

SUPREME COURT OF NOVA SCOTIA
Citation: *Dimichele v. Gabriel*, 2025 NSSC 295

Date: 20250912
Docket: Hfx No. 529169
Registry: Halifax

Between:

Tammy Dimichele

Plaintiff

v.

Adam Gabriel, Tyler Strong, Enterprise Rent-A-Car Canada Company/
La Compagnie De Location D'Autos Enterprise Canada, a body corporate

Defendants

and

Hfx No. 536576

Tammy Dimichele on behalf of the Estate of Ace Gabriel-Killen pursuant to the
Survival of Actions Act, R.S.N.S. 1989, C. 453,
as amended, on her own behalf, and on behalf of other claimants, under section 4
(2) of the *Fatal Injuries Act*, R.S.N.S. 1989,
c. 163, as amended

Plaintiffs

v.

Adam Gabriel, Tyler Strong and Enterprise Rent-a-car Canada Company

Defendants

MOTION FOR DIRECTIONS ON CARRIAGE AND CONTROL OF PROCEEDINGS

Judge: The Honourable Justice Scott C. Norton
Heard: August 21, 2025, in Halifax, Nova Scotia
Decision: September 12, 2025

Counsel: David S.R. Parker, Elizabeth Dreise and Emma Valardo (A/C) for the Plaintiff, Tammy Dimichele
Emma J. Neynens, for the Defendants, Sara Gabriel and Adam Gabriel

By the Court:

Introduction

[1] A tragic motor vehicle accident occurred on October 21, 2023, in Fort Lawrence, Nova Scotia. The result was three fatal injury claims as well as two personal injury claims. As is often the case, the surviving family members are left with some conflicts. The motions before the court are to determine who is best to be the representative of the estates of the deceased and have carriage of the fatal injury litigation.

[2] For clarity, and with no intent of disrespect, I will sometimes refer to the deceased parties by their first names.

Facts

[3] The basic facts of the accident are not in issue on this motion. Amanda Gabriel was operating a motor vehicle on Highway 2 in Fort Lawrence, Nova Scotia. Her daughter, Sara, was the front seat passenger. Sara's partner, Travis Killen, was a rear seat passenger along with their two-month-old son, Ace Gabriel-Killen.

[4] Amanda was allegedly turning left onto the ramp to enter Highway 4. As her vehicle entered the turn, it was struck on the driver's side by a vehicle owned by Enterprise Rent-A-Car Canada and operated by Tyler Strong. Kayley Marie Bird was a passenger in the Strong vehicle. The Strong vehicle was allegedly overtaking the Gabriel vehicle at the time of the collision at a high rate of speed.

[5] The collision caused the deaths of Amanda, Travis, and Ace. Sara and Kayley sustained personal injuries.

[6] No executor, administrator, or other personal representative has been appointed for the Estates of Travis or Ace. At the hearing, Ms. Neynens advised the court that the Probate Court has appointed Adam Gabriel the personal representative of the Estate of Amanda Gabriel.

[7] Joseph Burke advised the court he is representing Tyler Strong and Enterprise as defendants on behalf of their motor vehicle liability insurer. Mr. Burke elected to not participate in the motion and by letter advised that his client would be contesting liability for the accident in issue. Counsel for the motor vehicle liability insurer of

the Estate of Amanda Gabriel, Sheree Conlon, KC, elected to not participate in the motion.

Procedural History

[8] Tammy Dimichele is the mother of Travis and grandmother of Ace. She retained David Parker as counsel in December 2023. On December 13, 2023, she commenced an action naming as defendants, Tyler Strong and Adam Gabriel, on behalf of the Estate of Amanda Gabriel (amended December 22, 2023, to name Enterprise) (Hfx No. 529169). She claimed “on behalf of” the Estate of Travis, on her own behalf and on behalf of other claimants under section 4(2) of the *Fatal Injuries Act*.

[9] Sara and Adam retained Emma Neynens on December 5, 2023, to represent their interests. Ms. Neynens and Mr. Parker corresponded about the issues raised on this motion but came to no agreement or resolution.

[10] On September 12, 2024, Tammy commenced a second action “on behalf of” the Estate of Ace Gabriel Killen naming as defendants, Tyler, Enterprise, and Adam Gabriel, on behalf of the Estate of Amanda Gabriel (Hfx No. 536576). She claimed on her own behalf and on behalf of other claimants under section 4(2) of the *Fatal Injuries Act*.

[11] On October 16, 2024, Sara filed an action against Tyler and Enterprise (Amh No. 537533). She claimed, “in her own right” and “through the Estate of Travis Killen, pursuant to the *Fatal Injuries Act* and the *Survival of Actions Act*”.

[12] Also on October 16, 2024, Sara filed an action against the same defendants (Amh No. 537541) “through the Estate of Ace Gabriel-Killen” pursuant to the same named legislation. It also included a claim by Sara “in her own right”.

[13] Noteworthy is the fact that the Estate of Amanda Gabriel is not named as defendant in these two Amherst proceedings.

[14] An additional action was commenced on October 16, 2024, against Tyler Strong and Enterprise (Amh No. 537537). This action is brought “through the Estate of Amanda Gabriel” pursuant to the *Fatal Injuries Act* and *Survival of Actions Act*. It names as plaintiffs, Adam Gabriel, Amy Gabriel, Riley Gabriel, Connie Fraser, and Amy Gabriel as Litigation Guardian of Arlo Allen. It also names Sara as

claiming “in her own right”. It does not name Adam as representative of the Estate of Amanda Gabriel.

[15] For the sake of completeness, I would note that Kayley Marie Bird filed an action claiming against Tyler Strong, Enterprise, and the Estate of Amanda Gabriel (Amh No. 537779).

[16] At the hearing, counsel confirmed that all actions concerned by this motion have been served. Counsel for the insurers are awaiting the outcome of these motions before filing further pleadings.

[17] Although the motions before the court were filed in the two Halifax actions, the issues engage the actions filed in Amherst and the court requested and received those files in advance of the hearing.

The Positions of the Parties

[18] Tammy says that the court should appoint her as representative of the Estates of her son, Tyler, and grandson, Ace, and grant her carriage of those claims for all class members entitled to claim under the *Fatal Injuries Act* and *Survival of Actions Act*. Aside from the fact that she was first to file, she says that the unwillingness of Sara and Adam to name the Estate of Amanda as a party defendant shows that they are not prepared to properly advance the claims of the class of beneficiaries under the legislation.

[19] Sara and Adam are adamant that the accident was not caused by any fault on the part of their late mother and spouse, Amanda, and they will not claim against her. They say that aside from this, Sara is the best representative for the Estates of her partner, Travis, and son, Ace. They submit that in the circumstances of this case the legislation and *Rules* permit them to file separate actions from Tammy. Alternatively, if there can be only one action, they should be permitted to file a separate statement of claim with a separate solicitor of record.

[20] In order to understand the importance of whether the Estate of Amanda Gabriel should be a named defendant, it is important to understand that the circumstances of the motor vehicle collision in issue are known colloquially in motor vehicle litigation as a “left turn/overtaking” accident: see *Faulkner v. Inglis*, (1989) 94 N.S.R. (2d) 411. Surprising to many lay persons and even lawyers not experienced in motor vehicle collision cases, is that the left turning vehicle operator may have some, and in some cases, most of the liability apportioned to them. There

are exceptions of course, and the apportionment of liability is determined by the facts of each case. However, a prudent lawyer representing a party claiming damages arising from such a collision would recommend that the drivers of both vehicles be named as defendants.

Analysis

[21] The *Fatal Injuries Act*, RSNS 1989, c. 163 (“*FIA*”) states:

2 In this Act,

...

(aa) "common-law partner" of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least one year immediately preceding the death of the individual;

...

(c) "parent" includes father, mother, grandfather, grandmother, stepfather and stepmother;

...

Liability

3 Where the death of a person has been caused by such wrongful act, neglect or default of another as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereto, in such case, the person who would have been liable if death had not ensued shall be liable to an action of damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a crime.

Representative of deceased

4 (1) Such action shall be brought by, and in the name of, the executor or administrator of the person deceased.

(2) If there is no executor or administrator, or if there is an executor or administrator and no action has been brought under this Act within six months after the death of such person by and in the name of such executor or administrator, such action may be brought by and in the name or names of the spouse, common-law partner, parent or child of such person, or any of them.

...

Statement of claim

6 In every action the plaintiff on the record shall set forth, in his statement of claim, or deliver therewith to the defendant, or his solicitor, full particulars of the person

or persons for and on behalf of whom such action was brought and of the nature of the claim in respect to which damages are sought to be recovered.

...

Limitation of action

10 Not more than one action shall lie for and in respect to the same subject-matter of complaint and every such action shall be commenced within twelve months after the death of the deceased person.

[22] In my view the only reasonable interpretation of the language in the *FIA* is that only one action for damages can arise in relation to one particular death. This was also the conclusion reached by Justice Haliburton in *Gillott Estate v. Faulkner Estate*, [2008 NSSC 332](#). In that case, like this case, multiple deaths arose from the same accident. The beneficiaries of one estate brought a motion to be joined to the action already commenced on behalf of the estate of another deceased.

[23] The court dismissed the motion noting that there must be a separate action brought for each deceased individual. With respect to multiple beneficiaries seeking damages in relation to the death of one deceased, he found that all beneficiaries must bring their claims in one action:

[12] The limitation with respect to one action, I would interpret as meaning then, that there will be no more than one action lying for the benefit of those persons surviving a particular father, child, or person from whom they would have anticipated receiving some benefit had they survived. That is to say, that each family, anybody claiming to have suffered a loss deriving from the death of a particular person, is obliged to join in one action.

[13] If there are multiple deaths arising from an accident or from some wrongful action of the defendant, then each of those deaths would give rise to separate actions and all those actions would have to be commenced within one year.

...

[20] The legislation must have, in fact, intended that the action arises from the death being the incident and that all persons deriving a claim as a result of that death under the statute are entitled to make their claim provided that, again, only one action can arise in relation to one particular death.

[24] In *MacLean v. MacDonald*, [2002 NSCA 30](#), at para. 24 and following, Justice Cromwell (as he then was) provided a detailed analysis of the *FIA* in the context of describing its interaction with the *Survival of Actions Act*. At para. 29 he stated:

(a) Wrongful death claims:

[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.

[emphasis added]

[25] The Respondents assert they should be allowed to file a separate action. No *Rule* or authority from Nova Scotia was cited in support of this argument. The Respondents refer to the Alberta decision in *Morton-Paterson v. College of Physicians and Surgeons of Alberta*, 2007 ABQB 671. I find this decision distinguishable on its facts. It involved a claim brought after the dismissal of a previous action under the Alberta *Fatal Accidents Act*. The action was brought by different plaintiffs against different defendants and alleged a completely different cause of action from the action previously dismissed. In the present case the cause of action claimed by the Applicant and the Respondents is ongoing and identical. It is for damages permitted by the *FIA* because of a fatal injury resulting from a motor vehicle accident. Aside from those distinguishing facts, I find the reasoning neither binding nor persuasive and to the extent it differs with the Nova Scotia jurisprudence referred to, I choose not to follow it.

[26] The defendants submit in the alternative that the court should permit two statements of claim to be filed by separate solicitors of record in the same action. No authority in the *Rules* or Nova Scotia jurisprudence is cited for this request.

[27] Both these submissions are based on the allegation that Tammy Dimichele and David Parker are conflicted from representing Sara because they questioned if she met the definition of common law spouse in the *FIA*. The evidence and submissions from Mr. Parker satisfy me that this was no more than an inquiry on their part and will not prevent Ms. Dimichele and Mr. Parker from including and supporting Sara's claim. The facts are the facts on this question, and it will be for

the defendants to accept or litigate whether she meets the definition of common law spouse in the *FIA*.

[28] I am not persuaded that these exceptional remedies requested by the defendants are required in these circumstances as there are other procedural remedies and protections that I will explain below.

[29] With respect to the divisive issue of what, if any, fault may be apportioned to the Estate of Amanda Gabriel, this issue will inevitably be litigated by the insurers of the two vehicles and will either be resolved by agreement or determined by the court at a liability trial. If Amanda's Estate is not named as a defendant, it is in my view inevitable that the defendants, Tyler and Enterprise, would file a Third Party Claim claiming contribution or indemnity from Amanda's Estate. There is no avoiding that Amanda's Estate is going to be a party to the litigation advanced through the Travis and Ace Estates.

[30] Sara can file her own claim for damages for personal injuries sustained in the accident, but she can only do so in one proceeding, not three as is presently the case. As she does not wish to claim against her mother, her claim is best included in Amh No. 537537, together with the claims on behalf of those who seek damages under the *FIA* arising from the death of Amanda Gabriel.

[31] The Probate Court has appointed Adam Gabriel as personal representative of the Estate of Amanda Gabriel. The style of cause in Amh No. 537537 must be amended to name him as representative of the Estate of Amanda Gabriel as plaintiff. Although this claim does not name Amanda's Estate as a defendant, it is reasonable to expect that Strong and Enterprise will defend this action on the basis that Amanda's Estate is contributorily liable.

[32] The Estate of Amanda Gabriel as defendant is represented by counsel appointed by the Estate's motor vehicle liability insurer. By contract (in the form of the standard automobile policy), the insurer controls the decision making in the litigation subject to certain exceptions. It is unlikely that the naming of Adam as representative of the Estate of Amanda Gabriel as defendant will cause any issues. If any issues arise, counsel for the insurer can seek directions from the court.

[33] As to the claims made by those entitled to claim for the deaths of Travis Killen and Ace Gabriel Killen, it is in the best interests of those claimants that the litigation be conducted and carried by Tammy Dimichele as representative of these Estates. The fact that she was first to file is not a principled basis to determine who best

represents the interests of the class of claimants under the *FIA*. In my view, it is reasonable and prudent for a representative in a fatal injury claim to name as defendants all those persons who could be found liable. In this case, as it is a left turn/overtaking accident as explained above, that includes the Estate of Amanda Gabriel. As Sara and Adam have both declared that they are not prepared to proceed against Amanda's Estate, they cannot act as representative parties in the interests of the entire class of claimants.

[34] As to the personal claims of Sara through the Estate of Travis Killen and the claims of Sara and Adam through the Estate of Ace Gabriel-Killen, like any individual claimant they are entitled to retain, at their expense, their own counsel to assist with presenting their individual claim. The Court expects that Sara and Adam and any counsel acting on their behalf, as well as the representative and counsel for the representative, to act reasonably and professionally, and to work cooperatively to advance the claims to resolution. If that proves not to be possible, the court is available to provide directions, including the replacement of the representative.

[35] David Parker is approved as solicitor of record for the plaintiffs in the Halifax actions. Emma Neynens is approved as solicitor of record for the plaintiffs in Amh No. 537537.

[36] The actions in Amh No. 537533 and Amh No. 537541 are duplicative of the Halifax actions and shall be stayed.

[37] I direct that once the pleadings close, the parties seek further direction from the court with respect to having the remaining actions (including those not involved in these motions) joined together for the purpose of production of documents, discovery examinations, and trial. It may also be helpful to appoint a case management judge. In the interim, I will retain the files for the purposes of providing these directions.

[38] There will be no award of costs on this motion.

Mr. Parker shall prepare an order for consent as to form accordingly.

Norton, J.