

Comparative Study of Canadian and American Personal Injury Cases

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Comparative Study of Canadian and American Personal Injury Cases

by

Michel Green⁽¹⁾

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Introduction

This is a comparative study of Canadian and American jurisprudence relating solely to quantum of damages in personal injury cases. We have undertaken this study for the purpose of enabling the reader to determine the scope of awards which are being rendered in Canada and in the United States for the following categories of injury :

1. Quadraplegia ;
2. Paraplegia ;
3. Eye injuries ;
4. Amputation of one or more fingers ;
5. Amputation of arm and loss of use of arm ;
6. Amputation of one or both legs.

The reader should bear in mind that this study is based upon a selective survey of relevant Canadian and American case law and does not purport to be an exhaustive study of the subject matter. For the purposes of this study, representative cases in a limited number of areas in both countries were selected, comparisons were made and general conclusions were drawn.

It is evident that many factors influence an award for damages including the age, the sex and the previous health of the claimant. As well, the professional and the social status generally of the claimant must be considered when calculating loss of future earnings and loss of enjoyment of life. We have attempted to exercise control over the numerous variables, limiting our comparison to cases of plaintiffs

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similar in age and social standing. The judgments which form the basis of this study were rendered both by Judge alone and by civil juries. As well, we have made use of damage settlements, which are reported in excerpt form, from the State of New York. By comparing these selected damage awards and settlements, we have been able to draw general conclusions regarding anticipated damage awards in Canada and the United States.

We have also noted certain extraordinary damage awards, although these cases do not precisely coincide with the fact patterns in other cases. These extremely high judgments are included to make the reader aware that, in some jurisdictions, extraordinary damage awards are possible.

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Lastly, we would advise the reader that this study is devoted solely to the quantum aspect of personal injuries cases. We have not taken into account the specific causes of action which have resulted in the various damage awards. That is to say, we have not differentiated between, for example, cases of medical malpractice and automobile accidents.

The difference in quantum of damages for similar claimants and similar injuries, between Canadian and American cases was striking. The American awards were consistently higher than the Canadian awards.

It is our opinion that this fact can be explained as a result of the presence of different social, economic and judicial philosophies. For example, juries will obviously believe that large American corporate defendants have more funds available for the compensation of accident victims of the types dealt with than would their average Canadian counterparts. Furthermore, American Courts, in contrast to Canadian Courts, have moved beyond notions of compensatory damages to the actual punishment of perceived wrongs by means of large punitive damage awards against certain corporate defendants. This is particularly true of the cases involving injuries which resulted in either general paralysis or in the amputation of plaintiff's legs.

Another important reason is the fact that the quantum of damages in American cases is almost invariably established by juries which, in our opinion, contributes to the size of awards rendered. Frequently, juries are swayed by considerations other than those ar-

guments which are relevant in law. In contrast, the great majority of Canadian damage awards are rendered by a Judge sitting alone. This fact results in much more conservative damage awards, calculated strictly according to the categories of pecuniary and non-pecuniary damages. The cost of future care and the loss of prospective earnings tend to be calculated by Canadian Judges in accordance with actuarial tables and are consequently not as all-encompassing as U.S. judgments. The Supreme Court of Canada referred (in the recent case of *Andrews -vs- Grand & Toy Alberta*, (1978) 2 S.C.R. 229.) to the social burden of high damage awards, i.e. the enormous insurance costs and the increased cost of consumer goods generally due to these extraordinary awards. At page 261 of the judgment, Mr. Justice Dickson states, on the subject of damages for non-pecuniary losses :

“In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.”

A third rationale for the extreme difference in the size of Canadian and U.S. quantum awards, lies in the fact that far more liability cases are taken on a contingency basis in the United States than in Canada, a fact which encourages the claiming of extraordinary amounts of damages and which therefore results in very high damage awards and settlements.

The majority of the jurisprudence is very recent and the following cases illustrate general trends as regards damage awards in Canada and the United States for the above-described categories of injury. The latest Canadian judgments seem to follow an upward trend, but the same can also be said for the American decisions. In both countries, the awards have increased by a percentage greatly exceeding the inflation rate.

Unless expressed otherwise the awards indicated include all heads of damages, being pecuniary or non-pecuniary. Finally, the reader should bear in mind that the American decisions are ex-

pressed in their national currency ; the Canadian dollar being worth approximately 30% less than the American dollar, it increases the gap between the American and Canadian awards to an even greater extent.

Quadraplegia

Regarding this type of injury, we used jurisprudence involving young male plaintiffs, who are generally employed in minimum-wage occupations for the purposes of our comparison. Fifteen Canadian judgments regarding claimants in this "test group" and fourteen American cases involving similar claimants were used.

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A total of twenty-seven Canadian cases concerning quadraplegia were studied in the course of this project. Fifteen judgments, which involved young male plaintiffs, non-professional, between the ages of 15 and 29 years old, were used for the purpose of comparison with similar American cases. The judgments were rendered by the Courts in Saskatchewan, British Columbia, Quebec, Ontario, New Brunswick and Alberta, from 1978 to 1984. For the above-described class of plaintiffs, the average Canadian award was determined to be approximately \$877,000 (average calculated by adding all of the relevant awards and dividing by the number of cases). There were two noteworthy cases : Schmidt and others vs Sharpe and others, a 1983 Ontario Superior Court case, which awarded a total of \$1,631,644 to a 16-year-old male plaintiff. This case provides an example of the use of actuarial tables in the calculation of damages. The second one comes from the Superior Court of Quebec Lebrun vs Quebec Telephone, J.E. 84-566. The judge awarded \$2,400,000 for a snowmobile accident, but later found the plaintiff 33% liable.

Of the twenty-six cases, seven Canadian judgments dealt with female plaintiffs of various ages and professions. Of these seven, only one exceeded \$500,000. The case of Malat vs Bjornson, (1979) 4 W.W.R. 673, which involved a 46-year-old female homemaker, awarded a total of \$824,130 in damages, including \$85,000 non-pecuniary damages, over \$600,000 for future care and \$45,500 for a new home.

Regarding quadraplegic cases, the Supreme Court of Canada decided in 1978 to limit non-pecuniary damages to the sum of \$100,000 (Andrews vs Grand and Toy Alta Limited, (1978)

2 S.C.R. 229). Since that time, Canadian judges have either abided by this general rule or adjusted the figure to reflect inflation. No such limitation is imposed upon American judges in similar cases.

Fourteen American cases involving the "test group" plaintiffs were used for this study. Twelve of these cases disclosed consistently high damage awards, with a mathematical average of \$3,041,666. We note, however, that the two other cases, from the Courts of Florida, one involving a 16-year-old male and the other a 19-year-old, awarded respectively \$13,300,000 and \$16,500,000.

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We would conclude from this random survey that an American plaintiff, in an action for bodily injury resulting in quadraplegia, can anticipate being awarded damages in an amount more than 3 times the damages which would be awarded to a Canadian plaintiff in the same situation. As well, in certain cases, extraordinary amounts have been awarded.

Paraplegia

In researching quantum of damage awards in cases of paraplegia, we once again resorted to comparing cases of young male claimants (under 35), generally earning the minimum wage or slightly in excess thereof. Using Canadian and American case law involving this type of plaintiff, we were able to compare typical damage awards in both countries.

Our study utilized eleven Canadian cases, including several judgments from Quebec, and judgments from Saskatchewan, British Columbia, Ontario, Alberta and Manitoba, all involving young male plaintiffs holding non-professional jobs. The average judgment in these paraplegic cases was approximately \$377,000. In cases outside of the fact pattern which was used in the comparative study, there was a Quebec judgment which discussed the case of a 25-year-old male student with an anticipated professional salary of at least \$42,000 per year. In this case, the plaintiff was awarded over \$1,500,000 (*Dugal vs Procureur Général du Québec*, 1979 C.S. 617). In *Bouliane vs Commission Scolaire de Charlesbourg*, J.E. 84-297, a 10-year-old girl received \$2,780,000, because of her young age.

Twenty United States cases, involving both damage awards and settlements, from New York, Rhode Island, Ohio, Illinois,

Colorado, Florida, California and Louisiana were used in our study. Ten of these cases involved young male plaintiffs. The average award or settlement among the five cases which are similar to the Canadian cases was \$3,653,360. The average award is relatively high due particularly to the case of *Kempa vs Clark Equipment*, a 1982 Michigan decision, which involved a young field worker injured on the job because of a manufacturer that had produced an unstable forklift. He received \$13,500,000, of which \$7,700,000 represented punitive damages. But even without this exceptional American case, the average amount of damages in the U.S. cases canvassed is \$2,622,222, still almost seven times the Canadian average for similar plaintiffs with similar injuries.

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Ten other American paraplegic cases were studied, involving male and female plaintiffs of various ages and professions outside of our comparison fact pattern. The average award or settlement for the twenty cases reviewed was \$3,734,280.

Although only the most general conclusions may be drawn using the present data, it is safe to conclude that the damage awards for an injury resulting in paraplegia will be several times higher in the United States than it would be in Canada.

Eyes

With respect to loss of eyesight, we surveyed fourteen Canadian cases involving the loss of sight in one eye. The claimants in these cases, men and women of various ages and professions, claimed damages for loss of employment opportunity, psychological damage, pain and suffering, past and future medical expenses, esthetic prejudice due to facial injury and scarring and loss of enjoyment of life, among other heads of damage.

Of the fourteen Canadian judgments, eleven damage awards involved the loss of sight in one eye of male plaintiffs. Notwithstanding the differences in ages and profession of the various plaintiffs, the judgments were very consistent. The average award was \$50,000.

Of the fourteen cases surveyed, two were relatively small awards of under \$20,000, involving older people. Another judgment was much higher than the average. The case of *Haddad vs St-Gelais*, (1980) C.B. 553, awarded a total of \$102,500 to a young female plaintiff in Quebec. This award included \$10,000 for esthetic preju-

dice and \$50,000 for her permanent partial incapacity due to the loss of her right eye.

From the cases surveyed, it would appear that the average award in Canada recently for injury resulting in partial loss of vision is between \$40,000 and \$50,000, bearing in mind that higher awards are possible where the plaintiff is a young person with professional potential. In cases regarding loss of vision, the age and profession of the plaintiffs are governing factors.

462 Our survey of American jurisprudence on this topic disclosed eight cases. Our American case law would place the amount of damages for the loss of vision in one eye at approximately \$200,000. The American judgments were not consistent in amount, and took into account various different heads of damage. There were two American cases not calculated in the average : The unreported Washington case of *Smyth vs Washington Tug and Barge Company*, a 1981 case where the plaintiff, a tugboat engineer, claimed damages after he lost his sight in a chemical accident. The plaintiff was awarded a cash payment of \$1,185,000 plus annual payments of \$48,000 for life, guaranteed for twenty years. We would underline that this was a case of injury resulting in total blindness. The other interesting case is the one of *Mack vs The County Public Health Trust*, a 1982 Florida decision where an infant born prematurely was rendered blind because of medical malpractice. He was awarded \$2,2 million.

Therefore, we can see that extraordinarily high awards are possible in the United States, but even the average of the American awards still remains four times the amount of the Canadian awards.

Fingers

Concerning the loss of one or more fingers, we decided at the outset to take into account only those cases involving the actual amputation of whole fingers. We did not utilize the numerous cases involving simple laceration, scarring and other injuries to the hands and fingers. One difficulty often encountered was that one sum would be awarded for each head of damages (i.e. loss of enjoyment of life, pain and suffering, etc.) pursuant to an incident which resulted in the loss of one or more fingers as well as other bodily injuries. It was often difficult to separate the amount of damages awarded

specifically for the loss of fingers from the damages awarded for the other accompanying bodily injury.

Nine Canadian cases were used as the basis of our study regarding the amputation of fingers. These cases involve plaintiffs of various ages and professions. It is evident that as regards an injury of this type, the profession of the plaintiff *may* play an important role in the determination of damages. A plaintiff whose occupation involves fine manual work and who loses one or more fingers can anticipate a much higher damage award than could a plaintiff whose occupation does not involve manual dexterity.

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In this regard, we would point out the case of Champeau vs Vaillancourt, an unreported 1980 case of the Quebec Superior Court where the plaintiff was a pianist who also taught piano. This 17-year-old woman was awarded \$50,545 pursuant to injuries to her right hand which forced her to reorient her career. The case of Breton vs Lemieux, an unreported 1978 judgment of the Quebec Superior Court, may also be cited in this regard. Plaintiff was a 35-year-old male pianist earning \$21,000 per year. Plaintiff was prevented from continuing his career in music by an injury which resulted in extensive damage to the thumb and one finger of one hand. With a permanent partial incapacity of from 1 to 2%, plaintiff was awarded a total of \$225,000. This case was inscribed in appeal and was later settled out of Court.

With respect to cases where the plaintiff's career is not jeopardized by the injury in question, we noted two recent British Columbia judgments (1980 and 1981) regarding plaintiffs under the age of 30, each of whom had suffered the amputation of all or portions of two or more fingers. A 27-year-old housewife was awarded \$20,000 for these injuries and a 16-year-old male student was awarded \$25,000.

Another aspect which plays an important role in cases involving the amputation of fingers is the element of damages for esthetic prejudice, as this type of injury invariably involves apparent mutilation. This will bring into play the usual rules regarding this head of damages, i.e. the age, sex and marital status of the plaintiff become relevant as does the question of whether a good appearance is vital to his or her work or social life.

For the loss of more than one finger, the nine Canadian cases surveyed, including the extraordinary judgment regarding the 35-year-old pianist, disclose an average total award of approximately \$46,000. Regarding damages for the pain and suffering of the plaintiff, the Canadian jurisprudence is not consistent and few conclusions can be drawn. For example, a 1981 Saskatchewan case involving a 36-year-old man who suffered the severe laceration of part of his thumb and two knuckles, requiring 4 days' hospitalization was awarded \$10,000 for pain and suffering. This may be compared to the 1979 Alberta case involving a male student who suffered the partial amputation of three fingers and was awarded only \$2,000 for pain and suffering.

The American case law compiled discloses considerably higher damage awards for this type of injury, in cases both of the amputation of one finger and of two or more fingers.

Regarding the amputation of one finger, damage awards of more than \$25,000 are not uncommon. This may be compared to the nominal amounts seen to be awarded by Canadian Courts for similar injuries.

With respect to the loss of more than one digit, the U.S. case law is inconsistent, varying according to the State where the judgment was rendered and to the specific facts of each case. Judgments as low as \$100,000, where the injury involved the loss of portions of three fingers and extreme pain and suffering, are recorded. As well, we note that judgments as high as \$1,500,000 (Michigan Appeal Court, 19-year-old female plaintiff who lost four fingers) have been rendered.

When the earning potential of the victim is not seriously affected by the injury, damage awards for the loss of more than one finger can be expected to be in the range of \$150,000 to \$200,000. As discussed with respect to the Canadian jurisprudence, the actual loss suffered by the plaintiff, as regards his professional and social life, and the actual pain and suffering, is relevant. It is not merely a question of standard calculation based upon the extent of the injury. The award is influenced by the proof, both medical and otherwise, presented. Several cases indicate that proof concerning extraordinary pain and suffering and psychological damage was introduced.

With respect to the plaintiffs to whom this type of injury poses a special professional damage, we would cite the American case of *Philippe vs Browning Arms Co.*, 395 So. 2d 31, a 1980 Louisiana judgment granting \$800,000 in damages to a dentist whose thumb was amputated, preventing him from continuing to practice. We would also point out the unreported New York case of *Berg vs Huntington Hospital*, a 1981 judgment granting \$163,550 in damages (including \$150,000 for pain and suffering) to a 40-year-old nurse whose injuries resulted in the amputation of her thumb.

It is evident that while no true average may be taken of the American damage awards regarding this injury, an American plaintiff can anticipate a damage judgment in an amount several times higher than his Canadian counterpart.

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Amputation of arm and loss of use of arm

With respect to Canadian cases regarding the amputation of one arm, our survey disclosed seven recent judgments in Alberta, British Columbia, New Brunswick and Quebec Courts. The average damage award, taken from the aforementioned cases, was approximately \$205,000, including one extraordinarily low judgment from British Columbia (*Poppe vs Tuttle*, (1980) 14 C.C.L.T. 115) in the amount of \$35,000, for a 42-year-old male plaintiff; and one above-average judgment concerning a 39-year-old male plaintiff in Quebec (*Lapointe vs O.B. Canada*, J. E. 84-484), who was awarded \$634,000 for a similar injury. These judgments disclose an average award of \$40,000 for non-pecuniary damages such as pain and suffering and loss of enjoyment of life, etc.

Apart from the above-described Canadian cases regarding the amputation of an arm, we noted one further case regarding the loss of the use of an arm, without amputation. A 1980 Vancouver Court of Appeal (unreported) case awarded a 19-year-old male plaintiff a total of \$172,930 for the complete paralysis of the right arm and hand. This judgment also granted \$35,000 in damages for pain and suffering and loss of enjoyment of life.

It is evident that Canadian damage awards for both the amputation of an arm and the loss of use of an arm vary widely. A specific calculated average would be misleading as judgments from the Prov-

ince, rendered during the same year, for similar injuries can be many thousands of dollars apart.

As well, we would point out an unreported 1980 Ontario case where an 11-year-old boy suffered amputation of both arms above the elbow following an electrical accident. In view of various factors, including his lengthy hospital stay and rehabilitation period, his greatly reduced ability to earn an income and his psychological depression, the boy in question was awarded \$590,000.

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Our survey of United States case law disclosed a far greater number of cases regarding the loss of an arm.

Nine American cases were identified wherein the plaintiff was a young, adult male who had suffered the amputation of one arm.

In three cases, (one in Pennsylvania, one in Wyoming and a case in Indiana) the damages awarded were very low, being \$100,000 or less. Various reasons can be advanced for the size of these damage awards, as for example the advanced age of the plaintiff, the proof presented at trial, the amount of pain suffered by the plaintiff and the attitude of the Courts in the jurisdiction in question to large damage awards.

Apart from the aforementioned exceptional judgments, the average damage award for injury resulting in the amputation of an arm was approximately \$630,000. In a few cases, damages were greatly in excess of the average. Proof was presented regarding exceptional pain suffered by the plaintiff, greatly reduced earning power, difficulties with respect to rehabilitation and the need for psychiatric treatment in the cases involving high damage awards. The American cases from which an average was taken originated in Courts in New York, Kansas, Michigan, Florida, North Dakota, and Louisiana.

As long ago as 1974, a Florida Court of Appeal case awarded \$150,000 to an 87-year-old woman who had suffered the amputation of one arm below the elbow in a laundry machine accident. This 9-year-old judgment involving an elderly plaintiff underlines the extreme difference in damage awards between Canada and the United States.

With respect to the loss of the use of one arm, without amputation, our survey of American jurisprudence disclosed extreme varia-

tions in the amount of damages awarded, due to various factors, including the State where the judgments were rendered, the pain and suffering of the plaintiff, the profession and social standing of the plaintiff and other factors. The awards ranged from \$35,000 to \$600,000. In view of the wide diversity of awards, no conclusions can be safely drawn regarding this type of injury.

Although, in this category of injury, judgments in both Canada and the United States are inconsistent in terms of quantum of damages, we may conclude once again that an American plaintiff can anticipate a damage award which will be several times higher than the damages awarded to his Canadian counterpart.

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Loss of leg

We have limited our study to cases involving injuries resulting in the amputation of one or both legs, as it is our opinion that lesser injuries are far too numerous and varied to permit a coherent conclusion for the purposes of this comparative study.

With respect to cases involving injuries which resulted in the amputation of one or both legs, our survey of Canadian jurisprudence disclosed twelve cases, which cases concern male and female plaintiffs of various ages and professions.

Based upon this selection of relevant judgments which we compiled, we calculate that the average award for injury resulting in the amputation of one leg is \$188,000. The twelve judgments surveyed were rendered by Courts in Ontario, British Columbia, Alberta and Quebec, from 1979 to 1984.

In calculating our approximate average award, we excluded two British Columbia cases where plaintiffs were only awarded \$27,500 and \$30,000 respectively, for injuries which resulted in the amputation of a leg. These judgments concern plaintiffs whose further life expectancy at the time of judgment was relatively short, they being 70 and 71 years old.

One notable case was that of *Grant vs Argyle*, a 1982 British Columbia judgment, where an instructor in dining room service was awarded \$707,300, including \$356,000 for loss of future earning capacity and \$125,000 for non-pecuniary loss.

A more typical judgment is that of *Armes vs Pshyk*, a 1982 Alberta judgment involving a 30-year-old male who suffered the loss of his left leg. The plaintiff was awarded a total of \$202,800, including \$142,800 for loss of future income.

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While researching American case law involving injuries resulting in the amputation of one or both legs, we noted that an unusually high percentage of cases involved farm-related accident. The reader must bear in mind when comparing total damage awards, that many of the cases used in our study involved relatively low income farm employees, as the awards invariably include damages for loss of past and future salary. Many other factors enter into the judgment regarding injuries as extensive as the loss of one or both legs, including the plaintiff's ability to adapt to his handicap, both physically and emotionally ; esthetic prejudice ; and the pain suffered by the individual plaintiff. More importantly, public policy would seem to be a factor in many of the United States judgments surveyed on this category of injuries. The unusual high awards in certain of the judgments reflect the imposition of punitive damages against prominent corporate defendants.

The application of these various factors has resulted in American damage awards which are extremely inconsistent. In the twelve relevant U.S. decisions we used in the course of our study on this topic, damage awards range from \$295,000 to \$15,000,000.

The most notable case concerning the amputation of both legs was that of *Harris vs Long Island Railroad Company*, a 1984 New York case. The plaintiff sued the train company for his injury sustained when the train ran over the lower part of his body. Both legs had to be amputated and, in that instance, the plaintiff was awarded the total amount of \$15,000,000. However, we would compare this to the case of *Torres vs Southern Pacific Transport Company*, 428 F. Supp. 1962, a 1977 Arizona judgment. In this case, the plaintiff, a 28-year-old railroad track labourer, was involved in an accident which resulted in the amputation of both of his legs. In this instance, the plaintiff was awarded the sum of \$295,000. We would include as well the New York case of *Cover vs General Motors*, No. 146-175, Kings County Superior Court, a 1981 products liability case. The plaintiff sued G.M. for his injuries, which had resulted in the loss of

the use of his right leg and in the amputation of his left leg. In that case, the plaintiff was awarded the sum of \$8,000,000.

Our American judgments concerning the amputation of both legs were rendered by Courts of ten different States, and involve men and women who had been employed at various occupations before the accidents in question. The judgments utilized do not reflect any said pattern geographically. Nor is the amount of the awards strictly related to the identity of the plaintiff. In view of the numerous variables involved, a true average would be difficult to determine. We could, nevertheless, mention that four cases granted awards of \$5,000,000 or more.

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With respect to injuries resulting in the amputation of only one leg, we noted fourteen relevant American cases, involving plaintiffs of various ages and professions, both male and female. Four of these cases, all heard in 1981 or 1982, awarded over \$1,000,000 in damages. One noteworthy case is that of *Benitez vs Mackey*, No. 78-2114 (Kansas, January 15th, 1982) where a Kansas jury awarded a 26-year-old male plaintiff, an illegal migrant farm worker, the sum of \$1,250,000 (less contributory negligence) for the loss of one leg and lacerations to the abdomen. We do not, however, wish to give the impression that all such judgments are in the range of \$1,000,000.

The average global sum awarded for the loss of one leg, taken from the fourteen above-described U.S. cases, is \$707,000. The 1980 Missouri case of *Doss vs U.S.*, 507 F. Supp. 29 awarded a total of only \$290,000 to a 48-year-old male janitor for injuries resulting in the amputation of one leg, including damages for pain and suffering in the amount of \$100,000 and damages for his physical permanent injuries in the amount of a further \$100,000. With respect to special proof which is presented in cases of this nature, we note the case of *Palmer vs Avco Distributing Corp.*, (1979) 75 Ill. App. 3d 598, the Illinois case of an 11-year-old boy, injured in a farm accident which required the amputation of his leg below the hip. In this case the plaintiff underwent counselling and psychotherapy for anxiety and depression, which contributed to the total award of \$492,000.

Overall, our random survey of relevant Canadian and American jurisprudence discloses much higher American awards for similar injuries.