

DETERMINING DAMAGES

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 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. Damages awarded for economic loss will be the subject of our next newsletter.

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.

Unfortunately, the Supreme Court of Canada adopted a very conservative approach. While I recognize that an award of damages



RICHARD M. BOGOROCH

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:

“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.”

“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

IN THIS ISSUE

HOW DAMAGES ARE DETERMINED

BACKGROUND & ANALYSIS

CALENDAR

A TIMETABLE OF B&A ENGAGEMENTS

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

Rachel J. Urman
(416) 341-5620
rurman@bogoroch.com

Tripta S. Chandler
(416) 341-5618
tchandler@bogoroch.com

Emma Holland
(416) 341-5611
eholland@bogoroch.com

Anatoly Dvorkin
(416) 341-5619
advorkin@bogoroch.com

BOGOROCH AND ASSOCIATES
LITIGATION *bulletin*

IS PUBLISHED QUARTERLY IN CANADA.
ISSN 1708-9689

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 2004

DETERMINING DAMAGES

CONTINUED FROM PAGE 1

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 \$297,000.00 (\$100,000.00 plus the accumulated inflation since 1978).

The “cap” of \$297,000.00 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 \$297,000.00, 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.

With the exception of one case which was very fact specific (*To v. Board of Education*), the awards in this area have been woefully inadequate. One of the leading cases is *Mason v. Peters*, a 1982

decision from the Ontario Court of Appeal which concerned the measure of damages for the loss of a son. In *Mason*, the deceased son was a capable, wonderful young man who helped look after his paraplegic mother. The mother was awarded \$45,000.00 for her loss, which at the time was one of the highest awards.

While the awards have increased somewhat over the last twenty years, the courts are, unfortunately, still very conservative when it comes to awarding compensation for the loss of a child. For the loss of a child under the age of 18 years, each parent will likely be awarded between \$40,000 and \$60,000 for their loss of care, guidance and companionship.

In rare circumstances where the child is expected to care for the parents because of cultural or religious reasons the award has been higher. In *To v. Board of Education*, Chinese parents were awarded \$100,000.00 each, by a jury, for the loss of their 15 year-old son. Evidence was led about the cultural requirements and expectations of the son to care for his parents when they were older and for that reason, the jury award was higher than in previous cases. The jury decision was upheld by the Court of Appeal as to the amounts awarded to the parents.

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 1986 case of *Nielsen v. Kaufmann* (see chart).

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 “non-cash” 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 what is fair and reasonable compensation.

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 FLA CLAIMANTS FOR LOSS OF A SPOUSE/PARENT

CASE	SUMMARY OF CASE	LOSS OF CARE, GUIDANCE & COMPANIONSHIP	LOSS OF DEPENDANCY INCOME	LOSS OF HOUSEHOLD SERVICES
Nielsen et. al. v. Kaufmann , [1986] O.J. No. 2359 (C.A.); [1984] O.J. No. 285	<ul style="list-style-type: none"> Loss of a wife/mother (age 31) Married for 12 years Children aged 12 and 6 	<ul style="list-style-type: none"> Husband – \$40,000.00 Child – \$20,000.00 Child – \$30,000.00 <p><i>There must be an actual loss of care, companionship and guidance; depends on facts of case</i></p>	<ul style="list-style-type: none"> Loss of support to age 65 – \$113,143.00 Loss of support after age 65 – \$5,248.00 <p><i>Court allowed offset to reflect “credit” with pooled resources due to death of spouse</i></p>	<ul style="list-style-type: none"> Loss of past housekeeping and past loss of support – \$30,365.00 Loss of future housekeeping – \$50,000.00 <p><i>Court assumed joint responsibility of parents for child care and household management in calculating damages, regardless of whether deceased spouse provided larger portion of child care services</i></p>
Levesque v. Lipskie , [1991] O.J. No. 635 (C.A.)	<ul style="list-style-type: none"> Loss of a husband/father Married Children 	<ul style="list-style-type: none"> Wife (total – breakdown unclear) – \$533,036.74 Child – \$24,723.39 Child – \$26,988.76 Child – \$28,407.63 Child – \$43,280.29 	<p><i>Court found that surviving spouse under no obligation to mitigate loss by finding employment outside of the home</i></p>	<p><i>Court awarded damages for loss of deceased’s contribution in building dreamhome</i></p>
Dybongco-Rimando Estate v. Lee , [2001] O.J. No. 3826	<ul style="list-style-type: none"> Loss of a wife/mother (age 30) Married for 6 years Children aged 3 and 1 week 	<ul style="list-style-type: none"> Husband – \$40,000.00 Children (each) – \$35,000.00 	<ul style="list-style-type: none"> Loss of dependency income – \$177,455.00 <p><i>Court considered potential future earnings of husband’s new spouse in calculating surviving spouse’s future loss of dependency income</i></p>	<ul style="list-style-type: none"> Past loss of household services – \$81,377.00 <p><i>Reduced award to reflect personal benefits received by deceased in performing past household services</i></p> <p><i>No future loss of household services awarded due to re-marriage of husband/plaintiff</i></p> <p><i>Court did not award specific amount for nanny services – where both parents worked outside of the home, Court found no extra cost has been incurred due to loss of caregiver spouse</i></p>
Hechavarria v. Reale , [2000] O.J. No. 4288	<ul style="list-style-type: none"> Loss of a wife/mother (age 53) Married for 34 years Children aged 31, 26, 21 	<ul style="list-style-type: none"> Husband – \$85,000.00 Children (each) – \$30,000.00 <p><i>Court considered length of marriage, severity of emotional impact of loss and need for father to assume both parenting roles</i></p>	<ul style="list-style-type: none"> Past dependency loss – \$6,978.00 Future dependency loss – \$158,635.00 <p><i>Court adopted modified sole dependency approach</i></p>	<ul style="list-style-type: none"> Past loss of household services – \$9,600.00 Future loss of household services – \$135,540.00 <p><i>Court adopted approach which used averages from StatsCan, adjusted upwards to reflect superior housekeeping abilities</i></p>
Wilson v. Martinello , [1995] O.J. No. 1397 (C.A.); [1993] O.J. No. 3361	<ul style="list-style-type: none"> Loss of a wife/mother Married for 22 years Child aged 15 	<ul style="list-style-type: none"> Husband – \$60,000.00 Child – \$30,000.00 	<ul style="list-style-type: none"> Loss of past income – \$29,000.00 Loss of future income – \$195,000.00 	<ul style="list-style-type: none"> Loss of past housekeeping services – \$9,000.00 Loss of future housekeeping services – \$109,000.00 <p><i>Discounts on future housekeeping services for contingencies (i.e. death, remarriage, accepting lower standard of housekeeping, moving where housekeeping provided)</i></p>
Nye v. Hogan , [1992] O.J. No. 1490	<ul style="list-style-type: none"> Loss of a husband/father (age 36) Married Children aged 8 and 5 	<ul style="list-style-type: none"> Wife – \$40,000.00 Children (each) – \$20,000.00 	<ul style="list-style-type: none"> Loss of support (wife) – \$73,143.00 Loss of future non-cash support (wife) – \$20,000.00 Loss of investment counseling – \$34,000.00 Loss of support (children each) – \$4,605.00 Loss of future support (daughter) – \$10,000.00 Loss of future support (son) – \$13,000.00 	
Peterbaugh v. Marsbergen , [1984] O.J. No. 392	<ul style="list-style-type: none"> Loss of a husband (age 27) Married for 4 years Children aged 5 and 2 	<ul style="list-style-type: none"> Wife – \$30,000.00 Children (each) – \$15,000.00 	<ul style="list-style-type: none"> Past loss of dependency – \$40,780.00 Past pecuniary loss (children each) – \$2,570.00 Future loss of support (wife) – \$332,500.00 Future loss of support (son) – \$9,729.00 Future loss of support (daughter) – \$12,097.00 	

DAMAGES AWARDS FOR FLA CLAIMANTS FOR LOSS OF A CHILD

CASE	SUMMARY OF CASE	LOSS OF CARE, GUIDANCE AND COMPANIONSHIP
To v. Toronto Board of Education , (2001) O.J. No. 3490 (C.A.)	• Loss of a son (age 14)	• Parents – \$100,000.00 (each) • Sibling – \$25,000.00
Ayoub v. Dreer , [2000] O.J. No. 3219 (S.C.J.)	• Loss of a son (age 19)	• Parents – \$35,000.00 • Siblings – \$7,500.00 (out of country); \$15,000.00
Huggins v. Ramtej , [1999] O.J. No. 1696 (Ont. S.C.J.)	• Loss of a son (age 15)	• Parents – \$40,000.00 • Siblings – \$15,000.00
Rintoul v. Linde Estate , (1997) O.J. No. 465 (Gen. Div.)	• Loss of a son (age 16)	• Mother – \$55,000.00 • Sibling – \$20,000.00
Hamilton v. Canadian National Railway (1991), 47 O.A.C. 329 (C.A.)	• Loss of a daughter (age 9)	• Mother – \$50,000.00 • Brother – \$7,500.00 • Sister – \$10,000.00
Mason v. Peters (1982), 39 O.R. (3d) 27 (C.A.) affg (1980), 30 O.R. (2d) 409 (H.C.J.)	• Loss of a son (age 11)	• Mother – \$45,000.00 • Sibling – \$5,000.00

Recent and Upcoming Events Calendar



Bogoroch & Associates are honoured to have the opportunity to interact with groups & organizations on matters of legal interest. Below is a list of recent & upcoming events:

October 22, 2004: Richard Bogoroch chaired a Professional Development Program for Osgoode Hall Law School on Complex Issues in Tort Litigation. Heidi Brown spoke on the issue of Guardianship.

October 28, 2004: Richard Bogoroch and Tripta Chandler spoke to a group of Toronto-area Rehabilitation Specialists on Understanding Bill 198 (the car insurance legislation).

November 4, 2004: Bogoroch & Associates hosted a celebration in honour of the **Bogoroch & Associates Renewable Entrance Scholarship for Osgoode Hall Law School.**

November 27, 2004: Richard Bogoroch is a guest speaker at the Myalgic Encephalomyelitis Association of Ontario Annual General Meeting.

December 6, 2004: Richard Bogoroch is a guest speaker at the Arthritis Society of Ontario's Professional Development Day.

December 14-15, 2004: Richard Bogoroch is speaking at the Canadian Institute's Auto Insurance Claims Litigation Conference.

If you or your organization would like a member of our team for a speaking engagement, kindly contact: Mary Battaglia (416) 341-5606, mbattaglia@bogoroch.com or Carrie Fine (416) 341-5625, cfine@bogoroch.com



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.

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.

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

"Forget mistakes. Forget failures. Forget everything except what you are going to do now and do it. Today is your lucky day."

— WILL DURANT, HISTORIAN

"The greatest discovery of my generation is that man can alter his life simply by altering his attitude of mind."

— WILLIAM JAMES,
PSYCHOLOGIST & PHILOSOPHER

"I long to accomplish a great and noble task, but it is my chief duty to accomplish small tasks as if they are great and noble."

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

NEXT ISSUE

Coming up in our next Newsletter

FEBRUARY-MARCH 2005:
DAMAGES FOR
ECONOMIC LOSS

**BOGOROCH
& ASSOCIATES**
Barristers and Solicitors

Sun Life Centre, 150 King Street 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
Visit us at www.bogoroch.com