The Canadian Institute's 10th Annual
Reducing the Risk of Hospital Liability
Best Practices for Managing Risk, Adverse Events and Costly Litigation

Are Damages Awards on the Rise? Learning Cold Hard Lessons from Recent Negligence-Based Litigation

Richard M. Bogoroch and Kate L. Cahill

Bogoroch & Associates
Sun Life Financial Tower
150 King Street West
Suite 1707
Toronto, Ontario
M5H 1J9

February 27, 2007

BOGOROCH & ASSOCIATES

Are Damages Awards on the Rise?
Learning Cold Hard Lessons from Recent Negligence-Based Litigation

I. INTRODUCTION

A discussion of damages would be incomplete without a reference to the three Supreme Court of Canada cases, known as the "trilogy," consisting of *Arnold* v. *Teno,*[1] *Thornton* v. *School District No. 57,*[2] *and Andrews* v. *Grand & Toy.*[3] All of these cases involved catastrophically injured Plaintiffs who faced a lifetime of dependency on others. The trilogy established the principles applicable to the assessment of damages in personal injury cases and, in particular, set out various "heads of damages" under which an injured person is entitled to recover compensation, as follows:

1. Non-pecuniary Loss (i.e. compensation for physical and mental pain and suffering).

2. Pecuniary Loss:
   a. Compensation for past and future care costs; and
   b. Compensation for past and future loss of income.

The *Andrews* case is notable for the establishment of an "upper limit" or "cap" on non-pecuniary general damages of $100,000.00 to be adjusted according to inflation. As a result of this cap, general damages for pain and suffering have slowly risen over the last 29 years. Today, a catastrophically injured plaintiff would be entitled to a maximum of approximately $311,000.00 (as at January 2007) for his or her pain and suffering.

---

[1] [1978] 2 S.C.R. 287.

[2] [1978] 2 S.C.R. 267.

[3] [1978] 2 S.C.R. 229 [hereinafter *"Andrews*"].

In contrast, over the last 29 years, there have been significant developments in the assessment of damages for pecuniary loss, with the categories of damages expanding and becoming more clearly defined to reflect the general principles established in *Andrews*; namely, that future care is of paramount importance and that a plaintiff's pecuniary claim includes all reasonable sums of money that will assist with putting the plaintiff back into the position in which he or she would have been had the injury not occurred.

This paper will review a recent case from British Columbia in which the cap on general damages was unsuccessfully challenged and will then consider some recent case law assessing future pecuniary losses. It will then turn to a consideration of the court's approach to assessing damages for family members of individuals who have been injured or killed. Finally, this paper will briefly review developments in the area of leading evidence to establish damages.

II. THE CAP ON NON-PECUNIARY DAMAGES

About 30 years after *Andrews,* the Supreme Court of Canada addressed the issue of the nature and purpose of non-pecuniary damages in *Lindal* v. *Lindal.*[4] In *Lindal,* the Court stated that the objective of non-pecuniary damages is to provide a substitute for lost amenities and to make a plaintiff's life more bearable. Therefore, the Court concluded that **an award for non-pecuniary damages is not to be assessed based on the seriousness of a person's injury, but based on the potential for the award to ameliorate the condition of the plaintiff.**

[4][1981] 2 S.C.R. 629 at 637.

With respect to the purpose of non-pecuniary damages, the Court stated:[5]

> The award of $100,000.00 was made, as earlier indicated, in order to provide more general physical arrangements above and beyond those directly relating to the injuries in order to make life more endurable.
>
> We award non-pecuniary damages because the money can be used to make the victim's life more bearable. **The limit of $100,000.00 was not selected because the Plaintiff could only make use of $100,000.00 and no more. Quite the opposite. It was selected because without it, there would be no limit to the various uses which a plaintiff would put a fund of money** [*emphasis added*].

A challenge to the rationale for the cap on non-pecuniary general damages was recently heard by the British Columbia Court of Appeal in the case *Lee* v. *Dawson.*[6] The *Lee* case was tried before a jury in early 2003. The Plaintiff, Ik Sang Lee, was 17 years old when he was seriously injured in a motor vehicle accident when a transport truck spilled a load of lumber, causing the lumber to crash into the vehicle in which Mr. Lee was a passenger. As a result of the accident, Mr. Lee suffered a traumatic brain injury, dramatic personality changes, permanent psychological injury, major chronic depression, and permanent facial scarring. The Plaintiff's evidence at trial was that he was suffering from permanent, constant, and disabling pain and that his serious facial disfigurement caused him to suffer from shame, alienation, and psychological trauma which was exacerbated by his cultural background.[7]

After a 13-day trial, the jury delivered a verdict awarding the Plaintiff, Ik Sang Lee, $2,000,000.00 in non-pecuniary damages, a verdict which clearly demonstrates that there is an enormous disparity

---

[5] *Lindal, supra,* at 642-643.

[6] [2006] B.C.J. No. 679 (C.A.) [hereinafter *Lee*].

[7] *Ibid.* at paras. 2-4.

been the current state of the law and the public's sense of what is just. Following this verdict, the trial judge reduced the Plaintiff's award for pain and suffering to the then-upper limit of $294,660.00. The Plaintiff appealed this ruling to the Court of Appeal, arguing that the cap was a violation of the Plaintiff's rights under the *Charter of Rights and Freedoms*. The following is a summary of additional arguments made by the Plaintiff[8]:

> (i) The cap is not a strict rule of law;
>
> (ii) Twenty-five years have passed since the trilogy set out the upper limit. The policy reasons that justified its adoption no longer exist;
>
> (iii) In the trilogy, the Supreme Court noted that the possibility of having an extravagant claim was higher with respect to non-pecuniary damages because of the difficulties with quantification. In the Plaintiff's submission, difficulty in quantification does not relieve the Court of its obligation to determine the issue;
>
> (iv) In the trilogy, the Supreme Court was concerned that non-pecuniary damages might be awarded on the basis of improper considerations such as sympathy for the Plaintiff, a desire to punish the defendant, or a perception of the defendant's "deep pockets". The Plaintiff submits that a solution is to have a jury instruction that warns of the impropriety of these considerations;
>
> (v) The Supreme Court in the trilogy expressed concern that non-pecuniary awards were increasing. Subsequent studies have demonstrated that the notion of sky-rocketing non-pecuniary awards is a false perception;
>
> (vi) A further policy consideration that was contemplated in the trilogy was that pecuniary awards provide the plaintiff with full compensation, and non-pecuniary awards should, therefore, be modest. The Plaintiff argues that this conclusion assumes perfect compensation with respect to other heads of damage;
>
> (vii) In the trilogy, the Supreme Court was concerned with the high social impact of high non-pecuniary awards. It highlighted increased insurance premiums as an example. The Plaintiff submits that again, the Court made an assumption in the absence of evidence capable of supporting it;

---

[8] *Ibid.* at para. 84.

(viii) The rough upper limit disregards juries. The Plaintiff argues that the jury is the only trier of fact capable of keeping up with the rapid pace of social, economic and technological change in our society. The imposition of the rough upper limit precludes juries from addressing these questions, with the result that the values of the community, as represented by the jury, are ignored;

(ix) The legislature expressly declared in s. 6 of the *Negligence Act*, R.S.B.C. 1996, c. 333, that the amount of damages is a question of fact. The Plaintiff submits that it does not appear that this legislative provision was considered in the trilogy. Pursuant to the principles of legislative supremacy, the decisions setting out the rough upper limit cannot be interpreted as imposing a rule of law that modifies s. 6 of the Act;

(x) The standard of appellate review applicable to questions of fact would be fundamentally altered if the rough upper limit is viewed as a strict rule of law rather than as a guideline; and

(xi) The incremental method by which changes to the common law are made would be breached if the rough upper limit were adopted as a rule of law, as this would constitute a radical change in the common law that would be contrary to the principle that the common law evolves slowly, and radical changes are left to the legislature.

The Court of Appeal also heard submissions from The British Columbia Coalition of People with Disabilities, who obtained leave to intervene on the appeal. The intervenor made four main arguments. First, that the cap discriminates against people who are not entitled to large future care awards because they suffer from pre-existing conditions which prevent them from working. Second, that the cap is inappropriate when the courts are increasingly relieving defendants of their responsibility to pay future care awards . Third, the cap is not consistent with community values as demonstrated by the jury award. Fourth, the policy reasons for the cap are unsupported, particularly when the Supreme Court has not applied a cap in defamation cases.[9]

[9] *Ibid.* at paras. 86-90.

The Court of Appeal concluded that the Plaintiff and the intervenor had advanced persuasive arguments for revisiting the conceptual basis for the cap. However, the appeal was dismissed on the basis that the Court was bound to follow the precedent established by the Supreme Court. Leave to appeal the decision of the Court of Appeal was dismissed without reasons by the Supreme Court in October 2006. Given the Supreme Court's refusal to reconsider this issue, it is unlikely that there will be any significant changes to the cap on non-pecuniary damages in foreseeable future.

III. FUTURE PECUNIARY DAMAGES

As previously stated, over the last 29 years, there have been significant developments with respect to the assessment of future pecuniary damages, with the categories of damages expanding to reflect the principle that plaintiffs must be fully compensated for their losses. A detailed discussion of all of the possible areas of damages is beyond the scope of this paper, which will focus on a few notable cases which have contributed to the law on the assessment of future pecuniary damages.

An important issue for plaintiffs who have been catastrophically injured is assessing the cost of having a guardian manage the funds received from a damages award. A recent case dealing with this issue is *Sandhu (Litigation Guardian of)* v. *Wellington Place Apartments.*[10] At the age of 2, the Plaintiff, Harvinder Sandhu, suffered catastrophic injuries when he fell five floors from the bedroom window of his aunt's apartment. In addition to multiple fractures and bodily injuries, he sustained a permanent frontal lobe brain injury. The case was tried before a jury, who awarded the Plaintiff, Harvinder Sandhu, the largest amount of damages in a personal injury action in Canada. The jury's

[10][2006] O.J. No. 2448 (S.C.J.) [hereinafter "*Sandhu*"].

assessment of Harvinder Sandhu's damages was as follows: $311,000 for non-pecuniary loss; $1,166,283 for future loss of income; and $10,942,908.00 for future care costs.[11]

After this verdict was rendered, the Plaintiffs asked the trial judge to determine the Plaintiffs' damage claim for guardianship costs. The Plaintiffs argued that the guardianship costs would include three types of fees:[12]

(a) Compensation for a non-corporate guardian;
(b) Legal fees for guardianship; and
(c) Compensation for a corporate guardian.

The Court held that the Plaintiff, Harvinder Sandhu, was required to prove that there was a real and substantial possibility that he would require guardianship costs.[13] With respect to the non-corporate guardian, the Plaintiffs assumed that Harvinder's father would be appointed as the guardian and asked the Court to provide him with compensation for this role. The Defendants argued that Mr. Sandhu should receive little or no compensation for this role. However, the Court disagreed, concluding that Mr. Sandhu's responsibilities as guardian would be significant given the nature of Harvinder's injuries.[14] The Court awarded $7,500.00 per year for the non-corporate guardian.[15]

With respect to future legal services, the Court awarded $400,000.00, stating that the relevant considerations were: the size of the award; the duration of the guardianship; and the risk of legal

---

[11][2006] O.J. No. 2449 at para. 12 (S.C.J.).

[12]*Sandhu, supra* note 10 at para 4.

[13]*Ibid.* at para. 37.

[14]*Ibid.* at para. 81.

[15]*Ibid.* at para. 87.

challenges in the future.[16] For the corporate guardian, the Court awarded damages in the sum of $1,127,000.00 stating that, given the complexities of the issues likely to arise throughout the duration of the guardianship, the guardianship position should be held by a trust company, which would charge annual fees of $23, 318.41.[17]

Another notable decision is *Bovingdon* v. *Hergott*[18] which is a watershed decision for parents seeking full compensation when their children have been catastrophically injured. In *Bovingdon,* the Defendant, Dr. Hergott, prescribed Clomid, a drug intended to stimulate ovulation, to Carolyn Bovingdon. She became pregnant with twins, Karley and Kaylin Bovingdon, who were born with severe disabilities due to their premature birth. An action was commenced against Dr. Hergott for negligently prescribing Clomid to Ms. Bovingdon and for failing to warn her of the risks associated with Clomid.

The case was tried by a jury and the jury returned a verdict that the Defendant, Dr. Hergott, was negligent in failing to adequately disclose the risks associated with Clomid.[19] One issue in the trial was whether the parents of the twins had a sustainable claim for the costs of caring for their children once they reach adulthood. The Defendant argued that if parents are not legally obliged to support their children when they are adults, then the Defendant is not responsible for these costs, particularly when the *Ontario Disability Support Act* provides welfare benefits for disabled adults and the

---

[16] *Ibid.* at paras. 113-115 and 124.

[17] *Ibid.* at paras. 144 and 152.

[18] *Bovingdon* v. *Hergott,* [2006] O.J. No. 4058 (S.C.J.) [hereinafter *"Bovingdon"*].

[19] *Bovingdon* v. *Hergott,* [2006] O.J. No. 4672 (S.C.J.).

Developmental Services Act allows developmentally disabled persons admission to residential facilities.[20]

In assessing the validity of this claim, Justice Pardu stated as follows:[21]

> The evidence to date establishes that these children, now 13, are profoundly disabled. They reside with their parents who have testified that they will never place their twin daughters in a group facility. While those facilities can provide physical care, they contend that those facilities could not give the girls the care and attention to their emotional well-being nor give then intellectual stimulation and pleasure which their limitations allow them to enjoy.

Based on this evidence, Justice Pardu found that the Bovingdons would continue to care for Karley and Kaylin into adulthood and that they would incur enormous expense in doing so. Justice Pardu further concluded that Mr. and Mrs. Bovingdon were not barred from asserting a claim for the costs of caring for their disabled children into their adult years.[22]

In addition to the *Bovingdon* case, other recent cases support the proposition that the cost of future care should not be shifted to government agencies or to the families of people who have been injured. This issue was addressed in *Fullerton (Guardian ad litem of)* v. *Delair*,[23] a case in which the Plaintiff, Benjamin Fullerton, sustained catastrophic injuries at birth. At trial, the Defendants argued that they were not responsible for future care costs if the services that the Plaintiff requires are available to the Plaintiff through government agencies. The trial judge agreed and the Plaintiffs

---

[20] *Bovingdon* v. *Hergott,* [2006] O.J. No. 4058 (S.C.J.).

[21] *Bovingdon, Ibid.* at para. 4.

[22] *Bovingdon, Ibid.* at para. 22.

[23] [2005] B.C.J. No. 1920 (S.C.).

appealed this decision. The Court of Appeal concluded that it is inappropriate to shift the burden of care from wrongdoers to the public, particularly when the benefit at issue is not universal and the effect of denying compensation will be to deprive other families of care that is required.[24]

The issue of shifting the responsibility of care to families was recently considered in the case, *Morrison* v. *Greig.*[25] In *Morrison*, two boys, Ryan Morrison and Derek Gordon, were catastrophically injured in a motor vehicle accident. Ryan Morrison sustained serious injuries to his spinal column at the T5-T6 level, rendering him a paraplegic. Derek Gordon sustained a serious brain injury and an upper spinal cord injury. Liability was admitted by the Defendants. Therefore, the only issue at trial was the assessment of the quantum of damages for both Plaintiffs, who would require continuous attendant care and continuous rehabilitation assistance throughout their lives.[26]

In both cases, the primary caregivers for the Plaintiffs were their families. With respect to Derek Gordon, the defence argued that damages for attendant care should be reduced because Derek Gordon was unlikely to accept attendant care assistance. Mr. Justice Glass rejected this position, stating that:[27]

> I do not agree with the defence position regarding attendant care. Today, Derek receives attendant care assistance. The care is not a luxurious form of care. It is necessary. There is no likelihood that Derek will recover and have no need for this form of care. Acquired brain injury is permanent... To suggest that the recommended attendant care be reduced significantly or abandoned completely simply passes the

---

[24][2006] B.C.J. No. 1585 (C.A.).

[25]*Morrison* v. *Greig,* [2007] O.J. No. 225 (S.C.J.).

[26]*Ibid.* at para. 23.

[27]*Ibid.* at para. 35.

> task over to the family in the sense of dumping such responsibility on them. There is no justification for doing so.

Similarly, with respect to Ryan Morrison, the defence attempted to argue that Ryan Morrison would not require constant attendant care throughout his life. Specifically, with respect to Ryan Morrison's future housing needs, the defence argued that Ryan Morrison would be able to live on his own as long as he had access to a call centre for emergencies. This proposition was flatly rejected by Justice Glass who stated:[28]

> This approach by the defence with the opinions of Lee Tasker appears to be shortsighted. If this Plaintiff were living on his own and did not have 24-hour care a day attendant care, he would be at risk of not having an emergency addressed quickly. For example, if there were a fire and it was going to take a personal care worker half an hour to come to his residence, the Plaintiff might die in the meantime. ...[This Plaintiff] needs someone who can be there right away and someone who understands the limitations of a spinal cord injury person so that he can be properly assisted.

Again, Justice Glass concluded that the Defendants' arguments amounted to nothing more than attempts to reduce the amounts payable to the Plaintiffs, commenting as follows:[29]

> The costs for such care as determined by Carol Kelly and Ronald Smith are reasonable. They are challenged by the defence as excessive. Lee Tasker, for the defence, has provided her evidence to reduce those dollars, but her assessment amounts to searching for any way to knock down the dollars without proper foundation. Her suggestions would amount to downloading the work to the family of Ryan Morrison. That is not fair to those family members.

---

[28] *Ibid.* at para 125.

[29] *Ibid.* at para. 127.

IV. EVIDENCE REQUIRED TO ESTABLISH FUTURE LOSS

In order to win a case in negligence, a plaintiff is required to establish that a defendant was negligent on the balance of probabilities. In contrast, once that burden has been met, the plaintiff need only establish his/her entitlement to damages for future losses by showing that there is a reasonable chance that the future losses will occur.[30] The principles governing the assessment of future losses are set out in *Krangle* v. *Brisco*:[31]

> Damages for cost of future care are a matter of prediction. No one knows the future. Yet, the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

With respect to proving a future loss of income, although it is helpful to lead expert evidence, a recent ruling of the Ontario Court of Appeal in *Lurtz* v. *Duchesne*[32] establishes that it is not necessary for the plaintiff to do so in order to prove a claim for future loss of income. In *Lurtz,* a family physician and an endocrinologist were found liable for failing to diagnose acromegaly, which left the Plaintiff, Donna Lurtz, with significant health problems that affected her ability to function in the workplace. The trial judge awarded damages for future loss of income and the Defendants appealed.

---

[30] *Schrump et. al.* v. *Koot et. al.* (1997), 18 O.R. (2d) 337 (C.A.).

[31] [2006] O.J. No. 4058 (S.C.J.).

[32] (2005), 194 O.A.C. 119 (C.A.) [hereinafter "*Lurtz"*].

On appeal, Mr. Justice Rosenberg, writing for the majority, found that the Plaintiff was not required as a matter of law to call expert evidence:[33]

> The Plaintiff need only call sufficient evidence to meet the burden of proof. In choosing not to call certain medical evidence the respondent ran the risk that she would not be able to make out her claim. As Professor Waddams points out, however, the assessment of damages is a matter for the court not the experts. **The respondent's claim for damages for future loss of income would inevitably have come down to the credibility and reliability of the evidence of the respondent, and her husband and mother, who had daily contact with her.... That evidence, together with the evidence establishing the link between the acromegaly and her condition was a sufficient foundation for the claim** [*emphasis added*]**.**

In addition, the Defendants attacked the Plaintiff's evidence on the basis that she had not tendered *viva voce* evidence from her treating physicians to support her claim for future income loss. The Defendants argued that the trial judge was bound to draw an adverse inference against the Plaintiff. The Court disagreed, stating that the Plaintiff was entitled to rely on the reports that she had filed in accordance with Section 52 of the *Evidence Act* and that an adverse inference should not be drawn, particularly since the Defendants had the opportunity to cross-examine the Plaintiff's treating physicians and failed to do so.

V. FAMILY LAW ACT CLAIMS

In 1978, the *Family Law Reform Act* (now *Family Law Act*[34]) 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.[35]

---

[33] *Lurtz, supra,* at para. 19.

[34] R.S.O. 1878, c.2, s. 60(2); now *Family Law Act,* R.S.O. 1990. c. C.43, s.61(2)(e).

[35] Claimants permitted to sue under the Act include the following: spouse, children; grandchildren; parents; and siblings.

The damages that a family member may recover are specified in section 61(2) of the *Family Law Act,* which reads as follows:

> (2) The damages recoverable in a claim under subsection (1) may include,
>
> (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
> (b) actual funeral expenses reasonably incurred;
> (c) 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; 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.

A. Death of a Spouse

In the case, *Neilson et al.* v. *Kaufman,*[36] the Court offered some guidance into determining the level of damages to be awarded a surviving spouse. *Neilson* was an action commenced by the husband and two children of a woman who died following negligently performed surgery. In upholding, in part, the decision of Justice Holland, the Ontario Court of Appeal clearly endorsed a case-by-case approach to assessing these types of general damages.[37] 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

---

[36][1986] O.J. No. 2359 (C.A.).

[37]*Nielsen, supra,* at 9.

and wife, the Court upheld the award of $40,000.00 to the surviving spouse for loss of care, guidance and companionship.[38]

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.[39]

The Court 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."[40] The Court awarded $50,000.00 for future housekeeping services.

In another notable case, *Hechavarria* v. *Reale*,[41] the Court awarded a surviving husband $85,000.00 in damages for loss of care, guidance and companionship for the loss of his wife of 34 years and the

---

[38]*Nielsen, ibid.* at 10.

[39]*Nielsen, ibid.* at 8-9.

[40]*Nielsen, ibid.* at 8.

[41][2001] O.J. No. 4288 (S.C.J.).

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.[42] 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 whose loss is being determined."[43] The Court awarded a total dependency income loss of $165,613.00.

B. Death of a Child

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.[44] These awards have increased somewhat over the years; however, awards in compensation for the loss of a child have generally been woefully inadequate.

The Ontario Court of Appeal decision in *To* v. *Board of Education*[45] is regarded as the highwater mark in damage awards to parents for the loss of a child. In this case, the jury awarded parents who

---

[42] *Ibid.* at para. 12.

[43] *Ibid.* at para. 26.

[44] *Mason* v. *Peters* (1982), 39 O.R. (2d) 27 (C.A.), affg (1980), 30 O.R. (2d) 409 (H.C.J.).

[45] [2001] O.J. No. 3490 (C.A.).

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."[46] The Court comments as follows:[47]

> I regard the existing disparity in guidance, care and companionship awards as the inevitable result of choices made by the Court s and the legislature. The Court s 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 family ties, loss of protection of parents in old age) supported the award.[48] Having regard to similar cases, the Court did choose to intervene with the award to the sister, reducing to $25,000.00.[49]

The decision in *To* remains a reference point for courts in assessing damages to compensate parents who have lost their children. For example, in the case *Osman v. 629256 Ontario Ltd,*[50] the Court

---

[46] *Ibid.* at para. 26-28.

[47] *Ibid.* at para. 29.

[48] *Ibid.* at para. 37.

[49] *Ibid.* at para. 46.

[50] [2005] O.J. No. 2689 (S.C.J.).

awarded the parents of the deceased, 16-year-old Guled Mohamed, $80,000.00 for loss of care, guidance and companionship. In concluding that $80,000.00 would reasonably compensate the parents, the Court stated as follows:[51]

> I accept that Guled, like Bin Hoy To, was a very special child with a potential for a great future. There is every reason to believe that he would have achieved his dreams. Three of his older brothers are at university in Manitoba. I also accept that any success he enjoyed would have been shared with his family. However, unlike the *To* case, **Guled was not the only boy in his family, nor the only child who was close to and committed to helping his parents. Thus there is a difference between this case and the *To* case** [*emphasis added*].

However, plaintiffs are not limited to claiming damages for loss of care guidance and companionship when they suffer the loss of a child. The Ontario courts have recently recognized that the *Family Law Act* also supports parental claims for economic loss arising from the death of a child. The leading case in this regard is the decision of the Ontario Court of Appeal in *Macartney* v. *Warner.*[52] Jeremy Macartney was killed in a motor vehicle accident close to his home. Jeremy's parents, Dana and Cecil Macartney, were at home at the time of the accident and heard the accident occur. Dana and Cecil Macartney both advanced claims for nervous shock. As a result of the accident, Dana Macartney was completely unable to resume employment and Cecil Macartney was only able to maintain employment in a less stressful and lower paying job.

The Court concluded that nothing in the wording of the *Family Law Act* restricts a parent's claim to pecuniary benefits that a parent would receive from their child if she/he had not been killed. In

---

[51] *Ibid.* at para. 15.

[52] (2000), 46 O.R. (3d) 641 (C.A.).

confirming the legitimacy of a parent's claim for loss of income Justice Laskin stated:[53]

> In my view, restricting the scope of pecuniary loss is inconsistent with the purpose of the Act. The F.L.R.A. was path-breaking legislation when enacted in our province in 1978... Moreover, the scheme of the Act as a whole reflect the Legislature's intention to provide much greater protection to family members in the case of family break-up or family loss than previously available.

The scope of what a parent may recover will be dictated by the circumstances of the case:[54]

> In each case, the court will have to apply the words of the statute and ask whether this is a "pecuniary loss resulting from injury or death." These words may well raise difficult questions of causation. Undoubtedly, the courts will have to develop a set of principles to resolve these causation questions and to govern compensation under the [*Family Law Act*].

VI. CONCLUSION

The answer to whether damage awards are on the rise depends on a more detailed analysis of the various types of damages. As previously stated, non-pecuniary general damages have slowly risen over the years with inflation as a result of the cap placed on these damages by the Supreme Court almost thirty years ago. With the decision in *Lee,* it is unlikely that there will be a change to the law in this regard in the near future. Therefore, a person who is catastrophically injured can expect to receive a maximum of $311,000.00 for their pain and suffering. As argued in *Lee,* for a person who has a sixty-year life expectancy, this is the equivalent of $13.69 a day, or less than the current price a movie and a bag of popcorn.[55] In contrast, the law with respect to the assessment of pecuniary damages has developed over the years with the categories of damages expanding to reflect the

---

[53] *Ibid.* at para. 50.

[54] *Ibid.* at para. 64.

[55] *Lee* v. *Dawson,* [2003] B.C.J. No. 1532 at para. 6 (S.C.J.).

principle that plaintiffs must be fully compensated for their losses. Although there have been significant damages awards over the last year in the *Sandhu, Bovingdon,* and *Morrison* cases, the awards reflect the fact that the Plaintiffs in each of these cases were catastrophically injured and as a result of their injuries have lost a lifetime of income and will require a lifetime of future care.