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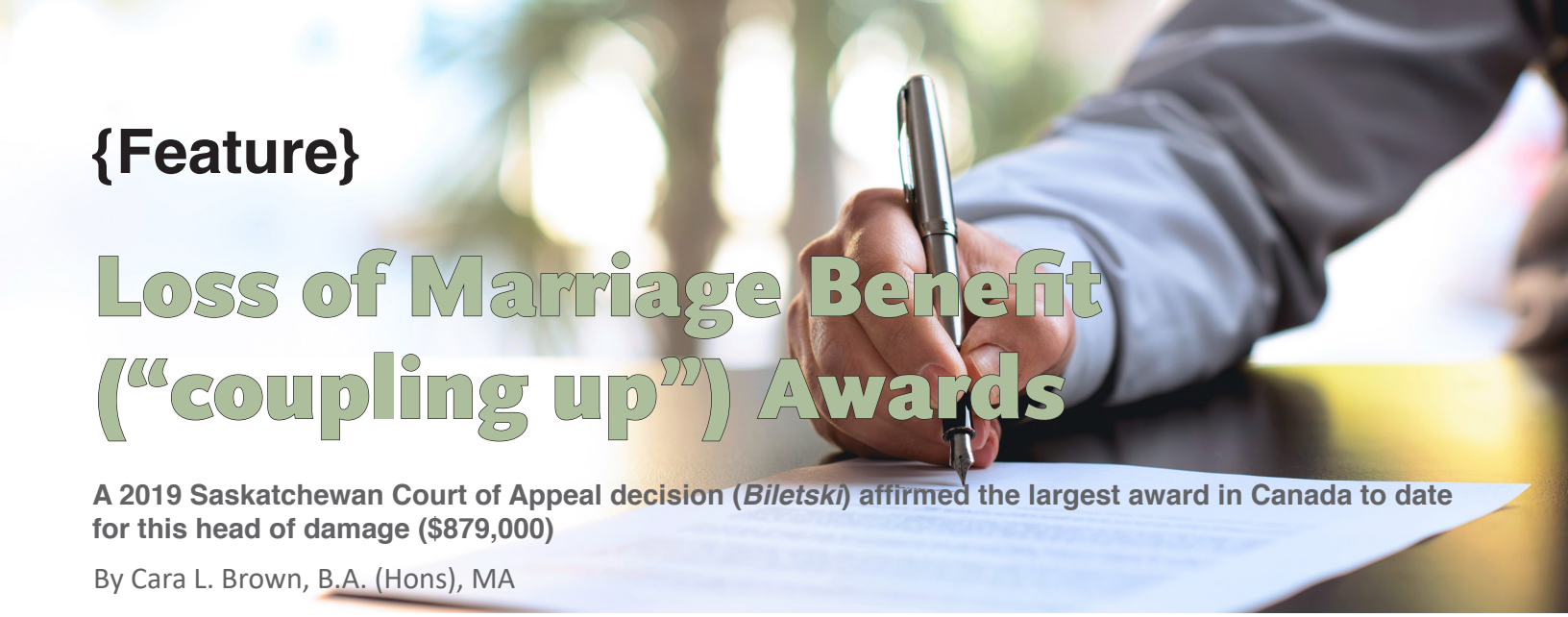

Loss of Marriage Benefit ("coupling up") Awards

A 2019 Saskatchewan Court of Appeal decision (*Biletski*) affirmed the largest award in Canada to date for this head of damage ($879,000)

By Cara L. Brown, B.A. (Hons), MA

A jury verdict released in *Biletski v. University of Regina* was rendered in favour of the plaintiff, Miranda Biletski, with liability found against the University of Regina, in October 2017. The jury awarded Ms. Biletski more than $9 million in damages.[1] This author gave testimony on behalf of the plaintiff. This article outlines the damages awarded to Ms. Biletski by the jury, and excerpts relevant paragraphs from the **Court of Appeal for Saskatchewan's judgment** dated May 23, 2019 (*University of Regina v. Biletski*, 2019 SKCA 44), which **dismissed all claims that were launched on appeal and affirmed awards for all heads of damage**. Of special note is the Saskatchewan appeal court's affirmation of the $879,000 award for "loss of marriage/interdependence benefits" rendered by the trial jury, the magnitude of which has never before been awarded in Canada for this head of damage, as we shall see upon a brief review of quantum awards for this loss in previous precedents.[2]

This article subsequently reviews the 3 factors that are required for a loss of marriage benefit award to be successfully claimed, and the information needed by a forensic economist from counsel to calculate this potential award. I close the article with a few comments on negative contingencies that may apply to this calculation, and the impact of a loss of marriage benefit award on the tax gross-up projected on all future awards.

Heads of Damage Awarded in *Biletski v. University of Regina* (2017) and Affirmed in the Court of Appeal for Saskatchewan's decision in 2019

Ms. Biletski was 16 years old at the time of the June 6, 2005 accident, when a diving incident resulted in a fracture of her cervical vertebrae rendering her quadriplegic.[3] A jury verdict released in October 2017 in *Biletski v. University of Regina* awarded Ms. Biletski more than $9 million in damages, of which the large majority consisted of pecuniary damages, divided as follows:[4]

- Cost of Care: **$6,474,584**
- Loss of future income/earning capacity: **$1,512,000**[5]
- Loss of future marriage/interdependence benefits: **$879,000**
- Tax gross-up *on* future cost of care and loss of marriage benefit: $**1,158,315**[6]
- Non-pecuniary damages: **$295,000**[7]
- Pre-judgment interest: **$53,956**[8]

When Zarzeczny, J. heard the evidence after the jury verdict to determine the potential tax gross-up award (which can only be accurately estimated *after* the awards for other heads of damage are fixed), the economic experts' estimates differed mainly because the *defense expert double-counted the impact of reduced life expectancy* in his lowest estimate of the potential tax gross-up award.[9] Zarzeczny, J. stated the following with respect to this approach by the opposing economic expert:[10]

> [79] …Ms. Brown opined, in critiquing [the other expert's] calculations resulting in this reduced figure ($263,319), that *[the other expert] double accounted for the plaintiff's reduced life expectancy as the jury's verdict award already did so*. I agree. (emphasis added)

Counsel for Ms. Biletski, Alan McIntyre, has advised this author that the total award for Ms. Biletski, as affirmed by the Court of Appeal for Saskatchewan in its 2019 decision, equaled **$12,119,705**. In concluding their review of the challenges to the trial jury's verdict, the Court of Appeal for Saskatchewan concluded:[11]

> [155] Every aspect of the damages verdict fell within a range that was given to the jury as a possible award.

The Court of Appeal for Saskatchewan's award for "loss of marriage benefit" in *Biletski* (2019)

The jury awarded Ms. Biletski **$879,000** for loss of marriage/interdependent relationship benefits.[12] The Court of Appeal for Saskatchewan did *not* disturb the trial jury's award of

$879,000 for this head of damage.[13] In considering the appeal for this award, the Court of Appeal commented that:

> [122] …Ultimately, my conclusion is that the University conflates Ms. Biletski's stated desire to enter into a future relationship with the *evidence the jury heard that could form the basis for its conclusion that she was likely to have difficulty in achieving this objective* (emphasis added).
>
> [124] Cara Brown, an expert economist called on Ms. Biletski's behalf, testified that *Ms. Biletski's injuries made her statistically less likely than non-injured persons of her cohort to "couple up" and to remain "coupled up"*. Ms. Brown's calculations supported a claim up to $1,681,500.00 under this head if the jury assumed that Ms. Biletski's life expectancy was unaffected by her injuries, and $1,464,500.00 if the jury found she had a reduced life expectancy, as disclosed in another expert's evidence… (emphasis added)
>
> [126] Therefore, among the issues that the jury had to consider when deliberating on this claim for damages was the likelihood of Ms. Biletski "coupling up", to adopt the phrase used by Ms. Brown…
>
> [127] Evidently, *the jury determined that Ms. Biletski was less likely to enter into an interdependent economic relationship than if she had not been injured*. Notably though, the amount of the juror's award reflected approximately 60 percent of the amount Ms. Biletski claimed under this head, even on a reduced life expectancy basis. It can be *inferred therefore that the jury did not conclude that Ms. Biletski's chances of entering into an interdependent relationship were fully impaired*. The jury must therefore have taken into account the evidence the University now points to as the basis to completely negate any award under this head… (emphasis added).
>
> [128] From all of this I conclude that there was evidence to support the jury's award, which fell within the range open to it on the evidence. Therefore, *there is no basis to disturb the jury's award under this head* (emphasis added).

Precedents for "loss of marriage benefit" in Canadian courts[14]

Author Smith declares that the "loss of marriage benefit" award is claimed when "…the plaintiff must have suffered permanent catastrophic injury. Examples of this type of injury include: spinal injuries, brain injuries, paraplegia, quadriplegia, disfigurement, and severe psychological injuries" (p. IF7-3).[15]

We have been advised that the originating case for this head of damage is a 1989 judgment from British Columbia, *Reekie v. Messervey*,[16] in which Lambert J.A. recognized that when a person loses the opportunity to enter into a 'permanent interdependency relationship' there may be a pecuniary loss derived from the loss of a share in joint family income or a loss of economic efficiencies associated with sharing a household with another person, and awarded $50,000 as the sum for Ms. Reekie's pecuniary loss under this new head of damage. Other cases in which the court considered this head of damage and made awards for "loss of marriage benefit" include:[17]

- **British Columbia** (1996): *Bates v. Nichol*[18]: **$150,000**
- **British Columbia** (1999): *Anderson v. Miner*[19]: **$15,000** (awarded on appeal)
- **Ontario** (1999): *Osborne (Litigation guardian of) v. Bruce (County)*[20]: **$125,000**
- **New Brunswick** (2000): *Belyea v. Hammond*[21]: Trial judge awarded **$50,000**; the Court of Appeal set aside the award because it "lacked the requisite evidentiary foundation"
- **British Columbia** (2001): *Bystedt v. Hay*[22]: **$100,000** (agreed to by counsel at trial)
- **Ontario** (2003): *Walker v. Ritchie*[23]: **$125,000**
- **British Columbia** (2016): *Brodeur (Litigation Guardian of) v. Provincial Health Services Authority*[24]: **$221,638**
- **British Columbia** (2017): *Wilhelmson v. Dumma*[25]: **$325,000**
- **Ontario** (2018): *K.M. v. Marson*[26]: **$135,587**

The judge in *K.M. v. Marson* accepted the plaintiff expert's assessment that the "consumption savings of having an interdependent relationship is 29.5%" (para. 680).[27] From this percentage, the judge awarded $135,587. In this assessment, no assumptions were made as to a hypothetical spouse or partner – an unusual approach and one that fails to acknowledge the full benefits (minus the costs) of entering into a permanent and financial interdependent relationship.

Author Smith located the following cases in which a claim for loss of financial interdependency was <u>not</u> successful: *Newell v. Hawthornthwait*,[28] *Souto v. Anderson*,[29] *G. (I.) (Next Friend of) v. Harmon*,[30] *Bartosek (Litigation Guardian of) v. Turret Realties Inc.*,[31] *Powell (Litigation Guardian of) v. Leger*,[32] *Latta v. Ontario*,[33] *Herman v. Alberta (Public Trustee)*,[34] *Labrecque v. Heimbeckner*,[35] *Hodgins v. Street*,[36] *Campbell v. Swetland*,[37] *Afonina v. Jansson*,[38] and *Corbett v. Odorico*.[39] The reasons given by the judges in these cases were either that the financial benefit of "coupling up" is offset by the costs of childrearing[40] (*Newell*); that the plaintiff's injury was not severe enough to prevent the plaintiff from entering into a relationship (*Souto*, *Latta* and *Herman*); for lack of evidence, such as missing testimony on the "sociological evidence of family life and modern marriage and statistical probability of marriage, employment and earnings" (*Harmon*, *Powell* and *Labrecque*[41]); for being "too speculative and too remote" (*Bartosek*); that the plaintiff had demonstrated the capacity for entering into relationships after the incident (*Hodgins* and *Afonina*); the key evidence was contradictory (*Campbell*[42]); or the incident was not responsible for a plaintiff's marriage breakdown (*Corbett*).

In the New Brunswick court of appeal's decision in Belyea v. Hammond, Drapeau, J.'s two "conditions" for a loss of marriage benefit claim to be successful were as follows:

- The injured party must satisfactorily establish that, as a result of the accident, his or her chances of forming a 'shared living relationship' have been detrimentally affected (the 'reduced probability for cohabitation or marriage')
- The evidence must show in accordance with the recognized standard of proof that the 'more elusive relationship would have been economically advantageous to the injured party'.

The New Brunswick Court of Appeal in *Belyea* indicated that an award under this head of damage is only appropriate "if proven with cogent statistical, economic and actuarial evidence". This requirement, along with the tests for establishing damages above, threw down a gauntlet for forensic economists when calculating this claim.

How a forensic economist calculates a "loss of interdependent relationship" award

Importantly, author Smith clarifies that this claim is *not* about the foregone opportunity to marry but rather the loss of a "permanent financial interdependency…is the gist of the claim".[43] In other words, the inability to "couple up" due to an incident (in part or entirely), whether it be with a close friend, live-in partner, (same-sex or opposite-sex) spouse, or relative and the economic benefits flowing from "coupling up" is what must be proven. Further, the Ontario court in *K.M. v. Marson* (2018) rejected the BC court's assessment in *Wilhelmson v. Dumma* (2017) that the loss of financial benefit from an interdependent relationship should be simply folded into the loss of income award. *Marson* confirmed the NBCA's insistence in *Belyea* that this claim should be separately calculated and substantiated with expert evidence.

When a quantum expert calculates a potential loss of interdependent relationship award, s/he includes the following factors in order to do a "cogent statistical, economic and actuarial" calculation:

1) The plaintiff was *likely to have formed a permanent and interdependent relationship* in the absence of the incident –this is established using Statistics Canada's data on marriage and cohabitation rates;
2) Forming an interdependent relationship *confers economic benefits* (derived from the concept of "economies of scale") – this is estimated by establishing a "hypothetical partner"[44] and estimating the monetary advantages of coupling up, after deducting expenditures made by the plaintiff on his or her "hypothetical partner";[45]
3) The plaintiff is *less likely to marry or cohabit now that the incident has occurred* – this is a finding of fact and typically requires evidence from the plaintiff and other healthcare practitioners.[46]

FACTOR (1): Virtually all Canadians "couple up"

In *Reekie v. Messervey*, the court accepted the statistical premise that, at that time (in 1989), 91% of all Canadian women marry at least once. While author Smith rightly points out that the rate of marriage has declined since 1989 from 91%, this is due simply to the fact that cohabitation (common-law status) has markedly increased.[47] Our research indicates that 95% of all Canadians "couple up" over their lifetime when we sum together those who marry and cohabit – whether of the opposite sex or same sex.[48] Were we to add households where living circumstances reflect two people who are "permanently and financially interdependent" (but are not counted as married or cohabiting), we can see that the vast majority of Canadians "couple up" at some juncture in their lives. (We address the possible contingency for subsequent "divorce/dissolution" in this calculation below). For our calculation of the potential loss of marriage benefit award, we assume the rate of "coupling up" for the average plaintiff is 100%, since the 5% of Canadians who remain single throughout their lives and never embrace a "permanent and financially interdependent" relationship at any juncture self-identify for specific reasons, reasons that may likely not be applicable to the average plaintiff.[49]

FACTOR (2): Economic benefits are conferred from "coupling up"

Legislation and case law across Canada has already established that the *loss* of a spouse or partner typically results in a financial loss – hence the standard "loss of dependency" assessments that are routinely done in fatality cases. The implied analogy of this established principle is that the *inability to form* a permanent and financially interdependent relationship similarly suggests a financial loss, and has been awarded in virtually all fatality cases decided across Canada.

To undertake the projection of a loss of "coupling up", we build on the income streams already estimated for the plaintiff for the loss of income claim (the *without*-incident A1, A2,…etc. scenarios) with assumptions about the future income stream of a "hypothetical partner" until retirement age, who is assumed to be the opposite sex[50] to the plaintiff and achieve the same education level[51] as assumed for the plaintiff in the *without*-incident scenarios for the loss of income projection. The claim is assumed to commence as of the *average* age of first marriage for females (28 to 30) and males (31) in Canada.[52] Income streams based on highest education level attained (for both individuals)[53] are projected on an after-tax basis (depending on province of residence), since the couple could only share income after income tax is paid. Labour market and health/mortality contingencies are applied to both income streams.

The estimation of the pecuniary benefit from "coupling up" is subsequently quantified by calculating the proportion of a partner's income the plaintiff might have shared in or benefitted from using **personal consumption rates (PCRs)** from those routinely applied in fatality cases to reduce dependency losses by the amount of money the decedent would have spent solely on himself. This share reflects the amount of the hypothetical partner's income that is contributed to shared and fixed household expenditures, but excludes from consideration the share of the partner's income s/he spent on himself which vary with his/her daily existence (i.e., food, clothing, personal care, health care, recreation, etc.). From this resulting share, we then deduct the plaintiff's likely expenditures on the hypothetical partner, since that share would not have been available to the plaintiff in any event. The **PCRs** vary by family size[54] and family income level.[55]

Female plaintiffs will be more likely to be disadvantaged if their impairments affect their prospects for "coupling up" than might male plaintiffs because, on average, women still earn considerably less than do men. Indeed, a 'gender wage gap' still persists across Canada.[56] In 1920, women earned 36 percent of what men earned, while in 2018 women's earnings equaled 87 percent of men's earnings.[57] The gender wage gap varies with age, education level, marital status, work activity level, industry, occupational choice, and union status; and whether the gaps are derived from comparing annual incomes or hourly wage rates. An approximate 'gap' of 15% to 30% between women's and men's earnings persists to date. The gap decreases as more education is acquired, but rises with age.

This does not mean, however, that a male plaintiff does not suffer a loss from an inability to form a permanent and interdependent relationship, since the calculation depends on each individual's education level, income level, and personal consumption rate (PCR) used.[58] Our firm has already assessed claims for financial loss arising from the inability to form a permanent and interdependent relationship for young males, as did the court in *K.M. v. Marson*.[59]

FACTOR (3): Can the plaintiff "couple up" following the incident?

Counsel for the plaintiff must obtain evidence that shows the plaintiff has and will continue to have a reduced likelihood to "couple up" *because of* the incident in question.

In conjunction with plaintiff-specific evidence, Brown Economic has acquired statistics from disability surveys and other economic studies which have observed the lower rate of marriage reported by disabled persons compared to non-disabled persons, and the higher rate of divorce or dissolution experienced by persons with disabilities *versus* non-disabled persons.[60] This author testified to these statistics at Ms. Biletski's trial in 2017, and the Court of Appeal for Saskatchewan in 2019 recognized this very facet as being

one the jury likely considered when affirming the award of $879,000 in Ms. Biletski's case[61] – along with evidence from Ms. Biletski herself as to her hopes for a future relationship.

Information Needed From Counsel to Pursue an Award for "Loss of Interdependent Relationship"

In *G. (I.) (Next Friend of) v. Harmon*, the Alberta court reiterated the NBCA's requirements in *Belyea* for proper evidence in order to award a claim under this head of damage – indeed, in refusing to make an award, the judge in *Harmon* listed the kind of economic and statistical information I discuss in **FACTOR (1)** and **FACTOR (2)** above as the key items that were missing and as such an award was not granted. In three additional cases, author Smith commented when judges refused to grant an award for loss of financial benefits from an interdependent relationship (*Harmon*, *Powell* and *Labrecque*) because **FACTORS (1)** and **(2)** were not presented. The outcomes in these cases – as well as the *Biletski* case – strongly suggest that a quantum expert must be hired to quantify not only the financial benefit from interdependence, but also that almost all Canadians "couple up". Given the complexity of this calculation (which mirrors the complexity of dependency losses in fatality cases); the need for the expert to be familiar with wage and statistical data; and the necessity of understanding the derivation of personal consumption rates (PCRs), a forensic economist is typically best positioned to calculate this claim.

We saw from cases reviewed by author Smith that judges are alive to the necessity of proving the plaintiff's capacity to enter into an interdependent relationship is seriously impaired because of the incident (*Souto*, *Latta* and *Herman*). This means that a claim under this head of damage must be more than simply asserted: counsel must tender evidence that speaks to the plaintiff's (in)capacity for relationships attributable in part or entirely to the incident in question. *Counsel's job, then, is to focus on gathering corroboration for the claim that the plaintiff's injuries are severe enough to impede entering into a relationship* (**FACTOR (3)**) – from the plaintiff (if possible); and a healthcare practitioner who has interviewed the plaintiff (or reviewed medical records) and can speak to any or all factors that might impede his or her chances for "coupling up", now that the incident has occurred.

All of the precedents listed above, including the 2019 *Biletski* court of appeal decision, only captured the financial or monetary loss from being unable to "couple up". The "loss of the benefit of shared homemaking", though referred to as a category of loss arising under this head of damages in *Grewal v. Brar*, 2004 BCSC 1157 (B.C.S.C.), was not considered or calculated.

Contingencies & Tax Gross-Up

Labour market & health/mortality contingencies: always embedded in calculation

It is customary in all calculations of future income streams to discount them for the possibility that the plaintiff or his/her partner might be unemployed, choose not to participate in the work force, or work part-time. Further, a forensic economist reduces potential income streams by the prospect of becoming disabled or passing away prematurely (mortality). As a consequence, these 5 negative contingencies are embedded in any calculation of the potential loss of "coupling up" or loss of marriage benefit award.

Divorce contingency: recommend that it <u>not</u> be applied; at most, -5% to -10%

Because the central underpinning of this calculation is that the plaintiff likely would have formed a permanent and interdependent relationship if not for the incident – but now faces a reduced or nil prospect of doing so *because of* the incident – it is obvious that *if* the plaintiff would have dissolved his/her permanent and interdependent relationship then during these solo years there would be a minimal to nil loss, regardless of the incident in question.

Conceivably, the forensic economist could "weight" the potential award calculated under this head of damage by a negative divorce contingency (as is routinely done in fatality cases when dependency losses on income and valuable services are advanced), but this would not take into account that there might be an ongoing dependency or sharing of assets following the divorce in terms of spousal support,[62] child support, and property transfers, which mediate the financial impact of divorce.

The other obstacle in applying a "divorce" contingency in these calculations is that 11% of Canadians remarry *at least once* after divorcing.[63] Males have a greater propensity to remarry than females, and do so at a quicker pace following dissolution of a relationship.[64] So while the plaintiff might have experienced a period of independence, this period rarely lasts indefinitely. Canadians remarry or re-partner after an average of almost five years.[65]

The final difficulty with applying a "divorce" contingency in these calculations is that once the *injured* plaintiff is able to finally "couple up", s/he may also divorce in the future – just as non-disabled persons do – and in fact is *more likely to divorce* than households with non-disabled persons.[66] In such cases, the financial loss accruing to the disabled plaintiff is <u>underestimated</u> if it is assumed that s/he will in fact *still* "couple up", i.e., s/he has a 10%, 25%, or 50% chance to still form a permanent and interdependent relationship, because the calculations assume that once the disabled plaintiff "couples up" (whether his/her reduced chance is, post-incident, at 10%, 25% or 50%), s/he will not divorce. What this means is that if it is found a "divorce" contingency should be applied to reflect dissolution of a permanent and interdependent relationship to the loss of marriage benefit award, it should also be applied to the disabled person's chance for divorce – which is greater than a non-disabled person's average divorce

rate. In essence, the application of the divorce contingency must be applied to "both sides" of the equation – which can effectively "cancel out" the impact of this contingency.

Because of these considerations, we do not usually apply a negative "divorce" contingency. Importantly, it would be inappropriate to simply discount a loss of "coupling up" award by the (mythical) "1 in 2" rate of divorce (suggesting a -50% discount). Canadian divorce rates range from 17% in Newfoundland to 50% in Quebec *over a person's lifetime*,[67] such that the ***annual* rate of divorce across Canada is only 2%**. Remember, too, that divorce is, more often than not, a temporary marital status – though the actual time spent in this marital status varies by age and gender.

If a divorce/dissolution contingency (net of remarriage/re-partnering) were to be applied, we would recommend -5% to -10%, assuming there is no specific evidence to the contrary about the plaintiff. The court, of course, could decide on a different contingency altogether for this factor.[69]

Tax gross-up: assessed with the loss of marriage benefit included in Biletski

Because the loss of 'coupling up' is primarily a *future loss* calculation (as it is being assessed at a time when the plaintiff has not yet formed a permanent and interdependent relationship), it is appropriate to include the potential award for loss of 'coupling up' when calculating the tax gross-up applicable to all future awards (which normally consist of loss of income and costs of future care awards).

Zarzeczny, J. heard evidence after the jury verdict in *Biletski v. University of Regina* to determine the **tax gross-up amount** and awarded $1,518,315.[70] The tax gross-up amount in *Biletski* had been augmented by approximately +16% (the loss of marriage benefit award *increased* the tax gross-up by $280,000) because the loss of marriage benefit award of $879,000 was included with the other pecuniary damages in the tax gross-up calculations.[71]

Aside from the *Biletski* decision, in which the tax gross-up awarded ($1,518,315) included consideration of the jury's award of $879,000 (affirmed on appeal), I do not know of other cases where the loss of marriage benefit award has been "grossed up" for tax.[72] Given that this calculation is done on an after-tax basis, and that the interest income accruing on the loss of marriage benefit award (but not the lump sum award itself), theoretically it would appear that a tax gross-up is appropriate on this head of damage. If counsel wished to augment any loss of "coupling up" calculation for a tax gross-up (since the majority of this claim occurs in the future), I would recommend a range of +10% to +16%.

Notes:

1 Alan McIntyre, QC of McKercher LLP law firm represented Ms. Biletski.

2 The cases reviewed below granted awards for this head of damage ranging from $15,000 to $325,000.

3 *Biletski v. University of Regina*, 2017 SKQB 243, at para. 1.

4 *Biletski v. University of Regina* (October 2017), Regina (1770/2007) (SK QB), at p. 4. This total sum did not include the tax gross-up on future awards, nor interest. All sums reflected reduced life expectancy for Ms. Biletski because of her injuries (by 10 or 20 years). The amounts awarded by the trial jury, and then affirmed by the court of appeal, were linked closely to the awards calculated by Brown Economic in this case.

5 This award is not "grossed-up" because it was calculated on a before-tax basis, since the incident arose from a non-MVA origin. It only affects Ms. Biletski's original *without*-incident tax bracket in the tax gross-up calculation (i.e., the only tax burden accruing to the plaintiff is from the interest income *earned by investing* the future loss awards (all together), *not* the lump sum awards alone, which are non-taxable).

6 *Biletski v. University of Regina*, 2017 SKQB 386, at para. 85. The tax gross-up was calculated post-verdict by the economic experts based on the actual sums awarded for future loss of income, future cost of care, and future loss of marriage benefit. (Tax gross-ups are *only ever* calculated on future loss sums – not on past loss sums – since it pertains to the potential tax burden the plaintiff will face *once s/he receives* the lump sums, withdraws the necessary annual compensation, and earns interest income on the remaining balance in the future). Brown Economic estimated the tax gross-up to be $1,403,500 when medical expense tax credits are claimed for *all* of the care items and services, even though in our calculations of the tax gross-up, this author cautioned that "As it appears there is no fund to assist Ms. Biletski in managing her investments and/or tax liabilities, Brown Economic estimated Ms. Biletski's tax gross-up award *with* and *without* applying medical expense tax credits because it cannot be determined at this point in time precisely which items Ms. Biletski will require and/or purchase and whether or not those particular items will be eligible for the medical expense tax credit". Zarzeczny, J.'s award of $1,518,315 in para. 85 assumes that *all* items that Ms. Biletski will eventually purchase every year in the future

(once she receives the funds) will be eligible for the medical tax expense credit – perhaps a conservative assumption inherent in the tax gross-up award in para. 85.

7 The $295,000 figure is below the current inflation-adjusted maximum of $385,413 based on the Supreme Court of Canada 1978 ruling of a $100,000 maximum for non-pecuniary damages in 1978 dollars, converted to 2019 dollars (using the September 2019 all-items index for Canada, the most recent CPI data published to date). To inflate non-pecuniary awards by inflation, visit our online calculator at www.browneconomic.com > **Non-Pecuniary (free)**.

8 *Biletski v. University of Regina*, 2017 SKQB 386, at para. 5.

9 The defense expert had suggested a tax gross-up figure of $263,319 on a total pecuniary award of more than $8.1 million in the future loss period. A figure this low suggests an augmentation for the tax gross-up of only 3%. The tax gross-up award is typically in the range of 10 to 25%, depending on the plaintiff's age (but this global percentage augmentation can *only* be estimated *after* the year-by-year tax gross-up calculation is done – it cannot be applied at the outset without this detailed calculation).

10 *Biletski v. University of Regina*, 2017 SKQB 386.

11 *University of Regina v. Biletski*, 2019 SKCA 44.

12 The court in *Roussin v. Bouzenad*, 2005 BCSC 1719 articulated that "a claim for loss of marriageability is a claim for the loss of opportunity to enter into a permanent and inter-dependent relationship".

13 *University of Regina v. Biletski*, 2019 SKCA 44, at para. 128.

14 In this section, comments are constrained to simply listing the quantum award for loss of marriage benefit in these cases (which have been previously identified by legal scholars); reproduce any comments by judges as to how the claim should be estimated or calculated; and listing cases where this claim was not successful – again, as identified by legal scholars.

15 J. Smith, "How have courts treated claims for 'loss of marriageability'?" in C.L. Brown, **Damages: Estimating Pecuniary Loss** (Toronto, Ontario: Canada Law Book, A Thomson Reuters business), Sept. 2019, release #25. Author Smith's article is published in the **ISSUES IN FOCUS** section following chapter 15. Smith includes a review of cases where the plaintiff had been married or in an interdependent relationship at the time of the injury in her memo, but I do not canvass those cases in this article.

16 (1989), 59 D.L.R. (4th) 481 at pp. 494-500 (B.C.C.A.)

17 As per J. Smith, "How have courts treated claims for 'loss of marriageability'?" in C.L. Brown, **Damages: Estimating Pecuniary Loss** (Toronto, Ontario: Canada Law Book, A Thomson Reuters business), Sept. 2019, release #25. Author Smith's article is published in the **ISSUES IN FOCUS** section following chapter 15.

18 1996 CarswellBC 473 (B.C.S.C.).

19 1999 BCCA 1 (B.C.C.A.). The plaintiff was disfigured (from severe burns) in this case.

20 (1999), 39 M.V.R. (3d) 159 (Ont. Ct. (Gen. Div.)), at para. 83.

21 (2000), 193 D.L.R. (4th) 476, 231 N.B.R. (2d) 305 (C.A.)

22 (2001), 111 A.C.W.S. (3d) 163 (B.C.S.C.), at para. 136. A subsequent decision was rendered but did not disturb the "loss of marriageability" award.

23 (2003), 119 A.C.W.S. (3d) 252 (Ont. S.C.J.)

24 2016 BCSC 968 (B.C.S.C.).

25 2017 BCSC 616 (B.C.S.C.). The plaintiff in this case was disfigured from scarring.

26 2018 ONSC 3493 (Ont. S.C.J.). The plaintiff in this case was sexually assaulted.

27 It would appear from the judgment in *K.M. v. Marson* that the 29.5% figure was based on a rough approximation of a personal consumption rate (PCR) used in fatality cases (see paras. 680, 681, 682, 683). Without reviewing and analyzing the plaintiff expert's report in this case, I am not able to independently confirm this percentage. Moreover, the PCR varies by family size and family income level, so cannot be used as a global percentage in loss of marriage benefit cases, since they vary depending on the plaintiff's and hypothetical partner's income levels (and possibly family size).

28 *Newell v. Hawthornthwait* (1988), 26 B.C.L.R. (2d) 105 (B.C.S.C.).

29 *Souto v. Anderson*, 1994 CarswellBC 2923 (B.C.S.C.).

30 *G. I. (Next Friend of) v. Harmon*, 1999 ABQB 354 (Alta. Q.B.).

31 *Bartosek (Litigation Guardian of) v. Turret Realties Inc.*, 2001 CarswellOnt 4292, [2002] W.D.F.L. 105, [2001] O.J. No. 4735, [2001] O.T.C. 856 (Ont. S.C.J.); affirmed by (2004), 185 O.A.C. 90, 2004 CarswellOnt 1044 (Ont. C.A.); Leave to appeal dismissed 2004 CarswellOnt 4001, 335 N.R. 196 (note), 201 O.A.C. 200 (note) (S.C.C.).

32 *Powell (Litigation Guardian of) v. Leger*, 2003 NBQB 105 (N.B.Q.B.).

33 *Latta v. Ontario*, 2004 CarswellOnt 3770 (Ont. S.C.J.).

34 *Herman v. Alberta (Public Trustee)*, 2005 ABQB 926 (Alta. Q.B.).

35 *Labrecque v. Heimbeckner*, 2007 ABQB 501 (Alta. Q.B.).

36 *Hodgins v. Street*, 2009 BCSC 673 (B.C.S.C.).

37 *Campbell v. Swetland*, 2012 BCSC 423 (B.C.S.C.).

38 *Afonina v. Jansson*, 2015 BCSC 10 (B.C.S.C.).

39 *Corbett v. Odorico*, 2016 ONSC 1964 (Ont. S.C.J.). As per J. Smith, "How have courts treated claims for 'loss of marriageability'?" in C.L. Brown, **Damages: Estimating Pecuniary Loss** (Toronto, Ontario: Canada Law Book, A Thomson Reuters business), Sept. 2019, release #25, pp. IF7-8 to IF7-12.

40 It is unlikely that the financial benefits of an interdependent relationship equate to the costs of child-rearing in most cases when these events are quantified, especially since the costs of child-rearing are temporary and are borne by both parents – not just the plaintiff.

41 In *Labrecque*, the judge found that the plaintiff had proven she had difficulties sustaining long-term relationships but the actual amount claimed ($75,000) was not calculated.

42 In *Campbell*, the plaintiff had been engaged and in a relationship for more than a decade prior to the accident but after the accident the relationship broke down, allegedly because of the plaintiff's symptoms. The plaintiff's fiancé testified that but for the accident they would have been married by the time of trial. The judge declined to make an award because the court found the plaintiff's evidence and the fiancé's evidence was contradictory.

43 *Labrecque* at para. 173, quoting *Reekie v. Messervey* (1989), 59 D.L.R. (4th) 481, 36 B.C.L.R (2d) 316 (B.C.C.A.).

44 The profile of a "hypothetical partner" is a routine exercise in fatality cases when counsel or the court wish to know the impact on the loss of dependency awards (both on income and valuable services) in the event the survivor remarries or cohabits with a new partner following the fatal incident.

45 This is accomplished through personal consumption rates (PCRs), which are a standard deduction in fatality cases.

46 The calculation assumes that the plaintiff will not marry/cohabit in the future, however the estimates can be adjusted based on the *reduced* probability for marriage or partnership (as opposed to NO probability of future coupling up). For example, if it is determined that the probability of marriage or partnership is reduced by 75% (compared to 100%), then the estimates should be reduced by 25%. It is our understanding, as per consultation with counsel, that Ms. Biletski's loss of marriage/interdependence benefits award represents an approximate 40% reduction in the estimates put to the jury, i.e., the jury may have assumed that Ms. Biletski had a 40% reduced chance of coupling up or, conversely, a 60% chance of still entering into marriage or cohabitation.

47 According to Statistics Canada's 2016 *Census*, over one-fifth of all couples (21.3%) were living common law in 2016, more than three times the share in 1981 (6.3%) (Source: Statistics Canada, "Family Matters: Being common law, married, separated or divorce in Canada" (Ottawa, Ontario: Minister of Industry) *The Daily*, Wednesday, May 1, 2019.

48 Statistics Canada, Table 17-10-0060-01 (formerly CANSIM 051-0042), *Estimates of population as of July 1st, by marital status or legal marital status, age and sex*, for Canada in 2018. The official "coupling up" rate, which combines Canadians who reported a marital status of legally married, legally separated, or living common-law is 61% (males) to 70% (females) by

ages 30 to 34, rising rapidly to 75% or higher by ages 50 to 54 (both sexes), at which time it decreases (for women) but increases (for men). The two groups excluded are those who are widowed and those who are divorced, even though they *were married* at some point, which understates our "coupling up" rate by 2% for ages 30 to 34 (both sexes) and by 9% to 13% (men or women) by ages 50 to 54. This means the official "coupling up" rate is, at minimum, 70% to 75% but may in fact be higher by 2 to 13% for widowed and divorced Canadians who *had been married* and who *might again remarry*. Additionally, the official "coupling up" rate of 70 to 75% excludes any common-law couples who register as "single" (whether opposite-sex or same-sex). The proportion of Canadians who register as "single" ranges from 28% (women) to 37% (men) at ages 30 to 34, decreasing to 6% (women) to 7% (men) by ages 65 to 69 (retirement age). There is a strong likelihood that the majority (but not all) of the individuals who *live* in a common-law situation but *register* as "single" are same-sex couples. The proportion of same-sex couples per 1,000 households has been estimated to be approximately 7 to 18%, depending on US state, with an average of 8% (rounded) (source: The Williams Institute, *Same-sex Couple Data & Demographics*. The Williams Institute is located at the Faculty of Law at UCLA. Data used in this publication include the US Census bureau, the *American Community Surveys* for 2011, 2012 and 2013, and a 2017 *Gallup Daily Tracking* survey. The authors indicate that the data will very likely underestimate the share of same-sex couples, since neither the US Census nor the *American Community Survey* (ACS) explicitly ask questions about sexual orientation or gender identity). So if we add back the "single" Canadians who may in actuality be living common-law (8%) to the "official" coupling up rate (75% by ages 50 to 54), and add back some share of the widowed/divorce group (say, 10%) we arrive at a global "coupling up" rate of 93% to 95%, depending on age.

49 Some share of the 5% who remain single throughout their lives comprise the institutionalized (in mental health facilities or prisons) and the homeless population, who are unlikely to be plaintiffs in civil litigation.

50 This assumption can be easily changed in our calculation program if the evidence supported it.

51 Economic studies of "mating markets" show that, on average, people marry within the same socioeconomic class (i.e., highest education level attained, type of occupation, income level).

52 Statistics Canada, *Women in Canada 2005: A gender-based statistical report* (Ottawa: Statistics Canada, 2006) indicates that in 2002 the average age at first marriage for males was 30 and for females was 28 (Table 2.3, page 46). According to Statistics Canada's report in 2011, "in 2008, women married for the first time at age 29.6 years of age, on average, younger than that of men (31.0 years)". (Source: A. Milan, *Marital Status: Overview, 2011*. Statistics Canada catalogue no. 91-209-X, July, 2013, p. 10).

53 Using average earnings by education level differs from most income loss assessments, which are based on not just the plaintiff's education level but also on his/her occupation. However, using earnings data by education level is commonplace when quantifying losses for infants, children or minors (like Ms. Biletski), because occupational aspirations are not generally crystallized for such plaintiffs, and even if a child or young adult planned to pursue a specific occupation, such plans often change, not least because there are 35,000 occupation codes that exist.

54 Unless the plaintiff already has children, we assume a 2-person couple. If we imputed the existence of future children, the potential loss of marriage benefit would increase, because PCRs decline as family size expands.

55 For a schedule of PCRs for Canadian households which vary by household income level and family size using Statistics Canada's 2007 and 2008 *Surveys of Household Spending* (SHS), see Brown, C.L., "Personal Consumption Rates for Canada: Update of 2000 PCRs Using 2007-2008 *Surveys of Household Spending Data*", Journal of Forensic Economics, Vol. 23, no. 2, September 2012.

56 For a summary of the current economic literature on the 'gender wage gap', both the size and reasons proposed for its existence, are explored in **Brown's Economic Damages Newsletter**, "The Gender Wage Gap: Dimensions (Part I)", October 2014, vol. 11, issue 9 and "The Gender Wage Gap: Economic Theories (Part II)", November/December 2014, vol. 11, issue 10.

57 Sources: for 1920 to 1990, Abdul Rashid, "Seven decades of wage changes" (Summer 1993) *Perspectives on Labour and Income*, Summer 1993, Vol 5, No. 2; for 2000 and 2005, *2006 Census* Statistics Canada 97-563-XCB2006069; for 2018, Rachelle Pelletier, Martha Patterson and Melissa Moyser, "The gender wage gap in Canada: 1998 to 2018", Statistics Canada catalogue no. 75-004-M – 2019004, October 11, 2019.

58 This is because the forensic economist's calculation is based on income levels for both the plaintiff and hypothetical partner, which in cases involving infants, minor children and young adults is based on highest educational attainment achieved. The gender wage gap narrows as education rises, and the PCRs decrease as income rises, causing the dependency on the partner's income to increase – whether male or female.

59 2018 ONSC 3493 (Ont. S.C.J.).

60 Statistics Canada's 2001 *Participation and Activity Limitation Survey* (PALS) data showed that whereas only 22% and 16% of non-disabled males and females, respectively, reported being "never married/single", a considerably larger percentage of males and females with disabilities were "never married/single": 32% and 22%, respectively (source: Cara L. Brown and Herbert J. C. Emery, "The Impact of Disability on Earnings and Labour Force Participation in Canada: Evidence from the 2001 PALS and from Canadian

Case Law" *Journal of Legal Economics* vol. 16, no. 2, April 2010). Similar statistics were confirmed in Statistics Canada's 2006 *Participation and Activity Limitation Survey* (PALS) data.

61 *University of Regina v. Biletski*, 2019 SKCA 44, at para. 124.

62 Spousal support is awarded in 10% of cases in Canada (Source: Bertrand, Hornick, Paetsch & Bala, *The Survey of Child Support Awards: Interim Analysis of Phase 2 Data Through January 31, 2002* (Canadian Research Institute for Law & Family for Department of Justice Canada, 2003). Additionally, while child support payments are made "in the best interests of the child", there can still be instances where the spouse who has primary custody of the children shares in the benefits flowing from the child support payments from spending on shared resources.

63 Warren Clark and Susan Crompton, *Till death do us part? The risk of first and second marriage dissolution*, Statistics Canada catalogue no. 11-008, Summer 2006.

64 Pascale Beaupré, *I do… Take two? Changes in intentions to remarry among divorced Canadians during the past 20 years*, Statistics Canada catalogue no. 89-630-X, July 2008; and Statistics Canada, "Family matters: New relationships after separation or divorce" (Ottawa, Ontario: Minister of Industry) *The Daily*, Wednesday, May 15, 2019.

65 Statistics Canada, "Family matters: New relationships after separation or divorce" (Ottawa, Ontario: Minister of Industry) *The Daily*, Wednesday, May 15, 2019.

66 Statistics Canada, 2001 *Participation and Activity Limitation Survey* ("PALS"); Statistics Canada, 2006 *Participation and Activity Limitation Survey*; and Cara L. Brown and Herbert J. C. Emery, "The Impact of Disability on Earnings and Labour Force Participation in Canada: Evidence from the 2001 PALS and from Canadian Case Law" *Journal of Legal Economics* vol. 16, no. 2, April 2010. Data from the 2001 and 2006 PALS suggests that the *reduced probability of marriage* for disabled persons is about -12% to -15% and disabled persons' *increased chance of divorcing* is +4%.

67 **Brown's Economic Damages Newsletter**, "The Divorce Contingency: negative contingency in fatality cases – update with 2005 data", May 2010, vol. 7, issue 5. The rate of divorce over a person's lifetime generally ranged from 27-30% to 40% in Canada, suggesting less than 1/3 or 2/5 rather than "1 in 2".

68 A. Mrozek and P. J. Mitchell, *Building Instability Putting new census data in an international context with key Canadian takeaways*, CARDUS, Aug. 2, 2017, p. 8 (data ceases in 2011, when Statistics Canada ceased compiling marriage and divorce statistics).The 2% annual divorce rate is also confirmed in **Brown's Economic Damages Newsletter**, "The Divorce Contingency: negative contingency in fatality cases – update with 2005 data", May 2010, vol. 7, issue 5.

69 In *K.M. v. Marson* 2018 ONSC 3493, MacLeod-Beliveau, J. discounted the loss of marriage benefit award by -15% to arrive at the figure of $135,587 (para. 717).

70 *Biletski v. University of Regina*, 2017 SKQB 386, at para. 85.

71 The augmentation of +16% depends on the total award to be "grossed-up", which in this case was approximately $10 million (future loss of income + future cost of care + future loss of marriage benefit combined). The magnitude of this augmentation *to the tax gross-up award* will differ depending on the total award settled for or decided upon (amongst other variables assumed for the tax gross-up). These statistics are not included in Zarzeczny's award for tax gross-up in *Biletski v. University of Regina*, 2017 SKQB 386; they are courtesy of this author's reports and calculations from the *Biletski* case.

72 Sharma, J. allowed for applications to be made for the tax gross-up by counsel after delivering the judgment in *Wihelmson v. Dumma* 2017 BCSC 616 on April 13, 2017 (para. 22). I could not locate any reference to a possible tax gross-up in *K.M. v. Marson* 2018 ONSC 3493.

Cara L. Brown is the principal of Brown Economic Consulting Inc., where she has prepared over 10,000 reports quantifying economic assessments and damages in civil litigation covering a comprehensive range of cases. She has testified on more than 130 occoasions in a number of different courthouses across Canada. She can be reached at 1.800.571.0115 x201, email cara.brown@browneconomic.com and her website is www.browneconomic.com