

## DETERMINING DAMAGES

BY RICHARD BOGOROCH AND YONI SILBERMAN

### INTRODUCTION

One of the mysteries of the law that continues to confound lawyers and non-lawyers alike is the determination, calculation and assessment of damages. Much of what we know and learn comes from reading newspapers, watching TV and today, more commonly, from the internet. Many people in this country are often greatly surprised at how low damage awards are in Canada as compared to what is awarded in the United States.

For that reason, Bogoroch & Associates feel it is timely to discuss in a general way how damages are determined by Canadian courts. This newsletter, which updates our law firm's previous 2004 newsletter, will consider the principles underlying damage awards for pain and suffering in personal injury, wrongful death and medical malpractice cases. We will also look at damages awarded to family members for wrongful death, loss of care, guidance and companionship under the Family Law Act.

### NON-PECUNIARY GENERAL DAMAGES – PAIN AND SUFFERING

There are essentially two types of damages: damages for pain and suffering, which are also known as non-pecuniary general damages; and damages for economic or financial losses, also known as pecuniary damages.

Non-pecuniary general damages, are severely limited in Canada, unlike in the United States. In 1978, as a result of three cases known as "the trilogy", the Supreme Court of Canada (our highest Court) enunciated the rule for awarding damages for pain and suffering, loss of enjoyment of life and loss of amenities of life. The three cases that were decided in 1978 by the Supreme Court involved catastrophic personal injuries – injuries that resulted in quadriplegia and/or profound and devastating brain injury.



RICHARD M. BOGOROCH



YONI SILBERMAN

Unfortunately, the Supreme Court of Canada adopted a very conservative approach. While I recognize that an award of damages for pain and suffering is by its very nature inadequate, and while nothing can compensate for the suffering of an injured person who was rendered quadriplegic or severely brain injured, I believe the underlying policy has not stood the test of time.

In *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, Mr. Justice Dickson of the Supreme Court of Canada underlined the rationale for pain and suffering damages as follows:

*"When one door of happiness closes, another opens; but often we look so long at the closed door that we don't see the one which has been opened for us."*

— HELEN KELLER,  
DEAFBLIND ADVOCATE FOR  
PERSONS WITH DISABILITIES,  
AUTHOR & ROLE MODEL

If you would like to receive our newsletters by email please email us at [info@bogoroch.com](mailto:info@bogoroch.com) and be placed on our email list.

## IN THIS ISSUE

### HOW DAMAGES ARE DETERMINED

BACKGROUND & ANALYSIS

### LEGAL LEXICON

EXPAND YOUR LEGAL VOCABULARY

### THOUGHTS ON THE MEANING OF LIFE

WORDS TO PONDER

**BOGOROCH**  
& ASSOCIATES

Barristers and Solicitors

Dedicated to improving the lives of injured victims and their families



## CONTACT INFO

*In addition to our capable staff of law clerks and legal assistants our firm consists of the following team of lawyers:*

Richard M. Bogoroch  
416-341-5600  
rbogoroch@bogoroch.com

Linda J. Wolanski  
416-341-5602  
lwolanski@bogoroch.com

Heidi R. Brown  
416-341-5603  
hbrown@bogoroch.com

Kate Cahill  
416-341-5620  
kcahill@bogoroch.com

Yoni Silberman  
416-341-5613  
ysilberman@bogoroch.com

Lisa Penick  
416-341-5625  
lpenick@bogoroch.com

Steven Glowinsky  
416-341-5616  
sglowinsky@bogoroch.com

Melanie Larock  
416-341-5629  
mlarock@bogoroch.com

S. Ora Shpigelman  
416-341-5619  
sshpigelman@bogoroch.com

BOGOROCH AND ASSOCIATES

LITIGATION *bulletin*

IS PUBLISHED IN CANADA.  
ISSN 1708-9670

**WE WOULD BE DELIGHTED TO HEAR FROM YOU. PLEASE SHARE WITH US ANY INSPIRATIONAL THOUGHTS, SAYINGS OR COMMENTS BY EMAILING:**

**editor@bogoroch.com**

FOR SUBSCRIPTIONS AND UNSUBSCRIPTIONS CONTACT US BY E-MAIL AT:

**bulletin@bogoroch.com**

© BOGOROCH & ASSOCIATES 2011

## DETERMINING DAMAGES

CONTINUED FROM PAGE 1

*“But the problem here is qualitatively different from that of pecuniary losses. There is no medium exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one.”*

Mr. Justice Dickson said that the purpose of an award of damages for pain and suffering is to provide the injured person,

*“...with reasonable solace for his misfortune.” “Solace” in this sense is taken to mean physical arrangements which can make his life more endurable rather than “solace” in the sense of sympathy. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible accepting that what has been lost is incapable of being replaced in any direct way.”*

In my view, and with great respect to the Justices of the Supreme Court of Canada, it is unfair for those devastated by the most catastrophic injuries to have their damages for pain and suffering limited.

The maximum that the Supreme Court of Canada determined should be awarded for pain and suffering in the most catastrophic cases was \$100,000.00. In a subsequent case they held that annual inflation should be added on to the “rough upper limit” of \$100,000.00. At the date of this writing, the maximum award for pain and suffering, whether arising from a car accident, medical malpractice, or a slip and fall, is approximately \$343,000.00 (\$100,000.00 plus the accumulated inflation since 1978).

The “cap” of \$343,000.00 for a devastating injury is no longer appropriate. In the United States, as a general rule, except in certain States, there is no limit on the amount that an injured person can be awarded for pain and suffering.

Further, while the courts have made it clear that damages are not required to be scaled down, in essence, that is what often occurs. If the most catastrophic case would merit an award of \$343,000.00, one would be correct in assuming that a court would award less for those who have sustained near catastrophic injuries, the loss of a leg

or an arm, a serious brain injury, or an injury resulting in numerous fractured bones and requiring multiple surgical procedures.

It is uncertain whether the Supreme Court of Canada will ever revisit the “trilogy” and, for the foreseeable future, litigants and those who have been injured or afflicted, as a result of the negligence of others, must be aware of the limits on damage awards mandated by the Supreme Court.

## DAMAGES FOR WRONGFUL DEATH, LOSS OF CARE, GUIDANCE AND COMPANIONSHIP: THE FAMILY LAW ACT

In 1978, the *Family Law Act* came into effect. It provided, for the first time, the right of family members to sue as a result of the injury or death of another family member. The category of claimants identified in the *Family Law Act* include the following:

- a) spouse; b) children; c) grandchildren;
- d) parents; e) siblings; and f) grandparents.

For example, in the case of the death of a spouse, the eligible claimants are the surviving spouse, the children, the parents, the siblings, the grandchildren and the grandparents of the deceased.

Section 61(2) of the *Family Law Act*, R.S.O. 1990, c. F.3 provides that the damages recoverable in a claim **may include**,

- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
- (b) actual funeral expenses reasonably incurred;
- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. R.S.O. 1990, c. F.3, s. 61 (2).

In *Hechavarria v. Reale*, [2000] O.J. No. 4288, Mr. Justice Nordheimer of the Ontario Superior Court of Justice wrote that in cases involving the tragic injury or death of a loved one:

*“It is impossible to quantify the loss of life in monetary terms.”*

Justice Nordheimer further stated:

*"No amount of money could ever replace the contribution that a loved one makes to the people around him or her. The loss of care, companionship, guidance, and the very important emotional bond, cannot be calculated in dollar terms."*

## DAMAGE AWARDS

On September 1, 2010, Ontario **eliminated** the fatality deductible that applied in all cases of **death caused by a motor vehicle accident** in Ontario. Prior to September 1, 2010, the law applied a \$15,000.00 statutory deductible for claims by loved ones under the *Family Law Act*. This meant that if the claim for loss of guidance, care and companionship was not in excess of

\$50,000.00, a \$15,000.00 deductible was applied, which substantially if not completely eliminated a loved one's recovery of non-pecuniary damages.

Whereas the Courts have historically been very conservative when it comes to awarding compensation for the loss of a child, the recent case of *Fiddler v. Chiavetti*, [2010] ONCA 210 demonstrates a step in the right direction. In this case, a mother was awarded \$125,000.00 for the loss of her daughter, who died as a result of a motor vehicle accident.

The highest amount awarded in Ontario for the loss of care, guidance and companionship for the death of a spouse is \$85,000.00. **As well, where there is a loss of a spouse, the Courts have awarded the surviving spouse and children amounts for loss of financial support based on principles which were enunciated by the Court of Appeal in the case of *Nielsen v. Kaufmann*.**

### DAMAGES AWARDS TO FAMILY LAW ACT CLAIMANTS FOR LOSS OF A SPOUSE/PARENT

CASE NAME	SUMMARY OF CASE	LOSS OF CARE, GUIDANCE & COMPANIONSHIP <i>There must be an actual loss of guidance, care and companionship; depends on facts of the case</i>	LOSS OF DEPENDANCY INCOME	LOSS OF HOUSEHOLD SERVICES
<b>1. Isildar et al. v. Rideau Diving Supply et al.</b> , [2008] O.J. No. 2406 and [2008] O.J. No. 2728	<ul style="list-style-type: none"> <li>Scuba diving accident</li> <li>Loss of a husband and father (age 28)</li> <li>Married for 4 years</li> <li>Child was an infant</li> </ul>	<ul style="list-style-type: none"> <li>Wife – \$75,000.00</li> <li>Child – \$50,000.00</li> </ul>	<ul style="list-style-type: none"> <li>Wife – loss of past support \$119,607.00; loss of future support \$783,008.00</li> <li>Son – loss of past support \$43,313.00; loss of future support \$164,199.00</li> </ul>	<ul style="list-style-type: none"> <li>Loss of past housekeeping and past loss of support for both wife and child – \$20,748.00</li> <li>Loss of future housekeeping for both wife and child – \$122,987.00</li> </ul>
<b>2. Wilcox v. Miss Megan (The)</b> , [2008] F.C.J. No. 645	<ul style="list-style-type: none"> <li>Wrongful death – drowning</li> <li>Loss of a husband, father (age 63)</li> <li>One child was disabled</li> </ul>	<ul style="list-style-type: none"> <li>Wife – \$75,000.00</li> <li>Disabled Child – \$75,000.00</li> <li>Children – \$25,000.00 each</li> </ul>	<ul style="list-style-type: none"> <li>Wife – Loss of past support \$51,950.00; Loss of future financial support \$116,454.00</li> <li>Disabled Child – Loss of past support and valuable services \$43,561.00; loss of future financial support and valuable services \$86,394.00</li> <li>Siblings and 3 children – Past loss of valuable services \$22,908; Future loss of valuable services</li> <li>\$45,147.00</li> </ul> <p><i>All amounts are inclusive of interest.</i></p>	<p><i>The Court combined Housekeeping and Financial Support under one head of damages.</i></p> <p><i>Funeral expenses were also rewarded.</i></p>
<b>3. Madonia v. Stevens</b> , [2008] O.J. No. 5434	<ul style="list-style-type: none"> <li>Medical Malpractice</li> <li>Loss of wife, mother and grandmother (age 78)</li> <li>1 grandchild was particularly close to the deceased</li> </ul>	<ul style="list-style-type: none"> <li>Husband – \$50,000.00</li> <li>Children – \$20,000.00 each</li> <li>Grandchildren – \$7,500.00 each, \$12,500.00 for particularly close grandchild.</li> </ul>	<ul style="list-style-type: none"> <li>Husband – Loss of pension income \$14,261.00</li> </ul>	<ul style="list-style-type: none"> <li>Husband – Loss of housekeeping \$3,000.00</li> </ul> <p><i>Funeral and burial expenses were further awarded.</i></p>
<b>4. Johnson v. Milton (Town)</b> , 2008 ONCA 440 (C.A.)	<ul style="list-style-type: none"> <li>Loss control of bicycle because road was in state of disrepair</li> <li>Loss of husband and father (age 31)</li> </ul>	<ul style="list-style-type: none"> <li>Wife – \$50,000.00</li> <li>Son (age 13) – \$5,000.00</li> <li>Son (age 3) – \$20,000.00</li> </ul>	<ul style="list-style-type: none"> <li>Wife – Loss of support \$1,035,970.00 (USD)</li> <li>Son – Loss of support \$49,037.00 and \$64,190.00 respectively</li> </ul>	<ul style="list-style-type: none"> <li>Loss of past housekeeping \$83,086.00</li> <li>Loss of future housekeeping \$42,170.00</li> </ul>
<b>5. Wright v. Hannon</b> , [2007] O.J. No. 53	<ul style="list-style-type: none"> <li>Motor vehicle accident</li> <li>Loss of <b>ex-husband</b> and father (age 54)</li> <li>Couple had split up prior to the date of loss</li> </ul>	<ul style="list-style-type: none"> <li>Wife – \$7,500.00</li> <li>Daughters – \$50,000.00 each</li> </ul>	<ul style="list-style-type: none"> <li>Wife – Past pecuniary loss \$5,000.00; Future pecuniary loss \$10,000.00</li> <li>Daughters – Past pecuniary loss \$28,000.00 (as agreed upon prior to Trial)</li> <li>Daughters – Future pecuniary loss \$45,000.00 and \$70,000.00 respectively</li> </ul>	
<b>6. Hechavarria v. Reale</b> , [2000] O.J. No. 4288	<ul style="list-style-type: none"> <li>Motor vehicle accident</li> <li>Loss of a wife/mother (age 53)</li> <li>Married for 34 years</li> <li>Children ages 31, 26, 21</li> </ul>	<ul style="list-style-type: none"> <li>Husband – \$85,000.00</li> <li>Children (each) – \$30,000.00</li> </ul>	<ul style="list-style-type: none"> <li>Past dependancy loss \$6,978.00</li> <li>Future dependancy loss \$158,635.00</li> </ul>	<ul style="list-style-type: none"> <li>Past loss of household services \$9,600.00</li> <li>Future loss of household services \$135,540.00</li> </ul>

## DAMAGE AWARDS

CONTINUED FROM PAGE 3

Generally, the surviving spouse is awarded 70% of the deceased's net take home pay for the duration of the deceased's work life expectancy. For example, if the deceased spouse was earning \$50,000.00 per year, his net take home pay would be approximately \$35,000.00 a year and the surviving spouse would be awarded somewhere in the neighbourhood of about \$22,000.00 per year for the deceased spouse's work life expectancy.

In addition to the loss of financial support, surviving spouses also lose what is known as "noncash" services such as handyman, homemaking and other assistance provided by

the deceased. The surviving spouse is compensated for the value of these services. Actuaries, economists and other experts are enlisted to provide evidence as to the value of the services provided. **While one can never reduce a life to dollars and cents**, for the purposes of litigation, accountants and actuaries are required to help the court determine the measure of the financial losses.

On the following pages are charts outlining how the Courts have awarded *Family Law Act* compensation for families who have lost children or spouses.

Our objective in this issue is to educate and inform about the principles governing the award of non-pecuniary damages and to illuminate an area of law which affects so many people.

### DAMAGES AWARDS TO FAMILY LAW ACT CLAIMANTS FOR LOSS OF A CHILD

CASE NAME	SUMMARY OF CASE	LOSS OF CARE, GUIDANCE & COMPANIONSHIP
1. <b>Fiddler v. Chiavetti</b> , [2010] ONCA 210	<ul style="list-style-type: none"> <li>• Motor vehicle accident</li> <li>• Loss of a daughter/sibling</li> </ul>	<ul style="list-style-type: none"> <li>• Mother – \$125,000.00</li> <li>• Father – \$50,000.00</li> <li>• Sister – \$25,000.00</li> </ul>
2. <b>MacGregor v. Potts</b> , [2009] O.J. No. 3581 (S.C.J.)	<ul style="list-style-type: none"> <li>• Obstetrical negligence</li> </ul>	<ul style="list-style-type: none"> <li>• Mother – \$90,000.00</li> <li>• Father – \$35,000.00</li> <li>• Grandparents – \$10,000.00</li> </ul>
3. <b>To v. Toronto Board of Education</b> , (2001) O.J. No. 3490 (C.A.)	<ul style="list-style-type: none"> <li>• Loss of a son (age 14)</li> </ul>	<ul style="list-style-type: none"> <li>• Parents – \$100,000.00 (each)</li> <li>• Sibling – \$25,000.00</li> </ul>
4. <b>Ayoub v. Dreer</b> , [2000] O.J. No. 3219 (S.C.J.)	<ul style="list-style-type: none"> <li>• Loss of a son (age 19)</li> </ul>	<ul style="list-style-type: none"> <li>• Parents – \$35,000.00</li> <li>• Siblings – \$7,500.00 (out of country); \$15,000.00</li> </ul>
5. <b>Huggins v. Ramtej</b> , [1999] O.J. No. 1696 (Ont. S.C.J.)	<ul style="list-style-type: none"> <li>• Loss of a son (age 15)</li> </ul>	<ul style="list-style-type: none"> <li>• Parents – \$40,000.00</li> <li>• Siblings – \$15,000.00</li> </ul>
6. <b>Rintoul v. Linde Estate</b> , (1997) O.J. No. 465 (Gen. Div.)	<ul style="list-style-type: none"> <li>• Loss of a son (age 16)</li> </ul>	<ul style="list-style-type: none"> <li>• Mother – \$55,000.00</li> <li>• Sibling – \$20,000.00</li> </ul>
7. <b>Hamilton v. Canadian National Railway</b> (1991), 47 O.A.C. 329 (C.A.)	<ul style="list-style-type: none"> <li>• Loss of a daughter (age 9)</li> </ul>	<ul style="list-style-type: none"> <li>• Mother – \$50,000.00</li> <li>• Brother – \$7,500.00</li> <li>• Sister – \$10,000.00</li> </ul>
8. <b>Mason v. Peters</b> (1982), 39 O.R. (3d) 27 (C.A.) affg (1980), 30 O.R. (2d) 409 (H.C.J.)	<ul style="list-style-type: none"> <li>• Loss of a son (age 11)</li> </ul>	<ul style="list-style-type: none"> <li>• Mother – \$45,000.00</li> <li>• Sibling – \$5,000.00</li> </ul>



## Legal Lexicon

DEFINITIONS OF COMMON  
LEGAL TERMINOLOGY

■ **Pecuniary Losses:** Pecuniary losses are those losses that can be calculated or estimated in terms of money lost, including loss of income or loss of earning capacity, out-of-pocket expenses such as medical expenses, rehabilitation expenses, housekeeping expenses, etc.

■ **Non-Pecuniary General Damages (Pain and Suffering Damages):** General Damages are damages payable for losses that cannot be directly calculated in terms of money; for example, the loss of enjoyment of life and the loss of the ability to pursue leisure activities and personal relationships, as well as compensation for pain and suffering resulting from the conduct of another person.

## THOUGHTS ON THE MEANING OF LIFE

*“All of us tend to put off living. We are all dreaming of some magical rose garden over the horizon, instead of enjoying the roses that are blooming outside our window today.”*

— DALE CARNEGIE,  
PIONEER IN PUBLIC SPEAKING &  
PERSONALITY DEVELOPMENT

*“Injustice anywhere is a threat to justice everywhere.”*

— DR. MARTIN LUTHER KING JR.

*“No one can make you feel inferior without your consent.”*

— ELEANOR ROOSEVELT

*“Optimism is essential to achievement and it is also the foundation of courage and true progress.”*

— NICHOLAS MURRAY BUTLER

## BOGOROCH & ASSOCIATES Barristers and Solicitors

Sun Life Financial Tower, 150 King St. West,  
Suite 1707, Toronto, Ontario, M5H 1J9

Tel: (416) 599-1700

Fax: (416) 599-1800

Toll Free: 1 866-599-1700

General email: [info@bogoroch.com](mailto:info@bogoroch.com)

Visit us at [bogoroch.com](http://bogoroch.com)

The information in this newsletter is not, nor is it intended to be, legal advice. You should consult a lawyer for individual advice regarding your own situation. Use of this newsletter does not create a solicitor/client relationship between Bogoroch & Associates and the reader.