

Discriminatory Impact of Application of *Restitutio in Integrum* in Personal Injury Claims

Elizabeth ADJIN-TETTEY*

INTRODUCTION	121
I. PURPOSE OF TORT LAW: PRIMACY OF CORRECTIVE JUSTICE	125
II. DISCRIMINATORY IMPACT OF <i>RESTITUTIO IN INTEGRUM</i> AND CORRECTIVE JUSTICE IN THE VALUATION OF PLAINTIFFS' LOSSES.....	130
A. IN TRUST AWARDS	131
B. COMPENSATION FOR IMPAIRED WORKING CAPACITY	135
III. DISTRIBUTIONAL CONSIDERATIONS IN TORT LAW.....	146
IV. DISTRIBUTIONAL CONSIDERATIONS IN TORT REMEDIES	155
A. NON-PECUNIARY LOSSES	155
B. PUNITIVE DAMAGES	159
CONCLUSION.....	162

* Professor, Faculty of Law, University of Victoria, British Columbia. Financial support for this paper was generously provided by the Charles D. Gonthier Research Fellowship, 2008–2009.

*When we talk about tort law, we should start with the premise that it is designed to protect [human] dignity and promote social equality and social justice. Our causes of action and remedies should be tailored to ... achieve those ends.*¹

INTRODUCTION

According to proponents of therapeutic jurisprudence, legal rules and actors (lawyers, judges, etc.) can have either therapeutic or anti-therapeutic effects. Law is a social force with the potential to impact either positively or negatively the emotional life, psychological well-being and sense of social citizenship of legal subjects.² Remedies for vindicating rights provide a conceptual lens for ascertaining how the interest at stake is valued. Therapeutic or anti-therapeutic effects may result from the valuation of a plaintiff's losses and his/her human capital, especially when compared with others in similar circumstances.³ Personal injury can have a particularly devastating impact on the lives of victims—physically, psychologically, financially, socially, etc. It is therefore important that personal injury law, in particular the assessment of losses, should seek to improve therapeutic outcomes for victims and minimize the potentially harmful effects of engagement with the legal system that may result from focusing on social identity. As Cassels notes, “It is hard to use the word justice to describe a system that replicates injustice and ensures that the disadvantaged remain disadvantaged.”⁴

The underlying premise of this paper is that although the structure of tort law is generally informed by corrective justice, that is, consideration is given only to the relative positions of the injurer and

¹ Leslie Bender, “Tort Law’s Role as a Tool for Social Justice Struggle” (1997–1998) 37 Washburn L.J. 249, at p. 257.

² See David B. Wexler & Bruce J. Winick, “Putting Therapeutic Jurisprudence to Work” (May 2003) 89(5) A.B.A. J. 54; David Wexler, “Two Decades of Therapeutic Jurisprudence” (2008) 24 Touro L. Rev. 17, at p. 20.

³ Compensation for impaired working capacity and in trust awards, which are based on the opportunity cost to the person who provided care and services, have great social significance because they represent an individual’s actual or perceived potential in the capitalist market.

⁴ Jamie Cassels, “(In)Equality and the Law of Tort: Gender, Race and the Assessment of Damages” (1995) 17 Advoc. Q. 158, at p. 198.

victim in a dispute, the tort system often reflects distributional considerations or broader societal interests. Thus, tort law principles, in particular those relating to the determination of liability, are rarely conceived solely in terms of correlativity and hence a bilateral engagement between the victim and tortfeasor. Rather, courts often consider broader issues such as the impact of a finding of liability on particular relationships and on the availability of certain social goods. These considerations can result in denial of an otherwise “legitimate” claim. Thus, notwithstanding how compelling a plaintiff’s claim might be from a moral and corrective justice standpoint, liability may be considered morally objectionable or socially undesirable.⁵ Viewed in this light, tort law is utilitarian because it reflects broader societal interests and a willingness to sacrifice individual interests for the greater good of society. Emphasis on broader societal considerations in determining the nature and limits of tort liability underscores the fact that the administration of justice, and in particular tort law, is a human and social institution designed to respond to the needs of society.

Courts frequently make policy decisions and choices in their decision-making.⁶ As Professor Luntz argues, reliance on legal principles alone will often be insufficient to decide cases that come before the courts and it is important for courts to use policy in making decisions.⁷ Courts

⁵ For example, the limited tort law protection accorded psychological well being and purely financial interests do not deny the legitimacy of victims’ losses. Public policy considerations such as potential for indeterminate liability and the view that economic interests are better protected through contractual arrangements influence the law in these areas. See *Mustapha v. Culligan of Canada Ltd* (2006), 84 O.R. (3d) 457 (C.A.), aff’d [2008] 2 S.C.R. 114 [*Mustapha*]; *Devji v. Burnaby (District)* (1999), 70 B.C.L.R. (3d) 42 (C.A.); *Rhodes v. C.N.R.* (1990), 50 B.C.L.R. (2d) 273 (C.A.), leave to appeal to S.C.C. refused, [1991] S.C.C.A. No. 1; Lewis Klar, *Tort Law*, 4th ed. (Toronto: ThomsonCarswell, 2008), at pp. 476–486; Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markam, Ont.: LexisNexis, 2006), at pp. 443–444; *Ultramares Corporation v. Touche*, 255 N.Y. 170, at p. 179 (U.S. N.Y. Ct. App. 1931); *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, at paras. 60, 62, 65 [*Design Services*]; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, at para. 118; *Brooks v. Canadian Pacific Railway Ltd.*, 2007 SKQB 247, at para. 85; Bruce Feldthusen, *Economic Negligence*, 4th ed. (Scarborough, Ont.: Carswell, 2000), at pp. 9–15.

⁶ See Jane Stapleton, “The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable” (2003) 24 Austl. Bar Rev. 135 [Stapleton, “The Golden Thread at the Heart of Tort Law”].

⁷ Harold Luntz, “The Use of Policy in Negligence Cases in the High Court of Australia” Univ. of Melbourne Legal Studies Research Paper No. 264, online: Social Science Research Network <<http://ssrn.com/abstract=1021629>>. See also Izhak England, *The Philosophy of Tort Law* (Aldershot: Dartmouth, 1993), at pp. 11–20.

sometimes openly acknowledge that legal principles or aspects of their decision-making process reflect particular policy choices, values and distributional considerations,⁸ whereas others do not and even disavow reliance on policy.⁹ This confirms the observation that law, in particular the role of courts, is not simply declaratory of pre-determined rules or naturally constitutive social relations, what has been referred to as the “fairy tale view of law.”¹⁰ Rather, courts and legislatures actively construct, structure and maintain social relations. One of the benefits of this process is the ability to structure tort law to respond to the changing needs of society and to reflect contemporary conceptions of social mores, values and justice.¹¹ Courts make particular policy choices that reflect their perception of social reality and human interactions, including assumptions about the place and role of persons in society, which may be gendered, racialized, classed, ableist, etc.¹² Luntz argues that the fact that

⁸ For example, policy considerations feature prominently in the determination of new duty relationships, specifically whether the parties are in a sufficiently proximate relationship to justify a tort law duty of care for the plaintiff’s benefit, and whether such a duty is desirable from a societal viewpoint: see *Cooper v. Hobart*, [2001] 3 S.C.R. 537. Another area of tort liability heavily influenced by policy is vicarious liability: see *Bazley v. Curry*, [1999] 2 S.C.R. 534; Elizabeth Adjin-Tettey, “Accountability of Public Authorities through Contextualized Determinations of Vicarious Liability and Non-Delegable Duties” (2007) 57 U.N.B.L.J. 46, at pp. 50–51.

⁹ For example, the High Court of Australia has taken the position that whereas policy considerations are inevitable in deciding novel tort claims, it is inappropriate to do so openly. See *Cattanach v. Melchior*, [2003] H.C.A. 38, 215 CLR 1, at para. 122, *per* Kirby J. [*Cattanach*]. In *McFarlane v. Tayside Health Board*, [1999] 4 All E.R. 961 (H.L.) [*McFarlane*], the House of Lords disavowed basing their decision on the issue of whether parents of a child conceived after a failed sterilization should be entitled to the cost of rearing the child to the age of majority on social policy, notwithstanding strong evidence of these considerations in the reasons for judgment. It is therefore common for courts not to articulate the policy factors that animate their decisions, leaving the impression that the result flows from a formalistic application of legal rules and principles. See John G. Fleming, “Remoteness and Duty: The Control Devices in Liability for Negligence” (1953) 31(5) Can. Bar Rev. 471, at p. 473 [Fleming, “Remoteness and Duty”].

¹⁰ See Luntz, referring to Sir Anthony Mason, Luntz, “The Use of Policy in Negligence Cases,” *supra* note 7 at footnotes 5 and 6 and accompanying text.

¹¹ See Benjamin N. Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924), at p. 62, online: Infotrac <http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F152241803&srchtp=a&ste=14&locID=uvictoria_p>.

¹² See Regina Graycar, “Hoovering as a Hobby and other Stories: Gendered Assessments of Personal Injury Damages” (1997) 31 U.B.C. L. Rev. 17, at pp. 20–26, 35. Stapleton argues that the distinction between principle and policy is a fine one and the categories are unstable. It may be unclear whether a particular concern that

judges can have multiple reasons for a particular outcome, even if they concur in the result, and the frequency of dissenting judgments show the latitude available to judges. These varied outcomes cannot result merely from the application of legal principles; judges are bound to be influenced by values and policy considerations in making their decisions.¹³

Many tort theorists and courts reject a purely monist and non-instrumental view of tort law. While tort law is seen as an instrument for shaping society and hence promoting broader societal interests with respect to liability, distributional considerations are rarely adopted at the remedial stage. Rather, courts resort to formal legal principles and the need for “principled” outcomes that accord with law and justice between the parties when providing remedies for tort victims. Specifically, courts rely on the principle of *restitutio in integrum*—restoring the plaintiff to her *status quo ante* as far as money can do—as justification for the formalistic approach. Broader societal interests are deployed in remedial considerations usually in relation to intangible interests (non-pecuniary damages) and non-compensatory damages, such as punitive damages. However, there is reluctance to infuse broader policy considerations into compensation for tangible interests, such as impaired working capacity, in ways that will promote social justice, fairness and the equal moral worth of all plaintiffs. This reinforces historical patterns of discrimination, and projects these inequalities into the future, sometimes contrary to changing social realities.

This paper adopts a consequentialist approach that focuses not only on substantive principles of tort liability but also considers how general principles of tort remedies are applied to victims, especially claimants from marginalized backgrounds. I explore the implications of the principle of corrective justice on the tort system, noting its inadequacy to fully explain the workings of that system and arguing that distributional considerations necessarily intrude. Remedies for personal injury can be a site for reinforcing and exacerbating the vulnerability and devaluation of

forms the basis of legal decision making is principle or policy. She does not contest the fact that courts are influenced by various social and legal concerns in making their decisions. However, she finds the distinction between principle and policy unreliable and prefers to characterize the considerations that animate legal decision making in neutral terms as “legal concerns,” without having to separate policy from principle: Stapleton, “The Golden Thread at the Heart of Tort Law,” *supra* note 6.

¹³ Luntz, “The Use of Policy in Negligence Cases,” *supra* note 7. See also *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

members of marginalized groups.¹⁴ Discrimination is pronounced in the assessment of pecuniary losses, specifically in trust awards and damages for impaired working capacity.¹⁵ The paper will focus on these issues because the traditional legal principles informing this area reveal the unfairness to claimants from marginalized backgrounds and could leave the impression that it is cheaper to injure persons from such backgrounds compared to those from more favourable socio-economic situations. Damages for impaired working capacity and in trust awards also present unexplored opportunities to creatively assess victims' losses in ways that will not reinforce their socially constructed marginalization and devaluation. This also reflects our commitment to equality and the Canadian Institute for the Administration of Justice's (CIAJ) theme of using remedies to give content to substantive legal rights and to reflect "contemporary trends in law and society."

I. PURPOSE OF TORT LAW: PRIMACY OF CORRECTIVE JUSTICE

The primary organizing principle of tort law is corrective justice; tort law is viewed as a system for righting wrongs caused by the defendant's conduct.¹⁶ Thus, tort law is described as essentially a system of "reparative" justice.¹⁷ Seen in this light, tort litigation is a private,

¹⁴ See Richard Abel, "General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)" (2006) 55 DePaul L. Rev. 253, at p. 303 [Abel, "General Damages"].

¹⁵ The discriminatory impact of the application of *restitutio in integrum* is also evident in the assessment of non-pecuniary damages for plaintiffs with pre-existing disabilities. Their condition may affect their ability to live and enjoy what is considered a normal lifestyle; that is, live as an able-bodied person. For such plaintiffs, restoring them to their original position would often mean they receive less for pain and suffering, loss of amenities and enjoyment of life because their position was already compromised even without the injury in question. Since the plaintiff is not to be restored to a better position than her/his pre-injury state, there will be no compensation for inability to live a normal lifestyle; for example, if lack of mobility was inherent in her/his original position and not attributable to the defendant's wrongdoing. See Darcy L. MacPherson, "Damage Quantification in Tort and Pre-Existing Conditions: Arguments for Reconceptualization" in Dianne Pothier and Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006), at p. 250.

¹⁶ See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), at p. 178.

¹⁷ Peter Cane, "Retribution, Proportionality, and Moral Luck in Tort Law" in Peter Cane and Jane Stapleton eds., *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Clarendon Press, 1998), at p. 162.

bilateral transaction between the injured and the injurer. It is the plaintiff's responsibility to initiate the action at her/his own expense and control the litigation to the extent possible within the rules of court. In personal injury claims, the plaintiff seeks redress for interference with her autonomy and personal security: specifically a determination that the defendant wrongfully violated the plaintiff's legally protected interests. Redress may take the form of compensation for the plaintiff's losses caused by the defendant's wrongful conduct—for example impaired working capacity, pain and suffering and diminished quality of life. The defendant's obligation to compensate the plaintiff is limited by the principle of *restitutio in integrum* that underlies tort damages. This requires the defendant to compensate the plaintiff only for the latter's actual losses arising from the wrongful conduct, and to provide only what is necessary to restore the plaintiff to the position she would have been in absent the defendant's wrong. This calls for an individualized assessment of the plaintiff's losses, using her *status quo ante* as the baseline for that determination.¹⁸

Corrective justice requires that a determination of the defendant's liability and the plaintiff's entitlement should occur strictly within the bilateral relationship between the parties, with no consideration of factors external to that relationship, that is, factors relevant to only one party, or to serve alternative ends.¹⁹ Distributive justice, on the other hand, is aimed at promoting collective goals and involves political considerations. According to corrective justice theorists, these are not applicable in tort law.²⁰ Given the bilateral nature of tort liability, the inquiry is limited to a formal assessment of the plaintiff's *status quo ante*; courts therefore disregard inherent systemic inequalities affecting the plaintiff. The goal is

¹⁸ Stephen Perry refers to this as "outcome responsibility." See Stephen Perry, "Risk, Harm and Responsibility" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), at p. 321. See also Gerald Postema, "Introduction: Search for an Explanatory Theory of Torts" in Gerald Postema, ed., *Philosophy and the Law of Torts* (Cambridge: Cambridge Univ. Press, 2001), at p. 9.

¹⁹ See Ernest J. Weinrib, "Corrective Justice in a Nutshell" (2002) 52 U.T.L.J. 349, at pp. 351–352; See generally, Ernest J. Weinrib, "The Disintegration of Duty" in M. Stuart Madden, ed., *Exploring Tort Law* (Cambridge University Press, 2005), at pp. 146–159; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995), at p. 73.

²⁰ See Ernest J. Weinrib, *The Idea of Private Law*, *ibid.* at pp. 210–211. Weinrib notes that corrective justice and distributional considerations are categorically distinct, and a single interaction cannot be meaningfully justified in the two systems of justice: *Ibid.* at p. 73.

to do justice as between the parties by treating them as morally equal subjects with the exercise of one's liberty having detrimentally impacted the other's interests. As Weinrib notes, the purpose of corrective justice is to maintain and restore "the notional equality with which the parties enter the transaction."²¹ Corrective justice theorists contend that mixing the two theories of justice results in incoherence in tort principles and may unjustly deny recovery to a person injured by the defendant's conduct.²² It is therefore inappropriate to use the tort system as a mechanism for adjusting societal inequalities and promoting the welfare of vulnerable parties or those from marginalized backgrounds.²³

Corrective justice theorists like Weinrib assume equality between the parties, an interaction based on free will and choice between equals, and the possibility of determining the "true" wrong suffered as a result of that interaction.²⁴ These assumptions are deemed to justify a focus on external aspects of the parties' relationship to preserve their formal equality,²⁵ but fail to consider both the construction of the "baseline against which correction takes place"²⁶ and the agency of legal actors.²⁷

²¹ Weinrib, "Corrective Justice in a Nutshell," *supra* note 19 at p. 349.

²² For example, broader policy considerations in the duty analysis are criticized by corrective justice theorists as unjust because they can deny liability, and hence compensation, to the victim of another's wrongdoing even after a finding that it is fair and just to impose a duty of care on the wrongdoer. For a critique of the modern duty analysis, see Weinrib, "The Disintegration of Duty," *supra* note 19 at pp. 145–147, 164; Weinrib, *The Idea of Private Law*, *supra* note 19 at pp. 212–214.

²³ See Weinrib, "Corrective Justice in a Nutshell," *supra* note 19 at p. 353.

²⁴ See Finnis, *supra* note 16 at pp. 178–179; Peter Cane, "Distributive Justice and Tort Law" 2001 N.Z.L. Rev. 401, at p. 409.

²⁵ Weinrib, *The Idea of Private Law*, *supra* note 19 at p. 104. This view of tort law, and human interactions generally, is premised in liberal theory's vision of society as composed of autonomous individuals focused on maximizing their personal interests; a vision not reflected in reality. Rather, human societies reflect social interactions and interdependencies and have developed laws, norms and conventions to facilitate these interactions to ensure harmonious coexistence. See Bender, *supra* note 1 at pp. 255–256.

²⁶ Cane, "Distributive Justice in Tort Law," *supra* note 24 at p. 408.

²⁷ It is pretentious to assume that tort litigation is about corrective justice between equal parties whereby the injurer is held accountable for their wrongful conduct. Many tort actions tend to be subrogated claims brought by insurance companies on behalf of insured plaintiffs, whose losses have been satisfied through insurance. In that sense, the actual victim is merely a notional plaintiff and is thus not in a vulnerable position vis-à-vis the defendant, often also an insurance company, who would be in a similarly powerful position. However, this picture of tort litigation is not universal. Individuals with first party insurance for the loss in question benefit from subrogated

The false understanding of notional equality is particularly evident in the assessment of damages, that is, what is actually needed to restore the injured party to her *status quo ante*. It disregards the inequalities inherent in the parties' initial positions, structured by systems of marginalization that are (re)produced and reinforced by the *status quo*, which is itself premised on an assumption that the identity and characteristics of the individual participants are irrelevant. This understanding therefore precludes the use of tort law to achieve social justice goals that recognize existing inequalities. Meanwhile, the pursuit of corrective justice and the *restitutio* principle still rely on the injured party's identity as a member of a disadvantaged group(s) to construct her loss, specifically the value of impaired working capacity. The process fails to recognize that what is considered the claimant's loss is itself socially constructed to reinforce, and sometimes exacerbate, systemic inequalities and the devaluation of the human capital of members of disadvantaged groups. This is particularly problematic when courts fail to make favourable assumptions for young plaintiffs regarding their income potential based on their socially constructed socio-economic status, for example gender and family background, in predicting their future losses.²⁸ In this regard, the remedial process does not only thrive on social inequalities; it also actively protects and promotes those inequalities.²⁹

claims. But aside from situations of compulsory insurance, such as automobiles, access to first party insurance often has a class dimension, as it is generally available only to those with the adequate financial means or who have it as an employment benefit. Others find themselves without this safety net. Examples include plaintiffs in institutional abuse cases who would often not have received any insurance money for their victimization. The insurance element therefore magnifies rather than diminishes societal inequalities. Thus, considering parties to a tort action as equals is an inaccurate conceptualization of harm and ignores the social dimension of tortious injuries. See Elizabeth Adjin-Tettey, "The Marginalizing Effect of Deductibility of Past Welfare Benefits from Compensation for Personal Injury" (2009) 44 S.C.L.R. 2d 37; Martha Chamallas, "Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss" (2005) 38 Loy. L.A. L. Rev. 1435, at p. 1437.

²⁸ Even the idea of a right or interest protected by tort law is not neutral or apolitical. Tort liability arises only where the defendant's conduct interferes with the plaintiff's legally protected interest or right. However, legally protected interests have not remained static. The rights and duties recognized by tort law are given effect through state institutions, such as the judiciary, that determine the nature and content of these rights and correlative duties, as well as what constitutes interference with these rights and what is necessary to rectify harms resulting from such interferences. See Weinrib, "Corrective Justice in a Nutshell," *supra* note 19 at pp. 352–354.

²⁹ See Cassels, *supra* note 4 at pp. 158–159.

Meanwhile, the Supreme Court of Canada has stated that the development of the common law, tort included, must be informed by the equality principles and values enshrined in the *Canadian Charter of Rights and Freedoms*, even though the *Charter* is not directly applicable in private litigation.³⁰ The expectation that the common law's development should reflect *Charter* values has been rhetorical, at least in the context of tort damages, as courts have been reluctant to use private ordering as a site for considering social context or redressing systemic inequalities. It is thought to be contrary to corrective justice and individual liberty, and also unduly places the burden of societal problems on defendants.³¹ Resistance to the infusion of equality principles in tort remedies stems from reliance on the capitalist market and social identity as the benchmark for ascertaining plaintiffs' losses. However, this resistance presupposes equality in the market and assumes that individuals engage with each other as autonomous, self-interested actors. As well, it ignores how systemic inequalities affect the lives of marginalized people through the valuation of their losses in personal injury claims based on formal principles such as *restitutio in integrum*.

Corrective justice may be a weak conceptual principle for explaining tort actions. Many victims would like to hold someone accountable for their injuries. A corrective justice rationale would suggest suing to hold wrongdoers personally accountable for the plaintiff's victimization. The ability to pay would be incidental. However, in practice, victims rarely sue tortfeasors who are judgment-proof, as compensation for the consequences of the wrongdoer's conduct is often of greater concern for plaintiffs than the tortfeasor's personal responsibility; few victims pursue perpetrators simply for the psychological satisfaction of having them held personally accountable without being concerned about monetary compensation for their injuries.³² The purpose of this paper is not to challenge the importance of

³⁰ See *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573, at p. 603; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at p. 1169 [*Hill*].

³¹ See *MacCabe v. Board of Education of Westlock Roman Catholic Separate School District No. 110* (2001), 293 A.R. 41 (C.A.), at paras. 98–110 [*MacCabe*]; *Rewcastle v. Sieben* (2001), 296 A.R. 61 (QB), rev'd on other grounds (2003), 20 Alta. L. R. (4th) 17 (CA) [*Rewcastle*]; *British Columbia (Public Trustee) v. Asleson* (1993), 78 B.C.L.R. (2d) 173 (C.A.), at para. 180 [*Asleson*]; Cassels, *supra* note 4 at pp. 160–162.

³² Victims often look for deep-pocketed or insured parties other than the actual perpetrator to hold liable for their injuries, for example through a finding of negligence for not taking adequate precautions to prevent the plaintiff's victimization

corrective justice to tort law and the bilateral nature of the relationship between the injurer and the injured.³³ However, the bilateral nature of the relationship does not tell us anything about valuation of the plaintiff's losses, which inevitably relies on external factors regarding the value of her human capital to make that assessment. Moreover, the concept of corrective justice as the underlying basis for damages in tort can lead to severely inequitable outcomes. In the next section I explore how the *restitutio in integrum* principle operates in regards to in trust awards and compensation for impaired working capacity, pointing out the inequities that arise as a result. I argue that the current approach has the effect of perpetuating and reinforcing discrimination suffered by disadvantaged plaintiffs.

II. DISCRIMINATORY IMPACT OF *RESTITUTIO IN INTEGRUM* AND CORRECTIVE JUSTICE IN THE VALUATION OF PLAINTIFFS' LOSSES

From a victim's perspective, the substantive content of legal rights is largely reflected in the remedies available for their vindication and the extent to which those remedies mirror the ideals underlying the legal system, including how the victim is valued as a member of the community. Thus, issues of justice in remedying personal injury cannot be dismissed as not warranting serious consideration. According to the CIAJ's mission statement, the remedial side of the legal process

by the perpetrator. Alternatively, plaintiffs may seek to hold third parties vicariously liable for the plaintiff's injuries regardless of the third party's fault. Even when powerful defendants are found liable, the prevalence of liability insurance and loss-spreading mechanisms available to self-insurers undermines corrective justice. While corrective justice identifies the injurer as the person accountable, the defendant is often a nominal party and liability is spread among policy holders and/or consumers of their goods and services. There might be repercussions for making claims, such as increased premiums, but these are costs of doing business and will be passed on to shareholders, consumers and/or qualify as deductible business expenses for tax purposes. Non-legal sanctions such as bad publicity and boycott of the defendant's goods and services may be of limited effect. Negative publicity may also be avoided through settlements that often preclude the victim from publicly disclosing terms of the agreement.

³³ Regardless of a plaintiff's desire to obtain compensation for her or his injuries, she does not have a right to compensation against the whole world or the wealthiest person on the block. Rather, entitlement to compensation only arises in relation to the person responsible for the interference with the interests at stake. See Ernest J. Weinrib, "Deterrence and Corrective Justice" (2002) 50 *UCLA L. Rev.* 621, at pp. 626-627.

determines the extent to which ideals of justice get tested in victims' lives and whether it is worth seeking legal solutions to one's problems.

The influence of corrective justice as expressed in the principle of *restitutio in integrum* appears to be so strong that even when courts recognize the need for equality and social justice in the assessment of damages, they may still feel constrained from infusing the process with distributional considerations because it offends the goal of tort damages to restore the plaintiff to her so called original position.³⁴ This can have a discriminatory effect on claimants from marginalized backgrounds by creating and reinforcing systemic inequalities on the basis of social identity such as gender, race, ethnicity, (dis)ability and class because of the way victims' original position and losses are constructed. Valuation of the claimant's losses can be particularly crucial where the reason for her victimization was tied to her marginalized status, for example, claimants who were abused as children in the care of government agencies and institutions. The needs of vulnerable members of society should inform the remedies provided for violations of their rights to bodily autonomy and security in such a way that shows their losses are equally valued.

A. IN TRUST AWARDS

Where the plaintiff has benefited from care and services provided by family members and friends in the pre-trial period, the court may award damages for the reasonable value of those services to be held in trust for the benefit of the service provider. The rationale for in trust awards is that the plaintiff has suffered a loss due to the defendant's wrongdoing, resulting in the need for the care or services in question; the plaintiff would likely have purchased those services if they had not been gratuitously provided. In trust awards are premised on corrective justice and ensure a defendant's accountability for losses caused by her wrongful conduct. They also prevent a windfall to the plaintiff by not compensating her for expenses not actually incurred. This appears consistent with the restorative goal of tort damages.

Restitutio in integrum governs both the availability and amount of in trust awards and may create and reinforce inequalities on the bases of gender and/or class. In trust awards are only available for "extraordinary"

³⁴ *MacCabe*, *supra* note 31; *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403; *Asleson*, *supra* note 31.

care, that is, services over and above what the providers normally do, or are expected to do for the plaintiff in the aftermath of an injury; there is no compensation for what the service provider ordinarily does or is expected to do for the plaintiff based on their relationship.³⁵ In theory, the basis of in trust awards and the amount awarded are consistent with the compensatory goal of tort damages. However, these apparently neutral principles have a discriminatory effect because it is easy for women's care work to be characterized as less than extraordinary and it therefore may not warrant in trust awards.

There are class and gender implications of the principles in relation to in trust awards and special damages generally. The threshold for in trust awards presumes there is a common understanding of what family members are expected to do for each other when healthy or injured. Meanwhile, for a variety of reasons including social and cultural assumptions and expectations, women tend to do more care work within families compared to men. This means in trust awards will rarely be awarded in respect of care provided to injured family members by women, save for exceptional cases. As well, where the service provider does more for her family members than is typically expected, an in trust award might not be warranted or will be awarded only for limited services.³⁶

Further, the amount of compensation provided is generally based on the lesser of the reasonable replacement cost of those services or the service provider's opportunity cost. Low-income earners who give up paid employment to look after injured family members may be

³⁵ See *Bystedt (Guardian ad litem of) v. Hay*, [2001] B.C.J. No. 2769 (S.C.) (QL), aff'd (2004), 24 B.C.L.R. (4th) 205 (C.A.) [*Bystedt*]; *Bartosek (Litigation Guardian of) v. Turret Realities Inc.*, [2001] O.J. No. 4735 (Sup. Ct. J.) (QL), aff'd (2004), 23 C.C.L.T. (3d) 161 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 202 [*Bartosek*]; *Wozniak v. Alexander*, [2008] A.J. No. 788 (Q.B.) (QL), at para. 67; *Lakhani v. Elliot*, 2009 BCSC 1058, at para. 163.

³⁶ In *Dhillon v. Zurek*, 2001 BCSC 271, the plaintiff alleged that her upbringing, cultural background and specific arrangements with her spouse prior to their marriage required that she undertake all the household tasks including raising her children and working outside the home, if appropriate. Her inability to perform these duties due to her injuries was a source of disappointment and likely depression and, the court found, was probably a factor in her slow rate of recovery. Had a member of her family been a plaintiff, given the amount of care and services that she normally provided, the threshold for extraordinary care would have been high. It is likely that some of the services that she routinely provided for her family members may not be the norm in the dominant society, and hence could easily attract in trust awards should those same services be provided to a plaintiff in another family.

disadvantaged because they might recover less for in trust awards (if their forgone income is less than the reasonable replacement cost) compared to those with higher incomes who can recover their actual opportunity cost provided it is reasonable. High-income families might find it easier to purchase professional services for injured family members, among other things, because they are used to having paid services and/or the high opportunity cost. More privileged plaintiffs can also enjoy professional services and recover the reasonable cost of those services. Poorer families are likely to provide “do it yourself” services for the injured family members and may also recover less for in trust awards when they forego paid work to look after an injured family member, because their opportunity cost may be less than the cost of using professional services.

Women are particularly affected since they tend to earn less and are more likely to be those who give up paid employment to look after injured family members. Compensation is also limited to services in excess of what the person would otherwise do for the victim. Therefore, families who do not normally hire outside help, whether for personal, ideological, economic or cultural reasons, are likely to be disadvantaged. Again this is a gendered problem, since women continue to perform more household and care work compared to men.³⁷ The aggregate effect of adherence to the *restitutio* principle, with respect to in trust awards, is the further disadvantaging of those from less privileged socio-economic backgrounds.

Ideally, concerns about inequalities in the amount of in trust awards may be avoided where plaintiffs purchase services they need when they suffer tortious injuries. However, this might not be a realistic option for all plaintiffs. Some services and care may be better provided by family members, where possible. There is no reason to devalue such services simply because they were “homemade.” The plaintiff and/or her family might not have the resources to purchase those services, especially where there is no guarantee of compensation from the tortfeasor—for example where liability is contested.³⁸ Plaintiffs with first party insurance—usually those with disposable incomes to purchase these policies, or who have them as employment benefits or as members of

³⁷ See Statistics Canada, “Are Women Spending more Time on Unpaid Work than Men in Canada?”(2008), online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-630-x/2008001/article/10705-eng.htm>>; Statistics Canada, “Converging Gender Roles” Canadian Economic Observer, August 2006, Catalogue No.: 11-101-XIB, online: Statistics Canada <<http://www.statcan.gc.ca/pub/11-010-x/00806/9290-eng.htm>>.

³⁸ See *Preston v. Chow*, 2007 MBQB 318 [*Preston*].

professional associations—can obtain commercial services even if there are doubts about the defendant’s liability for the injuries, because their insurers will likely indemnify them for those expenses. This leaves marginalized people—low-income earners, the unemployed, persons in receipt of social assistance, etc.—at risk of further marginalization through the devaluation of services provided by family members who are unemployed or earn less than the reasonable replacement cost of the services in question. The differences in the quantum of in trust awards amounts to discrimination on the basis of social identity, despite the alleged basis of such awards being the compensatory goal of tort damages. Thus, the restorative principle allows courts to indirectly sanction inequalities seemingly justified through adherence to legal principles. This does not correspond with the attention given to desirable social outcomes in the determination of tort liability. In assessing in trust awards, the focus should be on the market value of the services in question and not the identity of the service provider and her socio-economic location. Compensation should be based on the reasonable replacement cost for those services, similar to impaired homemaking capacity, where all plaintiffs receive comparable damages for work they are no longer able to perform.³⁹ Such an approach will not offend the compensatory purpose of tort damages because compensation will be limited to services necessitated by the effects of the defendant’s wrongdoing. As well, it will ensure equality of treatment between those who give up paid employment to look after injured family members and those who do not.⁴⁰

³⁹ See *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 (Sask. C.A.). Compensation for impaired homemaking capacity is available to all plaintiffs who experience diminished ability to perform such tasks due to the injury, regardless of gender and whether they were full time homemakers or participated in the waged labour force. Thus, plaintiffs who had chosen to work less in order to focus on household tasks will be compensated at the same rate as all other plaintiffs who are no longer able to perform the task in question regardless of their income level.

⁴⁰ Where there is no opportunity cost to the person who provides the services, the quantum of damages will be determined based on the reasonable replacement cost. Thus, family members earning less may recover less where they give up income to look after injured family members while other family members who did not give up any income can recover more for the same work.

B. COMPENSATION FOR IMPAIRED WORKING CAPACITY

The purpose of tort law includes protection of autonomy, security, dignity and property interests of individuals. The value placed on these interests is often conceptualized through the lens of the market, or economic considerations in the form of monetary compensation in the event that these interests are violated.⁴¹ Consequently, the tort system highlights interests valued by society and deserving of protection, and the corresponding monetary worth of a tortious injury. Thus, the value of an individual's autonomy, security and dignity, at least in relation to the ability to engage in productive work, depends on the worth of her human capital in the marketplace. This is often an arbitrary and subjective process for future losses in general, but especially for future income loss.⁴² In practice, liability for the consequences of one's conduct is not assessed independent of the background characteristics of victims; these are considered inherent in their original position, and hence impact the extent of their loss. Victim characteristics such as race, gender, disability, class, etc., serve as a conceptual lens for the valuation of the earning potential and therefore of their losses. These characteristics are considered pre-existing or independent factors that would have detrimentally affected the plaintiff even absent the defendant's intervention in her or his life, and that cannot be ignored in the assessment of her losses due to the tortious injury.

Differential valuation of plaintiffs' losses based on social identity, seemingly pursuant to the *restitutio* principle, results in only formal equality, and may be discriminatory. The intersection of factors such as gender, race, disability, and poor socio-economic status may have a detrimental effect on damages for impaired working capacity. Systemic factors that often operate to exclude members of marginalized

⁴¹ See Joan C. Williams, "Unbending Gender: Why Family and Work Conflict and What to Do about It" in Martha M. Ertman and Joan C. Williams, eds., *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press, 2005); Viviana A. Zelizer, *Pricing the Priceless Child* (Basic Books, Inc., 1985), at pp. 15–20; Margaret Jane Radin, *Contested Commodities* (Harvard University Press, 1996), at chapter 13; Martha M. Ertman, "What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification" (2003) 82 N.C. L. Rev. 1, at pp. 42–58.

⁴² See Lucinda M. Finley, "The Hidden Victims of Tort Reform: Women, Children, and the Elderly" (2004) 53 Emory L.J. 1263, at pp. 1278–1279. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at para. 58 (WLeC) [*Andrews*], where Justice Dickson refers to the speculative nature of the assessment of future income loss as crystal ball gazing.

communities from the labour market, or at least from high income positions, are perceived to be outside the valuation of plaintiffs' losses.⁴³ To compound the problem, marginalized status can exacerbate a person's losses, making mitigation increasingly difficult.⁴⁴ For example, courts have said they cannot ignore the "reality" of women's level of attachment in the paid labour force due to their child-bearing and caring responsibilities which lower their overall earnings even after eliminating the gender wage gap.⁴⁵ This can have significant implications for plaintiffs, especially in cases of catastrophic physical injuries or injuries with long-term psychological consequences, where income loss is a significant part of the plaintiff's claim.⁴⁶

While not denying social inequalities that detrimentally affect plaintiffs from marginalized backgrounds, courts see their role in the assessment of damages as focused on doing justice *inter se* and restoring the plaintiff to her "original position." without "scapegoating" the defendant by redressing societal ills or inequalities. According to this understanding of the tort system, the burden of eliminating societal inequalities based on social identity is to be borne by society generally and not by individual defendants. Unlike the determination of tort liability or the limits of tort law generally that reflect broader societal interests, the assessment of damages seems to be controlled solely by corrective justice and a narrow focus on the plaintiff's so-called original position. The fairness of that position, including the impact that social identity, structural inequalities affecting the plaintiff or her family, or the social construction of gender roles have on the valuation of human capital, is not questioned.⁴⁷ This benefits plaintiffs from privileged

⁴³ For employment rate of women compared to men, types of occupations, income level, etc. see: Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, 5th ed., 2006 (Social and Aboriginal Statistics Division), Catalogue no. 89-503-XIE, chapter 6, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/89-503-x2005001-eng.pdf>>.

⁴⁴ Cassels, *supra* note 4 at p. 192.

⁴⁵ See *MacCabe*, *supra* note 31; *Spehar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104, aff'd (2004), 31 B.C.L.R. (4th) 223 (C.A.) [*Spehar*]; *Grewal v. Brar* 2004 BCSC 1157, at para. 153 [*Grewal*].

⁴⁶ See Chamallas, *supra* note 27 at pp. 1438–1442.

⁴⁷ For a contrary approach that considers the reasons for the unfavourable conditions of those used as a proxy to ascertain the plaintiff's earning potential and does not project that into the future, see *Preston*, *supra* note 38 at paras. 289–290. Although the plaintiff's mother had not completed high school and did not have any employment skills, the court noted that this was because of the responsibilities thrust upon her by having a child with special needs. The court used the educational level that the

backgrounds while negatively impacting those in unfavourable circumstances. Those prejudiced by this regime tend to be poor people, women, racialized persons, those living with disabilities, etc. Why should the extent of a defendant's liability be determined by the plaintiff's social identity? In other words, why should the defendant obtain a financial advantage from societal inequities?

The discriminatory effect of the restorative principle is particularly acute in relation to young plaintiffs with no earning record. For these plaintiffs, courts rely on factors such as gender, family background and socio-economic conditions, including parents' educational attainment, work ethics and home environment, to determine the value of their impaired working capacity. This often results in depressed awards for those from marginalized backgrounds because they are not perceived to have the prospect of favourable material conditions absent their injury.⁴⁸ A focus on family background and conditions can entrench privilege while exacerbating the marginalization of less privileged members of society, often based on mere speculation. Family status is not always an accurate predictor of a person's future socio-economic prospects, as children often achieve higher job or income status than their parents.⁴⁹ It is questionable whether supporting societal inequities should be condoned. As Bruce notes, "it is not clear that society considers it equitable that the child of a well-educated [person] should receive more

mother would otherwise have achieved as an appropriate benchmark for assessing the plaintiff's losses.

⁴⁸ See *W.R.B. v. Plint* (2001), 93 B.C.L.R. (3d) 228 (S.C.), at paras. 327-336, aff'd [2005] 3 S.C.R. 3 [*Plint*]; *M.B. v. British Columbia*, 2000 BCSC 735, at paras. 277-278, varied on other grounds [2003] 2 S.C.R. 477; *T.W.N.A. v. Clarke* (2003), 22 B.C.L.R. (4th) 1 (C.A.), at para. 78 [*T.W.N.A.*]; *B.P.B. v. M.M.B.*, 2006 BCSC 1027, at para. 130, varied on other grounds (2009), 97 B.C.L.R. (4th) (C.A.), leave to appeal to SCC refused [2010] S.C.C.A. No. 90 [*B.P.B.*]; *Osborne (Litigation guardian of) v. Bruce (County)* (1999), 83 O.T.C. 326 (Gen. Div.) [*Osborne*]. See also A. Kaminsky et. al., "Recent Developments in Litigation of Lead Paint Poisoning Among Children" (2001) 13 Environmental Claims J. 89.

⁴⁹ See *Rotumah v. NSW Insurance Ministerial Corp* (NSW SC, April 16, 1998, unreported), cited in Harold Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed. (Chatswood, NSW: Butterworths, 2002), at pp. 323-324, note 123. See also *Mumford v. Health Sciences Centre* (1991), 77 Man. R. (2d) 1 (Q.B.), aff'd (1993) 85 Man. R. (2d) 271 (C.A.), leave to appeal to S.C.C. refused, [1993] S.C.C.A. No. 347 [*Mumford*]; *M (A Child) v. Leeds Health Authority*, [2002] P.I.Q.R Q4, 2001 WL 1751078 (QBD), at para. 55; *Greyhound Lines Inc. v. Sutton*, 765 So. 2d 1269 (Miss. 2000) at paras. 20-21 [*Sutton*].

compensation than the child of a labourer.”⁵⁰ Equality of opportunity for all children is a cherished Canadian value. Given that the assessment of future losses is speculative and that the plaintiff’s so-called original position will never be known with certainty, it is unfair for the defendant to pay less for a marginalized plaintiff’s impaired working capacity and thereby benefit from the latter’s undervalued social identity. Courts should apply egalitarian principles to value the working capacity of all young plaintiffs in a similar way, for example based on average income, regardless of gender and other social markers, unless there is reasonably predictive evidence of a higher than average income potential.⁵¹

Reliance on the *restitutio* principle with its focus on corrective justice masks the inequities of a subjective valuation of the plaintiff’s socially constructed worth in the labour market. This is particularly problematic where the plaintiff’s marginalized status was a reason for her victimization,⁵² or where the defendant has exploited the plaintiff’s vulnerability and exposed her or him to an unreasonable risk of harm.⁵³

⁵⁰ Christopher J. Bruce, “The Calculation of Foregone Lifetime Earnings: Three Decisions of the Supreme Court of Canada” (1979) 5 Can. Pub. Pol’y 155, at p. 166. See Abel, “General Damages,” *supra* note 14 at pp. 311–312, 315.

⁵¹ See *Sutton*, *supra* note 49 at paras. 22–23. It will be unfair for courts to ignore concrete or reasonable evidence regarding a child’s future potential in assessing their lost earning potential. However, the analysis should focus on personal characteristics of the individual plaintiff and not generally on their social identity, which is possible with older children when there is the evidential basis for an assessment of academic performance, work ethics, or indications of career path. Using average income statistics for children generally avoids potential disadvantage to those from unfavourable backgrounds or late bloomers who have had no opportunity to at least try.

⁵² Take for example a developer who builds sub-standard social housing that exposes residents to an increased risk of harm not present in other areas, and who then, as a defendant, benefits from paying less in damages for impaired working capacity of those catastrophically injured in a building collapse or from exposure to toxic substances such as lead. This not only exploits those residents, mostly poor people, but is also an affront to their human worth and dignity, contrary to principles of equality. The developer may be charged and convicted of criminal negligence causing bodily harm if the court finds that this was a calculated conduct in disregard for the safety or life of residents (See *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 219) and/or may be liable for punitive damages. However, this does not affect the valuation of the plaintiffs’ worth and losses. See Laura Greenberg, “Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards” (2001) 28 B.C. Env’t Affairs L. Rev. 429.

⁵³ For example, consider Aboriginal children removed from their homes and families and forced to attend residential schools. The assimilative purpose of the schools, the remote locations and the coercive manner in which the schools operated made

Manufacturers of products specifically designed and marketed to persons living with physical limitations, and intended to alleviate those limitations, can successfully argue for lower damages where a defect in the product causes injury resulting in impaired working capacity to the plaintiff, because the plaintiff already faced diminished employment prospects due to her or his disability prior to the defendant's wrongdoing. The amount of compensation in such cases may be contrasted with what may be awarded in respect of products intended for non-disabled persons who can recover higher damages based on their perceived worth in the capitalist market.⁵⁴ In so doing, courts reinforce and exacerbate the exclusion, systemic marginalization and devaluation of the worth of disabled persons, as well as validate the institutional and structural obstacles to their full participation in paid employment and society generally.⁵⁵ As well, the ableist underpinning of the construction of the

children vulnerable to abuse. Defendants, including the federal government and the religious organizations that ran the schools, have successfully argued for diminished losses from abuse because the plaintiff's original position was already compromised. Evidence for this argument included reference to their difficult family situations, such as domestic violence and alcohol abuse, which would have also detrimentally impacted their socio-economic prospects absent the abuse in question. Courts have accepted these arguments to lower damages for Aboriginal plaintiffs, using their disadvantaged situation to devalue their losses compared to plaintiffs from dominant groups, but without recognizing the complicity of the dominant society in the marginalization of Aboriginal people through colonization and the inter-generational effects of forced attendance at Indian residential schools. See *Plint*, *supra* note 48 at paras. 375–378, 388 (S.C.), and para. 82 (S.C.C.); *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2001 BCSC 1783, at paras. 261–262, 308, rev'd on other grounds (2003), 14 B.C.L.R. (4th) 99 (C.A.); *D.W. v. Canada (A.G.)* (1999), 187 Sask. R. 21 (Q.B.), at paras. 38–39; *T.W.N.A.*, *supra* note 48. See also Abel, "General Damages" *supra* note 14 at pp. 256–257.

⁵⁴ See MacPherson, *supra* note 15 at pp. 250–253.

⁵⁵ For example, it may be easy to point to statistics about the participation rate of persons with disabilities in the paid labour force to make predictions about the earning potential of a disabled plaintiff. However, those statistics mask the fact that the problem is not located in persons living with those limitations but in the way society is constructed that limits education and employment opportunities or accessibility to public places for such persons. See Robert D. Wilton, "Working at the Margins: Disabled People and the Growth of Precarious Employment" in Pothier and Devlin, eds., *Critical Disability Theory*, *supra* note 15, at pp. 129–130. The devaluation of the worth of persons living with disabilities is particularly troubling where their victimization is attributable to their vulnerability. For example, persons marginalized on the bases of factors such as disabilities, racialization, gender, age, class, immigration status, and sexuality are particularly susceptible to sexual assault. See British Columbia Law Institute, *Civil Remedies for Sexual Assault* (Vancouver, BCLI Report No. 14, 2001), at pp. 4–5; Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent,

“normal” and the benchmark for assessing tort damages remains unchallenged. Thus, rather than valuing the plaintiff and her losses in themselves—for instance based on the nature of the injury and how it has impacted the plaintiff—her moral worth and loss are assessed against the yardstick of the unstated norm or the ideal, able-bodied plaintiff.⁵⁶

It is unconscionable for a defendant to pay less in damages because of the plaintiff’s pre-existing vulnerabilities that have been exploited for personal gain. This results in re-victimization and exacerbation of social inequities. It reinforces marginalization by devaluing the lives and moral worth of plaintiffs, and fails to employ tort law as a mechanism for protecting human dignity and promoting equality consistent with *Charter* values.⁵⁷ The consequent implications on access to justice are important. Generally, only a small number of tort victims actually initiate claims for their losses, the phenomenon referred to as “the ‘dark figure’ of unasserted legitimate claims.”⁵⁸ Victims from socio-economically disadvantaged backgrounds appear less likely to initiate action.⁵⁹ Even if such victims seek vindication of their rights, the *resitutio* principle, with its focus on replicating the victim’s “actual” losses, often results in lower compensation for plaintiffs from marginalized backgrounds. This is a further disincentive for pursuing claims and thereby creates unequal access to the civil justice system.⁶⁰

Capacity, and Mistaken Belief” (2007) 52 McGill L.J. 243; UNICEF, *Violence against Disabled Children*, UN Secretary Generals Report on Violence against Children, Thematic Group on Violence against Disabled Children, Findings and Recommendations, Convened by UNICEF at the United Nations, New York July 28, 2005.

⁵⁶ See MacPherson, *supra* note 15 at pp. 255–259.

⁵⁷ See Bender, *supra* note 1 at pp. 256–257.

⁵⁸ Richard Abel, “Civil Rights and Wrongs” (2004–2005) 38 Loy. L.A. L. Rev. 1421, at p. 1425 [Abel, “Civil Rights and Wrongs”].

⁵⁹ *Ibid.* at pp. 1425–1426.

⁶⁰ The problem of unasserted claims arises in relation to both personal and fatal injuries. In the context of fatal injury claims, dependents may also receive depressed awards for the value of their dependency on the deceased family member based on the limited valuation of the earning potential of the deceased. Damages in fatal injury claims are mostly economic and limited to the pecuniary benefits that the claimants would have obtained from the deceased had she not been fatally injured, referred to as the value of dependency. The claimants’ entitlement is assessed based on the deceased’s disposable income. Given the correlation between income and value of dependency, limited valuation of lost income would mean less compensation for dependents. See Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2nd ed. (Toronto: Irwin Law, 2008), at pp. 183–187.

The possibility of depressed awards can make it difficult to find a lawyer willing to take on the plaintiff's claim on a contingency fee basis.⁶¹ This, in addition to the potential high cost of litigation, will often leave the victim with very little by way of compensation after disbursements and legal fees, and may make legal action futile. Further, the potential for depressed awards may create incentives to settle or succumb to the pressure from powerful defendants and/or their insurers to settle, sometimes for less, to avoid the uncertainty of the outcome of a trial, as well as minimize the cost of litigation and alleviate financial hardship caused by the injury.⁶²

The cumulative effects of factors that make it less likely for victims from marginalized backgrounds to seek vindication of their rights results in the potential disproportionate exposure of such people to risks of injury. It also creates immunity, wholly or partially, for tortfeasors who pay less in damages or settlement awards, or may not be sued at all, thereby exacerbating the vulnerability of disadvantaged individuals and groups.⁶³ Thus, depressed damages for lost earning capacity based on the perceived value of the plaintiff's human capital can have a particularly detrimental effect on members of marginalized groups such as women, racialized people and persons living with disabilities, making them "cheaper" to injure. As Abel notes: "The legal system creates an incentive to injure those whom society endows with less human capital (earning capacity...), who are also less ... likely to respond by suing. (The poor also have less bargaining power to demand workplace safety

⁶¹ Plaintiffs unable to afford legal fees may maintain an action against the tortfeasor by entering into contingency fee arrangements with lawyers. However, the reality is that the decision to take on a client on a contingency fee basis will largely be influenced not only by the chances of success but also the size of the potential award. The likelihood of depressed awards will likely diminish the chances of being able to obtain legal representation on a contingency fee arrangement. Finley makes similar arguments with respect to caps on non-pecuniary damages. Plaintiffs who suffer mostly intangible losses are often left with little compensation after paying for fees and disbursements, and may have difficulty finding lawyers. This has a corresponding effect on fairness and equal access to the civil justice system: Finley, *supra* note 42.

⁶² See Richard Abel, "Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability" (2002), 80 Tex. L. Rev. 1547, at p. 1549; Abel, "Civil Rights and Wrongs," *supra* note 58 at p. 1431.

⁶³ See Finley, *supra* note 42 at p. 1295; Abel, "Civil Rights and Wrongs," *ibid.* at p. 1426; Chamallas, *supra* note 27 at pp. 1440–1441. See also Tsachi Keren-Paz, "An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness" (2003) 16 Can. J.L. & Jur. 91, at pp. 94–95.

and less purchasing power to buy it in consumer products, or even to protect themselves against the weapons of the rich...,”⁶⁴ for example, by way of first party insurance. Incentives for victimizing vulnerable groups and individuals, and the devaluation of their losses, may be avoided or at least minimized by remedies that focus on reversing the unjust enrichment of defendants or the defendant’s wealth.⁶⁵ However, these solutions may be of limited value where the defendant did not obtain financial gain from the tort, which will be the situation in many personal injury claims, and so long as compensation is based on the restorative principle.

Women may be doubly disadvantaged by the lower valuation of their probable earnings. Generally, women receive less compensation for impaired working capacity for a number of reasons. The majority of women work in traditional female occupations, which pay less compared to the rate of remuneration for male dominated jobs, a phenomenon referred to as the “pink ghetto.”⁶⁶ In addition, women’s familial roles of child bearing and rearing and other care responsibilities are perceived to limit their attachment to the labour market, and hence decrease their earning potential.⁶⁷ Thus, even when women’s earnings in particular occupations are expected to be comparable to that of their male

⁶⁴ Abel, “Civil Rights and Wrongs,” *ibid.* at pp. 1421–1422.

⁶⁵ See Thomas H. Koenig and Michael L. Rustad, “Toxic Torts, Politics, and Environmental Justice: The Case for CrimTorts” (2004) 26 *Law & Pol’y* 189; Allan Kanner, “Equity in Toxic Tort Litigation: Unjust Enrichment and the Poor, 209 in Special Issues on Toxic Torts and Environmental Justice, (2004) 26 *Law & Pol’y* 209.

⁶⁶ See Statistics Canada, “Women in Canada: Work Chapter Updates,” online: Statistics Canada <<http://www.statcan.gc.ca/pub/89f0133x/89f0133x2006000-eng.htm>>; Statistics Canada, “Women in Canada,” *The Daily*, March 7, 2006, online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/060307/dq060307a-eng.htm>>; *Women in Canada*, *supra* note 43, at pp. 113, 139; Statistics Canada, *The “who, what, when and where” of gender pay differentials*, by Marie Drolet, Catalogue No. 71-584-MPE, no.4 (Ottawa: Minister of Industry, 2002), chapter IV; Judy Fudge and Rosemary Owens, *Precarious Work, Women and the New Economy* (Oxford: Portland, Oregon: Hart 2006), at p. 13.

⁶⁷ Some recent cases show a tendency to assume comparable earnings for men and women where the female plaintiff would likely have completed post-secondary education either because of pay equity initiatives or because there is generally no difference in remuneration for men and women in particular occupations. See *MacCabe*, *supra* note 31; *Walker v. Ritchie*, [2003] O.J. No. 18 (Sup. Ct. J.), at para. 135 (QL), *aff’d* (2005), 31 C.C.L.T. (3d) 205 (C.A.) [*Walker*]; *Audet (Guardian ad Litem of) v. Bates*, [1998] B.C.J. No. 678 (S.C.), at para. 81. However, female earnings continue to be used for plaintiffs not expected to obtain education beyond high school. See *Preston*, *supra* note 38 at paras. 291–293; *Osborne*, *supra* note 48.

counterparts, the overall lifetime earnings of women are perceived to be less because of withdrawals from the workforce for familial reasons. This is justified as being consistent with the *restitutio* principle that tort damages should not place plaintiffs in a better financial position than they would have been in absent the tortious injury.⁶⁸ Some courts avoid gender-specific contingency deductions by using average earnings for determining income loss for young female plaintiffs.⁶⁹ However, use of blended statistics will not necessarily guarantee that there will be no gender-based discount in relation to particular plaintiffs.⁷⁰ As well, the alleged fairness in using neutral earning statistics for female plaintiffs is suspect since this approach is only used for female and not male plaintiffs.

Depressed awards for women's impaired working capacity rest on a number of gendered assumptions and actually reinforce gender inequalities in the market and society generally. Their use sanctions gendered occupational segregation and the devaluation of women's labour in the capitalist market. As well, they are premised on a devaluation of women's unpaid work in the home or private sphere compared to work in the waged labour force or public sphere.⁷¹ Those who largely perform

⁶⁸ See *MacCabe, ibid.* Similarly, compensation for family members of all victims of the events of September 11, 2001 in the United States was based on male earning tables rather than gendered statistics in order to avoid disadvantaging the families of women victims. See Chamallas, *supra* note 27 at pp. 1444–1445.

⁶⁹ See *Walker, supra* note 67; *Ediger (Guardian ad Litem) v. Johnston*, 2009 BCSC 386 [*Ediger*]. See also *U.S. v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah 2004) reversed and remanded on other grounds, *U.S. v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005), where the court refused to rely on race and gender-based earning statistics in determining compensation for family members of Native American murder victims (a male and female) on the bases of race and gender.

⁷⁰ The court may conclude that the statistical average does not adequately reflect the situation of a particular plaintiff, and a further adjustment, either upward or downward, may be appropriate. See *Paxton v. Ramji*, [2006] O.J. No. 1179 (Sup. Ct. J.) (QL), paras. 59–60, aff'd (2008), 299 D.L.R. (4th) 614 (C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 508 [*Paxton*]; *B.P.B.*, *supra* note 48. Given the speculative nature of plaintiffs' losses absent earnings history, it may be difficult to adduce evidence to justify awarding higher than average income to a group, but this has not prevented some courts from making *discounts* based on the plaintiff's social identity.

⁷¹ Notwithstanding commodification anxieties regarding caregiving and other domestic services as productive labour, courts have now recognized that unpaid work in the home has economic value just as paid work. Hence, a plaintiff may be compensated for impaired homemaking capacity where an injury has diminished or impaired that ability. However, the assessment of housework continues to show devaluation of such work. Impaired housekeeping ability is considered a non-pecuniary loss where the plaintiff does not obtain replacement services, or performs the task herself but

unpaid work at home are prejudiced when the focus of gender inequality in earnings is shifted away from market forces, which affirms the unstated assumption that remuneration is the proper measure for the value of work. Differential earnings are attributed to women's lived experiences; that is, limited attachment to the capitalist market, which is in turn attributed to women's choices.⁷² These assumptions also entail notions of ideal workers, men who are often unencumbered by care responsibilities, who are used as the benchmark for women's participation in the paid labour force. This conceptualization renders invisible unpaid care work, usually done by women in the so-called private sphere. That work supports men as ideal workers in the market and is used to justify the gender wage gap.⁷³ As well, it ignores how the public sphere creates, reinforces and thrives on socially constructed gender roles and the resulting inequalities for women and other marginalized groups.⁷⁴ Further, the devaluation of care work partly stems from concerns about the commodification of family relations and attempts to bring economic or market considerations to bear on aspects of family life that are supposed to be priceless, motivated by love and affection with corresponding intangible benefits for caregivers. Such a rationalization rests on a bifurcated view of society with hostile spheres and the need to police the boundaries to avoid corrupting the private sphere through objectification of the priceless or

with difficulty, and is compensated modestly. Pecuniary damages are awarded where the plaintiff obtained or is expected to obtain replacement services. The rate of pay tends to be low and is sometimes below minimum wage. See *Fobel, supra* note 39; *McIntyre v. Docherty*, 2009 ONCA 448; *Morgan v. Oates* (2007), 47 C.C.L.T. (3d) 216 (Nfld. C.A.); Cara L. Brown, "Valuable Services Trends in Housekeeping Quantum Across Canada, 1990–2001" (2003) 27 *Advoc. Q.* 71; Graycar, *supra* note 12 at p. 28.

⁷² See *Spehar, supra* note 45; *Paxton, supra* note 70 at para. 59 (Sup. Ct. J.).

⁷³ See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (New York, N.Y.: Oxford Univ. press, 2000), at pp. 124–125; Fudge and Owens, *supra* note 66 at p. 13.

⁷⁴ Feminist scholars have contested the public/private distinction, among other things, because it is socially constructed, has shifting boundaries, and entrenches patriarchal power and existing hierarchies to the detriment of women's and other marginalized groups' equality. See Tracy Higgins, "Reviving the Public/Private Distinction in Feminist Theorizing" (2000) 75 *Chicago-Kent L. Rev.* 847; Mary Heath, "The Public/Private Distinction as a Conceptual Boundary of the State: A Bifocal Theory of the State for Feminism?" (2000) 4(1) *Flinders J.L.R.* 19; Frances Olsen, "Constitutional Law: Feminist Critiques of the Public/Private distinction. (1993) 10 *Const. Commentary* 319; Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 *Osgoode Hall L.J.* 485, at pp. 487–488.

non-commodifiable.⁷⁵ Not only is such a dualistic and oppositional view of society a myth, it also denies the reality of the inter-relatedness of the public and private spheres.⁷⁶ As well, it masks the gendering and feminization of care work as motivated by maternal instincts, selflessness, protecting familial bonds, emphasizing the invisibility and devaluation of women's work both at home and in the market, and hence their exploitation.⁷⁷ To avoid undervaluation of household labour, work done outside the paid labour force should be valued in the same way as paid work in the market. This will be consistent with compensation for impaired working capacity with its focus on work of value, regardless of the location, and avoid female-specific discounts for familial responsibilities.⁷⁸

Even if still guided by *restitutio*, the construction of the claimant's original position and the losses arising from her victimization can be crucial to the assessment of damages. It is therefore important that the *status quo ante* be viewed from a non-discriminatory and egalitarian perspective.⁷⁹ Remedies must be used to give meaning to the substantive rights they enforce, in this case bodily autonomy and security. Purposively using remedies to enforce the values of equality also serves to make visible the role of courts and legal actors not only in adjudicating cases before them, but also as instruments of social change.⁸⁰ Among other things, this will mean avoiding differential valuation of human interests and potential on the basis of social identity or identifiable characteristics. Social identity may be relied on to increase damages

⁷⁵ See Martha M. Ertman and Joan C. Williams, "Preface: Freedom, Equality and the Many Futures of Commodification" in Ertman and Williams, eds., *Rethinking Commodification*, *supra* note 41 at p. 4; Joan C. Williams & Viviana A. Zelizer, "To Commodify or not to Commodify: That Is Not the Question" in Ertman and Williams, eds., *ibid.* at pp. 364–365, 367–368; Deborah Stone, "For Love nor Money: The Commodification of Care" in Ertman and Williams eds., *ibid.* at pp. 274–275, 282–287.

⁷⁶ See Williams and Zelizer, "To Commodify or not to Commodify" *ibid.* at p. 366.

⁷⁷ See Stone, *supra* note 75 at p. 278; Katherine Silbaugh, "Commodification and Women's Household Labor" in Ertman and Williams, eds., *Rethinking Commodification*, *supra* note 41 at p. 297.

⁷⁸ See Bruce, *supra* note 50 at p. 160.

⁷⁹ For a discussion of these issues as they pertain to the impaired working capacity of historical abuse victims, see Elizabeth Adjin-Tettey, "Righting Past Wrongs through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses" (2007) 25 Windsor Y.B. Access Just. 95, at pp. 121–130.

⁸⁰ See Bender, *supra* note 1.

where to do so results in substantive equality,⁸¹ but should not be resorted to in furtherance of formal equality to the detriment of plaintiffs with allegedly unfavourable features.

Admittedly, the defendant may be innocent in the construction of the alleged value of the plaintiff's loss. However, the defendant benefits from the social inequality that constructs that value. It is therefore not unreasonable to infuse the analysis of the plaintiff's alleged original position, and hence the value of her loss, with egalitarian considerations in the interest of promoting therapeutic outcomes and social change. In the next section, I question the perception that tort litigation is a "private" and bilateral engagement between parties and challenge the assumption that corrective justice is the exclusive rationale underlying tort law.

III. DISTRIBUTIONAL CONSIDERATIONS IN TORT LAW

*"[T]he prime responsibility of tort scholars is to ... focus their attention on uncovering the distributive principles on which tort liability is based, and offer courts a sound theoretical framework for considering distributive issues."*⁸²

*"Justice to the doer and sufferer cannot be secured in the abstract."*⁸³

Human society is not static. As a system for, among other things, mediating inter-personal relations and determining what constitutes legally actionable conduct, including what counts as compensable injuries, the aims and substantive content of tort law must continually evolve to meet the needs of contemporary society. Attempts to explain the internal logic of tort law based solely on a single, comprehensive, consistent and enduring organizing principle is idealistic and can leave the system anachronistic and unresponsive to the needs of society. This is inconsistent with the view that law generally is a dynamic human

⁸¹ Courts have sometimes been guided by egalitarian considerations when assessing damages in ways that recognize and respect the differential impact of tortious injuries on plaintiffs due to their minority cultural, ethnic and religious backgrounds. See *C.Y. v. Perreault*, 2006 BCSC 545; *Sandhu v. Wellington Place* (2008), 291 D.L.R. (4th) 220 (Ont. C.A.) [*Sandhu*]; *To v. Toronto Board of Education* (2001), 55 O.R. (3d) 641 (C.A.).

⁸² Cane, "Distributive Justice and Tort Law," *supra* note 24 at p. 420.

⁸³ Ariel Porat, "Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice" (2001) 2 *Theor. Inq. L.* 161, at p. 174.

institution that evolves over time with necessary incremental and/or wholesale changes to meet the needs of society.⁸⁴ Both the rhetoric and practice of tort law point to the pluralistic nature of that system.⁸⁵ Further, although the structure of tort law is informed by corrective justice and correlativity, current understandings of social values or distributive justice considerations inform the development of tort duty or liability, legally protected interests and entitlements for interference with those rights.⁸⁶ It is therefore impossible to explain tort law by reference to a single theory. In fact, an attempt to do so will not only be futile but also inconsistent with its origins and evolution. As Calabresi states,

Tort law and its many parts have long been characterized by complexity of functions, goals, and methods.... The complexity has come about haphazardly, over time, and in significant part through the common-law development of the field.... And without this complexity torts would be a very different subject. When we contemplate the future of tort law, we must keep this fact in mind.... It is rare that ... single minded views can fully encompass and understand a slowly developed field of law like torts.⁸⁷

Although tort litigation is perceived as a private, bilateral action influenced by corrective justice, the tort system is a public institution; the institutions that establish and enforce the rules that make up tort law are

⁸⁴ See Postema, *supra* note 18 at pp. 15–16.

⁸⁵ See Izhak Englard, “The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law,” in Owen, ed., *The Philosophical Foundations of Tort Law*, *supra* note 18 at p. 184.

⁸⁶ See Jane Stapleton, “Controlling the Future of the Common Law by Restatement,” in Madden ed., *Exploring Tort Law*, *supra* note 19 at pp. 266–267; Hanoch Dagan, “The Distributive Foundation of Corrective Justice” (1999) 98 *Mic. L. Rev.* 138. For example, the old writ of trespass provided a remedy for direct interference with the plaintiff’s personal or proprietary interests regardless of fault, which reflected corrective justice. Modern tort law is no longer premised on the direct-indirect distinction, but rather liability arises for intentional and negligent conduct as a reflection of the needs of modern society: *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.). In theory, Canadian tort law continues to be influenced by the direct – indirect distinction: *Cook v. Lewis*, [1951] S.C.R. 830; *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, [2000] 1 S.C.R. 551. However, the actual practice reflects the Anglo-American position with negligence being the predominant cause of tort actions today.

⁸⁷ Guido Calabresi, “The Complexity of Torts” in Madden, ed., *Exploring Tort Law*, *supra* note 19 at pp. 350–351. See also G. Edward White, *Tort Law in America: An Intellectual History*, Expanded Edition (Oxford Univ. Press, 2003), at pp. 232–233.

state-funded.⁸⁸ Courts and legislatures establish the legally relevant principles that govern social interactions and determine actionable conduct. Tort law is therefore part of the coercive authority of the state intended to ensure peace and order in society.⁸⁹ It is therefore inaccurate to think of tort law as a system of private apolitical rules operating at the inter-personal level with no room for pursuing broader social policy or political goals. Indeed, as White points out, doctrinal analysis of negligence law does not operate in a vacuum but rather “inevitably involves policy judgments.”⁹⁰

Notwithstanding efforts by corrective justice theorists to conceive of tort law as an autonomous and apolitical system grounded in correlativity between the doer and sufferer of harm, it is a truism that the tort system is not informed by a single organizing principle. Rather, tort law reflects a range of competing interests beyond those pertaining to the parties, and incorporates both corrective and distributive justice considerations.⁹¹ In rejecting the monist view of tort law advocated by corrective justice theorists, scholars like Chapman have argued for a pluralistic and instrumentalist view of tort law.⁹² Chapman notes that it is not inconceivable for tort law to pursue multiple goals or for tort litigation to be influenced by different values, even if separately these goals and values are incoherent, independent and incompatible, provided the constituent elements work towards a common goal.⁹³ This pluralistic

⁸⁸ There has been no suggestion to abolish the public system of adjudication despite trends of privatization and neo-liberalism where individuals are expected to look after their own welfare. There is a broader state interest in minimizing undesirable behaviour even if such conduct is not criminal. See Tony Honoré, “The Morality of Tort Law – Questions and Answers” in Owen, ed. *The Philosophical Foundations of Tort Law*, *supra* note 18, at pp. 76–78.

⁸⁹ Indeed, the early action for trespass - interference with another’s person or property - was intended to provide a remedy for violence because such conduct threatened the King’s peace, and ultimately the security of others. Thus, although the action was created as a civilized avenue for revenge between the victim and injurer, there was also societal interest in providing a remedy. See also Cassels, *supra* note 4 at p. 162.

⁹⁰ White, *supra* note 87 at p. 238.

⁹¹ For examples, see White, *ibid.* at pp. 236–237; Stapleton, “Controlling the Future of the Common Law by Restatement,” *supra* note 86 at pp. 267–268; Calabresi, *supra* note 87 at pp. 333–334.

⁹² See also Gary T. Schwartz, “Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice” (1997) 75 *Tex. L. Rev.* 1801.

⁹³ Specifically, Chapman notes that ensuring societal welfare is a legitimate aim of tort law even if it is incompatible with other goals of the tort system: Bruce Chapman, “Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation” in

approach is consistent with the reality that tort law has been shaped not just by corrective justice but also by distributive justice and public policy considerations.⁹⁴ This in turn recognizes the progressive potential of tort law as a mechanism for promoting social equality, social justice and overall societal welfare.

Not all aspects of tort law have been influenced by distributional justice goals. Courts appear more willing to infuse some aspects of the system, in particular the liability side of the equation, with broader policy and distributional goals beyond the private, bilateral relations between the injurer and the sufferer. The question is: to what extent should social justice and distributional considerations influence the valuation of loss, especially for plaintiffs from marginalized backgrounds? I argue that like the other aspects of the tort system, the assessment of damages should be a mechanism for promoting the well-being of those engaged in the system, as opposed to reinforcing and perpetuating the marginalization of disadvantaged groups. Although attention to systemic inequalities in the assessment of tort damages does not appear to benefit those not engaged in tort litigation, it will nevertheless influence social change. Among other things, it will challenge the alleged neutrality and the resulting regressive effects of the *status quo* for marginalized plaintiffs. Such a change can also debunk the social construction of members of these groups, and hopefully influence social change aimed at eliminating or at least minimizing social inequalities.

Tort law does not treat all interests equally. Determination of issues such as whether a duty of care should be imposed on the defendant involves policy considerations and value judgments about the nature of

Postema, ed., *Philosophy and the Law of Torts*, *supra* note 18, at p. 276. See also Porat, *supra* note 83. Similarly, Bender argues that focusing on corrective justice as the foundational concept of tort law is inconsistent with the purpose of tort law as protecting human dignity and promoting social justice. Bender, *supra* note 1 at p. 258.

⁹⁴ See Chamallas, *supra* note 27 at pp. 1456–1457, who notes that even traditionalists such as Dan Dobbs concede this point. Abraham notes that although modern tort scholars are no longer focusing on the distributional functions of tort law, distributional considerations continue to inform the actual working of tort law: Kenneth S. Abraham, “Twenty-First-Century Insurance and Loss Distribution in Tort Law” in Madden, ed. *Exploring Tort Law*, *supra* note 19 at p. 83. See Ted Decoste, “Taking Torts Progressively” in Ken Cooper-Stephenson and Elaine Gibson, eds., *Tort Theory* (Toronto: Captus Press, 1993), at pp. 262–275; Ken Cooper-Stephenson, “Corrective Justice, Substantive Equality and Tort Law” in Cooper-Stephenson and Gibson, eds., *ibid.* at pp. 58–63; See generally John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998), at p. 120.

the interest interfered with, whether it is worthy of legal protection and if so, the scope of protection it is to be accorded.⁹⁵ As McLachlin C.J.C. points out in *Cooper*, the duty analysis is a balancing act in which “[t]he quest for the right balance is in reality a quest for prudent policy.”⁹⁶ These considerations use the duty concept to limit negligence liability that would otherwise flow from a defendant’s wrongdoing within a purely corrective justice framework.⁹⁷ Determining whether the extent of proximity in a particular relationship justifies imposing a duty of care on the defendant involves corrective justice considerations. However, foreseeability and proximity may not be sufficient to ground a duty of care where doing so runs contrary to societal interests.⁹⁸ Thus, corrective justice and the concomitant notion of personal responsibility determine the players in a given action, making certain that the litigation is between the sufferer and doer based on their correlative rights and obligations. However, to ensure that the decision accords with broader societal interests, the determination of liability involves consideration of factors outside the confines of that relationship.⁹⁹ According to Finnis, the idea of commutative justice better reflects the tort law process in general because it embodies both corrective and distributive justice considerations and makes evident the balancing of interests that occurs in the

⁹⁵ See Fleming, “Remoteness and Duty” *supra* note 9, at pp. 472, 476–77, 486. See also Cane, “Retribution, Proportionality and Moral Luck in Tort Law,” *supra* note 17 at pp. 147–150.

⁹⁶ *Cooper*, *supra* note 8 at para. 29.

⁹⁷ See Fleming, “Remoteness and Duty,” *supra* note 9 at pp. 474–475.

⁹⁸ See *Cooper*, *supra* note 8; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643. See also Stapleton, “Controlling the Future if the Common Law by Restatement” *supra* note 86 at pp. 287–288. Utilitarian considerations are also evident in determining the appropriateness of injunctions to restrain interference with the plaintiff’s interests. An injunction could be denied where the cost of compliance would be disproportionate to the benefit the plaintiff will obtain, provided the defendant’s conduct was not in deliberate disregard of the plaintiff’s interests. As well, social costs and protection of the environment may be invoked to deny an injunction notwithstanding that a particular state of affairs infringes the plaintiff’s proprietary interests. See *Goetzing v. Woodworth* (1999), 212 N.B.R. (2d) 305 (QB).

⁹⁹ See Cane, “Distributive Justice and Tort Law,” *supra* note 24 at pp. 403–405. Stapleton argues that although the proximity requirement of Lord Atkin’s Neighbour Principle in *Donoghue v. Stevenson* limited the scope of liability, overall the benefits of the Neighbour Principle included removing barriers to liability and recognizing an increasing sense of social responsibility: Jane Stapleton, “Duty of Care Factors: A Selection from the Judicial Menus” in Cane and Stapleton, eds., *The Law of Obligations*, *supra* note 17 at p. 61.

determination of justice and fairness.¹⁰⁰ Policy considerations in the duty analysis deviate from the correlativity between the plaintiff's rights and the defendant's obligations, and take the inquiry beyond what would be permissible within a purely corrective justice model.¹⁰¹ It is therefore inaccurate to characterize the determination of liability in tort as being a strictly bilateral transaction.¹⁰²

¹⁰⁰ Finnis, *supra* note 16 at pp. 178–179. See also Cane, “Distributive Justice and Tort Law,” *supra* note 24 at pp. 408, 412–414, who notes a flaw in Weinrib's theory of tort law as premised on corrective justice. Cane notes that Weinrib concedes that corrective justice is only concerned with the structure of tort law but not its substantive content. He argues that the determination of the scope of tort law, what he refers to as “the grounds and bounds of tort liability,” is a matter of distributive justice whereas the application of tort law principles in particular cases is based on corrective justice. Cane, *ibid.* at pp. 412–414.

¹⁰¹ It is not uncommon for courts to refuse to impose a duty of care on a defendant because of potential conflicting duties to others, sometimes notwithstanding hardship for the plaintiff. See *Paxton*, *supra* note 70; *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83; *Abarquez v. Ontario*, 2009 ONCA 374; *D.C. v. Children's Aid Society of Cape Breton Victoria*, 2009 NSCA 73. For a critique of the consideration of factors that have no bearing on the personal responsibility of the wrongdoer and the victim's entitlement to redress in new duty situations, see Stapleton, “Duty of Care Factors,” *supra* note 99 at pp. 63–71. Consideration of factors extrinsic to the relationship between the parties may no longer be central to the duty analysis given the emphasis in *Cooper* on an incremental approach guided by previously recognized or analogous categories of duty, but it still remains important in recognition of new duties. See *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263; *Design Services*, *supra* note 5; *Douglas v. Kinger*, 2008 ONCA 452, at paras. 57–65.

¹⁰² Reference to broader policy considerations usually privileges defendants, and more generally others in similar situations, often to the plaintiffs' detriment. For example, the law recognizes that involuntary parenthood due to the negligence of a health care professional violates autonomy rights of parents, particularly mothers, and has gendered implications. Based on corrective justice, parents' claims for their pecuniary and non-pecuniary losses arising from the negligence of health care professionals, including child rearing costs, should succeed. Yet, the predominant view supports providing compensation to parents only for the financial and non-pecuniary costs of the unplanned pregnancy and childbirth, start up costs and interference with the parents' reproductive autonomy. Generally, parents' claims for the cost of raising the unplanned but healthy child have been rejected seemingly for utilitarian considerations. Although harms to parents' autonomy and reproductive freedom as well as pecuniary and non-pecuniary consequences of the birth of the child are not questioned, courts take the view that societal interests in perceiving the birth of a child as a blessing and not a legal injury should trump notions of corrective justice that focus on harm to the parents, which in theory would have allowed recovery of all the parents' losses. See *McFarlane*, *supra* note 9 especially at pp. 977–78, *per* Lord Steyn; *Kealey v. Berezowski* (1996), 136 D.L.R. (4th) 708 (Ont. Gen. Div.); *Bevilacqua v. Altenkirk* (2004), 35 B.C.L.R. (4th) 281 (S.C.); *Roe v. Dabbs* (2004), 31 B.C.L.R. (4th) 158 (S.C.). In *Cattanach*, *supra* note 9, the High

Fault is central to modern tort law and to the notion of corrective justice that grounds that system. Thus, wrongful conduct that injures another person is the basis of both tort liability and the obligation to repair the resulting damage by restoring the victim to her *status quo ante*. Yet, based on the remoteness principle, a defendant may not be liable for some or all the consequences of her breach of duty, even if those losses flow directly from that breach, because there is no liability for unforeseeable consequences of one's wrongdoing.¹⁰³ This is notwithstanding the fact that the defendant's injurious conduct often entails taking chances that expose others to unreasonable risks of harm.¹⁰⁴ A corrective justice model would appear to support the directness rule in *re Polemis and Furness, Withy & Co.*,¹⁰⁵ which states that liability is established once it is determined that the breach of duty caused the victim's injury, assuming

Court of Australia held that parents are entitled to recover the financial cost of raising the unplanned child subject to a deduction for the benefits parents may obtain from the child's existence. This common law position has subsequently been reversed by statute in some states: *Civil Liability Act* 2002 (NSW), ss. 70, 71; *Civil Liability Act* 1936 (SA), s. 67; *Civil Liability Act* 2003 (Qld), ss. 49A(2), 49B(2). For a discussion of the law in relation to involuntary parenthood and a critique of that position, see Elizabeth Adjin-Tettey, "Claims of Involuntary Parenthood: Why the Resistance?" in Jason W. Neyers et al., *Emerging Issues in Tort Law* (Portland, OR: Hart Publications, 2007), at p. 85. See also *Stockford v. Johnston Estate* (2008), 335 N.B.R. (2D) 74 (QB), at paras. 94–108.

¹⁰³ Courts have generally interpreted the reasonable foreseeability requirement for remoteness purposes liberally. The manner in which damage occurs and the extent of damage need not be foreseeable. Once the plaintiff's injuries fall within the foreseeable consequences of the defendant's conduct, recovery is not determined based on a correlation between the extent of defendant's culpability and the plaintiff's losses. See *Jolley v. Sutton London Borough Council*, [2000] 3 All E.R. 409 (H.L.); *Assiniboine South School Division No. 3 v. Hoffer*, [1971] 4 W.W.R. 746 (Man. C.A.), aff'd (1973), 40 D.L.R. (3d) 480 (S.C.C.); *Michaluk (Litigation Guardian of) v. Rolling River School Division No. 39* (2001), 153 Man. R. (2d) 300 (C.A.); *Fielding v. Bock*, 2008 MBCA 1. Yet, the remoteness principle may still be used to limit or exclude liability. For example, in *Mustapha*, *supra* note 5, the Court had no difficulty in holding that the manufacturer owed a duty of care to the appellant as the ultimate consumer, that Culligan breached that duty when it supplied the appellant's family with contaminated bottled water and that its breach had a debilitating psychological impact on the appellant's life. Yet the Court concluded that a person of normal fortitude and robustness would not foreseeably suffer such an injury in those circumstances. Hence, the defendant's breach of duty caused the plaintiff's injury in fact, but not in law.

¹⁰⁴ See James Gordley, "Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule?" in Cane and Stapleton, eds., *The Law of Obligations*, *supra* note 17 at pp. 197–198.

¹⁰⁵ [1921] 3 K.B. 560.

the direct consequences of a particular conduct are reasonably ascertainable.¹⁰⁶ Yet, the directness principle has been rejected in favour of the reasonable foreseeability test, by which courts limit liability to situations where the victim's injury was a reasonably foreseeable consequence of the defendant's wrongful conduct.¹⁰⁷

Policy considerations can also be invoked for the benefit of victims, and in the interest of justice and fairness to those who have been harmed by the defendant's negligence.¹⁰⁸ Some courts, motivated by the compensation needs of victims, may strain tort principles in the pursuit of fairness and justice for plaintiffs in particular cases.¹⁰⁹ "Liberalization" of tort principles for "needy victims" or "worthy complainants" is particularly evident where liability may be imposed in situations that deviate from probabilistic theories of causation.¹¹⁰ Courts have been willing to recognize a causal connection where there is inadequate scientific evidence of the link between the defendant's breach of duty and the plaintiff's injury.¹¹¹ As well, a causal link has been found where the defendant's negligence is a possible but not a probable cause of the plaintiff's injury.¹¹² Causation has even been satisfied where although the plaintiff's injury is within the risk created by the defendant's negligence, it is impossible to determine how events would have unfolded absent the

¹⁰⁶ One of the criticisms of the *Re Polemis* directness rule was the difficulties in accurately ascertaining what are the direct as opposed to indirect consequences of negligent conduct, and the fact that policy factors will inevitably intrude in that analysis. Critics saw this as casting doubt on the superiority of the directness principle in determining the limits of negligent conduct. See Fleming, "Remoteness and Duty," *supra* note 9 at pp. 482–485.

¹⁰⁷ See *Overseas Tankship (U.K.) Ltd., v. Morts Dock & Engineering Co. (Wagon Mound No. 1)*, [1961] 1 All E.R. 404 (P.C. Aust.).

¹⁰⁸ For example, see *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, where the Court justified the need for a tort of negligent investigation, among other things, to respond to systemic problems of wrongful conviction and institutional racism. The plaintiff's claim failed under standard of care because the manner of investigation was consistent with police practice at the time.

¹⁰⁹ This trend continues notwithstanding that it has been characterized as "intellectual dishonesty" given that the victims' need for compensation, and not legal principles, dictates the success of such claims. See Klar, *supra* note 5 at pp. 11–12.

¹¹⁰ See Richard L. Abel, "A Critique of Torts" (1990) 37 UCLA L. Rev. 785, at p. 792 Abel, "A Critique of Torts".

¹¹¹ See *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] 3 All E.R. 305 (H.L.) [*Fairchild*].

¹¹² See *Snell v. Farrell*, [1990] 2 S.C.R. 311.

defendant's breach of duty.¹¹³ In such cases, courts recognize that application of the traditional "but for" test will result in injustice and hence apply other less demanding tests that ease the plaintiff's burden of proving causation. While recognizing the potential unfairness in holding defendants liable in the absence of a probable causal connection between their wrongdoing and the victims' injuries, the House of Lords noted in *Fairchild* that any injustice to defendants in such cases pales in comparison to the injustice of denying compensation to the victims. For example, Lord Nicholls stated:

On occasions the threshold 'but-for' test of causal connection may be over-exclusionary. Where justice so requires, the threshold itself may be lowered. In this way the scope of the defendant's liability may be *extended*.... To impose liability on a defendant in such circumstances normally runs counter to ordinary perceptions of responsibility. Normally this is unacceptable. But there are circumstances ... where this unattractiveness is outweighed by leaving the plaintiff without a remedy.¹¹⁴

Changing judicial attitudes towards causation have been influenced in part by the need to respond to changing and increasingly complex sources of tortious injuries in modern society which render traditional probabilistic causation inadequate. Rather than persist in applying traditional principles that will exclude liability, and hence compensation for innocent plaintiffs, in many instances courts have recognized that doing so will result in injustice and will impose unreasonable burdens on the unfortunate few who become casualties of modern living. Instead, fairness to plaintiffs dictates that the consequences of the activities in question should be borne by the beneficiaries of those activities, even though this may sometimes create inconsistencies in tort principles.¹¹⁵

¹¹³ See *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647; *Resurface Corp. v. Hanke*, [2007] 1 S.C.R. 333.

¹¹⁴ *Fairchild*, *supra* note 111 at para. 40. See also Lord Bingham, at para. 33, who refers to the strong policy in favour of compensating victims who have suffered serious injury even if they cannot establish causation on a balance of probabilities. See also Michael Green, "The Future of Proportional Liability: The Lessons of Toxic Substances Causation" in Madden ed., *Exploring Tort Law*, *supra* note 19 at p. 353.

¹¹⁵ For a critique of the direction of modern tort law, especially causation, see Jane Stapleton, "Two Causal Fictions at the Heart of U.S. Asbestos Doctrine" (2006) 122 *Law Q. Rev.* 189; Jane Stapleton, "Lords a'Leaping Evidentiary Gaps" (2002) 10 *Torts L.J.* 276; Vaughan Black, "A Farewell to Cause: Canadian Red Cross Society v. Walker Estate" (2001) 24 *Advoc. Q.* 478; Vaughan Black, "Decision Causation:

While notions of public policy and the broader needs of society have made their way into certain aspects of tort law, for example, recognition of new duties of care and the concept of remoteness, they rarely appear in the area of damages. The assessment of damages in tort law remains heavily dependent on the concept of corrective justice and the principle of *restitutio in integrum*. As noted above, this has the potential to lead to unjust awards, and has a wider impact in that it reinforces certain assumptions about underprivileged plaintiffs, depriving them even further of full compensation and justice. In the next section I argue that certain distributive justice concepts ought to be considered in courts' assessments of loss and the calculation of damages.

IV. DISTRIBUTIONAL CONSIDERATIONS IN TORT REMEDIES

Broader societal considerations are not entirely absent from the assessment of tort damages. However, these considerations are often limited to non-pecuniary and punitive damages, and rarely inform the assessment of the plaintiff's pecuniary losses. In the context of non-pecuniary damages, broader societal concerns are reflected in the functional approach and rough upper limit or cap on the quantum of damages recoverable. Punitive damages may increase the plaintiff's overall damages but broader policy considerations militate against widespread availability of punitive damages, and the quantum is often modest. As well, since the focus is punishment and not compensation, availability of punitive damages does not address concerns about the devaluation of a plaintiff's pecuniary losses.

A. NON-PECUNIARY LOSSES

Non-pecuniary damages are awarded for a plaintiff's intangible losses—loss of amenities, pain and suffering and loss of expectation of life. The purpose of non-pecuniary damages is not to replace the plaintiff's loss or provide a monetary substitute for that loss,¹¹⁶ but rather to provide a means of purchasing substitutes for what the plaintiff has

Pandora's Tool-Box" in Neyers et al., *Emerging Issues in Tort Law*, *supra* note 102 at p. 309.

¹¹⁶ See A.I. Ogus, "Damages for Lost Amenities: For a Foot, a Feeling, or a Function?" (1972) 35 Mod. L. Rev. 1, at p. 2.

lost.¹¹⁷ Hence, availability and quantum of non-pecuniary damages are informed by the functional approach, that is, what is necessary to provide “solace” to the plaintiff and improve her condition, with the goal of giving her some pleasure in her injured state.¹¹⁸ The severity of the plaintiff’s injuries is not the ultimate determinant of the quantum of non-pecuniary damages. Rather, the guiding principle is the purpose that money can serve for the plaintiff in her situation. This depends on her ability to appreciate the expenditure of money, usually based on her cognitive awareness,¹¹⁹ notwithstanding the fact that a court ought not be concerned about what a plaintiff actually does with a properly assessed award.¹²⁰

Thus, full or perfect compensation for non-pecuniary losses is perceived to be impossible, and the principle of *resitutio in integrum* is of limited application in this context.¹²¹ Given their subjective nature, the assessment of non-pecuniary losses is necessarily arbitrary and influenced by policy considerations.¹²² In this regard, the award is influenced by utilitarian considerations that focus on the impact of non-pecuniary damages on society generally and avoiding undesirable consequences, especially in light of the incommensurability of intangible losses. Courts and defendants are often concerned about the potential for extravagance in

¹¹⁷ *Lindal v. Lindal*, [1981] 2 S.C.R. 629, at p. 639 [*Lindal*].

¹¹⁸ The Supreme Court of Canada adopted the functional approach in the 1978 personal injury damages trilogy: *Andrews*, *supra* note 42; *Teno v. Arnold*, [1978] 2 S.C.R. 287 [*Teno*]; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267. The Court rejected the conceptual approach that considers a plaintiff’s life and faculties as proprietary assets with an objective value. The personal approach focuses on the extent to which the injury has impaired the plaintiff’s happiness and enjoyment of life, and places a monetary value on the happiness lost due to the injury. The functional approach accepts the premise of the personal approach, but focuses on providing solace for the plaintiff’s misfortune by providing physical arrangements to ameliorate her or his condition.

¹¹⁹ See *Lindal*, *supra* note 117; *Lee v. Dawson* (2006), 51 B.C.L.R. (4th) 221 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 192 [*Lee*]; *Bystedt*, *supra* note 35; *Abbott v. Sharpe* (2007), 250 N.S.R. (2d) 228 (C.A.), at paras. 118–25 (QL); *Sandhu*, *supra* note 81 at paras. 23–28 (QL).

¹²⁰ The functional approach premised on offsetting intangible losses with equivalent pleasures also entails commodification of these otherwise incalculable interests. See Abel, “A Critique of Torts,” *supra* note 110 at pp. 803–805, 823. Yet interestingly, damages for non-pecuniary losses do not often generate commodification anxieties.

¹²¹ Robert L. Rabin, “Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss” (2006) 55 DePaul L. Rev. 359.

¹²² *Andrews*, *supra* note 42 at pp. 261–262; *Lindal*, *supra* note 117 at p. 635; *Teno*, *supra* note 118 at p. 332; *Aberdeen v. Langley (Township)*, 2007 BCSC 993, at para. 97; *Lee*, *supra* note 119 at paras. 69–70.

regards to non-pecuniary damages, as well as the impact on insurance. This is partly due to the difficulty of accurately assessing intangible losses and concerns that courts, motivated by sympathy for the plaintiff's plight, could desire to punish the defendant or the depth of the defendant's pocket by making large awards for non-pecuniary losses.¹²³ To avoid the danger of what the Supreme Court perceived to be skyrocketing awards, in the trilogy the Court held that non-pecuniary damages should be limited to what is necessary to provide consolation for the plaintiff's misfortune or make life bearable in her or his injured state; awards were capped at \$100,000 (1978 dollars adjusted for inflation—currently about \$330,000).¹²⁴ Emphasis is on moderation in non-pecuniary damages to counteract the high likelihood of extravagant claims.¹²⁵ In justifying this approach, the Court noted, among other things, that high awards have a social cost and are not in the best interest of society, since members of the public would ultimately have to fund these awards through higher insurance premiums, risking an insurance crisis. This could make activities that require insurance, such as driving, unaffordable for ordinary people.¹²⁶ Although the \$100,000, adjusted for inflation, was supposed to be a rough upper limit with the possibility of exceeding that amount in appropriate cases, courts have never exceeded that amount.¹²⁷ Even in

¹²³ See *Teno*, *ibid.* at p. 332.

¹²⁴ *Andrews*, *supra* note 42.

¹²⁵ *Ibid.* at p. 261; *Lindal*, *supra* note 117 at pp. 639–640.

¹²⁶ The Court pointed to the insurance crisis in the United States due mainly to large awards of damages in medical malpractice cases affecting the availability of insurance for health care professionals and the public's ability to obtain medical services. Canadian Courts were cautioned to avoid such a predicament. See *Teno*, *supra* note 118 at p. 333; *Andrews*, *supra* note 42 at p. 261. As part of containing non-pecuniary damages within reasonable limits, some jurisdictions have enacted regulations limiting the amount of non-pecuniary damages available for certain types of injuries. *Injury Regulation — Insurance Act*, N.B. Reg. 2003–20, s. 4; *Automobile Insurance Tort Recovery Limitation Regulations*, N.S. Reg. 182/2003, s. 3; *Minor Injury Regulation*, Alta. Reg. 123/2004, s. 6. A constitutional challenge to the Alberta regulations as discriminatory on the basis of disability failed: *Morrow v. Zhang*, 2009 ABCA 215. Among other things, the Court noted that the purposes of the Minor Injury Regulations, which include maintaining affordability of insurance and access to necessary treatment for those who suffer soft tissue injuries, are legitimate and justify the cap on non-pecuniary damages. See also *Hartling v. Nova Scotia (A.G.)*, 2009 NSSC 2, *aff'd* 2009 NSCA 130, where a constitutional challenge to the Nova Scotia Regulations was dismissed.

¹²⁷ See *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674; *Brimacombe v. Mathews* (2001), 87 B.C.L.R. (3d) 75 (C.A.), at para. 243; *Fullerton (Guardian ad litem of) v. Delair*, 2005 BCSC 204, at paras. 247–250, varied on other grounds (2006), 55 B.C.L.R. (4th)

cases where juries have awarded substantially more than the rough upper limit because they perceive that amount to be an appropriate compensation for the plaintiff's non-pecuniary losses, courts have consistently reduced the award to the amount set by the Supreme Court.¹²⁸

Part of the rationale for the functional approach is the notion of the paramountcy of care and full compensation. Once the plaintiff's needs have been adequately cared for through pecuniary damages, non-pecuniary damages become "icing on the cake." Thus, large awards are unnecessary as the money would only end up creating a windfall for plaintiffs. This further justifies more latitude for consideration of policy factors in the assessment of non-pecuniary damages.¹²⁹ Courts continue to defend the functional approach, moderation and the limit on non-pecuniary damages even when full compensation for pecuniary losses is absent or it is clear that the plaintiff's non-pecuniary losses exceed the cap.¹³⁰ For plaintiffs who receive depressed awards, especially for impaired working capacity—women, racialized minorities, persons living with disabilities—this is a further limitation on their awards.¹³¹ As well, the functional basis for non-pecuniary damages and the tendency to keep such awards modest has a detrimental effect on those who suffer mostly intangible injuries, particularly racialized minorities, women, children and the elderly. For example, certain types of injuries that are predominantly experienced by women and other marginalized persons, such as sexual wrongdoing and reproductive harms, are remedied mostly through non-pecuniary damages because they may not necessarily impair the victim's ability to engage in paid work.¹³² Both the functional approach and the

252 (C.A.); *Lee*, *supra* note 119 at para. 20 (C.A.). The perceived basis of the soaring awards has been doubted as unsupported by evidence: *Lee*, *ibid.* at para. 90.

¹²⁸ See *Lee*, *ibid.*; *Li (Litigation Guardian of) v. Sandhu* (2006), 56 B.C.L.R. (4th) 316 (C.A.). Courts are required to instruct jurors on the rough upper limit where jurors are likely to exceed it.

¹²⁹ See *Andrews*, *supra* note 42 at pp. 261–262; *Teno*, *supra* note 118 at p. 333.

¹³⁰ See *Payne et al v. Alb et al* (1999), 44 O.R. (3d) 598 (C.A.); *Padfield v. Martin* (2003), 64 O.R. (3d) 577 (C.A.); *Lee*, *supra* note 119.

¹³¹ All plaintiffs may have their future care costs adequately taken care of based on what is fair and reasonable in the circumstances. Thus, it is conceivable that the award for impaired working capacity could end up benefiting the plaintiff's estate or more generally those who would have benefited from their savings if they had not been injured. This means that even if depressed awards do not directly affect the plaintiff's quality of care, it could still affect the size of their estate.

¹³² See *Finley*, *supra* note 42; *Kelly v. Lundgard* (1996), 189 A.R. 34 (Q.B.), rev'd in part (2001), 286 A.R. 1 (C.A.); *Adan v. Davis* (1998), 43 C.C.L.T. (2d) 262 (Ont.

cap on non-pecuniary damages remain firmly in place, at least in personal injury cases, notwithstanding doubts about justifying modest awards because of entrenched fears of the social cost of large awards.¹³³

B. PUNITIVE DAMAGES

Punitive damages are part of the instrumentalist and utilitarian goals of tort law to influence social interactions in ways that promote societal interests. Punitive damages are aimed at punishing defendants for

Gen. Div.); *Bowlby v. Oosterhuis* (2003), 63 O.R. (3d) 748 (Sup. Ct. J.). For examples of the centrality of non-pecuniary damages for sexual wrongdoing, see *C.M.K. v. Young*, [1994] B.C.J. No. 2729 (S.C.) (QL); *B.O. v. E.T.*, [1994] Y.J. No. 14 (S.C.) (QL); *A.W. v. C.M.*, [2001] O.J. No. 4618 (Sup. Ct. J.) (QL); *J.R.S. v. Glendinning* (2004), 237 D.L.R. (4th) 304 (Ont. Sup. Ct. J.); *Plint*, *supra* note 48; *Gates v. MacDougall*, 2006 BCSC 1919; *Evans v. Sproule*, [2008] O.J. No. 4518 (Sup. Ct. J.) (QL). In light of the correlativity between marginalized status and vulnerability to sexual abuse, a substantial number of sexual abuse victims are from disadvantaged backgrounds. Even if such victims also suffer pecuniary losses, specifically impaired working capacity, their losses are not highly valued or are not perceived to have been caused by the defendant's wrongdoing on a "but for" basis. This, together with the attitude towards non-pecuniary damages, means that many sexual abuse victims will often receive depressed damages. The cap on non-pecuniary damages may also be a further reason for reduced awards. Courts in British Columbia have held that the cap is not applicable in cases of sexual abuse, but the cap applies in other provinces. See British Columbia Law Institute, *Civil Remedies for Sexual Assault*, *supra* note 55; Kate Sutherland, "Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault" in Cooper-Stephenson and Gibson, eds., *Tort Theory*, *supra* note 94 at p. 212; Cassels and Adjin-Tettey, *supra* note 60 at p. 178; *S.Y. v. F.G.C.* (1996), 26 B.C.L.R. (3d) 155 (C.A.). Where there is a link between psychological consequences of abuse and impairment of the plaintiff's employability, courts will assess that loss and compensate the plaintiff accordingly. However, the causal link between psychological consequences of tort and employment prospects is not often easy to establish. See also Adjin-Tettey, "Righting Past Wrongs" *supra* note 79 at pp. 127–130.

¹³³ See *Lee*, *supra* note 119; *Young v. Bella*, [2006] 1 S.C.R. 108; Cassels and Adjin-Tettey, *ibid.* at pp. 175–178. The U.K. Law Commission has also criticized the functional approach to the assessment of non-pecuniary damages: *Law Commission Report – Damages for Personal Injury: Non-Pecuniary Loss* (1999, Law Com No. 257), at pp. 6, 2.5, online: Law Commission <<http://www.lawcom.gov.uk/docs/lc257.pdf>>. For a critique of the cap, but a defence of the functional approach, see Matthew Good, "Non-Pecuniary Damage Awards in Canada – Revisiting the Law and Theory on Caps, Compensation and Awards at Large" (2008) 34 *Advoc. Q.* 389. For support of the cap, see Stephen Waddams, "Compensation for Non-Pecuniary Loss: Is there a Case for Legislative Intervention" (1985) 63 *Can. Bar Rev.* 734; Roger G. Oatley, "Is it Time to Revisit the Trilogy?" in *The Law Society of Upper Canada, Special Lectures 2005: The Modern Law of Damages* (Toronto: Irwin Law, 2005) 153.

their reprehensible and high-handed conduct, rather than focusing on the plaintiff's losses; they promote the goals of punishment, deterrence and denunciation.¹³⁴ While compensation is the principal objective of tort damages, it is not the only aim. However, the appropriateness of punitive damages in civil litigation has been questioned. Emphasis on corrective justice and the bilateral nature of tort litigation presupposes that tort damages look backward to repair the harm caused by the defendant's wrongdoing.

Corrective justice theorists have criticized the availability of punitive damages in civil litigation as a deviation from the compensatory focus of civil damages. Punitive damages are also inconsistent with the relational structure of tort liability because they are one-sided and do not attempt to correlate the doing and the suffering of harm.¹³⁵ The focus of punitive damages takes the determination outside the parties' relationship and addresses the need for societal condemnation and disapproval of the defendant's conduct. This can hardly be considered the plaintiff's entitlement within a corrective justice model.¹³⁶ The focus on deterrence engages only one side of the litigation equation, namely the nature of the defendant's conduct, and disregards the defendant's status vis-à-vis the plaintiff with no correlation to the victim's loss. Punitive damages also straddle the civil and criminal justice processes and confuse the functions of the two systems.

Notwithstanding these criticisms, functionalists accept deterrence as a legitimate objective of tort law,¹³⁷ even if it is incompatible with other goals of the tort system and notwithstanding an absence of empirical evidence of tort law's actual deterrent effect.¹³⁸ As White notes, the

¹³⁴ See *Whiten v. Pilot*, [2002] 1 S.C.R. 595, at paras. 36, 43, 68 [*Whiten*]; *Hill*, *supra* note 30.

¹³⁵ See Weinrib, "Deterrence and Corrective Justice," *supra* note 33, at pp. 627–628. See also *Whiten*, *ibid.* at paras. 38–39; Cassels and Adjin-Tettey, *supra* note 60 at pp. 283–284.

¹³⁶ See Dagan, *supra* note 86 at p. 151.

¹³⁷ See *Whiten*, *supra* note 134, at para. 37; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 268 (per Justice La Forest); M. Stuart Madden, "Tort Law through Time and Culture: Themes of Economic Efficiency" in Madden ed., *Exploring Tort Law*, *supra* note 19, 11 at pp. 12–13. See also Cane, "Retribution, Proportionality and Moral Luck," *supra* note 17 at p. 170; *Salmond and Heuston on the Law of Torts*, 18th ed. (London: Sweet & Maxwell, 1981), at p. 21; Schwartz, *supra* note 92 at p. 1802.

¹³⁸ See Linden and Feldthusen, *supra* note 5 at pp. 8–10; Schwartz, *ibid.* at p. 1826. The threat of liability will likely encourage potential defendants to minimize liability, but not necessarily to avoid unreasonable behaviour. Abel, "A Critique of Torts," *supra*

admonitory purpose of punitive damages is a value worth pursuing, especially where the defendant's conduct is wrongful but not necessarily criminal and compensatory damages will be paltry.¹³⁹ As well, the Supreme Court of Canada has recently noted that punishment is a legitimate objective of the civil justice system.¹⁴⁰ Punitive damages are premised on retributive justice and have no bearing on the plaintiff's losses or vindication of private interests.¹⁴¹ They serve a public function of promoting specific deterrence: that is, societal condemnation of the defendant's reprehensible conduct and general deterrence with the aim of minimizing or preventing such injurious conduct in the future,¹⁴² and may enhance victims' sense of justice. The deterrence objective is to serve broader societal interests, which takes it outside what is necessary to restore the imbalance within the bilateral relationship between the doer and sufferer.

The availability of punitive damages and the inclusion of societal interests in providing tort remedies demonstrate that the tort system

note 110 at pp. 813–817. As well, the deterrent effect of punitive damages remains questionable because defendants rarely compensate plaintiffs from personal assets, given the widespread availability of liability insurance. In *McIntyre v Grigg* (2006), 83 O.R. (3d) 161 (C.A.), Blair J.A., dissenting in part, noted that if punitive damages were to be awarded against the defendant in a drunk driving case, it would likely be paid for by his insurer. The defendant is required by law to carry automobile insurance for the vehicle. The standard policy provides that the insurer will indemnify the insured for injury to person or damage to property of others arising from their ownership, use and operation of the insured motor vehicle subject to the policy limit. Punitive damages awarded against the insured do not appear to be excluded from coverage: at para. 131.

¹³⁹ White, *supra* note 87 at p. 237. See also Calabresi, *supra* note 87 at pp. 343–344.

¹⁴⁰ *Whiten*, *supra* note 134 at paras. 37, 40–44, 69; White, *ibid.* at p. 237; Cassels and Adjin-Tettey, *supra* note 60 at p. 284.

¹⁴¹ In *Myers v. Haroldson*, [1989] 3 W.W.R. 604, 76 Sask. R. 27 (Q.B.), a case involving the brutal rape and sexual assault of an Aboriginal complainant, the victim was awarded relatively low general damages. This was presumably because of the Aboriginal status, but there was no acknowledgement of the racist nature of the attack. Yet, the court found the assailant's conduct reprehensible and deserving of punishment and awarded punitive damages four times the amount of general damages. While there is generally no correlation between general damages and the quantum of punitive damages, there is some indication that the public dimension of the remedies, based on outrage for the defendant's conduct, was valued higher than the plaintiff's personal injury from the attack. See Elizabeth Adjin-Tettey, "Protecting the Dignity and Autonomy of Women" (2006) 39 U.B.C. L. Rev. 3, at pp. 51–52.

¹⁴² See *Whiten*, *supra* note 134, at paras. 43, 68; Cassels and Adjin-Tettey, *supra* note 60 at p. 7; Weinrib, "Deterrence and Compensation," *supra* note 33 at p. 634.

cannot be explained purely in terms of corrective justice, but rather that it can accommodate both distributional and corrective justice considerations. Although the primary goal might be to promote justice, mixed theorists advocate the complementarity of corrective justice and deterrence objectives of tort law.¹⁴³ Even corrective justice theorists concede that while deterrence has no place in determining tort liability, it plays a role in the overall tort sequence through its behaviour modification potential.¹⁴⁴

CONCLUSION

Tort law made tremendous strides in the 20th century, including recognizing victims' need for compensation outside of contractual relationships—at least for those who win the tort lottery.¹⁴⁵ By so doing, the dignitary interests of victims are preserved through recognition of their bodily integrity, and the need for redress in the event of violation. As well, tort law, especially tort liability, has generally evolved in ways that promote broad societal interests through incremental development of the common law. The challenge for the 21st century is to move tort law forward by ensuring that tort remedies do not become a site for reinforcing social inequalities, but rather an avenue for social change, social justice and the promotion of social equality consistent with how courts adapted tort law to the changing needs of society in the previous century.¹⁴⁶ Such an approach will also be consistent with the underlying purposes and aims of the tort system.

Restitutio in integrum promotes a particular form of justice, corrective justice and formal equality, and can limit the ability of courts to use tort remedies in imaginative ways to promote social justice. The *restitutio* principle can have a regressive effect on marginalized claimants by creating and reinforcing systemic inequalities on the basis of social identity, such as gender, race, ethnicity, (dis)ability and class, while constructing victims' original positions and losses in such a way as to

¹⁴³ See Schwartz, *supra* note 92 at pp. 1802, 1827–1828. Schwartz also notes that the justice objective of tort law may perhaps better be achieved through deterrence and preventative measures that avoid or at least minimize interference with the plaintiff's interests: at 1831–1833.

¹⁴⁴ Weinrib, "Deterrence and Corrective Justice," *supra* note 33 at pp. 638–640.

¹⁴⁵ See Bender, *supra* note 1.

¹⁴⁶ *Ibid.* at pp. 253–258; Chamallas, *supra* note 27 at p. 1454.

promote wealth redistribution from marginalized to privileged members of society. The differential valuation of human potential based on social characteristics reinforces and reproduces social inequalities with a resulting harm to members of disadvantaged groups. This makes continued reliance on the *restitutio* principle questionable, at least in relation to in trust awards and damages for impaired working capacity. This is particularly so where the valuation of human potential is highly speculative and based on social identity. The pursuit of “accuracy” in determining economic losses using a plaintiff’s alleged original position is premised on a socially constructed and discriminatory valuation of human potential that favours the privileged and disadvantages marginalized members of society. Courts can play an important role in addressing societal inequalities through creative interpretation and application of the law, not only in determining liability but also in providing remedies consistent with equality principles. The assessment of damages for personal injuries should be a contextualized exercise intended to promote substantive equality for plaintiffs from historically marginalized backgrounds rather than to reinforce and exacerbate existing inequalities on the basis of social identity.

This may mean different approaches to assessing loss in particular situations in order to do justice. For example, in the context of plaintiffs living with disabilities prior to the injury, the focus should not be on comparing their situation with non-disabled persons, but rather on how the injury impacted that plaintiff. Such an approach will allow courts to consider how that plaintiff may have adapted to her pre-existing limitations to give better insights into that person’s loss. This will avoid value judgments inherent in measuring persons living with disabilities against the norm of non-disabled persons and will suppress the paternalistic attitudes that inform that perception.¹⁴⁷ The plaintiff’s original position should not be perceived as “abnormal,” but rather as a difference to be recognized and respected. MacPherson suggests that when viewed in this light, the loss to a disabled person may be as or more severe than to a non-disabled person in similar circumstances.¹⁴⁸

A contextualized approach to assessing damages will be consistent with the expectation that development of the common law reflect *Charter* values, including substantive equality. Even if still informed by *restitutio*, the construction of the claimant’s original position and the losses arising

¹⁴⁷ See MacPherson, *supra* note 15 at pp. 261–264.

¹⁴⁸ *Ibid.* at pp. 261–264.

from her victimization must be approached from a non-discriminatory and egalitarian perspective.¹⁴⁹ This will ensure that remedies are not provided in the abstract, but rather, as the CIAJ's theme states, that remedies are used to shape the substantive rights they enforce, in this case bodily autonomy and security, and to remediate the violation of this fundamental right. Using remedies to enforce the values of equality makes visible the role of courts and other legal actors not only in adjudicating cases before them, but also as instruments of social change. Among other things, this will mean avoiding differential valuation of human interests and potential on the basis of social identity.

Societal inequalities can be addressed through creative interpretation and application of the law not only in determining liability but also in providing remedies consistent with equality principles and in ways that advance social justice. In fact, courts have responded to the problem of gender discrimination through incremental changes. For instance, it is now recognized that loss of impaired housekeeping is a personal loss for women plaintiffs, and it is compensated accordingly, though modestly.¹⁵⁰ Marriage or partnership is no longer considered a negative contingency. Courts now recognize shared financial benefits of interdependent relationships and routinely award compensation for loss of opportunity to form such a relationship, referred to as lost opportunity of shared family income. Compensation is not limited to loss of opportunity to form marriage-like relationships; it includes all relationships of financial interdependency.¹⁵¹ In the context of young female plaintiffs, courts have also acknowledged gender bias in historical wage statistics and will sometimes gross up the award for the possibility of future wage parity.¹⁵² Where there is reasonable certainty of a young plaintiff's career path or educational attainment and the likelihood of a male-oriented career, or pay equity initiatives, or simply as a matter of substantive

¹⁴⁹ For a discussion of some of these issues in the context of determining the impaired working capacity of historical abuse victims, see Adjin-Tettey, "Righting Past Wrongs," *supra* note 79 at pp. 121–130.

¹⁵⁰ See *supra* notes 39, 71.

¹⁵¹ See *Reekie v. Messervey* (1989), 36 B.C.L.R. (2d) 316 (C.A.); *Walker*, *supra* note 67; *Bartosek*, *supra* note 35; *Cojocar* (*Guardian ad litem*) v. *British Columbia Women's Hospital*, 2009 BCSC 494, at paras. 297–303 [*Cojocar*].

¹⁵² See *Rewcastle*, *supra* note 31. See also *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at para. 22. For a discussion and critique of this practice, see Elizabeth Adjin-Tettey, "Replicating and Perpetuating Inequalities in Personal Injury Claims" (2004) 49 McGill L.J. 309, at pp. 317–318.

equality, courts have not hesitated to use male earnings¹⁵³ or average male and female earnings as the basis for valuing plaintiffs' impaired working capacity.¹⁵⁴ Notwithstanding these developments, presently the remediation process continues to be a site for reinforcing and promoting social inequalities,¹⁵⁵ thus highlighting the need for change in this area of tort law.

Generally, defendants do not choose their victims. Hence defendants should be indifferent to the award of damages for impaired working capacity, especially for children, for example based on average earnings and not the plaintiff's social identity.¹⁵⁶ Where tortfeasors do choose their victims, they often do so because of the latter's vulnerability.

¹⁵³ See *MacCabe*, *supra* note 31; *Spehar*, *supra* note 45; *Tucker (Guardian ad litem of) v. Asleson* (1991), 62 B.C.L.R. (2d) 78 (S.C.), varied (1993), 78 B.C.L.R. (2d) 173 (C.A.); *Soligo v. Turner*, 2001 BCSC 205, at para. 41; *Grewal*, *supra* note 45 at para. 151; *Gray v. Macklin* (2000), 4 C.C.L.T. (3d) 13 (Ont. Sup. Ct. Jus.), at para. 197.

¹⁵⁴ See *Walker*, *supra* note 67; *Ediger*, *supra* note 69.

¹⁵⁵ In *Mumford*, *supra* note 49, the court refused to assess the infant plaintiff's earning potential based on the lower educational attainment of her parents, stating that this was harsh and unacceptable; instead the court used average earnings. Notwithstanding *Mumford*, some courts continue to use parental background as a proxy for assessing potential earnings for infant plaintiffs. See *Ediger*, *ibid.* para. 323; *Cojocar*, *supra* note 151 at paras. 264, 268, 269; *Preston*, *supra* note 38; *B.M.G. v. Nova Scotia (A.G.)* (2007), 250 N.S.R. (2d) 154 (S.C.), *aff'd*: (2007), 260 N.S.R. (2d) 257 (C.A.). As well, even when courts use male earning statistics to assess a female plaintiff's income loss, there is often female-specific contingency deduction or that wage parity might not be achieved in the near future.

¹⁵⁶ See *Mumford*, *supra* note 49. An example of such an egalitarian regime is the personal injury benefits for students under Manitoba's no-fault automobile insurance scheme. Students who are unable to attend school due to motor vehicle-related injuries are indemnified for each school year they are unable to attend or complete. The amount depends on the level of schooling the victim is unable to attend or complete: elementary (kindergarten to grade 8 - \$4,630, indexed to March 1, 2009); secondary (grade 9-12 - \$8,578, indexed to March 1, 2009); or post-secondary: *Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215, ss. 88, 94. Where injuries persist after a child turns 16 and prevents her/him from attending school or working or the scheduled time that a student would have completed her/his studies, s/he will receive income replacement benefits based on the average income of all employed people in Manitoba (Manitoba Average Industrial Wage). *Manitoba Public Insurance Corporation Act*, ss. 90, 96, online: Manitoba Public Insurance <<http://www.mpi.mb.ca/English/claims/PIPP/IRI%20minors.html>>. Other jurisdictions provide set amounts for those who were unemployed prior to the injury, including students. Although the amount is modest and not based on average income in the province, it avoids reference to social identity to determine potential income level. See *Insurance Act*, Ontario Regulation 403/96, Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996.

The principle of *ex turpi causa non oritur actio* should be invoked to prevent defendants from relying on plaintiffs' marginalized status to limit their liability because to do so amounts to "profiting" from one's blameworthy conduct contrary to public policy.¹⁵⁷ Under the current regime, marginalized people not only receive depressed awards, but they also subsidize plaintiffs from privileged backgrounds who obtain higher damages, resulting in skewed wealth redistribution in favour of the latter.¹⁵⁸ It is questionable whether "public" funds should be used to further such an inequitable regime based on the *restitutio* principle.¹⁵⁹

¹⁵⁷ See *Hall v. Hebert*, [1993] 2 S.C.R. 159 [*Hall*]. Courts have recognized *ex turpi* as a limited defence available to a defendant to defeat a plaintiff's action because of the latter's own conduct: *Hall*, at paras. 26–39, especially, para. 35. Such situations will involve a plaintiff seeking to profit from his/her wrongful conduct or to prevent a plaintiff from circumventing the consequences of criminal activity and incarceration by claiming lost income during periods of incarceration: *Hall*, at para. 40. For examples of the second situation see *H.L. v. Canada*, [2005] 1 S.C.R. 401; *British Columbia v. Zastowny*, [2008] 1 S.C.R. 27. In both situations, the purpose of *ex turpi* is to maintain the integrity of the legal system. See also Douglas M. Foley, "Infants, Lost Earning Capacity, and Statistics: Sound Methodology or Smoke and Mirrors?" (1991) 13 *Geo. Mason U. L. Rev.* 827, at p. 841.

¹⁵⁸ Damages are often paid for with insurance funds, or by defendants who are self-insurers. The public contributes to these funds through insurance premiums or by purchasing goods and services. Members of marginalized groups may be disadvantaged by contributing disproportionately to these funds relative to their earnings, and also by depressed awards based on their social identity. For example, the tobacco industry specifically targets minority communities through the selling of more addictive cigarettes and aggressive advertising in their communities. Members of these communities account for a disproportionately high percentage of smokers, notwithstanding their overall lower income status, and hence have greater exposure to tobacco-related diseases. Smokers generally also pay more for personal insurance. Yet, compensation for this group for impaired working capacity resulting from tobacco-related conditions will often be lower when compared to what is obtained by members of more favourable groups. See Cheryl Heaton, "What is Similar or Different about the Issue of Tobacco?" (2008) 11 *J. Health Care L. & Pol'y* 93; Danny Davis, "Three Paths to Justice: New Approaches to Minority-Instigated Tobacco Litigation" (1999) 15 *Harv. BlackLetter L.J.* 185; Vernellia R. Randall, "Smoking, the African-American Community, and the Proposed National Tobacco Settlement" (1997) 29 *U. Tol. L. Rev.* 677; Abel, "A Critique of Torts," *supra* note 110 at pp. 799–801, 803.

¹⁵⁹ See Luntz, *Assessment of Damages for Personal Injury and Death*, *supra* note 49 at pp. 301–302.