You Should Thank Me…

by [Geoffrey Young]

"The wrongdoer should not profit from his wrong" is under challenge in B.C.

Many motor vehicle accident deaths do not result in a money loss to the victim's survivors. The death of a young child or of a spouse with little or no earnings may be a life-changing tragedy to the victim's family, but nevertheless leave them better off in narrow financial terms. The courts and legislation, for reasons too obvious to list, do not allow a tort-feasor to sue the survivors of his victim for a share of any financial benefit that may be conferred on those survivors as a result of the death of the victim. Yet claims of precisely this nature, contained within expert calculations of economic loss using the "pooled family income" approach, are appearing in B.C. courts.

"Income Pooling" represents a Damage Claim by the Defendant

The "income pooling", "cross-dependency" or "joint dependency" approach to income loss awards that has now been generally accepted[i]

assumes that a fraction of the accident victim's earnings has been spent to the victim's benefit alone, and that a similar fraction of the earnings provided by the victim's spouse (and any other earner within the family) has also been devoted to the victim's benefit alone. In other words, family earnings are all contributed to a common "pool", and each member draws from the pool an amount that depends on need, not earnings. Survivors need only be compensated for the income lost as a result of the victim's death to the extent that it exceeds the share of family income that was consumed by the victim.

The practical consequence of the income pooling approach has been to reduce income loss awards. For example, if a man has an income of $100,000, and his wife would be able to live alone at the same standard of living for only $70,000, then it is well accepted that should he be killed his widow is due compensation of only $70,000 with respect to income loss if she has no income. That is, since spending that was to the benefit of the victim alone consumed 30 percent of his earnings, the widow is considered to be as well off with an award equal to 70 percent of the family income as she was before the accident. However, if the victim's earnings had been only $30,000 of the family income of $100,000, and his surviving wife had earned $70,000, then as a widow (under the income pooling assumption) she is in financial terms neither better nor worse off as a result of the victim's death - she still enjoys a $70,000 per year standard of living. Her income loss claim is zero (although she may have a claim under other heads of damage)[ii].

Under the income pooling income approach the loss claim by the plaintiff is being offset by what is essentially a counter-claim by the defendant, although the defendant's case is not formally presented as a counter-claim. Thus the widow in our example is claiming compensation for the loss of her husband's income of $30,000, less the 30 percent of that income which he would have consumed himself, for a claim of $21,000. The defendant (in effect) is claiming that the widow has gained the use of the 30 percent of her own $70,000 earnings (or $21,000) that she devoted to her deceased husband before the defendant's action resulted in his death. In this case the two claims cancel each other out and the widow's net income loss claim is zero.

Income Pooling Can Lead to Negative Claims

It is easy to see from our example that if the surviving widow's share of the pre-accident family earnings had been greater than 70 percent, the income loss claim would be negative. We have seen many defence economist reports that do indeed say, in effect, "you should thank me for killing your husband/wife/child", but the courts in some jurisdictions are still having difficulty with the notion that the income pooling approach will often produce negative losses. They may characterize this result as "bizarre" or "preposterous"[iii], and sometimes seem to be inclined to find particular circumstances why full pooling of income should not apply where negative losses would result. As experience with the new standard method grows very small or zero pecuniary awards may become more common.

To an economist, the pooled family income approach has the unattractive characteristic that it increases the gap between the compensable private impact of a tort and the true social cost. A tort-feasor can bring about the death of a brilliant cancer researcher at the height of her powers, but the law says her life is valueless in financial terms if she was married to a wealthy man who (under the pooled income approach) is deemed to have been relieved of the burden of supporting her. Nevertheless, income pooling appears now to be the approach required by the courts, whose task is to compensate for the private, not the social, cost of wrongs.

Since there is no prospect of the courts actually making damage awards to defendant tort-feasors, a finding of "negative loss" in pecuniary terms is only of value to the defendant if the negative claim can be subtracted from another award. Lately our firm has been asked to comment on expert economist reports that extend the "pooling" principle so as to subtract a negative pecuniary damage award from another claim, reducing the award for the second claim. It is not clear to us that these extensions of the principle have been accepted by the courts, and we believe some of these estimates should be challenged. Some examples follow.

Pooling Family Services

Accident victims have usually made a contribution to their families in the form of household services or child care, and the loss of these services represents a source of pecuniary loss to the survivors. Following the pooling principle, a claim by a victim's widow that she should be compensated for the value of the household services that her husband provided must be offset by the defendant's counter-claim that the value of the work the victim's wife formerly did for her husband (and now need no longer do) should also be taken into account. Only the net loss of services, much smaller than the value of the victim's contribution, should be awarded.

In principle the argument for pooling services is similar to the argument for pooling income. On factual grounds we have argued that in most situations full pooling of services is unlikely, however. In practice it is usually impossible for the widow to "trade" her new found spare time, formerly spent doing her husband's laundry or preparing his meals, for the time of someone willing to mow the lawn, change the oil in her car or clean the gutters. To the degree that household services are specialized there is no true "pool" of services.

Pooling Services and Income

Since both income and household services represent pecuniary losses, fully compensable with dollars, it is a logical extension of the pooling principle to reduce any claim for a loss of household services by the amount of a negative income loss claim. This will be typical where the victim is a spouse who had little income but who provided household services [iv]. Where the surviving spouse was a high income earner compared to the victim (so the income loss claim was much below zero) the net pecuniary loss claim (that is, combining earnings loss and family services loss) could easily be less than zero.

Pooling Claims for Pecuniary and Non-Pecuniary Damages

Most claims will include a non-pecuniary damages component, and the courts, or the legislature, will eventually have to grapple with the issue of whether negative pecuniary claims can be set off against plaintiffs' non-pecuniary loss claims.

Pooling with Claims for Other Victims

Some economist's reports on behalf of defendants present an offsetting claim in a form that is easy to overlook; the defence suggests setting off against the plaintiff's pecuniary loss claim a counter-claim by the defendant for a "negative award" for causing the death of another member of the plaintiff's family (that is, a second victim).

The counter-claim is based on income pooling and is not set out in this blunt form, but rather is buried inside the arithmetic of the loss calculation. Several years ago we prepared a loss estimate for the case of a young father who had been killed along with two of his children. Defence counsel objected that our report failed to recognize that the income benefit provided to the widow and surviving child (absent the accident) would have been reduced because the two dead children, had they survived, would have consumed part of the victim's income, leaving less for the survivors. The economist's report prepared on behalf of the defendant embodied that assumption and naturally produced a much lower estimate of pecuniary loss.

In a recent case we prepared an estimate of pecuniary loss for the case of a young woman who had left a husband and their child. Plaintiff counsel had not informed us that the victim had been expecting the family's second child at the time of her death, assuming that this second, unborn, victim would not affect our calculation of the pecuniary loss to the surviving husband and child. The defence economist's report, however, included this information in the calculations. The defence report assumed that in the absence of the accident the second child would have consumed a share of the family income. That unborn child's death meant that more income was now available for the surviving father and child. The impact of the inclusion of the financial counter-claim for the dead child in this case reduced the net claim on behalf of the surviving father by 15 to 20 percent and on behalf of the other, surviving, child by about half.

The Family Compensation Act requires the same "subject matter" to be dealt with in a single action [v]. In the case of an accident that has claimed multiple victims, an adult whose death imposed financial loss on the survivors and children leaving "negative losses", were it possible to make each victim the subject of a separate action the nature of the defence counter-claim would be much more clear. At the trial dealing with the death of the income earning adult, the defence would have to introduce evidence about the death of the children (not a tactic well-calculated to build sympathy for the defendant) if it wished to introduce a defence economist's report that rolls all of the victims together to reduce the monetary loss claim for the death of that adult. At the trial dealing with the death of the children the plaintiff would need introduce no economic evidence at all, leaving to the defence the task of explaining to the jury how much the surviving child had benefited financially from the death of his siblings. My suspicion is that if legislation made this procedure possible the courts would by now have produced a body of law on the issue of negative claims.

Advice to Plaintiffs

Income pooling is a troubling area of law that deserves clarification, but in the meantime there is no need for plaintiffs to make the job of defence counsel easier. Where the economist predicts that the pecuniary loss calculation for a spouse will show a negative amount (that is, where the income of a deceased spouse is small relative to that of the survivor) as plaintiff counsel you might consider presenting a claim only for loss of household services. If you do not provide the earnings evidence needed by the defence to make a counter-claim, the defence will not only have to introduce information on earnings but will also have to explain to the court that they are forcing the plaintiff to discuss her income, and that of her deceased spouse, because they intend the bereaved plaintiff's "profit" on the head of income loss to be subtracted from her claim for loss for household services or other heads of damage. I suspect jury members will have as much difficulty with this procedure as many judges must have had when the income pooling concept was first adopted.

You should be alert to the nature of the counter-claim, usually buried in the economist's arithmetic, that underlies any use of the income pooling approach. In the case of the death of the expectant mother, we understand that plaintiff counsel was barred by precedent from making a claim for damages for the death of the unborn child, and it is not clear to us (as non-lawyers) why the defendant had the right even to introduce what is in effect a pecuniary loss counter-claim against the plaintiff asking to be rewarded for causing the death of this prospective child, in the form of a negative amount to be offset against the pecuniary loss claim for the death of the wife who was the subject of the income loss claim. In pressing such a counter-claim, would the defence have to introduce evidence that the defendant's actions have resulted in the death of an unborn child (since the plaintiff has no requirement to introduce evidence about the advanced pregnancy of the victim) in order to substantiate the lower claim for non-pecuniary damages that as a result had been calculated by its expert economist? One can imagine that any defence lawyer, no matter how persuasive the economist's report, would quail at the thought of explaining to judge or jury that because it has been proved that the victim was pregnant at the time of her death the pecuniary damage award to her surviving family members should be reduced.

One hopes, of course, we will eventually receive clear guidance from the courts or the legislature that zero is the smallest award that can be made (leaving aside costs) for a claim with respect to the wrongful death of any individual victim under any single head of damage. It will be made clear, in other words, that negative awards may not be subtracted from awards with respect to other victims, or from awards with respect to the same victim under other heads of damage.

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i. See, for example, Cara L. Brown, Damages: Estimating Pecuniary Loss, Canada Law Book, Inc., November 2003, page 7-17 ff.

ii. The simple examples here are for a single year. Estimating total future loss requires adjustment for discounting, mortality and other contingencies over many future years, of course.

iii. (2001) 204 Nfld. & P.E.I.R.225 (Nfld. S.C.), supplementary reasons 208 Nfld. & P.E.I.R. 333, 20 C.P.C. (5th) 337 (Nfld. S.C.), para. 41, as cited in Cara L. Brown, op. cit., page 7-18.

iv. The pooling of income and services claims is supported in MacKinnon v. Tremere (2000), 97 A.C.W.S. (3d) 79 (B.C.S.C.), para. 27, as cited in Cara L. Brown, op. cit., page 7-21. We can expect to see this argument raised in reverse where the victim is a high-earning husband who can be shown not to have helped with household work and who has thus by his death conferred a household services saving on his widow.

v. Family Compensation Act [RSBC 1996], Chapter 126, Section 6. Queen's Printer, Victoria, 2004.