

MILNE SELKIRK PRESENTS “YOU AND THE LAW”

How Do You Compensate for Pain and Suffering?

I.L., a 17-year-old teenager, was partially crushed in his uncle’s car when two trailers spilled their load of lumber on the Trans Canada Highway. He suffered a traumatic brain injury, personality changes, major chronic depression, permanent facial scarring, and constant and disabling pain, which had a “profoundly negative impact” on him.

At trial, a jury decided that the young man should be given \$2 million compensation for his pain and suffering (in addition to some \$1 million for income and other losses). The trial judge then slashed the pain and suffering award to \$294,000. The case was appealed all the way to the Supreme Court of Canada, but the country’s top court recently refused to hear the appeal.

Why?

To understand this decision – and how Canadian courts compensate for pain and suffering – you need to look back to 1978.

In 1978, the Supreme Court of Canada was asked to consider the appropriate range of “damages” or compensation in three important cases: for a 17-year-old who suffered a serious neck injury resulting in loss of use of all limbs (*Thornton v. Prince George School District No. 57*), a 21-year-old quadriplegic (*Andrews v. Grand & Toy*), and a four-year-old suffering serious brain damage and debilitating physical injuries (*Teno v. Arnold*).

Quantifiable losses like lost wages and medical expenses sustained as a result of the fault of another are often easily calculated. But the court wrestled with how to assess compensation for a victim’s pain, suffering and loss of enjoyment of life. Any amount chosen would be an arbitrary one based on a “philosophical and policy exercise” rather than a legal or logical analysis, said then-Chief Justice Dickson. As he added: “No money can provide true restitution.”

The Supreme Court of Canada chose a maximum figure of \$100,000 as compensation for pain, suffering and loss of enjoyment of life for catastrophic personal injuries – roughly about

\$310,000 in today's dollars when adjusted for inflation. (Note that compensation for pain and suffering is over and above what an injured plaintiff may be entitled to for wage loss, cost of care and other financial losses.)

In the *Andrews* case, Dickson explained that this part of the compensation package was intended to provide the victim with solace. "Solace in this sense is taken to mean physical arrangements [that] can make his life more endurable rather than 'solace' in the sense of sympathy," he added.

At the time, the court was concerned with soaring compensation awards in the United States. Part of the reason for imposing a "cap" or upper limit on pain and suffering damages was to prevent runaway insurance premiums in Canada. If awards were exorbitantly high, reasoned the court, no one but the very rich could own a car and pay the huge insurance premiums that insurance companies would have to charge to pay out on claims.

Fast forward to the present. Some lawyers and legal scholars believe the cap isn't fair or appropriate – especially because you may get more of this type of compensation for defamation or loss of your reputation. But with the Supreme Court of Canada's refusal to hear arguments about lifting the cap in the I.L. case, it's unlikely this will change any time soon.

If you're injured in a car or other accident, consult your lawyer. He or she can advise you on what your total claim is worth and help obtain the best compensation possible.

This article was written by Janice Mucalov, LL.B. with contribution by Lawrence Coulter of MILNE SELKIRK. A version of this was previously published in the Langley Times. Copyright by Janice Mucalov. "You and the Law" is a registered trade-mark. Please call Lawrence Coulter (604-882-5015) if you have any questions or for legal advice.