Marier v. Air Canada: the Common Law Perspective

This note considers the validity of Dame Marier's claim at common law. In this perspective the case raises two interesting questions: who is entitled to claim in an action for damages for loss caused by the death of a human being, and what losses are compensable if a cause of action exists? The judgments of the Superior Court of Quebec and the Court of Appeal focused on the first question, but it is the second that poses problems to the common lawyer.

The position of the common law in cases of wrongful death has never been very satisfactory. The original position at common law was that there could be no cause of action for the wrongful death of a human being. It might be argued that this view is more a statement of the practical result of other rules than a legal rule itself. This practical result was caused by the fact that the wrongful death would be a felony, and conviction of felony entailed forfeiture of goods to the Crown, leaving nothing for the person injured by the death of the deceased. The Crown's claim to the goods of the wrongdoer was ensured priority by the rule that in those cases where the tort was also a felony, no civil action could be maintained until the wrongdoer had been prosecuted. The case that is regarded as the foundation of the common law rule is *Baker* v. *Bolton*,[1] a decision of Lord Ellenborough at *nisi prius*. (It is curious that two of Lord Ellenborough's decisions, *Baker* v. *Bolton* and *Stilk* v. *Myrick*,[2] both very poorly reasoned cases, have been accepted as the "leading case" in their respective areas of the law. A study of what makes a case a "leading case" in the common law system is an interesting enquiry in its own right.) The decision in *Baker* v. *Bolton* was accepted by the Court of Exchequer in *Osborne* v. *Gillett*[3] and by the House of Lords in *The Amerika*.[4]

The common law rule was changed by statute in 1846 by *Lord Campbell's Act*.[5] The Act permitted an action by certain designated relatives of the deceased, and originally permitted an action by the wife, husband, and children of the person killed. *Lord Campbell's*

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[1] (1808) Camp. 493; 170 E.R. 1033 (N.P.).
[2] (1809) 2 Camp. 317; 170 E.R. 1168: 6 Esp. 129; 170 E.R. 851 (N.P.).
[3] (1873) L.R. 8 Ex. 88.
[4] [1917] A.C. 38 (H.L.).
[5] 9-10 Vict., c. 93.

Act became in Ontario *The Fatal Accidents Act*,[6] which permitted a claim to be brought "for the benefit of the wife, husband, parent and child" of the person killed. The Act defined both "parent" and "child" broadly but did not include illegitimate children[7] and did not broaden the meaning of the word "wife" or "husband". This would mean that only those who were lawfully married to the deceased could sue.[8] The scope of those given a cause of action by the legislation was broadened by *The Family Law Reform Act, 1978*, which provides that:

> Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part II, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.[9]

For our purposes, the word "spouse" is the crucial factor. That word is defined in Part II, section 14(b):

> "spouse" means a spouse as defined in section 1, and in addition includes,
> (i) either of a man and woman not being married to each other who have cohabited,
> 1. continuously for a period of not less than five years, or
> 2. in a relationship of some permanence where there is a child born of whom they are the natural parents,
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> and have so cohabited within the preceding year, and

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[6] R.S.O. 1970, c. 164.

[7] The broadening of the category of legitimate children in *The Legitimacy Act*, R.S.O. 1970, c. 242 (now repealed by *The Children's Law Reform Act*, S.O. 1977, c. 41) would have removed some of these problems.

[8] This follows from the general position of the common law on marriage. Only those who are validly married can claim any of the rights that flow from the status of husband or wife. This has, of course, been significantly broadened by legislation. As an example of the harsh application of the basic common law position, see *Ex p. Côté* (1971) 22 D.L.R. (3d) 353 (Sask. C.A.). The common law has never had the idea of putative marriage except to the extent that an order for maintenance could be made in an action for nullity when the marriage was annulled (*The Matrimonial Causes Act*, R.S.O. 1970, c. 265, ss. 1 & 2). This legislation has survived the legislative changes of 1978 (*The Family Law Reform Act, 1978*, S.O. 1978, c. 2). That legislation permits a person who is not married to claim support in certain cases and considerably broadens the former basis for support. I have found no case in Canada or England where a person not lawfully married has ever claimed under *Lord Campbell's Act* or *The Fatal Accidents Act*.

[9] S.O. 1978, c. 2, s. 60(1). The legislation of the other common law provinces of Canada is similar, but for the sake of simplicity, I shall confine my discussion to the law of Ontario.

(ii) either of a man and woman between whom an order for support has been made under this Part or an order for alimony or maintenance has been made before this Part comes into force.

"Spouse" is also defined in section 1:

(f) "spouse" means either of a man and woman, who

(i) are married to each other,

(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity, or

(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year.

On the facts of the case, *Marier* v. *Air Canada,* the plaintiff would have a cause of action under section 60 by virtue of section 14(b)(ii).

The first question raised by the facts of *Marier* v. *Air Canada* is thus easily answered at common law, at least on the basis of the legislation in force in Ontario. What can one say about the principles that might underlie the case? There are two issues that have to be considered. The first is the issue of the purpose of the law of torts and the second has to do with the application of any torts principle in the special facts of *Marier* v. *Air Canada.*

Tort law concerns the "allocation of loss incident to man's activities in modern society."[10] The principal problem in the law of torts is the development of a justification (or a set of justifications) for shifting the loss from the person on whom it has fallen onto someone else. This problem is caused by the existence of conflicting pressures. The first is the notion that one who is caused harm or loss by the act of another should be compensated for the loss. The second is the belief that only certain kinds of action should attract liability, and it is this which leads to the requirement that the act involve fault in some form. Fleming suggests that the view expressed in the second concern was the dominant view of the law of torts.[11] He points out that there is no social value in shifting loss if the only effect is to impoverish one person rather than another. An emphasis on fault can justify the shift of a loss on the ground that a person should be responsible for actions accompanied by some sense of blameworthiness. The more generally accepted modern view is to regard certain losses (*i.e.,* losses caused by accident as opposed to the intentional infliction of harm) as necessarily incident to modern living, and that such losses should be borne by those who benefit from that activity.[12] This point of

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[10] Fleming, *The Law of Torts,* 5th ed. (1977), 7-10.

[11] *Ibid.*

[12] *Ibid.,* 9-10.

view easily justifies the imposition of liability on Air Canada for the death of Dr Desmarais. Air Canada and those who fly benefit from the provision of passenger services and should therefore bear the costs of the losses that, statistically, are certain to be incurred by those passengers who die in crashes.[13] Thus we could justify the imposition of liability had Dr Desmarais been injured rather than killed. It is easy to show that the losses for which he could receive compensation would include the effect of his injuries on his economic situation.[14]

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[13] I shall ignore the problem caused by the fact that, unlike some situations of tort liability, the relationship of Dr Desmarais and Air Canada was based on a contract. It is possible, in theory at least, for the parties to a contract to allocate the risk of loss that may be caused by breach. Thus the contract, ignoring for the moment the effect of *The Carriage By Air Act*, S.R.C. 1970, c. C-14, could provide that the passenger agrees to release the carrier from liability for injury or death in consideration of, for example, a reduction in the fare charged. This raises the very difficult case of the extent to which the values represented by the law of contracts should supersede the values of the law of torts. This issue was the focus for an interesting comparison between the civil and common law approaches to civil liability. Examining the problem from the civil law position, Mr Nicolas Palmieri-Egger said, in an unpublished paper, *Developments in Civil Liability: from Contract and Delict to Imposed and Assumed Duties*, presented to the Canadian Association of Law Teachers, 3 June 1980:

> The better theory is that the victim shall always obtain compensation. Society as a whole has, indeed, superior ability to absorb the cost of compensation. The loss should not rest on the victim simply because of technicalities and sophisticated characterizations of the "regimes" of liability. The loss ought to be passed on by appropriate price calculation to a wider section of the public. This development will certainly result, eventually, in a decreasing need for a sharp distinction between the two regimes of liability. But it can only develop correctly if the fundamental concept is affirmed, that the innocent victim must have all his damages, notwithstanding exemption clauses and theories of distinction between contract and delicts.

The same position was taken from the common law perspective by Professor B.J. Reiter in a paper delivered at the same meeting: *The Interrelationship between Contract and Tort in Canadian Common Law* (unpublished). It is justifiable, therefore, to regard the case as one where, were it not for *The Carriage by Air Act*, any purported allocation of risks through contract would be ineffective and the right of the passenger to recover would be governed entirely by tort duties. If there are problems justifying the enforceability of contractual allocations of the risk of loss, there are as many in justifying the effect of the Warsaw Convention under *The Carriage by Air Act*.

[14] This follows generally from the fact that the purpose of damages in the law of torts is to put the person injured in the position, so far as money can do so, that he would have been in had the injury never occurred. This is the reliance measure of recovery. See Fuller & Perdue, *The Reliance Interest in Contract Damages* (1936) 46 Yale L.J. 52 & 373.

If we can justify Dr Desmarais's recovery for his lost earnings we are treating his ability to earn money as an economic asset that has been harmed by the defendant's act. The economic effect is the same if the act of the defendant had damaged a truck or building owned by the plaintiff and from which he generated his income. The justification for the kind of liability found in *The Fatal Accidents Act* can be seen as an extension of the view that part of the loss suffered by the deceased is harm to an economic asset.[15] Thus those who might by virtue of their relationship to the deceased reasonably have expected[16] to share in the economic asset that belonged to the deceased, are entitled to claim for the loss suffered by the fact that the economic benefits arising from the relationship are cut off. If the deceased had lived long enough to recover a full indemnity[17] from the tortfeasor, it should follow that the right of any dependent to further relief should be excluded. The recovery of an indemnity from the tortfeasor has had (or is deemed to have had) the effect of providing the equivalent of the economic asset lost by the injury. Where the deceased has not recovered a full indemnity, those who might benefit if the deceased had not been killed are entitled to recover what they have lost. In theory, the recovery under each of these heads should be the same if we assume that the deceased's estate can also claim in

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[15] An interesting analogy is the claim of the master for the loss he has suffered by the injury to his servant; the *per quod* action. The modern analogy is to the right of a corporation to recover for the loss it has suffered by injury to its shareholders and employees. See Hansen and Mullan, "Private Corporations in Canada, Principles of Recovery for the Tortious Disablement of Shareholder/Employees" in Klar, *Studies in Canadian Tort Law* (1977), 215.

[16] The legal analysis of the consequences of both marriage and parenthood is (or certainly, was) very simple. A woman who was married to a man was assumed to be dependent. A woman who was not married was assumed not to be dependent. At least there was no analysis of the fact of dependence. Modern legislation has tended to expand the notion of dependence by giving those who are not married reciprocal rights of support. It seems to be unnecessary to focus any attention on the status of the parties. What is important is the fact of dependence. The use of the phrase "reasonably have expected" is then a test for determining those who have been harmed by the defendant's act, regardless of the legal relationship between the claimant and the deceased: see Deech, *The Case Against Legal Recognition of Cohabitation* (1980) 29 I.C.L.Q. 480.

[17] I am prepared to assume for the purposes of this paper that the actuarial calculations are an adequate measure of what is a full indemnity. Although this is at best a very dubious assumption, an investigation of alternative kinds of damage awards (*e.g.*, periodic payments) is beyond the scope of this paper. See Fleming, *Damages: Capital or Rent* (1969) 19 U.T.L.J. 295.

such fashion that whatever the deceased would not have spent on his dependents would have been distributed by his will or on an intestacy.

There also seems to be a moral dimension to the need for like results, whichever of the two bases for the claim against the tortfeasor is used. There is something offensive about a result that would make it cheaper to kill than to injure. And as this discussion concerns the allocation of the risk of *economic loss* caused by accident, this analysis would preserve the results that are now uniformly reached in cases where the person killed has had little or no income. The issue of compensation for emotional loss and grief will be discussed later.

This analysis suggests that the loss suffered by the plaintiff in *Marier* v. *Air Canada* should be shifted to the defendant. Dr Desmarais was an economic asset[18] to his former wife and his death deprived her of the benefit that her claim against him for maintenance gave her. To deny her claim results either in the enrichment of his estate (at her expense if the estate can maintain an action for what amounts to the replacement of the economic asset lost by his death to which she has no claim[19]), or an incomplete shift of the losses caused by the act of the defendant. Neither of these results seems satisfactory, as might be made clearer by an example. If we assume for purposes of illustration that Dr Desmarais would have earned $500,000 over the balance of his expected life, we could produce the following table:

Total Earnings		$500,000
Amount spent on himself	$200,000	
Amount spent on children & other relatives	100,000	
Amount paid to his former wife	100,000	400,000
Net increase in estate		$100,000

Of these amounts, the amount that would have been spent on himself is not recoverable. Had it been received it would have been spent and would not have gone to his relatives or to his estate. The amount that could have been spent on his children or relatives would be recoverable by them.[20] The amount that would have in-

[18] S. 14(b)(ii) of *The Family Reform Act* recognized the importance of the economic basis for recovery and, at the same time, assumes dependence and a reasonable expectation of future benefits.

[19] I am assuming here that the claim to maintenance was only for the parties' joint lives, so that the plaintiff would have no claim against Dr Desmarais's estate except for any arrears that had been allowed to build up.

[20] I am assuming that these claims come up under any applicable legislation, *The Fatal Accidents Act* or *The Family Law Reform Act.*

creased his estate should be recoverable by his estate. This latter result would permit two desirable consequences to follow. First, any claim by creditors would be protected. (It is hard to see why creditors should be prejudiced either by denying the estate any recovery or by permitting those who would succeed to the balance left in the estate to recover in priority to the creditors.) Second, the balance of the estate could then go either in accordance with the deceased's will or as on an intestacy. The advantage of this is that those entitled to take under a person's will could comprise a wider class than those entitled to claim under *The Fatal Accidents Act* or *The Family Law Reform Act.* If the amount that would have gone to his former wife is not recoverable, then either the amount of damages payable by the defendant is reduced from $300,000 to $200,000 or the claim under the estate is increased from $100,000 to $200,000. While the second of these may be preferable to the first, it remains undesirable. Why should those taking through the estate be better off because the money that would have gone to his former wife had he lived does not now have to be paid? It makes even less sense to give the defendant the benefit.

This argument suggests that on principle the former spouse of a person killed should be entitled to recover the pecuniary loss caused by death. This loss will be the present value of the maintenance payments that he or she might reasonably have expected to receive. There is no room for an argument that the defendant is unfairly treated by this. This is so for the following reasons. First, the defendant, who is, after all, engaged in an enterprise where death is probable if an accident should happen, cannot claim to be surprised by the imposition of liability to an amount dependent on the earning potential of the victim.[21] Second, the actual amount of the damages to which the defendant is liable is, to some extent, independent of the number of claimants. Thus on the figures that have been given, the proper measure of recovery for the economic loss should be $300,000 regardless of whether the claim is brought by the estate or anyone else. This amount might be slightly larger if, for example, the children were more numerous, younger, or if Dr Desmarais had been more generous so that the amount that would be spent on the children were $150,000 rather than $100,000. But, once again, the defendant must take the generosity of its

[21] Once again, I am avoiding any discussion of the justification for an award of damages based on earnings as opposed to a flat rate award for death. So long as we recognize the right of one individual to earn more than another, there seems to be no escape from the award that varies with earning potential. See Atiyah, *Accidents, Compensation and the Law,* 2d ed. (1975).

victims as it finds it, and presumably its victims, taken over all, will be of average generosity and fruitfulness.

There does not seem to be much room for an argument that any practical consideration should limit the amount recoverable by excluding any person other than those in a narrow class of "expected" beneficiaries.[22] The touchstone of recovery is the economic dependence of the plaintiff on the deceased (or economic benefit derived by the plaintiff from the deceased) and the reasonable likelihood of the continuance of the dependence on benefit. The total potential earnings of the deceased (less whatever amount he might spend on himself) set an upper limit to the amount recoverable and, as has been shown, there is no reason why the defendant should benefit from the fact that the deceased may have chosen (or, on the facts of *Marier* v. *Air Canada*, have been compelled) to pay a benefit to someone outside the class of beneficiaries approved by the modern analogue of *Lord Campbell's Act*. Nor is there any reason why the expected pattern of benefits should be disturbed by denying recovery to one beneficiary and increasing the recovery of another beyond the amount that the second person might reasonably have expected to receive.

The result that would be reached under section 60 of *The Family Law Reform Act*, is, therefore, preferable to that which is reached by the Quebec Court of Appeal.

The second major issue concerns the claims for which compensation is payable. The original act of 1846 limited recovery to the economic loss caused by the death. Thus a wife and children might obtain a fairly large award if the husband and father were killed, while parents often received damages that were little better than nominal for the death of a young child. The same thrust is carried forward into section 60. That section provides that the "pecuniary loss resulting from ... death" can be recovered. The justification for that recovery has already been discussed. Section 60 is innovative in another respect. At common law, the dependents had no cause of action if the victim were injured but not killed. This is changed by section 60.[23] The denial of recovery in case of injury could be justified, at least in part, if the person injured received the full economic equivalent of his (economic) loss. This amount would then be available for him to distribute as he sees fit. *So long as full compensation is paid for any medical expenses and other increased costs due to the accident*, there is no economic reason

[22] See *supra*, note 16.

[23] This change is achieved by adding the word "injured" into the first and eighth lines.

why the pattern of benefits to dependents should be necessarily disrupted. It is not clear therefore what losses will be compensable under section 60 in respect of the "pecuniary loss resulting from the injury...". Section 60 recognizes that those closely related to the person injured or killed may incur expenses or invest time that would not be recoverable under any of the economic arguments that have been made.[24] Section 60(2)(d) adds a significant new head of recovery. This permits recovery for non-pecuniary loss. The scope of this clause is not clear. It does not use the word "death" and appears to be confined to cases where the person injured does not die. This is an awkward limitation. It reintroduces the discrepancy between the amount recoverable in cases of injury and cases of death and in principle this distinction, on this head of damage, is hard to defend. The loss of "guidance, care and companionship" will be essentially the same if the person injured is totally incapacitated both physically and mentally or killed. The extension of recovery under section 60 provides the basis for an argument that damages for non-pecuniary loss should be awarded in cases of fatal accidents.

The whole topic of damages for non-pecuniary loss is extremely difficult and cannot be extensively analyzed here. Recent cases in Canada and the United States have focused on the proper award for pain and suffering arising from personal injury.[25] I want to

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[24] This right comes from s. 60(2) which reads:

60(2). The damages recoverable in a claim under subsection 1 may include,

(a) actual out-of-pocket expenses reasonably incurred for the benefit of the injured person;

(b) a reasonable allowance for travel expenses actually incurred in visiting the injured person during his treatment or recovery;

(c) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the injured person, a reasonable allowance for loss of income or the value of the services; and

(d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred.

The courts interpreted *Lord Campbell's Act* very strictly and disallowed, for example, claims for funeral expenses incurred by the relatives of the deceased. Such claims were recoverable where the death was caused by a breach of contract where the *plaintiff and defendant* were in a contractual relation. This is not, of course, the situation in *Marier* v. *Air Canada*. See *Jackson* v. *Watson* [1909] 2 K.B. 193 (C.A.); *Sellers* v. *Best* [1954] 1 W.L.R. 913 (Q.B.).

[25] See *Arnold* v. *Teno* [1978] 2 S.C.R. 287; *Andrews* v. *Grand and Toy Alberta Ltd* [1978] 2 S.C.R. 229 and *Thornton* v. *Board of School Trustees of School District No. 57 (Prince George)* [1978] 2 S.C.R. 267. See also Paterson, *Loss of Future Income in Actions for Damages* (1980) 26 McGill L.J. 114.

investigate only one aspect of the problem since it is particularly applicable in the case of *Marier* v. *Air Canada.* The problem is highlighted by the following comments of the Ontario Law Reform Commission in its examination of torts and family law. The Commission discussed the problem of the claim under *The Fatal Accidents Act* for pecuniary loss and said:

> When a study is undertaken, the very difficult question of non-pecuniary loss should be examined. While the Commission has great sympathy for the wife whose husband is totally comatose as a result of an injury, what dollar and cents value can be placed on the loss of his affection and companionship? If an assessment of that value were to be made by the courts, would not this turn each case into an investigation of just how satisfying the marital relationship had been? Furthermore, in situations where minor children would have claims, there would be a problem in reaching settlements without the approval of the courts. The English Law Commission, in its Published Working Paper No. 19, referred to earlier in the Chapter, did not come to any conclusion on this issue.
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> For the present, however, the Commission considers that the wisest course of action would be to place the law relating to non-fatal injuries on a similar basis to that under *The Fatal Accidents Act.*[26]

This reasoning is unsatisfactory. Any plaintiff can always choose whether or not to advance a claim for compensation under any particular head of damage. It may, for example, be inferred that the plaintiff in *Marier* v. *Air Canada* could not successfully support a claim for substantial non-pecuniary loss arising from the death of her former husband. The amount of "guidance, care and companionship" she would reasonably be expected to receive from him in the future would be very small. On the other hand, a woman (or children) who has clearly suffered a significant loss in this respect should not be denied any right to recover just because other women or children may be asked embarrassing questions. There is no reason to regard a claim for compensation under this head as unmanageably subjective just because the actual process of quantification is necessarily based on highly subjective factors.[27] The fact of the loss can easily be shown by objective evidence, or at least evidence that is no less subjective than that which establishes the existence of pain and suffering.[28]

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[26] *Report on Family Law*, Part 1, "Torts" (1969), 109, 110.

[27] See, *e.g.*, the judgment of the Supreme Court of Canada in *Andrews* v. *Grand and Toy Alberta Ltd, supra*, note 25.

[28] It is ironic that at the same time as the effect of the Warsaw Convention is to restrict the amount recoverable, its application has permitted a broadening of the heads of recovery: *Preston* v. *Hunting Air Transport Ltd* [1956] 1 Q.B. 454. The Court took the word "damage" in art. 17 as being wider than the words in *Lord Campbell's Act* (which are the same as *The Family Law Reform Act*).

The question of the range of non-pecuniary losses for which compensation can be claimed under the law of torts can only be answered by considering the values that the law of torts exists to protect. If we think that people should "suffer the slings and arrows of outrageous fortune" rather than sue the defendant under the law of torts, that is a coherent and possible position for a society to take. If, alternatively, we think that money should be made available to help assuage the hurts (or at least some of them) inflicted on unfortunate members of society, there is no reason to restrict artificially the extent of recovery. Once again, the defendant who knows that its carelessness could easily result in death to others, cannot complain that it has been unfairly surprised by being asked to compensate those who are bereaved. There seems to be no more reason to deny recovery for non-pecuniary losses arising from the death of another than there is to deny non-pecuniary loss in cases of personal injury that does not cause death to the person injured. If we allow damages for pain and suffering in the second case, we should do so in the first.

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