

CIVIL JURY GIVEN A RANGE FOR NON- PECUNIARY DAMAGES



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On September 25, 2002, Mr. Justice Rooke of the Court of Queen's Bench in Calgary ruled that in a trial by civil jury the trial judge is entitled to give the jury a range to guide the jury when establishing non-pecuniary damages: *Nguyen v Collette*, 2002 ABQB 841.

This is a very bold decision. It directly contradicts the established law in Alberta that was set by the Alberta Court of Appeal in *Pendergras v. McGrath* (1988), 86 A.R. 291 (C.A.), application for leave to appeal dismissed (1988), 92 A.R. 320n. In that case, the Court of Appeal ruled that a trial judge must not give any guidance to a jury assessing damages in a civil case except where there is agreement between counsel, or where the jury must be reminded that by reason of law there is an upper limit to the award of non-pecuniary damages.

Justice Rooke was well aware that his decision was contrary to the rules established by the Alberta Court of Appeal. He stated that the law was bad and that it should change. He commented that slavish adherence to case law can result in "stagnation of the law". He pointed out that the law has changed in Saskatchewan where a trial judge may now instruct a jury as to a range of damages. He also relied on comments made in passing by the Supreme Court of Canada that hint at a possible relaxation of the rule against instructing juries as to a range of damages for non-pecuniary awards.

It is difficult to determine whether this decision will be followed by other Justices of the Court of Queen's Bench. First, it is contrary to the principle that trial judges must follow the directions of the Court of Appeal. Second, the recent Supreme Court of Canada decision in *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257, relied upon by Justice Rooke as authority for the emerging trend to allow a trial judge

greater abilities to guide a jury as to damages, also states regarding non-pecuniary damages that "if counsel can agree on a bracket or range of an appropriate award the trial judge should convey these figures to the jury, but at the present time specific figures should not be mentioned in the absence of such agreement." The Supreme Court did comment that this prohibition may have to be re-examined in the future, but declined to do so at the time.

Accordingly, both the current law from the Supreme Court of Canada and the Alberta Court of Appeal is that a trial judge may not give a bracket or range of damages with respect to non-pecuniary awards. Therefore, it is hard to say whether or not Justice Rooke's decision will be followed by the other judges.

This is an emerging issue in the law, and we are monitoring it closely. Future legal alerts will be published regarding any future developments.

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