaintiff sued a municipality in respect of icy roads. The Ministry of Health sought to recover the cost of its insured services from the City. But the Court of Appeal found that because the City owned vehicles that were insured under motor vehicle liability policies and this accident involved a motor vehicle the OHIP claim was barred against the City. This was so even though this was a claim for failure to salt the roads rather than negligence of a City driver and even though the motor vehicle liability policies were not the policies responding to the claim.

Whether or not there is an OHIP claim against a defendant municipality or tavern will depend on whether they have motor vehicle liability insurance. Therefore, it is imperative

in these cases to determine, at the outset, whether all defendants have motor vehicle liability insurance.

Where the Ministry of Health does have a subrogated claim remember it is for both past services and future services. The past services are generally pretty easy to prove. The Ministry will provide an OHIP summary that shows the medical services it paid for and the cost of those services. It is necessary to prove that they were caused by the injuries in question. Many times this can be done on agreement. Rarely have we had to call a representative of the Ministry to prove a past claim.

Don't forget to present evidence to address the future OHIP claim. You need to obtain opinions from your medical experts and your future care planner about what OHIP and non-OHIP treatment will be required. The cost of the future OHIP services must be part of the economic loss report. In serious cases it can be worth hundreds of thousands of dollars.

In many settlement discussions defendants will off a lump sum of money to settle both the injured party's claim and OHIP, without an allocation as between them. In these cases there is essentially a competition between your primary client (the injured party) and your secondary client (OHIP) over one sum of money. In a case involving contributory negligence there will be inadequate funds to make both clients whole. In those cases both the injured party and the Ministry must take the same reduction off their claims.

But where inadequate insurance limits is the reason for less than full compensation the Ministry does not have a right to recovery. In the Supreme Court of Canada case of 1974 CanLII 9 (SCC) | Ledingham v. Ontario Hospital Services Commission | CanLII the injured party's damages exceeded the available insurance funds.[8] OHIP took the position that it should get a *pro rata* share of the limit. The Court applied a key principle of the law of subrogation – that the party with the subrogated right does not get compensated until the injured party has recovered complete indemnity from the wrongdoer. Therefore, when we have a case where our injured client's damages exceed the available insurance limits and the case is settled for the limits, OHIP has no right of recovery. They will walk away from their claim. But (and this is very important) if there is a settlement for less than the limits, OHIP will demand **their *pro-rata* share.**

DISABILITY INSURERS

Disability insurers (eg. long-term disability) will usually have a right of subrogation by contract.

Again, there is a distinction between auto cases and non-auto cases as to whether the right of subrogation is enforceable.

[8] It was actually the MVAC not a private insurer but this is of no consequence to the decision.

Section 267.8 of the *Insurance Act,* R.S.O 1990, c. I.8 provides that the in cases involving bodily injury or death from the use or operation of an automobile the plaintiff's damages are reduced by amounts received for things like accident benefits, income continuation plans (eg. LTD) and health and drug plans. And the tortfeasor is entitled to an assignment of future benefits of this sort.

Section 267.8(17) provides that "a person who has made a payment [of the sort in the prior paragraph] is not subrogated to a right of recovery of the insured against another person in respect of that payment."

This section effectively negates subrogation rights for disability insurers in an case of injury or death arising from the use or operation of an automobile.

But in non-auto cases it is key to review disability insurance policies to determine whether they have a subrogated right. Most children won't have a long-term disability policy but they may be covered by other disability policies. And it's crucial to review those policies to determine the nature of any subrogated interest and pursue the damages subject to subrogation.

The principle set out in *Ledingham*, that there is no subrogation until the injured party is made whole applies equally to subrogated interests created by contract. Therefore, where the injured child does not get fully compensated because of inadequate insurance limits he or she can take the position that the collateral insurers must walk away from their claims. Otherwise, they must be paid according to the terms of the policy.

WSIB

Many teenage kids work. And they can be injured in the course of their employment just like anyone else. Under the *Workplace Safety and Insurance Act, 1997* S.O. 1997 c. 16 the right to sue for a workplace injury is restricted. The statute creates a scheme of no-fault compensation for workplace injuries Where someone is injured in the course of their employment they are restricted from suing their employer or co-workers and, depending on which industry they work in, may be barred from suing anyone else who was in the course of their employment.

But there are cases where a person who is working can elect to sue rather than continue under the WSIB. Where a child is injured at work, takes WSIB for a period of time and then elects to sue, the WSIB will seek repayment of what it has paid out of the tort compensation.

OTHER GOVERNMENT ASSISTANCE PROGRAMS

The *Ontario Disability Support Program Act*, 1997, S.O. 1997 c. 25 establishes a program that provides income support and health care support to people with disabilities. Most ODSP recipients are adults, although 16 and 17 year-olds can quality. Section 49 of the Act also provides that the Director "may provide financial assistance in accordance with

the regulations to a person who meets the prescribed criteria to assist the person with extraordinary costs related to a child who has a severe disability." This program is known as the Assistance for Children with Severe Disabilities Program ("ACSD"). Eligible claimants can receive financial assistance. Section 52 of the Act provides that if a person suffers a loss as a result of a tort and receives income support, the Director is subrogated to any right of the person to recover damages or compensation.

If you client or his or her family is receiving support from the ACSD you will need to advance their subrogated claim.

There are other government programs that may get your client to sign an Agreement to Reimburse. One such example is the Special Services at Home Program that provides funding for caregiver relief and rehabilitation services to disabled children. It is important to advise your clients to tell you if they are applying for any government program and to provide you with copies of everything they sign to ensure that you do not settle a case without knowing about an agreement to reimburse.