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Damages for Personal Injury or Wrongful Death in Canada

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TABLE OF CONTENTS

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I. INTRODUCTION

THIS PAPER PROVIDES an overview of the Canadian law of damages for personal injury or wrongful death as at September, 2003. Other than Quebec, which is a civil law jurisdiction, the provinces and territories of Canada operate under a common law tradition. The assessment of damages for personal injury and wrongful death is discussed here from a common law perspective, though the basic principles apply in Quebec as well, albeit with some exceptions. In Canada, the primary aim of an award of damages is to restore a plaintiff to his or her pre-accident condition and thereby compensate the plaintiff for the injuries he suffered. It follows that an award of damages that

places the plaintiff in a better position than he or she would have been in had the accident not occurred overcompensates the plaintiff and constitutes a windfall. An award beyond full compensation punishes the defendant and is inconsistent with the principle of full compensation fundamental to tort law damages.[1]

The difficulty, of course, lies in determining what amount of money will appropriately compensate the plaintiff for all loss suffered, be it pecuniary or not. Canadian personal injury damages law recognizes that not all loss the plaintiff suffers is specifically measurable pecuniary loss. It contemplates the awarding of non-pecuniary general damages for intangible injury such as pain, suffering, and loss of the amenities of life, as well as aggravated damages where the defendant's conduct was particularly blameworthy. As an adjunct to the fundamental compensatory basis of personal injury damages awards, Canadian courts can also make non-compensatory awards in the form of exemplary or punitive damages in circumstances warranting censure and punishment of the defendant.[2]

Because the plaintiff should be compensated for past and prospective pecuniary loss, the award of damages attempts to restore the plaintiff to his or her pre-accident financial position in respect of both pre-trial events and the future. The plaintiff may also be compensated for past and prospective non-pecuniary loss, in which case the award of damages provides the plaintiff with some measure of consolation for his or her intangible losses.[3] Pecuniary damages that have crystallized before the trial date are called "special damages" and must be specifically pleaded and proved. Non-pecuniary damages and pecuniary damages that have not crystallized before the trial date are known as "general damages." As can be seen, the distinction between special and general damages is one of form rather than substance.[4]

If the plaintiff's injury is fatal, the plaintiff's cause of action vests in his or her estate and a civil action for damages may be brought or continued by the estate (a "survival action") to re-

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[1] Ratych v. Bloomer, [1990] 1 S.C.R. 940 (McLachlin J.).

[2] A chart illustrating the breakdown of the various categories of damages forms Appendix I to this paper.

[3] KEN COOPER-STEPHENSON, PERSONAL INJURY DAMAGES IN CANADA 12 (2d ed. 1996).

[4] *Id.* at 73, 91-94.

cover the deceased plaintiff's pre-death losses.[5] Certain of the plaintiff's dependants may also have a claim against the tortfeasor if the plaintiff suffers a fatal injury ("fatal accident claims"). In the common law jurisdictions of Canada, fatal accident claims, like survival actions, are governed by legislation that permits specified dependants to recover damages they suffer following the death of someone upon whom they were dependant.[6] Whether the action is brought by the plaintiff, the plaintiff's estate, a dependant, or some other third party such as an insurer exercising a right of subrogation, the quantum of damages will be assessed based on actuarial evidence by either a trial judge sitting alone or a jury, as the case may be. The judge or jury will determine an appropriate lump sum, subject to guidelines established by the Supreme Court of Canada in a 1978 trilogy of cases (the "Trilogy"),[7] and also subject to developing rules regarding other benefits received by the plaintiff or on the plaintiff's behalf from third party sources ("collateral benefits"). Rights of subrogation that will affect the plaintiff's ultimate recovery should also be taken into account. Alternatively, the parties themselves may agree on compensation that will be paid to the plaintiff over time (a "structured settlement"). As in all civil cases, a successful plaintiff will, as a general rule, be entitled to his or her costs.[8]

This paper focuses on the assessment of damages for personal injury or wrongful death by Canadian courts once a right of recovery has been established either at common law or under stat-

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[5] Appendix II to this paper outlines the types of damages typically excluded or recoverable in a survival action in each of Canada's common law provinces or territories. Note that while Nunavut does have some stand-alone legislation, survival actions in Nunavut are governed by the Northwest Territories legislation.

[6] COOPER-STEPHENSON, *supra* note 3, at 13. Appendix III to this paper sets out the range of eligible claimants and the types of damages typically excluded or recoverable in a fatal accident claim in each of Canada's common law provinces or territories. Again, while Nunavut does have some stand-alone legislation, fatal accident claims in Nunavut are governed by the Northwest Territories legislation.

[7] Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229; Arnold v. Teno, [1978] 2 S.C.R. 287; Thornton v. Prince George Sch. Dist. No. 57, [1978] 2 S.C.R. 267.

[8] In Canada, costs are governed by statute and/or the *Rules of Court* and the rules therefore differ from one jurisdiction to another. Generally, however, costs are within the court's discretion and are usually awarded to the successful plaintiff in an amount providing less than complete indemnification. A further analysis of costs is beyond the scope of this paper.

ute.[9] Despite this focus, some preliminary issues merit brief discussion. A plaintiff's right to recovery can be severely limited by the principles governing causation. For example, the issue of causation may be unnecessarily conflated with the assessment of damages issue, giving rise to confusion. Accordingly, prior to embarking on the more detailed discussion of damages assessment issues in Canada, some problems unique to the causation issue are addressed here first, followed by an explanation of the effect of the federal statute, the Carriage by Air Act,[10] and by a brief analysis of some of the basic choice of law rules applicable to damages assessment.

II. PRELIMINARY ISSUES

A. CAUSATION

A plaintiff cannot recover damages for his or her injury unless the injury is causally connected to the accident. The accident must be the cause of the injury in fact, but must also be the legal cause of the injury. Legal causation requires that the type or class of injury be a foreseeable result of the accident, although the extent of the injury need not be foreseeable. The plaintiff must establish, on a balance of probabilities, that the injury would not have occurred "but for" the accident, or alternatively, that the accident materially contributed to the injury.[11]

If the plaintiff meets either of the "but for" or "material contribution" tests, it is irrelevant that the accident may not have been the sole cause of the injury. It follows that a plaintiff is not precluded from recovering where the extent of the injury is unusually severe because the plaintiff has some pre-existing injury or condition that is triggered or exacerbated by the accident.[12] The "but for" or "material contribution" tests also apply if the injury is psychological or emotional in nature. Recovery for this

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[9] The main secondary sources consulted in drafting this paper were: COOPER-STEPHENSON, *supra* note 3; 4 REMEDIES IN TORT (Linda D. Rainaldi, ed., 1987); JAMIE CASSELS, REMEDIES: THE LAW OF DAMAGES (2000). To a lesser extent, the authors also relied on: CHRISTOPER J. BRUCE, ASSESSMENT OF PERSONAL INJURY DAMAGES (3d ed. 1999); S.M. WADDAMS, THE LAW OF DAMAGES (1991); PHILIP H. OSBORNE, THE LAW OF TORTS (2000); J.G. CASTEL & J. WALKER, CANADIAN CONFLICT OF LAWS (5th ed. 2002); P. NORTH & J.J. FAWCETT, CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW (13th ed. 1999). In subsequent footnotes, these sources will be referred to by the author's name unless expressly defined.

[10] R.S.C. 1985, c. C-26 (R.S.C., ch. C-26 (1985) (Can.)).

[11] Athey v. Leonati, [1996] 3 S.C.R. 458, 466.

[12] That is, the injury is caused by both tortious and non-tortious factors.

kind of harm is also discussed below because psychiatric illness presents its own unique problems with causation.

Where the plaintiff's injuries or loss are legally caused by more than one person, the plaintiff's damages will be apportioned among the defendant wrongdoers. In the absence of contributory negligence, the defendants' liability to the plaintiff will be joint and several.[13] If the plaintiff is contributorily negligent, there will be apportionment of liability based on respective degrees of responsibility for causation not only amongst defendants, but also in respect of the plaintiff. In British Columbia, if the plaintiff is found contributorily negligent, and so is one of the persons "at fault" for his or her injuries, then in negligence cases, all defendants' liability to the plaintiff will be several only, and not joint and several.[14] This is not the case in Alberta, where a plaintiff's contributory negligence does not alter the joint and several liability of defendants.[15] Similarly, the Ontario Negligence Act[16] has been interpreted to mean that a plaintiff's contributory negligence does not affect the joint and several liability to the plaintiff of multiple defendants.[17] In cases involving intentional torts, it has been held that the defendant cannot raise a contributory negligence defence.[18]

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[13] The British Columbia Ministry of the Attorney General is currently engaged in a comprehensive review of civil liability issues. The government's discussion paper contemplates reform of a number of areas, including joint and several liability. The proposed reforms are controversial and, to date, have not received general support from the British Columbia Bar. Further information may be found at http://www.ag.bc.ca/liability-review/.

[14] Leischner v. West Kootenay Power & Light Co. (1986), 70 B.C.L.R. 145, 173-174. (C.A.). In British Columbia, the courts can apportion fault to a non-party where the plaintiff is contributorily negligent. *See* Wells v. McBrine (1988), 33 B.C.L.R.2d 86 (C.A.), *leave to appeal refused,* (1989), 36 B.C.L.R.2d xxxvii (S.C.C.). However, they cannot apportion fault to a non-party where there is no contributory negligence. *See* Hongkong Bank of Canada v. Touche Ross, (1989), 36 B.C.L.R.2d 381 (C.A.). Also, in British Columbia, a contributory negligence defence, and resulting severing of defendants' liability if successful, can be used in breach of contract cases. *See* Crown W.est Steel Fabricators v. Capri Ins. Servs. Ltd., (2002), B.C.L.R.4th 272 (C.A. 417).

[15] Campbell Estate v. Calgary Power, [1989] 1 W.W.R. 36 (Alta. C.A.).

[16] R.S.O. 1990, c. N-1 (R.S.O., ch. N-1 (1990) (Ont.)).

[17] Ingles v. Tutkaluk Constr. Ltd., (1995), 18 C.L.R.2d 67 (Ont. Gen. Div.); *see also* D. CHEIFETZ, APPORTIONMENT OF FAULT IN TORT 20 (1981).

[18] Boma Mfg. v. C.I.B.C., [1996] 3 S.C.R. 727 (applying to the tort of conversion); Bains v. Hofs (1992), 76 B.C.L.R.2d 98 (S.C.) (applying to assault and trespass). The interface of causation theory, apportionment of liability, and the defense of contributory negligence is a complex one. This paper will not further discuss recovery in the context of multiple tortious causes of injury or loss.

B. The "Thin" or "Crumbling" Skull Plaintiff

Plaintiffs with a "thin skull" are those who are more susceptible to injury than the average person. Thus, the extent of the injury suffered is unexpectedly severe because of some pre-existing psychological or physical condition. In proving causation, the "thin skull" plaintiff must establish that the accident activated this pre-existing condition that would not have otherwise materialized or been harmful. If causation is proved on a balance of probabilities, the defendant will be liable for the full extent of the harm even though the effects of the injury are more extensive, persistent, or devastating than they might have been with a more robust plaintiff. The tortfeasor must take his victim as he finds him.

Plaintiffs with a "crumbling skull" suffer from a pre-existing degenerative condition and, to prove causation, they must establish, on a balance of probabilities, that the accident aggravated the condition. Provided the "crumbling skull" plaintiff meets the onus of proof, the defendant will be liable for any additional damage the accident has caused. If there is a measurable risk that the pre-existing condition would have worsened to some extent apart from the accident, the award of damages will be reduced according to the relative likelihood of this happening. The defendant does not have to prove the risk on a balance of probabilities. Both the "thin skull" and "crumbling skull" rules are consistent with the general principle that damages for personal injury are designed to restore the plaintiff to his or her pre-accident condition, but it is important to keep the assessment of damages issue separate from the issue of causation.[19]

C. Psychological Versus Physical Harm

Psychological or emotional harm—as distinct from the "ordinary" pain and suffering that might flow from a physical injury—is now compensable in Canada, even without proof of physical injury provided the harm constitutes a recognizable psychiatric injury and the psychiatric injury was a reasonably foreseeable consequence of the defendant's conduct.[20] That said, psychiatric illness presents unique problems of proof and causation. In particular, the plaintiff must meet the "but for" or "ma-

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[19] Hosak v. Hirst (2003), 9 B.C.L.R.4th 203, ¶ 10 (C.A.).

[20] A.M. Linden, Canadian Tort Law 390-91 (7th ed. 2001). See the leading case of Vanek v. Great Atlantic & Pacific Co. of Canada (1999), 180 D.L.R.4th 748 (Ont. C.A.), *application for leave to appeal dismissed*, [2000] S.C.C.A. No. 50 (QL).

terial contribution" test,[21] must establish that his or her psychiatric injury is something suffered apart from grief and sorrow, which are not compensable, and must show that the psychiatric illness is beyond the plaintiff's control.[22] The law has developed to permit both primary victims (those directly affected by the defendant's conduct) and secondary victims (those indirectly affected, such as witnesses to accidents) to recover damages for psychiatric illness, formerly known as "nervous shock."

Matkin v. Gauarian provides a recent example of an award of damages to a primary victim for a psychiatric injury.[23] As the plaintiff rounded the corner on a mountainous, winding stretch of highway, her vehicle was struck at high speed by a trailer truck traveling in the wrong lane. The impact threw the plaintiff onto the passenger side of her vehicle and she suffered relatively minor physical injuries that resolved in six months.[24] After the accident, the plaintiff suffered from an anxiety or phobia that significantly affected her ability to drive.[25] The plaintiff was awarded $40,000 in non-pecuniary damages for her psychological injury.[26]

With respect to secondary victims, however, there is still some debate in Canadian law as to whether or not "control mechanisms"[27] are required in addition to the reasonable foreseeability test. In the United Kingdom, the plaintiff must meet a proximity test that involves consideration of factors such as the closeness of the relationship between the plaintiff and the victim, the plaintiff's proximity to the scene of the incident, and the time lapse between the incident and the onset of the psychiatric illness.[28] The British Columbia Court of Appeal has also

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[21] C.R. v. R.R., 2002 BCSC 1275, 2002 BC.C. LEXIS 4533.

[22] *See, e.g.*, Yoshikawa v. Yu (1996), 21 B.C.L.R.3d 318, ¶ 24 (C.A.) (allowing the plaintiff to recover damages for a somatoform disorder once the court ruled out any "conscious failure to exercise [her] willpower to bring about a healing of the symptoms").

[23] 2003 BCSC 763, 2003 BC. C. LEXIS 2824.

[24] *Id.* ¶ 4.

[25] *Id.* ¶ 7.

[26] *Id.* ¶ 16.

[27] Control mechanisms were explained in Devji v. Burnaby (District) (1999), 180 D.L.R.4th 205. (B.C.C.A.), *application for leave to appeal dismissed*, [1999] S.C.C.A. No. 608 (QL). British Columbia Chief Justice McEachern (as he then was), stated that control mechanisms were "limitations on the extent of the duty of care that arises from foreseeable consequences." *Id.* ¶ 27.

[28] McLoughlin v. O'Brian, [1982] 2 All E.R. 298 (H.L.). This proximity test was modified slightly in Alcock v. Chief Constable of the South Yorkshire Police,

concluded that public policy may require the imposition of control mechanisms in nervous shock cases.[29] In *Devji v. Burnaby*, Chief Justice McEachern (as he then was) held that in addition to reasonable foreseeability, the court must consider proximity (as described above) and the nature of the experience itself. To recover damages for psychiatric illness, the secondary victim must suffer a "fright, terror or horror."[30]

It seems that the Ontario courts have avoided the phrase "control mechanism," but similar factors appear to be considered under the rubric of "reasonable foreseeability," arguably eliminating any significant differences between the two jurisdictions. In determining whether the plaintiff parents' alleged psychiatric illnesses were reasonably foreseeable in *Vanek v. Great Atlantic & Pacific Co. of Canada*, the Ontario Court of Appeal took into account the facts and circumstances of the particular case.[31] At paragraph 34, Justice MacPherson stated that "foreseeability cannot be considered in the abstract" and that "the surrounding circumstances will include the identity of the parties, their relationship to each other, the careless conduct, its aftermath or consequences, and the injuries suffered."[32]

D. Carriage by Air Act

The Carriage by Air Act[33] incorporates the Montreal Convention of 1999, which came into force in Canada on November 4, 2003.[34] The Montreal Convention replaces the 1929 Warsaw

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[1991] 4 All E.R. 907 (H.L.) and in White v. Chief Constable of the South Yorkshire, [1999] 1 All E.R. 1. (H.L.).

[29] Rhodes Estate v. CNR (1990), 75 D.L.R.4th 248 (B.C.C.A.), *application for leave to appeal dismissed* (1991), 79 D.L.R.4th vii (S.C.C.); *see also* Devji v. Burnaby (District) (1999), 180 D.L.R.4th 205 (B.C.C.A.), *application for leave to appeal dismissed*, [1999] S.C.C.A. No. 608 (QL).

[30] Devji v. Burnaby (District) (1999), 180 D.L.R.4th 205, 228-29, ¶¶ 75-76 (C.A.).

[31] Vanek v. Great Atlantic & Pacific Co. of Canada (1999), 180 D.L.R.4th 748 (Ont. C.A.), *application for leave to appeal dismissed*, [2000] S.C.C.A. No. 50 (QL). The Court of Appeal considered that the injured person was the plaintiffs' daughter, the potential seriousness of the injury, the actual extent of the harm (minimal), the plaintiffs' physical proximity to the incident, and how the incident was handled by the professionals and others involved. The plaintiffs' claim for damages for their psychological injury was denied on appeal. *Id.*

[32] *Id.*

[33] R.S.C. 1985, c. C-26 (R.S.C., ch. C-26 (1985) (Can.)).

[34] Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, ICAO Doc. 9740 [hereinafter Montreal Convention].

Convention,[35] as amended by the Hague Protocol of 1955[36] and the Montreal Additional Protocols,[37] which continue to apply in states that have not ratified the Montreal Convention. The provisions of the Montreal Convention deal with the liability of a carrier to its passengers and are intended to constitute a uniform international code, excluding any resort to the rules of domestic law. Therefore, if a plaintiff is injured or dies as a result of an accident on an international flight originating in Canada and having its final destination in Canada or in another country that has ratified the Montreal Convention, the right to recover damages in respect of an injury or death is governed by Schedule VI to the Carriage by Air Act, and the fatal accident or survival action legislation referred to elsewhere in this paper would not apply.

Accordingly, a claim for damages, brought by a passenger arising from his presence on board an aircraft making an international flight,[38] or embarking or disembarking such an aircraft, is subject to the provisions of the Montreal Convention, whether the cause of action is framed in negligence or in contract.[39] An

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[35] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 2000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (West 2004) [hereinafter Warsaw Convention].

[36] Protocol to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, *opened for signature* September 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol].

[37] Protocols Nos. 1-4 to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, *opened for signature* Sept. 25, 1975, ICAO Doc. 9145, 9146, 9417, 9470 [hereinafter Montreal Protocols].

[38] "International carriage" is defined in Article 1, Schedule VI of the Carriage by Air Act, R.S.C. 1985, c. C-26(R.S.C., ch. C-26 (1985) (Can.)) as:

> [A]ny carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

Id.

[39] *See* Clarke v. Royal Aviation Group Inc. (1997), 34 O.R.3d 481 (Gen. Div.); *see also* Gal v. Northern Mountain Helicopters, Inc. (1999), 177 D.L.R.4th 249 (B.C.C.A.).

"accident" within the meaning of Article 17 has been defined by the Supreme Court of the United States in *Air France v. Saks*,[40] a definition that was adopted in Ontario in *Quinn v. Canadian International Airlines Ltd.* and recently affirmed in *MacDonald v. Korean Air*.[41] Under Article 17 of the Montreal Convention, the carrier's liability is limited to damages for bodily injury suffered by a passenger.[42] The carrier is not liable for damages for embarrassment and emotional distress or additional expenses in the absence of bodily injury,[43] nor is the carrier liable for punitive damages if the plaintiff dies, is wounded, or suffers any other bodily injury.[44]

Further, the carrier is strictly liable for the first 100,000 special drawing rights ("SDRs")[45] of damage except to the extent that the carrier can prove that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation. The strict liability imposed on carriers under the Montreal Convention constitutes a significant departure from the 1929 Warsaw Convention, which did not impose strict liability on carriers but instead capped their liability.

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[40] Air France v. Saks, 470 U.S. 392, 405-06 (1985). Justice O'Connor, speaking for the Court, stated:

> We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. . . . Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger.
> *Id.*

Recovery of damages is still dependent upon there being an "accident." Presumably, therefore, the case law interpreting "accident" prior to the coming into force of the Montreal Convention continues to apply.

[41] *See* Quinn v. Canadian Int'l Airlines Ltd. (1994), 18 O.R.3d 326 (Gen. Div.), *aff'd*, [1997] O.J. No. 1832 (C.A.) (QL), *leave to appeal refused* (1997), 108 O.A.C. 318 (S.C.C.); *see also* MacDonald v. Korean Air, [2002] O.J. No. 3655 (S.C.J.) (QL), *aff'd* (2003), 171 O.A.C. 368, *application for leave to appeal refused*, [2003] S.C.C.A. No. 160 (QL).

[42] Montreal Convention, *supra* note 34, art. 17.

[43] *See* Mileikovskaia v. Royal Airlines, Inc., [1998] O.J. No. 5352 (Gen. Div.) (QL); *see also* Chau v. Delta Air Lines, Inc., No. 02-CV-24145 2SR, 2003 WL 22417503 (Ont. S.C.J. Sept. 3, 2003) (Nordheimer J.).

[44] Naval-Torres v. NorthwestAirlines (1998), 159 D.L.R.4th 67 (Ont. Gen. Div.).

[45] Carriage by Air Act, R.S.C. 1985, c. C-26, s. 2(7)(b) (R.S.C., ch. C-26, § 2(7)(b) (1985) (Can.)) (providing that SDRs will be converted into Canadian dollars at the rate established by the International Monetary Fund. For example, in September 2003, 100,000 SDR's were worth approximately $190,000 CAD and $140,000 USD).

For damages in excess of 100,000 SDRs, the carrier can limit or exclude its liability if it proves that the damage was not due to the negligence or wrongful act or omission of the carrier or its servants or agents, or that such damage was due solely to the negligence or other wrongful act or omission of a third party. However, in the absence of such proof, there is no monetary limit on the amount of recoverable compensatory damages.

An action for damages may be brought by certain of the plaintiff's dependants or the plaintiff's estate.[46] Section 1 of Schedule II expressly provides that claims for damages are only enforceable for the benefit of "members of the passenger's family." That term is defined to mean spouses (married, or common law for a period of at least one year), parents, step-parents, grandparents, siblings, children (including adopted children, step-children, or others for whom the passenger stood *in loco parentis*), and grandchildren.[47] It seems that if the action for damages is brought by the estate, then unlike survival actions, the damages recovered must be for the benefit of those individuals who come within the definition of "members of the passenger's family" and not for the estate generally.

An action for damages must be brought within two years.[48] The action for damages need not be brought in a federal court. Rather, the plaintiff has the option of bringing the action in the jurisdiction of one of the contracting territories, "either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination."[49] Notably, the Montreal Convention adds a fifth possible jurisdiction (known as the "Fifth Jurisdiction"). Pursu-

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[46] *Id.* § 2, Schedule II.

[47] Modernization of Benefits and Obligations Act, S.C. 2000, c. 12 (S.C., ch. 12 (2000) (Can.)) (extending benefits and obligations under various federal statutes to all couples who have been in conjugal relationships for at least one year, rather than just to opposite-sex couples, and applying to federally administered benefits programs and to rights of recovery under various federal statutes). Section 73 amends the Carriage by Air Act to broaden the definition of persons entitled to recover in the event of the death of a passenger to include a same-sex spouse.

[48] Article 35, Schedule VI to the Carriage by Air Act, R.S.C. 1985, c. C-26 (R.S.C., ch. C-26 (1985) (Can.)). Note that the case law does not appear to address the availability of a jury trial. The implication is that jury trials are not precluded by the Montreal Convention.

[49] Article 33, Schedule VI to the Carriage by Air Act, R.S.C. 1985, c. C-26 (R.S.C., ch. C-26 (1985) (Can.)).

ant to Article 33 of Schedule VI, an action for damages may also be brought

> [I]n the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

It is generally accepted that code share agreements and similar inter-carrier marketing agreements fall within the scope of "commercial agreement."

E. Choice of Law Principles for Personal Injury Damages Assessment

Personal injury claims arising out of aviation accidents may well involve multiple jurisdictions in that the parties may reside or be present for business purposes in various places, and the action may be brought in a different jurisdiction than that where the accident occurred. Consequently, a brief mention of choice of law principles in the personal injury damages context is appropriate.

Conceptually a distinction is drawn between substantive and procedural matters in litigation where there is a choice of law issue: substantive matters are determined by the *lex causae* and procedural matters by the *lex fori*.[50] Therefore, in cases where the law of the forum is not that of the place where the cause of action arose, it becomes necessary to determine whether the matter of damages is substantive or procedural. The conflict of laws commentators acknowledge that the determination of whether a matter is substantive or procedural is not an easy or self-evident one, and cannot be done in the abstract. It has been said the reason the distinction is made in private international law is for the convenience of the court. With respect to certain matters, even if the cause of action arises under foreign law, the forum court must be able to apply its own rules for the mechanics of justice to work effectively.[51]

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[50] Castel & Walker, *supra* note 9, ch. 6: Substance and Procedure; North & Fawcett, *supra* note 9, ch. 6: Substance and procedure.

[51] *See* North & Fawcett, *supra* note 9, at 70-72; *see also* Tolofson v. Jensen; Lucas v. Gagnon, [1994] 3 S.C.R. 1022, 1071-72.

In Canada, tort liability is a substantive matter, and, as a rule, is to be determined by the law of the place of the tort (the *lex loci delicti*).[52] "Liability" includes questions of causation and remoteness.[53] Remoteness includes whether the plaintiff can recover only reasonably foreseeable losses,[54] and what heads of damage are recoverable (*e.g.*, pain and suffering, past income loss, cost of future care, etc.).[55] The measure of damages (*i.e.*, the quantification or assessment of the amount of money to which a plaintiff is entitled under each head of damage,[56] and the manner in which provision is made for future or prospective losses[57]), however, is procedural, and is determined by the law of the forum (the *lex fori*).[58]

A statutory bar against the actionability of certain causes of action or against recovery in an action for certain types of damages is equivalent to a common law rule that completely precludes recovery for certain heads of damages. Therefore, applying the Canadian choice of law rules, the *lex loci delicti* should be looked to in assessing whether there is any statutory régime precluding recovery for certain types of injuries, or heads of damages, since that has been determined to constitute

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[52] Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 1052-55, where Justice La Forest, for the majority of the Supreme Court of Canada acknowledged that in certain exceptional circumstances, involving international litigation, the choice of law rule should not be applied where its application would be unjust. The minority did not take exception to the availability of an exception but would have made it somewhat more broadly available.

[53] NORTH & FAWCETT, *supra* note 9, at 86-87 (citing, *inter alia*, Slater v. Mexican Nat'l. Rly. Co., 194 U.S. 120 (1904)).

[54] CASTEL & WALKER, *supra* note 9, ¶ 6.3.f, n.39 (citing J. D'Almeida Aranjo Lda. v. Sir Frederick Becker & Co. Ltd., [1953] Q.B. 329); Livesley v. E. Clements Horst Co., [1925] 1 D.L.R. 159 (S.C.C.)).

[55] CASTEL & WALKER, *supra* note 9, ¶ 6.3.f, n.40 (citing Chaplin v. Boys, [1971] A.C. 356, 379, 392, 395; *contra* at 382; Boys v. Chaplin, [1968] 2 Q.B. 1, 20, 41 (C.A.); *contra* at 32; Naftalin v. London Midland & Scottish Ry. Co., [1933] S.C. 259; McElroy v. M'Allister, [1949] S.C. 110 (Sct.); Mackinnon v. Iberia Shipping Co., [1954] 2 Lloyd's Rep. 372); *see id.* ¶ 35.7, n.6 (stating specifically, by way of contrast, that "[t]he nature of the remedy to be granted is a matter for the *lex fori* and a quantification of damages falls within this principle.") (internal citation omitted); *see also* NORTH & FAWCETT, *supra* note 9, at 87.

[56] CASTEL & WALKER, *supra* note 9, ¶ 6.3f, n.41 (citing Kohnke v. Karger, [1951] 2 K.B. 670; Chaplin v. Boys, [1971] A.C. 356, 379, 381, 382, 392-394; Story v. Stratford Mill Bldg. Co. (1913), 18 D.L.R. 309 (Ont. C.A.); Young v. Industrial Chemicals Co. Ltd., [1939] 4 D.L.R. 392 (B.C.S.C.)).

[57] CASTEL & WALKER, *supra* note 9, ¶ 6.3f , n.42 (citing Kohnke v. Karger, [1951] 2 K.B. 670; Chaplin v. Boys, [1971] A.C. 356, 393-94.

[58] CASTEL & WALKER, *supra* note 9, ¶¶ 6.3f, 35.7, n.8; *see also* NORTH & FAWCETT, *supra* note 9, at 87-88.

a substantive matter. For example, if an accident occurs in California and that jurisdiction precludes tort actions for personal injury where the plaintiff is injured while working (workers' compensation legislation), the law of California should determine whether the claim can be maintained, even if the law of the forum does not include workers' compensation type legislation. If the place of the tort was British Columbia, and so British Columbia law would be applied on substantive matters, then damages for loss of consortium would not be recoverable because the Family Relations Act prohibits recovery in any action for that head of damage.[59] Similarly, because it is the *lex loci delicti* that is determinative of the heads of damage for which recovery can be had, the no-fault legislation, if any, applicable in the forum jurisdiction will not be taken into account in assessing the maintainability of a claim arising out of an accident occurring outside the forum, even if that legislation is structured to preclude tort recovery for certain types of damages.[60] But these determinations are different from assessment of the measure of damages under a specified head of damages that *is* recoverable in respect of the cause of action. Once it is established (as a matter of substantive law) that recovery for that head is available, the law of the jurisdiction in which the claim is being

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[59] R.S.B.C. 1996, c. 128, s. 123 (R.S.B.C., ch. 128, § 123 (1996) (B.C.)).

[60] *See, e.g.*, George v. Gubernowicz (1999), 44 O.R.3d 247 (Gen. Div.), where an accident occurred in Alberta. Under Alberta law, a claim for economic loss was maintainable, although it was not under Ontario law because of no-fault legislation that barred tort actions arising out of motor vehicle accidents. The court stated that the plaintiff, who was an Ontario resident, was entitled to maintain the claim for economic loss in the Ontario action because Alberta law applied. *Id.* at 250-51. The court further noted:

> The defendant on this motion asserts that the plaintiff who has received benefits pursuant to the no-fault insurance scheme in Ontario has in essence elected to receive benefits provided by Ontario insurance law and an injustice would occur if the plaintiff were to ultimately be entitled to receive benefits from another system in addition to the no-fault benefits being paid in Ontario. *There was no evidence before me to support the proposition by the defendant that the plaintiff will be unjustly benefited by being permitted to have access both to the no-fault regime in Ontario because he has his own insurance policy as well as a cause of action pursuant to law.* The defendant has also provided no authority for its assertion that the plaintiff has in any way attorned to Ontario law by electing to receive the no-fault benefits payable under the Ontario no-fault insurance scheme.
>
> *Id.* at 251 (emphasis added).

Query what the ruling would have been had evidence been presented showing the plaintiff would receive double recovery if the Ontario benefits were not taken into account?

brought (the *lex fori*) applies to assess the quantum of damages.[61]

III. COMPENSATORY DAMAGES

As mentioned above, the goal of an award of personal injury damages is to compensate a plaintiff for his or her loss insofar as it is possible to do this with money. Compensatory damages are awarded for past and future loss, and on a special and general basis. The award is made as a one-time, all-inclusive lump sum. The assessment of general damages for the future loss component of that award is arrived at using the actuarial method and therefore requires the court to make or approve mathematical calculations, rely on the advice of actuaries and economists, and accept statistical averages.[62] The plaintiff is not required to prove his or her future losses (damages) on a balance of probabilities; rather, damages are assessed according to the degree of likelihood that an event will or will not happen.[63] Nevertheless, a plaintiff has a duty to mitigate his or her past and future loss.

In accordance with the compensatory principle, courts strive to provide a plaintiff with full compensation for his or her pecuniary loss (both past and future), and fair compensation for non-pecuniary loss.[64] Thus, damages should be assessed in their real context and should serve some useful function.[65] Awards of compensatory damages are often discounted or grossed up to reflect the fact that damages (or at least general damages) are largely a product of estimation, and are awarded in present dollars for both past and present losses. For the same reason, the

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[61] One of the more complex questions that may arise is what law should be applied in assessing the effect of collateral benefits. The issue may be further complicated where the collateral benefits are paid pursuant to a statutory scheme that is wholly or partially prohibits tort actions. Arguably, collateral benefits generally, and particularly government benefits or subsidies paid for medical or long-term care, should not constitute a "head of damage" because by definition, they offset rather than increase the loss suffered by the plaintiff. Thus, it seems correct to say that the issue of deductibility of collateral benefits forms part of the principled assessment or quantifying of the amount of damages for certain types of losses that the injured person is entitled to recover and thus should be governed by the law of the forum. Further analysis of this issue is beyond the scope of this paper.

[62] COOPER-STEPHENSON, *supra* note 3, at 58.

[63] *Id.* at 67.

[64] Andrews v. Grand & Toy Alberta Ltd. (1974), 54 D.L.R.3d 85 (Alta. T.D.), *varied* (1975), 64 D.L.R.3d 663 (Alta. C.A.), *rev'd in part*, [1978] 2 S.C.R. 229.

[65] COOPER-STEPHENSON, *supra* note 3, at 114-15.

awards may attract interest. In particular, the pre-trial loss component of an award of damages should attract interest to compensate the plaintiff for that interest he or she could have earned but for the injury. Arguably, the plaintiff should not have interest on the post-trial component of the damages award because he or she has not yet incurred the expenses. The plaintiff's entitlement to interest is governed by statute and therefore, those rights and rates of interest differ from one Canadian jurisdiction to the next.[66] To avoid overcompensating the plaintiff, it has been suggested that a plaintiff's pecuniary loss should be assessed before his or her non-pecuniary loss. Aggravated damages may then be assessed as part of the general compensatory damages component of the award if the non-pecuniary award requires augmentation. Finally, punitive damages may also be assessed in the appropriate circumstances.[67] Each of these categories of damages will be discussed in more detail below.

A. Pecuniary Loss

A plaintiff's[68] pecuniary or financial loss can be further subdivided into the following categories: special damages; future loss of working capacity (which includes traditional claims for loss of earnings, loss of homemaking capacity, and possible loss of shared family income);[69] and future cost of care. These individual categories of loss are described below, but all pecuniary damages are assessed in accordance with some general principles. For example, an award of pecuniary damages may be reduced if the defendant proves that making the award without deduction will result in over-compensation of the plaintiff because the plaintiff will also recover in respect of certain losses from a third party source (the "collateral benefits" issue). Alter-

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[66] All Canadian common law jurisdictions have enacted legislation governing the award of pre- and/or post-judgment interest. *See, e.g.*, Judgment Interest Act, R.S.A. 2000, c. J-1, s. 2(2) (R.S.A., ch. J-1, § 2(2) (2000) (Alta.)) (prohibiting an award of interest on, *inter alia*, post-trial pecuniary loss and exemplary damages).

[67] Huff v. Price (1990), 51 B.C.L.R.2d 282, 300 (C.A.). This is not a personal injury case, but has been applied in the personal injury context.

[68] Cooper-Stephenson, *supra* note 3, at 189. The author states that third parties may also recover pecuniary loss arising out of the personal injury to another in limited circumstances: spouses, parents, and employers may have a claim at common law. Certain relatives may have a claim under Ontario's Family Law Act, R.S.O. 1990, c. F.3 (R.S.O., ch. F.3 (1990) (Ont.)); and husbands and wives may have a claim in Alberta under the Domestic Relations Act, R.S.A. 2000, c. D-14 (R.S.A., ch. D-14 (2000) (Alta.)).

[69] Cooper-Stephenson, *supra* note 3, at 90.

natively, or additionally, the pecuniary award may be scaled up or down by various percentages to reflect life events that impact on prospective losses ("contingencies").[70] These contingencies may be ones that are commonly experienced such as illness (general contingencies) or contingencies peculiar to the plaintiff that therefore require proof (specific contingencies). Although contingencies may be positive as well as negative, in practice, awards are reduced according to the degree of likelihood of the happening of an event more often than they are increased.

Once the award for pecuniary loss is adjusted for contingencies, pecuniary damages for future losses will be discounted[71] on the assumption that the plaintiff will invest the lump-sum award at a rate higher than the inflation rate, thereby earning a profit. Pecuniary damages for pre-trial losses ("special damages") attract prejudgment interest to compensate for the lost opportunity to invest those funds and earn profit.[72] The pecuniary award for cost of future care is subject to a gross-up for tax consequences. That is, the courts recognize that the plaintiff will be taxed on the award for cost of future care and make an upwards adjustment to the award to compensate.[73] Finally, if the plaintiff can establish that he or she requires professional assistance in managing an award of damages for future pecuniary loss, the plaintiff may be entitled to management fees to cover the cost of these services.[74]

1. Special Damages

Special damages compensate plaintiffs for all pre-trial monetary losses.[75] Special damages are generally less controversial insofar as they can be supported by evidence. Having said that, the plaintiff is required to plead and prove special damages to recover them. Not all special damages can be strictly proven,

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[70] *Id.* at 375-394, 449-455.

[71] *Id.* at 400 (noting that the discount rate may be legislated depending on the jurisdiction, though evidence may be adduced to show that the legislated discount rate is inappropriate in the circumstances).

[72] *Id.* at 83.

[73] *Id.* at 457.

[74] *Id.* at 119-124.

[75] The term "special damages" has been succinctly defined in Canada as "precisely calculable expenses or losses incurred prior to the date of decision . . . ." Butterill v. Via Rail Canada, Inc. (1980), 1 C.H.R.R. D/233, D/234 (Human Rights Rev. Trib.). With respect to the recovery of court order interest, the characterization of damages as "special" as opposed to "general" can be significant.

however, as loss of earning capacity can involve some degree of estimation. In assessing special damages, contingencies are properly taken into consideration, but given that the estimate of pre-trial loss of working capacity is based on "strong evidential indicators," they are less likely to play a significant role.[76]

a. Pre-trial Loss of Working Capacity

Under this head of damages, a plaintiff can recover for gross earnings lost between the injury and the date of trial. Salary loss generally makes up the largest part of the damages awarded under this head, but the plaintiff can also recover lost benefits, gratuities, profits, or other financial gains where those losses can be established on a balance of probabilities.[77] Other losses compensable under this head of damages include loss of homemaking capacity calculated at replacement cost,[78] and loss of shared family income, which aims to compensate a plaintiff for the lost financial benefits that flow from an interdependent relationship.[79] Damages for lost earnings will take into account any income the plaintiff is able to earn during the pre-trial period; but if the plaintiff is totally disabled, no deduction will be made from the post-injury, pre-trial income.[80] Where the plaintiff receives wage replacement indemnity benefits from a collateral source but still claims damages for pre-trial loss of working capacity, it must be determined whether, to avoid over-compensation, deduction should be made for such benefits. If such benefits are paid pursuant to private insurance or employment-based benefits plans, then they will not usually be taken into account, so no deduction will be made.[81]

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[76] COOPER-STEPHENSON, *supra* note 3, at 161-163.

[77] Proof of pre-trial loss of working capacity is frequently based on information contained in income tax returns or assessments. However, the failure to file an income tax return or to pay income tax (*e.g.*, on unreported income such as tips) does not preclude the plaintiff from proving his or her loss.

[78] COOPER-STEPHENSON, *supra* note 3, at 147. If a replacement expense has not been incurred, the loss of homemaking capacity is best treated as a non-pecuniary loss. *Id.*

[79] *Id.* at 145. The loss of an opportunity to form a permanent interdependent relationship is generally compensated by non-pecuniary damages.

[80] Rainaldi, *supra* note 9, at ch. 27, §84.

[81] One of the leading Canadian cases on this issue is Cunningham v. Wheeler, [1994] S.C.R. 359, *sub nom.* Cooper v. Miller. For further discussion of the issue of deduction for collateral benefits, see *infra* pp. 258-266.

b. Pre-trial Cost of Care

This head of damages includes all reasonable pre-trial expenses the plaintiff (or a third party on the plaintiff's behalf) would not have incurred but for the injury, and can therefore include hospitalization and medical expenses, as well as home and living expenses. Potential rights of subrogation (against the plaintiff and/or the defendants) available to providers of these types of services must be taken into account when assessing this head of damage. The court will allow recovery for any expense that the plaintiff honestly and reasonably determined would improve his or her mental or physical health. The eventual effectiveness of these expenditures is irrelevant. Note that the plaintiff may also recover damages for services voluntarily rendered even where the plaintiff did not incur an expense with respect to that service, though these damages may be subject to a trust in favour of the third party who performed the services.[82] Where it can be shown that an expense would have been necessary even if the injury had not occurred, the expense will not be recoverable.[83] The plaintiff must itemize the expenses under this head of the pecuniary loss claim.

2. *Damages for Future Loss of Working Capacity (General Damages)*

Traditionally known as loss of earnings, this head of damage is now identified as loss of working capacity to better recognize the several negative losses experienced by an injured plaintiff. A negative loss is the deprivation of a desirable item (such as the lost opportunity to obtain a promotion) as opposed to the acquisition of an undesirable item, the latter being characterized as a positive loss (such as rehabilitation costs).[84] Damages for future loss of working capacity are assessed according to their simple probability, but the assessment requires the estimation of the value of the plaintiff's work, an actuarial determination of the period of loss, any adjustment for contingencies, the application of a discount rate, any reduction for overlap or reduced need, and any deduction of collateral benefits.[85]

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[82] COOPER-STEPHENSON, *supra* note 3, at 173, 187.

[83] *Id.* at 164.

[84] *Id.* at 90, 202.

[85] *Id.* at 203-04.

a. Loss of Earnings

The plaintiff is entitled to compensation for all pecuniary gains that he or she would have made but for the injury. The onus is on the plaintiff to establish a real and substantial risk of loss of future income. Under this head, the plaintiff can recover projected salary loss and loss of benefits as well as loss of business profits and/or losses associated with the inability to pursue other income-producing activities. While the determination of the award under this head is partly mathematical, the court will consider all relevant factors and make an award that is reasonable in the circumstances.

Loss of earnings is calculated by subtracting from the income that the plaintiff would have earned between the date of trial and retirement the income that the plaintiff is now expected to earn over the same period. This net loss figure is then adjusted for life expectancy and a calculation is made of the amount that would have to be invested at the date of trial to replace these future net losses.[86] Loss of future pension income, if applicable, will also be included in this calculation.[87] Damages for loss of future earnings are calculated using gross, before-tax earnings. Therefore, the award is not grossed-up to account for income tax.[88]

b. Loss of Homemaking Capacity

This head of loss permits the plaintiff to recover damages for the value of household services the plaintiff would have been able to perform but for the injury and is thus distinguishable from the value of services the plaintiff must receive because of the injury.[89] This loss includes impairment of the ability to perform both management and manual tasks in the household context.[90] While replacement cost is not the only method of quantification of damages under this head of loss, it is the primary method of quantification.[91]

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[86] BRUCE, *supra* note 9, at 1-2.

[87] *Id.* at 20.

[88] COOPER-STEPHENSON, *supra* note 3, at 277.

[89] *Id.* at 315, where the author noted that the latter would be compensated under the cost of future care.

[90] *Id.* at 104, 312.

[91] *Id.* at 105, 318.

c. Loss of Shared Family Income

Plaintiffs can recover under this head for pecuniary loss associated with the loss of the ability to form a permanent interdependent relationship or to continue to benefit therefrom. Financial benefits of family income include joint income to which the plaintiff would have had access and shared living expenses. Courts recognize that the formation of interdependent relationships has both positive and negative financial effects and these effects are closely related to the individual's employment status. The assessment will be made on statistical evidence combined with consideration of actuarial evidence of the individual plaintiff's circumstances. The award for lost family income is generally combined with the award for loss of earnings and loss of homemaking capacity as these heads are interrelated.[92]

3. Damages for Future Cost of Care (General Damages)

Cost of future care includes medical, schooling, and personal care expenses that will arise in the future as a result of the injury (primarily positive losses). The plaintiff is entitled to compensation for any expenses that are reasonably necessary for rehabilitation or to provide the plaintiff with the lifestyle enjoyed before the injury, insofar as money can accomplish this objective. While the basis for an award under this head is a mathematical calculation, the court will also consider whether the award is reasonable and fair to both parties. The plaintiff's standard of proof is that of simple probability. An award for future care is final and it is not open to the plaintiff to return to the court to make a further claim.[93] In cases involving severe or catastrophic injury, particularly where the plaintiff is young, the cost of future care component of the damages award can involve significant amounts of money, thus increasing the likelihood that the issues surrounding its assessment will be hard fought. One of the more contentious issues may be the impact of government benefits on the plaintiff's needs and hence, the defendant's liability.[94]

In cases where the defendant is able to satisfy the court that the plaintiff will not incur any future costs for housing and attendant care because the plaintiff will live for the rest of his or her life in an institution at no cost (because such care is govern-

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[92] *Id.* at 342-43; *see also* Rainaldi, *supra* note 9, at ch. 27, § 66.1.

[93] Rainaldi, *supra* note 9, at ch. 27, § 58.1.

[94] *See* Krangle v. Brisco, [2002] 1 S.C.R. 205, ¶¶ 4, 28 for a recent example.

ment subsidized), it is possible that no award will be made for this component of future care costs, or a deduction will be made if there is only partial subsidization.[95] In the last decade particularly, there has been an increasing recognition by Canadian courts of the uncertainty of the continuing provision of universal and free government benefits, leading to adoption of various different approaches to assessing damages for future cost of care fairly and realistically.[96]

The lump sum for cost of future care is calculated by taking the base year annual cost of care and applying a growth rate to determine how costs will change in the future during the specific time period over which the care is expected to be required. A discount rate to reflect the present value of the future costs and life expectancy are then factored in to arrive at a lump sum estimate of the plaintiff's future costs of care.[97] Costs of future care awards are grossed-up to account for income tax.[98]

4. Survival Actions or Fatal Accident Claims[99]

a. Survival Actions

Legislation across Canada permits a plaintiff's estate to commence or continue a claim for personal injury damages (a "survival action") whether the plaintiff dies as a result of the defendant's wrongful act or some other unrelated cause.[100]

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[95] *See, e.g.*, Wipfli v. Britten (1984), 56 B.C.L.R. 273 (C.A.), *leave to appeal to the Supreme Court of Canada granted January 31, 1985, but apparently abandoned*; Tronrud v. French (1991), 75 Man. R.2d 1 (C.A.); D.W. v. Canada (1999), 187 Sask. R. 21 (Q.B.).

[96] *See, e.g.*, Jacobsen v. Nike Canada Ltd. (1996), 19 B.C.L.R.3d 63 (S.C.); Krangle v. Brisco, [2002] 1 S.C.R. 205; Stein v. Sandwich West (1995), 77 O.A.C. 40 (Ont. C.A.); Cherwoniak v. Walker (1999), 81 Alta. L.R.3d 214 (Q.B.), *aff'd* (2001), 293 A.R. 198 (C.A.); Elder v. Farrell, [1998] B.C. J. No. 2051 (S.C.) (QL).

[97] BRUCE, *supra* note 9, at 37.

[98] *Id.* at 45.

[99] For damages recoverable in these types of claims, see *infra* Appendices II and III.

[100] Alberta, Survival of Actions Act, R.S.A. 2000, c. S-27 (R.S.A., ch. S-27, § 2 (2000) (Alta.)); British Columbia, Estate Administration Act, R.S.B.C. 1996, c. 122, s. 59 (R.S.B.C., ch. 122, § 59 (1996) (B.C.)); Manitoba, Trustee Act, R.S.M. 1987, C.C.S.M. c. T160, s. 53 (R.S.M., ch. T160, § 53 (1987) (Man.)); New Brunswick, Survival of Actions Act, R.S.N.B. 1973, c. S-18 (R.S.N.B., ch. S-18, § 2 (1973) (N.B.)); Newfoundland, Survival of Actions Act, R.S.N. 1990, c. S-32 (R.S.N., ch. S-32, § 2 (1990) (Nfld.)); Nova Scotia, Survival of Actions Act, R.S.N.S. 1989, c. 453 (R.S.N.S., ch. 453, § 2 (1989) (N.S.)); Nunavut and the Northwest Territories, Trustee Act, R.S.N.W.T. 1988, c. T-8, s. 31 (R.S.N.W.T., ch. T-8, § 31 (1988) (Nun. / N.W.T.)); Ontario, Trustee Act, R.S.O. 1990, c. T.23, s. 38 (R.S.O., ch. T.23, § 23 (1990) (Ont.)); Prince Edward Island, Survival of Actions Act,

Theoretically, the damages are assessed in the same manner as they would be had the action been brought by the plaintiff: *i.e.*, according to the compensatory principles, using the actuarial method and on the basis of simple probability. In practice, however, the estate's right to recover damages is more limited than that of the plaintiff had he or she survived. The primary heads of recovery in a claim brought by the plaintiff's estate are for pecuniary loss and, in particular, for those losses incurred by the deceased up to the date of death: pre-death loss of working capacity; and past cost of care and other expenses, whether or not they have crystallized.[101]

The majority of survival action statutes limit the estate's right of recovery to those actual pecuniary (or monetary, or financial) losses suffered by the deceased or the estate, with the probable result that the estate is impliedly prohibited from recovering future loss of earnings.[102] Other statutes expressly exclude recovery for loss of earnings after death.[103] On the other hand, some of the statutes provide that an assessment of damages shall take into consideration any gain, profit, or advantage to the wrongdoer's estate, thereby preventing unjust enrichment.[104] Further-

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R.S.P.E.I. 1988, c. S-11 (R.S.P.E.I., ch. S-11, § 4 (1988) (P.E.I.)); Saskatchewan, Survival of Actions Act, S.S. 1990-91, c. 66.1 (S.S., ch. 66.1, § 3 (1990-91) (Sask.)); and the Yukon Territory, Survival of Actions Act, R.S.Y. 2002, c. 212 (R.S.Y., ch. 212, § 2 (2002) (Yukon)).

101 COOPER-STEPHENSON, *supra* note 3, at 721-726.

102 *See, e.g.*, Nova Scotia, Survival of Actions Act, R.S.N.S. 1989, c. 453, s. 4 (R.S.N.S., ch. 453, § 4 (1989) (N.S.)). New Brunswick, Newfoundland, and Prince Edward Island have similarly worded legislation.

103 *See, e.g.*, British Columbia, Estate Administration Act, R.S.B.C. 1996, c. 122, s. 59(3)(c) (R.S.B.C., ch. 122, § 59(3)(c) (1996) (B.C.)); and Saskatchewan, Survival of Actions Act, S.S. 1990-91, c. S-66.1, s. 6(2) (S.S., ch. S-66.1, § 6(2) (1990-91) (Sask.)). The Yukon Territory expressly excludes recovery of damages for expectancy of earnings but it does so in section 59(3)(c) of the Estate Administration Act, R.S.Y. 2002, c. 77 (R.S.Y., ch. 77, § 59(3)(c) (2002) (Yukon)). Alberta also explicitly precludes recovery of damages for future earnings including future loss of earning capacity in the Survival of Actions Act, R.S.A. 2000, c. S-27, s. 5(2)(c) (R.S.A., ch. S-27, § 5(2)(c) (2000) (Alta.)). The current position in Alberta reflects a 2002 amendment to the statute to counter the effect of two controversial decisions that permitted recovery of damages for future loss of earnings. *See* Galand Estate v. Stewart (1992), 6 Alta. L.R.3d 399 (C.A.); Duncan Estate v. Baddeley (1997), 50 Alta. L.R.3d 202 (C.A.), *application for leave to appeal dismissed,* [1997] S.C.C.A. No. 315 (QL).

104 *See, e.g.*, Newfoundland, Survival of Actions Act, R.S.N. 1990, c. S-32, s. 8(2) (R.S.N., ch. S-32, § 8(2) (1990) (Nfld.)). Note that this provision is unlikely to be of import where a death is caused through negligence. However, critics have noted that an assault could be motivated by profit, in which case the profit would be recoverable. COOPER-STEPHENSON, *supra* note 3, at 727.

more, legislation in most Canadian jurisdictions explicitly allows the estate to recover funeral expenses or the expense of disposing of the body even though such expenses would not otherwise be recoverable because they would ultimately be incurred in any event.[105]

b. Fatal Accident Claims

Fatal accident legislation has altered the common law to permit certain dependants of a deceased plaintiff to bring an action for damages suffered *by them* as a result of the death of another ("fatal accident claims").[106] Even so, fatal accident claims are derivative in the sense that the dependants can only sue for their own damages under the applicable fatal accidents legislation if the deceased could have maintained an action and recovered damages had death not ensued.[107] Although the permissible claimants vary from jurisdiction to jurisdiction, eligible dependants identified by the fatal accident statutes tend to include spouses (or common law partners), parents, children,[108] and, in more limited cases, siblings.[109] The definitions of "parent" and "child" vary as well. "Parent" can be broad enough to include step-parents and grandparents;[110] and "children" can include grandchildren, step-children, or those to whom the deceased stood *in loco parentis.*[111]

A dependant's right to recover non-pecuniary or punitive damages is discussed below. In respect of pecuniary loss, a de-

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[105] *See, e.g.*, Yukon Territory, Survival of Actions Act, R.S.Y. 2002, c. 212, s. 6 (R.S.Y., ch. 212, § 6 (2002) (Yukon)). The recovery of these expenses is frequently limited to those that are reasonable, and constitute an exception to the rule in many statutes that the damages should be calculated without reference to any gain or loss by the estate.

[106] Notably, the Ontario Family Law Act, R.S.O. 1990, c. F.3, s. 61 (R.S.O., ch. F.3, § 61 (1990) (Ont.)) permits statutory dependants to recover in the case of personal injury to another as well as the wrongful death of another.

[107] COOPER-STEPHENSON, *supra* note 3, at 636. Prince Edward Island is the exception to this general rule and would allow dependants to recover even if the deceased could not have maintained an action or recovered damages. Fatal Accidents Act, R.S.P.E.I. 1988, c. F-5, s. 2(2) (R.S.P.E.I., ch. F-5, § 2(2) (1988) (P.E.I.)).

[108] *See, e.g.*, the Northwest Territories and Nunavut, Fatal Accidents Act, R.S.N.W.T. 1988, c. F-3 (R.S.N.W.T., ch. F-3, § 3(1) (1988) (Nun. / N.W.T.)).

[109] *See, e.g.*, New Brunswick, Fatal Accidents Act, R.S.N.B. 1973, c. F-7, s. 3(1) (R.S.N.B., ch. F-7, § 3(1) (1973) (N.B.)).

[110] *See, e.g.*, British Columbia, Family Compensation Act, R.S.B.C. 1996, c. 126, s. 1 (R.S.B.C., ch. 126, § 1 (1996) (B.C.)).

[111] *See, e.g.*, Manitoba, The Fatal Accidents Act, R.S.M. 1987, C.C.S.M. c. F50, s. 1 (R.S.M., ch. F50, § 1 (1987) (Man.)).

pendant is generally entitled to recover some of his or her pecuniary loss and typical heads of recovery include special damages (pre-trial expenses), future loss of shared family income (dependency on income), future loss of family work (dependency on valuable services), and future loss of wealth (inheritance or estate).[112] As with a survival action, damages in a fatal accident claim are assessed in much the same way as they would be had the plaintiff brought the action *inter vivos.* Damages are awarded in a one-time lump sum that is assessed on the basis of actuarial evidence, and in accordance with the compensatory principle.[113] Regardless of the number of eligible dependants, only one fatal accident claim may be brought.[114] Therefore, each dependant's losses will be separately assessed and then added together to arrive at a final sum.[115]

It is important to recall that in a fatal accident claim brought by dependants, the deceased's anticipated expenditures will be taken into account in assessing a dependant's damages. That is, the deceased plaintiff would have spent some of his or her income on basic necessities, pleasurable activities, family and community contributions. Moreover, that income would have been taxable.[116] Damage awards for dependants will be based on the deceased plaintiff's after-tax earnings, but subsequently grossed-up to allow for future taxation.[117] The awards are also subject to adjustments for contingencies and will be discounted to allow for inflation and investment.[118] The dependants may also be entitled to management fees.[119] Finally, note that where a dependant inherits damages awarded pursuant to a survival action, they may have to be taken into account in assessing damages in a fatal accident claim.[120]

5. *Collateral Benefits*

Collateral benefits are benefits or payments received by the plaintiff and provided by or at the expense of a third party instead of being paid for personally by the plaintiff. The British

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112 COOPER-STEPHENSON, *supra* note 3, at 640-41.
113 *Id.* at 642-46.
114 *Id.* at 635.
115 *Id.* at 648.
116 *Id.* at 653.
117 *Id.* at 665, 707-09.
118 *Id.* at 700-07.
119 *Id.* at 648-49.
120 *Id.* at 719.

Columbia Court of Appeal has defined the term "collateral benefits" as follows:

> In general terms, collateral benefits are payments or benefits received by a tort victim (aside from the damages being claimed against the tortfeasor) which the tort victim would not have received but for the tort. The most common of these benefits are: private insurance proceeds, gifts from friends, contributions from charitable organizations, and a variety of statutory benefits, including Canada Pension Plan, Employment Insurance, Disability Pensions, Social Assistance Benefits, subsidized medical care, Workers' Compensation, criminal injuries compensation, No-fault Automobile Insurance Benefits, and so on . . . .[121]

Government or statutory benefits are merely one type of collateral benefit, but in Canada, where the social safety net is arguably a defining socio-cultural characteristic, they represent a significant category of collateral benefits. Government subsidies paid to a third party to defray the cost of goods or services provided to the plaintiff by the third party (such as a hospital, physiotherapist, residential care facility, or school) would also come within this definition, as would wage replacement benefits paid pursuant to a statutory scheme or private contract. One of the controversial, difficult, and changing areas of Canadian personal injury damages law is the treatment of collateral benefits within the overall methodology of damages assessment.

The basic principle of avoidance of double recovery that was enunciated by the Supreme Court of Canada in *Ratych v. Bloomer*[122] and *Cunningham v. Wheeler*[123]—two of the leading

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[121] M.B. v. British Columbia (2002), 99 B.C.L.R.3d 256, ¶ 16 (C.A.). The Supreme Court of Canada's judgment on appeal was released October 2, 2003, after this paper was submitted for the ABA Aviation and Space Law Committee TIPS Conference proceedings. *See* M.B. v. British Columbia, [2003] 2 S.C.R. 477. In what was technically *dicta*, the court reversed some of the British Columbia Court of Appeal's rulings about the treatment of social assistance benefits in the context of tort damages award assessments. *Id.*

[122] Ratych v. Bloomer, [1990] 1 S.C.R. 940. *Ratych* dealt with the deductibility of collateral benefits received by an employee from an employer pursuant to a collective agreement. *Id.* In *Ratych*, Justice McLachlin (now Chief Justice of Canada) re-emphasized the fundamental principle that the policy of tort law is to compensate the plaintiff and not to punish the defendant, and that the plaintiff is entitled only to full compensation, and not more. *Id.* ¶ 21. A failure to deduct collateral benefits amounts to double compensation or a windfall to the plaintiff and is to be avoided. *Id.* ¶ 22. Justice McLachlin reasoned that where the benefit was received pursuant to a collective agreement, the plaintiff had not made a direct personal contribution to a privately-funded benefit. Therefore, the benefit did not come within the private insurance exception to the deduction for collat-

cases on the collateral benefits issue—remains a fundamental aspect of damage assessment and is the source of the concern with collateral benefits. If a plaintiff will not incur any personal costs with respect to certain required goods or services because those services or goods (the benefit) will be provided to him or her at the expense of a third party such as government (*i.e.*, by a collateral source), if the benefit is a compensatory payment (*i.e.*, an indemnity payment) but not a private insurance payment, and if the third party has no right of subrogation in respect of such costs, then *prima facie*, no award to cover the cost of those

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eral benefits principle, so a deduction should be made to avoid over-compensating the plaintiff. *Id.* ¶ 52. But the apparent sweep of *Ratych* must be interpreted in light of the tempering effect of the same court's subsequent decision in Cunningham v. Wheeler, [1994] 1 S.C.R. 359, *sub nom.* Cooper v. Miller, which varied the characterization of collateral benefits received pursuant to a collective agreement or employment contract.

[123] Cunningham v. Wheeler, [1994] 1 S.C.R. 359. In a 4 to 3 split decision, the majority held that the private insurance exception to the rule against double recovery should be extended to payments received for loss of wages or disability benefits obtained pursuant to a collective bargaining agreement. *Id.* ¶ 31. Justice Cory, writing also for Justices Sopinka, Iacobucci and Major, held that the benefits for which employees have bargained in good faith should not be sacrificed simply because the mode of payment for such benefits is different from that in private insurance contracts. The majority held that as long as evidence is adduced showing that the employee–plaintiff pays in some manner for the benefits obtained under the collective agreement or contract of employment, then the insurance exception should apply, so that no deduction would be made from the plaintiff's award. *Id.* Proof of such payment would require evidence that the employee gave up some type of consideration in return for the benefits. *Id.* ¶¶ 34-38. Justices McLachlin, La Forest, and L'Heureux–Dubé dissented in part. They were of the view that where a plaintiff is indemnified for lost wages through disability benefits under a collective agreement or by payment from an employer, the plaintiff has suffered no loss and therefore is not entitled to compensation in respect of that head of damage. They reasoned that the tortfeasor should not be viewed as benefiting at the plaintiff's expense because the plaintiff would make the payments for the benefits regardless of whether or not the accident occurred. *Id.* ¶¶ 76-78.

The divergence of judicial opinion about the proper way to give effect to the compensatory principles of tort law, while not putting the plaintiff at risk for under-recovery with respect to costs that are subsidized by third party (particularly government) payments, is reflected in the case law. Different courts solve the problem different ways and even within a single jurisdiction, there does not appear to be complete unanimity of approach. It seems to be the view of the commentators that simple reference to the basic compensatory principle does not resolve the collateral benefits problem. Larger policy issues are in play and must be accounted for when deciding whether or not to make deductions. For a taste of some of the academic discussion on these issues, see COOPER–STEPHENSON, *supra* note 3, at 565 *et seq.* and WADDAMS, *supra* note 9, at p. 3-91, ¶ 3.1750.

goods or services should be made to the plaintiff. Alternatively, if the plaintiff will incur some costs, but will also receive subsidization from collateral sources, then corresponding deductions relating to those types of costs should be made from the damages award. The Supreme Court of Canada's recent decision in *Krangle (Guardian ad litem of) v. Brisco*[124] reiterates the principle of avoidance of double recovery, although it may also be viewed as acknowledging the additional uncertainties now facing litigants, judges, and juries in making an accurate and fair assessment of the costs of future care where the plaintiff does or will access government services or programs, or other collateral benefits. It is the treatment of collateral benefits in relation to the assessment of general prospective pecuniary damages, and particularly the cost of future care, that is likely to be the most contentious and problematic.

Historically, in personal injury cases, no deduction was made for payments received or receivable by plaintiffs from third parties because there was a disinclination, as a matter of social policy, "to 'subsidize' the wrongdoer by treating such benefits as credits against the damages payable."[125] There was also a concern that if such credit were given, the effect would be to discourage charitable efforts because contributors would be shocked at the notion that the plaintiff should be denied the benevolence of third parties and that the defendant should benefit from it.[126] This rationale for non-deduction from the plaintiff's damage award is still applied for gifts and private charity conferred on the plaintiff, although the courts will now sometimes invoke trust or restitutionary principles to require the plaintiff to repay the third party once recovery is obtained from the defendant.[127] It is arguable that government benefits are not equivalent to charitable gifts because they are publicly funded through tax dollars and hence are benefits conferred by society as a whole, as a matter of public policy, on individuals who suffer misfortune. The cases have responded to this argument in different ways. Government benefits that are not characterized as compensatory or in the nature of an indemnity may

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[124] Krangle v. Brisco, [2002] 1 S.C.R. 205.

[125] CASSELS, *supra* note 9, at 111, 377.

[126] *Id.* at 380-381 (citing Redpath v. Belfast & County Down Ry., [1947] N.I. 167; Parry v. Cleaver, [1970] A.C. 1, 14 (P.C.); Cunningham v. Wheeler, [1994] 1 S.C.R. 359, 370).

[127] *Id.* at 381.

be analogized to charitable gifts. In such instances, no deduction will be made from the tort award.[128]

In addition to the charitable contribution exception to the principle that deduction for collateral benefits should be made from compensatory pecuniary damages awards, a second exception is made where the collateral benefit received by the plaintiff is a privately-funded insurance benefit or should be characterized as such.[129] Such benefits include accident, disability, or life insurance policy payments for which the plaintiff has privately paid premiums, or pension or wage indemnity benefits conferred through the plaintiff's employment contract where there is proof that the plaintiff has made some form of sacrifice or contribution in exchange for the benefit.[130] Simply put, if the plaintiff has purchased or contributed towards such additional protection at his or her own expense, directly or indirectly, then those insurance benefits are not taken into account in assessing damages.

The third exception to the collateral benefits deduction principle arises where the third party conferring the benefit has a right of subrogation against the recipient of the benefit. In such scenarios, the plaintiff will end up under-compensated where a deduction is made from the plaintiff's award because he or she has received the benefit, but the third party can then pursue the plaintiff for indemnification if the plaintiff is compensated by

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[128] The decision of the British Columbia Court of Appeal in M.B. v. British Columbia (2002), 99 B.C.L.R.3d 256 (C.A.) illustrates this approach. The case addressed, *inter alia*, whether social assistance benefits should be deducted from the plaintiff's past loss of earnings award on the basis that such benefits are intended as wage replacement benefits. Justice Prowse refused to find that social assistance benefits are wage replacement payments, and characterized such benefits as akin to a charitable gift and therefore coming within the charitable gift exception to the rule against double recovery in tort damage awards. The law in other Canadian provinces on the proper characterization of social assistance benefits is not necessarily the same as that of British Columbia. *See, e.g.*, M.Y. v. Boutros, [2002] 6 W.W.R. 463 (Alta. Q.B.). In its recently released decision on the appeal of *M.B. v. British Columbia*, the Supreme Court of Canada disagreed with Justice Prowse's characterization of social assistance benefits as equivalent to charitable gifts. Rather, such benefits were found to be wage indemnity payments that *should* be deducted from any pre-trial wage loss award. Technically, because the British Columbia government's appeal on the vicarious liability issue was allowed, resulting in dismissal of the plaintiff's claim, there was no actual need to address the damages assessment issues raised on appeal. However, the court stated that the damages issues should be canvassed briefly "in the interest of providing guidance on the issues raised." *See* [2003] 2 S.C.R. 477, ¶ 19.

[129] Cunningham v. Wheeler, [1994] 1 S.C.R. 359.

[130] COOPER-STEPHENSON, *supra* note 3, at 567-68.

another for the same loss for which the third party made payment. Subrogation rights of third parties must also be taken into account if the right is exercisable directly against the tortfeasors. In such cases, the plaintiff should not recover equivalent damages from the tortfeasors because the plaintiff is not out-of-pocket, and the tortfeasors would be paying twice if both the plaintiff and the third party were to recover. It should be noted that many third party payors of insurance-like benefits retain a contractual or statutory right of subrogation.[131] Thus, in respect of such benefits, there are two bases—the private insurance exception and the subrogation exception—for not making a collateral benefits deduction.

The potential availability of government benefits particularly complicates the assessment of damages for future care costs because basic damages principles dictate that the assessment must be made once and for all at the time of trial, but must also ensure, as accurately as possible, full and fair[132] compensation to a plaintiff while not overcompensating at the expense of the defendant. Defendants will argue that they should not be responsible for costs that have been or will be covered by a third party and therefore not incurred or payable by the plaintiff, and that if they are required to cover costs that are in fact paid for or subsidized by the government or another third party source, the plaintiff is getting a windfall and the defendant is being penalized rather than simply being required to fully compensate the plaintiff.[133]

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[131] *Id.* at 568.

[132] Cassels writes:

> [W]hile the award must be "fair to both parties," the means of the defendant are irrelevant and the plaintiff is entitled to all expenses that can be justified and supported as expenditures that would be incurred by a reasonable person in the plaintiff's circumstances. Fairness has nothing to do with the defendant's ability to pay. It is achieved by ensuring that the plaintiff's claim is reasonable and justifiable.

CASSELS, *supra* note 9, at 119 (citing Thornton v. Prince George School Dist. No. 57, [1978] 2 S.C.R. 267, which was one of the "trilogy" of Supreme Court of Canada decisions on the assessment of damages in personal injury cases).

[133] A case that illustrates this type of reasoning is Wipfli v. Britten (1984), 56 B.C.L.R. 273, ¶ 74 (C.A.), in which the court held that the plaintiff was not entitled to recover from the defendant expenses that would be covered by government. CASSELS, *supra* note 9, at 122 (citing *Wipfli* and Semenoff v. Kokan, (1990), 42 B.C.L.R.2d 6 (S.C.), *varied by* (1990), 45 B.C.L.R.2d 294 (S.C.), *varied by* (1991), 59 B.C.L.R.2d. 195 (C.A.) as authority for the rule that "Where there is no right of subrogation, and the expenses will *clearly* and *certainly* be covered by a government agency, the plaintiff may not include these items in the claim"). *Wip-*

One of the counter-arguments at the policy level is that tort law includes a deterrence element, which dictates that tortfeasors should bear the full cost of their wrongdoing.[134] Furthermore, the risk in accepting the argument that over-compensation must be rigorously avoided (and so deduction should be made for collateral, and especially government benefits) is that, although apparently available, in reality, the government benefits may be denied to the plaintiff either outright or at some future time. Another risk is that the government may stop covering such costs or may introduce a user fee for which provision has not been made in the damage award. If any of these contingencies occurs, the plaintiff's award will have been reduced on the expectation of a collateral recovery that does not in fact occur. Alternatively, in respect of some types of expenditures that are initially provided at no cost to a plaintiff, the government may claim a right of indemnity or subrogation and seek reimbursement from the plaintiff if the plaintiff recovers damages for those expenses from the defendant. If the government seeks indemnification from the plaintiff, who then has to reimburse the government, then the plaintiff will not have been fully compensated if a deduction has been made from the damage award on the basis that the government will pay for those costs.

It is clear from the cases that detailed evidence about the nature and structure of the government benefits in issue, the plaintiff's eligibility for those benefits, and the sustainability of the benefits program will be important to determining whether various government benefits should be deducted from a particular plaintiff's pecuniary loss award. If it can be shown that: (1) a plaintiff will not be eligible for certain programs (perhaps because of a family means eligibility test, or because the handicaps or injuries are not sufficiently severe); (2) that the program is policy-based instead of being mandated and structured by legislation and is therefore much more susceptible to discontinuance depending on political developments; or (3) that there is a recognized funding crisis in respect of a program such that in reality its ability to deliver goods or services must be questioned on a reasonable analysis, then such factors should influence a

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fli dealt with whether account should be taken of the near-certainty that the plaintiff would live in an institution for his entire life and that the associated costs would be covered by government subsidization of the institution. *Wipfli* (1984), 56 B.C.L.R. 273 ¶ 74.

[134] CASSELS, *supra* note 9, at 378. For a more detailed analysis of the competing policy issues, see COOPER-STEPHENSON, *supra* note 3, at ch. 9 – Collateral Benefits.

court to treat the cost of the goods or services that might be paid for by government as being expenses for which the plaintiff should receive an award, rather than allowing no recovery or reducing an award by amounts notionally available from or supplied by the government.

The commentators identify that where the evidence shows that government benefits, to some level, will be available but there is uncertainty about the extent to which they will remain available to the particular plaintiff, a court has three basic options: (1) to allow potential double recovery by the plaintiff by making no deduction for the government benefits; (2) to deduct from the future care award, thereby potentially under-compensating the plaintiff and providing a windfall to the defendant; or (3) to try to achieve reimbursement of the party who actually does incur the cost.[135] Professor Cooper-Stephenson has described the ways in which the last option may be implemented as follows:

> The legal mechanisms for achieving the third solution include: (a) the doctrine of subrogation; (b) the imposition of a trust or direction for repayment of the third party benefactor; (c) the creation of a statutory right of action by the third party against the tortfeasors; and (d) respect for conditional benefits – benefits received on condition that, if damages are awarded, repayment will be made.[136]

Plaintiffs who aim to persuade a court that no deduction for government benefits availability should be made from the future care award should develop an argument that suggests to the court a reasonable and theoretically-sound basis for deviating from the basic "no-double-recovery" rule.

To summarize with respect to collateral benefits, the starting point under current Canadian law is that damage awards *should* include deduction for collateral benefits (such as government benefits) that are compensatory in nature, for which the plaintiff does not pay, and that result in the plaintiff not incurring costs that he or she would otherwise have to pay for personally. However, there are exceptions to this basic rule so that a deduction is not made where the collateral benefit is characterized as a charitable gift or a privately-funded insurance payment, or

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[135] Ratych v. Bloomer, [1990] 1 S.C.R. 940, 978 (describing this last option as "readjustment of the loss, usually involving transferring the benefit to the third party").

[136] COOPER-STEPHENSON, *supra* note 3, at 566.

where the payor of the collateral benefit has a right of subrogation against the plaintiff as recipient of the benefit.[137] Moreover, despite this starting point, it is apparent from recent cases that many judges will take judicial notice of the fact that in the current socio-economic climate, it cannot be said with certainty that government benefits—even those that we currently view as universal and free—can reasonably be viewed as being guaranteed to remain available in the future on the same basis as at present. Consequently, if a court is persuaded that there is insufficient certainty that benefits will continue to be available to the plaintiff into the future, it may refuse to make any deduction at all based simply on the current availability of such benefits.[138] Alternatively, it may refuse to award damages with respect to costs that are expected to be covered from a government collateral source, but it may add a contingency award to address the chance that in the future, the availability of the collateral benefits will change to the plaintiff's detriment.[139]

6. Subrogation

A simplistic definition of subrogation is that it involves the substitution of one person in the place of another.[140] A right of subrogation, whether afforded by contract, statute, or common law, is often thought of as allowing the subrogated party to "stand in the shoes" of another person and be subsumed to that person's rights, claims, and remedies vis-à-vis third parties. This is the first aspect of subrogation. But it is the second aspect of subrogation—an insurer's right "to recover from its insured any benefits actually received by him from a third party in diminution of the loss"[141]—that has the potential to dramatically affect a plaintiff's actual recovery, and hence is of considerable importance in assessing personal injury and wrongful death damages.

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[137] Under certain statutory benefit schemes, the government confers no-fault benefits but retains a right of subrogation not only against third parties but also potentially against the benefit recipient in the last resort. The same scheme may also provide for mandatory deductions from tort damage awards based on the plaintiff's right (even if unexercised) to receive such no-fault benefits. In such scenarios, the interface between the collateral benefits and subrogation issues is complicated, particularly where the situation involves defendants, plaintiffs, and third party benefit providers from different jurisdictions.

[138] *See, e.g.*, Jacobsen v. Nike Canada Ltd. (1996), 19 B.C.L.R.3d 63, ¶¶ 199-200. (S.C.).

[139] *See, e.g.*, Krangle v. Brisco, [2002] 1 S.C.R. 205, ¶ 43.

[140] HENRY SHELDON, THE LAW OF SUBROGATION 1 (2d ed. 1893).

[141] S.R. DERHAM, SUBROGATION IN INSURANCE LAW 1 (1985).

In the context of personal injury damages assessments, subrogation interrelates with the collateral benefits issues discussed earlier because in the majority of cases, the third parties who provide collateral benefits to plaintiffs are insurers, or tantamount to insurers. These third parties often acquire, by contract or by statute,[142] the right to subrogate, not only against third parties, but also against the plaintiff who is treated like an insured. It would seem, however, that the right to subrogate against one's own insured, who has recovered from a third party, is an equity-based right, although it may also be reinforced or reiterated by contract or legislation. Where insurers seek indemnification directly from their own insureds based on contractual rights articulated in the insurance policy, the courts construe the insurers' rights strictly.[143]

In each Canadian provincial or territorial jurisdiction there are various government-related bodies that are mandated to provide various benefits to persons injured or killed, or to their dependants. Such bodies include workers' compensation boards, hospital insurance commissions, departments of health, and government disability programs. Many of these bodies have statutory rights of subrogation, which often purport to amplify or modify common law rights of subrogation. A table listing the statutory provisions in each province and territory that provide these types of bodies with subrogation rights is found in Appendix IV.[144]

Where a third party who confers a collateral benefit has a right of subrogation against the plaintiff, the plaintiff will not be over-compensated if he or she recovers damages for the loss or injury addressed by the collateral benefit, because upon receipt of the damage award, the plaintiff can be forced to reimburse the third party. This is the rationale for the subrogation exception to the damages assessment principle that a deduction

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142 There may also be common law rights of subrogation, although these may be less robust than those conferred by contract or statute.

143 *See, e.g.*, Nat'l Fire Ins. Co. v. McLaren (1886), 12 O.R. 682 (Ch. D.); Confederation Life Ins. Co. v. Causton (1989), 38 B.C.L.R.2d 69 (C.A.). One of the leading cases on subrogation is Gibson v. Sun Life Assurance of Canada Ltd. (1984), 45 O.R.2d 326 (H.C.J.). Cooper-Stephenson discusses the issue of subrogation as a component of the broader issue of collateral benefits. COOPER-STEPHENSON, *supra* note 3, at 614-620.

144 The table set out in Appendix IV does not include any of the pertinent motor vehicle accident insurance legislation because it would not apply in aviation cases. However, much of the case law addressing subrogation by government entities could be expected to arise in the motor vehicle accident context.

should be made to take account of collateral benefits conferred on the plaintiff. What is difficult in the context of damage assessment is ensuring that an accurate and fair account is taken of the various potential rights of subrogation that may come into play.

One of the areas relating to subrogation that has the potential to raise difficult issues is the scope of provincial statutory quasi-insurer's subrogation rights in relation to parties in other jurisdictions. Different provincial legislative schemes may conflict, as may the common law rules in different provinces for dealing with collateral benefits and subrogation in the assessment of personal injury damages, potentially giving rise to constitutional jurisdiction issues. This can affect the extent to which a local court will permit a foreign insurer or quasi-insurer to exercise subrogation rights against a local defendant. For example, in some British Columbia cases involving motor vehicle accident claims, the British Columbia Court of Appeal refused to permit a foreign insurer to exercise subrogation rights against a British Columbia defendant on the basis that the foreign statutory subrogation provisions in question conflicted with local laws regarding liability for damages.[145] Although these cases are very specific to their facts, including the particulars of the legislative schemes involved, they highlight one of the uncertainties in respect of subrogation rights.

Generally, it has been the case that tortfeasors and their victims could expect private insurers to fully exercise their rights of subrogation. But that has not always been so with Canadian quasi-insurers, such as provincial government hospital insurance administrators and workers' compensation boards, who may have had certain statutory as well as common law rights of subrogation but often did not exercise them, or who were viewed as not having subrogation rights at all.[146] There appears, however,

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[145] United States of America v. Bulley (1991), 55 B.C.L.R.2d 212, ¶ 8. (C.A.). *See* Matilda v. MacLeod; Schaffer v. McPherson (2000), 182 D.L.R.4th 331, ¶ 7 (B.C.C.A.).

[146] Semenoff v. Kokan (1990), 42 B.C.L.R.2d 6 (S.C.), *varied by* (1990), 45 B.C.L.R.2d 294 (S.C.), *varied by* (1991), 59 B.C.L.R.2d 195 (C.A.) (illustrating the interaction between deduction for government benefits and rights of the government entity to subrogate). In *Semenoff,* Justice Hutcheon, for the court, described the decision in Flaherty v. Hughes (1952), 6 W.W.R. (N.S.) 289 (B.C.C.A.) as follows:

> But as I understand the decision in *Flaherty* and the decision in *Wipfli* the rationale in each case was that the plaintiff was not able to show he had suffered a loss; he was under no legal liability to pay

to be an increasing tendency for these quasi-insurers to actively and aggressively pursue their subrogation rights not only against third parties responsible for a plaintiff-insured's injuries and losses, but also against plaintiffs themselves who recover tort awards.[147] This development may affect the ultimate exposure faced by defendants in personal injury or wrongful death claims, and may also mandate different approaches by both plaintiffs and defendants to settlement and/or litigation in that the possibility of subrogated claims and the indemnification obligations of the plaintiff to the insurer or quasi-insurer may have to be factored into case management strategies.

In dealing with personal injury damage claims, counsel will have to keep in mind the possibility of subrogated claims by such government bodies. The structure and particulars of each statutory scheme, even if addressing the same area of benefits or compensation, is not necessarily the same from province to province, and therefore cases involving specific statutory schemes may not be useful in assessing issues that arise under different legislation.

B. Non-pecuniary Loss (General Damages)

1. *General Principles*

Non-pecuniary damages are general damages intended to compensate a plaintiff for intangible injuries including pain and suffering, loss of amenities (or loss of enjoyment of life), and

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the hospital and therefore was not entitled to be indemnified by the wrongdoer.

Id. ¶ 31.

The issue in *Semenoff* was whether or not the British Columbia Medical Services Commission had a right to bring a subrogated claim in Semenoff's action against the defendant for recovery of expenses paid on behalf of the Commission for medical services rendered to Semenoff. The Commission's subrogation right was predicated on the plaintiff having a "right of action against a third person for the amount" paid by the Commission. It was concluded, applying *Wipfli*, that because Semenoff had not incurred any cost or suffered any loss, he had no right of action against the defendant for those costs, and therefore the Commission did not have a subrogated claim and could not recover its expenses as against the defendant. As it was put by Justice Hutcheon: "I am compelled by the decisions in *Flaherty, Heltman,* [Heltman v. Western Canadian Greyhound Lines Ltd. (1966), 57 W.W.R. 440 (B.C.C.A.)] and *Wipfli* to hold that because Gordon Semenoff was under no legal obligation to pay the medical expenses, he has no right to recover them from Dr. Kokan." *Id.* ¶ 34.

147 *See, e.g.*, Her Majesty the Queen in Right of Ontario, represented by the Ontario Minister of Health v. Medwid, Court File No. 97-CV-133871SR. (Ont. Gen. Div.).

loss of expectation of life. Non-pecuniary damages may also include an award of aggravated damages. Non-pecuniary loss is assessed using a functional approach based on the plaintiff's overall psychological condition and his or her need for solace. Solace "is taken to mean physical arrangements which can make [the plaintiff's] life more endurable,"[148] potentially leading to the strange result that a severely injured plaintiff who is unaware of her surroundings may not be entitled to recover any damages under this head. Alternatively, the award of non-pecuniary damages may be assessed taking into consideration a plaintiff's reduced ability to appreciate what has been lost.[149]

Because these damages are based on a philosophical or policy approach rather than a legal or logical approach,[150] the functional approach has been modified to the extent that the plaintiff is not required to prove that the damages will provide him with solace and the court will not adjust the damages award to allow for positive or negative contingencies. Instead, the damages are awarded in a single lump sum (that is, they are assessed globally) taking into consideration awards in comparable cases, the plaintiff's need for solace depending on the extent and duration of the injury as well as the utility of this kind of damages award, the effect of inflation, and any concerns about overlap between types of damages or reduced need.[151] As a general rule, non-pecuniary damages do not need to be itemized because they are awarded in a lump sum, but the traditional categories of loss, articulated above, provide guidance as to the types of intangible losses that are compensable. It is important to emphasize that quantification of non-pecuniary damages is not a mechanical or systematized process driven by blind reference to monetary valuations of various types of intangible loss. Rather, the courts attempt to fashion a fair award in the specific circumstances of the case. Consequently, plaintiffs who suffer the same injuries might each receive different awards of non-pecuniary damages.

Despite the fact that non-pecuniary damages are within the discretion of the trial judge (or jury) in Canadian personal injury cases, they are subject to a rough upper limit, or a cap (the "Cap"), which applies in the case of severe or catastrophic inju-

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148 Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 262.

149 *See, e.g.*, McGlone v. Kelly (2002), 5 B.C.L.R.4th 134 (S.C.).

150 COOPER-Stephenson, *supra* note 3, at 495.

151 *Id.* at 512.

ries such as quadriplegia or profound brain injury.[152] Introduced by the Trilogy, a set of three Supreme Court of Canada cases, the Cap recognizes the need for relative consistency in awards and the need to limit the social burden of excessive awards of non-pecuniary damages. When the first of the Trilogy decisions, *Andrews v. Grand & Toy Alberta Ltd.*, was decided in January 1978, the Cap was set at $100,000. The Cap is adjusted for inflation using the current consumer price index and is currently somewhat in excess of $290,000.[153]

The Cap should not be exceeded unless special or exceptional circumstances justify an increased award. In 1995, the Supreme Court of Canada took the opportunity to reiterate that the Cap is a legal limit on non-pecuniary damages that was imposed as a "rule of law."[154] Consequently, although it is clear that in this area of damages assessment, courts are not rigidly bound by prior decisions or by a requirement that they make strictly mathematical *pro rata* awards depending on the nature and extent of the injuries, one is left to wonder what would constitute circumstances sufficient to permit an award in excess of the Cap. Clearly, such circumstances will be rare. *Fenn v. Peter-*

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[152] The Cap does not apply in defamation cases because general damages serve a different function in such cases. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, ¶ 168. It has also been held, in British Columbia, that the Cap does not apply where the cause of action is an intentional tort involving criminal behaviour such as sexual assault. Y.(S.) v. C.(F.G.) (1996), 26 B.C.L.R.3d 155 (C.A.). However, the Cap was held to apply to an award of punitive damages in an incest case. Ms. R. v. Mr. W., 2003 ABQB 50, [2003] A.J. No. 927 (QL).

[153] In a recent British Columbia Supreme Court judgment decided June 27, 2003, the court stated that the current value of the Cap is $294,700. *See* Lee v. Dawson (2003), 17 B.C.L.R.4th 80, ¶ 4 (S.C.). Bruce provides the method of calculation for determining the Cap. BRUCE, *supra* note 9. The Trilogy provided that the Cap is $100,000 measured in January 1978 dollars. Since that time, the practice has been to adjust the ceiling by dividing the current CPI by the January 1978 CPI and multiplying the resulting quotient by the known (earlier) dollar figure for the non-pecuniary damage in question. For example, to calculate the current Cap, determine the most recent CPI (122.1 as of June, 2003), divide this figure by 41.8 (the January 1978 CPI) and multiply the resulting quotient by $100,000 (the 1978 value of the Cap). This calculation can also be used to calculate the value of awards for particular non-pecuniary damage amounts at different points in time. For example, Bruce cites the 1984 non-pecuniary award of $60,000 for loss of a leg. BRUCE, *supra* note 9. The present value of the loss of a leg according to the 1984 figure can be determined using the same calculation. All that is required is to know the current CPI, the CPI at the time of the award, and the amount of damages assessed for the loss in question in the earlier case.

[154] ter Neuzen v. Korn, [1995] 3 S.C.R. 674, ¶ 114.

borough (City)[155] provides one example. In that case, the Ontario Court of Appeal awarded a severely injured plaintiff $125,000 in non-pecuniary damages notwithstanding the Cap. The Court of Appeal concluded that in addition to the change in the value of money since the Trilogy had been decided (approximately one and one half years earlier), the plaintiff had suffered more pain than any of the plaintiffs compensated in the Trilogy.[156]

2. *Survival Actions or Fatal Accident Claims*[157]

a. Survival Actions

Arguably, non-pecuniary damages should not be recoverable by the plaintiff's estate in survival actions because they are intended to provide solace to the plaintiff.[158] Claims for non-pecuniary damages are expressly excluded by statute in some jurisdictions and seem to be excluded by implication in others. In most Canadian jurisdictions, the survival action statutes provide that damages are limited to "actual pecuniary loss."[159] Several jurisdictions expressly exclude the right to recover damages for pain and suffering,[160] disfigurement,[161] loss of expectation of

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[155] Fenn v. City of Peterborough (1979), 25 O.R.2d 399 (C.A.), *aff'd sub nom.* Consumers Gas Co. v. Fenn, [1981] 2 S.C.R. 613.

[156] The plaintiff was horribly burned when a natural gas explosion demolished her house and killed her three young children.

[157] Damages recoverable in these types of claims are summarized in Appendices II and III to this paper. The following discussion suggests that non-pecuniary damages are not generally recoverable in survival actions or in fatal accident claims. This is not the case in Quebec, however, where non-pecuniary damages can be recovered in an action brought by the deceased plaintiff's estate or by a dependant. *See* Augustus v. Gosset, [1996] 3 S.C.R. 268.

[158] It seems obvious that the plaintiff would have to be alive to benefit from the intended solace. However, in the United States, nominal awards of damages have been made for pre-impact pain and suffering.

[159] *See* Alberta, Survival of Actions Act, R.S.A. 2000, c. S-27, s. 5(1) (R.S.A., ch. S-27, § 5(1) (2000) (Alta.)); New Brunswick, Survival of Actions Act, R.S.N.B. 1973, c. S-18, s. 5(1) (R.S.N.B., ch. S-18, § 5(1) (1973) (N.B.)); Newfoundland, Survival of Actions Act, R.S.N. 1990, c. S-32, s. 4 (R.S.N., ch. S-32, § 4 (1990) (Nfld.)); Nova Scotia, Survival of Actions Act, R.S.N.S. 1989, c. 453, s. 4 (R.S.N.S., ch. 453, § 4 (1989) (N.S.)); Prince Edward Island, Survival of Actions Act, R.S.P.E.I. 1988, c. S-11, s. 5 (R.S.P.E.I., ch. S-11, § 5 (1988) (P.E.I.)); Saskatchewan, Survival of Actions Act, S.S. 1990-91, c. S-66.1, s. 6(1) (S.S., ch. S-66.1, § 6(1) (1990-91) (Sask.)); Yukon Territory, Survival of Actions Act, R.S.Y. 2002, c. 212, s. 5 (R.S.Y., ch. 212, § 5 (2002) (Yukon)).

[160] *See* British Columbia, Estate Administration Act, R.S.B.C. 1996, c. 122, s. 59(3)(a) (R.S.B.C., ch. 122, § 59(3)(a) (1996) (B.C.)); Alberta, Survival of Actions Act, R.S.A. 2000, c. S-27, s. 5(2)(b) (R.S.A., ch. S-27, § 5(2)(b) (2000) (Alta.)); Saskatchewan, Survival of Actions Act, S.S. 1990-91, c. S-66.1, s. 6(2)(c) (S.S., ch. S-66.1, § 6(2)(c) (1990-91) (Sask.)); New Brunswick, Survival of Actions

life,[162] or loss of amenities.[163] Other Canadian statutes are silent on the issue. Claims for non-pecuniary loss may be permissible in Manitoba, Ontario, Nunavut, the Northwest Territories, and to a limited extent, British Columbia.[164] Non-pecuniary damages, where recoverable, are assessed on the same basis as they would be had the plaintiff brought the action.

Act, R.S.N.B. 1973, c. S-18, s. 5(1) (R.S.N.B., ch. S-18, § 5(1) (1973) (N.B.)); Nova Scotia, Survival of Actions Act, R.S.N.S. 1989, c. 453, s. 4(c) (R.S.N.S., ch. 453, § 4(c) (1989) (N.S.)); Newfoundland, Survival of Actions Act, R.S.N. 1990, c. S-32, s. 11(g) (R.S.N., ch. S-32, § 11(g) (1990) (Nfld.)); Prince Edward Island, Survival of Actions Act, R.S.P.E.I. 1988, c. S-11, s. 5(c) (R.S.P.E.I., ch. S-11, § 5(c) (1988) (P.E.I.)); Yukon Territory, Survival of Actions Act, R.S.Y. 2002, c. 212, s. 5 (R.S.Y., ch. 212, § 5 (2002) (Yukon)).

[161] *See* British Columbia, Estate Administration Act, R.S.B.C. 1996, c. 122, s. 59(3)(a) (R.S.B.C., ch. 122, § 59(3)(a) (1996) (B.C.)); Alberta, Survival of Actions Act, R.S.A. 2000, c. S-27, s. 5(2)(b) (R.S.A., ch. S-27, § 5(2)(b) (2000) (Alta.)); Saskatchewan, Survival of Actions Act, S.S. 1990-91, c. S-66.1, s. 6(2)(d) (S.S., ch. S-66.1, § 6(2)(d) (1990-91) (Sask.)); New Brunswick, Survival of Actions Act, R.S.N.B. 1973, c. S-18, s. 5(1) (R.S.N.B., ch. S-18, § 5(1) (1973) (N.B.)); Newfoundland, Survival of Actions Act, R.S.N. 1990, c. S-32, s. 11(g) (R.S.N., ch. S-32, § 11(g) (1990) (Nfld.)); Prince Edward Island, Survival of Actions Act, R.S.P.E.I. 1988, c. S-11, s. 5(d) (R.S.P.E.I., ch. S-11, § 5(d) (1988) (P.E.I.)); Yukon Territory, Survival of Actions Act, R.S.Y. 2002, c. 212, s. 5 (R.S.Y., ch. 212, § 5 (2002) (Yukon)).

[162] *See* British Columbia, Estate Administration Act, R.S.B.C. 1996, c. 122, s. 59(3)(b) (R.S.B.C., ch. 122, § 59(3)(b) (1996) (B.C.)); Alberta, Survival of Actions Act, R.S.A. 2000, c. S-27, s. 5(2)(b) (R.S.A., ch. S-27, § 5(2)(b) (2000) (Alta.)); Saskatchewan, Survival of Actions Act, S.S. 1990-91, c. S-66.1, s. 6(2)(a) (S.S., ch. S-66.1, § 6(2)(a) (1990-91) (Sask.)); Manitoba, Trustee Act, R.S.M. 1987, C.C.S.M. c. T160, s. 53(1) (R.S.M., ch. T160, § 53(1) (1987) (Man.)); Ontario, Trustee Act, R.S.O. 1990, c. T.23, s. 38(1) (R.S.O., ch. T.23, § 38(1) (1990) (Ont.)); New Brunswick, Survival of Actions Act, R.S.N.B. 1973, c. S-18, s. 5(1) (R.S.N.B., ch. S-18, § 5(1) (1973) (N.B.)); Nova Scotia, Survival of Actions Act, R.S.N.S. 1989, c. 453, s. 4(b) (R.S.N.S., ch. 453, § 4(b) (1989) (N.S.)); Prince Edward Island, Survival of Actions Act, R.S.P.E.I. 1988, c. S-11, s. 5(b) (R.S.P.E.I., ch. S-11, § 5(b) (1988) (P.E.I.)); Yukon Territory, Survival of Actions Act, R.S.Y. 2002, c. 212, s. 5 (R.S.Y., ch. 212, § 5 (2002) (Yukon)). Neither the Northwest Territories nor Nunavut expressly limit the right to recover damages for the loss of expectation of life. *See* Trustee Act, R.S.N.W.T. 1988, c. T-8 (R.S.N.W.T., ch. T-8 (1988) (Nun./N.W.T.)).

[163] *See* Alberta, Survival of Actions Act, R.S.A. 2000, c. S-27, s. 5(2)(b) (R.S.A., ch. S-27, § 5(2)(b) (2000) (Alta.)); Saskatchewan, Survival of Actions Act, S.S. 1990-91, c. S-66.1, s. 6(2)(e) (S.S., ch. S-66.1, § 6(2)(e) (1990-91) (Sask.); Prince Edward Island, Survival of Actions Act, R.S.P.E.I. 1988, c. S-11, s. 5(b) (R.S.P.E.I., ch. S-11, § 5(b) (1988) (P.E.I.)).

[164] COOPER-STEPHENSON, *supra* note 3, at 738.

b. Fatal Accident Claims

At common law, third parties (*e.g.*, dependants) were generally not permitted to recover damages for their non-pecuniary losses suffered as a result of the wrongful death of another. It seems that this position has been altered in Alberta[165] and Nova Scotia,[166] but it is debatable whether this position has been statutorily changed in other Canadian jurisdictions.[167] While recovery for losses in the nature of guidance, care, and companionship is possible in many Canadian jurisdictions, recovery may be based on the view that these losses are properly characterized as pecuniary rather than non-pecuniary losses.[168] For instance, in British Columbia,[169] the legislation applicable to fatal accident claims is somewhat ambiguous as it refers only to "damages." It has been held that non-pecuniary damages are not compensable,[170] but it has also been stated that an exception may exist where cultural differences justify a departure from the general rule.[171] A better explanation of the "exception" may be that loss of care and guidance is actually a pecuniary loss that is more frequently awarded to children but it is a loss recoverable by parents if the circumstances so require. The

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[165] Damages for "grief" or loss of "guidance, care and companionship" are mandatory. *See* Fatal Accidents Act, R.S.A. 2000, c. F-8, s. 8 (R.S.A., ch. F-8, § 8 (2000) (Alta.)). While the loss of "guidance, care and companionship" may be construed as a pecuniary claim, grief is an intangible loss and most probably falls under the rubric of a non-pecuniary loss. *Id.*

[166] Non-pecuniary damages are expressly recoverable in fatal accident claims in Nova Scotia. *See* Fatal Injuries Act, R.S.N.S. 1989, c. 163, s. 5(2) (R.S.N.S., ch. 163, § 5(2) (1989) (N.S.)).

[167] The Yukon Territory limits recovery to pecuniary loss. Fatal Accidents Act, R.S.Y. 2002, c. 86, s. 3(2) (R.S.Y., ch. 86, § 3(2) (2002) (Yukon)).

[168] There is a good discussion of the issue in Balmer Estate v. Hrehirchuk (1998), 63 B.C.L.R.3d 288 (S.C.), wherein the judge refers to Supreme Court of Canada authority. Compare this decision and the authorities cited therein with Lord v. Downer, [1998] O.J. No. 2623 (Gen. Div.) (QL), *aff'd* (1999), 179 D.L.R.4th 430 (Ont. C.A.), *application for leave to appeal dismissed*, [1999] S.C.C.A. No. 571 (QL).

[169] Other jurisdictions have similarly-worded statutes. *See* Saskatchewan, The Fatal Accidents Act, R.S.S. 1978, c. F-11, s. 4(1) (R.S.S., ch. F-11, § 4(1) (1978) (Sask.)); Newfoundland, Fatal Accidents Act, R.S.N. 1990, c. F-6, s. 6(1) (R.S.N., ch. F-6, § 6(1) (1990) (Nfld.)); the Northwest Territories, Fatal Accidents Act, R.S.N.W.T. 1988, c. F-3, s. 3(2) (R.S.N.W.T., ch. F-3, § 3(2) (1988) (N.W.T.)). The latter statute applies in Nunavut as well.

[170] *See, e.g.*, Bianco Estate v. Fromow, (1998), 161 D.L.R.4th 765 (B.C.C.A.); Ruiz v. Mount Saint Joseph Hospital, 2001 BCCA 207, 2001 B.C.A.C. LEXIS 143.

[171] Lian v. Money (1994), 93 B.C.L.R.2d 15 (S.C.), *aff'd on this ground* (1996), 15 B.C.L.R.3d 1 (C.A.).

Manitoba, Ontario, and Prince Edward Island statutes support this conclusion because although they permit recovery for the loss of "guidance, care and companionship," they also provide that damages in fatal accident claims are limited to pecuniary loss.[172] New Brunswick further confuses the issue by restricting recovery to pecuniary loss in one provision,[173] but permitting parents to recover for "grief," as well as "loss of companionship," in another provision.[174]

In one recent Alberta case,[175] a 57-year-old man claimed damages for "grief" and "loss of guidance, care and companionship" when his 84-year-old mother was killed in a motor vehicle accident, despite the age restriction in the Alberta statute. The court denied the claim on the basis of his age, finding that the statute only permitted dependants in a vulnerable age group to recover damages under these heads. The court further concluded that the legislation did not violate Section 15(1) of the *Charter of Rights and Freedoms*.[176]

3. Aggravated Damages

a. Claims by the Injured Plaintiff

Aggravated damages present an exception to the general rule that non-pecuniary damages need not be itemized. Aggravated damages are a separate category of non-pecuniary damages designed to compensate for injured feelings arising not from the injury, but from the manner in which the wrongful act was committed. In *Hill v. Church of Scientology*, Justice Cory held that "[a]ggravated damages may be awarded in circumstances where

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[172] *See* Manitoba, The Fatal Accidents Act, R.S.M. 1987, C.C.S.M. c. F50, ss. 3(2) & 3.1 (R.S.M., ch. F50, §§ 3(2), 3.1 (1987) (Man.)) (making damages for the loss of "guidance, care and companionship" mandatory). *See* Ontario, Family Law Act, R.S.O. 1990, c. F.3, ss. 61(1) & 61(2)(e) (R.S.O., ch. F.3, §§ 61(1), 61(2)(e) (1990) (Ont.)) (making such damages discretionary); *see also*, Prince Edward Island, Fatal Accidents Act, R.S.P.E.I. 1988, c. F-5, ss. 6(2) & 6(3)(c) (R.S.P.E.I., ch. F-5, §§ 6(2), 6(3)(c) (1988) (P.E.I.) (permitting recovery only for pecuniary loss, and specifically for the loss of "guidance, care and companionship" as "additional" damages).

[173] New Brunswick, Fatal Accidents Act, R.S.N.B. 1973, c. F-7, s. 3(2) (R.S.N.B., ch. F-7, § 3(2) (1973) (N.B.)).

[174] *Id.* § 3(5).

[175] Ferraiuolo v. Olson, 2003 ABQB 330, 2003 AB. C. LEXIS 1454.

[176] The plaintiff was successful, in part, in his claim for damages for loss of earning capacity under Alberta's Survival of Actions Act, R.S.A. 2000, c. S-27 (R.S.A., ch. S-27 (2000) (Alta.)). The court did not discuss the amendments to the statute, but the action may have been brought prior to the amendments prohibiting damages for prospective earnings loss.

the defendants' conduct has been particularly high-handed or oppressive."[177] Hence, they are most often awarded in cases of intentional tort such as assault or battery. Nevertheless, there is nothing to preclude the award of aggravated damages in negligence cases.[178] For example, they have been awarded where the negligent conduct is criminal in nature.[179] Because aggravated damages are awarded separately from the global sum for non-pecuniary loss, it is not yet clear whether aggravated damages form part of the overall non-pecuniary award subject to the Cap.[180]

b. Survival Actions or Fatal Accident Claims

As a type of non-pecuniary loss, it is likely that claims for aggravated damages in survival actions are excluded by implication in the majority of Canadian jurisdictions.[181] Only Saskatchewan explicitly excludes claims for aggravated damages in survival actions. In every other jurisdiction, the legislation is silent, but the case law seems to support the view that aggravated damages are not generally recoverable in survival actions.[182]

It is evident from the general discussion on non-pecuniary damages in fatal accident claims that a dependant's right to recover non-pecuniary damages is questionable at best. The right to recover aggravated damages is made more difficult by virtue of the fact that the fatal accident legislation across Canada, with one exception, is silent on the issue of non-pecuniary damages generally and, without exception, on the issue of aggravated damages. The safest conclusion, it seems, is that aggravated damages are not recoverable in fatal accident claims unless the

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[177] Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, ¶ 188.

[178] Bob v. Bellerose (2003), 16 B.C.L.R.4th 56, ¶ 32 (C.A.).

[179] *Id.*

[180] *Id.* ¶ 3.

[181] As mentioned above, most survival action statutes limit recover to actual pecuniary loss.

[182] In Allan Estate v. Co-operators Life Insurance Co. (1999), 62 B.C.L.R.3d 329, ¶ 72 (C.A.), the British Columbia Court of Appeal held that "[t]he damages which may be recovered under the *Estate Administration Act* are the damages that reflect a diminution of the personal estate of the deceased, whether they are for damage or loss to the person or damage or loss to property, and nothing more." *Id.*; *see also* Campbell v. Read (1987), 22 B.C.L.R.2d 214 (C.A.); Davie Estate v. Yukon Territory (Commissioner), [1993] Y.J. No. 74 (S.C.) (QL); Young Estate v. Transalta Utilities Corp., [1996] A.J. No. 138 (Q.B.) (QL).

claim is brought in Nova Scotia, which expressly provides for the recovery of non-pecuniary damages.[183]

IV. NON-COMPENSATORY DAMAGES

As stated in the introduction to this paper, non-compensatory damages can be awarded in addition to those damages intended to compensate a plaintiff. Such damages go beyond the realm of compensation and, in the personal injury and wrongful death context, generally aim to punish the tortfeasor and deter future occurrences of the same wrong. Punitive or exemplary damages are quantified having regard to several factors, including: whether the award will serve some rational purpose; the conduct of the parties; the quantum of the compensatory component of the damages award; the tortfeasor's ability to pay; and any criminal proceedings or fines.[184] Alternatively, non-compensatory damages may be awarded where the plaintiff has a cause of action against a tortfeasor but cannot adequately establish his or her loss. As the name suggests, the sum awarded is usually trivial, and accordingly, does not truly compensate the plaintiff.[185]

A. Nominal Damages

Nominal damages may be awarded where the plaintiff has established a cause of action against the defendant but is unable to establish a right to compensatory damages, recovery is otherwise barred, or the plaintiff cannot adequately quantify his or her loss.[186] Awards of nominal damages should be relatively infrequent in the aviation context where most actions will be based in negligence, which requires proof of damage. Nonetheless, to recognize a technical infringement of rights, an award could be made in a negligence action where the plaintiff fails to quantify his or her loss despite the ability to do so.[187]

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[183] Nova Scotia, Fatal Injuries Act, R.S.N.S. 1989, c. 163, s. 5(2) (R.S.N.S., ch. 163, § 5(2) (1989) (N.S.)). The Ontario Court of Appeal confirmed that aggravated damages were not recoverable under the Family Law Act, R.S.O. 1990, c. F.3, s. 61 (R.S.O., ch. F.3, § 61 (1990) (Ont.)), even assuming other types of non-pecuniary loss were recoverable. *See* Lord v. Downer (1999), 179 D.L.R.4th 430 (Ont. C.A.), *application for leave to appeal dismissed*, [1999] S.C.C.A. No. 571 (QL).

[184] Cooper-Stephenson, *supra* note 3, at 98-99.

[185] *Id.* at 99-100.

[186] Rainaldi, *supra* note 9, at ch. 27, § 1.

[187] Cooper-Stephenson, *supra* note 3, at 100-01.

B. Punitive or Exemplary Damages

1. *Claims by the Injured Plaintiff*

Punitive (or exemplary) damages fall under the rubric of non-compensatory damages because, as their name suggests, they are designed to punish the defendant rather than compensate the plaintiff. Theoretically, such awards should be rare in the case of a personal injury or wrongful death because it has been held that they are only justified where the defendant's malicious, vindictive, or reprehensible conduct constitutes an independently actionable wrong.[188] Given that most personal injury or wrongful death claims in the aviation context will be based in negligence, it is difficult to conceive of a situation that would attract an award of punitive (or exemplary) damages. In practice, courts appear to award punitive damages where the defendant's misconduct is so outrageous that a sanction is required to punish the defendant and deter recurrences whether or not the conduct constitutes an independently actionable wrong.[189] Nevertheless, punitive damages in negligence actions for personal injury are generally limited to situations involving recklessness[190] or bad faith.[191]

2. *Survival Actions or Fatal Accident Claims*

a. Survival Actions

Because punitive or exemplary damages are designed to punish the defendant, they should not be precluded by reason of the plaintiff's death. However, survival action statutes expressly exclude recovery of punitive or exemplary damages in several jurisdictions.[192] While claims for punitive damages are expressly permitted in Saskatchewan and New Brunswick, their permissi-

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188 Vorvis v. I.C.B.C., [1989] 1 S.C.R. 1085.

189 The requirements for an award of punitive damages are set out in Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, ¶ 196, and were recently affirmed in Whiten v. Pilot Ins. Co., [2002] 1 S.C.R. 595.

190 Robitaille v. Vancouver Hockey Club Ltd. (1981), 30 B.C.L.R. 286 (C.A.).

191 *See* Coughlin v. Kuntz (1989), 42 B.C.L.R.2d 108 (C.A.); McBeth v. Boldt (1998), 164 D.L.R.4th 247 (B.C.C.A.).

192 Punitive damages cannot be recovered in a survival action in Alberta, the Yukon Territory, Newfoundland, Nova Scotia, or Prince Edward Island. Manitoba excludes recovery where the plaintiff's death is caused by the tort. See Appendix II to this paper.

ble recovery can only be implied in other Canadian jurisdictions where the legislation is silent.[193]

b. Fatal Accident Claims

The rationale for punitive or exemplary damages persists where the claim is brought by a dependant in a fatal accident claim, but it is not clear whether punitive damages will be awarded. New Brunswick is exceptional insofar as it expressly permits a dependant to recover exemplary or punitive damages in an appropriate case notwithstanding that the statute otherwise limits recovery to pecuniary loss.[194] All other legislation dealing with fatal accident claims is silent on the issue of punitive or exemplary damages. As discussed above, some of the fatal accident statutes restrict recovery to pecuniary loss.[195] This would appear to preclude an award of punitive damages.[196]

V. THE AVAILABILITY OF JURY TRIALS AND JUDICIAL TREATMENT OF JURY AWARDS

Jury trials are available for all civil cases in every jurisdiction in Canada except Quebec, which prohibits the use of juries in civil trials.[197] Civil jury trials are more frequent in British Columbia and Ontario than in other Canadian jurisdictions.[198] In British Columbia and Ontario, jury trials for personal injury have been referred to as common,[199] but note that in a 1978 case, Justice Bouck for the British Columbia Supreme Court stated in dicta that "less than 2% to 3% of personal injury actions tried in Brit-

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193 These provinces are British Columbia, the Northwest Territories, Nunavut, and Ontario. In Manitoba, recovery can be implied where the plaintiff dies from an unrelated cause.

194 New Brunswick, Fatal Accidents Act, R.S.N.B. 1973, c. F-7, s. 6(4) (R.S.N.B., ch. F-7, § 6(4) (1973) (N.B.)).

195 *See, e.g.*, the Yukon Territory's Fatal Accidents Act, R.S.Y. 2002, c. 86, s. 3(2) (R.S.Y., ch. 86, § 3(2) (2002) (Yukon)).

196 This was the conclusion in Lord v. Downer (1999), 179 D.L.R.4th 430 (Ont. C.A.), *application for leave to appeal dismissed*, [1999] S.C.C.A. No. 571 (QL); *see also* Nichols v. Guiel (1983), 145 D.L.R.3d 186 (B.C.S.C.); Campbell v. Read (1987), 22 B.C.L.R.2d 214 (C.A.).

197 Jeremy Solomon, *A Civil Jury: A Comparative Study of the Selection of Jurors in Ontario and the United States*, *in* PRACTICAL STRATEGIES FOR PERSONAL INJURY LAWYERS: "TRICKS OF THE TRADE": PLAINTIFF AND DEFENCE STRATEGIES FOR SUCCESS IN A BILL 59 ENVIRONMENT ¶ 29 (2002) (QL).

198 *Id.*

199 WADDAMS, *supra* note 9, at p. 13-25, ¶13.470; *see also* Halbot v. Little, [2003] O.J. No. 520, ¶ 9 (QL), 2003 ON. C. LEXIS 4737, ¶ 9 (S.C.J. [Master]).

ish Columbia are decided by a jury."[200] In a paper written on national developments in product liability, the author stated that jury trials for product liability claims are the exception rather than the rule.[201] In an Ontario paper, the author stated that in 1996, 22% of civil cases in Ontario had jury trials and that the majority of those cases were motor vehicle accident cases.[202]

Once a jury arrives at a determination on the quantum of damages payable to the plaintiff, in British Columbia at least, a trial judge cannot reject that finding unless there is no evidence at all to support the jury's conclusion or unless the jury's finding is equivocal. In this case, the trial judge can redirect the jury and if the jury returns with the same response, may direct a new trial. With the exception of an award of non-pecuniary damages that exceeds the Cap, even if the jury has made an unjust or perverse award, as long as there is some evidence to support the award, it is generally held to be the role of the appellate court and not the trial judge to correct it.[203] The necessary conclusion is that a trial judge is obligated to treat a jury's determination of quantum with deference. This is consistent with the following statement from *Force v. Gibbons*:

> The value of the jury system is that it brings to the law the application of the common sense existing in the community. If judges alone fix all the damages in personal injury actions it is thought that because of the "cloistered" position they might not keep pace with the times.
>
> In some instances judges' awards might be too low, in others too high. The jury, therefore, has an educating effect upon the law because if juries consistently award damages which are markedly different than those fixed by judges themselves then it seems the judiciary should examine the basis for its assessments.[204]

This passage was recently quoted with approval by the British Columbia Court of Appeal where Justice Thackray held that

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[200] Force v. Gibbons (1978), 93 D.L.R.3d 626, 632 (B.C.S.C.). Cooper-Stephenson wrote that personal injury claims are tried before juries on the "comparatively rare occasion." COOPER-STEPHENSON, *supra* note 3, at 524.

[201] Robert B. Bell, *Product Liability: Recent Developments of Importance, in* LEXPERT ARTICLES ON RECENT LEGAL DEVELOPMENTS, CANADIAN LEGAL LEXPERT DIRECTORY 2000 (2000) (QL).

[202] SOLOMON, *supra* note 197, ¶ 1.

[203] THE LAW REFORM COMMISSION OF BRITISH COLUMBIA REVIEW OF CIVIL JURY AWARDS, L.R.C. 75 (1985).

[204] Force v. Gibbons (1978), 93 D.L.R.3d 626, 632 (B.C.S.C.).

"the view of the judiciary is that judge-made awards are not inherently superior to jury awards."[205]

The Supreme Court of Canada has ruled that a trial judge must reduce a jury's award of non-pecuniary damages to conform with the Cap where the award that exceeds it.[206]

> Whether the jury is or is not advised of the upper limit, if the award exceeds the limit, the trial judge should reduce the award to conform with the "cap" set out in the trilogy and adjusted for inflation. While a trial judge does not sit in appeal of a jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgment for an amount that as a matter of law is excessive.[207]

This statement infers that a trial judge is only justified in adjusting a jury award for damages where it is excessive as a matter of law and that consideration of a jury award beyond that standard is for the appellate court.

Apart from the issue of exceeding the Cap in respect of non-pecuniary damage awards, as a general rule, appellate courts will not set aside a lower court's assessment of damages merely because the appellate court would have arrived at a different conclusion.[208] In *Nance v. B.C. Electric Railway*,[209] Viscount Simon gave the leading judgment on this subject:

> Whether the assessment of damages be by a Judge or a jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then, before the Appellate Court can properly intervene, it must be satisfied either that the Judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate . . . *[W]hen on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at*

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205 Brisson v. Brisson (2002), 213 D.L.R.4th 428, ¶¶ 21-26 (B.C.C.A.).

206 ter Neuzen v. Korn, [1995] 3 S.C.R. 674.

207 *Id.* ¶ 114. For a recent confirmation that a trial judge has a duty to reduce a jury award for general damages that exceeds the Cap, see Lee v. Dawson (2003), 17 B.C.L.R.4th 80 (S.C.); and Maodus v. Zeidler & Walker Ltd., No. C21926/99 (Ont. S.C.J. May 14, 2003).

208 WADDAMS, *supra* note 9, at 13-22, ¶13.420.

209 Nance v. B.C. Electric Ry., [1951] 3 D.L.R. 705, 713-714 (P.C.).

which they could properly have arrived must, to justify correction by a Court of Appeal, be even wider than when the figure has been assessed by a Judge sitting alone. The figure must be wholly "out of proportion."[210]

There are cases that suggest that jury awards should only be set aside by an appellate court where they are "perverse, unconscionable, shocking to the conscience of the court, indicating gross error or improper motive, or when such as no reasonable jury acting judicially could have reacted."[211] Since the Supreme Court clearly articulated some limits in the Trilogy, appellate courts interfere with jury awards more readily on the basis that the jury has made a gross error in arriving at a non-pecuniary damages award.[212] If an appellate court decides that justice requires an interference with a jury award of damages, the proper remedy is to order a new trial, unless the parties consent to the appellate court substituting its own assessment,[213] or the appellate court is permitted to do so by legislation.[214]

Bob v. Bellerose[215] is a recent example of both trial and appellate level treatment of an excessive jury award for non-pecuniary damages for personal injury. Mr. Bob was the victim of a carjacking during which Mr. Bob was dragged by the vehicle over a city block. Mr. Bob suffered serious physical and psychological injuries that will plague him for the rest of his life. The jury's non-pecuniary damages award included $500,000 for "pain, injury, suffering and loss of enjoyment of life," and $75,000 for aggravated damages. The trial judge, with counsels' agreement, reduced the $500,000 award to $281,000 to comply with the Cap imposed by the Trilogy. The trial judge ruled that the $75,000 aggravated damages award was not subsumed within the Cap.[216]

The appellate court considered the defendant's appeal on the ground that the adjusted award was so high as to be wholly erroneous.[217] The majority found that even the adjusted award was not supportable and stated that while the historical solution has been to order a new trial, they found themselves to be in the

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[210] *Id.* (emphasis added).

[211] WADDAMS, *supra* note 9, at 13-23, ¶13.440.

[212] *Id.* at 13-25, ¶13.470.

[213] *Id.* at 13-24, ¶13.450.

[214] *See, e.g.*, the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 119 (R.S.O., ch. C.43, § 119 (1990) (Ont.)) (discussed in Padfield v. Martin (2003), 64 O.R.3d 577 (C.A.)).

[215] Bob v. Bellerose (2002), 98 B.C.L.R.3d 384 (S.C.), *varied on appeal* (2003), 16 B.C.L.R.4th 56 (C.A.).

[216] *Id.*

[217] *Id.*

place of a court of first instance and reduced the award for non-pecuniary damages to $200,000.[218] The majority also upheld the award of $75,000 for aggravated damages, but since the total non-pecuniary damages would then be $275,000, they did not address the issue of whether or not aggravated damages would be included in the capped amount.[219] Justice Newbury, in dissent, agreed with the majority's reduction of the non-pecuniary damages figure to $200,000, but would have fixed the aggravated damages at $10,000 as the jury's award was, in her view, unreasonable and inordinately high.[220]

The Nova Scotia Court of Appeal has considered an appeal on the ground that a jury award for personal injury damages was so inordinately high as to be wholly erroneous.[221] The court upheld the jury's awards under all heads, including general damages, noting that the general damage award did not exceed the Cap on general damages.[222] In conclusion, the court made the following statement about appellate courts' powers to adjust jury damage awards: "Even if we were in disagreement with the amounts set by the jury, this court would not be justified in intervening unless the figures were 'wholly out of all proportion . . . .'"[223]

VI. PERIODIC PAYMENT AWARDS AND STRUCTURED SETTLEMENTS

The following definition of a structured settlement, articulated in 1981, is still frequently cited in Canada, and also explains the primary advantage of such settlements:

> Structured settlements are a means whereby all or part of the damages are paid to a claimant by means of periodic payments rather than by means of a lump sum. Perhaps the prime advantage of a structured settlement is that payments are received tax free in the hands of the plaintiff whereas if the plaintiff had used the lump sum to purchase an annuity the interest portion of the annuity payment would be subject to income tax.[224]

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218 *Id.*

219 *Id.*

220 *Id.*

221 Binder v. Mardo Constr. (1994), 136 N.S.R.2d 20 (C.A.).

222 *Id.*

223 *Id.*

224 Yepremium v. Scarborough General Hospital (No. 2) (1981), 31 O.R.2d 384, 387 (H.C.J.); *see also* Fuchs v. Brears (1986), 44 Sask. R. 112 (C.A.); Bowser v. Bowser, [1998] O.J. No. 2085, ¶¶ 12-13 (C.A.)(QL). For a succinct explanation of the conditions necessary to maintain the tax exempt status of structured settle-

Structured settlements can be used in Canada only where all parties expressly and mutually consent to their use,[225] or where legislation specifically authorizes courts to use them as a means of damages assessment. Thus, courts are not at liberty to make periodic payment damages awards on their own initiative in the absence of enabling legislation.[226]

It has long been recognized that the historical common law rule[227] that tort damages are to be awarded on a one-time, lump sum basis can potentially work injustice for either the plaintiff or the defendant.[228] There have often been calls for relaxation of the rule to allow trial courts to order payment of the future damages components of the award on a periodic or structured basis, or to allow post-award adjustment where unforeseen contingencies develop.[229] However, it is still the law in all Canadian jurisdictions that in the absence of legislation authorizing the imposition of structured personal injury damage awards, courts cannot impose any form of such awards by judicial order.[230] The parties can negotiate and consent to a structured settlement, but obviously, this is not equivalent to the courts having the inherent power to impose on the parties a structured damages award that controls over time the stream of money payable

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ment income, see Bob Nigel, *So what is a structured settlement and what are its advantages?* 22 THE LAWYERS WEEKLY, Dec. 13, 2002, at 3.

225 COOPER-STEPHENSON, *supra* note 3, at 54.

226 Watkins v. Olafson, [1989] 2 S.C.R. 750.

227 *See, e.g.*, Fournier v. Canadian Nat'l. Ry. Co., [1927] A.C. 167 (J.C.P.C.).

228 In Watkins v. Olafson, [1989] 2 S.C.R. 750, Justice McLachlin J. (now Chief Justice of Canada) wrote:

> The imperfections of a lump sum, once-and-for-all award, as a means of providing for a plaintiff's cost of future care have often been noted. Where the injury is serious and the period of time for which care must be made lengthy, a large number of variables enter into the calculation. Should the plaintiff live longer than projected, or earn less on his capital than expected, he will run out of funds for his care. On the other hand, should chronic illness force him to live in an institution rather than his own home, or should he die earlier than forecast, the funds provided may turn out to be excessive, resulting in a windfall for him or his heirs at the defendant's expense.
>
> *Id.* at 756, ¶ 7.

For an overview of the various arguments that have been put forward in favour of allowing periodic payment awards, see COOPER-STEPHENSON, *supra* note 3, at 50-54, where references to more focused writing on this issue are also found.

229 CASSELS, *supra* note 9, at 112-113 (describing some of the post-award events that can affect its sufficiency or its fairness).

230 OSBORNE, *supra* note 9, at 105; *see also* JOHN P. WEIR, STRUCTURED SETTLEMENTS 5 (1984).

to the plaintiff, and can impose conditions in respect of future developments.

In the leading case on this issue, the Supreme Court of Canada expressed the view that judicial reform through the common law of the type that would permit courts to impose periodic payment awards or structured settlements without the express consent of the parties is beyond the Supreme Court of Canada's jurisdiction (and hence also beyond the jurisdiction of any other Canadian court of inherent jurisdiction) and competence.[231] The court stated that such a change would be major and far-reaching, would affect diverse economic and policy interests, and would require devising subsidiary rules and procedures relevant to implementing such change.[232] Consequently, perspectives other than the judicial should be canvassed. Any change should result from a broad-based consultative process involving all stakeholders, and should be implemented at the legislative level. Furthermore, "and perhaps most importantly, there is the long-established principle that in a constitutional democracy, it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform."[233]

In Canada, there are still only limited instances of legislation enabling or requiring courts to make structured or periodic damages awards. This is somewhat different from the United States, where even in 1989, there were numerous jurisdictions in which the courts were legislatively enabled to order periodic payment schemes as a component of personal injury damage awards (particularly, it would seem, in medical malpractice cases).[234] In a Canadian torts text published in 2000, the author wrote, "[a] few provinces including Ontario, Manitoba and British Columbia have legislation that permits or requires periodic payments to be ordered in limited circumstances."[235]

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231 Watkins v. Olafson, [1989] 2 S.C.R. 750, 760-762. The Supreme Court of Canada overturned the Manitoba Court of Appeal's decision to order monthly payments of a damages award for future care made in a personal injury action.

232 *Id.*

233 *Id.* at 760-761.

234 *Id.* at 757-758, ¶ 9 (citing the American legislation).

235 OSBORNE, *supra* note 9, at 106. The legislation referenced for each of the three provinces was the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 116 (R.S.O., ch. C.43, § 116 (1990) (Ont.)); The Court of Queen's Bench Act, S.M. 1988-89, c. 4, s. 88.1 (S.M., ch. 4, § 88.1 (1988-89) (Man.)); and the Insurance (Motor Vehicle Act), R.S.B.C. 1996, c. 231, s. 55 (R.S.B.C., ch. 231, § 55 (1996) (B.C.)).

In Ontario, the court has the discretionary power to order periodic payments in proceedings where damages are claimed for personal injuries if all affected[236] parties consent. If the plaintiff requests that an amount be included in the award to off-set any liability for income tax from the investment of the award, the court may order the defendant to pay all or part of the award periodically if it is satisfied that periodic payments would be in the plaintiff's best interest. As a practical matter, the court should first assess damages in the conventional manner, then put the plaintiff to an election whether to request a gross-up. If the plaintiff elects a gross-up, the defendant should either agree to a lump sum award with the gross-up, or submit a proposed structure. If the defendant proposes a structure, the plaintiff has the onus of establishing a plan or method better than the proposed structure.[237]

In Manitoba, it appears that an order for periodic payments could be made in all actions for personal injury damages. However, the language in the Manitoba statute is permissive: the court may order periodic payments on application of any party. In British Columbia at present, periodic payment or structured settlement awards are only authorized in respect of motor vehicle accident damage awards, and only if the award for pecuniary damages is at least $100,000 and the court considers it to be in the best interests of the plaintiff.[238] Amendments to the British Columbia Law and Equity Act[239] were enacted several years ago but remain not in force.[240] Once in force, Sections 65 through

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[236] In dealing with the 1984 version of the Courts of Justice Act, the Ontario Court of Appeal ruled that where parties have settled the quantum of a claim but require judicial determination of liability issues, the defendant remains an "affected party" such that a structured settlement cannot unilaterally be imposed upon the defendant on the plaintiff's application. Bowser v. Bowser, [1998] O.J. No. 2085, ¶¶ 12-13 (C.A.) (QL).

[237] In Chesher v. Monaghan (2000), 48 O.R.3d 451 (C.A.), the Ontario Court of Appeal ruled that the structured settlement advocated by the defendant physician was not in the best interests of the plaintiff. The plaintiff was found to bear the onus of demonstrating that periodic payments were not in his best interests. For another recent Ontario case dealing with structured settlements, see Roberts v. Morana (2000), 187 D.L.R.4th 577 (Ont. C.A.).

[238] Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, s. 55 (R.S.B.C., ch. 231, § 55 (1996) (B.C.)). A recent example of a British Columbia case in which the court ruled that a structured settlement was not in the best interests of a plaintiff injured in a motor vehicle accident is Lee v. Dawson (2003), 17 B.C.L.R.4th 80 (S.C.).

[239] Law and Equity Act, R.S.B.C. 1996, c. 253 (R.S.B.C., ch. 253 (1996) (B.C.)).

[240] Law and Equity Act, R.S.B.C. 1996 (Supp.), c. 253, s. 3 (R.S.B.C., ch. 253, § 3 (Supp. 1996) (B.C.)) (affecting Sections 65-67 of the Law and Equity Act,

67 of the Law and Equity Act will deal with periodic payment orders of damages awards in personal injury actions and fatal accident claims brought under the Family Compensation Act.[241] Subject to certain conditions, they will enable British Columbia superior courts to order periodic payment of the damages award components relating to future earning capacity and cost of future care.

It has been stated that structured settlements "guard against the risk of large sums being dissipated by seriously disabled plaintiffs who may then be forced to fall back on the social welfare system."[242] This comment raises for consideration the issue of the interface between a plaintiff's financial position on a going-forward basis and his or her entitlement to collateral benefits, and particularly government benefits and subsidies. Where benefits entitlement is subject to means, asset, or income tests, the effect of an on-going stream of payments from a structured settlement or periodic payment award must be taken into account.[243] Even if the government agency's position is that the structured settlement itself (*i.e.* the capital to fund the annuity) is not an asset (and even this may not be the case), the monthly income to be received by the plaintiff may be treated as unearned income and may lead to a reduction in the amount of government benefit for which the plaintiff is eligible. Where counsel are considering use of a structured settlement and it is anticipated that the plaintiff will also receive and need to rely upon government benefits, it is prudent to seek a ruling from the appropriate government agency or department prior to finalizing the structured settlement.

VII. CONCLUSION

The assessment of damages for personal injury or wrongful death in Canada is based on rules and principles authoritatively

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R.S.B.C. 1996, c. 253 (R.S.B.C., ch. 253 (1996) (B.C.)), and which, as of September 8, 2003, had still not been brought into force by regulation).

[241] Family Compensation Act, R.S.B.C. 1996, c. 126 (R.S.B.C., ch. 126 (1996) (B.C.)).

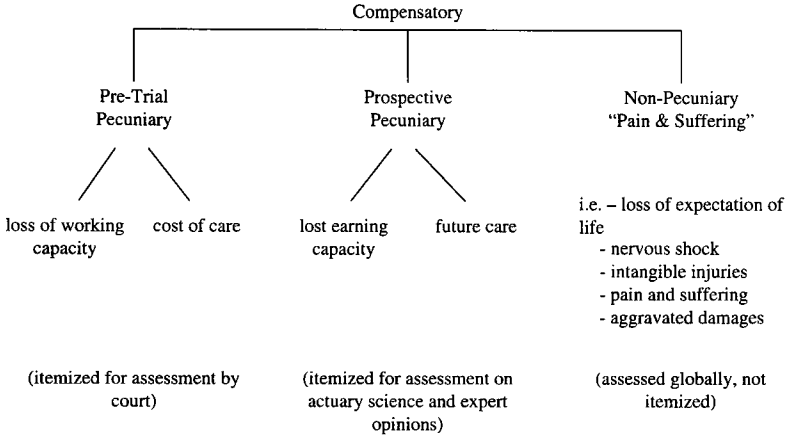
[242] OSBORNE, *supra* note 9, at 106.

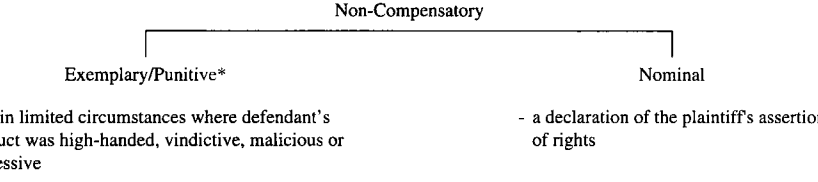
[243] This paper merely raises this issue for consideration. For a non-exhaustive sampling of various issues that arise in this area, see, *e.g.*, Alan Suggerson, *Structured Settlements – Loss of Benefits – Special Needs Trusts*, 5 PERSONAL INJURY, Issue 6 (2002) (written from an English perspective, and referencing Beattie v. Sec'y of State for Soc. Sec., [2001] E.W.J. No. 1658 (Eng. C.A., Civil Div.) (QL)); Bob Nigel, *Interplay between disability support and damage settlements can be confusing*, 22 THE LAWYERS WEEKLY, Nov. 17, 2002, at 17.

settled either by the legislatures or by the Supreme Court of Canada. Under our present system, assessments are generally predictable, relatively consistent, and reasonably understandable. The law in this area will, of course, continue to develop. Thus, despite the clarity of the basic rules, there is often room for creative and innovative argument on what will constitute a proper and fair assessment of damages. Ultimately, to achieve an assessment that fulfills the function of the law of damages, what is called for is not only an understanding of the rules and principles, but an in-depth appreciation of the individual's loss in any given circumstance.

APPENDIX I

Categories of Damages Chart:





APPENDIX II

Survival Actions: The following chart illustrates that various non-pecuniary and punitive damages are expressly *excluded* from recovery in many common law jurisdictions, and may be excluded by implication where the statute limits recovery to "actual pecuniary loss." A blank indicates that the statute is silent. In Quebec, an estate's right to prosecute a deceased plaintiff's claim for personal injury damages (*e.g.*, a survival action) flows from the *Civil Code of Quebec*, S.Q. 1994, c. 64, Article 625.[1]

				Damages Generally Excluded From Recovery					
Jurisdiction	**Statute**	**Damages Generally Recoverable**	**Allowable Expenses**	**Pain & Suffering**	**Disfigurement**	**Expectation of Life**	**Amenities/ Enjoyment of Life**	**Aggravated Damages**	**Punitive Damages**
Alberta	*Survival of Actions Act*, R.S.A. 2000, c. S-27	"actual financial loss" – s. 5(1)	reasonable expenses for funeral / disposal of body – s. 6	s. 5(2)(b)	s. 5(2)(b)	s. 5(2)(b)	s. 5(2)(b)		s. 5(2)(a)
British Columbia	*Estate Administration Act*, R.S.B.C. 1996, c. 122			s. 59(3)(a)	s. 59(3)(a)	if death caused by tort – s. 59(3)(b)			
Manitoba	*Trustee Act*, R.S.M. 1987, C.C.S.M. c. T160		funeral expenses – s. 53(1)			s. 53(1)			s. 53(1)
New Brunswick	*Survival of Actions Act*, R.S.N.B. 1973, c. S-18	"actual pecuniary loss" – s. 5(1)	funeral / disposal of body expenses – s. 6	s. 5(1)	s. 5(1)	s. 5(1)			**expressly recover-able** – s. 5(2)

[1] Current to January 1, 2003, Article 625 reads:

The heirs are seised, by the death of the deceased or by the event which gives effect to the legacy, of the patrimony of the deceased, subject to the provisions on the liquidation of successions.

The heirs are not, unless by way of exception provided for in this Book, bound by the obligations of the deceased to a greater extent than the value of the property they receive, and they retain their right to demand payment of their claims from the succession.

The heirs are seised of the rights of action of the deceased against any person or that person's representatives, for breach of his personality rights.

For a recent discussion of some of the issues relating to survival actions in Quebec, see: *Augustus* v. *Gosset*, [1996] 3 S.C.R. 268, 138 D.L.R. (4th) 617.

Newfoundland	*Survival of Actions Act*, R.S.N. 1990, c. S-32	"actual monetary loss" – s. 4	funeral expenses – s. 4(d)	s. 11(g)	s. 11(g)				s. 4(b)
Northwest Territories and Nunavut	*Trustee Act*, R.S.N.W.T. 1988, c. T-8								
Nova Scotia	*Survival of Actions Act*, R.S.N.S. 1989, c. 453	"actual pecuniary loss" – s. 4		s. 4(c)		s. 4(b)			s. 4(a)
Ontario	*Trustee Act*, R.S.O. 1990, c. T.23					if death caused by tort - s. 38(1)			
Prince Edward Island	*Survival of Actions Act*, R.S.P.E.I. 1988, c. S-11	"actual pecuniary loss" – s. 5	reasonable funeral / disposal of body expenses – s. 6(a) cost of taking out administration up to $500 – s. 6(b)	s. 5(c)	s. 5(d)	s. 5(b)	s. 5(b)		s. 5(a)
Saskatchewan	*Survival of Actions Act*, S.S. 1990-91, c. S-66.1	"actual pecuniary loss" – s. 6(1)	reasonable expenses for funeral / disposal of body – s. 7(2)	s. 6(2)(c)	s. 6(2)(d)	s. 6(2)(a)[2]	s. 6(2)(e)	s. 6(2)	**expressly recoverable** – s. 6(3)
Yukon Territory	*Survival of Actions Act*, R.S.Y. 2002, c. 212	"actual pecuniary loss" – s. 5	reasonable funeral / disposal of body expenses – s. 6	s. 5	s. 5	s. 5			s. 5

[2] Section 6(2)(b) also excludes recovery for loss of expectancy of earnings subsequent to death.

APPENDIX III

Fatal Accident Claims: Fatal accident legislation provides even less guidance as to whether both pecuniary and non-pecuniary loss is recoverable as the following chart demonstrates. A blank indicates that the statute is silent. In Quebec, dependants' rights to pursue their own claims for damages following the death of another (*e.g.*, fatal accident claims) are said to flow from the *Civil Code of Quebec*, S.Q. 1994, c. 64, Article 1457.[3]

Jurisdiction	Statute	Eligible Dependants	Damages Generally Recoverable	Allowable Expenses	Specific Heads of Recovery	Aggravated Damages	Punitive / Exemplary Damages
Alberta	*Fatal Accidents Act*, R.S.A. 2000, c. F-8	spouse adult interdependent partner ("AIP") parent (includes father, mother, grandparents, and step-parents) child (includes son, daughter, grandchildren, step-children, and illegitimate children) brother or sister	"appropriate to the injury resulting from the death" – s. 3(1)	care and well-being of deceased - s. 7(a) travel and accommodation expenses incurred in visiting deceased between time and injury of death - s. 7(b) funeral expenses and disposal of body - s. 7(c) cost of grief counselling (for spouse, AIP, child, parent, brother or sister) - s. 7(d)	"grief" and "loss of guidance, care and companionship" – s. 8(2) limits: $75,000 to spouse or AIP; $75,000 to mother or father where child is a minor or has no spouse or AIP; $45,000 to son or daughter, legitimate or illegitimate where a minor or has no spouse or AIP - s. 8(2)(a)-(c)		
British Columbia	*Family Compensation Act*, R.S.B.C. 1996, c. 126	spouse (includes cohabitant of 2 years) parent (includes grandparents and step-parents) child (includes step-children and persons to whom deceased stood *in loco parentis*)	"damages proportioned to the injury resulting from the death" – s. 3(2)	medical or hospital expenses – s. 3(9)(a) reasonable funeral and disposal of body expenses – s. 3(9)(b)			

[3] Current to January 1, 2003, Article 1457 reads:
Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.
For a recent discussion of some of the issues relating to fatal accident claims in Quebec, see: *Augustus* v. *Gosset*, [1996] 3 S.C.R. 268, 138 D.L.R. (4th) 617.

Manitoba	*The Fatal Accidents Act*, R.S.M. 1987, C.C.S.M. c. F50	wife, husband, common-law partner (cohabitant of 3 years or 1 year if parents of child) support recipient (person to whom deceased had court order to pay support) parent (includes father, mother, grandparents, step-parents, and persons who stood *in loco parentis* to deceased) child (includes son, daughter, grandchildren, step-children, and persons to whom deceased *stood in loco parentis*)	"such damages as are proportional to the pecuniary loss resulting from the death" – s. 3(2)	reasonable funeral and disposal of body expenses – s. 3(3)	"loss of guidance, care and companionship" – s. 3.1(2) limits: $30,000 to each of husband, wife, common-law partner, support recipient, and son or daughter under 18 years; $10,000 to each son or daughter over 18 years, step-son, step-daughter, person to whom deceased stood *in loco parentis*, step-mother, stepfather or person who stood *in loco parentis* to the deceased, brother, sister, grandson, granddaughter, grandfather, grandmother – s. 3.1(3)(a) & (b)		
New Brunswick	*Fatal Accidents Act*, R.S.N.B. 1973, c. F-7	wife, husband (includes cohabitants to whom deceased owed obligation to provide support, or would have but for the fact that the cohabitant was not substantially dependent on deceased for support, former wife or husband to whom deceased was obliged to provide support) parent (includes father, mother, grandparents, step-parents, adoptive parents, and persons who stood *in loco parentis* to the deceased) child (includes son, daughter, grandchildren, step-children, adopted children, and persons to whom deceased stood *in loco parentis*) brother or sister	"such damages as are proportional to the pecuniary loss resulting from the death" – s. 3(2)	reasonable funeral and disposal of body expenses – s. 3(3)	"loss of companionship" and, for parents of deceased under 19 years or dependent deceased, "grief" – s. 3(4)		punitive or exemplary damages are expressly recoverable – s. 6(4)

Newfoundland	*Fatal Accidents Act*, R.S.N. 1990, c. F-6	wife, husband parent (includes father, mother, grandparents, step-parents, adoptive parents, persons who stood *in loco parentis* to deceased) child (includes son, daughter, grandchildren, step-children, adopted children, and persons to whom deceased stood *in loco parentis*)	"damages . . . proportional to the injury resulting from the death" – s. 6(1)	reasonable funeral and disposal of body expenses – s. 9			
Northwest Territories and Nunavut	*Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3	spouse parent (includes father, mother, grandparents, step-parents, adoptive parents, and persons who stood *in loco parentis* to the deceased) child (includes son, daughter, grandchildren, stepchildren, adopted children, and persons to whom the deceased stood *in loco parentis*)	"damages that are proportional to the injury resulting from the death" – s. 3(2)	medical or hospital expenses - s. 4(1)(a) funeral expenses - s. 4(1)(b)			
Nova Scotia	*Fatal Injuries Act*, R.S.N.S. 1989, c. 163	spouse or common-law partner (cohabitant of 1 year) parent (includes father, mother, grandparents, step-parents, and persons who have demonstrated a settled intention to treat the deceased as a child of the family) child (includes son, daughter, grandchildren, step-children, illegitimate children of mothers, and children deceased has demonstrated a settled intention to treat as a child of the family)	"such damages as they think proportioned to the injury resulting from such death" – s. 5(1) "damages" means "pecuniary and non-pecuniary damages" and includes certain other expenses (see Allowable Expenses column) – s. 5(2)	out-of-pocket expenses – s. 5(2)(a) travel expenses for visiting deceased between time of injury and death - s. 5(2)(b) nursing, housekeeping, or other services purchased or a reasonable allowance for loss of income – s. 5(2)(c)	"loss of guidance, care and companionship" s. 5(2)(d)	"damages" means "pecuniary and non-pecuniary damages" – s. 5(2)	

Ontario	*Family Law Act*, R.S.O. 1990 c. F.3, ss. 61-63 Note: benefits also available if family member injured.	spouse (includes married, cohabitant of 3 years or in relationship of some permanence if natural or adoptive parents of a child) same-sex partner (see definition of spouse) parent (includes grandparents, and persons who have demonstrated a settled intention to treat a child as one of the family) child (includes grandchildren, and persons to whom a parent has demonstrated a settled intention to treat as a child) brother or sister	"pecuniary loss resulting from the injury or death" – s. 61(1)	"actual expenses reasonably incurred" – s. 61(2)(a) actual, reasonable funeral expenses – s. 61(2)(b) travel expenses for visiting person during treatment or recovery – s. 61(2)(c) the value of nursing, housekeeping, or other services purchased, or a reasonable allowance for loss of income – s. 61(2)(d)	"loss of guidance, care and companionship" - s. 61(2)(e)		
Prince Edward Island	*Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5	dependants (include widow or widower, child or grandchild, parent, spouse of a child, grandchild or parent, person divorced from deceased who was entitled to or dependant upon support from deceased at time of death, person of opposite sex cohabiting with deceased as spouse and dependant on deceased for support or entitled to support, person who was dependant on deceased for support for period of at least 3 years immediately prior to death) NOTE: child (includes unborn child, adopted child, person to whom deceased stood *in loco parentis*), and parent (includes person who stood in place of a parent to the deceased, father, mother, grandfather, grandmother, adoptive parent or adoptive grandparent)	"such damages as are attributable to the loss of pecuniary benefit or reasonable expectation of pecuniary benefit" – s. 6(2)	reasonable funeral expenses and disposal of body - s. 6(3)(a) expenses of taking out administration subject to a maximum of $500 –s. 6(3)(b)	"loss of guidance, care and companionship" - s. 6(3)(c)		

Saskatchewan	*Fatal Accidents Act*, R.S.S. 1978, c. F-11	spouse (includes wife, husband, cohabitant of 2 years or 1 year if they have child and are in relationship of some permanence) parent (includes father, mother, grandparents, step-parents, adoptive parents, and persons who stood *in loco parentis* to the deceased) child (includes son, daughter, grandchildren, step-children, adopted children, and persons to whom deceased stood *in loco parentis*)	"such damages . . . as are proportioned to the injury resulting from the death" - s. 4(1)	medical or hospital expenses – s. 4(2)(a) funeral expenses – s. 4(2)(b) cost of grief counselling – s. 4(2)(c) limited loss of earnings – s. 4(2)(d) out-of-pocket expenses – s. 4(2)(e)			
Yukon Territory	*Fatal Accidents Act*, R.S.Y. 2002, c. 86	spouse parent (includes grandparents, step-parents, and persons who stood in the role of a parent to the deceased) child (includes grandchildren, step-children, and persons to whom deceased stood in the role of a parent)	"damages that are proportional to the pecuniary loss resulting from the death" – s. 3(2)	reasonable funeral and disposal of body expenses – s. 3(3)			

APPENDIX IV

Subrogation Rights Table - Statutory Conferral of Subrogation Rights on Government Agencies: The following table lists a representative and fairly comprehensive sampling of the provincial and territorial legislation conferring rights of subrogation on various government bodies in each Canadian jurisdiction, *but excludes* legislation that is specific to the motor vehicle accident context. References to the applicable section numbers for the specific provisions containing the subrogation right are included.

Jurisdiction	**Legislation**
British Columbia	*Hospital Insurance Act*, R.S.B.C. 1996, c. 204, s. 25. *Workers Compensation Act*, R.S.B.C. 1996, c. 492, s. 10. (all B.C. legislation current to Aug 25, 2003)
Alberta	*Hospitals Act*, R.S.A. 2000, c. H-12, s. 9. *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 22. (all Alta. legislation current to August 30, 2003)
Saskatchewan	*The Department of Health Act*, R.S.S. 1978, c. D-17, s. 19. *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, s. 40. (all Sask. legislation current to August 18, 2003)
Manitoba	*The Health Services Insurance Act*, R.S.M. 1987, C.C.S.M. c. H35, s. 106(1). *The Worker's Compensation Act*, R.S.M. 1987, C.C.S.M. c. W200, s. 9(5). (all Manitoba legislation current to September 1, 2003)
Ontario	*Health Insurance Act*, R.S.O. 1990, c. H.6, s. 30. *Long-Term Care Act, 1994*, S.O. 1994, c. 26, s. 59. *Ministry of Community and Social Services Act*, R.S.O. 1990, c. M.20, s. 8. *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Schedule B, s. 52. *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, s. 30. (all Ontario legislation current to August 30, 2003)
Quebec	*Workers' Compensation Act*, R.S.Q., c. A-3, s. 7. *An Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q., c. A-3.001, s. 446. *Hospital Insurance Act*, R.S.Q., c. A-28, s. 10. *Health Insurance Act*, R.S.Q., c. A-29, s. 18. *Public Health Act*, R.S.Q., c. S-2.2, s. 75. *An Act Respecting Health Services and Social Services*, R.S.Q., c. S-4.2, s. 78. *An Act Respecting Health Services and Social Services for Cree Native Persons*, R.S.Q., c. S-5, s. 151. (all Quebec legislation current to July 1, 2003)

New Brunswick	*Health Services Act*, R.S.N.B. 1973, c. H-3, s. 5(3) *Workers' Compensation Act*, R.S.N.B. 1973, c. W-13, s. 10(10). (all N.B. legislation current to June 30, 2003, confirmed no amendments since that date)
Newfoundland	*Workplace Health, Safety and Compensation Act*, R.S.N. 1990, c. W-11, s. 45(8). *Medical Care Insurance Act*, S.N. 1999, c. M-5.1, s. 19(4). (all Nfld. Legislation current to August 8, 2003)
Northwest Territories and Nunavut	*Hospital Insurance and Health and Social Services Administration Act*, R.S.N.W.T. 1988, c. T-3, s. 19. *Medical Care Act*, R.S.N.W.T. 1988, c. M-8, s. 20. *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, s. 12. (current to February 1, 2003)
Nova Scotia	*Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 30. *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, s. 18. (all N.S. legislation current to July 10, 2003, confirmed no amendments since that date)
Prince Edward Island	*Workers Compensation Act*, R.S.P.E.I. 1988, c. Q-1, s. 11(3). (current to July 1, 2002) *Health Services Payment Act*, R.S.P.E.I. 1988, c. H-2, s. 22(4). (current to October 29, 2003) (confirmed no amendments since those dates)
Yukon Territory	*Health Care Insurance Plan Act*, R.S.Y. 2002, c. 107, s. 9 *Hospital Insurance Services Act*, R.S.Y. 2002, c. 112, s. 10 *Travel for Medical Treatment Act*, R.S.Y. 2002, c. 222, s. 11 *Workers' Compensation Act*, R.S.Y. 2002, c. 231, s. 56. (Current to June 30, 2003, confirmed no amendments since that date)