

PERSONAL INJURY FOR JUNIOR LAWYERS AND PARALEGALS PAPER 7.1

The Assessment of Non-Pecuniary Damages: a Primer

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These materials were prepared by William S. Dick of Murphy Battista LLP, Kelowna, BC, for the Continuing Legal Education Society of British Columbia, June 2017.

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THE ASSESSMENT OF NON-PECUNIARY DAMAGES: A PRIMER

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I. Introduction

The assessment of non-pecuniary damages in a personal injury action is an irrational and somewhat bizarre exercise. How do you possibly translate a person's pain and suffering into some kind of monetary figure. The Supreme Court of Canada in the leading decisions relating in non-pecuniary damages acknowledged the irrational nature of this assessment. Dickson J. in the seminal decision of *Andrews* stated that there was "no medium of exchange for happiness" and that the monetary evaluation of non-pecuniary losses is more a "philosophical and policy exercise than any kind of legal or logical one". Justice Sopinka similarly stated "it is simply impossible to put a money value on the non-pecuniary losses which have been suffered by a plaintiff".

The reality is that no amount of money can truly compensate an injured victim, and in particular, a catastrophically injured person. There is no restitution, as the injured person's function can never be restored. When we think of "pain and suffering" we will frequently think only of the injuries suffered and the pain the person has to endure and live with. We don't necessarily think of all of the ways that the injuries and pain can impact a person's life. Think of the unfortunate young person who is rendered a quadriplegic. His or her life is completely and catastrophically changed. How much should such a person receive for compensation for pain and suffering and loss of enjoyment of life? Or consider similar injured plaintiffs who have both suffered broken fingers that do not heal properly. One is a concert pianist, the other a social studies teacher. Should they receive the same compensation, or should the pianist receive more? These questions as well as considerations of policy and broad social implications were brought before the Supreme Court of Canada in 1978 in three decisions dealing with severely injured plaintiffs. It was not just non-

pecuniary damages that the Supreme Court of Canada grappled with but all heads of damage in personal injury awards. In these three decisions known as the Trilogy, the Supreme Court of Canada sought to provide some kind of rational and cohesive principles meant to guide trial courts in the assessment of personal injury damages.

The purpose of this paper is to provide an overview on the law and guiding principles that underpin the assessment of non-pecuniary damages and to review the analytical frame work necessary to make the “impossible” assessment, possible.

Whether we are acting for a plaintiff or acting for a defendant in an action one of our primary obligations is to provide guidance to our clients in the valuation of claims. The plaintiff wants to know what his or her claim is worth. The insurer wants to set proper reserves. Ultimately, the goal is to assess heads of damage based on all relevant facts and opinions and determine as best we can, what a judge or jury will award for damages. With non-pecuniary damages the only proper way to make this assessment is to spend the time investigating all of the surrounding facts that are unique to the plaintiff and to do the legal research necessary to find supportive and analogous cases. However, as will be set out, case law is only a rough guide in this analysis. The real work is in the assessment of how an individual's injuries have impacted his or her life, and whether in that assessment, a court should award more or less than previously decided case.

Further, once we get to the point of negotiation, or if that fails, trial, our task moves from assessment to advocacy. At this stage, again, whether acting for a plaintiff or defendant our job is to set out all relevant facts through lay witnesses and experts that will enhance or diminish the non-pecuniary award. This paper will address the analytical framework in which trial courts will evaluate and award damages. In gaining a greater insight into principles underling the assessment, it should be easier to properly assess and explain to our clients the predicted value of non-pecuniary damages and how the monetary value is reached. In addition, having a greater understanding will enhance your ability to ultimately advocate in your client's respective interest.

II. Pecuniary and Non-Pecuniary Damages

In personal injury law, damages are designed to place the victim as nearly as can be done in the place they would have been in had the accident not occurred. Generally there are two categories of damages. Pecuniary damages are those that provide compensation for expenses incurred prior to trial and expenses that will be incurred in the future. Examples of pecuniary loss include cost of care items, out of pocket expenses, and past and future income. Non-pecuniary damages provide compensation that cannot easily be measured in monetary terms. These will include such things as loss of enjoyment of life and pain and suffering.

III. The Trilogy

No discussion of damages in personal injury actions can be had without reference to the Supreme Court of Canada's three decisions known as the Trilogy (*Andrews v. Grand & Toy Alberta LTD*, *Teno v. Arnold* and *Thornton v. Prince George School District No. 57*).

All three cases before the Court involved severely or catastrophically injured plaintiffs. Justice Dickson, writing for the Court in *Andrews* saw that it was time to bring some needed uniformity and consistency to awards for personal injury damages in Canada. With respect to non-pecuniary damages, he sought to bring some kind of stability to what he perceived as a potential scenario of skyrocketing and unlimited awards which in his view could cause a significant social burden to

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society such as bankrupting Insurers or making insurance too expensive for the ordinary person. In addition, Justice Dickson set out to provide the proper analytical frame work for the assessment of non-pecuniary damages within an overall coordinated and interconnected approach for the assessment of all heads of damage in personal injury awards.

The following principals emerge from a review of *Andrews* as it relates to non-pecuniary damages:

- It was acknowledged that the evaluation of non-pecuniary damages is fraught with difficulty as no money can provide true compensation. The award is not reparative as there can be no restoration of the loss of a person's function.
- The paramount concern of the court when awarding damages should be to ensure that there is adequate future care.
- Because cost of care is paramount there is more room for policy factors in assessing non-pecuniary damages.
- A significant concern of unregulated non-pecuniary damages is a social burden of large awards particularly when there is no objective yard stick. The court was clearly concerned with what they perceived as potentially extravagant claims and pointed to the United States and significant medical malpractice claim awards as an example.
- Because of these concerns the court placed a cap "or limit" for an award of non-pecuniary damages at \$100,000.00 as the high end to similar catastrophic losses (In *Andrews*, the plaintiff was a young man who rendered a quadriplegic).
- The proper analytical framework when assessing non-pecuniary damages is the "functional approach" which attempts to assess the compensation required to provide the injured person with reasonable solace for his misfortune. This was in contrast to two other approaches: provide compensation for some objective value for each loss of function (ie: x amount for the loss of a thumb) like a tariff; or to compensate for an individual's loss of happiness).
- Solace is meant to mean physical arrangements which can make someone's life more durable rather than solace in a sense of sympathy.
- The amount of such awards should not vary greatly from one part of the country to the other.
- Any variation in awards should be made on the basis of what a particular individual has lost in the way of amenities and what will function to make up for this loss.
- Awards for non-pecuniary damages should be fair to both parties. Fairness to both parties is achieved by reviewing cases of a similar nature that have been decided in previous decisions.

A. Lindal v. Lindal [1981] 2 SCR 629

A few years after the Trilogy, the Supreme Court of Canada had the opportunity to expand on and refine the principles relating to non-pecuniary damages. This decision dealt with a fairly narrow issue in which a trial decision awarded non-pecuniary damages in excess of the \$100,000.00 "cap".

In the decision Justice Dickson reinforced the notion of the functional approach which provides money that can be used to substitute other enjoyment and pleasures for those that have been lost. In explaining this, Justice Dickson made it clear that the severity of the injury is not determinative and that determining solace is a subjective exercise unique to the plaintiff:

The amount of an award for non-pecuniary damages should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victims considering his or her particular conditions....In considering what part of the maximum should be awarded the severity of the injury alone is not determinative....An appreciation of the individual loss is the key and the need for solace will not necessarily correlate with the seriousness of the injury.

The court reaffirmed a rough upper limit of \$100,000.00 for non-pecuniary losses in cases of serious personal injury. The cap was to provide a measure of uniformity and predictability in the assessment of these damages. (In a subsequent decision the Supreme Court of Canada set out that the cap was a "Rule of Law"). The court did however allow an increase of the rough upper limit to take into consideration inflation. Today, because of inflation, the limit or cap is approximately \$367,000.00

In the *Lindal* decision, the Supreme Court of Canada emphasized that an award of non-pecuniary damages is to make the victims life more bearable. In making that assessment, an appreciation of an individual's loss is the most important aspect of that evaluation and not simply a comparison of the seriousness of the injuries.

IV. Post Trilogy

After the Trilogy decisions came out, there was some degree of confusion about what the decision meant and how trial courts were to apply the principles. A number of earlier decisions assessed non-pecuniary damages by comparing the injuries of the plaintiff to the \$100,000.00 cap figure applied to catastrophically injured plaintiffs. As a result, non-pecuniary damages were significantly lower than awards made prior to the Trilogy.

The British Columbia Court of Appeal in *Penso v. Solowan* (1982) 35 B.C.L.R. 250 (CA) rejected the notion that the assessment of non-pecuniary damages in non-catastrophic injured cases should involve a comparison to the injuries in the cap figure. In *Penso*, trial judge compared the injuries suffered by the plaintiff with the injuries suffered in the Trilogy cases and fixed non-pecuniary damages in the amount of \$22,500.00. In reviewing the body of decisions following the Trilogy including *Lindal* the Court of Appeal found that it was an error in law for a trial judge to compare injuries suffered by a plaintiff to the injuries suffered by plaintiffs in the Trilogy cases. The Court also stated that it was not necessary or possible that evidence should or might be called to provide an estimation of the costs of "solace" for any particular plaintiff. The court provided the following summary in relation to functional approach adopted by Justice Dickson:

- There is no monetary limit to the claims which could be put forward to cover the cost of substitute uses.
- There are infinite number of uses of money which could be suggested to improve the lot of any plaintiff.
- It would be difficult to determine the reasonableness of any claims for there are no accurate measures available in that area.

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- The functional approach should be undertaken in all cases and not simply catastrophic injury cases.
- Lastly, the court set out the analytical frame work for assessing non-pecuniary damages based on the premise that non-pecuniary damages should be fair and reasonable, and the great need for accessibility, uniformity and predictability. The courts set out as follows:

It follows from the above, in order to achieve uniformity and predictability first the facts should be analyzed to determine the appropriate conventional award. This analysis will require comparison with awards made in previous cases for similar injuries. In making such a comparison an allowance should be made for inflation to consider the dates of previous awards. After making such a comparison the appropriate conventional award should be adjusted to meet the specific circumstances of the individual case including “need for solace” of the particular plaintiff. This is not a complicated or new method of assessment. For example if a plaintiff testifies that his leisure activities have been greatly curtailed he will require greater solace than a plaintiff suffering from the same injuries or leisure activities have not been so curtailed.

Mr. Justice Anderson summarized his remarks with respect to the functional approach as applied to other than very severe cases as follows:

- Evidence as to the need for particular kinds of solace and the cost of getting such need will, as a general rule be irrelevant.
- Awards should be conventional, adjusted to meet the specific circumstances of the individual case. Adjustments under this head, having the “need for solace” of the particular plaintiff should be made on a subjective basis.

The *Penso* decision sets out that non-pecuniary damages must be assessed in light of the particular circumstances of the plaintiff and not influenced by the cap set out in the Trilog. The judge’s task is to analyze the evidence to determine on the evidentiary basis what amount can properly compensate for pain, suffering and loss of enjoyment of life. non-pecuniary damages are to compensate for the intangible impact the accident has on a plaintiff for pain, suffering and loss of enjoyment in life.

V. The "Governor" Metaphor

In the B.C Court of Appeal decision of *Boyd v. Harris*, 2004 BCCA 146, Mr. Justice Smith adopted the described purpose and function of the upper limit as previously set out in *Brimacombe v. Mathews*, (2001) BCCA 206:

If a plaintiff is found by a court to be catastrophically injured as a result of tortious action, the Supreme Court of Canada, in the applicable authorities, has, in my opinion, decided such an individual should be entitle to a monetary award of non-pecuniary damages that will not bankrupt society but will, to the limited degree possible, provide a fund of money to enhance the situation of that severely injured plaintiff. The rough upper limit is, rather like a governor of an engine, a device that limits what otherwise could be an unlimited sum of damages....

Justice Smith, in *Boyd*, took the metaphor of the “governor” a step further and applied to the assessment of non- catastrophic injuries:

The governor on an engine is a useful analogy. Just as the operator of an engine may choose a speed appropriate to the circumstances, uninfluenced in that choice by the governor until the speed limit is reached, a trier of fact, be it judge or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling, a rule of law and policy, operates, like a governor, to limit the amount of the judgment that may be granted for damages assessed under that head.

VI. Factors to Consider in the Assessment of Non-Pecuniary Damages in British Columbia

Two decisions by the BC Court of Appeal attempted to assist judges and counsel in setting out the factors to be evaluated in the assessment of non-pecuniary damages. These decisions are *Boyd v. Harris, supra* and *Stapley v. Hejslet*, 2006 BCCA 34.

In *Boyd*, Justice Smith set out the following in relation to the factors that should be considered in assessing non-pecuniary damages in the context of comparing analogous cases:

“The identification of comparable cases is not simple task. Each case is unique. The process should be systematic and rational, not conclusory. We must therefore search for common factors that influence the awards, such as, most obviously, the age of the plaintiff and the nature of the injury. However, comparisons can be made on a more abstract level, as well. The factors to be considered include the relative severity and duration of pain, disability, emotional suffering, and loss or impairment of life. When the appropriate range is identified (after adjustment for inflation) adjustments must be made for the particular circumstances of this case, including the plaintiff’s need for solace.”

In *Stapley*, Madam Justice Kirkpatrick reiterated the underlying purpose of non-pecuniary damages and set out a non-exhaustive list of common factors that influence the award and expanded on those enumerated in the *Boyd* decision:

Before embarking on that task I take it as instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal* is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury, but upon its ability to ameliorate the condition of the victim considering his or her particular situation. Therefore, it will not follow that in considering what part of the maximum should be awarded, the gravity alone will be determinative. An appreciation of the individual’s loss is the key and the need for solace will not necessarily correlate with the seriousness of the injury... In dealing with an award of this nature it will be impossible to develop a tariff. An award will vary in each case to meet the specific circumstances of the individual case

The non-exhaustive list of factors set out in *Boyd* that influence an award of non-pecuniary damages includes:

- a) the age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;

- d) disability;
- e) emotional suffering; and
- f) loss of impairment of life

I would add the following factors although they may be arguably be subsumed in the above list:

- a) impairment of family, marital and social relationships;
- b) impairment of physical and mental abilities;
- c) loss of lifestyle; and
- d) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

It should be emphasized from the above that the list set out by Madam Justice Kirkpatrick is not an exhaustive list. For example, it does not include loss of employment or the loss of a particular type of employment. Loss of employment or loss of a profession can have a significant impact on self-worth and emotional well-being. Although not enumerated, it is certainly a category of some significance to some plaintiffs.

VII. Assessment of Non-Pecuniary Damages

In order to properly assess the value to be assigned to non-pecuniary damages for any given plaintiff, the first step as set out in *Penso* is to research and find cases where judges have made awards for analogous injuries and additionally common factors that influenced the award as set out in *Boyd* and *Stapley*. This is only the first step as the courts have made it very clear that analogous case law is merely a rough guide in the assessment of damages to unique individuals.

The second step in the analysis is to look at the unique aspects of the plaintiff to determine if there is a greater need for solace in the circumstances. It is essential to ascertain the facts which will individualize the plaintiff to show that more "solace" is needed or alternatively, less. In undertaking this analysis, it is essential to uncover the detailed facts which will help to distinguish your client's case from other decisions where courts have awarded damages in comparable circumstances. For example, what are the amenities that have been lost by your client and how have they impacted the client. Physicians tend to focus on the physical and psychological impact of the injuries, but they don't often articulate how these injuries impact the individual plaintiff in his or her own unique way. In undertaking this analysis, one should analyze the factors set out in *Stapley* as they apply to the plaintiff- for example, age is often a determining factor utilized by judges in distinguishing awards from previous judgments. Obviously there is a difference between a 20 year old plaintiff who will be faced with chronic pain for the rest of his life as opposed to a 50 year old. In terms of doing your own analysis, the **starting point** is to proceed through the enumerated list set out in *Stapley* and apply it to your client's own circumstances.

In contrast, when defending cases, counsel will want to find decisions where the plaintiff was impacted in more significant ways than the plaintiff being dealt with, in order to distinguish in a downward manner. The analysis is the same in that counsel will want to review the factors set out in *Stapley* to determine not what the plaintiff cannot do, but what the plaintiff can. During examination for discovery for example, significant time should be spent eliciting the details surrounding any alleged loss of enjoyment of life. However, one should also spend time eliciting positive responses on what the plaintiff is still able to do. In defending the claim, the more detail

you have about the plaintiff's life and activities and relationships, the more facts you will ultimately have in establishing inconsistencies on how the plaintiff's case is being portrayed. A proper defence will involve a detailed examination of all pertinent medical records, interviews, and interviews of friends, family and co-workers.

Particularly in cases where there are no objective injuries such as soft-tissue claims, chronic pain cases and mild traumatic brain injury, finding inconsistencies or establishing inconsistencies in the facts will ultimately undermine the credibility of the plaintiff.

VIII. Assessment Examples

Two recent B.C. Supreme Court decisions provide excellent examples of counsel spending the time and leading the appropriate evidence that resulted in significant awards for non-pecuniary damages.

A. Sangra v. Lima, 2015 BCSC 2350.

This case involved an 85 year old plaintiff who suffered significant injuries when he was run over by the defendant while standing at a bus shelter in Surrey. He suffered a brain injury, unstable fractures to his cervical spine, skull fractures, facial fractures, pelvic fractures and trauma to his liver and spleen, fractured ribs and torn rotator cuff. In addition to his physical injuries, Mr. Sangra also suffered from depression, PTSD and chronic pain. At trial, counsel for the plaintiff lead evidence through the plaintiff's family and friends that showed prior to the collision, the plaintiff, although elderly, lived a very active and vibrant life. Evidence was lead that the plaintiff was very highly motivated, worked out at the gym and swam at the pool for 2 hours. He enjoyed grocery shopping and did most of it. He did the majority of housekeeping and cleaning, repairs and maintenance needed at his house, banking and performed many of the cooking tasks while his wife worked. He was described as a neat freak in his approach to maintaining, cleaning and organizing his home. Friends and family provided evidence that he carried out his life at a level that exceeded most people decades younger. All of the details of his pre-accident life were provided to the court through witnesses. Overall the court accepted that the plaintiff was in good shape, active and dynamic right up until the collision.

Through friends, the plaintiff was depicted as someone who loved social events, was engaged with his adult children, enjoyed house and yard maintenance and repairs, loved to drive. Even the mood in the household was set out and depicted him as happy and upbeat prior to the collision. All of the positive details of his life and his enjoyment of life were lead through evidence. All of the medical and lay witnesses also set out in significant detail how the collision had a profoundly adverse effect on his life. In doing so the court was able to see that the plaintiff lost his vitality, his love of life and his physical mobility. Medical evidence indicated that he was no longer capable of independent living as a result of the injuries. Evidence was lead in significant detail concerning the impact that his injuries had on his day to day activities and enjoyment of life.

Mr. Justice Walker agreed with the defence submission that Mr. Sangra's injuries were "not catastrophic but only in the limited sense that he is not a quadriplegic or paraplegic in a vegetative state or requires around the clock care. Otherwise, his injuries are on the whole, close to catastrophic." The court after hearing all of the evidence was satisfied that to the plaintiff, the injuries and the condition in which he was currently in were devastating to him given his exceptional pre-collision health and his focus on maintaining his health and physical and emotional fitness as he grew older. In conclusion, Justice Walker agreed with the submissions of plaintiff's counsel that the effect of the testimony of the witnesses including the lay witnesses, was a

description of a now fatigued, frustrated and unhappy man in continual pain whose once vibrant and full life has been ruined by the collision. After reviewing case law, Justice Walker concluded:

I have determined that the amount suggested by Mr. Sangra's counsel is fair, reasonable and appropriate in the circumstances of this case and takes into account the numerous additional serious injuries and surgeries that Mr. Sangra has suffered, the risk of further surgeries, the loss of life expectancy and the effects on Mr. Sangra's exemplary pre-collision lifestyle and cognitive and physical function. I am satisfied that his recovery emanates from his own commendable motivation in the face of his severe depression and with the assistance of his wife and son. The defence position fails to recognize the truly devastating and ongoing adverse effects caused to Mr. Sangra by the injuries he sustained as a result of the collision. The amount proposed by Mr. Sangra's counsel is not in my respectful opinion overreaching, especially when comparing it to the current rough upper limit and when assessing the relationship of the awards made in the defence' cases to the rough upper limits extent and the relevant times, accordingly I assess an appropriate award for non-pecuniary damages in this case to be \$315,000.00.

B. Hans v. Volvo Trucks North America Inc. 2016 BCSC 1155.

This was a case involving a single vehicle accident in which all power control of the semi being driven by the plaintiff was lost resulting in the truck jack knifing down the road and ultimately crashing into a ditch. As a result of the collision, the plaintiff was alleged to have suffered severe post-traumatic stress disorder. The Judge's reasons in his award for non-pecuniary damages are instructive in the sense that they show the degree to which counsel was able to effectively portray the before and after picture of the plaintiff and the devastating impact that his post-traumatic stress disorder had on his life across several domains, including the factors set out in *Stapley*. The reasons include the following:

- Mr. Hans' injuries were life altering in every respect.
- The evidence of not only Mr. Hans but also Mr. Hans' daughter and his many friends who testified establishes that before the collision Mr. Hans was gregarious, fun loving, competitive, hard-working, ambitious and a financially driven young man with boundless energy.
- As a truck driver he was still a man with great strength and athletic ability resulting in a prodigious capacity for hard work which he immensely enjoyed.
- Mr. Hans lead a socially and emotionally rewarding life often centered on work but also often involving his family, friends of many years and his love of travel which he shared with his wife and children.
- Mr. Hans shared a loving partnership with his wife, as her husband, business partner, as a father to their children. He was a full participant with Mrs. Hans in all respects of their children's lives and household responsibilities.
- Mr. Hans was a proud man with a taste for good clothing, who cared for his appearance. Socially he was often the center of attention – while dancing or even while playing with children.
- Over the 7 years since the collision, all of that has changed drastically because of PTSD accompanied by Mr. Hans suffering from a major depressive order that arose as a consequence of PTSD.
- Mr. Hans is now emotionally a shell of his former self.

- His gregariousness has been replaced by isolation and withdrawal from contact with friends and family.
- His love of fun has been replaced by depression, agitation and volatile bursts of anger.
- Competitiveness has been replaced by lethargy.
- Ambition has turned to resentment and the blaming of those he believes have ruined his life.
- Where he once ran and played sports, he now walks aimlessly.
- Mr. Hans' capacity for and love of hard work has been replaced by indolence and despair.
- He neglects his personal hygiene and cares little for his appearance. He is irritable and has significant problems with concentration and memory. He suffers from nightmares, sleeplessness and bad eating habits.
- He has little interest in his children and must be coaxed to attend their activities. When he does, he is often uncomfortable, disinterested or both.
- Mr. Hans is no longer active in the partnership that he and Mrs. Hans foraged during the years of their marriage before the collision. He does not share in responsibility or work load but rather requires supervision and care.
- He has attempted suicide 3 times, each of which has seen him hospitalized for extended periods.
- His life is now ruled by pharmaceutical intervention to attempt to overcome the symptoms of PTSD and major depression which dominate his existence.
- Mr. Hans faces a future of continued pharmaceutical and psychiatric intervention as well as close supervision as his treating medical professionals, family and friends attempt to preclude the active manifestation of his suicidal ideation.
- Mr. Hans' self-loathing and despair were starkly evident by his testimony at trial as well as by his anger and resentment at those whom he holds responsible for the loss of his capacity to care and provide for his family and enjoy life as he once did.
- The totality of the medical evidence establishes that there is little prospect that Mr. Hans will ever recover socially, mentally or emotionally from the effects of the collision.
- The prognosis for real progress after almost 7 years of debilitating effects of PTSD and major depression from which Mr. Hans suffers is guarded at best and bleak at worst.

In this case, counsel for the plaintiff submitted that the plaintiff should be compensated for his non-pecuniary losses based upon a finding that his injuries are catastrophic or near catastrophic in nature and suggested a range of \$300,000.00 for damages.

Counsel for the defence set out that an appropriate award for non-pecuniary damage was in the range of \$130,000.00 (the high end for damages in regard to PTSD).

Mr. Justice Davies in the end set out that in his opinion "to differentiate an all-consuming debilitating psychological injury such as that suffered by Mr. Hans from the psychologically devastating injuries suffered by those diagnosed with a traumatic brain injury would be artificial". Mr. Justice Davies then reviewed brain injury cases that awarded quite significant damages. In the end considering all of the facts and the factors enumerated in *Stapley*, an award of \$265,000.00 for non-pecuniary damage was awarded.

I highly recommend that these decisions be read to obtain the full flavor of the evidence that was proffered to support the serious impact that the physical and psychological injuries had on the respective plaintiffs. They are both very good examples of the amount of detail and factual evidence that needs to be put before the trial judge to effectively portray in detail the before and after picture and devastating impact of the injuries in all aspects of the plaintiffs' lives. In particular, it is the details provided through witnesses that portray the picture and tell the story. Both cases are illustrative of the amount of and the degree to which detailed evidence needs to be put forward through witnesses and experts that will provide a fulsome and detailed portrayal of the loss of enjoyment of life and amenities which require the additional solace for these individual plaintiffs compared to the cases that were put forward by counsel for the defence.

IX. Conclusion

As Justice Dickson said, “money is a baron substitute for health and personal happiness”. The primary focus on personal injury awards is to ensure that a victim has adequate future care. Non-pecuniary damages on the other hand, are designed to augment an award and provide substitute pleasures and enjoyment for what has been lost. In the end, it is somewhat of an artificial and impossible exercise as in reality, no amount of money can properly compensate someone for their functional losses particularly in catastrophic claims.

As set out in *Andrews*, a functional approach is utilized as the analytical tool in the assessment of non-pecuniary damages. It seeks to provide some degree of money to provide solace for plaintiff losses. As part of this functional approach, it is the individual's unique experiences and the impact that an individual's injuries have that will determine the amount of solace that is required in any given case. As a consequence, there is no “tariff” that can be applied. However, in order for there to be fairness to both parties, the Supreme Court of Canada and subsequent decisions of the B.C. Court of Appeal have made it clear that one must still look to previous decisions which involve similar or analogous injuries as a starting point and guide for the trier of fact.

In the end, it is counsel's job to ascertain all of the factual matrix necessary to distinguish either positively or negatively, a particular plaintiff's experiences to argue for either an increase or decrease from previously decided comparable decisions. One must look to the enumerated factors set out in the *Stapley* decision as a guide and starting point in any analysis. However, they are not an exhaustive list and it is important to take the time to truly understand who the plaintiff is, how he or she lived her life prior to the motor vehicle accident and what losses specifically have been occasioned to that person as a consequence to his or her injuries.

If defending the claim, an equal amount of work should go into inquiring through the discovery process, examining records, and through extensive interviews with lay witnesses underlying facts that will establish what the plaintiff is capable of doing in order to either show inconsistencies in presentation or to distinguish awards made in prior cases cited by plaintiff's counsel.

It cannot be emphasized enough that the assessment of non-pecuniary damages will be influenced significantly by the individual and the experiences he or she has in dealing with the injuries and to the consequences flowing from that. Each case that we deal with will depend on its own unique facts with unique individuals. Whether acting for the plaintiff or defendant, any assessment of quantum or advocacy at trial will necessarily require time and energy to properly adduce the evidence necessary to fully depict the individuality of the plaintiff, what his or her life was like in all aspects prior to the injury, and to articulate his or her losses - or if defending, what he or she didn't lose, and what he or she is still capable of doing.

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