THE CAP ON NON PECUNIARY GENERAL DAMAGES: WHERE IS IT GOING AND HOW DOES IT AFFECT LITIGATION?

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INTRODUCTION

On October 19, 2006, the Supreme Court of Canada dismissed the Leave to Appeal application in *Lee v. Dawson*[1] without reasons. In doing so, the Supreme Court of Canada ended speculation that the time had come to revisit the cap on general damages.

This paper will review the cap on general damages and the key cases that have dealt with this issue over the past 30 years.

THE *TRILOGY*

The cap on non-pecuniary damages became law in Canada as a result of the 1978 trilogy of Supreme Court of Canada decisions in *Andrews v. Grand & Toy Alberta Ltd.*[2], *Teno v. Arnold*[3], and *Thornton v. Prince George School District No. 57*[4].

In *Andrews*, Mr. Justice Dickson concluded that the time had come to stabilize and bring some consistency to awards for non-pecuniary or general damages. This was viewed as necessary for the following reasons:

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[1] [2006] S.C.C.A. No. 192
[2] [1978] S.C.J. No. 6
[3] [1978] S.C.J. No. 8
[4] [1978] S.C.J. No. 7

1. The claim of a severely injured person for damages for non-pecuniary loss is virtually limitless. The fact that there is no objective yardstick for measuring such loss leaves this area open to inconsistent and widely extravagant awards.

2. Damages for non-pecuniary losses are not really "compensatory" as no money can provide true restitution. Accordingly, such damages should be viewed as simply providing additional money to make life more endurable.

3. Under the law, the plaintiff will be fully compensated for future loss of income and future care costs which are arguably more important for ensuring that the injured person is well cared for in the future.

4. Exorbitant awards for general damages can lead to an excessive social burden (i.e. unaffordable increases in insurance and social costs).

In order to bring stability to this area of the law, Mr. Justice Dickson essentially established a rough upper limit on awards for non-pecuniary loss. He did so with the following statement:

> I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of $100,000. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.[5]

There are two important observations that can be drawn from the reasons of Mr. Justice Dickson in *Andrews*.

The first observation is that a fundamental justification for imposing an upper limit on non-pecuniary losses is the underlying assumption that pecuniary losses will be fully compensated. This results in "a co-ordinated and interlocking basis for compensation."

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[5] [1978] S.C.J. No. 6 at p. 21

The second observation is the assumption that non-pecuniary claims in the most serious cases, if left unregulated, would lead to "extravagant" awards and a subsequent burden on society. On this point, Mr. Justice Dickson said the following:

> This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.[6]

This line of reasoning was further developed by Mr. Justice Spence in *Teno v. Arnold* as follows:

> The very real and serious social burden of these exorbitant awards has been illustrated graphically in the United States in cases concerning medical malpractice. We have a right to fear a situation where none but the wealthy could own or drive automobiles because none but the wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards.[7]

SUBSEQUENT CASES

Fenn v. City of Peterborough[8]

This case came before the Ontario Court of Appeal in 1979, a little more than a year after the *trilogy* had been handed down by the Supreme Court of Canada.

In this case, the Court of Appeal seized on the words of Mr. Justice Dickson that the cap should not be exceeded *save in exceptional circumstances*. The Court of Appeal was dealing with a grievously injured plaintiff. There was little doubt that the plaintiff's crushing and disabling injuries moved her at least the $100,000 plateau. The question before the Court was whether or not that plateau should be exceeded.

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[6] [1978] S.C.J. No. 6 at p. 19

[7] [1978] S.C.J. No. 8 at p. 28

[8] [1979] O.J. No. 4312

In that case, the Court of Appeal relied on two factors which justified an award that was somewhat higher than $100,000. Firstly, the trial took place approximately 1 ½ years after the latest of the trials in the *trilogy* cases. It was assumed that there had been an appreciable erosion in the value of money. Secondly, it appeared that the plaintiff had suffered more substantial pain than any of the plaintiffs in the *trilogy*. Accordingly, the Court of Appeal determined that the appropriate figure for general damages in the case before it was $125,000.

This decision was not appealed and accordingly, the Supreme Court of Canada was never given an opportunity to comment on the reasons and conclusions of the Ontario Court of Appeal. It remains the only appellate level decision that exceeds the cap imposed by the *trilogy*

Lindal v. Lindal

In 1981, the same issue came before the Supreme Court of Canada in *Lindal v. Lindal*[9]. The issue before the Court was narrow: Under what circumstances should a trial Judge exceed the rough upper limit of $100,000 for non-pecuniary losses established the *trilogy.*

At the trial level, the plaintiff was awarded $135,000, a figure in excess of the rough upper limit. This case was then appealed to the British Columbia Court of Appeal which allowed the appeal and reduced the amount of the award for non-pecuniary damages from $135,000 to $100,000 based on the *trilogy.*

The case was subsequently appealed to the Supreme Court of Canada and once again, Mr. Justice Dickson rendered that Court's decision. Mr. Justice Dickson repeated the rationale in support of a rough upper limit as set out in his decision in *Andrews.* Mr. Justice Dickson re-iterated the point that such damages were not meant to

[9] [1981] S.C.J. No. 108

"compensate" the injured person but rather provide additional money to make life more endurable.

Accordingly, it was not proper to compare the nature of the injuries as between various plaintiffs to determine whether or not they were more or less seriously injured than those plaintiffs in the *trilogy*. Rather, the limit of $100,000 was to be viewed as the upper limit for all such similar cases. This would provide a measure of uniformity and predictability in this difficult area.

Finally, Mr. Justice Dickson indicated that the quantum of the award itself should not be increased to reflect the impact of inflation. Rather, the specific amount of $100,000 should be increased upon proof of, or agreement as to, the effect of inflation on that amount over time.

It is from this decision that the Courts have subsequently viewed the cap as $100,000 indexed for inflation to a precise point in time, which as of December of 2006 was $311,483.

ter Neuzen v. Korn[10]

In 1995, the Supreme Court of Canada once again commented on the rough upper limit on non-pecuniary damages. In this case, the plaintiff had been infected with AIDS as a result of an artificial insemination. At trial, the jury awarded $460,000 for general damages. The Court of Appeal ordered a new trial on the basis that the award for general damages could not exceed the rough upper limit as set by the *trilogy.*

Mr. Justice Sopinka, writing for the Court, stated that the *trilogy* had imposed as a "rule of law" a legal limit for non-pecuniary damages in personal injury cases.[11] Furthermore, Mr. Justice Sopinka indicated that the appropriate approach in cases where jury verdicts

[10] [1995] S.C.J. No. 79
[11] [1995] S.C.J. No. 79 at p. 29

exceed the rough upper limit was for the Court to essentially substitute its own award for general damages at the amount of the cap.

With this decision, the rough upper limit evolved from a judicial policy directive to a "rule of law" which not only reinforced the Supreme Court of Canada's view on the rough upper limit but arguably further formalized it in law.

The Decisions in *Lee v. Dawson*

Trial Level

In *Lee v. Dawson*, a young plaintiff sustained an extremely serious brain injury as well as serious facial injuries. The jury awarded general damages of $2,000,000. After hearing arguments from counsel, the Trial Judge felt he was bound by the *trilogy* and reduced this award to $294,600 which was the indexed amount for the cap at that time. [12]

The plaintiff appealed seeking to restore the jury's verdict by arguing that the cap should not apply.

Court of Appeal

The main ground for the appeal was based on the equality provisions of Section 15 of the *Charter*. The plaintiff conceded that the *Charter* did not directly apply as this was litigation between private parties. However, the plaintiff relied upon a body of case law[13] which held that the common law must conform to "charter values" and the cap essentially offended such "charter values". It was also noted that the *trilogy* predated the *Charter* and had never been subject to a *Charter* analysis.

In making this argument, the plaintiff essentially stated that the cap discriminated against seriously injured victims of negligence. In that regard, less seriously injured

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[12] [2003] B.C.J. No. 1532 at p. 3

[13] See *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130 at paragraph 95

victims of negligence were entitled to full compensation for pain and suffering. However, full compensation was denied to the most seriously injured victims of negligence as a result of the cap.

The plaintiffs also argued that seriously injured victims of negligence were also discriminated against when compared to seriously injured victims of other torts, for example, defamation where the cap on general damages did not apply. [14]

The British Columbia Court of Appeal rejected this argument based on "charter values". In doing so, they concluded that the plaintiff's argument in this regard was flawed as general damages were never meant to provide "full" compensation to injured plaintiffs. In addition, the Supreme Court of Canada had held that the amount of award for general damages should not depend upon the seriousness of the injury or how it compared to the injury of other plaintiffs as illustrated by the following passage:

> In *Lindal v. Lindal,* the Court defined the nature of non-pecuniary damage awards. The Court clearly indicated that the non-pecuniary awards are not fully dependent upon the gravity of the injury. Their purpose is not compensatory; rather, the objective is to provide a substitute for the lost amenities in an effort to improve the victim's condition and to make the plaintiff's life more bearable.[15]

In attempting to compare seriously injured plaintiffs to less seriously injured plaintiffs in order to illustrate discrimination, the plaintiffs misapprehended the essential rationale for both awarding general damages and the need for the rough upper limit, namely bringing stability and predictability to awards for general damages while at the same time avoiding excessive awards and their corresponding social costs.

In addition to this *Charter* argument, the plaintiff also made a number of additional arguments as to why the cap should not apply, including the following:

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[14] See *Hill v. Church of Scientology* [1995] S.C.J. No. 64
[15] *Lee v. Dawson* [2006] B.C.J. No. 679 at p. 16

- The Supreme Court of Canada used language in the *trilogy* suggesting that the rough upper limit was just that and not a strict rule of law.
- Considerations contemplated by the Supreme Court in the *trilogy,* such as skyrocketing awards and insurance premiums had proven to be false.
- The upper limit precluded juries from keeping up with the rapid pace of social, economic and technological change in society.
- The cap is inconsistent with modern community values, which are more accepting of disabilities than previously.
- The rough upper limit disregards juries and the importance of juries outweighs the hypothetical benefits that the guidelines might bestow.
- The establishment of the upper limit constitutes a radical change in the common law contrary to the accepted "incremental method" of achieving such changes.
- The cap produces unjust results for plaintiffs whose situations differ from the plaintiffs in the *trilogy.*
- Finally, the cap is simply arbitrary and lacking a logical foundation.

After highlighting these arguments, the Court of Appeal chose not to respond to the merits of these arguments but rather stated in a concluding paragraph the following:

> I agree with the plaintiff and the intervenor that the time may have come for the rationalization or conceptional underpinning for having a rough upper limit on non-pecuniary damages to be re-examined. However, I am not persuaded that is open to this Court to proceed on the footing that the trilogy establishing the rough upper limit is not binding on us. Some of the submissions made by the appellant and the intervenor advocating a reconsideration of the rough upper limit seem to me to be compelling but, in the end, this Court cannot overturn the trilogy.

Certainly, anyone reading this paragraph is left with the impression that the British Columbia Court of Appeal was sympathetic to the plaintiff's arguments for revisiting the rationale for the cap but simply felt that this was for the Supreme Court of Canada to decide.

Supreme Court of Canada

On October 19, 2006, the Supreme Court of Canada dismissed the plaintiff's application for Leave to Appeal. This was done without reasons. Accordingly, the rough upper limit remains the law in Canada.

Any discussion as to why the Supreme Court of Canada declined to hear the appeal in *Lee v. Dawson* is pure speculation. However, it is a probably safe to conclude that the Supreme Court continues to support the rationale for having a cap on general damages.

Perhaps the following 1981 quote from Professor Beverly McLachlin [as she then was] provides some insight in this regard:

> The concept of "full compensation" does not provide a comprehensive rationale for damages for personal injuries. It is applicable only to pecuniary losses. It provides no theoretical justification for damages for non-pecuniary losses. Full compensation in relation to non-pecuniary losses is meaningless, and arguably dangerous, since such losses by their nature cannot be fully restored.[16]

Also, for an excellent discussion on the *trilogy* and a thesis in support of the cap, it is worthwhile to review Roger Oatley's 2005 article "Is It Time To Revisit The Trilogy". Essentially, Mr. Oatley argues that the cap works because it creates an economic climate where insurers continue to underwrite property and casualty insurance. This, in turn, ensures that "innocent people recover full compensation for economic loss within an economic context that has finite resources." It also supports a stable and predictable system of law in this area which is essentially fair to most people.[17]

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[16] What Price Disability? A Perspective On The Law of Damages For Personal Injury, McLachlin [1981] Cdn. Bar Rev. Vol. 59 at p. 7.

[17] Is It Time To Revisit The Trilogy, Oatley [2005] The Law Society of Upper Canada Special Lectures 2005 (Irwin Law) at p. 174.

Cases To Which The Cap Does Not Apply

There have been cases that have awarded general damages to plaintiffs in excess of the cap.

For example, in *S.Y. v. F.G.C.*[18], the British Columbia Court of Appeal rejected the notion that the cap applied to claims for damages for sexual assaults.

In *Hill v. Church of Scientology*[19] the Supreme Court decided that there was no cap for defamation and the plaintiff was awarded $300,000 in general damages.

In *Young v. Bella*[20] heard October 20, 2005, the Supreme Court commented on the issue of the cap for non-pecuniary damage awards outside the personal injury context.

In that case, the Appellant was a university student taking courses toward her goal of being admitted to the School of Social Work and becoming a social worker. As a result of a missing footnote to her term paper, the Respondent professor speculated that the case study attached as an appendix might be a personal confession to having sexually abused children (a 'cry for help'), which gave rise to the release of this information to the child protection agency suggesting that she was a suspected child sex abuser. The information was also discussed amongst three university professors, communicated to the RCMP, social workers and her boyfriend's sister. The appellant sued the Defendant professor and University complaining that their actions 'combined to put in motion a series of events that would forever shape the course of [her] future by affecting her reputation in the community, her ability to complete her education and by reducing her income-earning capacity'.

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[18] (1996), 78 B.C.A.C. 209:

[19] [1995] 2 S.C.R. 1130

[20] [2006] S.C.J. No. 2

A jury found the University's treatment of the appellant to be negligent and further found that as a result of this negligence her chosen career prospects had been destroyed; it awarded $839,400 in damages, including $430,000 in non-pecuniary damages. A majority of the Court of Appeal set aside the jury award.

The matter was appealed to the Supreme Court of Canada and it was argued that the cap should apply to the award for non-pecuniary damages. In rejecting this argument, the Supreme Court stated at page 17:

> The respondents have not established why the policy considerations which arise from negligence causing catastrophic personal injuries, in the context of accident and medical malpractice, should be extended to cap a jury award in a case such as the present. This argument was rejected in relation to damages for defamation in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 170-76. In our view, the case for imposing a cap in cases of negligence causing economic loss is not made out here either. As Macfarlane J.A. commented in *S.Y. v. F.G.C.* (1996), 78 B.C.A.C. 209:
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> > There is no evidence before us that this type of case has any impact on the public purse, or that there is any crisis arising from the size and disparity of assessments. A cap is not needed to protect the general public from a serious social burden, such as enormous insurance premiums.

From these passages it is quite clear that the "social costs" issue, as a reason for the cap, remains a paramount concern of the Supreme Court of Canada.

Conclusion

The cap on general damages imposed by the *trilogy* remains a "rule of law" in Canadian jurisprudence. The Supreme Court's very recent refusal to revisit this issue in *Lee v. Dawson* likely stands as a good indication that the cap will remain with us well into the future.

Furthermore, subsequent decisions demonstrate that the original rationale for the cap, particularly the concern regarding consequential social costs, remains valid and relevant to the Supreme Court of Canada 30 years later.