

“GOOD GRACIOUS ME – AS HIGH AS THAT?”

By Allan Thackray, QC

I originally entitled this paper “**Measuring Your Chance of Success in Quantum Appeals.**” As I researched the topic I realized it was not possible to make that measurement with any degree of exactitude. I then recalled the words of Lord Denning in *McCarthy v. Coldair Ltd.* as replicated in *Bone v. Seale* [1975] 1 All E.R. 787 (C.A.) and chose those as the title because they capture the dilemma faced by appellate courts in deciding quantum of damage appeals.

In assessing damages there are a host of issues to be considered. Some sound in the law, but most are factual. The words of Lord Denning bring home the extent to which it is a visceral exercise. Consequently, it is difficult to draw any general guidelines. Nevertheless, I will try and give an outline which, even if not giving many definitive answers, might give some insight into matters to be considered.

Damages are, by statutory definition, matters of fact. The *Negligence Act*, R.S.B.C. 1996, c.333, states:

In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

As such, appellate review demands a standard of palpable and overriding error. This presents particular difficulty if the judgment was by way of a jury verdict. There are no reasons for judgment to probe for palpable and overriding errors.

But who can say that any two injuries are similar? You hear the phrase, “the defendant takes the victim as he finds him.” One plaintiff, seeing a fly in a bottle will simply ignore it, or even spit it out, and carries on drinking. Another will go into post traumatic stress disorder. Appellate courts are painfully aware of the difficult task they are being assigned in finding errors that can be categorized as palpable and overriding.

Damage appeals based on quantum alone are less than 5% of the Court’s cases. In 2007 there were only six of what I would call “pure” quantum appeals out of a total of 641 judgments. To date in 2008 there have been three judgments delivered in quantum appeals out of a total of 190 judgments. I delivered approximately 150 judgments in my six years on the Court of Appeal. Of those about fifteen were in quantum appeals, of which five were in appeals from judge-alone decisions. Those included *Schellak v. Barr*, 2003 BCCA 5, *Vivakandand v. Gibson*, 2003 BCCA 148 and *Spehar v. Beazley*, 2004 BCCA 290.

APPEALS OF JURY AWARDS

Appellate courts look to judge-made awards to see if the award in question was within, or at least not grossly outside of, awards in similar cases. This started with **Nance v. B.C. Elec. Ry.** (1951) 2 WWR (NS) 665, not a jury case, where Viscount Simon said an assessment of damages by a trial judge should not be interfered with unless the appellate court is satisfied the judge applied a wrong principle of law or, “short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Nance was relied upon in British Columbia in **Bisson v. Corporation of Powell River**, 1967, 62 WWR 707 (B.C.C.A.) even though **Bisson** was a jury case. The Court found an award to be “out of all proportion.” To explain this the Court said it had “in mind a general idea of the damages which are being awarded day by day by the courts in cases of this kind” and “out of all proportion” meant the judgment was “plainly so unreasonable that no jury acting judicially could have reached it.”

This started a tortuous route that still bedevils courts in attempting to find the proper basis upon which to review jury awards. This can be seen in **Cory v. Marsh** (1993), 77 B.C.L.R. (2d) 248 (C.A.) where, in considering jury awards to two plaintiffs for soft tissue injuries, McEachern C.J. said a “proportionality test” requires a “consideration of whether an award is inordinately low, high, wholly erroneous or not erroneous in relation to both the circumstances of the case, and to other cases.” He then cited a large number of “analagous” cases and determined “the range for the kind of non-pecuniary damages suffered by these plaintiffs” and reduced the awards.

Debate then raged as to what was meant by a “proportionality test.” In **Cody v. Leonard** (1995), 15 B.C.L.R. (3d) 117 (C.A.) it was argued that **Cory** “set a new test for the review of non-pecuniary damage awards by juries.” The Court held **Cory** “did not apply a new test”, but rather “applied the long established test of reasonableness” which is based upon a consideration of comparable cases. The jury award was reduced.

It is of interest to note that at the time there was a Court of Appeal rule providing, where “excessive” damages had been awarded by a jury, the Court may reduce the damages. (There was no provision, or even any thought given, to a jury award being inadequate.) As noted in **Da Silva v. Dudas**, [1989] B.C.J. No 1318 (C.A.), that rule “disappeared” with the enactment of section 9(1) of the **Court of Appeal Act, 1982** that provided the Court could make any order that could be made by the court or tribunal appealed from.

Many cases followed **Cory** and **Cody** in which the jury verdicts were reduced: **Stewart v. Shimpei** (1995) CA019406, **Baas v. Jellema** (1998) CA021856, **Unger v. Dhaliwal** (1999) CA024444, **Strazza v. Stupich**, 2000 BCCA 108 and **Laycock v. Longo**, 2002 BCCA 186.

In **Vaillancourt v. Molnar Estate**, 2002 BCCA 685, the jury awarded a figure in excess of the judicial cap of \$281,300. The trial judge reduced the award to the cap. The Court of Appeal set the non-pecuniary damage award at \$125,000 and also reduced the awards for cost of future care and loss of earning capacity.

In **Ferguson v. Lush**, 2004 BCCA 517, the plaintiff/appellant brought it to the Court's attention that an award under one of the heads of damages was inconsistent with the award under another. The Court held it is for the injured party to prove each head of damage and pointing to success under one head and failure under another does not ground a successful appeal. Nor, said the Court, was there any relevance in making a comparison to awards made by judges in "comparable" cases.

In **Djukic v. Hahn**, 2007 BCCA 203, the appellant submitted the difference between the awards for past and future income loss were "simply inexplicable and indicative of an error in principle." The Court said it was "not persuaded" that argument had any merit. This seems to reinforce the judgment in **Ferguson** that an imbalance between awards under the various heads of damages will not ground a successful appeal.

However, in **Toor v. Toor**, 2007 BCCA 354, a judge-alone trial, the plaintiff alleged the non-pecuniary, cost of future care and cost of past care awards were inordinately low. The Court did the comparable case type of review and held the award for non-pecuniary loss was inordinately low. Curiously, and in my view contrary to legal precedents, the Court found it significant that the award was inconsistent with the award for cost of care and allowed the appeal.

I have been noting cases in which damages were reduced, but whether from jury or non-jury trials there is at least one other remedy. That is to order a new trial. This is not an uncommon result, see for example: **Balla v. Insurance Corporation of British Columbia**, [2001] B.C.C.A. 62, **Banks v. Shrigley**, [2001] B.C.C.A. 232 and **Binnie v. Marsollier**, 2001 BCCA 543 and **Hoskin v. Han**, 2003 BCCA 220. In **Toor**, because of the large role credibility played in the trial, the Court sent the case back to be retried.

A unique result was devised in **Johnson v. Laing**, 2004 BCCA 364. The award of damages made by a jury was \$2,250. The award sought by the plaintiff was \$500,000. Madam Justice Southin, with the concurrence of her colleagues, sent the case back "to the trial judge to assess the damages on the evidence at the trial." She relied upon section 9(1)(c) of the **Court of Appeal Act**, referred to earlier in this paper.

Damages were then assessed by the original trial judge, Mr. Justice Grist: 2006 BCSC 948. He set the quantum of damages at \$186,000. I venture the opinion that the option of sending a jury award to be assessed by the trial judge is unlikely to recur with any regularity, if at all.

Commentary

The focus of this section is on appeals from jury verdicts, but the issue of mode of trial should be considered by litigants and their counsel early in the litigation. Consideration should be given to the fact there are no reasons for judgment. This denies to an appellate court an insight into how the verdict was arrived at and whether a “palpable and overriding” error can be identified.

From an academic standpoint arguments can be made in favour of discontinuing civil jury trials. This has already taken place in England. Judges are lawyers who have had years of training in legal principles, are familiar with medical evidence and concepts, and can review the cases referred to as “comparables.” Moreover, they can review the medical, accident, actuarial, etc. reports with leisure, have their judgments reviewed by the brightest young legal talent in the land, reconsider their opinions and give reasons for judgment.

I carry the view that to have juries set awards of damages is illogical. Juries are denied access to precedent cases (with which I agreed as a judge), yet are found to have erred in making an award outside of the range set in judge-made awards. Thus I ask, how can it be said a jury erred in making an award outside of the usual range of damages as discerned from judge-made awards?

In *Vaillancourt v. Molnar* there is an extensive review of appellate court jurisdiction to vary jury awards and also of the appropriate standard of review. It was held that the Court has the jurisdiction to vary a jury award. However, that case emphasized another of the anomalies in jury trials. Juries are generally not informed of the judicial cap on non-pecuniary damages. That is, damages for pain and suffering. Nevertheless, if a jury should make an award in excess of the cap the court must reduce the award to at (or arguably within) the cap.

In *Laycock v. Longo*, 2002 BCCA 186, I suggested that in appellate reviews of quantum awards by juries there is a “lack of logic in citing what are suggested to be comparable cases.” I said the process was “illogical, unfair to the jury and unfair to the civil jury system.”

In so stating I was mindful of the comments of Mr. Justice Legg in *Cody v. Leonard*:

This Court must recognize that a jury award is not necessarily wrong if it does not conform with the damage awards made by

judges when considering whether a jury award is out of all proportion to the circumstances of the case.

Those words have gone unheeded. The “proportionality” or “comparable” test is the basic criteria used in appellate reviews of quantum awards. Mr. Justice K. Smith has suggested the “error” is not in setting the appellate award within the range of judge-made awards, but rather in not acknowledging jury awards as reflecting community standards. In other words, in not setting the appropriate range of damages using jury awards as at least one of the criteria.

APPEALS OF JUDGE-ALONE AWARDS

Insight into how the Court analyzes an appeal of a quantum award may be found in the reasons for judgment of Mr. Justice K. Smith in *Boyd v. Harris*, 2004 BCCA 146. He cited cases referred to the Court as “comparables” and said:

[41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it is falls so substantially outside the range that it must be adjusted.

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

The criteria adopted in *Spehar v. Beazley* might also give some guidance:

[25] The appellants’ position on this appeal would have this Court simply adopt and substitute the defence submission for the reasoned conclusion of the trial judge. This is not the standard of review that is open to this Court. In *Van Mol (Guardian ad litem of) v. Ashmore* (1999), 58 B.C.L.R. (3d) 305, 168 D.L.R. (4th) 637, 1999 BCCA 6 at paras. 9 -13 it was said the relevant questions are:

Is there a palpable and over-riding error?

Is there a manifest error?

Has the trial judge ignored conclusive or relevant evidence?

Has the trial judge misunderstood the evidence?

Has the trial judge drawn erroneous conclusions from the evidence?

The Court has generally adopted that criteria which is based on identifying a palpable and overriding error. The definition of those words is subjective and the Court has a great deal of respect for the trial bench. There is a judicial principle of deference. The Supreme Court of Canada has repeatedly said appellate courts must recognize the fact the trial judge saw and heard the witnesses and is in a better position than an appeal court in assessing the weight to be assigned to their evidence.

Deference is given in large doses when it comes to credibility findings. In judge-alone decisions the credibility of the plaintiff will likely be spelled out in the reasons for judgment. It is generally difficult on appeal to overcome credibility findings made at trial, however this occurred in a series of criminal cases and the Supreme Court of Canada has given the Crown leave to appeal those cases.

Findings of fact will also receive a high degree of deference. Appellate courts are reluctant to be seen as places to rehear cases. While there is a tendency for appellate courts to steer towards “getting it right”, they will not blatantly make new factual findings. As was said in *Steward v. Berezan*, 2007 BCCA 150, it will not accept a “thinly disguised effort “to have it retry the facts and substitute its views for those of the trial judge.

CONCLUSIONS

Non-pecuniary damage appeals

Jury award appeals of non-pecuniary damage awards brought by defendants have had considerable success. Plaintiffs’ appeals have not fared as well, but that reflects the fact the number of such appeals is small. If juries make awards outside of the usual range of damages they are usually on the high side of the range.

In judge-alone cases, unlike appeals from jury awards, it is seldom a judge makes an award of non-pecuniary damages that is devoid of evidence in support

or goes outside of the usual range of damages. In **Gojevic v. Philpott**, 2002 BCCA 483 the Court rejected the appeal of the non-pecuniary award because there was some evidence to support the trial decision. In doing so Huddart J.A. said the “Court is not entitled to reweigh the evidence and substitute our opinion of the facts for that of the trial judge.”

Loss of income earning capacity appeals

Loss of earning capacity awards is the other area for fruitful appeals. The Court deleted the award for loss of future earning capacity in **Steward v. Berezan** pointing out this head of damage is a recognition the loss must be The loss of a capital asset, i.e. the ability to earn. It is not the loss from one particular vocation if it is open to the injured party to pursue another vocation. The Court said it could not “see the basis for a substantial possibility giving rise to compensation for diminished earning capacity.”

I have underlined “substantial possibility” because it must be kept in mind the level to which an injured person must establish the prospect of returning to a previous type of employment is only at the level of “possibility” or “substantial possibility”, not probability: Also see **Smith v. Knudsen**, 2004 BCCA 613 and **Haile v. Johns** 2005 BCCA 517.

What was said by Southin J.A in **Palmer v. Goodall**, (1991), 53 B.C.L.R. (2d) 44 (B.C.C.A.) still holds true:

[59] Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning capacity.

In **Bedwell v. McGill**, 2008 BCCA 6, the plaintiff challenged the nil award for loss of income earning capacity. The trial judge noted the criteria set forth by Finch J. in **Brown v. Golaly**, (1985), 26 B.C.L.R. (3d) 353 (S.C.):

Has the plaintiff been rendered less capable overall from earning income from all types of employment?

Is the plaintiff less marketable or attractive as an employee to potential employers?

Has the plaintiff lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not been injured?

Is the plaintiff less valuable to himself as a person capable of earning income in a competitive labour market?

The trial judge answered “no” to each. On appeal the Court found no palpable and overriding error by the judge in coming to that decision.

In **Somers v. Wesnoski**, 2008 BCCA 139, there was no award for loss of income, either past or future. On appeal the Court said the “weighing of evidence is classically within the province of the trier of fact. It found the losses were not caused by “the appellant’s increased level of stress and anxiety arising out of “the accident. The Court continued:

[30] It is to be noted that the facts as found by the trial judge supported only one conclusion – that the appellant had not established that her past income loss and any future loss of earning capacity arose in any way out of the accident.

In **Sinnott v. Boggs**, 2007 BCCA 267, the trial judge made his award on the basis the plaintiff was “less marketable as an employee because of the limitations on her ability to work competitively in all jobs previously open to her.” The appellate court noted this finding and held this, in itself, was “an adequate foundation for the trial judge’s award.”

In **Schellak v. Barr** the award for past loss of income was reduced on the basis of the earnings of the plaintiff before the accident which were lower than those awarded for the period after the accident and prior to the trial. That is, her “track record” worked against her in the appeal.

In **Kralik v. Mount Seymour Resorts Ltd.**, 2008 BCCA 97, the trial judge awarded the plaintiff \$300,000 for loss of earning capacity. The Court of Appeal reduced that award to \$75,000:

[27] I agree [with the appellant] that the award of \$300,000 was inordinately high in the circumstances of this case while it is true that Mr. Kralik’s opportunities of earning income from heavy labour or other employment that involves lifting or reaching have been seriously diminished, the chances are good that he will turn to other employment and will do so successfully. ... I would reduce the award to \$75,000, which is roughly equivalent to two times his pre-accident income and makes due allowance both for

the difficulties he may encounter and the more positive contingencies that exist in this case.

It will be seen that what I call the “track record” of a plaintiff is an important factor in the appeal of awards for loss of income earning capacity.

Kralik should be read carefully. It reviews many of the theories that have been applied in this area. It is, however, in my opinion, one of those cases where, taking into account the modest injury, the visceral reaction to the award at trial was significant, i.e. “**good gracious me.**”

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