



Crawford[®]

Quantifying Bodily Injury Claims

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What is the purpose of Damages?

The overriding principle of damages in tort is to “restore” the Plaintiff to the same position that they would have been had the tort not occurred.

This is also known as the Latin maxim of ‘restitutio in integrum’ which translates to ‘restoration to original condition’.

The Courts function is to compensate the Plaintiff, monetarily. It is assumed that while no amount of money will “fix” them; the damages awarded will be used by the Plaintiff to make life easier or more tolerable.



Damages Fall Into 3 Main Categories:

- General Damages (non-pecuniary):
 - These damages are not quantifiable. They include monies awarded for pain and suffering, and any damages awarded to family members for the loss of care, guidance and companionship of the injured person
- Special Damages (pecuniary):
 - These damages are quantifiable. They include monies awarded for loss of past and future income, out-of-pocket expenses, and the cost of medications, medical care or home care.
- Punitive Damages:
 - These damages are not compensatory in nature. They are aimed at punishing the wrong doer. They are equal to a fine imposed by the Court.

Punitive Damages are very rare in personal injury actions. They are awarded when the Defendant's conduct is so reprehensible it deserves punishment.



General Damages (Non-Pecuniary)

Assessments of general damages are difficult due to their immeasurable nature. The Court will look to previous decisions involving similar fact scenarios for guidance. Each case is based on its own set of facts.

Factors the Courts takes into consideration:

- The age of the Plaintiff
- The severity of the injury
- The recovery time from the injury
- The nature of the treatment the Plaintiff underwent
- The physical and emotional limitations caused by the injury
- The pre-existing health and status of the Plaintiff

THRESHOLD

The court must determine whether the plaintiff has sustained a permanent, serious impairment of an important physical, mental or psychological function as required under s. 267.5(5) of the Insurance Act.

Johnston v Walker (2017)

In order to reach the threshold required to receive non-pecuniary damages, plaintiff's impairments must be permanent, important and serious.

In determination of such, greater importance is placed on the effects of the injury rather than the doctor's diagnosis and "labelling" of the injury.

Nadarajah v Aviva Canada (2017)

The Plaintiff was awarded \$15,000 for general damages as he sustained a "minor soft tissue strain".

This decision emphasizes the standard of "serious impairment" in which plaintiffs must prove in order to receive general damages. The plaintiff must also be able to demonstrate how the injuries from the accident have substantially interfered with his abilities to carry on with his regular duties following the accident.

THRESHOLD

In practice the courts hear threshold motions in many cases where there is no objective findings to explain a plaintiff's disability and pain, and especially in cases which are founded on subjective reports of chronic pain, pain.

The case law shows that credibility of the plaintiff is paramount. First, as a reliable historian who informs the medical record and expert opinions. Second, as a teller of narrative which is consistent with surveillance or other lay witness evidence.

Wray v Pereira (2018)

- Plaintiffs theory was that MVA triggered an asymptomatic right knee injury
- Credibility of the plaintiff was undermined at trial re: pre mva knee complaints

Al-Radwan v Wanless (2018)

- Plaintiff's credibility questioned due to inconsistent statements to medical practitioners, non-disclosure of income and AB settlement to ODSP

Mousseau v Morrison (2018)

- Plaintiff returned to work 4.5 years after the accident but retired due to pain
- She was found to be a "refreshingly credible and reliable witness"

Courts Assessment of Chronic Pain:

An award for general damages, as the Court of Appeal for Ontario stated in *Rizzi v Mavros*, “is a philosophical and policy exercise that, although necessarily arbitrary, must be an amount that is reasonable and fair both to the plaintiff and to society as a whole.” Since assigning a number to compensate for someone’s pain is arbitrary, the trier should look to existing case law to determine what the appropriate award is to ensure consistency.

The jury awarded \$41,000 in general damages, subject to a 75% reduction for the plaintiff’s contributory negligence. Due to a finding that there was an error in the trial judge’s charge to the jury, the COA assessed damages as \$80,000.

In increasing the award, the COA provided a helpful review of the case law regarding general damages in chronic pain cases. The court established roughly three tiers of damages awards: a low end between \$40,000 and \$55,000; a mid-range between \$55,000 and \$80,000; and a high-end between \$80,000 and \$120,000.

Family Member Claims

FLA claims are subject to a \$19,409.49 deductible. Where the claim exceeds \$64,697.21, the deductible does not apply. There is no deductible where death occurs as a result of the accident. Family members that are eligible includes spouses, children, grandchildren, parents, grandparents, brothers and sisters of the victim. The types of damages recoverable under an FLA claim may include:

- Actual expenses reasonably incurred for the benefit of the person injured or killed;
- Money damages for the loss of income of the person injured or killed;
- Actual funeral expenses reasonably incurred;
- A reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- Where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- An amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.



Special Damages (Pecuniary):

An award for special damages includes: loss of income, medical or rehabilitation expenses and housekeeping expenses.

Special damages may include monies already lost, or future anticipated expenses and/or losses which require detailed analysis and some speculation.

Special damages must be supported by documentary evidence. This could include:

- Income Tax Returns
- Employment Records
- Bank Records
- Expert Evidence
- Receipts and Invoices

Special damages also attract PJI – Prejudgment Interest pursuant to section 128 of the CJA

**Only on past losses*

Deductions

Contributory Negligence:

Plaintiff's conduct contributed to the accident or resulting damages

Plaintiff's who fail to wear seatbelts may be found 15% to 25% contributorily negligent, but only where the Defendant can prove that proper use of a seatbelt would have prevented or reduced the injury

Plaintiff's who fail to wear helmets on bikes or motorcycles can be found to be 10% to 15% contributorily negligent. The Defendant must prove the use of the helmet would have reduced or prevented the injury.

Plaintiff's who are impaired by alcohol or other drugs, as well as willing passengers with impaired drivers, and are injured in an MVA can be found 25% to 45% contributorily negligent.

Snushall v. Fulsang: where contributory negligence is found only for not wearing a seatbelt, its award should fall within a range of 0 to 25%; the upper limit of the range, is available only in those cases where the jury is satisfied that substantially all the damages could have been prevented by wearing a seatbelt; and that, where the evidence does not establish that all the injuries would have been effectively prevented, the allocation would be less.

Productions to be Requested:

Documents required when assessing damages:

- Clinical notes and records of the Plaintiff's family physician, and any other treating physicians;
- Clinical notes and records of any treatment facilities that the Plaintiff has attended;
- Hospital Records;
- Decoded OHIP Summary;
- OHIP Subrogated Claim;
- Prescription Summary;
- Income Tax Returns, including Notice of Assessments;
- Employment File;
- Collateral Benefits File;
- ODSP/Ontario Works File;
- Invoices/receipts to confirm any out-of-pocket expenses;
- Transcripts from previous MVAS and/or EUO transcripts;
- Preservation of social media accounts which may contain photos.



Cormack-Terrelonge v Gah my Estate (2018)

Prior MVA transcripts are caught by the deemed undertaking rule, therefore prior transcripts need a court order to be disclosed. The test for an Order will be if the interest of justice outweighs any prejudice that would result to a party who disclosed the evidence.

The plaintiff was injured in a 2014 MVA. At discoveries, it was revealed that the plaintiff had been injured in three previous MVA's and had sued over each one. Plaintiff's counsel refused to provide an authorization for the defendant to obtain the discovery transcripts.

The court ordered production of the transcripts. It was necessary to assess the extent to which the plaintiff's current complaints overlapped with her injury complaints about the subject 2014 accident.

Leduc v Roman (2009)

Ontario courts have rules that posted content to social media sites such as Facebook and MySpace constitute data in electronic form, producible as documents under the *Rules of Civil Procedure*. This means that information drawn from a Facebook profile, Instagram photo or Twitter feed can be relied upon as evidence in a legal action.



When requesting such information, be sure to be specific. For example, documentation that refers or relates to the physical injuries the plaintiff alleges that she/he sustained as a result of the accident and any treatment she/he received therefor, or, documentation that reflects the physical capabilities that are inconsistent with the injuries that the plaintiff allegedly sustained as a result of the injuries.

Motor Vehicle Damage Assessment

THRESHOLD

Injuries sustained are a permanent serious disfigurement or permanent serious impairment of an important physical, mental or psychological function



Generals:	\$80,000.00
Less Deductible:	<u>\$(38,818.97)</u>
Net:	\$41,181.03
Less 10% CN:	<u>\$4,118.10</u>
Net:	\$37,062.93

DEDUCTIBLE

Damages over \$100,000 (now \$129,395.49) = No Deductible

Damages under \$100,000 subject to deductible

FLA Claimant – \$19,409.49 deductible

Slip & Fall Damage Assessment

- No Threshold
- No Deductible (for Plaintiff or FLA Claimant)
- No Deduction for Collateral Benefits
- Past Loss of Income – entitlement from day 1
- OHIP – Subrogated Claim
- Pre-Judgment Interest: 5% per annum from the date the cause of action arises to date of judgment
 - Bill 15 changes - *Courts of Justice Act* rates for MVA claims



Insured [REDACTED]
 Claimant [REDACTED]
 Occupation unknown M S

Date of Loss *(mm/dd/yy)* [REDACTED]
 Claim No. [REDACTED]
 D.O.B. *(mm/dd/yyyy)* [REDACTED]
 No. Dependents 0

Accident Description:

Slip & fall, alleged ice.

Injuries:

strain of the right knee, soft tissue injuries to right shoulder & right elbow.

Notes:

[REDACTED]

Legal	
Statement of Claim:	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Jury Notice:	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Plaintiff Counsel	[REDACTED]
Defence Counsel	[REDACTED]
Effective PJI Start Date <i>(mm/dd/yyyy)</i>	22-Jan-18
Projected Disposition Date <i>(mm/dd/yyyy)</i>	22-Jan-20

RESERVE CALCULATION AT:

	DATE:	DATE:	DATE:
	10-Jun-18		
	1 st VERSION	2 nd VERSION	3 rd VERSION
A. Pre-Disposition Date Wage Loss.....	7,040		
B. Special Damages.....	13,200		
C. TOTAL SPECIAL.....	20,240		
GENERAL DAMAGES			
D. Non-pecuniary Damages.....	27,500		
E. Future Income Loss.....	0		
F. Future Care Costs.....	0		
G. F.L.A. claim(s).....	0		
H. SUB TOTAL (100% Liability).....	47,740		
<i>Contributory Negligence Reduction factor</i>			
	0%		
I. Less Contributory Negligence.....	0		
J. Less Credit for Section B Benefits.....	0		
K. TOTAL NET DAMAGES (H-I & J).....	47,740		
L. Add 15% contingency.....	7,161		
M. Plaintiff Costs.....	5,000		
N. TOTAL GROSS ASSESSMENT.....	59,901		
O. Defendant's Costs.....	4,000		
PROBABLE ULTIMATE VALUE.....	\$63,901		

Completed by _____ [REDACTED] _____

Date June 10, 2018

Supervisor _____ [REDACTED] _____

Date _____

BODILY INJURY WORKSHEET

CLAIMANT: [REDACTED]
 CLAIM#: [REDACTED]

Note
 P.V. - PRESENT VALUE
 P.J.I. - PRE JUDGMENT INTEREST
 F.L.A. - FAMILY LAW ACT

Worksheet Status 1st Version Complete
 Date Completed **10-Jun-18**

1st Version

<p>A. PRE -DISPOSITION DATE WAGE LOSS <i>(Project to recovery or trial date) (Calculate on a gross basis)</i></p> <p>TOTAL DISABILITY Rate <input type="text" value="8.00"/> WEEKS @ <input type="text" value="\$500"/> = <input type="text" value="\$4,000"/></p> <p>PARTIAL DISABILITY <input type="text" value="8.00"/> WEEKS @ <input type="text" value="\$300"/> = <input type="text" value="\$2,400"/></p> <p>P.J.I. <input type="text" value="2.00"/> YEARS @ <input type="text" value="5.0%"/> = <input type="text" value="\$640"/></p> <p>TOTAL PRESENT INCOME LOSS <input type="text" value="\$7,040"/></p> <p style="text-align:center"><i>TRANSFER TO LINE "A" ON PAGE 1</i></p> <p>D. NON-PECUNIARY DAMAGES</p> <p>CURRENT ASSESSED VALUE <input type="text" value="\$25,000"/> SUBTOTAL <input type="text" value="\$25,000"/></p> <p>P.J.I. <input type="text" value="2.00"/> YEARS @ <input type="text" value="5.00%"/> <input type="text" value="\$2,500"/> Less Deductible (where applicable) <input type="text"/></p> <p>TOTAL NON-PECUNIARY DAMAGES <input type="text" value="\$27,500"/> <i>TRANSFER TO LINE "D" ON PAGE 1</i></p> <p>F. FUTURE CARE COSTS</p> <table style="width:100%;"> <tr><td>1 NURSING(PV of attendant care)</td><td><input type="text"/></td></tr> <tr><td>2 PROSTHETICS</td><td><input type="text"/></td></tr> <tr><td>3 ACCOMMODATIONS</td><td><input type="text"/></td></tr> <tr><td>4 RENOVATIONS</td><td><input type="text"/></td></tr> <tr><td>5 TRANSPORTATION</td><td><input type="text"/></td></tr> <tr><td>6 ANCILLARY EQUIPMENT</td><td><input type="text"/></td></tr> <tr><td>7 REHABILITATION</td><td><input type="text"/></td></tr> <tr><td>8 OTHER</td><td><input type="text"/></td></tr> <tr><td colspan="2" style="text-align:right">SUBTOTAL</td></tr> </table> <p>**TAX GROSS UP MULTIPLE <input type="text"/></p> <p>TOTAL FUTURE CARE <input type="text"/> <i>TRANSFER TO LINE "F" ON PAGE 1</i></p> <p>J. CREDIT FOR PRE-DISPOSITION DATE Sec. B</p> <p>Total Dis. <input type="text"/> WEEKS @ <input type="text"/> Rate <input type="text"/> Part Dis. <input type="text"/> WEEKS @ <input type="text"/> Rate <input type="text"/></p> <p>TOTAL CREDIT <input type="text"/> <i>TRANSFER TO LINE "J" ON PAGE 1</i></p>	1 NURSING(PV of attendant care)	<input type="text"/>	2 PROSTHETICS	<input type="text"/>	3 ACCOMMODATIONS	<input type="text"/>	4 RENOVATIONS	<input type="text"/>	5 TRANSPORTATION	<input type="text"/>	6 ANCILLARY EQUIPMENT	<input type="text"/>	7 REHABILITATION	<input type="text"/>	8 OTHER	<input type="text"/>	SUBTOTAL		<p>B. SPECIAL DAMAGES</p> <table style="width:100%;"> <tr><td>1 PROVINCIAL HEALTH SUBRO</td><td><input type="text" value="\$3,000"/></td></tr> <tr><td>2 MEDICAL EXPENSE</td><td><input type="text" value="\$3,500"/></td></tr> <tr><td>3 HOUSEKEEPING/MAINTENANCE</td><td><input type="text" value="\$3,000"/></td></tr> <tr><td>4 MISC. EXPENSE</td><td><input type="text" value="\$2,500"/></td></tr> <tr><td>5 P.J.I. <input type="text" value="2.00"/> YEARS @ <input type="text" value="5.0%"/></td><td><input type="text" value="\$1,200"/></td></tr> <tr><td colspan="2">TOTAL SPECIALS <input type="text" value="\$13,200"/></td></tr> </table> <p style="text-align:center"><i>TRANSFER TO LINE "B" ON PAGE 1</i></p> <p>E. FUTURE INCOME LOSS</p> <table style="width:100%;"> <tr><td>1 <input type="text"/> YEARS @ <input type="text"/> /yr=</td><td><input type="text"/></td></tr> <tr><td>2 Discount Rate</td><td><input type="text"/></td></tr> <tr><td>3 Present Value</td><td><input type="text"/></td></tr> <tr><td>4 and/or a Lump Sum Option</td><td><input type="text"/></td></tr> <tr><td>TOTAL FUTURE LOSS</td><td><input type="text"/></td></tr> </table> <p style="text-align:center"><i>TRANSFER TO LINE "E" ON PAGE 1</i></p> <p>G. F.L.A. CLAIMS</p> <table style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="width:50%;">NAME</th> <th style="width:20%;">Relationship</th> <th style="width:30%;">AMOUNT</th> </tr> </thead> <tbody> <tr><td>1</td><td><input type="text"/></td><td><input type="text"/></td></tr> <tr><td>2</td><td><input type="text"/></td><td><input type="text"/></td></tr> <tr><td>3</td><td><input type="text"/></td><td><input type="text"/></td></tr> <tr><td>4</td><td><input type="text"/></td><td><input type="text"/></td></tr> </tbody> </table> <p>PJI <input type="text"/> Years @ <input type="text"/> Interest Rate <input type="text"/></p> <p>TOTAL F.L.A. <input type="text"/> <i>For Ont. auto damage amounts should be net of Statutory deductible \$7500 per claimant</i> <i>TRANSFER TO LINE "G" ON PAGE 1</i></p> <p>M. PLAINTIFF'S COSTS</p> <table style="width:100%;"> <tr><td>1 ESTIMATE OF DISBURSEMENTS</td><td><input type="text" value="\$1,000"/></td></tr> <tr><td>2 ESTIMATE OF TAXABLE COSTS</td><td><input type="text" value="\$4,000"/></td></tr> <tr><td>TOTAL</td><td><input type="text" value="\$5,000"/></td></tr> </table> <p style="text-align:center"><i>TRANSFER TO LINE "M" ON PAGE 1</i></p> <p>O. DEFENDANT'S COSTS</p> <table style="width:100%;"> <tr><td>1 ADJUSTING FEES</td><td><input type="text" value="\$3,000"/></td></tr> <tr><td>2 EXPERT REPORTS</td><td><input type="text"/></td></tr> <tr><td>3 MEDICAL REPORTS</td><td><input type="text" value="\$1,000"/></td></tr> <tr><td>4 COUNSEL FEE</td><td><input type="text"/></td></tr> <tr><td>TOTAL</td><td><input type="text" value="\$4,000"/></td></tr> </table> <p style="text-align:center"><i>TRANSFER TO LINE "O" ON PAGE 1</i></p> <p>P. 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Fact Scenario #1

The Plaintiff was 39 years of age when she was involved in a slip and fall accident. She was walking down a sidewalk that was under construction. The sidewalk had a temporary asphalt in place. The Plaintiff slipped and fell and injured her neck and right shoulder.

Within a few months of the accident, the Plaintiff noted a 20-30% improvement in her symptoms. Within one year of the accident, the Plaintiff had full range of motion of her neck and shoulder. The Plaintiff continued to complain of pain, notwithstanding the absence of any objective findings.

You insure the contractor that supplies the temporary asphalt, Slip and Slide Asphalt Inc.



Assessment of Damages #1:

Factors involved in assessing damages:

- OHIP subrogated claim
- Soft tissue injury
- Non-invasive, conservative treatment
- Diagnosis and prognosis of the Plaintiff's damages
- Ongoing treatment
- Ongoing limitations, if any

\$30,000 to \$50,000

Fact Scenario #2

The Plaintiff was a 47 year old real estate agent, who suffered injuries when she slipped and fell on a wet floor in Holt Renfrew at the Eaton Centre.

She suffered soft tissue injuries and was diagnosed with Fibromyalgia (prior to this accident). At the time of this accident, she had ongoing significant complaints of disabling pain, but was able to continue working full time and maintain her family home which included a husband and three children.

After this accident, she had pain in her head and neck, numbness in her left arm and left trunk. She was not able to return to her pre-accident working capacity, but returned to a limited clerical role after the accident.

You insure the cleaner contracted by Holt Renfrew, Shine on your Dime Inc.. The cleaners have a schedule to make their designated rounds; however, they rely on the manager of Holt to advise them of spills etc. between their routes.



Assessment of Damages #2:

Factors involved in assessing damages:

- OHIP subrogated claim
- Pre-accident details and medical history re: fibromyalgia
- Pre and post-accident work capabilities
- Pre and post income tax returns
- Pre and post corporate business tax information
- Annual listings/sale revenue
- **Retain an accountant
- Expert can assist with Examination for Discovery

\$75,000 to \$90,000



Fact Scenario #3

The Plaintiff was a 39 year old man at the time of the incident. He worked as a physical labourer. He was married with two children.

The Plaintiff was at a Nsync reunion concert. In a state of complete inebriation, the Plaintiff jumps on stage and attacks Justin Timberlake. As a result of the incident, he sustained a soft tissue injuries, as well as a broken rib. The rib healed independently.

The Plaintiff's pain continued. He became frustrated and angry that he could not perform. He would become very emotional. He was depressed and sad. Eventually his wife left him and Nsync broke up for good.

The Plaintiff was diagnosed with a mild closed head injury. He had post-concussive syndrome which resulted in depression; stress and headaches. It was expected the would have mild memory deficits for the rest of his life.



Assessment of Damages #3:

Factors involved in assessing damages:

- Rib fracture is a self-healing injury (least costly injury)
- Plaintiff is a singer, he has difficulty breathing
- Ongoing emotional issues
- Flashbacks of crazed fans
- Economic loss
 - Cancelled concerts
 - Fear of performing
 - Loss of income from the drummer to the sound technician
 - *Importance of accountant – large and complicated economic loss claim

\$175,000 to \$200,000

Fact Scenario #4

A 38 year old architect stops his car in a line of traffic. It is struck from behind by an overtaking vehicle travelling at 20km/h. The plaintiff's car is pushed into the vehicle in front of them.

The Plaintiff suffers no outward signs of injury but almost immediately detects a pain in his neck which is very much worse the next day. His doctor recommends physiotherapy, which is discontinued after two weeks because the pain seems to be worsening. The doctor then prescribes a collar, which the plaintiff wears for a month. He retards physiotherapy. Six months post-accident, the plaintiff says the pain has diminished greatly, but he still has pain in his neck with certain movements.



Assessment of Damages #4:

Further information required:

- Was he referred to any specialists?
- Did the injury prevent him from carrying on his work?
- What medications were ingested as a result of the injuries?
- This case will likely not meet threshold, if it does, it will likely not meet the deductible.

\$25,000 to \$35,000



QUESTIONS?