COMPUTING TORT DAMAGES IN MOTOR VEHICLE CASES

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Feb, 2008

OVERVIEW

- **This presentation will explain:**

  A) WHAT heads of damages can be claimed in tort motor vehicle cases; and,

  B) HOW MUCH to claim, including:

  - **a) Tips on how to come up with the amounts you are claiming; and,**
  - **b) Tools on how to properly quantify and present your claims.**

A) WHAT CAN BE CLAIMED

- The most common heads of damages in tort motor vehicle cases are as follows (this list is not intended to be exhaustive):

  a) General Damages
  b) FLA claims for loss of care, guidance and companionship along with any FLA pecuniary loss claims;
  c) Past and Future Claims of:
     i. Loss of Income/Opportunity/Competitive Advantage
     ii. Housekeeping and Home Maintenance
     iii. Medical/Rehab Expenses including Case Manager services
     iv. Attendant Care
     v. Out of Pocket Expenses
  d) Interest

PARAMATERS OF CLAIMS

- **Tort motor vehicle claims (under Bill 198 for accidents on or after October 1, 2003) are limited by statute to the following:**

  a) **General Damages are subject to a $30,000 statutory deductible, unless the general damages exceed $100,000 gross**

  b) **FLA claims for loss of care, guidance and companionship are subject to a $15,000 statutory deductible, unless the amount exceeds $50,000 gross**

  c) **Past Income Loss claims are restricted to a claim of 80% of net income**

  d) **Interest is only available on General Damages (and FLA claims) since the date of notice**

  e) **You must account for Collateral Benefits (to be discussed further)**

WHAT ELSE CAN BE CLAIMED

- Other common heads of damages in tort motor vehicle claims are (again this list is not intended to be exhaustive):

  a) Loss of Interdependent Relationship (in cases of death)
  b) Management Fees/Guardianship Costs (for managing finances, etc.)

- Additional items to look for in tort motor vehicle claims include:

  a) Non-Protected Defendant Issues—impacts statutory limits
  b) Pre Oct 2003 issues—Bill 59 and prior legislation have different statutory limits
  c) Employment Issues—may impact whether the defendant is unprotected
  d) Leasing Issues—may impact the extent of insurance available

REMEMBER CREDITS TO GIVE

- **Collateral Benefits Received Credit-It must be noted that in tort motor vehicle cases credit must be given to collateral benefits received (such as accident benefits, other disability benefits, etc.)**

- **Collateral Benefits Owed Assignment-It must also be noted that in tort motor vehicle cases the tort defendant is ultimately entitled to an assignment of all collateral benefits that the claimant is entitled to**

B) HOW MUCH TO CLAIM

- **It is not easy to determine how much to claim. The challenges faced include:**

  a) **Coming up with an appropriate range for how much to claim;**

  b) **Properly quantifying the present value of the amounts claimed;**

  c) **Properly applying interest; and,**

  d) **Applying varying assumptions (such as contributory negligence reductions, retirement ages, etc.)**

TIPS TO DETERMINE AMOUNTS

- **Tips to determine the amount to claim include:**
  - a) **When it comes to general damages and FLA amounts, you should:**
    - i) **Speak with colleagues about a fair range for both the injuries and the impact it has had on the victim and their family;**
    - ii) **Consult with caselaw involving similar injuries and client profiles—and in particular have regard to the Court's online damage compendium at: www.ccla.ottawa.on.ca/Practice_and_Procedure/Civil_Litigation/Damages/FINAL_1999_2005_Compendium_of_Damages.pdf**
    - iii) **Make sure to apply inflation to caselaw on general damage awards to determine equivalent modern day awards-free online tools are available to do this, for example at: www.brownecon.com/bea_calculators/nonPecuniaryCalc/default.asp**

TIPS TO DETERMINE AMOUNTS

b) **When it comes to determining amounts for past and future damages you should:**

- **i)** **rely on expert reports outlining these expenses and losses whenever possible;**
- **ii)** **take some guidance from the caselaw regarding the scope of claims, such as for loss of opportunity;**
- **iii)** **have regard to the facts associated with your clients expected retirement age, true housekeeping and home maintenance needs and medical and rehabilitation expense history; and,**
- **iv)** **make sure that you have properly calculated the present value of future damage claims, usually by relying on expert reports**

TOOLS TO DETERMINE AMOUNTS

- **Tools are NEEDED to determine amounts since:**

  a) **It is difficult and time consuming to accurately and precisely quantify the value of a personal injury claim;**

  b) **It is difficult and time consuming to clearly explain and present a personal injury assessment to opposing counsel and clients; and,**

  c) **It is difficult and time consuming to calculate and explain the net return (or total cost) to clients when exchanging settlement offers.**

THE KEY MESSAGE

- **It is no longer cost effective and practical to use a standard 'calculator' to assess a personal injury claim**

THE NEW TOOL

- Like word processors have replaced typewriters, spreadsheets have now replaced calculators

- Spreadsheet software is available on virtually every laptop computer (the most popular software is "Excel")

- Spreadsheets are the primary tool needed by all personal injury lawyers to properly assess the value of a motor vehicle tort claim, especially when applying varying assumptions

SPREADSHEETS

- Spreadsheet programs, like Excel, are essentially sophisticated calculators
- Spreadsheets allow for easy manipulation of figures and assumptions
- Spreadsheet programs can also be used to prepare graphs and charts

	A	B	C
1		computer ledger	
2			
3		car loan	$12,000.00
4		interest	9.60%
5		# of payments	60
6			
7		Monthly Pmt.	$252.61

USE OF SPREADSHEETS

- **The best way to explain how a spreadsheet is better than a calculator is through the use of real life examples**

- **The slides that follow introduce an example to illustrate how spreadsheets can effectively be used to:**
  - **a) assess a personal injury claim, and**
  - **b) analyze settlement proposals at mediation**

DAMAGE ASSESSMENT

EXAMPLE-THE FACTS:

- **David Jones was born on April 15, 1970**
- **David was injured as a passenger in an Ontario car accident on May 2, 2004**
- **In the accident David suffered serious and permanent injuries**
- **You are David Jones' lawyer. You provided notice to the defendant on December 12, 2004**
- **You issued a claim on behalf of David and his wife Debbie back on January 17, 2006. A mediation is scheduled for February 8, 2008**

DAMAGE ASSESSMENT

THE PLAINTIFFS' ASSESSMENT-as Plaintiffs' counsel you assess David's claim as follows:

- **David's gross general damages for his pain and suffering at $115,000 gross, plus interest**
- **David's wife Debbie's claim for loss of care, guidance and companionship at $25,000 gross, plus interest**
- **A future housekeeping claim of $100 a week for the remainder of David's life expectancy and a past housekeeping claim from May 3, 2006 to date in the total amount of $8,500, plus interest**
- **A future loss of opportunity claim of $10,000 per year for the remainder of David's working life expectancy (a working life expectancy that you believe is 65 years)**

DAMAGE ASSESSMENT

Question 1: What is the value of the Plaintiffs' assessment?
(note: this is when you pull out your calculators)

a) **General damages, inclusive of interest: $____________________**
b) **FLA claim, inclusive of interest: $__________________________**
c) **Past Housekeeping claim, inclusive of interest: $_____________**
d) **Future Housekeeping claim: $______________________________**
e) **Loss of Opportunity claim: $_______________________________**
f) **Total damages, inclusive of interest: $______________________**

DAMAGE ASSESSMENT

THE DEFENDANT'S ASSESSMENT-Defence counsel assesses:

- **David's gross general damages at $75,000 gross, plus interest**
- **Debbie's FLA claim at $17,500 gross, plus interest**
- **David's future housekeeping claim at $50 per week until age 50 and acknowledges a past housekeeping claim of $5,000, plus interest**
- **David's loss of opportunity claim at $5,000 per year until age 62**
- **David's contributory negligence at 15% for not wearing a seatbelt**

DAMAGE ASSESSMENT

Question 2: What is the value of the Defendant's assessment?

a) **General damages, inclusive of interest: $____________________**

b) **FLA claim, inclusive of interest: $__________________________**

c) **Past Housekeeping claim, inclusive of interest: $_____________**

d) **Future Housekeeping claim: $______________________________**

e) **Loss of Opportunity claim: $_______________________________**

f) **Total damages, inclusive of interest: $______________________**

MEDIATION

EXAMPLE-ANALYZING THE DEFENDANT'S OFFER:

- **Defence counsel has just made a settlement proposal of $225,000 plus partial indemnity costs, assessable disbursements and GST**
- **Assume the Defendant's offer includes a contribution of 15% plus GST towards your partial indemnity costs**
- **Assume your assessable disbursements are $10,000, inclusive of GST**
- **Assume you plan on charging your clients 15% plus GST out of their damage award as your solicitor-client account**

MEDIATION

QUESTIONS:

Question 3: What do you tell your clients they would receive in their pocket if they accept the defendant's offer? $________________

Question 4: Assume your clients instruct you to make a settlement proposal that results in a net return to them of $325,000. What is the all-inclusive settlement proposal that you would make to defence counsel? $_______________

Question 5: Assume the defendant's final offer is for a settlement at $350,000 all inclusive. What do you tell your clients they would receive in their pocket if they accept the defendant's final offer? $___________

USES OF THE PIDC

- The Personal Injury Damages Calculator can also do the following:
  - Calculate Present Values of Future Care Reports
  - Apply both the Bill 59 and Bill 198 Ontario MVA systems
  - Prepare Directions and Accounts
  - Prepare Basic Releases

OTHER TECHNOLOGIES

- **The PIDC is just one example of a spreadsheet program**
- **Spreadsheets can be effective used to prepare graphs and charts (see example that follows)**
- **Spreadsheets can also be used in accident benefit disputes (for example when calculating compound interest owed under the Ontario Insurance Act)**

GRAPH/CHART EXAMPLE

- Graphs/charts can easily be generated from spreadsheet programs and are effective means of presenting important information

- For example, the document on the right is one of three pages prepared by Professor Jack Carr in the *Resch v. Canadian Tire* trial

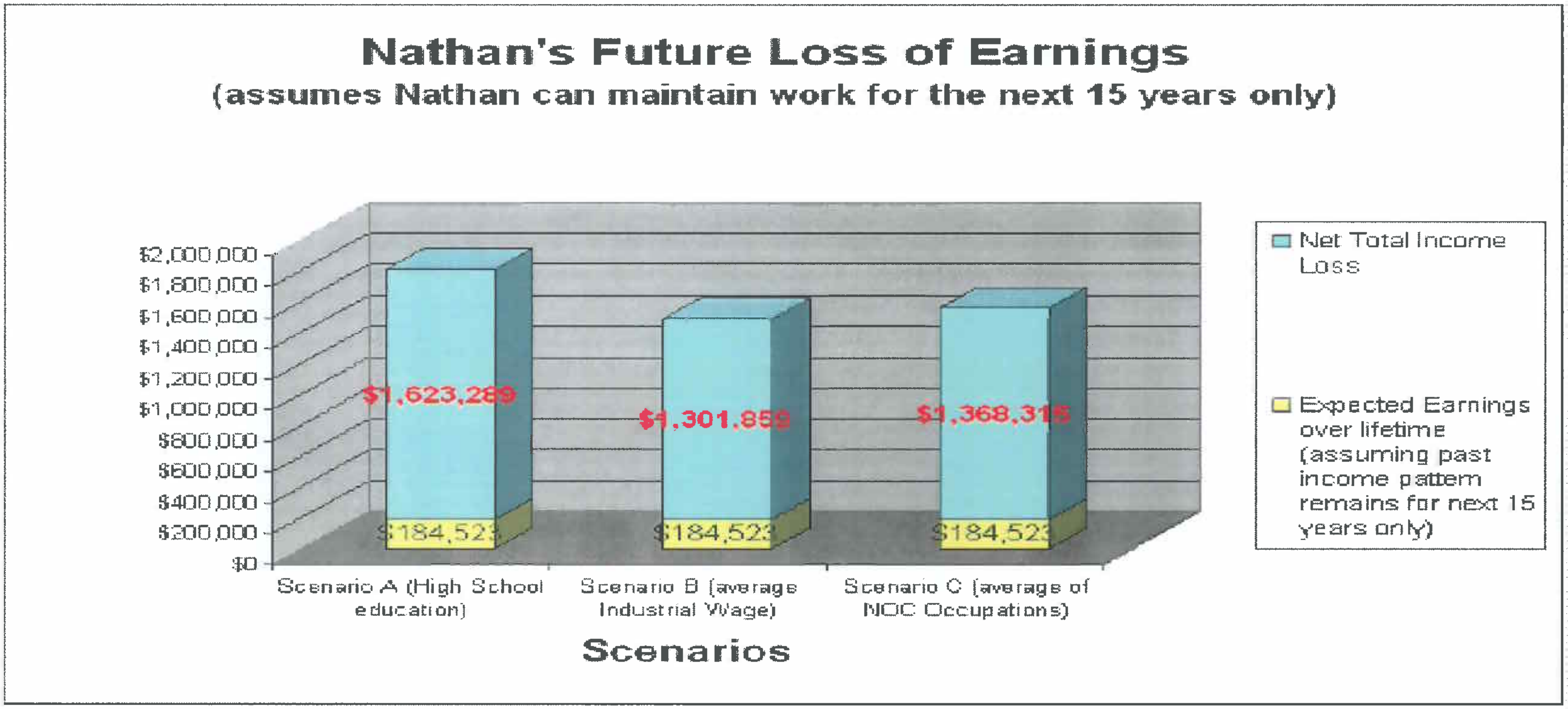
- The page that follows graphically depicts the income loss calculations prepared by Professor Jack Carr in the *Resch v. Canadian Tire* trial

NET FUTURE INCOME LOSS

SCENARIO 'C'

WITHOUT INCIDENT EARNINGS		$1,552,838.
LESS WITH INCIDENT EARNINGS:		
A)	TO AGE 62	($407,868.)
	NET LOSS	$1,144,970.
B)	15 YEARS	($184,523).
	NET LOSS	$1,368,315.

GRAPH/CHART EXAMPLE



MANAGEMENT FEE--Professor Carr testified that a 5% management fee should apply			
	Amount	Management Fee	Total
Scenario A	$1,623,289	$81,164.44	**$1,704,453.14**
Scenario B	$1,301,859	$65,092.94	**$1,366,951.82**
Scenario C	$1,368,315	$68,415.73	**$1,436,730.43**

CONCLUSION

- When assessing a personal injury claims the first step is to make sure you have properly set out all the heads of damages claimed and are aware of the statutory restrictions that may apply

- Then when coming up with the amounts to claim speak with colleagues, refer to caselaw and rely on expert reports to come up with your figures

- Ultimately when quantifying the value of your claim, use available tools such as spreadsheet programs to help calculate the precise value of your claim and to enable you to vary your assumptions as the negotiations evolve

Thomson Rogers

Thank you,

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WITHOUT PREJUDICE	Plaintiffs' Assessment		*Prepared using the Personal Injury Damages Calculator 2008*
File Name	Jones v. Reynolds	Internal File Number	81675
Damage Assessment (as of)	February 8, 2008		
Date of Incident	May 2, 2004		
Applicable Motor Vehicle Accident Scheme	Bill 198	Injuries Meet Threshold but non-catastrophic	

DAMAGE ASSESSMENT

GENERAL DAMAGES (Gross Amounts)		Gross Amount	Deductible		Net	PJI rate	PJI	Total
David Jones		$115,000.00	$0.00		$115,000.00	15.78%	$18,151.27	$133,151.27

FAMILY LAW ACT CLAIMS (Gross Amounts)		Gross Amount	Deductible		Net	PJI rate	PJI	Total
Debbie Jones		$25,000.00	-$15,000.00		$10,000.00	15.78%	$1,578.37	$11,578.37

PAST DAMAGES	PJI Rates	PJI since	Amount	Less Benefits	Net	PJI rate	PJI	Total
Past Housekeeping and Home Maintenance Expense	Half Rates	03-May-06	$8,500.00		$8,500.00	2.92%	$248.05	$8,748.05

FUTURE DAMAGES (calculated)	Starting age	Ending at age	Annual Loss	Less Benefits	Discount Rate	Mortality	Multiplier	Total
Future Housekeeping and Home Maintenance Expense	Now	Life	$5,200.00		Ontario 2008	n/a	31.1819	$162,145.73
Future Loss of Opportunity	Now	65	$10,000.00		Ontario 2008	yes	22.8211	$228,210.89

	Total Damages (without PJI)	Total Interest	Grand Total
GRAND TOTAL OF ALL DAMAGES AND INTEREST	$523,856.62	$19,977.69	$543,834.31

Notes

Years Since Incident (to assessment date)	3.77		
Date Notice Given to Defendants (i.e. PJI Commencement Date)	12-Dec-2004	Plaintiff's Date of Birth	15-Apr-1970
Years Since PJI Commencement Date (to assessment date)	3.16	Plaintiff's Age (as of Assessment Date)	37.82
Date Statement of Claim Issued	17-Jan-2006	Plaintiff's Gender	Male
Applicable annual PJI rate pursuant to s.127/128 of CJA	3.30%	Plaintiff's Life Expectancy	40.7069

WITHOUT PREJUDICE **Defendant's Assessment** *Prepared using the Personal Injury Damages Calculator 2008*

File Name	Jones v. Reynolds	Internal File Number	81675
Damage Assessment (as of)	February 8, 2008		
Date of Incident	May 2, 2004		
Applicable Motor Vehicle Accident Scheme	Bill 198	Injuries Meet Threshold but non-catastrophic	

DAMAGE ASSESSMENT

GENERAL DAMAGES (Gross Amounts)	Gross Amount	Deductible	Contrib*	Net	PJI rate	PJI	Total
David Jones	$75,000.00	-$30,000.00	-$6,750.00	$38,250.00	15.78%	$6,037.27	$44,287.27

FAMILY LAW ACT CLAIMS (Gross Amounts)	Gross Amount	Deductible	Contrib*	Net	PJI rate	PJI	Total
Debbie Jones	$17,500.00	-$15,000.00	-$375.00	$2,125.00	15.78%	$335.40	$2,460.40

PAST DAMAGES	PJI Rates	PJI since	Amount	Contrib*	Less Benefits	Net	PJI rate	PJI	Total
Past Housekeeping and Home Maintenance Expense	Half Rates	3-May-06	$5,000.00	-$750.00		$4,250.00	2.92%	$124.03	$4,374.03

FUTURE DAMAGES (calculated)	Starting age	Ending at age	Annual Loss	Contrib*	Less Benefits	Discount Rate	Mortality	Multiplier	Total
Future Housekeeping and Home Maintenance Expense	Now	50	$2,600.00	-$4,494.26		Ontario 2008	yes	11.5237	$25,467.46
Future Loss of Opportunity	Now	62	$5,000.00	-$15,716.99		Ontario 2008	yes	20.9560	$89,062.95

	Total Damages (without PJI)	Total PJI	Grand Total
GRAND TOTAL OF ALL DAMAGES AND INTEREST	$159,155.41	$6,496.70	$165,652.11

Notes

Years Since Incident (to assessment date)	3.77	*Contributory Negligence of the Plaintiff calculated at	15.00%
Date Notice Given to Defendants (i.e. PJI Commencement Date)	12-Dec-2004	Plaintiff's Date of Birth	15-Apr-1970
Years Since PJI Commencement Date (to assessment date)	3.16	Plaintiff's Age (as of Assessment Date)	37.82
Date Statement of Claim Issued	17-Jan-2006	Plaintiff's Gender	Male
Applicable annual PJI rate pursuant to s.127/128 of CJA	3.30%	Plaintiff's Life Expectancy	40.7069

MEDIATION GENIE

Prepared using the Personal Injury Damages Calculator 2008

Insert the Information requested in the Yellow boxes below

Criteria	Amount
Calculate Demands using a 'DW' assessment?	No
Insert Partial Indemnity Cost Constribution % (excludes GST)	15.0%
Insert Assessable Disbursement Amount, inclusive of GST	$10,000.00
Insert Balance of Solicitor-Client Account % (excludes GST)	15.0%

Insert a $ amount in any Yellow box of your choice below (you can use more than one yellow cell)

TOTAL OF CLAIMS (INCLUSIVE OF INTEREST)		$225,000.00	$293,736.50	$385,756.68	
Partial Indemnity Costs		$33,750.00	$44,060.48	$57,863.50	
GST on Partial Indemnity costs		$1,687.50	$2,203.02	$2,893.18	
Assessable Disbursements, inclusive of GST (approx)		$10,000.00	$10,000.00	$10,000.00	
GRAND ALL INCLUSIVE TOTAL		$270,437.50	$350,000.00	$456,513.35	
DIRECTION AND ACCOUNT CALCULATIONS					
Total Amount to Plaintiffs (before Solicitor-Client account)		$225,000.00	$293,736.50	$385,756.68	
Balance of Solicitor-Client account		$33,750.00	$44,060.48	$57,863.50	
GST on balance of Solicitor-Client account		$1,687.50	$2,203.02	$2,893.18	
TOTAL NET AMOUNT TO PLAINTIFF(S)		$189,562.50	$247,473.00	$325,000.00	
GRAND TOTAL PAYABLE TO LAW FIRM		$80,875.00	$102,527.00	$131,513.35	

You may answer "yes" to any of the Yellow boxes below (to use the figures in a particular column)

Use the calculations in this column for the "Direction" and "Release"?					