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Non-Fatal Exclusion: The Fatal Accidents Act, Stepchildren, and Equality Rights

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Case Considered:

Dares v Newman, 2012 ABQB 328

A father died in a motor vehicle accident. For his grief and the loss of his father's guidance, care and companionship, his biological child received $45,000 in bereavement damages from the at-fault driver's insurance company under section 8(2)(c) of the *Fatal Accidents Act*, RSA 2000, c F-8. His two adopted children, who had not spoken to him for twenty years, also received $45,000 each under the same provision. His two stepchildren, to whom he had stood in the place of a parent for twenty years - and who had received his guidance, care and companionship over two decades and who suffered grief on his death - received nothing. This case raises the issue of the extent to which government is entitled to deny benefits to certain claimants for the purpose of restricting legal action against private parties for tortious conduct causing death.

The stepchildren challenged both the interpretation and constitutionality of excluding stepchildren under section 8 of the *Fatal Accidents Act*. The Minister of Justice and Attorney General of Alberta intervened to defend the provision even though Alberta is the only common law province which allows bereavement damages but excludes stepchildren for whom the deceased stood in the place of a parent from receiving them. Madam Justice S. L. Hunt McDonald upheld both an interpretation of section 8 that excludes stepchildren and the constitutionality of the provision, finding that it did not offend section 15 of the *Canadian Charter of Rights and Freedoms*. We will focus on the equality issue in this post.

Facts

Ken Smith was killed in a motor vehicle accident in 2004. The defendant, Kris Newman, was at fault. Newman's insurance company settled the claim of Smith's common law spouse, Deborah Dares. However, Newman's insurer refused to pay the claim of Deborah Dares' biological children, Jeffrey Dares and Angela Dares.

Ken Smith and Deborah Dares began living together more than 20 years ago, when Jeffrey was eight years old and Angela was four. For two decades, Ken Smith raised Jeffrey and Angela as his own, referring to them as his children, just as they referred to him as their father. He taught them to bike, drive, fish, and swim. He walked Angela down the aisle at her wedding. Jeffrey and Angela's biological father was not involved in their lives; Ken Smith was the only father they had ever known. Justice Hunt McDonald had no difficulty in finding that Ken Smith had stood in *loco parentis* ("in the place of a parent") to Jeffrey and Angela. He provided guidance,

care and companionship to them and Jeffrey and Angela experienced grief on Ken Smith's death due to their close relationship with him.
We are not told much about Ken Smith's biological child, Robert Smith. However, the evidence that Jeffrey and Angela were closer to Ken Smith than was his biological child was uncontested.

Ken Smith's two adopted children, Tracie-Lee Bennett and Sheila-Ann Smith, ceased communication with Ken Smith when he began living with Deborah Dares twenty years ago. They had not seen nor spoken to him since and they did not attend his funeral.

Fatal Accidents Act

All of the children of Ken Smith - biological, adopted and step - sought damages against Newman under section 8 of the *Fatal Accidents Act*. Section 1 is also relevant.

> 1. In this Act,
> (a) "child", except in section 8, includes a son, daughter, grandson, granddaughter, stepson and stepdaughter;
>
> 8. (1) In this section,
> (a) "child" means a son or daughter;
> . . .
> (2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of
> (a) subject to subsection (3), $75 000 to the spouse or adult interdependent partner of the deceased person,
> (b) $75 000 to the parent or parents of the deceased person to be divided equally if the action is brought for the benefit of both parents, and
> (c) $45 000 to each child of the deceased person.

The damages for grief and loss of the guidance, care and companionship are commonly collectively referred to as "bereavement damages."

The history and purpose of section 8 is well documented in reports of the Alberta Law Reform Institute - Final Report No. 24: *Survival of Actions and Fatal Accidents Act Amendment* (April 1977), Report for Discussion No. 12: *Non-Pecuniary Damages in Wrongful Death Actions*, Final Report No. 66: *Non-Pecuniary Damages in Wrongful Death Actions* - and in the Alberta Court of Appeal decision in *Ferraiuolo v Olson*, 2004 ABCA 281, 357 AR 68 at paras 18-73 (a successful *Charter* challenge we will discuss below). It is also a fascinating bit of legal history, containing quite a bit of back and forth between the legislature and the courts, which we can only very briefly sketch here.

Before 1846, the common law did not allow actions for wrongful death. The deceased's estate could not recover damages of any kind from the wrongdoer (whether criminal or negligent) and neither could the deceased's dependants. It was therefore cheaper for a wrongdoer to kill than to injure - injured victims could sue.

By the middle of the 1800s, with the advent of the industrial revolution, railways, and more deaths due to negligence, the common law's failure to recognize the harm done and its inability

to deter negligent conduct causing death led to demand for reform. Surviving spouses and children were often left destitute, as well as grief-stricken. Statutory reform was of two types. "Wrongful death" or "fatal accident" legislation assisted surviving family members of the deceased victims of wrongful death. "Survival of actions" legislation allowed the estates of the deceased to bring tort actions against wrongdoers, to the ultimate benefit of the deceased's heirs.

The first fatal accidents statute, known as *Lord Campbell's Act*, was introduced in England in 1846.This Act conferred a cause of action on the wife, husband, parent and child of a victim of a wrongful death. *Lord Campbell's Act* served as the model for wrongful death statutes subsequently enacted throughout Canada, including one enacted in 1884 in the Northwest Territories, which then included what was to become the province of Alberta. Alberta has had its version of *Lord Campbell's Act* ever since, providing that a child (among others) was entitled to claim damages arising from the wrongful death of a parent.

The law has traditionally distinguished between pecuniary and non-pecuniary losses. Pecuniary loss refers to the loss of financial benefits such as the loss of future income or loss of support. Non-pecuniary loss refers to losses viewed as intangible and not easily measured, such as the emotional, psychological and physical losses suffered by survivors on the death of a family member. As a result of restrictive judicial interpretations of "damages", under Alberta's fatal accidents legislation surviving family members could not recover non-pecuniary damages for their grief or loss of companionship. An exception was made for minor children when the Supreme Court of Canada in *St. Lawrence & Ottawa Railway Co. v Lett* (1885), 11 SCR 422 characterized a child's loss of a parent's care, education and training as a pecuniary, i.e., financial, loss.

Survival of actions legislation was also introduced into what is now Alberta, in 1903. It conferred a cause of action on an estate of a deceased. Although the statute was originally limited to actions commenced by the deceased before his death, in 1937 the House of Lords in *Rose v Ford*, [1937] AC 826 concluded that English survival legislation conferred on a victim's estate a cause of action for non-pecuniary damages on wrongful death. Some provinces revised their legislation to restore the common law but Alberta followed *Rose v Ford*.

In 1977, what is now the Alberta Law Reform Institute (ALRI) published *Report No. 24*: *Survival of Actions and Fatal Accidents Act Amendment*. ALRI recommended that claims for damages for loss of expectation of life be abolished under survival of actions legislation, but also — as a trade-off — recommended compensating certain of the deceased's family members with damages for grief. The wrongdoer would pay damages not for the deceased's loss but instead for the deceased's family's loss because "natural feelings of survivors call for some pecuniary recognition" (ALRI *Report No. 24* at 14). It recommended damages for grief in the amount of $3,000 be available only to spouses and minor children of the deceased and parents of a deceased minor child.

In 1978 the Alberta legislature followed all but one of ALRI's recommendations, amending both the survival of actions legislation and adding what is now section 8 to the *Fatal Accidents Act.* Damages of $3,000 for grief were automatically available to spouses and minor children of a victim and to parents of a deceased child, whether a minor or not.

The changes were dramatic for family members of the deceased who were not in the preferred class of surviving family members. Parents and minor children got a new right to claim a statutorily-prescribed amount for grief without any proof of damage. But an estate's beneficiaries

who were not part of the preferred class of surviving family members had their right to share in the estate's recovery of non-pecuniary damages abolished. Those who a deceased had chosen to receive his or her estate no longer received non-pecuniary damages on behalf of the estate due to the amendments to the *Survival of Actions Act*, while under the *Fatal Accidents Act* and at common law they could not claim non-pecuniary damages on their own behalf.

The 1978 amendments were not well received. The amount of damages was seen as too low for the amount of harm inflicted, especially in the case of the wrongful death of minor children. They were far lower than the amounts the courts had been awarding estates for loss of expectation of life. In 1992, ALRI invited public input by publishing *Report for Discussion No. 12: Non-Pecuniary Damages in Wrongful Death Actions*. Following consultation it released *Final Report No. 66: Non-Pecuniary Damages in Wrongful Death Actions*. Its recommendations for amendments included expanding non-pecuniary damages to cover not only grief, but also loss of the guidance, care and companionship of the deceased; raising non-pecuniary damage awards for spouses or cohabitants and for parents of minor children and children 18 to 26 who were not married or cohabiting at the time of death to $40,000; and awarding minor children and children 18 to 26 who were not married or cohabiting at the time of death non-pecuniary damages in the sum of $25,000. In 1994, the Alberta legislature adopted all of these recommendations.

In 1997, the Alberta Court of Appeal interpreted the survival of actions legislation to allow compensation to the estate of a victim of wrongful death for the deceased's future loss of income: *Duncan Estate v Baddeley* (1997) 196 AR 161. In response, ALRI recommended the legislature abolish the estate's claim for the deceased's future loss of income and in 2002 the Legislature did so. Once again, surviving family members were denied any meaningful amount of compensation.

Next followed a series of challenges to the constitutionality of section 8 and the distinctions it drew. *Lemke v Juckes Estate* 2000 ABQB 776, was a successful section 15 challenge to the age limitation in the *Fatal Accidents Act* that prevented parents from suing for the wrongful death of a child 26 years of age and older. In response the Alberta legislature abolished all age limitations in the *Fatal Accidents Act* and increased the amounts of non-pecuniary damages payable. The only express limitations left were marital status and status as a stepchild, and the marital status limitation was struck down in *Ferraiuolo* as violating section 15 of the *Charter*. As a result of the successful challenge in *Ferraiuolo*, section 8 of the *Fatal Accidents Act* was amended to the form that was in force when Ken Smith died.

This brief recounting of Alberta's *Fatal Accidents Act* reveals a long and difficult struggle by those victimized by wrongful death to receive compensation for non-pecuniary damages inflicted on them by wrongdoers. The fight to obtain recognition and recompense for the grief suffered by close family members has been especially difficult.

The Statutory Interpretation Issue

The first issue Justice Hunt McDonald addressed was whether the references to "child" in section 8(2) (c) included a stepchild or a child to whom the deceased stood in *loco parentis*. The problem confronting Jeffrey and Angela is easy to see. Section 1 says that "child" includes six categories of persons: "son, daughter, grandson, granddaughter, stepson and stepdaughter" in all sections of the Act except section 8. Section 8 has a different definition of "child" for the purposes of bereavement damages, one that is expressly limited to a "son or a daughter."

Justice Berger had decided the same issue in *O'Hara v Belanger* (1989), [1990] 69 Alta L R (2d) 158, holding that stepchildren were not eligible to receive the then $3,000 in bereavement damages under section 8. In section 1, the legislature gave the word "child" a broad meaning, clearly implying that they intended the word "child" to have a narrower meaning in section 8 than in the rest of the act. His conclusion was bolstered by the statutory interpretation maxim *expressio unius est exclusion alterius* ("the express mention of one thing excludes all others") and by section 13 of the *Interpretation Act*, RSA 1980, c I-7, s 13 ("Definitions . . . are applicable to the whole enactment . . . except to the extent that a contrary intention appears in the enactment"). Justice Hunt McDonald found this reasoning persuasive (at para 72). The definition of "child" in section 8 of the *Fatal Accidents Act* therefore did not include stepchildren.

The Section 15 Issue

The key issue in *Dares v Newman* was whether section 8 of the *Fatal Accidents Act* contravenes the equality rights guaranteed under section 15(1) of the *Charter* by denying to stepchildren and/or to children to whom the deceased stood in the place of a parent, because of their status, the damages for grief and loss of guidance, care and companionship granted to biological and adopted children? Unfortunately, Justice Hunt McDonald's analysis of this issue is somewhat cryptic.

Justice Hunt McDonald first set out the law, based on *R. v Kapp*, 2008 SCC 41, which established a new approach to the analysis of section 15 claims, and *Withler v Canada*, 2011 SCC 12, the Supreme Court's most recent section 15(1) decision. She noted (at para 90) the Supreme Court's commitment to substantive equality and the two-part test from *Law Society of B.C. v Andrews*, [1989] 1 SCR 143, restated in *Kapp* (at para 17):

> 1. Does the law create a distinction based on an enumerated or analogous ground?
> 2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Because Jeffrey and Angela challenged a distinction based on other than an enumerated ground, Justice Hunt McDonald focused on the first part of this test. The enumerated grounds of discrimination listed in section 15(1) are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. For the test for analogous grounds, she relied (at para 96) on *Withler* at paragraph 33, which held that "[a]n analogous ground is one based on 'a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity': *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13." Based on this test, the Supreme Court has recognized sexual orientation, marital status, and citizenship as analogous grounds of discrimination. Justice Hunt McDonald then quoted (at para 96) from the judgment of Bastarache and McLachlin JJ. in *Corbiere* at paragraph 13, where they expand on the "immutability" test:

> [T]he thrust of identification of analogous grounds . . . is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular

> minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

Justice Hunt McDonald then summarized at length the arguments of the claimants, on the one hand, and the respondent and the intervenor, on the other hand (at paras 98-146), focusing on whether the distinction in section 8 of the *Fatal Accidents Act* is based on an analogous ground and on whether the distinction creates a disadvantage. Unfortunately, both sides based a great deal of their argument on *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, even though the focus of that case on human dignity and its formalistically applied comparator analysis and contextual factors was criticized in *Kapp* and a new approach to section 15 was formulated. As Justice Hunt McDonald correctly noted (in para 91), the Supreme Court has not used the *Law* test (nor its focus on human dignity) in jurisprudence subsequent to *Kapp*.

Justice Hunt McDonald's very brief analysis follows these summaries (at paras 147-162) and reads like a response to the arguments she summarized, rather than a complete analysis of the section 15 issues. Thus it is difficult to be sure what Justice Hunt McDonald actually decided on crucial points such as whether or not she recognized the claimants' status as an analogous ground and what exactly that ground was: status as stepchildren or as children for whom someone stood in the place of a parent or non-biological/non-adopted children.

On the analogous ground issue, the claimants based their arguments on "status of the child as a stepchild" (at para 99); they argued that the law distinguished between "natural children and stepchildren" (at paras 107, 117). The respondent and intervenor focused on stepchildren as the relevant status, even stating (at para 129) that "if the stepchild relationship, which is a more formal, more easily determined relationship in many respects, is not an analogous ground, then it is difficult to imagine how the *loco parentis* relationship could be an analogous ground."

The respondent and intervenor relied heavily on *McCrea v Bain Estate*, 2004 BCSC 208, an unsuccessful section 15 challenge to the *Wills Variation Act*, RSBC 1996, c 490. In *McCrea*, the Court found that stepchildren were not subject to historical social stigma and that there was no recent history of animus against stepchildren, so that stepchildren, as a group, are not disadvantaged. Historic disadvantage was therefore a major factor in what the respondent and intervenor saw as the test for analogous grounds. The respondent and intervenor did address immutability as well, arguing that a step-parent can choose to change the status of a stepchild through adoption and that it was appropriate for the choice to be the step-parent's. Thus, although the respondent and intervenor conceded (at para 124) "it may not be within the stepchild's power to unilaterally change his or her status," it was Ken Smith's failure to adopt Jeffrey and Angela that was the focus of their argument on immutability (at paras 124-29). The claimants argued (at para 103) that *McCrea* was wrongly decided.

Justice Hunt McDonald appears to have accepted that the claimants succeeded on the first part of the *Kapp* test and established that the *Fatal Accidents Act* creates a distinction based on an enumerated or analogous ground. She agreed with the claimants' argument that the status of being a stepchild is immutable from the child's perspective (at para 147). The court's focus at this stage seems to have been solely on immutability (assuming that when she moved to consider historical disadvantage as one of "the other indicia of constitutionality under s. 15(1)" at paragraph 153, that Justice Hunt McDonald was moving on to the second part of the *Kapp* test).

She did not explicitly state whether she found status as a stepchild to be an analogous ground (at paras 148-152).

On the disadvantage issue in the second part of the *Kapp* test, the claimants argued (at paras 109-117) that the *Fatal Accidents Act* withheld a benefit and that excluding stepchildren from bereavement damages perpetuated the stereotype that stepchildren are not as desirable as biological children or do not feel grief to the same extent as biological children. The respondent and intervenor, relying on the *Law* test, argued (at paras 131-145) that stepchildren are not an historically disadvantaged group; that the Act reasonably focused on the closest blood or legal relationships; that stepchildren are not excluded from all bereavement damages because they could receive them on the wrongful death of their biological parent even if they had no relationship with that parent; that bereavement damages are ameliorative because they are not available at common law; and that the distinction was based on the needs and circumstances of the majority of families even if it did not correspond perfectly to those needs, rather than being based on prejudice or stereotyping. The respondent and intervenor also made what they characterized as a "policy" argument that not all stepchildren are in relationships of care, guidance and companionship with their step-parents, potentially resulting in "windfall" awards if they were included in section 8. Alternatively, if they were included but subject to a *loco parentis* test of some kind, this would undermine the efficiency of the legislation (at para 145).

Justice Hunt McDonald held (at para 148) that the claimants had not provided enough evidence to prove that stepchildren or children in *loco parentis* relationships suffered "social disadvantage and prejudice," and (at para 154) that they had failed to provide evidence of a history of discrimination against stepchildren, relying heavily on *McCrea*. She suggested (at para 157) that the challenged law cannot itself create the disadvantage necessary to prove a breach of section 15; the discrimination must be "sourced from outside of the impugned legislation itself." While she expressed sympathy for the claimants (at para 158), this was not enough to establish a section 15 violation.

Commentary

We have several comments on Justice Hunt McDonald's judgment, relating to the evidentiary basis for her decision, her section 15 analysis, and section 1 considerations.

Dealing first with the evidence, Justice Hunt McDonald specifically mentioned (at para 160) that she reviewed legislation from other Canadian provinces. She summarized that legislation by saying that "some" provinces have made the "policy choice" to give some benefit to people on the basis of stepchild or *loco parentis* relationships, thereby sacrificing certainty and ease of the recovery of damages. This misstates the situation elsewhere. That legislation is summarized in the Government of Alberta's Discussion Paper: Review of Damage Amounts under Section 8 of the Fatal Accidents Act (May 2012). In all other common law jurisdictions which authorize awards of bereavement damages, stepchildren and/or persons to whom the deceased stood in the place of a parent are eligible to receive those non-pecuniary damages. British Columbia and the three territories do not permit bereavement damages for anyone (see e.g. *Family Compensation Act*, RSBC 1996, c. 126). But the seven other provinces and the federal jurisdiction do include those who have the type of relationship to the deceased that Jeffery and Angela had to Ken Smith among those who can receive damages for grief and/or loss of guidance, care and companionship. It does not matter whether the amount of damages is set by statute (as it is in Saskatchewan and Manitoba) or awarded by a court on proof of loss (as in Ontario, New Brunswick, Prince Edward Island and Newfoundland and Labrador). In Manitoba, stepchildren

are included in the category of "family member" (along with adult biological children, siblings, grandchildren and grandparents) rather than the category of "child," but they do automatically receive a set amount for bereavement damages: see section 3(1)(b) of *The Fatal Accidents Act,* CCSM c F50.

This inclusiveness elsewhere is not apparent in the government's discussion paper, which appears to misstate the group of persons eligible for bereavement damages in Ontario and PEI. In Ontario, under section 1(1) of the *Family Law Act,* RSO 1990, "child" includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family and those children are entitled to recover damages to compensate for the loss of guidance, care and companionship under section 61(2)(e). In Prince Edward Island, under the *Fatal Accidents Act,* RSPEI 1988, c F-5, section 1(a)(iii), "child" includes a person to whom the deceased stood in the place of a parent and "dependants", who are awarded damages for the loss of guidance, care and companionship under section 6(3)(c), includes "child." Thus, among the provinces which do award bereavement damages, Alberta is the only province which excludes stepchildren for whom the deceased person stood in the place of a parent.

A full review of legislation elsewhere would have responded to the "policy" concerns noted by the respondent and intervenor. Like the ALRI, Justice Hunt McDonald seems to have been very concerned about conceptual clarity in the class of family members who receive bereavement damages, preferring it over justice in individual cases. The Attorney General revealed its preference for formalism and water-tight categories over human relationships when it argued against the recognition of the *loco parentis* relationships on the basis that those relationships were less formal and less easily determined than the stepchild relationship (at para 129). They all tie conceptual clarity to Alberta's approach of an automatic award to anyone in the categories, without proof of damages. But Saskatchewan and Manitoba also give amounts set by statute rather than the courts, and they include stepchildren in their fatal accidents legislation.

As shown by the approach in Ontario and PEI, there are several ways to include stepchildren. But Justice Hunt McDonald noted (at para 139, in the middle of summarizing the government's argument) that expanding the preferred class to include stepchildren might result in them receiving more benefits because they have biological parents too. She appeared to believe that the only remedy would be to include stepchildren in the class, rather than adopting some sort of *loco parentis* test that would include Jeffrey and Angela but exclude Ken Smith's adopted children who had not had contact with him for 20 years.

Are these policy arguments even proper section 15(1) considerations? To the extent that the second *Law* factor – correspondence with actual needs and circumstances – relates to the harm of stereotyping (*Kapp* at para 23), these policy considerations are still relevant to how discrimination is defined in *Kapp* and subsequent cases. If stepchildren were to receive compensation for non-pecuniary harms associated with the loss of a parent with whom they did not actually have a relationship, this would overshoot their actual needs. The corollary, though, is that stepchildren who did have a parental relationship with the deceased and were excluded from benefits by section 8 would be the victims of stereotypical categorization, as the law does not respond to their actual needs. Although the fact that legislation in other provinces might provide such benefits does not in and of itself prove discrimination for Alberta stepchildren, the existence of that legislation shows that there are alternatives that avoid the stereotypical categorization in section 8 of the *Fatal Accidents Act.*

On the other hand, there is altogether too much about "policy reasons" in the section 15 analysis, when policy concerns properly belong in a section 1 analysis. In addition to the policy matters noted above, Justice Hunt McDonald stated (at para 158) that "[a] finding of substantive discrimination against stepchildren will have sweeping and far-reaching consequences." A focus on these sorts of policy considerations rests on the government's purpose, which is a section 1 rather than section 15 matter. This critique dates back to the *Law test*, which was acknowledged in *Kapp* (2008 SCC at paras 21-22), but it remains embedded in section 15 through the correspondence factor, now part of the analysis of whether there is stereotyping. This case is a good example of how and why the failure to keep section 1 considerations out of section 15(1) persists despite *Kapp*'s new approach.

Another concern with the section 15(1) analysis in this case is Justice Hunt McDonald's suggestion (at para 157) that the challenged law cannot create the disadvantage; the discrimination must be "sourced from outside of the impugned legislation itself." The question of whether the challenged law must "perpetuate disadvantage" in addition to creating disadvantage is one left open by *Kapp*. This type of approach would require proof of historic disadvantage of the claimant group, raising again an issue discussed in *R. v Turpin*, [1989] 1 SCR 1296, and *R v Hess; R v Nguyen*, [1990] 2 SCR 906, and a disagreement between Justice Wilson and Justice McLachlin that has to date not been resolved. There is no acknowledgement of this debate in *Dares v Newman*. The idea that a law cannot discriminate on the basis of a new ground — such as carrying genes that predispose as yet unrecognized groups of people to characteristics thought undesirable by those with the ability to impose their definitions attributes an unwarranted infallibility to our legal and political systems.

On the issue of historic disadvantage suffered by stepchildren — leaving aside whether historic disadvantage is required — it strikes us as relatively simple to prove this through the law itself. For example, at common law the mere establishment of a "step" relationship imposed no legal obligation on a husband to support the children of his wife by another man. That exemption probably reflects old ideas about the sanctity of blood ties and the indissolubility of marriage: Bernard J. Berkowitz, "Legal Incidents of Today's "Step" Relationship: Cinderella Revisited" (1970) 4 Family Law Quarterly 209 at 210. Part of the argument against including stepchildren in support legislation is that it would discourage marriage to women who have children (Berkowitz at 228) although that dreadful argument is not even relevant in this case. It is, however, in accord with the Attorney General's emphasis on the step-parent's right to choose whether to adopt (at paras 124-28). Neither the AG nor the court took into account that step-parent adoption is not always a matter of choice. They did not factor in the statutory law that states that a biological parent must consent, but often will not because adoption severs all ties. Nor did they consider that encouraging ties with more than one father or mother might be in the child's best interests in some cases. Also, given that cohabitants as well as spouses have been able to recover under the statute for years now, the insistence on the formality of adoption for children but not their parents, in this day and age, seems odd.

The court and government positions in this case prioritized both genetic ties and intentionality. Susan B. Boyd, in "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) Windsor Yearbook of Access to Justice 1, reviewed recent Canadian cases dealing with legal parenthood, and found that they variously emphasize bio-genetic ties and intention. She notes (at 1) that legal systems have barely begun to rethink their norms and presumptions to take account of the reality that sexuality and procreation have increasingly become uncoupled both technologically and socially, and baby-making of all sorts, including the hi-tech and clinical kind, has increasingly occurred outside heterosexual marriage. In the case of

same sex partners who plan a pregnancy but cannot both be biological parents, the concepts of "stepparent" and "stepchild" seem altogether inappropriate. (For a comment on a case discussing some of the legal complexities around parentage in such cases, see Melissa Luhtanen's ABlawg post, Non-biological father from separated same-sex couple declared a legal parent). The dichotomy relied on by the parties and court — between "natural children and stepchildren" (at paras. 107, 117) — strongly suggests a stereotype of stepchildren as "not natural" and is out of step with the decoupling that Boyd writes about.

These types considerations show that not only were stepchildren historically disadvantaged but they continue to be disadvantaged today in that their legal rights are tied to the decisions of others, which are often legally constrained as well. A stepchild often has a strong interest in his or her stepparent's health and life, often depending on that stepparent for physical well-being, social and intellectual development, and a place within the family, including inheritance and other legal incidents. To the extent that laws such as section 8 of the *Fatal Accidents Act* fail to recognize this, they should be seen as discriminatory.

Another concern with Justice Hunt McDonald's decision relates to her failure to explicitly find status as a stepchild to be an analogous ground. Once a ground is found to be analogous, it will be so in future cases as well (*Corbiere* at para 10), so her lack of clarity on this point is unfortunate.

Dares v Newman also raises issues concerning the role of section 15(2), which protects ameliorative laws and programs from claims of discrimination. Section 8 of the *Fatal Accidents Act* has been characterized elsewhere as ameliorative legislation designed to benefit those most dependent upon and vulnerable to a family member's wrongful death. In *Dares*, the government argued that section 8 was ameliorative, but in the context of amelioration being one of the four contextual factors in *Law*. Since *Kapp*, section 15(2) is supposed to have independent force in the section 15 analysis, rather than simply being a factor relevant to whether there was discrimination. In *Dares*, however, the government does not appear to have argued section 15(2). To do so, it would have needed to show that the benefits in the Act were targeted at ameliorating the circumstances of a disadvantaged group (biological and adopted children who have lost a parent through the wrongful acts of another) and that the exclusion of stepchildren did not fail to serve or advance the goals of the Act (see *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 at para 45). It may have been difficult for the government to meet this test in the circumstances of the case, although the court's finding that stepchildren are not themselves a disadvantaged group may have operated in the government's favour.

The exclusion of stepchildren from the receipt of benefits under the *Fatal Accidents Act* raises questions about the extent to which the government is entitled to deny benefits to certain claimants, not for the purpose of limiting entitlement to publicly-funded social programs, but rather for the purpose of restricting legal action against private parties for tortious conduct causing death. In *Dares v Newman*, the government argued the case as though the money was coming out of its purse. Even ALRI has been more concerned about the possible rise in insurance premiums every time the class of recipients is expanded than they have been about making tortfeasers – such as impaired drivers – pay. Are these appropriate considerations for denying private benefits to potentially deserving claimants? Even if they are, these considerations belong under section 1 of the *Charter* as matters of justification, rather than under section 15.

This case did not get to section 1, but in *Ferraiuolo*, the government advanced two main reasons for the limitations on the members of the preferred class of surviving family members who can recover non-pecuniary damages on wrongful death. ALRI had recommended the age and marital status limitations to "obtain certainty in the class and avoid litigating on the basis of a dependency test": Report No. 66 at 5. ALRI had also voiced concern about what it called an "unacceptable" increase in insurance premiums: Report No. 12 at 124-131, and see also Report No. 66 at 130. These rationales were rejected as pressing and substantial objectives for violating *Charter* equality rights in *Ferraiuolo* (at paras 142-144 and 151-155). They should also have been rejected as considerations in *Dares v Newman*, especially, in the case of certainty, in the section 15(1) analysis.