|  |  |  |
| --- | --- | --- |
|  |  |  |
| Law 435C.001 | Personal Injury Advocacy | 2022 Term 2 |
|  |  |  |
| Professors:MARC KAZIMIRSKI and SANDRA KOVACS | Tel: (604) 681-9344Email: mak@kazlaw.ca Email: sk@kazlaw.ca Office: 1900-570 Granville Street, Vancouver BC  | Mondays 5:00 – 8:00 pmUBC Allard HallFaculty of LawRm. 121 |
|  |  |  |

**WEEK 4 – Non-Pecuniary Damages**

* 1. **Recommended readings**
* *Stapley v. Hejslet,* [2006 BCCA 34](https://www.canlii.org/en/bc/bcca/doc/2006/2006bcca34/2006bcca34.pdf)
* *Uy v. Dhillon,* [2020 BCSC 1302](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.pdf)
* *Grabovac v Fazio*, [2021 BCSC 2362](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc2362/2021bcsc2362.html?autocompleteStr=grabov&autocompletePos=1#_Toc89248676)
* *Wilhelmson v. Dumma*, [2017 BCSC 616](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc616/2017bcsc616.html?autocompleteStr=wilhelmson&autocompletePos=1#_Toc479755193)
* *Anderson v. Molon,* [2020 BCSC 1247](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.pdf)
	1. **Teaching Objectives - Week 4**

Compensation for a plaintiff in a personal injury claim must fall under “heads of damage”:

1. Non-Pecuniary Damages (i.e. “pain and suffering”)
2. Past Income Loss (i.e. income lost up to the date of trial/settlement)
3. Future Loss of Earning Capacity (i.e. income to be lost after the trial/settlement)
4. Special Damages (i.e. out of pocket expenses for treatments, medications, etc.)
5. Cost of Future Care (i.e. cost of treatments after trial/settlement)
6. Lost Housekeeping Capacity
7. “In Trust” Claim (the cost of services provided by loved ones)

Today we will look at the theoretical justification for non-pecuniary damages and the valuation of these damages in various case examples, as well as non-compensatory damages, such as punitive damages and aggravated damages.

Non-Pecuniary Damages: Pain, suffering, loss of enjoyment of life, and loss of amenities – quantifying the unquantifiable.

Special cases:

* + Elderly individuals
	+ Athletes
	+ Previously disabled plaintiffs

“Rough upper limit” or “cap” for non-pecuniary damages: catastrophic injuries

Sexual abuse

Aggravated and punitive damages

* 1. **Non-Pecuniary Damages - Generally**

The guiding principle in the assessment of damages (generally) was articulated by the Supreme Court of Canada in *Athey v. Leonati,* [[1996] 3 S.C.R. 458](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=%5B1996%5D%203%20S.C.R.%20458&autocompletePos=1), at para. 20 as follows:

*“... the essential purpose of tort law... is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.”*

The rationale for non-pecuniary damages (in particular) was set out in the trilogy of cases decided in the Supreme Court of Canada (the “Trilogy”): *Andrews v. Grand and Toy Alta. Ltd*, [[1978] 2 S.C.R. 229](https://www.canlii.org/en/ca/scc/doc/1978/1978canlii1/1978canlii1.html?autocompleteStr=%5B1978%5D%202%20S.C.R.%20229%20&autocompletePos=1) *Thorton v. Prince George Dist. 57 Bd. of Trustees,* [[1978] 2 S.C.R. 267](https://www.canlii.org/en/ca/scc/doc/1978/1978canlii12/1978canlii12.html?autocompleteStr=%5B1978%5D%202%20S.C.R.%20267&autocompletePos=1), and *Teno v. Arnold,* [[1978] 2 S.C.R. 287](https://www.canlii.org/en/ca/scc/doc/1978/1978canlii2/1978canlii2.html?autocompleteStr=%5B1978%5D%202%20S.C.R.%20287&autocompletePos=1).

In *Andrews v. Grand and Toy Alta*., Dickson J. acknowledged that restitution is impossible for the pain and suffering associated with non-pecuniary loss, and that *“money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way.”*

The Supreme Court of Canada further articulated the principles guiding the assessment of non-pecuniary damages in *Teno v. Arnold.* Spence, J. held that non-pecuniary damages were meant to *“set up a fund from which the plaintiff may draw, not to compensate for those losses, but to provide some substitute for those amenities.”*

At paragraph 70, of *Provencher v St. Paul’s Hospital,* [2015 BCSC 916](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc916/2015bcsc916.html?autocompleteStr=2015%20BCSC%20916&autocompletePos=1.)**,** Dardi J. noted:

*While recognizing that the loss of good health cannot be valued in monetary terms, the ‘functional approach’ attempts to assess the compensation required to provide the plaintiff with reasonable solace for his injuries. The award should compensate the plaintiff for the non-pecuniary loss he has suffered up to the date of the trial and for that loss he will suffer in the future.*

The principles applicable to assessing non-pecuniary damages are well settled - *Shongu v Jing,* [2016 BCSC 901](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc901/2016bcsc901.html?autocompleteStr=2016%20BCSC%20901&autocompletePos=1):

*[136] Damages for non-pecuniary losses compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The purpose of non-pecuniary damages is to provide substitute pleasures and amenities to make the life of the injured person more bearable:* *Milina v Bartsch[,](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii179/1985canlii179.html%22%20%5Cl%20%22document)* [[1985] CarswellBC 13](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii179/1985canlii179.html%22%20%5Cl%20%22document).

The overriding consideration in assessing non-pecuniary damages is “*an appreciation of the individual’s loss*” *Lindal v Lindal (No. 2),* [[1981] 2 SCR 629](https://www.canlii.org/en/ca/scc/doc/1981/1981canlii35/1981canlii35.html?autocompleteStr=%20%5B1981%5D%202%20SCR%20629&autocompletePos=1). “*The Court must not only review comparable cases and injuries but also the seriousness of the injury and whether an award for non-pecuniary damages for pain and suffering can ameliorate the plaintiff’s position considering his or her particular situation*.” (*Liu v Zhang,* [2019 BCSC 778](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc778/2019bcsc778.html?autocompleteStr=2019%20BCSC%20778%20&autocompletePos=1) at para 55). Although awards of non-pecuniary damages in similar cases are useful as a guide, the specific circumstances of each individual plaintiff must be considered. The compensation award must be fair and reasonable to both parties (see *Stapleton v Andrew,* [2019 BCSC 678](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc678/2019bcsc678.html?resultIndex=1)at para 63and *Trites v Penner,* [2010 BCSC 882](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc882/2010bcsc882.html?autocompleteStr=2010%20BCSC%20882%20&autocompletePos=1)at paras 188-89).

In ***Stapley v. Hejslet,*** [**2006 BCCA 34**](https://www.canlii.org/en/bc/bcca/doc/2006/2006bcca34/2006bcca34.html?autocompleteStr=2006%20BCCA%2034&autocompletePos=1), Kirkpatrick J.A. (writing for the majority) outlined (at para. 46) the factors a trial judge should consider when assessing general damages:

*The inexhaustive list of common factors cited in Boyd that influence an award of non-pecuniary damages includes:*

*(a) age of the plaintiff;*

*(b) nature of the injury;*

*(c) severity and duration of pain;*

*(d) disability;*

*(e) emotional suffering; and*

*(f) loss or impairment of life;*

*I would add the following factors, although they may arguably be subsumed in the above list:*

*(g) impairment of family, marital and social relationships;*

*(h) impairment of physical and mental abilities;*

*(i) loss of lifestyle; and*

*(j) the plaintiff’s stoicism (as a factor that should not, generally speaking, penalize the plaintiff: Giang v. Clayton, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).*

The quantification of non-pecuniary damages is explored through a number of special cases: elderly, infants, athletes, sexual abuse, previously disabled, pre-existing conditions, etc.

**1.4 Special Cases**

1. **Elderly Plaintiff – Golden Years**

There is a line of cases in British Columbia affirming the "golden years" principle for the assessment of non-pecuniary damages in cases where the plaintiff is older and the injuries compromise the plaintiff's health (see for example *Taylor v Grundholm,* [2010 BCSC 860](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc860/2010bcsc860.html?autocompleteStr=2010%20BCSC%20860&autocompletePos=1) at para 60).

However, there is a competing line of cases that reduces non-pecuniary damages on the basis that elderly plaintiff will not have as long to live.

The modern approach to elderly plaintiffs within the quantification of non-pecuniary damages seems to be a balance between the two doctrines.

(1) Increased non-pecuniary damages

Increased non-pecuniary damages for elderly plaintiffs were confirmed in *Pingitore v. Luk,* [[1994] B.C.J. No. 1866 (S.C.)](https://www.canlii.org/en/bc/bcsc/doc/1994/1994canlii1050/1994canlii1050.html?autocompleteStr=Pingitore%20v.%20Luk&autocompletePos=1), by Fraser J. stated as following:

*What must be looked at is the deprivation of the vigour he had enjoyed up until the accident and which, on the evidence, I think he might have expected to enjoy for some long years. Injury to older people is, from at least one vantage, more profound than injury to the younger. The Court of Appeal of England, in Frank v. Cox said this: I take the view myself that when one has a person in advancing years, in some respects an impairment of movement may perhaps be more serious that it is with a younger person. It is true, as Mr. Chedlow has stressed, that he has not got as many years before him through which he has to live with this discomfort, pain and impairment of movement. But it is important to bear in mind that as one advances in life one's pleasures and activities particularly do become more limited, and any substantial impairment in the limited amount of activity and movement which a person can undertake, in my view, becomes all the more serious on that account.*

In *Etson v. Loblaw Companies Limited,* [2010 BCSC 1865](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1865/2010bcsc1865.html?autocompleteStr=2010%20BCSC%201865%20&autocompletePos=1) Fisher J. made some great comments regarding non-pecuniary damages at paragraph 66:

*… There is no evidence in this case that Ms. Etson would not have continued to enjoy her active and independent life style for many years to come. In my view, this is a case where Ms. Etson's injuries could be viewed as more profound due to her age. In Pingitore v. Luk, [1994] B.C.J. No. 1866 (S.C.), the court noted (at para. 36) that "[i]njury to older people is, from at least one vantage, more profound than injury to the younger" and referred to these comments in a decision of the Court of Appeal of England, in Frank v. Cox (1967), 111 S.J. 670.*

In *Fata v. Heinonen*, [2010 BCSC 385](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc385/2010bcsc385.html?autocompleteStr=2010%20BCSC%20385%20&autocompletePos=1) S. Griffin J. summarized the factors for assessing damages in an elderly plaintiff at paragraph 88 and 89:

*The retirement years are special years for they are at a time in a person’s life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age. The impact an injury can have on someone who is elderly was recognized in Giles v. Canada (Attorney General), [1994] B.C.J. No. 3212 (S.C.), rev’d on other grounds (1996), 21 B.C.L.R. (3d) 190 (C.A.).*

*In short, it is Mr. Fata’s loss of enjoyment of life in recreation, home chores, and work that should be compensated for in an award for non-pecuniary damages.*

(2) However, there is also a line of cases that argue for reduced non-pecuniary damages in elderly plaintiff’s on the basis that those injuries will have a shorter duration.

In *Olesik v. Mackin* [1987] BCJ No. 229 the Plaintiff was 88 years old on the date of trial. In coming to judgment with regard to non-pecuniary damages, Taylor J. stated the following:

*Had the Plaintiff been a relatively young adult, I believe that non-pecuniary damages of at least $100,000.00 would have been awarded, approximately one-quarter of which could properly be attributed to past pain and suffering and loss of amenities and enjoyment of life, and the balance to the future. Having in mind the necessarily limited duration of the Plaintiff's future suffering, I set his non-pecuniary damages at $50,000.00.*

The Court reduced non-pecuniary damages in this action by exactly fifty percent to account for the "necessarily limited duration" of time that the Plaintiff could expect to continue to suffer from his injuries, given his advanced age.

In *Munro v. Faircrest* [1987] BCJ No. 1389 (CA) the sixty-eight year old male Plaintiff lost the use of his right wrist and left ankle in a motor vehicle accident. In coming to judgment, the Court found that the injuries suffered by the plaintiff substantially interfered with his enjoyment of life during his remaining years but noted his advanced age as a factor for assessing non-pecuniary damages:

*When comparing awards, one must give some weight to the factor of age in that a younger person will suffer a loss of amenities over a longer period of time.*

As a result of the above statement and principle contained therein, the Court of Appeal reduced damages from that awarded by the trial judge of $60,000.00 to a figure of $45,000.00, and it would appear that this was entirely to account for the Plaintiff's advanced age.

In *Dahl v. Gelderman* [1987] BCJ No. 331 (SC) the Plaintiff was seventy years of age at the time of the accident. In assessing damages awardable to this Plaintiff, the Court took into consideration her advanced age and stated:

*In subjectively approaching her individual circumstances, I have also had regard to her age as I consider it a proper matter for consideration. I find support in so doing in the recent judgment of Taylor J. in Olesik v. Mackin and Mackin, [1987] BCJ No. 229, Vancouver Registry No. B860356, February 23, 1987. In that casehe was dealing with the non-pecuniary damages to be awarded to an eighty-eight year old man.*

Taking the above into account Cowan L.J.S.C. found that non-pecuniary damages awardable to this Plaintiff amounted to $38,000.00. Although not specifically stated in this judgment, considering that the Court took into consideration the principle espoused by Taylor J. in *Olesik* (supra.), we can presume that the Court applied a fifty percent reduction to the non-pecuniary damages awarded to this Plaintiff. Further, considering that this Plaintiff suffered an injury severe enough to require the surgical removal of a disk from her spine, a fifty percent reduction appears to have been likely in this case.

In *Knudsen et al. v. Tyckyj* [1994] OJ No. 2763 (Ont. Ct. Gen. Div.) the Plaintiff was ninety-four years of age at the time of the accident and ninety-eight years of age at the time of Trial. The action was decided in favour of the Plaintiff, however, in coming to an assessment of damages Somers J. found:

*...from the point of view of the assessment of damages, I must take into account Mr. Knudsen's advanced years. Any injury such as this has a lesser impact on damages on an older person than on a younger person with the same result. I fix the general damages of the Plaintiff in the sum of $20,000.00.*

In this case we are provided with no guidance to indicate how much damages would have been awarded to a younger person. The case does not indicate submissions on this point by either counsel, and the Court is not clear with regard to the amount of damages it would have awarded if not for the quote noted above.

(3) The “modern approach”: the two considerations may balance each other out

More recent cases suggest that the competing considerations may balance each other out, depending upon the facts. In *Mahtroo v Edge-Partington,* [2015 BCSC 122](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc122/2015bcsc122.html?autocompleteStr=2015%20BCSC%20122&autocompletePos=1)**,** the court set out:

*[95]      The golden years doctrine has some limited applicability here, in that Mr. Mathroo has experienced a decrease in his willingness to walk because of the effect of his injuries on his perceptions of his physical condition and his feelings of safety when walking, but I take the point made by Mr. Edge-Partington's counsel that he was not involved in that many activities beforehand, other than going to the temple and gardening, so the curtailment of them has been more limited than in other cases cited on his behalf.*

*[96]      I do not feel comfortable relying on [Olesik](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=1987297144&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) to reduce the non-pecuniary damages on the basis of Mr. Mathroo's limited remaining life expectancy, as urged by Mr. Edge-Partington's counsel. Its applicability on that issue has been questioned by other decisions of this Court. In Giles v. Canada (Attorney General)*[*, [1994] B.C.J. No. 3212*](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=1994410108&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))*(B.C. S.C.) varied on other grounds*[*(1996), 71 B.C.A.C. 319*](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=1996435847&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))*(B.C. C.A.), Mr. Justice Fraser held that the principle described in [Olesik](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=1987297144&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) and the golden years doctrine essentially balanced each other out, so that advanced age should not be a factor either way in arriving at an appropriate award. This view was adopted more recently in Duifhuis v. Bloom*[*, 2013 BCSC 1180*](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=2030936981&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))*(B.C. S.C.).*

These statements were adopted by the court in *Sequeira v Higgins,* [2015 BCSC 1192](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1192/2015bcsc1192.html?autocompleteStr=2015%20BCSC%201192&autocompletePos=1)**.**

In *Johal v Radek,* [2016 BCSC 454](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc454/2016bcsc454.html?autocompleteStr=2016%20BCSC%20454&autocompletePos=1)**,** Voith J. provided the most recent and definitive position with regard to the use of the Golden Years doctrine in BC:

*52      Some cases rely on the "Golden Years" doctrine, which suggests that an injury may have a greater impact on an older person, whose activities are already constrained by age, than on a younger person who may be active in other respects; see for example;*Taylor v. Grundholm*[, 2010 BCSC 860](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=2022356819&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) (B.C. S.C.) at para. 60; and*Fata v. Heinonen*[, 2010 BCSC 385](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=2021647022&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) (B.C. S.C.) at para. 88. Other cases suggest that the competing considerations of the plaintiff's age and the application of the "Golden Years" doctrine may balance each other out; see*Mathroo v. Edge-Partington*[, 2015 BCSC 122](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=2035364748&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) (B.C. S.C.) at para. 96; and*Duifhuis v. Bloom[*, 2013 BCSC 1180*](https://nextcanada.westlaw.com/Link/Document/FullText?findType=Y&pubNum=6407&serNum=2030936981&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))*(B.C. S.C.) at paras. 58-59. It is this last group of cases that I consider most useful and that I rely upon.*

See also *Bardua v Han,* [2016 BCSC 861](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc861/2016bcsc861.html?autocompleteStr=2016%20BCSC%20861&autocompletePos=1)**.**

In *Nikkhah v Batin,* [2019 BCSC 2223](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc2223/2019bcsc2223.html?autocompleteStr=2019%20BCSC%202223&autocompletePos=1)**,** the court noted that the award for non-pecuniary damages reflected the fact that the plaintiff was 84 years old at the time of the accident and that “*he already suffered, for example, with significant hand and right knee pain, with some sleep disruption, and with some restrictions in his mobility. The need to recognize the “original position” of a plaintiff is confirmed in numerous decisions*”.

1. **Athletes – enhanced non-pecuniary damages**

There is a line of cases in British Columbia awarding enhanced non-pecuniary damages for athletes in circumstances where the plaintiff’s injuries impact their ability to pursue their athletic endeavours.

*Morrow v. Outerbridge,* [2009 BCSC 433](https://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc433/2009bcsc433.html?autocompleteStr=2009%20BCSC%20433%20&autocompletePos=1)is the leading case regarding damages for an aspiring athlete and cites many of the relevant authorities on this issue. The case is also instructive for its analysis of aggravated damages (see paragraphs 250-259). Note there is an interesting issue whether the combined effect of general damages and aggravated damages can exceed the cap on general damages as outlined in the Trilogy – food for thought in a paper topic.

*[229] As a result of the surgery, Mr. Morrow has suffered significant and debilitating arthritis to his right shoulder, starting at the age of 19 years old. The evidence indicates that some individuals with a traumatic shoulder injury develop arthritis; however, there was no evidence that had Mr. Morrow developed arthritis later in his life, it would have had any effect on his mobility or caused him pain. It might have, but that is not the test. As noted above, his prior complaints regarding his shoulder I found to be insignificant and there was no evidence of a continuing or chronic problem with his shoulder prior to the dislocation.*

 *[231] The surgery caused pain and grinding to the shoulder. Mr. Morrow suffered terrible pain while undergoing physiotherapy. Certainly some pain is expected, but this pain was beyond the norm. He has lived with chronic pain since he was 19 years old, and he will live with chronic pain for the rest of his life. The pain will be alleviated from time to time when he has to undergo at least two, possibly three or four surgical interventions to have a shoulder replacement. He gets some relief from massage and chiropractic treatment, but it is fleeting. His range of motion is still limited, especially reaching behind his back.*

*[234] Mr. Morrow suffered disappointment at the Nashville Camp when he could not skate in July. He felt humiliation and embarrassment at the rookie camp when he performed poorly in the training and games. When he returned to the Blazer’s in September, his game deteriorated. He could not longer play the tough, aggressive game for which he was known. The coach demoted him from a first or second line defenceman to a fourth line forward. When he was traded to the Kootenay Ice, things did not improve and he became more frustrated, angry and depressed. Finally, he was cut from the Kootenay Ice just before play-offs and after the trade deadline.*

*[235] He suffered humiliation and great loss when his hockey career came to an abrupt end because he could no longer play with his damaged shoulder. He suffered personally when it was apparent to him that no one believed that he was injured when he was playing in Kamloops. The trainer was told by Dr. Outerbridge that Mr. Morrow was fine. His billet family was fed up with his complaining. He was to a degree ostrasized by a team and a community which had formerly been very supportive of him. While lost wages will be address in the wage loss category, Mr. Morrow still suffered an emotional and psychological loss when his hockey career ended in the manner that it ended. As he said, this all could have been prevented. His social network also disappeared. He became very angry and frustrated. He had conflicts with his family, which seldom occurred before. His grandfather said he could no longer do things for him around the farm.*

*[236] In spite of his loss and pain, he tried to carve out a career for himself in the oil patch, but the chronic pain became unbearable, especially in the cold weather. He had made a significant investment in equipment and lost a fair bit of money as a result of having to leave this employment.*

*[237] He tried going to school. I acknowledge that he did not have the academic background or ability to be very successful at Lakeland College but his ability to study was also compromised by his inability to sit at a desk, the chronic pain, and the headaches all relating to his shoulder.*

*[238] Day-to-day activities that he can no longer perform are as follows: reaching behind his back, washing and applying deodorant to this left side, reaching into a high cabinet, reaching into his back pocket for his wallet or cell phone, brushing his teeth, holding a pen for an extended period of time, using a computer, personal hygiene after using the washroom, and engaging in intimate relationships.*

*[239] He can also no longer rock climb, play basketball, swim, bike, horseback ride, play tennis, play volleyball, go cow roping and steer wrestling, play football or baseball, play golf, or shoot with a rifle. The only exercise he can now do is ride a recumbent stationary bike.*

*[240] He cannot do any heavy lifting and is bound to go from an extremely active, physical life to one that is primarily sedentary.*

*[241] He is suffering from Clinical Depression as a result of his chronic pain and the loss he has experienced as a result of what has occurred and the degenerative arthritis in his shoulder.*

*[242] Prior to the surgery, Mr. Morrow was a happy, bubbly, hard-working, driven young man. He had a goal and a dream and worked extremely hard to fulfil it. He was a very successful junior hockey player, in that he has been playing since he was 15 years old, and was drafted by an NHL team. He had a professional career ahead of him to one degree or another. To use the vernacular, “Life was good”. Now he is an unhappy, frustrated, depressed young man prone to angry outbursts, who has lost his way in the world. He is in chronic pain, and faces at least two, probably more, major surgeries to alleviate his shoulder pain. He has already had to have two surgeries, one to remove the anchors and one to debride the cartilage, since 2003. He has no direction, no focus and does not, at age 25, know what to do with his life. Much has changed since February 2003.*

*[243] Given his young age when this event occurred, and the significant subsequent events, it is clear that the effect of this surgery on Mr. Morrow was devastating to him. This was and continues to be a life-altering injury.*

*[244] The defendant submits that a fair award for general damages is $150,000, less $30,000 to take into account prior injuries to his shoulder, for a total of $120,000. As I have previously indicated, regardless of the award, I am not disposed to reduce it on the basis of prior or pre-existing injury. The evidence does not support a finding of that magnitude.*

*[245] The plaintiff submits that an appropriate award is $225,000, which is 70% of the current upper limit of $330,000 for general damages.*

*[248] The plaintiff relies on Soligo v. Turner, 2002 BCCA 73, 97 B.C.L.R. (3d) 300. The plaintiff was struck by a car and suffered soft tissue injuries to her shoulder. She was a school teacher and an elite curler. She had competed in the 1992 Olympics, winning a Bronze Medal. At the time of the accident in 1996, she had left competitive curling to complete her education, but had hoped to return to the competitive level in order to compete in the 1998 Olympics. Her injury did not improve and she had seven surgeries, as well as other non-surgical interventions. She suffered from chronic pain and could no longer teach, although she could work at other employment. She certainly could not curl any longer, but was able to take up coaching the sport. The Court of Appeal upheld an award of general damages in the sum of $150,000.*

*[249] In Alden v. Spooner, 2002 BCCA 592, 6 B.C.L.R. (4th) 308, the Court of Appeal upheld a jury award of $200,000 for general damages for injuries suffered by a 17-year-old girl for injuries suffered as a result of four car accidents. She suffered chronic pain syndrome and depression. There was evidence that the accidents could have the effect of physically and emotionally devastating to plaintiff. Similarly, in this case, Mr. Morrow has been physically and emotionally devastated by the injury to his shoulder.*

*[250] In some cases, aggravated damages have been made a separate award, and in other cases, they are considered part of the award for non-pecuniary or general damages. I have concluded that if there is to be an award for aggravated damages, it should be part of the general damages for the following reasons.*

*[251] Aggravated damages are compensatory in nature, and are to be distinguished from punitive damages, which, as the name implies are to impose punishment. Aggravated damages are awarded when the conduct of the defendant, beyond the act comprising the negligence, aggravates the injury. The conduct is variously described in the cases as “high-handed, malicious or oppressive”. These adjectives often describe behaviour that will also attract an award for punitive damages, and the two sometimes overlap. However, the distinction between the two is significant, and important to keep in mind.*

*[252] In Huff v. Price (1990), 51 B.C.L.R. (2d) 282, 76 D.L.R. (4th) 138 (C.A.), the Court, said this, at 299, in relation to aggravated and punitive damages:*

*So aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff’s suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff’s life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage is for aggravation of the injury by the defendant’s high-handed conduct.*

*Punitive damages, by contrast, are a separate award against the defendant designed to impose a punishment on the defendant and to set an example to others who might seek to act in a similar way. Punitive damages are measured by the degree of moral culpability of the defendant. They are not designed to compensate the plaintiff and they are not measured by an assessment of the plaintiff's suffering. An element of wilfulness or recklessness such as would underlie a finding of guilt in a criminal act is likely to be present before punitive damages will be awarded. But the defendant's conduct need not be criminal. Mr. Justice McIntyre used such words to describe the conduct that would give rise to a claim for punitive damages as "harsh, vindictive, reprehensible and malicious" but Mr. Justice McIntyre acknowledged that he had not exhausted the available adjectives. The anomaly, of course, about punitive damages is that they are paid to the plaintiff and not to the state, even though the plaintiff should have been fully compensated by his award of compensatory damages, pecuniary, non- pecuniary, and aggravated.*

*[253] See also Vorvis v. Insurance Corporation of British Columbia, [1989] 1 S.C.R. 1085 at 1098-1099, 58 D.L.R. (4th) 193; Norberg v. Wynrib, [1992] 2 S.C.R. 226 at 263-264, 92 D.L.R. (4th) 449; and Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at paras. 188-191, 126 D.L.R. (4th) 129.*

*[254] Here the conduct that attracts aggravated damages is as follows:*

*i) The anchors were not removed when Dr. Outerbridge knew they could cause damage to Mr. Morrow’s shoulder. This is the act of negligence, and does not, on its own, attract additional compensation through aggravated damages.*

*ii) He did not identify that the anchors were sitting proud in the operative report.*

*iii) He did not tell Mr. Morrow that the anchors were sitting proud and that there were symptoms that he should be aware of, in particular, pain and grinding, that could indicate if the anchors were causing a problem. Nor did he advise Mr. Morrow of the risks associated with the anchors sitting proud.*

*iv) Dr. Outerbridge knew the anchors were sitting proud. He also knew that there were potential symptoms that could identify if the anchors were in fact causing problems, yet he did not notify the two primary health care providers, Ms. Eburne and Mr. Lanuk, to watch for those symptoms.*

*v) He rejected Dr. Pagnani’s concerns expressed to him through Mr. Morrow in July 2003, when it clearly called for investigation.*

*vi) He rejected Dr. Pagnani’s direct concerns when Dr. Pagnani contacted him. Again, clearly there was a need to further investigate Mr. Morrow’s shoulder and Dr. Outerbridge did nothing.*

*vii) When Mr. Lanuk approached Dr. Outerbridge regarding the second opinion sought by Mr. Morrow, Dr. Outerbridge said that it was not necessary as there was nothing wrong with Mr. Morrow. As a result, Dr, Outerbridge effectively derailed Mr. Morrow’s opportunity to obtain a second opinion in September 2003.*

*viii) At all times, Dr. Outerbridge knew that he had left the anchors proud in the joint of Mr. Morrow.*

*[255] As a result of all the conduct (except the original act of negligence and the misleading operative report), both cumulatively or individually, Mr. Morrow’s injury was aggravated beyond merely the act of negligence. Had Dr. Outerbridge acted sooner, the fact that the anchors were causing significant arthritis would have been identified at the latest in July 2003 or likely earlier given the evidence of Holly Eburne, that she knew that the shoulder was not progressing properly.*

*[256] He would have been spared some of the pain he suffered through 2003 until today, and in the future. Mr. Morrow would have been spared the humiliation of playing his last year of hockey as a wash-out, or less than useful player. He would have been spared the humiliation of being cut from a team just before play-offs. Although significant damage was done by July 2003, according to Dr. Pagnani, it would not have been as serious as it was ten months later.*

*[257] The evidence fully supports the finding that Mr. Morrow’s injury was aggravated by the high-handed, arrogant, and oppressive conduct of Dr. Outerbridge subsequent to the initial act of negligence in February 2003, and calls for an award of aggravated damages.*

*[258] I recognize that there is an issue whether the combined effect of general damages and aggravated damages can exceed the cap on general damages as outlined in the trilogy (Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; Thornton v. Prince George Board of Education, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; and Teno v. Arnold, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.) The amount that I have awarded is well-within the current upper-limit; I do not need to address this issue. See Bob v. Bellerose, 2003 BCCA 371,16 B.C.L.R. (4th) 56 at para. 35.*

*[259] Based on the authorities cited above, the many consequences suffered by Mr. Morrow as a result of the surgery to his shoulder as outlined in detail above, I conclude that an award of $200,000 in general damages is appropriate. I would augment this award by an additional $35,000 for the aggravation of the injury by the conduct of Dr. Outerbridge. Clearly, this money will not put Mr. Morrow completely back in the position he was before the surgery. No amount of money will do that. However, hopefully this will provide some measure of compensation to him for what he has suffered.*

*Hagreen v. Su,* [2009 BCSC 1455](https://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc1455/2009bcsc1455.html?autocompleteStr=2009%20BCSC%201455%20&autocompletePos=1) is another case that considers enhanced non-pecuniary damages for athletes:

*[25] I now turn to damages. The plaintiff submits that an appropriate award for non-pecuniary damages is $130,000 and relies on the decision of this court in Bonham v. Smith (1998), 50 B.C.L.R. (3d) 350 (S.C.). There, the plaintiff was an established ironman tri-athlete capable of earning very* *substantial income as a top world athlete. The plaintiff had sustained serious head and shoulder injuries when she was struck by a van while riding a bicycle. The injuries resulted in ongoing cognitive difficulties. Non-pecuniary damages were assessed at $130,000. At para. 37, Mr. Justice Leggatt said:*

*...It is as well to remember that the Plaintiff was not an aspiring athlete when she had her accident, she had arrived. The accident has left her frustrated and unable to complete the necessary intensive training for the highest level of success.*

*[26] That description fits Mr. Hagreen, even though Mr. Hagreen continues to aspire to the highest level of success. Non-pecuniary damages are a once and for all award for pain and suffering and loss of enjoyment of life. Wheelchair basketball is central to Mr. Hagreen’s enjoyment of life, and while there has been no significant expression of frustration in his inability to achieve his goal, there is a reasonable prospect of that and a consequent diminution of his enjoyment of life. The defendant says that the plaintiff remains fully capable of doing everything and that he continues to believe that he can enjoy his goal of being the most valuable player at the national level. She submits that an appropriate award of non-pecuniary damages is $37,000 and relies upon Tripp v. Kumar, [1989] B.C.J. No. 13 (S.C.), and Pennykid v. Escribano, [2004] B.C.J. No. 1497 (S.C.). In Tripp, the plaintiff was an excellent athlete and enjoyed competitive hockey in particular. There is not in Tripp the same passion for hockey or other competitive sports that there is in this case.*

*[27] I find an appropriate award for non-pecuniary damages is $110,000.*

The *Morrow* and *Hagreen* decisions recognize that injuries to an athletic individual can be a grievous loss because it directly impacts their enjoyment of life.

1. **Previously disabled plaintiff – quantifying what little they have left**

The British Columbia Supreme Court has acknowledged the greater impact of injury on those who suffer from pre-existing disease or disability. In these cases, the court has awarded increased non-pecuniary damages.

The assessment of non-pecuniary damages for a person suffering for pre-existing disability was considered in *Bracey (Committee of) v. Jahnke*, [[1995] CarswellBC 2125 (S.C.)](https://www.canlii.org/en/bc/bcsc/doc/1995/1995canlii2992/1995canlii2992.html?autocompleteStr=bracey%20v.%20jahnke&autocompletePos=2) varied on other grounds [[1997] CarswellBC 1104 (C.A.)](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2988/1997canlii2988.html?autocompleteStr=Bracey%20(Committee%20of)%20v.%20Jahnke&autocompletePos=1). The plaintiff suffered a brain injury in a prior motor vehicle accident and was injured in a subsequent accident that caused a fracture and torn ligaments in her left leg. Oliver J. considered the impact of these injuries in light of the plaintiff’s pre-existing brain injury and noted the following at paragraph 27:

*Following the first accident the plaintiff had with great difficulty learned to adjust her life to her physical and mental disabilities and to develop a style of living suited to her condition. She has, by reason of the defendant's negligence, been substantially deprived of many of the limited pleasures and comforts life still held for her. To rob a disabled person of what little she has left is a monstrous injury, for that little she has is, for her, the whole of her life. Not only is it an enormous physical injury but the emotional damage is, to most people, well nigh incomprehensible.*

The above passage from *Bracey* regarding the impact of injury on those suffering from pre-existing disease or disability has subsequently been cited with approval in a number of cases, including *Agar v Morgan,* [2003 BCSC 630](https://www.canlii.org/en/bc/bcsc/doc/2003/2003bcsc630/2003bcsc630.html?autocompleteStr=2003%20BCSC%20630%20&autocompletePos=1)at paragraph 229 and *Morgan v Scott,* [2012 BCSC 1237](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1237/2012bcsc1237.html?autocompleteStr=2012%20BCSC%201237%20&autocompletePos=1)at paragraph 41.

In *McAllister v. Sotelo,* [[1999] CarswellBC 2077 (S.C.)](https://www.canlii.org/en/bc/bcsc/doc/1999/1999canlii5825/1999canlii5825.html?autocompleteStr=McAllister%20v.%20Sotelo&autocompletePos=1), the plaintiff suffered from pre-existing multiple sclerosis which affected one of his legs. The plaintiff was involved in an accident that caused injuries to his other leg and further compounded the plaintiff’s symptoms resulting from multiple sclerosis. Sigurdson J. held that the plaintiff’s pre-existing disability exacerbated the impact of the subsequent injuries and stated the following at paragraph 44:

*The plaintiff's injuries to his left eye and, in particular, to his left ankle and right knee, were injuries that would be serious for any healthy person. However, when sustained by a person with a pre-existing medical condition like Mr. McAllister, those injuries, in my view, become even more significant…*

The trial judge in*Agar* provided a detailed analysis of the case law regarding damages for disabled individuals, starting at paragraph 229.

*[229] In determining and evaluating this loss, the Courts have recognized that an injury to an already disabled person can be devastating. That is, "[t]o rob a disabled person of what little she has left is a monstrous injury, for that little she has is, for her, the whole of her life. Not only is it an enormous physical injury but the emotional damage is, to most people, well nigh incomprehensible." See: Bracey (Committee of) v. Jahnke, [1995] B.C.J. No. 1850 (S.C.) varied on other grounds (1997), 34 B.C.L.R. (3d) 191 (C.A.) quoting with approval from the reasons of the trial judge. See also: Boren v. Vancouver Resource Society for Physically Disabled, 2002 BCSC 1134 (S.C.); McAllister v. Sotelo, 1999 Carswell BC 2077 (S.C.); and Heska v. Little, 1999 Carswell BC 596 (S.C.).*

*[230] Although pecuniary damage awards are reduced using a percentage formula to reflect negative contingencies, this is not the approach adopted in the calculation of non-pecuniary damages. That is, "[i]n arriving at a global figure which represents the non-pecuniary loss to the plaintiff, a trial judge will consider real and substantial future possibilities, both positive and negative which could impact on the plaintiff's quality of life. These considerations will be reflected in the figure which the trial judge arrives at in his assessment of general non-pecuniary damages. There is no need, as there may be in cases of future pecuniary losses, to translate these possibilities into a percentage and to adjust accordingly." York v. Johnston (1997), 37 B.C.L.R.(3d) 235 (C.A.) quoting with approval from Graham v. Rourke (1990), 75 O.R. (2d) 622 (C.A.).*

*[231] Applying these principles to the present case, for the rest of his life the Plaintiff will suffer in varying degrees pain in his right knee and periodic pain from the soft tissue injuries to his neck and back. Although the chronic pain program may assist the Plaintiff to manage this pain better, that program will not eliminate this ongoing pain.*

*[232] As a result of the right knee injury the Plaintiff’s quality of life was reduced by the fact that he permanently lost the capacity to participate in his favourite activity (namely, bicycling aggressively) and to continue with a job that he truly enjoyed (namely, being a longshoreman) at least for a further three years. Although the loss of past income and future capacity to earn income have already addressed his pecuniary losses with respect to this job, this award addresses the emotional or mental loss accompanying this loss of capacity.*

*[233] Because of this collision the Plaintiff has had to face the risks of a lung transplant sooner than he would otherwise have had to face them. Most significantly, in my view he lost three years of stability which was a precious commodity given the Plaintiff's medical circumstances.*

*[234] Cases such Bracey, Boren, McAllister, and Heska demonstrate a range of awards between $105,000.00 to $150,000.00 for non-pecuniary damages in situations in which a defendant's negligence has robbed or, at the very least, substantially reduced what little a plaintiff has left.*

*[235] However, the circumstances of this case are so unusual that although the aforementioned cases are helpful they are not analogous.*

*[236] In my view, the loss of three years of stability is a greater loss than the losses suffered in these cases. However, in my view the case does not go so far as to permit an award in the uppermost range of non-pecuniary damages for this kind of injury.*

*[237] In my view, it is appropriate to award $175,000.00 in non-pecuniary damages. An award is made in that amount.*

* The Court of Appeal in *Agar v. Morgan,* [2005 BCCA 579](https://www.canlii.org/en/bc/bcca/doc/2005/2005bcca579/2005bcca579.html?autocompleteStr=2005%20BCCA%20579%20&autocompletePos=1)considered the case law and noted:

*16      In my view, the important difference between those cases and the present one is that in those cases the complications from the accident-related injuries to the pre-existing condition would extend over the whole of the remaining life expectancy of the plaintiff. Here in contrast, the effect of the accident was simply to accelerate by three years a CF condition that would have resulted in any event, and the compensation is for the loss of the stable condition during that three-year period rather than over the whole of Mr. Agar's life expectancy.*

**1.5 The Trilogy Cap**

Historically there was no ceiling in the amount of money that could be awarded to an injured plaintiff for non-pecuniary loss in Canada. This changed, however, in 1978 when the Supreme Court of Canada heard a “Trilogy” of cases and handed down a significant decision which held that there should be a cap on Canadian awards for non-pecuniary damages. Specifically the Canadian high court held that “Save in exceptional circumstances…an upper limit of non-pecuniary loss” should be set at $100,000.

The policy reasons underlying the "cap" were discussed by Cory J. in *Hill v. Church of Scientology of Toronto* [[1995] 2 SCR 1130](https://www.canlii.org/en/ca/scc/doc/1995/1995canlii59/1995canlii59.html?autocompleteStr=Hill%20v.%20Church%20of%20Scientology%20of%20Toronto%20&autocompletePos=1)at 167-168, where the appellants argued for a cap on general damages in defamation cases. Cory J. said this:

*The appellants contend that there should be cap placed on general damages in defamation cases just as was done in the personal injury context. In the so-called "trilogy”, it was held that a plaintiff claiming non-pecuniary damages for personal injuries should not recover more than $100,000.*

*In my view, there should not be a cap placed on damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. In the latter case, the plaintiff is compensated for every aspect of the injury suffered: past loss of income and estimated future loss of income, past medical care and estimated cost of future medical care, as well as non-pecuniary damages. Second, at the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole. The damages awarded were varying tremendously not only between the provinces but also between different districts of a province. Perhaps as a result of motor vehicle accidents, the problem arose in the courts every day of every week. The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicle and, indeed, businesses of all kinds throughout the land. In those circumstances, for that one aspect of recovery, it was appropriate to set a cap.*

The cap on non-pecuniary damages has been the subject of much criticism and recent court challenges, however, none of this has resulted in change. Unless there is legislative intervention or a reversal by the Supreme Court of Canada this cap will continue to remain in place.

This figure is subject to inflation. [McKellar Structured Settlements](https://www.mckellar.com/statistics), a Canadian structured settlement firm, has calculated the rough upper limit for non-pecuniary damages to be $410,256 as of December 2021.

***Uy v. Dhillon*,** [**2020 BCSC 1302**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.html?autocompleteStr=2020%20BCSC%201302&autocompletePos=1)

*[**90]        Andrews continues to be a seminal decision governing the assessment of non-pecuniary damages, particularly in cases involving catastrophic injuries. There, the Supreme Court described the objective of non-pecuniary damages and established the functional approach to assessing such damages. Mr. Justice Dickson, as he then was, said at 261-62:*

*The … “functional” approach … attempts to assess the compensation required to provide the injured person “with reasonable solace for his misfortune.” “Solace” in this sense is taken to mean physical arrangements which can make his life more endurable rather than “solace” in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way. As Windeyer J. said in Skelton v. Collins, supra, at p. 495:*

*... he is, I do not doubt, entitled to compensation for what he suffers. Money may be compensation for him if having it can give him pleasure or satisfaction. ... But the money is not then a recompense for a loss of something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.*

*If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.*

*[**91]        In Lindal v. Lindal,*[*1981 CanLII 35 (SCC)*](https://www.canlii.org/en/ca/scc/doc/1981/1981canlii35/1981canlii35.html)*, [1981] 2 S.C.R. 629, the Supreme Court affirmed the functional approach. Justice Dickson said at 637:*

*Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual’s loss is the key and the “need for solace will not necessarily correlate with the seriousness of the injury” (Cooper-Stephenson and Saunders, Personal Injury Damages in Canada (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a “tariff”. An award will vary in each case “to meet the specific circumstances of the individual case” (Thornton at p. 284 of S.C.R.).*

*[**92]        Justice Dickson went on to discuss the rationale underlying the establishment of an upper limit on non-pecuniary damages, at 639-640:*

I have already indicated that the social costs of the award cannot be controlling when assessing damages for loss of income and the cost of future care. The plaintiff must be provided with a fund of money which will provide him with adequate, reasonable care for the rest of his life. The social impact of the award must be considered, however, in calculating the damages for non-pecuniary loss. There are a number of reasons for this. First, the claim of a severely injured plaintiff for damages for non-pecuniary loss is virtually limitless. This is particularly so if we adopt the functional approach and award damages according to the use which can be made of the money. There are an infinite number of uses which could be suggested in order to improve the lot of the crippled plaintiff. Moreover, it is difficult to determine the reasonableness of any of these claims. There are no accurate measures available to guide decision in this area.

A second factor that must be considered is that we have already fully compensated the plaintiff for his loss of future earnings. Had he not been injured, a certain portion of these earnings would have been available for amenities. Logically, therefore, even before we award damages under the head of non-pecuniary loss, the plaintiff has certain funds at his disposal which can be used to provide a substitute for lost amenities. This consideration indicates that a moderate award for non-pecuniary damages is justified.

A third factor is that damages for non-pecuniary loss are not really ‘compensatory’. The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfil this function, should be moderate.

…

 *[**94]        Mr. Uy submits that his injuries have had a profound impact on all aspects of his life and that he should be awarded damages at the upper limit established in Andrews, which the parties agree is currently $388,177 taking account of inflation. Mr. Uy cites the following cases in support of his position:*

a)   *Spehar et al. v. Beazley et al.*, [2002 BCSC 1104](https://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc1104/2002bcsc1104.html), aff’d [2004 BCCA 290](https://www.canlii.org/en/bc/bcca/doc/2004/2004bcca290/2004bcca290.html);

b)   *Van v. Howlett*, [2014 BCSC 1404](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc1404/2014bcsc1404.html);

c)   *Paur v. Providence Health Care*;

d)   *McCormick v. Plambeck*,[2020 BCSC 881](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc881/2020bcsc881.html)*;*and,

e)   *MacEachern v. Rennie.*

*[**95]        The defendants acknowledge that Mr. Uy has suffered a significant brain injury but they submit that he has not lost the ability to enjoy life. They submit further that he continues to be able to carry out many activities of daily life with some degree of independence. They submit that an appropriate award is $325,000.*

*[**96]        The defendants cite the following cases:*

*a)   Robinson v. Bud’s Bar Inc.,*[*2015 BCSC 1767*](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1767/2015bcsc1767.html)*;*

*b)   Mackey v. British Columbia,*[*2016 BCSC 1333*](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1333/2016bcsc1333.html)*; and,*

*c)   Van v. Howlett.*

*[**97]        It is never an easy task to compare injuries and their impacts between plaintiffs in different cases and each case must be decided on its own facts. That said, I find the facts in the case cited by Mr. Uy to be more analogous than those relied on by the defendants. For example, in Paur, Madam Justice Griffin described the plaintiff there as being limited in his ability to direct and control his daily living activities (at para. 722) and as requiring close supervision and control (at para. 726). In MacEachern, Mr. Justice Ehrcke found that the plaintiff had little short-term memory, her behavior was disinhibited and she presented much like a young child (at para. 678). Much the same can be said of Mr. Uy.*

*[**98]        In contrast, the plaintiffs in Robinson and Mackey were able to achieve a much higher degree of independence. For example, Mr. Robinson attended college after the accident and maintained employment. Mr. Mackey also continued his education, got married and had children. These options are not available to Mr. Uy.*

*[**99]        The defendants highlight certain elements of the evidence to suggest that Mr. Uy continues to enjoy some quality of life and a reasonable measure of functional capacity. They submit, for example, that he continues to enjoy singing and dancing, he travels with Mr. Amurao’s family and is able to carry out many daily living activities on his own.*

*[**100]     The defendants in Paur advanced a similar position, which was rejected by Justice Griffin. Her observations about the plaintiff in that case (at para. 720) apply with equal force to Mr. Uy:*

*The Hospital Defendants have pointed to small pieces of evidence to suggest that Mr. Paur is not so badly off: that he considers himself lucky that he did not die; that he has no lasting physical injuries; and they point to one test in which his scores for functioning were not at the very bottom of the non-brain-injured population. These pieces of evidence, in my view, do not detract from the severity of Mr. Paur’s injury in terms of its impact on his future life, as indicated by the totality of the evidence. Mr. Paur will never be able to function as an independent adult again.*

*[**101]     Mr. Uy’s life has been profoundly and permanently impacted as a result of the brain injury sustained in the Accident. Taking account of the evidence as a whole, the authorities cited by the parties and the principles set out in cases like Andrews and Stapley, I find that Mr. Uy is entitled to damages in the amount of the rough upper limit, or $388,177.*

**1.6 Loss of capacity to have children or keep house– non-pecuniary or pecuniary?**

***Grabovac v Fazio*,** [**2021 BCSC 2362**](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc2362/2021bcsc2362.html?autocompleteStr=grabov&autocompletePos=1#_Toc89248676)

*[**229]   The plaintiff described her present circumstances to Dr. Anderson in the following terms:*

*I was so happy before. I felt very fulfilled. I loved my job, apartment, travelling and friends… I wish I’d died in the accident. My life is so hard now… It flipped my life upside-down. I’m dependent. I have no money. My relationships are strained. I can’t travel. I’ve lost my sense of identity. The things that make me happy I don’t care about anymore. I don’t care about anything. I’ve lost my self-confidence. My self-worth is down the drain. I don’t care as much about my appearance. I’m not wearing any makeup. I have to wear flat shoes. I have to bring a stool to a dance floor now. It’s like my life is over. I feel hopeless. I feel like an old lady now. I’m stuck at home. I used to love snowboarding. My pain is so bad all the time. People don’t understand. My own sister doesn’t understand how I feel physically and emotionally. I’ve lost a lot of friends. I worry my pain will get worse as I get older.*

*[**230]   The defendant Fazio argues that Dr. Okorie’s opinion should be preferred over that of Dr. Anderson’s when it comes to prognosis. Dr. Okorie testified that the plaintiff’s treatment needs to move away from symptoms and focus on function. This includes educating the plaintiff as well as her parents and loved ones. Dr. Okorie also recommends further medication management (something that Dr. Parhar is working on with the plaintiff), and the end of this litigation, which will help shift the plaintiff’s focus off of her injuries.*

*[**231]   Counsel for the defendant Fazio proposed that a suitable award for the plaintiff’s non-pecuniary damages for the First Accident alone would be $40,000, based in part on the awards in Wong v. Pannu,*[*2020 BCSC 1158*](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1158/2020bcsc1158.html)*[Wong], McBurney v. Levesque,*[*2019 BCSC 1897*](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1897/2019bcsc1897.html)*[McBurney], Brass v. Von Chudentiz,*[*2020 BCSC 343*](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc343/2020bcsc343.html)*[Brass], Jacobi v. Monteith,*[*2020 BCSC 218*](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc218/2020bcsc218.html)*[Jacobi], Manhas v. Jaswal,*[*2020 BCSC 586*](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc586/2020bcsc586.html)*[Manhas], and Carleton v. Warner,*[*2020 BCSC 436*](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc436/2020bcsc436.html)*[Carleton].*

*[**232]   In Wong, Justice Francis awarded non-pecuniary damages of $40,000 to a woman who was only 14 years old when she was involved in a rear-end collision. She sustained soft tissue injuries to her neck, upper back, lower back, and shoulders with associated headaches. She had difficulty sitting for long periods in school, but maintained an A average. Some of her recreational activities were curtailed, but she maintained a busy, active, and happy lifestyle.*

*[**233]   In McBurney, Justice Burke awarded non-pecuniary damages of $50,000 to a labourer in a meat-packing facility who was 23 years old when injured in a motor vehicle accident. He sustained a mild traumatic brain injury as well as soft tissue injuries to his neck, and upper back with headaches, dizziness, fatigue, difficulty concentrating and disrupted sleep. His injuries improved but did not resolve within 18 months to two years.*

*[**234]   In Brass, Justice Betton awarded non-pecuniary damages of $50,000 to a woman who was 20 years old when she was involved in a motor vehicle collision which caused injuries to her neck, left shoulder and upper back, and affected her social, recreational, and vocational activities. Her symptoms were persistent at the time of trial but were expected to improve somewhat with an active rehabilitation program.*

*[**235]   In Jacobi, Justice Wilson awarded non-pecuniary damages of $50,000 to a man who was 17 years old when he was involved in a motor vehicle collision. He developed pain in his upper back and neck that resolved but experienced persistent pain in his low back. He was unable to drive for long periods, and while he did not miss any work because of his injuries, he did require some accommodation at work.*

*[**236]   In Manhas, Justice Basran awarded non-pecuniary damages of $60,000 to a woman who was involved in two motor vehicle accidents; the first was seven years prior to trial and the second was four years prior to trial. At trial, she still had ongoing pain in her neck and upper back and associated headaches. Her mood was also affected. She was unable to return to playing basketball and soccer recreationally with friends as she had done prior to the accidents.*

*[**237]   In Carleton, Justice Verhoeven awarded non-pecuniary damages of $60,000 to a woman who was involved in a vehicle accident and sustained soft tissue injuries to her lower back, upper back, and shoulder area. She did not miss any time from work and went on a pre-arranged trip to Europe where she avoided some of the more physical activities, but otherwise participated as planned. She found it more difficult to do her recreational activities after a day of work, and decreased the intensity of her gym exercises and had to take breaks when standing for long periods.*

*[**238]   Counsel for the defendant Meszaros conceded that before the Second Accident, the plaintiff was an outgoing and capable young woman and that her life has been significantly changed since.*

*[**239]   He submitted, however, that the plaintiff has shown incremental improvement over time. He argues that she continues to live in much the same world as she lived in before the Second Accident, as she is continuing to enjoy the support of her family, her relationship with Mr. Posavljak, and studying for her degree in Health Sciences. She has moved out of her family home and has a new measure of independence living with Mr. Posavljak. They still intend to get married. He contends that they still intend to have children, albeit with reservations. She is driving and doing volunteer work.*

*[**240]   Counsel for the defendant Meszaros concedes that the plaintiff’s injuries put her at the higher end of the range of damages for significantly disabling chronic pain cases. He submitted that a fair award for her non-pecuniary damages from the accidents would be $150,000, referring to three cases he asserted were comparable: McColl v. Sullivan 2020 BCSC 137 [McColl], McHatten v. McCrea 2021 BCSC 1471 [McHatten], and Downey v. O’Connor, 2017 BCSC 1459 [Downey].*

*[**241]   In McColl, Justice Baker awarded a young female plaintiff $120,000 in non-pecuniary damages for her severe thoracic outlet syndrome (“TOS”), myofascial pain, cervicogenic headaches, and psychological symptoms resulting from her injuries. While Justice Baker noted the plaintiff’s headaches had largely resolved by the time of trial, her myofascial pain and TOS were expected to continue throughout her life.*

*[**242]   In McHatten, Justice G.C. Weatherill awarded non-pecuniary damages of $100,000 to a young woman who sustained personal injuries in a rear-end collision in 2014. She suffered fibromyalgia and chronic back pain that continued to trial and developed anxiety and depression.*

*[**243]   In Downey, Justice Jenkins awarded non-pecuniary damages of $110,000 to a plaintiff who was 18 years old at the time of his second accident and was 24 years at the time of trial. His injuries included TOS and chronic pain. Justice Jenkins found that the accidents had a huge impact on all aspects of the plaintiff’s life. The career options remaining open to her were very limited and the prognosis for any improvement not optimistic.*

*[**244]   Counsel for the plaintiff seeks non-pecuniary damages in the amount of $225,000 based upon in the range of $200,000 to $250,000, as established in cases such as Martin v. Steunenberg, 2021 BCSC 1411 [Martin], Steinlauf v. Deol, 2021 BCSC 1118 [Steinlauf], Fletcher v. Biu, 2020 BCSC 1304 [Fletcher], and Gill v. Apeldoorn, 2019 BCSC 798 [Gill].*

*[**245]   In Martin, the plaintiff had been involved in a previous accident for which he had effectively recovered at the time of the subject accident, and had some history with periods of anxiety which did not limit his functionality, and maintained and enjoyed a physically rigorous career as a firefighter. In the subject accident, he suffered soft tissue injuries to his neck, left shoulder, left rotator cuff, and left wrist, as well as lower and mid back. As a result, he suffered from ongoing headaches and psychological symptoms including depression, SSD and anxiety. He also suffered from anxiety specifically related to driving. His injuries have impacted his ability to maintain his career as a firefighter. Justice Walker awarded him $210,000 in non-pecuniary damages, including loss of housekeeping capacity.*

*[246]   In Steinlauf, the 26-year-old plaintiff lived a life without restrictions but was seriously injured in a motor vehicle accident. He worked as a police officer and was ambitious in his career pursuits, but had those ambitions cut short by the accident. He had ongoing physical and psychological injuries that required multiple daily medications to manage his symptoms. He was left with chronic pain and a heavy limp. He suffered from PTSD, anxiety, depression, SSD, disrupted sleep, and cognitive issues. His prognosis was guarded as his symptoms had continued for over three and a half years. There was no chance of him returning to his career as a police officer and he was now limited to sedentary, administrative duties. Justice Basran awarded him $225,000 in non-pecuniary damages.*

*[247]   In Fletcher, the plaintiff was a 32-year-old woman who suffered injuries to her back and neck and developed chronic pain, depression, PTSD, and anxiety. By the time of trial, her PTSD and depression had remitted, but her anxiety and chronic pain remained. She suffered a diminishment in her capacity to work in her chosen career as an Occupational Therapist, but was able to work almost full-time, though with many absences. Justice Douglas awarded her a non-pecuniary award of $200,000.*

*[248]   In Gill, the plaintiff was 44 years old at the time of the accident and suffered soft tissue injuries to his neck, back, and shoulder. Her injuries caused headaches and referred pain with tingling to her arm. She developed chronic pain, MDD, anxiety, and PTSD. At trial, nearly four years after the accident, the disorders continued to persist and she was never able return to work. Justice Gropper held that the plaintiff’s psychological injuries had a devastating impact on every aspect of her life, and awarded her $200,000 for non-pecuniary damages.*

*[249]   The defendant Fazio argues, and I agree that, it is preferable to include the plaintiff’s loss of housekeeping capacity in her non-pecuniary damages, although I will address the assistance that she has received from her family and Mr. Posavljak in terms of the plaintiff’s trust claim.*

*[250]   The plaintiff also seeks an award for the cost of care of raising children. As I will explain below, I am not prepared to find that the plaintiff has any real prospect of having children. Her counsel argued that if she could not have her own children, she could pursue a surrogate pregnancy or adopt children, but neither the plaintiff nor Mr. Posavljak expressed any intention of pursuing such a means of having children.*

*[251]   I find that the range of damages proposed by the plaintiff is insufficient to compensate her for this loss, in addition to the other factors that must be considered in a non-pecuniary award, and I assess her non-pecuniary damages at $350,000; $40,000 of which I attribute to the First Accident, and the remaining $310,000 to the Second Accident.*

One of the main issues considered by Hinkson, C.J.B.C. in *Grabovac* in his award for non- pecuniary damages was the issue of whether or not the plaintiff would be able to have children on her own. It was his belief that based on the testimony of the plaintiff’s partner that this was not a possibility.

The issue of compensating a plaintiff for the loss of ability to have children has been given previous judicial comment. In *Wilhelmson v. Dumma*, [2017 BCSC 616](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc616/2017bcsc616.html?autocompleteStr=wilhelmson&autocompletePos=1#_Toc479755193), Sharma J. awarded the plaintiff the then-maximum award for non-pecuniary damages of $367,000. This was due to the horrific injuries that the plaintiff suffered as a result of the accident, and the impact that this would have on the rest of her life. Importantly, this included the loss of her ability to carry a child to term.

*[**168]     Ms. Wilhelmson seeks between $325,000 and $360,000 in general damages for pain and suffering. The defendant says an award of $300,000 is appropriate. There is no dispute that the controlling case law limits the maximum damages available to be $367,000 in today’s dollars.*

***A. Legal Principles***

*[**169]     There is no dispute between the parties about the applicable legal principles. The purpose of non-pecuniary damages is to compensate a plaintiff’s pain, suffering and loss of enjoyment of life. While that is measured in part by the injuries suffered, the Court of Appeal has pointed out that the enquiry is not limited to an inventory of the nature and severity of injuries. It provided the following comments as a reminder “given the not-infrequent inclination by lawyers and judges to compare only injuries” when examining comparable case law. In Stapley v. Hejslet, 2006 BCCA 34, the court quoted from Lindal v. Lindal (para. 45 of Stapley):*

*[45] Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual’s loss is the key and the “need for solace will not necessarily correlate with the seriousness of the injury” (Cooper-Stephenson and Saunders, Personal Injury Damages in Canada (1981), at p. 373.)*

*[**170]     The Court of Appeal also identified a non-exhaustive list of factors used to quantify an award for general damages as including the age of the plaintiff, nature of the injury, severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships; impairment of physical and mental abilities and loss of lifestyle. The Court stated a plaintiff’s stoicism should not, generally speaking, be a reason to reduce an award.*

*[**171]     The parties are not far apart in their position as to the appropriate award of damages. The plaintiff suggests an award in the range of $325,000 to $360,000 and the defendant suggests $300,000. The defendant’s position is that the upper limit for general damages (as per Andrews but converted to today’s currency) is reserved for only the most catastrophic cases, involving severe brain injury or paralysis. So while the defendant accepts Ms. Wilhelmson has suffered severe injuries, he says the upper limit is not justified in this case, pointing by comparison to the following cases where near maximum non-pecuniary damages were awarded:*

*a)   Spehar v. Beazley, 2002 BCSC 1104; aff’d 204 BCCA 290. The plaintiff was 16 years old and suffered a severe traumatic brain injury which resulted in significant personality changes; she became argumentative and frustrated and her behaviour deteriorated to the degree that she fell under the influence of people who used her for criminal activities. An expert opined it was one of the most disappointing outcomes he had seen for traumatic brain injury. The court awarded $280,000.*

*b)   Morrison v. Cormier Vegetation Control Ltd., [1998] B.C.J. No. 3279. The 20 year old plaintiff suffered a very serious brain injury that damaged both frontal lobes, right temporal lobe and right occipital lobe. Her brain function was so seriously compromised that she could not manage her own affairs and a committee was appointed. She suffers from a number of serious mood, emotional, psychological and behavioural abnormalities. She was awarded the maximum in non-pecuniary damages.*

*c)   Dennis v. Gairdner, 2002 BCSC 1289. The plaintiff suffered a C4-5 spinal injury which rendered him a quadriplegic. He also suffers from spasticity, neurogenic bladder and bowel impairments and cannot perform tasks of self-care without assistance.*

*[**172]     The defendant also refers to two cases that he says are more helpful guidance to the facts before me in that the amount of damages was awarded because there were greater cognitive deficiencies suffered by the plaintiff than by Ms. Wilhelmson. In Claiter v. Rose et al, 2004 BCSC 50 the plaintiff suffered a traumatic brain injury and a fracture of the C2 vertebrae. His neck injury did recover, but he had severe impairment in his cognitive and daily functioning. He could only be left for short periods of time and while he could do some things for himself (such as drive, make a snack, do volunteer work at a basic level and help with household chores if prompted), the trial judge described him as a child in many ways. He was awarded the equivalent of $215,000.*

*[**173]     In Matthew v. Tattrie, 2009 BCSC 263, a 19 year old was injured in an accident and suffered a severe head injury from an assault. He was left with deficits in memory, concentration and executive function and both his strength and dexterity were impaired. He could not live independently without considerable assistance. He was awarded the equivalent of $244,000.*

*[**174]     The defendant submits even if there are significant differences between the injuries described in the preceding cases and Ms. Wilhelmson, the important feature is that those plaintiffs require near-constant supervision. While Ms. Wilhelmson will require assistance for many aspects of her life, she will have a significant degree of autonomy and independence. Thus, even though her injuries may cumulatively be greater, the defendant submits the impact on her life as that affects her future care is not as dire. In these circumstances, the defendant says $300,000 represents an appropriate award.*

*[**175]     The plaintiff points to a recent case as helpful guidance in terms of the analysis because of the similarity of the plaintiff’s age and outlook on life. In Symons v. ICBC, 2016 BCSC 1667, a 26 year old woman involved in a very serious rear end collision where it was estimated the “closing speed” (difference between vehicle travelling at 70km/hr rear ended by one travelling at 170 km/hr) was about 90 km/hour. This would result in much lower forces that Ms. Wilhelmson suffered given Mr. Dumma was travelling in the opposite direction of Mr. Salapura and driving over 150 km/hr.*

*[**176]     After the collision, Ms. Symons was released from hospital with pain medication and returned to work two months later, working for about two years with leg, neck and back pain, which the court took the view “she had to just push through”. At that point, it was discovered she had a disc protrusion at L5-S1 that required discectomy and another surgery the following year. The pain returned and she is very much restricted in recreational activities (that pre-accident included competitive horse riding). Her prospect of returning to work was poor and just prior to the accident she had start her own business, after working up north as a first aid attendant; she was also trained as a chef. She was under the care of psychiatrist, although her psychiatric injuries were not nearly as severe as Ms. Wilhelmson’s.*

*[**177]     Ms. Symons was awarded $200,000 for general damages, and the overall award for all heads of damages was over $2 million. Given the greater degree to which Ms. Wilhelmson’s physical injuries have negatively impacted her life, the plaintiff submits an award in the range of $325,000 to $360,000 is justified.*

***B. Analysis and Conclusion***

*[**178]     Turning first to the cases cited to me by counsel, Ms. Wilhelmson’s injuries were much more serious than Ms. Symons because of the severity of her psychiatric injuries, the probability that she is facing early degenerative effects in her spine and the effect her abdominal injuries have had on her ability to have children, among other things. But there was similarity in the two women’s prospect for work and daily pain.*

*[**179]     One of the cases the defendant cited could support an award at or near the maximum for Ms. Wilhelmson. While the plaintiff in Spehar was younger and suffered a severe traumatic brain injury, she did not suffer the severe physical injuries and ongoing pain that will characterize Ms. Wilhelmson’s future and thus a higher award is appropriate.*

*[**180]     The defendant pointed out that the cases to which he referred where the maximum or near-maximum award was made, all deal with people suffering a different category of injury: severe brain damage that has altered people’s independence and personality. The defendant points out that the plaintiffs in the cases he cites all require near-constant supervision, unlike Ms. Wilhelmson. However, that merely distinguishes those cases rather than providing support for the defendant’s position.*

*[**181]     The other problem with that argument is that the need for supervision is presumably accounted for in the awards for cost of future care. I am not suggesting the loss of independence is irrelevant to an award of pain and suffering, nor am I minimizing the negative impact that has on plaintiffs’ lives. But the Court of Appeal has cautioned against looking only at injuries in a categorical fashion when assessing general damages. I understand those remarks to recommend against a “tariff”-like approach to deciding the amount of damages that are appropriate.*

*[**182]     Moreover, I agree with the comments of Mr. Justice Davies at para. 519 in Hans v. Volvo Trucks North America Inc., 2016 BCSC 1155 that attempts to “differentiate an all-consuming debilitating psychological injury such as that suffered by Mr. Hans from the psychologically devastating injuries suffered by those diagnosed with traumatic brain injury would be artificial”. In making that statement, Mr. Justice Davies refers to Sangra (Guardian ad litem of) v. Lima, 2015 BCSC 2350 at para 94, where Justice Walker accepted that a plaintiff did not suffer catastrophic injuries in the limited sense that “he is not a quadriplegic or paraplegic, in a vegetative state, or requires around the clock care” but that “[o]therwise, his injuries are, on the whole, close to catastrophic”.*

*[**183]     The two cases the defendant refers to as being similar, with respect, are not. In neither case did the plaintiff suffer the extreme physical injuries that Ms. Wilhelmson has. Furthermore, the defendant concedes that she is entitled to some award greater than in those two cases because of the impact the accident has had on her ability to carry a child.*

*[**184]     The defendant says the “most” catastrophic injuries that justify the maximum award of damages are only those involving paralysis or severe brain injury. No case was cited to me that stated that principle and in my view, Walker J.’s comment in Sangra are inconsistent with that position.*

*[**185]     Moreover, I find it contrary to the proper approach to assessing general damages: “non-pecuniary damages must be assessed in light of the particular circumstances of the plaintiff” and “not … influenced by the legal limit: Hodgins v. Street, 2009 BCSC 673 at para. 79. The Supreme Court of Canada likened the legal limit it set in Andrews v. Grand & Toy (Alberta) Ltd., [1918] 2 S.C.R. 229 to a “legal ceiling, a rule of law and policy” which “operates like a governor, to limit the amount of the judgment”, but says that trial judges must assess what is appropriate in the circumstances without regard to that limit.*

*[**186]     Thus, my task is first and foremost to analyze the evidence before me and determine on that basis, what amount can properly compensate Ms. Wilhelmson for her pain, suffering and loss of enjoyment of life. I understood both counsel to agree they could find few cases that had enough similarities to be of precedential value on the issue of non-pecuniary damages. They conceded that my task in assessing general damages in this case, more so than in most motor vehicle cases, will depend upon fundamental principles of tort law rather than finding similar precedents for guidance.*

*[**187]     Non-pecuniary damages are compensation for the intangible impacts the accident has on the plaintiff for pain, suffering and loss of enjoyment of life. The question before me is whether the pain and suffering the accident has caused Ms. Wilhelmson justifies awarding her the maximum or near maximum amount of damages.*

*[**188]     I find that it does and I award her $367,000 in general damages.*

*[**189]     Even an incomplete list of the undisputed facts about her injuries and their impact amply demonstrates that Ms. Wilhelmson has been catastrophically injured:*

*a.            It is a miracle that Ms. Wilhelmson survived the crash. She had to be resuscitated back to life.*

*b.            She was in a medically induced coma for 25 days and spent a total of 39 days in intensive or traumatic care unit of VGH.*

*c.            She had 10 surgeries in her first month of hospitalization.*

*d.            Dr. Street describes her spinal injury as the worst he has seen. Her prognosis for that injury is negative in terms of the chronic, permanent pain, the possibility of future surgeries and the early degenerative changes he has already begun to see. This injury on its own justifies a sizable award for pain and suffering.*

*e.            Ms. Wilhelmson has had numerous complications from surgeries including repeated, serious bacterial infection requiring hospitalization, further surgery and aggressive antibiotic treatment.*

*f.            Her abdominal injuries are devastating. Her abdomen is severely scarred and disfigured. This alone justifies a large award for pain and suffering.*

*g.            She faces a likely future of complications arising from her abdominal injuries because of adhesions including bowel obstructions which can present as a medical emergency.*

*h.            Her clavicle injury was extremely serious.*

*i.              She will suffer chronic, permanent daily pain from the above injuries.*

*j.              She has permanent “pins and needles” and loss of sensation.*

*k.            She has an aortic stent.*

*l.              Her voice will never be the same and she is unlikely to be able to project her voice in a noisy environment.*

*m.           Although her hair has grown back, she has spots of permanent baldness.*

*n.            She suffers from moderate to severe PTSD and to this day, still suffers night-mares. This justifies a large award for pain and suffering.*

*o.            She has panic attacks and anxiety.*

*p.            She has great difficulty sleeping. It is an understatement to say her ability to cope with difficult or traumatic events in the future is fragile.*

*q.            These psychological injuries conditions make her more vulnerable to depression which she has had to a severe degree.*

*r.            She attempted suicide.*

*s.            She has difficulty concentrating, loses focuses and has trouble being organized.*

*t.              Her injuries have robbed her of the ability to earn income by working.*

*[**190]     She suffers all of these things because of the defendant’s negligence. Compounding her suffering is the fact that the accident also killed the love of her life just as they were beginning to plan a life together. The emotional impact of that cannot be discounted (see Dr. O’Shaughnessy). That loss, combined with the overall impact of all her injuries, has impaired the likelihood that she will be able to receive financial benefit from a life partner.*

*[**191]     In my view, one of the most compelling factors justifying a maximum award for pain and suffering is the fact that Ms. Wilhelmson endured the truly awful ordeal of having to abort a child that she wanted to carry. Some might argue her injuries should not be seen to be as severe as a woman who loses the ability to get pregnant, but I disagree. Ms. Wilhelmson faces a future where she might be fertile and might be able to get pregnant again, but cannot safely carry a child. Other than abstinence, no method of birth control is 100% effective. She therefore faces a possibility at the young age of 26 of again, getting pregnant and having to abort a child that she desperately wants to have.*

*[**192]     It is difficult to image a more agonizing situation facing a young woman who wants to have a family. This emotional pain cannot be compensated under any other head of damage and it is entirely different, in my view, from compensation that may be appropriate by way of surrogacy fees. This situation is unique to her and I find it is deserving of significant recognition in the award for non-pecuniary damages.*

*[**193]     Taking all of these factors into account, I find she is entitled to the maximum award of damages for non-pecuniary damages and I award her $367,000. The plaintiff submitted she is entitled to the maximum, but only sought $360,000 based on counsel’s understanding that the maximum was reserved for cases involving paralysis and/or severe brain injury. I do not find the case law cited to me to support that supposition and therefore the plaintiff is entitled to the maximum.*

For a commentary on the past inadequacies of non-pecuniary damage awards when compensating female plaintiffs, please see pages 138 & 151-155 the following case comment on *Wilhelmson:*

* (*You're) Having My Baby: Surrogacy Fees as a Cost of Future Care Award in Canadian Tort Law*, 2019 [CanLIIDocs 372](https://www.canlii.org/en/commentary/doc/2019CanLIIDocs372?zoupio-debug#!fragment/zoupio-_Tocpdf_bk_2_2/(hash:(chunk:(anchorText:zoupio-_Tocpdf_bk_2_2),notesQuery:'',scrollChunk:!n,searchQuery:'non-pecuniary%20damages',searchSortBy:RELEVANCE,tab:search)))

For discussion: What is your opinion on the differences of approaches taken by Hinkson, C.J.B.C and Sharma, J. when awarding non-pecuniary damages?

On the issue of lost housekeeping capacity, in *Ali v. Stacey,*[2020 BCSC 465](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc465/2020bcsc465.html), Gomery, J. has tried to reconcile two decisions of the Court of Appeal addressing claims for loss of housekeeping capacity; *Kim v. Lin,*[2018 BCCA 77](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html) at paras. [27–37](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html#par27), and *Riley v. Ritsco,*[2018 BCCA 366](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca366/2018bcca366.html) at paras. [96–103](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca366/2018bcca366.html#par96).  He concluded:

[67]      Read together, these two judgments establish that a plaintiff’s claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:

a)   The first question is whether the loss should be considered as pecuniary or non-pecuniary.  This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim*at para. [33](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html#par33).

b)   If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley*at para. [101](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca366/2018bcca366.html#par101).

c)   A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim*at para. [31](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html#par31).  It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim*at para. [44](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html#par44).

d)   Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley*at para. [102](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca366/2018bcca366.html#par102).

Lost Housekeeping and Childcare Capacity will be revisited when we discuss Pecuniary Damages next week.

**1.7 Exception to the Trilogy Cap: Sexual assault**

The assessment of non-pecuniary damages in sexual abuse cases is incredibly challenging. In many cases the plaintiff suffers physical and emotional injuries, addiction, poverty, and numerous other ailments, the causation of which is not fully understood, but the correlation exists.

In [*S.Y. v. F.G.C*](http://www.canlii.org/en/bc/bcca/doc/1996/1996canlii6597/1996canlii6597.html)*.,* [1996 CanLII 6597 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1996/1996canlii6597/1996canlii6597.html?autocompleteStr=%5B1997%5D%201%20WWR%20229%20&autocompletePos=1) the BC Court of Appeal articulated the principles to be applied in determining non-pecuniary damages for sexual abuse and also considered aggravating factors/damages as part of the non-pecuniary award. In the S.Y case the Plaintiff was the victim of sexual abuse. At trial a Jury awarded her $650,000 including $350,000 for non-pecuniary and aggravated damages. This amount greatly exceeded the Canadian cap on non-pecuniary damages which was at $260,000 at the time. The Defendant appealed arguing that non-pecuniary damages in sex assault cases are caught by the trilogy therefore the Jury’s award was in excess of what was permitted by law. The Court of Appeal confirmed the cap does not apply to sexual abuse cases but nonetheless reduced the non-pecuniary damages to $250,000, effectively within the cap.

*50 The foregoing cases present a variety of circumstances, and describe differing degrees of harm caused by sexual abuse. They exemplify the difficulty of giving solace or satisfaction to a person who has been abused by one he or she was entitled to trust, and who may suffer from the psychological impact of that abuse for years to come. What amount of money is sufficient as a substitute for lost pleasures and amenities, and as compensation for what yet remains to be suffered? Prior to 1990 a respected judge thought $40,000 to be sufficient. Within about five years other judges of the same Court thought $80,000 - $85,000 to be fair. Now awards by judges appear to range from about $100,000 to $175,000. It is understandable that juries, without guidance as to the range of awards in comparable cases, may have more difficulty than judges in keeping their emotions under control, and in making awards as a result of reasoned analysis.*

*53 In cases of this kind, where the aggravating factors are so serious, and where damages for long-term psychological injury are so difficult to assess, I think that great deference ought to be given to juries who have seen and heard the witnesses, and who reflect the public view of such matters. Having said that, I am of the firm opinion that the award of $350,000 for general damages including aggravated damages is not only high, but wholly out of proportion.*

*54 I have come to that conclusion because the award at bar is twice what was awarded in P.B. v W.B. supra, which at the time was regarded as the "worst case". It is also twice what was awarded in S.L.C. v. M.J., supra which was regarded as a "most serious case". I pause to observe that the amount awarded in this case indicates clearly that the jury saw the case as a most serious case.*

*55 What is fair and reasonable compensation for general damages, including aggravated damages, in this case is not easy to say.* ***This is an evolving area of the law. We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement****. [Emphasis added]*

*56 Comparison with the awards made in similar cases is helpful in maintaining consistency, and therefore giving fair and equivalent treatment to all victims. But the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.*

*57 Critical to any assessment is the view which the trier of the facts takes of aggravating features. In this case the jury was entitled to consider a number of very significant aggravating factors. The defendant occupied* ***a position of trust*** *with respect to this child. Instead of providing an environment for a happy childhood, and for normal development of character, he made her childhood a nightmare. After seven years she told her mother. His response was not remorse. It was anger at being exposed. In different ways, he continued the abuse until life became so unbearable that the girl left home. The psychiatric evidence indicated the extent of the impact on the plaintiff, and on her relationships with others. She needs a great deal of help in dealing with the psychological trauma she has suffered.* ***Another aggravating feature is the defendant's response to the claims made by the plaintiff. He did not admit liability.*** *His response was to threaten the plaintiff, her mother, and the family doctor. The jury may have taken into account that he did not testify in order to mitigate his conduct, or to apologize.*

*58 The jury had before it evidence of many of the aggravating factors noted in similar cases. These include the relationship between the parties, the number of assaults, the ages at which those assaults occurred, the frequency and duration of the abuse, the degree of violence and coercion, the nature of the abuse, and the physical pain and mental suffering associated with it.*

*59 In my opinion an award of $250,000 would not have been wholly out of proportion in view of the factors open for consideration by the jury.*

In *Water v. Bains*, [2008 BCSC 823](https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc823/2008bcsc823.html?autocompleteStr=2008%20BCSC%20823&autocompletePos=1), the plaintiff sued her aunt and uncle for childhood sexual abuse by the uncle, commencing in 1966 when the plaintiff was just eight years old, continuing until she was 18. The aunt was held liable in negligence for failing to take reasonable steps to prevent the abuse; it was also alleged, and found as fact, that the aunt conspired to have an IUD inserted into the plaintiff at the onset of her puberty, at age 12 or 13, to prevent an unwanted pregnancy by the uncle. Morrison J. was referred to the damages awarded not only in the historical sexual assault cases, but also in defamation cases, such as *Hill v. Church of Scientology of Toronto,* where the Supreme Court of Canada upheld a jury’s award of $800,000 in general and aggravated damages, and $800,000 in punitive damages. Morrison, J. awarded $325,000 in general and aggravated damages, and punitive damages of $80,000. This 12-year-old case currently stands as the high-water mark for general damages awards for sexual abuse in B.C. In today’s dollars, applying inflation, it is the equivalent of $388,500.

In *John Doe* v. *The Roman Catholic Episcopal Corporation of St. John’s*[*,* 2020 NLCA 27](https://www.canlii.org/en/nl/nlca/doc/2020/2020nlca27/2020nlca27.html#related), leave to appeal to SCC refused [2021 CanLII 1097 (SCC)](https://www.canlii.org/en/ca/scc-l/doc/2021/2021canlii1097/2021canlii1097.html), aff’g [2018 NLSC 60](https://www.canlii.org/en/nl/nlsc/doc/2018/2018nlsc60/2018nlsc60.html?resultIndex=1#document), four Mt. Cashel Orphanage victims brought action against “The Roman Catholic Episcopal Corporation of St. John’s” (the “Archdiocese”), what the court describes at paragraph 20 as the “corporate personality of the Catholic Church in the eastern portion of the island of Newfoundland, with its head office in St. John’s”. The plaintiffs submitted the Archdiocese was both vicariously and directly liable in negligence for the intentional wrongs of the Christian Brothers. While the Court declined to find liability against the Archdiocese on the facts available, it nonetheless engaged in an assessment of each of the plaintiffs’ damages and all heads of damages. One plaintiff, R.H., was consistently singled out and abused at age 13, 3-4 times per week, for a period of 1.5-2 years. The conduct included fondling of his genitals and buttocks, but *no intercourse* (the court described this as “at the low to moderate end of the intrusive scale”). Nonetheless, the impact was severe. He suffered from alcoholism and depressive disorders; both affected his ability to engage in the workforce. Despite the court’s consideration of his pre-existing adversities, including the fact he was an orphan, the sexual abuse “made the difference in his life” (at para. 584).

The court provisionally awarded $750,000 in non-pecuniary damages, inclusive of aggravated damages, in the following amounts to the four plaintiffs:

* J.E. received a non-pecuniary award of $125,000, inclusive of $25,000 for aggravated damages;
* E.F. received a non-pecuniary award of $240,000, inclusive of $40,000 for aggravated damages
* R.H. received a non-pecuniary award of $325,000, inclusive of $50,000 for aggravated damages;
* R.S. received a non-pecuniary award of $60,000.

In *MacLeod v. Marshall and the Basilian Fathers of Toronto, et al,* [2019 ONCA 842](https://www.canlii.org/en/on/onca/doc/2019/2019onca842/2019onca842.html?resultIndex=1),leave to appeal to SCC refused [2020 CanLII 30830 (SCC)](https://www.canlii.org/en/ca/scc-l/doc/2020/2020canlii30830/2020canlii30830.html), aff’g File No. CV-13-481825 (Jury Award), (re punitive and economic damages), Roderick MacLeod was abused during his teen years by a Catholic priest and teacher, William Hodgson Marshall, approximately 50 times. The jury awarded general damages of $350,000 and aggravated damages of $75,000, for a total of $425,000. While the defendants appealed on other grounds, they did not appeal the award for general and aggravated damages.

[If you have an interest in learning more about the *MacLeod v. Marshall* trial, there is a documentary on TVO called [*Prey*](https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwih2v_8g8P1AhUiM30KHej1BdwQwqsBegQIAhAB&url=https%3A%2F%2Fwww.tvo.org%2Fvideo%2Fdocumentaries%2Fprey-feature&usg=AOvVaw3lBtIDRu46NzEfpsvyrIvG)*.*

In ***Anderson v. Molon,*** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?autocompleteStr=2020%20BCSC%201247&autocompletePos=1), Crossin J. awarded the adult sexual assault complainant $275,000 in non-pecuniary damages. In making this award, he provided the following analysis:

*[**214]     The plaintiff seeks non-pecuniary damages in the amount of $425,000, inclusive of aggravated damages. This is close to, or beyond the upper limit on pecuniary damages set by the Supreme Court of Canada in Andrews v. Grand & Toy Alberta Ltd., 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229, which she says does not or ought not to apply to cases of sexual assault.*

*[**215]     In support of this quantum, the plaintiff cites the Ontario case of MacLeod v. Marshall, 2019 ONCA 842 [MacLeod], in which a jury awarded the victim of a historical sexual assault $425,000 in non-pecuniary damages, including $75,000 of aggravated damages. In addition, she cites Waters v. Bains, 2008 BCSC 823 ($325,000), and John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John’s, 2018 NLSC 60 ($320,000), both cases of sexual battery.*

*[**216]     The Diocese submits that an award in the range of $50,000–$60,000 is appropriate in the circumstances. The cases it cites, however, are dated, readily distinguishable, and of little assistance: Norberg; D.C.B. v. Boulianne, [1996] B.C.J. No. 2183; Gates v. MacDougall, et al, 2006 BCSC 1919.*

*[**217]     In the case at bar, the plaintiff was a young woman at a vulnerable time in her life. The abuse she suffered was protracted and ongoing. The plaintiff’s encounters with Fr. Molon were degrading and highly invasive. Fr. Molon occupied a position of trust and authority. He abused that trust to exploit the plaintiff repeatedly over months. When confronted with this misconduct, the only evidence before the court suggests he was wholly indifferent and dismissive of the ramifications of what he was doing.*

*[**218]     Even taking the plaintiff’s pre-existing condition into account, I find the assaults had a profound effect upon the plaintiff’s psychological well-being. Fr. Molon’s abuse caused the plaintiff pain, anguish, grief, and humiliation. It deeply affected her self-confidence. She has carried these wounds throughout her life.*

*[**219]     The present circumstances resemble those of the cases cited by the plaintiff much more closely than those cited by the defendant. In my view, an award of $275,000, inclusive of aggravated damages, is appropriate in light of the aggravating factors described above, and the severe effect of the abuse on the plaintiff’s well-being and quality of life, making due allowance for the plaintiff’s pre-existing condition.*

**1.8 Minor Injury Cap – MVAs after April 1, 2019 but before May 1, 2021**

* For motor vehicle accidents occurring after April 1, 2019, non-pecuniary damages for injuries that fall under the definition of “minor injury” are capped at $5,500. The two key pieces of legislation on this topic at the ***Insurance (Vehicle) Act*, RSBC 1996, c 231 [the *Act*]** and the **Minor Injury Regulation, BC Reg 234/2018 [the *Regulation*]**.
* Despite the cap on non-pecuniary damages, the other heads of damage remain “un-capped” (i.e. past/future income losses, loss of housekeeping capacity, future care, in-trust claims, etc.)
* What injuries fall under the definition of “minor injury”?
* Section 101(1) of the ***Act*** defines “minor injury” and “serious impairment”:

**“minor injury**” means a physical or mental injury, whether or not chronic, that

1. Subject to subsection (2), does not result in a serious impairment or a permanent serious disfigurement of the claimant, and
2. Is one of the following:
3. An abrasion, a contusion, a laceration, a sprain or a strain;
4. A pain syndrome;
5. A psychological or psychiatric condition;
6. A prescribed injury or an injury in a prescribed type or class of injury;

“**serious impairment”**, in relation to a claimant, means a physical or mental impairment that

1. Is not resolved within 12 months, or another prescribed period, if any, after the date of the accident, and
2. Meets prescribed criteria.
* Section 2 of the ***Regulation*** provides the prescribed injury for definition of “minor injury”:

2. The following injuries are prescribed injuries for the purposes of paragraph (b) (iv) of the definition of “minor injury” in section 101 (1) of the Act:

(a) a concussion that does not result in an incapacity;

(b) a TMJ disorder;

(c) a WAD injury.

* Section 1 of the ***Regulation***sets out the following definitions:

**“incapacity”,** in relation to a claimant, means a mental or physical incapacity that

1. Is not resolved within 16 weeks after the date the incapacity arises, and
2. Is the primary cause of a substantial inability of the claimant to perform
3. Essential tasks of the claimant’s regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant’s incapacity and the claimant’s reasonable efforts to use the accommodation to allow the claimant to continue the claimant’s employment, occupation or profession,
4. The essential tasks of the claimant’s training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant’s incapacity and the claimant’s reasonable efforts to use the accommodation to allow the claimant to continue the claimant’s training or education, or
5. The claimant’s activities of daily living;

**“activities of daily living”** means the following activities:

1. Preparing own meals;
2. Managing personal finances;
3. Shopping for personal needs;
4. Using public or personal transportation;
5. Performing housework to maintain a place of residence in acceptable sanitary condition;
6. Performing personal hygiene and self-care;
7. Managing personal medication;

**“pain syndrome”** means a syndrome, disorder or other clinical condition associated with pain, including pain that is not resolved within 3 months;

**“psychological or psychiatric condition”** means a clinical condition that

1. Is of a psychological or psychiatric nature, and
2. Does not result in an incapacity;

**“sprain”** means an injury to one or more ligaments unless all the fibres of at least one of the injured ligaments are torn;

**“strain”** means an injury to one or more muscles unless all the fibres of at least one of the injured muscles are torn;

* Efforts must be made to accommodate an impairment and to continue employment, training/education, or activities daily living. Section 3 of the ***Regulation*** sets out the prescribed criteria for the definition of “serious impairment”:

**3**  For the purposes of paragraph (b) of the definition of "**serious impairment**" in section 101 (1) of the Act, the claimant's physical or mental impairment must meet the following prescribed criteria:

(a)the impairment results in a substantial inability of the claimant to perform

(i)the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(ii)the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or

(iii)the claimant's activities of daily living;

(b)the impairment is primarily caused by the accident and is ongoing since the accident;

(c)the impairment is not expected to improve substantially.

* Section 101(2)-(3) of the ***Insurance (Vehicle) Act*** establishes that serious impairment caused by a failure to mitigate what was once a “minor injury” continues to be deemed a minor injury:

(2)Subject to subsection (3) and the regulations, an injury that, at the time of the accident or when it first manifested, was an injury within the definition of "minor injury" in subsection (1) is deemed to be a minor injury if

(a)the claimant, without reasonable excuse, fails to seek a diagnosis or comply with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury, and

(b)the injury

(i)results in a serious impairment or a permanent serious disfigurement of the claimant, or

(ii)develops into an injury other than an injury within the definition of "minor injury" in subsection (1).

(3)An injury is not deemed, under subsection (2), to be a minor injury if the claimant establishes that either of the circumstances referred to in subsection (2) (b) would have resulted even if the claimant had sought a diagnosis and complied with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury.

* Section 5 of the ***Regulation***sets out that where a claimant sustains more than one injury in an accident, each injury is to be diagnosed separately as to whether the injury is a “minor injury”. If there are both minor injuries and non-minor injuries, the cap applies to the damages for the non-minor injuries.
	+ For example, if a claimant sustains a broken leg and soft tissue injuries, the cap applies to the soft tissue injuries. The non-pecuniary damages for the broken leg will not be capped.
	+ Damages for non-pecuniary damages is limited to $5,500 for all of the minor injuries combined.
* Revisiting the question: What injuries fall under the definition of “minor injury”?
	+ Is a concussion a “minor injury”?
* The ICBC website sets out that where an injury continues to impact a claimant’s life for more than 12 months (i.e. unable to go to work or school, have to modify work hours/duties, or unable to care for self), the injury will no longer fall under the definition of “minor injury”.
* Who determines whether a claimant’s injury is “minor”? The claimant’s physician. However, if the physician is unable to make a clear diagnosis, the claimant is not recovering as expected, or factors are present that complicate the claimant’s recovery from the injury, the physician must refer the claimant to a “registered care advisor”. The registered care advisor must then assess the claimant’s injury within 15 days and provide a report outlining the diagnosis or treatment of the claimant’s injury within 10 days.
* If a dispute arises over what is or is not a minor injury, a claim may be brought through the Civil Resolution Tribunal (the “CRT”). Under section 133(1)(a) of the ***Civil Resolution Tribunal Act,* SBC 2012, c 25**, the CRT has jurisdiction in determining whether an injury is a “minor injury” for the purposes of the ***Act***.
* Who has the burden of proving that an injury is or is not “minor”?
	+ Section 4 of the ***Regulation***: “In civil proceedings relating to an injury, the burden of proof that the injury is not a minor injury is on the party making the allegation that it is not a minor injury.”

**1.9 Pain & Suffering compensation under the new No Fault regime**

Due to the fact that injury claims arising out of a motor vehicle accident have been statutorily barred by [s. 115 of the *Insurance (Vehicle) Act,* RSBC 1996, c 231](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96231_01#section115), it is currently not possible to sue for compensation of **any type** for damages arising from motor vehicle related injuries.

Woodin, Hayley, “Features, faults of no-fault auto insurance: New ICBC regime increases care costs, but cuts drivers’ ability to sue for pain and suffering,” *Business in Vancouver,* February 19, 2020: [**https://biv.com/article/2020/02/features-faults-no-fault-auto-insurance**](https://biv.com/article/2020/02/features-faults-no-fault-auto-insurance)**:**

*Chuck Byrne, executive director of the Insurance Brokers Association of BC (IBABC), said that greater allowances for care and* ***new permanent impairment compensation*** *will compensate for a lot of the same things, even though the definitions differ from those of pain and suffering.* ***ICBC’s proposed impairment compensation would award a maximum amount of $250,000 for injury impairments that last a lifetime****.*

Under the new regime, if you are permanently impaired, ICBC will exercise its discretion to assign you into an impairment level for a lump-sum amount. If the injury is catastrophic, the “permanent impairment benefit”, paid in a lump sum, is $264,430 (well below the Trilogy Cap with inflation). For a non-catastrophic injury, the amount assigned ranges between $836 and $167,465.

.See: [Enhanced Accident Benefits Regulation (gov.bc.ca)](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/59_2021)

**1.10 Aggravated and Punitive Damages**

1. Overview

Reprehensible conduct may give rise to aggravated and/or punitive damages. But these heads of damage are distinct in nature.

Aggravated damages are *compensatory* as non-pecuniary damages, while punitive damages are intended to be punishment for wrongdoing and are awarded under a separate head (and are hence not non-pecuniary in nature).

Aggravated damages require proof of injury while punitive damages do not

Punitive damages require a separate actionable wrong (i.e. a breach of the duty of good faith) whereas aggravated damages may only require evidence of injury resulting from a breach of the contract (i.e. mental distress caused by breach of a “peace of mind” contract)

While it may be presumed that the upper limit on damages established by the Supreme Court in the trilogy (the “cap”) likely applies to aggravated damages there is no upper limit on punitive damages.

1. Aggravated Damages

Aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done; exemplary / punitive damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment - moral retribution or deterrence. Aggravated damages are commonly described as being awarded for conduct which shocks the plaintiff, while exemplary awards are for conduct that shocks the court.

Aggravated damages are available as additional compensation if the insured establishes that a breach of that contract caused her mental distress - *Fidler v Sun Life Assurance Co. of Canada,* [2006 SCC 30](https://www.canlii.org/en/ca/scc/doc/2006/2006scc30/2006scc30.html?autocompleteStr=2006%20SCC%2030&autocompletePos=1)

There must be actual evidence of aggravation and mental distress - *Fidler*

However, no independent, extra-contractual actionable wrong need be proven for such damages to be awarded. – *Fidler; Warrington* *v Great-West Life Assurance Co.* [1996 CanLII 1443 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1996/1996canlii1443/1996canlii1443.html?autocompleteStr=Warrington%20v%20Great-West%20Life%20Assurance%20Co&autocompletePos=1))

No one rule as to damages can be adopted to fit every case - as the circumstances differ, so must the rule.

Damages are more modest and are tied to the evidence of injury to the plaintiff. The typical range is from $10,000 to $100,000 but more often at the lower end.

In [*S.Y. v. F.G.C*](http://www.canlii.org/en/bc/bcca/doc/1996/1996canlii6597/1996canlii6597.html)*.,* [1996 CanLII 6597 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1996/1996canlii6597/1996canlii6597.html?autocompleteStr=%5B1997%5D%201%20WWR%20229%20&autocompletePos=1) the Court of Appeal discussed the interplay between non-pecuniary damages and aggravated damages as follows:

35 I begin by noting that general damages in most cases are assessed taking into account any aggravating features of the case. Those aggravating features may increase the amount awarded. Aggravated damages must be distinguished from punitive damages: Norberg v. Wynrib (1992), 68 B.C.L.R. 29 at 54 (S.C.C.).

36 In my opinion aggravated damages are not a separate head of damages. They are a part of general damages. Juries ought not to be instructed as if they are a separate category of damages, particularly in cases of sexual abuse where it is difficult to separate the physical harm, which is often of much less significance than the fright, misery and humiliation connected with it, and the continuing mental suffering from it.

37 The trial judge properly instructed the jury that part of the award for non-pecuniary loss or compensatory damages was for pain, injury, suffering and discomfort, and for the negative effect of those injuries on the plaintiff's *enjoyment of life. He referred to aggravated damages as the "second item under compensatory damages". He properly instructed the jury that aggravated damages could be included in the award of compensatory damages for injury to the plaintiff's feelings, dignity, pride and self respect. He also told the jury that they were entitled to find that stripping the plaintiff of her sexual innocence was "an act of the most aggravated nature".*

*38 In my opinion the trial judge did not err in his instructions on compensatory damages. It would not have been appropriate in the circumstances of this case to instruct the jury that aggravated damages should be modest. There were significant aggravating circumstances, the most important of which was the serious and extended breach of a stepfather's duty of trust towards his stepdaughter. The number of assaults, the duration of the abuse, the age of the plaintiff, the degree of violence and coercion, and the extent of penetration are all aggravating factors.*

See also ***Anderson v. Molon,*** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?autocompleteStr=2020%20BCSC%201247&autocompletePos=1)*,* at para. 212:

*[**212]     In addition, aggravated damages may be warranted if the tort occurred in humiliating or undignified circumstances: B.M.G. v. Nova Scotia (Attorney General), 2007 NSCA 120 at para. 131. The nature of an award of aggravated damages was explained in Huff v. Price (1990), 1990 CanLII 5402 (BC CA), 51 B.C.L.R. (2d) 282 at 299 as follows:*

*…aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff’s suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff’s life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage award is for aggravation of the injury by the defendant’s high-handed conduct.*

1. Punitive Damages

The courts have been relatively clear in defining the circumstances in which punitive damages should be awarded. In an authoritative decision on point, the Supreme Court of Canada, in the case of *Hill v. Church of Scientology of Toronto* [[1995] 2 SCR 1130](https://www.canlii.org/en/ca/scc/doc/1995/1995canlii59/1995canlii59.html?autocompleteStr=Hill%20v.%20Church%20of%20Scientology%20of%20Toronto%20&autocompletePos=1) held:

*Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and highhanded that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.*

Accordingly, for an award of punitive damages to be made, two requirements must be met. First, the defendant must have committed an independent or separate actionable wrong causing damage to the plaintiff. Secondly, the defendant's conduct must be sufficiently harsh, vindictive, reprehensible and malicious as to attract such an award. Whether the second arm of the test is met, in any particular lawsuit, is a question of fact based on the circumstances which evolved between the parties. The first arm of the test, however, tends to be more of a legal issue.

Punitive or exemplary damages are generally only available in Canada where there is proof of malicious conduct on the part of the defendant. Canadian courts are generally careful in exercising their discretion to award these damages, which are an exception to the time-honored principle that civil damages seek to compensate the victim. As the term implies, "punitive" damages are meant to punish the offending party rather than to compensate the plaintiff. There are two sources of punitive damages in Canada - the Common Law and statutes.

It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

The following are the essential factors a court will consider when determining an award of punitive damages:

* + - 1. Punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant;
			2. Punitive damages should take into account any other fines or penalties suffered by the defendant for the misconduct in question;
			3. Punitive damages should generally only be awarded where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation;
			4. The purpose of punitive damages is to give the defendant her or his “just deserts”, deter the defendant, and others, from similar misconduct, and to mark the community’s collective condemnation of what has happened. Punitive damages are only awarded when compensatory damages are insufficient to accomplish these objectives;
			5. Punitive damages are awarded in an amount that is no greater than necessary to accomplish their purposes and are generally moderated; and
			6. The court should assess whether the conduct of a defendant should be punished over and above the requirement to pay non-pecuniary, pecuniary and aggravated damages.

*Thomson v. Friedmann*, [2008 BCSC 703](https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc703/2008bcsc703.html?autocompleteStr=2008%20BCSC%20703%20&autocompletePos=1) at para. 33 aff’d [2010 BCCA 277](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca277/2010bcca277.html?autocompleteStr=2010%20BCCA%20277&autocompletePos=1),
referring to *Whiten v. Pilot Insurance Co.*, [2002 SCC 18](https://www.canlii.org/en/ca/scc/doc/2002/2002scc18/2002scc18.html?autocompleteStr=2002%20SCC%2018&autocompletePos=1)

In *Macleod v. Marshall et al., supra,* the jury awarded punitive damages of $500,000 against the Basilian Fathers of Toronto, recently upheld by the Ontario Court of Appeal: [2019 ONCA 842](https://www.canlii.org/en/on/onca/doc/2019/2019onca842/2019onca842.html?autocompleteStr=2019%20ONCA%20842&autocompletePos=1). The jury gave the following particulars of the conduct meriting the punitive damages award:



In ***Anderson v. Molon,*** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?autocompleteStr=2020%20BCSC%201247&autocompletePos=1), Crossin J. made the most-significant judge-made award in Canadian history as against the Roman Catholic Church:

*[**246]     In addition to compensatory damages, the plaintiff seeks punitive damages against both Fr. Molon, and the Diocese.*

*[**247]     Punitive damages are an exceptional remedy. The law governing punitive damages was helpfully set out by Justice Watchuk in West Bros. Frame & Chair Ltd. v. Yazbek, 2019 BCSC 1844 at paras. 223–226:*

*[223]   Punitive damages are unlike any other form of damages. Their purpose is not to compensate, but to punish. Similar to a criminal penalty, punitive damages are driven by a logic of retribution, denunciation and deterrence: Whiten v. Pilot Insurance Co., 2002 SCC 18 at para. 111.*

*[224]   Courts should only resort to an award of punitive damages in exceptional circumstances. Such an award should only made in response to conduct that “harsh, vindictive, reprehensible and malicious in nature” as well as “extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment”: Vorvis v. Insurance Corporation of British Columbia, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085 at 1108. Punitive damages should be awarded to deter conduct only if compensatory damages are insufficient to do so: Whiten at para. 94.*

*[225]   Punitive damages must be tailored to the defendant’s culpability. In Whiten, Binnie J. identified the following factors in assessing the blameworthiness of a defendant’s conduct at para. 113:*

*(a)        whether the conduct was planned and deliberate;*

*(b)        the intent and motive of the defendant;*

*(c)        whether the defendant persisted in the outrageous conduct over a lengthy period of time;*

*(d)        whether the defendant concealed or attempted to cover up its misconduct;*

*(e)        the defendant’s awareness that what he or she was doing was wrong;*

*(f)        whether the defendant profited from its misconduct; and*

*(g)        whether the interest violated by the misconduct was known to be deeply personal or irreplaceable.*

*[226]   In addition, an award of punitive damages must be:*

*(a)        proportionate to the degree of vulnerability of the plaintiff;*

*(b)        proportionate to the harm or potential harm directed specifically at the plaintiff;*

*(c)        proportionate to the need for deterrence;*

*(d)        proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct;*

*(e)        proportionate to the advantage wrongfully gained by a defendant from the misconduct: Whiten at paras. 114-126.*

*[**248]     I have concluded an award of punitive damages is clearly warranted against Fr. Molon. Fr. Molon’s conduct was an egregious, and indeed reprehensible, abuse of power. He exploited the vulnerability of a young woman entrusted to his care to engage in a prolonged and repeated course of sexual exploitation. His conduct was clearly wrong, by the standards of any time. He also demonstrated a brazen indifference to the harm caused by his actions.*

*[**249]     Although these concerns are addressed to some extent in the award of aggravated damages, I do not consider an award of aggravated damages alone to provide sufficient denunciation of this reprehensible conduct. In light of the blameworthiness of Fr. Molon’s conduct, his position of trust and authority, and the vulnerability of the plaintiff to his abuse, I consider an award of punitive damages in the amount of $250,000 to be appropriate in this case, in addition to the compensatory damages already awarded.*

*[**250]     The plaintiff’s claim for punitive damages against the Diocese is less clear. As explained in Whiten v. Pilot Insurance Co., 2002 SCC 18 (at para. 67) “[i]t is in the nature of the remedy that punitive damages will largely be restricted to intentional torts.” Nevertheless, punitive damages have been awarded in cases of negligence, where the conduct of the defendant is sufficiently egregious to merit condemnation by the court: Whiten at para. 67; Robitaille v. Vancouver Hockey Club Ltd. (1981), 1981 CanLII 532 (BC CA), 124 D.L.R. (3d) 228 (BCCA).*

*[**251]     Once again, the plaintiff relies on MacLeod, where the jury made an award of punitive damages in the amount of $500,000. Similar to that case, the plaintiff in her submissions attempted to paint a picture of a culture of pervasive secrecy in the Diocese; a culture that systematically buried allegations of abuse, blamed victims for their own trauma, and shielded abusers from accountability. This submission was not made out on the evidence before me.*

*[**252]     Nevertheless, I am persuaded that an award of punitive damages against the Diocese is merited in this case on the basis of its direct liability in negligence.*

*[**253]     The Diocese failed the plaintiff profoundly in a moment of great need. Bishop Exner was aware of troubling rumours about Fr. Molon as early as the spring of 1976. These rumours were all but confirmed when he confronted Fr. Molon. He knew that Fr. Molon’s conduct put the spiritual and psychological well-being of his parishioners at risk. He chose not to act. As he himself admitted, this resulted in a serious violation of trust.*

*[**254]     I have found Bishop Exner was candid about his failings, and expressed regret that he did not act to prevent the plaintiff’s abuse. His conduct was not vindictive or malicious. Nevertheless, his failure to act fell egregiously short of the standard of care required of a person in his position of trust and authority. It was, in my view, a purposeful and reprehensible omission, which merits the condemnation of the court. The compensatory damages already awarded against the Diocese are not sufficient, in my view, to address the blameworthiness of this conduct. I consider an award of $150,000 to be warranted in these circumstances.*

In motor vehicle litigation, in *Arsenovski v. Bodin*, [2016 BCSC 359](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc359/2016bcsc359.html?autocompleteStr=2016%20BCSC%20359&autocompletePos=1), the BC Supreme Court awarded punitive damages of $350,000 in condemnation of ICBC’s malicious prosecution of the plaintiff. In making this order, Griffin J. ruled that people involved in car accidents “must be protected from abuses of power by ICBC and its SIU officers.”

In *Howell v. Machi,* [2017 BCSC 1806](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc1806/2017bcsc1806.html?autocompleteStr=2017%20BCSC%201806&autocompletePos=1), MacNaughton J. awarded $100,000 in punitive damages to a pedestrian plaintiff struck by a motorist with a suspended license who fled the scene of the collision; the defendant’s conduct was viewed as reprehensible.

On his retirement, in his “exit interview” with the Globe and Mail, Binnie J. – the voice of the majority in *Whiten* said this about their decision to uphold the punitive damages award:

*… we upheld the outcome and it seemed to me that on a human scale, a massive injustice had been corrected and a very powerful message sent to the insurance industry. Occasionally, you feel that you have really made a difference.*

Makin, Kirk, [Transcript, The Globe and Mail,](https://www.theglobeandmail.com/news/national/justice-ian-binnies-exit-interview/article555452/)
“Justice Ian Binnie’s Exit Interview,” 23/SEPT/2011