

Leading Liability Developments: National Round Up of Leading Cases

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- Liability Case Law Overview
- Procedural Case Law Overview
- Damages Case Law Overview



Occupiers Liability: Onus on Plaintiff

Charlie v. Canada Safeway Ltd.

BCCA April 2011

Plaintiff must still prove that there
was a substance on the floor
which caused her to slip and fall

Plaintiff had no direct evidence of
cause of fall



Occupiers Liability: Proof of System

Foley v. Imperial Oil Ltd.

BCCA June 2011

Onus rests on occupier to demonstrate a system that was appropriate *and* that the system functioned on the date of loss

System in question was inadequate to deal with snow and ice (reactive as opposed to proactive)



Liability Waivers

Loychuk v. Cougar Mountain

BCSC February 2011

Zip-line plaintiffs collide mid-air at
100km/hour

Negligence conceded

Plaintiffs did not intend to waive rights for
defendant's own negligence

Waivers of Liability complete defence,
valid consideration, not unconscionable

Appeal December 14, 2011



Directors and Officers Coverage

Dunn v. Chubb Insurance

Company of Canada

OCA January 2011

Chubb pays full defence even
though some acts alleged were out
of the Chubb policy period

Enforcement of 90% payment rule



Law Enforcement & Investigation *Wellington v.* *Ontario and SIU*

OCA April 2011

Police pursuit of 15 yr old driving van,
confrontation and fatal shooting of youth

Family sued officers but also Ontario and
SIU for negligent investigation

No duty of care owed by SIU to specific
public or victims' family, conflicts with
duty to public in general



Additional Insureds

Dominion of Canada v. ING Insurance

Ont. Div. Ct. June 2011

Slip and fall in parking lot at banquet hall

No duty to defend landlord where landlord
responsible for condition of parking lot

Fall did not “arise” out of use of banquet
hall



Municipal Winter Maintenance

Billings v. Mississauga

OCA 2011

Gross negligence v. reasonable system during “runner-up on its list of the top ten Canadian weather stories of 2003”

Evidence of resources and priorities, roads v. sidewalks, even though delay of days after storm started, “everything humanly possible”

Plaintiff 25% contributorily negligent for venturing into storm aware of sidewalk condition



Excess Insurance and Duty to Defend

Dominion of Canada v. Kingsway

OSC February 2011

Auto claim with minimum limits and
multiple claimants

Underinsured carrier objected

Primary insurer tendered its limits and
was permitted to escape from
defence obligation



School Board Liability

Hussack v. Chilliwack School Dist.

BCCA June 2011

- 13 year old boy concussed when hit in the face in field hockey gym class in 1998
- Trial 2009, standard of care not met by teacher permitting plaintiff to play field hockey without progressive training
- Damages \$1,365,000 lifelong total disability, somatoform disorder



Hussack: Causation

“But for” the defendant's negligence, would the plaintiff's injuries have occurred? *Resurfice* 2007 SCC

Tort need not be *only* cause. *Athey* 1996 SCC

Defence expert's “causative metaphor:”
bug bite – without scratching it doesn't become a sore. Court noted without a bug bite, there would be no scratching.

So, “but for” the head injury, the father's “pathological” reaction would not have caused the somatoform disorder = 100% damages



Psychiatric Illness Damage *Healey v. Lakeridge Health Corp.*

OCA April 2011

Class of hospital patients exposed
to tuberculosis

Some contracted TB; some did not

Fear of exposure to TB not
actionable

Mustapha did not change the law to
require demonstrable psychiatric
illness



Duty to Defend: Hotel CGL

SGI v. Patricia Hotel

SCA June 2011

CGL policy not required to defend claim against hotel arising from damage to municipal property from demolition by hotel

Allegations were unrelated to the operations for which the insured had coverage “hotel beverage room and wine store”



Procedure: Defence Expert Evidence Under Attack

Allegations of expert bias

New Rules on experts in many
provinces, some with “expert’s duty
to the court/impartiality” provisions

Nature of bias: personal, professional
or financial interest

Selection bias: expert shopping, not
mainstream expert opinion



Defence Medical Recording

Adams v. Cook

OCA 2010 (3:2)

Alleged “systemic bias” of defence doctors with “corrupt practices and ulterior strategies”

Lawyer’s affidavit evidence only

Motions Judge and Divisional Court ordered video for “general bias in the conduct of defence medicals”

Ont. Div.Ct. no need for “specific factual foundation of potential abuse or concern directly attacking the credibility of the defence doctor”



Adams: OCA Majority

- “I do not accept that the evidence of alleged systemic bias is sufficient to draw any general conclusion... It is not enough simply to allege general bias on the part of the doctors who do defence medicals.”



Jilla v. Ribeiro

(Ontario Master 2009)

- No order for recording of defence psychiatric medical due to “real risk” that the plaintiff would “play” for the camera, given history of exaggerating the severity of his impairment
- Clearly, very fact specific - no other plaintiff has exaggerated his or her symptoms on a medical examination 😊



GOAL OF PERSONAL INJURY DAMAGES ASSESSMENT

- Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (HL 1880)

“... you should as nearly as possible get at that sum of money which will put the party who has been injured in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”



WHO IS
RESPONSIBLE?





30008-41



General Damages



1978







CCM

LOSERS SINCE

67

Supreme Court of Canada Trilogy (1978)

- *Andrews v. Grand and Toy*
- *Teno v. Arnold*
- *Thornton v. Prince George School District*



\$100,000



\$343,590

(As of May, 2011)



Discount Rate/Multiplier

Lewis v. Todd (1980, Supreme Court of Canada)

“The discount rate represents the difference between the interest rate earned on investment income and the rate of inflation”



Examples of Difference in Discount Rate

Assume 25 year old plaintiff is awarded \$50,000 per year for loss of income for 40 years

Discount Rate	Total Awarded	Amount Payable Now
3%	\$2,000,000	\$1,171,545
2%	\$2,000,000	\$1,380,265
1%	\$2,000,000	\$1,649,245



Pickering v. Deacon

(BCCA 1984)

- 25 year old male
- Severe brain injury
- Employed as a farming contractor
- Award - \$730,794
 - General damages - \$150,000
 - Loss of Earning Capacity - \$282,360
 - Past loss of earnings - \$237,500
 - Cost of future care - \$425,532
 - Management Fees - \$64,000
 - Special Damages - \$15,000



Watkins v. Olafson

(SCC 1989)

- 33 year old male
- Fracture of C6 – complete quadriplegia
- Award - \$2,075,632
 - General damages - \$180,000
 - Loss of Future Earnings - \$540,000
 - Past loss of earnings - \$263,000
 - Cost of future care - \$1,046,078
 - Management Fees - \$75,000
 - Special Damages - \$19,308



Unruh v. Webber

(1992 B.C.C.A.)

- 17 year old male
- Incomplete quadriplegia
- Award - \$3,508,933
 - General damages - \$238,000
 - Loss of Future Earnings and Future Care - \$3,270,933



Chow v. Hiscock

(BCSC 2005)

- 19 year old male
- Severe brain injury
- Award - \$5,679,431
 - General damages - \$306,500
 - Loss of Past and Future Earnings - \$1,189,500
 - Cost of Future Care - \$4,126,407
 - Awarded to Mother for Attendant Care - \$73,544



Gordon v. Grieg

(OSC 2007)

- Severe brain and spinal injuries
- Award - \$11,369,525
 - General damages - \$310,000
 - Loss of past income - \$15,100
 - Loss of future income - \$1,871,600
 - Future care costs - \$8,646,900
 - Management fee - \$525,925
 - *FLA* claim - \$150,000



Morrison v. Grieg

(Ont. S.C.J. 2007)

- Spinal injuries resulting in paraplegia
- Award - \$12,441,197
 - General damages - \$310,000
 - Loss of past income - \$55,400
 - Loss of future earnings - \$2,298,320
 - Future care costs - \$8,880,000
 - Housing costs - \$374,800
 - Management fee - \$447,164
 - Special damages \$ 74,713.78
 - FLA claim - \$165,000



Sandhu v. Wellington

(Ont. S.C.J. 2008)

- 2 year old male
- Brain injury – would function at 12 year old level for remainder of his life
- Award - \$14,731,945
 - General damages - \$311,000
 - Future loss of earnings - \$1,166,283
 - Future care costs - \$10,942,908
 - Guardianship costs - \$1,795,800
 - FLA claims - \$300,000



Sandhu v. Wellington

(Ont. S.C.J. 2008)

- Summary of Guardianship award
 - \$268,800 – non-corporate guardian
 - \$400,000 legal expenses
 - \$1,127,000 corporate guardian



Marcoccia (Litigation Guardian) v. Gill (OCA2009 Jury)

- 20 year old male
- Severe brain injury
- Award - \$16,914,798
 - General damages - \$312,000
 - Loss of future earnings - \$1,384,918
 - Future care costs - \$13,952,064
 - Individual guardian fees - \$161,250
 - Future legal fees - \$389,009
 - Future corporate co-guardian fees - \$715,557

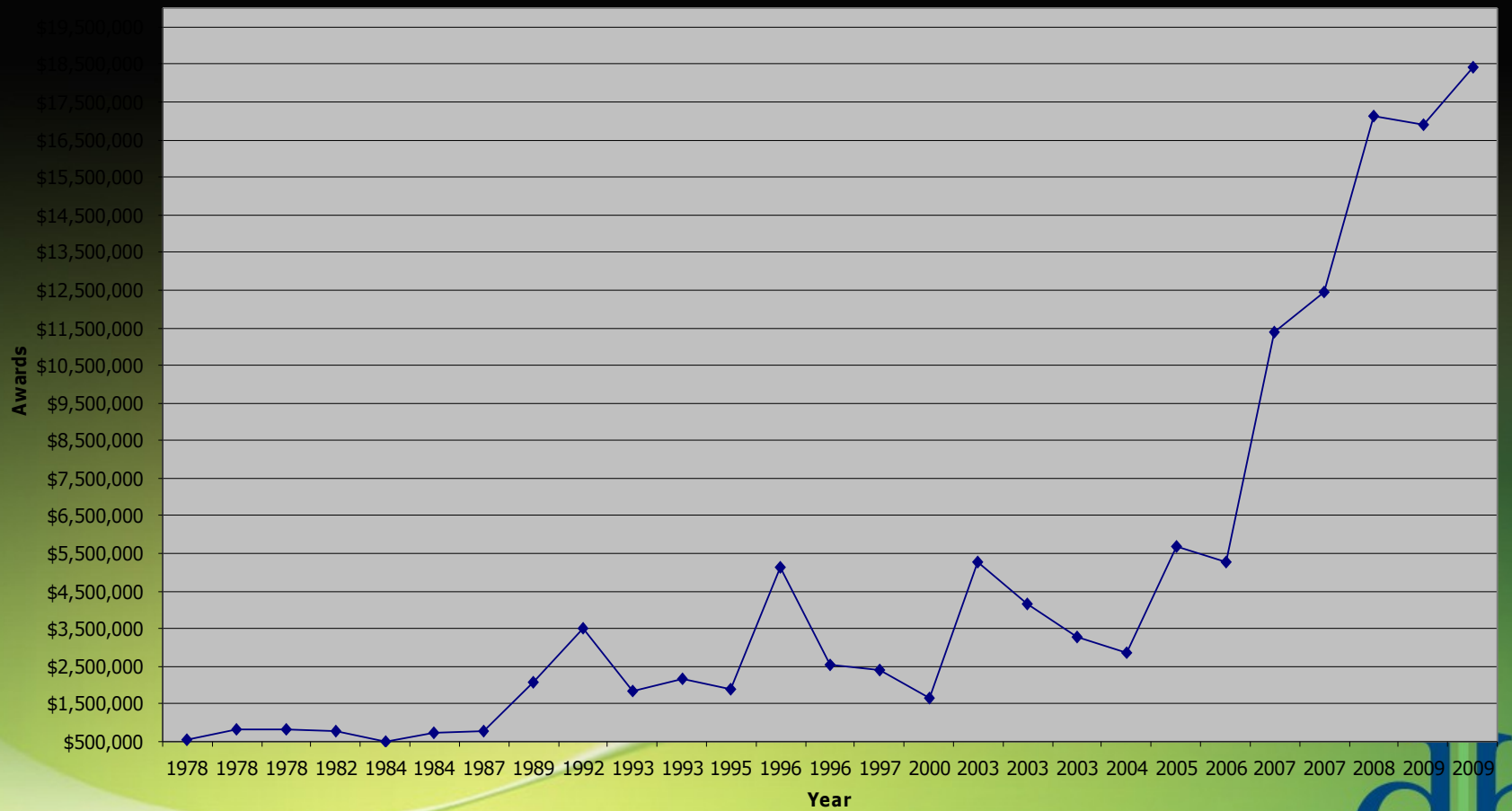


MacNeil v. Bryan

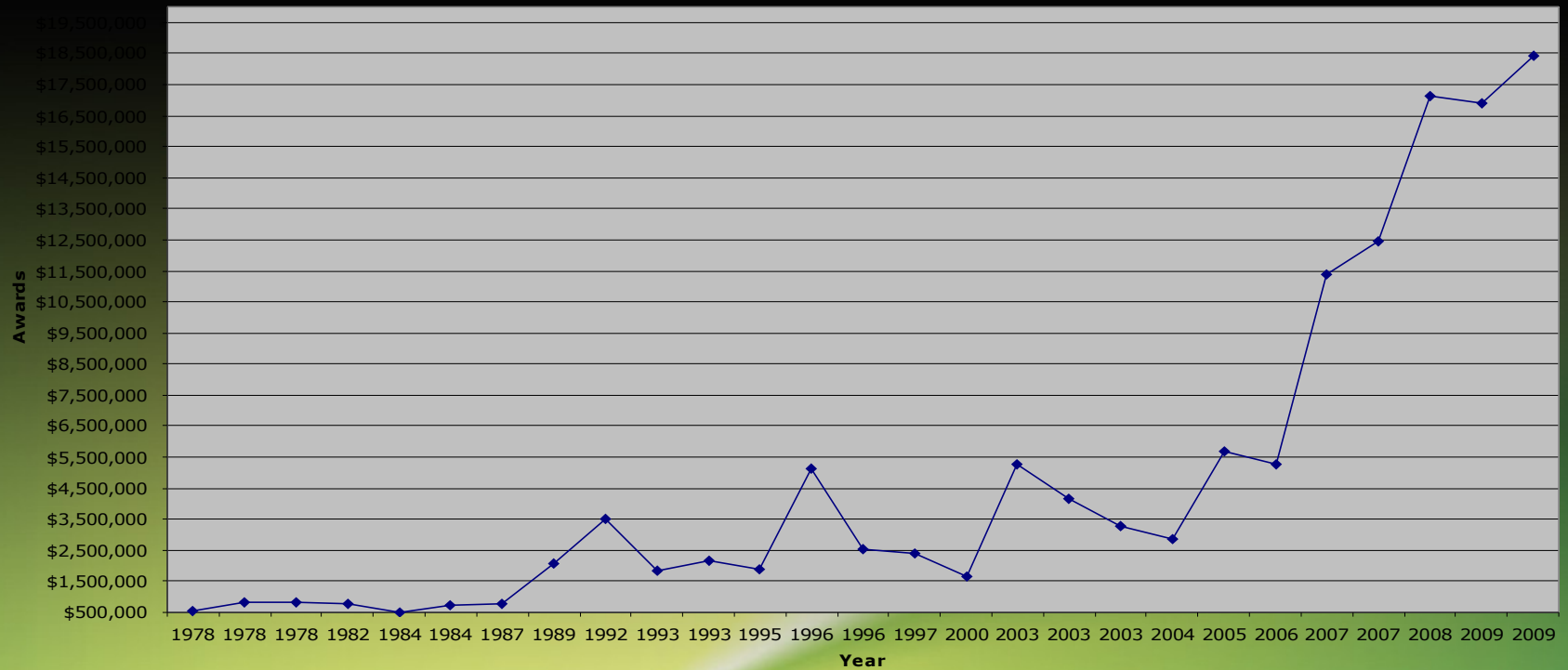
(Ont. S.C.J. 2009)

- 15 year old female
- Severe brain injury
- Award - \$18,427,207.20
 - General damages - \$321,968
 - Loss of past income - \$18,730.33
 - Loss of future earnings - \$1,374,800
 - Loss of future interdependent relationship - \$190,300
 - Future care costs - \$15,158,500
 - Management fee - \$836,180
 - FLA Claims - \$312,500





Progression of Damage Awards 1978-2009



IMPACT ON RISK MANAGERS

Appropriate limits of coverage – where is the money coming from?

Reinsurance issues

- Catastrophic coverage layers
- Reporting issues

Excess of loss coverage

- Availability
- Reporting issues

Bad Faith





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iPod Touch Contest

Question

What is the current value of the Supreme Court of Canada's \$100,000 1978 cap on general damages?

Answer: _____

Your Name:





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