

CASE SUMMARY OF QUOC LUONG TO ET AL V. THE TORONTO BOARD OF EDUCATION ET AL.

**Jennifer Trépanier
(formerly Jennifer Tremblay)
Shibley Righton LLP**

In the decision of *To et al. v. The Toronto Board of Education et al.* (2001) 204 D.L.R. (4th) 704, released Ontario Court of Appeal raised the limit for damages for the loss of guidance, care and companionship under the *Family Law Act*, R.S.O. 1990, c. F.3, s. 61 (the “FLA”).

The Court considered the quantum of damages awarded under the FLA to the family of a fourteen-year old boy killed by the steel frame of a European handball net which fell on him while he was doing pull-ups in a school gymnasium.

TRIAL DECISION

At trial, the Toronto Board of Education (the “Board”) was found 75% liable for the death and the deceased was found 25% liable. In respect of the family’s FLA claims for loss of guidance, care and companionship, the jury awarded \$100,000.00 each to Mr. and Mrs. To, and \$50,000.00 to the deceased’s sister. The trial judge awarded party-and-party costs against the Board to the date of trial, and solicitor-and-client costs thereafter. The Board appealed the amount of the FLA damages and the cost award.

COURT OF APPEAL DECISION

Standard of Review

The Court of Appeal stressed the reluctance by courts to interfere with an assessment of damages and stated that it would not intervene unless the damages assessment was so inordinately high (or low) as to constitute a “wholly erroneous estimate of the guidance, care and companionship loss.” The Court explained that the reasonableness of the assessment is done by comparing the assessment with damages awarded in other cases to determine if the damage assessment is within an acceptable range. The Court cautioned, however, that counsel should not refer to other cases when making submissions to the jury regarding damages, since this will deflect the jury from its analysis.

Damages

The Court cited definitions of the terms ‘companionship’, ‘care’ and ‘guidance’ as set out in prior case law, stating in particular that: (1) ***companionship*** has been defined as: “deprivation of the society, comfort and protection which might reasonably be expected if the child had lived”, as well as, “the loss of the rewards of association which flow from the family relationship.”; (2) ***care*** has been defined as “feeding, clothing, cleaning, transporting, helping and protection

another person”; and, (3) **guidance** has been defined as “including such things as education, training, discipline and moral teaching.”

Damages to Parents

The Court of Appeal compared the damages assessed in various similar cases and found that the \$100,000.00 awarded to each of Mr. and Mrs. To were not outside of the accepted range of damages. The Court acknowledged that they were at the high end of the range, but that there was evidence to justify such an award. In this respect the court made particular reference to the family’s Vietnamese culture, noting the following points: the importance of the first-born son; the expectations of successful employment after graduation; the expectation of the deceased being obedient, providing social and financial support to his parents and providing “direct assistance” to his sister. The Court of Appeal further stressed that the deceased was “in many ways his father’s contact with the English-speaking world” and concluded that by his death, the family suffered a “substantial loss of society, comfort and protection, all benefits that flow from the family relationship.”

When comparing the damages awarded in the *To* decision to those awarded in prior decisions, the Court of Appeal made reference to the following decisions: *Hamilton v. Canadian National Railway Co.* (1991), 80 D.L.R.(4th) 470 (Ont. C.A.) where damages to a deceased’s parent were reduced from \$150,000.00 to \$50,000.00; and *Macartney v. Warner* (2000), 46 O.R. 669 (Ont. C.A.) wherein damages of \$25,000.00 were awarded to a deceased’s mother and \$15,000.00 to the father; and *Mason v. Peters* (1982), 39 O.R.(2d) 27 (Ont. C.A.) where damages of \$45,000.00 were awarded to a parent.

The Court of Appeal noted that the decision in *Mason v. Peters* to award \$45,000.00 based on a death which occurred in 1978 is roughly comparable to the \$100,000.00 award in this case when comparing the constant dollar value. The Court of Appeal further cited the finding of Justice Robins’s that the assessment in *Mason* was “modest” and one that could “in no sense be considered excessive.”

The *To* decision also references a damage award in *Reidy v. McLeod* (1986), 54 O.R. (2d) 661 (C.A.) wherein various damages were awarded to two families of deceased teenagers. The highest award to a parent in that decision was \$30,000.00 (reduced from \$65,000.00); the highest award to a sibling was \$10,000.00 (reduced from \$15,000.00.)

Damages to Sister

In respect of the sister’s award, the Court of Appeal found that although the deceased’s sister had a very close relationship with the deceased, the assessment of \$50,000.00 exceeded the acceptable range of damages, and reduced the damages to \$25,000.00. The Court noted that the range of assessments in comparable cases were very broad but were “consistently lower than \$50,000.00.”

The Court relied in particular on *Rintoul v. Linde Estate* (1997), 32 O.R. (3d) 704 (Gen. Div.) which was considered to be the closest fact situation to the *To* case. The judge there had held

that the facts of the case were “unique” and that the deceased was relied upon by his sister for guidance. The sister was awarded \$20,000.00 in damages.

Costs

The cost award was based upon: (1) the plaintiff’s settlement offers (which were not made under Rule 49.10); (2) the efficiency of the presentation of the plaintiff’s case (mostly referring to the plaintiff’s use of Power Point); and, (3) the Board’s failure to meaningfully respond to the plaintiff’s request to admit.

The Court of Appeal found that this situation was not one of the reasonably narrow circumstances where offers which do not comply with Rule 49.10 can be used to justify costs on a solicitor-and-client basis. Nor was the plaintiff’s ability to use modern technology (i.e., Power Point) a basis upon which to grant solicitor-and-client costs. The Court directed an assessment officer to determine if the trial was prolonged due to the Board’s failure to respond in a meaningful way to the plaintiff’s request to admit.

The Court varied the cost order by awarding party-to-party costs throughout the proceedings, subject to the assessment officer’s findings. If the assessment officer determines that the trial was prolonged by the Board, the plaintiffs will be entitled to solicitor-and-client costs for additional time spent at trial.

Conclusion

The *To* decision, by raising the bar for damage claims under the FLA, potentially increases the liability of school boards in situations of accidental death in a school setting, which would have a corresponding effect on insurance coverage to these boards. It remains to be seen whether the increased level of damages will be upheld further by the courts.

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