

Personal Injury Damages

(What the SCC said in the Grand & Toy case)

The decision of *Andrews v Grand & Toy Alberta Ltd.* is the most important decision on personal injury damages. Following are the high points of the unanimous judgment of the entire Supreme Court of Canada delivered by Dickson, J. It covered a number of different topics in the area of personal injury damages.

With respect to the question of actuarial evidence, the Supreme Court of Canada had the following to say:

“The apparent reliability of assessments provided by modern actuarial practices is largely illusionary, for actuarial science deals with probabilities not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which it proceeds. Although a useful aid, and a sharper tool than the “multiplier-multiplicand” approach favored in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump-sum awards, however, we are also tied to actuarial calculations as the best available means of determining amount.”

The two areas in which damages must be determined are pecuniary loss and non-pecuniary loss. Pecuniary loss deals with the costs of future care and future loss of earnings (or loss of prospective earnings), while non-pecuniary loss deals with loss of amenities or enjoyment in life.

The Supreme Court of Canada discussed the question of the standard of care that a compensation award should address. The court had to determine whether or not home care, though far more expensive, would be more appropriate than institutional care. With respect to the question of mitigation of damages, the court had this to say at p. 461:

1. PECUNIARY LOSS

Pecuniary loss includes the costs of future care and the loss of future earnings.

(a) Future Care

(I) Standard of care

In discussing the question of mitigation of damages (under the sub-heading) of standard of care, the court had the following to say:

“...I agree that a plaintiff must be reasonable in making a claim. I do not believe that the doctrine of mitigation of damages, which might be applicable, for example, in an action for conversion of goods, has any place in a personal injury claim. In assessing damages in claims arising out of personal injuries, the ordinary common-law principles apply.”

The court approved the statement of principal made by Lord Dunedin when he said, “in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as a natural result of the wrong done to him.”

The court went on to say, “The principal that compensation should be full for pecuniary loss is well-established... The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. “

As to what is full compensation the court had this to say:

“*restitutio in Integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or prove the mental or physical health of the person injured it may properly form part of a claim... there is no duty to mitigate, in the sense of being forced to except less than real loss. There is a duty to be reasonable. There cannot be “complete” or “perfect” compensation. An award must be moderate, and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. But, in a case like the present, where both Courts have favored a home environment, reasonable means reasonableness in what is to be provided in that home environment. It does not mean that Andrews must languish in an institution which on all evidence is inappropriate for him.”

They went on to say that “There is no doubt upon the medical and other evidence that a home environment would be salutary to the health of the appellant and productive of good effects. **It cannot be unreasonable for a person to want to live in a home of his own.**” (emphasis added)

With respect to the question of whether or not mothers or wives should be compensated for their services in providing health care, the court had this to say:

“There is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis.”

With respect to the ability of the defendant to pay, that is not a relevant consideration.

The court had this to say:

“An award must be fair to both parties but the ability of the defendant to pay has never been regarded as a relevant consideration of the assessment of damages at common-law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable.”

The court came to the conclusion that, if possible, home care should be provided. Just because the government treats veterans and injured workers differently is no reason to impose that standard of care onto victims of torts. At page 465 of the judgment the court said the following:

“What a legislature sees fit to provide in the cases of veterans and in the cases of injured workers and the elderly is only of marginal assistance. **The standard to be applied to Andrews is not merely “provision” but “compensation”, i.e., what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care.** If there were severe mental impairment, or in the case of an immobile quadriplegic, the results might well be different; but, where the victim is mobile and still in full control of his mental faculties, as Andrews is, it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better.” (emphasis added)

As to whether or not Andrews would the plaintiff would squander the money or spend it foolishly, the court noted:

“it is not for the court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes. Financial advice is readily available. He has the flexibility to plan his life and to plan for contingencies. The preference of our law to date has been to leave this flexibility in the plaintiff's hands... Save for infants and the mentally incompetent, the courts have no power to control the expenditure of the award.”

With respect to the question of whether or not the cost of a high award is an unreasonable burden on the defendant, the court noted that in days when costs are distributed through insurance premiums, the argument should fail. The court noted:

“I do not think the area of future care is one in which the argument of the social burden of the expense should be controlling, particularly in the case like the present, where the consequences of exceeding it would be to fail in large measure to compensate the victim for his loss. Greater weight might be given to this consideration were the choice with respect of future care is not so stark as between home care and auxiliary hospital. Minimizing the social burden of expense may be a factor influencing choice between acceptable alternatives. It should never compel the choice of the unacceptable.”

(ii) Life Expectancy

The court noted that it is of little assistance to consider the life expectancy of a 23 year old person when what is need is the average life expectancy of a 23 year old quadriplegic as “a statistical average is helpful only if the appropriate group is used.”

(iii) Contingencies of life

The court also dealt with contingencies and hazards of life as follows:

“The “contingencies and hazards of life” in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect

future earnings, such as unemployment, accident, illness. They are not merely to be added to the latter so as to achieve the cumulative result.

With respect to the question of whether or not there is duplication between costs of future care and loss of future earnings, the court had the following to say:

“When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings, i.e., the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse, i.e., to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

The trial judge took the first approach, reducing loss of future earnings, and that was determined to be the approach to be preferred:

“in accordance with **the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages.** To determine accurately the needs and costs in respect of future care, basic living expenses should be included. The costs of necessities when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.” (emphasis added)

(b) Prospective loss of earnings

The oft-quoted passage of Dickson, J, that is the standard for determining prospective loss of earnings is as follows:

“We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made... A capital asset has been lost: what was its value?”

The first thing that must be determined is the level of earnings that the plaintiff had at the time of the accident as well as the reasonable estimate of the plaintiff's future average level of earnings as, “without doubt, the value of the plaintiff's earning capacity over his working life is higher than his earnings of the time of the accident.”

The next thing to be determined is the length of the working life of the plaintiff. On that point the court had this to say:

“One must then turn to the mortality tables to determine the working life expectancy for the appellant over the period between the ages of 23 and 55. The controversial question immediately arises whether the capitalization of future earning capacity should be based

on the expected working life span prior to the accident, or the shortened life expectancy. Does one give credit for the “lost years”? When viewed as the loss of a capital assets consisting of income earning capacity rather than a loss of income, the answer is apparent: it must be the loss of that capacity which existed prior to the accident. This is the figure which best fulfills the principal of compensating the plaintiff for that for what he has lost.”

The next thing to be determined are the contingencies and the court had this to say: “It is a general practice to take account of contingencies which might have affected future earnings, such as unemployment, illness, accident and a business and business compression... There are, however, a number of qualifications which should be made. First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse, as the above list would appear to indicate... ‘Why count the possible buffets and ignore the rewards of fortune?’ Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff’s occupation, but generally it will be small.

Actuarial evidence is of considerable assistance in this area.

With respect to duplication of the costs of future care of future basic maintenance, “since basic needs such as food, shelter and clothing have been included in a cost of future care award, a deduction must be made from the award for prospective earnings to avoid duplication. The injured person would have incurred expenses of this nature even if he had not suffered the injury.”

There then followed a rather lengthy discussion about what rates of inflation should be – a discussion that would be much more appropriate to the 1970s and '80s than it is to present.

(ii) Income tax considerations

The court had the following to say on the subject:

“an award for prospective income should be calculated with no deduction for tax which might have been attracted had it been earned over the working life of the plaintiff. This results from the fact that it is earning capacity and not lost earnings which is the subject of compensation. For the same reason, no consideration should be taken of the amount by which the income from the award will be reduced by payment of taxes on the interest, dividends or capital gains. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.”

The court went on to say that “the exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with political winds.”

Non-pecuniary losses

On the subject of non-pecuniary losses, the court had the following decision to say at page 475:

“Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life’s pleasures and subject to pain and disability. For this he is entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. 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 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. No money can provide true restitution. Money can provide for proper care: this is the reason that I think **the paramount concern of the courts when awarding damages for personal injury should be to assure that there will be adequate future care.**” (emphasis added)

NOTE: Given the indication that “**fairness is to be gauged by earlier decisions**” it would seem arguable at the very least that juries should be apprised of similar decisions in PI cases.

The court went on to consider the various approaches and approved the “functional” approach which:

“rather than attempting to set a value on lost happiness, attempts to assess the compensation required to provide the injured person “with a reasonable solace for his misfortune”. “Solace” in this sense is taken to mean physical arrangements which can make his life more endurable rather than “solace” in the sense of sympathy. This approach provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and a loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way.”

The court commented on whether or not damage awards from other provinces are to be considered. The court also noted “the amount of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss.”