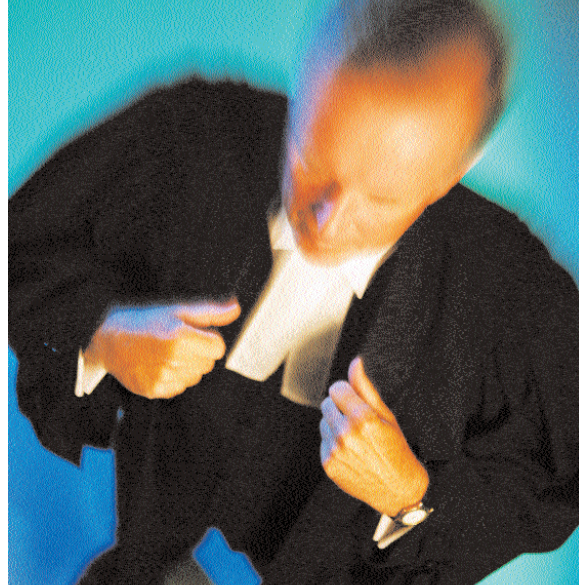


## FERRAIUOLO V. OLSON AMENDS THE ALBERTA FATAL ACCIDENTS ACT



INSURANCE LITIGATION LEGAL ALERT

OCTOBER, 2004

\$45,000.00 NOW TO EACH CHILD OF THE DECEASED:

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On October 7, 2004, the Alberta Court of Appeal handed down its decision in *Ferraiuolo v. Olson*, 2001 ABCA 281. Chief Justice Fraser, with Justices Picard and Paperny concurring, struck down both the age and marital status limitations in the statutory award for grief and loss of care, guidance and companionship provided to children when their parent is killed by a wrongdoer and held:

...When a person wrongfully kills someone, there can be no doubt that it is foreseeable that the immediate members of the victim's family – the spouse, children and parents – will suffer grief as a direct result of that wrongful death. ...it is not unreasonable to expect that the wrongdoers will be called on by a society that values life to compensate the immediate members of the victim's family, on a non-discriminatory basis, for the grief needlessly inflicted on them. That family includes all the victim's children, not just some of them.

The plaintiff's 84-year-old mother was struck and killed by a motor vehicle when she was walking across a street. At the time of his mother's death, the plaintiff was 57 years old and married. The plaintiff claimed damages for grief and loss of guidance, care and companionship under s. 8(2)(c) of the *Fatal Accidents Act*, R.S.A. 1980, c. F-5.

At the time, s. 8(2)(c) of the *FAA* provided an award of \$25,000 to each child of the deceased person who is "a minor" or "unmarried and 18 years of age or older and has not reached his 26th birthday and is not living with a cohabitant." The plaintiff argued that the section breached s. 15 of the *Charter of Rights and Freedoms*, which provides individuals with equal protection and equal benefit of the law without discrimination, and argued that the court should strike out both the age and marital status limitation. While the section was later amended to remove the age limitation, the marital status limitation remained. The trial judge determined that s. 8(2)(c) of the *FAA* did not discriminate, and accordingly, that there was no breach of s. 15 of the *Charter*.

Chief Justice Fraser allowed the appeal and held that the distinctions based on age and marital status did not treat married or older children in the excluded categories in a way that was respectful of their dignity as full members of society, and therefore, the age and marital status limitations breached s. 15 of the *Charter*. Further, Chief Justice Fraser held that s. 8(2)(c) could not be saved by s. 1 of the *Charter* which requires the limitations imposed to be reasonable and demonstrably justified in a free and democratic society. To remedy the breach, the court struck out the offending limitations.

Chief Justice Fraser was very critical of any argument of an "unacceptable" increase in insurance premiums. She found that the Attorney General of Alberta did not lead sufficient evidence of such an increase and went on to state the following:

Depriving married or older children of legitimate damages for the grief they suffer on wrongful death of a parent in order to avoid any increase in insurance premiums for others constitutes, by itself, a discriminatory purpose. Moreover, it is, in its own right, an affront to human dignity.

Section 8(2)(c) must now be read as:

*Damages for bereavement*

8 (2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of...

(c)\$45 000 to each child of the deceased person

These changes to the *FAA* appear to apply to all ongoing actions as the Court of Appeal did not order that the changes apply only to deaths on or after a specific date. All claims should be reviewed to determine whether or not this Court of Appeal decision has an effect on damages in the event of death caused by a wrongful act.

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The Fine Print:

*This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.*

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