Date: 20080418

Docket: T-753-05

Citation: 2008 FC 506

Ottawa, Ontario, April 18, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

PATSY ANN WILCOX

Plaintiff
(Respondent)

and

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

Defendants
(Applicants)

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] The applicants have filed this motion pursuant to Rule 163(1) of the *Federal Court Rules*, SOR/98-106 to appeal the findings of a report on reference (the report) issued by Prothonotary

Lafrenière in *Patsy Ann Wilcox* v. *"Miss Megan" et al.*, 2007 FC 1004 dated October 2, 2007. The report made several monetary awards in relation to the death of John Wilcox.

[2] The applicants request that this Court reduce the damages awarded in the report.

Background

[3] Patsy Ann Wilcox (respondent in the motion, plaintiff in the action) is the widow and executrix of the estate of John Wilcox (the deceased). On Saturday, May 8, 2004, the deceased was lawfully working on board the fishing vessel *Miss Megan* when it foundered, took on water and capsized or partially sank. The deceased drowned; he was 63 years old at the time of his death.

[4] On April 29, 2005, Patsy Ann Wilcox filed a statement of claim against Gary Ross Hanley, the owner of the *Miss Megan* (applicants in the motion, defendants in the action) alleging the wrongful death of her husband pursuant to the *Marine Liability Act*, 2001 c.6 (the Act). The plaintiff made claims for loss of financial support and loss of valuable services on behalf of herself and her disabled daughter, Tina Wilcox. The plaintiff also sought damages for loss of guidance, care and companionship on behalf of herself, the couple's three adult children, and the deceased's brother and sister.

[5] The defendants filed a statement of defence dated May 26, 2005 whereby they admitted liability for the death of the deceased, but disputed the entitlement to certain damages. By order

dated April 11, 2006, the plaintiffs were granted summary judgment with costs and the matter was referred for an assessment of the quantum of damages owed to the plaintiff. On October 2, 2007, Prothonotary Lafrenière rendered his report allocating and quantified the damage awards.

[6] On October 30, 2007, the applicants filed a notice of motion to appeal the report pursuant to Rule 163(1) of the *Federal Court Rules*, above. This is the appeal of Prothonotary Lafrenière's report in the decision *Patsy Ann Wilcox* v. *"Miss Megan" et al.*, above.

Prothonotary Lafrenière's Report

[7] Prothonotary Lafrenière's report addressed the following three issues: (1) the eligibility of the deceased's siblings to seek damages, (2) pecuniary losses suffered by the deceased's widow and disabled daughter, and (3) damages for care, guidance and companionship.

(1) Eligibility of the deceased's siblings to seek damages

[8] With regards to the question of eligibility, Prothonotary Lafrenière reviewed sections 6 and 4 of the Act which grant the opportunity to recover damages and limit eligibility to recover, respectively. A question arose at trial as to whether the deceased's siblings qualified under subsection 4(c) of the Act to claim damages. Prothonotary Lafrenière stated at paragraph 10 of his report that words contained in a statute are to be given their ordinary meaning and that other

principles of statutory interpretation "only come into play where the words sought to be defined are ambiguous (*R.* v. *McCraw*, [1991] 3 S.C.R. 72)." Prothonotary Lafrenière found at paragraph 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 personnne", that is, any other individual who does not fit within the class of family members listed.

[9] Consequently, the deceased's siblings were entitled to claim damages as dependents pursuant to the Act.

(2) Pecuniary losses suffered by the deceased's widow and disabled daughter

[10] With regards to the recovery of pecuniary damages claimed by the deceased's widow and disabled daughter, Prothonotary Lafrenière began by assessing the evidence regarding the life expectancy of the deceased and his disabled daughter. Prothonotary Lafrenière reviewed the expert witness testimony presented by both sides, and was convinced by the evidence presented by the plaintiff's experts. With regards to the deceased's life expectancy, Prothonotary Lafrenière stated at paragraph 65 that all the plaintiff's experts consistently concluded that 75 was an appropriate life expectancy. Prothonotary Lafrenière found the defendant's expert testimony of Dr. Armstrong, problematic in part because it was from an insurance perspective and therefore not an impartial assessment of life expectancy. As a result, Dr. Armstrong's reports regarding life expectancy were given no weight. In conclusion, Prothonotary Lafrenière was satisfied that the deceased would have lived until the age of 75. With regards to the life expectancy of Tina Wilcox, Prothonotary Lafrenière, in part for the same reasons as above, gave Dr. Armstrong's testimony no weight.

Prothonotary Lafrenière gave significant weight to Dr. Craig and Ms. Gmeiner's testimonies. It was concluded that Tina Wilcox's life expectancy would far surpass the age at which her father had died, at the very least, 14 years from the date of the accident.

[11] With regards to the work expectations of the deceased, Prothonotary Lafrenière stated at paragraph 64:

> […] 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. [. . .]

[12] With regards to the actual calculation of the financial loss, Prothonotary Lafrenière found that the amount projected by the plaintiff's actuary, Ms. Gmeiner, should not be reduced on the basis that the deceased's widow was expected to mitigate her loss upon the death of her husband. Prothonotary Lafrenière rejected this argument put forward by the defendants and explained why the jurisprudence cited by the defendants did not support their position.

[13] Prothonotary Lafrenière did however accept that a reduction was to be made for the personal expenses of the deceased. After having discussed two approaches, Prothonotary Lafrenière found the Cross Dependency Method to be the most appropriate given the circumstances of the case.

[14] With regards to the loss of valuable services provided by the deceased, Prothonotary Lafrenière accepted Ms. Gmeiner's evidence. Ms. Gmeiner's report projected that based on the

figures of a Statistic Canada report, the deceased likely spent 2.1 hours a day on household tasks. Prothonotary Lafrenière was of the opinion that this approach was “a conservative one and eminently reasonable in the circumstances, given the evidence presented to the Court.” Ms. Gmeiner’s report then used Statistic Canada’s valuation of the replacement cost of household work in New Brunswick to quantify the hours of household work lost.

[15] With regards to the loss of valuable services provided by the deceased to his disabled daughter, the Prothonotary also accepted Ms. Gmeiner’s evaluation which assumed that the deceased spent on average 20 hours per week assisting his disabled daughter, Tina Wilcox. Prothonotary Lafrenière found this amount to be reasonable and noted that without the assistance of professionals provided by the province, the number would have been much higher.

[16] The Prothonotary made the follow awards regarding loss of financial support:

- Patsy Ann Wilcox:
    - Past loss of support with interest $51,950
    - Loss of future financial support with interest $116,454
- Tina Wilcox
    - Past loss of support with interest $3,480
    - Loss of future financial support with interest $10,763

[17] The Prothonotary made the follow awards regarding loss of valuable services:

- Wilcox Family

  - Past loss of valuable services with interest $22,908

  - Loss of future valuable services with interest $45,147

- Tina Wilcox

  - Past loss of valuable services with interest $40,081

  - Loss of future valuable services with interest $75,631

(3) *Damages for care, guidance and companionship*

[18] With regards to the damages claimed for loss of care, guidance and companionship, Prothonotary Lafrenière noted that paragraph 6(3)(a) of the Act provides for the recovery of these damages, but the Act fails to provide guidance on quantifying the amounts. Prothonotary Lafrenière discussed two approaches taken in various jurisdictions, but in the end found that the legislative provisions in the Province of Ontario bore the closest resemblance to section 6 of the Act in both form and effect. In *Patsy Ann Wilcox*, above Prothonotary Lafrenière discussed the Supreme Court's decision in *Augustus* v. *Gosset*, [1996] 3 S.C.R. 268, stating at paragraph 90:

> […] 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. [. . .]

[19] Prothonotary Lafrenière then reviewed cases comparable to the present one including *Stephen* v. *Stawecki* [2006], 213 O.A.C. 199, *Hechavarria* v. *Reale* (2000), 51 O.R. (3d) 364 (OSCJ), and *Fish* v. *Shainhouse*, [2005] O.J. 4575 (OSCJ). Taking into consideration the factors outlined by the Supreme Court of Canada in *Augustus*, above Prothonotary Lafrenière assessed each of the relationships between the deceased and the individuals claiming damages for loss of care, guidance and companionship and made the following awards:

- Patsy Ann Wilcox - $75,000
- Tina Marie Wilcox - $75,000
- Tammy-Lynn Wilcox-Doiron - $25,000
- Thomas Wilcox - $25,000
- David Leslie Wilcox - $15,000
- Mary Eileen Wilcox - $15,000

[20] And finally, Prothonotary Lafrenière awarded the plaintiff $7,979.64 for the recovery of funeral expenses.

Issues

[21] The applicants submitted the following issues for consideration:

1. Are John Wilcox's siblings "dependants" pursuant to subsection 4(c) of the *Marine Liability* Act, above?

2. Did Prothonotary Lafrenière err in law in his award of damages for loss of care, guidance and companionship by failing to assess conventional amounts for these damages?

3. Did Prothonotary Lafrenière err in law and substantially misapprehend the evidence as to the determination of the life expectancy of Tina Marie Wilcox and John Wilcox?

4. Did Prothonotary Lafrenière err in law and substantially misapprehend the evidence as to the assessment of the loss of financial support and loss of valuable services for Patsy Ann Wilcox and for Tina Marie Wilcox?

Parties' Submissions

[22] I have summarized the parties' submissions under the following headings:

1. *Definition of "dependents"*
2. *Damages for care, guidance and companionship*
3. *Life expectancy*
4. *Loss of financial support and valuable services*

Applicants' Submissions

1. *Definition of "dependents"*

[23] The applicants submitted that the deceased's brother and sister do not fall within the definition of "dependants" under subsection 4(c) of the Act as they were not "individual[s] who

stood in the place of a parent" to the deceased. It was submitted that an ambiguity exists between the English and French versions of the Act as the English version of subsection 4(c) reads "or an individual" while the French version reads "ou toute autre personne". In making this argument, the applicants relied on *Medovarski* v. *Canada (Minister of Citizenship and Immigration)* (2005), 258 D.L.R. (4th) 193 (S.C.C.) and submitted that the interpretation of bilingual statutes is a two-part process. One must first determine if there is discordance and a common meaning between the two versions and if so, the common meaning favours the more restricted or limited meaning (*Medovarski*, above). The second step is to determine if the common meaning is consistent with Parliament's intent (*Medovarski*, above). The applicants submitted that the French version of subsection 4(c) of the Act is more restrictive and thus, best reflects the common intention of the legislator found in both versions.

[24] The applicants further submitted that one must also consider the presumption against tautology. It was submitted that the wording used in section 4 of the Act can be compared with the *Canada Shipping Act*, R.S.C. 1985, c. S-9 (since repealed), and Manitoba's *Fatal Accidents Act*, C.C.S.M. c. F50, which both provide definitions that include a list of specific persons followed by the words "and a person who stood in *loco parentis* to a deceased person." The applicants submitted that the Court must give meaning to the words "toute autre" as it has the effect of qualifying the persons listed in subsection 4(c) to only those "individual[s] who stood in the place of a parent" to the deceased.

2. Damages for care, guidance and companionship

[25] The applicants submitted that the awards made for loss of care, guidance and companionship under paragraph 6(3)(a) of the Act should have been modest, conventional awards. It was submitted that the Court has more latitude when dealing with the exercise of a prothonotary's discretion in setting awards for loss of care, guidance and companionship. The Court should step in if the findings are "clearly wrong, i.e., it is based upon a wrong principle or a misapprehension of the facts, or [if it] raises questions vital to the final issue of the case" (*Reading & Bates Construction Co.* v. *Baker Energy Resources Corp.* (1994), 58 C.P.R. (3d) 359 at 6 (F.C.A.)). In cases where the prothonotary's discretion is reviewable, a judge's discretion is *de novo* (*Reading & Bates Construction Co.*, above at 6).

[26] The applicants submitted that conventional awards do not preclude the Court from weighing the evidence in each case, but yet ensure reasonability and consistency between cases. It was submitted that the principles of certainty, predictability and objectivity should not be overlooked (*Nightingale* v. *Mazerall*, [1991] N.B.J. No. 1127 at 4 and 5 (C.A.)). The applicants submitted that New Brunswick case law has adopted an approach that balances the needs of the particular case and elements of predictability and consistency. Other provinces have also adopted a similar approach (*Lawrence* v. *Good* (1985), 18 D.L.R. (4th) 734 (Man. C.A.), *Braun Estate* v. *Vaughan*, [2000] 3 W.W.R. 465 (Man. C.A.), *Augustus* v. *Gosset*, above).

[27] The applicants submitted that in the present case, the awards for care, guidance and companionship should be substituted by this Court. Based on the alleged comparable cases of *Simpson Estate* v. *Cox*, [2006] N.S.J. No. 133, *Lynch Estate* v. *Anderson* (1999), 180 Nfld & P.E.I.R. 225 (Nfld T.D.), and *McDonell Estate* v. *Royal Arch Masonic Homes Society*, [1997] B.C.J. No. 2079 (S.C.), the applicants submitted that an appropriate award in the present case would be $15,000 for Patsy Ann Wilcox (wife), and $15,000 for Tina Wilcox (daughter).

3. Life expectancy

[28] The applicants submitted that Prothonotary Lafrenière made a reviewable error in his assessment of life expectancy for both the deceased and Tina Wilcox. It was submitted that Prothonotary Lafrenière erred in law in deciding to give no weight to the expert opinion of Dr. Armstrong on the basis that the evidence was given from an insurance perspective. The applicants submitted that life expectancy is the same whether it is assessed for an insurance purpose or for any other purpose. In fact, it was submitted that Dr. Armstrong's opinion on life expectancy was accepted in *Rupert* v. *Toth*, [2006] O.J. No. 882 (Ont. S.C.) at paragraph 174). As the credibility of the witness was not at issue, the principal of non-intervention does not apply (*Toneguzzo-Norvell (Guardian ad litem of)* v. *Burnaby Hospital*, [1994] 1 S.C.R. 114 at paragraph 15).

[29] The applicants submitted that Prothonotary Lafrenière's conclusion at paragraph 65 that all of the respondent's experts concluded that the deceased would likely have lived until age 75 is not supported by the evidence. It was submitted that only Dr. Melvin and Dr. Armstrong provided

opinion evidence on life expectancy and both were of the view that the deceased's life expectancy would be less than 75 years. The applicants submitted that based on the evidence, the deceased's life expectancy was 71 years old.

[30] The applicants submitted that Prothonotary Lafrenière also erred in finding that the deceased's daughter, Tina Wilcox, has a life expectancy greater than that of her father and at the very least, 14 years from the date of the accident. It was submitted that the only expert qualified to give evidence on life expectancy was Dr. Armstrong and Prothonotary Lafrenière erred in according his evidence no weight. It was also submitted that Prothonotary Lafrenière's reliance on Dr. Craig's medical opinion was a reviewable error as Dr. Craig was not qualified to give evidence on life expectancy and nothing in his evidence supports the conclusion that Tina would live for many years to come. The applicants submitted that Dr. Armstrong's assessment of Tina Wilcox life expectancy is supported by the evidence and should be adopted by the Court.

4. Loss of financial support and valuable services

[31] The applicants submitted that Prothonotary Lafrenière erred in concluding that the deceased would have worked until age 70, earning at least the same employment income as he had earned in the three years prior to his passing. It was submitted that the evidence showed that 65 is the normal age of retirement in New Brunswick and that the deceased's age, residency, education and experience all indicate that he would only work until the age of 65.

[32] The applicants also submitted that Prothonotary Lafrenière's award for loss of valuable services was not supported by the evidence. It was submitted that the evidence showed that the deceased's daughter attended school from 8:30 a.m. to 3:30 p.m., 5 days a week, 12 months a year and that in addition, Community Services provided her with 40 hours a week paid care. As such, the award for loss of valuable services was not supported by the evidence.

Respondent's Submissions

[33] The respondent submitted that on appeal of the decision of a Referee, this Court should not interfere with the findings of law or fact unless errors of law or findings of fact were made in a perverse or capricious manner or as the result of a palpable and overriding error. The exercise of the discretionary powers of a prothonotary, whether sitting as a prothonotary or referee is not to be disturbed unless clearly wrong (*Reading & Bates Construction Co.*, above), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 532). The respondent submitted that none of the Prothonotary's findings of fact or law meet this standard. Moreover, all of the findings of fact were supported by the evidence, which in many instances was undisputed.

1. *Definition of "dependents"*

[34] With regards to Prothonotary Lafrenière's finding that the deceased's brother and sister were dependants pursuant to section 4 of the Act, the respondent submitted that the applicants' interpretation restricts the classes of persons who would be entitled to recover losses under the

legislation. The respondent submitted that this narrow interpretation means that under subsection 4(c) of the Act, only persons who stood in the place of a parent could recover; this is clearly contrary to Parliament's intent given the other defined relationships in the subsection.

2. Damages for care, guidance and companionship

[35] The respondent also submitted that in choosing a "case by case approach" over a "conventional award approach", Prothonotary Lafrenière used the correct method to determine the appropriate level of damages in light of the legislation. It was submitted that sections 4, 5, and 6 of the Act were Parliament's reaction to the Supreme Court of Canada's decision in *Ordon Estate* v. *Grail*, [1998] 3 S.C.R. 437. In making this argument, the respondent relied on a working paper by the Law Commission of Canada entitled *"Compensation for Relational Harm (2001)"* which provided that in the aftermath of *Ordon*, above new legislation expanded the definition of beneficiaries, diversified the types of compensable losses, and permitted claims for relational losses in situations of wrongful injury as well as wrongful death.

[36] It was submitted that to date there have been no reported decisions of the Federal Court in assessing the award of damages for loss of care, guidance and companionship; however, in other jurisdictions two approaches have prevailed. In the "convention awards approach", the Court assesses the damages and provides for an amount to be paid to the survivors without an in depth analysis and assessment of the relative relationship between the parties. It was submitted that such an approach has been legislated in Alberta and Manitoba, and has been adopted by the courts in

British Columbia and Nova Scotia. The respondent submitted that the "case by case approach", which involves an in depth analysis and assessment of the relative relationship between the parties, is in force in paragraph 61(2)(e) of Ontario's *Family Law Act*, R.S.O. 1990, c. F3 and bears the closest resemblance to the provisions that this Court must adjudicate. The respondent provided a number of examples where the "case by case approach" was applied in Ontario including *To* v. *Toronto Board of Education*, [2001] O.J. 3490 (OCA), *Stephen* v. *Stawecki*, *above*, *Hechavarria* v. *Reale*, above, and *Fish* v. *Shainhouse*, above. It was also submitted that in *Augustus*, above the Supreme Court of Canada clearly signalled its acceptance of the Ontario courts' approach, therefore rejecting a conventional award approach in jurisdictions where there does not exist an amount stipulated by statute. The respondent noted that in *Augustus*, above the Supreme Court of Canada gave general guidance about evidence including the factors to be considered when assessing such damages. The respondent submitted that in adopting the "case by case approach", Prothonotary Lafrenière followed the guidance provided by the Supreme Court of Canada.

3. Life expectancy

[37] The respondent submitted that the applicants' argument with regards to Prothonotary Lafrenière's assessment of the life expectancy of both John and Tina Wilcox is baseless. The respondent submitted that the applicants are arguing that Dr. Armstrong's evidence should be preferred over the respondent's experts. The respondent submitted that Prothonotary Lafrenière was clear in stating that Dr. Armstrong's evidence was qualified only for the limited purpose of providing evidence as to mortality from an insurance perspective. It was submitted that given the

limited expertise and qualifications of Dr. Armstrong, and given the credibility and consistency of the respondent's experts, there is no basis upon which to disturb Prothonotary Lafrenière's findings on this matter.

4. Loss of financial support and valuable services

[38] And finally, with regards to Prothonotary Lafrenière's findings on loss of financial support and valuable services, the respondent submitted that these findings were consistent with the actuarial evidence of Ms. Gmeiner. These findings were for the most part not contested and were consistent with the evidence adduced at the hearing. There is no basis upon which to disturb the findings.

[39] The respondent requested that the motion be dismissed.

Analysis and Decision

[40] Before proceeding to analyze the issues raised by the applicants, I must first address the standard of review and powers of the Court on appeal under Rule 163 of the *Federal Court Rules*, above.

[41] The standard of review on appeal of a report on reference was discussed in *Reading & Bates Construction Co.*, above; leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 532. Essentially,

the Federal Court of Appeal at paragraphs 9 to 11 found that on appeal of a decision of a referee, the reviewing judge should only interfere with findings of law or fact where the referee committed an error of law or fact in a perverse or capricious manner or as the result of a palpable and overriding error. The Federal Court of Appeal also stated that "when the exercise of [the discretion of a Prothonotary] is reviewable, a judge ought to exercise his discretion *de novo*" (*Reading & Bates Construction Co.*, above at paragraph 10).

[42] As for the powers of the Court, Rule 163(3) of the *Federal Court Rules*, above provides that "the Court may confirm, vary or reverse the findings of the report and deliver judgment or refer it back to the referee, or to another referee, for further inquiry and report."

[43] **Issue 1**

Are John Wilcox's siblings "dependants" pursuant to subsection 4(c) of the *Marine Liability Act*, above?

The applicants submitted that Prothonotary Lafrenière erred in law in finding that the deceased's siblings were eligible under paragraph 4(c) of the Act to recover damages. The respondent disagrees.

[44] The applicants submitted that when the English and French versions are read together an ambiguity arises. Specifically, the applicants submitted that the French words "toute autre personne" mean "any other person", whereas the English version reads simply "an individual". The effect of this ambiguity in the eyes of the applicants is that in the French version the family

members listed at the start of paragraph 4(c) are only eligible if they “tenait lieu de parent à cette denière” which means they must have “stood in the place of a parent”. The applicants submitted that according to the rules of bilingual statutory interpretation, the more restrictive version is to be preferred as it best reflects the common intention of the legislator found in both versions.

[45] While I agree with the principles of bilingual statutory interpretation as stated by the applicants, I simply do not accept that they apply in the present case. As the applicants stated themselves at page 14 of their written submissions, the rules of bilingual statutory interpretation are to be used “with conflicting French and English versions of legislation.” That is, an ambiguity or conflict between the two versions must first be found.

[46] I agree with Prothonotary Lafrenière that if the words of the statute are given their ordinary meaning there exists no conflict or ambiguity between the two versions. Both versions essentially create a group of individuals separate from the enumerated family members who are still eligible to claim damages so long as they “stood in the place of a parent.” In my opinion, the applicants’ interpretation of the French version is one that misconstrues the ordinary meaning of the words. Moreover, I agree with the respondent that to accept the applicants’ interpretation would render the list of family members set out in paragraph 4(c) meaningless as Parliament could just as easily said anyone who stood in the place of a parent. For these reasons, I find that Prothonotary Lafrenière did not err in his interpretation of paragraph 4(c) of the Act and as such, I see no reason to interfere with the corresponding damage awards made to the deceased’s siblings.

[47] **Issue 2**

Did Prothonotary Lafrenière err in law in his award of damages for loss of care, guidance and companionship by failing to assess conventional amounts for these damages?

The applicants submitted that Prothonotary Lafrenière erred in not adopting a conventional approach in assessing damages for loss of care, guidance and companionship and in doing so failed to adhere to the principles of moderation and predictability.

[48] As Prothonotary Lafrenière noted, the Act provides no guidance as to the amount of damages that may be awarded under this section unlike similar provincial legislation that explicitly set out a prescribed amount. Prothonotary Lafrenière found that the legislative provisions of the Province of Ontario bore the closest resemblance to section 6 of the Act both in form and effect. As such, Prothonotary Lafrenière engaged in what is called a case-by-case approach and assessed each individual relationship between the deceased and the claimants in quantifying damages for the loss of care, guidance and companionship. As the Ontario legislative scheme was found to be the most comparable with the one at issue, Prothonotary Lafrenière reviewed a number of cases from that province with similar facts. Prothonotary Lafrenière then assessed the individual relationship in the present case and rendered his awards.

[49] In my opinion, Prothonotary Lafrenière committed no reviewable errors in his assessment of damages for loss of care, guidance and companionship. The approach taken by Prothonotary Lafrenière was one open to him. I agree that the Ontario legislative scheme closely resembles the one at issue in this case. As a result, it was reasonable for Prothonotary Lafrenière to canvass and

rely on cases from that province with similar facts. In doing this, Prothonotary Lafrenière did indeed adhere to the principles of predictability and consistency to the extent possible. I also feel it necessary to note that Prothonotary Lafrenière had the advantage of assessing the oral testimony of the witnesses and credibility. As such, his findings regarding the relationships between the deceased and his loved ones are owed a great deal of deference. I see no reason for this Court to interfere with the awards made for loss of care, guidance and companionship.

[50] **Issue 3**

Did Prothonotary Lafrenière err in law and substantially misapprehend the evidence as to the determination of the life expectancy of Tina Marie Wilcox and John Wilcox?

The applicants submitted that Prothonotary Lafrenière committed a reviewable error in failing to award any weight to Dr. Armstrong's medical reports on the life expectancy of the deceased and Tina Wilcox. It was submitted that the method employed by Dr. Armstrong in reaching his opinion on life expectancy was recently accepted by the Ontario Superior Court of Justice in *Rupert*, above. As such, the applicants argued that Prothonotary Lafrenière should not have ignored the report merely because it was from the perspective of insurable risk.

[51] It is clear in Prothonotary Lafrenière's reasons, that his decision to give Dr. Armstrong's reports no weight was not solely based on the fact that they were from an insurance perspective. With regards to the deceased's life expectancy, Prothonotary Lafrenière also took issue with the fact that some of the notations made by the deceased's family doctor, such as shortness of breath and chest pain, were given "undue weight" by Dr. Armstrong in his reports. With regards to Tina

Wilcox, Prothonotary Lafrenière took issue with the fact that Dr. Armstrong's evidence was "unreliable" and his approach was "unbalanced". Prothonotary Lafrenière appears to have been unpersuaded by Dr. Armstrong's evidence in part because it failed to take into consideration Tina Wilcox's strength and drive and past defiance of "numerous predictions by professionals of her imminent death for almost four decades" (*Patsy Ann Wilcox*, above at paragraph 70).

[52] In my opinion, *Rupert*, above is distinguishable from the present case. While the Ontario Superior Court of Justice in *Rupert*, above accepted medical opinion's on life expectancy from an insurance perspective, issues of undue weight, and unbalanced evidence did not arise in that case as they did in the present one. Given that the insurance perspective of Dr. Armstrong's reports was not the sole reason for which Prothonotary Lafrenière awarded the reports no weight, I see no reason to interfere with his weighing of the evidence. Fact finders are owed a high degree of deference as they have the opportunity to witness oral testimony first hand. The Prothonotary did not err in this respect.

[53] **Issue 4**

Did Prothonotary Lafrenière err in law and substantially misapprehend the evidence as to the assessment of the loss of financial support and loss of valuable services for Patsy Ann Wilcox and for Tina Marie Wilcox?

The applicants submitted that Prothonotary Lafrenière made a palpable and overriding error when he concluded that the deceased would have worked until age 70, likely earning at least the

same employment income as he earned in the three years prior to his death. The applicants also submitted that the award for loss of valuable services was not supported by the evidence.

[54] The evidence before Prothonotary Lafrenière with regards to the deceased's future length of employment was contradictory. On one hand, the applicants submitted that the normal retirement age of a normal New Brunswick male is 65 years old. The applicants also presented evidence that this number should be reduced due to the deceased's poor health. On the other hand, the respondent presented evidence of the deceased's past work experience and habits demonstrating that he was "a motivated man who did not shy away from physical labour" (*Patsy Ann Wilcox*, above at paragraph 64). Moreover, retirement was also unlikely because of evidence that the deceased had no savings or pension plan. In my opinion, no error was made when Prothonotary Lafrenière found that the deceased would likely have worked to the age of 70. There was evidence before the decision-maker upon which this finding of fact could be made, and I see no reason to interfere with it.

[55] With regards to the likely income from future employment, the evidence before Prothonotary Lafrenière supported the finding that in years just prior to his death, the deceased maintained a somewhat steady income from year to year. The deceased's income tax information for 2001 to 2003 showed his total earnings as $23,865 in 2001, $25,538 in 2002 and $19,093 in 2003. As such, in my opinion, it was perfectly reasonable for Prothonotary Lafrenière, having already found that the deceased would likely have worked until the age of 70, to also find that he would likely have earned a wage comparable to the years just prior to his death.

[56] And finally, with regards Prothonotary Lafrenière's award for loss of valuable services, the applicants have failed entirely to convince me that any reviewable error was made in the initial assessment. The applicants are of the opinion that the award is unreasonable given the amount of time Tina Wilcox spends at her school, Vocational Plus and the 40 hours a week Community Services provides of paid care. I note that at paragraph 85 of his decision, Prothonotary Lafrenière clearly took this into consideration when he stated "Were it not for the assistance of professionals provided by the province, the number would have been double, or even triple." In my opinion, there is no reason to interfere with Prothonotary Lafrenière's decision as I would reach the same decision.

[57] The applicants' motion is therefore dismissed, with costs to the respondent in the motion.

JUDGMENT

[58] **IT IS ORDERED that** the applicants' motion is dismissed with costs to the respondent in the motion.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Marine Liability Act*, 2001 c.6:

4. 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:	4. 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 father or mother, or an individual who stood in the place of a parent.	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 de la personne blessée ou décédée, ou toute autre personne qui tenait lieu de parent à cette dernière.
5. This Part applies in respect of a claim that is made or a remedy that is sought under or by virtue of Canadian maritime law, as defined in the Federal Courts Act, or any other law of Canada in relation to any matter coming within the class of navigation and shipping.	5. La présente partie s'applique à toute mesure de redressement demandée et à toute réclamation présentée sous le régime du droit maritime canadien, au sens de la Loi sur les Cours fédérales, ou au titre de toute autre règle de droit canadien liée à la navigation et à la marine marchande.
6.(1) If a person is injured by the fault or neglect of another under circumstances that entitle the	6.(1) Lorsqu'une personne subit une blessure par suite de la faute ou de la négligence d'autrui

person to recover damages, the dependants of the injured person may maintain an action in a court of competent jurisdiction for their loss resulting from the injury against the person from whom the injured person is entitled to recover.

dans des circonstances lui donnant le droit de réclamer des dommages-intérêts, les personnes à sa charge peuvent saisir le tribunal compétent d'une telle réclamation.

(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.

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

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

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

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 blessures ou le décès;

(b) any amount to which a public authority may be subrogated in respect of payments consequent on the injury or death that are made to or for the benefit of the injured or deceased person or the dependant.

b) toute somme pour laquelle une autorité publique a été subrogée relativement aux paiements effectués à la personne blessée ou décédée ou à la personne à sa charge ou pour leur compte, par suite de la blessure ou du décès.

(4) In the assessment of damages, any amount paid or payable on the death of the deceased person or any future premiums payable under a contract of insurance shall not be taken into account.

(4) Il ne peut être tenu compte, dans le calcul des dommages-intérêts, d'aucune somme versée ou à verser au décès, ni d'aucune prime à venir dans le cadre d'un contrat d'assurance.

(5) The damages recoverable by a dependant are subject to any apportionment made under Part 2.

(5) Les dommages-intérêts recouvrables par une personne à charge sont assujettis au partage de la responsabilité conformément à la partie 2.

The *Federal Courts Rules*, SOR/98-106 :

163.(1) A party may appeal the findings of a report of a referee who is not a judge on motion to the court that ordered the reference.	163.(1) Une partie peut interjeter appel des conclusions du rapport de l'arbitre qui n'est pas un juge, par voie de requête à la cour qui a ordonné le renvoi.
(2) Notice of a motion under subsection (1) shall be served and filed within 30 days after filing of the report of a referee and at least 10 days before the day fixed for hearing of the motion.	(2) L'avis de la requête visée au paragraphe (1) est signifié et déposé dans les 30 jours suivant le dépôt du rapport de l'arbitre et au moins dix jours avant la date prévue pour l'audition de la requête.
(3) On an appeal under subsection (1), the Court may confirm, vary or reverse the findings of the report and deliver judgment or refer it back to the referee, or to another referee, for further inquiry and report.	(3) La Cour peut, dans le cadre de l'appel visé au paragraphe (1), confirmer, modifier ou infirmer les conclusions du rapport et rendre jugement ou renvoyer le rapport à l'arbitre ou à un autre arbitre pour une nouvelle enquête et un nouveau rapport.
164.(1) The report of a referee who is not a judge that is not appealed becomes final 30 days after it is filed.	164.(1) Le rapport de l'arbitre qui n'est pas un juge devient définitif à l'expiration du délai d'appel s'il n'est pas porté en appel.
(2) A report of a referee, once final, becomes a judgment of the Court.	(2) Le rapport de l'arbitre, lorsqu'il est définitif, est réputé être un jugement de la Cour.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-753-05
STYLE OF CAUSE:	PATSY ANN WILCOX - and - THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MISS MEGAN" and GARY ROSS HANLEY
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	January 10, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
DATED:	April 18, 2008

APPEARANCES:

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