

**To v. Toronto Board of Education; Radical Change or Merely Extreme  
End of the Range**

More than a few eyebrows were raised in the insurance defence industry when the Ontario Court of Appeal released its decision in the case of *To et al. v. Toronto Board of Education et al.* (2001), 55 O.R. (3d) 641. For the first time, the Ontario Court of Appeal had allowed a six figure award for loss of guidance, care, and companionship to stand. Was this the new benchmark? Had the Ontario Court of Appeal just armed plaintiffs' counsel to the teeth? Were thousands of files under reserved?

**Legislative Background**

Prior to the enactment of the *Family Law Reform Act*, S.O. 1978, c.2, a restricted number of family members could claim for pecuniary loss following the death of a family member. The *Family Law Reform Act* expanded the number of relatives entitled to advance a claim, allowed claims in the event of injury and not just death, and introduced claims for compensation for the loss of guidance, care, and companionship. The legislation recognised that children were not economic assets and that the death or injury of a child was a significant loss to other family members, as the relationship was interfered with or lost entirely. The *Family Law Reform Act* was replaced by the *Family Law Act*, R.S.O. 1990, c. F.3. Subsection 61(2)(e) sets out the claim for loss of guidance, care and companionship. The legislation does not specify the compensation to be paid, unlike Alberta's *Fatal Accident Act*, R.S.A. 1980, c.F-5, in which section 8, which provides for payment in the amount of \$43,000.00 to each parent in the event of the death of a child. The Ontario legislation, as does the legislation in most other provinces, leaves it to the trier of fact to assess the compensation to be awarded. Numerous decisions have confirmed that each case must be assessed on its own facts on an objective, non-emotional basis [see *To v. Toronto Board of Education*, supra, and *Nielsen v. Kaufmann* (1986), 54 O.R. (2d) 188 (C.A.)]

**To et al. v. Toronto Board of Education et al.**

Before *To*, awards for loss of guidance, care, and companionship of a child or sibling varied within a range, with the pendulum swinging towards one end or the other from time to time. Through the late 1990s, awards for loss of a child still living at home usually fell in the \$20,000.00 to \$40,000.00 range, with the occasional greater award in exceptional cases. It was not unusual at examinations for discovery for counsel for the defence, after reviewing the basics, to ask counsel for the plaintiff whether there was anything within the family relationship that would take the claim outside the "norm".

Then along came the Ontario Court of Appeal decision in *To* where the Court declined to roll back the jury's award of \$100,000.00 for each of the parents for loss of guidance, care, and companionship, and \$50,000.00 for the sibling. While plaintiffs' counsel were wringing their hands in anticipation of significant increases in FLA awards across the board, the defence industry was trying to figure out whether the case established a new

baseline. But did the decision in *To* really represent a significant increase in FLA awards across the board and a marked change in comparison to previous awards? The answer appears to be “No”. Before considering the decision, a brief summary of the facts should help.

Binh Hoy To, a 14 year old grade 9 student, died in a gymnasium accident at his school on February 26, 1992. Binh’s parents were of Chinese decent. They were living in South Vietnam at the time of Binh’s birth in 1977. They escaped from South Vietnam and immigrated to Canada in 1980 and became Canadian citizens. Binh’s sister, Mary, was born shortly after their arrival in Canada and was 11 years old at the date of Binh’s death.

Mr. Justice Osborne, who wrote the decision on behalf of the Court, noted that families of Chinese origin have significant expectations for a first born male. It was anticipated that Binh would graduate from University, obtain a high paying job, and support, financially and socially, his parents and sister. Binh seemed to be fulfilling those expectations as he excelled at school. Mr. Justice Osborne noted that the family members were devoted to one another. Binh assisted his father by translating business and personal correspondence. He was a trusted companion and advisor to his father and mother. He had an especially close relationship with his sister, “almost paternal”. Binh cared for his sister as his parents spent long hours at work and he assisted her with her homework. They walked to and from school together each and every day (often accompanied by one of their parents). According to Mary, “...they were as close as a brother and sister could be”. Mr. Justice Osborne, at page 647, went on to describe Binh as follows:

The deceased was a fun loving, outgoing, popular, hard working teenager, who was committed to school and who cared for his family and his friends at Harbord Collegiate. He was an excellent student. Although he was a hockey fan, he did not play hockey or any other sport because his goals did not permit him time to pursue such hobbies.

It should also be noted that the family was devastated by his death, to the point that they moved out of the family home for approximately one year. Mr. and Mrs. To tried to have another son, but were unsuccessful.

Clearly, Binh was somewhat of a dream child. The average teenager would not fit the description of Binh. Binh did not display the selfish, rebellious, and disrespectful behaviour that parents of other teenagers may note from time to time. The situation assessed by the jury in the *To* case was clearly exceptional.

The defence industry should also be comforted by the fact that Mr. Justice Osborne’s decision can be interpreted as indicating that he would not have assessed the award for the parents as high as did the jury. When considering the standard of appellant review, he states, at page 650, “It is manifest, merely because I would have assessed guidance, care and companionship damages lower than the jury’s assessment, does not justify this Court’s intervention with the jury’s assessment”. He goes on to state at page 653, that:

Although I think that the jury's guidance, care and companionship assessments for Mr. and Mrs. To are high, they are not so high as to justify this Court's intervention. In my opinion, there was evidence in this case that would support a conclusion that damages for guidance, care and companionship in respect of the mother, father and sister were justifiably assessed at the high end of what one might describe as an accepted range of damages.

Mr. Justice Osborne is indicating that, even for exceptional cases, there is little or no additional room at the high end of the acceptable range of damages. Clearly, *To* is not the launch pad for future sky rocketing awards.

The jury's award in *To* was not a substantial departure from awards in previous exceptional cases. Mr. Justice Osborne referred to the case of *Mason v. Peters et al.* (1982), 39 O.R. (2d), 27 (C.A.). *Mason* involved the death in 1978 of an 11 year old boy named "Darren". He and his sister, Kelly, who was 10 years old as of the date of Darren's death, were raised by their mother. Darren's parents had separated shortly after his birth and his father was not contributing to the family financially. Mrs. Mason was a paraplegic. The trial judge described Darren as being a remarkable, very mature young man capable of doing "a man's work" around the house, and who was ever mindful of his mother's needs. They had an extremely close relationship as did Darren and his sister. The jury awarded \$45,000.00 for loss of guidance, care, and companionship to Mrs. Mason and \$5,000.00 to Kelly. The Court of Appeal did not disturb the awards. In *To*, at page 653, Mr. Justice Osborne noted that the award to Mrs. Mason, when adjusted for the increase in the Consumer Price Index for Canada from April 1978 to February 1992, would amount to \$104,753.00.

In assessing the award of the jury for Binh's sister in *To*, Mr. Justice Osborne referred to the decision of Salhany J. in *Rintoul v. Lind Estate* (1997), 32 O.R. (3d) 704 (Gen. Div.). *Rintoul* may be of assistance in keeping awards to parents for the death of a child away from the high end of the range. *Rintoul* involved the death of a 16 year old boy named "Kevin". Kevin lived with his widowed mother and younger sister, Cory, who was 12 at the date of his death. Kevin died in an automobile accident in 1994. He was described as, "...the kind of person to have as a son". He assisted on the family farm, was actively involved in the 4-H Club, and his sports activities were an important part of the family social life. It was anticipated that Kevin would marry, have children, take over the family farm and provide guidance, care, and companionship to his mother on an ongoing basis. Kevin was very supportive of his sister, being her closest friend and companion. Salhany J. noted that the family would experience a more significant loss, as Kevin was the sole male figure in this family that lived in a farming community. Kevin's mother was awarded \$55,000.00 and his sister, \$20,000.00, before application of the statutory deduction under section 267.1(8) of the *Insurance Act*, R.S.O., 1990, c. I.8, as amended. Salhany J. saw Kevin as an exceptional child and yet he awarded significantly less to the parent than did the jury in *To*.

Perhaps the insurance industry should be more concerned with the award to Binh's sister, Mary, in *To*. The jury had originally awarded \$50,000.00. The Court of Appeal felt that such an award was "inordinately high" and reduced the award to \$25,000.00 (*To*, supra, at page 655). This is still significantly beyond the \$5,000.00 awarded to the sibling in *Mason* even after adjustment for the change in the Consumer Price Index. It was also more than what was awarded to the sister in *Rintoul* by Salhany J., where the younger sister had already lost her father.

It should be noted that in *To* the jury attributed 25 per cent contributory negligence to Binh. One can speculate that the jury may have increased its award in order to compensate for the reduction due to the finding of contributory negligence.

### **Defence Strategy**

How should the insurance industry deal with *To*?

Obviously, it must be pointed out that *To* was an exceptional case based on the facts noted earlier. It should also be emphasised that, even for an exceptional case, Mr. Justice Osborne saw the award as being higher than what he would have awarded and certainly at the highest end of the acceptable range. An effort must be made to establish that the deceased children of future claimants were not exceptional (if that is in fact the case). Understandably, following the death of a child, surviving parents and siblings may not have a realistic memory of the deceased child or their relationship with him or her. Through gentle, empathetic questioning, a realistic picture may be obtained at examinations for discovery. It may also be necessary to go to other sources such as teachers, school records, and coaches for a more accurate description. While counsel cannot refer a jury to other cases when making submissions as to the quantum of an award [*Thompson v. Bell Helmets Inc.* (1999), 40 C.P.C. (4d) 31 (Ont. C.A.)] such references can be made when making submissions to a judge. On these occasions, the decision in *Rintoul* may be relied upon as a more judicious starting point for exceptional cases and counsel may suggest that the court should move down from there when dealing with the loss of a child who could not be described as "exceptional". It should also be emphasised that, even in exceptional cases, and certainly when dealing with children who would not be described as exceptional, as the child gains independence and starts a life of his or her own outside the family home, the amount of guidance, care and companionship available to parents and siblings diminishes significantly. With careful questioning, the family members may acknowledge this upon examination for discovery.

### **Summary**

*To* does not represent a new baseline for awards for loss of guidance, care, and companionship. To the contrary, it represents the extreme end of the acceptable range of awards. *To* is fact specific. In more typical circumstances, young children provide little in the way of care and guidance to parents. The loss of companionship is more significantly felt and even this diminishes as the child becomes increasingly independent. As a result,

awards such as those granted in *To* are not appropriate for the loss of a typical child and should be reserved for the most exceptional cases.