Legal Matters | PERSONAL INJURY LAW

How to Put a Price on Pain

Darcy

Darcy is a lawyer with Boland Howe LLP, Trial Lawyers for the Injured, and can be reached at ***905.841.5717*** ***www.bolandhowe.com***

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The year was 1978. Pierre Trudeau was prime minister. Saturday Night Fever and Star Wars were in theaters. McCartney was with Wings. Lennon was with Yoko. And Apple was in its first year of sales.

On January 19th, 1978 three tragic cases all rose to the Supreme Court of Canada, where nine judges decided how Canadian law would compensate the injured for pain and suffering. In *Andrews* v. *Grand and Toy,* Jim Andrews was an 18-year-old who was rendered quadriplegic in a car accident. In *Thornton* v *School District 57*, Gary Thorton was an 18-year-old who was rendered quadriplegic in a gymnastics accident at school. In *Arnold* v. *Teno*, Diane Teno was a four-and-a-half-year-old girl who was rendered partially paralyzed and severely brain injured after stepping into traffic from behind an ice cream truck.

The dilemma, of course, is the impossibility of measuring pain and the absurdity of translating it into money. However, the alternative of saying there should be no compensation since it can't be perfectly done, is equally absurd. Undeniably there is profound loss; the problem is in the measuring.

The court was concerned that leaving juries unfettered to select what number they considered just, would produce wildly variable and unpredictable results, as demonstrated in the USA. However, the court was also against a tariff system, which prevailed in the days of King Alfred, when a thumb was worth 30 shillings. Instead the court preferred a combined approach where the jury assesses the loss of the individual person, but the maximum amount that can be awarded is capped. In 1978, it was capped at $100,000 (which in 2015 equates to $362,678).

While this seems low to most people, the cap was part of a trade-off, with the Supreme Court emphasizing that victims should be compensated for the future losses of income on a tax-free basis and their future care needs. In particular, the court rejected the defendants' argument that they should only be responsible for the cost of institutionalized care, as opposed to "luxurious" home care.

The $362,678 cap remains, but it has been eroded over the past 10 years in Ontario. In 2003, the government granted automobile insurance companies a $30,000 deductible on claims valued under $100,000. This August, reforms to automobile insurance legislation increased these deductibles with inflation. Effective August 31, 2015 the new deductible is $36,450, and the $100,000 benchmark is raised to $121,799.

Juries are unaware and not told about the deductible. There are limits on what plaintiff lawyers can say to help juries value such losses. Meanwhile, the defendant can appear reasonable in suggesting $35,000 or less, knowing it really means zero, or $120,000 knowing it really means $83,550.

Nevertheless, with a compelling narrative and the support of a victim's friends, family and treatment providers, fair awards are available. We are proud of our precedent-setting decisions in relation to knee injuries, burn injuries, chronic pain and facial disfigurement, which have been recognized as the highest awards for pain and suffering in their category, when they were decided.