A Litigator’s Guide
TO DAMAGES

Chair: Harvin Pitch,
Teplitsky, Colson LLP

January 17, 2017
9:00 a.m. - 12:00 p.m.

Donald Lamont Learning Centre
The Law Society of Upper Canada

Total CPD Hours = 2.5 h Substantive + 0.5 h Professionalism

SKU: CLE17-0010601-A-REG

Agenda

9:00 a.m. – 9:10 a.m. Welcome and Opening Remarks
Harvin Pitch, Teplitsky, Colson LLP

9:10 a.m. – 9:30 a.m. Restitution Damages
Andrew Winton, Lax O’Sullivan Lisus Gottlieb LLP
9:30 a.m. – 9:50 a.m. The Law of Tort-Recent Developments
Rikin Morzaria, McLeish Orlando LLP

9:50 a.m. – 10:10 a.m. The Law of Contract
Harvin Pitch, Teplitsky, Colson LLP
Jennifer Lake, Teplitsky, Colson LLP

10:10 a.m. – 10:15 a.m. Go Ahead and Ask Us (Question and Answer Session)

10:15 a.m. – 10:30 a.m. Coffee Break

10:30 a.m. – 10:50 a.m. Appeal of Damage Awards
Paul Pape, Pape Barristers Professional Corporation
Joanna Nairn, Pape Barristers Professional Corporation

10:50 a.m. – 11:10 a.m. Class Action Damages
Megan McPhee, Kim Orr Barristers P. C.

11:10 a.m. – 11:30 a.m. Construction Law: Damages in Construction Cases
Geza Banfai, C.S., McMillan LLP

11:30 a.m. – 12:00 p.m. Professionalism and Damages-Concerns of Experienced Litigators-Panel Discussion
Moderator: Harvin Pitch, Teplitsky, Colson LLP
Panelists: Ronald Slaght, Lenczner Slaght LLP
Janice Payne, Nelligan O’Brien Payne LLP

12:00 p.m. – 12:05 p.m.  Go Ahead and Ask Us (Question and Answer Session)

12:05 p.m.  Program Ends
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Janice Payne, Nelligan O’Brien Payne LLP
Restitution Damages

Andrew Winton
Lax O’Sullivan Lisus Gottlieb LLP

January 17, 2017
A Litigator’s Guide to Damages: Restitutionary Damages

Andrew Winton
Lax O’Sullivan Lisus Gottlieb LLP

With assistance from Fahad Siddiqui

Introduction
• Restitutionary damages best considered in contrast to the better-known cousins, tort and contract
  • Tort = “but-for” = place plaintiff in same position as if wrongdoing did not occur
  • Contract = “expectation” = place plaintiff in same position as if contract had been performed
  • Restitution = “unjust enrichment” = grant recovery to plaintiff for the value of the benefit acquired by the defendant

Unjust Enrichment
• From Becker v Pettkus, [1980] 2 SCR 834
  • The defendant has been enriched
  • The plaintiff has suffered a corresponding deprivation
  • There is no juristic reason for the enrichment

• Purpose of the doctrine is to reverse unjust transfers of wealth (PIPSC v Canada (A-G), 2012 SCC 71)

Established Categories of Restitutionary Damages
• Mistaken payments
• Mistakes of law
• Other benefits conferred by mistake (e.g., improvements to another’s land or chattel)
• General principle preventing unjust enrichment means restitution is capable of being extended in “new directions”

Recent Ontario Cases
• Apotex Inc. v Eli Lilly and Co. (ONCA)
• Wyman v Kadlec (ONSC)
• Accuworx Inc. v Enroute Imports Inc. (ONSC)
• Cleanol Integrated Services Ltd. v Johnstone (ONSC)
Apotex Inc. v Eli Lilly and Co.
- 2015 ONCA 305 (Doherty, Feldman and Blair JJ.A.)
- Facts:
  - EL owned patent relating to drug used in treatment of ADHD
  - Used process under regulations to keep A's generic version out of market for two years
  - EL’s patent was later invalidated and A was entitled to recover damages suffered during period it was excluded from market
  - A brought claim for unjust enrichment that would have entitled it to EL’s profits made during two-year period, over and above what A would have earned at lower prices
  - EL brought motion to strike claim
  - Motion dismissed at first instance
  - Div Ct allowed appeal and struck claim
  - A appealed to OCA – appeal dismissed
  - No unjust enrichment
    - A would not have earned EL’s “monopolistic” profits
    - EL’s gain did not lead to a corresponding deprivation suffered by A
  - Remedial unjust enrichment should only be awarded where no other remedy is available

Wyman v Kadlec
- 2014 ONSC 4710
- Facts:
  - Parties entered into oral agreement for W to manage K’s resort
  - Dispute arose, K terminated the contract
  - W sued for, inter alia, unjust enrichment for time and expenses in undertaking certain activities he claimed fell outside the scope of the agreement
  - K conceded W did things that enriched K, but argued the services were covered by the agreement or that W intended to donate his time
  - Services included acting as nominal purchaser for property and locating other properties for purchase
  - TJ held those services fell outside the scope of the agreement
  - W successfully made out case for unjust enrichment
    - K enriched by W's services, saved $$ for travel to Canada
    - W suffered deprivation in form of time and expense
    - Services not covered by contract, so no juristic reason
  - Damages fixed at $10,000 (no documentary evidence re. how much time spent)
Accuworx v Enroute Imports
- 2015 ONSC 5797
- Facts:
  - Large spill of canola oil on premises
  - Landlord = “Pydel”; Tenant = Enroute (same director)
  - A retained to clean up spill, told to invoice Enroute
  - EPA would hold P responsible to restoration/mitigation
- Enroute doesn’t pay invoices
- A sues Enroute and Pydel
- Enroute files NOI, stays claim against it
- A seeks SJ against Pydel
- SJ granted on basis of unjust enrichment and quantum meruit
- A satisfied 3 conditions for unjust enrichment
- Pydel enriched by clean-up, which it was responsible for under EPA
- Work was performed by A, clearly documented
- No juristic reason for the enrichment to Pydel
- Good example of how restitution prevents unfairness

Cleanol Integrated Services v Johnstone
- 2015 ONSC 768
- Facts:
  - J hired CIS to renovate condo
  - CIS delivered “proposal” doc that J signed, contemplated price range of $100k to $125k, parties were to agree to scope of work
  - J received, but never signed, scope of work docs
  - CIS completed reno (did a great job!)
  - J paid $62,800
  - CIS claimed payment for $68,017.51 for services and materials
  - CIS registered construction lien
- Claim allowed for $57,657.31
- No contract between the parties
  - Proposal was void for uncertainty
  - No meeting of minds on scope of work docs
- But J received benefit of CIS’s services
- Unjust not to compensate CIS for value received

Conclusion
- Restitution saves the day! (the Clark Kent of remedies?)
- When no contract, no tort, but an unjust fact pattern, consider restitution to prevent unjust enrichment
- A stand-alone remedy of last resort
- Plead in the alternative to contract or negligent misrep
• If facts can’t support contract or tort claim, might get unjust enrichment if unfairness is palpable
Recent Developments in Tort Damages

Rikin Morzaria
McLeish Orlando LLP

January 17, 2017
Recent Developments in Tort Damages

LSUC:
A LITIGATOR’S GUIDE TO DAMAGES
January 17, 2016

Rikin Morzaria
McLeish Orlando LLP
Critical Injury Lawyers

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PROVING FUTURE CARE CLAIMS: Law and Practical Strategies
Rikin Morzaria, McLeish Orlando LLP

Introduction

The framework and principles governing tort damages are generally well-established and static. In several areas, however, there have been developments in both the heads of damages that can be claimed in tort and the quantification of damages. This paper will review such developments in the areas of future care, income loss claims on behalf of family members of a deceased or injured person, and management fees.

Before entering into a review of disparate developments, it is useful to briefly review the foundational principle that underlies all tort damages: that a plaintiff is entitled to receive full compensation for any losses he or she has suffered as a result of a defendant’s negligence. As far back as 1880, Lord Blackburn expressed this principle in the following way:

I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.1

Developments to Future Cost of Care Claims

Principles Governing the Valuation of Future Cost of Care Claims

Canadian courts have wrestled with four levels of care, each with the support of various expert witnesses. The first level is subsistence, or what a plaintiff can simply make do with. The second is what may be described as community care, and it stems

1 Livingstone v. Rawyards Coal Co. (1880), 5 App. Cas. 25 at 39 (H.L.)
from the notion of the expenditure of limited public funds. The third level is full compensation. Fourth, is the highest level of care possible, which includes all the care, housing, and hardware that a victim could wish for or absorb. Lawyers often refer to this as the “Cadillac” future cost of care plan. In Andrews v. Grand & Toy, the Supreme Court of Canada unequivocally endorsed the third level, that of “full compensation.”

In Andrews, the Supreme Court noted that a court’s “paramount concern when awarding damages for personal injuries should be to assure that there will be adequate future care.” The plaintiff has “no duty to mitigate, in the sense of being forced to accept less than the real loss.” In the context of attendant care, the Court further noted that a plaintiff is entitled to home-based attendant care even if it is vastly more expensive than comparable institutional care: “It cannot be unreasonable for a person to want to live in a home of his own.” Thus, the standard to be applied is:

[W]hat 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?

In the lesser-cited trilogy decision of Thornton v. School District No. 57 (Prince George) the Supreme Court of Canada again provided a strong endorsement for the value of home-based attendant care and indicated that, in the absence of an alternative that will deliver equally effective results at lower cost, the plaintiff is entitled to the full cost

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of such care. The Court focused, in particular, on the evidence that suggested that home
care was expected to extend the plaintiff’s length of life:

According to the medical evidence, the very length of life of the youthful
quadriplegic is directly proportional to the nature of the care provided. With
home care the injured person can be expected to live a normal, or almost
normal, life-span. With institutional care it can be expected that he will not
live a normal life-span. It is difficult, indeed impossible, to fashion a yardstick
by which to measure "reasonableness" of cost in relation to years of life. It
is sufficient, I think, for the purposes of the present case, to say that before
denying a quadriplegic home care on the ground of "unreasonable" cost
something more is needed than the mere statement that the cost is
unreasonable. There should be evidence which would lead any right-
thinking person to say: "That would be a squandering of money — no
person in his right mind would make any such expenditure." Alternatively,
there should be evidence that proper care can be provided in the
appropriate environment at a firm figure less than that sought to be
recovered by the plaintiff.6

Madam Justice McLachlin (as she then was) emphasized the paramountcy of the
full compensation principle in Ratych v. Bloomer.7 There, McLachlin J. stated that “the
Plaintiff is to be given damages for the full measure of his loss, as best as can be
calculated."

On the issue of institutional versus home care, the Court in Keenan v. Scandals
Ltd.8 considered a number of factors relevant to the determination of which setting is most
appropriate in a given case. These included the plaintiff’s level of awareness, the
potential for improvement in the plaintiff’s condition, quality of care available at home,
whether a greater quality of life was available in one setting versus the other, continuity
of care, cultural beliefs, and the impact on others if home care were to be selected.

6 Ibid., at para 27.
7 [1990] 1 S.C.R. 940
8 Keenan v Scandals Ltd., 2000 CarswellOnt 959 (ON SCJ).
Intention of Plaintiff to Purchase Recommended Care Items

Plaintiffs who claim the full market cost of attendant care services must often deal with the fact that plaintiff has received gratuitous services from family members or friends to the time of trial. Defendants may argue that the plaintiff will continue to receive those gratuitous services, instead of using the proceeds of judgment to hire professional attendant care providers. As far back as 1967, the Supreme Court of Canada provided a complete answer to this argument in its decision in *Vana v. Tosta*9:

The Court of Appeal erred in placing far too much emphasis on the possibility of remarriage and in taking into account any services the appellant's mother and mother-in-law might contribute to maintaining the home. It is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party. In the present case it amounts in my judgment to conscripting the mother and mother-in-law to the services of the appellant and his children for the benefit of the tortfeasor and any reduction of the award on this basis is and was an error in principle.

In *Andrews*, the Court addressed this issue again, holding that a court’s role is not to “conjecture upon how a plaintiff will spend the damages awarded to him or her.10 In addition, the Court specifically addressed the possibility that Andrews' mother might provide attendant care services to her son and concluded that the defendant should not get the benefit of such gratuitous services:

This should have no bearing in minimizing Andrews' damages. Even if his mother had been able to look after Andrews in her own home, 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.11

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10 *Andrews*, *supra*, note 3 at para 41.
Thus, when a trial judge declined to award a plaintiff any amount for future care because he believed that the plaintiff’s mother or other family members would continue to provide such care, the Ontario Court of Appeal found the trial judge’s decision to be a reversible error:

If the mother did not meet [the demands of the plaintiff’s care] when Tony is at home then help in the form of something akin to a paid baby sitter would have to be obtained. Tony’s entitlement to recover for the reasonable cost of such care cannot be denied because the necessary care and assistance has been provided by a member of his immediate family…\(^\text{12}\)

More recently, when a defence future care expert proposed that a plaintiff’s parents should provide 8 hours of care to a catastrophically injured plaintiff, with a further eight hours to be provided by a PSW, and the final eight hours to be provided by an RPN, the trial judge held that this proposal was “not good enough:"

First of all, as aforesaid, there is no legal basis upon which to impose this burden on Melissa’s parents, even though that they have and probably will continue to provide whatever care and comfort they are able to give her. Secondly, given Melissa’s physical problems, the caregiver must, at least, possess the qualifications of an RPN registered practical nurse.\(^\text{13}\)

The question that remained ambiguous, however, was whether it was open to a trier of fact to consider whether a plaintiff has any intention of using recommended services. The Ontario Court of Appeal confronted this issue in \textit{Bakhtiari v. Axes Investments}\(^\text{14}\). In \textit{Bakhtiari}, a unanimous panel of the Court of Appeal held that the trial judge did not err when he considered the plaintiff’s express wishes and intentions with


\(^{13}\) \textit{Crawford (Litigation Guardian of) v. Penny} (2003), 2003 CarswellOnt 82 (S.C.J.) at para 304.

respect to future living arrangements. The Court noted endorsed the trial judge’s finding that “it is not reasonable to base an award to Zari on the cost of a type of care which would help her, but which she will not use.”

How does one reconcile the principle that a plaintiff cannot be denied funding for items that she has received, and will likely continue to receive, with the principle that the court should not award funding for a service that the plaintiff will no use even if it is warranted? Though neither the trial judge nor the Court of Appeal said so explicitly in Bakhtiari, the distinction they appear to have drawn is between an inquiry into whether a plaintiff will actually use a service, which is acceptable, and an inquiry into who the service provider will be, which is not.

Availability of Public and Charitable Programs and Services

A second area which has been expanded upon and clarified in recent years is the impact of government or charity-funded goods and services that a plaintiff can avail herself of on the assessment of damages. The dilemma courts must wrestle with here is whether the plaintiff should bear the risk (even if that risk is minimal) of funding not being available indefinitely, or conversely, whether the defendant should be ordered to pay an amount for damages that may result in double compensation. Although there were initially competing lines of cases that reached differing conclusions on this issue, in more recent years courts have consistently held that because of the uncertainty of continued government funding, future cost of care awards should not be reduced to account for such programs.
In *Stein v. Sandwich West (Township)*, Mr. Justice Zuber held a reduction in the future cost of care award for government funded services was inappropriate due to “the uncertain expectation of government help”:

…these programs of government assistance really cannot be counted on to endure. It seems to me to be obvious that John Stein's award for future care should not be diminished based upon the uncertain expectation of government help.15

On appeal, a unanimous panel of the Ontario Court of Appeal upheld the trial decision. In the course of arriving at its decision, the Court considered the defendant’s argument that a failure to apply a reduction would lead to a windfall and double-recovery by the plaintiff. The Court concluded that because there is no statutory obligation on OHIP to provide the services required by the Plaintiff, non-deduction of the government funded services did not amount to the injured party recovering a windfall or double recovery. The Court concurred with the trial Judge that “funded programs of this nature at adequate levels of care is not assured and is most uncertain.”16 In addition, the Court noted that service levels mandated by social programs should not inform the standard of tort compensation.

In *Dann (Litigation Guardian of) v. Chiavaro*,17 Justice Molly considered the availability of assistance from Ontario’s Assistive Devices Program (ADP) and rejected the Defendant’s argument for a reduction in the future care award to account for services provided by ADP:

16 (1995), 77 O.A.C. 40 (C.A.) at para 39
I am mindful of the fact that some of the amounts claimed had been reduced from their actual cost in the expectation that some funding for these items would continue to be covered by the Assistive Devices Program. It is by no means certain that the ADP will continue at current levels of funding in these days of increasing government cutbacks and it is even more unlikely that the assistance will continue to be provided without any means testing. Accordingly, even if the plaintiff’s overall estimates under this category are slightly on the high side, I am allowing the full amount so as to provide a contingency for changes to levels of funding in the future.

Notwithstanding the decision of the Court of Appeal in Stein, in the following years, several decisions partially or fully deducted anticipated benefits from damages awards. This was the case in H. (R.) v. Hunter\(^\text{18}\), where Justice McLean reduced the portion of the future cost of care award related to assistive devices by 50% to reflect the contingency that funding would continue under the Assistive Devices Program. Justice Brockenshire adopted the same approach in Dowhan v. Coates\(^\text{19}\) but went even further, reducing items covered by the Assistive Devices Act by 75%, both in the past and into the future.

In MacLean v. Wallace\(^\text{20}\), the defendants proposed a 50% reduction to future care costs consistent with Hunter. Mr. Justice Dilks rejected this submission, noting that an innocent party should not bear the risk of uncertain government funding:

> It seems to me that if anyone should be forced to run the risks attendant on government funding it should not be the innocent party. Funding under the Assistive Devices Programme is not mandatory; it depends upon the political and social conscience of the government of the day. In days of increasing cutbacks to social spending continuation of existing funding is by no means certain. If the defendants’ argument were to prevail and if funding

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\(^{19}\) Dowhan v. Coates, 2000 CarswellOnt 2140 (S.C.J.)

were to be reduced or discontinued all together, it would mean that an innocent party might find himself shouldering his own future care expenses.

Eventually, however, the line of authority beginning with Stein prevailed. In Paxton v. Ramji, Madam Justice Eberhard held that existing and expected future funding cannot be relied on to reduce a future care award. This was the case even though the funding in question for alleviation of hearing loss disability was such that “one can hardly imagine a government losing interest in assisting”:

In the present case, the funded devices for alleviation of the disadvantages of hearing loss would not seem to be unusual or experimental and hearing impairment is a common disability that one can hardly imagine a government losing interest in assisting. Still, government policies change with the temper of the times and Jaime has a long time ahead of her. I find she must have the benefit of the doubt, as government funding cannot be reliably predicted.

In 2014, the defendant municipality in Kelly v. Perth (County) argued that the government funding referred to originally in Stein and MacLean had continued for many years following those decisions and the rationale of uncertainty no longer held. Justice Grace rejected this submission, noting that public funding may end at any time, whether long-standing or not.

Stein and the line of cases that have followed it make clear that a plaintiff is entitled to full compensation for expected future care costs, regardless of the current state of government funded programs or whether such programs can reasonably be expected to

22 Kelly v. Perth (County), 2014 ONSC 4151
23 Ibid., at paras 246-247.
continue into the future, because reasonable expectations may not hold and the plaintiff
should not bear the risk of reductions or elimination in funding.24

**Increasing Damages Quantum by Reducing Discount Rates**

The discount rate to be applied in civil actions is prescribed by Rule 53.09(1) of the
*Rules of Civil Procedure*. However, while most lawyers are quite familiar with the
prescribed rates (currently 0% for the first 15 years and 2.5% thereafter), recent
jurisprudence has confirmed that the prescribed rate may be adjusted if it does not
accurately reflect the difference between investment and inflation. Rule 53.09(1) itself
reads as follows:

> 53.09(1) The discount rate to be used in determining the amount of an
award in respect of future pecuniary damages, to the extent that it reflects
the difference between estimated investment and price inflation rates, is...

[emphasis added]

It is well-documented that the rate of inflation for goods and services relating to
health care rises at a rate of between 1% and 1.5% higher than the general rate of
inflation.25 This includes the rate of inflation for the cost of attendant care services. In
fact, in *Walker v. Ritchie*,26 the Court of Appeal specifically endorsed the trial judge’s
decision to reduce the discount rate by 1.5% to reflect the correspondingly higher rate of
inflation for professional services:

> In this case, evidence called before the trial judge established that the costs
of professional services are increasing faster than the rate of inflation, thus
justifying the variation to a 1.5% discount rate. Accordingly, the trial judge

25 Canadian Institute for Health Information: *National Health Expenditure Trends, 1975-2010*. (Canadian
Institute for Health Information: Ottawa, 2010).

did not err in accepting evidence supportive of an adjusted discount rate for professional fees.

To warrant a departure from the prescribed discount rate, a plaintiff must obtain a qualified health care economist to provide opinion evidence, both on the rate of inflation in general and on the expected rate of inflation for the goods and services recommended in the future cost of care report. A forensic accountant must then calculate the impact of the reduced discount rate on the present value of the future cost of care.

The impact of a reduction in the discount rate can be substantial; in a recent case with relevant future care costs valued at $4.5 million, the reduction of the discount rate by 1% caused the value of future care damages to increase by over $1 million.27

**Developments to Economic Loss Claims by Family Law Act Plaintiffs**

**Statutory Basis for Recovery of Pecuniary Loss**

Subsection 61(1) of the *Family Law Act* (FLA) entitles family members of injured or deceased persons to recover pecuniary losses resulting from the injury or death.

Subsection 61(2) states that the damages recoverable under s. 61(1) may include, among other things, a reasonable allowance for loss of income or the value of services provided, where, as a result of the injury, the claimant provides nursing, housekeeping, or other services for the injured person.

Read together, these provisions would appear to entitle an FLA claimant to recover pecuniary losses incurred as a result of the injury or death of a family member, including

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damages for the full measure of any loss of income stemming from the injury or death. However, for over 20 years, there continued to be disputes over the scope and measures of any such claims. The following sections will explore the development of the law relating to pecuniary loss claims under the FLA.

**Early Decisions Interpreting the Scope of s. 61 of the FLA**

In 1982, the Ontario Court of Appeal had the opportunity to consider s. 60 of the *Family Law Reform Act*, the predecessor to the current *Family Law Act*. Justice Robins for a unanimous Court noted that the provision put the law governing non-fatal injuries on the same plane as the law governing fatal injuries:

> …[I]t creates a new statutory right of action enabling members of a family to recover losses resulting from non-fatal injuries to a family member caused by the tortious conduct of third persons, just as they are able to recover losses resulting from fatal injuries. Further, it enlarges the circle of relatives entitled to maintain the action beyond that provided for in the *Fatal Accidents Act*. And, most important, it specifically allows recovery of certain damages which may not have been discoverable under the *Fatal Accidents Act*, particularly, for the purposes of this case, the loss of “guidance, care and companionship.”

In *Stevens (Litigation Guardian of) v. Forney,* Cindy Stevens brought an FLA claim for loss of income resulting from the injuries her three-week-old daughter suffered in a motor vehicle accident. Mr. Justice Yates noted that Cindy had given “extraordinary care” to her daughter, keeping watch over her, administering anti-convulsant drugs, monitoring vital signs for clues as to when she may have been liable to have a seizure, and attending the hospital in an emergency situation. Yates J. found that her services went “beyond the normal care and attention required of a mother of a normal child similar

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in age to Valerie. Based on this finding, Yates J. awarded damages for loss of income in the amount of $127,351.13:

Under s. 61(2)(d) of the FLA, because Cindy provided nursing, housekeeping, or other services, she is entitled to make a claim for loss of income (due to the fact she stayed home from work to care for Valerie) or make a claim for the value of the services rendered. Cindy has claimed loss of income in the amount of $127,351.13, and I have awarded this sum to her. However, the loss of income award only takes into account the time Cindy spent with Valerie when Cindy would normally have been at work (approximately 8 hours daily). Cindy also spent time with Valerie and performed many extraordinary services for Valerie during periods in which Cindy would not have been at work, (i.e. after Cindy’s workday would have been over). As indicated above, the services provided by Cindy to Valerie were above and beyond what is expected of a mother caring for a normal child of the age of Valerie. Thus, these extra services are to be considered when determining the FLA claim of Cindy.

Justice Yates awarded Cindy Stevens an additional $25,000 for “extraordinary services she rendered to Valerie.” The significance of this decision is that it sets out a test to determine whether a claimant has a compensable claim for services rendered to a family member or for lost income. That test is whether the services provided have gone beyond the normal care and attention that would be provided to a “normal” family member of a similar age and ability.

The Modern Era: Macartney v. Warner and Beyond

In Macartney v. Warner, the Ontario Court of Appeal provided considerable clarity to loss of income claims under the FLA. On this issue, Justice Laskin wrote the majority opinion. Mr. and Mrs. Macartney each claimed to have lost income due to the death of their son, Jeremy. Justice Laskin held that the plain meaning of the words of s. 61(1) allowed for recovery of such loss:

30 Ibid., at para 318.

The ordinary meaning of the words in s. 61(1) would permit recovery for the loss claimed by Mr. and Mrs. Macartney. Their income loss is a pecuniary loss. Each claims to have suffered profoundly because of Jeremy’s death, and as a result, Mrs. Macartney was capable of working only in a less stressful, lower-paying job. If Mr. and Mrs. Macartney prove the necessary facts, they can establish a “pecuniary loss resulting from the … death” of their son. Nothing in the wording of s. 61(1) restricts Mr. and Mrs. Macartney’s recovery for pecuniary loss to the pecuniary benefits that they would have received from their son had he not been killed.  

Mr. Justice Laskin also concluded that, absent a good reason to reject it, the ordinary meaning of a legislative provision should prevail. He addressed three defence arguments that favoured a departure from the ordinary meaning of s. 61(1), and rejected each:

- **The legislature intended s. 61 to be a restatement of the Fatal Accidents Act:** Justice Laskin found, to the contrary, that the scheme of the FLA reflects the legislature’s intention to provide greater protection to family members in the case of family break-up or loss. Given this purpose, he found it unreasonable to refer to 150-year-old legislation, when the legislature “meant to rectify that dreadful page of our legal history” and “dramatically expanded recovery.” While he acknowledged that the relationship between ss. 61(1) and (2) was an important indicator of legislative intent, he found that s. 61(2) did not restrict the scope of pecuniary loss in s. 61(1) for three reasons. First, was the rule of statutory interpretation which states that when the general precedes the specific, the legislature does not intend to restrict the general category. Second, Justice Laskin noted that s. 61(2) was introduced with the words “may include,” which suggests that the list is not intended to be exhaustive. Finally, he found that the specific examples in 61(2) were inserted either to remove any ambiguity that they were included in the general category or to show that the general category extends to matters otherwise thought to fall outside it. It is noteworthy that Justice Laskin specifically noted that while 61(2)(d) provides a reasonable allowance for loss of income when a claimant provides services to an injured family member, “cl. (d) does not preclude a straightforward claim for loss of income because of a family member’s injury or death under s. 61(1).”

- **Mason v. Peters dictates a restrictive approach:** Justice Laskin noted that the Ontario Court of Appeal’s 1982 decision restricted recovery only to the extent that

32 Ibid., at para 46.
losses must be pecuniary. The decision did not, however, restrict the scope of pecuniary loss.

- Permits the Macartneys' claims would open the door too wide for claims under s. 61(1): Justice Laskin stated that he did not share this concern, and did not see any policy reason to restrict the scope of pecuniary loss. He noted, however, that a plaintiff must still establish the necessary causal relationship between the loss claimed and the family member's injury or death.

Justice Laskin concluded by permitting the Macartneys to maintain their claim for loss of income resulting from their child's death.

Roughly one year after Macartney v. Warner, Mr. Justice Joseph Quinn considered the claim for lost income put forward by the husband of the deceased in Dybongco-Rimando Estate v. Lee33. Raul Rimando claimed damages for the lost income suffered during the 8-month period when he was unable to return to work following his wife's death. Justice Quinn denied recovery on the basis that no evidence had been adduced in respect of disability benefits received by Mr. Rimando from his employer. It is noteworthy, however, that the Defendants did not contest the causal connection between Mr. Rimando's absence from employment and his wife's death:

Counsel for the defendants do not argue against a causal connection between the absence from employment and Evelyn's death (the absence being directly referable to the grief and despondency Raul experienced over her death). However, counsel contend that no evidence was led to explain the arrangements that were in place between Raul and his employer for payment of his lost income. Accordingly, it cannot be determined whether the collateral benefits rule applies so as to disentitle the defendants to a full credit for monies Raul received by way of income replacement.

I accept the contention of counsel for the defendants. I am prepared to allow damages in an amount equal to the difference between the gross income lost and the disability benefits received. However, since I do not recall any evidence in respect of the latter, I am unable to calculate the difference. This particular claim for damages, therefore, is

dismissed subject to further submissions from counsel should I be mistaken about the absence of evidence as to the amount of benefits received.34

[Emphasis added]

The Dybongco decision supports the proposition, made explicit in Macartney v. Warner, that lost income is compensable under the FLA so long as the loss was caused by the injury or death of a family member.

In Fiddler v. Chiavetti,35 the Ontario Court of Appeal had the opportunity to consider income loss claims by FLA plaintiffs again, this time in the context of the evidence that the plaintiff must lead to be successful in such a claim. In Fiddler, the plaintiff, Debbie Fiddler, brought a claim for loss of income following her inability to work after the death of her daughter, Amanda Fiddler. At trial, Debbie Fiddler relied on her own evidence supported by the evidence of several lay witnesses, who testified to her work history and earnings. None of their evidence was confirmed through records or other documentation. The jury awarded Debbie Fiddler $22,000 for past wage loss and $72,000 for future wage loss. On appeal, the defendants argued that the trial judge erred in law by permitting the jury to consider Debbie Fiddler’s income loss claim in light of the absence of expert evidence on issues such as contingencies, work life expectancy, and Ms. Fiddler’s ability to work in the future. Mr. Justice LaForme for the Court rejected this submission:36

There is no rule governing when actuarial evidence is required to establish a loss of income claim. For example, in MacNeil Estate v. Gillis (1995), 1995 CanLII 4302 (NS CA), 138 N.S.R. (2d) 1 (C.A.), the

34 Ibid., at para 24-25.
36 Ibid., at paras 62-65.
court held that actuarial calculations are necessary, whereas in *McKee v. Gergely*, [1986] B.C.J. No. 854 (C.A.), the court rejected the submission that the lack of actuarial evidence was fatal to a claim for future loss of earning capacity.

There is no question that actuarial evidence is valuable in cases involving complex calculations, such as claims for future lost income or medical care which must be discounted for various contingencies. Nonetheless, the jurisprudence suggests that there is no requirement *per se* that a plaintiff obtain an actuarial assessment in every such case. Indeed, one could easily conceive of a situation in which the plaintiff did not have the resources to retain an expert, but had other persuasive documentary or testimonial evidence at their disposal.

Thus, Debbie Fiddler’s failure to provide expert evidence in connection with her wage loss claim is not fatal. While it was open to Ms. Fiddler to adduce expert evidence, she chose to prove her loss of income without doing so and left it to the jury to make its own calculations. Although it is customary that expert evidence is called in this regard, I can find no reason to conclude that it is a legal requirement to do so. I would adopt the position expressed by Ferguson J. in *Buksa v. Brunskill*, [1999] O.J. No. 3401 (S.C.J.) at para. 5:

> The usual instruction to the jury is to suggest that if it finds that there will be a future loss of income it should determine the average annual loss and then consider the present value and then consider the various contingencies. These calculations are customarily explained by an expert witness but in my view the jury must make its own calculations whether or not there is expert evidence.

While Justice LaForme agreed that the evidence adduced was “far from optimal” it was sufficient to constitute evidence that the jury, if it found the evidence to be true, could conclude supported the issue of pre-accident and post-accident earning capacity.

**Damages Awarded to Help the Plaintiff Manage Damages Awards**

Historically, Canadian courts have recognized that a seriously injured plaintiff who is unable to manage a large damages award should be awarded a management fee to cover the cost of professional asset management. In *Mandzuk v. Vieira*, the Supreme
Court of Canada held that a management fee may be awarded where a plaintiff’s level of intelligence or lack of acumen is such that he is unable to manage his affairs, whether this is by reason of the injuries complained of or a "natural state."\textsuperscript{37}

In 2004, the Supreme Court of Canada clarified that the management fee must be assessed based on the first assessment of damages and not based on a consideration of subsequent events, including the plaintiff’s investment choices. Accordingly, the Court rejected the defence argument that damages ought to be reduced to reflect superior returns on investment.\textsuperscript{38} In coming to this conclusion, the Court took the opportunity to restate the rationale for management fees and tax gross-ups:

The dollar amount received for future care costs is actually lower than projected costs because it is assumed that the amount paid will be invested and will earn income before being used for future needs . . . [The award is] discounted to reflect the present value of the expenses incurred or the income earned at a future date, taking inflation adjustments into consideration. The purpose of the discount rate is thus to ensure that victims will be fully compensated but that defendants will not be called on to overpay . . .

The same underlying rationale guides the attribution of management fees and tax gross up. The law aims at ensuring that the value of the amounts awarded to victims is maintained over time. In tort law, victims of personal injuries are awarded management fees when their ability to manage the amount they receive is impaired as a result of the tortious conduct. The purpose of this segment of the award is to ensure that amounts related to future needs are not exhausted prematurely due to the inability of the victims to manage their affairs.\textsuperscript{39}


\textsuperscript{39} Ibid. at paras 5-6
In *Bartosek v. Turret Realities Inc.*,\(^4^0\) the Ontario Court of Appeal considered a trial judge’s refusal to award a management fee. The trial judge’s rationale was that a professional manager of substantial funds would be able to earn his or her fee without encroaching on the award and the income earned by it. The Court of Appeal found that the trial judge had erred and that his conclusion that a money manager would earn superior returns was speculative. It held that “[f]airness requires that where, because of the defendant’s tort, the plaintiff will incur a cost to achieve a level of assumed income, the defendant should bear that cost.”\(^4^1\) It substituted its own award for a management fee.

While earlier decisions, including *Mandzuk*, characterized both the entitlement and quantum of the management fee as a question of fact, more recent decisions have treated the quantification of the management fee more as a matter of mixed law and fact. For example, in both *Gordon v. Greig*\(^4^2\) and *MacNeil v. Bryan*,\(^4^3\) the courts reviewed earlier decisions and concluded based on those decisions, rather than on actuarial evidence, that a reasonable management fee was 5% of the awards of future cost of care and future income loss.

**Conclusion**

While the recent developments in tort damages are mainly incremental, they can have a substantial impact on an overall damages award in significant cases, particularly

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\(^4^0\) *Bartosek v. Turret Realities Inc.*, 2004 CarswellOnt 1044 (C.A.)


\(^4^2\) *Gordon v. Greig*, supra, note 27 at paras 72-74.

when their impact is measured collectively. The relaxation of evidentiary requirements, particularly with respect to management fees and FLA income loss claims, also opens up the opportunity for plaintiffs to significantly enhance damages awards without the need for specific and costly actuarial evidence. However, counsel should exercise caution before advancing claims in this manner, particularly where the case will be heard by a jury; while the law may permit or even dictate such an award, the trier of fact may not be satisfied with the evidence. Therefore, it is critical that counsel continue to consider tactical considerations when advancing these economic claims regardless of the strict requirements of the law.
A Litigator’s Guide TO DAMAGES

Contract Damages

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January 17, 2017
A LITIGATOR’S GUIDE TO DAMAGES
January 17, 2017

CONTRACT DAMAGES

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OVERVIEW

• Specific Performance & Mitigation
  Southcott Estates Inc. v Toronto Catholic District School Board (2012) SCC

• Third Party Benefits & Mitigation
  Waterman v IBM Canada Ltd (2013) SCC

• Loss of Chance
  Trillium Motor World Ltd v GM of Canada Ltd. (2015) ONSC

• Liquidated Damages & Penalty
  Cavendish v Makdessi, ParkingEye v Beavis (2015) UKSC

• Punitive Damages
  Boucher v Wal-Mart Corp (2014) ONCA

• Privity of Contract and Third Parties
  Brown v Bellville (2013) ONCA

1. SPECIFIC PERFORMANCE & MITIGATION

Southcott Estates Inc. v Toronto Catholic District School Board (2012) SCC

• SCC resolves controversy that mitigation is required in a sale of land case unless the land is unique

• There was prior confusion in cases across Canada as to whether a buyer of real property seeking specific performance is required to mitigate and buy alternative property reasonably available

• In Southcott, the P, seeking specific performance, acknowledged it took no steps to mitigate and offered no evidence of uniqueness
• Court held that the following analysis is required where a P is seeking specific performance:

  • *Was the P’s inaction reasonable in the circumstances?*
  • *Could the P have mitigated if it chose to do so?*

• If the P has a ‘substantial justification’ or a ‘substantial and legitimate interest’ in specific performance, its refusal to purchase other property may be reasonable, depending on the circumstances

• The property in question must be unique (peculiar and special value) such that money cannot compensate fully for the loss

• Within the context of nominal damages, failure to mitigate has the potential to reduce a damage award from several hundreds of thousands of dollars to $1

2. **THIRD PARTY BENEFITS & MITIGATION**

*Waterman v IBM Canada Ltd (2013) SCC*

• SCC resolves the issue of whether pension benefits received by a wrongfully dismissed employee are deducted from a damages award for wrongful termination.

• Employee, aged 65, had worked for IBM for 42 years and had a vested retirement pension plan. Was terminated without cause. Sued for wrongful termination. Upon being terminated he received his pension. Was it deductible from damage award?

• 7-2 SCC majority found that pension was never intended to indemnify the employee against the financial consequences of unemployment and could not be deducted from the damage award

• **Court created and applied a 2-step test for whether damages should be reduced by benefits secured by the Plaintiff as a result of/after Defendant’s wrong:**
  
  1. Is there a sufficient connection between the D’s wrong and the benefit received by the P that potentially justifies reducing P’s damages by the value of the benefit?

  2. If yes, would the deduction create an injustice or do policy concerns militate in favour of permitting the P to recover full damages without reduction?
• Exceptions to the General Rule that Third Party Benefits are Deducted From a Damages Award:

1. Charitable Gift Exception
2. Private Insurance Exception & Analogues
3. Wrongful Dismissal and Collateral Employment Benefits
   • Disability Benefits
   • Workers’ Compensation

Significance of Waterman

• Despite the general rule in contract damages being that damages should place the P in the same economic position he/she would have been in had the D performed the contract, and not in a better position, new SCC test enables policy concerns to be used to allow for full recovery i.e. Court worried allowing deduction in Waterman would encourage employers to terminate older pensioned employees

3. LOSS OF CHANCE

Trillium Motor World Ltd v GM of Canada Ltd. (2015) ONSC

• Where a party to a contract is deprived of an “opportunity” to obtain a benefit which was uncertain at the time of the breach damages are awarded based on loss of chance

• Analysis requires the Court to calculate the loss of chance that the benefit would have been obtained. i.e. was the chance ‘real’ and if so what was the % likelihood that the benefit would have been realized?

• In Trillium, Court finds that lawyers for GM franchisees that had been offered a termination package in 2008 were in breach of contract for failing to advise to bargain collectively with GM. Court has to assess whether, had the collective bargaining advice been given, would the class have realized a larger settlement? What was the chance that the settlement would have improved?

2 Stage Test for calculating damages for Loss of Chance:

1. Court must determine causation – P has to prove on a balance of probabilities that the D’s breach or negligence caused P to lose a substantially real and significant chance to obtain a benefit; and
2. Court must determine quantum – Court must assess the value of the benefit and the percentage likelihood of realizing that benefit

**Significance of Trillium**

- Provides a clear illustration of the Court’s methodology for calculating damages for loss of chance because the funding of the settlement was provided by the federal gov’t and the GM negotiation strategy dictated by the fed gov’t was set out in detail at the trial

4. **LIQUIDATED DAMAGES & PENALTY**

*Cavendish v Makdessi, ParkingEye v Beavis (2015) UKSC*

- *Cavendish*, a decision of the Supreme Court of England, presents a new methodology for calculating liquidated damages which will likely be adopted in Canada
- **Test in Canada**: Does the amount represent a genuine pre-estimation of damages?
  - If **yes** – the amount is liquidated damages
  - If **no** – the amount is a penalty
- **Test in Cavendish**: Even if the amount is **not** a genuine pre-estimation of damages, it can still be supported as liquidated damages if the innocent party has a legitimate interest in demanding the payment which exceeded the amount of estimated damages

Two examples of legitimate interest found in *Cavendish, ParkingEye*:

1. **Liquidated damages clause in restrictive covenant to protect good will in the sale of a business**

   Buyer needed to protect the good will of the business to prevent vendor setting up competing business and destroying the business being sold

2. **Ensure efficient operations: liquidated damages clause in parking lot contract**

   Owner of a parking lot needed to ensure customers would not stay longer than 2-3 hour maximum otherwise the operation of the lot would be imperiled

**Significance of Cavendish**

- The UK test broadens the scope of liquidated damages
- Will the test be applied in Canada?
5. **PUNITIVE DAMAGES**

*Boucher v Wal-Mart Corp* (2014) ONCA

- ONCA conclusively establishes that punitive damages can be reduced if there has been a sufficient compensatory award
- Action for constructive dismissal tried before a jury who found constructive dismissal; awarded 20 weeks’ salary plus punitive damages of $1 million against Wal-Mart:
- ONCA reduced punitive damages to $100,000 because of the large award for compensatory damages (over $400,000)
- **Purpose of punitive damages is retribution, deterrence and denunciation of a party’s conduct**
- Awards of punitive damages are determined by the following factors:
  - Blameworthiness of D’s conduct
  - Vulnerability of real/perceived harm to the P
  - Need for deterrence
  - Amount of other damage awards
  - Amount of any unjust enrichment

**Significance of Boucher**
- Demonstrates the reluctance of Canadian Courts to impose excessive punitive damage awards; clarifies that awards of punitive damages can be reduced by size of the compensatory award

6. **PRIVITY OF CONTRACT & THIRD PARTIES**

*Brown v Bellville* (2013) ONCA

- ONCA establishes a new exception to the doctrine of privity
- Common law doctrine of privity of contract: only parties to a contract can enforce the contract
- Doctrine survives in a weakened form in Canada and many exceptions have been carved out by Courts to allow third parties to benefit from contracts (e.g. trust, collateral, contracts, insurance)
• In Brown, the issue was whether a successor on title was entitled to enforce a contract made 60 years prior between a municipality and former owner whereby the municipality agreed to repair a water main on the owner’s property.

• The test to determine whether a third party can enforce a contract is whether the parties to the contract, either expressly or impliedly, intended to extend its contractual benefits to the third party.

• In Brown, the Court interpreted the contract and the inurement clause it contained, holding that the contracting parties intended to extend the contractual benefits to the third party successor.

Significance of Brown

• Sets out a new exception to the doctrine of privity; demonstrates that privity of contract is being continually weakened and its enforcement abandoned where it can be shown that the original parties intended benefits to be capable of enforcement by a third party and where the merits dictate a third party ought to obtain the benefits.
So You Want to Fix Your Trial Decision:
Damages in the Appeal Context

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I. Introduction

“Appeals of damages awards” is a dauntingly broad topic, and any attempt to canvass all of the issues that it encompasses would necessarily fall short (and still be a painful slog to get through). Instead, we have put together this brief primer to introduce a few key issues: standards of review, the Court of Appeal’s attitude and approach to damages appeals, and some thoughts about appeal strategy more broadly.

II. Welcome to the Thunderdome: Deference, the Standard of Review, and You

In principle, the standard of review that governs your appeal determines the level of scrutiny the appellate court will apply to its review of a lower court’s decision. In practice, however, the willingness of appellate courts (and their individual judges) to interfere with lower court decisions can be seen to ebb and flow independent of any difference in the official standard of review. In this section and the following one, we discuss the principle and practice of deference in damages appeals.

In general terms, appeals—including damages appeals—are governed by three standards of review. Questions of law are reviewed for correctness. Findings of fact and inferences of fact are reviewed for palpable and overriding error (i.e. whether they are clearly wrong, unreasonable, or unsupported by the evidence). And mixed questions of fact and law are on a spectrum between those two extremes; the more the factual and legal questions are intertwined, the more deference to which they are entitled.¹

Naturally, the three basic standards of review are simply a starting point, and our courts have developed a large number of more detailed rules and exceptions that govern in particular circumstances. Some of these are specific to particular claims or substantive areas of law, but others relate to procedural features and may apply regardless of the underlying subject matter. For example, jury decisions—whether resolving a contract dispute, tort claim, or a criminal case—are usually given an additional level of deference. Similarly, a higher standard of review often applies when an error or argument is raised for the first time on appeal. Depending on the circumstances of the case, one or more such rules may impact the standard of review in a damages appeal.

Against that backdrop, and most relevant for our purposes, are the standards that have been developed specifically for review of particular types of damages awards. While we can by no means provide a comprehensive guide to this area, below is a broad outline of the most notable damages-specific standards of review.

**General Damages:** Assessing the quantum of compensation for intangible harms (such as suffering or loss of life) is an essentially factual assessment and an exercise of reasoned discretion. It is reviewed for palpable and overriding error and appeal courts “must take a highly deferential approach to varying the quantum of compensatory damages awarded by the trial judge.”\(^2\) Specifically, a reviewing court “may only intervene if the award is ‘so exorbitant or so grossly out of proportion [to the injury] as to shock the court’s conscience and sense of justice.’”\(^3\) Thus, although framed as the usual palpable and overriding error standard, it might be thought of as “deference-plus” relative to other questions of fact.

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\(^2\) *de Montigny v. Brossard (Succession)*, 2010 SCC 51, at para. 27.

\(^3\) *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 108
**Punitive Damages:** In reviewing both the decision to award punitive damages and the quantum of those damages, “the test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant’s misconduct.”⁴ This is a more interventionist standard of review than that applicable to general damages. Additionally, where both compensatory and punitive damages are awarded the standard of review asks the appellate court to decide both whether the total award is greater than what is required to fulfill its purpose (including punishment of the defendant) as well as the proportionality of the award in relation to a number of different factors.⁵ Relative to the usual standard of review for questions of fact, this might be thought of as “deference-minus”.

**Contractual Damages:** When damages flow from or are determined by a contract, the standard of review for questions of contractual interpretation is that set out in the Supreme Court’s recent decision in *Sattva Capital Corp. v. Creston Moly Corp*. In that case, the Court moved away from the historical view of contract interpretation as a question of law, and instead held that it is a question of mixed fact and law that generally attracts a deferential standard of review. The Court did recognize that in some cases it may be possible to identify an extricable error of law (such as “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor”) to which a correctness standard would apply, but cautioned that such instances will be rare and that appellate courts should limit their intervention “to cases where the results can be expected to have an impact beyond the parties to the particular dispute.”⁶

**III. Deference Redux: Now You See It, Now You Don’t…**

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⁴ *Id.*, at para. 107.
⁵ *Id.*, at paras. 109-110.
⁶ 2014 SCC 53, at paras. 50-51, 53.
Formally, there have been no significant changes to the basic standards of review for at least fifteen years. Informally, over the past decade or so we have witnessed a dramatic shift in the Ontario Court of Appeal’s application of those standards. The Court has become far less willing to interfere with lower court decisions, particularly when there is no clear legal error. Or put differently, the Court has become far more stringent with what it considers to be a palpable and overriding error. A decade ago, an appeal which showed the evidence in favour of the appellant’s trial position was far more compelling than that supporting the result reached by the trial court had a good chance of succeeding; in a similar case today, the Court is very likely to affirm the result because there was “some evidence” to support it (sometimes even when that evidence was not referred to in the trial decision). This trend away from interventionism appears to be true across the board: on the whole, the Court of Appeal is less willing to second-guess lower courts on all manner of issues, from procedural and evidentiary rulings to treatment of experts to the sufficiency of reasons to ultimate conclusions on the determinative issues.

The shift in the Court of Appeal is unsurprising when one considers the guidance it has received from the Supreme Court. Over the past few years, the Court has emphasized over and over again, in a variety of contexts from alternative dispute resolution and arbitration to administrative law to the summary judgment procedure, the need to entrust resolution of disputes to the tribunal of first instance with only very limited avenues for further challenges. And although it has not formally changed the basic standards of review, when describing those standards it has increasingly emphasized the scope of deference and the reasons it is so important.7 Consistency and predictability of judicial decisions—the values safeguarded by

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robust appellate review—have received less emphasis in favour of a focus on efficiency and access to justice.

However, while the overall trend has been one of increasing deference, there are signs that the Court of Appeal remains a little more willing to intervene in some damages appeals.

Punitive damages awards are one area where the Court of Appeal has a far more interventionist stance. But that should not come as a surprise, since the case law explicitly suggests a need for closer review to control those awards and has created a less deferential standard of review for punitive damages. More interesting is the way both the Supreme Court and Court of Appeal have approached an area where the formal standard of review counsels maximum deference: general (or non-pecuniary) damages awards.

The jurisprudence in that area reveals an unresolved tension. On the one hand there are exhortations to leave factual issues to trial courts and emphasis on the enormous discretion inherent in quantifying non-pecuniary damages. But on the other hand there is a serious concern about American-style proliferation of larger and larger tort awards, and the accompanying dramatic and unfair inconsistencies from case to case and defendant to defendant. The latter were sufficiently compelling to lead the Supreme Court to set a cap on the non-pecuniary damages that can be recovered in personal injury cases.

Formally, general damages that are under that cap or that are awarded outside of the personal injury context are reviewed under the “deference-plus” standard outlined in the previous section of this paper. But in practice, our Court of Appeal has shown some reluctance to let go

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8 For a recent example, see Pate Estate v. Galway-Cavendish and Harvey (Township), 2013 ONCA 669, where the majority found that the trial judge failed to consider the “full circumstances” in reaching his award and substituted its own figure. The dissent, written by Lauwers J.A., disagreed that there was any error in the decision below and made the case for greater deference on the quantum of punitive damages (see particularly paras. 165-168).

9 The cap was originally set in a trio of 1978 decisions and continues to apply with adjustments for inflation. A brief summary of the reasoning behind the cap can be found in Hill v. Church of Scientology of Toronto, [1995] 2 SCR 1130, at paras. 167-168.
of concerns about inappropriate and/or inconsistent general damages awards. The very existence of a cap encourages that instinct, by giving appellate courts a clear framework by which to gauge the proportionality of personal injury awards; it is far easier to determine whether a discretionary number reached by the trial judge was too high when there is an explicit and limited range within which all suffering must be compensated. And that same comparative approach has spilled over into other contexts, as the Court of Appeal frequently looks to define some “range” of awards for particular types of claims or severity of harm by which it can then judge the reasonableness of a particular case.  

Finally, even in the pecuniary damages context the Court of Appeal sometimes demonstrates a mildly interventionist streak. This observation is admittedly even more anecdotal than our generalizations about general damages. But to illustrate the point we invite readers to review the decisions (and vigorous dissents) in two appeals challenging a trial judge’s conclusions in relation to expert evidence before drawing their own conclusions: a successful appeal challenging a pecuniary damages award in *Pirani v. Esmail*, 2014 ONCA 145, and an unsuccessful appeal challenging a causation finding in *Mangal v. William Osler Health Centre*, 2014 ONCA 639. Whatever one might think about the merits of either decision (observant readers may note the appellants’ counsel on *Mangal* and draw their own conclusions about our views), the different approaches to the same standard of review are striking.

We don’t want to overstate the point: with the exception of punitive damages, the Court of Appeal does not consciously approach its review of damages awards in a different manner.

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10 The Supreme Court may have given further encouragement to that approach in *de Montigny v. Brossard (Succession)*, 2010 SCC 51, at para. 27, when it instructed trial judges making general damages awards to give as much priority as possible to consistency with established judicial practice. Although that followed a statement about the deferential standard of review for such awards, it also sent a clear signal to appellate courts that those awards must be evaluated in comparison to those made in similar cases.
than any other appeal, and in a given case it should be assumed that the Court will begin with a presumption of deference. But there is some reason to believe it may be a little more open to having its mind changed by good advocacy in damages appeals than it has shown itself to be in other contexts.

IV. How to Win Friends and Influence Appellate Judges

An appeal of a damages award should be approached like any other appeal. In this section, we offer some of our thoughts about appeal strategy more generally.

Your Appeal Starts (and Often Ends) at Trial

However difficult it may be to win your case at trial, changing a loss at trial to a win on appeal will be exponentially more difficult. This is true not just because of the deference given to trial decisions, but also because of the constraints on introducing new evidence and new theories on appeal. Appeals are not a second chance to try your case. Equally, dispositive motions (especially summary judgment motions) are not dress rehearsals for the real thing.

Of course, we recognize that although “win your case at trial” may be the most accurate advice for those who want to succeed on appeal, it is not particularly helpful as a tip for advocates. So we will modify that statement slightly to ensure you presented a winning case at trial. Win or lose, that case is the raw material you will have to work with on appeal.

What that means in practice is fairly straightforward. Ensure your pleading contains every claim and defense you might want to argue (and don’t forget to plead the Negligence Act!). Present evidence and make out a case on every element needed for your claim to succeed. When in doubt about whether expert evidence is needed, get an expert—and make sure they’re well prepared. Preserve legal arguments and objections, and try to obtain clear rulings on the record.
And make sure you put before the trier of fact any favourable evidence you may need or want considered, and that it is presented in the best possible light for your case.

That last tip may seem obvious, but for appeal lawyers it is frighteningly common to encounter the following scenario. A potential client brings a trial judgment to your office and asks about their chances on appeal, but when you review the judgment you see a number of unfavourable factual findings that will be exceedingly difficult to overcome on appeal. You sit down with the client to explain the concept of deference and the importance of those facts to the outcome of the case. “But wait!” the client says. “The trial judge got it all wrong! There were emails showing that we both knew the contract didn’t mean that! There was a bus full of nuns that saw the car accident and say it was the other guy’s fault!” You perk up. “Well, that could change things,” you tell her. “How many of the nuns testified at trial? Which exhibit contains those emails?” And then you hear the answer all appeal lawyers dread: “oh, that didn’t come up at the trial, but I brought all those documents so you can tell the appeal court about them!”

Bzzzzzzzt. Game over.

We belabor this point because it tends to be particularly applicable to damages; lawyers often get caught up in proving liability and give comparatively short shrift to their damages case. Failing to put in evidence of lost profits or business opportunities. Failing to call an expert to quantify the loss in situations where there is no obvious and objective value. Failing to put in medical evidence to support claims of general damages for mental distress. Or even just failing to spend sufficient time in the examination-in-chief teasing out all of the ways in which the plaintiff suffered or all of the details of their loss. Without that raw material, you will not just fail at overturning a trial loss—you will be at real risk of having your trial wins converted into losses on appeal.
Make Your Judges *Want* to Help You

Most litigators understand the importance of telling a story when trying a case. On appeal, that narrative may change or be presented differently but it will be no less important to tell a compelling story.

Appellate judges are strongly discouraged from interfering with trial decisions for a number of reasons: case law stressing deference and the limitations of their error-correcting powers, their appreciation of the difficult job facing trial judges, their respect for (and sometimes identification with) their colleagues on lower courts, reluctance to publicly second-guess their fellow judges, their large caseloads and the ratio of baseless appeals to meritorious ones, and so on. Of course, any given judge or panel may be more or less inclined to defer to lower court decisions, generally and also with regard to specific types of cases or errors. But on the whole, appeals are more likely to be dismissed than granted.

That means that the story you tell on appeal is crucial. Your story might be about the facts underlying the case: emphasizing the terrible harm your client has suffered and was denied compensation for, or painting the other party as a bad actor who has been allowed to get away with it. Or it might be about the conduct of the case itself: a disorganized trial where your client was denied the right to make their case, the domino effect from one key error by the trial judge, the way in which the opposing party gained an unfair advantage by sharp practice in the discovery phase. Whatever the specifics, the goal is the same: make the judges hearing your appeal *want* to help your client. There are certainly cases you can win without that, where the law is so clearly on your side that the panel is forced to reluctantly hand you a victory they wish they didn’t have to. But the closer cases tend to be influenced by things like the judges’ inherent sense of fairness, or sympathy, or plain dislike for your opponent’s character or behaviour.
Likewise, the respondents should also be telling a story. Often, that story will simply reinforce the appellate court’s inherent reluctance to overturn trial decisions: stressing the length of the trial (i.e. the resources already expended to reach the result the appellant wants to throw out) or the many years since the case began (i.e. the importance of letting the result stand so the parties can finally move on), the thoroughness and care of the trial judge, the many judgment calls and credibility determinations underpinning the decision and the reasons the trier of fact was in an equal or better position than the appellate panel to make those calls, and so forth. But where the appellant has made a particularly compelling case, the respondent may need to take a more appellant-like approach to crafting their own story about fairness or decency.

Convince Your Judges They Can Help You

Making the judges hearing your appeal want to help your client is only half the battle; the other half is giving them enough cover to feel comfortable doing so. Or in less cynical terms: the other half of the battle is convincing them that as a matter of law they are empowered—and maybe even obligated—to do that good deed.

The easiest way to accomplish that is to point them to a legal error in the trial judge’s decision. Of course, if your appeal was premised on a clear legal error you probably wouldn’t be wasting your time reading our thoughts on the subject. But even where your appeal seems to be about factual errors or other discretionary determinations, don’t be too eager to cede the opposing party an enormous head start by giving up on legal errors and boxing yourself into a highly deferential standard of review. The real art of appeal advocacy is creating reversible errors in cases where it isn’t obvious that any exist.

So when you’re handed a decision your client seems to have lost on the facts, begin by spending some time really searching for a legal argument to make on appeal instead or alongside
the factual one. There are a huge number of legal issues that are intimately related to fact-finding: improper admission or exclusion of evidence, lack of expert evidence where a certain finding required it, and so on. And don’t overlook aspects of the case that may not have been your focus at trial. A legal error on a relatively small contributory negligence issue or third-party claim against a joint tortfeasor might be a surer route to a new trial than factual errors in the primary causation analysis. And successful arguments have a tendency to snowball: once your judges are persuaded an error occurred and are forced to roll up their sleeves and start mucking around with the trial decision, they’re more likely to accept or at least give serious consideration to arguments alleging other errors.

In some cases, although you may be able to identify one or two legal issues your real complaint is just that the trier of fact believed the wrong witnesses or reached the wrong conclusions. If so, look for ways to tie those factual errors to the legal ones. If the trial judge erred in law by excluding certain evidence, did that excluded evidence have any relation to the unreasonable factual findings you’re actually upset about? Even if you didn’t view the excluded evidence as critical to your case, could it have impacted credibility determinations or shed doubt on the assumptions underlying the expert evidence the trial judge accepted?

Finally, think about how you might convert factual errors as legal ones by adjusting the way that you frame them. The intuitive explanation of your argument might be that the trial judge misunderstood the expert evidence about what the standard of care required of a doctor in the position of the defendant, and ignored important facts that showed why the standard of care she adopted was inappropriate for the circumstances. But arguments that a trial judge misunderstood evidence or ignored evidence that would have helped your case are likely to have the appellate court yelling “deference!” before you even finish the sentence. On the other hand,
if you take the same appeal and reframe the argument as “the trial judge erred by creating a
theory of liability not advanced by the parties or developed at trial, unfairly depriving the
defendant of an opportunity to respond to the case against her,” you have both a legal error and a
winning appeal. 11

The caveat to our encouragement to seek out questions of law is that you need to be
cautious about overstretching yourself. Sometimes there really weren’t any legal errors, or there
were but they ultimately had no effect on the result. If your only legal arguments don’t pass the
smell test, you’re better off accepting the high level of deference involved in a straightforward
attack on factual findings and preserving your credibility and that of your appeal.

Finally, as noted above appellate courts sometimes display less enthusiasm for deference
in relation to damages than they do in other contexts. When your ask is not “take away the other
guy’s win and give the trial judge a public rebuke” or “give me a new trial, sucking up several
more weeks of court resources and extending already protracted litigation by another year or
two”, but rather “just tinker with the numbers a bit to give me a little more or the other guy a
little less”, then a compelling story may be enough even without an extricable legal error.

But even when making that kind of pitch for the appellate court to adjust the quantum of
damages, it can be helpful to give your judges some authority to fall back on. So if you want to
challenge a general damages award, do a survey of similar cases to show the court that the
number in your case is outside the usual range, or identify a number of cases in which
objectively worse harm resulted in significantly lower awards (or lesser harm in significantly
higher awards). If you want to challenge trial judge’s choice of one expert damages calculation
over the other, look for other cases in which the methodology used by the preferred expert was

11 Grass v. Women's College Hospital, 2005 CanLII 11387 (ON CA).
found to be flawed—or even look to your trial judge’s own findings, to the extent there are any inconsistencies between the facts as found by the judge and the assumptions and premises underlying the expert’s methodology and calculations. In short, reassure the appellate judges that there is some independent support for that limb you’re asking them to walk out on for you.

V. Conclusion

We’ll leave you with one final cautionary note: appeals are more art than science. Every case is different, and so is every lawyer and every judge. We’ve provided our views on a few issues we believe to be important, but our real goal is to prompt some thought and discussion about an area that is often wrongly treated as an afterthought in appeals.
A Litigator’s Guide TO DAMAGES

Damages in Class Actions: Increasing access to justice through aggregate assessments

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INTRODUCTION

In individual actions, plaintiffs are required to prove they suffered an injury or loss in order to hold the defendant liable and collect damages. Given the nature of the claims typically advanced in the class context, proof of individual damages could prove an expensive endeavor, potentially dwarfing the individual’s actual damages and defeating the very objectives of class action legislation (access to justice, behavior modification and judicial economy).

The legislature has provided courts with an additional tool in their procedural toolbox, namely the ability to award aggregate damages. While the availability of aggregate damages has been certified as a common issue, until recently, it had not been applied in the practical context. The Ontario Court of Appeal’s 2015 decision in Ramdath v. George Brown College of Applied Arts and Technology, 2015 ONCA 921 was the first appellate decision to consider and uphold a trial-level aggregate damages award. These two decisions provided much needed guidance on the availability of aggregate damages in class actions.

OVERVIEW OF CLASS PROCEEDINGS

Class actions often involve claims that would not be economically viable to litigate on an individual basis. Without the Class Proceedings Act, 1992 (“CPA”), these claims would in all likelihood not be pursued.

Class proceedings are a procedural vehicle. In addition to the savings garnered by determining certain issues on a common basis, the CPA also allows for damages to be assessed in the aggregate, without proof of individual loss, in specific circumstances. Thus, class proceedings differ from individual actions in that damages can be assessed either collectively, on a class-wide basis, or individually.
COMMON ISSUES AND DAMAGES

There are two stages to a certified class proceeding: the common issues stage and the individual issues stage. As part of the certification motion, the court will determine the common issues, which are then resolved at a common issues trial. As the bulk of litigation in class proceedings to-date has occurred at the certifications stage, much of the jurisprudence surrounding damages in class actions arises at that stage, and often involves discussion of the suitability for damages questions as common issues.

Plaintiffs often propose common issues relating to remedies, including whether a court can award aggregate damages or whether the defendant’s conduct justifies an award of punitive damages. However, the failure to certify aggregate damages as a common issue does not preclude the trial judge from invoking s. 24(1) of the *CPA* if considered appropriate once liability is found, or from considering whether s/he has a sufficient measure of the compensatory damages to determine entitlement to, and the quantum of, punitive damages, or whether this can only be determined after any individual assessment phase. Further, the need for individual assessment of damages after the common issues trial is not a bar to certification.

INDIVIDUAL ASSESSMENTS OF DAMAGES

S. 25 of the *CPA* governs the procedure for determining individual issues, which can include individual class members’ damages. The purpose of s. 25 is the “cost-effective and timely determinations of individual issues.” In deciding the manageability of this stage, courts should consider “what, on the basis of experience, is likely to occur assuming good faith and professional competence and considering all forms of dispute resolution.”

S. 25 provides the trial judge with wide discretion to determine the appropriate process to deal with the remaining individual issues. Options include further hearings presided over by a

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1 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57[“Pro-Sys”] at para. 134.
2 *Good v Toronto (Police Services Board)*, 2016 ONCA 250 at paras 81-82.
3 *Class Proceedings Act, 1992*, S.O. 1991, c. 6 (“*CPA*”), s. 6(1).
judge, appointment of referees to conduct a reference under the rules of the court, or direct any other procedure with the consent of the parties.  

In developing a plan for individual assessments, the court can be as flexible and creative as necessary, as long as the procedure for the individual issues stage is “workable” and within the limits of the objectives of the CPA and any procedure designed by the parties and settled by the court. They can, among other things, forgo usual procedural requirements that they deem unnecessary, adopt a different standard of proof, or admit evidence that would otherwise be inadmissible.

While parties may propose their own preferred procedure, it must pass judicial scrutiny, and courts will assess any proposal in the context of the CPA’s three objectives. For example, in *Lundy v. Via Rail Canada Inc.*, Justice Perell rejected both parties’ proposed litigation plans because they did not serve the objectives of access to justice and judicial economy. He admonished the parties for failing “to utilize the creative resources from s. 25 of the Act” and the *Rules of Civil Procedure*. Justice Perell then suggested his own procedure, which provided for a claims procedure for claims up to $50,000, a summary judgement motion procedure for claims between $50,000 and $100,000, and a trial procedure for claims over $100,000. This proposal was ultimately adopted by the parties.

**AGGREGATE ASSESSMENTS OF DAMAGES**

Aggregate damages are a unique feature of class actions that further the objectives of access to justice and judicial economy. S. 24 of the CPA permits courts to determine the aggregate of a defendant’s liability where:

a) monetary relief is claimed by some or all class members;

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6 *CPA supra* note 3, s. 25(1).
7 *Lundy v. Via Rail Canada Inc.*, 2015 ONSC 1879 at para. 3.
8 *CPA supra* note 3, s. 25(3); *Healey v. Lakeridge Health Corp.*, 2006 CarswellOnt 9528 (Ont. S.C.J.) at para. 2.
11 *Lundy v. Via Rail Canada Inc.*, 2016 ONSC 425 at para. 3.
b) no questions of fact or law other than those relating to the assessment of monetary relief
remain to be determined in order to establish the amount of the defendant’s monetary
liability; and

c) the aggregate or a part of the defendant’s liability to some or all class members can
reasonably be determined without proof by individual class members.\textsuperscript{12}

It is typically the trial judge at the common issues stage who would determine whether the
plaintiff’s claim meets the three s. 24(1) criteria.

The Supreme Court of Canada held in \textit{Pro-Sys Consultants Ltd. v. Microsoft Corp.}\textsuperscript{13} that the
aggregate damages provisions of the \textit{CPA} cannot be used to establish liability - they are purely
procedural. Therefore, aggregate damages can only be determined after liability is established at
the common issues stage. The SCC stated that:

\textit{… an antecedent finding of liability is required before resorting to the aggregate
damages provision of the \textit{CPA}. This includes, where required by the cause of
action... a finding of proof of loss. I do not see how a statutory provision designed
to award damages on an aggregate basis can be said to be used to establish any
aspect of liability.}\textsuperscript{14}

Assessing damages on an aggregate basis avoids the complications of proving damages
individually, which can be complex and time-consuming. A court may take into consideration the
fact that a defendant’s liability can be calculated in the aggregate when determining whether a
class action is the preferable procedure under s. 5(1)(d). For example, in \textit{Cassano v. Toronto
Dominion Bank},\textsuperscript{15} the Court of Appeal certified the common issue of whether damages should be
assessed in the aggregate. Chief Justice Winkler (as he then was) went on to state that, because
individual assessments were not required to determine the extent of liability, “a class proceeding

\textsuperscript{12} \textit{CPA supra} note 3, s. 24(1).
\textsuperscript{13} \textit{Pro-Sys, supra} note 1.
\textsuperscript{14} \textit{Ibid.,} at para. 131.
\textsuperscript{15} \textit{Cassano, supra} note 4.
is clearly the preferable procedure, particularly where an aggregate assessment of damages under s. 24 is possible."\textsuperscript{16}

It is important to note that an aggregate damages award does not preclude individual assessments, as aggregate damages may apply to only part of a defendant’s liability. Further, s. 24(4) provides that where an award of aggregate damages is to be divided among class members, a court may require individual claims in order to give effect to the award.\textsuperscript{17} This procedure can involve the use of standardized claim forms, affidavit or documentary evidence or the auditing of claims.\textsuperscript{18}

S. 23 of the CPA outlines the scope for using statistical evidence for the purpose of determining the amount or distribution of a monetary award. Under this section, plaintiffs can rely on statistical evidence that would not otherwise be admissible to determine aggregate damages.\textsuperscript{19}

\textit{Markson v. MBNA Canada Bank}\textsuperscript{20} is an example of a plaintiff using a statistical model to overcome concerns about individual issues overwhelming common issues. The plaintiff brought a claim against a credit card company alleging the charging of illegal interest. The lower courts refused to certify the action, finding that millions of transactions would have to be individually manually examined to determine damages for each individual class member and the action therefore lacked commonality.

On appeal, the plaintiff relied on ss. 23 and 24 of the CPA to convince the Ontario Court of Appeal that damages could be assessed on an aggregate basis, demonstrating that statistical sampling could be used in lieu of manual review. In certifying the action, the Ontario Court of Appeal found that the claim met the s. 5(1)(c) requirement for commonality because once the common issues were determined, the trial judge could rely on the method proposed by the plaintiffs under ss. 23 and 24 to resolve the issues of quantum and distribution of damages. The

\begin{itemize}
  \item \textsuperscript{16} \textit{Ibid.}, at para. 54.
  \item \textsuperscript{17} CPA supra note 3, s. 24(4).
  \item \textsuperscript{18} \textit{Ibid.}, s. 24(6).
  \item \textsuperscript{19} \textit{Ibid.}, s. 23.
  \item \textsuperscript{20} 2007 ONCA 334 ["Markson"].
\end{itemize}
action also met the preferable procedure requirement because it furthered the goals of access to justice and judicial economy. While some class members who did not suffer damage would receive a share of the award, the Court was not concerned because it would be “impractical and inefficient” to manually examine the accounts of individual cardholders due to the large number of cardholders and the small size of the potential award.\textsuperscript{21} The Court found that “Sections 23 and 24 provide a means of avoiding the potentially unconscionable result of a wrong eluding an effective remedy.”\textsuperscript{22}

In its subsequent 2012 decision of \textit{Fulawka v. Bank of Nova Scotia}, 2012 ONCA 443, the Court of Appeal qualified the use of statistical sampling in the context of aggregate damages. The Court held that a statistical sampling methodology based on evidence from class members could not be used to meet the requirement under s.24(1)(c) that all or part of the defendant’s liability be reasonably determined without individual evidence. The methodology in \textit{Markson} was distinguished on the grounds that the sampling was based on the defendant’s own undisputed records (and not the evidence of individual class members), and therefore there was no prejudice to the defendant.\textsuperscript{23} This strict interpretation of s.24(1)(c) ultimately barred the certification of an aggregate assessment of damages common issue in \textit{Nolevaux v. King and John Festival Corp.}, 2013 ONSC 5451, and has not been revisited by the Court of Appeal since.

Nonetheless, s. 24 continues to offer significant advantages by empowering courts to allocate damages on an average or proportional basis. In making such an award, a court should consider whether it would be impractical or inefficient to identify each individual class member who is entitled to damages or to determine their exact entitlement.\textsuperscript{24} According to the Ontario Court of Appeal, this section “contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages cannot be done except on a case-by-case basis, which may be impractical or inefficient.”\textsuperscript{25}

\textsuperscript{21} \textit{Ibid.}, at para. 49.
\textsuperscript{22} \textit{Ibid.} at para. 42.
\textsuperscript{24} \textit{CPA supra} note 3, ss. 24(2) and 24(3).
\textsuperscript{25} \textit{Markson supra} note 20 at para. 48.
Despite its obvious utility, s. 24 did not receive trial level consideration prior to 2015. The decision of Justice Belobaba in in Ramdath v. George Brown College of Applied Arts and Technology was the first to consider the availability of aggregate damages, a decision upheld by the Court of Appeal.26

**RAMDATH V. GEORGE BROWN COLLEGE**

i) **Factual Background**

The program description for George Brown College’s International Business Management program stated that students who completed the program would receive an “opportunity to complete three industry designations in addition to the George Brown College Graduate Certification.” This description was published in the George Brown course calendar and their website between September 2006 and September 2008.

The industry designations were considered valuable because they would provide industry recognized credentials to students who wished to work in the field of international business. However, at the end of the program, students received only a George Brown certificate.

The plaintiffs filed a class action on behalf of students who enrolled in the International Business Management program during the time that the impugned program description was in place. The majority of the class members were international students who been recruited by George Brown recruitment agents overseas, and who paid tuition at over three times the rate of domestic students. The plaintiffs alleged negligent misrepresentation, breach of contract, and breach of the Consumer Protection Act.

ii) **Common Issues Trial**

The common issues trial was held on October 23 and 26, 2012. Justice Belobaba found that the program description was misleading and George Brown was liable for committing an unfair practice under the Consumer Protection Act. The Court held that the appropriate remedy for breach of the Consumer Protection Act was monetary relief under s. 18(2).

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26 2015 ONCA 921.
This decision was upheld by the Court of Appeal in a decision released on July 9, 2013. Notably, the Court of Appeal confirmed that reliance was not necessary to establish entitlement to monetary relief under the Consumer Protection Act.

Following the common issues trial, the plaintiffs elected to pursue the Consumer Protection Act claim and seek damages on an aggregate basis. By not having to prove individual reliance to establish liability under the Consumer Protection Act, the plaintiffs had effectively met s. 24(1)(b) of the CPA, which requires that no questions of fact or law, other than those relating to the assessment of monetary relief, remain to be determined.

Since it was not disputed that monetary relief was claimed on behalf of the class members (required under s. 24(1)(a)), the only issue at the first stage of the damages trial was whether the plaintiffs could satisfy s. 24(1)(c) and demonstrate to the Court that the class members’ damages could reasonably be determined on an aggregate basis without proof by individual class members.

iii) Damages Trial

The damages trial was held on January 7-9, April 10, and May 23, 2014. On June 24, 2014, Justice Belobaba released a decision finding that class members were entitled to an aggregate assessment of damages for the direct costs of entering into the International Business Management program.

In his decision, Justice Belobaba emphasized the importance of aggregate damages to class proceedings. He stated that they are “essential to the continuing viability of the class action.”\(^\text{27}\) It should be the routine, rather than the exception, to award them, in order to enhance access to justice.

Justice Belobaba endorsed a standard for determining the availability of aggregate liability which focused on what is reasonable, not what is mathematically accurate. The operative principle is whether all or part of the defendant’s monetary liability can reasonably be determined without proof by individual class members. While a more accurate accounting would

\(^{27}\) Ramdath v. George Brown College of Applied Arts and Technology, 2014 ONSC 3066 at para. 42.
avoid the risk of imposing greater liability on the defendants, the legislature “intentionally tilted the balance in favour of access to justice.”

Justice Belobaba stated the overarching principle for aggregate damages:

The court may award aggregate damages under s. 24(1)(c) of the CPA if the evidence put forward by class counsel is sufficiently reliable to permit a just determination of all or part of the defendant’s monetary liability without proof by individual class members.

He established three factors that courts should consider when considering whether aggregate damages should be awarded:

1) the reliability of the non-individualized evidence that is being presented by the plaintiff;
2) whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant’s liability); and
3) whether the denial of an aggregate approach will result in a wrong eluding an effective remedy and thus a denial of access to justice.

Applying these principles, Justice Belobaba found that the direct costs of attending the program, such as tuition, textbooks, and airfare for international students, could be assessed on an aggregate basis without individual evidence. He found that the indirect costs, such as lost earnings during the program and delayed entry into the workforce, could not be determined without individual evidence and were therefore not able to be assessed on an aggregate basis.

To avoid overstating the defendant’s liability, Justice Belobaba considered whether the George Brown certificate in International Business Management offered class members any “residual value”. He found, based on the defendant’s evidence, that it offered no value for the students who already had a post-secondary degree and did not find employment in international trade.

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28 Ibid. at para. 44.
29 Ibid. at para. 46.
30 Ibid. at para. 47.
Justice Belobaba also amended the class definition to exclude the third cohort of students who began the impugned program in September 2008. He held that these students were not entitled to a remedy under the Consumer Protection Act because the defendant had corrected their program description within the 10-day window for class members to drop out of the program. Justice Belobaba found that those students who remained in the program “cannot fairly be described as the victims of an unfair practice” and, as such, were not entitled to a remedy under the Consumer Protection Act.\(^{31}\)

The plaintiffs appealed Justice Belobaba’s decision dismissing the claims of the third cohort, arguing that it conflicted with the Court of Appeal’s ruling that reliance on the unfair practice is not a prerequisite to obtaining a remedy under s. 18(2).

The defendant cross-appealed the decision to award an aggregate assessment of damages (i.e., the direct costs of the program).

iv) **Appeal and Cross Appeal**

On December 24, 2015, the Court of Appeal released its decision, allowing the plaintiffs’ appeal, and dismissing the defendant’s cross-appeal.

The Court found that Justice Belobaba erred in dismissing the claims of the third cohort of students. Because the plaintiffs elected to only pursue their Consumer Protection Act claim, reliance was no longer in issue as it is not necessary to prove reliance in order to establish an unfair practice claim under the Consumer Protection Act. The Court held that the third cohort remained part of the class and were entitled to damages under s. 18(2), but referred the assessment of their damages back to Justice Belobaba.

With respect to the cross-appeal, the Court found no merit to George Brown’s submission that Justice Belobaba erred by awarding aggregate damages and not requiring individual proof of reliance in order to quantify and award damages under s. 18(2) of the Consumer Protection Act.

The Court found that Justice Belobaba erred in attributing the motivation of the representative plaintiffs to all members of the class. Reliance evidence must be individual and therefore, following the Court’s reasoning in *Fulawka v. Bank of Nova Scotia*, cannot be used as the foundation for an award of aggregate damages.

The Court rejected the defendant’s argument that Justice Belobaba’s use of a representative plaintiff’s textbook receipts constituted an impermissible extrapolation of individual evidence, characterizing it instead as a test of the cost figure he arrived at based on the average textbook cost from the GBC Guide for International Students. The Court found that Justice Belobaba had properly instructed himself on the test he had to apply, which included that the damages awarded could not overstate the defendant’s liability, and his evidentiary decisions attracted significant deference.

The Court also found that the defendant’s insistence on individual discovery of class members was “essentially another attack on [Justice Belobaba]’s conclusion that he could award aggregate damages based on direct costs minus residual value. To the extent that this ground targets the accuracy of the aggregate damages award, that factor is addressed in the trial judge’s formulation by ensuring that the defendant’s overall liability is not overstated, even if some members of the class may be over or under-compensated on individual expenditures.”

The Court affirmed the aggregate damages award to the first two cohorts, but deducted the residual value of the program from the students who did not complete it on the grounds that their failure to complete the program and obtain the residual value could not be attributed to the defendant.

v) Commentary

Both the trial level and appellate decisions in *Ramdath* provide much needed guidance on the applicability of s. 24 of the *CPA*. As Justice Belobaba noted at the damages trial, aggregate assessments of damages are the exception, rather than the rule, despite their ability to enhance

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32 *Fulawka, supra* note 23.
access to justice and judicial economy. These decisions will be useful as more class actions head to trial.

The Court of Appeal affirmed Justice Belobaba's formulation of the test for aggregate damages, which focuses on the “reasonableness” standard for determining aggregate liability, as opposed to mathematical accuracy. Rather than achieving the same accuracy as in individual actions, the Court focused on ensuring that the defendant’s total liability would not be overstated, irrespective of individual class members who may be undercompensated or overcompensated. The Court also endorsed Justice Belobaba’s view that “it is desirable to award aggregate damages where the criteria under s. 24(1) are met in order to make the class action an effective instrument to prove access to justice”\(^{34}\), and upheld Justice Belobaba’s denial of individual discovery rights in the aggregate damages stage of the action.

The *Ramdath* will be particularly helpful to plaintiffs pursuing *Consumer Protection Act* claims. Because the Court of Appeal confirmed that consumers do not have to show reliance or even knowledge of the unfair practice to qualify for a remedy under s. 18(2), defendants’ liability can be fully resolved on common issues trials. This removes significant obstacles to an award of aggregate damages, as both s. 24(1)(a) and (b) will likely be satisfied.

**Appendix - Case Law Cited**


*Baroch v. Canada Cartage Diversified GP Inc.*, 2015 ONSC 40

*Bozsik v. Livingston International Inc.*, 2016 ONSC 7168

*Cassano v. Toronto Dominion Bank*, 2007 ONCA 781


*Lundy v. Via Rail Canada Inc.*, 2015 ONSC 1879

*Lundy v. Via Rail Canada Inc.*, 2015 ONSC 7063

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\(^{34}\) *Ibid.* at para. 76.
Lundy v. Via Rail Canada Inc., 2016 ONSC 425

Markson v. MBNA Canada Bank, 2007 ONCA 334

Nolevaux v. King and John Festival Corp., 2013 ONSC 5451

Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57

Ramdath v. George Brown College of Applied Arts and Technology, 2014 ONSC 3066

Ramdath v. George Brown College of Applied Arts and Technology, 2015 ONCA 921


Smith v. Inco, 2011 ONCA 628, leave to appeal to SCC refused, [2011] CSCR No 539

A Litigator’s Guide TO DAMAGES

Damages in Construction Cases

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Damages in Construction Cases

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Why construction cases differ...

While the usual principles of damages law all apply in construction cases, for example:

- the purpose of a damages award: to put the injured party in same position as if the contract had been performed
- requirement to prove a loss
- requirement to show cause & effect relationship between breach and loss
- considerations of remoteness; mitigation; set-off; etc.,

There are aspects of the construction process itself which are unique, and which take the practitioner into certain corners of damages law more frequently than do other kinds of cases.

These include:

1. CONSTRUCTION CONTRACTS ARE “RELATIONAL”, STIPULATING VARIOUS MUTUAL RIGHTS AND OBLIGATIONS BY THE PARTIES OVER AN EXTENDED DURATION (IN CONTRAST TO CONTRACTS COVERING “SPOT” TRANSACTIONS)

Implications include:

- Damages will almost certainly be the only remedy for breach; specific performance not likely available since damages will usually be adequate + the court’s general reluctance to supervise ongoing commercial relationships

Implications include:

- The duty of honest performance (Bhasin) and corresponding liability for breach of that duty, would be expected to have greater significance.

2. HIGH DEGREE OF INTERDEPENDENCY AMONG THE MANY DISCRETE TWO-PARTY CONTRACTS INVOLVED IN THE CONSTRUCTION OF A PROJECT
The Interdependency … a simplified schematic

Implications include:

- Third party beneficiary rule, and its exceptions, frequently assume practical significance
  - The traditional rule: a contractual obligation is enforceable by, and a contractual right is available to, only a party to the contract.
  - But numerous exceptions have arisen, leading the authors of Heintzman & Goldsmith to opine: “... the common law exceptions to the rule are now so numerous that the third party enforcement of the contract may be approaching the rule in civil law which permits a stipulation in a contract in favour of a third party”

- Difficult issues of causation frequently arise where multiple participants engage in interdependent series of contracts

- The interdependencies often spawn claims for damages due to delay and impact costs.

- not unique to construction cases but certainly found there with the most prevalence
delay damages include extended general conditions, site/head office overhead costs, increased labour and material costs (for the contractor); loss of revenue, loss of use (for the owner)

impact damages account for the “knock-on effects” due to disruption and delay (e.g. loss of productivity)

3. HIGH NUMBER OF UNKNOWNS, UNCERTAINTIES, AND UNPREDICTABLE FACTORS

assessment of damages issues
- damages are assessed, not calculated
- assuming causation is found, difficulty in quantifying the loss is no bar to recovery, and the court must do the best it can, recognizing that a mathematical calculation will often be impossible
- this assessment includes taking into account possibilities and chances.

“Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.”

* Naylor Group Inc. v Ellis Don Construction Ltd. [2001] 2 S.C.R. 943

And so ... assessment of damages involves numerous uncertainties, such as:

- a finding that a contractor’s expected profits, but for owner breach, were themselves subject to discount due to site risks, labour and material supply risks and similar contingencies
- a finding that an innocent owner, faced with a repudiation by the contractor, was under a duty to replace the contractor rather than await performance and claim damages for delay
- a finding that a homeowner, in mitigating its loss due to contractor default, could keep a betterment when there was no reasonable alternative available
4. MEASURE OF DAMAGES DIFFERS, DEPENDING UPON THE NATURE OF THE BREACH AND WHO IS CLAIMING

- If claimant is the owner:

  - likely to claim due to failure to complete, defects & deficiencies, delay
  - claim is calculated in relation to capital value of the asset

- several potential approaches to assessment:

  - “additional cost to complete” – difference between what the owner required to pay under the contract and what the owner actually paid to complete and/or rectify damages
  - “loss in value” – difference in value of the owner’s asset between what it would have been had contractor not breached vs value in its defective state.
  - “loss amenities, inconvenience and disturbance” – an assessment where neither of the above two approaches is appropriate

- If claimant is the contractor:

  - likely to claim due to scope changes (not otherwise compensated in extras), delay, owner interference
  - claim is calculated by reference to loss of revenue or profit

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A Litigator’s Guide TO DAMAGES

Professionalism and Damages—Concerns of Experienced Litigators—Fact Patterns

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FACT PATTERN #1 – DAMAGES MEDIATION

You are mediating a damages claim.

You act for the Defendant, an institutional client, with whom you have a continuing relationship. You have reviewed the damages claimed by the Plaintiff, considered the exposure facing your client, discussed the matter with in-house counsel, provided a written report and recommendation on damages, and received instructions to pay $750,000.00 inclusive to settle the claim. This figure exceeds your recommendation. The client is prepared to pay more than your recommendation in this case, if necessary, for its own business reasons.

What are your obligations owed to the Plaintiff, its counsel, to the mediator, and generally to adhere to the Rules of Professional Conduct in the course of preparing a Mediation Brief and in negotiations at a mediation?

Your Mediation Brief assesses the Plaintiff’s damages at $500,000.00, on a win everything basis (although your opinion is that this figure is more likely in the range of $850,000.00).

What if any obligations do you owe in respect of the description of this aspect of the mediation process?

In your Brief, as liability is not in issue, you offer, described as generous, to pay $350,000.00.

Are there any issues arising about how this offer can be put forward? Are you able, for example, to say in your brief, or orally at the mediation, my client will pay a maximum of $350,000.00?

You are now at the mediation.

After the parties have exchanged personal information about their lives, children, cats and dogs, hobbies and feelings of mutual respect, positional bargaining begins.

After incremental increases on both ends, the Plaintiff makes its “final” offer to settle for $600,000.00. This is more than your assessment, less than your instructed limits, but more than you believe the Plaintiff will actually take.

What limitations, if any are you under at this point? Are you able to say this is beyond my instructions or, I will have to make a phone call or, my client will not pay that

1 See generally Chapter 5.
amount. Are you able to make any statement at all at this stage as opposed to simply putting forward another number? Are you able to tell the mediator anything differently? Are you able to have your client representative tell the mediator anything about instructions and actual limits, but limit the mediator's authority in respect of what may be passed on to the other side?

Are you obliged to tell the mediator the actual position you are in?

You know of course that if the Plaintiff sticks to its guns, notwithstanding your next offer, you will agree to pay $600,000.00 on behalf of your client. How do you deal with that circumstance? Do you have any obligation to your client notwithstanding your instructions on limits, to seek specific instructions to settle at a number beyond that which you have assessed the case but below your limits? Should you do so?

Does any of this change if you are dealing with inexperienced counsel?

What if the other side has significantly miscalculated its case?

Generally, is mediation a without-prejudice settlement process, not governed by any rules, regulations or considerations as above. Do all counsel understand that likely no one is telling the actual truth about their instructions, real opinions, the merits or values, and there are no expectations coming the other way namely that no one expects counsel or the clients to reveal the truth in these sessions.

Rather, it is all about bargaining, no duties are owed and it is caveat emptor throughout.
FACT PATTERN #2 FOR LITIGATOR’S GUIDE TO DAMAGES
PANEL ON PROFESSIONALISM AND DAMAGES

You represent a plaintiff at mediation in a wrongful dismissal law suit where the employer has alleged cause. Mediation has been scheduled before discovery.

The employer has made an offer that is much lower than your client’s potential recovery if the matter proceeds to trial and cause is not established, unless the client finds other work within the applicable notice period.

In fact the client has a number of prospects and has advised you that she has been told that she will receive a written offer that she will want to accept within the next few days. The terms of the offer have already been discussed with her. She has asked that this information not be disclosed to the other side and in response to questions about whether she has any offers or prospects, has stated during the joint session that she has none.

The employer is prepared to allocate as much as its entire offer to general damages in order to make the offer more attractive to your client. Employer counsel has pointed out that this will both avoid income tax and any obligation to repay the EI benefits that your client has received.

The mediator is recommending the offer.

There are no obvious circumstances in the facts of the case that could support a significant award of general damages.

What is your obligation to opposing counsel and the employer to correct the information provided by your client with respect to her employment prospects?¹

Can you properly complete a settlement providing for general damages where there is no basis in fact or law for the payment?²

¹ Rule 2.1 – Integrity
Rule 3.2-4 – Encouraging Settlement
Rule 3.2-7 – Dishonesty by Client, Others
Rule 3.3 - Confidentiality
² ibid.
The client is concerned that no portion of the settlement be treated as severance because she does not want to draw attention to it with CRA or HRDC. Are there any circumstances where you can properly agree to fully allocate the settlement to general damages?

Would your advice be any different if there were allegations that your client’s employment was terminated on grounds that constitute discrimination under the Human Rights Code?

Over the course of the mediation you become increasingly concerned about your client’s behaviour. She seems erratic, inconsistent and her judgment is poor. It occurs to you that the allegations of cause may be related to a mental health problem as yet undiagnosed. How would your answers to the foregoing be affected by your concerns?³

Can you complete the settlement that your client is now instructing you to take?⁴

Does it matter what the mediator’s view is?⁵

² Rule 3.2-9 – Client with Diminished Capacity
³ Rule 3.7-7 – Mandatory Withdrawal
⁴ Rule 5.7 – Lawyer as Mediator