

**Date: 20071002**

**Docket: T-753-05**

**Citation: 2007 FC 1004**

**BETWEEN:**

**PATSY ANN WILCOX**

**Plaintiff**

**and**

**THE OWNERS AND ALL OTHERS INTERESTED  
IN THE SHIP "MISS MEGAN"  
and GARY ROSS HANLEY**

**Defendants**

**REPORT ON REFERENCE**  
**(pursuant to Rule 161 of the *Federal Courts Rules*)**

**LAFRENIÈRE P.**

[1] The following is an assessment of damages following a reference in a wrongful death action brought pursuant to the *Marine Liability Act*, 2001 c.6 (the *Act*).

[2] John Wilcox (the deceased) drowned in a tragic boating accident at sea on May 8, 2004 off the waters of Back Bay, Charlotte County, in the Province of New Brunswick. The deceased had worked two days on shore preparing the boat *Miss Megan* for the upcoming lobster fishery. On the third day, he set out with the crew on the fishing boat for the first day of fishing. As the boat left harbour that day with a full load, it began taking on water and, after about thirty minutes at sea, the

*Miss Megan* sank. The deceased, who could not swim, drowned, despite the rescue efforts of those around him. He was 63 years old at the time of his death.

[3] Patsy Ann Wilcox, the deceased's widow, commenced an action on behalf of the deceased's estate for damages against Gary Ross Hanley, the owner of the *Miss Megan*, alleging that the vessel was unseaworthy and that Mr. Hanley had negligently navigated the vessel. As executor of the estate and nominal Plaintiff, Mrs. Wilcox sought damages for loss of guidance, care and companionship on behalf of herself, the couple's three adult children, Thomas Wilcox, Tammy-Lynn Wilcox-Doiron (Tammy Wilcox), and Tina Marie Wilcox, the deceased's brother, David Leslie Wilcox, and his sister, Mary Eileen Wilcox, who are collectively referred to in these reasons as "the dependants" or "the claimants". Separate claims for loss of financial support and loss of valuable services were advanced on behalf of Mrs. Wilcox and Tina Wilcox.

[4] Mr. Hanley admitted liability for the deceased's death, but took issue with the claims for various heads of damages. Madam Justice Danièle Tremblay-Lamer granted the Plaintiff's motion for summary judgment against the Defendants based on Hanley's admission of liability. She ordered that a hearing be held before a referee in order to determine the quantum of damages that the dependants were entitled to for their loss resulting from his death.

[5] I will first deal with a preliminary issue raised by the Defendants regarding the eligibility of the deceased's siblings to seek damages, then address the pecuniary losses suffered by Mrs. Wilcox

and Tina Wilcox , and conclude with an assessment of the claimants' loss of care, guidance and companionship.

**(A) Dependants under s. 6 of the Act**

[6] The claimants maintain that they have suffered loss as a result of the deceased's death, and that they are entitled to recover damages as dependants pursuant to section 6 of the *Act*.

[7] Subsections 6(2) and (3) read as follows:

6. (2) If a person dies by the fault or neglect of another under circumstances that would have entitled the person, if not deceased, to recover damages, the dependants of the deceased person may maintain an action in a court of competent jurisdiction for their loss resulting from the death against the person from whom the deceased person would have been entitled to recover.

(3) The damages recoverable by a dependant of an injured or deceased person may include

(a) an amount to compensate for the loss of guidance, care and companionship that the dependant could reasonably have expected to receive from the injured

6. (2) Lorsqu'une personne décède par suite de la faute ou de la négligence d'autrui dans des circonstances qui, si le décès n'en était pas résulté, lui auraient donné le droit de réclamer des dommages-intérêts, les personnes à sa charge peuvent saisir le tribunal compétent d'une telle réclamation.

(3) Les dommages-intérêts recouvrables par une personne à charge peuvent comprendre :

a) une indemnité compensatoire pour la perte des conseils, des soins et de la compagnie auxquels la personne à charge aurait été en droit de s'attendre de la personne blessée ou décédée, n'eût été les

or deceased person if the injury or death had not occurred;

blessures ou le décès

[8] Section 4 of the *Act* lists the individuals who claim as dependants.

In this Part, “dependant”, in relation to an injured or deceased person, means an individual who was one of the following in relation to the injured or deceased person at the time the cause of action arose, in the case of an injured person, or at the time of death, in the case of a deceased person:

Dans la présente partie, « personne à charge », à l’égard d’une personne blessée ou décédée, s’entend de toute personne qui, au moment où le fait générateur du litige s’est produit, dans le cas de la personne blessée, ou au moment du décès, dans le cas de la personne décédée, était :

(a) a son, daughter, stepson, stepdaughter, grandson, granddaughter, adopted son or daughter, or an individual for whom the injured or deceased person stood in the place of a parent;

a) le fils, la fille, le beau-fils ou la belle-fille, le petit-fils, la petite-fille, le fils adoptif ou la fille adoptive de la personne blessée ou décédée ou toute autre personne à qui cette dernière tenait lieu de parent;

(b) a spouse, or an individual who was cohabiting with the injured or deceased person in a conjugal relationship having so cohabited for a period of at least one year; or

b) l’époux de la personne blessée ou décédée, ou la personne qui cohabitait avec cette dernière dans une relation de nature conjugale depuis au moins un an;

(c) a brother, sister, father, mother, grandfather, grandmother, stepfather, stepmother, adoptive

c) le frère, la soeur, le père, la mère, le grand-père, la grand-mère, le beau-père ou la belle-mère, le père adoptif ou la mère adoptive

father or mother, or an individual who stood in the place of a parent.

de la personne blessée ou décédée, ou toute autre personne qui tenait lieu de parent à cette dernière

[9] The Defendants submit that the deceased's brother and sister do not fall within the definition of "dependants" since they were not "individuals who stood in the place of a parent" to the deceased. Relying on the associated words rule of statutory interpretation, they maintain that the addition of the words "or an individual who stood in the place of a parent" implies that the individuals specifically listed in paragraph 4(c) must have stood in the place of a parent to the deceased in order to qualify as a "dependant" under the *Act*. I disagree.

[10] It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation, including the associated words rule, or *noscitur a sociis*, only come into play where the words sought to be defined are ambiguous (*R. v. McCraw*, [1991] 3 S.C.R. 72 at 80).

[11] The associated words rule was defined by Martin J.A. in *R. v. Goulis* (1981), 32 O.R. (2d) 55 (C.A.):

When two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general.

As stated by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed. (Markham: Butterworths, 2002) at p. 173, the rule should be relied on only to resolve ambiguity or to limit the scope of the terms.

[12] There is simply no ambiguity in paragraph 4(c). Persons who stood in the place of a parent are a separate class of individuals set out in paragraph 4(c) of the *Act* who might qualify as a dependant. This interpretation is consistent with the French version of the provision which refers to “toute autre personne”, that is, any other individual who does not fit within the class of family members listed.

[13] Having found that the deceased’s siblings are entitled to claim damages as dependants, I now turn to the damages suffered by Mrs. Wilcox and Tina Wilcox for loss of financial support and loss of valuable services.

**(B) Pecuniary damages**

*(i) Introduction*

[14] The financial loss suffered by a dependant, such as financial support and loss of valuable services, must be measured by what they would have received from the deceased within a reasonable degree of probability if he or she had survived. To determine the extent of the loss caused by the premature death of the deceased, all circumstances and probabilities which bear upon that loss must be considered, including the age and general state of health of the deceased and the

dependants, the deceased's personality and character, his or her habits and customs, and the relationship that existed between the deceased and the dependants.

[15] The Plaintiff introduced in evidence an actuarial report prepared by an actuary, Jessie Shaw Gmeiner (Gmeiner). The purpose of report was to place a lump sum dollar value on the financial loss sustained by the Wilcox family as a result of the deceased's death. The report presents results on the basis of various assumptions, however the use of multipliers readily permits alternate calculations assuming any annual level or duration of future loss.

[16] The Defendants did not seriously challenge the methodology used by Ms. Gmeiner in preparing her report. They took issue, however, with six critical assumptions that were used in calculating damages, which they say are not supported by the evidence.

[17] First, the Defendants say that although the deceased had declared an average total annual income of \$25,000 in the three years before his death, there is no evidence to show that he would have continued to earn such an income in the future. According to the Defendants, the deceased's total annual income would have been, at best, \$7,000 had the accident not occurred.

[18] Second, the Defendants dispute that the deceased would have worked until age 70. They maintain that his medical condition would have prevented him from working past 65 years of age.

[19] Third, they disagree that the deceased's life expectancy would have been an additional 13.89 years, as determined by Ms. Gmeiner. According to their Defendants' expert, his life expectancy was no more than 8 years based on his poor state of health.

[20] Fourth, the Defendants take issue with the assumption that Tina Wilcox, the disabled daughter, would not die within his life expectancy. The expert medical opinion they obtained concludes that her life expectancy was only three years.

[21] Fifth, the Defendants maintain that the extent of the valuable services performed by the deceased for his family is exaggerated. They submit in particular that damages for loss of valuable services should be significantly discounted taking into account the assistance provided to Tina Wilcox by trained professionals hired and paid by the provincial government.

[22] Sixth, the Defendants submit that Mrs. Wilcox's income increased significantly in 2005, and that, as a result, she has suffered no loss of financial support.

[23] I now turn to the evidence adduced by the parties, focussing mainly on the contentious issues identified by the Defendants.

*(ii) Facts relating to pecuniary loss claim*



[24] Eight witnesses were called by the Plaintiff. All of the claimants, with the exception of Tina Wilcox, testified about their relationship with the deceased, and the loss they suffered as a result of his death. Ms. Gmeiner gave expert evidence regarding the methodology she used in preparing her actuarial report, the information she relied on, and the assumptions she made. In support of the assumptions outlined in the report, the Plaintiff called Dr. Kenneth Melvin, a medical practitioner and clinical cardiologist, and Dr. Brian Craig, a family physician, to opine about the state of health and life expectancies of the deceased and Tina Wilcox at the time of the accident.

[25] The Defendants called four witnesses in response: Janene Hickman, a social worker with the New Brunswick Department of Family and Community Services; Shirley Beaudry, a home care attendant; Samuel LeBreton, an economist with Service Canada, and Dr. Andrew Ian Maugham Armstrong, a medical doctor and expert in the area of mortality in the insurance field.

[26] With the exception of the expert opinion of Dr. Armstrong, which was substantially at odds with those of the Plaintiff's three experts, the facts adduced by the parties proved to be not particularly contentious. The credibility was not an issue since the witnesses testified in a frank, candid and forthright manner, and none were prone to exaggeration. I have set out below a summary of the relevant facts distilled from the documents introduced on consent of the parties and the testimony of witnesses, followed by my findings on the six key issues identified by the Defendants.

[27] At the time of his death, the deceased was survived by his widow of 37 years, Patsy Ann Wilcox, his daughters Tina Wilcox and Tammy-Lynn Wilcox-Doiron, his son Thomas Wilcox, his sister Mary Wilcox, and his brother David Wilcox.

[28] Mrs. Wilcox first met the deceased in 1966 and married him in 1967. Until the deceased's untimely death, they maintained a stable and loving relationship while raising three children together. Their relationship is described, in a nutshell, as follows by Mrs. Wilcox: “[W]e just did what we needed to do. We did it together [...] We loved one another and we just worked together to – to keep the family together and keep our children brought up with a sense of right and wrong and a sense of hard work.”

[29] The deceased quit school at grade 7 and was continuously employed throughout his adult life. The breadwinner of the family, he did mostly labour or construction work, and picked blueberries during blueberry season. Although the deceased and Mrs. Wilcox struggled to get by on his modest income, they prided themselves in providing all the necessities of life to their family. Mrs. Wilcox testified that the deceased was “always working at something” and was not prone to sit back and put his feet up.

[30] In 2003, the deceased worked for Hawkins Blueberry Farms and for Acadian Seaplants (Acadian). He decided to leave Acadian because he did not feel safe driving a tractor. However, he immediately landed on his feet and found work as a labourer for Hanley on the *Miss Megan*, for

which he would be paid \$100.00 per day. In the three years before his death, the deceased's annual income was relatively stable, averaging approximately \$25,760.

[31] Mrs. Wilcox was a real estate agent at the time of the accident. Her income varied widely from 2001 to 2004. In 2001, she reported a loss of \$2,319. In 2002, her income rose to \$7639, but dropped to \$16 in 2003. In 2004, the year of the deceased's accident, she declared \$2,699 as income. In order to make ends meet after her husband's death, Mrs. Wilcox started working at Home Hardware on a part-time basis at \$7.00 per hour. She also works part-time earning \$8.50 per hour as an office manager for Complete Care Treatment Centre, a business owned by her daughter Tammy Wilcox. Her total income in 2005 was \$16,784.

[32] In 2006, Mrs. Wilcox started receiving an Old Age Security supplement of \$1,000.17 and a Canada Pension Plan survivor's monthly benefit of \$394.88. She earned employment income totalling \$14,700 and gross real estate commissions of \$3,500, from which expenses would be deducted.

[33] The deceased played an active part in the household, cutting the lawn, cleaning the basement, and performing general duties around the house. He was also kept occupied assisting in the care of Tina Wilcox, his eldest daughter. Tina Wilcox was born on May 5, 1969, and is profoundly disabled, the result of radiation therapy she received as a young child upon discovery of a brain tumour. She has always lived at home, and remained wholly dependent on her parents. She

requires 24 hour care by a person with First Aid training. In particular, she needs help with feeding (as she chokes very easily), with putting on her leg brace and shoes, and with denture maintenance.

[34] The deceased would regularly take Tina Wilcox to school and doctor's appointments and assist her around the house, especially at night or when getting dressed. They took part in activities together that gave her great joy. Often, in the evening, the deceased and Tina Wilcox would go for a drive together and stop for ice cream.

[35] By all accounts, the emotional bond between father and daughter was very close. Despite her age, she was daddy's little girl. By all accounts, her demeanour changed considerably after the death of her father. She became more reserved with her family members and now takes less pleasure in activities she would normally have done with her father.

[36] The Wilcox family benefited from assistance for Tina Wilcox provided by the provincial Department of Family and Community Services. Ms. Hickman, departmental manager of in-home services, testified that before and after a stroke in 2000, Tina Wilcox had been provided with the services of a social worker for 40 hours a week. This service was provided free of charge by the Department.

[37] Ms. Beaudry, a former employee of Vocational Plus, and directly responsible for Tina Wilcox's care, provided further evidence as to the services that Tina Wilcox received. She would sometimes pick up her from the school and take her home where they would undertake some

activities, such as speech exercises. Ms. Beaudry would also prepare her meals, bathe her, and put her to bed, when necessary. This support continued after the death of the deceased until August 2006 when Ms. Beaudry ceased assisting Tina Wilcox for personal reasons.

[38] At the time of the accident, the deceased was slightly obese, had high blood pressure, and had been treated for what had been diagnosed as chronic obstructive pulmonary disease (COPD). The deceased had smoked cigarettes for 42 years until he stopped in 1999 on his doctor's advice. In 2002 and 2003, the deceased complained of chest pain to his doctor.

[39] Dr. Kenneth Melvin, a medical practitioner and clinical cardiologist in Toronto, provided his expert opinion regarding the presence, absence or severity of COPD and the deceased's anticipated life expectancy based on a review of his medical records. Dr. Melvin's concluded that the deceased had only mild to moderate atherosclerosis, consistent with a man of his age. This diagnosis was consistent with the deceased's obesity and hypertension, conditions which his family doctor, Dr. Craig, was adequately monitoring.

[40] Based on the observations of Dr. Craig and the autopsy report, Dr. Melvin concluded that there was no indication in the deceased's health profile that his life expectancy would be significantly different than that of a typical average Canadian male living in New Brunswick.

[41] Dr. Melvin opined that, on a balance of probabilities, the deceased would not have had an excessive risk of coronary heart disease (CHD) mortality based on the favourable comparison with

his peer group in relative risk. According to Dr. Melvin, the deceased had, at maximum, a calculated 27% 10-year risk of CHD mortality, based on the Framingham risk scores. Dr. Melvin described the risk of CHD mortality as low to average, which is what one might expect for a man who had mild to moderate disease proven by autopsy.

[42] Dr. Craig has practised family medicine in Saint John, New Brunswick since 1984. He provided expert evidence regarding his medical diagnosis and the prognosis of both the deceased and Tina Wilcox, who he started treating in 1990. He testified that the deceased's health was quite reasonable for a 63 year old man. Although there were a number of ongoing issues with the deceased's health, Dr. Craig was monitoring these issues and working closely with him to address specific problems if and when they arose. By way of example, on the advice of Dr. Craig, the deceased ceased smoking in 2001.

[43] Dr. Craig's made notations of "COPD" and "SOBOE" during some of the deceased's clinical visits. Dr. Craig indicated that these notes were in reference to the deceased's complaints of shortness of breath on exertion and a clinical diagnosis of COPD. In cross-examination, counsel for the Defendants suggested that these notes indicated that there were serious concerns with the deceased's health. However, Dr. Craig did not agree with this characterization and noted that there were no significant concerns, and where there were concerns, they were being appropriately monitored and treated. As it turned out, an inhaler was all that was required to address the deceased's breathing concerns.

[44] Overall, Dr. Craig was satisfied that the deceased's health had improved over the previous years. He noted that the deceased's weight, which had increased as a result of having ceased smoking, as well as his hypertension, normal for a man of his age, would require further monitoring. The post mortem report confirmed that the deceased was only suffering from mild to moderate coronary atherosclerosis and mild hypertensive disease with concentric left ventricular hypertrophy, consistent with a man of his age.

[45] Tina Wilcox's medical history is a long one. At age two, she was diagnosed with a cancerous brain tumour and treated with cobalt therapy radiation. At the time of her treatment, the consequences of cobalt therapy were unknown, but it was later discovered that the treatment can result in calcium deposits. The treatment, designed to destroy the cancerous cells, also destroyed the surrounding healthy cells. Given its location, the tumour also affected her pituitary and hormone producing glands, affecting her growth and cognitive function.

[46] Tina Wilcox also suffered from hydrocephalus, a consequence of some swelling in her brain and the swelling of the ventricle cavities inside her brain. This has required the installation, and replacement, of ventriculoperitoneal shunts to control the swelling.

[47] In 2000, Tina Wilcox suffered a severe stroke. Dr. Craig's was of the opinion that she substantially recovered, however she still requires substantial assistance from those around her. She lost the feeling in her throat such that she is unable to ascertain when she has swallowed food. This has resulted in a number of choking episodes. Mobility and daily activities also require a great deal

of assistance. The stroke has affected her balance and she must now wear a brace and an elevated shoe which she cannot put on without help. Without the brace, she needs help to move around and even with the brace, she needs the assistance of someone when outside. She also requires assistance in the bathroom.

[48] Despite these difficulties, Tina Wilcox has defied the odds and thrived. She is given an independent role in the household by her family, and is an active participant at Vocational Plus, a school she attends daily which is designed for disabled adults. Dr. Craig specifically noted that her drive is extremely strong, aided not only by the responsibilities her family requires of her, but also because of her personal determination.

[49] Dr. Andrew Armstrong, a family practitioner from Toronto, testified at the request of the Defendants. Over the last 30 years, Dr. Armstrong worked part-time in the field of Life Insurance Medicine, involving the assessment of mortality in insurance applicants.

[50] From a review of the notes of Dr. Craig, Dr. Armstrong concluded that the deceased had gained considerable weight, and was developing shortness of breath and chest pain, none of which had been investigated. He further noted the deceased had untreated hypertension. In his report, he concluded that, if the deceased had survived, he would have 8 years of life remaining at the time of his death.



[51] Dr. Armstrong concluded that Tina Wilcox had an overall life expectancy of 3 years based on what he viewed as significant neurological disorder, significant atherosclerotic vascular disease, an ischemic stroke in 2000, an episode of acute heart failure in 2006, all associated with diabetes and obesity.

[52] Ms. Gmeiner concluded that there was no evidence to indicate that the life expectancy of the deceased and Mrs. Wilcox would have been any different to that of any other male or female, respectively, of the same age resident in Canada. Accordingly, using the Canadian Population Mortality Table for males and females as the underlying tables in her calculations, she found that the couple's remaining joint life expectancy as of the valuation date of May 1, 2007, had the deceased not died prematurely in the accident, would have been 13.89 years.

[53] Regarding life expectancy for Tina Wilcox, Ms. Gmeiner used mortality rates for Canadian females of the same age without adjustment. She took into account that Tina Wilcox had recovered quite well from her stroke and had already outlived projected life expectancies of various physicians.

**(C) Pecuniary damages**

*(iii) Loss of financial support*

[54] Ms. Gmeiner made a number of assumptions in her report regarding the deceased and Mrs. Wilcox's employment related income for the purpose of calculating the loss of financial support for the surviving family. She assumed that the deceased's employment income would have remained steady and the family's net family income would have increased from \$25,801 in 2004 to 32,200 in

2010 when the deceased would have attained the age of 70. The increase over the years is mainly attributable to qualification for Canada Pension Plan and Old Age Security Benefits.

[55] The Defendants suggest that I put little weight on the assumptions in the actuarial report because they say Ms. Gmeiner failed to account for Mrs. Wilcox's duty to mitigate her loss upon the death of her husband. Consequently, the Defendants submit that her calculations have been exaggerated and are unreliable. However, the Defendants did not support this argument with their own actuary report to reflect their alternative calculations.

[56] With respect to the obligation to mitigate, the evidence was that Mrs. Wilcox has been working part-time at Home Hardware, and has worked as a receptionist and bookkeeper for her daughter's massage therapy business. The Defendants suggest that because, after her husband's death, Mrs. Wilcox began working at different jobs to replace the loss of income from her husband's employment, she has mitigated her loss, as was her obligation, and any amount gained must be deducted from her award.

[57] Counsel for the Defendants submitted to decisions in support of the proposition that a wife has an obligation to mitigate her loss upon the death of her husband by seeking employment; *Baumgartner v. Ripplinger*, [1982] S.J. No. 625 and *Cookson v. Knowles*, [1977] 2 All E.R. 820. Counsel also referred to paragraph 74 of the Supreme Court of Canada's decision in *Keizer v. Hanna*, [1987] 2 S.C.R. 342.

[58] The jurisprudence cited does not support the Defendants' position. First, in *Baumgartner v. Ripplinger*, Justice Maurice of the Saskatchewan Court of Queen's Bench noted that in Saskatchewan, there appeared to be an inconsistent approach to the question. But in that case, Justice Maurice held that because the widow had not worked outside the home prior to her husband's death, her subsequent employment was an irrelevant factor in the assessment of damages.

[59] It was suggested that because Mrs. Wilcox had been earning income before her husband's death, the case was distinguishable, and her work should be considered a relevant factor. With respect, I cannot agree. The purpose of these damages is to restore a dependant to the financial position that he or she would have occupied but for the death (*Keizer v. Hanna* at pp. 461-62). This is the case regardless of whether the dependant had some or no income prior to the death.

[60] In any event, because Justice Maurice declined to consider the dependant's prior income earning-capacity, he never explained how it might be taken into consideration. Therefore, the defendant suggested that the following comments of Lord Denning in *Cookson v. Knowles* required that Mrs. Wilcox mitigate her losses, thereby reducing her entitlement following the death:

He was earning at his death 1820 pounds a year. His wife was a cleaner at a school in Chipping for 32 hours a week. She was earning 900 pounds a year. But she could not do it without her husband's help. He used to see to the boiler, clean the windows and such like tasks. They were man's work which she could not do. After her husband was killed, she was unable to find any other man in the place to help her. So she had to give up her work at the school... the judge found that, as a result of her husband's death, her earning capacity of 920 was wholly destroyed, but we do not think the evidence supports that finding.

Seeing that the husband help the wife in her work, it was quite legitimate for the judge to regard them as conduction a joint operation. He took the combined earnings of the husband and wife and calculated the dependency as two thirds of the combined figure. He regarded that as completely lost by his death. He seems to have disregarded the future earning capacity of the wife. We do not think that was right. After his death, she retained her earning capacity. By his death the dependents were deprived of the contribution provided by the husband. But not the contribution of the wife. [emphasis added]

[61] This excerpt does not stand for the proposition that a wife has a duty to mitigate. Rather, it merely confirms that the earning capacity of the wife prior to death must be deducted from her entitlement. This is consistent with the purpose of pecuniary damages meant to place the dependant in the same place that he or she would have been but for the loss.

[62] Ms. Gmeiner's actuary report reflects precisely this approach. She took into consideration Mrs. Wilcox's meagre earnings from some real estate work she had undertaken in the years prior to her husband's death, work she sought in order to improve the family's finances. Ms. Gmeiner was not required to make any reduction in spite of her new employment. In fact, Ms. Gmeiner's report represents a thorough, fair and professional review of the Wilcox family earnings. Her testimony was equally professional and frank. The Defendants' suggestion that Ms. Gmeiner was not a reliable witness is completely unfounded.

(iv) *Work expectations*

[63] Ms. Gmeiner operated on the assumption that the deceased would have continued working until the age of 70 and lived to the same age as the normal New Brunswick male. The Defendants

contested these assumptions, suggesting that the deceased's health was poor, that he was suffering from heart disease, and would not have been able to continue working.

[64] However, by all accounts, the deceased was a motivated man who did not shy away from physical labour. He had no savings or pension plan that would allow him to retire comfortably. Moreover, his sense of duty to provide for his family would have driven him to work until his health faltered. I am satisfied that the deceased would likely have continued to work to age 70 and earn approximately the same employment income as he earned in the three years prior to his death at least. Ms. Gmeiner was therefore correct to assume that although the normal retirement age is 65, the deceased would have continued to work to age 70.

(v) *The deceased's life expectancy*

[65] There is no exact science of predicting mortality. However, there are scientific approaches to forecasting mortality that actuaries, econometricians and statisticians use. All of the experts called by the Plaintiff were consistent in concluding that the deceased would likely have lived to age 75. Dr. Armstrong's testimony is problematic for a number of reasons, not the least of which is the approach he adopted in drafting his report. Dr. Armstrong admitted that he sought to determine the life expectancy of both the deceased and Tina Wilcox from an insurance perspective. In doing so, the underlying purpose of Dr. Armstrong's report is to set out the insurable risk for a possible insurer, not an impartial assessment of life expectancy.

[66] The consequence of this approach was demonstrated during Mr. Armstrong's cross-examination, particularly when discussing the contents of his report prepared in respect of Tina Wilcox. Dr. Armstrong admitted that many of the conditions of which he identified, such as osteoporosis, were not actual issues, but only potential ones. Potential medical conditions may be relevant to an insurer, however they do not assist the Court in determining how an individual's existing conditions will likely affect their life expectancy.

[67] Furthermore, as the testimony of Dr. Craig reveals, while he noted concerns in respect of the deceased's shortness of breath and chest pain, he had taken these factors into consideration but did not feel that at the time they reached the level of serious concern. Therefore, Dr. Armstrong has afforded these notations in Dr. Craig's clinical notes undue weight.

[68] As a result, I have given no weight to the reports produced by Dr. Armstrong or his opinions regarding the life expectancies of the deceased and Tina Wilcox.

[69] The deceased would have been able to physically continue to work, and indeed, live. Consequently, both parties provided testimony from expert witnesses in order to determine the deceased's life expectancy. I am further satisfied that Ms. Gmeiner correctly assumed that the deceased would have lived to the age of 75.

(vi) *Tina Wilcox's life expectancy*

[70] Dr. Armstrong opined that Tina Wilcox's life expectancy is approximately three years as of the date of his report. His evidence was unreliable, however, because of the unbalanced approach he took in assessing the risk of mortality, thereby skewing the results. I am left with the opinions of two experts called by the Plaintiff. Dr. Craig's medical opinion is that Tina Wilcox's strength and drive will allow her to live for many more years to come. Ms. Gmeiner considers Tina Wilcox a survivor who has been able to surmount very difficult medical challenges. In the absence of any impartial evidence suggesting otherwise, I am satisfied that Tina Wilcox's mortality was not significantly different than that of Canadian females of the same age. Tina Wilcox has defied numerous predictions by professionals of her imminent death for almost four decades. I therefore conclude that Tina Wilcox's life expectancy is far greater than that of her father had he survived, and at the very least 14 years from the date of the accident.

(vii) *Proper Method of Adjustment*

[71] There remains the method of calculation used by Ms. Gmeiner. Where the deceased is not the only contributor to the family income, a reduction must be made for the personal expenses of the deceased. In order to determine the appropriate calculation, Ms. Gmeiner's report adopted two approaches in order to reach this calculation, the Cross Dependency Method and the Modified Sole Dependency method.

[72] There is no unequivocal rule as to which method is appropriate in a given case. Instead, the particular circumstances of the case will dictate the approach to adopt. In this case, the calculations

reach almost identical results, separated only by approximately \$10,000 in the result. Nonetheless, I believe the Cross Dependency Method is appropriate in these circumstances.

[73] Under the Cross Dependency Method, the loss of financial support is deemed to be 70% of the net after-tax income of the family unit less his or her net after-tax income. Where there are three or fewer children, the loss of financial support of each child is deemed to be 4% of net after-tax income. The practical result of this model results in an assumption that the deceased's personal expenses would have constituted 26% of net after-tax family income with a single child present.

[74] Using the Modified Sole Dependency Method, calculations are based on the assumption that the surviving spouse estimated net income would be equal to 60% of the deceased's after tax and other deductions. This is equivalent to the deceased's personal expenses constituting 36% of the deceased's net income with one dependent child present.

[75] Justice Fraser of the Alberta Court of Queen's Bench, noting little jurisprudence on the issue, undertook an extensive discussion of the appropriate method to adopt in *Millott Estate v. Reinhard*, 2001 ABQC 1100. He concluded as follows:

[245] There is little direct discussion in the cases on this point. Rather, there are implied assumptions. Often, a court will neither discuss the rationale in detail nor use the labels. The difference is that some cases apply a dependency rate to family income (cross), while some apply a dependency rate to the deceased's income (sole). Occasionally, a court will find the dependency rate to be a certain number, then apply a lower rate (modified).



[...]

[255] Therefore, I would reserve sole dependency for cases where the sole income-earner is deceased. In my view, sole dependency is inappropriate for a dual income household. Some adjustment must be made for the survivor's income, because the loss incurred by the survivor must take into account the value of the financial gain to the survivor from no longer spending a portion of the survivor's income on the deceased.

[256] The proper method of adjustment (cross or modified) depends on the circumstances. Generally, the modified approach is applicable where there is evidence that the survivor's income is much greater than the deceased's (which would lead to an absurd result using cross dependency), or where there is evidence that the deceased was extraordinarily frugal or self-sacrificing (as in *Hechavarria [v. Reale]* (2000) 51 O.R. (3d) 364).

Justice Fraser went on to apply the Cross Dependency Method to a situation in which the deceased was an equal contributor to the family's income. In that case, the spouses contributed equally to a joint account from which family expenses were paid.

[76] The circumstances of this case are particularly unique. The deceased was the primary income earner. However, Mrs. Wilcox had obtained her real estate licence and was earning around \$3,000 prior to her husband's death.

[77] Although the deceased clearly earned a more substantial salary than Mrs. Wilcox, their incomes were pooled together and used for the benefit of the entire family. It is reasonable to assume that both spouses benefited equally from the total net family income.

[78] As stated in *MacNeil v. Gillis*:

[190] As a general rule, and in the absence of evidence to the contrary, in two income families where the incomes are pooled each spouse would spend approximately 30% of net family income for their respective personal usage. Therefore, it is reasonable that in most cases such a sum be deducted from the deceased spouse's net income as a start to determining the amount of support lost to the surviving spouse.

[79] Consequently, the Cross Dependency Method should be adopted in the assessment of damages.

(viii) *Loss of Valuable Services*

[80] Mrs. Wilcox and Tina Wilcox are also entitled to damages with respect to the loss of valuable services provided by the deceased prior to his death.

[81] With respect to the support provided by the deceased to the operation of the household, Ms. Gmeiner's report operated on the basis of general averages provided by the *Overview of the Time Use of Canadians in 1998* report prepared by Statistics Canada. In that study, Ms. Gmeiner noted that the average time spent by Canadian males on household tasks in 1998, excluding child care activities, was 2.1 hours per day, or around 764 hours per annum. Ms. Gmeiner adopted these figures, but reduced the hours by 20% on the basis that the deceased may have spent time on tasks for his own benefit.

[82] In my opinion, this approach is a conservative one and eminently reasonable in the circumstances, given the evidence presented to the Court. That evidence suggests that the deceased's contribution was no more, nor any less than the average male.

[83] Based on a study prepared by Statistics Canada entitled *The Value of Household Work in Canada, 1992*, Ms. Gmeiner also concluded that the replacement cost of household work in New Brunswick was \$9.87 per hour, or \$12.33 in 2004 dollars, \$12.47 in 2005 dollars, \$12.82 in 2006 dollars and \$12.98 in 2007 dollars, a sum used for all of the following years until he reached the age of 75, when it was assumed the deceased himself, if still alive, would have required assistance. Again, this approach is entirely reasonable and reflective of the evidence presented to the Court.

[84] Tina Wilcox's loss was evaluated on the assumption that the deceased provided 20 hours of assistance for her each week, whose replacement costs would have been around \$13.00 per hour. Ms. Gmeiner conceded that this figure was not necessarily precise, since she based her decision on information with which she had been provided. Nonetheless, she noted that depending on the Court's conclusion, this calculation could be easily modified.

[85] It is difficult to calculate precisely how many hours of attendant care assistance the deceased would have provided to Tina Wilcox. The amount of assistance would necessarily vary depending on the periods that Mr. Wilcox was gainfully employed. However, evidence of the services he provided before his death is the best indicator. I am satisfied that, on average over the year, Mr. Wilcox provided attendant care assistance to Tina Wilcox amounting to 20 hours per week. Were it not for the assistance of professionals provided by the province, the number would have been double, or even triple.

[86] A simple example demonstrates the reasonableness of this assumption, which works out to less than three hours a day of assistance. A single trip to the doctor itself, given Tina Wilcox's disabilities, may have required several hours on its own. The deceased would have had to prepare her for the trip, driven her to the appointment, assisted her during the appointment, and repeated each step on their return.

**(D) Damages for Care, Guidance and Companionship**

[87] Paragraph 6(3)(a) of the *Act* provides for the recovery of damages to compensate specified family members for the loss of guidance, care and companionship that the deceased would have provided but for his or her untimely death. The Act provides no guidance as to the amount of damages that may be awarded under this section. The method of assessment of damages and the quantum of the award are not uniform among those provinces.

[88] There have been two approaches with respect to the award of damages for loss of care, guidance and companionship. In some jurisdictions there has been an acceptance of the "conventional awards" standard in which the Court assessing the damages provides for an amount to be paid to the survivors of the deceased without an in-depth analysis and assessment of the relative relationship between the parties to the deceased. Other jurisdictions have by case law set forth a range of damages to be paid to the survivors of the deceased without any evidence of the nature of the relationship or entitlement.

[89] In New Brunswick, where the accident took place, section 3(4) of the *Fatal Accidents Act* provides that the parents of a child may recover an amount to compensate for the loss of companionship and an amount to compensate for grief suffered. There is no provision, however, for a claimant to recover for loss of a spouse, or for a child to recover for loss of a parent. Those losses have to be pursued on a pecuniary loss basis.

[90] The legislative provisions in the Province of Ontario bear the closest resemblance to s. 6 of the *Act* both in form and effect. In *Augustus v. Gosset* [1996] 3 S.C.R. 268, the Supreme Court signalled its acceptance of the approach taken by the Ontario Courts for a full assessment of the evidence on a case-by-case basis, and has rejected a conventional award approach in jurisdictions where there does not exist an amount stipulated by statute. Various factors should be considered, including the circumstances of the death, the ages of the deceased and the dependant, the nature and quality of the relationship between the deceased and the dependant, the dependant's personality and ability to manage the emotional consequences of the death, and the effect of the death on the dependant's life. The following cases outline the process of analysis of the relationship and considerations which gives rise to the general damage award.

[91] In *Stephen v. Stawecki*, [2006] O.A.C. 199, the Ontario Court of Appeal fixed the damages for loss of care, guidance and companionship at \$70,000.00 where the deceased had been involved in a relationship with the Plaintiff and had lived together for some period of time prior to the trial. Notwithstanding that the parties maintained separate residences, the fact that they cohabited in a

conjugal relationship and that were planning a long term future was found by the Court to be sufficient for the purposes of making an award under the act.

[92] In *Hechavarria v. Reale* (2000) 51 O.R. (3d) 364 (OSCJ), a 53-year-old wife and mother of three was killed when a school bus driven by the defendant went through a red light and struck her vehicle. The Court awarded damages for loss of care, guidance and companionship in addition to loss of housekeeping services, loss of income and past and future dependency loss. In that case the husband was awarded general damages of \$85,000.00, her three children aged 30, 27 and 22 were awarded general damages of \$30,000.00 each, and her sisters were awarded general damages of \$12,500.00 each.

[93] In *Fish v. Shainhouse* [2005] O.J. 4575 (OSCJ), the Ontario Court made a provisional assessment of damages. After finding that the plaintiff and her husband had a close and loving relationship and would have continued in this relationship for the remainder of their lives, the Court calculated a general damage claim in the amount of \$80,000.00. Similarly a dependent child who was completely devastated as a result of his father's death was awarded \$80,000.00. A daughter, aged 23 and attending university while still living with her parents, who had a close relationship with her father was awarded \$50,000.00. Even a child who had a strained relationship with his father was awarded \$25,000.00.

*(ix) Patsy Ann Wilcox and Tina Wilcox*

[94] The late John Wilcox was a quiet, kind and unassuming man. He provided both financial and emotional stability, and by all accounts, was selflessly devoted to his family. I find that considerable importance should be given to the words “care, guidance and companionship” in the context of his family, and particularly his wife and Tina Wilcox.

[95] Counsel for the Plaintiff submitted that the proper range of damages for Mrs. Wilcox’s loss of care, guidance and companionship of her husband should be \$75,000 to \$100,000. The Defendants counter that her damages should be limited to \$10,000. The uncontradicted evidence establishing a long-lasting, loving and close relationship between the deceased and Mrs. Wilcox militates strongly in favour of a higher award. The loss comes at a time when companionship would have been most important to Mrs. Wilcox. However, the advanced age of the couple requires that the amount be discounted somewhat. Considering the case law and the need for some consistency in the law, and adjusting awards of damages in other cases for inflation, I conclude that damages in the amount of \$75,000 on account of the loss of care, guidance and companionship to Mrs. Wilcox are appropriate in this case.

[96] The Defendants submit that a reasonable amount for loss of care, guidance and companionship for Tina Wilcox should be \$10,000 since the actual care provided by the deceased was not significant and her life expectancy was significantly reduced. It was clear from the evidence that there was a strong bond between the deceased and Tina Wilcox. The evidence indicated that he was a good and loving father. As a result of her disability, she relied on the care and assistance of her family, and quite heavily on her father. It is clear that she senses a deep loss of

an individual with whom she was very close. She has been deeply affected by the loss of her father, becoming less outgoing and more reclusive. A significant award is in order. In my view, \$75,000 represents a fair and reasonable amount to compensate Tina Wilcox for the loss of her father's care, companionship and guidance.

*(x) Thomas Wilcox and Tammy-Lynn Wilcox-Doiron*

[97] Thomas Wilcox is the deceased's middle child and works as an assistant manager at Acadia Seaplants. He returned to his parent's home at age 21 and lived in the attached apartment free of charge while he and his wife saved money to purchase their own home. While living in the apartment, he spoke with his parents daily and at other times, his father would often watch his son play hockey. He also testified about regular pastimes that he and his father would partake in, such as playing catch at family dinners, going for drives, having a coffee together and generally helping each other out.

[98] Tammy Wilcox, the youngest of three children, operates her own business where she works as a massage therapist. She explained that her father did not show his affection in the usual way with kisses and hugs. Instead she says his affection for his children was evident from the way he teased and played with his children, especially Tina Wilcox.

[99] The relationship Tammy Wilcox described with her father was quite typical. She passed by her parent's home at least once a week and was always present at special occasions, as was Thomas



Wilcox. The deceased was always willing to help her in times of need, and she would rely on him for advice.

[100] Thomas Wilcox, in his own words, is “not a talker” and not someone prone to describing his relationship with his father in any detail. But it is clear from his testimony that he and his father enjoyed a close relationship. Tammy Wilcox also enjoyed a similarly close relationship with her father. In the circumstances, I consider an award of \$25,000 to each of them for the loss of the care, companionship and guidance of their father to be appropriate.

*(xi) David and Mary Wilcox*

[101] David Wilcox is the deceased’s brother, a retired school teacher from Rothesay, about an hour’s drive from Pennfield. Like his brother, David Wilcox is fairly reserved and not one to express his emotions publicly. David Wilcox testified that he saw his brother from time to time, occasionally visiting each other at home or over the holidays. I do not take the two brother’s lack of regular contact as a sign of estrangement. Rather, it simply attests to their stoic personalities. In the last two or three years before his death, after David Wilcox’s retirement, the brothers managed to see each other more often.

[102] Mary Wilcox, a freelance journalist and part-time university professor from Halifax is the deceased’s sister. Although she no longer resided in New Brunswick like her two brothers, it is clear that she kept in close contact with her family. She spoke regularly with her brother and visited the family in Pennfield often.

[103] Both David Wilcox and Mary Wilcox enjoyed a close and warm relationship with their brother. They have lost an important person, the first of three siblings. In the circumstances, I consider damages in the amount of \$15,000 for each of them is appropriate to compensate them for the loss of care, guidance and companionship of their brother.

**(E) Funeral Expenses**

[104] The Plaintiffs introduced evidence that the cost of the funeral and the newspaper notices totalled \$7,979.64. I am satisfied that these out-of-pocket expenses were reasonable in the circumstances and compensable pursuant to s. 6 of the *Act*.

**Conclusion**

[105] The assumptions outlined in Ms. Gmeiner's actuarial report in calculating the financial losses of the Wilcox family are in my view conservative, and quite reasonable. I am also satisfied that the assumptions made regarding the life expectancies of the deceased, Mrs. Wilcox, and Tina Wilcox were sound. On the evidence before me, I am satisfied that the pecuniary losses calculated using the cross dependency method effective May 1, 2007, the first day of the hearing, have been established on a balance of probabilities.

[106] In light of the above, I assess damages against the Defendants in the following amounts:

(a)	Losses of support for Pasty Ann Wilcox	
(i)	Past Loss of Support with interest	\$ 51,950.00
(ii)	Loss of Future Financial Support with interest	\$116,454.00
(b)	Losses of support for Tina Wilcox	
(i)	Past Loss of Support with interest	\$ 3,480.00
(ii)	Loss of Future Financial Support with interest	\$ 10,763.00
(c)	Losses of Valuable Services for the Wilcox Family	
(i)	Past Loss of Valuable Services with interest	\$ 22,908.00
(ii)	Loss of Future Valuable Services with interest	\$ 45,147.00
(d)	Losses of Valuable Services for Tina Wilcox	
(i)	Past Loss of Valuable Services with interest	\$ 40,081.00
(ii)	Loss of Future Valuable Services with interest	\$ 75,631.00
(e)	Loss of care, guidance and companionship	
(i)	Patsy Ann Wilcox	\$ 75,000.00
(ii)	Tina Marie Wilcox	\$ 75,000.00
(iii)	Tammy-Lynn Wilcox-Doiron	\$ 25,000.00
(iv)	Thomas Wilcox	\$ 25,000.00
(v)	David Leslie Wilcox	\$ 15,000.00
(vi)	Mary Eileen Wilcox	\$ 15,000.00
(f)	Funeral expenses	\$ 7,979.64

[107] I trust that the parties can and will resolve the issues of pre-judgment and post-judgment interest, as well as costs of the proceedings, on a consensual basis. In the event they cannot agree, the Plaintiff is directed to serve and file, within 10 days, written representations not exceeding five pages in length, a draft bill of costs, and copies of any written offers to settle. The Defendants shall serve and file written representations in reply, not exceeding five pages in length, with 10 days of service of the Plaintiff's submissions.

“Roger R. Lafrenière”

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Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-753-05

**STYLE OF CAUSE:** PATSY ANN WILCOX v. THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP MISS MEGAN and GARY ROSS HANLEY

**PLACE OF HEARING:** Fredericton, New Brunswick

**DATE OF HEARING:** May 1, 2007

**REASONS FOR ORDER:** LAFRENIÈRE P.

**DATED:**

**APPEARANCES:**

James Crocco  
Peter Crocco

FOR THE PLAINTIFF

Marco Clouthier  
Remy Boudreau

FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

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FOR THE PLAINTIFF

FOR THE DEFENDANTS