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Wrongful Death and Survival Actions in Washington state: Comparing benefits from a Canadian perspective

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One of the most rewarding benefits that flows from a multi-jurisdictional practice is the opportunity to evaluate legal issues within the framework of two diverse judicial systems. As a lawyer licensed in both British Columbia and Washington who focuses much of his practice on assisting Canadians with legal challenges in the United States, I'm often required to consider the laws of both countries to determine the best strategy for achieving our clients' objectives. Inevitably, comparing U.S. and Canadian laws that govern a specific client problem leads to thinking about the differences between the two nations' legal systems in a more general way, and wondering how each might benefit from greater awareness of the approach taken by its neighbour.

One area in which British Columbia and Washington law differ substantially is in valuing the recoverable losses arising from the death of a loved one. Most practitioners on both sides of the border have a general awareness that awards for "wrongful death" are more generous in the United States, while the heads of damage are more limited in Canada. For the rare case which presents a multi-jurisdictional fact pattern, the lesson seems clear – bring your action in the jurisdiction which enables you to maximize your client's compensation. Keeping the case in that favorable jurisdiction, however, can be quite a challenge – and even if you succeed, you can't help but consider the policy choices which lead to radically disparate awards for the same injuries north and south of the international border.

Does the Canadian approach err on the side of modesty, offering too little compensation for the devastating impact of losing a family member? Or do the Washington courts, which have gone so far as to recognize claims for the losses to the estate of a viable unborn fetus[1], permit excessive damages for intangible and speculative harms? We don't presume to offer a definitive answer to this question. Practitioners in British Columbia, however, can easily overlook Washington as an alternative forum for their client's cross-border dispute – an oversight which can both diminish the client's recovery in the short run and thwart the evolution of British Columbia damages law over the long term. In this article, we'll offer a brief overview of the Washington law analogous to our *Family*

Compensation Act and *Estate Administration Act* claims, provide one example of how Canadian plaintiffs used the more favorable Washington law to their advantage, and illustrate the challenges Canadians face when seeking to avail themselves of U.S. wrongful death statutes – even for accidents arising in the U.S.

Washington's Wrongful Death and Survival Statutes – An Overview

Both Washington and British Columbia have legal systems that evolved from the English common law tradition, which failed to recognize a cause of action for "wrongful death". As the pressures of industrialization and the social hardships created by increased accidents mounted in the mid-19th century, both the United States and Canada began considering statutory solutions to ameliorate the harsh effects of the common law regime. The British Parliament responded first in 1846 with *Lord Campbell's Act*, recognizing the right of close relatives to seek compensation for the death of a family member. Washington, in contrast, took its first steps towards recognition of a wrongful death cause of action in 1854, when the territorial authorities approved a limited cause of action for the benefit of widows and orphans of men killed while dueling.[2] Thankfully, the scope of actionable claims for injuries resulting in death has advanced significantly in the intervening 150 years, both through adoption of Washington's wrongful death and survival statutes, and through continued evolution of the rights afforded under these statutes as interpreted by the state's courts. Today, claims arising from death in Washington state fall into two general groups, governed by four distinct statutes.

The Wrongful Death Claim

Wrongful death claims are actions which inure in statutorily defined beneficiaries of the decedent, and are conceptually equivalent to actions under British Columbia's *Family Compensation Act*. The action is brought by the personal representative of the decedent's estate, but this is merely for the sake of procedural convenience; the cause of action vests in the beneficiaries, not the estate, and sums awarded cannot be attached by the estate's creditors[3].

The "general" wrongful death statute

The general wrongful death statute, RCW 4.20.010, was created to compensate a decedent's surviving family members for pecuniary losses they sustain as a result of the decedent's death. The decedent's

spouse and children, including stepchildren, are treated as "first-tier" beneficiaries, and have priority standing to bring the action. If no "first-tier" beneficiaries survive the decedent, secondary beneficiaries such as the decedent's parents or siblings may bring the action – but only if they are residents of the United States and can demonstrate a threshold level of financial dependency on the decedent.

While the precise heads of damage to which the beneficiaries are entitled is not enumerated in the statute, subsequent court decisions have permitted claimants to recover the true pecuniary loss sustained by the surviving family member(s). In Washington, pecuniary loss includes not only the financial contributions the decedent would have made to the beneficiaries had he lived, but also an award for "loss of consortium" – the loss of the decedent's love, care, companionship and services[4]. Although prior cases have established that the general wrongful death statute does not recognize claims for the grief and mental anguish of the survivors, the flexible definition of "consortium" provided by the case law undoubtedly results in circumstances where jurors consider the claimant's emotional distress when computing an award for consortium damages.

The "child" wrongful death statute

Washington also offers a discrete statutory remedy for parents who suffer the loss of a child. Like general wrongful death claims, a cause of action brought under RCW 4.24.010 vests in the parents as beneficiaries. If the child is under the age of 18, there is no requirement that the parents show financial dependence on the child to make this claim. Parents may elect to bring an action under this statute for adult children if substantial financial dependence can be shown. Unlike the general wrongful death statute, RCW 4.24.010 does not require a parent to be a resident of the United States at the time of the decedent's death to make a claim.

The heads of damages recoverable under the child wrongful death statute include pecuniary and nonpecuniary claims, and are broader in scope than those permitted by RCW 4.20.010. As in a general wrongful death claim, the child-specific statute permits recovery for medical and funeral expenses, as well as for the loss of the child's "consortium". But the statute further allows a claim for destruction of the parent-child relationship, which the case law has defined as being distinct from the consortium claim. This latter claim is intended to compensate the

parent(s) for the grief, mental anguish and anxiety suffered as a result of the child's loss – thus providing a head of noneconomic damages specifically disallowed in the context of a general claim for wrongful death[5].

Obviously, circumstances often arise where both statutes may be applicable to a parental claim for the loss of a child. Parents are entitled to bring claims under both statutes in the same action, but to the extent the statutes overlap, the claimant is required to elect his remedies under the two statutes and avoid a double recovery.

Survival Actions

Survival actions preserve the decedent's own cause of action for injury or death, permitting the decedent's estate and/or statutory beneficiaries to bring those claims which the decedent would have been able to make had he lived. Roughly analogous to claims in British Columbia brought under the *Estate Administration Act*, survival actions in Washington are governed by two separate statutes.

The "general" survival statute

The general survival statute, RCW 4.20.046, simply preserves a decedent's cause of action for the benefit of his estate. Any award obtained under the statute is treated as an estate asset, and can be attached by the estate's creditors[6]. The statute is not tort-specific, and thus makes no distinction between cases where the decedent died as the result of negligence underlying the action, or whether the decedent died of causes unrelated to the claims asserted.

The "special" survival statute

In contrast, the special survival statute, RCW 4.20.060, was created specifically to address the continuation of claims which resulted in the death of the decedent. While actions brought under the special survival statute are brought for harms done to the decedent's estate, they vest not in the estate but in the "first-tier" or "second-tier" beneficiaries established in the wrongful death statutes[7]. As such, awards made under the special survival statute cannot be attached by the estate's creditors.

Relevant heads of damage in survival actions

The heads of damage permitted under the general and special survival statutes are identical. In addition to medical and funeral expenses incurred by the estate (and not recovered under the wrongful death statutes), the survival action

permits a claimant to seek damages for the loss of net earnings that would have accumulated to the estate had the decedent lived. The loss of earnings claim is computed by establishing the decedent's future earnings through expert economic testimony, then offsetting probable deductions for family and personal expenses and other relevant adjustments. The future net earnings figure is then reduced to present value to arrive at the final award[8].

Finally, the estate is permitted to seek compensation for two elements of noneconomic damage. If any measurable length of time occurred between injury and death – even a matter of a few seconds – the estate is permitted to seek damages for the decedent's pre-death pain and suffering[9]. Testimony must establish that the decedent was conscious during this interval, or else these damages will not be permitted. Additionally, the Washington courts recognize a claim by the estate for the fear suffered by the decedent in anticipation of imminent death – again, if the fear is supported by more than mere conjecture and speculation[10].

The overlapping nature of Washington's statutory framework for resolving actions resulting in death leads most personal representatives to file claims under both the wrongful death and the survival statutes. Expert economic testimony regarding the decedent's future earnings often plays a central role in any damages inquiry, as the decedent's probable lifetime income is relevant to both the pecuniary loss sustained by the beneficiaries of the wrongful death claim and the value of future net earnings recoverable in the survival action.

Applying Washington law to Canadian plaintiffs – Brooks v. Cytodyne Technologies

As the preceding paragraphs illustrated, the range of damages awarded for wrongful death and survival claims in Washington are significantly broader than those afforded under the *Family Compensation Act* and *Estate Administration Act* in two important respects. The value of a decedent's "net future earnings" can be substantial, especially in cases involving the loss of a child or young adult with a strong educational background and future job prospects. Further, some cases present facts which clearly indicate that the decedent suffered some level of conscious pain and suffering prior to death, or likely experienced fear in anticipation of imminent injury. While these three heads of damage are excluded by the *Estate Administration Act*, all are permitted under the Washington survival

statutes. When presented with those unique cases where Washington law might apply to your client's claims, the significant disparities in the American and Canadian compensation schemes simply must be considered before an action is pursued under the familiar but more conservative British Columbia statutes.

Brooks v. Cytodyne Technologies arose out of a much-publicized fatality automobile collision which occurred at the Peace Arch border crossing in May of 1998. A vehicle driven by a Washington resident at speeds approaching 160 km/h crossed the international border and struck a line of vehicles waiting to clear Canada customs. Two young women, Kimberly Brooks and Monique Ishikawa, were killed when the Washington driver struck the rear of their Honda sedan, causing it to burst into flames. The Brooks/Ishikawa vehicle was in turn propelled forward into the next car in the customs line, causing it too to catch on fire and seriously injuring the four occupants inside. In all, eleven individuals waiting in the customs line were injured or killed in the collision, and five vehicles sustained varying degrees of damage.

As the collision occurred approximately 100 yards north of the international boundary, the RCMP assumed responsibility for investigating the cause of the collision. The Washington driver was charged with two counts of reckless driving resulting in death, and was prosecuted by the Crown. During the course of the criminal trial, the accused submitted evidence that she had suffered a psychotic episode as a result of her use of Xenadrine, an ephedra-based diet supplement she had been taking in the weeks leading up to the collision. Following extensive testimony from both fact witnesses and medical experts establishing the transitory nature of the driver's psychosis and the role that Xenadrine played in causing the driver's bizarre symptoms, the Supreme Court found the driver not criminally responsible for her actions, and an acquittal was entered.

Our office was initially retained by the occupants of the second vehicle in the customs line to represent them in a civil tort action for damages against the driver. My initial reaction was that by broadening the lawsuit to include product liability claims against the manufacturer, distributor and retailer of the Xenadrine supplement, the clients would have an opportunity to bring this action in the United States, where all the defendants to the action resided or were incorporated. In the course of

learning about the tragic circumstances surrounding the collision, we came to discover that a claim under the *Family Compensation Act* had been filed on behalf of the Brooks family for the loss of their daughter in British Columbia. While the decision to file the FCA action was undoubtedly correct, it became clear to me that the relief I intended to seek for my clients applied with equal force to the Brooks and Ishikawa claims, and that pursuing all civil claims arising from this collision in Washington would bring consistency to the plaintiffs' collective strategy and the opportunity to have all the family and estate claims evaluated under Washington's more generous wrongful death and survival statutes. My office ultimately assumed the representation of twelve plaintiffs, including members of the Brooks and Ishikawa families, in a Washington action which sought damages from six individual and corporate defendants whose conduct contributed to the collision.

Shortly after commencing the lawsuit in August of 2000, it became evident that the defendants intended to vigorously contest our decision to have the action tried in Washington under Washington law. While the arguments of the defendants were often cloaked in high-minded references to Canada's overwhelming interest in the outcome of the dispute and a desire to promote international comity, the truth of the matter was that the defendants would substantially reduce their financial liability if they could have the claims of the two decedents evaluated under the British Columbia statutory framework. The defendants, including counsel for the driver, cooperated in motions seeking removal of our lawsuit to British Columbia under the doctrine of *forum non conveniens*, or in the alternative a ruling that the case could remain in Washington but be tried according to British Columbia law.

The defendants had some powerful arguments in support of their request – not the least of which was the fact that the collision had occurred north of the border in Canada. It was also true that Canada had expressed some interest in the outcome of the dispute by prosecuting the driver under Canadian criminal law. The defendants further contended that the Brooks family's initial decision to file an FCA claim in British Columbia – an action which was promptly dismissed once the possibility of a Washington action became evident – illustrated an intent by the parties to submit the dispute to the Canadian courts for adjudication, and reduced our Washington action to an

inappropriate example of "forum shopping."

Our response to the defendants' arguments centered around three main points. First, we stressed the fact that since all the defendants were United States domiciliaries (if not Washington residents), it could hardly be unjust to expect those defendants to have their conduct judged by American as opposed to Canadian legal standards. Second, we stressed that all tortious conduct by the defendants was initiated within the borders of the United States. Even if the driver were wholly to blame for the collision, she had traveled some 100 miles from the Seattle area north to the border at extreme speeds; it was unquestionable that someone who crossed the border going 160 km/h and came to rest 100 yards north of the boundary must have been driving negligently in Washington state, and Washington's interest in addressing that negligence was paramount. Finally, we argued that Washington maintains an interest in protecting visitors to the state until such time as they are cleared by Canadian customs to proceed into British Columbia, and that the accident occurred in this "no man's land" north of the boundary but south of customs, where precise notions of sovereign interest are harder to define.

In the end, a King County Superior Court judge accepted our arguments in November of 2001, ruling that the lawsuit should remain in the United States and be tried under Washington law. The trial court's decision was subsequently upheld by the Washington Court of Appeals in the spring of 2002. Shortly thereafter, with Washington's wrongful death and survival statutes established as the basis for evaluating quantum, the claims of all plaintiffs settled for a confidential amount.

While the defendants in *Brooks* were ultimately unsuccessful in their attempts to dismiss our action to British Columbia, it should be noted that other defendants have fared better with similar requests. Notably, plaintiffs involved in cross border civil litigation often discover that the Insurance Corporation of British Columbia has a standing policy of attempting to dismiss wrongful death and significant injury claims against its insureds arising in Washington back to British Columbia under the doctrine of *forum non conveniens*. ICBC and out-of-province counsel have amassed an impressive track record of success, both at the trial court and appellate level, in obtaining such dismissals in cases where both the plaintiff and defendant drivers are residents of British Columbia[11]. Still, it is important to "fight each

fight" on its particular facts, and evaluate the applicability of Washington law in cases where the scope of damages and the presence of potential claims against American defendants suggest even a modest chance of success. While we await the day when a broader spectrum of damages becomes available to our clients in their actions before the British Columbia courts, expanding our awareness of the Washington approach to wrongful death and survival claims can offer benefits for present-day clients as well as a source of inspiration for how Canadian damages law might evolve in the future.

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[1] *Moen v. Hanson*, 85 Wn.2d 597, 599, 537 P.2d 266 (1975). The Washington Supreme Court has subsequently held that a *nonviable* preterm fetus killed by the negligence of a third party does not possess an estate, and is not a "minor child" for the purposes of the child wrongful death statutes. See

[2] Gregory Casey, Comment, Washington Wrongful Death and Survival Actions, *6 Gonz. L. Rev. 314 (1971),* citing *Civil Practice Act,* 496 Wash. Terr. Sess. Laws. 220 (1854).

[3] *Wood v. Dunlop*, 83 Wn.2d 719, 724, 521 P.2d 1177 (1974)

[4] *Chapple v. Ganger*, 851 F. Supp. 1481, 1487 (E.D. Wash. 1994). *Chapple* provides an excellent example of how the wrongful death and survival scheme overlap, and the considerations a court must make in avoiding "double recovery" under the various heads of damage.

[5] *Hinzman v. Palmanteer*, 81 Wn.2d 327,332, 501 P.2d 1228 (1972).

[6] See *Walton v. Absher Construction, Inc.*, 101 Wn.2d 238, 676 P.2d 1002 (1984)(harmonizing the general and special survival statutes, and discussing distinctions between them).

[7] See *Higbee v. Shorewood Osteopathic Hospital*, 105 Wn.2d 33, 711 P.2d 306 (1985).

[8] *Wagner v. Flight Craft, Inc.*, 31 Wn. App. 558, 568, 643 P.2d 906 (1982). See *Chapple,* supra note 4, for the practical application of this approach.

[9] *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 837, 699 P.2d 1230 (1985).

[10] *Id.* at 837, citing *Johnson v. Marshall Field & Co.*, 78 Wn.2d 609, 617-18, 478 P.2d 735 (1970).

[11] See *Hill v. Jawanda*, 96 Wn. App. 537, 983 P.2d 666 (1999).