1 An Overview

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I. Introduction

Thousands of personal injury and medical negligence claims are commenced and prosecuted in Canada each year. According to Statistics Canada's Civil Court Survey,[1] between 2019 and 2024, over 1.1 million civil cases,[2] excluding family law, were initiated before the superior courts in the common law jurisdictions in Canada.[3] As of 2025, 649,924[4] civil cases were actively[5] being litigated before these courts. Of those 649,924 active civil cases, 370,677—over half of the total—were before the Ontario Superior Court of Justice.[6] According to the joint Attorney General of Ontario/Ontario Superior Court of Justice's *Civil Rules Review: Phase 2 Consultation Report*,[7] which proposes amendments to the current *Rules of Civil Procedure*,[8] personal injury claims represented the majority of civil cases commenced in Ontario in 2024.[9]

1 Statistics Canada, *General Civil Court Cases, by Type of Action, Canada and Selected Provinces and Territories*, Table No 35-10-0114-01 (Ottawa: Statistics Canada, 26 March 2026), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011401>. The Civil Court Survey (CCS) collects data on civil court events and cases at both the superior and provincial and territorial court levels. Appeal courts, federal courts (e.g., the Tax Court of Canada), and the Supreme Court of Canada are out of scope for this survey. Data are based on the fiscal year (April 1 to March 31).

2 Statistics Canada's categories of civil claims include bankruptcy, collection, other contract, motor vehicle, other tort, probate, other civil action type, and unknown type of action.

3 The Canadian total includes only the jurisdictions that report data to the CCS. British Columbia, Nova Scotia, Nunavut, Ontario, and Yukon have reported CCS data every year since 2005/2006. Northwest Territories began reporting data in 2006/2007. Alberta began reporting data for all provincial court level family cases in 2006/2007 and general civil cases and superior court level family cases in October 2007. New Brunswick began reporting data in 2011/2012 (all of 2011/2012 and the first and second quarters of 2012/2013 exclude the Judicial District of Moncton, which accounts for approximately one quarter of the civil court case load in New Brunswick). Saskatchewan began reporting data for superior level court cases for the judicial districts of Regina and Saskatoon only in 2013/2014 and superior level court cases in all other judicial districts and before the Registrar in Bankruptcy in 2015/2016. Provincial level court cases are excluded. Prince Edward Island began reporting data in 2014/2015. The 2020/2021, 2021/2022, 2022/2023, and 2023/2024 releases exclude data from Saskatchewan due to data availability.

4 Statistics Canada, *Active Civil Court Cases, by Elapsed Time from Case Initiation to First Disposition, Canada and Selected Provinces and Territories*, Table No 35-10-0116-01 (Ottawa: Statistics Canada, 26 March 2026), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011601> [*Active Civil Court Cases*].

5 Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the year and thus include initiated cases.

6 *Active Civil Court Cases*, *supra* note 4.

7 Ontario Superior Court of Justice and the Ministry of the Attorney General, *Civil Rules Review: Phase 2 Consultation Report* (Toronto: Government of Ontario, April 2025), online (pdf): <https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-2025-phase-two-EN.pdf> [*Civil Rules Review*].

8 RRO 1990, Reg 194.

9 *Civil Rules Review*, *supra* note 7 at 22.

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We have prepared this book in light of this reality, knowing that each year in Canada thousands of individuals are injured and suffer harm as a result of the acts or omissions of others. Sometimes these acts or omissions are more than simple accidents or poor medical outcomes, reaching the level of negligence or other actionable conduct and entitling the injured to monetary compensation, commonly referred to as "damages."[10]

If proven, damages may be awarded for physical, psychological, and financial harm, and, in some provinces, certain defined family members may also recover for their financial and other losses. Damages cover a wide range of losses and expenses, aiming to restore the injured party to the position they would have been in but for the injury caused by another, commonly referred to as a "tortfeasor." Civil claims are often the only available means to seek recovery for the injuries and losses sustained.

For each claim initiated, one or more individuals or entities will be called upon to respond and account for their conduct and, if found liable, to pay damages to compensate for the harm they caused. For some, the financial consequences of defending a claim and paying damages can be profound and potentially ruinous if they are not insured. In the professional context, such as for health care professionals, architects, and engineers, the consequences of a successfully prosecuted professional negligence claim for personal injuries can extend beyond the financial cost, including an obligation to report to their regulating bodies. This book is intended to provide Canadian legal professionals and other interested readers with procedural guidance and insight on the assessment, quantification, and proof of damages in personal injury cases. It is intended to be a practical guide to assist with the prosecution and defence of civil claims rather than an academic treatise. The chapters that follow will guide the reader through the full lifecycle of a damages claim, from early assessment and causation to the various heads of damages, evidentiary issues, and ultimate resolution through settlement or trial.

II. Discovery of Damages

When an individual is harmed and wishes to seek redress through the courts, they have a fixed period of time within which to commence a civil claim.[11] This time limit, or "limitation period," generally begins to run once the individual has actual or constructive knowledge of the material facts from which a plausible inference can be made that another has acted negligently or wrongfully causing them harm.[12] For

10 The term "damages" is a commonly used legal term in common law in Canada to refer to the remedy sought by a plaintiff (the person bringing the civil claim) to address the harm caused by the defendant (the person being sued).

11 See e.g. *Limitations Act*, *2002*, SO 2002, c 24, Schedule B.

12 *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at paras 40, 48.

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example, in Ontario under section 5 of the *Limitations Act, 2002*,[13] a capable adult's personal injury or medical negligence claim will be considered "discovered" for the purpose of starting a limitation period on the earlier of:

> (a) the day on which the person with the claim first knew [that is, had actual knowledge of],
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known [that is, constructive knowledge] of the matters referred to in clause (a).

Although the potentially recoverable damages of a personal injury claim may influence whether an individual decides to seek recourse through the courts, generally speaking, limitation periods begin to run when the existence of a claim, including the fact that an "injury, loss or damage" may have been caused by the tortious conduct, is known or ought to have been known. The start of the limitation period is *not* dependent on when the extent of damages is known or crystalized.[14] The Court of Appeal for Ontario has emphasized this important distinction between "injury, loss or damage" and "damages" when considering whether a claim has been brought in time.[15]

III. Early Case Assessment

In civil litigation, early case assessment is crucial for informed decision-making, potential cost reduction, and efficient case management from both the plaintiff's and the defendant's perspective. Given the law in relation to discoverability and limitation periods, early case assessment in the personal injury context often focuses on (1) identifying the potential defendants who were involved with the events giving rise to the injury; (2) determining whether those potential defendants owed a duty of care to the injured party; and (3) if a duty was owed, assessing whether the potential defendants breached their duty of care by either act or omission. Therefore, there can be temptation to postpone an early assessment of the value of the "injury, loss or damage"—namely, the potential quantum of damages—until later in the process.

13 SO 2002, c 24, Schedule B.

14 *Dass v Kay*, 2021 ONCA 565 at paras 43-46.

15 *Ibid.*

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Although not necessary to calculate a limitation period, an early assessment of damages is essential to understand the risks and benefits of commencing a claim. Preparing a plaintiff's damages case cannot be an afterthought or postponed until later in the proceeding or at the last opportunity for disclosure. In *Aird & Berlis LLP v Oravital Inc*,[16] the Court of Appeal for Ontario recognized that lawyers have a professional duty to advise their clients on the issue of damages, including quantum, and the risks of litigation at an early stage of litigation, regardless of their level of sophistication. Moreover, the Court recognized that the duty to assess a client's damages claim is an iterative one; counsel must not only advise clients about the prospective value of a claim and the risks of the litigation at the outset but must also advise their clients as circumstances change and evolve.

Similarly, defendants often undertake early case assessment that is focused on the issues of duty, standard of care, and causation based upon records that are often available to both parties or that are disclosed early in the process. Unfortunately, it is not uncommon for the plaintiff to deliver information and documentation related to damages much later in the process, which impacts the defendant's approach to the case. Delayed disclosure of damages information complicates defence counsel's ability to advise their client about the financial risks of settling or defending a case through trial. In contrast, early disclosure of information and documentation supportive of a plaintiff's damages claim could, particularly where liability is not in dispute, allow the parties to undertake efforts to resolve the claim before proceedings are commenced.

IV. Benefits of Early Damages Disclosure

The practical benefits of early damages disclosure have been recognized by Ontario's *Civil Rules Review*, which contemplates pre-litigation disclosure of:

- known injuries suffered;
- how the injuries have impacted the individual on a day-to-day basis;
- known prognosis;
- particulars of the financial losses incurred to date; and
- details of any future expenses and losses, even on a provisional basis, which allows defendants to better assess the risks and benefits of defending a claim.[17]

The proposed Rules amendments also contemplate pre-litigation disclosure of documents that are now often requested and disclosed months, or longer, after the commencement of litigation.[18] Whether or not these proposed reforms to the *Rules of Civil Procedure* are implemented, they provide an important guide to potential liti-

16 2018 ONCA 164.

17 *Civil Rules Review*, *supra* note 7 at 113.

18 *Ibid* at 114-16.

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gants and their counsel as to what their pre-litigation focus should be in relation to personal injury damages.

The assessment, quantification, and proof of damages in personal injury and medical negligence cases are not something that should be treated as afterthoughts or secondary to establishing or disputing liability. Assessing damages is fundamental to assessing the risks and benefits of prosecuting and defending a personal injury claim.

V. Structure of the Book

With these practical considerations in mind, we have broken this book down in a way that reflects the procedural cadence of a claim. We start by expanding upon the concept of early case assessment, focusing on the practical aspects of this process and what counsel should do when retained to assess either a potential claim or defence. From there, we turn to causation and onus and proof of damages. These two concepts inform who has the obligation to gather and disclose evidence.

With the legal and evidentiary considerations covered, we look at the categories, or "heads," of damages, including compensatory damages (non-pecuniary and pecuniary losses); the sub-categories within these heads of damages; the specific damages that arise in the context of death; collateral damages; subrogated claims; and a plaintiff's duty to mitigate their losses. These later chapters, when combined with the early chapters relating to legal and evidential onus, will assist plaintiffs when assessing what evidence they will need to marshal to prove their claims and will assist defendants in assessing what evidence they will need to seek to respond to the claim and, where possible, minimize their financial exposure.

The later chapters review many of the practical considerations that are necessary to either resolve damages in advance of trial or prove one's claim or defence at trial. These considerations include structures and management, the role of experts, prejudgment interest, and settlement.

Personal injury damages aim to provide fair and just compensation for individuals who have suffered harm due to the negligence or wrongful conduct of others balanced against the legitimate interest of defendants to only pay compensation caused by their conduct. Understanding the types of damages and the assessment process is crucial for injured parties seeking to recover their losses and move forward with their lives and crucial for defendants to assess their risk and protect their financial and other interests. The goal of this book is to provide personal injury counsel with a practical resource to assist them in achieving a just and fair outcome for their clients.

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2 Initial Damages Assessment

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I. Introduction

Conducting an initial damages assessment in personal injury cases is important for plaintiffs, defendants, lawyers, and law firms. In addition to evaluating any liability issues, a comprehensive initial case assessment should gather information that helps identify the various types of damages available to the injured person and their family. The initial damages assessment provides foundational information that will be explored and built upon over the life of the case, helps the lawyer understand potential future care or treatment needs for the injured person, and offers a preliminary estimate of the possible quantum of damages.

The primary goal of initial damages assessments is to determine three key aspects: (1) the "original position" of the injured person, (2) the "current position" of the injured person, and (3) the "gap" between the original position and current position that was caused by negligence. The "gap" that can be identified between the original position and the current position ultimately represents what needs to be quantified in terms of damages.[1] An initial damages assessment aims to determine these three essential points in a brief and preliminary manner. Conducting a standardized and thorough assessment of these aspects at the outset also serves other useful goals for the plaintiff's lawyer and the defendant's lawyer. For the plaintiff's lawyer, it assists to identify the sources and types of documentation that should be requested early to establish the loss that has occurred, and it provides an opportunity to get to know the client in a more detailed way. For the defendant's lawyer, it assists to identify the sources and types of documentation to request through the discovery process and provides an opportunity to advise the client about potential exposure.

Initial damages assessments can be uncertain because personal injury claimants—along with their families, physicians, treatment providers, and even experienced legal counsel—may not know how injuries will evolve over time. The impact of further medical care or treatment of an injury, the emergence of additional or unforeseen medical issues, and the injured person's ability to adapt with available assistance are all factors that can alter an assessment. Due to these many variables, an initial damages assessment is provisional. Assessing potential damages is an iterative process. It is important to repeat and revise a damages case assessment at various stages of litigation to ensure that it remains current and useful.

II. Importance to Lawyers, Law Firms, and Clients

A. Lawyers and Law Firms

Although an initial damages assessment may be provisional and speculative, it is a crucial tool for lawyers in personal injury law. Personal injury litigation can be costly for any party. As reflected in recent costs decisions across the country, lengthy and

1 *Athey v Leonati*, 1996 CanLII 183 at para 32 (SCC).

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contentious personal injury trials are now often resulting in lawyer and clerk time in excess of $1 million, with disbursements often approaching or exceeding $500,000.[2] The fees and disbursements needed to pursue a claim through to trial or appeal often exceed what the average plaintiff can pay out of pocket on a pay-as-you-go basis, particularly if they are already injured and losing income due to a disability. In this context, the contingency-fee agreement becomes essential to enable plaintiffs to secure representation and access to justice. For this reason, contingency arrangements are among the most common types of legal fee agreements for such cases across Canada.

For lawyers operating largely by way of contingency-fee agreements on behalf of plaintiffs, an initial damages assessment helps determine if a case is suitable to take on. Contingency-fee retainers are often calculated as a percentage of a plaintiff's damages and interest upon settlement or judgment. Many lawyers or firms pay for all disbursements or require only modest retainers from clients at the beginning of their cases. An initial evaluation of the potential damages in a given case provides insight into the fees that may be expected if the lawyer obtains a recovery for the client. These expected fees can then be compared to various other business considerations. For instance, a thorough initial assessment of damages will assist the lawyer and firm in evaluating whether the anticipated damages and resulting fees favourably compare to the following considerations:

- the expected time commitment for completion of the case, usually calculated in multiple years for most cases;
- the number of lawyer and clerk hours likely required to work up the case to a successful resolution or to trial;
- the opportunity cost of taking on this particular file and therefore possibly being unable to take on other files should they come through the door;
- the number of experts required to establish the case and the resulting costs of likely disbursements that will be incurred; and
- the risk that the case will be lost at trial or abandoned after significant investment by the lawyer and firm.

Personal injury cases, often handled on a contingency-fee basis, are unique due to the intrinsic connections between the plaintiff's lawyer's efforts, their compensation, and the skill required to gather evidence and substantiate aspects of the client's case. Consequently, it is imperative to conduct a thorough and thoughtful initial damages assessment for each individual case.

Although rarely paid through a contingency-fee agreement, an initial damages assessment is equally important for defence counsel. For many defendants and their

2 E.g. *Hemmings v Peng*, 2022 ONSC 6482; *Denman v Radovanovic*, 2024 ONCA 276; *Pye v Di Trapani*, 2024 ONSC 2265; *Cheesman v Credit Valley Hospital*, 2020 ONSC 1729; *Barker v Barker*, 2022 ONCA 652; *Sacks v Ross*, 2016 ONSC 2498.

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lawyers, the initial awareness of a personal injury damages claim comes from a notice letter or a statement of claim that outlines the injuries and losses, often in general terms. A notice letter or statement of claim typically provides an indication, rather than a definitive statement, of both the types of damages being claimed and the likely amount of the claims that will be pursued at mediation or trial.

At the outset of any case, experienced defence counsel will conduct an initial assessment of potential damages, taking into account all available information. Basic details such as the number and types of claimants, their ages, and the nature of the injuries are typically evident from the claim itself. Unlike plaintiff's counsel, defence counsel and their clients do not have immediate access to educational, employment, or medical records from the beginning. Despite these limitations, an initial assessment is crucial for defence lawyers to anticipate which documents they need to request or obtain and to determine which damages experts may be necessary to retain. Notably, an early damages assessment enables defence counsel to provide their initial impressions to their client regarding the scope of the damages at issue in the case. Plaintiffs and their counsel have an important role to play in this. Early disclosure by the plaintiff of documents and information supportive of a damages claim, including before the formal discovery process, can have a material impact on how quickly defence counsel can assess the potential exposure from the claim, advise their clients, and take instructions, as appropriate.

B. Clients

In all circumstances, the initial damages assessment enables lawyers to manage their clients' expectations throughout the litigation process. For most potential personal injury plaintiffs, this is the first and often only time they are considering seeking financial compensation for an injury they have sustained. The initial consultation with a personal injury lawyer serves as an introduction to the fundamentals of personal injury damages assessment. Due to the significant amount of contradictory or misleading information available on the Internet and in media portrayals, the claimant's initial discussions with their lawyers provide a valuable opportunity to discuss the basic principles of damages assessment and quantification. These discussions also address any misconceptions about how personal injuries are compensated in Canada, particularly within their province.

A crucial initial step in maintaining the client relationship over the course of the litigation, which can take years, is engaging in realistic and transparent discussions regarding the evaluation and proof of personal injury damages within our legal system. It can be challenging for clients to understand that issues or impacts they believe deserve substantial compensation may not result in the anticipated damages or may not be acknowledged by personal injury law at all. By managing client expectations from the beginning, subsequent conversations about settlement or trial will be much easier. A more fulsome discussion of the types of questions to ask and the information

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to be obtained and imparted during initial consultations with injured persons seeking legal advice is set out below in this chapter.

The potential quantum of damages available in any given case may also be considered as part of the analysis to approve a personal injury plaintiff's application for a settlement or litigation loan. These loans may be sought by personal injury plaintiffs who have immediate financial needs and are unlikely to obtain immediate settlements. Various companies in Canada offer financing in the form of litigation or settlement loans to individuals who have brought a personal injury claim. In approving such financing, the companies providing the loans consider the expected quantum of the future personal injury settlement, among other factors. Lawyers representing personal injury plaintiffs may be required to provide an estimate of the value of the case and the likelihood of any settlement as part of the application and reporting process. Should clients request assistance from the available loan companies, it is necessary to understand the likely financial value of their case, what a settlement may entail, and the risks of not obtaining the anticipated settlement or any settlement at all.

Many personal injury defendants are insured or supported by institutional bodies experienced in defending personal injury claims. These insurers or institutions often participate in directing the litigation as clients. Due to the frequency and volume at which these institutional clients defend personal injury cases, they typically have significant experience in assessing and evaluating personal injury damages and estimating the types and amounts of damages that might be expected in a given case. During the early stages of potential or known litigation, defence clients usually require reporting on relevant damages information to help them set financial reserves for potential claim payouts, ensure appropriate counsel is appointed, and establish litigation budgets and expectations for the necessary experts and disbursements to fully evaluate or defend the case from a damages perspective.

III. How to Conduct Initial Case Assessments

A. Initial Consultation for the Plaintiffs

The "intake" phone call is one of the most important conversations for a plaintiff's lawyer in the course of a case. The initial consultation intake phone call serves as the first opportunity to gather essential facts and investigatory leads for building a personal injury damages case. While each situation and injured plaintiff is unique, a set of preliminary questions can help the lawyer obtain an appropriate initial damages assessment and develop an investigative plan to gather additional information. Fundamental questions to ask should be linked to the types of damages that will ultimately be pursued in the case.[3] In essence, the primary objective of the initial conversation is to obtain a preliminary understanding of who the potential plaintiffs may be, identify

3 Types of damages are explored in Chapter 3.

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the types of damages that may be claimed, and provide an approximate or general estimate of the quantum of damages for each category or head of damage.

The information gathered during the initial consultation should be documented for future reference by the lawyer or others in their office. Many firms use web-based or standardized intake procedures to ensure that the necessary factual information is obtained and that relevant and easily captured details are not missed during the initial consultation. It is advisable to create a standard interview format that is easily accessible and editable and that includes prompts for capturing the most essential information during the initial interview.

B. Discussion Points to Formulate an Initial Damages Assessment

To formulate an initial damages assessment, it is useful to consider a non-exhaustive list of discussion points, including:

1. who is the person speaking with the lawyer;
2. personal injury damages concepts;
3. the nature and stability of the injury;
4. age;
5. educational background, employment history, annual income, and prospects or goals;
6. pre-incident injuries, illnesses, or functional limitations;
7. post-incident medical care;
8. current attendant care and equipment needs;
9. family and living circumstances;
10. future care cost estimates; and
11. supporting documents.

1. Person Speaking with the Lawyer

The injured individual may not be the one initiating contact with a personal injury lawyer. In cases of severe injury, such as when the person is incapacitated or hospitalized, or when the injured party is a minor or otherwise unable to reach out to a lawyer, family members or friends often make the initial contact. In such circumstances, it is important to clearly identify the relationship between the person contacting the lawyer and the injured individual, as well as any potential limitations regarding the extent or accuracy of the provided information.

In certain scenarios, family or friends may contact a lawyer at the express request of the injured person, who might be overwhelmed or facing difficulties in reaching out themselves. Alternatively, a concerned friend or family member may independently seek information on the legal process out of concern for their loved one. When the injured individual is capable of providing information but did not initiate the first

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contact, it is crucial for the lawyer to directly communicate with them. This allows confirmation that they wish to obtain legal advice and services, verifies the accuracy of the initial information, and allows counsel to obtain the individual's consent for the collection of their personal and private information.

2. Introducing Personal Injury Damages Concepts

Regardless of who initiates contact with the lawyer, most individuals calling a personal injury lawyer are doing so for the first time. The objectives and possible outcomes of personal injury litigation, as well as how injured persons are compensated, are topics that are not widely understood by the general public. Clarifying the purpose of a personal injury lawsuit, as distinct from other legal and regulatory processes, is an important first step in managing a potential client's expectations about what a lawsuit can achieve and what personal injury damages in their case might entail. Lawyers should also always clarify that a personal injury lawsuit is different from the criminal process, where public punishment is pursued, and also distinct from regulatory regimes, where the competence of a regulated professional defendant in malpractice cases—such as doctors, nurses, and midwives—is the primary focus. The focus of all personal injury matters is compensation, not retribution, and rarely punishment (such as punitive damages). In most circumstances, the goal of the litigation is to restore the injured person to their pre-injury position, as best as money can do.[4] Ensuring that the injured person or the person consulting the lawyer is aware of that primary purpose is an important objective of the initial consultation discussion.

Lawyers should briefly explain the heads of damages that form the basis for personal injury compensation that may be relevant to the caller. Specifically, they should inform the individual of the types of compensation available to them or their loved one and briefly explain how each head of damage is calculated. This brief explanation will place all questions asked during the initial consultation in context and provide the personal injury caller with a framework to understand what information may be relevant to the discussion.

One of the most important heads of damages to clarify and discuss with a potential claimant is general damages or the compensation someone may receive for "pain and suffering" and other intangible injuries. Misconceptions about the possible quantum for "pain and suffering" emanating from American media or other sources can grossly inflate expectations about what and how much general damages may be awarded in Canada. A discussion regarding the "cap" on general damages in Canada, and how the cap may be relevant in the situation, can help set reasonable expectations early.[5]

4 *Andrews v Grand & Toy Alberta Ltd*, [1978] SCJ No 6 (QL) at paras 24, 26, 1978 CanLII 1.

5 See Chapter 5 for more information on the cap and how it is conventionally applied.

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3. Nature and Stability of the Injury

One of the most important issues to address during the initial assessment is the nature and stability of the injury. In some instances, the type of injury and its potential for permanence are evident and straightforward (e.g., an amputated limb). However, other injuries may be entirely imperceptible or unclear upon first examination. For instance, certain brain injuries and psychiatric conditions can be subtle and may require specific testing by specialists to be accurately identified and confirmed.

The actionable injury or outcome may also result from a negligently caused worsening of a pre-existing medical condition, rather than an entirely new or distinct injury.[6] For example, a slip and fall incident may aggravate an already arthritic joint or a negligent delay in diagnosing cancer could render it incurable with any treatment options when it was otherwise curable in the absence of negligence. As with all damages assessments, these injuries are evaluated by considering the potential plaintiff's "original position" compared to the outcome attributed to the negligence. The heads of damages available for these injuries, and the quantum assigned to each head, will be related to the "gap" between these two points. In such circumstances, identifying the precise injury, or gap, may require further investigation, additional medical records, or expert opinion. Although a preliminary idea or theory can be proposed for the initial damages assessment, it is important to acknowledge that further investigation and evidence will be necessary to substantiate the actual injury suffered in many cases.

The duration of an injury, or the expected length of time an injured individual will experience the effects of the injury, influences the calculation of various types of damages. If an injury is expected to be permanent, it may result in higher general damages due to prolonged pain or suffering, extended inability to work, and ongoing need for future care resources. Conversely, if an injury is expected to be temporary, different assumptions can be made regarding the duration of time a person will be off work, require assistance, or experience significant pain or discomfort.

In many situations, whether an injury will be permanent is unknown at the time when the injured person or their family contacts a lawyer. During the initial consultation, the injured person may still be in the hospital or undergoing rehabilitation, their medical situation may still be under investigation, or they may be receiving treatment to address the functional impact of their injury. In cases where the long-term effects of the injury are unclear or where significant improvement may occur in a short period, it may be advisable to schedule a follow-up consultation at a later time, once the person's condition has stabilized and a more accurate assessment can be made.

4. Age

The age of the injured individual is relevant to the initial damages assessment in several ways. First, it can indicate whether the initial assessment is likely to remain

6 *Athey*, *supra* note 1 at para 47.

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consistent or has potential to change over time. For example, if the injured person is an infant or a child, their development may affect the functional consequences of the injury. As a child grows, they may adapt or compensate for the injury, potentially reducing its impact on their daily functioning. Although some injuries may initially seem significant, a child may develop normally or with limited functional impact from the injury as they mature.

Conversely, injuries may appear to have limited or unclear impacts on infants or younger children when they first occur. However, with development, some may "grow into" their injury. This is best explained by considering an example of normal child development and how that development may be impacted by a brain injury. It is commonly appreciated that a three-year-old child cannot be expected to reliably remember to look both ways before crossing the street. For that reason, three-year-olds are generally not allowed to cross streets on their own. By contrast, a healthy and uninjured 12-year-old would generally be expected to know, and remember, to look both ways before crossing the street. Using this example, imagine that the impact of a brain injury meant that the injured person would never develop the ability to reliably remember to look both ways before crossing the street. In this case, the brain injury would not manifest as a functional limitation until the injured person had "grown into" the stage where competence at that task was expected from a developmental perspective; in this example, age 12. In this and similar ways, the impact of the injuries may be imperceptible during early phases of development, only to manifest themselves and become apparent as barriers to the individual's physical, social, or behavioural function as they age.

The age of an injured person will also likely influence the duration they are expected to live with their injury, assuming the injury is permanent, and consequently affect the preliminary estimate of damages during the initial damages case evaluation. The expected lifespan of the injured person, commonly referred to as "life expectancy," impacts several categories of damages. As will be discussed in subsequent chapters of this book, the duration for which an injured person may experience pain and suffering,[7] the period for which they may require specific equipment or exceptional care, and the manner and duration for calculating their income loss are all impacted by the injured person's life expectancy.[8]

In addition to the direct impact of age on an initial damages assessment, age may also inform the lawyer's ability to establish an evidentiary baseline of function and life trajectory. The longer an injured person has attended school, worked in their career, or been of good health as an adult, the more documents and records may be available to help substantiate a pre-injury position with which to compare.

7 See Chapter 5.

8 See Chapter 6.

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5. Educational Background, Employment History, Annual Income, and Prospects or Goals

For many, the loss of income or employment opportunity that results from an injury is life changing. Without disability insurance or other savings, many injured persons are left without the resources they need to provide for themselves and their families. Therefore, income loss or loss of employment opportunity is one of the most important areas to investigate when conducting an initial damages assessment.

Although many individuals may be away from work due to their injury at the time of their initial call to a lawyer, it remains good practice to ask for employment and educational history going back several years, including any time spent on leave or changing careers. For individuals who had established careers or employment before their injury, asking for their average annual income and benefits prior to the injury allows the lawyer to make a preliminary estimate of the past income loss and the potential future income loss should the individual remain unable to earn income either over an extended period or ever again.

Where there is limited employment or income-earning history due to age or other factors, information about the individual's past and future education, past and future employment prospects, and plans and goals will inform the damages assessment. In the case of injured infants or children who are unlikely to ever be employed as a result of their injury, the infant or child's family's educational and employment history will be important information to obtain. If the injured infant or child has siblings, their ages and educational history will also likely become relevant. Understanding the family's educational history, employment history, and annual income will assist in providing a factual underpinning for theories of income loss that may be pursued in later litigation.

Generally, assessing the potential loss of income that results from an injury is a straightforward exercise of understanding where the claimant worked, how much they earned, and their prospects with respect to return to work following the injury. However, caution should be exercised in situations that are less straightforward, including where the individual was self-employed or generated non-employment income. It is important to understand the nature of the claimant's prior income sources and tailor the assessment accordingly.

6. Pre-Incident Injuries, Illnesses, or Functional Limitations

Pre-existing injuries, past and present illnesses, co-morbidities, and functional limitations should be carefully considered during the initial consultation and as a part of an initial damages assessment. These pre-existing factors are used to set a baseline from which the impact of the injury will be assessed, since an individual will not be compensated for losses unrelated to tortious conduct. However, these same pre-existing factors may also increase the impact of the tortious injury on an individual.

To illustrate, certain behaviours—such as smoking and drug or alcohol abuse—or pre-existing medical conditions or co-morbidities—such as diabetes, hypertension,

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or coronary artery disease—may increase the likelihood of significant negative health events in the future. Negative health events may, in turn, reduce life expectancy and thereby render future losses of income or future care cost estimates to be less than they would otherwise have been. In contrast, if an injured person had a pre-incident stroke that rendered them paralyzed on one side of their body (e.g., the right leg) and they went on to suffer a significant injury to their previously unaffected side (e.g., the left leg), it is likely that the person is significantly more impaired by that injury than would be a person who had two functional legs before the incident. Such increased impairment could then be reflected in increased costs of care or equipment, an increased loss of amenity, and other important areas of damages quantification. Whether the pre-existing illness or injury increases or decreases the likely quantum of damages for a particular person will be very fact specific.

7. Post-Incident Medical Care

For many injured people who contact a lawyer, additional medical or other specialized care may be ongoing or set to continue for months or years after the initial injury takes place. In some circumstances, it can take a significant amount of time for an injury to resolve, stabilize, or reach chronicity, during which time several doctors, surgeons, or other regulated care providers may be providing additional treatment. For their part, various chronic injuries or illnesses may require continued or long-term medical or specialized care for the foreseeable future.

Depending on what future medical or other care may be likely, the injury may improve with further treatment, may remain stable because of treatment, or may worsen either on its own or from complications arising from the further treatment. Having an appreciation of the injured person's past, current, and likely future post-incident care will provide valuable information about how the injury may evolve, what care or therapies are working for the person and are likely to continue or should continue, and what types of contingencies may impact the injured person in the future as a result of further care. In addition, having an initial list of treatment practitioners will allow the lawyer to follow up with current and future practitioners when seeking additional information on the person's prognosis and when obtaining medical records to establish the injury or information and records in relation to therapies undertaken in the future.

8. Current Attendant Care and Equipment Needs

Injured people often lack the means or other resources to provide care or purchase equipment after an injury. For those without either means or privately funded alternatives, publicly available services that can provide care or equipment often have significant waitlists and limited hours of service, or are otherwise inadequate.[9] Therefore,

9 *Leroux v Ontario*, 2023 ONCA 314.

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many injured individuals rely on a mixture of publicly available resources and care or resources provided gratuitously by family or friends. To appreciate the day-to-day resources necessary for the individual and to assist in determining current and likely future needs and costs, several inquiries should be made (see Box 2.1).

BOX 2.1

NON-EXHAUSTIVE INQUIRIES IN ASSESSING CARE AND EQUIPMENT NEEDS

CURRENT RESIDENCE

Is the individual still in a hospital, rehabilitation centre, or other facility? If yes:

- What care is currently being provided?
- What is the discharge plan, if any?
  - When is discharge?
  - How will discharge be effected?
  - Will the individual be discharged to live where they lived prior to the injury, or will alternative or new accommodation be necessary?

PERMANENT RESIDENCE

- Where does the individual live relative to the location of current and/or future treating physicians and other health care providers?
- Does the individual rent or own their residence?
- Who else resides in the home?
- Are there any home modifications that have been completed or that are contemplated? If yes:
  - How were any modifications paid for?
  - Is there funding—private or public—to conduct any further renovations?
  - What barriers are there to effecting any necessary home modifications?

CARE

- Is a care team required? If yes:
  - Is a care team in place?
  - Who will provide care?
- Is formal or informal attendant care being provided? If yes:
  - Who is providing that care and why?
  - What core functions are being conducted by the people providing the care?
  - Are there any identifiable gaps in the current care being provided?
  - Have efforts been made to obtain more hours of care?
  - Have efforts been made to obtain a different type of care, such as nursing care versus personal support worker care?
- What para-medical or regulated health care is being received, and how is that care being delivered?

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- Is the injured person on any waitlists for assistance or care?

EQUIPMENT

- What equipment is being used?
- Why is that equipment being used?
- Have there been any barriers to obtaining that equipment?
- Is there equipment that would be useful if it was obtained?

These types of inquiries provide an understanding of the following:

- the person's current function and needs;
- insight into the individual's care needs up to resolution through settlement or trial, also known as "past care";[10]
- recoverable expenses that have been or may be incurred;[11]
- subrogated interests that may need to be advanced during any litigation;[12] and
- care or other resources that may be needed in the future.[13]

In addition to asking for such information, the initial consultation is also an optimal time to suggest that the injured person or their family and friends keep notes; receipts or records of any care; and resources or equipment they use in caring for the injury, including logging travel and parking to any additional hospital, medical, or therapy appointments. This information should be shared with the lawyer periodically to ensure that an up-to-date picture of the injured person's care and equipment needs is available. However, the facts gathered and recorded by the injured person and/or their family and friends—including the facts recorded in notes or diaries—will likely need to be disclosed in the litigation.

9. Family and Living Circumstances

An individual's family and living circumstances provide important context to any initial damages assessment. Who is close to and provides support to the injured person can impact the quantum of damages. In particular, obtaining a preliminary appreciation of the following facts will help guide an initial assessment:

- names, ages, and locations of family members, partners, or other close people who are supporting the injured person;
- the nature of the support or assistance being *provided to* the injured person by their support system;

10 See Chapter 6 for more information.

11 See Chapter 6.

12 See Chapter 10.

13 See Chapter 6.

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- the nature of the support or assistance of which the support system is being *deprived* as a result of their loved one's injury; and
- how the injury has changed the relationships in the injured person's support system.

In some provinces, family members may have derivative claims against a tortfeasor for harming their loved one. Each province has different rules on who, if anyone, can advance derivative claims for personal injury damages, how to claim them, and what they can claim. In Ontario, for example, a defined list of family members set out in the *Family Law Act*[14]—including spouses, children, siblings, and grandparents—can claim non-pecuniary damages for the "loss of guidance, care and companionship,"[15] as well as pecuniary losses such as out-of-pocket expenses. However, these claims are statutory only. To date, Canadian courts have not recognized a common law right for family members to advance derivative claims.[16]

Spouses, children, and others who are dependent on an injured person's income, care, or services, and who have lost those resources as a result of negligent conduct, may also be able to claim such losses both from the date of loss to trial and for any losses that are reasonably possible to occur in the future.[17] Such claims often arise in cases of fatalities, where the family of the deceased loses access to the income or resources that the deceased provided. These losses may also occur when an injured person is so significantly harmed that they can no longer offer certain services—such as child care or housekeeping—to a family member, who then has to purchase the services, perform the services themselves, or do without the services.

As noted, for many, family members are the primary source of attendant or other care. This may be due to having limited funding available to purchase care or because of the personal preferences of the injured person or their family. Where provincial law allows, family members may claim directly for the extraordinary care they provide to their injured family members. Similar to a past care claim, these claims are usually valued by applying market rates to the care being given.

Family members who are not named as claimants, or others who provide attendant or nursing care services and who are not enumerated family members, may also have claims at common law for the work they have done. These claims are often referred to as "in trust" claims, since they are brought by the injured person "in trust" for those who have provided the care.[18]

14 RSO 1990, c F.3.

15 *Family Law Act*, s 61(2)(e).

16 *Hubley v Est Hubley*, 2010 PESC 38, aff'd 2011 PECA 19.

17 See Chapters 6, 7.

18 *Pelletier v Ontario*, 2013 ONSC 6898.

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An initial assessment of potential family or support-related claims is important in all circumstances and can be even more so depending on the specific province where a claim is being made. It may help identify additional claimants and provide a clearer understanding of who is supporting the injured individual and how these supports might be compensated within a claim. Furthermore, recognizing the individuals who offer such support enables the lawyer to identify potential witnesses for damages later in the case.

10. Future Care Cost Estimates

Future care costs often make up a substantial part of personal injury damages claims. Essentially, the more extensive the required care and resources and the longer the duration needed for the injured person, the higher the anticipated quantum of a future care claim. Although it is important to consider these factors from the outset, accurately determining an injured person's future care costs can be quite challenging. To a large extent, future care claims depend on expert opinion regarding the necessary care and resources. However, if a rough annual estimate of care or resources can be evaluated based on prior cases or experience, an approximate sense of the potential future care cost award is possible.

Most future care cost awards are discounted for the present value of money. Some provinces prescribe the discount values by regulation, while other provinces allow the parties to dispute or argue the point on a per case basis. In addition, for some cases, future care costs are required to be placed in a structured settlement if they meet certain criteria.[19]

Several factors can affect the evaluation of a potential future care award when determining an initial damages assessment. In particular, the following questions in Box 2.2, many of which overlap with other information the lawyer may obtain when considering other damages questions, are useful to consider.

BOX 2.2

QUESTIONS TO CONSIDER IN EVALUATING A POTENTIAL FUTURE CARE AWARD

- How much care and equipment does the injured person receive now?
- What level of care does the injured person need?
  - Is supervisory care sufficient?
  - Does the injured person need more specialized and expensive care, such as nursing care?
- Where will the injured person be receiving the services?
  - What are the market rates in those areas?

(Continued on next page.)

19 *Courts of Justice Act*, RSO 1990, c C.43, ss 116, 116.1.

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  - Will some services be more expensive or less expensive because they are not close by?
- How long is the injured person likely to need those services or equipment?
- Will there be significant changes in the care or equipment the injured person needs over time?
- How long is the injured person expected to live?
- Is there a requirement that the future care funding be structured?
- Is the injured person able to manage their own care? If not:
  - Who will manage their care for them?
  - Will there be a cost associated with that management?

Taking these factors into account, an overall estimate of potential future care costs can be developed. Determining future care needs and costs is an interactive process, and this estimate should be continuously reviewed throughout the case and reassessed if there are any changes in the injured person's health or well-being during the litigation process.

11. Supporting Documents

Several types of documents can support an initial damages assessment, when available. During the initial consultations, it may be challenging for an injured person to obtain and provide medical or other records that detail their injuries. Although these records are helpful, they are often difficult to acquire and examine for the initial assessment. Thus, an initial damages case review often proceeds with limited or no supporting documents, with updates made as documents are obtained and reviewed.

Often, injured individuals or those contacting a lawyer may not be fully aware of the medical prognosis of their current injuries or potential future challenges. Therefore, reviewing initial medical records, therapy notes, or other treatment documents can provide valuable information on the injury's nature, extent, and likely prognosis.

In addition to medical and therapy records, other documents relevant to damages issues may also be available for a lawyer's initial review. Examples include income tax returns, notices of assessment, school or university records, receipts and logs, or time charts for care provided.

Although there may be a cost to obtain these records, it is an investment that will be necessary over the course of litigation. The records allow a more accurate and complete assessment of the loss and will inevitably be requested by whoever responds to the claim.

IV. Quick Tools to Help with Initial Case Assessments

There are tools that can assist with a rough estimate of some heads of damages. In particular, there are charts and texts that categorize general damages awards by type

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of injury, as well as other data such as age or province. Although these texts can be very helpful in orienting a lawyer in a new case, significant caution should be taken in relying on such charts and texts before being fully familiar with the facts of the case and reviewing the medical records of the particular case being assessed. The fact that an earlier case involved a similar injury to the same body system might give some guidance, but it does not obviate the need to take a full history of all the ways that *this* injury has impacted *this* claimant.

General damages awards rise with inflation year over year. Inflation calculators on the Internet are easy and available to use to ensure that the damages award has been updated for inflation to the current year. In addition, paper form and Internet-based "present value" calculators that include standard life tables can assist in providing estimates of the present value of various heads of future losses, although only for "normal" or median life expectancies.

V. The Defence Perspective

As noted, initial damages assessments are important for both plaintiffs and defendants. Evaluating the potential damages that may be sought in a particular case highlights the financial risk to the defendant if the case is lost, whether the defendant is an individual, a private institution, or a government. Many institutional defendants have internal reporting mechanisms to ensure appropriate and accurate underwriting of a claim so that necessary reserves can be set.

Like the plaintiff's lawyer, defence counsel and their client will seek to make an initial damages assessment considering most of the same factors mentioned above. However, unlike the plaintiff and their lawyer, the defence side is often initially at an informational disadvantage early in the case. Efficiently evaluating what information is available or can be sought will help achieve the goals of setting reserves and managing client expectations should the matter eventually be paid out. Upon receiving notice of a claim, defence counsel will want to explore available evidence on damages and request what is not available. To this end, defence counsel should:

- gather a date-stamped social media search of the claimant and relevant witnesses;
- send prompt written requests to the plaintiffs' counsel for all police or incident reports and any available scene or employer reports;
- review the pleaded injuries and claimed losses to understand alleged impairments and potential causation issues; and
- request early medical information (hospital charts, family physician clinical notes and records, diagnostic imaging, physiotherapy records, and medication histories/pharmacy printouts) even before formal documentary production is due, explaining that timely disclosure will assist in assessment and reserving rights.

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Reference to the claimant's entitlement to prejudgment interest is one tool that may be used to ensure early production. Where the statement of claim is the first notice of the injuries and the pleading is vague or overbroad, a demand for particulars tailored to damages may be considered. The earlier a plaintiff makes full and frank disclosure of their damages case, with supporting documentation and expert opinions, the earlier the claim can be evaluated and resolved, if appropriate. Disclosure and production on the eve of mediations or at the last moment required by the applicable rules of civil procedure do not provide the plaintiff with an advantage. On the contrary, untimely disclosure and production simply make it more difficult for defence counsel to take instructions and for clients to assess their potential risk and exposure.

VI. Re-evaluating the Initial Case Assessment

As noted above, case assessment is an iterative process. Conducting the initial damages assessment is the first step in evaluating and building a personal injury damages case. Because there is often a prospective element to a damages claim, the damages assessment is continually evolving and needs to be re-evaluated regularly. When new information emerges, the personal injury lawyer should consider how this information impacts each head of damage and how the new information can be explored, proven, disproven, or made irrelevant to develop a coherent damages theory. Common times for re-evaluating a damages case include the following:

- after any liability investigation is complete;
- where the person's condition changes significantly; for example, after a certain age of development or after discharge from a hospital;
- if there are any relevant changes in the person's family, such as divorce, remarriage, further children, death, or significant disability;
- each time additional medical or therapy records are obtained;
- before and after any examinations for discovery;
- before and after retaining damages experts or receiving opposing damages expert reports;
- before a mediation, pre-trial conference, or settlement negotiation; and
- before trial.

Like the injured person themselves, personal injury damages assessments will evolve and develop as time and circumstances require. An early assessment will allow the personal injury lawyer to be prepared, to prepare their client, and to set a solid foundation for the rest of the litigation.

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