

Personal Injury**Consideration of spousal status in *Climans v. Latner***By **Nick Todorovic and Ryan Marinacci**

Nick Todorovic

(February 17, 2021, 2:22 PM EST) -- The loss of a loved can give rise to a wrongful death action where negligence played a role in the death. Spousal status has enormous considerations in the context of a wrongful death action because of the damages that may be claimed by a spouse under s. 61 of the *Family Law Act*, RSO 1990, c F.3 (FLA). Those damages include pecuniary losses (such as loss of income and loss of services) and loss of guidance, care and companionship resulting from the death.

The latter head of damages is the wrongful death equivalent of general damages for pain and suffering and as such is subject to the cap set out in *Andrews v. Grand & Toy Alberta Ltd.* [1978] S.C.R. 229, as confirmed by the Court of Appeal for Ontario in *To v. Toronto Board of Education* [2001] O.J. 3490.



Ryan Marinacci

The definition of spouse under s. 61 derives from Part III of the FLA, which adds to the definition set out in s. 1 where spouse is defined as one of two persons who are married or in a void or voidable marriage. Spouse under Part III (s. 29) includes one of two persons who are not married and have cohabited (a) continuously for a period of not less than three years or (b) in a relationship of some permanence, if they are the parents of a child as set out in s. 4 of the *Children's Law Reform Act*.

At issue in *Climans v. Latner* 2020 ONCA 554 was the first branch of the definition under s. 29(a): continuous cohabitation of not less than three years. The Ontario Court of Appeal confirmed that partners in a committed relationship can still be considered spouses under s. 29(a) even though they maintain separate households throughout the duration of the relationship.

The court found that Justice Sharon Shore had correctly interpreted the legislation and articulated the governing principles in determining that the parties were spouses.

One issue at trial was whether the applicant met the definition of "spouse" under the FLA s. 29. She and the respondent had been in a relationship for 14 years but had maintained separate residences the entire time. Despite their separate households, Justice Shore concluded that the applicant and respondent were spouses under the FLA.

Justice Shore found as a fact that the applicant and respondent had been in a committed relationship, preferring the objective contemporaneous evidence of the relationship over the testimony of the two embattled parties during their acrimonious divorce proceedings.

In fact, while the respondent claimed that the applicant was no more than a travel companion or girlfriend, the couple exchanged commitment rings and celebrated their anniversary every year, and there was an expectation that the applicant be available to the respondent.

Justice Shore also found that economic dependency had been created almost from the beginning of the relationship. Within one month of meeting, the applicant had quit her job to be with the respondent, who then started to cover the applicant's expenses, support her children from a previous marriage and pay her a fixed monthly amount.

The couple also held themselves out to be a committed couple to friends and extended family, attending one another's family events, milestones and holidays.

Living together was not as obvious. With respect to cohabitation, Justice Shore stated, "To determine whether the parties lived together in a conjugal relationship, all the factors must be considered in conjunction with one another. However, there needs to be some element of living together under the same roof. The very definition of 'cohabit' requires that the parties live together in a conjugal relationship."

Acknowledging that this was not a clear-cut case, Justice Shore noted that the couple had lived together at their cottage during the summer months every year and had regularly travelled to and lived together in Florida. In addition, early in the relationship the applicant had resided at the respondent's home on weekends when her children were with her previous husband, although this changed later in the relationship.

Finally, Justice Shore concluded that when viewed in the context of the relationship as a whole, the living arrangements were enough to qualify the couple as spouses. However, when taken without the other factors of the relationship, the living arrangements, on their own, would not have been enough for spousal status.

This result was unsurprising given the court's previous decision in *Stephen v. Stawecki* [2006] O.J. No. 2412, where it held at para. 4 that, "The fact that one party continues to maintain a separate residence does not preclude a finding that the parties are living together in a conjugal relationship." Indeed, Justice Andromache Karakatsanis had likewise concluded in *Campbell v. Szoke* [2003] O.J. No. 3471, "The fact that parties maintain separate residences [did] not prevent the finding of cohabitation."

Given the decisions in *Climans*, partners can be spouses and FLA damages may flow even where both individuals formally maintain separate households. In the event of a loved one's death, potential spouses should be mindful of these decisions in order not to close the door on a claim for damages by mistakenly believing separate households preclude spousal status.

Nick Todorovic is an associate lawyer at McLeish Orlando LLP. His practice is dedicated exclusively to plaintiffs' personal injury and wrongful death cases. Ryan Marinacci is an articling student at McLeish Orlando.

Photo credit / TorriPhoto ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Yvette Trancoso-Barrett at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.