Citation: Berger v Seven Oaks General Hospital, 2026 MBCA 69
Date: 20260731
Docket: AI25-30-10288

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Jennifer A. Pfuetzner
Mr. Justice David J. Kroft

B E T W E E N:

	F. J. Trippier *and* ***J. Dobrucki*** *for the Appellant*
HART BERGER	***K. L. Dixon*** *for the Respondents Seven Oaks General Hospital, Winnipeg Regional Health Authority and C. Brown*
(Plaintiff) Appellant	
- and -	
SEVEN OAKS GENERAL HOSPITAL, WINNIPEG REGIONAL HEALTH AUTHORITY, DOCTOR CARRIE LAFOURNAISE and CHARMAINE BROWN	***N. M. Watson*** *and* ***A. J. Meyers*** *for the Respondent Dr. Lafournaise*
(Defendants) Respondents	*Appeal heard:* ***April 15, 2026***
	Judgment delivered: ***July 31, 2026***

On appeal from *Berger v Seven Oaks General Hospital et al*, 2025 MBKB 64 [*KB decision*]

RIVOALEN CJM

Introduction

[1] This appeal raises a question of statutory interpretation as to whether a claim for punitive damages is available in an action brought under the provisions of *The Fatal Accidents Act*, CCSM c F50 [the *FAA*].

[2] The appellant filed a statement of claim in which he claimed that the respondents, through their negligence, were responsible for the wrongful death of his father (the father). The claim for wrongful death was brought pursuant to the *FAA*, and included claims for loss of companionship, funeral expenses and loss of support. It also included a claim for punitive damages of $2 million as against each of the respondents.

[3] The respondents moved under rule 21.01(1) of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*], seeking the determination of the question of law of whether a claim for punitive damages exists under the *FAA*. They also moved under rule 25.11(1)(d) of the *KB Rules* to have references to punitive damages struck from the statement of claim because they do not disclose a reasonable cause of action (the motions).

[4] A judge of the Court of King's Bench (the motion judge) found that the *FAA* does not permit a claim for punitive damages. He issued an order declaring that no claim for punitive damages exists at law in an action brought under the *FAA*. As a result, he ordered that the paragraphs in the statement of claim which referred to punitive damages be struck, without leave to amend (the order).

[5] The appellant appeals from the order.

[6] For the reasons that follow, I would dismiss the appeal with costs.

The Motion Judge's Reasons

[7] The background of these proceedings was succinctly described by the motion judge in his reasons (see *KB decision*).

[8] The appellant's position before the motion judge was that a trial was required in order to establish the factual foundation to answer the very question of whether the respondents' conduct warranted punitive damages. Answering the question of law, according to the appellant, would not shorten the trial or save costs as no less evidence would be called. For this reason, the appellant argued that the motion judge should not proceed with the determination of the question of law.

[9] With respect to the question of law, the appellant argued that the father's common law claim for damages for the wrongful acts of the respondents is incorporated into the *FAA*—that is, if the father had not died, he personally would have been entitled to claim punitive damages. The appellant asserted that, as his son, he has a right to advance such a claim.

[10] The motion judge set out the respondents' position as follows. At common law, no action for wrongful death exists for relatives of a deceased person. While such an action is now maintainable pursuant to the *FAA*, the claims of the beneficiaries identified in the *FAA* are limited to the damages explicitly provided in the *FAA* and do not include punitive damages.

[11] The motion judge exercised his discretion and found that the determination of the entitlement to claim punitive damages under the *FAA* was an appropriate question of law to answer under rule 21.01(1) of the *KB Rules*.

[12] Having made this determination, the motion judge proceeded with a statutory interpretation analysis of sections 2(1) and 3(2) of the *FAA* to answer the question of whether a claim for punitive damages exists at law in an action brought under the *FAA*.

[13] The motion judge identified the leading Supreme Court of Canada decision for the modern approach to statutory interpretation, *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) [*Rizzo*]. In accordance with *Rizzo*, he interpreted the *FAA* by reading the relevant provisions "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object [and purpose] of the Act, and the intention of Parliament" (*KB decision* at para 10, quoting *Rizzo* at para 21).

[14] After reviewing the relevant case law and comparing the English and French versions of the text of section 3(2) of the *FAA*, the motion judge determined that the phrase "pecuniary loss", as used in that section, refers to the actual monetary losses resulting from the death. He held that "[t]his interpretation is consistent with the scheme, object, and purpose of the *FAA*" (*KB decision* at para 23). He further found that "[t]he conduct of a defendant has no relation to the pecuniary losses experienced by those entitled to benefit under the *FAA*" (*ibid*).

[15] The motion judge then considered the alternative argument raised by the appellant "that the specific exclusion of exemplary damages under

s. 53(1) of *The Trustee Act* with no similar express exclusion in the *FAA* indicates legislative intent to allow recovery of punitive damages under the *FAA*" (*KB decision* at para 29). The motion judge rejected this argument, indicating that this was not a suitable comparison. He noted that section 53 of *The Trustee Act*, CCSM c T160 [the *Trustee Act*] does not limit damages to pecuniary loss. He concluded that the clear wording of section 3(2) of the *FAA* limits damages to pecuniary loss, with the only non-pecuniary damages allowed under the *FAA* being those for loss of guidance, care and companionship under section 3.1(2).

Issues and the Standard of Review

[16] The appellant raises three issues.

[17] First, he argues that the motion judge erred when he allowed the motions to proceed.

[18] Second, the appellant argues that the motion judge erred when he found that section 2(1) of the *FAA* does not allow a plaintiff to claim damages that would have been available to the deceased had they not died. I will use the term plaintiff in these reasons when referring to the people who can sue the tortfeasor for damages.

[19] Third, the appellant argues that the motion judge erred when he found that section 3(2) of the *FAA* restricts damages to only pecuniary losses, such that no claim for punitive damages exists under the *FAA*.

[20] The first issue examines the motion judge's discretion in allowing the motions to proceed. Accordingly, the decision is to be reviewed on a

highly deferential standard and should not be interfered with unless the judge misdirected himself or unless his decision is so clearly wrong as to amount to an injustice. This is particularly so where the decision has been made by a case management judge (such as the motion judge here) in which case the court should interfere only in the clearest case of a misuse of judicial discretion (see *Hapko v Boel*, 2024 MBCA 110 at paras 32-34).

[21] The second and third issues raise questions of statutory interpretation. These are questions of law which give rise to the standard of review of correctness. No deference is owed to the motion judge on this standard (see *Housen v Nikolaisen*, 2002 SCC 33).

<u>Analysis</u>

The Motion Judge Did Not Err in Allowing the Motions to Proceed

[22] On the first issue, the motion judge considered all of the relevant factors with respect to the exercise of his discretion in allowing the motions to proceed. He did not misuse his judicial discretion and his decision did not result in an injustice. Accordingly, I would dismiss this ground of appeal.

[23] I will now focus on the questions of statutory interpretation.

The Relevant Provisions of the FAA

[24] The relevant provisions of the *FAA* read as follows:

Liability for damages caused by death **2(1)** Where the death of a person is caused by wrongful act, neglect, or default, and the	**Responsabilité quant aux dommages-intérêts** **2(1)** Lorsque le décès d'une personne est causé par une faute, une négligence ou une

act, neglect, or default is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, is liable for damages, notwithstanding the death of the deceased, even if the death was caused in circumstances amounting in law to culpable homicide.

omission à l'égard de laquelle la victime, eût-elle survécu, aurait eu un recours et aurait pu obtenir des dommages-intérêts, la personne qui aurait été responsable dans ces circonstances peut être poursuivie en dommages-intérêts malgré le décès de la victime, même si ce dernier a été causé dans des circonstances qui permettent de qualifier l'acte préjudiciable d'homicide coupable.

When cause of action arises
2(2) Subject to subsection (5), the liability for damages under this section arises upon the death of the deceased.

Naissance du droit d'action
2(2) Sous réserve du paragraphe (5), la responsabilité quant aux dommages-intérêts prévue au présent article prend naissance au décès de la victime.

. . .

Person entitled to benefit
3(1) Every action under this Act shall be for the benefit of the spouse, common-law partner, support recipient, parent, child, brother, and sister, or any of them, of the deceased; and, except as hereinafter provided, shall be brought by, and in the name of, the executor or administrator.

. . .

Bénéficiaire de l'action
3(1) Sous réserve de ce qui suit, l'exécuteur testamentaire ou l'administrateur de la succession intente en son nom l'action prévue par la présente loi au profit du conjoint, du conjoint de fait, du bénéficiaire des aliments, d'un parent, d'un enfant, d'un frère ou d'une sœur ou au profit de l'ensemble de ceux-ci.

Amount of damages
3(2) Subject to subsection (3), in every such action such damages as are proportional to the pecuniary loss resulting from the death shall be awarded to the persons respectively for

Montant des dommages-intérêts
3(2) Sous réserve du paragraphe (3), dans toute poursuite intentée en vertu de la présente loi, les dommages-intérêts sont accordés

whose benefit the action is brought.

proportionnellement à la perte financière résultant du décès à l'égard de chacune des personnes au profit desquelles l'action est intentée.

Funeral expenses
3(3) Where an action has been brought under this Act there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased if those expenses were incurred by any of the persons by whom or for whose benefit the action is brought; but nothing is recoverable, under this subsection, for funeral expenses if the amount of those expenses has been recovered, or is claimed, in an action brought under *The Trustee Act*.

Frais funéraires
3(3) Dans une action intentée en vertu de la présente loi, les dommages-intérêts accordés peuvent inclure un montant suffisant pour couvrir les dépenses raisonnables entraînées par les funérailles et la disposition du corps de la victime si ces dépenses ont été supportées par une des personnes par qui ou au profit de laquelle l'action est intentée; cependant, aucune somme n'est recouvrable, en vertu du présent article, pour les frais funéraires si le montant a été recouvré, ou s'il a été réclamé, dans une poursuite intentée en vertu de *la Loi sur les fiduciaires*.

. . .

Damages for loss of companionship
3.1(2) Subject to section 4, the court shall award damages for the loss of guidance, care and companionship of the deceased in the following amounts:

(a) $30,000. to each of the spouse of the deceased, the common-law partner of the deceased and the support recipient of the deceased and to each parent and child of the deceased;

. . .

Dommages-intérêts
3.1(2) Sous réserve de l'article 4, le tribunal accorde les dommages-intérêts indiqués ci-après pour la perte de soutien et d'affection de la victime :

a) 30 000 $ au conjoint, au conjoint de fait et au bénéficiaire des aliments de la victime ainsi qu'à chacun des parents et des enfants de celle-ci;

(b) $10,000. to each family member of the deceased.	b) 10 000 $ à chacun des membres de la famille de la victime.

[25] As stated above, the last two issues raise questions of statutory interpretation as to whether a claim for punitive damages is available under the *FAA*.

Principles of Statutory Interpretation

[26] To answer the question of whether sections 2(1) and 3(2) allow for punitive damages, I must interpret the legislation using the accepted method. As noted earlier, the modern approach to statutory interpretation is for the court to consider the words used in the legislation "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26 [*Bell*]).

[27] The modern approach requires a court to interpret statutory language "according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10 [*Canada Trustco*]). Even so, the "court need not address text, context, and purpose separately or in a formulaic way, since these elements are often closely related or interdependent" (*Piekut v Canada (National Revenue)*, 2025 SCC 13 at para 43 [*Piekut*]; see also *Bell* at para 31).

[28] If genuine ambiguity remains after conducting a textual, contextual and purposive analysis, in the sense that there are two equally plausible

readings of the statute in accordance with the intention of the legislation, a court may resort to secondary principles of interpretation. A statutory provision is not "ambiguous" in the required sense simply because different courts or authors have reached different conclusions as to its proper interpretation (*Bell* at para 30).

[29] In sum, as Professor Sullivan explains (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at s 2.01[4]), the prime directive in statutory interpretation is that

> after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.
>
> [footnote omitted]

[30] With these principles in mind, I now consider the interpretation of sections 2(1) and 3(1)-3(2) of the *FAA*.

Section 2(1) Does Not Allow a Plaintiff to Claim Damages That Would Have Been Available to the Deceased Had They Not Died

[31] Turning to section 2(1), the plain reading tells us *who can be sued* under the *FAA*. Where the death of a person is caused by the wrongful act, neglect or default of another, this section makes it clear that the person who is liable for the wrongful death (tortfeasor) can be sued for damages. Tortfeasor is defined in the *FAA* (see s 1). Damages in this subsection is not defined.

[32] Next, section 2(2) makes clear *when a cause of action arises*. It arises only upon the death of the person who died because of the wrongful act, neglect or default of the tortfeasor. Deceased is defined in the *FAA* (see s 1).

[33] It is obvious that a person who is injured through the wrongful act, neglect or default of another person, but who remains alive, cannot sue under the *FAA*. They may well have recourse to a cause of action under tort law or another statute, but nothing is available to them under the *FAA*.

[34] Finally, section 3(1) specifies *who can sue* for damages: the spouse, common-law partner, support recipient, parent, child, brother and sister of the deceased. These individuals are unambiguously defined in the definition section of the *FAA* (see s 1). Section 3(1) also provides that the action will generally be brought by, and in the name of, the executor or administrator of the deceased person for the benefit of the listed family members.

[35] During his oral submissions at the hearing of the appeal and in his factum, the appellant submitted that the *FAA* allows a plaintiff to continue an action that would normally be brought under a common law negligence or tort claim and that section 2(1) of the *FAA* allows a plaintiff, such as the appellant, to "stand in the shoes" of the person who suffered the wrongful death.

[36] In his factum, the appellant stated:

> [Section] 2(1), when read in its ordinary and grammatical sense, harmoniously with the act, and the intention of the legislature, means that the plaintiff bringing a claim under the *FAA* has the right to continue an action that would normally be brought under a common law negligence or tort claim. In other words, the [appellant] says that the above section allows a plaintiff bringing a claim under the *FAA* to stand in the shoes of the person who suffered the wrongful death.

[37] As will become clear, the text, context and purpose of section 2(1) does not allow a plaintiff to claim damages available to the deceased had they not died. The deceased never had a cause of action arising under the *FAA*.

[38] The appellant's submission that section 2(1) allows a plaintiff bringing a claim under the *FAA* "to stand in the shoes of the person who suffered the wrongful death", fails to recognize the historical and foundational principles underlying actions for wrongful death and fatal accidents legislation.

[39] First, and as a fundamental common law principle, the right to bring an action in tort does not survive the death of the victim. The point is made in countless decisions, including *Ryan v Moore*, 2005 SCC 38, where Bastarache J, for the Court, succinctly observed as follows: "As stated by the Court of Appeal, it is well known that at common law a personal action in tort is extinguished on the death of the victim or the wrongdoer: *actio personalis moritur cum persona* (see G. Mew, *The Law of Limitations* (2nd ed. 2004)" (at para 18).

[40] As the deceased lost their cause of action upon death, the issue then became whether survivors of the deceased could sue. Once again, the common law principle was harsh and rejected the view that a survivor could sue for their own loss because of the deceased's wrongful death.

<u>Historical Context Within Which Fatal Accident Claims Evolved</u>

[41] A brief review of the historical context of wrongful death claims is informative.

[42] In England, as the common law provided absolutely no remedy for wrongful death, *An Act for compensating the Families of Persons killed by Accidents* (UK), 1846, 9 & 10 Vict, c 93, s 1 [*Lord Campbell's Act*] was enacted. The preamble to *Lord Campbell's Act explicitly* indicates that those who drafted it accepted the law as settled that no cause of action existed for wrongful death at common law. It read:

> WHEREAS no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

[43] A year later, *An Act for compensating the Families of Persons killed by Accident, and for other purposes therein mentioned*, (1847) 10 & 11 Vict, c 6 was introduced in Canada [the *1847 Act*]. The preamble and first paragraph read slightly differently:

> WHEREAS a person, who by his wrongful act, neglect or default may have caused the death of another person, *should be answerable in damages for the injury so caused by him*: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and

> assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, intituled, *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada*, and it is hereby enacted by the authority of the same, That whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as an amount in Law to Felony.
>
> [emphasis added]

[44] This "new" cause of action was described by Cromwell JA (as he then was) in *MacLean v MacDonald*, 2002 NSCA 30 [*MacLean*]: "Fatal injuries legislation created a new, but limited statutory cause of action for wrongful death in favour of those dependant on the deceased" (at para 131). More recently, many of the historic decisions were reviewed by Leurer JA (as he then was) in *Lorencz v Talukdar*, 2020 SKCA 28 at para 81. I agree with his comments (*ibid* at para 82):

> [A]lthough "in point of form" the action is in the name of the estate, "in substance" it is given to the surviving family of the deceased. <u>Despite this formality, it is *not* the action of the deceased; it is a new action of the survivors. This point is made repeatedly in the case law</u>.
>
> [emphasis in original; underlining added]

[45] Following the aforementioned authorities, one can conclude that, in all cases, the action is for the benefit of the enumerated surviving members and their injury, not the deceased's, and the injury of the surviving members

defines the damages (see also *Jaman Estate v Hussain*, 1995 CanLII 11046 at para 7 (MBCA)). Accordingly, I cannot accept the appellant's statement in his factum "that s. 2(1) of the *FAA* allows the [p]laintiff to bring the same action that [the father] would have brought, had he not died." That proposition is not in keeping with the history of fatal accidents legislation creating a new claim, the purpose of that legislation, the text of the *FAA* and the case law interpreting the legislation.

[46] Further, as I have mentioned, at common law an individual's personal claim for damages for injuries died with the individual. Survival of actions statutes were enacted to ameliorate the common law (see *MacLean* at paras 17, 31). In Manitoba, the relevant provision is section 53(1) of the *Trustee Act*, which states:

Actions by and against legal representatives **53(1)** All actions and causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying continue in or against his personal representative as if the representative were the deceased in life; *but in any action brought or continued under authority of this section by the personal representative of a deceased person for a tort causing the death of the person, the damages recoverable for the benefit of his estate do not include any exemplary damages or damages for loss of*	**Actions par et contre des représentants personnels** **53(1)** Toutes les actions et les causes d'action pour dommages causés soit à la personne ou aux biens, sauf pour diffamation, poursuite abusive, séquestration arbitraire ou arrestation illégale à l'instance d'un mourant ou contre celui-ci sont prorogées du chef de son représentant personnel ou contre celui-ci comme si le représentant personnel était le défunt vivant. *Toutefois, dans toute action intentée ou continuée en vertu du présent article par le représentant personnel du défunt fondée sur un délit civil ayant causé le décès, les dommages-*

expectation of life and shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.	*intérêts recouvrables par la succession ne comprennent pas de dommages-intérêts exemplaires ou des dommages-intérêts pour perte d'espérance de vie* et sont calculés sans qu'il soit tenu compte du gain ou de la perte causés par la suite du décès à la succession, à l'exception d'une somme d'argent qui peut être accordée pour les dépenses funéraires.

[emphasis added]

[47] This provision essentially places the estate in the position of the deceased person to claim damages for injuries suffered during their lifetime up to the time of death. These are different injuries or damages than those suffered by the surviving family members and which are dealt with under the *FAA*.

[48] Section 53(1) of the *Trustee Act* specifically limits the damages that can be claimed by the deceased's estate for a tort causing death by excluding exemplary damages (which also are non-compensatory and essentially the equivalent of punitive damages). The action that the father could have brought if he lived is continued in his estate under the *Trustee Act*. The *FAA* action is separate and is personal to the father's surviving relatives.

[49] For these reasons, I would dismiss this ground of appeal.

Section 3(2) Does Not Allow for a Claim for Punitive Damages

[50] Turning now to section 3(2), the appellant argues that the motion judge erred when he concluded that section 3(2) refers to the actual monetary losses resulting from death and that punitive damages are not available.

[51] The critical question before this Court is whether section 3(2) allows for a claim for punitive damages. The text is the anchor of the exercise. The context of the words in the legislation can shed light on the meaning of the text and sometimes can resolve ambiguities in the text. The same is true for the legislative purpose. A court must consider the context and purpose of the provisions no matter how plain the disposition may seem upon initial reading (see *Canada Trustco* at para 47).

[52] Courts must consider both official language versions of the legislation (see *Piekut* at para 52; *Schreiber v Canada (Attorney General)*, 2002 SCC 62). In this case, I find that there is no substantive difference between the English version and the French version of section 3(2).

[53] When considering what type of damages may be awarded under the *FAA*, I note that while section 2(1) uses the word damages or dommages-intérêts, it is otherwise not defined.

[54] In section 3(2), we have the qualifier "damages *as are proportional to the pecuniary loss* resulting from the death" [emphasis added] or, in the French version, "dommages-intérêts sont accordés proportionnellement *à la perte financière* résultant du décès" [emphasis added]. The provision clearly and unambiguously states that it allows compensation for pecuniary loss.

[55] Pecuniary refers to a monetary loss. The following definition is found in Lewis N Klar et al, *Remedies in Tort* (Toronto: Thomson Reuters, 2026) (loose-leaf updated 2026, release 4), ch 30 at s 30:25:

> Pecuniary loss refers to the monetary losses incurred by the plaintiff as a result of his injury. They include, *inter alia*, past and potential loss of earnings, the cost of past and future medical treatment and purchases made to make life more comfortable for the plaintiff.

[56] The parties agreed with this definition and that pecuniary refers to monetary or financial loss.

[57] The qualifier "punitive" is not present in section 3(2). If punitive damages were intended, the *FAA* specifically would have used the expression. The parties agreed that punitive refers to damages that are not compensatory but that relate to a punishment to be inflicted on the respondents for their wrongful actions.

[58] As for context and purpose, the history of this legislation is relevant in ascertaining its purpose and whether it allows for a claim for punitive damages or is limited to compensation for pecuniary losses.

[59] I begin once again with a historical and statutory review of *Lord Campell's Act.* As reviewed above, fatal accidents legislation created an entirely new statutory right in the survivors of a deceased person.

[60] When it was introduced in 1846, *Lord Campbell's Act* at section 2 spoke of damages that are proportioned to the injury resulting from such death:

> And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may *give such Damages as they may think proportioned to the Injury resulting from such Death* to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided amongst the before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct.
>
> [emphasis added]

[61] Identical language, i.e., damages "proportioned to the injury resulting from such death", is found in the *1847 Act* at section 2, earlier identified.

[62] As regards Manitoba, similar legislation was first introduced in *An Act respecting compensation to the families of persons killed by accidents*, (1881) 44 Vict, c 23, s 3 [the *1881 Act*]. Like *Lord Campbell's Act*, the Manitoba legislation referred to damages that are "proportioned to the injury" resulting from such death (the *1881 Act*, s 3).

[63] Interestingly, in 1964, the Uniform Law Conference of Canada espoused a *Uniform Fatal Accidents Act* [the *Uniform Act*]. The *Uniform Act* added the phrase pecuniary loss in section 3(2) and read: "[s]ubject to subsection (3), in every action under this Act such damages as are proportional to the pecuniary loss resulting from the death shall be awarded to the persons respectively for whose benefit the action is brought".

[64] Manitoba adopted the *Uniform Act* wording in *The Fatal Accidents Act*, RSM 1967, c 84, s 1 [the *1967 amendment*]. There was no substantive legislative comment, in Hansard or elsewhere, at the time of adoption.

[65] In the absence of direct legislative commentary, I must consider the change in wording, and the inclusion of the word pecuniary, from the perspective of principles of statutory interpretation. To this end, there is a presumption that change is made for an intelligible reason, including to "clarify meaning". Sullivan at 629 makes the following point:

> [3] **Presumption that change is purposeful**
>
> It is presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: *to clarify the meaning*, to correct a mistake, to change the law. A legislature would not go to the trouble and expense of amending a provision without any reason. As Lord MacMillan wrote in *D.R. Fraser and Co. v. Canada (Minister of National Revenue — M.N.R.)*:
>
> > When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately.
>
> [footnote omitted; emphasis added]

[66] Sullivan also cites the decision in *Keizer v Hanna and Buch*, 1978 CanLII 28 (SCC) [*Keizer*], where de Grandpré J (Judson J concurring), dissenting but not on this point, observed as follows regarding the Ontario statute: "It is trite law that *The Fatal Accidents Act* has created a right of action which did not exist at common law and, as mentioned above, that the loss that can be recovered is the financial loss" (*Keizer* at 371).

[67] The clear intent of the *1967 amendment* is to define the type of damages that are available to a plaintiff. The explicit reference to pecuniary and absence of punitive are critical here.

[68] While the principle that damage awards in respect of fatal accidents are intended to be compensatory is not controversial, specific reference to the word pecuniary provides further confirmation. In Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Thomson Reuters, 2018) at 913 makes the point:

> As in personal injury cases, damages in fatal accidents are assessed predominantly according to the compensatory principle[.] . . . The goal, in other words, with respect to pecuniary loss at least, is full compensation on the basis of restitution regardless of its social cost.
>
> [footnotes omitted]

[69] Support for this view is also found in the comparable Ontario fatal accidents legislation enacted as part of the *Family Law Act*, RSO 1990, c F3. Like the *FAA* in Manitoba, section 61(1) speaks of the right to recover a pecuniary loss. The availability of punitive damages was firmly rejected in *Lord v Downer*, 1999 CanLII 1875 at para 7 (ONCA) [*Lord*], leave to appeal to SCC refused, 27630 (23 March 2000). Sharpe JA opined:

> As is clear from its terms, s. 61(1) limits the claims of survivors to "their pecuniary loss resulting from the ... death." "Pecuniary loss" refers to the actual monetary losses incurred by the plaintiff as a result of the injury[.] While s. 61(2)(e) allows for recovery of certain specified non-pecuniary damages, those damages are still compensatory in nature. In my view, the statutory language is fatal to any claim for punitive or exemplary damages. Punitive damages are non-compensatory and non-pecuniary in nature[.] Punitive

> damages are an award made for the purpose of punishing and deterring the defendant and not to compensate the plaintiff.
>
> [citations omitted]

[70] In light of the foregoing, I conclude that the text, context and purpose of section 3(2) support the premise that punitive damages are not available to claims made under the *FAA*. I would dismiss this ground of appeal.

Final Arguments

[71] I will now address two final arguments advanced by the appellant.

[72] The appellant argues before the panel, as he did before the motion judge, "that 'the legislature does not intend to abolish, limit or otherwise interfere with rights of subjects. Legislation that curtails rights is strictly construed'" and "legislation interfering with the rights to bring an action 'attracts a strict interpretation and any ambiguity . . . should be resolved in favour of the person whose right of action is being truncated'" (*TLB et al v REC*, 2000 MBCA 83 at paras 60-61).

[73] I agree with the motion judge that the above-mentioned principles do not apply here (see *KB decision* at para 19). The *FAA* does not restrict or limit rights; to the contrary, it creates a new cause of action from which certain rights flow. But for the *FAA*, the persons enumerated in the legislation would not be entitled to sue a tortfeasor for the wrongful death of the deceased.

[74] Finally, the appellant submits that his public policy argument was not appropriately addressed by the motion judge. Simply put, the appellant

argues that it is contrary to public policy that a tortfeasor can avoid punitive damages due to the victim dying.

[75] My statutory review of the *FAA* does not support this submission.

[76] I agree with Sharpe JA, who spoke directly to this point (*Lord* at para 13):

> Mr. Strosberg urged us to expand the range of damages recoverable by dependants for reasons of policy. I find it neither necessary nor appropriate to consider whether punitive or aggravated damages should, as a matter of policy, be made available in cases such as this. This is quite unlike the situation where the court is faced with an out-moded common law rule and is invited to extend existing principles to keep the law in step with the "dynamic and evolving fabric of our society"[.] Here, the dependant's right of action is wholly the creature of a recent statute which circumscribes the right in precise terms. I have concluded that the statute excludes these very losses. In these circumstances, any variation, whether by increase or decrease of those rights, is the function of the Legislature, not of this court.
>
> [citation omitted]

<u>Conclusion</u>

[77] In Manitoba, prior to the *1881 Act*, at common law, relatives of a deceased person had no cause of action for the wrongful death of their loved one.

[78] Having considered the evolution of fatal accidents legislation, noting the specific amendments made to the *FAA* to add certain types of losses or damages available to plaintiffs, and having reviewed the current text and context of the *FAA* as a whole, I find that the *FAA* does not allow a claim for punitive damages.

[79] The motion judge was correct to find that section 3(2) does not allow a plaintiff to claim punitive damages for the wrongful death of the deceased under the *FAA*.

[80] For the foregoing reasons, I would dismiss the appeal with costs.

Rivoalen CJM

I agree: Pfuetzner JA

I agree: Kroft JA