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# Standards for Damages: Comments on Canadian and American Law

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**ABSTRACT:** Significant differences in Canadian and American personal injury law are reflected in the Canadian system of no jury trials, monetary limitation for pain and suffering, emphasis on maintenance of maximal living style, and a different system for attorney reimbursement. Four Canadian cases (two quadriplegia, one severe neurologic injury, and one death) decided in 1978 have guided Canadian law. Some indication of questionable use of expert opinion and judicial decision-making may show similarities with American practices. Most important, the universality of the Canadian medical system eliminates the need for most damages for medical needs.

**KEYWORDS:** jurisprudence, personal injury law, financial damages, tort law, quadriplegia, Canada

The problem of damages in tort law has become increasingly important as awards have climbed to extremely large and hardly predictable amounts in the United States. Compounding the problems of American practice is the extreme expense of operating the system, not the least of which is the roughly 25 to 40% of damages that goes to the plaintiff's attorneys, in addition to the expenses for defense attorneys and the armada of intermediaries who live off the system. As insurance companies or corporations foot much of the bill, the immediate costs to the general public may not be noticeable, but they are reflected ultimately in consumer prices as well as in the insurance rates for all.

This paper will describe the standards utilized in four Canadian cases, decided on the same day, that have acted as the guidelines subsequently in determining awards for severe injury. While the varieties of American practices cannot be described here, some differences between the practices of the two countries will be pinpointed.

Broadly speaking, damages include (1) special or specific or compensatory damages, for which there is some monetary measure and which represent a defined cost or loss; (2) general or nonpecuniary damages, representing nonmonetary adverse experiences and reflecting loose and arbitrary—but difficult to measure—money awards; and (3) punitive damages, whose purpose is to punish the offender. Punitive damages were not involved in this review of four injured people, three of whom suffered very severe neurological deficits and one of whom died. The legitimacy of the physical claims was not at issue, though one wonders about some of the life-expectancy figures utilized.

Theoretically, some measurements are simple. If a man breaks a leg and is out of work for six months (and he is a truck driver making $40 000 a year), he has a $20 000 loss of wages. If a person does not have a specific work status measured in dollars (a home-

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maker, a minor, or a student), the issue of loss of earning or earnings potential becomes more difficult. Similarly, the costs of medical care may be measurable for that care already utilized (even if the person did not pay for it), but the cost of future necessary care may be difficult to ascertain or predict.

The issue of future earnings can be affected by inflation, shortened life expectancy, economic conditions, and likelihood of retirement. The problem of general damages such as pain and suffering, whether physical or nonphysiological, requires the imposition of a judgment, as does that of consortium damages (comfort, companionship, sexual consortium). Wrongful death statutes may provide specific guidelines or limits not found in ordinary personal injury actions with survival. Problems of inflation and taxation, lump payment versus periodic payment, and anticipated interest also are elements to be considered.

Two procedural elements in Canada make that country significantly different in its practices from the United States. One is the general practice of trial by judges rather than by juries—a procedure that should be more straightforward, less emotional, and perhaps less likely to be manipulable than is the case in the United States. Secondly, attorneys are generally reimbursed in Canada for their time rather than by a percentage, as with the American contingency fee, although I understand that with the use in Canada of many reported hours and the writing off of lost cases, the effect might not be so different. Nonetheless, my guess is that Canadian lawyers screen cases more carefully. Another difference is that court costs in Canada may be charged to the losing party.

In the United States, awards are generally not taxable. In Canada courts may take into account the fact that taxes would have had to have been paid on income and reduce the award accordingly in terms of actual monetary loss. This discussion is not comprehensive and does not reflect American practices; it is directed at some principles that govern Canadian law, which may then be compared by the American reader with practices in his or her own jurisdiction.

On 19 Jan. 1978 the Canadian Supreme Court decided four cases in which it established rules for deciding damages. The Canadians at that time placed a rigid limit on awards for pain and suffering. The amount established was $100 000; this amount has been indexed to inflation and is now about $200 000 (both numbers, as well as those that follow, are in Canadian dollars). This differs drastically from the American system, with its unpredictability and extremes in awards.

In *Arnold v. Teno* [*1*], two children 4½ and 6 years old crossed the street from their home to buy ice cream from a truck on the other side of the street. While the salesman was serving the 6-year-old, the 4½-year-old girl started to return across the street, going in front of the ice cream truck, where she was struck by a driver in another car passing the ice cream truck on the left side. The trial judge found the damages as follows—the car driver, one third; the ice cream vendor and owner, one third; and the ice cream company owner, one third (for having insufficient staff) in an award of $200 000 in nonpecuniary damages (pain and suffering) and $700 000 in pecuniary damages. The girl had impaired coordination in the left arm, right-sided spasticity, impaired speech, and dull-normal intelligence.

The Court of Appeal reduced the monetary general damages by $75 000 and distributed the responsibility as follows: driver, 25%; ice cream company owner, 25%; ice cream vendor, 25%; and mother, 25%.

The Supreme Court stated that the design and appearance of the ice cream truck were calculated to attract small children—"so soon as the defendants (ice cream vendor and owner) put the truck in operation on the streets, they then put themselves in such a relation to their child patrons that they became the neighbors of those children and . . . must take reasonable care to avoid acts or omissions which [they] can reasonably foresee would be likely to injure [their] neighbor."

The defendants were considered to have failed to take the proper steps to see to it

that children were not subjected to the gravest danger of traffic accidents which anyone with common sense could have done. The court even stated that if ice cream vendors could not carry on a business profitably and safely without a second attendant on the truck, then they should not be carrying on the business in that fashion. The ice cream vendor was criticized for not looking through the rear window to protect his "little customers." This was enough to attach liability to the truck driver. The court also claimed other acts of negligence—not warning the children before they started to return of danger from other cars was negligence—"in fact, the permitting of the children to cross the street at all in order to purchase might well be considered negligent."

Worthy of note was the questionable, almost bizarre decision of the Supreme Court to absolve the mother of contributory negligence. The court spoke of her having four children and her being on the phone talking to her husband while the two youngest were "crying for money to buy ice cream from a vehicle" designed to attract if not entice young children. The mother was reported to have told her children to watch out for cars.

A particularly dissenting opinion thus stated:

> It could not be accepted that the mother had committed no negligence. If an ice cream merchant is responsible to his young customer because his employee failed to take reasonable care owed to a child who had become his "neighbor," the mother, in the circumstances of this case, cannot be said to be in a better position. The duty of care resting on a parent is a paramount one.

Four of the judges did note that one-man operation of an ice cream truck was reasonable (four of the judges said otherwise, the fifth apparently concurred in that aspect).

Compensation for out-of-pocket expenses already accrued was not at issue. The court in discussing special damages, allowance for future care, and loss of future income noted the clearly defined disabilities of the child, accepting recommendations that a single attendant live in 24 h a day, five days a week, and that attendants for three 8-h shifts on weekends were needed—and that this would cost $28 000 per year, based on a decision that she should remain at home.

These amounts were for special care, not for food, clothing, or shelter. The sum being awarded would earn an income upon which taxes would then have to be paid. Canadian law provided that such income would be exempted from taxation until the plaintiff was 21. Future tax rates cannot be anticipated and no allowance for such would be made. The court assumed a future inflation rate of 3½%, counterbalanced by current investment rates of 10½%, and allowing for a discount rate of 7%. The court also allowed a fee of $35 000 for the management of the funds to be granted. With no guidelines as to the loss of earnings, the court assumed earnings of $7500 per year with a 20% reduction for illness short of death, financial disasters, and personality defects—reducing the amount to $6000 from ages 20 to 65—with a further discount rate of 7%. The judge granted $100 000 for nonpecuniary damage.

One judge strongly criticized the commentary that two operators of an ice cream truck were required, adding that such an operation was not the common standard and that it was not economically feasible.

In *Thornton v. School District* [2], the plaintiff was severely injured during a physical education class with resultant quadriplegia. The trial court awarded $1 534 000, which was reduced to $650 000 by the Court of Appeal. The Supreme Court made a final award of $860 000. Future income loss included calculations based on 3½ to 4% inflation, 10% monetary return, and a discount rate of 7% (by which growth in investment would exceed the inflation value). Awards for pain and suffering, loss of amenities, and loss of expectation of life were reduced to $100 000. The orthopedist testified that the young man, 18 at the time of trial, would have an almost normal life expectancy with optimal care, optimal care being defined as personalized, noninstitutional care. The cost of this care was given as $12 000 for equipment outlays, a home for $45 000 to $50 000, and an

Econovan at $8500—a total of about $65 000. Curiously, the life expectancy was given as 49 years instead of the expected life expectancy of 54 years at that age, an opinion that may be questioned in view of the numerous difficulties confronted in the maintenance of quadriplegics. The cost of monthly care was rated as $4305 per month—with a contingency reduction of 20% and a capitalization or discount reduction of 7%. The loss of ability to earn future income, estimated to be $850 a month, was reduced by 52% for food, clothing, and shelter, which the plaintiff would have had to meet under any circumstances. Noneconomic damages (pain and suffering, loss of amenities, and loss of enjoyment of life) were assessed at $200 000.

A major issue was the quality of care that had to be funded for a quadriplegic in relation to both the sophistication of such care and the quality of life style associated with such care. The defendants indicated that a chronic disease institution would provide care for $1200 a month. The Supreme Court felt that a young mobile quadriplegic should not be forced into institutional care, which would be unsuitable and which would probably lessen his life expectancy.

The issue of responsibility for an injury in a public physical education class was not explored, though it raises a social question that may require further consideration.

*Andrews v. Grand & Toy Alberta, Ltd.* [3] was a case in which the plaintiff, a 21-year-old apprentice railroad carman, suffered an injury resulting in quadriplegia as a result of a traffic accident. In this case the trial judge indicated that home care would cost $4135 a month; the Court of Appeal reduced this to $1000 a month. The Supreme Court indicated that there was no duty to mitigate damage in the sense of accepting less than the real loss. The issue was the reasonableness of compensation, and fairness did not require that the plaintiff languish in an institution. At trial, the 23-year-old was given a life expectancy of 45 years (5 years less than normal). A reduction of 20% for contingencies was allowed. The determination of economic loss was based on the loss of earning capacity rather than the loss of earnings per se. A reduction may be allowed for the likelihood of unemployment, illness, accidents, and business depression: here an arbitrary reduction of 20% was allowed. A reduction was also made for basic expenses that would have occurred anyway, and the allowance for taxes was made. The nonpecuniary loss was limited to $100 000.

The trial judge awarded $1 022 000, which was reduced to $516 000 by the Appellate Division. The Supreme Court's award was $817 000. The court strongly upheld the right to support for independent living, acknowledging that the plaintiff might accept the award for independent living and then utilize institutional care. Inasmuch as basic future living expenses were included in the care award, it would be redundant to allow the cost of necessities under the loss of earnings provision. In this case, the court used a retirement age of 55 because the plaintiff had been a railroad worker.

In *Keizer v. Hanna and Buch* [4], the wife of the decedent brought suit for the death of her husband, who had died in an automobile accident. The trial court awarded $104 000 to the wife and $17 500 to the infant son. The Court of Appeal reduced the amount to $65 000, further lessened by the $6500—for a total of $58 500 ($48 500 to the wife, $10 000 to the child).

The trial judge projected earnings at $15 000 a year for 31 years of work expectancy, deducting $32 000 for income tax, $1800 for personal use, and $3000 for personal support—leaving $7000 in disposable income per year for the dependents. The Court of Appeal agreed with these numbers, the issue being the lump sum necessary to produce $7000 a year for 31 years, extinguishing the fund in the process. The court again took into account the contingency deduction and the discount (interest rate less inflation). The Supreme Court awarded $78 000 to the wife and $15 000 to the son (to be given when he reached the age of 18). The Supreme Court concluded that the impact of income tax could be considered in assessing a damages award under the Fatal Accidents Act.

The four cases reflect awards, modest by American standards, in situations in which

there was extremely severe injury (three severe neurological injuries) and death (one lawsuit). The cases were decided by judges rather than juries. Judicial limitation on pain and suffering or nonpecuniary damage is markedly different in Canada in comparison with the United States; this limitation ultimately must be reflected in much lower insurance costs.

Of particular note is the fact that no award at all was made for medical and hospital care per se, as all Canadians are entitled to such care. This is in contrast to the American system, in which awards are given even when there has been no direct outlay and even when the party has been reimbursed several times through multiple insurance policies. Obviously, this difference between the two societies is very significant.

The Canadian courts have focused on care, rather than compensation. Whether, in the long run, any society will be able to maintain the high level of care sought here is questionable, but the focus seems to be more appropriate than that of the American model.

The attempt at careful calculation of self-extinguishing funds is also most important. More disquieting are the basic standards of the system and the attribution of responsibility in a way reminiscent of the American system. In particular, the philosophy in the *Teno* case raises serious questions as to the quality of judgment in Canadian courts and leaves one with an uncomfortable feeling about the future of the course of Canadian law.

## References

[1] *Arnold v. Teno*, 2 S.C.R. 287 (1978).
[2] *Thornton v. School District No. 57 (Prince George)*, 2 S.C.R. 267 (1978).
[3] *Andrews v. Grand & Toy Alberta, Ltd.*, 2 S.C.R. 229 (1978).
[4] *Keizer v. Hanna and Buch*, 2 S.C.R. 342 (1978).

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