



PRESERVING A CAUSE OF ACTION UNDER THE *FATAL ACCIDENTS ACT*

By Jon Rossall, Q.C., Partner, Health Law



When is a Release not a Release? A recent Alberta Court of Appeal decision explored the effectiveness of a Release which purported to preserve a surviving spouse's cause of action against a physician under Alberta's *Fatal Accidents Act*.

In this case, a physician was sued in relation to the diagnosis and treatment of colon cancer in a female patient. The action was ultimately settled, and a Release was signed by the patient which specifically excluded any claim that the husband may have on his own or on behalf of his children under the *Fatal Accidents Act*. Five months after the settlement, the wife died of colon cancer, and the husband commenced a new action under the *Fatal Accidents Act* on his behalf and on behalf of the children, making the same allegations against the physician.

The relevant section of the Act which gave rise to the action read as follows:

2. When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

The issue of the husband's entitlement to bring the new action, given the wording of the Act, was brought before a Chambers Judge for a preliminary ruling. The Chambers Judge held that section 2 of the Act required that the deceased be entitled to maintain an action and recover damages at the moment of her death. Since she had given up that right by signing a Release, she no longer had such a right. The Judge found that the portion of the Release which purported to exempt the *Fatal Accidents Act* was ineffective, and therefore there was no cause of action remaining for the husband.

A good part of the reasoning revolved around an examination of the development of the *Fatal Accidents Act*. The legislation represented a departure from the older common law position that any cause of action available during the life of an injured party died when the person died. Legislation such as the *Fatal Accidents Act* was enacted to preserve the rights of survivors, but it was clear from a review of the history of the legislation that in order for the cause of action to vest in the survivors, it must exist at the moment of the injured person's death.

Before the Court of Appeal, the Appellant husband tried to argue that social and economic times had evolved, and that different damages were now available to survivors and others who previously would not have been entitled.

The Alberta Court of Appeal upheld the Chambers Judge's decision. In doing so, the Court pointed out that the Appellant spouse had confused two separate aspects of the action under the *Fatal*



Accidents Act: (1) entitlement to bring the action, and (b) the types of damages that dependents could claim. The Chambers Judge's decision (and the appeal) was about entitlement, not damages.

An interesting sideline in the decision, of course, is the impact (or non-impact, in this case) of the Release. In settling this case, the surviving spouse and his wife had specifically addressed the potential to bring a new action and the settlement was entered into on that basis. Typically when a settlement is arrived at between parties to litigation, the settling party will require the recipient to sign a document acknowledging that the payment absolves the settling party from any further liability arising from the alleged wrongdoing. In this case, the Release specifically exempted a cause of action that might exist under the *Fatal Accidents Act*.

However, the Courts' response to that was to essentially say that simply because the Release preserved the right to bring such an action didn't necessarily mean there was such an action. That issue, as this case makes clear, was ultimately up to the Courts to decide.