

Damages For Sexual Assault

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INTRODUCTION

Although we are not lawyers, as experts in the quantification of damages be it damages for sexual assault or other torts we are guided by the relevant jurisprudence.

BASIC PRINCIPLES

Compensation for loss of income, is a head of damages designed to compensate tort victims for income losses attributable to their incident related injuries. It is designed to restore tort victims in the financial position that they would have been in absent the incident.

According to Cooper Stephenson's text "Personal Injury Damages in Canada" (2nd edn, Carswell, 1996):

" Despite frequent judicial use of the term "loss of earning capacity", the overwhelming weight of authority supports the view that the primary basis for assessment of income loss is an estimation of actual lost earnings, in the sense that the damages reflect what the plaintiff would have earned but for the accident, rather than what he or she had the capacity or ability to earn."

A person's loss of income should be based on the difference between what the person would likely have earned absent the incident and, subject to the principle of mitigation, on his or her likely post incident earnings. However, if on the other hand, compensation were based on a person's lost earning capacity, then it would be based on what the person could have earned had they not been injured regardless of whether they would in fact have made those earnings.

Complicating the quantification issue is the fact that there is no necessary correlation between the seriousness of the injury or the resultant disability and the extent to which a victim may be vocationally disadvantaged.

In attempting to assess what a Plaintiff would have earned the proper place to start may, depending on the circumstances, be to start from a consideration of what a Plaintiff could have earned but for his or her injuries reduced by both general labour market and specific contingencies applicable to his or her situation.

In most cases, information about past earnings and earnings growth specific to a plaintiff is a more accurate predictor of the person's future earnings compared to general information about the earnings of a population group. Consequently, as a general rule, the courts prefer the use of information specific to an individual, as opposed to general statistical information as the basis for future earnings calculations.

The exception to this general rule occurs in the case of persons whose earnings history is not well established for example in the case of minors, students or full time homemakers.

Where the plaintiff is a minor, the first step in predicting that individual's pre-accident earning capacity is to predict the level of education that would have been achieved by the individual. A recent study, by Statistics Canada ("Determinants of Postsecondary Participation", Education Quarterly Review, Vol.5, No.3 (1999)) confirmed that one of the most important factors in predicting a child's educational attainment is the education of the parents.

A SYNOPSIS OF RELEVANT JURISPRUDENCE

(i) General Principles

In *Andrews v Grand & Toy Alberta Ltd.* [(1978), 2 D.L.R. (3d) 469] the Supreme Court of Canada described the principle of damages as follows:

"We must now gaze more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not a loss of earnings but, rather, loss of earning capacity for which compensation must be made..... A capital asset has been lost: what was its value?"

Being prospective, the level of compensation is typically not determinable with any degree of mathematical precision. Nevertheless, the courts have consistently held that this lack of mathematical precision does not preclude it from assessing the various heads of damages based on a reasonable appraisal of the evidence.

In *Giannone v. Weinberg* [(1989), 68 O.R. (2d) 767] the Ontario Court of Appeal described the standard of reasonableness as follows:

"It is not necessary for the Plaintiff to prove on a balance of possibilities that a future pecuniary loss will occur but only that there is a reasonable chance of such a loss occurring."

The Ontario Court of Appeal elaborated on this standard in *Graham v. Rourke* [(1990), 75 O.R. (2d) 622] when it stated that a contingency may either be general in nature - for example, the likelihood of unemployment, illness or promotion - or it may be specific to the individual plaintiff - for example, possession of a marketable skill or a poor work history.

Furthermore the evidence need not prove that *“a potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility.”*

In *Athey v. Lenonati* [(1996), 3 S.C.R. 458 at paras. 27 & 35] the court wrote:

“Hypothetical events (such as how the plaintiff’s life would have proceeded without the tortuous injury) or future events need not be proven on a balance of possibilities. Instead they are simply given weight according to their relative likelihood . . . a future hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.”

“If there is a reasonable risk that the pre-existing conditions would have detrimentally affected the Plaintiffs in the future, regardless of the Defendant’s negligence, then this can be taken into account in reducing the overall award. This is consistent with the general rule that the Plaintiff must be returned to the position he would have been in, with all of its attendant risks and short comings, and not in a better position.”

As regards the treatment of contingencies in past loss calculations in *H.L. v. Canada (Attorney General)* [(2002), S.J. No. 702 (Sask. C.A.), paragraph 231], the court wrote:

“If the past loss of earning capacity is predicated on a loss of earnings in the past, the damages are quantified on the basis of the estimated difference between what the person actually earned and what he or she would have earned were it not for the wrongful act. The amount is subject, potentially, to reduction by reason of negative contingencies, retrospectively asserted, on events and circumstances that likely would have reduced the earnings of the person.”

(ii) Specific Issues

Social Assistance benefits are a form of income replacement and are to be deducted from an award of past income loss.

M.B. v. British Columbia [(2003) S.C.J. No. 53 paragraphs 25; 26; 28.]

It is not appropriate to award compensation for loss of earning capacity by reason of incarceration due to criminal convictions.

H.L. v. Canada (Attorney General) [(2002) S.J. No. 702 (Sask. C.A.) paragraphs 239-243]

As regards the issue of mitigation according to Cooper- Stephenson's text:

- (i) *"Personal injury victims cannot simply sit back and allow their losses to accumulate. They must take all reasonable steps to avoid those losses", and*
- (ii) *"No damages will be recovered for any loss which the plaintiff ought reasonably to have avoided".*

As regards the burden of proof of failure to mitigate:

"While the plaintiff has the of proving both the fact that he has suffered damage and the quantum of that damage, the burden of proof moves to the defendant if he alleges that the Plaintiff could have and should have mitigated his loss" [Janiak v. Ippolito {(1985), 16 D.L.R.(4th)}].

"A plaintiff is not entitled to be compensated for losses in tort that could reasonably have been avoided had the plaintiff mitigated his damages. The onus is on the defendants to show that the plaintiff failed to take reasonable steps to mitigate" Red Deer College v. Michaels, [(1976) 2 S.C.R. 324 at 331].

REVIEW OF LITERATURE ON DAMAGES FOR SEXUAL ASSAULT

In their article "Recent Canadian Court Decisions Concerning the Impacts of Child Sexual Abuse on Earnings" Christopher Bruce and Matthew Foss reviewed 35 Canadian tort cases involving sexual assault decided within the past decade ("Recent Canadian Court Decisions Concerning the Impacts of Child Sexual Abuse on Earnings", Expert Witness Newsletter, Economica Ltd., Winter 1999).

In approximately one quarter of the cases reviewed, the courts denied the plaintiff's claim for loss of earnings (after sexual assault had been proven). In some, the courts concluded that the non-pecuniary damages were "adequate" and, hence, pecuniary damages were not necessary. In others, it was concluded that the plaintiff had either not offered sufficient evidence on which to base an award or the court could find no difference between the income the plaintiff would have expected to earn had he or she not been assaulted and the income he/she was actually earning.

In approximately three quarters of the cases which proceeded to trial, the plaintiff was able to obtain damages for loss of earnings. The most common basis for the calculation of loss of income was that the plaintiff had suffered a reduction in the level of educational attainment, or had suffered a delay in reaching his or her ultimate educational level.

Alternatively, in many cases, the courts accepted the argument that the plaintiff had achieved the same level of education as she or he would have in the absence of the abuse, but that the plaintiff would now suffer from a loss of competitive advantage in the workplace including the prospect of higher unemployment, increased part-time work, or reduced overtime work.

In many of the cases in which damages for loss of income were awarded, the court implicitly recognised the argument that the victim's low income might be due not only to the sexual abuse, but also to a dysfunctional family background.

A common thread running through many of the cases in which victims were awarded damages for loss of income was the expectation by the court that the victim would soon "recover" from the effects of the abuse. With the assistance of therapy, the incomes of individuals who had suffered abuse 10 or 20 years prior to the trial were expected to "catch up," within a few years of the court's decision, to the incomes of those who had never been abused.

To summarise, the courts have looked for evidence that a plaintiff's past and future earnings were impeded by the sexual abuse. This involved examining factors such as the plaintiff's likely education, work history, and projected future career path absent the sexual abuse. Other factors that were given weight in decisions included the accomplishments of siblings and the familial environment in which the plaintiff grew up.

Bruce and Foss concluded that the courts have not, in general, been overly generous to plaintiffs in their awards for lost earnings.

THE MACMILLAN THESIS

In his article "Adolescent Victimization and Income Deficits in Early Adulthood: Rethinking the Costs of Criminal Violence from a Life Course Perspective" (Criminology, Vol 38, No.2, 553-87) Ross MacMillan Assistant Professor of Sociology at The University of Minnesota wrote that the most immediate consequence of violent victimization is a diminished investment in education. Such investment includes reductions in the time and energy devoted to schoolwork, reduced educational aspirations, and reduced educational attainment.

When MacMillan used the 1993 Canadian General Social Survey (CGSS-93) data, he found that adolescent victims of sexual assault have personal incomes of approximately \$6,000 per annum less than non victims based on an average of 4 years of education forgone. The data supported his model showing that an additional year of education was associated with an increase in income of approximately \$1,500 per year.

MacMillan further tested to see the impact of age of the victim at the time of abuse. His findings were that when the victim was in adolescence during victimization, annual income was decreased by \$6,000 compared to a decrease of \$3,700 per annum when the victim was 18 or 19 at the time of the abuse.

MacMillan argued that this was consistent with a life course model where the greatest damage to earnings is done during adolescence, when the victimization has a greater impact on socio-economic life course.

ANALYSIS OF THE SWALES v. GLENDINNING DECISION

The Swales case [(2003), Unreported, Court File # 33504 (SCJ)] involved the abuse of 3 siblings John, Guy and Ed Swales over a five year period, between 1969 and 1974, by Father Glendinning both in his room at the seminary and elsewhere. Father Glendinning was arrested and charged in 1974. He pled guilty and received a suspended sentence.

The Swales family subsequently sued the Diocese claiming damages for Glendinning's assaults.

None of the siblings completed high school. They all went on, at various times, to become male prostitutes, drug dealers, drug users and alcoholics. The siblings all experienced periods of incarceration, and in the case of John and Guy they both acquired hepatitis through intravenous drug use. They are all heavy smokers, which is in part responsible for their reduced life expectancies.

The issue of contingencies was in this case as complicated as it ever gets. For this reason the Defendant's suggested application of the McMillan approach. This approach computes losses after contingencies are taken into consideration.

Applying the McMillan methodology to the Swales case yielded the following results:

Loss Computations Based On \$6,000 Per Annum In 1993\$ (\$7,350 Per Annum In \$2004)						
	John Swales		Guy Swales		Lionel (Ed) Swales	
	Scenario 4		Scenario 4		Scenario 4	
	Normal Mortality, to Retirement at Age 65	810% Rated Mortality, to Retirement at Age 62	Normal Mortality, to Retirement at Age 65	160% Rated Mortality, to Retirement at Age 62	Normal Mortality, to Retirement at Age 65	335% Rated Mortality, to Retirement at Age 62
Past Loss To June 9, 2003	\$138,350	\$136,261	\$132,260	\$131,152	\$128,054	\$125,925
Future Loss From June 10, 2003 (based on \$7,119 p.a.)	\$108,564	\$75,461	\$116,751	\$103,439	\$123,443	\$104,009
Aggregate Losses At June 9, 2003	\$246,914	\$211,722	\$249,012	\$234,591	\$251,498	\$229,934

The MacMillan thesis, which computes losses after taking contingencies into consideration, was probably the most appropriate method for computing income losses in this instance given the large number of contingencies that had to be taken into consideration in the case of each Swales plaintiff.

As detailed above, subject to the issue of contingencies, income loss calculations should be based on the difference between income earning capacity absent an Incident and income earning capacity following the incident. Income earning capacity is typically defined as *“that which a person can reasonably earn in a competitive employment environment”*.

For example some of the problems facing Mr. Justice Kerr included:

- (i) In the case of John Swales he was self employed. His actual reported income was thus not necessarily indicative of his income earning capacity. For example, notwithstanding his superior intellect, per the Plaintiff’s brief he was only capable of earning at or close to the equivalent of minimum wage rates. The concept of whether the reported incomes of John should automatically be assumed to accurately reflect his income earning capacity, was in the case of the Swales brothers contentious and the subject of much argument.
- (ii) A victim may choose to only work during the summer months. Should his post Incident residual earning capacity be based on a possible lifestyle choice, and be limited to his summer employment income. If one accepts the principle of mitigation, then the answer is no.

- (iii) With respect to John's reduced mortality, which was attributable to inter alia hepatitis from intravenous drug use and smoking, the Plaintiff's argued that these factors should be ignored since they were indirectly related to the history of sexual assaults.

In his calculations the Plaintiff's expert adopted a top down approach which ignored the issue of contingencies. The difference between our calculations and those prepared for the Plaintiffs related primarily to the issue of contingencies and the extent to which they should be taken into consideration.

It was my opinion that the court should, in this instance, have taken into consideration the following general and specific contingency factors:

1. Participation Rates- the average participation rate (the probability that persons will not be outside the workforce) of male workers in Ontario per Statistics Canada is 84%. Thus, on average, 16% of males are outside the workforce at any point in time.
2. Unemployment Rates- the average unemployment rate of male workers in Ontario is 6%.
3. Unreported Income- calculations done for the Plaintiffs' made no allowance for earned income while the Plaintiffs' were earning but not reporting their past income. This includes periods when they were dealing drugs and in receipt of welfare. Additionally, no allowance was made for either social assistance received or for periods during which they were not earning as a result of incarceration.
4. Reduced Life Expectancy- all of the Plaintiffs had reduced life expectancies attributable to inter alia the fact that they are heavy smokers.
5. A further allowance should be made for general contingencies including the fact that:
 - (i) persons with reduced life expectancies have reduced work life expectancies, and
 - (ii) income loss is based on income earning capacity as opposed to actual or reported income and that John's and Guy's reported incomes from self employment may not reflect their past and prospective income earning capacity.

A comparison between our calculations and those prepared for the Plaintiffs was as follows:

Loss Computations Per Plaintiffs- Reduced For Contingencies And Failure To Mitigate						
	John Swales		Guy Swales		Lionel (Ed) Swales	
	Scenario 1	Scenario2	Scenario 1	Scenario2	Scenario 1	Scenario2
	High School	College	High School	College	High School	College
Past Loss To Dec. 31, 2002	\$608,051	\$668,214	\$372,582	\$424,459	\$122,458	\$161,121
Future Loss From Jan 1, 2003 To Age 65	\$493,704	\$571,275	\$428,558	\$511,502	\$56,342	\$143,837
Aggregate Income Losses At Dec. 31, 2002 Per Plaintiffs	\$1,101,755	\$1,239,489	\$801,140	\$935,961	\$178,800	\$304,958
Less Participation Rates @ 16%	(\$176,281)	(\$198,318)	(\$128,182)	(\$149,754)	(\$28,608)	(\$48,793)
Less Unemployment Rates @ 6%	(\$66,105)	(\$74,369)	(\$48,068)	(\$56,158)	(\$10,728)	(\$18,297)
Unreported Past Income Estimate	(\$113,111)	(\$113,111)	(\$110,742)	(\$110,742)	(\$85,917)	(\$85,917)
Reduced Life Expectancy	(\$197,902)	(\$317,883)	(\$45,283)	(\$54,047)	(\$8,387)	(\$8,387)
General Contingencies @ 10% (incl. reduced Work Life Expectancy, & difference between reported self employment income and earning capacity)	(\$110,176)	(\$123,949)	(\$80,114)	(\$93,596)	(\$17,880)	(\$30,496)
Net Past And Future Income Loss After Allowances For Contingencies And Before Mitigation	\$338,180	\$411,859	\$388,750	\$471,664	\$42,280	\$140,067
Mitigation @ 10%, 5%, and 0% respectively	\$33,818	\$41,186	\$19,437	\$23,583	\$0	\$0
Net Past And Future Income Loss After Contingencies And Allowance Re Failure To Mitigate Per Rich Rotstein	\$304,362	\$370,673	\$369,313	\$448,081	\$42,280	\$140,067

The above approach, after contingencies are taken into consideration, reconciles with that of MacMillan, using an average 1993 loss for all brothers of approximately \$7,000 per annum. Additionally, it takes into consideration the fact that Lionel (Ed) had been more successful than the other brothers in mitigating his losses.

Plaintiff's counsel argued that almost all contingency factors were indirectly attributable to the sexual assaults and should thus be ignored.

Faced with the abovenoted conflicting approaches Mr Justice Kerr wrote:

"The difficulty confronting me as the trier of fact when assessing the past and future loss of earnings of the three Plaintiff's is that there are so many uncertainties that present themselves. How can one say that these gentlemen would have finished high school or a community college, let alone university? There appears to be no family tradition of higher education. On the other hand, it is entirely possible that one or more of them would have completed at least a high school education. Unfortunately, there is no evidence of an expressed early desire on the part of any one of the three relating to career plans that would assist me on this issue.

In addition, if I were to utilize one of the first three scenarios presented, as defence counsel has pointed out, I would be obliged to take into account several contingencies which are conveniently overlooked by Plaintiff's counsel, such as participation and unemployment rates, unreported income, retirement, life expectancy etc."

"It would be nothing but wild, perhaps optimistic, perhaps pessimistic guesswork on my part to resolve the problem of lost earnings based on any of these three scenarios for that reason.

Consequently, it is my view that a preferable course is to apply the fourth scenario presented to me by counsel. That scenario is based upon a research paper authored by Dr. Ross MacMillan, an Assistant Professor in the Department of Sociology at the University of Minnesota. That paper was filed at trial as Exhibit 30. In that article Professor MacMillan was expounding on a methodology that provides an estimate of the monetary costs of criminal violence to victims thereof."

ANALYSIS OF DOE v. ODELL DECISION

Doe v O'Dell [(2003), O.J. No. 3546] involved an action by JD against Father O'Dell and the Roman Catholic Diocese for damages arising out of sexual abuse by O'Dell. The assaults, which occurred from 1982 to 1984, commenced when JD was 12.

The expert hired by the Plaintiff's computed Doe's losses under three alternative scenarios, assuming full time year round employment to age 65 absent the abuse.

From this she deducted Doe's residual earning capacity assuming minimum wage rates.

No adjustment was made for either positive or negative contingencies.

The expert hired on behalf of the defence was criticised by the judge for moving well outside his area of expertise, when he assumed contingencies, on an arbitrary basis, for inter alia-

- (i) a learning disability,
- (ii) a poor paternal relationship which may have affected the Plaintiff's self esteem,
- (iii) family health problems which may have limited his career path and life expectancy,
- (iv) possible alcohol and drug abuse which may have occurred independent of his abuse, and
- (v) an acne condition which may have affected his self esteem.

Not surprisingly, the above noted arguments, emanating from an accountant's analysis, were rejected by the judge as mere speculative possibilities which were not supported at trial. Furthermore, his arbitrary use of contingency factors was also rejected.

In deciding against the use of contingency factors the judge wrote:

"In this case it is likely that the negative and positive contingencies cancel each other out."

In this case there appears to have been little assessment of Doe's residual earning capacity, where residual earning capacity is defined as that which he could reasonably have earned in a competitive employment environment. Furthermore, notwithstanding the provision of therapy, it also assumes no improvement in Doe's prospective earning capacity.

As a result, the amounts awarded for past and future income loss of \$357,000 and \$825,340 respectively appear to be extremely high in the context of other awards to sexual abuse victims.

More than anything else the O'Dell decision emphasizes the need for both plaintiff and defence counsel to obtain expert evidence which addresses the issue of the Plaintiff's:

- likely level of educational attainment and career path absent the Accident, and
- potential future earning capacity both before and after the provision of therapy,

as opposed to leaving this up to the accountants to debate.

CONCLUSION

In summary, the size of recent awards will likely ensure that the number of cases involving pecuniary losses for sexual assault will increase, and that the issue of the quantification of damages for sexual assault victims will, in the future, receive greater attention.