

RETHINKING DAMAGES FOR PERSONAL INJURY: Is it too late to take the facts seriously?

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Three questions:

- Is it time to rethink personal injury damages?
- Is it time to rethink the cap on pain and suffering ?
- Is it time to rethink lump sum awards?

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Three questions:

- Is it time to rethink personal injury damages? **Yes**
- Is it time to rethink the cap on pain and suffering ? **No**
- Is it time to rethink lump sum awards? **Maybe**

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Three questions:

- Is it time to rethink personal injury damages? **Yes Won't happen**
- Is it time to rethink the cap on pain and suffering ? **No Shouldn't happen**
- Is it time to rethink lump sum awards? **Maybe Non-starter**

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Is it time to rethink personal injury damages?

- The unassailable facts:
 - UK - Pearson Commission (1978 - 85%)
 - UK – Civil Justice Review (1986 – 50-70%)
 - Can – Weiler – Ontario WCB (1980 - 9% - auto-insurance 50%)
 - NZ – NZ Law Commission (1988 – 7%)
 - NZ (2008)– NZ\$2.40 (CAN\$ 1.75) per person per day for comprehensive no-fault coverage.
 - 82% consumer approval rating.

Is it time to rethink personal injury damages?

- Dewees, Duff and Trebilcock:

“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.”

Is it time to rethink personal injury damages?

- Feldthusen:

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

Is it time to rethink personal injury damages?

- Why the persistent love affair with tort law?
 - Hijacking the public agenda by insurance interest and plaintiffs’ bar.
 - Tort law reform as a response to insurance crises.
 - Marginalization of ‘progressive’ voices – Sugarman, Feldthusen, Cane, Atiyah.
 - Canada’s lost legacy
 - Dickson’s incrementalism

Is it time to rethink the cap on pain and suffering ?

- Dickson J. - *Andrews v. Grand and Toy*:
 - **Incommensurability** means that any damages award is *ipso facto* arbitrary or conventional.
 - Any award must be **fair and reasonable**.
 - 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 economic burden large awards impose on society and insurance costs.

Is it time to rethink the cap on pain and suffering ?

- **Incommensurability**
 - Pain and suffering
 - Sensate – physical discomfort
 - Insensate – feels of loss
 - Loss of amenities
 - Sensate – respond emotionally to things which give us pleasure
 - Loss of expectation of life

Is it time to rethink the cap on pain and suffering ?

- **Incommensurability**
 - Theoretical constraints
 - Corrective Justice Accounts
 - Calibrated compensation according to extent of plaintiff's injury for something which is incommensurable cannot correct a normative imbalance, although it has utility.
 - Distributive Justice Accounts
 - Redirecting resources away from where it can do real good.
 - No person would buy in advance insurance for a payment which can do no good.

Is it time to rethink the cap on pain and suffering ?

- **Incommensurability**
 - Why do we award non-pecuniary damages?
 - Empathy towards the suffering of others. The best we can do.
 - BUT – Abel – What victims really want.
 - » concern with further prevention,
 - » acknowledgement of responsibility, and
 - » recognition of wrongdoing by tortfeasor.
 - Impact on legal cost rules and advice of lawyers.
 - What the public expects.

Is it time to rethink the cap on pain and suffering ?

- **Any award must be fair and reasonable.**
 - Waddams – not a ‘cap’ but a suggestion of what would amount to a fair and reasonable sum.

Is it time to rethink the cap on pain and suffering ?

- **Any award must be fair and reasonable.**
 - Conceptual, personal, functional
 - **Functional** – to provide **solace** which could be measured objectively in the cost of alternative pleasures provided in substitution.
 - **Solace**
 - » Alleviation of distress and discomfort
 - » Furnish comfort in sorrow or trouble
 - » Tilbury – separate purpose from assessment. The purpose of the award to provide consolation, the money is merely the means.

Is it time to rethink the cap on pain and suffering ?

- **Any award must be fair and reasonable.**
 - Functional approach – “an unhappy experience”.
 - Exacerbated by rejection of a scale.

Is it time to rethink the cap on pain and suffering ?

- **principle of paramountcy**
 - The irrefutable correlation between awarding an arbitrary sum for non-pecuniary loss and increased insurance rates.

Is it time to rethink the cap on pain and suffering ?

- **principle of paramountcy**

- \$100,000 becomes \$310,000.
- NZ - \$70,000.
- England - \$463,000.
- Australia - \$230,000 to \$400,000.
- Europe – median \$140,000 (\$420,000 - \$24,000 n=19).
- USA – median \$3,500,000 (\$1,000,000 - \$6,000,000 n=12).

Is it time to rethink the cap on pain and suffering ?

- Regardless of amount, have we achieved consistency?
 - Probably not.
- Possible reforms:
 - Legislated – Australian experience – severity ratings scheme
 - UK - *Guidelines for the Assessment of General Damages in Personal Injury Cases*. [premised upon rejection of functional approach]

Is it time to rethink lump sum awards?

- **Periodic Payment**

- Such an approach should be adopted in the case of catastrophic loss where there is both 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. The impediments to implementing such a course of action are practical rather than theoretical.

Is it time to rethink lump sum awards?

- Structured settlement is not periodic reassessment, but it overcomes the problem of plaintiff dissipation.

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Is it time to rethink lump sum awards?

- The United Kingdom experiment with **periodical payments**.
 - A UK 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.