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Backgrounder

LRC 76—Report on Compensation for Non-pecuniary Loss

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Damages can be divided into two general categories. The first category provides compensation for expenses incurred and those arising in the future, and includes such items as medical costs and loss of income. The second category, known as non-pecuniary losses, provides compensation for injuries, including loss of capacity to enjoy life, diminished life expectancy, and pain and suffering. Non-pecuniary losses are difficult to quantify but traditionally courts would attempt to determine an amount in order to put the victim in the position they would have been in had the injuries not been suffered.

In 1978, in a series of cases now frequently referred to as the "trilogy," the Supreme Court of Canada redefined the principles to be applied when assessing compensation for non-pecuniary loss. A "functional" approach was adopted. The basis of this approach was that an award for non-pecuniary loss should not compensate the plaintiff for his injuries, since that cannot be done. Instead it should provide solace for the plaintiff. The court should still consider the type of injury and its extent, lost amenities, and the plaintiff's pain and suffering. However, the guiding factor should be the amount of money required to comfort the particular plaintiff in their particular circumstances. The court felt that such damages should be moderate and set a rough upper limit of $100 000 (the limit has since been raised, to take account of inflation, to $300 000). This revised approach adopted by the courts caused considerable controversy and raised a large number of unanswered questions. As a result, the attorney general asked the commission to undertake a project examining the subject.

The report begins by discussing some of the issues arising out of the functional approach to measuring damages and the rough upper limit on those damages. One initial effect of imposing the upper limit was that a number of subsequent cases in British Columbia assessed damages for injuries by comparing them to those injuries justifying the upper limit. Many people felt this was unfair as it resulted in some losses being compensated at a level significantly less than that prevailing prior to 1978. Another issue discussed is the basis on which the courts determine a measure of damages that will provide solace. Should it be a subjective or objective approach? The question of what types of non-pecuniary loss the functional

and rough upper limit apply to is a further issue. Does it, for example, also apply to libel and slander which is a type of non-pecuniary loss?

The report then moves on to examine the justifications of the functional approach advanced by the Supreme Court of Canada. These include the difficulty in trying to quantify pain and suffering, the fact that other heads of damage provide the plaintiff with substantial funds, and the burden imposed upon society generally by high awards for non-pecuniary loss. Other arguments noted in favour of the upper limit are that, first, it appears indirectly to have a beneficial effect on the attitude of plaintiffs toward rehabilitation, and, second, it permits the courts to determine an appropriate level of damages for similar injuries on a more consistent basis. A number of criticisms of the rough upper limit are also discussed. These include the argument that a policy imposed to limit social costs should be a matter for the legislature, the fact that the ceiling on damages leads to under compensating victims, and that the ceiling represents an attack on the jury system.

Having examined the arguments for and against the functional approach, the report then discusses the question of whether or not there is a need for an upper limit. The question is approached by looking at the pre-trilogy cases and also the experience in England. The discussion notes that in British Columbia, while there was a dramatic increase in damages for non-pecuniary loss in the late 1960s and early 1970s, this was largely a result of the innovations in practice. These innovations are unlikely to contribute to a further dramatic increase in damages. England has also experienced a similar increase in the value of awards for damages, but they have now leveled off, significantly, without the need for a rough upper limit.

The final part of the report details the recommendations of the commission. The conclusion drawn is that there is no merit in retaining the current upper limit. The choice is therefore either to increase the current upper limit or to abolish it. The report believes that the latter course of action is the better option and recommends the abolition of the upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada.

Further Developments

There has been no legislation implementing the report's recommendations, although the upper limit has been increased in subsequent years by the courts to take inflation into account.