

JOHN R. CARLSON  
KAREN D.P. CARLSON

# Personal Injury Damages

2007-2011  
Cumulative Edition

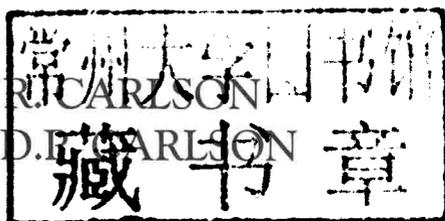


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2007-2011 Cumulative Edition

PERSONAL  
INJURY  
DAMAGES

JOHN R. CARLSON  
KAREN D. CARLSON



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## **Personal Injury Damages 2007-2011 Cumulative Edition**

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This work is dedicated to our boys Kai, Kam and J.D.

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## ABOUT THE AUTHORS

John Carlson is a partner with the Edmonton law firm Dean Duckett Carlson. He obtained his LL.B. from the University of Alberta and currently practices primarily in the fields of insurance defence and civil litigation. John is a past Chair of the Insurance Section of the Canadian Bar Association's Northern Alberta branch and has been a speaker at seminars on the topic of non-pecuniary damages. John Carlson may be contacted at:

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## PREFACE

Welcome to the 2007-2011 Cumulative Edition of this book. This is our second cumulative edition. You will be able to find case references between the two cumulative editions for cases dating as far back as the fall of 2000.

This project has evolved from our weekly digests of personal injury cases available on our “CARL” Netletter and database on Quicklaw. I review and report, on a weekly basis, all of the common-law decisions on Quicklaw (at least the ones I can find) where non-pecuniary damages are assessed by the court — regardless of liability. We exclude very few decisions — as explained below.

This Cumulative Edition includes nearly all of the reported non-pecuniary damages decisions that I obtained from Quicklaw for common-law provinces for the year 2007 to 2010 inclusive. Due to publishing deadlines, there will be a few later 2010 decisions, reported in early 2011 on Quicklaw, that will not make it into this Edition.

You will see that the reported range of non-pecuniary damages in this book is quite broad — from \$100 [*Tylak v. Allen*, [2010] N.S.J. No. 149 (Small Claims Ct.)] for a case where the plaintiff bicyclist was squeezed off the road by the vehicle operated by the defendant driver resulting in unspecified scrapes and fear, to \$326,000 [*Musselman v. 875667 Ontario Inc. (c.o.b. Cities Bistro)*, [2010] O.J. No. 2325 (S.C.)], for a case involving a 71-year old lady who became a quadriplegic following a trip and fall down stairs.

The cases summarized in this book are initially organized by province, and then organized by the nature of injury with a cross reference to the Table of Cases. This layout should assist you with simplifying the task of assessing non-pecuniary damages.

The practice of assessing non-pecuniary damages is an exercise of familiarity with precedents and with the numerous factors considered by the court in arriving at that figure for that particular plaintiff.

One of the key factors governing the court's assessment of non-pecuniary damages is the \$100,000 upper limit set by the Supreme Court of Canada in the well known 1978 trilogy of cases: *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229, *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, and *Arnold v. Teno*, [1978] 2 S.C.R. 287. Taking into account the effect of inflation since these judgments, this upper limit is now over \$320,000.

The delicate balancing act of assessing the relative severity of injuries along this range of damages can be an interesting exercise. For example, is an individual left with severe pain and debilitating psychological problems entitled to 50 per cent of the damages that a person who became a quadriplegic would receive? Are those damages too high or too low? Is a two-year soft tissue injury to a person's neck and back justifiably compensated at nearly 10 per cent of the damages awarded to a young person who became a quadriplegic? Too high or too low? Fortunately, it is not necessary for us to consider those deeper questions when assessing non-pecuniary damages. That issue has been answered by the large body of precedents dealing with the numerous types and combinations of injuries.

Not surprisingly, there is a great deal of predictability to the assessment of non-pecuniary damages. This is particularly true when dealing with a single injury or small groups of injuries. Of course, it is not a precise science, and each case can only be safely assessed within a range of damages that could reasonably be expected to apply to that particular case.

Experienced counsel will more often than not have their assessed range of damages overlap with opposing counsel and then also overlap with the court to some degree, so long as each assesses the various factors going into that assessment with the same perspective and weight. The existing body of recent cases provides us with a good guideline to assist in that assessment of non-pecuniary damages.

Having been involved with reviewing and reporting this data on a weekly basis for more than eight years for Quicklaw, the predictability of the courts' assessment has become fairly apparent. However, to accurately assess non-pecuniary damages, one must be aware of the various factors considered by the court when assessing these damages.

## PREFACE

We can best summarize the most important factors to be considered when assessing non-pecuniary damages as follows:

1. The upper limit set by the Supreme Court of Canada;
2. The nature of the injuries;
3. The permanence of the injuries;
4. The degree of debilitation from normal day-to-day activities;
5. The plaintiff's credibility.

The above factors help a court get to its initial assessment. Thereafter, there are many other factors that may decrease the assessment of non-pecuniary damages, including: symptomatic pre-existing conditions, crumbling skull and the failure to mitigate.

Obviously, the greater the severity of injuries, the longer the duration of injuries and the greater the degree of debilitation arising from those injuries, the greater the damages. Credibility, on the other hand, is the wild card that causes concern for the plaintiff's counsel and creates hope for the defence counsel.

It has become apparent to me, from reviewing these cases, that the courts often place very little weight on the credibility issue when faced with evidence of occasional exaggeration or lying. Those decisions reflect no drastic difference with another court's assessment of similar non-pecuniary damages involving no credibility issues. At most, it appears that the courts faced with occasional credibility issues are simply awarding damages towards the lower end of the otherwise normal anticipated range of damages.

Over the recent years, there have been a handful of cases where the courts have found consistent exaggeration and lying by a plaintiff to totally destroy the foundation and reliability of the related evidence, and thereby preclude the finding of any damages. However, those are very rare decisions. In other cases where the courts are facing significant credibility issues, they have chosen to deem the plaintiff to be recovered from all injuries within a specified period of time as a measured response to that credibility issue.

## PERSONAL INJURY DAMAGES

Looking at some simple statistics from the cases that I have reviewed for this 2007-2011 Cumulative Edition, one gets a telling snapshot of activity taking place across Canada regarding the differences between the non-pecuniary damages assessments in each province and the average value of those assessments in each province.

The statistics below reflect the number of assessments that I have reported for each province, and not the actual number of cases for that province. This difference arises from possible cases not known to me and by my intentional exclusion of certain decisions, as explained below.

The average assessments below only come from trial decisions and are rounded to the nearest \$1,000 effective 2008. I have generally reported the damages that are initially assessed before any deduction is applied by the court (*e.g.*, for failure to mitigate). I have excluded any cases where non-pecuniary damages were simply agreed upon between counsel versus having a court decide the issue. With the exception where the injury information remained useful, I have also generally excluded assessments made on a global basis (*e.g.*, for more than one accident). I have also excluded any aggravated damages component if it was identified as a separate figure from the non-pecuniary damages. Finally, I have also excluded those very few decisions where the court has provided little valuable information about the injury for comparative purposes.

When reporting on jury decisions, the information obtained comes from the Appeal Court. Due to the fact that jury decisions are unique, in that we are not left with a written decision, the figures below only reflect the jury decisions that have had an appeal and where that Appeal Court's decision gave sufficient background information on the injury evidence considered by the jury.

PROVINCE	NUMBER OF ASSESSMENTS		AVERAGE ASSESSMENT	
	Year	Number	Year	Value
British Columbia	2010	133	2010	\$69,000
	2009	184	2009	\$60,000
	2008	144	2008	\$52,000
	2007	102	2007	\$54,742
	2006	122	2006	\$50,705

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	2005	108	2005	\$48,690
	2004	92	2004	\$56,894
	2003	127	2003	\$41,110
	2002	126	2002	\$38,727
	2001	144	2001	\$35,560
Alberta	2010	18	2010	\$73,000
	2009	21	2009	\$49,000
	2008	21	2008	\$62,000
	2007	18	2007	\$49,639
	2006	20	2006	\$55,625
	2005	19	2005	\$56,421
	2004	23	2004	\$68,652
	2003	19	2003	\$70,842
	2002	15	2002	\$29,833
	2001	22	2001	\$48,377
Saskatchewan	2010	3	2010	\$122,000
	2009	0	2009	N/A
	2008	4	2008	\$34,000
	2007	4	2007	\$32,500
	2006	6	2006	\$53,667
	2005	17	2005	\$17,247
	2004	1	2004	\$30,000
	2003	5	2003	\$29,000
	2002	8	2002	\$38,500
	2001	13	2001	\$52,769
Manitoba	2010	1	2010	\$45,000
	2009	15	2009	\$15,000
	2008	2	2008	\$196,000
	2007	0	2007	N/A
	2006	5	2006	\$91,280
	2005	3	2005	\$60,667
	2004	8	2004	\$32,313
	2003	2	2003	\$46,250

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	2002	2	2002	\$32,500
	2001	6	2001	\$58,333
Ontario	2010	34	2010	\$79,000
	2009	22	2009	\$70,000
	2008	31	2008	\$68,000
	2007	28	2007	\$73,040
	2006	33	2006	\$63,673
	2005	42	2005	\$53,974
	2004	50	2004	\$65,815
	2003	75	2003	\$75,093
	2002	43	2002	\$67,128
	2001	56	2001	\$61,915
New Brunswick	2010	3	2010	\$21,000
	2009	5	2009	\$74,000
	2008	4	2008	\$25,000
	2007	7	2007	\$34,642
	2006	11	2006	\$14,409
	2005	20	2005	\$40,950
	2004	18	2004	\$25,194
	2003	15	2003	\$49,800
	2002	23	2002	\$26,870
	2001	13	2001	\$55,692
Nova Scotia	2010	11	2010	\$67,000
	2009	4	2009	\$70,000
	2008	3	2008	\$31,000
	2007	4	2007	\$71,250
	2006	12	2006	\$27,917
	2005	3	2005	\$69,667
	2004	3	2004	\$93,333
	2003	6	2003	\$41,667
	2002	7	2002	\$30,000
	2001	5	2001	\$62,000

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Newfoundland and Labrador	2010	1	2010	\$165,000
	2009	5	2009	\$76,000
	2008	3	2008	\$22,000
	2007	6	2007	\$73,750
	2006	1	2006	\$175,000
	2005	3	2005	\$58,333
	2004	1	2004	\$40,000
	2003	0	2003	N/A
	2002	1	2002	\$42,000
	2001	5	2001	\$29,200
Northwest Territories	2010	1	2010	\$5,000
	2009	0	2009	N/A
	2008	0	2008	N/A
	2007	0	2007	N/A
	2006	0	2006	N/A
	2005	1	2005	\$50,000
Yukon	2010	0	2010	N/A
	2009	1	2009	\$135,000
	2008	1	2008	\$50,000
	2007	1	2007	\$50,000
	2006	1	2006	\$4,000
	2005	0	2005	N/A
	2004	0	2004	N/A
	2003	1	2003	\$20,000
	2002	1	2002	\$45,000
	2001	0	2001	N/A

*\*Assessments for Nunavut and PEI cases are reported in other jurisdictions.*

## PERSONAL INJURY DAMAGES

B.C. remains the leader in the number of non-pecuniary damages assessments each year.

Where provincial legislation “caps” non-pecuniary damages, I will report only the reported non-capped assessment of those damages since those are the only assessments with any comparative value.

I hope that this book will assist you with finding the right case as you attempt to quantify your non-pecuniary damages.

Should you be aware of a case that has not made its way into this book, please let us know as we strive to make this the most comprehensive source of recent non-pecuniary damages assessments available.

This book is the joint effort of mine and my wife, Karen Carlson, who is responsible for the categorization and organization of the information provided in our case summaries — the hallmark of the popularity of our associated Quicklaw Netletter and database, “CARL.”

John R. Carlson  
January 2011

# TABLE OF CASES