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TAB 4

A Litigator's Guide TO DAMAGES

So You Want to Fix Your Trial Decision: Damages in the Appeal Context

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I. Introduction

"Appeals of damages awards" is a dauntingly broad topic, and any attempt to canvass all of the issues that it encompasses would necessarily fall short (and still be a painful slog to get through). Instead, we have a put together this brief primer to introduce a few key issues: standards of review, the Court of Appeal's attitude and approach to damages appeals, and some thoughts about appeal strategy more broadly.

II. Welcome to the Thunderdome: Deference, the Standard of Review, and You

In principle, the standard of review that governs your appeal determines the level of scrutiny the appellate court will apply to its review of a lower court's decision. In practice, however, the willingness of appellate courts (and their individual judges) to interfere with lower court decisions can be seen to ebb and flow independent of any difference in the official standard of review. In this section and the following one, we discuss the principle and practice of deference in damages appeals.

In general terms, appeals—including damages appeals—are governed by three standards of review. Questions of law are reviewed for correctness. Findings of fact and inferences of fact are reviewed for palpable and overriding error (*i.e.* whether they are clearly wrong, unreasonable, or unsupported by the evidence). And mixed questions of fact and law are on a spectrum between those two extremes; the more the factual and legal questions are intertwined, the more deference to which they are entitled.[1]

[1] *H.L. v. Canada*, 2005 SCC 25, at paras. 4, 56; *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 8, 25, 36.

Naturally, the three basic standards of review are simply a starting point, and our courts have developed a large number of more detailed rules and exceptions that govern in particular circumstances. Some of these are specific to particular claims or substantive areas of law, but others relate to procedural features and may apply regardless of the underlying subject matter. For example, jury decisions—whether resolving a contract dispute, tort claim, or a criminal case—are usually given an additional level of deference. Similarly, a higher standard of review often applies when an error or argument is raised for the first time on appeal. Depending on the circumstances of the case, one or more such rules may impact the standard of review in a damages appeal.

Against that backdrop, and most relevant for our purposes, are the standards that have been developed specifically for review of particular types of damages awards. While we can by no means provide a comprehensive guide to this area, below is a broad outline of the most notable damages-specific standards of review.

General Damages: Assessing the quantum of compensation for intangible harms (such as suffering or loss of life) is an essentially factual assessment and an exercise of reasoned discretion. It is reviewed for palpable and overriding error and appeal courts "must take a highly deferential approach to varying the quantum of compensatory damages awarded by the trial judge."[2] Specifically, a reviewing court "may only intervene if the award is 'so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice.'"[3] Thus, although framed as the usual palpable and overriding error standard, it might be thought of as "deference-plus" relative to other questions of fact.

[2] *de Montigny v. Brossard (Succession)*, 2010 SCC 51, at para. 27.
[3] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 108

Punitive Damages: In reviewing both the decision to award punitive damages and the quantum of those damages, "the test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct."[4] This is a more interventionist standard of review than that applicable to general damages. Additionally, where both compensatory and punitive damages are awarded the standard of review asks the appellate court to decide both whether the total award is greater than what is required to fulfill its purpose (including punishment of the defendant) as well as the proportionality of the award in relation to a number of different factors.[5] Relative to the usual standard of review for questions of fact, this might be thought of as "deference-minus".

Contractual Damages: When damages flow from or are determined by a contract, the standard of review for questions of contractual interpretation is that set out in the Supreme Court's recent decision in *Sattva Capital Corp. v. Creston Moly Corp*. In that case, the Court moved away from the historical view of contract interpretation as a question of law, and instead held that it is a question of mixed fact and law that generally attracts a deferential standard of review. The Court did recognize that in some cases it may be possible to identify an extricable error of law (such as "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor") to which a correctness standard would apply, but cautioned that such instances will be rare and that appellate courts should limit their intervention "to cases where the results can be expected to have an impact beyond the parties to the particular dispute."[6]

III. Deference Redux: Now You See It, Now You Don't…

[4] *Id.*, at para. 107.
[5] *Id.*, at paras. 109-110.
[6] 2014 SCC 53, at paras. 50-51, 53.

Formally, there have been no significant changes to the basic standards of review for at least fifteen years. Informally, over the past decade or so we have witnessed a dramatic shift in the Ontario Court of Appeal's application of those standards. The Court has become far less willing to interfere with lower court decisions, particularly when there is no clear legal error. Or put differently, the Court has become far more stringent with what it considers to be a palpable and overriding error. A decade ago, an appeal which showed the evidence in favour of the appellant's trial position was far more compelling than that supporting the result reached by the trial court had a good chance of succeeding; in a similar case today, the Court is very likely to affirm the result because there was "some evidence" to support it (sometimes even when that evidence was not referred to in the trial decision). This trend away from interventionism appears to be true across the board: on the whole, the Court of Appeal is less willing to second-guess lower courts on all manner of issues, from procedural and evidentiary rulings to treatment of experts to the sufficiency of reasons to ultimate conclusions on the determinative issues.

The shift in the Court of Appeal is unsurprising when one considers the guidance it has received from the Supreme Court. Over the past few years, the Court has emphasized over and over again, in a variety of contexts from alternative dispute resolution and arbitration to administrative law to the summary judgment procedure, the need to entrust resolution of disputes to the tribunal of first instance with only very limited avenues for further challenges. And although it has not formally changed the basic standards of review, when describing those standards it has increasingly emphasized the scope of deference and the reasons it is so important.[7] Consistency and predictability of judicial decisions—the values safeguarded by

[7] *See, e.g., Benhaim v. St-Germain*, 2016 SCC 48.

robust appellate review—have received less emphasis in favour of a focus on efficiency and access to justice.

However, while the overall trend has been one of increasing deference, there are signs that the Court of Appeal remains a little more willing to intervene in some damages appeals.

Punitive damages awards are one area where the Court of Appeal has a far more interventionist stance.[8] But that should not come as a surprise, since the case law explicitly suggests a need for closer review to control those awards and has created a less deferential standard of review for punitive damages. More interesting is the way both the Supreme Court and Court of Appeal have approached an area where the formal standard of review counsels maximum deference: general (or non-pecuniary) damages awards.

The jurisprudence in that area reveals an unresolved tension. On the one hand there are exhortations to leave factual issues to trial courts and emphasis on the enormous discretion inherent in quantifying non-pecuniary damages. But on the other hand there is a serious concern about American-style proliferation of larger and larger tort awards, and the accompanying dramatic and unfair inconsistencies from case to case and defendant to defendant. The latter were sufficiently compelling to lead the Supreme Court to set a cap on the non-pecuniary damages that can be recovered in personal injury cases.[9]

Formally, general damages that are under that cap or that are awarded outside of the personal injury context are reviewed under the "deference-plus" standard outlined in the previous section of this paper. But in practice, our Court of Appeal has shown some reluctance to let go

[8] For a recent example, see *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, where the majority found that the trial judge failed to consider the "full circumstances" in reaching his award and substituted its own figure. The dissent, written by Lauwers J.A., disagreed that there was any error in the decision below and made the case for greater deference on the quantum of punitive damages (see particularly paras. 165-168).
[9] The cap was originally set in a trio of 1978 decisions and continues to apply with adjustments for inflation. A brief summary of the reasoning behind the cap can be found in *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, at paras. 167-168.

of concerns about inappropriate and/or inconsistent general damages awards. The very existence of a cap encourages that instinct, by giving appellate courts a clear framework by which to gauge the proportionality of personal injury awards; it is far easier to determine whether a discretionary number reached by the trial judge was too high when there is an explicit and limited range within which all suffering must be compensated. And that same comparative approach has spilled over into other contexts, as the Court of Appeal frequently looks to define some "range" of awards for particular types of claims or severity of harm by which it can then judge the reasonableness of a particular case.[10]

Finally, even in the pecuniary damages context the Court of Appeal sometimes demonstrates a mildly interventionist streak. This observation is admittedly even more anecdotal than our generalizations about general damages. But to illustrate the point we invite readers to review the decisions (and vigorous dissents) in two appeals challenging a trial judge's conclusions in relation to expert evidence before drawing their own conclusions: a successful appeal challenging a pecuniary damages award in *Pirani v. Esmail*, 2014 ONCA 145, and an unsuccessful appeal challenging a causation finding in *Mangal v. William Osler Health Centre*, 2014 ONCA 639. Whatever one might think about the merits of either decision (observant readers may note the appellants' counsel on *Mangal* and draw their own conclusions about our views), the different approaches to the same standard of review are striking.

We don't want to overstate the point: with the exception of punitive damages, the Court of Appeal does not consciously approach its review of damages awards in a different manner

[10] The Supreme Court may have given further encouragement to that approach in *de Montigny v. Brossard (Succession)*, 2010 SCC 51, at para. 27, when it instructed trial judges making general damages awards to give as much priority as possible to consistency with established judicial practice. Although that followed a statement about the deferential standard of review for such awards, it also sent a clear signal to appellate courts that those awards must be evaluated in comparison to those made in similar cases.

than any other appeal, and in a given case it should be assumed that the Court will begin with a presumption of deference. But there is some reason to believe it may be a little more open to having its mind changed by good advocacy in damages appeals than it has shown itself to be in other contexts.

IV. How to Win Friends and Influence Appellate Judges

An appeal of a damages award should be approached like any other appeal. In this section, we offer some of our thoughts about appeal strategy more generally.

Your Appeal Starts (and Often Ends) at Trial

However difficult it may be to win your case at trial, changing a loss at trial to a win on appeal will be exponentially more difficult. This is true not just because of the deference given to trial decisions, but also because of the constraints on introducing new evidence and new theories on appeal. Appeals are not a second chance to try your case. Equally, dispositive motions (especially summary judgment motions) are not dress rehearsals for the real thing.

Of course, we recognize that although "win your case at trial" may be the most accurate advice for those who want to succeed on appeal, it is not particularly helpful as a tip for advocates. So we will modify that statement slightly to **ensure you presented a winning case at trial**. Win or lose, that case is the raw material you will have to work with on appeal.

What that means in practice is fairly straightforward. Ensure your pleading contains every claim and defense you might want to argue (and don't forget to plead the *Negligence Act*!). Present evidence and make out a case on every element needed for your claim to succeed. When in doubt about whether expert evidence is needed, get an expert—and make sure they're well prepared. Preserve legal arguments and objections, and try to obtain clear rulings on the record.

And make sure you put before the trier of fact any favourable evidence you may need or want considered, and that it is presented in the best possible light for your case.

That last tip may seem obvious, but for appeal lawyers it is frighteningly common to encounter the following scenario. A potential client brings a trial judgment to your office and asks about their chances on appeal, but when you review the judgment you see a number of unfavourable factual findings that will be exceedingly difficult to overcome on appeal. You sit down with the client to explain the concept of deference and the importance of those facts to the outcome of the case. "But wait!" the client says. "The trial judge got it all wrong! There were emails showing that we both knew the contract didn't mean that! There was a bus full of nuns that saw the car accident and say it was the other guy's fault!" You perk up. "Well, that could change things," you tell her. "How many of the nuns testified at trial? Which exhibit contains those emails?" And then you hear the answer all appeal lawyers dread: "oh, that didn't come up at the trial, but I brought all those documents so you can tell the appeal court about them!" *Bzzzzzzt*. Game over.

We belabor this point because it tends to be particularly applicable to damages; lawyers often get caught up in proving liability and give comparatively short shrift to their damages case. Failing to put in evidence of lost profits or business opportunities. Failing to call an expert to quantify the loss in situations where there is no obvious and objective value. Failing to put in medical evidence to support claims of general damages for mental distress. Or even just failing to spend sufficient time in the examination-in-chief teasing out all of the ways in which the plaintiff suffered or all of the details of their loss. Without that raw material, you will not just fail at overturning a trial loss—you will be at real risk of having your trial wins converted into losses on appeal.

Make Your Judges *Want* to Help You

Most litigators understand the importance of telling a story when trying a case. On appeal, that narrative may change or be presented differently but it will be no less important to tell a compelling story.

Appellate judges are strongly discouraged from interfering with trial decisions for a number of reasons: case law stressing deference and the limitations of their error-correcting powers, their appreciation of the difficult job facing trial judges, their respect for (and sometimes identification with) their colleagues on lower courts, reluctance to publicly second-guess their fellow judges, their large caseloads and the ratio of baseless appeals to meritorious ones, and so on. Of course, any given judge or panel may be more or less inclined to defer to lower court decisions, generally and also with regard to specific types of cases or errors. But on the whole, appeals are more likely to be dismissed than granted.

That means that the story you tell on appeal is crucial. Your story might be about the facts underlying the case: emphasizing the terrible harm your client has suffered and was denied compensation for, or painting the other party as a bad actor who has been allowed to get away with it. Or it might be about the conduct of the case itself: a disorganized trial where your client was denied the right to make their case, the domino effect from one key error by the trial judge, the way in which the opposing party gained an unfair advantage by sharp practice in the discovery phase. Whatever the specifics, the goal is the same: make the judges hearing your appeal *want* to help your client. There are certainly cases you can win without that, where the law is so clearly on your side that the panel is forced to reluctantly hand you a victory they wish they didn't have to. But the closer cases tend to be influenced by things like the judges' inherent sense of fairness, or sympathy, or plain dislike for your opponent's character or behaviour.

Likewise, the respondents should also be telling a story. Often, that story will simply reinforce the appellate court's inherent reluctance to overturn trial decisions: stressing the length of the trial (*i.e.* the resources already expended to reach the result the appellant wants to throw out) or the many years since the case began (*i.e.* the importance of letting the result stand so the parties can finally move on), the thoroughness and care of the trial judge, the many judgment calls and credibility determinations underpinning the decision and the reasons the trier of fact was in an equal or better position than the appellate panel to make those calls, and so forth. But where the appellant has made a particularly compelling case, the respondent may need to take a more appellant-like approach to crafting their own story about fairness or decency.

Convince Your Judges They *Can* Help You

Making the judges hearing your appeal want to help your client is only half the battle; the other half is giving them enough cover to feel comfortable doing so. Or in less cynical terms: the other half of the battle is convincing them that as a matter of law they are empowered—and maybe even obligated—to do that good deed.

The easiest way to accomplish that is to point them to a legal error in the trial judge's decision. Of course, if your appeal was premised on a clear legal error you probably wouldn't be wasting your time reading our thoughts on the subject. But even where your appeal seems to be about factual errors or other discretionary determinations, don't be too eager to cede the opposing party an enormous head start by giving up on legal errors and boxing yourself into a highly deferential standard of review. The real art of appeal advocacy is creating reversible errors in cases where it isn't obvious that any exist.

So when you're handed a decision your client seems to have lost on the facts, begin by spending some time really searching for a legal argument to make on appeal instead or alongside

the factual one. There are a huge number of legal issues that are intimately related to fact-finding: improper admission or exclusion of evidence, lack of expert evidence where a certain finding required it, and so on. And don't overlook aspects of the case that may not have been your focus at trial. A legal error on a relatively small contributory negligence issue or third-party claim against a joint tortfeasor might be a surer route to a new trial than factual errors in the primary causation analysis. And successful arguments have a tendency to snowball: once your judges are persuaded an error occurred and are forced to roll up their sleeves and start mucking around with the trial decision, they're more likely to accept or at least give serious consideration to arguments alleging other errors.

In some cases, although you may be able to identify one or two legal issues your real complaint is just that the trier of fact believed the wrong witnesses or reached the wrong conclusions. If so, look for ways to tie those factual errors to the legal ones. If the trial judge erred in law by excluding certain evidence, did that excluded evidence have any relation to the unreasonable factual findings you're actually upset about? Even if you didn't view the excluded evidence as critical to your case, could it have impacted credibility determinations or shed doubt on the assumptions underlying the expert evidence the trial judge accepted?

Finally, think about how you might convert factual errors as legal ones by adjusting the way that you frame them. The intuitive explanation of your argument might be that the trial judge misunderstood the expert evidence about what the standard of care required of a doctor in the position of the defendant, and ignored important facts that showed why the standard of care she adopted was inappropriate for the circumstances. But arguments that a trial judge misunderstood evidence or ignored evidence that would have helped your case are likely to have the appellate court yelling "deference!" before you even finish the sentence. On the other hand,

if you take the same appeal and reframe the argument as "the trial judge erred by creating a theory of liability not advanced by the parties or developed at trial, unfairly depriving the defendant of an opportunity to respond to the case against her," you have both a legal error and a winning appeal.[11]

The caveat to our encouragement to seek out questions of law is that you need to be cautious about overstretching yourself. Sometimes there really weren't any legal errors, or there were but they ultimately had no effect on the result. If your only legal arguments don't pass the smell test, you're better off accepting the high level of deference involved in a straightforward attack on factual findings and preserving your credibility and that of your appeal.

Finally, as noted above appellate courts sometimes display less enthusiasm for deference in relation to damages than they do in other contexts. When your ask is not "take away the other guy's win and give the trial judge a public rebuke" or "give me a new trial, sucking up several more weeks of court resources and extending already protracted litigation by another year or two", but rather "just tinker with the numbers a bit to give me a little more or the other guy a little less", then a compelling story may be enough even without an extricable legal error.

But even when making that kind of pitch for the appellate court to adjust the quantum of damages, it can be helpful to give your judges some authority to fall back on. So if you want to challenge a general damages award, do a survey of similar cases to show the court that the number in your case is outside the usual range, or identify a number of cases in which objectively worse harm resulted in significantly lower awards (or lesser harm in significantly higher awards). If you want to challenge trial judge's choice of one expert damages calculation over the other, look for other cases in which the methodology used by the preferred expert was

[11] *Grass v. Women's College Hospital*, 2005 CanLII 11387 (ON CA).

found to be flawed—or even look to your trial judge's own findings, to the extent there are any inconsistencies between the facts as found by the judge and the assumptions and premises underlying the expert's methodology and calculations. In short, reassure the appellate judges that there is some independent support for that limb you're asking them to walk out on for you.

V. Conclusion

We'll leave you with one final cautionary note: appeals are more art than science. Every case is different, and so is every lawyer and every judge. We've provided our views on a few issues we believe to be important, but our real goal is to prompt some thought and discussion about an area that is often wrongly treated as an afterthought in appeals.