

Rethinking Damages for Personal Injury: Is it too late to take the facts seriously?

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INTRODUCTION

It is just a little over thirty years since the Supreme Court of Canada took Canada's assessment of personal injury damages on a different tack in the trilogy.¹ In hindsight, the view then taken on damages for non-pecuniary loss was prescient, for it foreshadowed movements now taken legislatively in the United States² and Australia,³ and has parallels in the English Court of Appeal decision in *Heil v. Rankin*.⁴ The Supreme Court did not tackle the issue of lump sum verses periodic payment/reassessment in the trilogy, although it did express its views on this issue many years later.⁵ For obvious constitutional and jurisprudential reasons touching on the appropriate limits of judicial activism, and, one suspects, out of personal belief, the Supreme Court did not question the underlying premise of providing compensation for personal injury as a result of tortious conduct. The success of the Supreme Court's intervention is perhaps best revealed by the fact that apart from some minor skirmishes over automobile insurance, there has

¹ *Andrews v. Grand and Toy Alberta Ltd.* [1978] 2 SCR 229, *Thornton v. Board of Trustees (Prince George)*, [1978] 2 SCR 267, and *Teno v. Arnold*, [1978] 2 SCR 287.

² For example, many states have imposed legislative caps on the awarding of non-pecuniary damages for a variety of tort actions, and medical malpractice claims in particular. See the material collected by states at the website kept by the American Tort Reform Association—an admittedly conservative partisan group—at <http://www.atra.org/reforms>.

³ See the report commissioned by the Commonwealth and State governments of Australia under the chairmanship of Justice Ipp, *Review of the Law of Negligence* (October, 2002): online, <<http://revofneg.treasury.gov.au/content/home.asp>>, which has resulted in the passage of legislative caps on non-pecuniary damages in the majority of Australian States.

⁴ [2000] 2 WLR 1173.

⁵ *Watkins v. Olafson*, [1989] 2 SCR 750.

never been any real clamour in Canada for tort reform, or an insurance crisis similar to the experience in the United States⁶ and Australia.⁷

Three questions were posed to me by the organizers in preparing this paper: Is it time to rethink personal injury damages?; the cap on pain and suffering?; and lump sum awards? To these questions I answer yes, no, and maybe. On these three questions it is probably fair to state that there is now little public interest in the first, the second has generated some degree of passion, and the third is seen as a non-starter despite its obvious merit. I will approach them seriatim.

I. IS IT TIME TO RETHINK PERSONAL INJURY DAMAGES?

The recent world economic crisis has revealed that, much to the chagrin of many economists, people do not always behave in economically rational ways. One could have come to the same conclusion from looking at compensation for personal injuries. The fact remains unassailable that all objective studies have revealed the economic merits of comprehensive no-fault schemes over court-administered tort law.⁸ This is a simple truth that bears repeating lest we forget the research of our forebears. In the UK, the Pearson Commission estimated the cost

⁶ One could be accused of believing that the United States is in a perpetual state of insurance crises. See Michael Trebilcock, "The Social Insurance—Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis" (1987) 24 *San Diego L. Rev.* 929, and C.O. Jackiw, "The Current Medical Liability Crisis: An Overview of the Problems, its Catalysts and Solutions" (Paper presented to the Third Annual Health Law Colloquium: The Medical Malpractice Crisis: Federal Efforts, States' Roles and Private Responses, 2004) 13 *Annals Health L.* 505.

⁷ In Australia, two major insurers collapsed for a variety of reasons, although mostly associated with mismanagement, in 2001–2002. The outcome of these collapses was an increase in premium rates and a public outcry. State legislatures responded with a variety of tort and insurance reforms. See H. Luntz, "The Australian Picture" (2004), 35 *V.U.W.L.Rev.* 879, at 886.

⁸ It is difficult to find exact details on where personal injuries actual arise in Canada. W. Millar and O. Adams completed a survey in 1987, published as *Accidents in Canada* (General Survey Analysis Series, Minister of Supply and Services Canada, 1991), in which they found automobile accidents accounted for 33% of all injuries in Canada, workplace injuries 21%, sports and recreational injuries 23%, and at-home injuries 13%. Interestingly, when reviewing hospital admissions for personal injuries by accident in Australia a different picture is revealed. Home and residential institutions account for 55%, streets 5%, sport and recreational 10%, workplace 14%, and school and other public areas 16%. Discussed by R. Greycar in "Public Liability: A Plea for Facts," (2002) 25 *U.N.S.W.L.J.* 810, at 811.

of operating a tort system amounted to 85 per cent of the value of tort payments distributed.⁹ Some eight years later, the estimate of the costs of the tort system was said to consume between 50 and 70 per cent of the total payments distributed to claimants.¹⁰ In Ontario, Professor Paul Weiler noted that the Ontario's Workers' Compensation Board absorbed only 9 per cent of assessment dollars in administering the compensation scheme, in contrast to a 50 per cent ratio customarily found in both court-run auto-insurance schemes and court-based workers' compensation schemes in the United States.¹¹ In New Zealand, the only country to have legislated a truly comprehensive no-fault personal injury scheme, the New Zealand Law Reform Commission noted in the interim report of the Accident Compensation Scheme that 7 per cent was absorbed in administration.¹² In a comparison of workers' compensation schemes, New Zealand, which prohibits any suit before a court for personal injury, has consistently lower premium rates than Australian states, most of which retain some access to courts for serious injury.¹³ The actual cost to New Zealanders for comprehensive accident coverage was NZ\$1 per day in 1994 dollars.¹⁴ Today, the scheme costs New Zealanders NZ\$2.40 per person per day (CAN\$1.75).¹⁵ The cost to provide comprehensive personal injury coverage for automobile accidents is NZ\$254 per vehicle

⁹ UK, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (London: Her Majesty's Stationery Office, 1978), vol. 1, at p. 256.

¹⁰ UK, Lord Chancellor, *Civil Justice Review* (London: Her Majesty's Stationery Office, 1986).

¹¹ Paul Weiler, *Reshaping Workers' Compensation for Ontario* (Toronto: Ministry of Government Services, 1980), at p. 15.

¹² The New Zealand Law Commission, *The Accident Compensation Scheme: Interim Report on Aspects of Funding* (1987), at para. 35, online: New Zealand Law Commission, <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_17_48_R03.pdf>.

¹³ Safe Work Australia Council, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (April 2009), online: Safe Work Australia <http://www.safeworkaustralia.gov.au/NR/rdonlyres/2F9B1EA6-7E2A-407C-AA52-99D0F6B2D0C5/0/Comparison_of_Workers_Compensation_Arrangements_in_Aust_and_NZ_2008.pdf>.

¹⁴ G. Palmer, "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 *U. of T.L.J.* 223, at 227. In 1988, the New Zealand Law Commission report, *Personal Injury: Prevention and Recovery: Report on the Accident Compensation Scheme* (1988), at para. 75, stated that the cost per New Zealander for comprehensive coverage was 60 cents per day (NZ\$1.02 at today's value).

¹⁵ In 2008 the Accident Compensation Corporation gathered \$3,652 million in levies. (See the ACC Annual Report 2008, online: ACC <<http://www.acc.co.nz/publications/index.htm>>). The population of New Zealand in 2008 was 4,173,560.

per year (CAN\$185). The scheme also enjoys a whopping approval rating by its consumers at 82 per cent. A comparison of auto-insurance rates between New South Wales (NSW)—running a common law fault-based system with damage caps, Victoria—running a mixed no-fault and fault-based capped damages for serious injury (similar to Ontario), and New Zealand—running comprehensive no-fault, revealed that a car owner in NSW paid A\$350 to \$450, in Victoria A\$315 and in New Zealand A\$170.¹⁶

The most damning indictment of our current reliance upon tort law in personal injury compensation has been delivered by professors Dewees, Duff and Trebilcock. In a most informative book, poignantly titled *Exploring the Domain of Accident Law: Taking the Facts Seriously*, the authors undertook a comprehensive review of most of the available empirical studies completed in North America in five personal injury causing areas: automotive, medical, product liability, environmental, and workplace.¹⁷ Within these areas the authors evaluated the extent to which a particular approach advanced the normative claims of deterrence, compensation and corrective justice. Their conclusion is worth quoting in full:

Our review of the empirical evidence leads us to a bleak judgment about the tort system as a compensatory mechanism. Worker's compensation is widely accepted as a superior compensatory system in the case of workplace accidents, and automobile no-fault schemes and medical misadventure no-fault schemes seem likely to be superior and to entail far lower administrative costs, although they might cause some loss of deterrence. We think that these deterrence losses and other moral hazard problems are likely to be small if several crucial design features are incorporated: appropriate risk-rating of premiums, no compensation for non-pecuniary losses, and a deductible for short-term economic losses. In the case of product-related and environmentally related personal injuries, we have found no feasible specific compensatory alternatives to the tort system. Here, and in other accident and disability contexts, we suggest coordinating in a more rational fashion the present mix of tort and private and social insurance sources of compensation, and closing some of the more glaring compensation gaps through social programs with respect

¹⁶ See H. Luntz, *supra* note 7 at p. 894.

¹⁷ (New York: Oxford University Press, 1996).

to health care costs, including rehabilitation costs, and income losses from long-term disabilities. By placing the primary burden of accident reduction on the regulatory system, particularly in the motor vehicle, environmental, and product areas, and on the premium and benefit structures of insurance and compensation systems, and by shifting many compensatory functions from the tort system to other compensatory regimes, the tort system in the reduced domains that we would leave to it would serve principally to vindicate traditional corrective justice values, unencumbered by other values that it cannot simultaneously or effectively advance.¹⁸

The deterrence rationale, the last vestige of justification for tort law, has also been demolished with specific reference to New Zealand's comprehensive scheme. To the law and economic theorist, elimination of the deterrence effect of tort action should result in an increase in accident-causing behaviour. Professor Brown's study of New Zealand's scheme found quite the opposite effect with respect to automobile accidents.¹⁹ In the no-fault regime, the incidence of accidents and fatalities declined and there was no increase in bad driving behaviour. Brown attributed the decline in accidents and fatalities to the increased scrutiny given to drunk-driving offences, as well as to the introduction of seatbelt and helmet laws. He dismissed the alleged causal link between tort law and increased accident-causing behaviour, and concluded that the enforcement of traffic laws has a far greater deterrent effect over the supposed silent hand of tort law. The US Department of Transportation came to a similar conclusion when comparing no-fault and fault-based auto insurance schemes in the US.²⁰

The work by Brown echoes similar conclusions by a Canadian pioneer in accident compensation law, Professor Terry Ison, in his seminal work, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation*.²¹ Professor Bruce Feldthusen, an acknowledged expert on Canadian negligence law, has also observed:

No rational being would ever adopt (or have adopted) negligence law as an accident compensation scheme. It excludes too many,

¹⁸ *Ibid.* at pp. 436–437.

¹⁹ Craig Brown, "Deterrence in Tort and No-Fault: The New Zealand Experience" (1985) 73 *Cal. L. Rev.* 979.

²⁰ See references in J. O'Connell and C. Robinette, *A Recipe for Balanced Tort Reform* (Durham NC: Carolina Academic Press, 2008), at p. 104.

²¹ (London: Staples, 1967).

takes too long, and costs too much. Prudent individuals and compassionate governments do not and cannot depend on a liability system to spread the costs of illness and accidents. If compensation alone is the issue, outright abolition of personal injury negligence law is the obvious answer. Tinkering with doctrine is at best a compromise of competing political demands and at worst a wasteful sham.²²

If the objective evidence and expert opinion is so overwhelmingly in favour of comprehensive no-fault, what accounts for our apparent persistent love affair with tort law? I believe Professor Feldthusen provides the most plausible answer. Feldthusen suggests that it is naïve to believe that tort law reform can ever be divorced from its political dimension. He suggests keeping tort law reform off the public agenda is the result of political manipulation by organised interest groups. He points to the US experience, where tort reform is dominated by battles between “an incredibly well organized plaintiff’s bar on the one hand and the powerful insurance industry on the other.”²³ These two, coupled with consumer lobby groups and professional groups representing doctors, industry, and municipal government, play the fiddle and call the public’s tune. Thus, the tort reform debate in the United States is about preserving rights to litigation, juries, and uncapped damage awards—issues of interest to the political left (read Democrats); pitted against capping damages, limiting strict liability, causation, and juries—issues of interest to the political right (read Republicans).²⁴ Lost in this political discourse is any suggestion that progressives could argue for abolition of tort law and its replacement with comprehensive no-fault as a socially desirable goal. In fact, as acknowledged by Professor Stephen Sugarman, one of the leading tort scholars in the US and advocate of the progressive viewpoint, “the prospects of adopting a New Zealand style accident

²² “Posturing, Tinkering and Reforming the Law of Negligence – A Canadian Perspective” (2002) 25 *U.N.S.W.L.J.* 854, at p. 856.

²³ *Ibid.* at p. 855.

²⁴ From a leftist perspective, see David Johnson’s report written for the Commonweal Institute (a partisan leftist institute), “The Attack on Trial Lawyers and Tort Law” (October, 2003), online: Commonweal Institute <<http://commonwealinstitute.org/archive/the-attack-on-trial-lawyers-and-tort-law>>. From a conservative perspective, see the American Tort Reform Association website and accompanying publications available at <<http://www.atra.org>>.

compensation scheme seems even further away than they were 20 years ago.”²⁵

The tort reform environment in Canada mimics that of the United States, although in a far less virulent fashion. The organized bar jealously rejects any limitations on tort law or extension of no-fault schemes, arguing under the banner of protecting access to justice,²⁶ while the insurance industry seeks a variety of changes to effect limitations on claims to maintain profitability.²⁷

The common denominator in both countries—indeed one could also add Australia—is that tort reform only rise on the public agenda in response to a ‘crisis,’ either manufactured by lobbyists or real.²⁸ In all three countries it has been an apparent insurance crisis, in which premium rates covering either automobile or employment insurance are about to sky-rocket, or the imminent collapse of an insurance carrier, which has triggered reform. Paradoxically, from these crises, the reform often taken is the adoption of no-fault principles for less serious injuries, leaving more serious injuries to tort law. Alternatively, and more recently, the reform-of-choice has been to place limits on tort damage awards and to expedite court processes to lower transaction costs.²⁹

²⁵ S. Sugarman, “Tort Reform Through Damages Law Reform: An American Perspective,” (2005), 27 *Sydney L. Rev.* 507, at p. 524. Sugarman is also author of *Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers and Business* (New York: Quorum Books, 1989). A similar conclusion was given by the American Law Institute reporter, see *American Law Institute Reporter’s Study on Enterprise Responsibility For Personal Injury* (1991), at p. 445.

²⁶ See for instance the submissions of the Ontario Bar Association and of the Ontario Trial Lawyers Association to the Financial Services Commission of Ontario as part of their five-year review of automobile insurance (2008). (On file with author).

²⁷ See the literature on the Insurance Bureau of Canada’s website concerning proposed changes to Ontario’s automobile insurance scheme as part of the Financial Services Commission of Ontario five year review, online: Insurance Bureau of Canada <http://www.abc.ca/en/Car_Insurance/index.asp>.

²⁸ See Ipp Report, *supra* note 3. The terms of reference of the panel of experts convened to write the report stated:

“The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.”

²⁹ For example, in the United States, see the failed attempt to pass legislation through the US Senate which would have imposed various limits on damages and attorney fees in medical malpractice suits. See *Medical Care Access Protection Act* of 2006,

Like Sugarman and Feldthusen, I doubt the political climate exists in Canada to introduce a comprehensive no-fault scheme, and, in these difficult economic times, one doubts the inclination of any provincial government to take on the lobbyists who would assemble in opposition. Even the true progressives of two decades ago have abandoned hope. Sugarman resigns himself to the position that tinkering with tort reform will at least align tort law with ‘social insurance thinking’ and thus, establish a stepping stone to something better.³⁰ Professor Patrick Atiyah, originally the most forceful advocate of comprehensive state-run no-fault in the United Kingdom,³¹ has abandoned all hope of creating such a scheme and has radically proposed the simplest of reforms: abolish any legal action for personal injuries.³² In its place, Atiyah suggests, will rise first-party insurance offered by the private market.

Through the leadership of Sir William Meredith in 1913 and Justice Middleton in 1932, Ontario, followed by the other provinces,³³ did so much to create one of the first truly comprehensive workers’ compensation schemes. Sir Owen Woodhouse openly acknowledged this Ontario-led experiment as giving inspiration for New Zealand’s reforms.³⁴ It is tragic to think that Ontario and Canada no longer exercise any

S.22, 109th Congress 2nd session. In Ontario, see the successive reforms to auto-insurance initiated by Justice Coulter Osborne’s *Inquiry into Motor Vehicle Accident Compensation in Ontario* (November, 1986). But see C. Brown & B. Feldthusen’s critique of the report in “The Osborne Inquiry into Motor Vehicle Accident Compensation in Ontario” (1988) 8 *Windsor Yearbook of A. to J.* 318. An earlier report also commissioned by the Ontario government was more generously disposed to comprehensive no-fault. See the Ministry of Financial Institutions, *Final Report of the Task Force on Insurance* (May, 1986) [Slater Commission Report]. In Australia, the Ipp Report has led to the passage in all states of Civil Liability Acts which impose restraints on general damages, among other changes to substantive tort principles.

³⁰ *Supra* note 25 at p. 524.

³¹ See P.S. Atiyah, *Atiyah’s Accidents, Compensation, and the Law* (Cambridge: Cambridge University Press, 1970) 1st ed. The 7th edition, published in 2006 under the authorship of Peter Cane, has kept to Atiyah’s original ideals.

³² P. Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997), at p. 189.

³³ Ontario first enacted a Workmen’s Compensation Act in 1913, followed by Nova Scotia in 1915, British Columbia and Manitoba in 1916, Alberta and New Brunswick 1918, Saskatchewan 1929, Quebec 1931, Prince Edward Island 1949, and Newfoundland in 1950.

³⁴ Sir Arthur Owen Woodhouse, “A Challenge to the Law – Personal Injury Compensation” (Lloyd H. Fenerty Memorial Lecture, University of Calgary), (Calgary: Burroughs and Co. 1979), at p. 18.

leadership or have any political desire to advance the law reform agenda in a way that would complete what Meredith started so many years ago. In fact, if recent suggestions of the Financial Services Commission of Ontario to lower the threshold on non-pecuniary losses in automobile insurance claims are enacted, we will be moving backwards. But hope springs eternal. There is another automobile insurance crisis looming if the Insurance Bureau of Canada is to be believed.³⁵ Ontario has also found itself in the invidious position regarding medical malpractice claims that it both covers the actual medical expenditures incurred, which are then required by legislation to be included as part of a subrogated claim in any law suit brought against the physician, and then pays the physicians malpractice insurance premiums. The end result is a circuitous route to transfer government funds whilst incurring large transaction costs through litigation to effect the movement. Could this create a new tipping point toward comprehensive no-fault?

In a recent series of lectures, Professor Peter Cane, perhaps Australia's leading tort theorist, has cast the debate on tort reform and personal injuries as a dialogue between 'abolitionists,' those who would abandon tort law completely, and 'incrementalists,' those who accept tort law as a fact of legal and societal life, but wish for a more coherent debate on how the costs of personal injury should be allocated between injured and injurers.³⁶ Cane states that the abolitionists' arguments are 'strong and securely based'³⁷ in what we know of how the law operates, but that it is a utopian ideal—one that should continue to be taught to law students and remain in public circulation—but that now is the time to move on. I, as my comments may suggest, remain an abolitionist. Whether Dickson J. would have regarded himself as an abolitionist one can no longer say, but his judgments in the Supreme Court trilogy were decidedly

³⁵ Insurance Bureau of Canada, Media Release May 22, 2009 "Insurance Bureau of Canada Sets Record Straight: Auto insurance companies support changes that benefit consumers," online: Insurance Bureau of Canada <http://www.abc.ca/en/media_centre/news_releases/2009/05-22-2009.asp>.

See also the article by David Cambrill, "Ontario's Ailing Auto Insurance" *Canadian Underwriters* (May 29, 2009), at p. 24.

³⁶ P. Cane, "The Political Economy of Personal Injury Law" (McPherson Lecture Series), (Brisbane: QUP, 2007), vol. 2, at p. 3.

³⁷ *Ibid.* at p. 4.

incrementalist.³⁸ In fact, they may have disarmed many of the abolitionists' arguments.

II. IS IT TIME TO RETHINK THE CAP ON DAMAGES OR PAIN AND SUFFERING?

The judgment of Dickson J. in *Andrews v. Grand and Toy Alberta Ltd.* significantly altered the damage assessment process for non-pecuniary loss in personal injury cases.³⁹ It was a carefully worded judgment aimed at exploring the complex issues that surround assessing non-pecuniary losses, and, ultimately, coming to a very Canadian solution: a compromise.

Dickson J. started from the premise that a young able-bodied person who is rendered a quadriplegic, which deprives the victim of many of life's pleasures and subjects him or her to pain, incurs a loss meriting compensation. But unlike pecuniary loss, compensating for non-pecuniary loss incurs the immediate problem of incommensurability. There is no market place for pain and suffering, loss of expectation of life, or loss of amenities, and thus money is not an appropriate medium of exchange. This drove Dickson J. to assert that the problem of incommensurability and non-pecuniary loss is a philosophical and policy one, not a legal or logical one. What are these principles and policies which drove the decision?

- [1] Incommensurability means that any damages award is *ipso facto* arbitrary or conventional.
- [2] Any award must be fair and reasonable.
- [3] The principle of paramountcy of care concerning pecuniary loss allows a court to consider other social policy factors with respect to non-pecuniary damages and, in particular, the

³⁸ R. Sharpe and K. Roach, *Brian Dickson: A Judge's Journey* (Toronto: Osgoode Society, 2003), at p. 195: note that Dickson J., who had acted for Great Western Life Insurance Company before his elevation to the bench, harboured a strong inclination toward legislated state funded no-fault for personal injury so as to avoid cost and delay in litigation, and the disturbing disparity in awards between those who could, and those who couldn't establish fault. Dickson J. voiced some of his concerns in *Andrews v. Grand and Toy Alberta Ltd.* *supra* note 1 at p. 236, and his disinclination towards lump sum awards.

³⁹ *Supra* note 1.

economic burden large awards impose on society and insurance costs.

A. INCOMMENSURABILITY

It is the problem of incommensurability that dominates all debate on non-pecuniary damages: that an actual loss can be truly intellectualized and can be felt, yet nothing can be done to alleviate or compensate. Non-pecuniary loss with respect to personal injuries has traditionally been parsed into three sub-headings: pain and suffering, loss of amenities, and loss of expectation in life. These labels, although convenient, mask a myriad of individual subjective experiences. Pain and suffering is readily understood by analogy to our own experiences, and, yet, we readily recognize the individuality of personal experience. This loss covers both sensate (i.e. the physical discomfort experienced by the burn victim) and insensate experiences (i.e. the feelings of loss experienced by a victim who because of injury is no longer able to bear children). Some aspects can be converted into pecuniary losses as in where medication is given to deal with pain, or professional counselling is given to deal with grief, psychological, or other psychiatric manifestations of suffering. Somewhat perversely, the victim who objectively appears to suffer the most, the person rendered comatose or to a vegetative state, may in fact have no subjective feeling of pain or cognitive ability to experience suffering, and therefore should receive little.

Loss of amenities deals with sensate experiences, the inability to respond emotionally to those things which give us pleasure or meaning to our lives. But here again, the magnitude of this type of loss changes over a person's life. For example, in the course of a life, one is more likely to be engaged in physical pursuits when young than later in life, so that compensating a quadriplegic for such a loss should reflect the changing nature of activity and response experienced over the victim's life.

Loss of expectation seeks to compensate for the fact that a person who has suffered serious injury will, actuarially speaking, have a shortened life. But again, the magnitude of this loss is also constantly changing in response to medical advancements which extend actuarial tables for this cohort.⁴⁰ On these categories, Dickson J. reminded us that

⁴⁰ This head of non-pecuniary loss has been abolished in the UK. See *Administration of Justice Act* (UK) 1982, s.1(1)(a).

while they are ‘analytically distinct,’⁴¹ they do overlap and merge at the edges and thus justified a composite award.

The problem of incommensurability is universal to this type of loss, although its resolution differs widely depending upon the scheme used to award compensation. However, interestingly, and as Professor Bruce Chapman points out, for legal theorists there is near unity.⁴² Chapman, who follows Professor Weinrib’s corrective justice conception of tort law, argues that from a corrective justice standpoint there is no justification for non-pecuniary damages to compensate for personal injuries. Corrective justice is concerned with the normative imbalance of rights between wrongdoer and suffering victim. Because non-pecuniary damages by definition compensate for something which is not commensurate with money, its ordered payment cannot amount to a correction of the plaintiff’s normative rights. The payment has utility—it can be used to purchase things—but compensation resulting in gains or losses in social utility is distributive, not corrective, justice. It follows that some other way is needed to redress the rights imbalance that the wrongdoer has caused. This might be an apology, or it might be a publicly recognized monetary emolument taken by all as recognition of the restoration of the moral balance between the parties. That emolument may take the form of a set amount, or something in proportion to the defendant’s wealth, but it would not be a graduated scale dependent upon the extent of the plaintiff’s injuries.

Chapman also points out that those theorists who fly distributive justice colours are also antagonistic to awarding damages for non-pecuniary losses in personal injury claims. Those on the political left see such an award as redirecting scarce economic resources away from pecuniary coverage toward the victim’s future care and wasting it on a loss for which it can do no good. Those on the political right, arguing from an economic analysis of law standpoint, say that since a rational person would not willingly buy *ex ante* insurance to cover such a loss, it should not be compensable. The utility of money by way of reduced

⁴¹ *Andrews v. Grand and Toy Alberta Ltd.* *supra* note 1 at p. 264.

⁴² B. Chapman, “Wrongdoing, Welfare and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice,” in D. Owen ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), at p. 409. But this view may not be universally shared by corrective justice proponents: see B. Zipursky, “Coming Down to Earth: Why Rights-Based Theories of Tort Can and Must Address Cost-Based Proposals for Damages Reform” (2006) 55 *DePaul L. Rev.* 469.

insurance premium or cheaper goods *ex ante* the accident is valued more highly than the money paid for non-pecuniary loss *ex post* the accident.⁴³

If legal theory, even economic theory, is antithetical to non-pecuniary damages awards in personal injury, why do we continue to award them? Incommensurability is an intellectual construct. Once explained, most people understand why money cannot substitute for suffering. But the argument is out of sympathy with our emotional response. We feel pain; we empathise with others in their suffering. We are motivated by compassion at the sight of others loss; we wish to do something. Spike Milligan, the English comedian, captured this popular sentiment best in the following quotation: “Money can’t buy you happiness, but it does bring you a more pleasant form of misery.” Money is seen as the best thing we can do for the individual who is suffering. But is it? Professor Richard Abel, in a recent article which should be read by all interested in this subject, has pulled together recent research on what victims really want.⁴⁴ This research undermines the assumption that victims simply want damages and suggests that a variety of other motivations are equally, if not more, important; namely, a concern with further prevention, acknowledgement of responsibility, and recognition of wrongdoing by tortfeasor. Perhaps not surprisingly, there would appear to be a strong correlation between a victim’s desire to pursue damages and the amount accepted in settlement, with the advice received from their lawyer.⁴⁵ In the United States, the cost rules, which make each party liable for their own legal costs, means that the amount awarded for non-pecuniary damages (in the US called ‘general damages’) is often totally absorbed in paying legal fees.⁴⁶ Paradoxically, the award then does nothing to alleviate pain and suffering.

The lack of a sound theoretical underpinning to justify non-pecuniary damage awards in personal injury litigation has been answered by both the Ontario Law Reform Commission and the United Kingdom

⁴³ The left-right dichotomy is inelegantly drawn. P. Atiyah makes the same point in *The Damages Lottery*, *supra* note 32 at p. 16, although clearly would not be characterized as politically right.

⁴⁴ R. Abel, “General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)” (2006) 55 *DePaul L. Rev.* 253, at p. 266.

⁴⁵ *Ibid.* at p. 260, and citing the work of Donald Harris et. al., *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984), at p. 124, reporting on UK experiences.

⁴⁶ S. Sugarman, “A Comparative Law Look at Pain and Suffering Awards” (2006) 55 *DePaul L. Rev.* 399.

Law Commission with the simple refrain: it is what the public wants. While supporting limits on such awards,⁴⁷ their continuation is accepted as a matter of policy. In fact, it was the results of public opinion surveys which alone moved the UK Law Commission to recommend that the judiciary should revise the tariff approach to non-pecuniary damages in England upwards by a factor of between 1.5 and 2 in the case of serious injuries. This adjustment, it was contended, was necessary to take account of the views of the public and the Law Commission's consultees.⁴⁸ The Law Commission further recommended that this adjustment should be undertaken by appellate courts, and, if after one year there was no adjustment by the courts, legislation should be enacted. The Court of Appeal soon acceded to the Law Commission's suggestion in *Heil v. Rankin*, although it did not follow the specific recommendations as to the extent of the revisions, or the categories of injuries to be affected.⁴⁹ The Court of Appeal specifically cast doubt on the reliability of some of the survey data that had influenced the Law Commission. It is fair to say that the Court of Appeal was more readily persuaded by issues associated with the economic impact on insurance premiums and the National Health Service, which would be affected by increases in non-pecuniary damages.

The public's universal and persistent attraction to some form of non-pecuniary compensation for personal injury is grudgingly recognized in New Zealand. Despite the best efforts of Woodhouse to have them

⁴⁷ Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (Toronto: Ministry of the Attorney General, 1987), at p. 105. The OLRC divided on this particular issue. While a majority of the commission believed that as a policy decision there was no reason to abolish non-pecuniary damages for personal injury, a dissenting commissioner observed that such a position was inconsistent with an earlier report of the OLRC on the introduction of no-fault auto insurance (*Report on Motor Vehicle Accident Compensation*, 1973), and where the OLRC had recommended the complete abolition of non-pecuniary damages in auto accidents. The UK Law Commission Report, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com. No. 257, 1999), at para. 2.1, recommended against abolition of non-pecuniary damages because they recognize the personal and financial consequences of injury and almost all accident victims that had taken part in the Law commission's survey had recommended their retention. In *Personal Injury Compensation: How Much is Enough? – A study of the compensation experiences of victims of personal injury* (Law Com. No. 225, 1994). At para. 3.42 (Law Com. No. 257, 1999) the Commission asserted that public opinion on the level of non-pecuniary damages for personal injury should be influential.

⁴⁸ *Ibid.* at para. 3.107.

⁴⁹ [2000] 2 WLR 1173 (C.A.).

eliminated,⁵⁰ arguing that the cost of providing them would be better spent extending universal coverage to those suffering disease as well as injury from an accident, the New Zealand legislation still provides for lump sum payments.⁵¹

B. THE AWARD MUST BE FAIR AND REASONABLE

Professor Stephen Waddams has pointed out that the word “cap” was not used by Dickson J. Rather, he spoke of compensation which was to be “fair and reasonable.”⁵² It follows that Dickson J. was not suggesting that a victim should receive anything less than they actually deserve, the implication of something being “capped,” but rather that what constituted “fair and reasonable” compensation for non-pecuniary loss experienced by the most seriously affected victim amounted to \$100,000. Regrettably, however, Dickson J. did characterise this figure as an ‘upper limit’ and suggested that it could be departed from if ‘exceptional circumstances’ existed. The use of the term “cap” appears to have entered the non-pecuniary damages lexicon rather late, and owes its origins to remarks made by Sopinka J. in *ter Neuzen v. Korn*.⁵³

Dickson J. also set the course regarding which method for quantifying non-pecuniary damages should be used: the conceptual approach—valuing each lost faculty as a proprietary asset with a set value (and commonly used in true no-fault schemes); the personal approach—valuing the amount of loss in human happiness for the particular victim; or the functional approach—attempting to value the amount needed to

⁵⁰ Woodhouse’s original report called for pecuniary loss only. The eventual legislation allowed for modest lump sum payments to a maximum of \$17,000 to compensate for a variety of losses but also encompassing loss of amenities, loss of enjoyment and pain and suffering. When Woodhouse reviewed the scheme as chair of the New Zealand Law Commission he advocated the repeal of the lump sum awards. See New Zealand Law Commission, *Personal Injury: Prevention and Recovery* (NZLC R4, Wellington, 1988), at para. 174. Bruce Dunlop, reviewing the NZLC report suggested that removal of the lump sum payments may also have proven a difficult pill for the public to swallow. See B. Dunlop, “Personal Injury, Tort Law, and Compensation” (1991) 41 *U. of T.L.J.* 431, at p. 442.

⁵¹ The current maximum award is \$100,000 but subject to a periodic cost of living adjustment. See *Injury Prevention, Rehabilitation and Compensation Act* (NZ) 2001 (No. 49) schedule 1, s.56.

⁵² S. Waddams, “The Price of Excessive Damage Awards” (2005) 27 *Sydney L. Rev.* 543, at p. 551.

⁵³ [1995] 3 SCR 674.

provide the victim with solace, as measured by what reasonable alternatives could be provided to substitute for the loss in enjoyment and amenities. In choosing the functional approach, Dickson J. arguably created some degree of coherence, while at the same time opening up other inconsistencies. He pursued this position with greater alacrity in *Lindal v. Lindal*.⁵⁴ The functional approach followed the direction recommended by the Pearson Commission in the United Kingdom that non-pecuniary damages should only be awarded where they can serve some useful purpose.⁵⁵ This, then, became the rationale for an award: to provide solace which could be measured objectively in the cost of alternative pleasures provided in substitution. It follows that the degree of the victim's injury provides no limits on what can functionally be provided to give solace. It would be quite possible that the sums involved to furnish solace to a person rendered deaf through injury may equal or exceed that of a quadriplegic. It certainly means that the comatose victim should receive nothing unless there is a chance of later recovery to some state of consciousness.⁵⁶ Further, any compensation under this heading should not be given for past losses; no solace can ameliorate that which has passed. The quantification of the award under this approach cannot be achieved using a tariff approach because it is dependent upon individual proof of what can and should be done to provide solace. Finally, part of the award potentially overlaps with pecuniary damages, which are also used to fund a victim's amenities.

A problem with the functional approach as described in numerous Supreme Court judgments is that the word "solace" has been used synonymously with "functional." Solace has two connotations: one, to alleviate of distress and discomfort, and two, to furnish comfort in sorrow or trouble. The Supreme Court uses the term in the former sense, although popular usage is more inclined toward the latter. Thus, providing substitute goods or services may be conducive to alleviating

⁵⁴ [1981] 2 SCR 629.

⁵⁵ *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (London: HMSO Cmnd. 7054, 1978), at para. 389.

⁵⁶ This is the current position in Canada, although modest awards are still granted. See *Wipfli v. Britten* (1984), 56 BCLR 273 (C.A.). Where there is some capacity to experience sensory response, the non-pecuniary damages have generally not been reduced. See *Granger (Litigation Guardian of) v. Ottawa General Hospital* (1996), 7 OTC 81 (Gen.Div.). In contrast, the English courts have given large awards to the comatose victim on the basis that while they do not experience pain and suffering, they have, nevertheless, experienced a real objective loss of amenities. See *Lim Poo Choo v. Camden and Islington Area Health Authority*, [1980] AC 174 (H.L.).

distress, but there is also the symbolic function of providing money as a way to give comfort, unconcerned with the use to which the money is put. Professor Michael Tilbury asserts that the confusion in usage stems from an error in failing to separate the purpose of the award from its assessment.⁵⁷ The purpose of the award is to provide solace or consolation. The money is merely the means. It is unnecessary to identify the ‘substitutes’ which will be purchased to discharge the function of providing comfort.

Another problem—one alluded to by the Law Reform Commission of British Columbia—is whether the functional approach is to be applied in a subjective fashion, asking what can be done to alleviate the particular individual plaintiff before the court, or whether an objective approach is to be favoured, asking what a similarly placed reasonable plaintiff would expect to be provided to alleviate the non-pecuniary losses. The Commission was concerned that if a subjective approach is used, then the “weak” may need more to provide solace than would the “stoic.”⁵⁸

I would suggest that despite its laudable goals, the functional approach has never been implemented in a way that fulfills its underlying rationale. In operation, the functional approach requires a plaintiff to adduce evidence of ways in which expenditure on goods or services could provide a substitute avenue of activities to ameliorate the non-pecuniary losses. But, as pointed out by Dickson J. in *Lindal v. Lindal*, there are an infinite number of ways in which an injured person’s life may be improved, which makes it difficult to determine these claims, and for which there is no accurate measures available to guide courts.⁵⁹ Dickson J. elucidated on these observations to support the imposition of an upper

⁵⁷ M. Tilbury, “Non-economic Loss and Personal Injury Damages: A Comment on the Law Commission’s Consultation Paper” (1997) 5 *Tort L. Rev.* 62, at p. 64.

⁵⁸ Law Reform Commission of British Columbia, *Report on Compensation for Nonpecuniary Loss* (LRC 76, Sept. 1984), at p. 8. M. Good uses the terms ‘subjective’ and ‘normative’ functional approach. He argues that the courts should assess non-pecuniary damages on a subjective functional approach without a cap. In its place, he argues, the requirement that any award be fair and reasonable, would act as a limit on the award. In essence the reasonableness requirement reintroduces objectivity and creates a type of cap, above which one would say the claim is extravagant and thus unreasonable. Whether this is an advance on a cap is difficult to determine. It would certainly make settlement more difficult to predict. M. Good, “Non-Pecuniary Damage Awards in Canada—Revisiting the Law and Theory on Caps, Compensation and Awards at Large” (2008) 34 *Advocates’ Q.* 389.

⁵⁹ *Supra* note 54 at p. 639.

limit applied in the case of a serious and catastrophically injured person. Of course, the trilogy did not apply a functional approach to any of the plaintiffs before the court because counsel obviously would not have prepared their cases on that basis. But it appears that the functional approach was not really applied in *Lindal v. Lindal* either.⁶⁰ Indeed, in *ter Neuzen v. Korn*, although ritual reference is made to the functional approach, it is difficult to reconcile that with the actual approach outlined by Sopinka J. in the following passage:

Essentially, she contends that the evidence demonstrated the uses to which the money could be put. However, this is not a proper rationale supporting an award of non-pecuniary damages in excess of the limit. There is no doubt that the appellant has suffered immensely as a result of this tragedy. It is also apparent that AIDS is a dreadful disease which will eventually take the life of the appellant prematurely. However, with respect to non-pecuniary losses, I do not believe that the present case is any different than other tragedies, such as those which befell the plaintiffs in the *Andrews* trilogy.⁶¹

The implications of Sopinka J.'s comments are that in any case where there is the prospect that the non-pecuniary damages are likely to reach or exceed the cap, the assessment should be performed by a comparison to the extent of the injuries suffered by the plaintiffs in the trilogy, rather than focussed upon the use that the funds could be put to in order to provide solace.

I would agree with the conclusion of the United Kingdom Law Commission that the "Canadian experience of the functional approach has not been an entirely happy one."⁶² We are left with a form of conceptual approach despite specific rejection of a tariff approach in the trilogy. However, in operation, the current approach lacks any of the specificity or guidance that formal adoption of a conceptual approach would give. Some

⁶⁰ A view apparently shared by McLachlin C.J. in her previous position as an academic. See B. McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injury" (1981) 59 *Can. Bar Rev.* 1, at p. 48. Bouck J., "Civil Jury trials—Assessing Non-Pecuniary Damages—Civil Jury Reform" (2002) 81 *Can. Bar Rev.* 493, has also written that few lawyers lead evidence on how the "plaintiff could obtain means of satisfaction to make up for the distress caused by the loss" (at p. 516).

⁶¹ *Supra* note 53 at para. 110.

⁶² *Supra* note 47 at para. 2.5.

courts, as demonstrated by the Supreme Court in *ter Neuzen v. Korn*, do indeed evaluate the seriousness of the plaintiff's injuries in comparison to those experienced by the claimants in the trilogy. In the cases where plaintiffs have sought to argue that they present "exceptional circumstance" meriting an award above the trilogy limit on non-pecuniary damages, they have invariably been answered with the argument that the injuries are no more serious than the trilogy plaintiffs and that there is a sound policy justification for the limit.⁶³ Other courts have drawn a comparison to levels of awards made by other courts confronted with similarly injured plaintiffs.⁶⁴ Interestingly, what has been explicitly rejected is any attempt to create a scale between zero and the top of the cap, and then requesting a jury to locate the particular plaintiff's injuries on that scale by comparison. The reason for rejecting this approach is not altogether self-evident but goes this way. Because the upper limit is an arbitrary cap imposed to meet other societal objectives, and because the majority of claims seeking non-pecuniary damages will not be affected by the cap, a scale approach is to be rejected.⁶⁵ The difficulty with this argument is that there is no obvious correlation between the cap, the assertion that the majority of awards will be unaffected by the cap, and the use of a scale. If the desire is to achieve consistency, and on the assumption that the functional approach is not being followed, then some form of proportionality argument to the severity of the injury of the most catastrophically affected individual has merit, as discussed below. The fact that some claimants appear to be affected by the cap while others arguably receive their full non-pecuniary loss has generated its own complications. In *Lee v. Dawson*, a jury awarded \$2 million in non-pecuniary damages.⁶⁶ These were reduced by the trial judge to \$294,600, the rough upper limit at that time. On appeal, the plaintiff argued that imposition of the limit constituted discrimination on the grounds of disability, in that as a severely disabled person, the cap affected him, whereas other less severely disabled persons were unaffected. The

⁶³ *Fenn v. City of Peterborough* (1979), 25 OR (2d) 399 (C.A.) stands alone as a case to have gone above the cap. See also R. Oakley, "Is it Time to Revisit the Trilogy" (The Law Society of Upper Canada Special Lectures, 2005), (Toronto: Irwin Law, 2005), at p. 161.

⁶⁴ See *Brewer v. Hewitt* (2005), 255 DLR (4th) 368 (Nfld. C.A.), actually describing this approach as a 'tariff system' (at para. 74), and *Rizzi v. Marvos*, [2008] OJ No. 935 (C.A.), reviewing comparative awards for a plaintiff suffering fibromyalgia.

⁶⁵ The cases discussing this point are dealt with in the recent Ontario Court of Appeal decision in *Rizzi v. Marvos*, *ibid.* at para. 30.

⁶⁶ (2006) 267 DLR (4th) 138 (BCCA), leave to appeal dismissed [2006] SCCA No. 192.

plaintiff argued that the implications of the common law rule imposing the cap had to be interpreted in light of *Charter* values, which prohibited this form of discrimination. The argument was rejected on two grounds: one, that the plaintiff had wrongly chosen his comparator group,⁶⁷ although the court could envisage a comparator group that may overcome this impediment;⁶⁸ and two, that because non-pecuniary damages amount to an arbitrary sum under any circumstances they do not fit within the concept of “full” or “adequate” compensation, so that no one to whom the plaintiff can be compared receives full compensation.

C. PARAMOUNTCY OF CARE CONCERNING PECUNIARY LOSS AND SOCIAL POLICY FACTORS INFLUENCING NON-PECUNIARY DAMAGES

The greater importance of the trilogy was the redirection of how pecuniary loss should be assessed. Going forward, courts would be required to give a breakdown of an award under certain heads of damages, the largest being future care, and loss of future earnings. A catastrophically injured plaintiff would be entitled to optimal care including twenty-four-hour attendant care, if necessary. Actuarial evidence was to be used and contingencies properly identified. Once pecuniary damages approached a level that more accurately reflected the probable future life experiences of the victim, there was less likelihood that damages for non-pecuniary loss would be called upon to prop-up deficiencies in the pecuniary assessment. This nagging suspicion, evident in the United States experience, where a large part of the non-pecuniary damages are used to pay legal fees, would be allayed. This sentiment is very reminiscent of the philosophical approach to true no-fault schemes with the emphasis on income replacement and provision of health needs obviating expenditure on anything else. Once real pecuniary need was

⁶⁷ The plaintiff’s comparator group was “less severely disable plaintiff who are entitled to full compensation for their non-pecuniary damages by virtue of the fact that the cap does not curtail their full recovery of these damages.” (*Ibid.* at para. 67).

⁶⁸ “The proposed comparator group may be characterized as follows. The claimant belongs to a group of plaintiffs injured through negligence, who, owing to the nature of their injuries, requires the solace and amelioration of their condition that can only be provided by non-pecuniary damages above the cap amount. The comparator group might be comprised of plaintiffs injured through negligence who, owing to the nature of their injuries, require solace and amelioration of their condition, but these requirements can be fully addressed by a quantum of non-pecuniary damages that falls beneath the cap.” (*Ibid.* at para. 82.)

met, the sting of limiting an admittedly arbitrary award for non-pecuniary loss was muted; other social policy factors would guide the actual determination of the limit. The sole social policy factor discussed by Dickson J. was the phenomenon of exorbitant and soaring non-pecuniary damages awards in the United States and the commensurate impact on insurance premium rates. Paradoxically, Dickson J. noted that most Canadian awards leading up to the trilogy had been substantially lower than the \$100,000 limit, but that a trend line was evident of significant increase.

The need to curb exorbitant awards to avoid an insurance crisis as a justification for some limitation on non-pecuniary damages has been questioned by the Law Commission of British Columbia.⁶⁹ John Bouck, a former judge from British Columbia, has also questioned the perception that juries always award higher amounts for non-pecuniary loss than judge-alone trials, and that juries would invariably award exorbitant sums.⁷⁰ Whether the Supreme Court correctly interpreted the social economic environment of the United States thirty years ago is now moot. However, this much we can now say, whether the evidence comes from New Zealand (Woodhouse Commission), Australia (Ipp Commission), the United Kingdom (Pearson Commission), the United States (The tort reform movement which has created legislative caps), or Canada (Coulter Osborne Commission), there is an irrefutable correlation between awarding an arbitrary sum for non-pecuniary loss and increased insurance rates.⁷¹

The Supreme Court was concerned with the effect that ever-increasing awards would have; thus the upper limit. Higher awards also drive much of the agenda in the United States and have been met with a variety of legislative caps at varying amounts in automobile and medical liability claims.⁷² However, attention is increasingly being paid to lower-

⁶⁹ *Supra* note 58 at p. 17.

⁷⁰ *Supra* note 60 at p. 516. Bouck seeks to restore the role of jury as final arbiter of damages, claiming that an imposed limit is inconsistent with the constitutional role played by juries in civil trials. This refrain has also been voiced by Finch C.J.B.C., but with the conclusion that juries, as reflecting community standards, are awarding higher amounts for non-pecuniary loss, which is completely undermined by a judicially imposed cap. See *Stapley v. Hejset* (2006), 263 DLR (4th) 19 (B.C.C.A.), at para. 120.

⁷¹ R. Oakley, *supra* note 63 at p. 168.

⁷² See the summary kept by the American Tort Reform Association, online: <<http://www.atra.org/reforms>>.

end awards which may have the greatest economic impact on insurance rates. This was the conclusion of Justice Coulter Osborne with respect to auto-insurance reform in Ontario.⁷³ The eventual scheme settled upon in Ontario is an increase in no-fault benefits with continued access to court tort principles above both a verbal threshold⁷⁴ and a minimum monetary deductible of \$30,000.⁷⁵ However, chairing the Ontario Government's Civil Justice Review, Osborne has recently questioned the need for both a verbal threshold and a damage deductible, suggesting that the latter is all that is necessary.⁷⁶ Osborne has since been quoted as describing the \$30,000 deductible as a "tax on pain," and the Financial Services Commission of Ontario, in their recent five-year review of Ontario's auto-insurance scheme, has recommended lowering the deductible to \$20,000, ostensibly to increase citizens' access to courts.⁷⁷

In the United Kingdom, Professor Richard Lewis has identified the significant impact that small claims have on the system.⁷⁸ Studies there reveal that the overwhelming number of claims are for less than £5000, of which the non-pecuniary loss claim makes up the largest component. While the Law Commission had recommended tapered increases on awards starting at a threshold of £2001, with increases

⁷³ *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario* (1988), vol. 1, at p. 597.

⁷⁴ *Insurance Act* RSO 1990 c. I.8 s. 267.5(5) (a) permanent serious disfigurement; or (b) permanent serious impairment of an important physical, mental or psychological function.

⁷⁵ *Insurance Act* RSO 1990 c.I.8 Ont. Reg. 461/96, s.5.1.

⁷⁶ C. Osborne, *Civil Justice Reform Project Report*, (Ontario Ministry of the Attorney General 2007), at p. 130, online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp>>.

⁷⁷ Alberta has also instigated a threshold on non-pecuniary damage claims resulting from automobile accidents aimed specifically at ridding the system of small claims for minor injuries by capping the maximum recovery to \$4000. See B. Billingsley, "Legislative Reform and Equal Access to the Justice System: An Examination of Alberta's New Minor Injury Cap in the Context of the Canadian Charter of Rights and Freedoms" (2005) 42 *Alberta L. Rev.* 711. However, the suggestion that these caps violate the *Charter* has recently been rejected by the Alberta Court of Appeal in *Morrow v. Zhang*, [2009] AJ No. 621, a case which also gives some useful information on the correlation between caps on small non-pecuniary damage claims and insurance rates, noting that after the introduction of the Alberta reforms, rates have dropped 18%.

⁷⁸ R. Lewis, "Increasing the Price of Pain: Damages, The Law Commission and *Heil v. Rankin*" (2001) 64 *M.L.R.* 100, at p. 102.

ranging by a factor of 1.5 to 2,⁷⁹ the eventual decision in *Heil v. Rankin* did not change existing levels of compensation to awards of less than £10,000. Lewis states that the Association of British Insurers had estimated the cost of the Law Commission's proposed changes at a staggering £500 to £1000 million per year, or 10% of their total premium income.⁸⁰ The Ipp Commission in Australia was similarly convinced that thresholds on lower non-pecuniary damage awards resulted in significant savings in the cost of claims.⁸¹

Another peculiarity of the current Canadian approach to non-pecuniary damages is the way it is to be applied in the case of a jury trial. The Supreme Court's opinion in *ter Neuzen v. Korn* has recently been interpreted by the Ontario Court of Appeal in *Rizzi v. Marvos*.⁸² A jury is only to be instructed on the application of a cap if the trial judge is of the opinion, taking into account the submissions of counsel and the severity of the injury, that a jury might make an award that approaches or will exceed the cap. At that stage, the trial judge is to inform the jury of the cap, and that it is an arbitrary figure, but that it is imposed for the policy reasons previously articulated in this paper. The implications of this ruling are that for lower-level awards, the jury will make a decision unaffected by the policy implications which impose restrictions on these awards, whereas for more serious injuries, the jury will be bound to observe the cap. Presumably, the rationale behind this approach is to avoid the creation of a scale or tariff. Nevertheless, as previously discussed, the policy implications of restricting non-pecuniary damages, i.e. the incommensurability problem, the need for fair and reasonable compensation, and the social policy implications over costs, apply equally to all awards. A jury should be entitled to reflect upon those policies and allow them to influence any decision over the award of non-pecuniary damages. These jury instructions may make more sense if the functional approach was applied according to its letter, but, again, as previously discussed, it is not.

Dickson J. described the award of non-pecuniary damages as being arbitrary or conventional. While the actual quantified amount will

⁷⁹ UK Law Commission Report, *supra* note 47 at para. 3.110.

⁸⁰ Lewis, *supra* note 78 at p. 104.

⁸¹ *Supra* note 3 at p. 188 and recommendation 47. The Commission noted that non-pecuniary damages accounted for 45% of the total cost of public liability personal injury claims between \$20,000 and \$100,000.

⁸² 2008 ONCA 172.

always remain arbitrary, its administration does not have to be similarly characterised. Indeed, Dickson J. stressed the need for everyone in Canada to be awarded equal measure of compensation for similar non-pecuniary loss. Both aspects warrant comment.

Dickson J. chose \$100,000 as a rough upper limit. Later cases allowed for an adjustment for inflation, resulting in a cap currently around \$310,000.⁸³ If the real reason for imposing this amount is because it satiates a public appetite for compensation for this type of loss, why is it that a Canadian's sense of fairness and justice equates to \$310,000? For instance, we know that the value a New Zealander places on this head of compensation is approximately \$70,000 (all figures adjusted to Canadian dollars), the English \$463,000, and an Australian, a range—NSW \$400,000, Victoria \$340,000, Queensland \$230,000. The picture in Europe is somewhat different. In a most informative article, Stephen Sugarman gives a comparative review of awards for pain and suffering in Europe and the United States.⁸⁴ Sugarman looks at both the raw amounts provided in European countries for a range of hypothetical injuries (he chose quadriplegia, total blindness, deafness, amputation above the elbow, amputation of a leg above the knee, and facial burns) as well as the extent to which each respective country reviews the seriousness of the hypothetical injury. In terms of amounts given for each of the respective injuries, the median (n=19) award amounted to the following (all expressed in Canadian dollars): quadriplegia \$140,000 (range \$420,000 – \$24,000), total blindness \$99,000 (range \$379,000 – \$32,000), deafness \$47,000 (range \$190,000 – \$11,700), amputation above the elbow \$58,000 (range \$252,000 – \$15,000), amputation of a leg above the knee \$62,000 (range \$252,000 – \$15,500), and facial burns \$21,000 (range \$143,000 – \$6,600). Generally, Ireland gave the highest awards while Greece gave the lowest awards. In terms of perception of seriousness of the injury, most countries rated quadriplegia as the most serious and facial burns the least. But even here there were significant differences in perceptions from different countries, although these may have been a result of the perceptions of national reporters who essentially conducted this evaluation. Discerning a true picture in the United States is difficult

⁸³ See *Morrison v. Greig*, [2007] OJ No. 225 (S.C.), awarding \$310,000 for non-pecuniary loss and *Huinink (Litigation Guardian of) v. Oxford (County)*, 2008 CarswellOnt 1895 (Ont.S.C.J.), awarding \$310,000. Applying a straight inflation calculator, the amount in 2009 should be \$314,480. See also *Singh v. Bains*, (2008) CarswellBC 1323 (S.C.), awarding \$325,000.

⁸⁴ S. Sugarman, *supra* note 25 at p. 44.

given the absence of reliable data sets and the disparity of treatment across 50 states. However, as well as he could, Sugarman found that in terms of ranking the seriousness of injuries, Americans did not differ appreciably from Europeans, placing quadriplegia as the most serious and having similar ranges for loss of limbs. However, the amount awarded did demonstrate a far greater disparity. The median awards from his study within the four categories in which comparisons could be made were: (all expressed in US dollars) quadriplegia \$3,500,000 (range \$1,000,000 – \$6,000,000 n=12), loss of a leg \$1,000,000 (range \$400,000 – \$9,750,000 n=17), and blindness either one or both eyes \$500,000 (range \$245,000 – \$5,500,000 n=10).⁸⁵

The explanations for wide disparities between nations are many. Economic prosperity may explain why Greece and New Zealand give relatively less than others. Religious differences and empathy may explain differences between predominantly Catholic nations (slightly higher awards) and more stoic, predominantly Protestant nations. Greater sense of individuality as against communitarian political philosophies may explain the Atlantic and Tasman divides. The impact of lawyers' fees and who bears the cost is another factor. Whatever the reasons, one would have to conclude that the Canadian figure arbitrarily seized upon by the Supreme Court thirty years ago, once adjusted for inflation, has kept Canada's cap within the range of comparable nations in Europe and with Australia, although not with the United States or New Zealand. More important than the amount awarded is the degree of consistency in determining what will be awarded. It is this criterion that allows settlement to take place. In Ontario, the recent Civil Justice Review reported that automobile personal injury disputes still accounted for 21% of all civil litigation before Ontario Superior Courts and constituted the single largest category of cases. These figures, taken with the general concern to expedite litigation and lower costs, suggest that anything which adds predictability in assessment should be encouraged.

I am not aware of any recent study, nor have I undertaken one of my own, that has gathered existing non-pecuniary damage awards to determine whether there is consistency across Canada. Since this was an expressed desire of the Supreme Court when creating a cap, perhaps some review should be done. A cursory inspection of Goldsmith suggests that

⁸⁵ A. Sebok, "Translating the Immeasurable: Thinking About Pain and Suffering Comparatively" (2006) 55 *DePaul L. Rev.* 379, at p. 392, finds a similar disparity in awards.

consistency across Canada remains an elusive goal; within the classification system used by the editors, there is a wide range in non-pecuniary damage awards.⁸⁶ One can also say that when compared to how consistency is obtained in the United Kingdom, our approach is somewhat Byzantine. On the assumption that Canada does not follow a functional approach—as argued above and, incidentally, the implicit assumption that underlies Goldsmith—but that we adopt in practice a form of the conceptual approach interspersed with the personal approach (i.e. we look at the severity of the injury in comparison to quadriplegia as representing the most serious form, but then allow a discretionary factor to accommodate individual and personal aspects of the injury suffered), how could we achieve better consistency?

Two approaches lend themselves for consideration, one statutory, the other created under the aegis of the judiciary and practicing bar. The statutory approach is that adopted in Australia as part of the Ipp Commission reforms. Most of the states have now enacted *Civil Liability Acts* which create a graduated scheme indexing severity of the injury against a percentage of the maximum allowable non-pecuniary damages. Quadriplegia is the most severe, rating 100 per cent and warranting the maximum permissible—AUS\$350,000 (adjusted for inflation. NSW is now AUS\$450,000). Less severe injuries warrant a lower percentage of the maximum, but the scheme is not just a straight line correlation. An injury that is ranked 15 per cent or less severe warrants no non-pecuniary damages, thus creating an effective cap on lower level awards in all cases. Between 15 and 34 per cent severe, there are incremental stepped increases: a 20 per cent severity rating will be awarded 3.5 per cent of the maximum, a 25 per cent severity will earn 6.5 per cent, and a 34 per cent severity will earn 34 per cent. The severity ratings use a variety of scales, including the American Medical Association guidelines for measuring impairment, the psychiatric impairment rating scale. Some states including assessment tools within regulations.⁸⁷ The impact of the reforms that followed the Ipp Commission has been dramatic, and has

⁸⁶ A. Duncan and A. Turgeon eds., *Goldsmith's Damages for Personal Injury and Death in Canada* (Scarborough: Thomson Carswell, 2008). If one reviews any of the classifications the range is quite large. For example, under spine below the neck the range is \$185,000 – \$27,000 (n=13). For whiplash range \$175,000 – \$0 (n=55). For scars and lacerations: torso and limbs range \$120,000 – \$27,500 (n=8).

⁸⁷ See for instance Queensland *Civil Liability Regulations 2003*, online: Queensland Legislation: <<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CivilLiabR03.pdf>>.

engendered criticism of having gone too far, even from Ipp himself.⁸⁸ The reforms were far more extensive than the cap on non-pecuniary damages, and it is these areas that have incurred most of the wrath of critics. There is also a degree of stoicism in the reforms, perhaps consistent with a nation that immortalizes the bearing of pain as a cultural trait. (As an Ocker would say, “footie’s not a game for sissies”). It is still too soon to judge whether greater consistency has been attained, as few cases have wound their way through the system. It is also a scheme that could only be created by legislation, although the results in time may justify such action.

The second scheme is that adopted in the United Kingdom. Confronted with the difficulty of determining damages for a loss which is incommensurable, the English Judicial Studies Board, a public body comparable to the Canadian National Judicial Institute, set out in 1992 to publish *Guidelines for the Assessment of General Damages in Personal Injury Cases*. It is now in its 9th edition, published last year.⁸⁹ The guideline, of which every sitting judge receives a copy, synthesises the reported judgments into brackets of injuries, gives a high and low range of damages, and provides a cost of living adjustment of the range to the date of publication. In that sense it presents data similar to that gathered in Goldsmith, but it presents it in what I would argue is a far more useable fashion, and one conducive to achieving consistency. Three features mark a difference. One, the classification system of injuries presents a more detailed typology containing evaluative criteria. Two, within each classification the range is cumulative, then adjusted for inflation. It thus becomes increasingly reliable as more cases are added between each edition. Three, it does all this in less than one hundred pages.

To the question of whether we should rethink the cap on pain and suffering, my answer is no. Unless we are willing to go down the path of comprehensive no-fault, where the sacrifice in non-pecuniary damages is set off against providing universal coverage for all—a sacrifice well-worth making—I believe the current cap on non-pecuniary damages has served Canada well. We need not jettison the cap; we simply need a bit of a makeover operationally to admit that we don’t apply the functional approach and can achieve greater consistency using a modified conceptual/personal approach. Such an approach would need the

⁸⁸ “Liability of flawed law reform” *The Australian* (April 14, 2007).

⁸⁹ For a copy see David Kemp & Margaret Kemp, *The Quantum of Damages* (London: Sweet & Maxwell Thomson, looseleaf), vol.4.

imprimatur of the Supreme Court, but it need not stop the gathering and reporting of statistics in a more usable guide.

III. IS IT TIME TO RETHINK LUMP SUM AWARDS?

Every year for the past ten years I have asked my students in my remedies class to answer a few simple questions about the current economy, the future economy, and their expected earnings. I give this survey as an introduction to the difficulty of assessing prospective losses in personal injuries. Most students have an awareness of current economic indicators: current inflation rate, marginal tax rates, current interest rates, life expectancy tables, etc. Given the enthusiasm of youth, they have wild expectations of future salary increases over their lifetime. Interestingly, they invariably think that inflation will climb and that marginal tax rates will steadily increase, as will interest returns. They are not alone in missing the mark on what the future economy has in store for us. After all, the Supreme Court got this matter hopelessly wrong in the trilogy, as evident in choosing a discount rate of 7 per cent, a matter that had to be legislatively corrected. Unlike most other areas in the law of remedies, personal injury damages are largely prospective and their assessment requires answers to the questions I give to my students. We are driven to this by the requirement that a court must give judgment in a lump sum amount. Dickson J. expressed his reservations:

The subject of damages for personal injuries is an area of the law which cries out for legislative reform.... When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.

The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuations on investments, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care for long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the

continuing needs of the injured person and the cost of meeting those needs.⁹⁰

Dickson J. concluded by stating that any change would require legislative intervention, a point with which a subsequent Supreme Court agreed.⁹¹

The arguments for and against a periodic payment scheme are well-rehearsed and have been aired on many occasions.⁹² Almost all conclude that such an approach should be adopted in the case of catastrophic loss, both where there is a serious risk that a lump sum will either under- or over-compensate the plaintiff because it is impossible to accurately predict the future, and where there is a higher risk that the plaintiff will be unable to manage such a large award, so as to deal with the changing circumstances as they arise.⁹³ The impediments to implementing such a course of action are practical rather than theoretical. Insurance companies pay most personal injury claims, and the insurance industry argues that for it to remain viable it requires financial certainty over such claims. While the insurance industry can live with the fortuitousness of accidents, it argues that once a claim is made it requires fixing the amount paid so that it can effectively close the books on the claim, allowing it to properly assess premiums.⁹⁴ The only innovation to change this compensation landscape has been the structured settlement, though Quebec has for some time had a provision that allows for limited periodic assessment in exceptional circumstances.⁹⁵ For the insurance

⁹⁰ *Andrews v. Grand and Toy Alberta Ltd.*, *supra* note 1 at pp. 236–237.

⁹¹ *Watkins v. Olafson*, *supra* note 5.

⁹² See for example, in Ontario, OLRC, *Report on Compensation for Personal Injuries and Death*, *supra* note 47, at p. 155, Coulter Osborne, *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario*, *supra* note 27 at p. 413, Manitoba Law Reform Commission, *Report on Periodic Payment of Damages for Personal Injuries and Death* (1987), New South Wales Law Reform Commission, *Provisional Damages Report No. 78* (1996), English Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com. No. 224, 1994), Lord Chancellor's Department, *Damages for Future Losses* (Consultation paper CP01/02, March 2002).

⁹³ Indeed, these were the factors given by Beverley McLachlin before appointment to the bench: "What Price Disability: A Perspective on the Law of Damages for Personal Injury," *supra* note 60 at p. 13.

⁹⁴ Holland Committee, *Report of the Committee on Tort Compensation*, 1980, at p. 14. See also see Osborne Report, *supra* note 73, vol. 2, at p. 424.

⁹⁵ Under article 1615 Civil Code of Québec (C.C.Q.), S.Q. 1991, c.64 provision is made in the case of damages for personal injury to reserve a right in the plaintiff to reopen the damage assessment where, because of his or her physical condition, a proper

industry, a structured settlement really means that once the liability insurer has met the claim, it passes the payment to a life assurer to provide the benefits. Structured settlements go some way in alleviating the risk that a claimant will dissipate a lump sum award on expenditures outside that for which the award has been assessed. However, structured settlements do little to deal with the risks of over- and under-compensation. While there is now a sophisticated industry providing structured settlements offering schemes that can be indexed to inflation, that provide periodic payments of capital amounts to replace necessary equipment, and can give a range of annuity terms regarding the length of term of payments, none of these schemes accommodate the ability to reassess a claimant's needs should they significantly change after judgment.

Recently, the United Kingdom enacted a provision which grants to a trial judge the ability to impose a true periodical payment scheme upon the litigants. Prior to 2005, an English court could only order a structured settlement where the parties consented to the order. In 2003, Parliament removed this prohibition and allowed a court to impose a periodical payment order regardless of the parties' wishes in any case which made provision to pay future pecuniary losses. Within such an order a judge may provide for a change in circumstances under what is known as a 'variation' order.⁹⁶ The origin of this process lies in an earlier reform which allows courts to make provision for "provisional damages."⁹⁷ An award of provisional damages allows a successful claimant to return to court at a later stage and seek additional compensation to cover a contingency (or chance) or later emergence of a serious medical condition which actually does develop subsequent to the original trial. At the original trial, damages are calculated on the basis that the claimant will suffer no further injury. However, contained within the judgment is a term covering provisional damages, allowing the claimant, within a

quantification cannot take place with sufficient precision. Such right to reopen cannot extend beyond three years.

⁹⁶ *Courts Act (UK) 2003 c.39 s.100*, which changed the *Damages Act (UK) 1996 c.48 s. 2B*. The procedures for a variation order have been regularized by the enactment of *The Damages (Variation of Periodical Payments) Order 2005 (UK) SI 2005 No. 841*.

⁹⁷ See *Supreme Court Act (UK) 1981 c.54 s.32A*, which makes provision that provisional damages may be awarded "for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future, the person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer serious deterioration in his physical or mental condition."

stipulated period, the right to seek additional compensation where a contingency or chance has now become a certainty.⁹⁸

Periodical payments move provisional damages another step forward, in that they allow a structured settlement, but also make provision for a reassessment both up and downward, and at the request of either claimant or defendant (provisional damages are only at the request of the claimant).⁹⁹

The net effects of the UK legislative changes are that a court can impose a structured settlement which may make provision for a future contingency that may vary the periodic payment upwards, should the claimant's position appreciably worsen, or downward, should the claimant's position significantly improve. It is still early days for this new regime. However, potential changes in circumstances must be specifically anticipated and incorporated into the original judgment. The variation must also be for a new distinct form of loss, not merely a further gradual deterioration of an existing condition. This limitation precludes endless attempts to revisit the original damages assessment.¹⁰⁰ In other words, the UK provisions provide a different way to deal with what Canadian law would be dealt with as of positive or negative contingency deductions to a lump sum award. The UK provisions assume that the contingency will not arise, but then provide that where it does, certain consequences follow to adjust the periodical payments (structured settlement) for the future.

Whether the ability to vary a periodical payment scheme will profoundly change the way damages for personal injuries are awarded in the United Kingdom is yet to be seen. Richard Lewis has written that insurance premiums are likely to rise as the life assurance industry

⁹⁸ The UK Civil Procedure Rules (CPR), rule 41.2(2), state that under *Supreme Court Act (UK)* 1981 c.54 s.32A, an order for provisional damages must specify the disease or type of deterioration in respect of which an application may be made at a future date, and must specify the period in which such an application may be made. Under CPR rule 41.3(2) only one application is allowed for further damages.

⁹⁹ *The Damages (Variation of Periodical Payments) Order 2005 (UK)* SI 2005 No. 841, s.2, states that a court may make a variable order where the claimant "as a result of an act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or enjoy some significant improvement in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission."

¹⁰⁰ *Willson v. Ministry of Defence*, [1991] 1 All ER 838 (QB).

absorbs the impact of the potential to reopen awards.¹⁰¹ He reports that there is little appetite amongst the life assurance carriers to provide this type of annuity, and quotes anecdotal evidence that the cost of these types of settlements has risen by as much as a third. Lewis also notes that the demand for periodical payments did not originate with the insurance industry as a way to better deal with contingencies, but with the National Health Service (NHS), and their need to deal with rising lump sum claim costs. By introducing periodical payments, the government was able to alleviate increasing personal injury claims on the NHS and thus lessen the need for upfront funding of these claims by shifting that liability onto a future group of taxpayers.

From the perspective of fairness and the desire to achieve full compensation, the ability to vary a periodical payment scheme appears both rational and desirable. It goes some way to alleviate both major problems identified previously with lump sum awards. Under existing Canadian law the prospect of further serious deterioration of a known injury, the emergence of a new injury (i.e. HIV emerging from a negligent blood transfusion), or significant post-judgment improvement of the claimant's condition, are all dealt with by a contingency adjustment either up or down. The difficulty with this approach is that the inevitable result is for the claimant to be under-compensated if their injury is exacerbated (the claimant only receives a percentage reflecting the chance of further loss), and being over-compensated if the chance of further injury never eventuates. Whether the trade-off of lowering initial damages by ignoring the contingency rather than having to pay more damages at some later time (incurring further administrative costs in proving the claim and reassessing the damages) would be cost-effective is something that would have to be carefully examined. One suspects that the life assurance industry would object to any reforms that prevent finalizing liability on a file once a claim has been made. In this sense, further rethinking on lump sum awards may be a non-starter despite its obvious merit from a compensation point of view.

¹⁰¹ Richard Lewis, "Appearance and Reality in Reforming Periodical Payments of Tort Damages in the UK" (paper delivered at the Emerging Issues in Tort Law conference, University of Western Ontario, 2006), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892980>.

CONCLUSION

Thirty years after the Supreme Court trilogy there is now a sizable number of cases covering catastrophic injuries. The awards in recent cases have climbed over the \$12 million dollar mark.¹⁰² Courts continue to make predictions on the claimant's future and further prognostications on the state of the economy, future care costs, and advances in medical science. All actors in the system argue that we have a far more sophisticated understanding of personal injury compensation than we did thirty years ago. Implicitly, these same actors believe that we have moved closer to a more just, fair, reasonable and humane approach to personal injury cases. But these beliefs are based on faith rather than empirical proof. Ironically, despite a thirty year history of court awards of personal injury damages under the new regime introduced by the trilogy, there has never been a systematic study of how victims have fared. I think such a study would prove immensely helpful.

¹⁰² *Morrison v. Greig*, [2007] OJ No. 225 (S.C.), awarding \$12,441,197 in damages.

