BILL 59 AND THE REFORM OF FATAL ACCIDENTS LEGISLATION

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In 1969 the Ontario Law Reform Commission reported somewhat complacently that "so far as the Commission is aware the fatal accidents legislation is working well".[1] In contrast, there has been pressure in some jurisdictions for the abolition and replacement of the legislation by a statutory scheme,[2] while in others, legislators,[3] judges[4] and writers[5] continue to struggle with the problems arising under laws placed on the statute books over one hundred and thirty years ago.[6] Meanwhile in Canada generally,[7] and in Ontario in particular,[8] the judiciary have had to cope with the problems arising from legislative inactivity.[9] The provisions relating to wrongful death and personal injury in the new Family Law Reform Act 1978 will, it is suggested, only partially alleviate the judicial burden.

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[1] THE LAW REFORM COMMISSION OF ONTARIO, REPORT ON FAMILY LAW, PART 1 TORTS, 107 (1969). *See id.* at 110, however, where a dissenting opinion advocated change to permit the award of non-pecuniary as well as pecuniary damages. By 1977 the matter had returned to the Ontario Law Reform Commission's agenda with another report expected before the end of the decade.

[2] THE REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967). As a result, the New Zealand parliament passed the Accident Compensation Act 1972, No. 43. The Quebec Automobile Insurance Act (Bill 67, 31st Leg. Que., 2nd sess., 1977, effective March 1, 1978), s. 4 abolishes the fatal accident action for death caused by an automobile, subject to certain restrictions in ss. 7, 8 and 17.

[3] In the United Kingdom, the Fatal Accidents Act 1976, c. 30, consolidates the wrongful death provisions of the following: Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93; Fatal Accidents Act, 1864, 27 & 28 Vict., c. 95; Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41; Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28; Fatal Accidents Act, 1959, 7 & 8 Eliz. 2, c. 65; Law Reform (Miscellaneous Provisions) Act 1971, c. 43; Social Security Act 1973, c. 38; Limitation Act 1975, c. 54.

[4] Hay v. Hughes, [1975] Q.B. 790, [1975] 1 All E.R. 259 (C.A. 1974); Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S. Ct. 806 (1974).

[5] Hodgin, *Recent Compensation Complications Under the Fatal Accidents Acts*, 28 N.I.L.Q. 43 (1977); Speiser and Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1 (1976).

[6] Lord Campbell's Act (Fatal Accidents Act, 1846), 9 & 10 Vict., c. 93. This legislation was "exported" to all of the English-speaking common law jurisdictions of the Empire and was incorporated in the law of the Province of Canada, which included Ontario, in 10 & 11 Vict., c. 6 (1847).

[7] Babineau v. MacDonald, 10 N.B.R. (2d) 715, 59 D.L.R. (3d) 671 (C.A. 1975); Lepine v. Demeule, [1975] 3 W.W.R. 732, 36 D.L.R. (3d) 388 (N.W.T.C.A.); Chapman v. Verstraete, [1977] 4 W.W.R. 214 (B.C.S.C.); Alaffe v. Kennedy, 40 D.L.R. (3d) 429 (N.S.S.C. 1973); Luethi v. Hague, 3 Alta. L.R. (2d) 393 (S.C. 1977).

[8] Vale v. R.J. Yohn Constr. Co., [1970] 3 O.R. 137, 12 D.L.R. (3d) 465 (C.A.); Franco v. Woolfe, 12 O.R. (2d) 549, 69 D.L.R. (3d) 501 (C.A. 1976), *modifying* 52 D.L.R. (3d) 355 (H.C. 1977); Trudel v. Canamerican Auto Lease, 9 O.R. (2d) 18, 59 D.L.R. (3d) 344 (H.C. 1975).

[9] In earlier years the judges chose to slavishly follow English precedent on the premise that a statute conferring a new cause of action must be strictly construed: Piper v. Hill, 53 O.L.R. 233, at 234 (C.A. 1923); McEllistrum v. Etches, [1954] O.R. 814, [1954] 4 D.L.R. 350 (C.A.).

Sections 60 to 64 of the 1978 Act[10] replace the Fatal Accidents Act[11] with a new cause of action encompassing fatal and non-fatal injuries. The preferred class of dependants under the former legislation has been extended. The basis of recovery has also been extended to include non-pecuniary as well as proven pecuniary loss. Monies payable as a result of the death or injury under a contract of insurance are expressly excluded from the assessment of damages. In short, the provisions aim at consolidation rather than codification.

The purpose of this brief essay is therefore not only to offer criticism of the reforms, but also to suggest possibilities as to future, more radical, changes to the law governing wrongful death actions. Such proposals would extend the list of dependants in section 60(1);[12] revamp the contributory fault statement in section 60(3);[13] enlarge the court's powers in section 63(3)[14] to include the granting of periodic payments; and the rewriting of section 64(1)[15] to increase the number of non-deductible benefits. Finally, a section should be added to incorporate punitive damages in wrongful death suits in the manner of past Canadian practice in personal injury cases.[16]

A. *The List of Dependants*

The specified class of dependants under the original Ontario Fatal Accidents Act[17] was essentially limited to the nuclear family. Section 1 of that Act included the following definitions:

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[10] An Act to reform the Law respecting Property Rights and Support Obligations between Married Persons and in other Family Relationships, S.O. 1978 (2nd sess.) c. 2, (The Family Law Reform Act, 1978). In force March 31, 1978.

[11] The Fatal Accidents Act, R.S.O. 1970, c. 164.

[12] S. 60(1):

> Where 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 II, 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.

[13] S. 60(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.

[14] S. 63(3):

> The judge may in his discretion postpone the distribution of money to which minors are entitled and may direct payment from the undivided fund.

[15] S. 64(1):

> In assessing the damages in an action brought under this Part, the court shall not take into account any sum paid or payable as a result of the death or injury under a contract of insurance.

[16] Fridman, *Punitive Damages in Tort*, 48 CAN. B. REV. 373 (1970); Veitch, *Punitive Awards in Canada — A Neighbour's Experience*, N. CAROLINA L. REV. 181 (1977).

[17] 10 & 11 Vict., c. 6 (Prov. of Can. 1847). The legislation remained largely unchanged until re-enacted in 1911 as The Fatal Accidents Act, 1 Geo. 5, c. 33, and has so remained except for the enactment of s. 3(2) in 1959.

(a) "child" includes son, daughter, grandson, stepson, stepdaughter, adopted child, and a person to whom the deceased stood in loco parentis;
(b) "parent" includes father, mother, grandfather, grandmother, stepfather, stepmother, a person who adopted a child, and a person who stood in loco parentis to the deceased.[18]

Judicial decisions have excluded other close family members, such as a sister[19] and a niece[20] of deceased persons, despite their ability to clearly establish dependency. Conversely, by a 1938 decision,[21] the action was extended to the deceased's illegitimate child as a person to whom the deceased stood in *loco parentis*. More recently, the Court of Appeal in *Hopkins v. McFarland*[22] upheld the claim of two children of a woman living in a common law relationship with the deceased on proof that they were not in receipt of support from their natural father.

The new section 60(1), incorporating the definitional sections 1(f) and 14(b), amends the scope of the former law by recognizing the claims of collateral dependants and redefining the meaning of spouse:

1(f) "spouse" means either of a man and woman who,
(i) are married to each other,
(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity,
(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year.
14(b) "spouse" means a spouse as defined in section 1, and includes
(i) either of a man and woman not being married to each other who have cohabited,
1. continuously for a period of not less than five years, or
2. in a relationship of some permanence where there is a child born of whom they are the natural parents,
and have cohabited within the preceding year, and
(ii) either of a man and woman between whom an order for support has been made under this Part or an order for alimony or maintenance has been made before this Part came into force.[23]

The policy implicit in this revision is clear: it attempts to recognize the fact of interdependence within the family circle and at the same time to accept the economic dependency stemming from informal relationships. The test for membership of the class has thereby been shifted from that of strict familial relationships to that of proven past depen-

[18] The Fatal Accidents Act, R.S.O. 1970, c. 164, s. 1.
[19] Royal Trust Co. v. Globe Printing Co., [1934] O.W.N. 547 (C.A.).
[20] Antoine & Larocque, [1954] O.W.N. 641 (H.C.), *aff'd*, [1955] O.W.N. 134 (C.A.).
[21] McMaster v. Fletcher, [1938] O.W.N. 103 (H.C.). In Ontario the common law distinction of legitimacy has now been abolished by s. 1(4) of the Children's Law Reform Act, effective March 31, 1978. The problem, however, still remains in other jurisdictions: *see, e.g.*, Tower v. Hubert, 6 N.B.R. (2d) 587, 14 R.F.L. 362 (Q.B. 1972), a case reflecting the original English position of Dickinson v. N.E. Ry. Co., 33 L.J. Exch. 91, 159 E.R. 304 (1863), later reversed by the Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41, s. 2(1).
[22] 15 O.R. (2d) 330 (C.A. 1976).
[23] The Family Law Reform Act, 1978, ss. 1(f) and 14(b).

dency. Having made these changes, which were foreshadowed in part by other legislation,[24] why did the drafters not go further and include others who might easily satisfy the dependency qualification? Why, one wonders, were they reluctant to admit that the whole Act seeks to recognize kinship and affinity relations as the source of legal rights?[25]

The new list does not cope with the dependency interests of persons such as the fiancée,[26] the spouse who does not satisfy the prescribed five year period, the polygamous wife,[27] the *de facto* separated wife,[28] the bigamous wife,[29] nieces and nephews living within the deceased's household, close relations by marriage and persons supported voluntarily by the deceased. Their claims could be readily dealt with by a provision expressly recognizing that the wrongful death claim is based primarily on proven dependency on the deceased by members of his *de facto* family. This would allow a family claim to be established by "any member of the family" and such a provision would include:

> spouse, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister, relations by affinity and unrelated persons dependent on the deceased.

This revised list of claimants would more effectively bring the law into line with social fact, which is the apparent aim of the Family Law Reform Act as a whole.

B. *Damages for Non-pecuniary Losses*

Initially Section 60 continued the policy of the original English Act, and the interpretation of the corresponding Canadian legislation,[30] of

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[24] The Family Benefits Act, R.S.O. 1970, c. 157, s. 7(1); The Workmen's Compensation Act, R.S.O. 1970, c. 505, s. 1(1)(d); the Canada Pension Plan, R.S.C. 1970, c. C-5, s. 63(1)(b) and the CRIMINAL CODE, R.S.C. 1970, c. C-34, s. 197.

[25] Knight, *A Modest and Useful Little Bill*, 5 MALAYA L. REV. 288 (1963), commenting on the Fatal Accidents Act, 1959, 7 & 8 Eliz. 2, c. 65.

[26] There was recovery for nervous shock on witnessing injury to the prospective spouse in Currie v. Wardrop, [1927] S.C. 538 (Scot.).

[27] *See*, however, s. 72 of the Family Law Reform Act, 1978.

> This Act applies to persons whose marriage was actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognizes the marriage is valid.

The jurisprudence has been uneven: Lim v. Lim, [1948] 1 W.W.R. 298, [1948] 2 D.L.R. 353 (B.C.S.C.); Sara v. Sara, 38 W.W.R. 143, 31 D.L.R. (2d) 566 (B.C.S.C. 1962), *aff'd*, 36 D.L.R. (2d) 499 (B.C.C.A. 1962); *Re* Hassan and Hassan, 12 O.R. (2d) 432 (H.C. 1976).

[28] Davies v. Taylor, [1974] A.C. 207, [1972] 3 All E.R. 836 (H.L. 1972). She has been included in he past on proof of dependency: Scarlett v. C.P.R., 4 O.W.N. 718, 9 D.L.R. 780 (H.C. 1913); Nowakowski v. Martin, [1951] O.R. 67, [1951] 1 D.L.R. 670 (C.A.).

[29] Is she a wife or a spouse under the Family Law Reform Act, 1978? *Cf.* Wilkinson v. Joughlin, L.R. 2 Eq. 319, 35 L.J. Ch. 684 (1866).

[30] C.P.R. v. Robinson, 14 S.C.R. 105 (1887); Toronto Ry. v. Mulvaney, 38 S.C.R. 327 (1907). Early attempts to argue that Lord Campbell's Act was aimed at assimilating the law of England with that of Scotland failed in Blake v. Midland Ry., 18 Q.B. 93, 118 E.R. 35 (1852), despite the evidence of Lord Campbell's participation in Duncan v. Findlater, 6 Cl. & F. 894, 1 E.R. 934 (H.L. 1831).

providing a remedy only for pecuniary loss resulting from the death of another. This policy resulted in the recognition of the awkward cases—minor children,[31] elderly[32] or handicapped persons and the non-working wife and mother[33]—as persons whose loss to the dependants is virtually non-compensable so far as their financial input is concerned. The reason for not awarding damages for intangible losses lay in the confused origins and early history of Lord Campbell's Act of 1846. This had long been recognized,[34] but the problem remained untouched[35] by the new Bill until the final amendments made prior to Third Reading. Currently, we award damages for nervous shock as a personal injury, but deny it as a claim to those who sue as dependants. Equally, we recognize that damages ought to be awarded to a person who suffers as a result of believing another is dead when he is in fact alive,[36] but deny a remedy should the rumour prove true.

A recent decision of the Supreme Court of the United States highlights the dilemma commonly faced by judges. In *Sea-Land Services Inc. v. Gaudet*[37] it was held that pecuniary loss must be stretched to cover intangible elements such as loss of society in the form of love, affection, care, attention, counselling, comfort and protection. Objections that this would lead to speculative and excessive awards were rejected. While this decision does not expressly accept grief and mental anguish as a head of damages, it recognizes that intangible harm is the consequence of the loss of intangible support.

An identical line of reasoning was used in Ontario by Mr. Justice Haines in *Franco v. Woolfe*[38] in order to compensate the husband and children for the loss of their "devoted and energetic" wife and mother.

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[31] *See, e.g.*, Piper v. Hill, *supra* note 10; Guitard v. MacDonald, 14 D.L.R. (3d) 252 (N.B.C.A. 1970); Wycko v. Gnodtke, 361 Mich. 331, 105 N.W. 2d 118 (Sup. Ct.); Spitalali v. Washbourne, [1976] 1 C.L. 73 (Richards J.) (Scot., Dec. 12, 1975). In Fenn v. City of Peterborough, 14 O.R. (2d) 137, at 171, 73 D.L.R. (3d) 177, at 211, Mr. Justice Holland adverted to the rule of thumb assessment of $100 for each year of life attained by the deceased child in the absence of proof concerning actual financial contribution to the family treasury.

[32] Constable v. Ulan, 70 W.W.R. 171, 7 D.L.R. (3d) 377 (Alta. C.A. 1969).

[33] St. Lawrence & Ottawa Ry. v. Lett, 11 S.C.R. 422 (1885); Vana v. Tosta, [1968] S.C.R. 71, 66 D.L.R. (2d) 97 (1966); Chapman v. Verstraete, [1977] 4 W.W.R. 214 (B.C.S.C.).

[34] *See* Knight, *supra* note 25, at 307-12 and Speiser and Malawer, *supra* note 5, at 5-8.

[35] Fenn v. City of Peterborough, *supra* note 31; Hinz v. Berry, [1970] 2 Q.B. 40, [1970] 1 All E.R. 1074 (C.A. 1970).

[36] Wilkinson v. Downton, [1897] 2 Q.B. 57, 66 L.J.W.B. 493; Hambrook v. Stokes, [1925] 1 K.B. 141, 94 L.J.K.B. 435 (C.A.); Dooley v. Camwell Land & Co., [1951] 1 Lloyd's Rep. 271 (Cty. Ct.).

[37] Sea-Land Services, Inc. v. Gaudet, *supra* note 4.

[38] *Supra* note 8. The expert evidence accepted by the trial judge in the measurement of the loss was criticized by the Court of Appeal.

Other trial and appellate judges in Canada[39] and in the United Kingdom[40] have been forced to employ the same sophistry to subvert the clear language of fatal accidents legislation. In Ontario the judiciary will no longer be compelled to stretch the meaning of "pecuniary loss" to allow compensation for intangible losses. The Family Law Reform Act now includes a remedial section which will virtually codify existing practice in Ontario. Section 60(2) provides that in a claim relating to wrongful death or personal injury, damages recoverable may include:

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

This section clearly gives the court the authority to make awards for non-pecuniary losses. What remains to be seen is how the courts will quantify what is just by way of compensation for these intangible losses. Several other jurisdictions[41] have also abandoned the purely financial restriction and a survey of their experience reveals that there are no insurmountable problems in this regard.[42]

There is also the issue of compensation for the intangible injuries suffered by parents whose child is fatally injured *in utero*. In Canada an award for personal injury is routinely made to a person who survives pre-natal injury,[43] and this has been incorporated into the Family Law Reform Act.[44] As yet, no award has been made in Canada to potential parents of a viable fetus which does not survive the pre-natal violence.

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[39] Babineau v. MacDonald, *supra* note 7; Trudel v. Canamerica Auto Lease, *supra* note 8; Chapman v. Verstraete, *supra* note 7. The Supreme Court of Canada, in a trio of million dollar personal injury cases just recently recognized that huge awards for intangible losses may mistakenly encompass punishment and also give rise to very real personal and social burdens by their exorbitancy; *see* Andrews v. Grand & Toy (Alta.) Ltd., [1978] 1 W.W.R. 577, Thornton v. The Bd. of School Trustees of School Dist. No. 57, [1978] 1 W.W.R. 607, and Teno v. Arnold, (S.C.C. Jan. 19, 1978). Accordingly the Court recommended that reasonableness be the characteristic of any assessment for such non-pecuniary losses.

[40] Regan v. Williamson, [1976] 2 All E.R. 241, [1976] 1 W.L.R. 305 (Q.B.).

[41] *See, e.g.*, Florida: FLA. STAT ANN. s. 768.21 (1972); South Carolina: S. C. CODE s. 10-195 (1962); and Maryland: MD. [COURTS AND JUD. PROF.] CODE ANN. s. 3-904(d) (Supp. 1975). For the death of a spouse or minor child, the damages are not limited or restricted by the "pecuniary loss" or "pecuniary benefit" rule, but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital, parental or filial care, attention, advice, counsel, training, guidance or re-education where applicable.

[42] *See* Speiser and Malawer, *supra* note 5, at 18-19, where the authors suggest that the awards made in these jurisdictions are lower than in others because the juries do not have to disguise their efforts to compensate the loss of society and mental anguish under pecuniary heads of damage.

[43] Montreal Tramways v. Leveille, [1933] S.C.R. 456, [1933] 4 D.L.R. 337; Duval v. Seguin, [1972] 2 O.R. 686, 26 D.L.R. (3d) 418 (H.C.), *aff'd, sub nom.* Duval v. Blais, 40 D.L.R. (3d) 666 (C.A. 1973). *Cf.* Watt v. Rama, [1972] V.R. 353 (Vict. S.C. 1971).

[44] S. 67:

> No person shall be disentitled from recovering damages in respect of injuries incurred for the reason only that the injuries were incurred before his birth.

Two decisions in the United States[45] point up the absurdity whereby the wrongdoer is rewarded for the severity of the injury. Both cases make it clear that calculations based on possible pecuniary advantage to the parents of the unborn child[46] are awkward and unsustainable. The damages must be measured by the intangible loss to the aggrieved parents and not by imaginary financial losses. We are not concerned here with legal personality or with definitions of persons, but rather with the recognition of the disappointment of potential parents due to the loss of their child by the intervention of a third party. This was clearly articulated by Mr. Justice Paolino of the Supreme Court of Rhode Island[47] when he said that viability should not be a condition precedent to a right of recovery for the wrongful death of a stillborn fetus as such "viability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs". A rationalization of the law can only be achieved by a redefinition of rights.

C. *The Derivative Nature of the Claim*

By section 60(3) the claim of the dependants remains wholly derivative of the deceased.[48] The basis of the action lies in the invasion by the defendant of the dependant's right to pecuniary advantage. That is, the rights of the plaintiffs are those of the deceased in consequence of his injuries but the assessment of damages is based on their losses. A provision such as section 60(3) fails to answer the criticism of Glanville Williams:

> What the Act should have done, it is submitted, was to provide that the dependant should not be identified with the deceased and should have a right of action irrespective of his contributory negligence but that the defendant should have the same right of contribution against the estate of the deceased as if the deceased owed a legal duty of care to his dependants not to contribute to his own death.[49]

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[45] Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E. 2d 88 (Sup. Ct. 1973); Eich v. Town of Gulf Shores, 293 Ala. 89, 300 So. 3d. 354 (Sup. Ct. 1974).

[46] Some twenty American jurisdictions equate viability with legal personality, a solution which creates more problems than it solves: *see* Duncan v. Flynn, 342 So. 2d 123 (Fla. Dist. Ct. App. 1977); Miller v. Highlands Ins. Co., 336 So. 2d 636 (Fla. Dist. Ct. App. 1976), *rev'd, sub nom.* Stern v. Miller, 348 So. 3d 303 (Fla. Sup. Ct. 1977).

[47] Presley v. Newport Hosp., 365 A.2d 748 (R.I. Sup. Ct. 1976).

[48] The death of the deceased is a condition precedent to the action and success is dependent upon the ability of the claimant to prove that his reasonable expectation of pecuniary benefits has been defeated by the death. *See* British Elec. Ry. Co. Ltd. v. Violet Gentile, [1914] A.C. 1034, 18 D.L.R. 264 (P.C.) *aff'g* 18 B.C.R. 397, 15 D.L.R. 384 (B.C.C.A. 1913) and Littley v. Brooks, [1932] S.C.R. 462, [1932] 2 D.L.R. 386, *varying* 40 O.W.N. 364 (C.A. 1931). Note the relatively unusual case of Maurant v. McLean, 15 N.B.R. (2d) 644 (Q.B. 1976) in which the deceased was found to have been 100 per cent responsible for his death hence denying recovery to both his wife and children.

[49] G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 422 (1951), criticizing the Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28.

Some legislative directive to set out the true basis of the dependant's claim as being independent of both the deceased's culpability and criminality would also have been desirable.[50]

Section 63(3) grants the court power to postpone the distribution of payments from the fund. Recent cases provide support for an extension of the court's powers to cope with both the situation of infirm dependants and the variable futures of plaintiffs. For example, where an infirm widow is the effective plaintiff suing for herself and on behalf of minor dependants, then the court can apportion the funds among them. Trustees are appointed to manage the award so that each dependant contributes to the upkeep of the widowed mother. Where the widow is physically and mentally healthy, she is given the largest award in recognition not only of her general financial responsibilities, but also because her dependency is the greatest and for the longest period. But where the widow and other dependants are both infirm, it would be preferable for judges to be given clear authority to deal appropriately with situations similar to that described in *Kolesar v. Jeffries*.[51] There the plaintiff mother, aged 36 years, facing a life expectancy of one to five years, sued on behalf of herself and her two teenage, but infirm, children. The trial judge, in the exercise of his discretion and at the request of counsel for the dependants, created an irrevocable trust of the whole award with portions credited in favour of the children, as determined by the Court. In view of the judge's remarks, codification of this discretionary power might remove any uncertainty felt by judges in dealing with such difficult cases. Such a change might take the form of an expansion of the existing Rules of Practice[52] which require merely that a judgment for the recovery of money on behalf of an infant shall direct the money to be paid into Court, with payment out as the Court thinks fit. There still remains the problem of the investment of the money and whether this can be achieved by the judge on his own initiative or only on request and by arrangement with the plaintiff(s).[53]

In order to do justice to the defendants, the court has to consider the possibility of future financial advantages accruing to the dependants.[54] Such factors as potential remarriage can have the effect of

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[50] It might also be worthwhile to clarify the law as to the irrelevance of the contribution of one dependant to the death of the deceased with regard to the claims of the other dependants. *See* Dodds v. Dodds, [1976] 1 C.L. (Scot.) 295a, and *compare* Trueman v. H.E.P.C. (Cont.), 53 O.L.R. 434, [1924] 1 D.L.R. 405 (C.A.).

[51] Joseph Brant Memorial Hosp. v. Koziac, 2 C.C.L.T. 170 (S.C.C. 1977), *aff'g on other grounds* Kolesar v. Jeffries, 12 O.R. (2d) 142 (C.A. 1976), *varying on other grounds* 9 O.R. (2d) 41 (H.C. 1974).

[52] O.R.P. 736-742, *as amended by* O. Reg. 545-76.

[53] The decontrolling of damages in the United Kingdom was achieved by the Administration of Justice Act 1965, c. 2, s. 19 (for men) and the Law Reform (Miscellaneous Provisions) Act 1971, c. 43, s. 5(1) (for women).

[54] Originally all benefits from the death of the deceased fell to be deducted: Grand Trunk Ry. v. Jennings, 13 App. Cas. 800, 58 L.J.P.C. 1 (1888).

benefitting not only the spouse[55] but also the surviving children of the deceased[56] and result in deductions from awards. However, at present this has little impact. Since the decision in *Fournier v. C.N.R.*,[57] it has been accepted that damages in a personal injuries action must be a final determination at the date of the trial, or possibly later in circumstances where there would be an "affront to common sense involved in the Court shutting its eyes to a fact which falsifies the assessment. . .".[58] Yet courts and legislators[59] continue to recognize such factors despite complaints as to the speculation and imprecision inherent in judicial guesswork. A possible set of curative provisions might resemble the following:[60]

(i) In any action for damages brought under the Act the court shall have power to make an order (in this section called a "periodical payments order") for the payment by the Defendant to any dependant for whose benefit the action is brought of such sums of money at such intervals and during such period as may be specified in the order.

(ii) A periodical payment may be made instead of or in addition to any judgment for a lump sum by way of damages for the benefit of a dependant.

(iii) The payments to be made under a periodical payments order shall be assessed according to the financial loss likely to be sustained by such dependant as a result of the death of the deceased during the period for which the order is made and different sums may be ordered to be paid in respect of different intervals during the period of the order.

(iv) The Defendant and any dependant entitled to payments under a periodical payments order may at any time apply to the court for variation of the order as to the amount of future payments to be made thereunder or as to the intervals at which or the period during which such payments shall be made. No such application shall be made except on the ground that there has been a material change of circumstances which has resulted in the payments ordered to be made ceasing to be a fair assess-

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[55] Mercer v. Sijan, 14 O.R. (3d) 12 (C.A. 1976). The Supreme Court of Canada in Keizer v. Hanna, (Jan. 19, 1978) approved of the practice of attaching relatively little significance to this contingency in the absence of specific evidence from the surviving spouse of plans for remarriage.

[56] Thompson v. Price, [1973] Q.B. 838, [1973] 2 All E.R. 846. *Compare* also the fact of the adoption of the children of the deceased: Adkins v. Mintz, 7 O.R. (2d) 102, 54 D.L.R. (3d) 358 (H.C. 1973).

[57] [1927] A.C. 167, 95 L.J.P.C. 177 (1926).

[58] Mercer v. Sijan, *supra* note 55, at 171.

[59] The United Kingdom's Law Reform (Miscellaneous Provisions) Act 1971, c. 43, s. 4(1), compels judges to disregard the remarriage factor of widows; no mention is made of widowers.

[60] Fleming, *Damages: Capital or Rent?*, 19 U. TORONTO L.J. 295 (1969).

ment of the financial loss likely to be sustained by such dependant after the date of application.

(v) Upon any application under the last preceding subsection the court, if satisfied that there has been such a material change of circumstances, may make such variation in order as it thinks fit.[61]

The judicial control of damages awards would clearly fall within the purposes and machinery of the Unified Family Court.[62]

D. *Deduction from Awards*

Section 64(1) is a very modest creature deficient in a variety of ways. This provision attempts to codify the wisdom of the Court of Appeal in *Boarelli v. Flannigan*[63] without more. There is no attempt to resolve the problem of pension benefits,[64] foreign welfare benefits,[65] or to clarify the no-fault insurance question.[66] With regard to pensions,[67] it is incongruous that their exclusion from awards should depend on whether they are payable compulsorily or voluntarily[68] or can be reduced or terminated.

A comprehensive reform might have included:

> 64(1) In assessing damages in respect of a person's death or injury in an action under this Act, there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death or injury.

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[61] These sections were proposed by the English Law Lords and debated during the passage of the Law Reform (Miscellaneous Provisions) Act 1971, c. 43.

[62] The Unified Family Court Act, 1976, S.O. 1976 (2d sess.), c. 85. In Kolesar v. Jeffries, *supra* note 55, Mr. Justice Haines at trial pointed out the limitations of the powers of the Official Guardian in dealing with the administration of awards to infirm minors after they achieve majority. It would appear that this area requires rethinking.

[63] [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (C.A.). The original exemption of the proceeds of insurance was recognized in Hicks v. Newport, Abergavenny & Hereford Ry., 4 B. & S. 403(a), 122 E.R. 510 (1857). It is to be hoped that the instant provision copes with the situation in which the insurance policy is paid for by someone such as the *driver* and is payable to relatives of a deceased *passenger*. In that case neither the deceased nor the dependants are contributors to the premiums. *Compare* Smith v. British European Airways Corp., [1951] 2 K.B. 893, [1951] 2 All E.R. 737, *with* Green v. Russell, [1959] 2 Q.B. 226, [1959] 2 All E.R. 525.

[64] Krause v. Davey, [1971] 2 O.R. 670, 18 D.L.R. (3d) 674 (H.C.); Plachta v. Richardson, 4 O.R. (2d) 654, 49 D.L.R. (3d) 23 (H.C. 1974); Bates v. Illerburn, 8 O.R. (2d) 467, 58 D.L.R. (3d) 339 (H.C. 1975), *varied on other grounds*, 12 O.R. (2d) 721 (C.A. 1976) and *compare* Spurr v. Naugher, 11 N.S.R. (2d) 637, 50 D.L.R. (3d) 105 (N.S.S.C. 1974).

[65] Pollington v. Air-Dale Ltd., [1968] 1 O.R. 747, 67 D.L.R. (2d) 565 (H.C.).

[66] Milone v. Harty, 7 O.R. (2d) 241 (H.C. 1975); Gorrie v. Gill 9 O.R. (2d) 73, 59 D.L.R. (3d) 481 (C.A. 1975).

[67] The deductibility of payments under the Canada Pension Plan has required the attention of the Supreme Court of Canada on two recent occasions: Canadian Pacific Ltd. v. Gill, [1973] S.C.R. 654, 37 D.L.R. (3d) 229 and Gehrmann v. Lavoie, [1976] 2 S.C.R. 561, 59 D.L.R. (3d) 634 (1975).

[68] *Compare* Bates v. Illerburn, *supra* note 64 (C.A.).

> (2) In this section —
> "benefit" means benefit under the enactments relating to social welfare, including any payment by a trade union for the relief or maintenance of a member's dependants but excludes any sum paid or payable under sections 231, 232 and 237 of the Insurance Act, R.S.O. 1970, c. 224.
> "insurance money" includes a return of premiums, and "pension" includes a return of contributions and any payment of a lump sum in respect of a person's employment.[69]

Of course a section such as the above does not answer many of the fundamental questions about the logic of ignoring all monies, benefits and payments made to the injured parties.[70] If the aim of the Family Law Reform Act was consolidation, then it is suggested that the above draft is more comprehensive. Even so, there is nothing in the draft section which deals with the problem of taking into account future increases in taxation which can only be to the detriment of the plaintiff.[71]

Just recently the Supreme Court of Canada, in *Keizer v. Hanna,*[72] held that the pecuniary losses of the dependants must be assessed on the basis of the net income of the deceased despite previous dicta to the contrary.[73] The bases of damages calculations in personal injuries and fatal accidents have thus been unequivocally differentiated. De Grandpré J. stated the principle as follows:

> Under *The Fatal Accidents Act,* what must be determined is the pecuniary benefit lost by the plaintiff because of the untimely death of the deceased. . . . It seems to me that what 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

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[69] *Compare* England's Fatal Accidents Act 1976, c. 30, s. 4(1). This provision:
(a) resolves the debate over double compensation both from the wrongdoer and from the State. It presumably covers the situation where the wrongdoer and pension-provider are the same legal person, that is, the employer: Jenner v. Allen West & Co. Ltd., [1959] 1 W.L.R. 554, [1959] 2 All E.R. 115 (C.A.);
(b) would include in the term "benefit" any payments under s. 1 of the Family Benefits Act, R.S.O. 1970, c. 157;
(c) gives statutory recognition to the term "gratuity" and therefore copes with the questions raised in Redpath v. Belfast and Cty. Down Ry., [1947] N.I. 167 and Peacock v. Amusement Equip. Co., [1954] 2 W.B. 347, [1954] 2 All E.R. 689 (C.A.).

[70] *See* Cooper, *A Collateral Benefits Principle,* 49 CAN. B. REV. 501 (1971); Samuels, *Damages in Personal Injury Cases: A Comparative Law Colloquium Report,* 17 INT. & COMP. L.Q. 443 (1968).

[71] In The Queen v. Jennings, [1976] S.C.R. 532, at 543, 57 D.L.R. (2d) 644, at 654, (Judson J.), the Supreme Court of Canada held on appeal from the Court of Appeal of Ontario that no deduction for future income tax should be made with regard to the earning of income. However, in Teno v. Arnold, 7 O.R. (2d) 276, at 310, 55 D.L.R. (3d) 57, at 91 (Ont. H.C.), *aff'd,* 11 O.R. (2d) 585, 67 D.L.R. (3d) 9 (C.A. 1976), Keith J. took into account the need to protect the plaintiff at the date of the judgment against future fiscal policy. Most recently on appeal to the Supreme Court of Canada this practice was disapproved of by Mr. Justice Spence speaking for the Court, because it required undue speculation by the Court as to "future fiscal policy": *see* Teno v. Arnold, *supra* note 39.

[72] *Supra* note 55.

[73] *See* Gehrmann v. Lavoie, *supra* note 67.

> pecuniary loss could be evaluated on any other basis that [*sic*] the take-home pay, that is the net pay after deductions on many items, including income tax.[74]

E. *Punitive Damages and Fatal Accidents*

This topic is not mentioned in the new legislation and there has never been any provision in either the English or Ontario legislation for the award of punitive damages in wrongful death actions. Yet in Canada, unlike England,[75] the courts readily award punitive or exemplary damages in personal injuries actions.[76] The very same conduct may on occasion result in the death of the victim,[77] but in that situation punitive damages may not be awarded, at least not openly. In recent years some American jurisdictions have felt it proper to remove this anomaly and have added a punitive damages section to their wrongful death statutes, for malicious, wilful, wanton, or reckless behaviour causing death or injury. The pioneer provision appeared in the general statutes of North Carolina:

> [s]uch punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence.[78]

A more forceful and concise section might read:

> Damages recoverable for death or injury by wrongful act include such punitive damages as are warranted by the malicious, wilful or wanton conduct of the defendant.[79]

The value of such a provision has been shown vividly in actions against the operators of conglomerate and multinational corporations whose recklessness has caused the loss of many lives.[80]

F. *Conclusion*

The basic problem with the Family Law Reform Act is that it suffers from a desire to succeed only in its limited aims of minor

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[74] *Supra* note 55.

[75] By the decisions of Rookes v. Barnard, [1964] A.C. 1129, [1964] 1 All E.R. 367 and Broome v. Cassell & Co., [1972] A.C. 1027, [1972] 1 All E.R. 801 the House of Lords has severely restricted the use of the award.

[76] Fridman, *supra* note 16; Veitch, *supra* note 16. The recent leading cases are Delta Hotels Ltd. v. Magrum, 50 D.L.R. (3d) 126 (B.C.S.C. 1975); MacDonald v. Hees, 46 D.L.R. (3d) 720 (N.S.S.C. 1974); S. v. Mundy, [1970] 1 O.R. 764, 9 D.L.R. (3d) 446 (Cty. Ct.); Lakatosh v. Ross & Victoria Hotel Ltd., [1974] 3 W.W.R. 56 (Man. Q.B.).

[77] Vana v. Tosta, *supra* note 33.

[78] N.C. GEN. STAT. s. 28-174(a)(5) (Supp. 1973).

[79] Or more simply: "In every such action the court may give such damages, pecuniary or exemplary, as under all the circumstances of the case, may seem just." Such rewording is essential to avoid the difficulties created by the blurring of the concepts of "negligence" and "gross negligence" by the Court of Appeal in Engler v. Rossignal, 10 O.R. (2d) 721, 64 D.L.R. (3d) 429 (1975) and to emphasize the independent nature of the dependant's action in light of that same court's decision in Shaw v. Gorter, 77 D.L.R. (3d) 50, 2 C.C.L.T. 111 (1977), on to mitigation of exemplary damages. With regard to the *Engler* decision, *see* now s. 1(2) of the Negligence Amendment Act, 1977.

[80] *In re* Paris Air Crash of March 3, 1974, 423 F. Supp. 367 (U.S. Dist. Ct. C.D. Calif., 1976), (loss of society awards); *in re* Paris Air Crash of March 3, 1974, 427 F. Supp. 701 (U.S. Dist. Ct. C.D. Calif. 1977), (punitive award).

consolidation and therefore does not attempt a full examination or appreciation of the aims and functions of wrongful death actions. There appears to have been no research into whether the original English legislation was designed to keep dependants off the parish welfare rolls, was only a compromise act to avoid a plethora of suits against the railway companies, or whether it was passed to provide a means of atonement for the injury suffered by dependants. As a result the newly enacted provisions remain hybrid and only partially reflect the modern-day action, the function of which is to remedy an unjustified interference with the dependant's continued society with the deceased. The dependant's interest is on the one hand emotional and sentimental and on the other financial.[81] Consequently the legislation is deficient because it does not seek to provide the complete remedy which it ought to have done. Instead of the present sections, the Act might have:

(i) adopted a wider definition of dependants so as to cover all of the hard cases and relate closeness of relationship to the reality of dependency;
(ii) redefined the nature of the cause of action and thus rationalized the claims of dependants and the accountability of the deceased to his dependants;
(iii) provided for the effective control of damages by the courts;
(iv) effectively consolidated the law as to deductions from awards; and,
(v) included a provision for the award of punitive damages where fit and just.

It is not pretended that these suggestions enjoy internal consistency. That will only be achieved by a much more thoroughgoing reform, possibly by way of total abrogation of the old law and its replacement by a comprehensive statutory scheme of compensation along the lines of the Quebec or New Zealand models. The most recent Canadian academic writing underlines the illogicality of current damages assessments,[82] persuasively argues that the tort system is unsupportable[83] and exposes its fundamental weakness.[84] In political terms such radical change may not be possible immediately, so that in the meantime we must do our best to inject as much reason as we can in coping with the inherently irrational.

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[81] It never has been essential that the dependant be financially dependent nor that there be a legal obligation of support by the deceased. The essence of the claim rests on proof of reasonable expectation of benefit.

[82] Charles, *Justice in Personal Injury Awards: The Continuing Search for Guidelines* in STUDIES IN CANADIAN TORT LAW (Klar ed.) (1977).

[83] Glasbeek & Hasson, *Fault—The Great Hoax*, STUDIES IN CANADIAN TORT LAW, *id.*

[84] Ison, *Human Disability and Personal Income*, STUDIES IN CANADIAN TORT LAW, *id.*