The Co-existence of a *Survival of Actions Act* Claim and a *Fatal Accidents Act* Claim

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What happens in situations where your client is injured, and lives for some time before he or she succumbs to their injuries? Can his or her estate sue for their injuries if a bereavement claim is also commenced under the *Fatal Accidents Act*?

It appears that the answer is yes, but the damages available in the *Survival of Actions* proceeding are statutorily restricted, and exclude general damages for pain and suffering.

Statutes such as Alberta's *Survival of Actions Act*, R.S.A. 2000, c. S-27, were enacted to undo the effects of a general common law rule holding that personal actions in tort did not survive for or against a deceased person. The statute's general purpose, therefore, is to put the deceased's estate, with very minor exceptions, in the same position – as regards causes of action by or against the deceased – as the deceased would have been if she had not died.[2]

The *Survival of Actions Act* does not create any new rights of action, but preserves from abatement whatever rights were vested in the deceased at the time of his or her death. The executor, thus, continues the action and, in relation thereto, stands in the shoes of the deceased.[3]

While, in a survival action, the estate is *prima facie* entitled to the same damages as the deceased would have recovered in an action *inter vivos*, section 5 of the *Survival of Actions Act* specifically restricts the damages recoverable to those that resulted in actual financial loss to the deceased or the deceased's estate. Further, as a result of amendments to the statute in 2002 – necessitated by the Alberta Court of Appeal's decision in *Duncan Estate v. Baddeley* (1997), 50 Alta. L.R. (3d) 202 (C.A.) – it is now clear that "actual financial loss" does not include damages in relation to future income/earnings.[4]

Similarly, the object and purpose of fatal accidents legislation is, again, to create a right of action which is not possible under the common law. Specifically, Alberta's *Fatal Accidents Act*, R.S.A. 2000, c. F-8, permits the near relatives of a deceased victim to bring a specific action against a tortfeasor. Under the *Fatal Accidents Act*, therefore, it is not the deceased's own cause of action which is caused to survive. Rather, it is a new action for the benefit of his or her statutory dependants.[5]

Claims brought under the *Fatal Accidents Act* and maintained under the *Survival of Actions Act* are conceptually distinct. Survival actions are brought to vindicate the rights of the deceased, whereas fatal accidents claims vindicate the rights of his or her statutory dependants. Accordingly, it would appear that the query here can be answered in the affirmative. That is, "yes", the deceased's estate can sue for his or her injuries under the *Survival of Actions Act* even if a bereavement claim is also commenced under the *Fatal Accidents Act* for the benefit of his or her statutory dependants.[6]

A. The *Survival of Actions Act*, R.S.A. 2000, c. S-27 – An Overview

Sections 2 and 5 of the *Survival of Actions Act*, R.S.A. 2000, c. S-27, ("the SAA"), state:

> "2 A cause of action vested in a person who dies after January 1, 1979 survives for the benefit of the person's estate.
>
> . . .
>
> 5(1) If a cause of action survives under section 2, only those damages that resulted in actual financial loss to the deceased or the deceased's estate are recoverable.
>
> (2) Without restricting the generality of subsection (1), the following are not recoverable:
>
> (a) punitive or exemplary damages;
>
> (b) damages for loss of expectation of life, pain and suffering, physical

disfigurement or loss of amenities;

(c) damages in relation to future earnings, including damages for loss of earning capacity, ability to earn or chance of future earnings.

(3) Subsection (2)(c) applies only to causes of action that arise after the coming into force of this section."

Pursuant to section 2, therefore, a cause of action – with all its constituent elements –that accrues before the death of an injured party survives for the benefit of the deceased party and is maintainable by an executor or administrator. And, as a result of section 5, only those damages that resulted in actual financial loss to the deceased or the deceased's estate are recoverable. Pursuant to amendments to the SAA in 2002, it is now clear that "actual financial loss" does not include damages in relation to future income/earnings.

In his text *Personal Injury Damages in Canada*, 2nd Edit., (Scarborough, Ont.: Carswell, 1996), Kenneth Cooper-Stevenson provides the following commentary on the nature and function of survival legislation such as the SAA:

> "By virtue of statutes everywhere in Canada, actions for personal injury now survive the death of the injured party for the benefit of his or her estate. Actions survive where death is caused by the defendant, even instantly, as well as where death ensues apart from the wrongdoing, for example following an unrelated illness. Furthermore, depending on the circumstances, personal representatives may either commence a suit themselves or else simply continue litigation previously initiated by the victim while alive. ..." (at p. 724)

In the well-known (and controversial) case of *Duncan Estate v. Baddeley* (1997), 50 Alta. L.R. (3d) 202 (C.A.), Kerans J.A. provided a similar summary:

> "Section 2 of the *Survival of Actions Act*, R.S.A 1980 c. S-30 provides that a cause of action vested in a person who dies "... survives for the benefit of his estate.". By these words, the Legislature put an end to the old, and much challenged, rule of the common law that a personal cause of action does not survive the death of the victim. The Legislature, however, hedged that big bet.

> Section 5 of the statute limits the new rule to "... only those damages that resulted in actual financial loss to the deceased or his estate." ... (at p. 207)

More recently, in its judgment in *Tardif v. Wong* (2002), 3 Alta. L.R. (4th) 1 (C.A.), the Alberta Court of Appeal said this with respect to the SAA and its purpose:

> "... [T]he purpose of the *Survival of Actions Act* was to put an end "to the old, and much challenged, rule of the common law that a personal cause of action does not survive the death of the victim": *Duncan Estate v. Baddeley* at 710.
>
> **Under both the *Fatal Accidents Act* and the *Survival of Actions Act*, the intent was to change the common law and allow actions to be pursued despite the death of the victim.** ..." (at pp. 12-13)(emphasis added)

B. The *Fatal Accidents Act*, R.S.A. 2000, c. F-8 – An Overview

Pursuant to the *Fatal Accidents Act*, R.S.A. 2000, c. F-8, ("the FAA"), the spouse, parent or child of a person whose death was wrongfully caused may bring an action for their own benefit. Thus, under the FAA, it is not the deceased's own cause of action which is caused to survive. Rather, it is a new action for the benefit of her statutory dependants.

The relevant provisions of the FAA read:

> "2 When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.
>
> 3(1) An action under this Act
>
> (a) shall be for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person whose death has been so caused, and
>
> (b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in the action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator.

(3) Every action so brought shall be for the benefit of the same persons and is as nearly as possible subject to the same regulations and procedure as if it were brought by and in the name of the executor or administrator.

4 Not more than one action lies for and in respect of the same subject-matter of complaint.

. . .

8(1) In this section,

(a) "child" means a son or daughter, whether legitimate or illegitimate;

(b) "parent" means a mother or father.

(2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of

(a) subject to subsections (3) and (4), $75 000 to the spouse or adult interdependent partner of the deceased person,

(b) $75 000 to the parent or parents of the deceased person if the deceased person, at the time of death,

(i) was a minor, or
(ii) was not a minor but was unmarried and had no adult interdependent partner,

to be divided equally if the action is brought for the benefit of both parents, and

(c) $45 000 to each child of the deceased person who, at the time of the death of the deceased person,

(i) is a minor, or
(ii) is not a minor but is unmarried and has no adult interdependent partner.

(3) The court shall not award damages under subsection (2)(a) to the spouse or adult interdependent partner if the spouse or adult interdependent partner was living separate and apart from the deceased person at the time of death.

. . .

(5) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of the person's estate."

In *Tardif v. Wong*, referred to above, the Alberta Court of Appeal characterized the purpose of the FAA as follows:

> "The purpose of the *Fatal Accidents Act* is to give to the dependent family of the deceased a right of action, and, in this sense, creates a new action: *British Columbia Electric Railway*. But ..., "it is a condition of the right of action which the statute confers upon the dependants that the victim himself should have been able to maintain an action, if he had lived." The intent was that the death of the injured person should not free the wrongdoer from an action." (at p. 12)

In the more recent case of *Sousa v. Mayo* (2005), 56 Alta. L.R. (4th) 395 (Q.B.), Binder J. provided extensive commentary on the nature and effect of sections 2-4 of the FAA, saying:

> "**Pursuant to s. 2 of the *Fatal Accidents Act*, an action for damages can be brought by a limited class of beneficiaries when the death of the person is caused by a wrongful act that would have entitled the deceased to maintain an action and recover damages. If the action is successful, family members are compensated for the grief caused by the wrongful death of a close family member; that is, for the non-pecuniary losses flowing from the wrongful death of the deceased. Family members can also be compensated for out-of-pocket expenditures and losses incurred as a result of the injury and death.**
>
> It is clear from s. 4 of the *Fatal Accidents Act* that only one action lies for and in

> respect of the same subject-matter of the complaint. A claimant cannot recover under the *Fatal Accidents Act* if the deceased commenced an action and recovered damages prior to his or her death.
>
> In *Tardif v. Wong* at para. 40, our Court of Appeal held that an action under fatal accidents legislation gives the dependent family of the deceased a right of action, and, in this sense, creates a new action. The court also noted at para. 54 that the object and purpose of the *Fatal Accidents Act* is to create a right of action which is not possible under the common law.
>
> I am not persuaded by the Applicants' arguments that the Respondents' claim under the *Fatal Accidents Act* is a derivative claim. ..." (at pp. 401-402)(emphasis added)

And, in relation to section 8, Justice Lutz said this, in *Kasko Estate v. Lethbridge Regional Hospital* (2006), 58 Alta. L.R. (4th) 215 (Q.B.):

> "... [Section] 8 of the *FAA* recognizes the injury done to people by the wrongful death of a close family member and aims to compensate, at least in some measure, for the bereavement. In recognizing the potentially devastating effects of such grief, the *FAA* via s. 3(1) also recognizes the injustice that could be worked by forcing suffering victims to come to Court to litigate their own claims, mandating instead that the representatives of the estate should bring the claims on behalf of the beneficiaries. In Report No. 66 at 18, the Alberta Law Reform Institute went on to find:
>
> > Section 8 of the *Fatal Accidents Act* recognizes that the wrongful act that has resulted in the death of the person has inflicted harm upon the close family members. To repeal the section would suggest that society does not regard their suffering as worth anything. It would leave the family member without any recognition of that suffering. It would suggest that their suffering was without significance in the eyes of the law." (at p. 239)

C. The Interplay Between the *Fatal Accidents Act* and the *Survival of Actions Act* – Selected Cases

With respect to the contrasting nature and purpose of fatal accidents and survival legislation, Cooper-Stevenson provides the following insights in *Personal Injury Damages in Canada*:

> "**Actions by estates under survival legislation are conceptually quite distinct from claims on behalf of the deceased's survivors under fatal accidents legislation. Survival actions are brought to vindicate the rights of the deceased, whereas fatal accident claims vindicate the rights of her or his statutory dependants. Not only that, survival actions for the most part cover losses incurred by the injured party up to the moment of death, whereas claims by dependants cover *their* losses from that moment on.** ..." (at p. 725)(emphasis added)

An instructive case in this regard is that of *Duhamel et al. v. Matic et al.* (2000), 262 A.R. 109 (Q.B.). In that case, Ms. Duhamel commenced a medical negligence lawsuit against a number of doctors on July 30, 1998. She died a month later. Her sister, therefore, decided to make a claim under the *Fatal Accidents Act*.

On July 27, 1999, an ex parte order was granted renewing the statement of claim for three months and allowing it to be amended by adding Duhamel's sister as a co-plaintiff and adding a claim under the *Fatal Accidents Act*. The defendant doctors applied to set aside the order.

Master Funduk ordered that Duhamel be deleted as a plaintiff and that the amended statement of claim would remain solely as a lawsuit by her sister under the *Fatal Accidents Act*. He ordered that the amendments were to take effect as of the date of the amendments. He reasoned:

> "Mr. Hawreluk acknowledges that **the claim advanced by [Duhamel's sister] Armstrong is a different cause of action than that advanced by Duhamel**. There is no suggestion that any of the doctors are prejudiced by the peculiar procedure that Armstrong chose to advance the cause of action she does advance. **Madill v. Alexander Consulting Group Ltd. et al.** (1999), 237 A.R. 307; 197 W.A.C. 307 (C.A.), does not come into play here absent an expiry of the appropriate limitation period for suing under the **Fatal Accidents Act**.
>
> The amendments entirely recast the lawsuit from one by Duhamel in contract or tort for injuries to her person to one by Armstrong under the **Fatal Accidents Act**. Duhamel is dead and so is the lawsuit by her unless a representative of her estate comes in to prosecute the lawsuit on her behalf. It appears that will not happen.
>
> If Armstrong had simply issued a separate statement of claim would counsel even be before me today?

> . . .
>
> The lawsuit before me ... is no longer a lawsuit by the initial plaintiff, Duhamel, and is not a lawsuit on behalf of her estate. It is not a lawsuit that Duhamel or her estate could advance. It is a lawsuit on behalf of the specified relatives. The nature of that claim is identified in **Austin v. Hart**, [1983] 2 C.A. 640, p. 645:
>
> > The benefit of a right of action for injuries resulting in death thus belongs to the specific dependants who are relatives of the deceased. The benefit of the right of action does not form part of the estate of the deceased or devolve under the provisions of his will. The Ordinance provides machinery for the action to be brought by personal representatives of the deceased as trustees for the dependants or, in certain circumstances, for one or more of the dependants themselves to bring the action as trustee or trustees for all the dependants." (at pp. 116-117)

Master Funduk then concluded with the following remarks:

> "In these peculiar circumstances the amended statement of claim will remain solely as a lawsuit by Armstrong under the **Fatal Accidents Act** and will be effective as of July 22, 1999, that is it will not be retroactive to the date of the initial unamended pleading. In other words, it will be treated as if it is a new lawsuit started on July 22, 1999.
>
> Duhamel will be deleted as a co-plaintiff." (at p. 118)

Martin v. Inglis (2002), 218 Sask.R. 1 (Q.B.), involved an action by a husband for damages resulting from the death of his wife. The wife, who suffered from morbid obesity, underwent gastroplasty surgery by the defendant, Inglis, in April 1997. Inglis did not disclose the risks involved in the procedure and specifically did not disclose that stomach perforation and death were possible risks.

During the operation, Inglis stapled a tube to the stomach. It was necessary to take up part of the staple line and redo it. Complications occurred and the wife died in June 1998. In July 1997, however, she had commenced an action for damages for personal injuries. After her death,

therefore, her husband, on his own behalf and as Executor of the wife's estate, sought to maintain the original action by amending it to include claims for damages under the *Fatal Accidents Act* and the *Survival of Actions Act*.

Inglis argued that the husband could not claim damages under the *Fatal Accidents Act* because he amended the wife's statement of claim rather than issuing a separate statement of claim within the limitation period under that Act.

In discussing the propriety of permitting the amendments to the original claim, Justice Hrabinsky undertook an extensive review of the jurisprudence and stated as follows:

> "There is a paucity of jurisprudence on the issue of whether a statement of claim can be amended to include a claim under the **Fatal Accidents Act**. However there are numerous cases dealing with amendments allowed after the expiration of the limitation period.
>
> . . .
>
> In my view special circumstances exist in this case. The claim advanced by Todd Martin is a different cause of action than that advanced by Linda Martin. There is no suggestion that Dr. Inglis is prejudiced by the procedure taken by Todd Martin to advance his claim and that of his children by amending the statement of claim rather than commencing a new action. On the contrary, Mr. Elson candidly concedes that his client has not been prejudiced. Todd Martin could have commenced a new action and if he had done so it would no doubt have been consolidated with the action commenced by Linda Martin. The amendment was made well within the statutory limitation period.
>
> The **Fatal Accidents Act** does not establish a new cause of action. It is the negligence of another person that gives a plaintiff a cause of action. The **Fatal Accidents Act** establishes limits to the economic losses that can be claimed for the benefit of the spouse, parent and child of the person whose death was caused by the negligence of another person.
>
> Counsel for Dr. Inglis did not object to the amendment procedure for a period of over two years. In fact he filed an amended statement of defence in reply to the amended statement of claim. He conducted an examination for discovery of Todd Martin after the amended pleadings had been served and filed.

> I find that the plaintiff is entitled to claim damages under the **Fatal Accidents Act** and the **Survival of Actions Act**." (at pp. 27, 33-34)

In the more recent Alberta Court of Appeal decision in *Ferraiuolo v. Olson* (2004), 36 Alta. L.R. (4^{th}) 3 (C.A.), the appellate court was asked to rule on the constitutionality of section 8(2)(c) of the FAA. That section conferred, on certain surviving children only (ie. minors and those under the age of 26 who were unmarried and not living with a cohabitant), the right to damages in the amount of $25,000 for grief and loss of care, guidance and companionship when their parent was killed by a wrongdoer.

Simply put, the key issue was whether that provision contravened section 15(1) of the *Charter of Rights and Freedoms* by denying to other children, because of their age and marital status, the same or any level of damages for grief and loss of guidance, care and companionship on a wrongful death of their parent.

In the course of concluding that section 8(2)(c) did, in fact, contravene section 15 of the *Charter*, was not saved by section 1, and ought to be severed from the Act, Fraser C.J.A. undertook an extensive/exhaustive review of the legislative history of the FAA – section 8(2)(c) in particular. She also made some instructive comments regarding the nature and function of the FAA. These are well-summarized in the headnote which reads:

> "The legislative regime under the FAA evolved out of a trade-off. The estate of the deceased parent lost the ability to claim non-pecuniary damages under the Survival of Actions Act for loss of expectation of life but as a counterbalance family members, including children, were instead awarded non-pecuniary damages for grief on wrongful death. ..." (at p. 4)

Furthermore, at page 67, the following remarks appear:

> "The family – in all its diverse forms – is the foundational basis for our society. The central players in that family are parents and children. When a person wrongly kills someone, there can be no doubt that it is foreseeable that the

> immediate members of the victim's family – the spouse, children and parents – will suffer grief as a direct result of that wrongful act. A wrongdoer who takes a life unnecessarily is now statutorily relieved of the obligation to pay any compensation to the victim's estate for loss of expectation of life and for future loss of income. The abolition of the first cause of action was to be balanced by the creation of another cause of action – damages for grief. That was the tradeoff. This being so, it is not unreasonable to expect that the wrongdoer will be called on by a society that values life to compensate the immediate members of the victim's family, on a non-discriminatory basis, for the grief needlessly inflicted on them. That family includes all the victim's children, not just some of them." (at p. 67)

The chambers decision of Verville J., in *Tardif v. Wong* (2000), 83 Alta. L.R. (3d) 114 (Q.B.), var'd (2002), 3 Alta. L.R. (4^{th}) 1 (C.A.) – the appellate judgment having been referred to above – involved a motion by the parties for a determination of whether either the FAA or the SAA created a new cause of action.

The facts were these: The deceased, Tardif, last received medical services from the defendant physicians in April 1997. He died on June 20, 1997. His widow and children commenced an action against the defendants on May 14, 1998 for negligence. The action was commenced within one year after the deceased's death, but more than one year after the termination of professional services by any one of the physicians. The defendants, thus, brought a motion for summary dismissal of the action claiming that the claims were barred by the *Limitation of Actions Act*.

The plaintiffs argued that the claim was governed by sections 53 and 54 of the *Limitation of Actions Act*, which created a limitation period of two years following death for claims commenced under the SAA, and the FAA.

A Master had dismissed the application for summary judgment and the defendants appealed to Justice Verville, who held that: (i) survivors were subject to the same limitation period applicable to the deceased, and , thus, that the plaintiff's claim under the SAA was barred by statute; (ii) the action pursuant to the FAA was not a derivative one but, rather, a new cause of action, distinct from any cause of action which the deceased may have had; and, (iii) the FAA

claim was not subject to the one-year limitation period applicable to medical negligence lawsuits.

Verville J. stated:

> "It was established in *Gentile, supra,* that fatal accidents legislation modeled on *Lord Campbell's Act* creates a new cause of action, distinct from any cause of action which the deceased may have had. This continues to be the law. ...
>
> I therefore find that the plaintiffs' claim pursuant to the *Fatal Accidents Act* is not subject to the one-year limitation which applies to medical negligence lawsuits." (at pp. 123-124)

And,

> "I find that ... the one-year period for medical negligence lawsuits applies here. The plaintiffs' claim pursuant to the *Survival of Actions Act*, which as stated in *Duncan*, *supra*, "is a suit by the victim for his loss" is consequently out of time." (at p. 126)

Finally, one older case of potential interest is that of *Poulin Estate v. Niewchas* (1992), 4 Alta. L.R. (3d) 35 (Q.B.). There, the plaintiff was the administrator of the estate of Marcel Joseph Poulin, who was a pedestrian who was struck by a motor vehicle. Mr. Poulin survived for approximately four months before succumbing to his injuries.

The statement of claim, issued in 1990, alleged the essential facts of the running down, the alleged acts of negligence by the defendant, and the injuries and hospitalization. The prayer for relief claimed as follows:

> "A. Under the provisions of The Fatal Accidents Act, the sum of $50,000.00;
>
> B. Under the provisions of The Trustee Act for personal injuries incurred by the deceased in his lifetime the sum of $30,000.00;
>
> C. Costs of this action;

D. Such future and other relief as this Honourable Court may deem meet."

The statement of claim made no reference to a claim of the Minister of Hospitals for unusual hospital services and the prayer for relief did not expressly seek any special damages. However, two days after the plaintiff was examined for discovery, the Provincial Department of Health, under section 58 of the *Hospitals Act*, claimed $103,000 and interest of $28,000. The plaintiff administrator, therefore, applied to amend the statement of claim to add this claim.

In discussing the nature and history of claims initiated under the SAA, McDonald J. said this:

> "The plaintiff, being the administrator of the deceased's estate, may sue the person who has allegedly committed a wrongful act, on behalf of the deceased's estate. While at common law a cause of action in tort did not survive the death of a person injured (see *Winfield & Jolowicz on Tort*, 11th ed. (1979), p. 530), statutory reform has provided that a cause of action which vests in a person before his death survives for the benefit of his estate: *Survival of Actions Act*, R.S.A. 1980 c. S-30 s. 2, which in 1978 c. 35) replaced the *Administration of Estates Act* ... This provision was originally enacted before Alberta became a Province: *The Trustee Ordinance*, O.N.W.T. 1903 (2nd Sess.) c. 11 s. 29. It continued as a provision of the *Trustee Act* of Alberta over the years until it was replaced by s. 51 of the *Administration of Estates Act*, 1969 c. 2. ... Under the Alberta and English legislation, until the enactment of the *Survival of Actions Act*, S.A. 1978, c. 35, the main tortious ground of damages which was commonly claimed by the estate was for "loss of expectation of life", which it had been held was a ground of recovering damages by an injured person: *Flint v. Lovell*, [1935] 1 K.B. 354 (C.A.). The right of the estate to recover damages under this head was recognized by *Rose v. Ford*, [1937] A.C. 826 ...; *Benham v. Gambling*, [1941] A.C. 826 ...; *Bechtold v. Osbaldeston*, [1953] 2 S.C.R. 177 ...; *Crosby v. O'Reilly*, [1973] 6 W.W.R. 632 ... (Alta. C.A.). In Alberta the right of the estate to recover damages was abolished by the adoption of the *Survival of Actions Act*, s. 5 of which provides as follows:
>
> > 5 If a cause of action survives under section 2, only those damages that resulted in actual financial loss to the deceased or his estate are recoverable and, without restricting the generality of the foregoing, punitive or exemplary damages or damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable." (at p. 38)

According to Justice McDonald, because section 5 only allowed the estate to recover damages that resulted in actual financial loss to the deceased or his estate, and because the original claim for damages for personal injuries by the deceased was stated to be $30,000 – such amount being the deceased's actual financial loss – the claim could be said to include the cost of hospitalization paid by the deceased, or, by statute, the cost of insured hospital services. This claim could be pursued without any amendment to the statement of claim alleging the costs incurred by the province.

Notably, McDonald J. also held that the amendment sought by the plaintiff did not amount to the alleging of a new cause of action and that because there was no evidence of prejudice to the defendant, there was no harm in allowing the amendment in any event.

END

[1] With thanks to Andrea Manning-Kroon for her original research and writing on this matter.

[2] Reference: Kenneth Cooper-Stevenson, *Personal Injury Damages in Canada*, 2nd Edit., (Scarborough, Ont.: Carswell, 1996), at pp. 724-725; *Ferraiuolo v. Olson* (2004), 36 Alta. L.R. (4th) 3 (C.A.), at pp. 23, 27

[3] Reference: Kenneth Cooper-Stevenson, *Personal Injury Damages in Canada*, at p. 725; *Canadian Encyclopedic Digest*, Actions, at para. 89

[4] Reference: Kenneth Cooper-Stevenson, *Personal Injury Damages in Canada*, at p. 725

[5] Reference: *Tardif v. Wong* (2000), 83 Alta. L.R. (3d) 114 (Q.B.), var'd (2002), 3 Alta. L.R. (4th) 1 (C.A.)

[6] Reference: *Duhamel et al. v. Matic et al.* (2000), 262 A.R. 109 (Q.B.); *Martin v. Inglis* (2002), 218 Sask.R. 1 (Q.B.); *Tardif v. Wong* (2000), 83 Alta. L.R. (3d) 114 (Q.B.), var'd (2002), 3 Alta. L.R. (4th) 1 (C.A.); *Poulin Estate v. Niewchas* (1992), 4 Alta. L.R. (3d) 35 (Q.B.)