

# The Accident Report

Spring 2002, Vol. 2 No. 1

A LEGAL DIGEST OF CURRENT TRENDS IN PERSONAL INJURY LAW



## Damages in Personal Injury Cases

by Nick Parker

The first principle of damages is that the victim should be put in the position that he/she would have been otherwise but for the accident, to the extent that is possible. For the purposes of litigation, the total amount of damages is divided into different categories or "heads" of damage. The traditional heads of damage are:

- I. Non-Pecuniary Damages, and
- II. Pecuniary Damages.

Other or more specific heads of damages can be claimed, but generally such damages can be incorporated into the above classifications. Other types of damages include claims for loss of amenities or enjoyment of life (or more specific activities), or for loss of the possibility of marriage. As well, loss of consortium claims may be brought on behalf of a spouse, while loss of care and guidance claims may be made on behalf of dependents.

### I. Non-Pecuniary Damages

Non-pecuniary damages can be broken down into three sub-categories:

1. Loss of future earnings or profits
2. Cost of future care
3. Damages awarded for pain and suffering (general damages)

1. Loss of future earnings or profits is an estimate of what the victim will lose in earnings or profits in the future due to the injury. It covers all future gains that the victim would have made but for the injury, and that he/she will now be unable to make. Generally, the major component of this type of damage is the loss of future income which would have been earned. Loss of housekeeping is recoverable, as is the loss of the ability to use one's spare time if the spare time would have resulted in an increased net worth (for example, the victim would have used his/her time to build a cottage or to renovate his/her house).

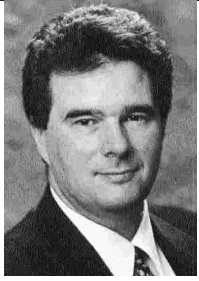
2. Cost of future care damages includes all expenses that a victim will incur in the future due to the injury. Primarily, this involves costs of future medical expenses, which might include such things as future costs for rehabilitation or tutoring.

3. Damages awarded for pain and suffering are determined by looking

at awards given by courts in previous cases for similar injuries.

### II. Pecuniary Damages

Pecuniary damages reimburse the expenses incurred due to the accident and must be pled and proven at trial. For example, the injury may have resulted in the person missing work which in turn will result in a loss of earnings or profits. The injury may have also required the plaintiff to spend money prior to trial for such things as parking and mileage charges for going to see a doctor, or for prescriptions and medical costs not covered by health care. Because these types of damages must be proven by the plaintiff, receipts or records should be kept. In addition, plaintiffs must be aware of their duty to mitigate their damages. Mitigation means that an injured person must take all reasonable steps to avoid losses. No damages will be awarded for a loss which the plaintiff should have reasonably avoided. Therefore, if it was reasonable for the plaintiff to have minimized his/her loss, then damages will be awarded as if he/she had done so.



# Are You Adequately Insured?

by Bill Barclay

If you have read the preceding article on damages by Nick Parker, you will appreciate the wisdom of having adequate insurance coverage. Awards in serious injury cases often exceed one million dollars and can go much higher, especially where more than one person is injured. Traditionally, insurance agents have recommended that individuals should have at least one million dollars worth of automobile insurance coverage. Now, many are suggesting that two million dollars is more appropriate. The difference in cost is not great, but the potential benefits are. If you do not have adequate insurance coverage, you may be personally liable for any claim in excess of your coverage. That could lead to the loss of all your savings and assets.

You should also consider obtaining an S.E.F. 44 endorsement with your policy. These policies are not expensive and are generally well worthwhile. In effect, they insure you against persons who

are not adequately insured. If, for example, you or a member of your family were involved in an accident and suffered damages in the amount of one million dollars, but the driver at fault only had half a million dollars worth of insurance, you would find yourself in a very undesirable situation. If, however, you had a one million dollar S.E.F. policy, your insurance company would be required to top up the defendant's contribution with an additional \$500,000 worth of insurance. When you consider the escalating costs of health care, an S.E.F. 44 policy makes good fiscal sense.

Do you drive your vehicle during the course of your employment? If so, you should consult your insurer as to whether or not your policy will cover you in those circumstances. If it does not cover you in those circumstances, you may find yourself without any insurance at all. You should also remember that, by operation of law, an owner of a vehicle may be liable for damages even though someone

else is driving. This should be of particular concern if there is more than one driver in your family, or if you lend your vehicle to others.

You should also ensure that you have adequate homeowner's insurance. You may be surprised by the types of claims that homeowner's insurance protects against. Anyone receiving a claim that is not covered by their automobile policy should check to see if there is coverage under their homeowner's policy. Often there is.

There are some types of claims which will not be covered under your automobile insurance policy or your homeowner's insurance policy. For this reason some people are also acquiring what is referred to as an "umbrella" policy which provides coverage for claims not covered elsewhere.

We suggest that you consider these issues and check with your insurer to see if you have adequate insurance coverage.



## Another Good Reason to Wear Your Seat-Belt

by Tom Rothwell

A motor vehicle accident victim's damage award can be reduced if the accident is partially caused by the victim's conduct, or if the injuries sustained are caused or worsened by the victim's own actions. Failure to wear a seat-belt is one of the most common grounds utilized by Courts, or insurance adjusters, to reduce damage awards.

Until recently, the maximum reduction imposed (by Alberta Courts) for failure to wear a seat-belt was 25%. In *Chae v. Min*, a November 2001 decision of the Court of Queen's Bench of Alberta, the trial judge reduced Mr. Chae's

damage award by 75% primarily as a result of his failure to wear a seat-belt. Mr. Min's lawyers were able to establish that had Mr. Chae been wearing a seat-belt, he would have only suffered bruising and perhaps a minor whiplash injury. Instead, he suffered a serious brain injury and several broken bones. The facts of each case must be considered independently in order to determine what is the appropriate degree of apportionment of damages applicable. Although there is no rule of thumb, it is clear that awards can and will be reduced by more than 25% in appropriate circumstances.

While the onus rests with the defendant to demonstrate that the victim's failure to wear a seat-belt contributed to an exacerbation of the victim's injuries, the potential reduction in damage awards presents a strong financial incentive for a defendant to retain the necessary experts to investigate an accident. It is anticipated that the *Chae v. Min* decision will be appealed, however until such time as the appeal is decided, this decision has the potential to significantly reduce damage awards for accident victims who have failed to wear their seat-belts.

**THE ACCIDENT REPORT** is published periodically by Reynolds, Mirth, Richards & Farmer, Barristers and Solicitors. It is intended to provide comments on recent legal developments as they pertain to personal injury matters. It is not intended to give legal advice. You should obtain legal advice on any matters of specific concern to you. Comments, questions or requests for additional copies may be directed to:

Christine L. Keylor, Client Services Director  
Reynolds, Mirth, Richards & Farmer  
3200 Manulife Place,  
10180 - 101 Street, Edmonton, Alberta T5J 3W8  
Tel: (780) 425-9510  
E-mail: ckeylor@rmrf.com  
www.rmrf.com