CHRONIC PAIN AND SUFFERING:
NON-PECUNIARY GENERAL DAMAGES AWARDS
IN CASES OF CHRONIC PAIN

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Introduction

In common-law jurisdictions, it is universally accepted that the law of torts exists to provide redress to those whose personal security and safety has been violated.[83] While such a violation is an intangible loss that is difficult to quantify in monetary terms, the law nonetheless recognizes that a plaintiff should be entitled to compensation to provide "reasonable solace for his misfortune".[84]

Damages awarded for intangible losses are formally known as non-pecuniary general damages, but are more often simply referred to as "general damages".[85] Justice Spiegel of the Ontario Superior Court recently stated that the "underlying purpose" of an award of general damages "is to provide compensation which is commensurate to severity and the duration of the pain and suffering experienced by the plaintiff" as a result of a tort that has been committed against them.[86]

This article explores the recent trend of general damages awards in chronic pain cases in Ontario. It breaks down the groundbreaking case of *Degennaro*, which remains the high watermark in these cases. It then looks to the recent case law to contextualize *Degennaro* andestablish a framework for understanding how courts arrive at these awards.

The Andrews Cap on Non-Pecuniary General Damages

It is important to keep in mind, when analyzing the trend of awards of general damages, that the Supreme Court of Canada capped these awards at $100,000 (indexed for inflation)[87] in the 1978 trilogy of *Andrews v Grand & Toy Alberta Ltd*.[88] The Supreme Court recently affirmed its constitutionality when, in 2006, it denied leave to appeal in the British Columbia case of *Lee v Dawson*.[89]

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[83] See e.g. *Imbree v McNeilly and Another* (2008), [2008] HCA 40, [2009] 1 LRC 518 (H Ct of Aus); *Marin and Another v Attorney General*, [2011] CCJ 9, [2011] 5 LRC 209 (Carib Ct J); *Cruddas v Calvert and others*, [2013] EWHC 1096(QB Gen Div); *Robb v St. Joseph's Health Centre*, 152 OAC 60, [2001] OJ No 4605 (CA).
[84] *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 262, [1978] SCJ No 6.
[85] *Chatterton v Cowan*, 2010 ONSC 4314, [2010] OJ No 3395.
[86] *Matthews Estate v Hamilton Civic Hospitals (Hamilton General Division)*, [2008] OJ No 3972, 170 ACWS (3d) 650 (Sup Ct) at para 176.
[87] The Bank of Canada provides an online "inflation calculator", which puts $100,000 in 1978 dollars at $339,083.56 in 2014 dollars. See http://www.bankofcanada.ca/rates/related/inflation-calculator/.
[88] *Andrews v Grand & Toy Alberta Ltd*, *supra* note 84. The companion cases were *Arnold v Teno*, [1978] 2 SCR 287, [1978] SCJ No 8 and *Thornton v School Dist No 57 (Prince George)*, [1978] 2 SCR 267, [1978] SCJ No 7.
[89] *Lee v Dawson*,[2006] SCCA No 192 (QL).

In *Lee*, a sympathetic Vancouver jury awarded over $2 million in non-pecuniary general damages to a plaintiff who had suffered a debilitating brain injury. The argument put forward by plaintiff's counsel was that the capped award would be grossly inadequate; with a 60 year life expectancy, the plaintiff would receive the "equivalent of $13.69 a day, or less than the current price of a movie and a bag of popcorn".[90] However, because this was above the applicable cap imposed by the *Andrews* trilogy, Justice Loo was obligated to reduce the award. At the time of the decision, adjusted for inflation, the cap was roughly $294,000.

The plaintiff appealed on the basis that the cap was unconstitutional because it infringed section 15 of the *Canadian Charter of Rights and Freedoms*, the *Charter*'sguarantee of equality.[91] The British Columbia Court of Appeal dismissed the appeal on the basis that the Court was bound by the ruling in *Andrews*.[92]

Accepting that the cap on general damages is here to stay, courts have struggled in its application. At times, courts have erroneously considered the *Andrews* cap to be a sliding scale, comparing the plaintiff before them to the extreme of a "young person who is made a quadriplegic".[93] However, the cap's purpose is not to scale one plaintiff's general damages award against another who suffers from catastrophic injuries.[94] Doing so would treat one person's pain and suffering as intrinsically less worthy than another's. This is inconsistent with the conceptual underpinning of the cap as a policy tool to control exorbitant awards that, by necessity, are based on little more than arbitrary, philosophical musings.[95]

Interpreting the above, it appears theoretically possible for a plaintiff with chronic pain to be awarded the cap amount of general damages. However, the high watermark for non-pecuniary general damages in a case of chronic pain came in a 2009 decision by Justice Gray: *Degennaro v Oakville Trafalgar Memorial Hospital*.[96]

The Crown Jewel of Chronic Pain: Degennaro v Oakville Trafalgar Memorial Hospital

On May 19, 1999, just after 1:00 a.m., Ms. Degennaro's son Justin was admitted to Oakville Trafalgar Memorial Hospital for flu-like symptoms. Since her son was only 2 years old, she was permitted to stay with him for the night.

The attendant nurse provided Ms. Degennaro with a fold-out chair to use as a bed. When Ms. Degennaro wanted to call her husband, she sat on the edge of the makeshift bed closest to the phone. Unfortunately, the bed collapsed and slid out from under her. Ms. Degennaro hit the floor so abruptly that she cracked her sacrum.
The pain from the cracked sacrum was so severe that Ms. Degennaro had difficulty getting out of bed for the month of June. After that, Ms. Degennaro continued to suffer pain which persisted over years. She had to use an "inflatable cushion" to sit down,[97] and was unable to undertake any substantial physical activity, such as hiking or bike-riding on her family vacation.[98] While the

[90]*Lee v Dawson*, 2003 BCSC 1012, [2003] BCJ No 1532 at para 6.
[91]*Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[92]*Lee v Dawson*, 2006 BCCA 159, [2006] BCJ No 679.
[93]*Rizzi v Mavros*,2008 ONCA 172, [2008] OJ No 935 citing the unreported trial decision at para 24 by Justice Little.
[94]*Howes v Crosby* (1984), 45 OR (2d) 449 at 460 (CA).
[95]*Rizzi*, *supra* note 93 at paras 33-35.
[96]*Degennaro v Oakville Trafalgar Memorial Hospital*, 67 CCLT (3d) 294, [2009] OJ No 2780 (Sup Ct).
[97]*Degennaro*, *supra* note 96 at para 18.
[98]*Degennaro*, *supra* note 96 at para 19.

pain was worst in her lower back, she also complained of upper body pain, up to and including in her jaw.

In February 2002, Ms. Degennaro was involved in a rear-end collision. She had suffered minor injuries to her left shoulder and arm, for which she received treatment. She did not suffer any additional damage to her lower back or sacrum, however, the overall pain in her body continued to worsen.

Ms. Degennaro attempted to return to work for approximately seven weeks in 2003, but stopped when the pain had increased by about 50%. She suffered numbness in her legs, hips, and knees; worsening migraine headaches; as well as neck, shoulder, arm, hand, leg, foot, and back pain. In short, she "felt like she had been hit by a truck".[99]

In 2003, Ms. Degennaro was diagnosed with fibromyalgia by her family doctor, Dr. Chernin. Dr. Chernin referred Ms. Degennaro to various chronic pain specialists, Drs. Saul, Blitzer and Ko,[100] all of whom confirmed the diagnosis and would eventually testify on her behalf at her trial.

At the end of the 10-day trial, Justice Gray awarded a total of $3,073,210 to the plaintiff Ms. Degennaro. Of this amount, $175,000 represented the amount allocated to general damages. While the Court of Appeal eventually reduced the damages awarded for Ms. Degennaro's future care costs, the quantum of her general damages award was not appealed by the Hospital.[101]

The Non-Pecuniary General Damages Trend in Cases of Chronic Pain

An award for general damages, as the Court of Appeal for Ontario stated in *Rizzi v Mavros*, "is a philosophical and policy exercise that, although necessarily arbitrary, must be an amount that is reasonable and fair both to the plaintiff and to society as a whole".[102] Since assigning a number to compensate for someone's pain is arbitrary, the trier should look to existing case law to determine what the appropriate award is to ensure consistency.

It is important to keep in mind that claims for general damages, particularly in cases of chronic pain, can be based on subjective criteria, including how the accident has impacted the plaintiff's life.[103] Therefore, credibility plays a central role; where the trier of fact has found the plaintiff to be not credible, the general damages award has been nominal.[104]

In *Degennaro*, Justice Gray did not reference any case law when he awarded $175,000. His explanation behind the award was, in fact, less than fulsome:

> *Mr. Kwinter [plaintiff's counsel] submits that an appropriate amount for non-pecuniary loss for Ms. Degennaro would be $175,000 to $200,000 … Mr. Birley [defence counsel] submits that an appropriate figure for non-pecuniary loss for*

[99] *Degennaro*, *supra* note 96 at para 40.
[100] Ms. Degennaro was seen by Dr. Saul in December, 2003; by Dr. Blitzer in December 2005; and by Dr. Ko in April 2003. See *Degennaro*, *supra* note 96 at paras 73, 82-83.
[101] *Degennaro v Oakville Trafalgar Memorial Hospital*, 2011 ONCA 319.
[102] *Rizzi*, *supra* note 93 at para 34.
[103] *Hanna-Harik v Waters*, [2001] OJ No 2303, [2001] OTC 446 (Sup Ct) at para 26. The Court in *Hanna-Harik* accepted, for example, the testimony of the witnesses that emphasized "how active [the plaintiff] had been before this accident and how the accident has so significantly affected her life".
[104] See e.g., *Clark v Zigrossi*, 2010 ONSC 5403, [2010] OJ No 4266 where the jury awarded a nominal $5,000 for general damages.

> *Ms. Degennaro is $60,000 … I am persuaded that the range for non-pecuniary loss for Ms. Degennaro, urged upon me by Mr. Kwinter, is appropriate. I will award Ms. Degennaro $175,000 for non-pecuniary loss.*[105]

However, other cases provide more guidance.

In *Rizzi v Marvos*, Ms. Rizzi had taken paint cans down to the storage room of Mr. Marvos' apartment building. When she entered, she noticed that there were large door-sized sheets of metal that would have to be moved before she could leave her paint cans.

While attempting to move the metal sheets, she lost her balance and stumbled backwards. The sheets collapsed on her right leg and when she attempted to remove it, the "sharp-edged sheets scraped her shin, causing immediate pain".[106]

As a result of the scrape, Ms. Rizzi developed allodynia, a condition where pain is caused by normally non-painful stimuli.[107] She attempted to return to work, and found she had to place the majority of her weight on her non-injured left leg. This imbalance in turn caused increasing lower back problems. Soon after, the neuropathic pain in her leg spread to the rest of her body, and she was diagnosed with post traumatic fibromyalgia.

The jury awarded $41,000 in non-pecuniary general damages, subject to a 75% reduction for the plaintiff's contributory negligence. Due to a finding that there was an error in the trial judge's charge to the jury, the Court of Appeal assessed damages itself at $80,000.[108]

In increasing the general damages award in *Rizzi*, the Court of Appeal provided a helpful review of the case law regarding general damages in chronic pain cases. The Court established roughly three tiers of damages awards: a low-end between $40,000 and $55,000, a mid-range between $55,000 and $80,000, and a high-end of between $80,000 and $120,000.

[105] *Degennaro*, *supra* note 96 at paras 118, 126, 171.
[106] *Rizzi*, *supra* note 93 at para 8.
[107] Also known as colloquially as "evoked pain": *Decision No 1582/13*, 2013 ONWSIAT 1978, [2013] OWSIATD No 2005 at para 32.
[108] The Court of Appeal upheld the apportionment of fault, essentially awarding Ms. Rizzi $20,000.

*The **low end** of the spectrum is between **$40,000 and $55,000:***

Westervelt v Frappier Estate[109]	Plaintiff was operating a snowmobile and hit a series of man-made moguls. He flew off the snowmobile and blacked out. When he awoke, he "hurt all over".[110] He initially suffered a fractured femur, as well as back and shoulder pain. After the pain spread to the rest of his body, he was eventually diagnosed with fibromyalgia. **Award: $40,000**
Hanna-Harik v Waters[111]	The plaintiff was rear-ended while at a red light, causing just $600 in damage to the rear bumper. She suffered whiplash, which developed into fibromyalgia. This case was held to have met the *Insurance Act* threshold.[112] **Award: $45,000**
Jones v Mazolla[113]	The plaintiff was involved in a motor vehicle collision, and suffered ongoing neck and back pain, as well as headaches and sleeplessness. She was diagnosed with chronic pain disorder. While she was able to continue working, the Court accepted that "her injuries have had an impact on her ability to do household chores, share activities with her children and enjoy a social life".[114] This case was held to have met the *Insurance Act* threshold.[115] **Award: $50,000**

[109] *Westervelt v Frappier Estate*,[1998] OJ No 4830 (Gen Div).
[110] *Westervelt*, *supra* note 109 at para 10.
[111] *Hanna-Harik v Waters*, [2001] OJ No 2303, [2001] OTC 446 (Sup Ct).
[112] *Insurance Act*, RSO 1990, c I.8, s 267.1.
[113] *Jones v Mazolla*,[2004] OJ No 366 (Sup Ct).
[114] *Jones*, *supra* note 113 at para 38.
[115] *Insurance Act*, *supra* note 112.

*The **mid-range** of the spectrum is between **$55,000 to $80,000**:*

Peloso v 778561 Ontario Inc[116]	The plaintiff was involved in a motor vehicle accident – she was backing out of a parking spot, when the rear of her car was hit by a snowplow. She developed fibromyalgia as a result, but had significant pre-accident medical history and failed to mitigate post-loss. **Award: $80,000 – reduced to $56,000 under crumbling skull principle and failure to mitigate.**
Deschamps v Chu[117]	The plaintiff had two separate motor vehicle accidents and brought two actions, which were heard together. As a result of the first accident, she developed fibromyalgia – suffering particularly from migratory polyarthralgia (pain affecting joints) and polymyalgia (pain affecting muscles), as well as insomnia and fatigue. **Award: $65,000 (for the first accident), $20,000 (for the second)**
Britt v Zagjo Holdings Ltd[118]	The plaintiff slipped and fell on black ice in the defendant's parking lot. She fell hard on her left knee and sustained an injury. She originally had pain in that knee, with swelling, joint stiffness, coldness and discoloration. Eventually the pain spread throughout her body, and she was diagnosed with fibromyalgia. The Court accepted that the impact on Ms. Britt's life was extreme: "it is a bleak and almost desperate future she faces in substitution for the normal life she probably would have lived".[119] **Award: $75,000**
Rizzi v Marvos[120]	Discussed above. **Award: $80,000**

[116] *Peloso v 778561 Ontario Inc*,[2005] OJ No 2489 (Sup Ct).
[117] *Deschamps v Chu*,[1997] OJ No 2593 (Gen Div).
[118] *Britt v Zagjo Holdings Ltd*,[1996] OJ No 1014 (Gen Div).
[119] *Britt*, *supra* note 118 at para 45.
[120] *Rizzi*, *supra* note 93.

*The **high end** of the spectrum is above **$80,000 to approximately $120,000**:*

McDonald v Kwan[121]	The plaintiff was involved in a rear-end collision, which pushed the plaintiff's vehicle into the vehicle in front of him. He initially suffered whiplash, which started as constant and extreme pain in his neck and back. This pain eventually spread, he was eventually diagnosed with fibromyalgia, as well as cervicogenic headaches and post traumatic stress disorder. The Court found that "as a result of the accident, Mr. McDonald cannot engage in his usual sporting activities, cannot work beyond his dog walking activities, and has restricted ability to socialise and to carry on the normal activities of daily living".[122] **Award: $98,000**
Latta v Ontario[123]	The plaintiff fell down a flight of stairs, tripping over a bucket the Province was using to store sand and salt. The plaintiff suffered a severe ruptured disc in the middle of the lumbar spine – which damaged the nerve controlling his bladder and bowels, causing incontinence. He developed chronic pain syndrome as a result. The Court put significant focus on the plaintiff's pre-accident lifestyle: "the plaintiff was physically fit and demonstrated significant athletic prowess. He went hiking, camping, canoeing and fishing. He rode a motocross bike for a couple of summers. He was an avid cyclist. He played hockey. He was captain of a second division team at the University of Western Ontario for a couple of years … he was a member of the UWO cycling club … he was certified as a scuba diver … since the accident, I am satisfied that as the plaintiff testified, he is unable now to participate in any of the above described outdoors activity because of the injury and related surgery and his continued suffering".[124] **Award: $120,000**

There does not appear to be a principled approach to an award of general damages in chronic pain cases. However, what set *Degennaro* apart from the cases cited by the Court of Appeal in *Rizzi*, is the weight given to the opinion of the plaintiff's expert medical witnesses.

[121] *McDonald v Kwan*, 2010 ONSC 5861, [2010] OJ No 4511 (Sup Ct).
[122] *McDonald*, *supra* note 121 at para 249.
[123] *Latta v Ontario*, [2004] OJ No 3751 (Sup Ct).
[124] *Latta*, *supra* note 123 at paras 102-08.

In *Degennaro*,the plaintiff had adduced strong medical evidence and called very senior experts. When reading the Court's description of one expert in particular, Dr. Gordon Ko, it is clear that Dr. Ko's experience had powerfully influenced the Court:

> *It is difficult to imagine an expert witness who is more qualified in the subject of chronic pain than Dr. Ko. He has a* **curriculum vitae** *that runs to 39 single-spaced pages. He is a diplomate of the American Board of Pain Medicine. He is the Medical Director of the Physiatry Pain Treatment Clinic, Sunnybrook Health Sciences Centre. He has attended dozens, if not hundreds, of courses and lectures on the subject of chronic pain. By my count, he has authored or co-authored 29 peer-reviewed articles on the subject of chronic pain.*[125]

Dr. Ko was of the opinion that Ms. Degenarro would not be able to return to work, and that her quality of life and relationship with her family would be significantly reduced.[126] He was also of the opinion that the motor vehicle accident, which Ms. Degenarro suffered in 2002, was completely unrelated to her diagnosis of fibromyalgia, and that her injuries had resolved during the following months.

In contrast, the defence only had one medical examination, conducted by Dr. Devlin. Dr. Devlin acknowledged on cross-examination that he was unaware that Ms. Degennaro complained of upper body pain prior to the motor vehicle accident.[127] The defence then called a second doctor, Dr. Clark. Dr. Clark had only provided a paper review, who admitted "when pressed further … that Ms. Degennaro would not likely have developed fibromyalgia had the 1999 incident [the fall at the Hospital] not occurred".[128]

Comparing the testimony and qualification of Dr. Ko to the medical opinions proffered by the defence, it is not difficult to understand how Justice Gray could come to an award that was 45% higher than the award given in *Latta*.

CONCLUSION

Despite the above, the good news for defence counsel is that while *Degennaro* remains a high watermark for general damages in chronic pain cases, it was, and continues to remain, an outlier.

However, *Degennaro* should continue to be a warning to those who would underestimate a viable claim of chronic pain. The ability to build a strong medical evidentiary foundation is available to both the plaintiff and the defendant, and the defendant should always come prepared to meet the case the plaintiff will put forward.

[125] *Degennaro, supra* note 96 at para 85.
[126] *Degennaro, supra* note 96 at para 89.
[127] *Degennaro, supra* note 96 at para 111.
[128] *Degennaro, supra* note 96 at para 106.