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Litigating Death in Care Cases in Alberta

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Legislation and Cases Commented On: *Fatal Accidents Act, RSA 2000, c F-8, Argent v Gray, 2015 ABQB 292, FRN v Alberta, 2014 ABQB 375, SM v Alberta, 2014 ABQB 376*

More than 775 children with some involvement with child protective services in Alberta have died since 1999. This past year alone, approximately 31 children have died while in provincial care or while receiving protective services. The vast majority of children dying in care are of Aboriginal heritage, and all come from marginalized backgrounds. Only until recently have the deaths of all children who die in provincial care been investigated. Prior to 2014, provincial fatality inquiries were only held into select deaths, with none of the findings and recommendations binding on the province or care providers.

For the families of children who have died in care, litigating wrongful death claims against the province and care providers offers an opportunity to obtain redress. Unfortunately, very few cases have been filed, let alone litigated, due in large part, in my view, to the marginalized position of families and the opaqueness of this area of law. With respect to the latter, common law causes of action are non-existent, duties of care are not clearly defined and the jurisprudence is sparse. However, a pair of companion decisions released by Justice Robert A. Graesser in 2014, and a notable decision by the Alberta Court of Appeal on punitive damages in the wrongful death context, provides a path forward. Drawing from these decisions and a more recent one, this post outlines a potential legal framework that could be used to inform and help formulate death in care claims against the province and care providers whose wrongful conduct led to the death. It is intended to spark a conversation on how lawyers can assist families of children who have died in care obtain financial restitution and push for reform to the child protective services system in Alberta.

The common law provides no basis for families of individuals who have died through wrongful means to recover damages for the loss resulting from the death. Statutory causes of action are instead relied upon to obtain financial restitution, which in Alberta is primarily set out under the *Fatal Accidents Act*(the *Survival of Actions Act RSA 2000, c S-27* provides another statutory cause of action but is not relevant in this particular context. For the *Survival of Actions Act* to be pled, claimants have to demonstrate that the deceased or their estate suffered actual financial loss as result of the death, which is unlikely here, as the deceased are children).

The *Fatal Accidents Act* provides the family of the deceased a statutory cause of action for non-pecuniary damages against those whose wrongful act, neglect or default caused the death of the deceased. Pursuant to section 8(2)(b), the parents of children who have died in care, and potentially the children of the children who have died in care, are entitled to damages for bereavement (defined more specifically as damages for grief and loss of the guidance, care and companionship of the deceased person). See [Non-Fatal Exclusion: The Fatal Accidents Act, Stepchildren, and Equality Rights](#) for an overview of the history and context of the *Fatal Accidents Act*. Any sort of negligence (including systemic negligence, which has been pled in

this context), breach of fiduciary duty or other cause of action that resulted in a child in care's death could be subsumed under the *Fatal Accidents Act*. Damages may be awarded without reference to any other damage awards granted and without evidence of damage. The parent or parents of the deceased child are entitled to a statutory maximum of \$82,000 in damages, to be divided equally if the action is brought for the benefit of both parents.

In *FRN v Alberta* and *SM v Alberta*, Justice Graesser considers two applications to strike brought by the Crown against claims filed by families of children who have died in provincial care. In considering the applications, which are partially successful, Justice Graesser provides a template for wrongful death claims in this context. Justice Graesser thoroughly examines the pleadings for causes of action against the Crown and care providers, which in both cases are individual foster parents and not corporate care providers. While it is necessary to read both companion decisions in their entirety, for the sake of brevity, Justice Graesser examines the various causes of action pled against the defendants and narrows them to two that could be meritorious.

In addition to damages under the *Fatal Accidents Act*, families may also be entitled to damages under section 24(1) of the *Charter of Rights and Freedoms* according to Justice Graesser (*FRN v Alberta* at paras 50 -55 and 75-88, *SM v Alberta* at paras 87 – 104, 129). Damages could be awarded to the parents of children in care for the violation of their *Charter* rights as a result of the death. Justice Graesser identifies potential section 7 *Charter* rights that could be breached in such instances, including: (1) the right to nurture one's child, to care for its development and to make decisions for it in fundamental matters, but not limited to medical care and moral upbringing; and (2) the right to physical and psychological integrity (*FRN v Alberta* at para 87 and *SM v Alberta* at para 100). It is important to recognize that the enumerated section 7 rights relate to the rights of the parents and not of the children themselves, as *Charter* cannot generally be asserted after death. Justice Graesser also sets out potential principles of fundamental justice that claimants could rely on to make out their section 7 *Charter* claims, the most relevant being: (1) that to have a right, you must have a remedy when your right is violated; (2) if a child is being provided with care under the Act, the child should be provided with a level of care that is adequate to meet the needs of the child; and (3) there should be no unreasonable delay in making or implementing a decision affecting a child (*SM v Alberta* at para 101). While it is not certain whether *Charter* arguments can be successfully made in each case, Justice Graesser makes clear that the apprehension, custody and death of a child in care could lead to such section 7 violations and corresponding damage awards under section 24(1).

In the event that the children of a child who has died in care bring a claim under the *Fatal Accidents Act*, the statutory award they would be entitled to is \$49,000 for each child. The award is not split between the children, as it is for parents of deceased children under the Act, but represents their individual entitlement. Moreover, as indicated in *Argent v Gray*, [2015 ABQB 292](#), pursuant to section 5.1(2) of the *Limitations Act*, [RSA 2000, c L-12](#) the two year limitations period for the children would be suspended until they reached the age of majority, recommencing afterwards. While this scenario may be rare, there is a distinct possibility that this could occur, and given the quantum of damages and limitations issues described above, filing on behalf of the children may provide a strategic advantage to the family of the deceased over filing on behalf of the parents.

Until recently it was generally thought that claimants were limited to non-pecuniary damages under the *Fatal Accidents Act* and not entitled to punitive damages. This understanding changed

with *Steinkrauss v Afridi*, [2013 ABCA 417](#) (clarified in *Steinkrauss v Afridi*, [2014 ABCA 14](#) – See [Punitive Damages Now Possible in Alberta Fatal Accidents Actions](#) for further discussion of punitive damages and the *Fatal Accidents Act*) For the first time, the Court acknowledged that punitive damages could be awarded under the *Fatal Accidents Act*, and that such awards would be granted in addition to the \$82,000 maximum set out for bereavement damages in the legislation. Provided that it can be established that conduct related to the wrongful act, negligence or default that led to the death was so egregious that it must be punished, denounced or deterred, claimants are now entitled to punitive damages in Alberta. From my experience litigating such cases, punitive damages are a real possibility given the often tragic and preventable manner in which many children in care die.

The number of children dying in care in Alberta is alarming. While there are a multitude of factors involved, the number of deaths caused by accidental or preventable means is disturbing. For both the families, and social justice activists interested in pursuing policy reform through the law, the civil justice system can provide a method to force the province and care providers to ensure there are adequate safeguards and protections for children in their care.

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