IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Rowe v. Brown 2008 NSSC 13

Date: 20080122
Docket: S.H. No. 281405
Registry: Halifax

Between:

Walter Rowe, Suzanne Rowe,
Lillian Rowe, Dom Hall and Anita Hall

Plaintiffs

v.

Justin Brown

Defendant

Judge: The Honourable Justice Margaret J. Stewart

Heard: October 25, 2007 in Halifax, Nova Scotia

Counsel: Scott Lytle, for the Plaintiffs/Respondents
Patricia Mitchell and Donn Fraser, for the Defendant/Applicant

By the Court:

[1] On May 27, 2006, as a result of a motor vehicle accident, Matthew Donald Rowe died. His parents, Walter and Suzanne Rowe, the respondents herein, along with his grandparents, commenced an action in part pursuant to the **Fatal Injuries Act**, R.S.N.S. 1989, c.163 as amended (the **FIA)**, under a number of heads of damages.

[2] The defendant, Justin Brown, seeks an order striking paragraphs (h) VI and (i)(b) of the Statement of Claim as failing to disclose a reasonable cause of action, pursuant to C.P.R. 14.25(1)(a) or alternatively, as inadequate pleadings. The paragraphs read as follows:

> (h) Particulars pursuant to the Fatal Injuries Act, R.S.N.S. 1989, c.100 as amended, are as follows:
>
> ...
>
> VI. Further, the parents of the deceased have incurred expense and loss due to severe emotional stress, which stress has been treated at considerable expense, particulars of which shall be supplied.

...

(i) The Plaintiffs therefore claim against the Defendant for:

(b) Exemplary Damages in the amount of $250,000.00;

[3] The plaintiffs in argument clarified that all they are claiming is actual out-of-pocket expenses related to counselling for emotional stress. They do so by relying on the same inclusive recoverability interpretation argued for punitive damages under s. 5 of **the FIA**; basically, asserting a statutory right of recovery based on the clear inclusive language of **FIA** and founded on the dual purpose of the **Act** to compensate them and to make the defendant accountable for his actions.

[4] The defendant contends that there are no facts pled in the Statement of Claim to support the claims for counselling expenses and punitive damages; that damages related to expenses incurred by the plaintiffs for emotional stress are simply not available under the limited statutory scheme of the **FIA** and that punitive damages are also not available under the **FIA**, as they are damages of a completely different nature than claims permitted under the legislation and the limited statutory right of action which the Act provides to claimants, such as the plaintiffs herein. This, as noted, is in stark contrast to the plaintiffs' assertion that

a plain reading of s. 5 of the **FIA** yields no restrictions/limitations on the type of damages allowable in a case of wrongful death. The defendant asks: Are the out-of-pocket expenses for counselling for emotional stress and punitive damages claimed by the parents excluded by the provisions of the **FIA**, so as not to provide a cause of action and thereby warrant striking as obviously unsustainable under CPR 14.25? Or, alternatively, are the pleadings inadequate, thus warranting the same response?

[5] The parties are not in dispute as to the very high burden resting on the defendant with respect to his application to strike portions of the plaintiffs' Statement of Claim. Both parties agree that pleadings should only be struck if it is "plain and obvious" that the plaintiffs' Statement of Claim discloses no reasonable cause of action (**Hunt v. Carey Canada Inc.** [1990] 2 S.C.R. 959). The defendant will only succeed if, on the facts as pled, the action is "obviously unsustainable". The burden is on the defendant to convince the court that the claim is "certain to fail", **(Hunt**, supra). The court's function is to decide if there are issues to be tried and not to try the issues (**Mabey v. Mabey** (2005) 230 N.S.R. (2d) 272 at para 13). Of significance here is the fact that a question of law may be determined on an application pursuant to C.P.R. 14.25; but, such should occur only when the law is

so clear that it is plain and obvious (**Gill Insurance Co. of Canada v. Noble** 2003 N.S.C.A. 102, para 13).

[6] The parties disagree on the availability of certain heads of damages under the **FIA**. Counsel concur, any determination of a failure to disclose a reasonable cause of action with regards to these heads of damages turns on a legal interpretation of the **FIA**, ie., what types of damages can the legislation encompass.

[7] S.5(1) and (2) of the **FIA** read as follows:

> 5 (1) Every action brought under this Act shall be for the benefit of the spouse, common-law partner, parent or child of such deceased person and the jury may give such damages as they think proportioned to the injury resulting from such death to the persons respectively for whose benefit such action was brought, and the amount so recovered, after deducting the costs not recovered, if any, from the defendant, shall be divided among such persons in such shares as the jury by their verdict find and direct.
>
> (2) In subsection (1), "damages" means pecuniary and non-pecuniary damages, and without restricting the generality of this definition, includes
>
> (a) out-of-pocket expenses reasonably incurred for the benefit of the deceased;
>
> (b) a reasonable allowance for travel expenses incurred in visiting the deceased between the time of the injury and the death;

> (c) where, as a result of the injury, a person for whose benefit the action is brought provided nursing, housekeeping or other services for the deceased between the time of the injury and the death, a reasonable allowance for loss of income or the value of the services; and
>
> (d) an amount to compensate for the loss of guidance, care and companionship that a person for whose benefit the action is brought might reasonably have expected to receive from the deceased if the death had not occurred.

[8] On proper interpretation, does this provision restrict or limit the type of damages allowable in a case of wrongful death. Although the parties purport to base their arguments on a "clear" reading of the provision and on the same principles of interpretation, their answers to the question and their propositions regarding statutory purpose in arriving at same are in stark conflict.

[9] The Supreme Court of Canada in **Canada Trustco Mortgage Co. v. Canada**, [2005] 2 S.C.R. 601 at para. 10 provided:

> .... The interpretation of a statutory provision must be made according to a textual, contextual yet purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretative process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words play a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretative process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[10] In **MacLean v. MacDonald** 2002 N.S.C.A. 30 Cromwell, J.A. in considering the **FIA** provided the following methodology summary at para. 18:

> "In attempting to find the correct interpretation of the statutory provisions, the court must "determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumption and special rules of interpretation, as well as admissible external aids.": see Ruth Sullivan (ed.), Driedger on Construction of Statutes (3rd, 1994) at 131.
>
> Having considered these matters, the court should adopt the appropriate interpretation. The appropriate interpretation is one which is plausible in the sense that it complies with the text of the Act, which is efficacious, in the sense that it promotes the legislative purpose and that is acceptable in the sense that the outcome is reasonable and just; ibid.

[11] Also in attempting to find the correct interpretation of a statutory provision, reliance is placed upon s. 9(5) of the **Interpretation Act**, R.S.N.S. 1989, c. 235 which provides that every act:

> ... shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters:
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

POSITION OF THE PARTIES

(A) Plaintiffs

[12] The plaintiffs state that the purpose of the **FIA** is broader than simply providing for compensation. Compensation is too narrow a scope. The dual purpose of the **FIA** is an apportionment or an allocation of some degree of accountability for the wrongdoer. Justice Cromwell when elaborating on the **FIA** in **MacLean v. MacDonald**, supra, refers to and describes compensation as the "primary purpose" of the legislation and describes the compensation to which claimants are entitled as being "primarily for the loss of support they reasonably could have expected to receive for the deceased had he or she lived." Although never expressly stating another purpose or purposes, his use of the word primary supports compensation not being the sole purpose. Indeed, another court has commented that, "There are circumstances in which claims for exemplary damages could be made in an action brought under the **Fatal Accidents Act** and such claims are not excluded by the provisions of the **Survival of Actions Act**." (**Blacquiere's Estate v Canadian Motor Sales Corp.** [1975] P.E.I. No. 15 at para. 30.)

[13] Clearly, they argue something more is at play within the **FIA** itself. It is the respondents' position that the history of the legislation lends support to a dual purpose that makes the wrongdoer accountable for his actions beyond just compensation. Besides seeking to remedy the void in the common law that all causes of action died with the deceased and no comfort whatsoever was provided to the deceased's dependants, there must also have been a recognition and a desire to correct the fact that a tortfeasor, "who was significantly astute to ensure the speedy demise of his victims was thus able to escape from liability to make financial restitution for his wrong doings." (A. Duncan, ed., Goldsmith's Damages for Personal Injury and Death in Canada, looseleaf, (Toronto: Thomson Carswell, 2004 @ xxxiii). Basically, they argue the Legislature in 1873 must have recognized that there must be some allocation of accountability for the tortfeasor through damages, otherwise, the tortfeasor would be able to escape liability to make financial restitution for his wrongs. It is within the context of and in harmony with a duality of purposes of compensation and accountability that the respondents propose the words of the **FIA** in their grammatical and ordinary sense be interpreted. These purposes cannot be overlooked in assigning any sort of meaning to the plain text of the **FIA** and must be considered when s. 5 of **FIA** is interpreted.

[14] The plaintiffs rely on the clarity of the wording of s. 5(1) and (2). In the plaintiffs' opinion, these provisions properly understood, simply reveal no restrictions on the type of damages allowable in a case of wrongful death. Section 5(1) states that damages are payable proportioned to the injury suffered to enumerated classes of people, of which they being parents are members. "This mandates the contextual analysis in determining the quantum but in no way does it restrict the type of damages recoverable." If it was otherwise, the Legislature would have used a phrase such as "damages that were caused by the injury." Proportion speaks to degree or magnitude and as such s. 5(1) should be read as instructing the trier of fact to assess damages in relation to the extent of the injury but not as restricting the types of damages. Rather, restricting the type of damages is controlled by subsection (2) of s. 5. The word "injury" cannot circumscribe the type of damages. This is merely the trigger for the damages proportioned to it. Without the injury there is no recovery whatsoever. Section 5(1) directs the trier of fact to make an award that is commensurate with the injury that is caused by the wrongful act of the tortfeasor. It makes no sense to define damages and then redefine damages in the following section. Section 5(1) does not say what damages includes. Section 5(2) is clear that "damages" means both pecuniary and

non-pecuniary damages. In other words, the entire scope of the damages recoverable is spoken to in s. 5(2) because of the use of the word “means” in the definition.

[15] The wording of s. 5 (2) is inclusive rather than restrictive. The phrase “without restricting the generality of this definition” coming after defining damages to mean both pecuniary and non-pecuniary and before listing specified damages would be rendered redundant if a restrictive view of the types of allowable damages under **FIA** is intended. To assign some sort of limited effect on the type of damages is irreconcilable with the expressed words of s. 5(2). Rather, they argue the use of the phrase supports their contention that the type of damages recoverable are only limited by the expressed words of **FIA** and not by historic reference to when only pecuniary damages were implied or by interpretations afforded to fatal injuries legislation in other provinces which lack Nova Scotia’s unique coverage of both pecuniary and non pecuniary damages. The 1986 legislative expansion of recoverable types of damages for claimants creates a permissive act affording damages as pled.

[16] There is no need to employ interpretative tools, given that on a plain reading the express wording of the **FIA** is clear and not ambiguous. The plaintiffs submit s. 5(2) is quite clear and as such, if one reads out of s. 5(2) types of damages, then one strains the plain and ordinary language unnecessarily and unreasonably. The wording of s. 5(2) is very broad and inclusive language and there is no basis upon which to read out the inclusiveness of that language types of damages. If the Act is plain on its face, it must be interpreted that way.

[17] A rational reading of the plain wording of the **FIA** is that punitive damages may be included, if the context of the situation merits. The imposition of "such non-pecuniary damages" is clearly allowable under **FIA** s. 5. The same is true for emotional stress and the resulting indirect expenses.

[18] Further, unlike related statutes such as the **Survivors of Actions Act**, R.S.N.S. 1989, c. 453 that touch on similar subject matters, ie. claims advanced for the benefit of the estate of the deceased, and which clearly state in the legislation that punitive damages are not recoverable, the **FIA** provides no such restriction, thus lending further credence to the ability to claim and receive them.

(B) Defendant

[19] It is the defendant's contention that the language of the pleadings fails to support a claim for either emotional stress or punitive damages and in any event, neither are available under the limited statutory scheme of the **FIA**. The plaintiffs position is quite simply an inappropriate interpretation of the FIA and in regards to punitive damages, notes that research reveals no other court in Canada or in any common law jurisdiction has allowed recovery for punitive damage under fatal injuries legislation.

[20] The **FIA** whose long title is "An Act Respecting Compensation to the Families of Persons Killed by Accident" does not permit anything more than compensatory damages. Such damages do not include punitive damages. The plain language of s. 5(1) itself limits damages under the **FIA** to damages "proportioned to the injury" which are not and cannot be punitive damages, given its nature. Such damages are compensatory and distinct from punitive damages which are non-compensatory and non-pecuniary [**Vorvis v. Insurance Corp of B.C.,** [1989] 1 S.C.R. 1085 (S.C.C.)]. Besides the words of s. 5 being precise and unequivocal so as to render a clear meaning, application of basic and well accepted

principles of statutory construction and interpretive aids also support the conclusion that damages may only be of a compensatory nature under the legislation. Claims for punitive damages and emotional stress simply have no foundation in the law under the **FIA**.

ANALYSIS

[21] The plaintiffs' assertion that a plain reading of s. 5 of **FIA** suggests that there is no restrictions/limitations on the type of damages allowable in a case of wrongful death is an inappropriate interpretation to make of the Act. Basically, the defendant's assertion that the **FIA** has a limited effect on recoverability of damages does not variegate from the plain words of the **Act**. Accountability of the defendant lies in his responsibility to pay compensation to the plaintiffs and not beyond.

[22] This conclusion is reached in part by having the advantage of Cromwell, J.A.'s recent detailed incite into the context and purpose of the **FIA**. While dealing with a claim under related legislation, namely, the **Survivors of Actions Act**, R.S.N.S. 1989, c. 453, at para. 5 in **MacLean v. MacDonald**, supra, Cromwell J.A. states:

> ...Under that Act [**FIA**] a defined group of persons, including the deceased's parents, may claim for damages against a wrongdoer who caused the deceased's death. The damages are to compensate the survivors for the loss of financial support which they could reasonably have expected and the loss of the care, guidance and companionship which they would have received from the deceased had he lived. Where a child is killed as a result of another's negligence, the fatal injuries action is not likely to provide much in the way of compensation for the surviving family members. Generally no one would have a reasonable expectation of receiving significant financial support from the child. While there is provision in the fatal injuries statute for damages for loss of companionship, those damages have generally in the past been fairly modest.

[23] Without quoting the entire paragraph, Cromwell J.A. at para. 23 commented on the common law background leading to the enactment of fatal injuries legislation. A general common law rule resulted in there being no action at common law for wrongful death. That is, one person could not receive damages from another person for causing the death of a third. As a result, those who suffered financial loss as a result of the loss of support previously provided to them by the deceased had no independent cause against the wrongdoer who caused the death. The deceased's dependants had no separate claim for the loss of support and expenses suffered directly by them as a result of the wrongful act because no cause of action for wrongful death was recognized.

[24] Cromwell then addressed how the unsatisfactory rule was changed by enacting fatal injuries legislation and thereby giving the dependants of a deceased person a limited statutory right to sue the wrongdoers, when negligence caused the death of the deceased, so that they could recover compensation from the wrongdoer for the amount they would have received from the deceased had he or she not been killed. At paragraphs 24-30, he expands upon wrongful death claims and resulting Nova Scotia legislation:

> **24** As noted, the common law did not recognize a claim for wrongful death. This rules was considerably amended by legislation in England in 1846 and similar changes occurred in Canadian common law jurisdictions about the same time. By 1873, Nova Scotia legislation permitted an action to be brought for the benefit of the deceased's "wife, husband, parent or child" against a person whose wrongful act caused the deceased's death: R.S. 1873, c. 113, s. 1 and 2.
>
> **25** This action was for what is often referred to as the "dependancy amount". The damages awarded (apart from certain other claims not relevant here) were to be based on the financial support that the wife, husband, parent and child could reasonably have expected to receive from the deceased had he or she not been killed. The defendant's liability depended on it being shown that the death was caused by the defendant's wrongful act which would have entitled the injured party to sue had death not occurred. However, the damages recoverable were based on the loss his or her death caused to the surviving spouse, parent and children.
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> **26** The starting point for the calculation of that loss was (and is) the earnings which the deceased would have received had he or she not been killed; in other words, the earnings during the period by which the deceased's working life was shortened by the wrongful death. That period is included in what is often called the "lost years", that is, the years of life lost as a result of the wrongful act.

> **27** It is significant that the primary purpose of this legislation was to put the survivors of a person wrongfully killed in the financial position they would have been in had the deceased lived and continued to provide support.
>
> **28** In the case of Nova Scotia's legislation, this basic purpose has been expanded in two respects. First, in 1956, the Fatal Injuries Act (which had been enacted in 1873) was amended to make it clear that, in assessing the compensation to be paid, sums payable on the death of the deceased such as pensions or proceeds of insurance were not to be deducted from the compensation otherwise payable by the defendants: S.N.S. 1956, c. 26, s. 1(2). Second, in 1986, the Act was amended to permit recovery of damages for the guidance, care and companionship which the survivors lost as a result of the deceased's death: S.N.S. 1986, c. 30, s. 1(d). In addition to these two major changes, the list of persons included in the definition of dependants has been updated from time to time.
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> **29** I think it important to note that this fatal injuries legislation does not do away entirely with the common law rule barring wrongful death actions. Rather, it only modifies the rule in specific ways. The claim under the legislation is limited to a defined class of persons. It provides for compensation for all of them, but in one action, and the compensation to which they are entitled is primarily for the loss of support they reasonably could have expected to receive from the deceased had he or she lived.
>
> **30** I note that this is not an old statute that has been ignored by the Legislature in the many years since it was first enacted. The statute has been amended several times with respect to both the types of damages that are recoverable and the definition of the persons for whose benefit the action may be brought. I think it is significant that the Legislature has, over the years, including quite recently, repeatedly addressed itself to both these issues.

[25] The compensatory nature of the damages recoverable under the legislation is highlighted repeatedly throughout the **MacLean** case. Besides the noted comments at paras. 5, 27, 28 and 29, Justice Cromwell found:

> **97** The primary purpose of the Fatal Injuries Act was to put a group of dependants, defined by that statute, in the same economic position (subject to the separate issue of collateral benefits) as they would have been in had the deceased lived and continued to provide support.
>
> **98** ...In the latter types of claims [claims by dependants under the wrongful death statutes], the object of the award is to put the plaintiff (or his dependants if the plaintiff has been killed) in the position they would have been in, financially, had the accident not occurred...
>
> **104** ...The Fatal Injuries Act may well not achieve what many will think to be a just result in all cases, but it does represent a clear and considered legislative judgment about which survivors of a person wrongfully killed should be compensated and on what terms. (Emphasis added)
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> ...
>
> **106** ...However, the Legislature specifically addressed the question of how losses of survivors should be compensated in wrongful death cases when it enacted the Fatal Injuries Act....
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> **131** ...It is worth remembering that the common law rule against recovery by dependents for wrongful death was the first of these rules to be reformed. Fatal injuries legislation created a new, but limited statutory cause of action for wrongful death in favour of those dependant on the deceased. Their claim, expressed simply, was for the support they could have expected to receive out of the earnings the deceased could have expected to make had he or she lived. To the extent that the estate would benefit those who were not dependants under the fatal injuries legislation, the estate had no claim for the wrongful death.

[26] Justice Cromwell makes it clear that the common law rule continues to exist and is only modified "in specific ways". He does not state or imply all types of

damages are now recoverable. His use of the words “primary” and “primarily” is in reference to claimants original recoverability for loss of financial support established in the initial 1873 legislation and prior to the 1986 amendment expressly expanding damage types and making loss of care, guidance and companionship recoverable. He interchanges the qualifying word “basic” with “primary” in describing purpose and the expansion of that purpose in two major respects, neither of which entail comment on accountability of the wrongdoer, punitive damages or expansion beyond care, guidance and companionship as a type of damage. The theme is compensation.

[27] The only significant claim Cromwell, J.A. envisioned the appellants receiving in **MacLean** was under the **FIA**. Given that the deceased was a child, he felt the claim, in all likelihood, would be small. It is significant that he made no comment on a potential punitive claim affecting the amount of the award, if indeed accountability of the tortfeasor, under the **FIA** is designated as a dual purpose and available to the claimant.

[28] The same compensatory interpretation flows not only from the long title assigned to the **FIA** enacted in 1873 without any reference to retribution or

punishment; but, from the Hansard debates of 1873 reflecting the need to adopt the English act in order to provide financial support that the deceased would have provided and from the 1986 debates when Nova Scotia law sought to be brought into line with other jurisdictions recoverability of care, guidance and companionship losses. No comment or inference on either Hansard occasion was stated or implied about punishing the wrongdoer or reference made to punishment or retribution as a purpose for enacting or amending same. Indeed, in the latter debate, particular reference was made to emanating Ontario's act whose provisions, although not identical, have been interpreted as being fatal to punitive damages and emotional stress.

[29] There is no Nova Scotia case law expressly disallowing punitive damages in wrongful death cases. Whether such damages should be read into s. 5 of **FIA** turns in part on what punitive damages mean. Of the various characteristics afforded to punitive damages by the Supreme Court of Canada in **Whiten v. Pilot Insurance** [2002] 1 S.C.R. 595 reference to the fact that the focus is on the defendant's misconduct and not the plaintiff's loss is an essential consideration as is the general objective of punitive damages being a punishment, deterrence and denunciation and the fact that at common law punitive damages should only be resorted to in

exceptional circumstances and with restraint, given that the primary vehicle of punishment is the criminal law (para. 68, 69 and 73). Case law stresses that the amount of a punitive damage award should have no relationship to the loss.

> "Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. ...they are in the nature of a fine. (**Hill v. Church of Scientology of Toronto** [1995] 2 S.C.R. 1130 at para. 199)

[30] Punitive damages are not compensatory damages which are awarded primarily for the purpose of compensating a plaintiff for pecuniary and non-pecuniary losses suffered. Punitive damages are designed to address the purpose of punishment, deterrence and denunciation (**Whiten**, supra, at para. 43; **Fidler v. Sunlife** [2006] 2 S.C.R. 3 at para 62). Punitive damages are non-compensatory and non-pecuniary in nature (**Vorvis v. Ins. Corp. of B.C.** [1989] 1 S.C.R. 1085 (S.C.C.)). There is a clear distinction drawn between compensatory damages inclusive of damages non-pecuniary in nature and punitive damages. Punitive damages serve an entirely difference purpose than compensatory damages. The basis of their assessment flows from the conduct of the wrongdoer without having regard for the actual loss which has occurred as a result of the death. Punitive

damages are made available as a function of the wrongful conduct irrespective of the injury occasioned.

[31] A suggestion of liability existing to make financial restitution for tortfeasors' wrongs does not meet the standard of retribution and punishment which are characteristic of punitive damages.

[32] Turning to the specific provisions of the **FIA**, I conclude as argued by the defendant, the wording of the **FIA**, on the issue of type of damages, is plain, admitting to only one meaning and that when considered in the context of this statute as a whole, the meaning of the words in the context is also clear.

[33] The type of damages permitted under s. 5(1) precludes any claim for punitive damages under **FIA**. S. 5(1) sets out both the class of claimants and the damages which may be claimed by them, under this statutory cause of action, which is independent and separate and apart from that which might have been brought by the deceased had he survived. S. 5(1) does not address quantum rather, both prior to and since the 1986 amendment, it creates the right to damages under the **FIA**, a right unfettered, although elaborated upon by s. 5(2) amendment. The

damages strictly prescribed by the Legislature are “such damages ... proportioned to the injury resulting from such death”. Given the context of an independent action on behalf of the claimants under **FIA** the focus is “on the injury resulting from such death” and the damages must be proportioned to this injury which means that the damages are to be compensatory in nature. What impact has the death had upon the claimants?

[34] Punitive damages focus on the actions of the wrongdoer, rather than the resulting loss. The language of s. 5(1) is clear that an award of damages must be assessed in relation to the injury. Accordingly, in any context, it is inconsistent with the statutory language of **FIA** itself to suggest that punitive damages are available. The damages to be awarded are those proportioned to the injury resulting from the death at issue and such an analysis does not focus on the conduct which has caused the loss needed to assess the availability of punitive damages. Accordingly, it is not possible to fix punitive damages within the scope of s. 5(1) which creates the only damages that may be granted under **FIA**.

[35] The clear distinction between compensatory damages which are damages proportioned to the injury arising from the wrongful death and punitive damages

which are made available as a function of the wrongful conduct irrespective of the injury was, as previously noted, drawn by the Supreme Court of Canada (**Whiten**, supra, and **Vorvis**, supra). The types of damages permitted under s. 5(1) accordingly precludes any claim for punitive damages under the legislation.

[36] S. 5(2) of **FIA** does not create the right to damages but rather it is itself limited by the types of damages which s. 5(1) provides are available. The provision expressly states: " In subsection (1), "damages" means..." It is obvious s. 5 (2) relates back to the damages conferred by s. 5(1). The definition of "damages" which follows in s. 5(2), namely, "pecuniary and non-pecuniary, without restricting the generality of this definition" ... is simply an elaboration upon the damages provided in s. 5(1), namely, those "proportioned to the injury resulting from such death". It is not as argued by the plaintiffs, an unlimited, unrestricted right to damages inclusive of punitive damages under the guise of non-pecuniary which may be claimed under this provision while relying on s. 5(1) to simply quantify the amount. Section 5(1) prior to the 1986 amendment was never interpreted in such a context as posed by the plaintiffs.

[37] Unique to Nova Scotia s. 5(2) references damages in subsection (1) to mean both pecuniary and non pecuniary and like s. 60 (2) of Ontario's Family Law Act, R.S.O. 1990, c. F.3, it allows for some expansion of types of damages which are not specified. The damages that are specified in s. 5 (2) provide for both pecuniary and non pecuniary damages that are all compensatory or compensatory in nature. **(Lord (Litigation Guardian of) v. Downer** 125 O.A.C. 168 at para. 7; **Varanese v. Campbell** (1991) 102 N.S.R. (2d) 104 (C.A.) at para. 18) and which must be viewed as being awarded proportioned to the injury suffered by the claimant, as set out in s. 5 (1).

[38] S. 5(2) is itself limited by the type of damages provided for by s. 5(1). Any non-pecuniary damages under s. 5(2), which the plaintiff argues encompass punitive damages, are limited to the type of damages under s. 5(1) which are damages "proportioned to the injury". This type by its very nature, precludes punitive damages which, as discussed, are damages arising by virtue of wrongful conduct at issue, as opposed to the resultant injury. Punitive damages under the guise of unspecified, unrestricted "non-pecuniary" damages under s. 5(2) of **FIA**, as argued by the plaintiffs, are not recoverable as this type is circumscribed by the limitation of the wording in subsection (1).

[39] The statutory language is fatal to any claim for punitive damages. To accept the plaintiffs interpretation of **FIA** would lead to circumstances where the **FIA** itself becomes moot except insofar as listing the eligible claimants. The **FIA** is designed to remedy the harshness of the common law but not create a current right to damages of the same nature and type that would have been available to a deceased if he had lived. It creates a limited right of action where otherwise no right of action would exist.

[40] The ordinary words of s. 5 (1) and (2) are precise and unequivocal. They do not support more than one reasonable meaning. Section 5 is limited and not inclusive of all types of damages and clearly disallows for any recoverability of punitive damages and as will be discussed emotional stress.

[41] Given the clear reading of the **FIA** both pre and post the 1986 amendment and the nature of punitive damages, I am unable to appreciate what circumstances allow for the possibility of a claim of punitive damage as referenced in the Prince Edward Island case of **Blacquiere's Estate v Canadian Motor Sales Corp**, supra

at para. 30. I find there clearly are none. The statement is without example; is obiter dicta and is without analysis associated with statutory interpretation.

[42] The **FIA** is designed to compensate the dependants and others affected by the death not to compensate the deceased or his estate. Such compensation is determined pursuant to the **Survivor of Actions Act**, supra, which clearly, under s.4 provides that punitive damages are not available to the estate of the deceased. The conduct creating punitive damages relates to conduct against the deceased not against the dependants. It would indeed be questionable for a dependant who did not experience the conduct creating the punitive damages to be able to receive same and yet the estate of the deceased who experienced the conduct not able to receive it.

[43] As for pleadings, in the Statement of Claim, provision (h)(viii), apparently the basis on which the exemplary damages have been alleged, reads as follows:

> The Plaintiffs state that the aforesaid actions of the Defendant were carried out without due regard for the care and welfare of his passengers, and were engaged in with such indifference, callousness, disregard and entire want of care as to the probable consequences of his carelessness, including injury of other persons.

Clearly, the alleged claim for exemplary damages was on the basis of alleged conduct by the defendant towards the deceased. As already noted, such a claim is not covered by the **FIA** but rather by the **Survivor of Actions Act**, supra, which specifically excludes claims for exemplary damages. There is nothing in the aforementioned pleadings alleging any misconduct towards any of the present plaintiffs. Clearly, there is no claim for exemplary damages on the facts pled.

[44] Apart from the question of punitive damages just considered, the plaintiffs' pleading (h) VI purports to support an element of a claim based on alleged emotional stress causing undefined expenses, which they seek to advance as a statutory claim under **FIA**. As noted, no such award can be made in respect of a claim arising out of a statutory right where the statute does not expressly provide for such a claim.

[45] Nova Scotia courts have been quite clear that a claim for grief or sorrow resulting after the death of a loved one is simply not recoverable under the **FIA** **(Varanese**, supra at para. 19; **Lutley (Guardian ad litem of) v. Jarvis Estate** (1992) 113 N.S.R. (2d) 201 at para. 145; **Jones v. LeBlanc** 2006 N.S.S.C. 131 at paras. 12 and 17). In **Varanese**, supra Chipman, J.A. confirmed Justice

Haliburton's point that grief and sorrow are not to be taken into account as that sort of assessment is so subjective. "No sum of money can compensate for these." They are not specifically provided for in the **FIA** and unlike guidance, care and companionship, they are not non pecuniary damages which are compensatory in nature. The significance of the details around this kind of non compensatory loss lies in furnishing an evidentary foundation for assessing compensation for the loss of care, guidance and companionship suffered by reason of the death. (**Reidy et al v. McLeod** (1986), 54 O.R. (2d) 661 (C.A.) at para. 4). Clearly, they are not an economic benefit that the deceased would have been accountable to the claimants for had his life continued. It follows that any indirect losses flowing therefrom are not compensatory either.

[46] While it is the case that the **FIA**, s. 5 (2) does state that recoverability of "non pecuniary damages" are "without" restriction to those specified non pecuniary loss (s. 5 (2)(d)), it does not follow that the door has been opened generally for recovery for all other forms of non pecuniary loss. As in other provinces, our case law reflects loss of grief and sorrow is distinguishable from loss of guidance, care and companionship. (**Lord**, supra at paras. 11 & 12). Such a

loss is excluded from the statutory right created by the **FIA**. There is no basis in law for recovery of grief and sorrow and indirect expenses under the **FIA.**

[47] As for the pleadings, the facts do not provide the physical proximity needed by the claimants with the accident scene, so as to render the impact direct at common law. (**Rhodes Estate v C.N.R.** [1990] B.C.J. No. 2388 (C.A.)).

[48] The **FIA** does represent "a clear and considered legislative judgment about" compensation and "on what terms". (**MacLean**, supra at para 104.) The law is clear and settled so as to find that the plaintiffs claims for punitive damages and

emotional stress inclusive of indirect expenses are absolutely unsustainable. The defendant's motion to strike paragraphs (h) VI and (i) (b) is granted.

J.