

BRIEFING NOTE

The Impact of Addiction on Personal Injury Damages

According to Statistics Canada, in 2012 over 21% of Canadians (approximately 6 million people) met the criteria for a substance use disorder during their lifetime.¹ In 2016, the Conference Board of Canada estimated that substance abuse cost the Canadian economy nearly \$40 billion each year, as a result of issues such as workplace absenteeism, lost productivity, on-the-job accidents and injuries, as well as associated workplace violence and harassment.²

This may be a growing problem. According to Health Canada, opioids alone caused 2,946 deaths in 2016 and nearly the same number in the first 9 months of 2017.³ As such in this brief, we will consider case law regarding how a plaintiff's addiction will influence the quantification of various heads of damages in personal injury cases. We will provide a brief primer regarding each head of damage in order to contextualize the analysis.

General (Non-Pecuniary) Damages

First Principles

Non-pecuniary damages are meant to compensate the plaintiff for intangible losses such as pain and suffering, loss of amenities, loss of enjoyment of life, and loss of expectation of life. In *Andrews v. Grand & Toy Alberta Ltd.*, the Supreme Court of Canada was cognizant of the limitations that are inherent to this form of compensation:

There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.⁴

In that same case, the SCC adopted the “functional approach” to quantification which involved a focus on an award that could provide a measure of solace for a plaintiff's distress.⁵ The court clarified that this would be an award that would

¹ *Health at a Glance: Mental and substance use disorders in Canada* (September 2013)
<http://www.statcan.gc.ca/pub/82-624-x/2013001/article/11855-eng.pdf>

² *Problematic Substance Use and the Canadian Workplace* (September 14, 2016)
<http://www.conferenceboard.ca/e-library/abstract.aspx?did=8270>

³ <https://www.canada.ca/en/health-canada/services/substance-abuse/prescription-drug-abuse/opioids/apparent-opioid-related-deaths.html>

⁴ [1978] 2 SCR 229 at 261

⁵ [1978] 2 SCR 229 at 262

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make life “more endurable”.⁶ As such conceptually there is some overlap between this head of damage and that of future care costs.

The aim of personal injury damages is to restore the plaintiff to the position he or she would have been in, had the injury not occurred. In *Stapley v. Hejlslet*,⁷ the BC Court of Appeal provided a non-exhaustive list of elements that the court should consider when determining non-pecuniary loss which included: the age of the plaintiff; the nature of the injury; the severity and duration of pain; the degree of disability; any emotional suffering; any impairment of life; any impairment of family, marital and social relationships; the degree of impairment of physical and mental abilities; any loss of lifestyle; and the plaintiff's stoicism.

Where the plaintiff's original position includes addiction, this must be factored into awards for non-pecuniary damages as it is a condition that can negatively impact a plaintiff's life, regardless of any other injury the plaintiff may have suffered. As explained in *Picco v. John Doe*:

A plaintiff may have a pre-existing condition that formed part of their position when the Accident occurred. As explained in *Athey*, the defendants are responsible only to restore the plaintiff to their “original position.” They are not responsible to compensate the plaintiff for debilitating effects of a pre-existing condition they would have experienced anyway. The defendants are liable for the additional damage, but not pre-existing damage or conditions. The risk that the plaintiff's pre-existing condition would have detrimentally affected the plaintiff in the future can be taken into account to reduce the overall award, regardless of the defendants' negligence.⁸

Where a plaintiff has a pre-existing addiction, the non-pecuniary damages will reflect the extent to which the addiction diminished the plaintiff's unique life experience.

Application

In *Kirilenko v. Bowie*, the injured plaintiff had a pre-existing cocaine addiction. The court noted that there was a real and substantial possibility that this addiction would have adversely impacted the plaintiff's family, marital and social relationships, physical and mental abilities, and overall lifestyle. Because of this, non-pecuniary damages were substantially reduced.⁹

A similar result followed in the Ontario case of *Pelletier v. Her Majesty the Queen*. That case dealt with injuries that, under normal circumstances, would attract non-pecuniary damages at or near the cap.¹⁰ However, the plaintiff's addiction, among other things, lowered his original position to such a degree that the cap was no longer appropriate:

In this instance, I favour the upper end of the defendants' suggested range. The cap level suggested by the plaintiff may well have been

⁶ [1978] 2 SCR 229 at 262

⁷ 2006 BCCA 34 at para 46

⁸ 2015 BCSC 1904 at para 160

⁹ 2017 BCSC 2048 – the plaintiff was seeking the upper limit of \$370,000 but was awarded the amount proposed by counsel for the defendant, which was \$200,000.

¹⁰ The cap at that time totaled \$338,000 but the plaintiff was instead awarded \$250,000.

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appropriate had Jerry come to the table without the host of impairments that he presented with at the time of the collision.¹¹

Where a plaintiff's injury is partially attributable to a pre-existing addiction, or where addiction makes an injury worse, this can also reduce non-pecuniary damages. In *Polovnikoff v. Banks*, the plaintiff was an alcoholic who developed a psychotic disorder after being in a motor vehicle accident. The court awarded non-pecuniary damages, but reduced the award by 2% for the risk that the alcohol consumption may have led to the psychotic disorder in any event. The award was reduced by a further 45%, "to reflect the adverse impact of alcohol consumption on the progression of his psychotic disorder and the involvement of alcohol addiction in the symptoms that are currently a part of the plaintiff's clinical presentation."¹²

In *Picco*, the court noted that the plaintiff's heroin addiction and drug-seeking behaviour may have caused him to overstate his pain and suffering following a motor vehicle accident:

...I acknowledge that the diagnosis of chronic pain and its symptoms do not always correspond to objective findings in persons with that diagnosis. That said, I find that some doubt is warranted regarding the plaintiff's complaints of severe ongoing pain, given his drug seeking behaviour, long-standing addictions, and the objective observations of medical experts.¹³

However, the court also found that his post-accident addiction was at least partially attributable to the accident and increased the non-pecuniary damages by \$10,000. Thus, *Picco* is an example of how addiction can both *increase* and *decrease* non-pecuniary damages.

The court in *Picco* also cautioned against attributing undue weight to a plaintiff's addiction when assessing damages:

I should note my view that the plaintiff's history of addiction, while a significant factor when assessing damages, should not negatively dominate all assessment of his potential before and after the Accident, bearing in mind that it is a treatable illness and that some addicts recover.¹⁴

Zawadzki v. Calimoso is an example of a court recognizing the impact of the plaintiff's alcohol addiction, while not allowing it to negatively dominate the entire assessment of damages:

It is also important to place Mr. Zawadzki's alcohol addiction in context because so much time was spent at trial on this issue. Quite apart from any alcohol issues, Mr. Zawadzki would struggle with each of the physical and psychological problems I described. The dramatic changes to his work, recreation and social life would exist. At the same time, his severe alcohol addiction has exacerbated some of his existing psychological difficulties. In particular, it has likely intensified his depression and anxiety, and worsened his cognitive impairment.¹⁵

¹¹ 2013 ONSC 6898 at para 309

¹² 2009 BCSC 750 at para. 379

¹³ 2015 BCSC 1904 at para 121

¹⁴ 2015 BCSC 1904 at para 124

¹⁵ 2011 BCSC 45 at 173

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Past Loss of Income or Earning Capacity

First Principles

Damages for past loss of income or earning capacity compensate the plaintiff for the loss of the value of the work that the plaintiff would have performed had the injury not occurred.¹⁶

The plaintiff's original position is also relevant to this head of damage. Where a plaintiff's addiction impeded his or her employment prior to being injured, damages for past loss of income or earning capacity may be reduced, or even eliminated.

As with future income loss, quantifying the plaintiff's loss requires judges to consider hypothetical situations and contingencies in order to compare what would have happened, had the injury not occurred, with what actually happened.¹⁷ Addiction is a negative contingency because it can impede a person's ability to generate income. As such, it narrows the gap between the income generated by the plaintiff post-injury, and what the plaintiff would have generated had the injury not occurred.

Application

In *Miller v. Dent*, the plaintiff's acute alcoholism was a factor in reducing awards for both past income loss and loss of future earning capacity. The court found "that it was highly likely his pre-existing depression and further bouts of acute alcoholism would have kept him out of the workforce for substantial periods of time even if the accident had not occurred."¹⁸

In *Gilbert v. Bottle*, the plaintiff's drug and alcohol abuse was such that the court found there was no "realistic possibility that she would have sought and maintained remunerative work... during the pre-trial period. This is so because her substance abuse and related borderline lifestyle would likely have continued as before."¹⁹ The court found that her inconsistent pre-accident earning pattern would have continued throughout the pre-trial period. She was awarded \$36,000 under this head of damage, just over half of what she had claimed.

The court went even further in *Lariviere v. Martins*, holding that the plaintiff's prior addiction and mental health problems rendered her "unemployed and functionally unable to hold any meaningful remunerative employment"²⁰ Thus, the injuries did not negatively affect her capacity to earn income in the pre-trial period because she had no such capacity to begin with. The court concluded that the plaintiff was not entitled to damages for past loss of earning capacity.

In *Harris v. Kuntz*, the plaintiff's doctor had advised him to quit drinking and consuming pills and to embark on a rigorous exercise regime. The court found that the plaintiff's loss was exacerbated by his failure to follow his doctor's advice:

... It is difficult to demonstrate what might have happened if Mr. Harris had accepted his physician's advice, quit drinking and consuming pills, embarked on a rigorous exercise regime, endured the pain, and

¹⁶ *Miller v. Dent*, 2017 BCSC 1177 at para. 155

¹⁷ 2017 BCSC 1177 at para 167

¹⁸ 2017 BCSC 1177 at para. 168

¹⁹ 2011 BCSC 1389 at para. 230

²⁰ 2013 BCSC 1751 at para. 99

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increased his physical capacity and his capacity for work... Common sense dictates that the consumption of alcohol and prescription drugs in the quantities used by Mr. Harris would necessarily affect his ability to function.

It is of course exceedingly difficult to assess what might have been if Mr. Harris had followed his physicians' advice and followed a strict regime of physical exercise unimpaired by excessive alcohol and drug consumption. However, I consider that it is open to me to assess this failure to act reasonably by applying a percentage reduction to Mr. Harris' post-1990 wage loss in order to achieve an award of damages which fairly reflects that portion of the loss attributable to Dr. Kuntz's actions. In these circumstances, I believe that a 50% reduction is fair.²¹

Future Loss of Income or Earning Capacity

First Principles

The process of quantifying future loss of income or earning capacity is as follows:

The court must assess the accident victim's earning capacity prior to the accident, measure the severity of the disability caused by the accident, estimate the extent to which the disability has impaired the victim's future income prospects, and award a capital sum representing the loss. The purpose is to put the plaintiff in the same position that he would have been in had the injury not occurred.²²

The BC Court of Appeal in *Perren v. Lalari*, stated “[a] plaintiff must always prove ... that there is a real and substantial possibility of a future event leading to an income loss.”²³ A future or hypothetical possibility of an income loss will be taken into account as long as it is a “real and substantial possibility and not mere speculation”. This is a lower threshold than the balance of probabilities burden required for past wage loss claims. Once the plaintiff proves a real and substantial possibility of income loss, then a plaintiff may prove such loss of earning capacity using either a loss of earnings approach or a capital loss approach, depending on the facts of the case. The former approach is generally used when the loss is more measureable and can involve consideration of calculations based on minimum annual income loss and present value multiplier or awarding the plaintiff's entire annual salary for a year or two.²⁴ The latter approach is utilized when earning loss is not so easily measureable and considers factors such as (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.²⁵

Addictions impact this head of damage in much the same way as past loss of income or earning capacity. The extent to which a plaintiff's addiction impeded

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²¹ [1993] B.C.J. No. 1682 at paras 188 to 189

²² Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3rd ed (Toronto: Irwin Law Inc., 2014) at 147

²³ 2010 BCCA 140 at para 32

²⁴ *Goguen v. Di Maddalena* 2018 BCSC 106 at para 90

²⁵ *Slater v. Gorden* 2017 BCSC 2265 at para 123

his or her ability to generate income will be reflected in the damage award, as this loss is not attributable to the defendant's conduct.

Application

In *Schoenhalz v. Reeves*, the court substantially reduced the award for loss of future earning capacity because the plaintiff's "substance abuse, chaotic lifestyle, and lack of education will result in her remaining unemployable"²⁶ However, given her young age, the court found it would have been possible for her to turn her life around, had she not been injured. The court noted that the plaintiff would have earned \$20,000 per year over the next 30 to 40 years but awarded \$200,000 for loss of future earning capacity, which amounts to a \$400,000 - \$600,000 reduction.

In *Paur (Committee of) v. Providence Health Care*, the plaintiff's alcoholism was a negative contingency that, when combined with his mental health problems, was sufficient for the court to conclude that he was not entitled to damages for future loss of earning capacity.²⁷

A history of addiction can also impact a plaintiff's life expectancy, thus reducing the length of the plaintiff's working life. In *Gilbert*, the court held that the plaintiff's history of substance abuse lowered her life expectancy and meant that she would not be able to work beyond age 60. Her award for loss of future earning capacity was assessed accordingly.²⁸

Cost of Future Care

First Principles

Like the other heads of damage, cost of future care aims to restore the plaintiff to his or her original position. The award is quantified by determining what is medically necessary to achieve that aim and, when that cannot be done, to identify what may be required to preserve and promote the plaintiff's mental and physical health in so far as it has been diminished by the issues being litigated.²⁹

Where a plaintiff has suffered severe and permanent injuries, the costs of future care must be assessed for the duration that the plaintiff will require them.³⁰ A reduced life expectancy will result in a lower cost of future care award.

Application

In the Alberta case of *Labrecque v. Heimbeckner*, the plaintiff's addiction history lowered her life expectancy, which resulted in a 10% reduction to the award for cost of future care.³¹

Addiction can also reduce damages for cost of future care if a portion of the plaintiff's future care needs are attributable to the addiction itself, as opposed to the defendant's negligence. In *Polovnikoff*, the plaintiff's psychotic condition was caused by a combination of a motor vehicle accident, an intervening event, and

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²⁶ 2013 BCSC 1196 at para. 260

²⁷ 2015 BCSC 1695 at para 709

²⁸ 2011 BCSC 1389 at para 248

²⁹ *Liu v. Bipinchandra* 2016 BCSC 283 at para 158

³⁰ *Cassels & Adjin-Tetty* at 142

³¹ 2007 ABQB 501 at para 217

alcohol consumption. The cost of future care award was reduced by 69%, as a result.³²

Failure to Mitigate

First Principles

Plaintiffs in personal injury cases have an obligation to mitigate their damages and failure to do so can result in reduced damage awards. The principle of mitigation is that “a plaintiff may not recover losses that could have been avoided by taking reasonable steps after the wrong”.³³

In *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.*, the Supreme Court of Canada quoted with approval the following passage from Viscount Haldene’s judgment in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*, [1912] A.C. 673:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.³⁴

Where a pre-existing addiction impedes the plaintiff’s recovery or exacerbates his or her injuries, this will result in a reduced damage award.

Application

Where addiction amounts to a failure to mitigate, the court can apply a general reduction to the total damage award. In *Smaill v. Williams*, the plaintiff’s post-incident drug abuse interfered generally with his recovery. Thus, the total damage award was reduced by 20%.³⁵

A plaintiff’s failure to mitigate can also be applied to an individual head of damage, without impacting the others. For instance, in *Harris*, the plaintiff’s failure to mitigate was only relevant to the assessment of damages for past income loss.³⁶

Judicial Notice

Although expert evidence on the impact of a plaintiff’s addiction is helpful, it is not strictly necessary. Courts have taken judicial notice of the impact of addiction when quantifying personal injury damages.

In *Kirilenko*, the plaintiff suffered from cocaine addiction. Neither party tendered expert evidence from specialists in addiction medicine on the difficulty of overcoming cocaine addiction, how responsive cocaine addiction is to treatment, and the relative probability of relapse with and without professional treatment. Nevertheless, in assessing non-pecuniary damages and loss of earning capacity, the court took judicial notice that cocaine is highly addictive and users face a risk of relapse:

³² 2009 BCSC 750 at para 388

³³ Cassels & Adjin-Tettey at 428

³⁴ [1979] 1 SCR 633, 1978 CanLII 16 (SCC) at 66

³⁵ 2010 BCSC 73 at para 56

³⁶ [1993] B.C.J. No. 1682 at para 189

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... While I am mindful that there are myths and misconceptions surrounding recreational drug use that have often passed for common knowledge, I believe it is not contentious – and therefore, properly the subject of judicial notice – that cocaine has the capacity to be highly addictive, with heavy users such as Mr. Kirilenko, if they attempt on their own to abstain or if they choose to undergo professional treatment, facing a significant long-term and possibly life-long risk of relapse. I take this risk into account in my assessment of the plaintiff's non-pecuniary damages and his loss of earning capacity.³⁷

In *Lariviere*, the evidence related to the plaintiff's addiction and its impact on her ability to maintain employment came from the plaintiff herself. Despite the lack of expert evidence, the court reduced the awards for past and future loss of earning capacity to account for the plaintiff's addiction.³⁸

In *Smaill*, the court appears to have taken judicial notice that drug abuse interfered generally with the plaintiff's recovery. Although the words "judicial notice" do not appear in the judgment, it appears that no expert evidence was tendered on how drug use impacted the plaintiff's recovery.³⁹

In *Harris*, although there was evidence that the plaintiff's treating doctors advised him to stop using alcohol and drugs, no expert appears to have opined on the degree to which drug and alcohol use impaired his recovery. Nevertheless, as we noted in our previous analysis of the case in relation to past wage, the court reduced the award for past wage loss by half on account of a failure to mitigate.

Conclusion

In this brief, we have identified the role addiction can play when quantifying various heads of damage in personal injury litigation. Given the current ubiquity of addiction and its deleterious effects in our society, it will no doubt be a subject that will garner further judicial attention in cases in the years to come.



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³⁷ 2017 BCSC 2048 at para 33

³⁸ 2013 BCSC 1751

³⁹ 2010 BCSC 73

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