

DAMAGES UNDER THE *FAMILY LAW ACT*:
AN UPDATER
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INTRODUCTION

In 2014, my Partner, Sloan H. Mandel, and I co-authored a paper entitled “Advancing Pecuniary and Non-Pecuniary Claims under the *Family Law Act*” (the “original paper”). The purpose of this paper is to provide personal injury lawyers with an update on some statutory changes and case law affecting *Family Law Act*¹ claims.

A BRIEF REFRESHER

While the original paper remains on my website², a brief “refresher” will be provided.

Pursuant to section 61(1) of the *Family Law Act*, if a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages (or would have been entitled to recover if not killed), the spouse, children, grandchildren, parents, grandparents, brothers, and sisters of the person are entitled to maintain an action for their losses and damages arising therefrom.

Pursuant to section 61(2) of the *Family Law Act*, the types of claims that may be advanced include:

- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
- (b) actual funeral expenses reasonably incurred;

¹ R.S.O. 1990, c. F.3.

² <https://www.thomsonrogers.com/resources/advancing-pecuniary-non-pecuniary-claims-under-the-family-law-act/>.

- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

The “bigger ticket” *Family Law Act* claims usually tend to be those advanced under section 61(2)(d). The non-pecuniary *Family Law Act* claims advanced under section 61(2)(e) are not subject to a hard “cap”, but the Ontario Court of Appeal has deemed the “high watermark” to be \$100,000.00 (effective 2001 and subject to inflation).³

Non-pecuniary claims may also be subject to a statutory deductible pursuant to section 267.5(8.4) of the *Insurance Act*⁴ if the following circumstances are present:

1. the case arose from a motor vehicle crash (e.g. as opposed to a slip and fall);
2. the Defendant is “protected” within the meaning of the *Insurance Act*⁵;
3. the *Family Law Act* damages do not pass a certain monetary threshold (to be discussed further in the next section); and
4. the *Family Law Act* damages arise from an injury sustained by the primary Plaintiff (as opposed to arising from a fatality).

While personal injury cases often give rise to one or more potential *Family Law Act* claims, these claims may not always be worth pursuing on a cost-benefit analysis. Before obtaining instructions to advance a *Family Law Act* claim, personal injury lawyers should

³ *To v. Board of Education*, (2001), 55 O.R. (3d) (C.A.); *Fiddler v. Chiavetti*, [2010] O.J. No. 1159 (C.A.).

⁴ R.S.O. 1990, c. I.8.

⁵ Meaning that the Defendant was not a driver or owner of the involved vehicle, or present at the crash.

consider: the likely value of the claim relative to the deductible; whether Court approval will be required (and the costs and delays associated with same); the risk of inconsistent statements given by multiple Plaintiffs at their respective discoveries; and the *Rules of Professional Conduct* regarding joint retainers⁶.

UPDATE: STATUTORY CHANGES IMPACTING FAMILY LAW ACT AWARDS

Changes to the *Insurance Act*

Section 267.5(7)(3) of the *Insurance Act* governs the applicability of the deductible to non-pecuniary claims made pursuant to section 61(2)(e) of the *Family Law Act*. Effective August 1, 2015 (i.e. after the date that the original paper was released), amendments were made to that provision.

Prior to August 1, 2015, a \$15,000.00 deductible would apply where the damages did not exceed \$50,000.00.⁷ Effective August 1, 2015, however, taking into account inflation since section 267.5(7)(3) was enacted, both the deductible and its monetary trigger increased. As of 2017, a, \$18,692.59 deductible will apply where damages do not exceed \$62,307.99.⁸ As always, the deductible applies per *Family Law Act* claimant.

Further, pursuant to section 267.5(8.4)(3) of the *Insurance Act*, on the 1st day of January in every year, the amount that applied for the previous year shall be revised by adjusting the indexation percentage for the year. In other words, this will get worse each year.

⁶ Enacted pursuant to section 61.2 of the *Law Society Act*, R.S.O. 1990, c. L.8. See rule 3.4-5.

⁷ Sections 267.5(7)(3) and 267.5(8) of the *Insurance Act*; and section 5.1(2) of the *Court Proceedings for Accidents On or After November 1, 1996*, O. Reg. 461/96 [the *Regulation*] (as the provisions were then).

A debate that arose following the 2015 amendments to the *Insurance Act* was whether the amendments solely to cases arising from motor vehicle crashes occurring after August 1, 2015 or to all ongoing cases so long as they had not been tried before August 1, 2015. That debate was recently resolved by the Ontario Court of Appeal in the matter of *Cobb v. Long Estate*⁹. The Court concluded that the amendments have retrospective application; meaning that they apply to all cases irrespective of when the crash occurred.

Readers should be aware that Cobb may not be the final word. There is at least one case that is to be heard by a five member panel of the Ontario Court of Appeal, which decision at trial involved the issue of the retrospective application of the deductible¹⁰.

Changes to the Ontario Disability Support Program Act

While the amendments to the *Insurance Act* are unfavourable to Plaintiffs, recent amendments to the General regulation¹¹ under the *Ontario Disability Support Program Act, 1997*¹² are favourable.

It is not uncommon in a personal injury case for a Plaintiff to either have been in receipt Ontario Disability Support Program benefits (“ODB”) prior to the subject incident or as a result of the incident. Eligibility for receipt of such benefits is tied to the individual’s

⁸ See sections 267.5(8), 267.5(8.1), and 267.5(8.4) of the *IA*; and s. 5.1(2) of the *Regulation*.

⁹ [2017] ONCA 717 (CanLII) [*Cobb*].

¹⁰ *Carroll v. McEwen*, [2016] ONSC 2075 at paras. 20-23 (CanLII). The decision also all involved the issue of whether the 2015 changes to the pre-judgment interest rate on general damages in motor vehicle cases is retroactive, which issue is important but beyond the scope of this paper. It is unknown to the author at this time whether a date has been set for the appeal.

¹¹ O. Reg. 222/98.

¹² S.O. 1997, c. 25, Sched. B [the *ODSPA*].

income and assets. The General regulation under the *ODSPA* prescribes what is considered to be “income” for purposes of eligibility under the *ODSPA*.

Prior to August 1, 2017, compensation received for expenses actually incurred or to be incurred as a result of death or injury to a family member [i.e. pecuniary damages under section 61(2)(a-c) of the *Family Law Act*] or for loss of guidance, care, and companionship [i.e. non-pecuniary damages under section 61(2)(e) of the *Family Law Act*] were considered to be income, if in excess of \$100,000.00¹³ (and certain other restrictions). This meant that in some cases, recovering *Family Law Act* damages had the effect of “cutting off one’s nose just to spite his face”.

Effective August 1, 2017, however, all compensation under sections 61(2)(a-c) and 61(2)(e) of the *Family Law Act* is exempt from what is considered to be “income” for purposes of eligibility to the receipt ODB. Consequently, people in receipt of ODB no longer need to undertake a cost-benefit analysis to receiving compensation for *FLA* damages.

UPDATE: CASE LAW

Loss of Income

In the original paper, it was noted that claims for loss of income brought pursuant to section 61(2)(d) can be quite significant. The decision of *Bhatt v. William Beasley*

¹³ See sections 28(1)(14-14.1) and 28(2-2.1) as they were then.

*Enterprises Limited*¹⁴, released following the original paper, demonstrates the importance of having the proper evidentiary foundation when advancing these claims.

Bhatt involved an 11 year-old boy who suffered fractures to his right tibia and fibula, requiring surgery. His mother advanced an income loss claim for a six year period following the crash, during which time she alleged that she would have worked but for the care she had to provide to her injured son. She claimed a loss of about \$74,000.00, based upon her average annual employment earnings in the two years prior to the crash. The evidence emerging at trial, however, included but was not limited to: the child spent full days at school; the mother was attending a college program during part of the period of alleged income loss; the mother's income had been much lower in earlier years; and the mother's pre-crash work history was sporadic. As a result of these "holes" in the evidence, the mother's income loss claim was dismissed.

Past Services & Care Rendered

In the original paper, it was noted that there are different approaches to quantifying claims for past services rendered pursuant to section 61(2)(d). Generally, the defence tends to advocate a non-actuarial/global assessment to the value of past services, whereas Plaintiffs tend to advocate an hourly rate assessment. Cases released since the original paper continue to show these competing approaches and the inconsistency with which they have been decided by the Court.

In the matter of *Campbell v. Roberts*¹⁵, a 58 year-old man suffered a severe brain injury that prevented him from working and driving. His wife advanced a claim for her services

¹⁴ [2015] ONSC 2168 (CanLII) [*Bhatt*].

rendered to her injured husband. Originally she sought a lump sum figure of \$250,000.00, but by the conclusion of trial had reduced her claim to \$75,000.00.

Interestingly, in this case it was the Plaintiffs who advanced a lump sum non-actuarial assessment and the defence who took issue with that approach. The defence argued that this type of lump sum past care cost could not be inferred without being properly quantified and supported by evidence. The Court acknowledged that such damages are “difficult to prove and quantify”¹⁶, rejected the defence argument, and awarded the *Family Law Act* Plaintiff \$75,000.00 for 4 ½ years of past care.

By contrast, in the *Bhatt* matter, the injured 11 year-old’s parents sought \$30,000.00 for past attendant care services based upon an hourly rate approach. The parents claimed a rate of \$20.00/hour, for 1 hour/day, for a period 4 years. They tendered evidence that the past services included: helping the child get in and out of the bathtub; and assisting the child walk to and from his house to the school bus in the morning, and walking from the school bus to his home in the afternoon.

The Court rejected the Plaintiffs’ past services claim on the basis that the evidence did not show any increase in the amount of time that was spent on these services post-incident as compared to prior to the injury. Further, the judge indicated that even had these services only been provided post-incident, the estimate of 1 hour/day was inflated such that the Court would have, at best, awarded \$15,000.00.

¹⁵ [2014] ONSC 5922 (CanLII) [*Campbell*].

¹⁶ *Ibid.* at para. 410.

Although beyond the scope of this paper, it is important to note that for accident benefits purposes, attendant care benefits are to be provided based upon the “material contribution” test rather than the “but for” test¹⁷. As such, had this been a claim for attendant care benefits rather than a tort claim for past services rendered, the Plaintiffs may have succeeded.

In the matter of *Foniciello v. Bendall and Acculine*¹⁸, a 44 year-old man suffered a serious traumatic brain injury rendering him semi-conscious for five months. By the time of trial ten years later, he had made remarkable improvements but had permanent cognitive, psychological, and behavioural problems.

The evidence was that the Plaintiff’s sister, who was trained as a registered practical nurse, had spent many hours each week providing services to her brother including: reviewing his schedule, providing personal care, prompting him with his activities of daily living, and generally being “on call” to deal with problems and perseverative thoughts. The sister advanced a claim for 8 hours/day, for 7 days/week, from May 2007 to January 2017, at a rate of \$17.00/hour, less the 16 hours/week during which the Plaintiff was with his rehabilitation therapist (for a total claim of \$305,635.00).

¹⁷ *Monks v. ING Insurance Company of Canada*, [2008] ONCA 269 (CanLII); *Blake v. Dominion of Canada General Insurance Company*, [2015] ONCA 165 (CanLII).

¹⁸ [2016] ONSC 1119 (CanLII) [*Foniciello*].

The judge commended the sister for her services, accepted that she was entitled to reimbursement, stated that he had “no difficulty” with the rate of \$17.00/hour¹⁹; however, concluded that the majority of the sister’s time was spent being “on call” rather than directly present. Without any specific explanation, the judge reduced the claim by 60%, thereby granting an award of \$122,254.00.

Finally, the matter of *Butler v. Royal Victoria Hospital*²⁰ was a birth trauma in which the Plaintiff was diagnosed with cerebral palsy. The case was tried ten years later. The Plaintiff’s mother sought \$774,273.74 for past services rendered over-and-above the level of care that she would have been expected to provide to her daughter at the relevant ages; namely, 4 extra hours/week in year 2, 6 extra hours/week in year 3, 8 extra hours/week in year 4, 10 extra hours/week in year 5, and 12 extra hours/week to trial. Conversely, the defence suggested a global figure of \$100,000.00.

The judge distinguished the circumstances in *Butler* from those in *Matthews Estate v. Hamilton Civic Hospitals*²¹ (reviewed in the original paper). In *Matthews Estate*, the Court focused on the services that were provided to the injured adult Plaintiff and applied an hourly rate for those services. In *Butler*, however, the Court was concerned that it was difficult to determine which services provided to the disabled child were actually “extraordinary” as compared to services that would have been needed in any event for a person of tender years. The Court also suggested that a mathematical approach would be difficult in the absence of contemporaneous care records (e.g. diary entries).

¹⁹ *Ibid.* at para. 230.

²⁰ [2017] ONSC 2792 (CanLII) [*Butler*].

In *Butler*, the Court adopted somewhat of a mathematical approach, but it reduced the number of “extraordinary” hours of services to be compensated. The hourly rate it applied for the “extraordinary” services was \$15.00, based upon the average market rate for a personal support over the ten years since the incident (as the evidence was that rates had fluctuated in that ten year span).

The Court’s approach to the hourly rate for services is, in fact, more favourable than in *Matthews Estate*. In *Matthews Estate*, the Court reduced the market rate value by 30% on the rationale that professional market rates incorporate profit and overhead, which costs would not be relevant to family-provided care.

Loss of Services & Care

Pecuniary *Family Law Act* claims are typically associated with section 61(2)(d) and non-pecuniary claims with section 61(2)(e); however, section 61(2)(e) can include a pecuniary component where the “guidance, care, and companionship” previously provided by the injured has a market value.

The matter of *Robins v. Wagar*²² was an undefended trial arising from a fatality. Prior to her death, a woman had been the primary caregiver to her partially deaf and legally blind husband. Following her death, the husband received assistance from his daughter, grandchildren, friends, and professional care providers. He brought a claim for the loss of the care that his wife formerly provided, pursuant to section 61(2)(d).

²¹ [2008] ONSC 52312 (CanLII) [*Matthews Estate*].

²² [2017] ONSC 3356 (CanLII) [*Robins*].

The husband adduced expert evidence that the value of the services provided by the wife would have been \$130,681.00/year until such time as she had turned 70, then \$32,825.00/year after she turned 70. The husband did not, however, seek a strict actuarial amount for damages but rather a lump sum figure that would appropriately recognize the significant and permanent loss he had suffered.

The Court recognized that while the Plaintiff had not actually received all of the services since his wife's death, had his wife not died she probably would have provided those services. Noting that the wife would have been age 67 by the time of trial, the Court awarded the husband \$390,000.00 (the equivalent to about 3 years at \$130,681/year).

Non-Pecuniary Claims

In the original paper, a summary was provided of cases in the ten preceding years in which relatively *high* non-pecuniary awards for loss of guidance, care, and companionship under section 61(2)(e) had been granted. In this paper, a *non-exhaustive* summary will be provided with respect to the range for non-pecuniary *Family Law Act* damages awarded since the original paper. It should be noted, however:

1. Only cases with written Judgments were reviewed, such that this sampling does not include jury awards. As Jury Notices are routinely filed by the defence where the Plaintiffs' damages are expected to fall into the lower range (especially in motor vehicle cases where the threshold and deductibles apply), it should be assumed that this sample of cases does not necessarily include *Family Law Act* awards on the lowest end of the range.
2. To the extent the awards identified in this paper are referred to or relied upon in future by counsel, the awards should be indexed for inflation to the time of the assessment.

Butler²³:

- Facts: Child born with cerebral palsy.
- Mom: \$50,000.00
- Dad: \$40,000.00
- Siblings: \$20,000.00 each (except \$25,000.00 to the twin)

Craven v. Osidacz²⁴

- Facts: Fatality of 8 year-old child.
- Parent: \$125,000.00

Zarubiak (Estate) v. Luce²⁵

- Facts: Fatality of woman. Case dismissed but damages assessed.
- Spouse: \$60,000.00
- Adult Children: \$30,000.00 each (except \$40,000.00 for child with whom she lived)
- Grandchildren: \$15,000.00 each (except \$30,000.00 for grandchild with whom she lived)

Rycroft Estate v. Gilas²⁶

- Facts: Fatality of woman (believed to be in her 60's).
- Spouse: \$55,000.00 (but judge indicated that had the spouse not re-married one year after his wife's death, the judge would have awarded \$90,000.00)
- Adult Child: \$40,000.00

Deboer v. Dr. D.M. Kolyt²⁷

- Facts: 46 year-old woman with delayed cancer diagnosis and treatment, reducing life expectancy to 5 years from trial.
- Spouse: \$50,000.00

Fonciello²⁸

- Facts: 44 year-old with severe brain injury.
- Sibling: \$50,000.00
- Children: \$40,000.00 each (Children were minors at the date of loss who lived with their mother and only saw the Plaintiff every other weekend)
- Parent: \$25,000.00 (mother was age 87 by trial)

Campbell²⁹

- Facts: 58 year-old with severe brain injury and 2 year reduced life expectancy.

²³ *Supra*, note 20.

²⁴ [2017] ONSC 1757 (CanLII).

²⁵ [2017] ONSC 1627 (CanLII).

²⁶ [2017] ONSC 7108 (CanLII).

²⁷ [2016] ONSC 7108 (CanLII).

²⁸ *Supra*, note 18.

²⁹ *Supra*, note 15.

- Spouse: \$50,000.00
- Adult Children: \$7,500.00 each

Bhatt³⁰

- Facts: 11 year-old with fractured tib/fib.
- Parents: \$30,000.00 each

Ellsworth v. Singer³¹

- Facts: 50 year-old who suffered dysphotopsia after cataract surgery.
- Adult Child: \$12,500.00 (age 16 at time of loss)

Foster v. Prince³²

- Facts: Fatality of young man who had been happy and functional until his father's death a few years prior to the incident, after which time he had developed behavioural issues and a substance abuse problem.
- Parent: \$60,000.00
- Siblings: \$20,000.00 each

Kelly v. Perth (County)³³

- Facts: 28 year-old (as at trial) with multi-trauma (brain injury, fractures, and internal injuries).
- Parents: \$75,000.00 each

UPDATE: CLAIMS FOR MENTAL DISTRESS BY FAMILY MEMBERS

A final recent development of note for individuals seeking to advance claims following the injury or death of a family member arises out of a rule 21 motion decision in the matter of *Snowball v. Orgne*³⁴, released at the end of July 2017. *Snowball* was a fatality case brought by the parents and child (age 16 as of the date of loss) of a 38 year-old paramedic who perished in an air ambulance crash. The issue on the motion was whether the deceased's family members – none of whom were involved in the crash or witnessed the scene in the aftermath – could advance claims for mental distress.

³⁰ *Supra*, note 14.

³¹ [2016] ONSC 4281 (CanLII).

³² [2015] ONSC 265 (CanLII).

To be clear, the claims for mental distress brought by the family members were not brought pursuant to the *Family Law Act* but rather as individual personal injury claims.

The case law prior to *Snowball* had fairly well established that individuals (whether family members or strangers) could not advance claims for mental distress arising from the injury or death suffered by someone else, unless the claimant had witnessed the subject incident or its immediate aftermath, or was involved in trying to save the injured person after the injury was sustained³⁵.

The Plaintiffs submitted that the Supreme Court of Canada's recent decision in *Saadati v. Moorhead*³⁶ changed the game. Some key excerpts from *Saadati* include³⁷:

This Court has not, however, adopted either the primary/secondary victim distinction, or *McLoughlin v. O'Brian*'s disaggregated proximity analysis. Rather, in *Mustapha*, recoverability of mental injury was viewed as depending upon the claimant satisfying the criteria applicable to any successful action in negligence — that is, upon the claimant proving a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true “damage” qualifying as mental injury, which is “serious and prolonged” and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury; and not all mental injury is caused, in fact or in law, by the defendant's negligent conduct.

...

³³ [2014] ONSC 4151 (CanLII).

³⁴ [2017] ONSC 4601 (CanLII) [*Snowball*].

³⁵ *Ibid.* at para. 16.

³⁶ [2017] SCC 28 (CanLII) [*Saadati*]. I reviewed this decision in an earlier post on my website: <https://www.thomsonrogers.com/news/expert-evidence-diagnosis-not-required-prove-damages-mental-illness/>.

³⁷ *Ibid.* at paras. 19, 21-24, 31, 37-38.

It follows that this Court sees the elements of the cause of action of negligence as furnishing principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury. The view that courts should require something more is founded not on legal principle, but on policy — more particularly, on a collection of concerns regarding claims for mental injury...founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is “subjective” or otherwise easily feigned or exaggerated; and that the law should not provide compensation for “trivial matters” but should foster the growth of “tough hides not easily pierced by emotional responses”...The stigma faced by people with mental illness, including that caused by mental injury, is notorious ...often unjustly and unnecessarily impeding their participation, so far as possible, in civil society. While tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them.

Where, therefore, genuine factual uncertainty arises regarding the worthiness of a claim, this can and should be addressed by robust application of those elements by a trier of fact, rather than by tipping the scales via arbitrary mechanisms...

...it is implicit in the Court’s decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one’s mental health...

...It is also implicit in *Mustapha* that the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury. With great respect to courts that have expressed contrary views, **it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity**, as was done in *McLoughlin v. O’Brian*. Certainly, “temporal”, “geographic” and “relational” considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the “close and direct” relationship which is the hallmark of the common law duty of care...

...In other words, the trier of fact’s inquiry should be directed to the level of harm that the claimant’s particular symptoms represent, not to whether a label could be attached to them.

...Claimants must, therefore, show much more — that the disturbance suffered by the claimant is “serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears” that come with living in civil society... To be clear, this does not denote distinct legal treatment of mental

injury relative to physical injury; rather, it goes to the prior legal question of what constitutes “mental injury”. Ultimately, the claimant’s task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness).

...Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury.

In light of the Supreme Court’s ruling, the Honourable Mr. Justice M.D. Faieta dismissed the Defendants’ motion in *Snowball*, stating³⁸:

...given that the court in *Saadati* rejected the “primary/secondary victim” distinction, as well as the view that there are geographic, temporal and relational proximity restrictions that are an absolute limitation on the duty to take reasonable care to avoid causing foreseeable mental injury, it is my view that **the plaintiffs’ claims for mental distress following Snowball’s death might succeed even though they are secondary victims who did not witness this sudden, traumatic event.** As directed by the Supreme Court of Canada in *Saadati*, the outcome of the *Snowball* action should turn on the robust application of the elements of an action in negligence by the trier of fact rather than on the separate application of geographic, temporal, and relational considerations or a distinction between “primary” and “secondary” victims.

CONCLUSION

The law surrounding *Family Law Act* claims continues to evolve, favourably and unfavourably. Pecuniary damages often result in higher awards than non-pecuniary damages. If the emerging case law is “opening the door”, however, to mental distress claims brought by family members, this may be one way (when properly supported by evidence) to overcome the “high watermark” for non-pecuniary claims, especially since personal injury damages for mental distress are not subject to the “cap” for general

³⁸ *Snowball*, *supra* note 35 at para. 21.

damages³⁹. It is critical for personal injury counsel to have a strategy to the claims advanced and ensure that they are properly supported by the evidence.

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³⁹ *Cinar Corporation v. Robinson*, [2013] SCC 73 (CanLII); *Young v. Bella*, [2006] SCC 3 (CanLII).