BOGOROCH & ASSOCIATES

Complex Issues in Tort Litigation

Osgoode Hall Professional Development Program*

Update on Damages

1. INTRODUCTION

A discussion of damages would be incomplete without a reference to the series of three Supreme Court of Canada cases (known as the "trilogy") which have provided a baseline for the assessment of personal injury damages for more than twenty-five years. Perhaps the most significant contribution of the trilogy, consisting of *Teno v Arnold*[1], *Thornton v School District No. 57*[2] and *Andrews v Grand & Toy*[3], is the establishment of an "upper limit" or "cap" for non-pecuniary general damages.

Mr. Justice Dickson, who gave the majority opinion in *Andrews v Grand & Toy*, put forward the following rationale for the "cap" or "upper limit":

> "There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical one and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional."[4]

[1] [1978] 2 S.C.R. 287
[2] [1978] 2 S.C.R. 267
[3] [1978] 2 S.C.R. 229
[4] Supra p.261

*I acknowledge, with thanks, the substantial contribution of Ms. L. Goldstein and Ms. E. Holland in the preparation of this paper.

Mr. Justice Spence, who authored the majority opinion in *Teno v Arnold*, echoed these sentiments when he stated that:

> "There remains the assessment of the quantum of non-pecuniary damages. These damages are spoken of as 'compensation' for pain and suffering, loss of amenities of life, loss of expectation of life - a grant of largely subjective considerations the very naming of which indicates the impossibility of precise assessments.
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> The real difficulty is that an award of non-pecuniary damages cannot be 'compensation'. There is simply no equation between paralysed limbs and/or injured brain and dollars. The award is not reparative, there can be no restoration of the lost function."[5]

In his paper entitled, *Special and General Damages Update*[6], presented at the Law Society of Upper Canada lectures held on June 11 and 12, 1998, Mr. Roderic G. Ferguson, Q.C., states that the trilogy was initially regarded with great alarm by the Bar, especially the Plaintiffs' Bar. He comments that with the passing of time, however, thoughtful lawyers began to shift focus and many now regard the trilogy as having revitalized the personal injury damages practice. In Mr. Ferguson's view, counsel began to see that the real message of the trilogy was not that general damages should be "fair" but that special damages (pecuniary losses) should be assessed in a manner that is "full".

In his paper, Roderic Ferguson Q.C. also refers to another reaction of lawyers to

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[5] Supra p.332

[6] R.G. Ferguson Q.C., "*Special and General Damages Update*", Special Lectures 1998, Personal Injury Law: Current Practices and Emerging Directions

the "cap". He describes this reaction as "innovative thinking in transforming non-pecuniary heads of damages into pecuniary ones"**.** Into this category he places claims for loss of competitive advantage, loss of homemaking, the loss of shared family income and the "Lost Years" claim.[7]

After an introduction of the concept of the "Lost Years" and its development in case law, we turn to a significant recent decision of the Ontario Superior Court of Justice (confirmed by the Court of Appeal), *in Crawford v. Penney,* which provides further insight into the various facets of a complex damages award where there has been a catastrophic injury. The significant and reasoned approach to damages in *Crawford v Penney*[8] stands in stark contrast to the approach to awards in fatal accident cases where the Court continues to struggle with the value to be accorded for the loss of a loved one.

2. WHAT DOES A CLAIM FOR "THE LOST YEARS" ENTAIL?

A "Lost Years" claim may be advanced where a plaintiff's normal life expectancy has been shortened because of an accident or injury. The "Lost Years" are determined by estimating the difference between a plaintiff's pre-accident life

[7] R.G. Ferguson Q.C., "*Special and General Damages Update*", Special Lectures 1998, Personal Injury Law: Current Practices and Emerging Directions at p.20-8

[8] Crawford (Litigation guardian of) v. Penney, [2003] O.J. No. 89 (S.C.J.), aff'd, [2004] O.J. No. 3669 (C.A.).

expectancy[9] and his or her diminished life expectancy. A court may make an award to compensate a plaintiff for the loss of income or for the loss of earning capacity during these "Lost Years". In other words, the plaintiff is compensated for the loss of income that he or she would have earned between the date of his or her expected death and the date of his or her expected retirement.

An example to illustrate this would be as follows:

> A 20 year old man sustains an injury which results in a reduced life expectancy. As a result of the injury he is now expected to die at age 40. If he had not sustained the injury, he would, in all likelihood, have worked until the normal retirement age of 65. The "Lost Years" claim would be advanced on the basis that, as a result of the injury, the plaintiff has been denied the opportunity to earn income from age 40 to age 65.

3. TYPE OF EVIDENCE THAT MAY BE ADVANCED TO SUBSTANTIATE A "LOST YEARS" CLAIM

In order to advance a "Lost Years" claim, evidence should be presented to enable the court to calculate the difference between the plaintiff's pre-accident life expectancy and the plaintiff's post-accident life expectancy.

Proving a plaintiff's pre-accident life expectancy can usually be done with the use of statistical tables, such as the Canadian Mortality Tables. Post-accident life expectancy, on the other hand, particularly in the case of severe injury, would depend heavily on medical evidence.[10]

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[9] K. Cooper-Stephenson, Personal Injury Damages in Canada, 2nd ed. (Carswell,1996) at 357
[10] K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 357

In the case of *Toneguzzo-Norvell v. Burnaby Hospital*[11], a decision of the British Columbia Supreme Court, Justice Hogarth considered the diverging opinions of three medical experts who provided evidence on the Plaintiff's post-accident life expectancy. The Plaintiff, a minor, was rendered totally disabled as a result of being deprived of oxygen to her brain at birth.

Two of the experts, Dr. Theo Van Rijn (an expert in the assessment of clinically impaired disabled persons) and Dr. Crichton (former head of the Division of pediatric Neurology at the University of British Columbia), based their evidence largely on a number of studies including the "Eyman Study"[12], a study of the life expectancy of 99,453 disabled persons in the State of California, categorized by many factors such as sex, degree of mental retardation, age, race, seizures, cerebral palsy, nature of residence and other medical conditions.

Dr. McLean, former head of pediatrics for Grace Hospital and a clinical professor at the University of British Columbia, who had examined the Plaintiff several times, also gave expert evidence. Dr. McLean testified that assuming the quality of care that she had been receiving continued, the Plaintiff's lifespan could be expected to be between 25 and 30 years. Although Justice Hogarth preferred the evidence of Dr. McLean, he felt that he also needed to give some weight to the "Eyman Study", which was not relied upon by Dr. McLean.

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[11] [1991] B.C.J. No. 2206
[12] A study published in the New England Medical Journal in 1990

Justice Hogarth concluded that the best estimate of the Plaintiff's life expectancy would be 25 years from her birth. Justice Hogarth's conclusion was largely based on the expert evidence presented and evidence attesting to the devotion and level of care provided by the Plaintiff's mother, which he felt would be a major factor in the child's continued well being. The Court of Appeal[13], however, was of the view that the trial judge had not placed sufficient weight on the statistical evidence, in particular, the "Eyman Study". The Court of Appeal accordingly reduced the Plaintiff's life expectancy by seven years.

The Supreme Court of Canada[14] overturned the Court of Appeal's decision in this regard. The Supreme Court of Canada was of the view that the trial judge had carefully considered the evidence of all the experts on life expectancy as well as the "Eyman Study". Madam Justice McLachlin concluded that the Court of Appeal had erred in interfering with the trial judge's conclusion on life expectancy.

In endorsing the approach of the trial judge, the Supreme Court of Canada appears to have established that, when asking a court to make a determination on post-accident life expectancy, the evidence presented should encompass both statistical and medical evidence.

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[13] Toneguzzo-Norvell v. Burnaby Hospital, [1992] B.C.J. No. 1659
[14] *Toneguzzo-Norvell v. Burnaby Hospital*,[1994] 1 S.C.R. 114

Bearing in mind that the "Lost Years" claim is essentially a claim for loss of future income or loss of future earning capacity, it would also be necessary to lead expert evidence in this regard. In his paper entitled *Strategies for Maximizing Future Loss of Income*[15], Mr. John McLeish, states that both lawyers and the courts have confused the concepts of future loss of income and loss of earning capacity[16]. McLeish states that the first concept emphasizes market wages and the second, human capital.[16] He states that the difference between the two concepts has important practical consequences. If a plaintiff is working at the time of the accident and has achieved his or her full potential, then both approaches will achieve the same result.[16] The difficulty arises however, where a plaintiff has not yet achieved his or her full potential, is not working at the time of the accident, or is a young child.[17]

Clearly, proving the future economic loss of a plaintiff who has already embarked on a career is significantly less complex than proving the future economic loss of an infant who has not yet selected a career path and has not yet determined his or her aptitudes or interests.

Utilizing the expertise of rehabilitation consultants, economists, accountants

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[15] J. McLeish, "*Strategies for Maximizing Future Loss of Income*", Practical Strategies for Advocates VI, "Looking into the Future", The Advocates Society, October 4-5, 1996
[16] a Ibid pg3
[16] b Ibid pg. 4
[16] c Ibid
[17] J. McLeish, "*Strategies for Maximizing Future Loss of Income*", Practical Strategies for Advocates VI, "Looking into the Future", The Advocates Society, October 4-5, 1996 at paras. 9 and 10

and/or actuaries at trial is essential in formulating the nature and quantum of the claim for future economic loss in any case. With a very young child, a psycho-vocational assessment and the expert evidence of a psychologist may, in addition, prove to be invaluable in establishing a basis for the infant plaintiff's earning potential.

Cooper-Stephenson points out that in the case of very young children, national and provincial averages can be used, as was done in *Toneguzzo-Norvell*. Such averages may, however, be varied with reference to environmental socio-economic and family considerations.[18]

4. TONEGUZZO-NORVELL

Once the difference between the pre-accident life expectancy and the post accident life has been determined and the nature of the future economic loss has been identified, the question remains whether the courts will award the plaintiff the full value of the income which would have been earned.

This issue was, as previously mentioned, considered by the Supreme Court of Canada in Toneguzzo-Norvell.[19] The Supreme Court of Canada held that where a plaintiff's post-injury work life expectancy is shorter than his or her actual life

[18] K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 266-267
[19] [1994] 1 S.C.R. 114

expectancy, expenses for the "necessaries of life" or "normal living expenses" should be deducted from the future loss of earning capacity for the "Lost Years".

In Toneguzzo-Norvell, Madam Justice McLachlin, states as follows:

> "Jessica is entitled to an award for the loss of earning capacity, not only for the years she will actually live, but for the years she would have lived had she not been injured at birth. It is established that a deduction for personal living expenses must be made from the award for lost earning capacity for the years she will actually live. This is necessary to avoid duplication with the award for costs of future care.[20]
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> A number of considerations suggest that a deduction for personal living expenses should be made from the award for lost earning capacity during the "lost years". The first is the fact that the projected earnings could not have been earned except on the supposition that the plaintiff would have been alive to earn them. There can be no capacity to earn without a life. The maintenance of that life requires expenditure for personal living expenses. Hence the earnings which the award represents are conditional on personal living expenses having been incurred. It follows that such expenses may appropriately be deducted from the award.[21]
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> It can be argued that not to make a deduction for personal living expenses is to introduce into the award for loss of earning capacity for the "lost years" a measure of overcompensation akin to the duplication which the law avoids in the case of an award for lost earnings during the plaintiff's actual life span. This deduction has been justified for the years before the plaintiff's actual projected death, on the ground that it avoids duplication between the award for cost of care and the award for lost earning capacity. But in fact, the "lived years" and the "lost years" cannot be so easily distinguished. The same reasoning applies to both: had the plaintiff been in a position to earn the monies represented by the award for lost earning capacity, she would have had to spend a portion of them for living expenses. Not to recognize this is to introduce an element of duplication and to put the plaintiff in a better position than she would have been in had she actually earned the monies in question."[22]

In *Toneguzzo-Norvell*, Madam Justice McLachlin justifies a deduction of 50 % for "personal living expenses" on the basis that the plaintiff, Jessica Toneguzzo-Norvell, would be adequately cared for from other heads of damages such that

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[20] Supra at para. 26
[21] Supra at para. 28
[22] Supra at para. 29

any funds paid in compensation for lost earnings would simply result in a windfall gain for the plaintiff's beneficiaries.

The *Toneguzzo-Norvell* decision stands for the proposition that when awarding damages for loss of income or loss of earning capacity during the "Lost Years", the court will make a deduction for "personal living expenses". What remains unclear however, is the extent of the deduction required for "personal living expenses".[23] In other words, what are "personal living expenses"?

Canadian courts have, in various cases, determined deductions of 33%[24], 40%[25], 50%[26] and 50-70%[27] to be appropriate. It appears that the determination largely depends upon the particular factual circumstances of a case and also on what is understood by "personal living expenses".

In practical terms, the interpretation of "personal living expenses" or "necessities" may vary greatly depending upon whether one leads a frugal or a lavish lifestyle and depending upon the nature and cost of family and dependants. As Christopher Bruce[28] points out, it has been argued that it is inappropriate to assume that all expenditures on broad categories such as food and shelter are "necessary".

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[23] K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 365
[24] See *Semenoff et al. v. Kokan et al.* (1991), 84 D.L.R. (4th) 76 (B.C.C.A.); *Dube (Litigation Guardian of) v. Penlon Ltd.* (1994), 21 C.C.L.T. (2d) 268 (Ont. Ct. Gen. Div.) and Brown *et al. v. University of Alberta Hospital et. al.* (1997) D.L.R. (4th) 63 (Alta. Q.B.)
[25] See *Pittman et al. v. Bain* (1994), 112 D.L.R. (4th) 482 (Ont. Ct. Gen. Div.)
[26] *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114
[27] *Duncan Estate v. Baddeley* (1997), 145 D.L.R. (4th) 708 (Alta. C.A.)
[28] Bruce C., *"The 'Lost Years' Deduction"*, The Expert Witness Newsletter, Spring 1997 Vol 2, No. 1 .

Furthermore, while statistical information can provide insight into the approximate amount that an individual is likely to spend on food clothing and shelter based on age, income level and family status, the difficult question is to determine what proportion of income represents living expenses.[29]

The English courts have struggled with the concept of "personal living expenses". In one decision, the English Court of Appeal[30] held that using "conventional" percentages (figures derived from English fatal accident legislation), the deduction should represent (a) the victim's personal expenditures; and (b) a pro-rated proportion of the joint family expenditures. In *Semenoff v. Kokan*[31], the British Columbia Court of Appeal, in the absence of evidence, made a deduction of 33% on the basis of the "conventional figures" used in England.[32]

In *Toneguzzo -Norvell*, expert economic evidence was presented to the effect that between 50% and 70% of a single person's income would be used as living expenses. After considering this evidence and *Semenoff v. Kokan*, the court determined that a deduction of 50% was appropriate in the circumstances. The Supreme Court of Canada concurred.

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[29] G. Young, "*Lost Years as a Wrongful Death Claim*", www.dec.bc.ca/resources/lost_years_article.html
[30] *Harris v. Express Motors Ltd.* [1983] 3 All E.R. 561 (C.A.)
[31] (1991), 59, B.C.L.R. (2d) 195 (B.C.C.A.)
[32] K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 267

Cooper-Stephenson has suggested that from a functional point of view, providing for dependants is an essential aspect of an award of damages for loss of income during the "Lost Years". Accordingly, no deduction will be made for the portion of the victim's earnings that would have been used by dependants.[33] (It must be noted that the courts have in some cases assumed hypothetical dependants in determining the deduction).[34] Conversely, the percentage deduction will be greater where an award for future economic loss is likely to result in a windfall gain to heirs.[35]

The complexities inherent in calculating "personal living expenses" as a percentage of income has led to a number of diverging decisions and it appears that this area of the law remains very much subject to the factual circumstances of the case at hand. Personal living expenses are or will be a "live issue" in most cases and the extent of the deduction will depend on the evidence led at trial.

5. CRAWFORD V. PENNEY**

The recent decision of Mr. Justice Power of the Ontario Superior Court of Justice, upheld on appeal, in *Crawford v. Penney*[36] represents a significant victory for Plaintiffs seeking full and proper compensation following an avoidable tragedy

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[33] K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 370
[34] *Semenoff et al. v. Kokan et al. (*1991), 84 D.L.R. (4th) 76 (B.C.C.A.)
[35] *Toneguzzo-Norvell v. Burnaby Hospital* [1994] 1 S.C.R. 114
[36] Crawford (Litigation guardian of) v. Penney, [2003] O.J. No. 89 (S.C.J.), aff'd, [2004] O.J. No. 3669 (C.A.).
**I acknowledge with appreciation the contribution that Ms. Emma Holland of Bogoroch & Associates made to this portion of the paper.

with catastrophic consequences. The decision, in which the Plaintiffs were awarded $10 million in damages, also provides further insight into the analysis of the Court in determining future loss of income generally and in an award for future costs of care, particularly in light of the absence of evidence as to pre-accident earnings and the catastrophic nature of the Plaintiff's injuries.

In *Crawford*, the Plaintiff, Melissa Crawford, born December 27, 1983, was stillborn after her shoulders became impacted in her mother's birth canal (an event known as "shoulder dystocia"). Melissa was resuscitated after birth but as a result of oxygen deprivation, she sustained serious brain injuries rendering her in need of "total care" for the remainder of her life.

An action was commenced against the physicians who conducted the delivery, Dr. Penney and Dr. Healey. After a comprehensive analysis of the appropriate standard of care and conduct of the Defendants, Mr. Justice Power found these Defendants to be negligent in the care they provided to Jeanette Crawford, Melissa's mother, in the pre-natal and perinatal stages. Mr. Justice Power concluded that Drs. Penney and Healey breached the standard of care and that the resulting harm to Melissa was reasonably foreseeable.[37]

Mr. Justice Power began the discussion of damages by awarding the Plaintiffs the

[37] The Defendant physicians appealed the decision to the Ontario Court of Appeal. The Court dismissed the appeal, finding that while the reasons lacked detailed analysis, this did not justify interference with the result. The Court held that the case turned on credibility and Justice Power's adverse findings against the Defendant physicians were supported by the evidence at trial.

maximum amount of non-pecuniary losses (approximately $280,000.00) as enunciated by the Supreme Court of Canada in the trilogy.[38] In doing so, the Court rejected the Defendants' argument that a risk of double recovery exists should the Plaintiff receive both an award of general damages adjusted to account for inflation while also claim pre-judgment interest from the commencement of the action in 1983.[39]

As a preliminary issue to determining the pecuniary damages owed to the Plaintiff for lost future earning capacity and future care, Justice Power addressed the issue of life expectancy. There was, as expected, a significant divergence of opinion. Dr. Berbrayer and Dr. Paul Kordish, who testified on behalf of the Plaintiffs, estimated a total life expectancy of between 57 to 62 years, citing the lack of a significant risk of seizures, sores, bladder infections (all cited as major risks to life expectancy) and distinguished the findings in the Eyman study (cited above), pointing to the level of care that Melissa would receive.[40] Dr. MacGregor who testified on behalf of the Defendants, estimated a total life expectancy of 40 years, citing Melissa's recent hospitalizations, restrictions on her ability to move and communicate, her reliance on tube feeding and the findings of the Eyman study, as the salient factors to be considered.[41]

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[38] *Crawford* at 282.
[39] *Crawford* at 283
[40] *Crawford* at 285 and 287.
[41] *Crawford* at 286.

While the Court preferred the opinion of Plaintiffs' experts which focussed on Melissa's particular circumstances, Justice Power observed that the estimates were optimistic and put the life expectancy at 45 years, with a total span of 54 years.[42]

In addressing the Plaintiff's future loss of income and in calculating the "Lost Years", the Court found that Melissa would never become gainfully employed and would, therefore, suffer a total loss of earning capacity. Citing *Toneguzzo-Norvell*, the Court notes that for the period of time between the Plaintiff's life expectancy and determination of her estimated age of retirement, a calculation of the loss of income requires a deduction for personal living expenses during that period of time (i.e. the "Lost Years").[43]

Without the benefit of evidence with respect to pre-accident earnings or level of ability or intelligence, Justice Power considered the earning capacity and intelligence of her parents and siblings.[44]

In accepting the assumptions proposed by Professor Carr, produced on behalf of the Plaintiffs, Justice Power found that Melissa's loss would be income equal to the average earnings of all employed females working full-time throughout the year, with reference to Ontario statistics. In doing so, Justice Power considered

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[42] *Crawford* at 288.
[43] *Crawford* at 289-290.
[44] *Crawford* at 292.

the Crawford family history of academic success and full-time/long-term employment. Justice Power further accepted that Melissa would attain the level of a community college graduate and would commence employment at age 20.[45]

However, Justice Power did apply a 10% deduction to an estimated annual income of $41,000 in recognition of the contingency proposed by Professor Pesando, the Defendants' expert, namely, that a female worker will experience unemployment due to illness and/or child care and will work part-time at some point.[46] Having also assumed a retirement at age 60, there were six "lost years" to which Justice Power applied a 30% deduction.[47]

Turning to the cost of future care, Justice Power cited the Supreme Court in *Arnold v. Teno*[48] writing, "There can be no excuse for foisting on the public the burden of caring for the Plaintiff (Melissa) or supplying her with necessities of life."

It was agreed among the parties that Melissa would require constant care. The principle disagreement lay in the type of attendant care required. The Court noted that while her family would continue to participate in her care, the Court emphatically rejected the Defendants proposal which imposed a shared burden on

[45] *Crawford* at 293-295.
[46] *Crawford* at 296.
[47] *Crawford* at 299.
[48] Supra, note 1 at 333.

Melissa's parents to provide care.[49] The Court accepted the compromise position of the Plaintiffs for 24 hour RPN care, citing the level of Melissa's physical condition, and allowed only a minor deduction (5%) in recognition of the contingencies of intermittent hospital care, staffing problems, and lack of guardianship.[50]

In dealing with the question of appropriate housing for Melissa, Justice Power recognized the Supreme Court's "strong predisposition for home rather than institutional care for a severely disabled plaintiff."[51] The Court rejected the Plaintiffs' proposition which involved a relocation of the family to Kingston and construction of a new home. The Court found that the current home could be appropriately modified, as proposed by the Defendants, as awarded $175,000.00 for renovations.

The damages awarded in *Crawford* signal a recognition by the courts that the true costs occasioned by the loss should be apportioned. As Justice Power wrote, citing the words of Dickson J. in *Lindel v. Lindal*:[52]

> The amount of the award under these heads of damages (future care expenses and loss of future income) should not be influenced by the depth of the Defendants' pocket or by sympathy for the position of either party.

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[49] *Crawford* at 304.
[50] *Crawford* at 305.
[51] *Crawford* at 308.
[52] Crawford at 301 citing [1981] 2 S.C.R. 629 (S.C.C.) At 635.

6. FATAL ACCIDENT CASES - LOSS OF A SPOUSE/CHILD

In 1978, the *Family Law Reform Act* (now, *Family Law Act*)[53] came into force providing, for the first time, the right of family members to sue as a result of the injury or death of another family member.[54]

In cases where a spouse has been fatally injured, the surviving spouse is generally awarded 70% of the net take home pay in compensation for the work life expectancy of the deceased spouse and compensation for the value of services provided by the deceased (i.e. child care; homemaking).

The Court has offered some guidance into determining the level of damages to be awarded a surviving spouse in the case of *Neilson et al. V. Kaufman.*[55] *Neilson* was a *Family Law Act* action commenced by the husband and two children of a woman who died following negligently performed surgery. In upholding, in part, the decision of R.E. Holland J., the Ontario Court of Appeal clearly endorsed a case by case approach to assessing these types of general damages.[56] The Court further declared that "there must be an actual loss of care, companionship and guidance" in order to warrant a *Family Law Act* award. Citing the length of the marriage (12 years) and the closeness of the relationship between husband and wife, the Court upheld the award of $40,000.00 to the surviving spouse for loss of

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[53] R.S.O. 1878, c. 2, s. 60(2); now *Family Law Act*, R.S.O. 1990, c. C. 43, s. 61(2)(e).
[54] Claimants permitted to sue under the Act include the following: spouse; children; grandchildren; parents; and siblings.
[55] [1986] O.J. No. 2359 (C.A.); [1984] O.J. No. 285 (H.C.J.).
[56] *Nielsen* at QL page 9.

guidance and companionship.[57]

Also notable was the Court's analysis of the damages to be awarded for loss of support. The Court recognized that where there are two "breadwinners" in the family, some offset must be allowed for the fact that no portion of the surviving spouse's income would now be used to support the deceased spouse. In circumstances where there was a pooling of resources between spouses, the death of one partner would have an impact with some offsetting "credit" to the family resources. In this case, the Court adjusted the 70% dependency rate set by the trial judge to 60% to reflect the "credits" noted above.[58]

The Court further clarified the principles to be considered in calculating the value of lost household services. The Court rejected a strict arithmetical calculation of this award which "cannot be anticipated" and also pronounced that "the Court is bound to take into consideration the assumption underlying s. 4(5) of the Family Law Reform Act that spouses have a joint responsibility for child care and household management."[59] The Court awarded $50,000.00 for future housekeeping services.

In another notable case, *Hechavarria v. Reale*,[60] the Court awarded the surviving husband $85,000.00 in damages for loss of care, guidance and companionship for

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[57] Nielsen at QL page 10.
[58] *Nielsen* at QL page 8-9.
[59] *Nielsen* at QL page 8.
[60] *[2000] O.J. No. 4288 (S.C.J.).*

the loss of his wife of 34 years and mother of their two adult children, again recognizing the length of the marriage, the severe emotional impact on him due to the loss and the new obligations on him as the sole surviving parent.[61]

In calculating the loss of income, the Court reviewed the traditional approach of awarding the surviving spouse 70% of the income that his wife was earning up to her anticipated date of retirement, present valued to today. In this case, the Court adopted the "modified sole dependency approach" which recognizes that the deceased's income was used almost exclusively for the benefit of the family, while also crediting the savings to the family expenses with the death. The Court wrote that "whatever approach is eventually adopted should give rise to a result that reflects, to the degree possible, the factual realities of the family who loss is being determined."[62] The Court awarded a total dependency income loss of $165,613.00.

Awards in compensation for the loss of a child have generally been woefully inadequate. In 1982, one of the highest awards given by the courts for such a loss was $45,000.00, awarded to a single mother who lost her son.[63] While the awards have increased somewhat over the years, the Courts are still unlikely to award damages exceeding $60,000.00 to a parent where a child is under the age of 18

[61] *Hechavarria* at para. 12.
[62] *Hechavarria* at 26.
[63] *Mason v. Peters* (1982), 39 O.R. (2d) 27 (C.A.), affg (1980), 30 O.R. (2d) 409 (H.C.J.)

years old.[64]

One notable exception to this rule is the Ontario Court of Appeal decision in *To v. Board of Education*.[65] In this case, the jury at trial awarded parents who lost their only son, 14 years old, $100,000.00 in general damages and awarded his sister $50,000.00 in recognition of the close family ties and the expected role of the eldest son in a traditional Korean family.

On appeal, the Court addressed the "great disparity" in guidance, care and companionship awards. The Court noted that the case by case analysis of family relationships adopted in *Nielsen* has led to "assessments so broad as to defy description as conventional."[66] The Court comments as follows:[67]

> I regard the existing disparity in guidance, care and companionship awards as the inevitable result of choices made by the courts and the legislature. The courts could have established conventional guidance, care and companionship awards, or could have imposed rough upper limits as the Supreme Court of Canada did in respect of non-pecuniary general damages in personal injury cases. See Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. That has not happened.

The Court found that while the $100,000.00 award to each of the deceased's parents may be at the "high end of an accepted range" of damages, the evidence presented in the case (i.e. the role of the eldest son in a Korean family, close

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[64] Attached to this paper is a chart reflecting damage awards for Family Law Act claimants for the loss of a child/sibling.
[65] [2001] O.J. No. 3490 (C.A.).
[66] *To* at paras. 26-28.
[67] *To* at para. 29.

family ties, loss of protection of parents in old age) supported the award.[68] Having regard to similar cases, the Court did choose to intervene with the award to the sister, reducing to $25,000.00.[69]

CONCLUSION

The Courts continue to struggle to find a reasoned approach to assessing damages which require making assumptions on the happening of future events (i.e. future loss of earning capacity/income and "Lost Years") and damages which are, in all practicality, unquantifiable (i.e. loss of care, guidance and companionship).

While the Supreme Court of Canada has established guidelines for the lost years deduction, it will arguably be left to the trial and provincial appellate courts to establish the economic and philosophical underpinnings for the lost years deduction and to enunciate a coherent and predictable formula for the calculation of the "lost years" deduction. The *Crawford* decision provides us with a thoughtful analysis of the various facets of an award for damages in the face of catastrophic injury and the reliance on experts in attempting to quantify future losses. In assessing the claims of family members who have lost a spouse or a child in fatal accidents, the case by case approach enunciated in *Nielsen* and adopted by the courts clearly leaves much room for broad and disparate damages awards.

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[68] *To* at para. 37.
[69] *To* at para. 46.

CHART RE: DAMAGES AWARDS FOR *FLA* CLAIMANTS FOR LOSS OF SPOUSE/PARENT

Case	**Summary of Case**	**General Damages**	**Loss of Dependency Income**	**Loss of Household Services**	**Miscellaneous**
Nielsen et. al. v. Kaufmann, [1986] O.J. No. 2359 (C.A.); [1984] O.J. No. 285 (S.C.Ont)	Loss of wife/mother (age 31) Married for 12 years Children aged 12 and 6	Husband - $40,000.00 Child - $20,000.00 Child - $30,000.00 *There must be an actual loss of care, companionship and guidance; depends on facts of case*	Loss of support to age 65 - $113,143.00 Loss of support after age 65 - $5,248.00 *Court allowed offset to reflect "credit" with pooled resources due to death of spouse*	Loss of past housekeeping and past loss of support - $30,365.00 Loss of future housekeeping - $50,000.00 *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*	Gross up less 25%
Levesque v. Lipskie, [1991] O.J. No. 635 (C.A.)	Loss of husband/father Married Children aged 16 and 4	Wife - (total - breakdown unclear) $533,036.74 Child - $24,723.39 Child - $26,988.76 Child - $28,407.63 Child - $43,280.29	*Court found that surviving spouse under no obligation to mitigate loss by finding employment outside of the home*	*Court awarded damages for loss of deceased's contribution in building dream home*	

Case	Summary of Case	General Damages	Loss of Dependency Income	Loss of Household Services	Miscellaneous
Dybongco-Rimando Estate v. Lee, [2001] O.J. No. 3826	Loss of wife/mother (age 30) Married for 6 years Children aged 3 and 1 week	Husband - $40,000.00 Children (each) - $35,000.00	Loss of dependency income - $177,455.00 *Court considered potential future earnings of husband's new spouse in calculating surviving spouse's future loss of dependency income*	Past loss of household services - $81,377.00 *Reduced award to reflect personal benefits received by deceased in performing past household services* *No future loss of household services awarded due to re-marriage of husband/plaintiff* *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*	
Hechavarria v. Reale, [2000] O.J. No. 4288 (S.C.J.)	Loss of wife/mother (age 53) Married for 34 years Children aged 31, 26, 21	Husband - $85,000.00 Children (each) - $30,000.00 *Court considered length of marriage, severity of emotional impact of loss and need for father to assume both parenting roles*	Past dependency loss - $6,978.00 Future dependency loss - $158,635.00 *Court adopted modified sole dependency approach*	Past loss of household services - $9,600.00 Future loss of household services - $135,540.00 *Court adopted approach which used averages from StatsCan, adjusted upwards to reflect superior housekeeping abilities*	*Court rejected specific claims of children for delay in entering workforce – lack of quantifiable economic loss and covered by general damages award* *Court allowed no deduction for re-marriage; extremely close relationship between spouses*

Case	Summary of Case	General Damages	Loss of Dependency Income	Loss of Household Services	Miscellaneous
Wilson v. Martinello, [1995] O.J. No. 1397 (C.A.); [1993] O.J. No. 3361 (Ont. C.J.)	Loss of wife/mother Married for 22 years Child aged 15	Husband - $60,000.00 Child - $30,000.00	Loss of past income - $29,000.00 Loss of future income - $195,000.00	Loss of past housekeeping services - $9,000.00 Loss of future housekeeping services - $109,000.00 *Discounts on future housekeeping services for contingencies (i.e. death, remarriage, accepting lower standard of housekeeping, moving where housekeeping provided)*	*Court of Appeal rejected award for management fee due to maturity of husband/plaintiff*
Nye v. Hogan, [1992] O.J. No. 1490 (Ont. C.J.)	Loss of husband/father (age 36) Married Children aged 8 and 5	Wife - $40,000.00 Children (each) - $20,000.00	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		20% contingency for re-marriage *Court allowed deduction although surviving spouse not engaged*

Case	Summary of Case	General Damages	Loss of Dependency Income	Loss of Household Services	Miscellaneous
Peterbaugh v. Marsbergen, [1984] O.J. No. 392 (S.C.J.)	Loss of husband (age 27) Married for 4 years Children aged 5 and 2	Wife - $30,000.00 Children (each)- $15,000.00	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		30% deduction allowed for re-marriage *Court recognized 90% chance of getting remarried during lifetime*

CHART RE: DAMAGES AWARDS FOR *FLA* CLAIMANTS FOR LOSS OF CHILD

Case	**Summary of Case**	**Assessment of Loss of Care, Guidance and Companionship**
To v. Toronto Board of Education, [2001] O.J. No. 3490 (C.A.)	Loss of 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 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 (S.C.J.)	Loss of son (age 15)	Parents - $40,000.00 Siblings - $15,000.00
Rintoul v. Linde Estate, [1997] O.J. No. 465 (Gen.Div.)	Loss of 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 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 son (age 11)	Mother - $45,000.00 Sibling - $5,000.00