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THE TRILOGY IN 1984

address by

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I. Introduction

In January, 1979, the Supreme Court of Canada handed down three decisions in which it consciously set out to lay down a comprehensive system of principles for the assessment of damages in personal injury cases. In many respects, the principles set out in Andrews, Teno and Thornton[1] appeared new, if not novel. Now, almost six and one-half years later, it is in order to review how these principles have been applied and to assess where the law of damages for personal injuries stands in Canada.

I approach this task with some trepidation and in the certain knowledge that many of you will disagree with me on many points in this most difficult area of the law. My aim is not a definitive exposition of the law, but the more modest one of raising pertinent questions and generating discussion.

II. The Law Before the Trilogy

The basic principle underlying the assessment of damages is the same today as before the trilogy - restitution. In so far as possible, the injured person is to be restored to the position he would have been in had he not sustained the wrong for which he seeks compensation.[2]

However, the subsidiary principles which govern how this broad statement of principle is translated into a

monetary award have changed radically. Prior to the trilogy, arithmetical calculations of cost of future care or future earnings served more as a rough guide than as a formula for assessment of damages. Detailed and costly schemes for the future care of severely injured persons were rare. In most cases, the injured person received a conventional award, based in large part on the severity of his injuries.

The conventional award is said to have developed from the ancient claim by an injured person or his family against a wrongdoer for wergeld or blood money, dictated as much by revenge and retribution as by the need to compensate the victim.[3] In more recent times, it was justified in terms of the plaintiff's losses and needs.[4] But courts freqently did not assign figures to particular losses and needs. Instead, the usual practice was to state a global total for all heads of general damage, pecunicary or non-pecuniary, without giving a breakdown of how the award had been computed.[5] In principle, heads of damages such as cost of future care, loss of earning capacity, and pain, suffering and loss of amenities were recognized, as was the arithmetical method of computing damages. However, in practice courts frequently evidenced reservations as to the usefulness of actuarial evidence and arithmetical calculations.[6]

The pre-trilogy global award was in large part a conventional award, based on what other courts had awarded to other plaintiffs similarly injured. For this reason, the practice of assessing damages globally is sometimes referred

to as the conceptual approach in which the injury is treated as a lost asset worth a given amount on an established tariff. However, the global approach was not confined to comparing the plaintiff's injury with those of other plaintiffs. Evidence was presented and courts considered the individual circumstances of the plaintiff. It was never doubted that a concert pianist who lost his hand would be entitled to greater damages than a retired school teacher suffering the same injury, notwithstanding the fact that cases articulating this proposition are rare.[7]

The pre-trilogy approach possessed certain advantages. Its emphasis on a conventional tariff lent certainty to the law of damages for personal injuries, promoting settlement. Moreover, the idea that like injuries should be compensated by a like award conformed with common sense notions of justice and avoided the offensive possibility that a malingerer would receive greater damages than the person who strove to surmount his injuries.

On the other hand, the typical absence in pre-trilogy cases of careful calculations of the loss sustained under the pecuniary heads of damage and the lack of emphasis on factors peculiar to the case at hand, arguably led to awards that were inadequate and unjust in the individual case. Awards prior to the trilogy, at least for serious injuries, were typically much lower than post-trilogy awards.[8] For example, in 1968 in Bisson the Supreme Court of Canada approved a global assessment of damages well under $200,000

for a 22-year old man rendered a quadriplegic.[9] In 1978, the Supreme Court awarded $810,000 for roughly the same injuries in Thornton[10]. Today, awards to plaintiffs similarly injured may well exceed $1,000,000.[11]

III. Calculation of Damages After the Trilogy

A. Philosophical Basis

The trilogy introduced a new philosophical approach to the assessment of damages for personal injury. First, it emphasized complete compensation. The injured person is to recieve full compensation for all his losses, to the extent this can be done by money. Secondly, it manifested increased concern with how the award could be used or "function" to ameliorate the plaintiff's situation - the functional approach. These two concerns underlay much of what the Supreme Court had to say with respect to the assessment of damages for both pecuniary and non-pecuniary loss. Most funadamentally, they dictated that the old global approach be abandoned in favour of a detailed assessment of damages under the established heads of damages, pecuniary and non-pecuniary.

The Supreme Court affirmed that the principle that the injured person should be restored to his pre-accident position - restitutio in integrum - should guide the assessment of damages for pecuniary losses.[12] It stated, however, that this principle had but limited application in the matter of non-pecuniary losses, in that money cannot repair permanent injuries or obliterate anguish and

suffering. Damages for non-pecuniary losses are justified on the functional rationale that money can be used to substitute other enjoyments and pleasures for those that have been lost.[13]

B. Damages for Pecuniary Loss

The principle aim of the award for pecuniary losses - cost of future care and lost earning capacity - is to restore the plaintiff to the position he would have been it had he not been injured, insofar as this can reasonably be done with money. However, it is recognized that in the case of serious permanent injuries, this may not be possible. In such cases, the goal is to provide the injured person with the means to live his life out in relative comfort, in accordance with the evidence as to his medical needs.

Consistent with these aims, the trilogy introduced a number of changes in the assessment of damages for pecuniary losses. One was an increased emphasis on economic projections and mathematical calculations. Where figures can be placed on the losses, they are to be calculated mathematically, with the aid, as appropriate, of evidence from actuaries and accountants. The award is to be discounted for present payment, and future inflation which might erode the buying power of the award is taken into account. The aim is to ensure that full, but fair, restitution is made for all losses which can be translated into monetary terms.

Another change was a new emphasis on making reasonable

provision for the plaintiff's future care so as to enable the seriously injured plaintiff to live his life in comfort and dignity approximating what he would have enjoyed had he not been injured. For this reason, the cost of future care is based not on the modest standard of institutional care, but (provided the evidence establishes it to be reasonable) on the more generous premise that the plaintiff should have a home of his own, together with the necessary assistance to run it and to meet his medical needs. Lost earning capacity, subject to a deduction for overlap with cost of future care, is likewise to be fully compensated by reference to the earnings the injured person would have enjoyed had he not been injured and on the basis of his pre-injury working lifetime.

The premise behind all these propositions is the same - to do less would be to award the plaintiff incomplete compensation and to fail to restore him as nearly as possible to his pre-injury position. The award for cost of care may also be justified on the functional rationale of use which the award will serve in ameliorating the plaintiff's situation.

On the whole, courts have encountered little difficulty in assessing pecuniary damages pursuant to the principles set out in the trilogy. The economic nature of the calculation gave rise to some conjecture as to the appropriate discount rate - should it be the 7% rate used by the Supreme Court in Andrews, or should it be the rates most economists testified represented the real return on money

after inflation - 2 to 3%? It was soon settled that the figure used by the Supreme Court was not sacred, being based on the evidence before it, and that the appropriate discount rate was that indicated on the evidence before the court.[14] To avoid the necessity of calling such evidence in each case, several provinces have introduced legislation fixing the discount rate.[15]

Questions were initially raised as to the proper basis of the award for cost of care of a seriously injured plaintiff. For example, is he or she entitled to a private home with a staff to run it in all cases? Is the proper standard a detached single-family house, or are group homes or apartments adequate? It now appears clear that the test for the accomodation, equipment and care which is to be provided is whether the expenditure in question "can be used to sustain or improve the mental or physical health of the injured person."[16] The need must be established by adequate evidence; "subjective theorizing" as to the plaintiff's preferences or happiness will not suffice.[17] The type of accomodation, equipment and assistance on which the cost of care is calculated, is dependent on what the evidence demonstrates is most appropriate for the plaintiff's mental and physical health.

With respect to loss of future earning capacity, difficulty has been encountered in predicting what the plaintiff's earnings would have been had he not been injured, where he or she was not launched on a permanent

career at the time of injury. In many cases the uncertainty is so great that there seems little point in attempting a precise mathematical calculation. It now appears clear that the plaintiff need not establish loss of future earnings on a balance of probabilities - he may recover for the possibility that he might have earned more had he not been injured. However, where the award is made on the basis of a mere possibility, it must be heavily discounted for the chance that the possibility would not have been realized.[18] In such cases, the evidence typically discloses several possibilities, some more remunerative than others. It has been suggested that the best that can be done may be to look at the upper and lower financial limits of the possibilities which lay before the plaintiff at the time of his injury and on the basis of all the evidence determine a fair recompense to him or to her.[19] Depending on how certain the plaintiff's actual plans are at the time of trial, the same excercise may need to be done with respect to the earnings he or she will realize in an injured state.

While affirming the necessity of awarding full compensation, the Supreme Court stipulated certain qualifications. First, it made the obvious stipulation that overlap between the award for cost of care and the award for lost future earnings (a portion of which would have been devoted to future care had the plaintiff not been injured) must be taken into account to avoid double damages. This does not derogate from the ideal of complete compensation.

With greater difficulty and some reluctance, the

Supreme Court concluded that a deduction for contingencies must be made from the amounts awarded for future care and lost earning capacity. Such deductions had routinely been made before the trilogy. The Supreme Court put the deduction at 20% for both heads of damage, with the exception of a 10% deduction on the award for lost earning capacity in Thornton.[20]

A deduction for contingencies may reflect the possibility that had the plaintiff not been injured by the wrongdoer, he might have encountered difficulties which would have interfered with his employment or necessitated special care. It may also reflect the possibility that the plaintiff in his injured state, for reasons such as the need for hospitalization or premature death, may not require the full amount provided for his care. While a deduction can be justified on these grounds, the problem remains that if the contingencies reducing cost of care do not materialize the plaintiff may run short of money before the end of his lifetime. Alternatively, if such contingencies reduce the cost of care beyond what is foreseen, the plaintiff may be overcompensated. In the first case, the award will not prove complete, in the second more than complete.

It may also be argued that negative contingencies may be cancelled in whole or in part by positive contingencies, and that the contingency of an early death is already taken into account in the actuarial calculation of life

expectancy. It has been urged that statistically, the hefty contingency deductions which courts typically made were too high.[21]

In principle, a deduction for contingencies does not violate the ideal of complete compensation. In practice it may, because of the impossibility of accurately forecasting the future. The Supreme Court has stated that whether or not there should be a deduction for contingencies depends on the facts of each case, and recognized that contingencies are not always negative. This leaves it open to judges and juries to make whatever deduction for contingencies, if any, is justified on the evidence. While the "standard" 20% deduction remains common, in some cases little or no reduction for contingencies has been made.[22]

The Supreme Court had also to consider the impact of taxation on the award in the context of complete compensation. The award for cost of future care is calculated on the basis that sums not immediately required will be invested. The earnings on this investment will attract tax. It was argued that the amount of this tax ought to be added to the award. Similarly, the plaintiff would have had to pay tax on lost future earnings. Logically, it can be argued that the amount of such tax ought to be deducted from the award for loss of future earning capacity.

The Supreme Court in the trilogy declined to make an allowance for taxation in either case, noting the uncertainty of the amount of future taxation and the complexity of the calculations. The Ontario Court of Appeal

in Fenn et al. v. City of Peterborough et al. etc. took the view that the claims for an allowance for tax on loss of future earnings in the trilogy failed for lack of proof, concluding that on appropriately detailed evidence, such an allowance might be made.[23] Accordingly, an allowance for taxation in calculating future care costs has been made in several Ontario cases.[24] In British Columbia, on the other hand, a number of trial decisions have declined to make an allowance for the impact of future taxation, one judge commenting that there can be no distinction between tax on the award for lost earning capacity (where it appears clear that tax cannot be considered) and on the award for cost of future care.[25]

It may be argued that the best solution would be to take taxation into account on in calculating both cost of future care and lost earning capacity, thereby avoiding the anomaly of considering it in one calculation and ignoring it in the other. Such an approach would be in harmony with the principle of complete compensation. It would also bring the calculation of damages for personal injury into conformity with the calculation of damages arising from death, where taxation is considered.[26] As for the apparent complexity and uncertainty of calculations of future taxation, such experience as has been gained indicates that the calculations are not significantly more complex or uncertain than other calculations routinely made in calculating damage awards for the future.[27]

In general it can be said that the Supreme Court's emphasis in the trilogy on adequate standards of future care and the use of arithmetical calculations, coupled with the traditional concept of effecting full restitution wherever possible, has led to awards for cost of future care and loss of earning capacity which are more sensitive to plaintiffs' actual needs and losses than those computed by the former global method of assessing damages. While a few difficulties remain - most noteably the question of whether to take taxation into account in calculating the award - most problems relating to the assessment of pecuniary losses have been satisfactorily resolved.

C. Damages for Non-Pecuniary Loss

The aspect of the trilogy cases which has generated the most discussion and given rise to the greatest difficulty is their treatment of damages for non-pecuniary losses - pain, suffering, loss of amenities and loss of expectation of life.

The Supreme Court in the trilogy adopted the "functional" approach as a rationale and justification for damages for non-pecuniary losses. It also established a ceiling on such damages, known colloquially as the "hundred thousand dollar limit". These two concepts, which are not intrinsically related, have raised uncertainties and generated considerable academic discussion. In 1981, in Lindal v. Lindal,[28] the Supreme Court of Canada reaffirmed both the functional approach and the ceiling on damages.

1. The Functional Approach

Much of the confusion surrounding the functional approach stems from the imprecision of the term "functional". That term does not, it is submitted, refer to compensation for bodily or mental functions lost, as has sometimes been suggested.[29] Rather, it is clear from the trilogy and Lindal that the Supreme Court used this term to indicate a concern with the purpose which the award would serve. To Dickson J., the functional approach meant that "non-pecuniary damages should be awarded only when they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost."[30]

In Andrews, Dickson J. outlined three possible approaches to the assessment of non-pecuniary loss - conceptual, personal and functional. These approaches were drawn from Ogus, "Damages For Lost Amenities: For a Foot, a Feeling or a Function".[31]

The conceptual approach treats each faculty as a proprietary asset with an objective value. On this approach, damages for non-pecuniary loss would be assessed by estimating the extent of the plaintiff's injuries and measuring their worth by reference to comparative awards. In Andrews Dickson J. equated this approach with the ancient "bot" or tariff system, and rejected it as having long been thought "unsubtle".[32]

The personal approach departs from conceptual "tariff"

approach by emphasizing the plaintiff's individual circumstances. The question is not only what faculties, viewed objectively, the plaintiff has lost, but how he has responded to that loss. The greater the victim's sense of loss or personal suffering, the larger the award for non-pecuniary losses.

The third approach, the functional, accepts the personal premise of the second, but rather than attempting to fix an objective value for lost happiness, considers what can reasonably be done to render the plaintiff's life more tolerable and assesses damages on the basis of the cost of achieving this result. The award for non-pecuniary losses is seen as enabling the injured person to buy new pleasures in substitution for those lost. It is meant to provide solace in the sense of physical arrangements to make his life more tolerable. "Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way."[33]

At first glance, the functional approach sounds simple enough. But on closer examination, it becomes apparent that it may be applied in two ways. The first is the "strict" functional approach. On this approach, the court's only concern is with the extent to which money can serve to provide replacement pleasures and amenities to the plaintiff. To this end, evidence would be called to show the degree to which the plaintiff might benefit from various proposed amenities. The award of damages would be based

entirely on the degree to which it is established that the plaintiff can alleviate his unhappiness or loss of amenities of life previously enjoyed by purchasing substitute pleasures.[34] Since the measure of such loss is purely subjective, awards for the same physical impairment would vary greatly.

The second version of the functional approach is the comparative or "normative" functional approach.[35] This approach rests on the assumption that plaintiffs similarly injured will suffer similar amounts of deprivation and unhappiness justifying similar amounts of damages for replacement pleasures. An assessment of damages on this approach therefore begins by reference to the seriousness of the plaintiff's injuries and determination of a prima facie range of damages by comparison with what has been awarded for such injuries in other cases. This might be called, for want of a better term, a functional tariff. The court then goes on to consider whether there is evidence peculiar to the plaintiff's personal situation which establishes a greater or lesser loss and a greater or lesser need for subsitute amenities than are present in the typical case. The figure indicated initially by comparison with awards for similar injuries in other cases is adjusted accordingly.

The differences between the strict functional approach and the comparative functional approach are apparent. The strict functional approach is entirely subjective; the comparative functional approach is primarily objective and

secondarily subjective. The strict functional approach depends on evidence of the particular uses to which the award for solace will be put; the comparative functional approach assumes that given injuries of a certain gravity, a certain amount of solace or substitute pleasures are usually justified. The strict functional approach would result in a wide range of awards, depending on the circumstances of the particular case and the evidence as to substitute amenities; the comparative functional approach would foster uniformity and predictability. Finally, the strict functional approach is inconsistent with the idea of an arbitrary ceiling on non-pecuniary damages; the comparative functional approach can be more easily reconciled with a ceiling designed to ensure moderation in awards.

The comments of Dickson J. in Andrews are more easily reconciled with a comparative functional approach than with a strict functional approach. He began by stating that the award for non-pecuniary loss must "of necessity be arbitrary and conventional".[36] He went on to say that "there is great need in this area for assessability, uniformity and predictability".[37] While the court must have regard to the individual situation of the victim in determining what has been lost, the award is not founded solely on the evidence of the plaintiff's personal loss and needs - "there should be guidelines for the translation into monetary terms of what has been lost. There must be an exchange rate, albeit conventional."[38] Such awards must be moderate, limited by "a rough upper parameter" and they must be uniform across

the country.[39] All of these pronouncements indicate that comparison with other awards for similar injuries is an important aspect of the assessment of damages for non-pecuniary loss. None of them can be reconciled with a strict functional approach.

At the same time, Dickson J. emphasized the importance of personal factors which from a functional perspective may indicate a higher or lower award than that suggested by comparison with other awards for similar injuries. Both aspects are important in assessing damages for non-pecuniary loss:

> "Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for his loss, but variation should not be made merely for the Province in which he happens to live."[40]

From this it appears that a two-step process should be followed. First, a preliminary assessment of the appropriate amount of damages for the plaintiff's non-pecuniary loss is made on the basis of the type of injuries sustained and the amenities lost, by reference to conventional standards. This done, the court looks to the individual situation of the plaintiff to determine if variation is required for what he has personally lost and what will function to make up that loss. This is not the strict functional approach, where the emphasis is on needs and the only question is how money can serve to provide

substitute amenities to replace what the particular plaintiff before the court has lost. It is a modified functional approach, where the loss and need for solace are assessed first by reference to the conventional standard of what would be generally appropriate for a person having sustained the plaintiff's loss and then are adjusted as necessary for individual factors.

Lower courts took up the first part of this test - the assessment of damages by reference to a conventional standard - with gusto. Cases following the trilogy typically proceeded by assessing the seriousness of the plaintiff's injuries in relation to those for which $100,000 had been awarded in the trilogy. Gradually, a tariff developed, using quadriplegia and severe brain damage as the upper limit and scaling lesser injuries down from there.[41] All this seemed right and natural - after all, it was the same thing as the courts had been doing on the global method that preceded the trilogy.

Lower courts tended not, however, to apply the second part of the test set out in Andrews. One finds little discussion of the personal peculiarities and needs of the victim in the assessment of damages for non-pecuniary losses in post-trilogy cases. Most of these decisions compared the severity of injuries in question with those in Andrews, Teno and Thornton and left the matter there. The result was that damages were being assessed on a purely conceptual approach, ignoring the personal functional aspect of the process.

The trial decision in Lindal v. Lindal,[42] decided by

the British Columbia Supreme Court only three months after the trilogy decisions, reflects the post-trilogy tendency to emphasize the comparative aspect of the Supreme Court's test while ignoring its second branch - the particular amenities and enjoyment of life which the plaintiff has lost and what will function to make up that loss. The plaintiff, the victim of a motor vehicle accident, suffered serious physical injuries and extensive brain damage. His injuries resulted in speech impairment and a loss of muscle control in his arms, hands and legs. He became emotionally disturbed and was unable to adapt to his condition.

The trial judge awarded the plaintiff damages for non-pecuniary damages in the sum of $135,000, well over the $100,000 ceiling established by the Supreme Court in the trilogy. His grounds were that Mr. Lindal's injuries were more serious than those of the plaintiffs in the trilogy cases - he had lost more faculties and amenities and therefore was entitled to a larger award. The trial judge did not consider how the money could be used to provide substitute amenities or to assist Mr. Lindal in adapting to his loss. Had he done so, he would have probably concluded that the award should be lower than the awards in the trilogy cases, since the evidence indicated that the plaintiff could not cope with his disorders and had almost no chance of leading a happy life.

On appeal, the award was reduced to $100,000.[43] But again, no explicit thought was given to the function or use

to which the money could be put in the enhancement of Mr. Lindal's life. The Court of Appeal reduced the award because it was of the view that the plaintiff's injuries and losses were no greater than those under consideration in the trilogy. The approach was purely comparative and conceptual - not functional.

It is not surprising that when Lindal reached the Supreme Court of Canada, Dickson J. took the occasion to criticize the approaches taken by the courts below and to reaffirm the necessity of having regard to functional considerations of how the award can be used to ameliorate the plaintiff's particular situation by providing substitute amenities for non-pecuniary loss. "Money is awarded," he confirmed, "not because lost faculties have a dollar value, but because money can be used to substitute other enjoyments and pleasures for those that have been lost."[44] The trial judge "made no reference to functional considerations in making his award of $135,000 for Brian Lindal's non-pecuniary loss...He seems to have assumed that the figure of $100,000 was a measure of the 'lost assets' of the plaintiffs in [the trilogy] cases. The issue was seen as one of quantifying and comparing the losses sustained."[45] This assumption about the $100,000 limit in the trilogy cases was mistaken, Dickson J. affirmed.

> "The award of $100,000 for non-pecuniary loss in the trilogy was not in any sense a valuation of the assets which had been lost by Andrews, Thornton and Teno. As has been emphasized, these assets do not have a money value, and thus an objective valuation is impossible. The award of $100,000 was made...in order to provide more

> general physical arrangements above and beyond those directly relating to the injuries in order to make life more endurable."[46]

It has been suggested that in Lindal the Supreme Court moved from a comparative (normative) functional approach toward a strict functional approach.[47] I do not share this view. It is true that in Lindal Dickson J. emphasized the need to consider the use to which the award can be put, but this is not surprising in view of the fact that the courts below had totally ignored this crucial factor. But he gave no indication that uniformity and moderation in awards were any less important than he had earlier indicated in Andrews. On the contrary, he affirmed that the award must be to an extent "arbitrary and conventional" and approved the rough upper limit of $100,000 for non-pecuniary losses in cases of severe personal injury "as providing a measure of uniformity and predictability in this difficult area".[48]

Most importantly, Dickson J. in Lindal confirmed his statement in Andrews that in assessing damages for non-pecuniary losses the court must consider two factors - one comparative and one personal:

> "Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key..."[49]
>
> (emphasis added)

It is clear from this passage that Dickson J.'s concern was not that the courts below had considered the gravity of

the plaintiff's injuries, but rather that this was the only thing they had considered. Courts should consider the seriousness of the plaintiff's injury in determining a prima facie range of damages which would in the average case provide an appropriate amount of solace or substitute pleasure. But having done so, they must ask themselves the further question - given the personal circumstances of this plaintiff and the uses to which he can reasonably put the award to make his life more bearable, what award is justified? The answer to this second question may, in the terminology used in Andrews, require an upward or downward adjustment of the figure indicated by the first comparative step. For this reason, as Dickson J. indicates in Lindal, one cannot posit a comprehensive tariff for non-pecuniary loss; awards must vary "to meet the specific circumstances of the individual case."[50]

Further confirmation that the award for damages for non-pecuniary losses is essentially a conventional award adjusted for personal factors to ensure that it is fair and just is the Supreme Court's reaffirmation of the $100,000 limit and implicit rejection in Lindal of usefulness of detailed evidence on specific uses to which the award can be put:

> "We award non-pecuniary damages because the money can be used to make the victim's life more bearable. The limit of $100,000 was not selected because the plaintiff could only make use of $100,000 and no more. Quite the opposite. It was selected because without it, there would be no limit to the various uses to which a plaintiff could put a fund of money. The defendant, and

> ultimately, society at large, would be in the position of satisfying extravagant claims by severely injured plaintiffs."[51]

Between the time of the trilogy and the Supreme Court's decision in Lindal, lower courts ignored the personal factor and limited themselves to comparing the injuries in question with those in the trilogy. There is some indication that after Lindal, they may swing to the opposite extreme and reject any attempt to evaluate the gravity of the plaintiff's injuries in relation to those for which in the trilogy an award of $100,000 was indicated. Thus the British Columbia Court of Appeal has stated that in assessing non-pecuniary damages for less serious injuries, the comparative approach is inappropriate.[52] For this reason, it concluded that in directing a jury no reference should be made to the Andrews case or to the $100,000 limit fixed by the Supreme Court of Canada, except in cases where the injuries are "very severe" or "devastating".[53] However, as noted above, Dickson J. in Lindal did not say the comparative approach is inappropriate. He stated rather that to assess damages solely by recourse to the comparative approach, without taking into account the plaintiff's particular loss of amenities and what will function to make up for that loss, is inappropriate. Both factors are required - the comparative to ensure that awards remain moderate and reasonably uniform, the personal to ensure that the award will serve a useful purpose and that justice will be done in the individual case.

The approach to the assessment of non-pecuniary damages

indicated by the trilogy and Lindal may be summarized as follows. The rationale for such an award is functional - the award is to serve as a means of buying substitute pleasures or solace for amenities which have been lost. While the justification for the award is the use to which it can be put to provide solace for lost amenities, the amount of the award is not to be determined by reference to evidence of the cost of purchasing substitute amenities, as on a strict functional approach. Rather it is to be determined by a two-stage process. First the court determines the appropriate range of damages for the plaintiff's non-pecuniary loss on the basis of the type of injuries sustained and the amenities lost, by reference to what has been awarded in other cases. This is the comparative aspect of the award which ensures the general uniformity of awards for similar injuries across the country. Secondly, the court considers the individual situation of the plaintiff to determine if variation is required for what he has actually lost and what will function to provide solace or substitute amenities for that loss.

It was earlier seen that prior to the trilogy, courts assessed damages by reference to a conventional standard, with some consideration for the personal situation of the plaintiff. It can be argued that notwithstanding the new justification for damages for non-pecuniary losses on functional grounds, the actual method of assessing such

damages has not radically changed.[54] As before the trilogy, the court must consider the appropriate range of the award by reference to a standard tariff, and then adjust it for factors particular to the plaintiff's case. Against this, however, it must be ackowledged that the trilogy and Lindal place a greater emphasis on the subjective personal factor than did pre-trilogy decisions.[55] Furthermore, it appears that considerations as to the function or use which an award will serve figure importantly in the court's consideration of this factor. Thus where the evidence suggests that the award will not function to provide substitute amenities to make up for what has been lost, it may be reduced or even eliminated.

2. The Insentient Plaintiff

The most dramatic effect which the functional approach to the assessement of damages may have may lie in the case of the insentient plaintiff. The Supreme Court has not yet dealt directly with this issue. However, if damages for non-pecuniary losses are to be awarded only where they can serve some purpose in providing substitute benefits and improving the plaintiff's life, logic suggests that such a plaintiff be awarded nothing for non-pecuniary losses. This logic appears to have been accepted by the Supreme Court in Lindal, where Dickson J. stated:

> "The functional approach in the assessment of damages for non-pecuniary loss was adopted by the Pearson Commission in England... The commissioners stated that the main aim of any system for the award of pecuniary damages should be to make good the loss. Non-pecuniary damages should be awarded

> only when they can serve some useful purpose, for example by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost... This led the commissioners to recommend that a permanently unconscious plaintiff should not receive any damages for non-pecuniary loss since the money award could serve no useful purpose..."[56]

It follows that plaintiffs who are totally and permanently unconcsious may receive no award for non-pecuniary loss. The adjustment for personal factors indicated by application of the functional rationale negatives the award of any damages. On the other hand where the plaintiff has some awareness, it may be demonstrated that money can provide assistance or substitute pleasures. Again, if it is not demonstrated that the unconsciousness is permanent, a small award may be indicated for the possibility that the unconscious person may at some point attain a level of consciousness where substitute amenities might be of benefit.[57]

3. The $100,000 Limit

In the trilogy, the Supreme Court adopted both the functional rationale for non-pecuniary damages and the view that these damages should be limited to the current equivalent of $100,000. Logically, the two ideas may seem inconsistent. The functional approach to damages would seem to require that the plaintiff receive an award sufficient to allow him to purchase amenities to replace those lost. This is potentially in conflict with the notion that such damages should be limited. The Supreme Court recognized that the concept of functional damages could lead to unlimited

damages unless an arbitrary ceiling were imposed. To avoid this, it imposed the $100,000 limit.[58] In Lindal, the Supreme Court affirmed its commitment to a limit on non-pecuniary damages. In its view, such a limit was necessitated by concern for the social impact of the award, the fact that the plaintiff already had been granted an award for lost earnings which would have been available to purchase amenities had he not been injured, and the fact that damages for non-pecuniary loss are not truly "compensatory."[59] These circumstances, in the Court's view, dictated that the award be moderate.[60]

The $100,000 limit is not without its detractors. Some urge that it usurps the function of the jury to determine the appropriate amount of non-pecuniary damages. It has been argued that the justifications cited by the Court for the limit do not withstand close scrutiny.[61] The ceiling, it is contended, short-changes plaintiffs. On the other hand it can be argued that most jurisdictions have found it expedient to impose some limit on damages for non-pecuniary loss - it has often been observed that even in the United States where high jury awards are much publicized, courts of appeal regularly cut them drastically to conform with their notions of what is appropriate. It can further be pointed out that prior to the cases which went to appeal in the trilogy, awards of more than $100,000 for non-pecuniary damages were uncommon.[62]

Whatever the merits of the Supreme Court's limitation

on awards for non-pecuniary loss, its existence is a fact. The problem of understanding and applying it cannot be avoided. Some difficulties were cleared up in Lindal. Unfortunately, others remain.

In Andrews, the Supreme Court indicated that the $100,000 limit should be updated for inflation when applied in subsequent cases. Debate followed as to the reference date for the $100,000 ceiling. Was it the trial dates in the trilogy cases, the date at which damages are usually viewed as being fixed? Or was it the date of pronouncement of the judgments of the Supreme Court in the trilogy? In Lindal, the question was settled in favour of the date of the judgments in the trilogy. Updated from that date, the present limit is in excess of $160,000.

Another question about the operation of the limit considered in Lindal was when, if ever, the $100,000 limit can be exceeded. The Court in Andrews spoke of exceeding the limit in "exceptional circumstances". However, in Lindal it stated that the circumstances in which it should be exceeded "will be rare indeed".[63] The Court rejected the contention that the fact that Brian Lindal's injuries were arguably more serious than those under consideration in the trilogy justified an award of more than $100,000 in his case. It also rejected the idea that proof of needs in excess of the limit could justify an award in excess of $100,000.[64] Thus it appears that neither on comparative grounds nor on functional grounds can the limit be exceeded. While, as Dickson J. points out, "it would be unwise to

foreclose the possibility of ever exceeding the guideline of $100,000",[65] it is difficult to imagine circumstances in which it could be exceeded.

4. Applicability of the $100,000 Limit to Less Serious Injuries

It was earlier suggested that there are two factors to be considered in assessing damages for non-pecuniary losses under the principles enunciated in the trilogy and Lindal - (1) the appropriate range of damages by comparison with awards for similar injuries in other cases, and (2) what the particular plaintiff has actually lost and what will reasonably function to provide solace for that loss.

The critical question which must be answered is what standard should be used for the conventional aspect of the assessment? Is it a scale based on the assumption that $100,000 is the maximum award for non-pecuniary losses in the most severe cases? Or is it some other standard? To put the question another way, is the $100,000 limit relevant to the assessment of damages for less serious injuries than those before the Supreme Court in the trilogy?

The Supreme Court has not expressly stated what standard is to be used for the conventional aspect of the assessment of non-pecuniary damages. Theoretically, it is possible to conceive of a standard unrelated to the $100,000 limit. But from a practical point of view, there is much to recommend conducting the comparative aspect of the assessment of non-pecuniary damages for more minor injuries

in a manner consistent with the $100,000 limit, so as to avoid the anomaly that a person who has lost much more and who has a much greater need of substitute amenities may receive less on that account than one whose loss and need is not so great.

The Ontario Court of Appeal in Richards v. B & B Moving & Storage Limited et al.[66] rejected the idea that the trilogy established a scale by which all other personal injury cases are to be measured. The same view has recently been adopted in British Columbia.[67]

In Reynard v. Carr et al.,[68] it was suggested that the Supreme Court of Canada in the trilogy has divided the assessment of personal injury claims into two categories - those where the plaintiff is completely disabled by quadriplegia or brain damage and adequately provided for through a judgment covering his or her cost of future care and loss of income, and those who are not completely disabled. Bouck J. concluded that the $100,000 limit applies only to those in the first category. Consequently, he awarded $425,000 for non-pecuniary losses to a plaintiff who was far from totally disabled.

The Alberta Court of Appeal adopted the opposite approach in Woelk v. Halvorson, Moir J.A. stating of the trial judge's $30,000 award for lacerated spleen, undisplaced skull fracture and brain concussion:

> "It appears to me that this is a wholly erroneous estimate of the value of those injuries, considering the award in cases such as the paraplegic cases where the maximum for total loss

of amenities has been fixed at $100,000."[69]

The Court of Appeal reduced the award for non-pecuniary loss to $15,000. The Supreme Court of Canada[70] restored the trial judgment, on the ground that an appellate court should not vary an award merely on the basis that it would have come to a different conclusion than the trial judge on the evidence. The decision seems to have turned to some extent on the greater emphasis placed by the trial judge than by the Court of Appeal on the subjective aspects of the plaintiff's suffering. The Supreme Court did not, however, say that Moir J.A. was wrong in stating that damages for non-pecuniary losses for less serious injuries should be determined by comparison with the bench-mark of $100,000 for the most serious injuries. It may therefore be argued that such an approach is not invalid, provided account is also taken of the subjective and functional aspects of the case.[71]

Faced by this uncertainty, one returns to the words of the Supreme Court of Canada. While it did not deal with the matter explicitly, the Court's language suggests that subject to personal functional considerations arising in the individual case, it had in mind that $100,000 would be the award for the most serious cases, with lesser awards for less grave losses. For example, in Lindal, Dickson J. referred to the assessment of damages for non-pecuniary loss as "considering what part of the maximum should be awarded."[72] Moreover, a system of assessing damages based on two different standards for two different categories of

injuries runs counter to the Supreme Court's expressed desire to lay down a comprehensive and interlocking set of principles governing the assessment of damages for personal injuries.[73]

Whatever standard is employed, it must be borne in mind that comparison with other awards is only part of the process required to assess damages for non-pecuniary loss. In each case, the court must go on to consider the personal loss and circumstances of the plaintiff and the use to which the award can be put in alleviating his or her loss.

IV. Instructing the Jury

The Supreme Court of Canada has not had occasion to consider how a trial judge, following the principles set out in the trilogy, should direct a jury.

Little difficulty arises with respect to pecuniary losses. The jury should be instructed to award the actual pecuniary loss which it finds to have been established by the evidence, subject to discounts for overlap between heads of damages and an allowance for contingencies. Under these heads, figures presented in evidence can and should be reviewed with the jury.

More difficulty arises with respect to damages for non-pecuniary losses. It would seem obvious that the jury should be instructed as to the functional rationale for damages for non-pecuniary losses as set out in Andrews and Lindal. The jury should be told that it is impossible to put a market price on pain, suffering, loss of amenities and loss of

expectation of life, but that the law instead attempts to fix a sum which will serve, within reason, to alleviate the plaintiff's loss by providing amenities and pleasures in substitution for those which have been lost. The jury should further be told that it should consider not only the degree of the plaintiff's loss objectively viewed, but his personal loss and the ability of money, given his or her particular situation, to provide substitute amenities and pleasures for those lost. Where there is evidence that the award may not serve to provide substitute amenities and pleasures (as in the case of a plaintiff partially or wholly insentient), this should be drawn to the attention of the jury with the instruction that damages should be awarded only where they will reasonably serve a useful purpose in ameliorating the plaintiff's situation and helping to make up for his loss.

A strong case can be made that specific figures, including the $100,000 limit, should not be mentioned to the jury. It has been held in British Columbia and Saskatchewan that in cases other than very serious losses such as those under consideration in the trilogy, the $100,000 limit should not be mentioned to the jury.[74] In British Columbia, the Court, in so holding, alluded to the non-comparative nature of the award for non-pecuniary losses since Lindal.[75] In Saskatchewan, in Decorby v. Wascana Winter Club,[76] the Court of Appeal cited two reasons: first, that such a direction is not appropriate where the award is not of "the same

interlocking nature" as in the trilogy cases, i.e. where there is a large award for loss of earning capacity and cost of care; and secondly, that in any event the $100,000 limit should not be put to the jury because of the principle that the plaintiff is entitled to have his or her damages fixed by the jury without the jury being instructed as to the range of damages which the trial judge thinks is appropriate.[77]

The principle that the trial judge should not put particular figures before a jury considering an award for non-pecuniary losses was established by such cases as Gray v. Alanco Developments Ltd. et al.,[78] and Ward v. James.[79] It has been affirmed since the trilogy not only by the Saskatchewan Court of Appeal in Decorby, but by the Ontario Court of Appeal in Howes et al. v. Crosby et al.[80]

In Howes, the trial judge prefaced his opinion as to the appropriate range of the damages with the statement that judges are "beginning to respond...to what some jurors feel they would like to have to help them, and what some researchers and academics and even judges are saying ought to be given to the jury," coupled with a warning that the jury was free to totally ignore the figures proffered. The Court of Appeal, notwithstanding considerable sympathy for juries struggling with the question of damage assessment, held that to put figures before the jury is to usurp its functions. MacKinnon A.C.J.O. stated:

> "So long as we accept the jury is part of the trial system and the trier of fact in this area of law, they should be left free from the

> 'guidance'of the opinion of the particular judge as to the appropriate range for their awards, even though he makes it clear his opinion is not binding upon them."81

While the Court in Howes was not concerned with an instruction to a jury on the $100,000 limit, the conclusion of the Saskatchewan Court of Appeal in Decorby that the principle there espoused precludes instruction on the upper limit is difficult to avoid. To advise the jury of the $100,000 limit is to suggest a range for the award - something which cannot be done on the established jurisprudence - jurisprudence which does not appear to have been shaken by the trilogy.

It appears therefore that a trial judge may well be precluded in all cases from advising the jury of the $100,000 limit. If the jury returns a verdict wholly inconsistent with the limit, the trial judge (or the Court of Appeal) may be obliged to reject it. This is also, it may be replied, a usurpation of the jury's function. Nevertheless, so long as damages are assessed by juries, it may be the best that can be done.

FOOTNOTES

1. Andrews et al. v. Grand & Toy Alberta Ltd. et al., [1978] 2 S.C.R. 229; 83 D.L.R. (3d) 452; [1978] 1 W.W.R. 577; 3 C.C.L.T. 225. Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al., [1978] 2 S.C.R. 267; 83 D.L.R.(3d) 480; [1978] 1 W.W.R. 607; 3 C.C.L.T. 257. Arnold et al. v. Teno et al., [1978] 2 S.C.R. 287; 83 D.L.R.(3d) 609; 3 C.C.L.T. 272. (Citations hereafter will be to the D.L.R. reports.)

2. (H.L.)Livingstone v. Rawyard Coal Company (1880), 5 A.C. 25 at 39.

3. See Edward Veitch, "The Implications of Lindal", (1982) 28 McGill Law Journal 117 at p. 118.

4. Doxator et al. v. Burch et al., [1972] 1 O.R. 321, (Ont.H.C.) per Lieff J.

5. Ibid. Lieff J., although setting out the heads of damage, did not assign figures to each but simply arrived at an overall total. See also Hill v. The Queen, [1972] 2 O.R. 282, where the Ontario Court of Appeal increased the damages awarded to a 22-year quadriplegic from $95,000 to $200,000 with no breakdown of the makeup of the award; Jennings v. Cronsberry, [1965] 2. O.R. 285, 50 D.L.R. (2d) 385 (Ont. C.A.), per MacKay J.A.: "...the better course to be followed by a Judge sitting without a jury, is to state the heads of damages to which he has given consideration in fixing the general damages awarded in order that there may be no doubt that he has taken into consideration all relevant factors, but not to allocate specific amounts of money under each heading." While the practice of breaking down damages into component parts increased in the 1970's, as late as 1976, courts were giving global awards without allocating specific amounts of damages to specific heads: see for example Earl v. Bourdon, unreported, B.C.S.C., June 5, 1975; Baumgartner v. Schneider, unreported, Sask. Q.B. April 30, 1976; Yorke v. LeBlanc, unreported, N.S.S.C., November 24, 1976; Shroth v. Innes (1976), 71 D.L.R. (3d) 647 (B.C.C.A.).

6. The arithmetical method may be contrasted with the multiplier method (used in England) and the annuity method. It consists of two parts: the use of arithmetical calculations and the acceptance of statistical data as a basis for those calculations. These concepts were accepted prior to the trilogy: see, for example, Bisson v. Powell River (1968), 66 D.L.R. (2d) 226 (B.C.C.A.), affirmed without written reasons 68 D.L.R. (2d) 765n (S.C.C.); Shroth v. Innes, ibid.(B.C.C.A.). However, in the aftermath of Mitchell v. Mulholland (No.2), [1972] 1 Q.B. 65, [1971] 2 All E.R. 1025 (C.A.), which criticized reception of actuarial evidence, Canadian courts frequently expressed reservations about the use of arithmetical calculations:

calculations: Shroth v. Innes at p. 238; Andrews (1976), 64 D.L.R.(3d) 663 at p. 694, per McGillivray C.J.A.; Thornton (1977), 73 D.L.R. (3d) 35 at p. 45 per Taggart J.A.. See also Earl A. Cherniak, Q.C. and Mary Anne Sanderson, "Tort Compensation -- Personal Injury and Death Damages", L.S.U.C. Lectures, 1981, New Developments in the Law of Remedies 197 at pp. 199 - 203.

7. While there is little doubt that courts did consider the individual circumstances of the plaintiff in determining damages for non-pecuniary loss prior to the trilogy, it is difficult to find a case specifically articulating that proposition. The editors of Halsbury's Laws of England (4th ed.), Vol. 12, para. 1147 seem to have made the same discovery.

8. Prior to the cases which came before the Supreme Court of Canada in the trilogy, awards for the most serious injuries ranged for the mostpart between $100,000 and $225,000. See Amile v. Holland, unreported, December 14, 1972, (B.C.S.C.) - 125,000; Oman v. Public Trustee, [1973] 2 W.W.R. 577 (Alta. S.C.) - $140,000; Barkhouse v. Vanderploet (1976) 16 N.S.R. (2d) 445 (N.S.C.A.) - $125,000; Cyr v. Bon Accord Enterprises Ltd. (1974), 9 N.B.R. (2D) 369 (N.B.S.C.) - $175,000; Gordon v. Johnson, unreported, July 18, 1973 (B.C.S.C.) - $200,000; Loomis v. Rohan, [1974] 2 W.W.R. 599 (B.C.S.C.) - $165,000; Earl v. Bourdon, unreported, June 5, 1975 (B.C.S.C.) - $160,000; Baumgartner v. Schneider, supra, footnote 5 (Sask. Q.B.) - $130,000; Yorke v. LeBlanc, unreported, November 24, 1976 (N.S.S.C.) - $104,600; Shroth v. Innes, supra, footnote 5 (B.C.C.A.) - $225,000; Hill v. The Queen, supra, footnote 5 (Ont. C.A.) - $200,000.

9. Bisson v. Corporation of Powell River, supra, footnote 6. At trial damages were assessed at $186,800, reduced by 20% for contributory negligence. The Court of Appeal, (1967), 62 W.W.R. 707 at p. 713, noting counsel's statement that this was the largest award of damages for personal injury ever given in a Canadian or English court, reduced the award by $90,000. An appeal and cross-appeal from this decision were dismissed by the Supreme Court of Canada.

10. Supra, footnote 1 at p. 479 (D.L.R.).

11. Schmidt v. Sharpe, unreported, Ont. H.C., July 14, 1982, No. 5248/81 - $1,886,150; Borbely v. Mryglod (1981), 9 Sask. R. 61 (Sask. Q.B.) - $1,266,742; Nash v. Olsen, unreported, B.C.S.C., December 4, 1981, Vancouver Reg. No. B781010 - $1,472,056.

12. Supra, footnote 1 at p. 462.

13. Andrews, ibid., at p. 475; Lindal v. Lindal, [1981] 2 S.C.R. 629; 129 D.L.R. (3d) 263; [1982] 1 W.W.R. 433; 34 B.C.L.R. 273; 19 C.C.L.T. 1, (citations hereafter to the

D.L.R. report).

14. In MacDonald v. Alderson et al., [1982] 3 W.W.R. 385 (Man. C.A.) (leave to appeal to S.C.C. denied), Huband J.A. at pp.412-413 summarized the view of the courts in post trilogy cases on the appropriate discount rate as follows: "The estimates of 3 1/2 % (for inflation) and 10 1/2 % (for interest) are no longer realistic. Judges have been persuaded, on the strength of evidence presented by economists who venture to prophesy the future, to decrease the net discount rate (and thus markedly increase damages). Judges have also been persuaded to make a distinction between wage-related and non-wage-related items - applying an even lower net discount rate to the wage-related items, on the theory that the inflationary rate for wages will increase faster than the inflationary rate for prices."

15. In Ontario, Nova Scotia and British Columbia, the net discount rate is prescribed by legislation. See Ontario Rules of Practice, Rule 267a (2 1/2 %); Law and Equity Act, R.S.B.C. 1979, ch. 224, s.5, giving the Chief Justice the power to prescribe rates (currently 3 1/2 % on non-wage related items and 2 1/2 % on wage-related items). For a criticism of the practice of discounting, see Bale, "Adding Insult to Injury: The Inappropriate Use of Discount Rates to Determine Damage Awards", 1983, 28 McGill Law J. 1015.

16. Andrews, supra, footnote 1, p. 462.

17. MacDonald v. Alderson et al., supra, footnote 14, at pp. 405, 419.

18. Clark v. Kereiff (1983), 43 B.C.L.R. 157 (B.C.C.A.); see also Conklin v. Smith, [1978] 2 S.C.R. 1107, 88 D.L.R. (3d) 317, 6 B.C.L.R. 362, 5 C.C.L.T. 113, 22 N.R. 140.

19. Clark v. Kereiff, ibid.; Sandquist v. Guiel, unreported, June 20, 1984, Vancouver Registry No. C821061 (B.C.S.C.).

20. In Andrews, a 20% deduction for contingencies was made from both the awards for loss of earning capacity and cost of future care. In Thornton, deductions of 20% from the award for cost of future care and 10% from the award for lost earning capacity were upheld. In Teno, a deduction of 20% from the award of lost earning capacity was made. In the post-trilogy decision of Lewis v. Todd (1980), 115 D.L.R. (3d) 257 at pp. 271-272, the Supreme Court, per Dickson J.confirmed that the court must attempt to evaluate the probability of the occurance of the stated contingency, using actuarial evidence where applicable.

21. J.H. Prevett, "Actuarial Assessment of Damages: The Thalidomide Case I" (1972), 35 Modern L. Rev. 140, stated that statistically the deduction for unemployment, sickness and disability, should not exceed 2%. Deductions for

contingencies in Canada prior to the trilogy ranged as high as 37%.

22. In some post-trilogy cases, deductions for contingencies have been small or nil: Fenn v. City of Peterborough (1979), 25 O.R. (2d) 399 (Ont. C.A.) at 457 (no deduction); Lewis v. Todd (1980), 115 D.L.R. (3d) 257 (S.C.C.) (10% deduction); Weare v. Anthony (1981), 47 N.S.R. (2d) 411 (N.S.C.A.) (no deduction). In Lewis v. Todd, supra, footnote 20, (S.C.C.), a trial judge's deduction of less than 10% was restored. It has been stated that the "standard" 20% deduction for contingencies is maximum and not automatic: Penso v. Solowan et al. (1982), 35 B.C.L.R. 250 (B.C.C.A.) at p.255 per Anderson J.A. See however, Lan v. Wu, [1981] 1 W.W.R. 64 (B.C.C.A.) where a 20 % reduction for contingencies was made from an award for loss of future earning capacity, reversing the trial judge who had declined to make any deduction for contingencies in the absence of evidence to show that the plaintiff's future might have been worse rather than better had he not been injured.

23. Ibid., at p. 456.

24. Julien v. Northern & Central Gas Corp. Ltd. (1980), 118 D.L.R. (3d) 458; Schmidt et al. v. Sharpe et al., unreported, Ont. S.C., July 22, 1983, No. 5248/81.

25. Malat et al. v. Bjornson et al. (1980), 19 B.C.L.R. 28, (B.C.S.C.); Leischner v. West Kootenay Power & Light Co. Ltd. et al., unreported, B.C.S.C., December 8, 1981, Kelowna Reg. No. 34/75, per Spencer J., noting that he saw no distinction between an allowance for impact of income tax on income to be earned on an award for the provision of future care, and an allowance of such tax on an award to replace lost earning capacity; Mandzuk v. Vieira et al., unreported, B.C.S.C., Van. Reg. No. B812073. It appears that it is not open to courts at present to make a deduction for taxation from loss of earnings because of the ruling to that effect in R. v. Jennings, supra, footnote 5, (sub nom. Jennings v. Cronsberry); affirmed [1966] S.C.R. 532, 57 D.L.R. (2d) 644, which the Supreme Court did not disturb in the trilogy.

26. Kaiser v. Hannah (1978), 82 D.L.R. (3d) 449 (S.C.C.) at p. 462. The disparity is made more glaring by the comment of Dickson J. at p. 462 that the "proper method of calculating the amount of a damage award under the Fatal Accidents Act is similar to that used in calculating the amount of an award for loss of future earnings, or for future care, in cases of serious personal injury."

27. The evidence of the impact of future taxation frequently takes the form that it will be necessary to "gross up" the award for cost of future care by a stipulated percentage to provide for the impact of future taxation. See, for example, Schmidt et al. v. Sharpe et al., supra,

footnote 24.

28. Lindal v. Lindal, supra, footnote 13.

29. See, for example, Reynard v. Carr et al. (1983), 50 B.C.L.R. 166 (B.C.S.C.) at p. 191, where the functional method is defined as "compensating the precise functions actually lost."

30. Ibid., at p. 476.

31. (1972), 35 Modern L. Rev. 1.

32. Andrews, supra, footnote 1 at p. 476.

33. Ibid.

34. Lewis N. Klar, "Developments in Tort Law: The 1981-82 Term", (1983), Supreme Court Law Rev. 273 at p. 284 ff.

35. Philip H. Osborne, "Annotation, Lindal v. Lindal", 19 C.C.L.T. 3 at p. 9; Cooper-Stevenson and Saunders, Personal Injury Damages in Canada, (1981), at p. 373.

36. Andrews, supra, footnote 1 at pp. 475, 477.

37. Ibid., p. 477.

38. Ibid.

39. Ibid.

40. Ibid.

41. Klar, supra, footnote 34 at pp. 279, 280.

42. [1978] 4 W.W.R. 592, 5 C.C.L.T. 244 (B.C.S.C.).

43. 115 D.L.R.(3d) 745, 25 B.C.L.R. 381, [1982] 1 W.W.R. 419 (B.C.C.A.).

44. Supra, footnote 13 at p. 269.

45. Ibid. at p. 273.

46. Ibid. at pp. 273, 274.

47. Osborne, supra, footnote 35 at p.5.

48. Supra, footnote 13 at p. 272.

49. Ibid. at p. 270.

50. Ibid.

51. Ibid. at p. 274.

52. Penso v. Solowan, supra, footnote 22, suggesting however at p. 260 that for less serious injuries the conventional approach should prevail; Bracchi v. Horsland (1983), 147 D.L.R.(3d) 182 (B.C.C.A.); Black et al. v. Lemon et al., unreported, B.C.C.A., November 25, 1983, Vancouver Registry, CA 810874.

53. Bracchi v. Horsland, ibid., at p. 185.

54. Klar, supra, footnote 34 at p. 284.

55. Supra, footnote 7.

56. Lindal, supra, footnote 13 at p. 271.

57. It is now established that damages may be recovered not only on account of losses and needs which the evidence shows will probably be incurred in the future, but for the possibility of future losses and needs: see D.B. Kirkham, "Proof of Future Loss: Probabilities and Possibilities" (1984), 42 Advocate 21.

58. Lindal, supra, footnote 13 at p. 274.

59. These factors are set out in Lindal, ibid. at pp.271-272. In stating an award for non-pecuniary loss is not really compensatory, the Court presumably meant that its purpose is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value.

60. Ibid. at pp. 271, 272.

61. Brodsky, "A Ceiling On Damages", (1982) 40 Advocate 235 at p. 236.

62. Lindal, supra, footnote 13 at p. 274. Many cases, because of the global approach, did not segregate damages for non-pecuniary losses. However, where this was done, the awards tended to be less than $100,000, with the exception of lower court judgments in the trilogy cases and others decided about the same time. For example, in Bisson, supra, footnote 6, (1967) an award of $50,000 for non-pecuniary losses for quadriplegia was upheld by the Supreme Court of Canada; in Loney v. Voll et al.,[1974] 3 W.W.R. 193 (Alta. S.C.) an award of $70,000 was made for a plaintiff with not dissimilar injuries.

63. Ibid.

64. Ibid.

65. Ibid.

66. Unreported, June, 1978.

67. Bracchi v. Horsland, supra, footnote 52; Reynard v. Carr et al., supra footnote 29.

68. Ibid., at pp. 194,195.

69. Woelk et al. v. Halvorson, [1980] 1 W.W.R. 601, C.C.L.T. 152, 106 D.L.R.(3d) 726 (Alta. C.A.).

70. [1980] 2 S.C.R. 430, [1981] 1 W.W.R. 289, 14 C.C.L.T. 181, 33 N.R. 232, 24 A.R. 620, 114 D.L.R. (3d) 385 (S.C.C.).

71. But see Penso v. Solowan, supra, footnote 22, at p. 258 per Anderson J.A., drawing the opposite conclusion.

72. Supra, footnote 13 at p. 270.

73. Andrews, supra, footnote 1, at p. 476; Lindal, supra, footnote 13 at pp. 270-271.

74. Bracchi v. Horsland, supra, footnote 52; Decorby v. Wascana Winter Club, [1980] 3 Sask. R. 96.

75. Bracchi, ibid., at p. 185.

76. Decorby, supra, footnote 75 at p. 100.

77. Ibid, at pp. 100 - 101, 110.

78. (1967), 61 D.L.R. (2d) 652; [1967] 1 O.R. 597 (Ont. C.A.).

79. [1965] 1 All E.R. 563 at p. 575 (C.A.).

80. Unreported, March 8,1984 (Ont. C.A.).

81. Ibid.