
AGGRAVATED DAMAGES IN MVA CASES

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October 2004*

I recently had the pleasure of representing a client who was injured as a result of one of the most egregious acts I had ever heard of. My client was the most deserving person I had ever represented in the context of a motor vehicle claim. In my opinion, he was a client entitled to an extraordinary remedy to right the terrible injustice he had suffered.

The Circumstances

My client, Bradley Bob, suffered severe personal injuries as a result of being struck and subsequently dragged beneath his own van. The culprit, Joseph Bellerose, was an individual who was intent on *car jacking* my client's van in an effort to flee what was understood to be some form of disturbance he had become involved in at a local nightclub in Kamloops.

As my client was attempting to boost the battery of his daughter's car from his van, the Defendant burst into my client's van, put it into gear, and sped forward down Seymour Street. Unfortunately, at this moment my client was attempting to connect the jumper cables to the battery on his van. The motor of his van was running and its hood was raised. Although my client had a momentary sense that something was amiss, he had no knowledge of the impending danger that he was in, nor the callous disregard the Defendant was about to display with respect to his life.

As the Defendant bolted forward, my client was immediately struck and knocked down. Unfortunately, his body became entangled in the front driver's wheel area. Mr. Bob remained in this position as the Defendant attempted his getaway, reaching speeds in excess of 30 mph over a distance of one city block.

The horrible event was finally brought to an end as a result of the quick thinking actions of a cab driver who saw what had occurred and decided to use his car to cordon off the Defendant, eventually bringing the van to a stop.

Mr. Bob suffered near fatal injuries. He was immediately taken to the Royal Inland Hospital in Kamloops and thereafter airlifted to the Royal Jubilee Hospital in Victoria where he was admitted into the intensive care unit.

As a result of the combined effect of being pushed along the asphalt surface of Seymour Street along with the force of the front driver's wheel against his torso, Mr. Bob sustained full thickness skin loss to over 16% of his body. His wounds were comparable to the full thickness skin loss that can occur in a fire.

In addition to these injuries, Mr. Bob suffered a complex chest injury. The majority of his right chest wall was fractured in multiple places and pushed into his chest cavity by the repeated force applied by the van's tire. The force applied to his chest, in combination with his now fractured ribs, resulted in a puncture of his right lung, a perforation of his diaphragm, a laceration of his liver, and a bruise to his heart.

Not surprisingly, Mr. Bob was subsequently diagnosed with a severe case of post-traumatic stress disorder. He was also determined to be totally and permanently disabled from his employment at the Lillooet sawmill.

When I first met with Mr. Bob and his family, two things became immediately clear. First, I knew Mr. Bob's case would include a claim for aggravated damages. Second, I knew if this matter proceeded to trial, I would choose to have it heard by a jury.

My instinct was that a jury would be as outraged as I by the callousness of the Defendant's act. I also sensed that a jury would be generous in their award of aggravated damages as well as with their awards on the other heads of damages that would be sought.

I was not concerned that it would be difficult to obtain a fair result for my client from a Judge. It was just that I sensed a jury would be so appalled by the Defendant's actions, and so moved by my client's resulting loss, that they would be very generous with their assessment of his loss.

Aggravated Damages Defined

In *Rookes v. Barnard* Lord Devlin provided the following definition of aggravated damages:

...it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.¹

In *Hill v. Church of Scientology of Toronto* the Supreme Court of Canada stated:

Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety...

These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature.... They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.²

¹ [1964] 1 All E.R. 367 (H.L.) at page 407.

² (1995), 126 D.L.R. (4th) 129 at paras. 188-189 [hereinafter *Hill*].

Accordingly, two requirements are essential to the entitlement to an award for aggravated damages: (1) evidence that the defendant's conduct was particularly highhanded or reckless in relation to the plaintiff; and (2) as a consequence of that conduct, the plaintiff has suffered mental harm.

As Distinct from Punitive/Exemplary Damages

The terms punitive and exemplary damages are used interchangeably in the jurisprudence. They are synonymous.

In *Vorvis v. ICBC*,³ the Supreme Court of Canada provided a very useful statement that explains the relationship between aggravated and punitive damages yet recognizes their distinctive purposes. In his decision, Mr. Justice McIntyre stated:

Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory....

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such a nature that it merits punishment.⁴

Accordingly, aggravated damages are compensatory in nature. They are designed to augment the conventional non-pecuniary award for pain, injury, suffering and loss of enjoyment of life where the circumstances warrant an award of aggravated damages.

Punitive damages, by contrast, are penal in nature and are intended to punish the defendant. Accordingly, a factor in determining whether punitive damages will be appropriate is whether or not the defendant has already been punished criminally for his conduct.⁵ A criminal conviction does not necessarily negate entitlement to an award for punitive damages but can be a factor in assessing the quantum of the award.

Because aggravated damages are compensatory in nature, ICBC is obliged to indemnify its insured for any award of aggravated damages that may be made against him/her, regardless of the fact that in most cases it is likely that ICBC will have deemed its insured to be in breach of his/her insurance coverage.⁶

³ [1989] 1 S.C.R. 1085. See also *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.) at 299 for a discussion of the relationship between aggravated and punitive damage and their respective purposes.

⁴ *Ibid.* at para. 16.

⁵ *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at para. 69.

⁶ BC Reg. 447/83, s. 56(1)(c).

In contrast, ICBC does not provide indemnification to its insured for an award of punitive damages.⁷

In Mr. Bob's case, a claim for punitive damages was not advanced as the Defendant had previously pled guilty to a charge of criminal negligence causing bodily harm and was sentenced to 16½ months in prison. It was also quite clear the Mr. Bellerose was impecunious.

Trial

The trial proceeded before a civil jury with Mr. Justice Lamperson presiding. The Defendant was appointed defence counsel by ICBC pursuant to the uninsured motorist provisions of the Act⁸.

Defence counsel did not oppose the issue of aggravated damages being left to the jury. Rather, his submission to the jury was that the facts of this case did not merit an award for aggravated damages. The Defendant's argument was that aggravated damages were not appropriate in this case as there was no evidence that the Defendant's actions were specifically targeted towards Mr. Bob. The Defendant also argued that, unlike a case involving a sexual assault or a wrongful dismissal, this was not a case where the Defendant's conduct caused Mr. Bob to feel undignified or humiliated.

Mr. Justice Lamperson provided the following instruction to the jury on the issue of aggravated damages:

After you fix a dollar amount of the plaintiff's non-pecuniary damages, you may award aggravated damages as extra compensation to the plaintiff for injury to his feelings, dignity, pride or self-respect resulting from the reckless disregard in which the defendant inflicted the plaintiff's injury. Aggravated damages are a type of non-pecuniary award. This type of damage award, and I want to emphasize this, is not meant to set an example or punish the defendant, but instead is meant to enhance the non-pecuniary damage award and to help assuage the resentment, anger, humiliation or loss of pride that the plaintiff feels or experiences as a result of the manner in which the defendant ruined his life. This type of award is, as Mr. Horne said, generally found in sexual assault cases and wrongful dismissal cases, but it is not confined to that. It is a head of damage that you must consider and whether it is applicable depends on your view of the facts.

Counsel, in discussion with Mr. Justice Lamperson, agreed to the format of the questions for the jury. With respect to Mr. Bob's claim for non-pecuniary damages, the questions to the jury read as follows:

⁷ *Ibid.*

⁸ *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 20.

(a) Non-Pecuniary Loss:

- | | | |
|---|----------|--|
| (i) Pain, injury, suffering and loss of enjoyment of life | \$ _____ | |
| (ii) Aggravated Damages | \$ _____ | \$ _____ |
| | | Total Amount of
Non-Pecuniary
Loss |

It was my objective to have the non-pecuniary damage claim presented as two separate questions. I did this for two reasons. First, I wanted as much insight as possible into the jury's award under each branch of the non-pecuniary award for the purposes of a potential appeal. Second, I wanted to segregate for the jury, in as demonstrative a manner as possible, the distinction between the two claims that were being advanced for non-pecuniary damages. I also remained optimistic that the jury would be generous in the amount awarded in response to each claim advanced and as such the more questions the better!

The jury awarded Mr. Bob \$500,000.00 for pain, injury, suffering and loss of enjoyment of life. The jury awarded an additional \$75,000.00 for aggravated damages.

Application of the Trilogy Cap

As the jury's verdict for pain, injury, suffering and loss of enjoyment of life exceeded the *cap* set by the Supreme Court of Canada in the trilogy, it was necessary, as a matter of law, to reduce the award for that claim to the value of the *cap* at the time.⁹ Accordingly, it was agreed to by counsel, and approved by Justice Lamperson, that the order for Mr. Bob's claim for pain and suffering would be entered at \$281,000.00, which was the current value of the *cap*.

The more thorny issue was whether or not Mr. Bob's award for aggravated damages was to be subsumed within the *cap* imposed by the trilogy, or whether it was appropriate to award aggravated damages in addition to the *cap*.

In support of his argument that the aggravated damages award must be subsumed within the *cap*, the Defendant relied on *K.L.B. v. K.E.B.*¹⁰ In this sexual assault case, Mr. Justice De Graves awarded the plaintiff \$100,000.00 in non-pecuniary damages for psychological trauma. He awarded an additional \$50,000.00 for aggravated damages.

With respect to the *cap* and its application to an award of aggravated damages, Mr. Justice De Graves said:

The Supreme Court of Canada in the "trilogy" did not specifically consider whether aggravated damages should be limited by the then *cap*. However, aggravated damages may be given for intangible injuries

⁹ *ter Neuzen v. Korn* (1995), [1995] 3 S.C.R. 674 at para. 104 and *Vaillancourt v. Molnar*, [2001] B.C.J. No. 1937 (S.C.) are both authorities which require a trial judge, as a matter of law, to reduce a jury's verdict for pain, injury, suffering and loss of enjoyment of life to the value of the *cap*.

¹⁰ (1991) 71 Man. R. (2d) 265 (Q.B.).

arising out of distress, insult, or humiliation.... I consider, having regard to the concept of solatium, that they are in the nature of nonpecuniary damages and thus to be included in and not in addition to the trilogy limit.¹¹

The Defendant also argued that the functional approach adopted by the Supreme Court of Canada in the trilogy for *capping* awards for pain and suffering ought to be applied to restrict Mr. Bob's award for aggravated damages within the *cap*.

The Defendant's argument was that in personal injury claims flowing from motor vehicle accidents, the plaintiff receives full compensation for his/her pecuniary claim and as such the award for non-pecuniary loss is only intended to provide reasonable solace for his misfortune.¹² Accordingly, the Defendant argued that because Mr. Bob's claim was for personal injury flowing from a motor vehicle accident, his award for pecuniary loss satisfied his paramount concern, i.e. future care.¹³ Relying upon this functional approach to damage assessments, the Defendant submitted that Mr. Bob's award for non-pecuniary loss (including aggravated damages) was only intended to provide reasonable solace, and as such there was no compelling reason for Mr. Bob's aggravated damages award to be in addition to the *cap*.

In an effort to distinguish *Hill, supra*, and *Y.(S). v. C.(F.G.)*,¹⁴ two decisions where the *cap* did not act to restrain awards for aggravated damages, the Defendant argued that they were cases of libel and sexual assault respectively, and not for personal injury flowing from a motor vehicle accident where the plaintiff's award for pecuniary damages is intended to address the plaintiff's paramount loss.

My position was that the three cases which comprise the trilogy were all cases of negligence without any aggravating component and as such the issue of aggravated damages was not even before the Supreme Court of Canada at that time.

I also took the position that the trilogy expressly recognized that there would be *exceptional circumstances* where the *cap* would not apply. In *Andrews v. Grand & Toy Alberta Ltd., supra*, Mr. Justice Dickson said:

I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of \$100,000.00. Save in *exceptional circumstances*, this should be regarded as an upper limit of non-pecuniary loss in *cases of this nature*.¹⁵ (emphasis added)

It was my position that Mr. Bob's loss clearly flowed from exceptional circumstances.

I also argued that the policy reasons which the Supreme Court of Canada cited in support of its decision to impose the *cap* on pain and suffering awards did not apply to a claim for aggravated

¹¹ *Ibid.* at para. 29.

¹² *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at pages 261 and 262. See also *Hill, supra*, at para. 168.

¹³ The jury awarded Mr. Bob a total of \$590,283.17 for his pecuniary losses.

¹⁴ (1996) 26 B.C.L.R. (3d) 155 (C.A.).

¹⁵ *Supra* note 12 at page 265.

damages. I argued that unlike pain and suffering awards, claims for aggravated damages, due to their very nature, would be very rare in the context of motor vehicle cases, and, as such, they would not create a burden on the system by clogging our courts with thousands of claims, nor would they threaten to increase the cost of insurance.¹⁶

In his decision of February 15, 2002 Mr. Justice Lamperson held that Mr. Bob's award of aggravated damages would be in addition to the *cap*.¹⁷ At paragraphs 10 and 11, he reasoned as follows :

Aggravated damages although a species of non-pecuniary damages are generally only an issue where the defendants tortuous conduct included some element that went beyond mere negligence. In that sense aggravated damages although not punitive are different from ordinary non-pecuniary damages that flow from ordinary negligence. Aggravated damages are meant to give the plaintiff some extra measure of balm for the manner in which the harm was inflicted.

There seems to be no logical reason why a plaintiff should be deprived of aggravated damages because his injuries resulted in a general damage award so high that it is capped by the trilogy. If two persons suffer catastrophic injuries, one as a result of ordinary negligence and the other because of some additional reprehensible conduct on the part of the defendant it seems unjust that their non-pecuniary damage awards should be identical because of the cap. The cap imposed by the trilogy was for policy reasons that were not meant to apply to all forms of damages flowing from tortuous conduct....

In my opinion the aggravated damages here flowed from exceptional circumstances. Thus the upper limit of non-pecuniary damages should not apply. I find that the aggravated damages are in this case an add-on to the other non-pecuniary damage award.

Although, I had plead and argued that the Defendant intended to harm Mr. Bob, I did not take the position that the *cap* should not apply to Mr. Bob's case on the basis that the Defendant's conduct constituted an intentional tort.

My concern was that even with the application of the *cap* to his pain and suffering award, it would be difficult to maintain Mr. Bob's entire award for non-pecuniary loss in the cumulative amount of \$351,000.00 at the inevitable appeal.

The Appeal

Majority Reasons

The Defendant appealed, *inter alia*, Mr. Bob's awards for pain, injury, suffering, and loss of enjoyment of life, the award for aggravated damages, as well as Mr. Justice Lamperson's ruling

¹⁶ The Supreme Court of Canada expressed concern over these issues in justifying a *cap* on pain and suffering awards. See *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, at page 261 and *Hill*, *supra*, at paras. 168-169.

¹⁷ *Bob v. Bellerose*, [2002] B.C.J. No. 398 (S.C.), online: QL (BCJ).

that Mr. Bob's award of aggravated damages was available as an "add-on" to the *cap* on non-pecuniary damages.

The Court of Appeal granted the Defendant's appeal with respect to the pain, injury, suffering and loss of enjoyment award reducing Mr. Bob's award for this claim to \$200,000.00.¹⁸

Madam Justice Huddart, with Mr. Justice Mackenzie concurring, dismissed the Defendant's appeal of the aggravated damages award. In essence, the Defendant's argument at appeal was that the jury erred in awarding any amount for aggravated damages, as there was no evidence that Mr. Bellerose's actions were directed specifically at Mr. Bob. Again, the Defendant was attempting to distinguish the facts of this case from the intentional conduct involved in cases of sexual assault or wrongful dismissal which, in the Defendant's opinion, typically give rise to awards of aggravated damages.

In response to the Defendant's submission that the jury erred in awarding any amount for aggravated damages, Madam Justice Huddart noted the following words of Mr. Justice Cory in *Hill v. Church of Scientology of Toronto*:

Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety....

These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature.... They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.¹⁹

In dismissing the Defendant's appeal on this issue, Madam Justice Huddart stated:

It may be that jury awards of aggravated damages are more typically associated with sexual assault or wrongful dismissal cases. However, I can see no logical reason why members of the jury, as right-thinking people, cannot be equally offended by conduct like that of the appellant. Mr. Bob's case was that he was intentionally struck by the appellant who got into Mr. Bob's van, pushed his son out of the driver's seat, put the van into gear, and drove it forward pushing Mr. Bob along under the left front tire for a city block. According to Mr. Bob, he had been standing in front of the van preparing to give his daughter's car a boost and had stepped back toward his daughter's car in an attempt to avoid being hit. If the jury accepted that happened, who can say that they were not expressing the natural indignation of right-thinking people, including Mr. Bob, at what happened to him?²⁰

In discussing whether it was appropriate to have posed a separate question to the jury with respect to Mr. Bob's claim for aggravated damages, Madam Justice Huddart noted that

¹⁸ *Bob v. Bellerose*, [2003] B.C.J. No. 1468 (C.A.), online: QL (BCJ).

¹⁹ *Ibid.* at paras. 188-189.

²⁰ *Ibid.* at para. 32.

aggravated damages are not a separate head of damages. However, she then made the following statement:

It may be that the trial judge's concern, supported by both counsel, to have the aggravated damages award segregated for purposes of appellate review of the jury's verdict overrode any concern they may have had that the jury might award double compensation for the same loss as a result of the way the questions were put to them.²¹

As the total sum of Mr. Bob's adjusted award for non-pecuniary damages (both pain and suffering as well as aggravated damages) was only \$275,000.00, the Court of Appeal held that it was unnecessary to consider the issue of whether the aggravated damages award was to be in addition to, or subsumed within, the trilogy *cap*.

Dissenting Reasons

Madam Justice Newbury wrote a dissenting Judgment with respect to the aggravated damages issue. Although she agreed that it was open to the jury to make an award of aggravated damages in the circumstances of this case, she did express concern that the award of \$75,000.00 was inordinately high when compared to other case law and as such would have awarded a lesser amount.

Madam Justice Newbury noted the difficulty that arises in trying to separate the amount of the aggravated damages awarded which represented the jury's "expression of natural indignation" arising from the Defendant's conduct (the role of aggravated damages) from the jury's wish to punish the Defendant for that same conduct (the role of punitive damages).

At paragraph 41, Madam Justice Newbury said:

...If aggravated damages are to be truly compensatory, such feelings about the defendant are irrelevant. The focus must remain on the plaintiff's injuries, mental and physical. Giving vent to indignation or anger by increasing the award runs contrary to the "functional" approach taken by Canadian courts and is likely to result in excessive awards.²²

For this reason, Madam Justice Newbury held that she would have only awarded \$10,000.00 in aggravated damages.

Application for Leave to Appeal to the Supreme Court Of Canada

The Defendant sought leave to appeal to the Supreme Court of Canada on the following issues:

- (a) Should aggravated damages be available as an "add-on" to non-pecuniary loss in personal injury cases and, if so, should "indignation" respecting a defendant's conduct play any role in their availability or assessment?

²¹ *Ibid.* at para. 34.

²² *Ibid.*

- (b) If aggravated damages are to be available separately in personal injury cases, should they be exempted from the trilogy “cap” for non-pecuniary damages? and
- (c) Do aggravated damages principles developed in the defamation context apply without modification to claims for personal injury in tort?

On April 1, 2004 the Supreme Court of Canada refused the Defendant’s application for leave to appeal.²³

Conclusion

Aggravated damages are available to provide additional compensation to a plaintiff in the context of a motor vehicle case provided there is evidence that the defendant has acted in a high-handed or particularly offensive manner and the plaintiff has suffered mental harm as a result of that conduct.

It is possible to have the jury make separate awards for the plaintiff’s claim for pain and suffering as well as the claim for aggravated damages. A strong argument in favour of such an approach is that it provides insight into the jury’s verdict in case of an appeal. If the questions had not been segregated in Mr. Bob’s case, we would not have had any idea of the quantum of the jury’s award for aggravated damages.

The current state of the law also provides that an award for aggravated damages in the context of a motor vehicle claim is available as an “add-on” to the award for pain and suffering and that the aggravated damages award will not be subsumed within the *cap* set by the Supreme Court of Canada trilogy.

Finally, any claim for aggravated damages will necessitate that the trial judge provide clear instructions to the jury as to the role and purpose of an aggravated damages award. If the jury’s award for aggravated damages is generous, you will likely be faced with submissions upon appeal that the award is inordinately high and thus punitive in nature. A clear charge to the jury by the trial judge as to the role and purpose of an aggravated damages award can minimize the success of such an appeal.

²³ *Bob v. Bellerose*, [2003] S.C.C.A. No. 408.