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Non-Pecuniary Damages: Defined, Assessed and Capped

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Résumé

La perte non pécuniaire est, en common law, une perte immatérielle et qui n'a aucune valeur marchande. En droit civil, l'on parle communément de perte extra patrimoniale. Il s'agit d'une atteinte à l'intégrité physique d'un individu qui n'a aucune incidence sur le patrimoine de ce dernier. Au fil des ans, au Canada, différentes approches ont été envisagées dans les poursuites pour blessures corporelles afin d'évaluer les dommages non pécuniaires. La trilogie de la Cour suprême du Canada a levé l'incertitude quant à l'approche à retenir pour ces dommages en common law. Malgré les difficultés inhérentes à leur évaluation, les tribunaux canadiens se sont entendus sur l'approche à adopter et sur le plafond à imposer à ce chef de dommages lors de poursuite pour blessures corporelles

Abstract

Non-pecuniary loss is, in common law terms, a loss which is intangible and which lacks market value. Commonly referred to in civil law as extrapatrimonial loss, it is defined as an attack on one's physical integrity which has no effect on one's patrimony. Different approaches towards assessing the right to non-pecuniary damages have been applied over the years to personal injury suits in Canada. The Supreme Court of Canada trilogy removed the uncertainty as to the appropriate approach to be adopted for non-pecuniary damages in common law personal injury suits. Despite the difficulty inherent in the assessment of non-pecuniary damages, therefore, the courts in Canada have come to a consensus with regard to the approach to be taken and the upper limit to be imposed

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en common law. Même si ces principes ont provoqué une certaine controverse chez des auteurs et des juges, ils ont également été appliqués au Québec par la Cour supérieure et la Cour d'appel dans des poursuites pour blessures corporelles. Il en résulte donc une situation similaire tant en common law qu'en droit civil.

Ces développements en matière de dommages non pécuniaires ne peuvent être accueillis sans critique. Le plafond imposé semble incompatible avec l'approche fonctionnelle adoptée par la Cour suprême, qui cherche à offrir à la victime de blessures corporelles une consolation pour ses malheurs. En outre, même si l'établissement de ce plafond crée une certaine injustice à l'égard des victimes de blessures corporelles par rapport aux victimes de diffamation dont les indemnités ont continué d'augmenter parfois même au-delà du plafond établi par la Cour suprême, cette dernière a refusé de fixer un plafond pour les dommages moraux dans les cas de diffamation.

under this head of damage in common law personal injury suits. Although they have created some controversy among authors and some judges, these principles have even been applied to personal injury cases in Quebec by both the superior and appeal courts. The end result is thus similar in both common law and civil law cases in terms of the awards for non-pecuniary damages.

These two developments in personal injury law in Canada cannot, however, be accepted without criticism. It appears that this upper limit is incompatible with the functional approach, adopted by the Supreme Court, which seeks to provide the victim of personal injury with solace for his misfortune. Moreover, while these policies may have resulted in an unjust situation in that awards for defamed victims continue to soar in some cases to exceed the upper limit of the Supreme Court for non-pecuniary awards in personal injury cases, the Supreme Court has continued to reject an upper limit for moral damages in defamation cases.

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The problem of the assessment of non-pecuniary damages has long been contemplated by authors writing in this area and even more so by the courts across Canada. Judges are faced with the task of attributing a sum of money to the loss experienced by victims of personal injury. Several approaches have surfaced in order to facilitate the evaluation of non-pecuniary loss under this particular head of damages in personal injury cases, their application varying in common law and civil law jurisdictions¹.

Prior to the Supreme Court of Canada's trio of cases, commonly referred to as the trilogy², no consensus existed as to which approach would be uniformly applied to the assessment of non-pecuniary damages in common law personal injury suits. The trilogy cases represent the Supreme Court's decision to apply one particular approach in the evaluation of these damages, namely, the functional approach. At the same time, the Court implemented a rough upper limit of \$100 000 for non-pecuniary damages, not to be exceeded except in exceptional circumstances. The upper limit was not, however, formally adopted by the Supreme Court for the evaluation of non-pecuniary damages in civil law cases³.

The first part of the following article will examine the notion of non-pecuniary damages in common law and civil law, the difficulty inherent in the assessment of non-pecuniary damages, the approaches to the evaluation of these damages, and the impact of the approaches adopted by the courts on the non-pecuniary damage awards for the unconscious plaintiff. The second portion of this paper will discuss the upper limit imposed by the Supreme Court of Canada for non-pecuniary damage awards in common

¹ These approaches were developed for the purposes of evaluating non-pecuniary loss in personal injury cases. Whether these approaches will be applied to defamation cases has yet to be determined by the courts.

² *Andrews v. Grand Toy Alberta*, [1978] 2 S.C.R. 228 [hereinafter *Andrews*]; *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287.

³ See, however, Justice Lamer's dissidence in *Snyder v. Montreal Gazette*, [1988] 1 S.C.R. 494 [hereinafter *Snyder*] and *Augustus v. Gosset*, [1996] 3 S.C.R. 268.

law personal injury suits, the repercussions it has had on civil law cases in Quebec, the reactions of both the courts and authors to the imposition of such a cap, as well as a criticism of the decision to cap these awards. The refusal to implement an upper limit for defamation will be discussed as part of the criticism of the decision to limit the size of the awards for non-pecuniary damages in personal injury suits.

I. The Concept of Non-Pecuniary Damages and their Assessment

A. The Definition and Subheadings of Non-Pecuniary Damages

1. Common Law

Non-pecuniary loss is an intangible loss which is incommensurate with money or lack market value. This particular form of loss may consist of physical and or mental impairment, pain and suffering, the inability to participate in activities once enjoyed, and in some cases, a shortened life-span⁴. Present and future physical and mental pain and suffering, various deprivations grouped under the loss of faculties and loss of enjoyment of life, and the loss of expectation of life, fall under the heading of non-pecuniary losses for the purposes of assessing the damages incurred by an individual.

In order to simplify the evaluation of non-pecuniary damages, its possible elements are divided into subheadings of non-pecuniary loss. The first of these subheadings is pain and suffering. It refers to the sum of the emotional distresses which victims experience as a result of the personal injury they endured⁵. Although it has been long established that both past and prospective pain and suffering are to be compensated, the recovery for past distress has always been debatable. According to Ogus, no

⁴ Kenneth COOPER-STEPHENSON and Iwan SAUNDERS, *Personal Injury Damages in Canada* (Toronto: Carswell, 1981), at p. 341.

⁵ *Id.*

real criterion for measurement of non-pecuniary damages exists since there is no method of objectively assessing pain⁶.

Loss of amenities, the second subheading of non-pecuniary losses, is described as the physical disability sustained by victims as a result of the accident, and the effect of that disability on the scope of their activities⁷. It addresses both the injury itself and its impact on the plaintiff's enjoyment of life. Although it is disputable as to whether compensation should be awarded for past loss of amenities, traditionally both past and future anguish over lost amenities have been compensated.

The last subheading of non-pecuniary loss, the loss of expectation of life, refers to a complete loss of pleasure of living during the period the victim would have lived if not for the accident. This can be divided into two aspects: the objective aspect, consisting of the loss of life itself, and the subjective aspect, involving the anguish experienced in apprehension of that loss⁸.

2. Civil Law

The concept of non-pecuniary damages, as described above, allows for a general understanding of its meaning in terms of common law. Although the concept of non-pecuniary loss as defined in civil law is similar to its common law counterpart, its examination enables a more complete appreciation of the substance of this form of damages.

Civil law, commonly referring to non-pecuniary damages as extrapatrimonial loss, defines this form of damages as an attack on one's physical integrity which has no effect on one's patrimony⁹. In other words, there is no effect on the economic and professional activities of the victim and, therefore, no negative impact on the person's ability to work and produce gains and profits. These damages are thus said to generate no material damage

⁶ Anthony I. OGUS, *The Law of Damages* (London: Butterworths, 1973), at p. 194.

⁷ K. COOPER-STEPHENSON and I. SAUNDERS, *op. cit.*, note 4.

⁸ *Id.*

⁹ Robert ANDRÉ, *La réparation du préjudice corporel* (Bruxelles: E. Story-Scientia, 1986), at p. 239.

(harm to one's reputation can also cause economic loss). They include the sufferance, harm or injury caused to one's reputation and honor, disgraces and physical deformities, suppression of pleasures and satisfactions which life can provide to those who are mentally and physically healthy, and frustrations of all kinds¹⁰. This idea is clearly summarized by Nadeau and Nadeau in *Blanchet v. Corneau*:

*Le préjudice moral est celui que subit une personne non plus à strictement parler dans ses biens ou son patrimoine, mais dans sa personne même. Ainsi, les dommages causés à la réputation ou à l'honneur d'une personne, sans même qu'on puisse leur assigner une portée pécuniaire exacte, mathématique, sont des dommages moraux.*¹¹

There have been discussions to the effect that as long as the victim is aware of the extrapatrimonial damages, there is almost no restriction to the judge's power to recognize the existence of these damages. The necessity of the victim's consciousness of sufferance was expressed by Jutras, in his discussion of extrapatrimonial loss in civil law¹². According to Jutras, there are two natures of extrapatrimonial loss. Firstly, it is exclusively subjective in the sense that it exists only when it is experienced. An unconscious victim would, therefore, have no basis for a claim under this head of damages. Secondly, Jutras referred to the visible and tangible character of extrapatrimonial prejudice. He argued that it is not sufficient to compensate the victim for the patrimonial consequences and the moral and physical pain caused by the injury. Compensation is due for the objective loss of a limb or faculty in function of the exterior signs and facts causing the suffering. Much controversy existed, however, as to whether an objective or subjective approach to extrapatrimonial loss should be adopted in civil law. It, therefore, remained ambiguous as to which of the two views is applicable:

*On trouve donc dans le droit québécois, côte à côte, des décisions qui retiennent la composante objective du préjudice extrapatrimonial, et d'autres qui l'écartent.*¹³

¹⁰ *Id.*

¹¹ *Blanchet v. Corneau*, [1985] Sup. Ct. 299, 307.

¹² Daniel JUTRAS, "Pretium et précision", (1990) 69 *Can. Bar Rev.* 203.

¹³ *Id.*, 222.

Jutras clearly opted for the subjective approach, stressing that an objective approach leads to an “in abstracto” appreciation of the indemnity and in turn, application by the judge of statistical methods. This method of appreciation must be avoided, according to Jutras, since the decisional process “a plus d’affinités avec l’art qu’avec la production automatisée.”¹⁴

Various justifications exist, in civil law, for compensating extrapatrimonial prejudice. Jutras emphasized the fact that it is better to allocate a sum of money than to do nothing at all to compensate the victim, even if monetary compensation cannot erase the prejudice. Wery expressed the same view in stating the following:

*L’âme est le bien le plus précieux et il serait barbare pour toute société de ne pas le reconnaître en faisant en sorte qu’elle ne puisse être protégée.*¹⁵

The provision of indemnification reflects the importance assigned to physical integrity, since in our society, money is the measure of value. Secondly, corrective justice is viewed as the best justification for the compensation of these damages. The compensatory and punitive goals of responsibility are to be viewed together and not separately. The sanction imposed is considered to be satisfactory if it permits the victim to obtain consolation and pleasures which, to a certain extent, replace what he has lost. The possible justifications for awarding non-pecuniary damages are, therefore, crucial.

The Supreme Court of Canada, in *Quebec (Public Curator) v. Syndicat National des Employés de l’Hôpital St-Ferdinand*¹⁶ put an end to this uncertainty:

The current law, case law and literature on this question in Quebec support the second conception, that is, that the right to compensation for moral prejudice is not conditional on the victim’s ability to profit or benefit from monetary compensation [...] Preference should, therefore, be given to the objective characterization of moral prejudice in Quebec;

¹⁴ *Id.*, 232.

¹⁵ André WERY, “L’évaluation des dommages non pécuniaires résultant des blessures corporelles : du pragmatisme de l’arbitraire?”, (1986) R.R.A. 355.

¹⁶ [1996] 3 S.C.R. 211, 243.

this is much more consistent with the fundamental principles of civil liability.

Non-pecuniary damages are thus recognized independent of the victim's awareness of this loss.

B. The Inherent Difficulty in the Assessment of Non-Pecuniary Damages

In order to obtain an overall appreciation of what non-pecuniary damages consist of in both common law and civil law, it is important to recognize the great difficulty involved in assessing these losses. The nature of these damages itself is at the root of this apparent challenge faced by judges called upon to evaluate the extent of compensation under this particular form of damages. Unlike material or economic damages, non-pecuniary damages cannot be compensated solely based on the principle *of - restitutio in integrum*¹⁷. In order to appreciate the difficulty encountered in evaluating these damages, several reasons at the core of this problem will be examined.

Authors writing on the subject of non-pecuniary damages have long alluded to the dilemma this head of damages gives rise to in terms of their assessment. Ogus discusses this problem inherent to non-pecuniary damages:

*A man who is physically injured in an accident will generally lose more than merely pecuniary advantages. He may lose the function of a part of his body. He may be permanently or temporarily disfigured. He may have experienced pain and suffering. His enjoyment of life may be impaired by the consequences of his injuries. The task of compensating these aspects of personal injuries is highly problematical.*¹⁸

Compensation on a restitutionary basis is impossible in terms of non-pecuniary damages, since the court cannot command the defendant to restore the victim's eye, leg, or any other lost member¹⁹. Furthermore, the pain and suffering endured by the victim cannot be erased, nor can years be added to compensate for a

¹⁷ *Snyder, supra*, note 3.

¹⁸ A.I. OGUS, *op. cit.*, note 6.

¹⁹ *Id.*

shortened life. In *Lindal v. Lindal*²⁰, Justice Dickson emphasizes the fact that only a limited application of the principle of *restitutio in integrum* is possible for non-pecuniary loss. Not only are lost limbs or a lost mind not possessions capable of being valued in monetary terms, but pain and suffering cannot be eliminated, nor can brain damage be repaired. He states that,

*it is fruitless to attempt to put a dollar value on the loss of a faculty in the way that we put a dollar value on the loss of a piece of property.*²¹

The greatest difficulty in the evaluation of non-pecuniary - damages, therefore, resides in the impossibility of applying the theory of complete restitution as applied in the case of pecuniary damages. This difficulty is just as prevalent in defamation cases:

*Rien n'est plus difficile à évaluer que le préjudice moral subi par la victime d'une diffamation. Les tribunaux doivent se contenter d'une évaluation approximative dans l'établissement de ces dommages.*²²

This inapplicability of the principle of complete restitution explains the view expressed in *Andrews v. Grand Toy Alberta*²³, part of the Supreme Court trilogy, that the evaluation of non-pecuniary damages is more of a policy and philosophical exercise than a logical or legal one. Consequently, the award must be fair and reasonable, fairness being measured according to previous judgements, but the sum awarded must also be essentially arbitrary or conventional²⁴. Since no "objective yardstick" exists for gauging non-pecuniary damages into monetary value, this form of damages is characterized by vastly lavish claims. According to *Andrews*²⁵, the social burden of large awards must be of considerable importance when assessing the amount to be awarded under this particular head of damages. This observation is what led to the Court's conclusion that since non-pecuniary damages is the area where the risk of an excessive burden of expense is most

²⁰ [1981] 2 S.C.R. 629 [hereinafter *Lindal*].

²¹ *Id.*, 636.

²² *Blanchet v. Corneau, supra*, note 11, 305.

²³ *Supra*, note 2.

²⁴ *Id.*

²⁵ *Id.*

significant, it is in turn the domain where there is the clearest grounds for moderation²⁶.

Although the Supreme Court views the evaluation of non-pecuniary damages as more of a philosophical dilemma, Klar²⁷ perceives it otherwise. As a result of the courts' decision to entitle a person to a sum of money for the loss of amenities of life suffered because of the injuries in addition to his entitlement to pecuniary damages, the problem of assessing these damages is a jurisprudential one. It is thus the responsibility of the courts to "clearly delineate the purpose and objective of such an award, and apply that reasoning to their actual decisions in individual cases."²⁸ In all evidence, the assessment of non-pecuniary damages has generated what seems like a continuous and profound perplexity. As will be noted in the following section reviewing the approaches to non-pecuniary damages, different justifications for these damages emerge depending on the approaches adopted. These approaches not only serve to justify non-pecuniary damages, but purport to evaluate this form of loss. Consisting of namely, the conceptual, the personal and the functional approach, each views non-pecuniary damages in a distinctive light.

C. The Common Law Approaches to the Evaluation of Non-Pecuniary Damages

1. A Historical Perspective on the application of the Approaches

The Supreme Court of Canada, in what is referred to as the "trilogy", established the functional method as the appropriate approach in the assessment of non-pecuniary damages in common law personal injury suits. This new stance of the Supreme Court has not, however, been embraced free of criticism by neither authors nor the courts. Before examining the content of the post trilogy approach, the quantification of non-pecuniary dam-

²⁶ *Id.*

²⁷ Lewis N. KLAR, "The Assessment of Damages for Non-pecuniary Losses", (1978) 5 *C.C.L.T.* 262.

²⁸ *Id.*, 264.

ages prior to *Andrews*²⁹ will be reviewed in order to observe the evolution of the assessment of non-pecuniary damages in Canada.

a. The Approach Applied to Non-Pecuniary Damages Prior to the Andrews Decision

Prior to the judgement in *Andrews*³⁰, the quantification of non-pecuniary loss was accomplished by applying two of the three approaches previously described. The subheading of pain and suffering was evaluated according to the conceptual approach³¹. The plaintiff was compensated for the loss of freedom from pain and suffering, viewed as an asset under this method. Factors which proved important in the assessment of damages were the extent and the duration of the anguish. Since there is really no method of objectively evaluating pain, however, the Court's main consideration was the sums attributed in previous cases similar to the one under consideration.

In terms of lost amenities, again, the method applied for the assessment was the conceptual approach. The plaintiff was viewed as having lost assets such as a damage-free body, and the ability to do the things he had done in the past, prior to the onset of his injuries. Finally, the personal approach was the mode of evaluation for the loss of expectation of life. Compensation was given for the unhappiness experienced, for the distress suffered due to the early shortening of life, or for the amount of happiness relinquished by the victim during the lost years. The Supreme Court did, however, recognize the objective loss of life³².

²⁹ *Andrews, supra*, note 2.

³⁰ *Id.*

³¹ K. COOPER-STEPHENSON and I. SAUNDERS, *op. cit.*, note 4.

³² See *Crosby v. O'Reilly*, [1975] 2 S.C.R. 381, [1955] 2 S.C.R. 177.

b. The Approach Applied to Non-Pecuniary Damages in the Andrews Decision and in Judgements to Follow

Following the judgement in *Andrews*³³, the search for solace through the acquisition of goods and services became the aim of the compensation of non-pecuniary damages in accordance with the functional view. Damages are now evaluated on the basis of the sum of money with which the plaintiff can be provided with reasonable solace. The decision confirms that in the case of pecuniary loss the principle of complete compensation prevents the consideration of the social burden of the award. On the other hand, in the case of the assessment of non-pecuniary damages, the social burden of the award is a factor to be considered. Finally, *Andrews*³⁴, as well as the other trilogy cases, maintains that the heading of non-pecuniary loss essentially compensates for a single loss, being mental distress, and, therefore, adopts a global sum as the method of distributing the award.

Several guidelines concerning the employment of the functional approach can, however, be discerned from the trilogy³⁵. Firstly, compensation is provided for non-pecuniary damages based on the use it can provide. Moreover, the likelihood of bettering the plaintiff's situation and the severity of the injuries suffered will establish the amount awarded for the non-pecuniary damages incurred. Finally, the sum awarded should be modest since the victim has already received indemnification for the pecuniary losses he assumed as a result of the injury and because the award for non-pecuniary damages is not compensatory in nature.

In 1981, just three years following the trilogy decisions, the Supreme Court in *Linda*³⁶, refined the functional approach established in the trilogy. One implication of this case is that the damage to the victim's limbs or faculties will be claimed in light of

³³ *Supra*, note 2

³⁴ *Id*

³⁵ Guy GILBERT, "L'évaluation du préjudice par blessures et décès", (1987) 47 *R. du B.* 3.

³⁶ *Supra*, note 20.

the expenses assumed to replace the lost use and pleasure³⁷. Another consequence revealed in this case is that counsel will be asked to make arguments for considerable compensation for the loss of expectation of life. The victim's age, prospects before the onset of the injuries, and possibilities taking into account his new situation are the factors to be considered in the assessment of non-pecuniary damages. On the other hand, the factors considered to be irrelevant to the evaluation of non-pecuniary damages include sympathy for the victim, punishment of the defendant, social status, income level, and assets of the victim, and the sex of the victim. In terms of the ramifications for the unaware plaintiff, it can be argued, based on the functional approach, that since there is no anguish and consequently no need for solace, no award should be provided. This approach has not been unanimously embraced by authors or by the courts.

2. A Theoretical Discussion of the Approaches

The existence of the approaches to non-pecuniary damages reveals the fact that the courts are in disagreement as to what is actually being compensated by the award. According to the conceptual approach, the plaintiff's loss of valuable personal assets, specifically the capacity and faculties for enjoying life, is being compensated. Each asset is perceived as having an objective value which is recoverable in case of loss³⁸. Ogus³⁹ refers to this approach as, "so much for a foot." The plaintiff's life, capacity and faculties for enjoying life are valuable assets and, therefore, being deprived of these is equivalent to being deprived of something in which he has a property right. It essentially promotes a tariff system which determines a sum for each part of the body and for the extent of damage to each part.

Whereas under the auspices of the conceptual approach the same amount of compensation is awarded whether or not the plaintiff is unconscious, this is not the case with the personal

³⁷ Edward VEITCH, "The Implications of *Lindal*", (1982) 28 *McGill L.J.* 116.

³⁸ Beverly M. McLACHLIN, "What Price Disability?", (1981) 59 *Can. Bar Rev.* 46.

³⁹ A.I. OGUS, "Damages for Lost Amenities: For a Foot, a Feeling, or a Function?", (1972) 35 *Mod. Law Rev.* 1.

approach. This approach advocates the allocation of damages for the plaintiff's actual personal unhappiness. The unconscious plaintiff, whose personal appreciation of his loss is minimal, receives a significantly reduced award. Coined by Ogus⁴⁰ as "so much for a feeling", this approach seeks to assess in monetary value the plaintiff's past, present and future loss of pleasure and happiness as a result of the deprivation of use of his injured limbs. The appraisal of non-pecuniary damages consistent with this approach can only be accomplished in terms of the loss of human happiness.

In contrast to the conceptual and personal view, the functional approach endeavors to determine how money can be used to compensate the plaintiff for his lost amenities rather than what has been lost. In this case, the award is determined based on the evidence of the cost of furnishing accommodations to make the plaintiff's loss easier to bear. The decision as to the amount of the award is based on the needs and evidence of each particular case. The award for non-pecuniary loss may be justified, therefore, to the extent that it can be constructively used to provide the plaintiff with some amount of consolation. Ogus describes this approach as "so much for a function" since it supports the award of a sum of money that can be used to provide a person with solace for his misfortunes, and in that sense, fulfills a certain function⁴¹.

In the case of English law, the conceptual approach has been the approach of choice in the assessment of non-pecuniary damages. The sole guidance offered for the evaluation of this loss is that the award should reflect a fair and reasonable compensation⁴². The level of awards has become more or less standardized. Ogus asserts that there are several aspects of the English method of evaluating non-pecuniary damages which indicate the inclination to the conceptual approach. Firstly, the availability of complete accumulations of current awards in personal injury cases indicates the use of a tariff system which serves to objectify the awards for these damages. Secondly, the award must be com-

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

mensurate with the extent of deprivation which the injury has caused the plaintiff. Lastly, controversy exists as to the amount of compensation awarded to the victim insensitive to loss. This is a challenge to the conceptual approach because, if the award is reduced on the basis that the plaintiff is unaware of his state, the grounds for the award is really the loss of pleasure, and not the objective loss of a bodily function⁴³.

Several criticisms can be brought forth regarding English law's conceptual approach⁴⁴. Firstly, the approach relies on the assumption that each part of the body has an objective value. The use and enjoyment obtained from the body part is not considered, yet the concept of lost amenities is intended to describe the lost capacity of the plaintiff consciously to enjoy life to its fullest as he might have done but for the injury.

Secondly, compensable loss depends on the consequences for the individual, not on the seriousness of the injury. In English law, the greater the injury, the greater the damages awarded. Thirdly, no punitive aspect should exist in the attribution of an award. The court is called upon to award the plaintiff a sum to compensate him for his losses and not to propose a sum which it thinks the defendant should pay. Fourthly, the approach also leaves a windfall to the plaintiff's dependents. They will benefit if the victim died or is approaching his death. As a final criticism, the approach follows a tariff system in which the categories of injury are vague and unclear.

On the other hand, the Great Britain Royal Commission on Civil Liability and Compensation for Personal Injury suggests three possible functions, compatible with the functional approach, which an award for non-pecuniary loss can serve. One function is that a conventional sum may serve as a palliative⁴⁵. The plaintiff who is seriously injured may feel entitled to some compensation for the pain and suffering and loss of amenities caused by an injury for which a third person is responsible. Ano-

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY REPORT, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, vol. 1 (London: H.M.S.O. 1978).

ther possible function is that other sources of satisfaction can be purchased by the plaintiff with an award for non-pecuniary damages in an attempt to replace those he has been deprived of due to his injuries. Lastly, an award for this loss may serve to cover expenses caused by the injury which were unforeseen. The Commission confirms that,

*the main aim of any compensation system should be to make good pecuniary loss. Our recommendations on the assessment of damages for non-pecuniary loss are made with this in mind.*⁴⁶

In terms of loss of expectation of life, the Commission recommends that damages under this subheading be erased. It views this subheading as unrealistic in the sense that it is impossible not only to evaluate the level of happiness the victim might have experienced had he lived out his days if not for the accident, but to assess such a loss as well. Pain and suffering and loss of amenity, however, should continue to be compensated under non-pecuniary loss. Keeping in mind what is considered to be a reasonable award, the method of assessment of these damages rests largely on the judge's view.

Although there was, as described by Ogus⁴⁷, an apparent unanimity in terms of the espousal of the conceptual approach in assessing non-pecuniary damages in English law, there seems to be a shift towards the functional approach, as embraced by the Commission.

D. A Criticism of the Functional Approach Adopted by the Supreme Court of Canada

Criticisms have emerged regarding the functional approach adopted by the Supreme Court in common law personal injury cases. One such criticism remarks that despite the adoption of the functional approach in theory, the concrete quantification in the trilogy more closely resembles the conceptual view⁴⁸. For instance, in *Andrews* allusion was made to the loss of an asset when

⁴⁶ *Id.*, at p. 86.

⁴⁷ A.I. OGUS, *loc. cit.*, note 39.

⁴⁸ K. COOPER-STEPHENSON and I. SAUNDERS, *op. cit.*, note 4.

the court commented that it was difficult to imagine a person losing more than what was lost by Andrews. As observed by Klar:

*To assume that the severity of the injury was related to the amount of money required to effectively "console" the plaintiff was to assimilate the conceptual approach and the functional approach.*⁴⁹

Furthermore, in *Arnold v. Teno*⁵⁰ and *Thornton v. School District No. 57 (Prince George)*⁵¹, the remaining two trilogy cases, a comparison with the injuries sustained by Andrews was the basis for the determination of the damages suffered by the plaintiffs. In essence, the trilogy cases did not actually ponder the need for consolation nor the goods or services which could possibly provide the plaintiffs with solace for their misfortune.

*In the result, the Supreme Court trio of decisions must be viewed as only a beginning towards a functional theory of non-pecuniary damages in Canada.*⁵²

There is no indication in the decisions that any thought was actually given to the function or purpose which the award for non-pecuniary damages could fulfill, nor of what the cost would be to provide these services or goods to make the victim's life more bearable⁵³. This does not reflect the intended application of the functional approach as described above, which compels evidence on the part of the victim of the purpose which the award would serve.

Since the judgements of the Supreme Court in the trilogy as well as *Lindal*, the courts have been grappling with the application of the functional approach. In a judgement of the Manitoba Court of Appeal, it seems as though the court was applying more of a comparative approach rather than a functional one. This Court, in a case concerning a young man who suffered permanent brain damage and severe physical and mental disability, reaffirms the trial judge's award for non-pecuniary damages, stating that he was correct in drawing a parallel between the plaintiff's inju-

⁴⁹ L.N. KLAR, *loc. cit.*, note 27, 267.

⁵⁰ *Supra*, note 2.

⁵¹ *Supra*, note 2.

⁵² K. COOPER-STEPHENSON and I. SAUNDERS, *op. cit.*, note 4, at p. 369.

⁵³ L.N. KLAR, *loc. cit.*, note 27.

ries and those suffered by the plaintiffs in the trilogy⁵⁴. Similarly, in *Hohol v. Pickering*⁵⁵, in which a motor vehicle accident left the plaintiff paraplegic, the judge found that, although the trial judge stated that an award for a paraplegic would not be as much as for a quadriplegic, this does not mean that he was applying a comparative approach. The judge, therefore, confirmed the trial judge's assessment of non-pecuniary loss.

Contrarily, in *Penso v. Solowan*⁵⁶, the trial judge was said to have erred in applying a comparative approach based on the relative seriousness of the plaintiff's injuries compared with those of a quadriplegic. Justice Anderson insisted that the trial judge should have adopted the functional approach, comparing awards for like non-pecuniary damages in order to decide on the conventional award for the loss suffered by the plaintiff. This sum should then be modified in accordance with the plaintiff's loss of amenities and loss of enjoyment of life, and how the award could be used to make up for the loss.

Similarly, in *Thachuk v. Thomas*⁵⁷, Justice Grotzky emphasized that the functional approach is a comparison of awards given for analogous non-pecuniary losses in order to ascertain the conventional award for the type of loss endured by a plaintiff. Regard must be given for other awards made in the given jurisdiction in similar situations in order to determine the just and reasonable award for non-pecuniary damages. In agreement with this rejection of the comparative approach, the Alberta Queen's Bench reaffirmed that,

*[t]he award for non-pecuniary damage ought not to be assessed by comparison to the injury suffered in these cases but rather on the basis of the functional approach reviewed by the court in Andrews. The individual's particular loss and how money can function to provide substitute amenities must be paramount.*⁵⁸

⁵⁴ *Macdonald v. Alderson*, [1982] 3 W.W.R. 385 (Man. C.A.).

⁵⁵ [1984] 3 W.W.R. 673 (Alta. C.A.).

⁵⁶ [1982] 4 W.W.R. 385 (B.C.C.A.).

⁵⁷ 91 Sask. R. 138, 146.

⁵⁸ *Mitchell v. U-Haul Co. of Canada*, (1986) 47 Alta. L.R. (2d) 193, 240.

More recently, the Supreme Court of Canada, in *Ter Neuzen v. Korn*⁵⁹, once again applied a comparative approach in the assessment of non-pecuniary damages. Justice Sopinka states:

In my view, the above passage adequately addresses the arguments of the appellant in the present case. Essentially, she contends that the evidence demonstrated the uses to which 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.

E. The Compatibility of the Approaches with Civil Law

The question as to which approach is applied in civil law in Quebec is far from unanimous. Authors view certain approaches as compatible with civil law ideology, while others perceive them to be incompatible and inapplicable as such in civil law. Daniel Gardner⁶⁰, in his discussion of the three approaches to non-pecuniary damages in respect to civil law, discusses the compatibility of their affinity with civil law.

The conceptual view, the approach in which “l'être humain est ici considéré comme une machine formée de diverses composantes, qui possèdent toutes une valeur monétaire spécifique,” is incompatible with civil law. Although it ensures an analogous award for non-pecuniary losses, there is a depersonalization of the process of evaluation in the sense that no consideration is given to the unique situation of the victim. According to Gardner, the “procédure d'arbitrage des dommages utilisée par notre système d'évaluation judiciaire du préjudice interdit une telle approche.”⁶¹ There exists, thus, a unanimous decision prevalent in

⁵⁹ [1995] 3 S.C.R. 674, 724 [hereinafter *Ter Neuzen*].

⁶⁰ Daniel GARDNER, *L'évaluation du préjudice corporel* (Cowansville: Yvon Blais, 1994).

⁶¹ *Id.*, at p. 158.

both doctrine and jurisprudence to reject the conceptual approach in Quebec.

Until recently, there was a lack of consensus concerning the application of the functional approach in civil law in Quebec. Despite the fact that it eliminates the problem of searching for a compensation of an immaterial loss, it carries with it certain burdens. The burdens include the cost of gathering evidence for the cost of replacement, the inequity for some victims in so far as the award is reduced in proportion to the extent to which the injuries restrain the possibility to replace pleasures with those lost, and the absence of an award to the unconscious victim since it cannot be seen as fulfilling a function.

Gardner does not consider the functional approach to be irreconcilable with civil law. According to his view, there is only a judicial practice in evaluating non-pecuniary damages since no rule exists. Moreover, he proposes that a similar notion to the functional approach has existed in civil law for a long time, in the sense that a victim should not be refused an award if his sufferance is lessened by the fulfillment he can obtain from it. He concludes that "il n'existe pas à notre avis, de motif juridique qui milite en faveur du rejet de l'approche fonctionnelle en droit québécois."⁶² Jutras concurs with this view. He supports a subjective approach to the evaluation of non-pecuniary damages:

*Quant à nous, il nous semble qu'il y a de bonnes raisons d'adopter la conception subjective de ce dommage [...] Dans cette perspective, en effet, l'indemnité sert de représentation des agréments perdus par la victime, et non de représentation du membre ou de la faculté dont la victime a été privée [...] Il faudrait donc cesser d'indemniser les victimes pour leur préjudice anato-physiologique objectif.*⁶³

Baudouin⁶⁴ differs with this stance of harmony between the functional approach and civil law. He maintains that the approach is in conformity with the spirit and tradition of common law, but inconsistent with the civil law tradition. Non-pecuniary

⁶² *Id.*, at p. 162.

⁶³ D. JUTRAS, *loc. cit.*, note 12, 224 and 225.

⁶⁴ Jean-Louis BAUDOUIN, *La responsabilité civile*, 4th ed. (Cowansville: Yvon Blais, 1994), at p. 190.

damages in civil law seek to objectively compensate a legitimate interest which has been harmed. The fact that this form of damage has no monetary value does not prevent the protection or compensation of the damage. Furthermore, if compensation is only awarded in the event that it can serve to diminish the effects of the harm caused, the result would be a refusal to compensate in the cases where the award could not fulfill this function, such as in the case of a coma victim. In conclusion, Baudouin states:

*À notre avis, en droit civil, le préjudice est dû parce qu'il y a atteinte à un intérêt légitime patrimonial ou extra-patrimonial, et non parce qu'il existe un moyen matériel d'en pallier les inconvénients. C'est une perte objective que l'on doit compenser, perte qui doit être mesurée, aussi difficile que soit le processus, de façon personnelle par rapport à ce dont la victime est effectivement privée.*⁶⁵

Justice Nichols, in *Syndicat National des Employés de l'Hôpital St-Ferdinand v. Quebec (Public Curator)*⁶⁶ expresses his agreement with Baudouin to the effect that the functional approach is incompatible with civil law.

*Je suis d'accord avec Jean-Louis Baudouin que, le droit civil, selon les principes qui traditionnellement le caractérisent, ne peut s'accommoder de l'approche fonctionnelle [...] J'en conclus que nous n'avons pas à nous demander si la victime pourra se servir ou jouir de l'indemnité qui lui est versée.*⁶⁷

Recently, in the appeal decision of the above judgement, Justice L'Heureux-Dubé⁶⁸ of the Supreme Court expressed her agreement with this view:

In fact, in Quebec civil law, the primary function of the rules of civil liability is to compensate for prejudice. This objective requires that there be compensation for the loss suffered or the opportunity for profit lost because of the wrongful conduct, regardless of whether the victim is capable of enjoying substitute pleasures[...] Thus for the purpose of characterizing the nature of the moral prejudice for the purposes of compensation, I am of the view, like Nichols J.A., that the purely sub-

⁶⁵ *Id.*, at p. 190.

⁶⁶ [1994] R.J.Q. 2761 (C.A.).

⁶⁷ *Id.*, 2794 and 2795.

⁶⁸ *Quebec (Public Curator) v. Syndicat National des Employés de l'Hôpital St-Ferdinand*, *supra*, note 16, 243.

jective conception has no place in the civil law, since the reason that damages may be recovered is not because the victim may benefit from them, but rather because of the very fact that there is a moral prejudice. The victim's condition or capacity to perceive are, therefore, irrelevant in relation to the right to compensation for the moral prejudice.

It is interesting to note that L'Heureux-Dubé J. is of the opinion, however, that the three approaches can be utilized in Quebec civil law, not in terms of the justification for the right to compensation for moral damage, but for the calculation of the amount of non-pecuniary damages to be awarded. She proposes that,

in Quebec civil law the three approaches to calculating the amount necessary to compensate for moral prejudice – that is, the conceptual, personal and functional approaches – apply jointly, and thereby encourage a personalized evaluation of the moral prejudice. In fact, this appears to me to be the best solution in a field in which exact quantification of the prejudice suffered is extremely difficult because of the nature of that prejudice.⁶⁹

Lastly, in terms of the compatibility of the remaining approach with civil law, the personal approach corresponds to the idea of civil liability. It is focused on the situation of the plaintiff, in terms of the injuries he sustained and the consequences they imply for him.⁷⁰ In sum, according to Gardner, since none of the three methods of evaluating non-pecuniary loss constitute rules of law in civil law, no approach should form the sole basis for the measurement of these damages. Although debate exists as to the application of the functional approach in civil law, the only method for the justification of non-pecuniary damages which must be rejected is the conceptual view because of its uniform employment which depersonalizes the process of evaluation of these damages. The only rule which exists regarding the assessment of non-pecuniary damages in civil law, is that the individual's loss must be compensated in a personalized fashion, according to article 1611 of the *Civil Code of Quebec*⁷¹.

⁶⁹ *Id.*, 248.

⁷⁰ D. GARDNER, *op. cit.*, note 60.

⁷¹ *Civil Code of Quebec*, S.Q. 1991, c. 64.

F. The Impact of the Approaches on the Non-Pecuniary Awards for the Unaware Plaintiff

1. Canadian Common Law

In terms of the unaware plaintiff, as mentioned above, a strict application of the functional approach leads to the conclusion that in so far as the award for non-pecuniary damages can serve no purpose for the plaintiff, such an award cannot be justified. In *Laird v. Costain*⁷², this is exactly what was decided:

she is, as I have stated, in a semiconscious state, her eyes may open, she may hear, she may make some movements of her body but she is completely unconscious of her environment. Although she may respond to pain, it is not a knowing response, according to medical evidence, she is unaware and therefore untroubled by any knowledge of her state [...] Therefore, it is my view that conscious suffering is the only basis for an award for pain and suffering. I have to conclude that no award for pain and suffering is justified in this case.

The judge did, however, award a sum of twenty-five thousand dollars for loss of amenities of life.

In *Knutson v. Farr*⁷³, it was decided that an award for non-pecuniary damages was appropriate in the case of an unconscious victim. This decision rested on the belief that when the Supreme Court rendered its decisions in the trilogy by adopting the functional approach, the Court was dealing with plaintiffs who were not unconscious. In this case, therefore, the Supreme Court's decision was viewed as *obiter dictum*, and *R. v. Jennings*⁷⁴, a previous decision of the Supreme Court, was followed. This decision purports that despite the fact that the award cannot provide solace, non-pecuniary damages should be awarded for loss of amenities⁷⁵. Seventy-seven thousand dollars were awarded for non-pecuniary damages for loss of amenities. This amount was, however, reduced by the Court of Appeal. Justice Hinkson considered that, based on the evidence, there is a slight chance

⁷² (1979) 24 N.B.R. (2d) 510, 522 and 523 (C.J.Q.B.D.).

⁷³ (1982) 38 B.C.L.R. 291.

⁷⁴ [1966] S.C.R. 532.

⁷⁵ *Id.*

that the level of consciousness of the plaintiff will increase with time, and decided, therefore, that the proper award for such a possibility where solace might be provided would be fifteen thousand dollars⁷⁶.

In his dissenting judgement, Justice Esson states that the trilogy and *Lindal* do not imply that the functional approach must be applied rigidly, in its strictest form⁷⁷. Specifically, he finds that with regards to the unconscious victim, because it is impossible to predict the future, there should be an award for non-pecuniary damages:

*Our inability to predict the future is a good reason for not dealing with the subject in an overly mechanistic and "logical" way. A plaintiff so terribly injured has lost everything but life itself. But where there is life there is hope. The recent changes in the law require emphasis on practical considerations but do not, in my view, exclude recognition of the extreme seriousness of the loss and the possibility of future change, even where such a possibility is not established by direct evidence.*⁷⁸

Esson J. then specifies that the plaintiff who has suffered the most serious loss has the right, for that sole reason, to some award for non-pecuniary damages. The amount should be lower in those cases where it is more certain that the award cannot serve any purpose, but not less than a modest conventional award. In conclusion he adds that in order to decide whether the award should be closer to the higher or lower end of the scale, the particular situation of the plaintiff, such as the degree of consciousness, the prospect for any improvement, and the life expectancy of the particular plaintiff should be considered. Although this opinion seems more reasonable than awarding minimal sums for unconscious plaintiffs, it does not represent the view expressed by the majority in *Knutson*⁷⁹.

Consistent with the majority judgement discussed in the case above, the plaintiff in *Semenoff v. Kokan*⁸⁰ was awarded twenty-

⁷⁶ *Knutson v. Farr*, (1984) 55 B.C.L.R. 145, 155.

⁷⁷ *Id.*

⁷⁸ *Id.*, 172.

⁷⁹ *Knutson v. Farr, supra*, note 76.

⁸⁰ (1989) 42 B.C.L.R. (2d) 6.

five thousand dollars in non-pecuniary damages because the plaintiff appeared to have exhibited some cognitive functions, in responding to music, and could, therefore, appreciate some solace.

It appears from the cases reviewed above concerning unconscious plaintiffs, that in most cases, even where there are no sign of cognitive response, a small award for non-pecuniary damages for loss of amenities is provided. As for the other components of non-pecuniary damages, an award will be furnished if there are signs that the plaintiff has some level of consciousness, or that the existing level might improve and thus justify an award to provide solace⁸¹.

One can, therefore, conclude that although the Supreme Court of Canada has expressed its preference for the functional approach in the assessment of non-pecuniary damages, it has not been applied consistently without criticism in its pure form. Moreover, some authors have revealed their doubts as to whether this approach is in fact desirable, since it places upon the victim the burden of having to prove the potential uses to which the award can be directed in order to improve his condition⁸². In sum, it remains to be seen if the functional approach will be applied, in its true form, in future personal injury cases in Canada. Until such time, it is the functional approach, as applied in the Supreme Court trilogy, which represents the current state of law for the right to moral damage compensation as well as the assessment of such damages.

⁸¹ The perplexity regarding the unconscious plaintiff has also spurred some concern in England. See the ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY REPORT, *supra*, note 45. The Commission recommends the adoption of the minority approach, namely, that no award should be made for non-pecuniary damages. See also the LONDON LAW COMMISSION REPORT O 225: Personal Injury Compensation: How Much Is Enough? (Ordered by the House of Commons to be printed 17 October 1994).

⁸² L.N. KLAR, *loc. cit.*, note 27.

2. Quebec Civil Law

The Quebec Court of Appeal has, contrarily to the common law cases reviewed above, taken a different approach to compensating the unconscious or mentally handicapped victim⁸³. As discussed previously, Justice Nichols rejected the application of the functional approach to civil law. In *Syndicat National*, a collective action was taken by the public curator in the name of mentally handicapped patients, following an illegal strike by the hospital employees. The appellants expressed the following in relation to the allocation of non-pecuniary damages:

*Comme plusieurs bénéficiaires n'ont jamais eu conscience de l'arrêt de travail et que la réception par eux d'une quelconque indemnité ne saurait consciemment leur apporter quelque source de satisfaction, on conclut que les sommes accordées sont nettement exagérées.*⁸⁴

The majority judgement of the Court of Appeal rejected, however, as mentioned previously, the functional approach with regards to civil law. The Court found that even within common law jurisdiction, there is disagreement as to the espousal of the functional approach. In addition, the Court noted that critics of the approach find it to be unjust for unconscious victims⁸⁵. Justice Nichols sums up this viewpoint in stating:

*Nos principes d'indemnisation en province civiliste nous permettent d'indemniser le dommage non pécuniaire d'une victime inconsciente ou mentalement déficiente sans qu'on ait à démontrer que l'indemnité soit de nature à procurer une forme de compensation ou de satisfaction.*⁸⁶

Thus, even if the sum awarded cannot provide solace nor satisfaction to the unconscious or mentally handicapped plaintiff, the civil law approach to compensation permits the allocation of non-pecuniary damages in such cases. Justice L'Heureux-Dubé⁸⁷, speaking for the Supreme Court, concurs with this ap-

⁸³ *Quebec (Public Curator) v. Syndicat National des Employés de l'Hôpital St-Ferdinand*, *supra*, note 66 [hereinafter *Syndicat National*].

⁸⁴ *Id.*, 2793.

⁸⁵ *Id.*, 2794.

⁸⁶ *Id.*, 2795.

⁸⁷ *Quebec (Public Curator) v. Syndicat National des Employés de l'Hôpital St-Ferdinand*, *supra*, note 16, 245.

proach, insisting that an objective conception of moral prejudice is much more consistent with civil law. She states that “the victim’s condition or capacity to perceive are, therefore, irrelevant in relation to the right to compensation for the moral prejudice.”⁸⁸ The unaware plaintiff, in civil law ideology, can obtain an award for non-pecuniary damages based on an objective conception of this loss⁸⁹.

II. The Upper Limit on Non-Pecuniary Damages in Personal Injury Cases

A. The Reasons for the Introduction of the Cap

The Supreme Court of Canada chose to implement a limit to the award for non-pecuniary damages in common law personal injury cases. As discussed above, the Supreme Court opted for the functional approach in the evaluation of this head of damage. According to the judgement in *Andrews*⁹⁰, in which the victim suffered a lesion of the spinal cord causing paralysis in most of the upper limbs, spine and lower limbs, the purpose of awarding non-pecuniary damages is to provide the victim with physical arrangements that will make his life more endurable. The Court added that the logical conclusion to be deduced from this approach, is that it is reasonable that a large sum should not be awarded for non-pecuniary damages once a person is properly provided for in terms of future care for the injuries and disabilities the victim has sustained. The award is, therefore, viewed as providing more general physical arrangements above and beyond those directly related to the injuries. Justice Dickson concludes that this results in “a coordinated and interlocking basis for com-

⁸⁸ *Id.*

⁸⁹ The same dilemma regarding the situation of the unaware plaintiff has been troubling the courts in France. It is only recently that this long standing debate has been resolved by the courts. On February 22nd 1995, the *Cour de Cassation* reaffirmed the principle of compensation in a case involving a victim, left in a vegetative state as a result of an accident; [...] *l'état végétatif d'une personne humaine n'excluant aucun chef d'indemnisation son préjudice doit être réparé dans tous ses éléments* [...] (Civ. 2nd, 22 Feb. 1995, *Bull. civ. II*, no. 61.

⁹⁰ *Supra*, note 2.

pensation, and a more rational justification for non-pecuniary loss compensation.”⁹¹

It was in *Andrews*⁹² that the court decided for the first time that a cap of one hundred thousand dollars, in 1978 dollars, should be applied in the case of non-pecuniary damages in personal injury cases. As stated by Justice Dickson,

*I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of \$100 000. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.*⁹³

What, one might ask, are the reasons for the imposition of a cap in the case of non-pecuniary damages? On the one hand, the Supreme Court in *Andrews* observes that,

*Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation.*⁹⁴

On the other hand, however, the Court emphasizes that because there is no way of measuring non-pecuniary damages in monetary terms, it is a domain exposed to exorbitant claims. The situation in the United States was invoked to demonstrate that the awards for non-pecuniary damages have climbed, in recent years, to incredibly high levels. The Court thus concluded that “it is the area where the danger of excessive burden of expense is the greatest” and “where there is the clearest justification for moderation.”⁹⁵

In *Arnold v. Teno*⁹⁶, another member of the trilogy, once again, there is a preoccupation with the soaring sums awarded in the United States. Several reasons for this phenomenon were considered. Firstly, high awards have been increasingly awarded

91 *Id.*, 262.

92 *Id.*

93 *Id.*, 265.

94 *Id.*, 260 and 261.

95 *Id.*, 261.

96 *Supra*, note 2, 289.

because of the impossibility of accurate assessment. Secondly, expressions of profound sympathy for the injured plaintiff and the mistaken feeling that loss of amenities of life may be alleviated by the feeling of satisfaction which money can bring, have also resulted in high awards. Thirdly, punishment of the wrongdoer is yet another reason for the soaring awards. Lastly, the ability of the defendant to pay the damages might be an explanation for this occurrence as well.

According to Justice Spence, this increase in extravagant awards fails to concur with the requirement of reasonableness, which is the appropriate gage for all damages. The cases concerning medical malpractice in the United States exemplify the very real and serious social burden of excessive awards. In sum, Spence J. discusses his fear of the situation where only the wealthy could drive a car because only they could afford to pay high insurance premiums required to meet such high non-pecuniary damage awards. He concluded that there must be upper limits with awards lower in some cases and some higher in exceptional cases.

It is thus as a result of the fear of largely extravagant awards likely to create an immense social burden, as is presently the case in the United States, coupled with the fact that non-pecuniary damages is an area susceptible to excessive claims, and that the victim has already been compensated for pecuniary loss, that the Supreme Court established an upper limit of one hundred thousand dollars, in 1978 dollars, for such damages in common law personal injury cases. It is interesting to note that although the trilogy set out the guidelines for the evaluation of non-pecuniary damages and the application of the upper limit, it became evident, with the advent of *Linda*⁹⁷, that the courts were not yet completely clear regarding the implementation of the cap. The Supreme Court, in rendering this decision, attempted to clarify these guidelines.

Reflecting on the remarks made by Dickson J. in *Andrews*⁹⁸, namely that the upper limit should not be exceeded save in ex-

⁹⁷ *Supra*, note 20.

⁹⁸ *Supra*, note 2.

ceptional circumstances, Justice Fulton, in the Court of Appeal's decision in *Lindal v. Linda*⁹⁹, decided that such exceptional circumstances were present in Lindal's case. He emphasized the fact that because of the brain damage suffered, Lindal had no chance of adapting and leading a valuable life, whereas this would be possible for Andrews and Thornton, who did not suffer damage to the brain. Fulton J. expressed several justifications for exceeding the cap¹⁰⁰. The results of Lindal's injury were more serious than in the cases of *Andrews*¹⁰¹ and *Thornton*¹⁰². There was evidence of severe depression and suicidal tendencies in Lindal's case. In addition to this, Lindal's use of a drug called Dantrum prescribed in order to alleviate the effects of spasticity in the muscles, had extremely undesirable side effects.

Despite the Court of Appeal's decision to surpass the upper limit, the Supreme Court responded by allowing the appeal and reducing the award for non-pecuniary damages to the upper limit outlined in the trilogy. The Court reaffirmed the fact that the social costs must be considered in the awards for non-pecuniary loss. The Court highlighted the limitless nature of the claim of a severely injured plaintiff for non-pecuniary damages, especially under the functional approach which permits an infinite number of uses which could provide the plaintiff with solace for his misfortune. It is thus difficult to ascertain the reasonableness of such claims. Again, the fact that the plaintiff has already been compensated for pecuniary losses and, therefore, has resources available which can be used to provide a substitute for lost amenities, influenced this decision. Dickson J. concluded that Fulton J. misapprehended the relevance of the upper limit of one hundred thousand dollars. In his view, Fulton J. wrongfully presumed that the award for non-pecuniary damages in the trilogy reflected the lost assets of the plaintiffs. The award allocated in the trilogy was not an evaluation of lost assets, since these assets have no monetary value and thus make an objective evaluation impossible.

⁹⁹ [1978] 4 W.W.R. 592 (B.C.C.A.).

¹⁰⁰ *Id.*

¹⁰¹ *Supra*, note 2.

¹⁰² *Supra*, note 2.

In terms of the upper limit, Dickson J. stressed that “if the purpose of the guideline is properly understood, it will be seen that circumstances in which it should be exceeded will be rare indeed.”¹⁰³ As mentioned above as one of the motivations underlying the imposition of the cap, Dickson J. reminded the courts that the upper limit was chosen because, without it, there would be no restriction to the numerous uses to which a plaintiff could direct a sum of money. The most obvious result of this would be that society would be in the predicament of satisfying the lavish claims brought forth by severely injured plaintiffs. In conclusion, he perceived no justification for exceeding the cap in Lindal’s case, adding that the sole fact that Lindal’s injuries differed from the plaintiffs in the trilogy, does not support surpassing the upper limit.

Recently, the Supreme Court of Canada, in a case originating in British Columbia, *Ter Neuzen*¹⁰⁴, reaffirmed, once again, the cap on non-pecuniary damages as outlined in the trilogy. In this case, a woman undergoing artificial insemination contracted HIV as a result of the infected semen of the donor. She was not warned by the doctor performing the procedure of the danger of HIV infection. In first instance, the jury awarded \$460 000 for non-pecuniary damages. A new trial was ordered on the question of liability as well as damages, however, in the Court of Appeal. The issue at hand in terms of the damages award was whether failing to instruct the jury on the cap on non-pecuniary damages was an error on the part of the trial judge. Furthermore, if the trial judge had not erred, the question remained as to whether the award for non-pecuniary damages should be modified consequently. Although the Court of Appeal decided that the trial judge had not erred in not advising the jury of the cap on non-pecuniary damages, it concluded that the award should be reduced in compliance with the trilogy in cases where the award surpasses the upper limit.

Similar to the issues discussed in *Lindal*¹⁰⁵ concerning the dilemma of situations in which the cap could be exceeded, this

¹⁰³ *Lindal*, *supra*, note 20, 642 and 643.

¹⁰⁴ *Supra*, note 59.

¹⁰⁵ *Supra*, note 20.

problem was addressed by the Supreme Court of Canada in *Ter Neuzen*¹⁰⁶. The Court outlined two matters to be considered. The first matter was whether the case at hand was representative of an exceptional case in which the cap on non-pecuniary damages could be surpassed, as discussed in *Andrews*¹⁰⁷. The second issue concerned whether the trial judge should have instructed the jury as to the upper limit in the assessment of non-pecuniary damages. The appellant in this case argued that this case differs from previous cases and consequently, surpassing the upper limit should be permitted.

In addressing the first issue, the Court reaffirms the functional approach to assessing non-pecuniary damages as delineated in the trilogy. It further discusses the view adopted in *Andrews*¹⁰⁸, that since non-pecuniary damage awards are "inherently arbitrary or conventional"¹⁰⁹, and since the victim has already been completely compensated for all pecuniary losses including future care, excessively large awards should not be awarded. Consistent with the trilogy, the Court maintains that once the plaintiff is fully provided for in terms of future care, it is appropriate to consider the social burden of lavish non-pecuniary awards. In terms of the appellant's claim that the upper limit should be exceeded in this case, the Court refers to *Lindal*¹¹⁰. In this case, the Court refused to permit surpassing the cap, stating that this kind of a situation would be extremely rare. Moreover, the limit of \$100 000 (in 1978 dollars) was chosen because without it, the uses to which a victim could put a sum of money would be limitless. The Supreme Court, therefore, maintains:

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

¹⁰⁶ *Ter Neuzen, supra*, note 59.

¹⁰⁷ *Supra*, note 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Ter Neuzen, supra*, note 59, 723.

¹¹⁰ *Supra*, note 20.

*present case is any different than other tragedies, such as those which befell the plaintiffs in the Andrews trilogy.*¹¹¹

The conclusion in *Ter Neuzen* regarding this first question, similar to that of the Appeal Court in *Lindal*¹¹², is that although the victim's injuries are different from those examined in the trilogy, the consideration of the important social burden must outweigh that factor. The award for non-pecuniary damages cannot, therefore, exceed the upper limit established by the trilogy.

In terms of the second issue, the Court contends that the trial judge should charge the jury with the upper limit¹¹³, if the judge believes that the particular situation of the plaintiff might be viewed as a case in which the cap could be exceeded. If it is not such a case, however, the Court maintains that the trial judge should not instruct the jury as to the existence of the cap. It asserts that, "the upper limit, like any other matter of law, need not be placed before the jury where the issue does not reasonably arise on the facts of the case."¹¹⁴ In cases where the cap is surpassed, it is upon the trial judge to reduce the award for non-pecuniary damages in conformity with the upper limit introduced in the trilogy.

*While a trial judge does not sit in appeal of the jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgement for an amount that as a matter of law is excessive.*¹¹⁵

In sum, the Court agrees with the opinion of the Court of Appeal, that a new trial is in order on the matter of damages, and that it was reasonable of the trial judge not to instruct the jury on the cap instituted by the trilogy.

Justice L'Heureux-Dubé, contrary to the majority of the Court, maintains that the jury should not be instructed as to the upper limit, regardless of the potential to exceed the limit im-

¹¹¹ *Ter Neuzen, supra*, note 59, 724.

¹¹² *Supra*, note 99.

¹¹³ It is important to note that the jury system is no longer in force for civil cases in Quebec.

¹¹⁴ *Ter Neuzen, supra*, note 59, 726.

¹¹⁵ *Id.*

posed by the trilogy. She supports this view based on several considerations. Firstly, she states that it is a well known principle that the amount of damages is a question of fact for the jury to evaluate, and not a question of law for the judge. By concluding that the judge should instruct the jury as to the existence of the cap on non-pecuniary damages, their assessment indirectly becomes a question of law. She contends that the introduction of the cap on non-pecuniary damages affects the quantum of the awards and not the way in which they are determined.

Secondly, L'Heureux-Dubé J. advances the reasoning applied in *Hill v. Church of Scientology*¹¹⁶. In that case, the Supreme Court ruled that the cap should not be applied to defamation cases since the injury suffered is significantly distinct from the injury suffered in *Andrews*¹¹⁷, namely, severe physical injuries as a result of a motor vehicle accident. According to L'Heureux-Dubé J., the same argument should be adopted, in cases where other kinds of injuries, such as HIV contamination during an artificial insemination procedure, are at stake. She insists that,

*[b]y suggesting that the jury be instructed on the upper limit of non-pecuniary damages, my colleague is in fact muzzling the jury, and, in doing so, institutionalizing the status quo in that novel area of the law, independently of evolving economics and other considerations.*¹¹⁸

Since the judge can reduce the award if it is judged to be excessive, the jury should be left with the discretion to assess the award.

Lastly, according to L'Heureux-Dubé J., requiring the trial judge to instruct the jury on the cap on non-pecuniary damages may lead to undeserving appeals on that part of the instructions given to the jury by the judge. She concludes by stating that she would "leave to the jury the determination of the quantum of damages without instructions as to the upper limit, subject to the judge's power to reduce excessive awards."¹¹⁹ As a result of *Lin-*

¹¹⁶ [1995] 2 S.C.R. 1130 [hereinafter *Hill*].

¹¹⁷ *Supra*, note 2.

¹¹⁸ *Ter Neuzen, supra*, note 59, 730.

¹¹⁹ *Id.*, 732.

*dal*¹²⁰, the courts must actualize the upper limit of \$100 000 in 1978 dollars.

B. The Compatibility of the Cap with Civil Law

Gardner comments on the fact that what differentiates Canadian common law from American common law is that Canadian common law has recognized the need to cap the evaluation of losses which are difficult to quantify in order to avoid the explosion of awards. He further notes that this increase in the size of the awards for non-pecuniary damages would prejudice society in general and that in this regard, the situation in Quebec does not differ from other Canadian provinces:

*il est à notre avis essentiel de plafonner l'indemnité sous ce chef, afin d'assurer la viabilité de notre système de droit commun.*¹²¹

In order to abolish the ambiguity which prevails in the assessment of non-pecuniary damage awards, Gardner deems it essential to translate the criteria of a reasonable evaluation into precise monetary terms. In conclusion, he states that the cap on non-pecuniary damages has become a world phenomenon, and that even most of the United States has adopted legislative measures in order to limit the evaluation of non-pecuniary damage awards.

Jean-Louis Baudouin, although rejecting the application in civil law of the functional approach, as outlined in the trilogy, due to an incompatibility between the two, embraces the notion of a \$100 000 limit on non-pecuniary damages:

*La règle posée relativement au plafond de \$100 000 en dollars de 1978 nous paraît juste et réaliste étant donné sa grande souplesse.*¹²²

The cap on non-pecuniary damages of \$100 000 in 1978 dollars is, therefore, in the opinion of Baudouin, consistent with civil law. Not alone on this stance of an affinity between the cap on

¹²⁰ *Supra*, note 20.

¹²¹ D. GARDNER, *op. cit.*, note 60, at p. 177.

¹²² J.-L. BAUDOIN, *op. cit.*, note 64, at p. 191.

non-pecuniary damages and civil law, Judge Letarte actually applied the upper limit in three civil law personal injury cases at the Superior Court level, known as the Letarte trilogy, which was maintained in appeal. Justice Letarte views the cap as being “*contre le danger d’indemnités déraisonnables hors de proportion avec le coût social.*”¹²³ This opinion is expressed in his three judgements.

In the first of this trilogy, *Bouliane v. Commission Scolaire De Charlesbourg*¹²⁴, Bouliane was severely injured while sledding down a hill during a school field trip, when she hit a vehicle which was stationed on the hill to repair a hole in the snow. Judge Letarte, in assessing the non-pecuniary damages in this case refers to the Supreme Court trilogy as well as Lindal and the imposition of the \$100 000 cap, in 1978 dollars, on the awards for these damages. After citing from the trilogy cases as to the principles behind the imposition of such a cap, Letarte states:

*C’est en application des principes ci-dessus que la Cour suprême du Canada octroyait au titre de dommages-intérêts non pécuniaires la somme de 100 000 \$ représentant alors un plafond non susceptible d’être excédé, à moins de circonstances tout à fait particulières.*¹²⁵

He discusses the refusal of the Court in *Lindal*¹²⁶ to exceed the upper limit and then compares Bouliane’s injuries to those of the victims in the Supreme Court trilogy and Lindal’s, concluding:

*L’état de la jeune Bouliane tel que décrit précédemment [...] même s’il comprend des caractéristiques particulières s’apparente aux quatre cas étudiés par la Cour suprême du Canada. La cour croit donc devoir, dans un premier temps, octroyer la même indemnité.*¹²⁷

Justice Letarte thus awarded Bouliane \$168 000 which was the equivalence, in 1984 dollars, of the \$100 000 upper limit es-

¹²³ René LETARTE, “L’évaluation judiciaire du préjudice résultant de blessures corporelles : de l’impressionnisme au réalisme?”, (1986) 64 *Can. Bar Rev.* 106.

¹²⁴ [1984] Sup. Ct. 323 [hereinafter *Bouliane*].

¹²⁵ *Id.*, 350.

¹²⁶ *Supra*, note 20.

¹²⁷ *Id.*

tablished by the Supreme Court of Canada in 1978. In appeal¹²⁸, Justice Rothman confirmed the evaluation of Bouliane's non-pecuniary damages in accordance with the upper limit.

In *Lebrun v. Quebec-Telephone*¹²⁹, Lebrun was snowmobiling at night when he hit a pole erected in an area often frequented by snowmobilers, and was left quadriplegic as a result. Judge Letarte, basing his decision, once again, entirely on the Supreme Court trilogy as well as *Linda*¹³⁰ in assessing the appropriate award for non-pecuniary damages, attributed the equivalence of the \$100 000 cap established in 1978. This case was confirmed in appeal.¹³¹ Similarly, in *Gravel v. Hôtel-Dieu D'Amos*¹³², Justice Letarte awarded the upper limit set by the Supreme Court of Canada for a child born with a serious illness as a result of the negligence exercised by the hospital during her birth. In all three cases, Justice Letarte applied the same principles as those applied in the Supreme Court trilogy, thus introducing the cap at the superior court and appeal court levels of the Quebec justice system.

In 1990, Justice Letarte, once again faced with a case involving personal injury, applied the principle of the upper limit of the Supreme Court trilogy. In *Juneau v. Rivard*¹³³, Juneau was left paraplegic when the plane, flown by Rivard, crashed, leaving her the sole survivor. The accident was the result of a false manoeuvre made by Rivard which caused him to lose control of the aircraft. Juneau was twenty years of age at the time of the crash. She lost one year of school as a result of the accident, and can no longer enjoy the athletic lifestyle she led prior to the accident.

The injuries Juneau sustained required her to undergo several operations. Her condition left her with severe bladder problems, as well as intestinal paralysis. She is bound to a wheelchair for the rest of her life, subject to cramps and burning sensations

¹²⁸ *Drouin v. Bouliane*, [1987] R.J.Q. 1490, 1504 (C.A.).

¹²⁹ [1984] Sup. Ct. 605.

¹³⁰ *Supra*, note 20.

¹³¹ *Quebec-Telephone v. Lebrun*, [1986] R.J.Q. 3073 (C.A.).

¹³² [1984] Sup. Ct. 792.

¹³³ [1990] R.J.Q. 1607 (C.A.).

in her lower limbs. In addition to this, Juneau suffered fractures in her nose and jaw. Since the pilot, Rivard, perished in the crash, it is the heirs of Rivard from which Juneau is claiming compensation.

Upon awarding the non-pecuniary damages, the Court maintained that taking into account inflation, the upper limit of \$100 000, in 1978 dollars, is the equivalent of \$200 000 in 1990¹³⁴. After considering all that Juneau had suffered, the Court concluded that her situation, although very serious, was better than those faced in the trilogy, and awarded her \$150 000 for non-pecuniary damages based on the upper limit imposed by the Supreme Court in the trilogy.

In *Carra v. Lake*¹³⁵, the plaintiff was injured by the defendant when he lowered his boat onto the lake where Carra was swimming. When Carra realized that the boat was coming towards her, she dove under the water in order to avoid being struck by the boat. She did not, however, dive deep enough, as her legs were hit by the propeller of the boat. Carra suffered serious injuries, and had to undergo surgery. Once she was operated on, Carra was hospitalized for a period of three months. She underwent physiotherapy for a year and a half, and was left with permanent disability and scarring.

The Court concluded that Lake committed a fault by driving his boat without the prudence required, considering that it was a sunny day and Carra was extremely visible on her inflatable mattress. After deciding on the amount to be awarded for the pecuniary loss, the Court turned its attention to the award for non-pecuniary damages. The Court, citing the Supreme Court trilogy, acknowledged the imposition of the upper limit of \$100 000 in 1978 dollars, and stated:

Le préjudice non pécuniaire en la présente instance est très considérable mais il faut admettre qu'il n'y a aucune commune mesure entre ce préjudice et les préjudices en cause dans les trois arrêts de la Cour Suprême.

¹³⁴ *Id.*, 1634.

¹³⁵ J.E. 92-1553 (Sup. Ct.).

Once the Court concluded that the cap of \$100 000 in 1978 dollars is equivalent of \$230 000 in 1992, it awarded Carra \$90 000 for the non-pecuniary damages she endured. It is thus evident that in evaluating the non-pecuniary damages in this Quebec based case, the Court considered and applied the cap imposed by the Supreme Court in the trilogy just as in the cases discussed above.

More recently, in *Poulin v. Prat*¹³⁶, as a result of Dr. Prat's failure to warn Poulin of the risk of undergoing major surgery while taking oral contraceptives, Poulin suffered several health problems including cerebral thrombosis, partial paralysis of her right arm and leg, paralysis of the right side of her face, loss of balance, diminished eyesight, memory loss, diminished intellectual capacity, and epilepsy. The court, after citing Justice Dickson in *Lindal*¹³⁷ and the justifications he expressed for imposing the cap on non-pecuniary damages, as well as Justice Letarte in *Bouliane*¹³⁸, awarded Poulin \$225 000, the equivalent of the upper limit in 1995. Thus the Quebec justice system, at both the superior court and appeal court levels have demonstrated an approval of, as well as a willingness to apply the upper limit established by the Supreme Court in the trilogy cases for non-pecuniary damages in common law personal injury cases. It remains to be seen, however, as to whether there will be a formal introduction of the \$100 000 cap into civil law jurisprudence in Quebec by the Supreme Court of Canada.¹³⁹

C. The Reactions to the Introduction of the Cap Imposed by the Supreme Court of Canada

Although there has not been, as of yet, a formal introduction of this upper limit on non-pecuniary damages in civil law personal injury cases by the Supreme Court of Canada, it is interesting

¹³⁶ [1995] R.J.Q. 2923 (Sup. Ct.).

¹³⁷ *Supra*, note 20.

¹³⁸ *Supra*, note 124.

¹³⁹ See, however, *Augustus v. Gosset*, *supra*, note 3, which discusses the upper limit in *obiter*.

to consider authors' as well as other courts' reactions to the implementation of this cap in personal injury suits.

1. The Positive Reactions to the Cap

It is evident that the cap on non-pecuniary damages has become, in the eyes of the Supreme Court of Canada, an approved technique of keeping awards for these damages at a level which will not result in an excessive burden to society. It is interesting to note that numerous authors favor the implementation of such a limit to non-pecuniary awards. Their reasoning for such support will be reviewed in order to gain insight on some of the possible justifications for the imposition of the cap.

Gibson, in his article entitled "Repairing the Law of Damages,"¹⁴⁰ states in reference to the cap, that "it permits a substantial sum of money to be allocated for the purchase of substitute pleasures without going to ridiculous extremes." Wery¹⁴¹ is in agreement with such rationality. He concurs with the Supreme Court's factors justifying moderation in the assessment of non-pecuniary awards, namely, the difficulty inherent in judging what reasonable substitutes are, the non-compensatory nature of such awards, and the fact that the victim has already been compensated for future earnings. Furthermore, Wery¹⁴² submits that the Supreme Court in *Lindal*¹⁴³, imposed a more or less absolute limit of \$100 000, in 1978 dollars. He maintains that the exceptional circumstances referred to in this case are more of a figure of speech rather than a likelihood since it is difficult to fathom a situation worse than Lindal's. Jutras¹⁴⁴ acknowledges the soundness of the upper limit, but insists that the courts must focus on the subjective consequences for each victim, rather than comparing their injuries to those of the plaintiffs in the trilogy.

¹⁴⁰ Dale GIBSON, "Repairing the Law of Damages", (1978) 8 *Man. L.J.* 637.

¹⁴¹ A. WERY, *loc. cit.*, note 15.

¹⁴² *Id.*

¹⁴³ *Supra*, note 20.

¹⁴⁴ D. JUTRAS, *loc. cit.*, note 12, 203.

Other justifications for the maintenance of the upper limit have been considered. Waddams¹⁴⁵ affirms that a rough upper limit is necessary in order to obtain the objectives of consistency, predictability, and fairness between plaintiffs. In reference to the Supreme Court's consideration of the anticipated cost of liability insurance consequent upon unlimited and unpredictable awards, Waddams finds it sensible to contemplate the fact that the cost of high awards is carried by large portions of the public through liability insurance premiums. He also concurs with the fact that the cost of insurance increases due to the unpredictability and the large size of awards. According to Waddams, the trilogy decisions,

*represent a conscientious attempt by a careful and competent court to assist, in an area acknowledged to be extremely difficult, in the resolution of disputes, in a manner consistent with rationality and justice.*¹⁴⁶

It is clear that many authors consider the cap on non-pecuniary damages to be a positive solution to the question of assessing these damages in the common law realm. For reasons ranging from an increase in predictability of the size of the awards to a decreased burden on the public, the cap is perceived as resulting in a more just and rational evaluation of non-pecuniary damages in personal injury cases. There are, however, in addition to these strengths, some shortcomings of the cap which help to reveal a more balanced perspective on the issue.

2. A Criticism of the Cap

a. General Criticisms

According to one author, the reason why some courts have proven to be reluctant to apply the upper limit of the Supreme Court trilogy, is that by appraising the damages as such, a low award, one that does not seem just and appropriate to the court

¹⁴⁵ S.M. WADDAMS, "Compensation for Non-pecuniary Loss: Is there a Case for Legislative Intervention?", (1985) 63 *Can. Bar Rev.* 734.

¹⁴⁶ *Id.*

in the situation, will be produced¹⁴⁷. In other words, it is possible that in some circumstances, a victim may experience mental suffering and frustration, for an extended period of time, that is more extensive than that suffered in the trilogy cases. Charles¹⁴⁸ further notes the fact that the majority of the non-pecuniary damage awards in the *Andrews*¹⁴⁹ and *Thornton*¹⁵⁰ cases was for the loss of amenities caused by the decrease in bodily motion. The other forms of non-pecuniary loss, mainly pain and suffering and loss of expectation of life, were not the focus in the evaluation of these awards. As a result of this, a court, following the yardstick of the extent of disability of the plaintiff, implementing the upper limit, would be compelled to award less than it might deem suitable in a case consisting of, for example, a whiplash injury, where an elevated degree of pain and suffering can persist for a long period of time.

Another probable explanation for the refusal of some courts to apply the cap initiated by the Supreme Court in the trilogy, is that some believe that something of an objective significance has been lost in situations where the damage incurred has caused the victim to have a decreased ability to appreciate life, and yet this loss cannot be improved by any physical arrangements:

*But in the minds of some judges and juries, there has been an objective loss of amenities that should be compensated although the victim is unaware of the loss and nothing can be done in a remedial way.*¹⁵¹

More focused on the application of the upper limit, one author questions how the cap should be interpreted. More specifically, Veitch¹⁵² ponders whether the upper limit is the measure of the most severe case conceivable, or if it should be considered a conventional amount which can be procured by all victims whose injuries extend beyond the moderate. There is evidence, he notes, that since the trilogy, many courts have been evaluating awards

¹⁴⁷ W.H.R. CHARLES, "The Supreme Court of Canada Handbook on Assessment of Damages in Personal Injury Cases", (1981-82) 18 *C.C.L.T.* 1.

¹⁴⁸ *Id.*

¹⁴⁹ *Supra*, note 2.

¹⁵⁰ *Supra*, note 2.

¹⁵¹ W.H.R. CHARLES, *loc. cit.*, note 147.

¹⁵² E. VEITCH, *loc. cit.*, note 37.

on a comparative basis, which implies a calculus in which the upper limit is attributed to cases of quadriplegia. This is not logical since the goal of the award for non-pecuniary damages is the need for solace. According to Veitch, it is unreasonable to equate the most serious injury with the upper limit "for reasons of sympathy or the discarded notion of 'lost assets'."¹⁵³

Another major source of criticism of the Supreme Court's upper limit is that it clashes with the functionalist approach to the evaluation of non-pecuniary damages in personal injury suits. As mentioned previously, according to the terms of the functionalist approach, the amount of the award should be sufficient to provide the victim with accommodations that will make life easier to bear. The upper limit might not be sufficient, in some cases, to meet this goal, thus creating an incompatibility between the functionalist approach and the cap.

b. The Inconsistency Between the Awards in Personal Injury and in Defamation Cases

It is also upon reviewing the high awards attributed in defamation cases, that one can criticize the fact that the Supreme Court has capped the non-pecuniary damage awards in common law personal injury cases. While the defamed plaintiff can reestablish his reputation over time, the victim of serious personal injury cannot replace what he has lost. Moreover, while the prejudice suffered by the defamed plaintiff is temporary, that endured by the victim of personal injury is permanent. It seems unjust, therefore, that non-pecuniary damages in personal injury cases are capped while those in defamation cases are not. Some authors, recognizing the significant difference between the awards allocated for non-pecuniary damages in personal injury cases as opposed to defamation cases, have begun to question whether a cap should be implemented in the latter as well.

In order to examine the issue of the application of the upper limit to defamation cases, the situation will be assessed in light of common law cases, followed by a review of the status in the domain of civil law. It is important to make this distinction espe-

¹⁵³ *Id.*

cially since there is a great disparity between the amount of the moral damage awards attributed in common law and civil law defamation suits.

In common law, the question as to whether the cap for non-pecuniary damages in common law personal injury cases should be applied in defamation cases as well was raised in *Hill v. Church of Scientology*¹⁵⁴. The conclusion of the Court was that the cap should not be applied to defamation cases. Several reasons were brought forth to support this view. Firstly, the Court underlined that the injury suffered from defamation is different from that suffered in personal injury cases. In personal injury cases, the plaintiff is compensated for every aspect of the injury suffered such as income loss, medical care and non-pecuniary losses. Defamation suits are different. Special damages for pecuniary loss are rare and difficult to prove. General damages are the entire basis for recovery for the loss of reputation. Moreover, whereas in defamation cases, the intentional publication of harmful false remarks are considered¹⁵⁵, in personal injury cases, the damage most often results from negligence.

Secondly, when the upper limit was imposed on non-pecuniary damages in personal injury cases, their assessment had become a problem for courts and society. There was wide disparity, at the time, in the awards for non-pecuniary damages between districts and provinces. There is no urgent social concern for awards in defamation cases as that which the courts experienced at the time of the trilogy. According to the Supreme Court in this judgement:

Second, at the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole [...] The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicles and, indeed, businesses of all kinds throughout the land. In those circumstances, for that one aspect of recovery, it was appropriate to set a cap. A very different situation is presented with respect to libel

¹⁵⁴ *Supra*, note 116, Laforest J.

¹⁵⁵ It is important to note that this requirement of intentional publication is proper to common law. In civil law cases, an intention to harm one's reputation is not imperative for the moral damages award.

*actions. In these cases, special damages for pecuniary loss are rarely claimed and often exceedingly difficult to prove. Rather, the whole basis for recovery for loss of reputation usually lies in the general damages award. Further, a review of the damage awards over the past nine years reveals no pressing social concern similar to that which confronted the courts at the time the trilogy was decided [...] Therefore, there is no indication that a cap is required in libel cases.*¹⁵⁶

It is interesting to note that one of the reasons presented in support of the refusal to apply an upper limit to libel cases is the fact that the size of the awards over the last nine years have not caused any pressing social concern. Yet, in awarding over one million dollars in damages to Hill, of which \$300 000 were allocated for moral damages, is the Supreme Court itself creating a problem of an explosion of damage awards to soaring heights as discussed in the trilogy as the main motivation for the imposition of a cap? This is an issue which the courts may have to attend to if the awards for damages in defamation suits continue at this level.

Lastly, the court emphasized that if it were known in advance what amount the defamer would have to pay the victim of the defamation, the defendant might consider the sum as the maximum penalty for the right to defame:

*Thus, if it were known in advance what amount the defamer would be required to pay in damages (as in the personal injury context), a defendant might look upon that sum as the maximum cost of a license to defame. A cap would operate in a manner that would change the whole character and function of the law of defamation. It would amount to a radical change in policy and direction for the courts.*¹⁵⁷

The court persists in stating that even if the trilogy's cap were to be applied, the cap in 1991 dollars would amount to approximately \$250 000, and since the jury attributed \$300 000 in general damages, there is not such a great discrepancy between the two amounts.

The Supreme Court, during another defamation case following its decision in *Hill*¹⁵⁸, addressed the question of the imposition of

¹⁵⁶ *Hill, supra*, note 116, 1197 and 1198.

¹⁵⁷ *Id.*, 1198.

¹⁵⁸ *Supra*, note 116.

a cap on the damages awarded in defamation cases. The judgement in *Botiuk v. Toronto Free Press Publications*¹⁵⁹ answered the question in the following words:

For the reasons expressed in Hill a cap on damages in defamation cases is neither needed nor desirable.

The Supreme Court, thus, reaffirmed its decision that an upper limit should not be applied to damage awards in common law defamation suits.

Morse¹⁶⁰ concurs that the upper limit imposed in personal injury cases should not be applied to defamation cases. He cites Judge Holland in *Munro v. Toronto Sun*¹⁶¹, who contends that the principles of assessment of damages in personal injury cases are applicable to the awards for damages in defamation suits.

According to Justice Holland, the relevant principles are the same regardless of the nature of the tort. More specifically, he purports that defamation and personal injury actions, each being based on tortious conduct, justify compensatory awards. Justice Holland adds that the Supreme Court of Canada's policy consideration which led it to impose the cap in personal injury cases can apply equally to any non-pecuniary award including the "at large" award in libel suits.

Morse does not agree with Holland J.'s point of view. According to Morse's view, the fact that the "at large" awards are not really compensatory undermines the application of personal injury appraisal principles to defamation awards. He finds that the grounds for the award in *Monro* seem to be an attempt to evaluate the moral damages suffered by *Monro* on a sliding scale to the most serious personal injury cases which have warranted the upper limit award. Furthermore, Morse explains that the nature of an "at large" or compensatory award in defamation cases is an acknowledgement that one can never know what it will take to compensate a plaintiff who has suffered defamation, whereas in

¹⁵⁹ [1995] 3 S.C.R. 3 [hereinafter *Botiuk*].

¹⁶⁰ Jerome MORSE, "The Applicability of Personal Injury Damage Principles to Libel and Slander Cases", (1983) 23 C.C.L.T. 52.

¹⁶¹ (1982) 21 C.C.L.T. 261 (Ont. H.C.).

all personal injury cases, one can rely upon scientific analysis to calculate the pecuniary loss endured with reasonable precision.

Morse, therefore, concludes that there is no legitimate ground for the application of the upper limit concept from personal injury awards to moral damage awards in defamation cases¹⁶². This is mainly due to the fact that the total pecuniary compensation, upon which the cap is based, does not exist in the case of the awards in libel suits. Morse states that there are three principal differences between the evaluation of damages in personal injury cases and in defamation suits. Firstly, whereas in defamation cases, the conduct of the defamer is always considered in the evaluation of the "at large" award, in personal injury cases such as the trilogy and *Lindal*¹⁶³, the Court emphasized the fact that the punishment of the defendant carried no weight in the assessment of non-pecuniary damages. Secondly, the nature of the non-pecuniary damages in personal injury cases as opposed to that in defamation cases is essentially different. In personal injury cases, although the true extent of the injury is known, the victim's non-pecuniary damages cannot be measured. In defamation cases, however, the extent of the injury is unknown, and the non-pecuniary damages cannot be measured. According to Morse, the "at large" damages awarded in defamation cases reflect this fundamental difference. Lastly, there is no foundation for fully compensated pecuniary losses in defamation awards to explain the social policy capping the non-pecuniary loss established in personal injury cases. The Court, in the trilogy, stated that consideration was given to the social impact of an award only for the assessment of non-compensatory damages. "At large" damages in defamation cases are "traditionally both theoretically and practically compensatory."¹⁶⁴ In addition to this,

[n]on-pecuniary general damages in personal injury cases are not compensatory, but rather a substitute to make life easier for the plaintiff. Hence, the establishment of a rough upper limit in personal injury cases. To the extent "at large" or compensatory damages in libel and slander cases are not compensatory, but are in part an expression of

¹⁶² *Id.*

¹⁶³ *Supra*, note 20.

¹⁶⁴ *Id.*, 69.

*the Court's outrage at the defendant's conduct, the basis for imposing a rough upper limit on the authority of the trilogy and the Lindal case is missing.*¹⁶⁵

It is relevant, in light of the discussion above, to turn our attention to civil law defamation cases in Quebec, more specifically to *Snyder*¹⁶⁶.

In this case, Snyder, a well-known Montreal city official and Vice-President for Revenue of the Olympic Games Organizing Committee, found his picture on the front page of the Gazette one morning, with an article insinuating that he was considered to be the representative of the "Jewish Mafia," and that he was suspected to have contacts with organized crime. The Supreme Court of Canada sustained the jury's award of \$135 000. Justice Lamer, in a partially dissenting opinion expressed his view that the jury award was unreasonable, and proposed that it be lowered to \$35 000. More importantly, Lamer suggested the imposition of a "reference level" of \$50 000, in 1978 dollars, on non-pecuniary damages in defamation cases, to be awarded in the most extreme case of defamation.

Several motivations led Lamer J. to render this dissident opinion and embrace the notion of a \$50 000 upper limit for moral damage awards in defamation cases. Firstly, this upper limit is justifiable since the evaluation of the award serving to compensate moral damages is arbitrary and subjective and, therefore, it is best to establish a reference point to facilitate the assessment of the amount to be awarded. Secondly, although the defamed has a right to be integrally compensated, this compensation should not be a source of enrichment for him to the detriment of the defamer. According to Lamer J., the larger the award for moral damages, the more the amount is likely to contain a punitive dimension. Since, in the civil law system, the principle is to compensate and not to punish the wrongdoer, this dimension must be erased from our system. Thirdly, the moral harm that the defamed suffers is usually of a temporary nature, since the suffering he endures fades with the passage of time. This also justifies the

¹⁶⁵ *Id.*

¹⁶⁶ *Supra*, note 3.

imposition of a \$50 000 upper limit on moral damages in defamation cases.

Lamer J. adds that the defamed can obtain a judgement which can help to reestablish his reputation and, therefore, serve to repair, either partially or totally, the damages the defamed is suffering. Moreover, the courts in Quebec have always exercised restraint in the evaluation of non-pecuniary damages in defamation cases. As a last, but more secondary factor to be considered, Lamer J. mentions that the courts risk paralyzing the functioning and possibly even the existence of the press by condemning it to pay large sums following a defamation suit.

Jukier¹⁶⁷ supports the imposition of the cap suggested by Lamer J. She suggests that the reference point can be strongly advocated based, in part, on the fact that in most defamation cases, it is the conceptual approach which is applied in the assessment of moral damages. It is her contention that since the true basis for the evaluation of moral damages in defamation cases is often the severity of the injuries suffered, defamation victims should receive lower non-pecuniary damage awards than personal injury victims. She concludes the following regarding the imposition of the upper limit proposed by Lamer J.:

*If the conceptual approach is the one in fact applied by the courts, then a strong argument can be made that the defamation victims should, as a general rule, receive lower moral damages than personal injury victims. The conceptual approach applied by the courts in defamation actions combined with the temporary character of the damages, the alternative means of redress available to the defamed victim and the consideration of the chilling effect large damage awards can have on freedom of speech lend support to Lamer's dissenting opinion in Snyder wherein he argued for a lower ceiling (of \$50,000 in 1978 dollars) on moral damages in defamation cases.*¹⁶⁸

Jukier¹⁶⁹ endorses the idea of a cap on moral damages in defamation cases for additional reasons. She maintains that it is the similarity between the evaluation of non-pecuniary damages

¹⁶⁷ Rosalie JUKIER, "Non-pecuniary Damages in Defamation Cases", (1989) 49 *R. du B.* 3.

¹⁶⁸ *Id.*, 16.

¹⁶⁹ *Id.*, 9.

in personal injury and defamation cases that justifies the application of the trilogy to defamation cases. She takes this idea one step further, however, in suggesting that even lower non-pecuniary damage awards are appropriate in defamation cases because of the existence of certain factors found in defamation cases which do not exist in personal injury cases.

The existence of two competing interests in defamation cases, which is not present in personal injury cases, is the first of these factors. More specifically, it is freedom of expression, protected by both the *Quebec Charter of Human Rights and Freedoms*¹⁷⁰ and the *Canadian Charter of Human Rights and Freedoms*¹⁷¹, that is being balanced against the protection of the individual's reputation. The absence of an upper limit on moral damages in defamation cases can have the effect of causing newspaper editors to be hesitant to publish certain controversial stories which they feel have the potential to lead to a libel suit¹⁷².

Secondly, the temporary nature of the loss endured by the defamed plaintiff as opposed to that suffered by the victim of personal injury is another factor foreign to personal injury cases. According to Jukier, damages caused in defamation cases seldom have life-long consequences for the plaintiff, even if these damages are severe.

Lastly, the third factor which, according to Jukier, exists in defamation cases and is absent in personal injury cases, thus justifying a lower moral damage award in defamation cases, is the availability of alternative remedies which the defamed can use to lessen the negative effects of the defamatory statement¹⁷³. These alternative remedies might include the mitigation of damages by judicial declaration, the publication by the defendant of the judgement, the printing of a retraction or reply, and other such remedies. Jukier concludes¹⁷⁴,

¹⁷⁰ *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

¹⁷¹ *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁷² Rosalie JUKIER, *loc. cit.*, note 167, 11.

¹⁷³ *Id.*

¹⁷⁴ *Id.*, 9.

[i]t is beyond the scope of this article to examine the merits of the trilogy and the appropriateness of placing an upper limit on the recovery of non-pecuniary damages in personal injury cases. It is argued, however, that as long as a ceiling remains on moral damages in personal injury cases, it is unwarranted to allow non-pecuniary damages in defamation cases to soar above such ceiling.

It is interesting to note that in *Hill*¹⁷⁵ and *Botiuk*¹⁷⁶, the two recent common law judgements of the Supreme Court of Canada concerning defamation, no mention was made of Lamer J.'s dissenting opinion in *Snyder*¹⁷⁷, proposing the implementation of a \$50 000 reference point for moral damages in defamation cases. This can be interpreted in such a way as to imply that the Supreme Court of Canada left the door open to the possibility of the eventual imposition of a cap on moral damage awards in civil law defamation cases. Perhaps this omission to include civil law defamation cases when discussing the inappropriate nature of a cap on moral damages in defamation suits can be explained by the fact that in civil law defamation cases, the intention to harm one's reputation is not required as it is in common law defamation cases.

Upon reviewing the existing Quebec case law addressing the issue of defamation, it is evident that the courts generally award small amounts for non-pecuniary damages and, thus, one might argue that the imposition of a cap is, consequently, unnecessary¹⁷⁸. On the other hand, one might argue that since the awards are generally low, it is best to have a reference point so that the courts refrain from awarding excessively high awards in the evaluation of moral damages in defamation cases. Moreover, as suggested before, perhaps by imposing such a cap, it will serve to avoid the situation in which the defamed plaintiff, who can reestablish his reputation over time, is receiving a larger award for moral damages than the victim of personal injury who cannot

¹⁷⁵ *Supra*, note 116.

¹⁷⁶ *Supra*, note 159.

¹⁷⁷ *Supra*, note 3.

¹⁷⁸ *Goupil v. Publications Photo-Police*, [1983] Sup. Ct. 875; *Poirier v. Leblanc*, [1983] Sup. Ct. 1214; *Blanchet v. Corneau*, *supra*, note 11; *Tremblay v. Ville d'Anjou*, [1991] R.J.Q. 1989 (Sup. Ct.); *Radiomutuel v. Carpentier*, [1995] R.R.A. 315 (C.A.).

restore what he has lost in terms of bodily damage. There are exceptions to the rule where high amounts are awarded in defamation cases in Quebec, thus perhaps justifying a limit on these awards as proposed by justice Lamer in his dissident opinion in *Snyder*¹⁷⁹.

It cannot be adequately emphasized that a defamed plaintiff can be provided with other means of redeeming his reputation, whereas the victim of personal injury cannot possibly repair or replace what he has lost. It is held by the courts that although a defamed victim can reestablish his reputation and obtain a retraction or apology, there are no grounds to limit the sums awarded in these cases¹⁸⁰. Can it not be argued, therefore, that limiting the non-pecuniary damage awards of personal injury victims is unjustifiable given the fact that they do not have the same means at their disposal to reduce the level of moral prejudice they suffer as those available to the defamed plaintiff? Moreover, when one considers the temporary nature of the prejudice caused to a defamed individual's reputation, it is difficult to justify limiting the non-pecuniary damages award for the victim of personal injury whose injury is permanent and irreversible. This can be viewed as the strongest criticism of the cap on non-pecuniary damages in personal injury cases.

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Non-pecuniary loss is, in common law terms, a loss which is intangible and which lacks market value. Commonly referred to in civil law as extrapatrimonial loss, it is defined as an attack on one's physical integrity which has no effect on one's patrimony.

¹⁷⁹ *Fabien v. Dimanche Matin*, [1979] Sup. Ct. 928 - \$75 000; this was reduced in appeal to \$35 000, JE 83-971; *McGregor v. Montreal Gazette*, [1982] Sup. Ct. 900 - \$50 000; *Snyder, supra*, note 3 - \$135 000; *Arthur v. Giguère*, [1989] R.R.A. 798 (Sup. Ct.) - \$30 000; *Cassivi-Lefebvre v. Piquemal*, [1992] R.R.A. 612 (Sup. Ct.) - \$60 000; *Samuelli v. Jouhannet*, [1994] R.J.Q. 152 - \$100 000, confirmed in appeal, (1996) R.R.A. 571; *Rizutto v. Rocheleau*, [1996] R.R.A. 448 (Sup. Ct.) - \$150 000.

¹⁸⁰ *Snyder, supra*, note 3.

Different approaches towards assessing the right to non-pecuniary damages have been applied throughout the years to personal injury suits in Canada. The Supreme Court trilogy settled the uncertainty as to the appropriate approach to be adopted for non-pecuniary damages in common law personal injury suits. Despite the difficulty inherent in the assessment of non-pecuniary damages, therefore, the courts in Canada have come to a consensus with regards to the approach to be applied and the upper limit to be imposed on this head of damages in common law personal injury suits. Although they have created some controversy among authors and some judges, these principles have even been applied to personal injury cases in Quebec by both the superior and appeal courts. The end result is thus similar in both common law and civil law cases in terms of the awards for non-pecuniary damages.

These two developments in personal injury law in Canada cannot, however, be accepted without criticism. It appears that this upper limit is incompatible with the functional approach, adopted by the Supreme Court, which seeks to provide the victim of personal injury with solace for his misfortune. Moreover, while these policies have possibly resulted in an unjust situation in that awards for defamed victims continue to soar in some cases to exceed the upper limit of the Supreme Court for non-pecuniary awards in personal injury cases, the Supreme Court maintained its disapproval of an upper limit for moral damages in defamation cases¹⁸¹.

It is argued, therefore, that since the harm caused by defamatory remarks are simply temporary, and can be minimized by using alternate remedies, whereas an injured victim's injuries are permanent and cannot be compensated by other means, the upper limit for non-pecuniary damages is unjust and should be reconsidered. At the very least, if the upper limit is to remain applicable to personal injury suits, a lower upper limit, as suggested by Lamer J. in his dissenting opinion in *Snyder*¹⁸², should be established for defamation cases. Otherwise, this refusal of the Supreme Court of Canada to limit non-pecuniary damage awards

¹⁸¹ *Hill, supra*, note 116.

¹⁸² *Supra*, note 3.

in personal injury cases and not in defamation cases suggests that life is less valued in our society than an individual's reputation.

Although the implementation of such a cap has not been formally excluded by the Supreme Court for civil law defamation cases in Quebec, it is not yet known if this is meant to imply that this remains a possibility, and if this is the case, if the Supreme Court of Canada will resolve this question in its judgements to come.