Fatality Claims: Calculating Damages in Ontario

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Prepared by: Christopher Gray

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Prepared for: Professor Leonard Brooks

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2.0 INTRODUCTION

What is Life Worth? This is the name of a book authored by Kenneth J. Feinberg, Special Master of the September 11th Victim Compensation Fund, in which he discusses the unprecedented effort to compensate the grieving families of the 2,880 people who lost their lives in the worst peace time disaster in U.S. history. Throughout the book, Mr. Feinberg speaks passionately about the challenges he faced in attempting to calculate fair and appropriate awards for the deceased families, while acknowledging that no amount of money could make the families and victims of 9/11 whole again.

In calculating economic losses, Mr. Feinberg refers to estimating the future earnings of the deceased as a crystal ball exercise that's as much art as science.[1] Would a young associate in a law firm become a partner? Would a stockbroker enjoy as good a year in 2002 as she had in 2000? What kind of success would a college student achieve? The answers to these questions would have a significant impact on the amount of the award and, in each claim, the questions and answers were different.

Mr. Feinberg then had to address how much of the deceased's income should be replaced. Should the families of the deceased be entitled to all of the deceased's projected income? Would the deceased not have consumed some of this income themselves? If so, would a replacement of all the deceased's income violate the principle of economic loss claims to put the deceased's family in the same financial position that they would have been in, had the loss not occurred? Did it matter?

[1] Kenneth R. Feinberg, "What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11", Public Affairs, 2005, 74

Next, Mr. Feinberg had to address who was entitled to the awards. Should awards be available to only the spouse of the deceased? What about their children? How about their parents and grandparents?

Finally, and perhaps most difficult, Mr. Feinberg had to address the noneconomic losses of the surviving family members (i.e. pain and suffering). Should a spouse who was married for 20 years be entitled to more than a spouse who was married for 20 months? What if their spouse was killed instantly? Should they get less money than the person whose spouse suffered?

These questions may appear unique to the circumstances of 9/11, but in fact, similar questions are asked in courtrooms across Canada every single day. They are asked by judges and juries in assessing appropriate awards for those families of approximately 2,200 people in Canada who lose their lives each year in fatal accidents.[2]

These questions are also asked by Investigative and Forensic Accountants ("IFA's") in calculating the loss of financial support suffered by the families of the deceased.

[2] http://www.tc.gc.ca/eng/roadsafety/tp-tp3322-2009-1173.htm#t7

3.0 OUTLINE AND OBJECTIVES

The objective of this paper is to identify and discuss the methods available to IFA's in Ontario to calculate pecuniary damages in fatality claims and assess whether one of these methods produce a more fair result than another method. Specifically, this paper will address the following:

- The legal basis for fatality claims in Ontario;
- Who is considered a dependent in a fatality claim;
- The sole and cross dependency approach to calculating losses in fatality claims;
- A comparison of the sole dependency and cross dependency approaches;
- The modified sole dependency approach to calculating losses in fatality claims;
- Dependency rates and the statistics, actual expenditure and income level approach;
- The impact of tax and contingencies on awards in fatality claims; and
- A review of fatality case law on Canada.

This paper will also comment on recoverable damages in Ontario for the loss of care, guidance and companionship as well as briefly comment on recoverable damages in wrongful death claims in the United States.

The writer acknowledges that there are several types of pecuniary and non-pecuniary losses available to dependents in fatality claims. For the purpose of this paper, the writer has limited his research primarily to the loss of financial support and care, guidance and companionship suffered by the family of the deceased in a fatality claim.

4.0 SCOPE OF REVIEW

The information used to prepare this paper includes articles and newsletters authored by respected professionals, legal briefs and reports on the subject of fatality claims and Canadian and US statistics on personal consumptions rates, the probability of survival and other contingencies.

This paper was also based on information on fatal accident and wrongful death claims included in two textbooks: “Damages: Estimating Pecuniary Losses” by Cara L. Brown and “Assessment of Personal Injury Damages” by Christopher Bruce, Kelly Rathje and Laura Weir.

The author also reviewed numerous court decisions in Canada on the subject of fatality claims and compared these decisions to his findings.

Finally, this paper includes the insight of two experts in the area of fatality claims, Bruce J. Webster and Cara L. Brown, as well as the experiences of its author.

The specific documents reviewed and relied upon in preparing this paper are outlined in the attached Bibliography.

5.0 SUMMARY OF FINDINGS AND CONCLUSION

The objective of this paper was to identify, understand and discuss the methods available to IFA's in Ontario to calculate damages in fatality claims and assess whether one of these methods produce a more fair result than another method.

It was established that the starting point for any fatality claim in Ontario is the *Family Law Act*. This Act provides families with the mechanism to recover damages from at fault or negligent parties and provides lawyers and IFA's with one of the standards by which fatality claims should be calculated.

My research then assessed who was considered a "dependent" in a fatality claim. Section 61(1) of the *Act* outlines who is considered a dependent and eligible to recover damages in fatality claims in Ontario and includes a spouse, children, grandchildren, parents, grandparents, brothers and sisters of the deceased person. It was noted, however, that pecuniary damages such as loss of financial support are typically limited to the spouse and children of the deceased.

This paper then identified and discussed the three methods available to IFA's to calculate damages in fatality claims in Ontario: the sole dependency approach, the cross dependency approach and the modified sole dependency approach.

It was found that the sole dependency approach has historically been used by IFA's to calculate the loss of financial support for dependents of a one income family. However, it was found that this approach may also be used for a two income family where those income earners did not typically pool their income or maintained separate financial arrangements.

Under the sole dependency approach, an IFA would calculate the future stream of income the deceased would have earned, absent the accident, to which they would then apply a

dependency factor. Case law in Ontario typically suggests that the dependency factor under the sole dependency approach be set at 70%, which means that the deceased would have consumed 30% of their own income for personal purposes with the remainder of their income available to the family.

The cross dependency approach, on the other hand, has typically been used by IFA's to calculate the loss of financial support for dependents of a two income family. Unlike the sole dependency approach, under this approach an IFA would calculate the future stream of income of both the deceased (absent the accident) and the surviving spouse. These amounts would then be added together, a dependency factor would be applied, from which the income of the surviving spouse would then be deducted. Case law in Ontario suggests that the dependency factor under the cross dependency approach should be set at 60%.

A comparison of the sole dependency approach and the cross dependency approach suggest the following:

- An award for financial support to the surviving spouse in a two income family can vary significantly based on the approach used to calculate the loss;
- The use of the sole dependency approach avoids the illogical result that may result from the use of the cross dependency approach. That is, that when the deceased's income is lower than the survivor's, the cross dependency approach often produces the result that the survivor is "better off" now that their spouse is dead;
- The use of the cross dependency approach addresses the shortcomings of the sole dependency approach, in that, from a purely financial perspective, the survivor has generated "savings" from the death of their spouse which should be offset from any award for the loss of financial support; and

- Courts have attempted to bridge the gap between these approaches through the introduction of a third approach – the modified sole dependency approach.

Where the background facts of the case support it, courts have increasingly accepted the modified sole dependency approach as an appropriate and fair approach to calculating the loss of financial support for the dependants of a two income family.

Similar to the sole dependency approach, the modified sole dependency approach only considers the income of the deceased, however typically applies a dependency rate of 60%, rather than the 70% used under the sole dependency approach. The modified sole dependency approach typically provides a higher result than the cross dependency approach but not as a high result as the sole dependency approach.

The dependency rate of 70% for a one income family and 60% for a two income family are based on statistics. Courts have come to rely on these dependency rates as “rules of thumb” in assessing pecuniary losses in fatality claims. This is often because IFA’s, either as a result of reference to historical case law or inadequate data, fail to conduct an analysis of the actual consumption rates (i.e., the inverse of the dependency rate) of the deceased and their family.

To date, consumption rates, whether based on statistics or actual expenditures, have typically been based on family size only. Cara Brown, a leading economist in Canada and author of the book “Damages: Estimating Pecuniary Damages” suggests that this approach may be short sighted, as it fails to consider the impact of family income on personal consumption rates.

My research suggested that the most important aspects of calculating damages in fatality claims are the projection of income and dependency rates. This is likely true, however the impact of income tax and contingencies, especially joint life expectancy, divorce and

remarriage, can also significantly impact the quantum of any damages award in a fatality claim.

The analysis throughout this paper, together with a review of a few select fatality cases in Canada, allow me to conclude the following with respect to calculating pecuniary damages in fatality claims in Ontario:

- First and foremost, the assessment of pecuniary damages in fatality claims in Ontario should be based on the facts of each subject case;
- The sole dependency approach and cross dependency approach to calculating a loss of financial support in a two income family each have fundamental flaws (as outlined above);
- Based on the facts of the subject case, the modified sole dependency approach may produce a more fair result than the sole and cross dependency approach to calculating damages in fatality claims involving a two income family;
- Irrespective of the approach adopted, consideration must be given to the income earned by both the deceased and their spouse and how this income was spent by each party (i.e., was the income pooled together to pay for the expenses of the family or where separate bank accounts and financial arrangements?) It appears that the latter may not always be consistently considered in fatality claims in Ontario;
- Courts continue to rely heavily on pre-established dependency rates based on statistics. This is because data to calculate the actual expenditures of the deceased's family is often not available. This may lead to an unfair result for the Plaintiff;
- Similarly, IFA's continue to rely on the notion that a dependent child's claim for damages ends at the time they graduate. This may also lead to an unfair result for the Plaintiff if it is

determined that the child would have lived with their parents (and therefore been dependent) beyond graduation;

- Personal consumption rates by both family size <u>and</u> income level should be considered by an IFA. To date, this does not always appear to be the case in Ontario;

- Personal consumption rates by both family size and income level may be best applied to situations where the deceased was expected to earn higher or lower levels of income than the average Canadian;

- The impact of income tax and tax-gross up can have a significant impact on an award for damages in a fatality claim and should be clearly understood and applied by the IFA;

- Unlike personal injury claims, the stream of future losses is adjusted to consider the possibility that both the deceased (absent the accident) <u>and</u> the deceased spouse may die. Accordingly, a "joint probability of survival" should be applied to the expected future stream of income, absent the accident, which is sometimes overlooked in fatality cases;

- Contingencies for divorce, absent the accident, and remarriage, following the accident, are subjective. No expert can clearly opine on these matters, as they are, for the most part, based on evidence of the surviving spouse and others. For this reason, an IFA should present fatality claims under two scenarios: one which considers the probability of divorce and remarriage and one which does not.

In addition to our assessment of pecuniary damages in fatality claims, we also reviewed the recoverable damages in Ontario for the loss of care, guidance and companionship.

Family members who are considered dependents under section 61(1) of the *Act* are eligible to recover damages for the loss of guidance, care and companionship that they would have

received from the deceased had the accident not occurred. Due to the nature of the award, these damages are typically assessed by a judge or jury rather than an IFA. There are no caps in Ontario on the amount of damages that may be paid to dependents, however the Court of Appeal in Ontario have set ranges for awards beyond which they will not go.

Finally, we briefly compared damages in fatality claims in Ontario to the United States. It was found that fatality claims in the United States are governed by state (provincial) law, as they are in Canada. In all states, immediate family members can recover damages in fatality claims. However, only some states allow others such as brothers, sisters and grandparents to seek damages in fatality claims. This is different than in Ontario in which all these individuals are considered dependents and can therefore seek damages.

For the most part, it appears that IFA's in the United States use similar methodologies to calculating a loss of financial support to those in Canada, with one exception. In calculating dependency rates, American IFA's appear to have shifted from focusing on statistics for family size only (as is common in Ontario) to focusing on both family size and income level.

With respect to non-pecuniary damages (i.e., loss of care, guidance and companionship), most states, as they do in Ontario, provide a mechanism for dependents to recover these damages in fatality claims. The primary difference, however, between awards for non-pecuniary damages in the United States and Ontario is quantum.

Courts in the United States which do not impose caps do not appear to have the same level of judicial activism as they do in Canada when it comes to managing awards for non-pecuniary damages. This has resulted in significantly higher awards for non-pecuniary damages in wrongful death claims in the United States than in Ontario.

6.0 DETAILED FINDINGS

6.1 Legal Basis for Claims in Ontario

The surviving dependents of those killed in fatal accidents in Ontario have not always been entitled to compensation. For most of the 19th Century, death was not considered a compensable injury for either the deceased or the surviving dependants of the deceased.[3] The reality of Ontario law at the time was captured by Justice Robins in *Mason v. Peters* in the aphorism that "it is cheaper to kill than to injure".[4]

In the early part of the 20th Century, the Ontario government attempted to remedy this injustice through the passing of the *Ontario Fatal Accidents Act (1911).* This law remained in effect until 1978 when it was replaced by the *Family Law Act*, the current statute in Ontario governing fatal accident claims.

Sections 61 to 63 of Part V of the *Family Law Act* address a dependents claim for damages. Specifically, Section 61 states the following[5]:

61(1) "If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction."

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[3] Chuck Blanaru (updated by Sarah Picciotto), "Family Compensation Act (1946 – 2006, Isn't time for a change?)" On Point Legal Research, 2001/2006, 1
[4] Mason v. Peters (1982) 39 OR (2d), 27
[5] Family Law Act, R.S.O., 1990, Chapter F.3,

61(2) "The damages recoverable in a claim under subsection (1) may include:

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

(b) actual funeral expenses reasonably incurred;

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

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

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

61(3) "In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed".

These sections of the *Family Law Act* provide families with a mechanism to recover damages from at fault or negligent parties and are designed to put the family in the same financial position they would have been in had the fatal accident not occurred. They also provide lawyers and IFA's with one of the standards by which fatality claims should be calculated.

6.2 Who is considered a Dependent in a Fatality Claim?

Unlike personal injury cases, when the loss of income calculation is focused on the individual plaintiff, there are a number of people that need to be considered in any fatality case where there are surviving dependents.[6]

Section 61(1) of the *Act* outlines who is considered a dependent and eligible to recover damages. As outlined above, a dependent is considered to be a spouse, children, grandchildren, parents, grandparents, brothers and sisters of the deceased person.

A spouse is defined as two persons who are married to each other, as well as those who are not married but who have lived together continuously for a period of not less than 3 years or if they are natural or adoptive parents of a child.[7] Dependent children may include children from a previous marriage or family to whom the deceased was paying child support.[8]

The dependents referred to above are eligible to recover both pecuniary damages (i.e. damages which may be calculated in financial terms) and non-pecuniary damages (i.e. damages which are not easily calculable, such as pain and suffering).[9] However, in practice, pecuniary damages such as loss of income are typically limited to the spouse and children of the deceased. This is because claims for loss of income of the deceased are only likely to be successful if advanced by a family member who was living with the deceased, or who was clearly dependent on the deceased's income.[10]

[6] Cara Brown, "Fatality Cases: Unique aspects related to quantum awards", Brown's Economic Damages Newsletter, Volume Eight, Issue 9, 3
[7] Family Law Act, R.S.O., 1990, Chapter F.3, s.29
[8] Cara Brown, "Fatality Cases: Unique aspects related to quantum awards", Brown's Economic Damages Newsletter, Volume Eight, Issue 9, 3
[9] Laura Kupcis, "Damages Resulting from Fatalities", Claims Canada, April 2010, 2
[10] James K. Fireman, "Fatality Law Update", Fireman Wolfe LLP, 2

The duration of a spouse's dependency depends on the facts of the particular case and considers such contingencies as death, divorce and remarriage, absent the accident. These contingencies are discussed in greater detail in section 6.10 of this paper.

The duration of a child's dependency on the deceased has historically assumed to end at the time the child would have completed high school (age 18) or post-secondary education (age 21 to 23).[11] However, this assumption may be modified by the IFA if it is determined, based on the facts of the individual case, that a child would have lived with their parents beyond graduation.

6.3 Overview of Loss of Financial Support Claims

The basis of any damage calculation is to put the Plaintiff in the same financial position that he or she would have enjoyed had the wrongful act not taken place. In the case of a fatality claim, it is necessary to measure the financial loss suffered by any surviving dependents.

The financial loss is normally measured with reference to the income generated by the deceased after deducting income tax and the amount that would have been personally consumed by the deceased had he or she lived. In other words, the aim is to allow the deceased's dependents to maintain the same quality of life, from a financial perspective, as would have been maintained had the deceased lived.

Case law in Ontario has established three typical approaches to calculating the loss of financial support suffered by the family of the deceased: the sole dependency approach, the cross dependency approach and the modified sole dependency approach.

[11] Cara Brown, "Fatality Cases: Unique aspects related to quantum awards", Brown's Economic Damages Newsletter, Volume Eight, Issue 9, 2

6.4 The Sole Dependency Approach

The sole dependency approach has historically been used by IFA's to calculate the loss of financial support for dependents of a one income family. However, this approach has also been used for a two income family where those income earners did not typically pool their income or maintained separate financial arrangements.

Under this approach, an IFA would calculate the future stream of income the deceased would have earned had the fatal accident not occurred, to which they would then apply a dependency factor. The future stream of income is calculated by the IFA in a similar matter to that of other personal injury matters and won't be expanded on in this report.

The dependency rate to be applied to the future stream of income has traditionally been based on background facts, statistics, and case law. An analysis of these dependency rates is included in section 6.8 of this paper.

Case law in Ontario typically suggests that the dependency factor under the sole dependency approach should be set at 70%.[12] In other words, the courts assume that the surviving spouse is entitled to 70% of the income the deceased would have earned up to the date of their retirement. This inherently assumes that the deceased in a one income family consumed 30% of their own income. It should be noted that this factor may be adjusted by the courts if it is determined that the deceased would have consumed more / less than 30% of their own income than assumed under this approach.

By way of example, let's assume that Mr. Brown is married and is the sole breadwinner in the family. Mr. Brown earns $100,000 per year (after tax) and was employed in a stable job. Mr. Brown and his wife have been married for 10 years and have 2 children, ages 4 and 6.

[12] Hechavarria v. Reale, 2000, Can LII 22711 (ONSC), 18

Unfortunately, Mr. Brown was killed in a car accident in 2011 and the other driver was found to be at fault.

Under the sole dependency approach, Mr. Brown's wife would be entitled to an annual loss of financial support of $70,000 [$100,000 x 70% dependency factor], subject to present value and contingencies (as discussed later in this paper). This example assumes that Mr. Brown consumed 30% of his income and that, given this assumption, 70% of his disposable income was available to Mrs. Brown.

As outlined in section 6.2 of this paper, Mr. Brown's children would also be considered dependents. Case law suggests that Mr. Brown's children are each entitled to 4% of Mr. Brown's income, or $4,000 per year.[13] Mr. Brown's children would be typically entitled to these amounts until such time as it is assumed that they will complete their post-secondary education, unless it is determined that Mr. Brow's children would have continued to be dependent on the Brown's beyond this period.

6.5 The Cross Dependency Approach

The cross dependency approach has historically been used by IFA's to calculate the loss of financial support for dependents of a two income family. This approach considers that the deceased, in addition to consuming a portion of their income, would have consumed part of the surviving spouse's income.

Unlike the sole dependency approach, under this approach the IFA would calculate the future stream of income of both the deceased (absent the accident) and the surviving spouse. These amounts would then be added together to determine "joint family income" or a "common

[13] Ibid

pool" of income for the expenses of the family.[14] A dependency factor would be applied to the joint family income, from which the income of the surviving spouse would then be deducted.

The theory for deducting the surviving spouse's income from the calculation under the cross dependency approach is that the surviving spouse's income is now available solely to him or her to fund their standard of living. It is assumed that these funds are now "saved" as the funds previously spent on the deceased can now be spent on the surviving spouse.[15]

Case law in Ontario suggests that that the dependency factor under the cross dependency approach should be set at 60%. This assumes that a deceased in a two income family consumed 40% of the total combined disposable income and that 60% of the combined disposable income was enjoyed by the family. Similar to the sole dependency approach, these factors may be adjusted by the courts if it is determined that the deceased would have consumed more / less than 40% of the total combined disposable income of the family.

By way of example, let's expand on the example outlined in section 6.4 of this paper. Let's now assume that Mr. Brown's wife is also employed and earns $50,000 per year (after tax) and that Mr. Brown and his wife pool their income to pay for the family's expenses.

Under the cross dependency approach, Mr. Brown's wife would be entitled to an annual loss of financial support of $40,000, subject to present value and contingencies. This amount was determined by pooling the Brown's income together [$100,000 + $50,000 = $150,000], multiplying this combined income by the dependency factor [$150,000 x 60% = $90,000] and then deducting Mrs. Brown's annual income from the total [$90,000 - $50,000 = $40,000].

For comparison purposes, using the sole dependency approach, Mr. Brown's wife would be entitled to an annual loss of financial support of $70,000, subject to present value and

[14] Ibid., 19
[15] C. Bruce, K. Rathje, L. Weir "Assessment of Personal Injury Damages", 5th Edition, Butterworths, 68

contingencies. This approach ignores the income earned by Mrs. Brown, instead calculating her loss of financial support based solely on her husband's expected income and a higher dependency rate of 70% [$100,000 x 70% = $70,000].

6.6 Comparison of the Sole and Cross Dependency Approaches

As demonstrated above, an award for financial support to the surviving spouse in a two income family can vary significantly based on the approach used to calculate the loss. Accordingly, it is essential that an IFA clearly understand the differences between the sole dependency approach and the cross dependency approach to calculating a loss of financial support. It is equally import that an IFA understand the detailed background facts of each case so that the proper dependency factor may be applied to the deceased expected income, absent the loss.

The arguments for and against the use of the sole dependency and cross dependency approach in a two income earning family are aptly set out in a book by Christopher Bruce, Kelly Rathje and Laura Weir entitled "Assessment of Personal Injury Damages".[16]

In their book, the authors state that there are two main arguments for using the sole dependency approach to calculating the loss of financial support in a two income family, as opposed to the cross dependency approach.

First, is the observation that most couples marry by choice; that is that it is reasonable to assume that each spouse devotes part of his or her income to expenditures that benefit the other spouse because he or she obtains pleasure from such expenditures. The husband or wife makes these expenditures because he is concerned for the welfare of their spouse – not because

[16] Ibid., 70

they are somehow forced to. Accordingly, if one spouse was to die, the other spouse would not consider themselves to be better off by the saving of those expenditures.

Second, the authors argue that the use of the sole dependency approach avoids the illogical result that may result from the use of the cross dependency approach. That is, that when the deceased's income is lower than the survivor's, the cross dependency approach often produces the result that the survivor is "better off" now that their spouse is dead.

Consider our example from earlier regarding the Brown's. Let's assume now that it was Mrs. Brown who died in the car accident and Mr. Brown is making a claim for the loss of financial support due to the death of his wife. As you recall, at time of the accident Mr. and Mrs. Brown were earning annual incomes of $100,000 and $50,000, respectively.

Using the methodologies outlined above, Mr. Brown would be entitled to an annual loss of financial support under the sole dependency approach of $35,000 [$50,000 x 70%]. However, under the cross dependency approach, Mr. Brown would be entitled to an annual loss of financial support of $Nil [($100,000 + $50,000) x 60% = $90,000 - $100,000]. In fact, under this approach, it is assumed that Mr. Brown is better off by $10,000 due to the death of his wife, a result which seems illogical in these circumstances.

The authors of the book also provide arguments for the use of the cross dependency approach to calculating the loss financial support in a two income family, as opposed to the sole dependency approach. Their arguments are derived out of the theory that some couples may not marry by choice or for love, but rather for financial gain.

Where that is the case, the authors argue that one person can live cheaper than two and, as such, the deceased will have benefited from the cost reductions that are obtained when two people live together. Based on this premise, from a purely financial perspective, the survivor

has generated “savings” form the death of their spouse which should be offset from any award for the loss of financial support.

In the case of *Hechavarria v. Reale*, Justice Nordheimer appears to dismiss this argument on the basis that is seems to confuse a financial or economic analysis with an emotional one and that the consideration of an emotional loss is more appropriately dealt with in the award for general damages.[17]

The authors conclude, and I would agree, that the courts have struggled with the appropriate method to use to calculate the loss of financial support experienced by the family of the deceased. They state that most courts have reservations about the sole dependency arguments noted above, as they are arguments of economics not law. These sentiments were echoed by Justice Nordheimer when he stated that the sole dependency approach “...seems to me to ignore the very practical, but harsh reality that there is likely to be some degree of savings in financial terms from the loss of one member of the family unit”.[18]

On the other hand, the courts also have strong reservations about the cross dependency approach. They accept that the surviving spouse now has money available to him or her that would not have been available had the deceased survived; however has difficulty accepting that the dependency rate should be reduced by more than 10 or 20 percent.[19]

The courts have attempted to address the shortcomings of these two approaches through the introduction of a third approach to calculating the loss of support – the modified sole dependency approach.

[17] Hechavarria v. Reale, 2000, Can LII 22711 (ONSC), 24
[18] Ibid., 25
[19] C. Bruce, K. Rathje, L. Weir “Assessment of Personal Injury Damages”, 5th Edition, Butterworths, 71

6.7 The Modified Sole Dependency Approach

The modified sole dependency approach has increasingly been accepted by the courts as an appropriate and fair approach to calculating the loss of financial support for the dependents of a two income family, provided the spending habits of the family can be clearly established.

Similar to the sole dependency approach, the modified sole dependency approach only considers the income of the deceased. In doing so, it attempts to address the problems that may arise when an IFA calculates a loss of financial support under the cross dependency approach where the surviving spouse may have a greater income than the deceased.

The modified sole dependency approach also attempts to address the primary criticism of the sole dependency approach; that it does not address the fact that the surviving spouse likely experienced some savings following the death of their spouse. It does so by reducing the dependency factor used under the sole dependency approach of 70% to a factor of typically 60%. This approach assumes that the deceased consumed 40% of their own disposable income and that 60% of their income was available to the family.

Let's now again consider our example of the Brown's using the modified sole dependency approach. Under this approach, the loss of financial support available to Mrs. Brown as a result of the death of her husband is estimated to be $60,000 [$100,000 x 60%].

This compares to a loss of financial support under the sole dependency approach of $70,000 [$100,000 x 70%] and a loss of financial support under the cross dependency approach of $40,000 [($100,000 + $50,000) x 60% - $50,000].

In other words, the modified sole dependency approach provided a higher result than the cross dependency approach but not as a high a result as the sole dependency approach. Considering the very real possibility of plaintiff counsel advocating a sole dependency approach and

defence counsel advocating a cross dependency approach, an approach that provides a result in the middle of these two approaches is worthy of consideration.

It should be clearly stated that the proper approach to use to calculate the loss of financial support should be driven first, and foremost, by the facts of each subject case. An IFA should not consider an approach to calculating a loss of financial support claim until such time as they have a thorough understanding of the background facts of the case, at which time they may independently and objectively consider the appropriate approach for the subject case.

6.8 Dependency Rates

In the preceding sections, we refer to dependency rates of 70% and 60% in assessing the loss of financial support in fatality cases; however do not establish how these amounts were determined or how they came to be relied upon by the courts.

As you will recall from our earlier discussion, the dependency rate is the family's rate of dependency on the deceased income before their death. That is, the percentage of income that the family consumed, as opposed to the percentage the deceased spent on themselves.[20]

There are two approaches two calculating dependency rates: one based on the actual expenditures of the deceased family and one based on statistics. These approaches are discussed below, as well as a discussion on calculating personal consumption rates by income level.

Statistics Approach

The dependency rate of 70% for a one income family and 60% for a two income family are based on statistics. These statistics assume that the deceased and their spouse have no children

[20] Millott Estate v. Reinhard, 2001, ABQB 1100 (Can LII), 234

and are the result of deducting personal consumption rates found in such studies as Statistics Canada's Family Expenditure Survey from a factor of 100%. In other words, in a one income family with no children, statistics show that the income earning spouse would have consumed 30% of their own income personally and would have contributed 70% of the family unit.

In cases where the deceased and their spouse have children, the dependency rate is actually higher. This is because statistics show that the personal consumption rate of an income earner decreases the more family members that are added.[21]

Let's consider again our case of the Brown's. If we were to assume that the deceased, Mr. Brown, was the sole income earner and that he had no children, than based on statistics, we would assume that Mr. Brown consumed 30% of his income for personal use and 70% was available to the family.

Now, let's assume that Mr. Brown and his wife had two dependent children. In this case, it would be assumed that Mr. Brown consumed only 22% of his income for personal use and that 78% of his income was available to the family. Based on the theory outlined above, with reference to statistics, this amount was calculated by assuming a starting personal consumption rate of 30% (and dependency rate of 70%), and reducing it by 4% for each dependent child.

The courts have often come to rely on the statistics approach to calculating dependency rates in fatality claims. This was acknowledged by Justice Fraser in *Millott Estate v. Reinhard* in which he stated that he preferred to use the "rule of thumb" approach adopted by the Plaintiff's expert (which was based on statistics), acknowledging that that this approach had been accepted in other cases as well.[22]

[21] Ibid., 236
[22] Ibid.

Actual Expenditures Approach

Although statistical averages appear to be the most often used approach to calculating dependency rates, these same rates may be calculated using the actual expenditures of the deceased's family. In fact, in the case of *Millott Estate v. Reinhard,* both experts agreed this was the preferred method to calculating damages.[23]

The benefits of using the actual expenditures of the deceased family over statics are obvious. Personal consumption statistics, by their nature, are averages of a group of people in defined circumstances and locations. But what if the family of the deceased are not considered "average"? What if they spend more money on transportation than other families because they enjoy having expensive new cars each year? What if they spend less money than the average family on food because of their financial circumstances dictate that they do so? These same type questions must be asked by each and every IFA in assessing whether the standard dependency rates referred to above are applicable to the subject case.

The difficulty of using the actual expenditures of the deceased family over statistics is unfortunately, just as obvious. The primary difficulty is that the data is typically not always available. An analysis of the personal consumption rates based on actual expenditures requires an assessment of all of the family's expenses for an appropriate period prior to the date of death. This period would need to be long enough to establish a trend or pattern in the nature and composition of the expenses incurred by the family, which may be as much as 5 years based on the facts of the case. The IFA would then have to trace these expenditures to each member of the family and, where necessary, apportion these expenses between family members where it cannot be clearly established who incurred the expense (i.e., food). Last, an assessment of future expenses, absent the fatal accident, would need to be carried out to

[23]Ibid., 235

ascertain whether the expenses incurred by the family prior to the date of death would be similar to the expenses expected to be carried out in the future.

Based on the above, it appears clear why certain judges have come to rely on the statistics approach to calculating dependency rates rather than the actual expenditure approach. I would caution however, that a reliance on the statistics approach without equal consideration and attempt to calculate the actual expenditures of the deceased family, may result in an unfair result for the Plaintiff.

Personal Consumption Rates by Income Level

To date, consumption rates, whether based on statistics or actual expenditures, have typically been determined based on family size only. Cara Brown, a leading economist in Canada and author of the book "Damages: Estimating Pecuniary Damages" argues that this approach may be short sighted, as it fails to consider the impact of family income on personal consumption rates.[24]

In a November 2011 Newsletter entitled "Fatality Cases: Unique aspects related to quantum awards", Ms. Brown states that constructing personal consumption rates by family size <u>and</u> family income level is long overdue.[25] Her basis for this charge is rooted in economics literature, specifically on consumption and savings behaviours, that has established in no uncertain terms that families' spending is dictated by the amount of resources available to the family.

In support of her position, Ms. Brown refers to the Statistics Canada report "Spending Patterns in Canada, 2000" which states that:

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[24] Cara Brown, "Fatality Cases: Unique aspects related to quantum awards", Brown's Economic Damages Newsletter, Volume Eight, Issue 9, 6

[25] Ibid., 9

> "Household spending patterns are strongly influenced by available income. In 2000, households in the lowest quintile spent an average of $18,909 while households in the top quintile spent $113,027. Households in the lowest quintile spent slightly less than half of their budgets on food and shelter ($8,836). In contrast, households in the top quintile spent $26,758 on these two necessities, representing one quarter of their budgets. Households in the top income quintile devoted 30% of their budgets to personal taxes, compared to only 3% for households in the lowest quintile."[26]

On the basis of the above, Ms. Brown examined the 2007-2008 Survey of Household Spending in Canada to assess the relationship between household income and personal expenditures in Canada. As outlined in her March 2011 newsletter "PCR Rates for Canada by Income Level", she notes that a household with income of $20,000 to $39,999 typically spends $4,656 per year on food, or 15% of their total expenditures. This compares to households with income greater than $100,000 who spends $9,400 per year on food, or 7% of their total expenditure.[27] An analysis of the data suggests that households with higher incomes spend more on food but less as a percentage of total expenditures.

The approach to calculating personal consumption rates by both family size and income level, as argued by Ms. Brown, was accepted by the Northwest Territories Supreme Court in the case of *Fullowka v. Royal Oak Ventures Inc.*, however rejected by the Ontario Superior Court of Justice in *Johnson v. Milton (Town).*[28]

In *Fullowka v. Royal Oak Ventures Inc.*, Justice Lutz noted the following:

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[26] Statistics Canada, "Spending Patterns in Canada 2000 (Ottawa: Statistics Canada, July 2002) Catalogue No. 62-202-XIE, p. 15

[27] Cara Brown, "PCR Rates for Canada by income level; update 2000 estimates with 2007-2008 Survey of Household Spending data from 2007", Volume Eight, Issue 2, 4

[28] Cara Brown, "A primer on calculating personal consumption rates by income level", Law Times, 11

- Ms. Brown developed a new method for calculating PCR's based on the relatively recent methodology employed in the United States;
- Ms. Brown applied the American methodology to Canadian data and offered by Statistics Canada and developed new Canadian tables;
- Ms. Brown and [the other expert] agreed that when income levels increase, the amount that the deceased would have consumed increases as well. However, Ms. Brown indicated that this was true in dollar terms only, not as a percentage of income;
- Ms. Brown's calculations reflect an inverse trend; as family income increases, the PCR decreases, and, as family size increases, the PCR decreases; and
- This approach marks a departure from those accepted by Canadian Courts in the past, but which has merits in my view.[29]

In the case of *Johnson v. Milton*, Justice Taylor determined that the projected level of income of the deceased, absent the accident, of $71,287 was not high enough to merit an adjustment to the standard personal consumption rates.[30]

Based on the above, I would agree with Justice Lutz that an approach which considers personal consumption rates by both family size and income level has merit. However, this approach may be best applied to situations where the deceased was expected to earn higher or lower levels of income than the average Canadian.

[29] Fullowka v. Royal Oak Ventures, 2004, NWTSC 66 (Can LII), 1016
[30] Johnson v. Milton, 2008, ONCA 440 (Can LII), 105

6.9 Income Tax and Tax Gross Up

Research suggests that the most important aspects of calculating damages in fatality claims are the projection of income and dependency rates. This is likely true, however the impact of income tax and tax gross-up can also significantly impact the quantum of any damages awards in fatality claims.

The impact of income tax on fatality claims is experienced in two ways. First, the projected income of the deceased (the sole / modified dependency approaches) as well as their spouse (the cross dependency approach) are calculated on an after-tax basis. This is different than a personal injury claim in which an award for a future loss of income is calculated on a before-tax basis.

The distinction for this difference was articulated by Justice De Grandpre in *Keizer v. Hanna*:

> "It seems to me that the widow and the child have lost in this case is the support payments made by the deceased, support payments which could only come out of funds left after deducting the cost of maintaining the husband, including the amount of tax payable on his income. I cannot see how this pecuniary loss could be evaluated on any other basis than the take-home pay; that is the net pay after deductions on many items including income tax....
>
> It is quite obvious that basing an award under the *Fatal Accidents Act* [now the *Family Law Act*] on gross income would fail to take into consideration the realities of life in a modern state and would, in some cases, give to the dependants a fund greatly in excess of their financial loss. Income tax must therefore be taken into consideration..."[31]

[31] Keizer v. Hanna, 1978, 2 SCR 342

The second impact income tax may have on fatality claims is the concept of "tax gross-up". An income tax gross up is typically required to compensate the surviving spouse for income taxes on any interest income that may be generated from an award of damages. This is because a lump-sum award for the loss of financial support in a fatality case is not subject tax, however the tax payable on the investment income from these awards is taxable.[32]

A tax gross-up may be claimed to adjust for income tax because the loss is calculated based on the net or after tax income of the deceased.[33] This is unlike a personal injury claim in which a tax gross-up may not be claimed because the future income stream is calculated on a pre-tax basis.

The tax gross-up is calculated on an award to the surviving spouse only, not the children of the deceased and their spouse. This is because children under the age of 21 are not taxed on investment income from an award.[34]

In her November 2011 Newsletter, Cara Brown aptly addresses the key assumptions to be considered by an IFA in calculating the tax gross up of the surviving spouse:

- The amount of the lump sum awards;
- The tax brackets and credits published in the most recent federal government and provincial budgets;
- The age and life expectancy of the decedent and survivor;
- The real discount rate used to calculate the prospective award and the tax gross up;
- The future rate of inflation;

[32] Cara Brown "Damages, Estimating Pecuniary Loss", Canada Law Book, 2009, 7-56.27
[33] Ibid.
[34] Income Tax Act (Canada), section 81(1)(g.1)

- The rate of growth of non-refundable tax credits (i.e., CPP and EI contributions);
- The "survivor-hypothetical's" tax bracket in the absence of the award;
- The "survivor-actual" deductions from income; and
- The "survivor-actual" income profile and tax bracket once the award(s) are included.[35]

6.10 Contingencies

There are a number of contingencies, both positive and negative, which may impact an award in a fatality claim. This paper will address those contingencies which differ than personal injury claims, namely: joint life expectancy, divorce and remarriage.

Joint Life Expectancy

In the case of personal injury claims, the stream of future losses is adjusted to consider the possibility that the Plaintiff may die. This is also the case in fatality claims, however there is also the possibility that the deceased's spouse or children may die and therefore no longer be dependent on the deceased. Accordingly, an IFA must consider the probability of survival of each of the dependent family members in a fatality claim, not just that of the deceased.

Consider the impact of life expectancy noted in Table 1, as found in Chapter 3 of the book "Assessment of Personal Injury Damages". In this table, it is assumed that the deceased and his wife were each 30 years old and they would have experienced the average probability of Canadians of their age dying, divorcing and (for the survivor) remarrying.[36]

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[35] Cara Brown, "Fatality Cases: Unique aspects related to quantum awards", Brown's Economic Damages Newsletter, Volume Eight, Issue 9, 13

[36] C. Bruce, K. Rathje, L. Weir "Assessment of Personal Injury Damages", 5th Edition, Butterworths, 75

Table 1

The Effects of Life Expectancy, Divorce and Remarriage on the Average Duration of Dependency

Age	Single Life	Joint Life	Joint Life and Divorce	Joint Life, Divoice and Remarriage
30	0.9991	0.9987	0.9787	0.9264
31	0.9982	0.9974	0.9590	0.8560
32	0.9973	0.9960	0.9379	0.7890
33	0.9963	0.9945	0.9184	0.7295
34	0.9952	0.9929	0.8997	0.6766
35	0.9941	0.9912	0.8815	0.6296
36	0.9930	0.9894	0.8639	0.5877
37	0.9917	0.9875	0.8469	0.5503
38	0.9904	0.9854	0.8404	0.5171
39	0.9890	0.9831	0.8144	0.4875
40	0.9875	0.9807	0.7988	0.4613
Expected Duration of Dependency	**47.67**	**42.98**	**31.45**	**16.75**

Source: Calculated from Statistics Canada, CANSIM Table 101-6505, Catalouge No. 84-536-XPB by C. Bruce, K. Rathje and Laura Weir in Chapter 3 of "Assessment of Personal Injury Damages", 5th Edition

As can be seen in this Table, the probability that a 30 year old single male will live to age 40 is 98.75%. This compares to the probability of both a husband and wife each living to age 40 of 98.07%. Not a significant difference. However, when you compare these statistics over the lifetime of these individuals, you find that the average life expectancy of the single male is 77.67 years (30 years old, plus 47.67 years beyond age 30). This compares to the average number of years that both the husband and wife could have both expected to live of 72.98 years (30 years old, plus 42.98 years beyond age 30), a difference of 5 years. This difference will have a significant impact on an award for damages in a fatality claim and illustrates why IFA's must understand the concept of joint probability of survival.

Divorce

The possibility that a couple may have divorced, absent the fatal accident, must be also considered in calculating a loss of financial support. To ignore this possibility would result in an overstatement of the award of damages to the surviving spouse.

Cara Brown states in her November 2011 Newsletter that "The most important aspect of integrating a divorce contingency in fatality cases depends on the nature of the couple's union prior to the incident".[37] This mimics other comments made throughout this paper which suggest that a thorough understanding of all of the background facts of the subject case, including the details of the quality of their marriage, are important to an IFA in the calculation of a loss of financial support claim. On this point, however, I would note that an IFA should be careful not to step outside the boundaries of their expertise.

I would also note that, an IFA must also consider what impact, if any, would support payments have on an award for damages in fatality claims. Ms. Brown indicates that when she applies the divorce contingency, she downgrades the impact of the contingency by calculating annual support payments to the survivor.[38] I would agree that this adjustment makes sense when applying the divorce contingency, especially in circumstances where the deceased earned significantly more income than their spouse.

Finally, let's consider a numerical example of the divorce contingency on an award for damages in a fatality claim. Referring again to Table 1, as outlined above, the probability that both the husband and wife would have lived to age 40 is 98.07%. The probability that the husband and wife would live to age 40 and "still be married to one another at age 40" is only

[37] Cara Brown, "Fatality Cases: Unique aspects related to quantum awards", Brown's Economic Damages Newsletter, Volume Eight, Issue 9, 15
[38] Ibid., 16

79.88%. This is a difference of more than 18% and would have a significant impact on a claim for damages by the surviving spouse in a fatality claim.

Remarriage

We considered above that, absent the accident, there is a possibility that a couple may have divorced and that this contingency need be considered in the calculation of fatality claims. It is equally important to consider the possibility that, due to the accident, the surviving spouse may remarry.

Similar to the divorce contingency, the application of the remarriage contingency is based on statistics. Cara Brown suggests in her November 2011 Newsletter that the main aspect to consider in applying remarriage statistics to fatality claims is to ensure that the proper statistics are being applied.[39] She notes that Statistics Canada does not release remarriage statistics rates for widowers, but rather combined rates for widowers and divorcees based on gender, age and marital status. This is an important distinction, as evidence suggests that widowers are less likely to eventually remarry that is divorcees. [40]

Let's again consider the example in Table 1 as it relates to remarriage. As outlined above, the probability that the husband and wife would live to age 40 and "still be married to one another at age 40" is only 79.88%. By comparison, the probability that the husband and wife would still be alive at age 40, married to one another, <u>and</u> the wife would have not remarried is only 46.13%. This represents a significant impact on the fatality claim and must be considered carefully by the IFA.

It should be clearly noted that the possibility of divorce, absent the accident, and remarriage, following the accident is subjective. No expert can clearly opine on this matters, as they are,

[39] Ibid., 14
[40] Ibid., 15

for the most part, based on the evidence of the surviving spouse and that of other family members and friends.

For this reason, it has been suggested by others, and I would agree, that an expert should consider presenting fatality claims under two scenarios: one which considers the probability of divorce and remarriage and one which does not.[41] This approach fulfils the expert's duty, which is to the court, while demonstrating a level of objectivity.

6.11 Overview of Relevant Case Law in Canada

The decision as to who is considered a dependent, the appropriate method to calculating a loss of financial support claim, dependency rates and the application of income tax and contingencies to an award of damages is ultimately decided in court by a judge or jury based on the facts of each subject case.

In this section, we will examine the background facts of a few select fatality cases in Canada, the expert's evidence, the court's decision in these cases as well as a brief comparison of these decisions with the findings summarized in the sections above. Our analysis will be limited to those areas affecting pecuniary awards (other than the projection of the future stream of income, absent the loss) made to the deceased's family for the loss of financial support.

We note that, although some of these cases were heard in jurisdictions outside Ontario, the decisions in these cases are relevant to our discussion regarding fatality claims in Ontario.

[41] Ibid., 14

Isildar v. Kanata Diving Supply (2008), Ontario S.C.J.

a) Background

- Mr. Isildar, 28, lost his life in a diving accident in the St. Lawrence River in June 2003. At the time of his death, Mr. Isildar was married and had one son (3 months);
- Prior to his death, Mr. Isildar has been employed in the hardware design group of Nortel Networks, earning $79,000 per year. Mr. Islidar's wife had not been employed outside of the home prior to the date of her husband's death; and
- Mr. Isildar's widow and infant son claimed damages for the loss of past and future financial support, amongst other damages.

b) Expert's Evidence

- Both the plaintiff and defence expert appear to use the sole dependency approach to calculate the past and future loss of financial support;
- The plaintiff's expert relied on Statistics Canada data for a 3 person family to assess personal consumption rates and calculate a dependency factor, the total of which was 56.7% for Mr. Isildar's spouse and 18.9% for his son;
- The defence expert used the "traditional" dependency approach to calculating dependency rates, resulting in a 70% rate for Mr. Isildar's spouse and 4% for his son.

c) Court's Decision

- The court expressed disappointment that neither the plaintiff nor the defence expert obtained actual household consumption rates of the Isildar family in calculating its dependency factor;

- The court excepted the dependency rate calculated by the plaintiff's expert, noting that their approach was a more realistic estimate of the cost of raising children than that the traditional approach used by the courts;

- The court found that it was likely that the Isildar's would have had another child within the next two years, at which point Ms. Isildar's dependency factor would have been reduced; and

- The court rejected the application of a remarriage contingency, noting that the evidence suggested that it was unlikely that Ms. Isildar will remarry. Interestingly, the court noted the following "In any event, the economic consequences of remarriage may range from benefit to burden and the onus is upon the Defendants to demonstrate that any financial benefit to remarriage would be real and sustained".

d) Comparison to Findings

- The use of the sole dependency approached used by the experts in this case, and accepted by the court, is consistent with our findings that this is the preferred approach in cases involving a one income earning family;

- This case supports the notion that an assessment of the actual expenditures of the family, where possible, as opposed to reliance on statistics, is the preferred approach to calculating dependency rates; and

- An assessment of whether the plaintiff's widow would have remarried is outside the scope of expertise of the IFA. The IFA would best serve the court in this area by providing alterative calculations to assist the judge in making their decision.

Hechavarria v. Reale (2000), Ontario S.C.

a) Background

- Winsome Hechavarria, a 53 year old mother of three, was killed in a motor vehicle accident on Ontario on April 12, 1999;

- At the time of her death, Ms. Hechavarria was employed by Chubb Insurance earning $28,000 per year. Her husband, Karl, was a manager at CGU Insurance and was earning $91,000 per year at the time of his wife's death;

- Mr. Hechavarria's salary was paid into a joint bank account for the use of family household expenses. Ms. Hecavarria's salary was paid into her own personal bank account, from which she bought groceries for the family and clothing for the children;

- Following the death of his wife, Mr. Hechavarria advanced a claim for the loss of past and future financial support on behalf of himself and his children.

b) Expert's Evidence

- The plaintiff's expert submitted that the proper approach to be taken is the sole dependency approach and set the dependency factor at 70% for the surviving spouse and 4% for each child; and

- The defendant's expert argued that the proper approach in this case is the cross dependency approach. Accordingly, he applies a 70% dependency factor to the combined earnings of Ms. Hecavarria and her husband and then deducts from the resulting amount 100% of Mr. Hechavaria's income.

c) Court's Decision

- The court did not accept the approach adopted by either the plaintiff expert or the defence expert, instead using a modified sole dependency approach to calculate the loss of financial support;

- The court's criticism of the cross dependency approach in this matter was that, because Mr. Hechavarria was earning a much larger income than his wife, this approach resulted in a situation in which no loss was sustained as a result of the death of Ms. Hecavarria and the removal of her income from the family pool. The court also indicated that the facts of the case (in which the majority of the deceased's income was used on family expenses) do not support the use of a cross dependency approach;

- The court's criticism of the sole dependency approach was that it did not consider the possibility that there must be some "savings" from the fact that there is one less member of the family unit; and

- The court reduced the future loss of one of Ms. Hechavarria's children to account for the fact that he recently obtained employment.

d) Comparison to Findings

- This case supports our findings that the appropriate approach to calculating a loss of financial support must be dictated by the facts of each case (particularly the use of their income), not just the standard approach to calculating losses for one and two income earning family's; and

- The modified sole dependency approach adopted in this case addresses some of the shortcomings of the sole and cross dependency approaches.

Holloway Estate v. Giles (2001), Newfoundland and Labrador S.C.

a) Background

- On February 15, 1994, Pastor Holloway was killed in a motor vehicle accident in Gander, Newfoundland. He was survived by his wife and two children, ages 21 and 16;

- At the time of his death, Pastor Holloway was making approximately $50,000 per year, while his wife was earning $5,000 per year;

- Pastor Holloway's wife and children advanced a claim for loss of financial support following his death; and

- Pastor Holloway's wife remarried following the death of her husband and prior to the date of the trial. Ms. Holloway's new husband's income was estimated to be $250 per week.

b) Expert's Evidence

- The plaintiff's expert and defence expert agreed that the most appropriate approach to use in this case was the sole dependency approach. The defence expert acknowledged Pastor Holloway's wife's income but agreed that it was so nominal that it did not merit the cross dependency approach for a two income earner family;

- However, in acknowledging Pastor Holloway's wife's income, the defence expert reduced the "standard" dependency factor from 70% to 60%;

- The plaintiff expert applied the standard dependency factor of 70% to Pastor Holloway's income, absent the loss;

- The defence expert argued that the income of Ms. Holloway's new husband should be offset by any award for damages, while the plaintiff's expert argued that Ms. Holloway's new husband's income is irrelevant in this case.

c) Court's Decision

- The court accepted the sole dependency approach to calculating the loss of financial support to Ms. Holloway and her family, however adjusted the dependency rate from 70% to 68% to account for the marginal income being earned by Ms. Holloway prior to the loss;

- Although counsel for the defence argued that Ms. Holloway had marketable skills that allowed her to earn income in the future, the judge in this case noted that Ms. Holloway "is not bound to go out to work so as to reduce any award"; and

- The court did not reduce Ms. Holloway's award for damages to account for her remarriage, noting that it is likely she will be the "breadwinner" in this new marriage.

d) Comparison to Findings

- The courts reduction of the dependency rate from 70% to 68% is consistent with the modified sole dependency approach, however this reduction is less than the 10% reduction referred to in most other modified sole dependency cases; and

- The decision by the court in this case to ignore the remarriage contingency is consistent with our findings that these contingencies should be applied on a case by case basis, with reference to the income of the dependants new spouse.

MacNeil v. Gillis (1994), Nova Scotia S.C.

a) Background

- Mr. MacNeil was killed in motor vehicle accident on June 29, 1987 in Cape Breton, Nova Scotia at the age of 28. At the time of his death, Mr. MacNeil was a self-employed mechanic earning approximately $16,000 per year;
- Mr. MacNeil and his wife were married approximately 2 months prior to Mr. MacNeil's death. Mr. MacNeil's wife had a 9 year old son; and
- Mr. MacNeil's wife was also 28 years of age at the time of the accident and was employed as a nursing assistant earning $20,000 per year.

b) Expert's Evidence

- The plaintiff's expert put forth a cross dependency approach to calculating Ms. MacNeil's loss of financial support. This approach combined the income of Mr. and Ms. MacNeil, to which a 70% dependency factor was applied, followed by a deduction of Ms. MacNeil's own income; and
- The defence did not provide an alternative expert accounting report.

c) Court's Decision

- In absence of a defence expert report, the Court initially accepted the approach used by the plaintiff expert, however noting that some of the assumptions used by the plaintiff expert were not based in the facts of the subject case;
- This ruling was appealed, upon which the Court of Appeal continued to accept the cross dependency approach used by the plaintiff's expert, however adjusted the result

to reflect a "more reasonable result". In doing so, Justice Hallett indicated that an award for damages is simply not just an exercise in mathematics. He also indicated that in lower two income families the death of one spouse and the consequential loss of that source of income will likely have a greater negative impact on the survivor's standing of living than would appear to be the case by strict application of the actuarial formula; and

- The court noted that "As a general rule, in absence of evidence to the contrary, in two-income families where incomes are pooled each spouse would spend approximately 30% of net family income for their respective personal use".

d) Comparison to Findings

- Our research of other cases has found that, under the cross dependency approach, it is assumed that the dependency factor is 60% (rather than 70% referred to *in MacNeil*). This assumes that a deceased in a two income family consumed 40% of the total combined income and that 60% of the combined income was enjoyed by the family; and

- In this case, the deceased and his wife each earned similar income prior to the accident, albeit nominal. The use of the cross dependency approach in this case resulted in a lower claim than would have the sole dependency or modified sole dependency approach. The judge in this case appears to understand this and arbitrarily adjusts the loss higher to reflect a more reasonable approach.

6.12 Conclusion

Based on the above, with reference to a few select fatality cases in Canada, I can conclude the following with respect to calculating pecuniary damages in fatality claims in Ontario:

- First and foremost, the assessment of pecuniary damages in fatality claims in Ontario should be based on the facts of each subject case;

- The legal standard for calculating fatality claims in Ontario can be found in section 61 to 63 of Part V of the *Family Law Act*;

- Section 61(1) of the *Act* outlines who is considered a dependent and eligible to recover damages in fatality claims in Ontario and includes a spouse, children, grandchildren, parents, grandparents, brothers and sisters of the deceased person. It was noted, however, that pecuniary damages such as loss of financial support are typically limited to the spouse and children of the deceased;

- The sole dependency approach and cross dependency approach to calculating a loss of financial support in a two income family each have fundamental flaws (as outlined above);

- Based on the facts of the subject case, the modified sole dependency approach may produce a more fair result than the sole and cross dependency approach to calculating damages in fatality claims involving a two income family;

- Irrespective of the approach adopted, consideration must be given to the income earned by both the deceased and their spouse <u>and</u> how this income was spent by each party (i.e., was the income pooled together to pay for the expenses of the family or were separate bank accounts and financial arrangements?) It appears that the latter may not always be consistently considered in fatality claims in Ontario;

- Courts continue to rely heavily on pre-established dependency rates based on statistics. This is because data to calculate the actual expenditures of the deceased's family is often not available. This may lead to an unfair result for the Plaintiff;

- Similarly, IFA's continue to rely on the notion that a dependent child's claim for damages ends at the time they graduate. This may also lead to an unfair result for the Plaintiff if it is determined that the child would have lived with their parents (and therefore been dependent) beyond graduation;

- Personal consumption rates by both family size <u>and</u> income level should be considered by an IFA. To date, this does not always appear to be the case in Ontario;

- Personal consumption rates by both family size and income level may be best applied to situations where the deceased was expected to earn higher or lower levels of income than the average Canadian;

- The impact of income tax and tax-gross up can have a significant impact on an award for damages in a fatality claim and should be clearly understood and applied by the IFA;

- Unlike personal injury claims, the stream of future losses is adjusted to consider the possibility that both the deceased (absent the accident) <u>and</u> the deceased spouse may die. Accordingly, a "joint probability of survival" should be applied to the expected future stream of income, absent the accident, which is sometimes overlooked in fatality cases; and

- Contingencies for divorce, absent the accident, and remarriage, following the accident, are subjective. No expert can clearly opine on these matters, as they are, for the most part, based on evidence of the surviving spouse and others. For this reason, an IFA should

present fatality claims under two scenarios: one which considers the probability of divorce and remarriage and one which does not.

7.0 LOSS OF CARE, GUIDANCE AND COMPAIONSHIP

Family members who are considered dependents under section 61(1) of the *Family Law Act* are eligible to recover damages for the loss of guidance, care and companionship that they would have received from the deceased had the accident not occurred.

These damages are typically assessed by a judge or jury rather than an IFA. Justice Nordheimer outlines some of the reasons for this approach in *Hechavarria v. Reale*:

> "As anyone will quickly appreciate, and certainly any judge that has to undertake this task, it is impossible to quantify the loss of life in monetary terms. No amount of money could ever replace the contribution which a loved one makes to the people around him or her. The loss of care, companionship, guidance and the very important emotional bond cannot be calculated in dollar terms. The awarding of money, however, is the only remedy which a court has available to it in circumstances such as this. Further, when considering the amount to be awarded, a judge must be constrained to a range that is consistent with awards previously made in other cases so that the results in any given case will have a measure of consistency with other like cases. In that way, the courts try to achieve a degree of predictability which in turn, it is hoped, will assist future litigants to resolve such matters without the need for a full trial with all of its attendant hardships and expense':[42]

In assessing damages for the loss of care, guidance and companionship in Ontario, courts are guided by the factors set out in *Newman Estate v. Swales*, as follows:

(i) The age and mental and physical condition of the claimant;

(ii) Whether the deceased lived with the claimant, and if not the frequency of the visits;

[42] Hechavarria v. Reale, 2000, Can LII 22711 (ON SC), 11

(iii) The intimacy and quality of the claimant's relationship with the deceased;

(iv) the claimant's emotional self-sufficiency;

(v) Whether the deceased's spouse has remarried; and

(vi) The deceased's and the claimant's joint life expectancy, or the probable length of time the relationship would have endured.[43]

There are no caps in Ontario on the amount of damages that may be paid to dependents for the loss of care, guidance and companionship. However, Jamie Dunn, partner at Blouin Dunn LLP indicates that "While there is no cap in the amount of the aware, the Court of Appeal has basically imposed a cap – a range beyond which they will not go".[44]

Average awards in Ontario (before deductibles) for the loss of care, guidance and companionship, in 2010 dollars, are as follows:[45]

- Death of a Husband / Wife - $65,000 / $64,000
- Death of a Father / Mother - $40,000 / $32,000
- Death of a Child - $75,000 to $85,000
- Death of a Brother / Sister - $25,000
- Death of a Grandparent / Grandchild - $10,000

[43] Newman Estate v. Swales, 2002, OJ No 2288 (Ont. S.C.J.), 214
[44] http://www.claimscanada.ca/issues/article.aspx?aid=1000370112
[45] Ibid.

8.0 A BRIEF COMPARISON TO THE UNITED STATES

Where a person is killed or injured in the United States due to the fault or negligence of another, that person's estate may bring a claim for damages against the at fault party. These claims are referred to as "Wrongful Death" claims in the United States and, in almost all cases, are governed by state law. This is similar to Canada in which dependency claims in fatality cases are based on the laws in each Province, rather than at the Federal level.

In all states, immediate family members like spouses, children and parents of unmarried children can recover damages in wrongful death claims.[46] However, only some states allow brothers, sisters and grandparents to bring wrongful death claims.[47] As you will recall from our earlier discussion, Ontario considers all of these individuals as dependents, therefore entitling them to advance a claim for damages in a fatality case.

In calculating the loss of financial support in a wrongful death claim, IFA's in the United States are guided by the same fundamental principle that IFA's in Ontario are: to put the plaintiff in the same financial position they would have been, had the fatal accident not occurred. For the most part, it appears that IFA's in the United States use similar methodologies to calculating a loss of financial support to those in Canada, with one exception.

In calculating dependency rates, American IFA's appear to have shifted from focusing on statistics for family size only (which is common practice for IFA's in Ontario) to focusing on both family size and income level. This difference was noted by Justice Lutz in *Fullowka v. Royal Oak Ventures.*[48]

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[46] http://www.nolo.com/legal-encyclopedia/wrongful-death-claims-overview-30141.html
[47] Ibid.
[48] Fullowka v. Royal Oak Ventures, 2004, NWSTSC 66 (Can LII)

With respect to non-pecuniary damages (i.e., loss of care, guidance and companionship), most states, as they do in Ontario, provide a mechanism for dependents to recover these damages in wrongful death claims. The primary difference, however, between awards for non-pecuniary damages in the United States and Ontario is quantum.

As outlined above, there are no caps in Ontario on the amount of damages that may be paid to dependents for the loss of care, guidance and companionship. However, the Court of Appeal has actively monitored these awards, thus implementing a self-imposed cap.

Although some states have attempted to impost caps on non-pecuniary awards in order to control the dollar value of awards, the majority of states do not impose caps. This is because a number of courts in the United States have held that such caps are unconstitutional.[49]

Courts in the United States which do not impose caps do not appear to have the same level of judicial activism as they do in Canada when it comes to managing awards for non-pecuniary damages. This has resulted in significantly higher awards for non-pecuniary damages in wrongful death claims in the United States than in Ontario.[50]

[49] Michael Trebilcock and Paul-Erik Veel, “A Tamer Tort Law: The Canada-US Divide”, 9
[50] Ibid., 4

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