Auto Insurance Claims Litigation Seminar
"The Lost Years"

1. INTRODUCTION

A discussion of damages would be incomplete without a reference to the Trilogy of Supreme Court of Canada cases which have provided a baseline for the assessment of personal injury damages for more than twenty 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

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 of cases were 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

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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

that is “full”.

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

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 expectancy and his or her diminished life expectancy.[8] 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:

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

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.[9]

In the case of *Toneguzzo-Norvell v. Burnaby Hospital*[10], 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

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

[10] [1991] B.C.J. No. 2206

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 paediatric Neurology at the University of British Columbia), based their evidence largely on a number of studies including the "Eyman Study"[11], 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 paediatrics 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.

[11]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[12], 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 [13] 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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[12] Toneguzzo-Norvell v. Burnaby Hospital, [1992] B.C.J. No. 1659

[13] *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* [14], Mr. John McLeish, states that both lawyers and the courts have confused the concepts of future loss of income and loss of earning capacity.[14] McLeish states that the first concept emphasizes market wages and the second, human capital.[14] 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.[14] 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[15].

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.

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[14]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

[14]a Ibid pg3

[14]b Ibid pg. 4

[14]c Ibid

[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 at paras. 9 and 10

Utilizing the expertise of rehabilitation consultants, economists, accountants 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[16].

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[17]. The Supreme Court of Canada held that where a plaintiff's post-injury work life

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[16]K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 266-267

[17][1994] 1 S.C.R. 114

expectancy is shorter than his or her actual life 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.**[18]
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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.**[19]
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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**

[18] Supra at para. 26

[19] Supra at para. 28

> **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."**[20]

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

[20]Supra at para. 29

The *Toneguzzo-Norvell* decision has entrenched in our law the concept 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".[21] In other words, what are "personal living expenses"?

Canadian courts have, in various cases, determined deductions of 33% [22], 40% [23], 50% [24] and 50-70% [25] to be appropriate. It appears that the determination largely depends upon the particular factual

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[21] K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 365

[22] 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.)

[23] See *Pittman et al. v. Bain* (1994), 112 D.L.R. (4th) 482 (Ont. Ct. Gen. Div.)

[24] *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114

[25] *Duncan Estate v. Baddeley* (1997), 145 D.L.R. (4th) 708 (Alta. C.A.)

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[26] 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".

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[27].

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[26]Bruce C., *"The 'Lost Years' Deduction"*, The Expert Witness Newsletter, Spring 1997 Vol 2, No. 1 .

[27] G. Young, "*Lost Years as a Wrongful Death Claim*", www.dec.bc.ca/resouces/lost_years_article.html

The English courts have wrestled with the concept of "personal living expenses". In one decision, the English Court of Appeal[28] 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*[29], 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.[30]

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.

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[31]. (It must be noted that the courts have in some cases assumed hypothetical dependants

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[28]*Harris v. Express Motors Ltd.* [1983] 3 All E.R. 561 (C.A.)

[29](1991), 59, B.C.L.R. (2d) 195 (B.C.C.A.)

[30]K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 267

[31]K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell,1996) at 370

in determining the deduction)[32]. Conversely, the percentage deduction will be greater where an award for future economic loss is likely to result in a windfall gain to heirs[33].

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 is or will be a "live issue" in most cases and the extent of the deduction will depend on the evidence led at trial.

CONCLUSION

The Supreme Court of Canada has established a guideline for the lost years deduction. In the years to come it will 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.

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[32] *Semenoff et al. v. Kokan et al. (*1991), 84 D.L.R. (4th) 76 (B.C.C.A.)

[33] *Toneguzzo-Norvell v. Burnaby Hospital* [1994] 1 S.C.R. 114