

**ACTUARIAL EVIDENCE:**  
**ACTUARIAL CALCULATIONS IN FATAL ACCIDENT CASES**

Prepared by: ROBIN ADOLPHE, LLB.

**Background**

Unlike personal injury claims which are brought by a plaintiff who has been injured, fatal accident cases are brought by survivors. At common law a deceased plaintiff does not have a claim, thus many common law jurisdictions have enacted legislation which specifically allows survivors to bring a claim against the tortfeasor. In British Columbia the legislation is the *Family Compensation Act*. Section 3 of the Act is as follows:

The action must be for the benefit of the spouse, parent or child of the person whose death has been caused, and must be brought in the name of the personal representative of the deceased.

The damages in the action relate to amounts representing loss of care, guidance and affection, loss of support and loss of services.

Unlike a claim for loss of income, the loss of support relates only to the amount of money that the deceased, but for his or her death, would have contributed to the support of the claimant or claimants. While recent legislation in British Columbia has changed the law in respect of personal injuries claims arising out of motor vehicle accidents to the extent that past wage loss claims are net of income tax and EI deductions, in death claims the loss of support is net of all other expenses and deductions, including income tax.

In personal injury claims there is usually an income history which is useful in determining both past loss of income and future loss of income where the injuries are permanent. It is often possible to determine what the loss should be under these two heads of damage without expert evidence since the loss is entirely that of the injured person.

However, since the loss of the claimant in a death claim is one of loss of support and such loss is only for that portion of the deceased's income which, but for the accident, would have been available to the claimant, the calculation can be complicated. It is the calculation of the loss of support past and future and the value of services past and future, therefore, which often brings the actuary into the claim or litigation as an expert.

**When is an Expert Needed?**

Since I represent both plaintiffs and defendants in these claims, there are two answers to this question. When I am defending a claim I like to engage an actuary as soon as I get the file. When I am acting for the plaintiff I usually do a lot of the information gathering that I know will be necessary before I engage an actuary.

**Defence Files**

When I am called upon to defend one of these claims, I usually start by engaging an actuary as soon as I have all the file material. This is **not** the common practice among defence lawyers in my experience but I have found that it is a much more efficient way to deal with the claims.

First off, I will call the actuary so that he can do a conflict check. If there is no conflict, I will send him the file material which I have at the time and which we agree to be relevant to the claim. Following a review of this material by the actuary we will have a meeting or telephone conference to discuss what needs to be done next. Most often a “shopping list” is generated as a result of these discussions and I go in search of the evidence I will need to defend the case. When I say “defend the case” what I mean is preparing and presenting the evidence that will support my view of the case, which may or may not correspond to the claimant’s lawyer’s view.

Some of the evidence will come as a result of making demands for documents from the other side. Other evidence may come from an independent adjuster who I retain to seek information and, in some instances, do interviews with collateral witnesses for me. Sometimes evidence may be obtained by hiring an accountant or an economist.

For example, if the deceased were a realtor, evidence about sales both pre and post accident will be important and this may not be information in the hands of the claimant (usually the surviving spouse) or his or her lawyer. In the past I have relied upon information from reports prepared by the Canadian Real Estate Research Bureau or the Real Estate Council of British Columbia.

Often the pre-accident health of the deceased becomes an issue. If the deceased suffered from conditions which could have ended his or her life or working life prematurely, it is obviously relevant to any future claim. Evidence of previous medical history and evidence relating to life expectancy has to be obtained either with opposing counsel’s agreement or by court order.

In other words some evidence may be readily available from the other side, some may be available with the co-operation of the other side, some may be obtained by my own investigations and some may be obtained by court order.

If I am defending the case, I will then examine the claimant for discovery and put to that person all of the questions my actuary wants asked and make demand for documents that have not been produced prior to the discovery.

Once all of the information has been gathered a decision must be made as to whether it will be used to prepare a report or whether it will be used to prepare a quantum assessment. If the plaintiffs have obtained an actuarial report the decision may be to simply use the defence actuary for litigation support. If the two actuaries disagree on significant issues, it may be necessary either to produce a full blown actuarial report or to produce a rebuttal report.

## **Plaintiff Files**

If I am acting for the claimant or claimants I will meet with them and put together a plan for obtaining all of the information that I feel to be necessary to assist in putting forward the maximum claim allowable at law. Very useful checklists are available to assist in making sure that the proper information is obtained, including but not limited to such things as:

1. Work experience and certification;
2. Income tax returns;
3. Duration and details of employment;
4. Fringe benefits for each job;
5. Details of employment, vocational or business plans;
6. Details of retirement plans;
7. Details of all savings;
8. Details of any investments;
9. Details of family expenditures;
10. Details of time spent on housekeeping, handyman, or child care activities;
11. Details of plans relating to having children;
12. Details relating to education for children;
13. Details relating to plans for retirement;
14. Details relating to investments or plans for investment;
15. Details relating to the deceased's health but for the accident;
16. Details relating to health of spouse;
17. Details relating to housing, including size and nature of the housing including heating (ie cutting wood for heating);
18. Details relating to care of yard or property;
19. Details of any duties performed which would have to be performed by someone else for pay on the death of the deceased (income tax returns, accounting, property management, etc.);
20. Changes in housing or living situation occasioned by the loss of the deceased;
21. Loss of any opportunities related to employment or volunteer work which would have to be replaced at a cost to the claimant (country club fees, paid vacations, bonuses, purchasing privileges).

Once this information has been gathered it is my practice to engage an actuary to review the information and to discuss the actuary's further needs and arrange for a plan to obtain all relevant information. The obvious difference between plaintiff files and defence files is that when one is working for the plaintiff it is possible to have a series of meetings with the claimants and significant others to obtain information and develop the case. It is also possible to assign various tasks to family members, family accountants, business partners, family lawyers or others.

When all the information is gathered, the report will start taking shape and we will have a fairly good idea of what the size of the claim will be. It is my usual practice to obtain a full blown actuarial report when acting for the plaintiff because it is unlikely that serious negotiations would take place in its absence.

## **Problem Files**

Some of the problems which come up in dealing with the actuarial calculations result from fact patterns which are unusual. An example of a relatively simple fact pattern would be that of a deceased husband and father of 4 children aged 40 who is a salaried full time employee worker with a long work history, a good health history and a wife who does not work out of the home. The wife and dependant children will likely have a substantial claim.

Less straight forward would be a case involving a single parent father of a young child who is living with his paternal grandmother and who lives and works in another city and who has a sporadic work history. One of the problems relates to deciding what the income stream would be which the child would have available for his support. Another problem relates to the amount of money which the father is not spending on support for his son as the son does not live with him or obtain food, shelter and clothing from him. Yet another problem relates to the money which the grandmother spends on the child for which the father had not been reimbursing her. Finally, problems also arise over just how much the father, who is absent most of the time, could spend helping his child with homework, taking him on outings and performing handyman activities.

In a situation like the latter one, our approach was to put together a scenario which seemed to be most likely and to base our calculations on that scenario. Unfortunately, much of the scenario could not be proven with any accuracy and it would thus be necessary to convince a trier of fact that the scenario would more likely than not have occurred, had the accident not occurred.

Claims involving deceased persons who were self employed business persons can be very difficult to assess and or to prove, particularly if the business does not have a successful track record. If the business was financially successful pre-accident and continues to be successful (as in the case of a husband and wife business) without the deceased's contribution, an issue may arise as to just what the claimant has lost. If the business was losing money and fails following the death of the owner, an equally difficult problem arises as arguably the business would have failed even without the accident.

For the purposes of "ball parking" a claim, my usual practice is to try to get an idea of the net income of the deceased and then attribute a certain portion of that net income to personal use on an annual basis then divide the remainder between those who are dependant upon that support. For children I usually take the present value of the support to age 19. >From age 19 I attribute the support back to the spouse if there is one. To estimate housekeeping claims or handyman services, I use numbers set out in Statistics Canada surveys and value the hours of service at an arbitrary rate such as \$10 per hour. I then add in amounts for care and guidance where applicable and Court Ordered Interest on past loss.

## **Deal Breakers**

Issues that can become deal breakers are ones such as what a claimant says that the deceased would have done in the future had the accident not intervened. I tend to operate on the assumption that a person will do in the future what they have done in the past. While this is not always true, I find that it is an intuitive explanation that often finds favour with judges.

Another deal breaker can be a claim that a parent was a “super mom” or a “super dad”. Often this scenario lacks credibility because even super parents only have so much time in a day. When the hours attributed to the things which it is claimed that the deceased did, it is clear that either they did not sleep or that they did not take any time for themselves at all.

Sometimes the problem which arises relates to income which cannot be shown to have been earned either because it is not claimed on income tax returns, because no returns have been filed or because the income is not from legal sources. Insurers are reluctant to pay large damages for these kinds of claims because either the documentary evidence is lacking, which means that a settlement is based on faith, or on moral grounds that unlawful income should not be replaced.

From a plaintiff’s point of view, the only approach which can be taken is one similar to that used by the income tax department in assessment cases where returns are not filed. It takes a certain level of income for any person or family to achieve a certain standard of living. If the deceased bought food, bought clothes, drove a car, rented a house, took holidays, golfed, went to movies, went out for dinner, had cable TV, had paper subscriptions or bought presents for birthdays and Christmas, he had to have an income which would allow for these things. Evidence can be led as to what amount of income would be required to pay for them and submissions based on that level of income could be made.

### **Summary**

In summary, I would say that I would not usually try to defend or prosecute a death claim of any substance without consulting an actuary at the very least. It is a technical field and it is simply too easy to overlook important issues and evidence with the result that a claim is not proper compensation or, alternatively, is over compensation. Whether the assistance of the actuary is (a) limited to that of a consulting role (b) for the purposes of providing a critique or rebuttal report or (c) for the purposes of a full blown expert report depends upon the circumstances of the case.

Adolphe & Company  
Barristers and Solicitors  
444 Ellis Street  
Penticton, B.C. V2A 4M2  
Phone: (250) 493-8633; Fax (250) 493-8682

E-mail: [robin@adolphelaw.com](mailto:robin@adolphelaw.com)