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# Popping The Cap

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## Abstract

On a beautiful summer night, Pritie Patel called up her friends. They decided to go out in Montreal's Old Port. Around 1:00 a.m., as Patel and her friends were returning home, Patel walked across a stopped train. There were no crossing bar- riers, and no indications that the train could be set in motion. It was. On that night, Patel lost both her legs and endured excruciating pain. But she lost much more than that. While Ms Patel may still lead a fulfilling existence, certain aspects of her life have permanently changed. Ms Patel will be compensated for the past and future income lost as a result of her injury. But she also endured a great deal of pain and lost access to some hobbies and occupations. How much is that, in our legal system, "worth," you ask? The answer is up to $390,000.

That's because over 40 years ago, the Supreme Court of Canada set an "upper limit" on the amounts which can be awarded as compensation for the non-pecuniary component of a bodily injury. This upper limit has evolved into an effective cap.

This article argues that the cap makes no sense. Having further detailed Ms Patel's story, it reviews the principles which define this area of personal injury law in Canada. Then, the article argues against the cap, attempting to show that it is neither fair nor theoretically consistent. It argues that the Supreme Court relied on unproven and incorrect assumptions when it created the cap in 1978. These assumptions still underlie the rhetoric used by courts to justify their continuing adherence to the cap. The article proceeds to contend that the best way to get rid of ("pop") the cap is not to challenge it on its own terms, but rather to persuasively argue that its conceptual foundations are incorrect. Throughout, the article briefly discusses other broader social issues, of which personal injury law is both a constitutive scene and a microcosm. In doing so, the article makes an original contribution to the severely sparse body of Canadian personal injury law scholarship — and tangentially argues that the field deserves far more scholarly attention.

## Introduction[1]

It was a beautiful summer night, early June, late evening.[2] It was supposed to rain, but didn't. On that evening, Pritie Patel called up her friends and made plans to go out.[3] They would drink, socially and reasonably, at a bar in Montreal's Old Port.[4] Patel and her friends left the bar around 1:00 a.m.[5] By then, it was raining a little.[6] As Patel walked back to the car, she saw a stopped train was fully in the way.[7] Following two of her friends, Patel decided to climb over the train.[8] In the absence of crossing barriers down the track, she never thought that the train could be set in motion.[9]

However, without warning, it was.[10] Patel fell between two train cars, her legs stuck under the wheels.[11] She was "dragged" several metres by the train.[12] Patel lost both her legs.[13]

Needless to say, Ms Patel's life will never be the same. She has endured, and will likely continue to endure, excruciating pain. She will invest significant time and effort into her recovery. At least throughout her recovery, and likely for the rest of her life, she will need the help of others. She won't run, or walk, again. She has lost, at least in part, access to many occupations and hobbies. For those she may still access, she will find more barriers upon her path — the absence of which able-bodied individuals have the luxury of taking for granted.[14]

Quite importantly, the accident wasn't her fault. All of these things happened not because she was careless or made a decision some of us would not have made. They happened because she was in the wrong place at the wrong time. The factual background in the case is somewhat complex, as is typical in personal injury litigation. Ms Patel sued the train company, the port, and the company which runs the port and employs the security guard who was there that night.[15] Then, two of these defendants settled — which turned out to be a very smart decision given how the trial turned out.[16] We got to learn in excruciating detail how careless the guard was.[17] Beyond the complex issues as to who did what, who was wrong, and who paid how much, the court agreed with one thing: it wasn't Ms Patel's fault. The lawyers on the other side did their job and argued that she was drunk and/or careless to cross over a train.[18] The court disagreed and apportioned only 10 per cent of the liability to Ms Patel. The court rejected the submission that Ms Patel accepted the risk that materialised. Instead, the court attributed this portion of liability to Ms Patel because she accepted a level of risk when she climbed over the train — which was significantly lower than the risk that materialised.[19]

Ms Patel could have been unluckier. The companies she sued were both solvent and insured, so to the extent that she could prove that they were at

fault, she would be compensated for her injury. Since no Canadian province has adopted a universal, no-fault liability system for personal injuries (with the exception of automobile accidents),[20] Ms Patel could very well have ended up with a shattered life, needing care that would cost millions of dollars, yet would have been unable to claim compensation from those who harmed her.

This also meant that Ms Patel didn't have to worry about coming up with tens or hundreds[21] of thousands of dollars to go to court to actually get that compensation. To the extent that a personal injury lawyer was satisfied that Ms Patel was very likely to prevail in court (or receive a settlement), that lawyer would agree to take a portion of the compensation awarded instead of billing by the hour. Fortunately, Ms Patel found such a lawyer.[22]

To get the money to which she was entitled, Ms Patel had to go to court. A court can't give Ms Patel her legs back, or anything that even remotely resembles that. As a general rule, courts can only put people in cages or take their money. Ms Patel's injury therefore had to be "assessed". It had to be converted into a dollar figure. There are relatively "straightforward" aspects to her injury, aspects which more naturally lend themselves to this exercise. For instance, Ms Patel can prove that she had some salary before her injury and will have a lower salary thereafter. She is owed the difference, discounted to present value.[23] Similarly, Ms Patel can prove that she will need to consult a physiotherapist (who is not available within the public system) for her entire life. The cost of that, again discounted to present value, forms part of the compensation she can claim. But what about what we discussed earlier? What about the intangible enjoyment that Ms Patel permanently and unfairly lost on that night? What about the pain she suffered? What about the pain she will continue to suffer? What about the meaning lost from being unable to work or being unable to pursue certain occupations?[24] What about the things she will either never do again or only be able to do with the assistance of others? How much is that "worth"?

The answer, it turns out, is as simple as it is absurd: $390,000. Actually, *up to* $390,000. And that's not because elected officials thought that was a sensible way to assess damages. It's because over 40 years ago, the Supreme Court of Canada set an "upper limit" on the amounts which can be awarded as compensation for the *non-pecuniary component of a bodily injury* (more on what that phrase means later). Then, since no judge really knew exactly what an "upper limit" was, or what circumstance would justify exceeding the limit, everyone took the safe route, and the "limit" became an effective cap — an absolute limit on the amounts that can be awarded.

This article argues that the cap makes no sense. It proceeds in three parts. The first section reviews the principles which define this area of personal injury law in Canada. The second section argues against the cap, attempting to show that it is neither fair nor theoretically consistent. It argues that the Supreme Court relied on unproven and incorrect assumptions when it created the upper limit in 1978. These assumptions still underlie the rhetoric used by our courts to justify their continuing adherence to the cap. Section three of the article addresses the more practical concern of how the cap could be overturned by our courts. It contends that the best way to get rid of ("pop") the cap is not to challenge it on its own terms, but rather to argue that its conceptual foundations are incorrect. Throughout, the article briefly discusses other broader social issues, of which personal injury law is both a constitutive scene and a microcosm. In doing so, the article makes an original contribution to the severely sparse body of Canadian personal injury law scholarship, and tangentially argues that the field deserves far more scholarly attention.

## 1. The Cap

This section provides a broad overview of the principles which I later criticise. It is articulated around three subsections. The first subsection provides an overview of the classification of *types* of injuries in personal injury law. This preliminary picture helps delineate what constitutes a bodily injury — the only type of injury to which the cap applies. The second subsection discusses the trilogy of cases which the Supreme Court of Canada heard and decided in 1978, and which led to the institution of the upper limit (subsequently interpreted as a cap) on compensation for the non-pecuniary component of a bodily injury. Finally, the third subsection consolidates and applies these concepts by giving two examples of cases where the cap did not apply.

### 1.1 Classification of Injuries

For our purposes, it is simplest to begin with the classification of injuries set out in the *Civil Code of Quebec*, which lists three types of injuries: material, moral, and bodily. Article 1457 reads as follows:

> Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

While the boundaries between these "types" of injuries can often be permeable and elusive, the three concepts are not inherently complex. A physical injury generally affects the body. For instance, a person who falls from a roof and becomes a quadriplegic has suffered a physical injury. A material injury generally involves one's property. If a malicious tortfeasor sets my house on fire (without injuring anyone), then I suffer a material injury. Finally, a moral injury is one that is more intangible, and involves neither one's body nor one's property. The most cogent example is defamation. If, say, the President of the United States tweets[25] that I am involved in an elaborate human trafficking and child sexual abuse operation led by his former political opponent,[26] the President will have attacked my reputation.[27] My reputation is neither part of my body nor my property. It is an intangible yet highly valuable aspect of my identity, both as it relates to my personal life and my work.[28] By leading some people to disassociate from me or stop trusting me, the President will have caused a moral injury.

It is entirely possible for a single act to cause an injury with aspects that fall into more than one of these categories. Recall the bodily injury example I just introduced: a person falls from a roof and becomes a quadriplegic. It is possible, and indeed quite likely, that the person will also have suffered a moral or material injury. For example, the person's glasses (*i.e.*, her property) may have been damaged,[29] and she may have endured significant pain from the moment of her fall to the moment she was transported to a hospital — which is not "physical" and would be classified as a moral injury.[30]

Nonetheless, it is clear in the example that the injury is best classified as *mainly* bodily: the main injury sustained is the physical loss of limbs and its economic consequences. This is also how courts have construed such an injury.[31] Therefore, in contrast to the wording used in the previous paragraph, courts would speak of a bodily *injury*, but not of a concurrent moral or material *injury*. Instead, these would be classified as moral or material *consequences* of a bodily injury, or as moral or material damages arising from a bodily injury. In classifying an injury, we consider "the initial breach, rather than the consequences flowing from that breach".[32]

The relevance of this subtle distinction becomes plain in the next subsection, which considers the cap established by the Supreme Court in 1978.

## 1.2 The Trilogy and the Cap

In the late 1970s, the Supreme Court heard three cases involving very serious bodily injuries: *Arnold v. Teno*,[33] *Thornton v. School District No. 57 (Prince George), et al.*,[34] and *Andrews v. Grand & Toy Alberta Ltd*.[35] (These cases are often referred as a trilogy.)[36] The decisions were rendered on the same day.[37] The specific facts of each case are not directly relevant to my argument here, except to show that the injuries suffered by the victims were very significant. *Arnold*[38] involved a child who was crossing the street after buying ice cream from an ice cream truck. She was struck by a car (before no-fault automobile insurance, of course). Her mobility was "seriously lessened […] and she suffered a very considerable degree of mental impairment".[39] *Thornton*[40] involved a child-athlete[41] who was injured during a physical education class. As a result of the injury, he suffered "total or partial paralysis to each of his four limbs".[42] Finally, *Andrews*[43] involved a plaintiff who became a quadriplegic as a result of a car accident (again before the institution of no-fault automobile insurance).

Two of these decisions involved an unanimous court,[44] and *Thornton* and *Arnold* expressly refer to the decision in *Andrews*,[45] which most exhaustively sets out the principles and reasoning relevant to the cap.[46] In *Andrews*, the Court states that "the appropriate award in the case of a young adult quadriplegic like Andrews [is] the amount of $100,000"[47] and that "[s]ave in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature".[48] Considering the seriousness of the victims' injuries in this and the other two cases, the intimation was that few, if any, injuries would justify a higher award.

As mentioned, although the intimation was that exceptions would be rare, the Court refers to an "upper limit". This is different from a cap, which would be an absolute limit. Nonetheless, over time (and quite quickly), the upper limit evolved into an effective cap.[49] There has been, in 40 years, no case where a court awarded a higher amount without being overturned by a higher-level court. The $100,000 figure has been indexed to account for inflation and now amounts to approximately $390,000.[50]

Courts have allowed for some flexibility in the amount awarded. They have consistently stated that each victim's injury is unique: awarding a diplegic victim half of a quadriplegic victim's compensation would fail to consider the uniqueness of her injury.[51] It is therefore quite possible that the victim would be awarded an amount that is closer to the cap. As is further discussed below, this may suggest that courts disagree, at least in part, with the cap yet are bound to respect it under *stare decisis*. They may, when appropriate, be using the interpretive room which they feel was left by the Supreme Court to maximise the compensation they award to victims. Nonetheless, and most importantly, they do so by treating the upper limit as a cap.

The next subsection helps clarify and circumscribe the principles set out by the Supreme Court. It provides two examples of cases where the cap did not apply.

## 1.3 Where the Cap Does Not Apply

Let us begin with what the Court states in *Andrews*: "Save in exceptional circumstances, this [$100,000] should be regarded as an upper limit of non-pecuniary loss in cases of this nature".[52] This is admittedly not the clearest sentence in the Court's storied history. First, "cases of this nature", as we shall see, refers to cases where the plaintiff suffered a *bodily* injury. As mentioned, a bodily injury can have moral and material consequences. Second, "non-pecuniary loss" refers, essentially, to moral damages under the classification introduced in the first subsection.[53]

Indeed, pecuniary means more easily quantifiable. Physical injuries are generally easily quantifiable. Let us use the example of Ms Patel from the introduction.[54] Ms Patel could prove that she had some

salary before losing her legs (the injury) and will have a lower salary thereafter. She is owed the difference, discounted to present value.[55] Likewise, Ms Patel can prove that she will need to consult a physiotherapist (who is not available within the public system) for her entire life. The cost of that, again discounted to present value, forms part of the compensation she can claim. Similarly, if Ms Patel's property is destroyed (a material injury), she can claim the value of the property. Again, this is quite easily quantifiable. In contrast, moral damages are not (as) easily quantifiable. There is no simple way to assign a dollar value to the suffering Ms Patel endured when she lost her legs, or the deep grief she will feel throughout her life as she finds new barriers upon her path. This portion of her injury is therefore "non-pecuniary".

The cap applies to "non-pecuniary loss in cases of this nature"[56] or, to rephrase the Court's statement more clearly, to the non-pecuniary (or moral) consequences of a bodily injury. There are two operative criteria. First, the injury must be a bodily injury. If it is not, the cap does not apply. Second, the cap only applies to the non-pecuniary component of such an injury. Past and future lost income, the cost of home care, and similar more easily quantifiable costs are *not* capped. Only non-pecuniary damages, such as pain and suffering, are.

Let us illustrate these distinctions with two examples where the cap did not apply. In *Cinar Corp. v. Robinson*, a company misappropriated the plaintiff's intellectual property.[57] Mr. Robinson had spent years creating a television show. He unsuccessfully pitched it to various individuals and companies. Then, about a decade later, he turned on his television and realised that some of these individuals and companies had stolen his ideas, changing only a few names and other secondary details.[58] This had a devastating impact on Mr. Robinson. He had invested years into his project, and the stolen version went on to make a great deal of money. His health suffered as a result.[59] Unsurprisingly, the lawyers on the opposite side argued that the non-pecuniary portion of the injury, *i.e.*, the psychological suffering he endured, should be capped — either because it stemmed from a physical injury or because the cap should apply to non-physical injuries.[60] More surprisingly, the Quebec Court of Appeal agreed, finding that the pecuniary portion stemmed from a physical injury (and the Supreme Court reversed that determination).[61] So why did the cap not apply? It is because Mr. Robinson's non-pecuniary harm (psychological suffering) did not stem from a *bodily* injury. Instead, it stemmed from a material injury, *i.e.*, the misappropriation of his intellectual property.[62] The Quebec Court of Appeal had erroneously focussed on the physical nature of the suffering, instead of on the fact that it stemmed from a non-physical injury.[63]

Similarly, in *Hill v. Church of Scientology of Toronto*, the plaintiff was defamed.[64] Mr. Hill was a Crown attorney involved in proceedings against the Church of Scientology. Representatives of the Church held a press conference by the entrance of a Toronto courthouse. They stated that they "intended to commence criminal contempt proceedings against [Mr.] Hill […, alleging that] Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology".[65] They sought the imposition of a fine and Hill's imprisonment.[66] None of the allegations were true, so Mr. Hill sued.[67] He was awarded $300,000 in damages.[68] In that case, the damages were moral, or non-pecuniary. Mr. Hill did not suffer a physical or material injury. Instead, his injury consisted of the intangible harm to his reputation and the suffering he endured as a result. Again, the cap was not applicable. Mr. Hill's injury, though non-pecuniary, did not stem from a bodily injury.[69] Instead, the injury was purely moral, or non-pecuniary.

The next section discusses the main issues with the cap. The first subsection discusses how the cap is unfair, in that it poorly reflects the magnitude of the

injury suffered in bodily injury cases. This is especially so when we compare these injuries (to the extent possible) with the non-pecuniary injuries for which compensation is not capped. The second subsection discusses and assesses the reasons the Supreme Court gave in *Andrews*[70] for the institution of the cap. It argues that the Court relied on incorrect and unsubstantiated assumptions.

## 2. What is Wrong

### 2.1 The Cap is Unfair

At first, capping these damages seems odd and arbitrary. How did the Court fix the $100,000 limit? Would such a figure not be for the legislature to determine?[71] Why is a single type of damages capped? There appear to be no analogous areas of law where courts have imposed a largely arbitrary limit, in the absence of relevant legislative provisions — or even evidence of legislative intent.[72] Most importantly, and as further discussed in the next subsection, the justifications the Court gave when it instituted the cap are (and, to a large extent, were) generally unfounded.

There is a strong argument to be made that the cap undercompensates personal injury victims. Of course, the very nature of moral or non-pecuniary damages is that they do not naturally lend themselves to quantification.[73] When describing Ms Patel's injury in the introduction, I stated: "Needless to say, Ms Patel's life will never be the same. She has endured, and will likely continue to endure, excruciating pain. She will invest significant time and effort into her recovery. At least throughout her recovery, and likely for the rest of her life, she will need the help of others. She won't run, or walk, again. She has lost, at least in part, access to many occupations and hobbies. For those she may still access, she will find more barriers upon her path — the absence of which able-bodied individuals have the luxury of taking for granted". How much is that worth? Although Ms Patel will be compensated for the past and future income lost as a result of her injury, the deep pain and grief she will invariably feel from the new barriers she will face is considered non-pecuniary harm. The excruciating pain Ms Patel felt when she lost her legs and the pain, she will presumably continue to suffer throughout her life are also considered non-pecuniary harm. All of these things are, *collectively*, worth up to $390,000.

Although there is no objective way to assign a dollar value to non-pecuniary harm, it seems dubious to claim that the pain and grief that arises from these multiple, overlapping, and cumulative consequences of a personal injury will never warrant compensation of more than approximately $390,000.

That is especially true when we engage in the inevitable comparisons which the cap invites. Recall the two cases we discussed in the previous section: *Cinar Corp. v. Robinson*[74] and *Hill v. Church of Scientology of Toronto*.[75] In both cases, the Court emphasised the distinction between non-pecuniary harm arising from a bodily injury and non-pecuniary harm arising from other types of injuries. As mentioned, this helped the Court, and judges in subsequent cases, circumscribe and justify the cap. However, it is hard to give much importance to this distinction, which is largely artificial. In both cases, the harm is moral or non-pecuniary. Indeed, for that reason, the *types of damages* are, in both cases, the same. A victim of defamation can claim compensation for the psychological distress she suffered as a result of the statements made about her. Similarly, a victim of a personal injury, such as Ms Patel, can claim compensation for the psychological distress she suffered when the injury occurred, as well as thereafter — for Ms Patel, the distress when her legs were severed, as well the distress described above. In both cases, the harm is considered moral or non-pecuniary. And quite logically so, given that both victims, although for different reasons or to a different extent, experience distress of the same nature.

Nonetheless, the damages that can be recovered are only capped for one of these victims. At first, this seems, as it likely should, both arbitrary and peculiar. The distinction seems to call for a singularly compelling justification, and it would probably be fair to assume that most people would intuitively feel that the justification presented in the previous section does not meet that threshold. From a theoretical and logical standpoint, it may therefore seem inappropriate and unfair to the personal injury victim to limit only her compensation for the *same* type of harm. Furthermore, and while again recognising that there is no objective way to assess (in absolute or comparative terms) non-pecuniary damages, most people would likely intuitively feel that *it should be the other way around*, *i.e.*, that the personal injury victim should be further compensated. The victims in *Cinar* and *Hill* both received as compensation an amount higher than the cap (in absolute dollars).[76] While acknowledging the significant distress which defamation or intellectual property misappropriation can bring about, most people would likely intuitively feel that the psychological distress experienced by Ms Patel should be attributed greater compensation. As mentioned, not only did Ms Patel (and similar personal injury victims) experience excruciating pain when her legs were severed, the non-pecuniary head also includes the pain she will suffer throughout her life, the loss of meaning from work and access to some occupations and hobbies, and the need to perpetually rely on others.

The cap can therefore be construed as unfair to personal injury victims. It can be argued to limit the compensation they receive to an inappropriately low amount, both in absolute terms (*i.e.*, given the magnitude of their injury) and in comparative terms (*i.e.*, given the compensation which can be awarded to other victims who suffer the same non-pecuniary harm).

The next subsection further discusses why the cap is problematic. It focusses on the assumptions which underlaid the Court's decision.

## 2.2 The Supreme Court Relied on Problematic Assumptions

Adding insult to injury[77] is, indeed, the fact that the Court relied on incorrect and unsubstantiated assumptions when it instituted the cap. I will discuss two key stated assumptions which helped the Court justify its decision. As we shall see, the Court's analysis was, on both, far more rhetorical than it was analytical. It is first worth mentioning that the decision is both visibly and substantively thin. The decision in *Andrews*,[78] which institutes and justifies the cap, cites few sources and is only 38 pages long. The portion which discusses the cap is under five pages long.[79]

The Court's juridical syllogism can be broken down as follows: (1) given the inherently unquantifiable nature of non-pecuniary harm,[80] there is bound to be excess in the amounts awarded;[81] (2) that is bad, because it adds unnecessary cost in our society, which everyone ends up paying for;[82] (3) the escalation is already happening;[83] so (4) we need to do something about it and do it now.[84] Of course, if we accept the individual validity of the constitutive elements, the syllogism makes sense. But all of these elements have to be valid for the end result to be justified. The problem, as we shall see, is that they are not.

Again, most of what the Court decided was asserted, not argued. My goal in this section is not to thoroughly weigh the broader social issues raised by the Court, on both sides of which exist valid arguments. For instance, I do not wish to argue that personal injury awards and settlements do or do not create a burden for which everyone ends up paying. Maybe they do. Maybe they don't. That's not the point. The point is that *regardless of the position the Court takes*, it should be intelligible and properly supported. We can't just accept a statement as

true because it is asserted, especially when the cited evidence either doesn't exist, isn't clear, or may suggest conclusions which have nothing to do with victim (over)compensation. If that is considered the most deferential standard of review when we approach administrative decisions,[85] then it is the least we can expect of our Supreme Court, especially when the quality of life of some of our most vulnerable citizens is at stake.

So let's take these elements sequentially. (1) and (3) are mutually dependent: (1) given the inherently unquantifiable nature of non-pecuniary harm, there is bound to be excess in the amounts awarded; and (3) the escalation is already happening. It is certainly, in light of what we saw in the previous section, fair to state that non-pecuniary harm is hard to quantify. In itself, that doesn't say much. The Court agrees that "hard to quantify" shouldn't mean "not worth quantifying".[86] In fact, to state that non-pecuniary harm is hard to quantify is a neutral statement. It simply means that assessing the injury with a dollar amount is subjective. In an adversarial system, lawyers on each side will do their job.[87] The lawyers for the victim will try to get as much money as possible, and the lawyers for the person paying that money will try to minimise what their client will pay. Along the spectrum, the neutral arbiter will find the appropriate outcome.[88] There is nothing ground-breaking there, and I am confident most litigators would agree that is also how litigation generally works.

Yet the Court equates subjective and excessive. That certainly requires quite a bit of justification. In fact, one would likely assume that the opposite is true. For a personal injury victim to be in court, she and her lawyer must first have determined that filing a lawsuit is worthwhile, because she is likely to win, but also because the defendant has money (or insurance). It would be a colossal waste of (billable) time to prove that she is entitled to millions of dollars yet be unable to recover that money because the defendant has no money or doesn't have enough money.[89] As a corollary, the defendant can be assumed to also have money to pay for a lawyer — and a good one. That is the typical (and admittedly simplified) context in personal injury litigation. It would be fair to assume, in litigation between an average individual who has just been the victim of a terrible injury[90] and a wealthy party, that the wealthy party will get a lawyer who is more likely to competently advocate for their interests, *i.e.*, the *minimisation* of compensation.

The Court disagrees. Why? We don't really know. To support the concept that compensation is bound to become, and is becoming, excessive, the Court makes two statements. First, we are told: "It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest".[91] I am not taking this statement out of context: these two sentences are the full justification.[92] Second, the Court states:

> It is clear that until very recently damages for non-pecuniary losses, even from very serious injuries such as quadriplegia, were substantially below $100,000. Recently, though, the figures have increased markedly. In *Jackson v. Millar*, this Court affirmed a figure of $150,000 for non-pecuniary loss in an Ontario case of a paraplegic.[93]

That statement is properly referenced, and the Court is correct to state that there was, then, an increase in awards.

Neither of these statements, or both in tandem, is evidence that compensation is becoming "excessive". The Court is stating that plaintiffs in the United States get a lot of money. Then, it is stating that Canadian plaintiffs get more money than they did before, although, and this should be stressed, to a *much, much* lesser extent.[94] Indeed, the example used is an award of $150,000. This is 1.5 times the cap, and approximately $553,000 in 2020 dollars.[95] It is certainly not self-evident why the Court felt $100,000 was appropriate as compensation, but that

$150,000 was an astronomical amount that clearly paved the way to havoc, in the form of an American-style system of excessive compensation.

Regardless, there is no evidence of "excess". The $150,000 figure is certainly not in itself evidence of excess. Neither is the fact that plaintiffs get high awards in the United States. "High" doesn't mean excessive. Nor does "higher" mean excessive. The Court seems to take for granted, perhaps influenced by the very nature of the common law,[96] that the past is the proper place to look for how things should be done. Again, however, that is not self-evident. If awards are higher today, we would be *equally* justified to assume that they are appropriate today and that they were previously "excessively low". As mentioned, the point of my analysis is not to definitively state that either interpretation is correct. I am more humbly trying to show that the Court did not justify its conclusions. It made assertions that, absent further argument, are as likely to be wrong and right. There is an equally justifiable argument to be made that victims were undercompensated, and that judges and juries consequently chose to award higher compensation. Absent a compelling justification, I would tend to assume that juries, and even more so judges, can properly do their job and award fair compensation to plaintiffs, as they do in other areas of law — instead of assuming, as the Court implicitly suggests, that something occult about bodily injuries clouds their judgment and makes them rubber-stamp excessive awards. Indeed, thus far, this article has made that case repeatedly. By describing Ms Patel's injury, and the various aspects of it which are considered non-pecuniary, it has repeatedly shown the significance of non-pecuniary harm in bodily injuries, and the consequent likely appropriateness of significant compensation.

In further support of this contrasting proposition, it should be noted that personal injury law has a long history of getting things wrong. I am not suggesting that to be abnormal or unsuitable. The field is one which involves complex issues of causation and quantification of damages. It also often involves complex scientific, financial, and actuarial concepts, none of which form part of the natural purview of lawyers or judges. For example, over the past several decades, there have been debates and changes as to how the taxation of personal injury awards should impact the calculation of damages, and whether gross or net income was the proper starting point in calculating past and future lost income.[97] For many years, in several courts, some judges accepted the odd contention that victims had a duty to "mitigate" their damages, which meant moving to a long-term care facility instead of staying in their home — the latter involves much higher costs in the form of full-time individual care, home adaptations, and so forth. The Supreme Court had to definitely state that such a duty was inconsistent with the principle that the victim should be able to live as much of a normal life as possible.[98]

Most recently, courts realised that managing millions of dollars is actually pretty hard. The twin effect of the principle of full compensation and the fact that the victim gets a lump-sum, immediate payment to cover future costs and lost income is that victims often get millions of dollars in compensation. First, most people cannot skillfully manage such a significant amount of money. Second, the money needs to be managed well, since attaining the expected rate of return used by the court (when awarding the lump sum) is necessary for the victim to fully cover future costs. Therefore, courts have begun awarding additional compensation to cover the necessary cost of hiring an asset manager.[99]

Looking forward, it is worth noting that, even today, when the victim is a child, courts consider the occupation of the parents in assessing lost income.[100] Of course, the younger the child is, the more difficult it will be to know what occupation she would have chosen — and which salary should therefore be used to compute income lost as a result of the injury. One of the factors in doing so is the

income of her parents. This is factual: children of highly educated and wealthy parents statistically do make more money. Yet most would agree they probably should not. In using as neutral such statistical data, our courts may be tacitly legitimising and actively perpetuating existing inequities. Analogously, a judge in Quebec recently refused to use the average wage earned by women in assessing future lost income. She instead used the average wage (of women and men), essentially stating the reason I just set out.[101]

These are only a few examples. In each example, however, as courts further understood these various aspects of a victim's injury, the awards *increased*. This further supports the thesis that the Supreme Court's assumption, when it instituted the cap, that awards were becoming excessive may have been incorrect.

This subsection has sought to uncover the key assumptions the Supreme Court made in *Andrews*,[102] and to assess the coherence and persuasiveness of the justification the Court provided to support these assumptions. The next section discusses, more concretely and strategically, what arguments are most likely to eventually persuade the Court to abolish the cap.

## 3. Popping the Cap

It is now worth explicitly discussing what will, hopefully, have by now become clear: the best argument against the cap is one that challenges its conceptual foundations.

I discussed in subsection 2.1 how a persuasive argument can be made that the cap is unfair to personal injury victims, especially given the uncapped compensation that can be claimed by victims of non-bodily injuries. While this argument is compelling, it is unlikely to lead to the cap's abolition. As mentioned, no court has, since the cap was instituted in 1978, awarded compensation beyond the cap without being overturned by a higher-level court. Furthermore, judges have not discussed, in judgments on personal injury cases, why they disagree with the cap yet are bound by Supreme Court precedent. As mentioned, they have used the interpretive room left under *Andrews*,[103] to award compensation which often nears the cap for injuries that may be considered far less "severe"[104] than those of the trilogy.[105] To justify such compensation, they have often dedicated significant portions of their decisions to discussing in minute detail the events surrounding the injury.[106] While this may suggest that courts find the cap constraining, judges have not explicitly argued as much in their decisions. Given that judges seem to universally feel bound by the cap, and have not yet sought to question its continued validity, it is unlikely that a relatively simple argument to the effect that the cap is unfair and undercompensates — as discussed, on an absolute or comparative basis — personal injury victims would persuade a judge to refuse to apply the cap.[107]

More importantly, such an argument challenges the cap *on its own terms*. It does not challenge the Court's reasoning in *Andrews*.[108] It merely challenges the result. Instead of arguing that the cap's justification is incorrect, it argues that the dollar figure is incorrect (that it is unfairly low).

Addressing the issues raised in section 2.2 is far more compelling. Instead of simply stating that the amount set by the Court is unfairly low, it states that the cap should never have been instituted because the Court relied on incorrect or unsubstantiated assumptions when it was. While more ambitious, this argument is also more fundamental. It touches upon similar fairness issues: after all, limiting compensation for non-pecuniary harm is unfair if we do so because of incorrect assumptions. Yet it is also harder to contradict and may be novel and persuasive enough to challenge a cap which has enjoyed surprising and unusual stability over four decades, even as our society and the principles governing the compensation of bodily injuries have changed a great deal.[109]

The latter point may be worth further emphasising. I discussed at length how the Court's assumptions regarding (the purported trend in) victim overcompensation is unsubstantiated and likely incorrect. But even if we accept these assumptions, the key relevant features of the social and juridical context of 1978 no longer exist today.[110] The Court's assumptions, and reasoning, were embedded in a world where: (1) the purportedly problematic cases were automobile accidents,[111] and (2) *juries* often awarded compensation.[112] In contrast, it is now exceedingly rare for personal injury cases to be decided by juries.[113] Similarly, in several provinces, automobile accidents no longer constitute a significant share of personal injury cases, in large part due to the advent of no-fault, universal public insurance schemes. For instance, under Quebec's no-fault regime,[114] victims are barred from suing when they suffer a personal injury.[115] The government agency in charge of administering the regime sets the compensation victims can claim for each type of injury.[116]

## Conclusion

This article has argued against the cap on damages for non-pecuniary harm in bodily injuries instituted by the Supreme Court of Canada in 1978. It proceeded in three parts. The first section reviewed the principles which define this area of personal injury law. The second section argued against the cap, seeking to show that the cap is neither fair nor theoretically consistent. In doing so, it argued that the Supreme Court relied on unproven and incorrect assumptions to justify the cap's institution. In section three, the article addressed the more practical concern of how the cap could be overturned by our courts. It argued that the best way to get rid of ("pop") the cap is not to challenge it on its own terms, but rather to persuasively argue that its conceptual foundations are incorrect.

As mentioned, the cap has enjoyed a surprising and unusual stability, over a 40-year period and as our society and the principles of personal injury law have changed a great deal. At first, it may well seem like this is the result of a consensus: no one has questioned the cap because we all agree it makes sense. Hopefully, this article will have suggested that there likely is an alternative explanation. If you have accepted the argument that the cap is a judicially imposed, unfair, and theoretically thin solution to a problem that did not even exist; then you will also agree that it is a testimony to something. Given how judges have almost universally mechanically applied the cap over four decades, it may be a testimony to the power of *stare decisis*, which underscores the power of the Supreme Court and the responsibilities that should accompany this power.

It may also be a statement to the importance of robust criticism and scholarly attention. The body of scholarship on personal injury law in Canada is thin — almost non-existent. This may have allowed unfair principles to persist, simply through the power of *stare decisis* and because no one has taken the time to question their continued fit with our societal values.

I find it crucial to end where I began. I think what I discussed here matters. It matters because of people like Ms Patel. As I wrote in the introduction, I hope this article has used language that is clear, simple, and understandable for Ms Patel and other victims. I discussed the concepts and theoretical frameworks which, essentially, govern how much money people like Ms Patel can get when they suffer the worst injuries imaginable. I think people like Ms Patel should receive more money. And I think those who think otherwise should at least have to give a clear and convincing explanation.

I hope things will change. And to Ms Patel, I sincerely hope the pain eases. I wrote this because my heart broke when I heard your story. Most importantly, I hope you can still find meaning in life. You deserve it. At least to me, you will remain a great source of inspiration.

[*Editor's Note*: The shorter version of this article, published as a blog post by the McGill Journal of Law and Health, is available at <https://mjhl.mcgill.ca/2020/03/17/popping-the-cap>.]

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1 In writing this article, I have made a conscious effort to use language that is accessible, although (I hope) never at the expense of precision. I think personal injury victims like Ms Patel (whose case I discuss quite extensively) should be able to understand what we write about them and the rules which govern the compensation of their injury. I am inspired in this effort by my (now former) McGill colleagues Florence Ashley ("Surgical Informed Consent and Recognizing a Perioperative Duty to Disclose in Transgender Health Care" (2020) 13:1 McGill J.L. & Health 73) and Aaron Mills ("The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61 McGill L.J. 847 at 849 (Throughout this article I speak in a tone and manner intended to be accessible to a wide audience, including beyond the academy. I've used language with this goal in mind, too, including, for instance, diction, the use of contractions, and my decision to address you directly (*i.e.*, in the second person). Although we've likely never met, I speak as though we're already in a relationship, inviting you into this possibility. This express linguistic choice is part of my small effort to provincialize the presumptive life-world within which law journal communication ordinarily happens).

2 See *Société du Vieux-Port de Montréal inc. v. Patel*, [2018] J.Q. no 6770, 2018 QCCS 3312 at para. 7 [hereinater "*Patel*"].

3 *Ibid*., at paras. 7, 10.

4 *Ibid*., at paras. 10-11, 65-66.

5 *Ibid*., at para. 11.

6 *Ibid.*, at para. 12.

7 *Ibid*., at para. 16.

8 *Ibid.*, at para. 20.

9 *Ibid*., at para. 69.

10 *Ibid*., at para. 20.

11 *Ibid.*

12 *Ibid*. To quote the original, in French: "Le train, en continuant sa progression, traîne celle-ci sur plusieurs mètres et lui sectionne les deux jambes".

13 *Ibid.*

14 I have tried to carefully frame these statements not to condone the medical model of disability, see generally Phil Lord, "Access to Inclusive Education for Students with Autism: An Analysis of Canada's Compliance with the United Nations Convention on the Rights of Persons with Disabilities" (2020) 9:5 Can. J. of Disability Studies 328 at 337. Construing disability as a limitation or an illness to cure is deeply detrimental to persons with disabilities and contributes to their continued marginalisation. Nonetheless, I believe it is appropriate to recognise the deep loss that can be experienced by those who have taken the absence of barriers in accessing certain activities for granted.

15 See *Patel*, *supra*, note 2, at para. 20.

16 *Ibid.*, at para. 3.

17 *Ibid*., at paras. 17-18, 26, 47-51, 58-97, 119-122, 130-144, 162-65.

18 *Ibid*., at paras. 54-55, 65-66, 150.

19 *Ibid*., at paras. 145 and following.

20 See *e.g*., J. David Cummins, Richard D. Phillips & Mary A. Weiss, "The Incentive Effects of No-Fault Automobile Insurance" (2001) 44:2 J.L. & Econ. 427; Rose Anne Devlin, "Liability Versus No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec" in Georges Dionne, ed., *Contributions to Insurance Economics* (New York: Springer, 1992) 499; and Jeffrey O'Connell & Charles Tenser, "North America's Most Ambitious No-Fault Law: Quebec's Auto Insurance Act" (1987) 24:4 San Diego L. Rev. 917. See also notes 114 to 116, below. In Quebec, the regime was introduced in 1978 by René Lévesque's newly elected government (O'Connell & Tenser, *ibid.*, at 917-18). A no-fault regime essentially means that compensation is unrelated to fault. A victim is entitled to compensation regardless of who (generally including herself) caused her injury. The victim does not need to – and cannot – sue the person who caused her injury. Instead, she is directly and invariably compensated by the state, which redistributes the cost through taxation or other mechanisms. The decision to implement such a system is deeply embedded in the broader issues which define

personal injury law and, more broadly, tort law (or extra-contractual liability). Of course, such a system makes it easier for the victim to get compensation, as she does not need to compensate a lawyer or prove who caused her injury. (Similarly, a victim is not unfairly prevented from receiving compensation because the person who caused the injury is insolvent or uninsured.) However, such a system arguably also fails to allocate cost to those who act recklessly, which can be considered unfair or a perverse incentive to be reckless. New Zealand is the best example of a jurisdiction which has adopted a broader no-fault system, see generally Peter H. Schuck, "Tort Reform, Kiwi-Style" (2008) 27:1 Yale L. & Pol'y Rev. 187.

21 In personal injury cases, which often involve several experts, complex evidence, and multi-week trials; this is hardly an overstatement.

22 Verbal conversations between the author and Arthur J. Wechsler, counsel to Ms Patel.

23 This is accounting lingo for the fact that a dollar paid later is worth less than one paid today. Indeed, a dollar paid today generates interest between now and a future date, so it is worth more *today* than a dollar paid at that future date. Analogously, a plaintiff in a personal injury lawsuit is paid a lump sum when the judgment is executed, to cover her expenses throughout her life. The compensable injury is not the sum of these future expenses. As the lump sum will generate interest and grow throughout the plaintiff's life, the amount of the lump sum is lower. The plaintiff is expected to use the income generated from the lump sum to pay for her expenses.

24 See generally Phil Lord, "Work, Family and Identity" in Daniel Wheatley, Irene Hardill & Sarah Buglass, eds, *Handbook of Research on Remote Work and Worker Well-Being in the Post-COVID-19 Era* (Hershey: IGI, 2021) 329.

25 The former American President has in fact extensively used social media since launching his presidential campaign. His use of social media has reshaped many aspects of everyday life in the United States, see generally Dawn Carla Nunziato, "From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital" (2019) 25:1 B.U.J. Sci. & Tech. L. 1; Jeffery A. Born, David H. Myers & William J. Clark, "Trump Tweets and the Efficient Market Hypothesis" (2017) 6:3/4 Algorithmic Finance 103; and James Grimmelmann, "The Platform is the Message" (2018) 2:2 Georgetown L. Technology Rev. 217.

26 See generally Gregor Aisch, Jon Huang & Cecilia Kang, "Dissecting the #PizzaGate Conspiracy Theories", *The New York Times* (10 December 2016), online: <www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.html>. See also Grimmelmann, *ibid.*, at 25.

27 In that example, the President would have done so by stating something that is untrue. In defamation suits, this is often, but not necessarily, the case. See more generally Hillary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95:3 Can. Bar. Rev. 591. My hypothetical assumes that the President can be sued.

28 See *e.g.*, *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at 1175 [hereinafter "*Hill*"]:

> Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. […] Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre.

29 A material injury.

30 See *e.g.*, *Schreiber v. Canada (Attorney General)*, [2002] S.C.J. No. 63, 2002 SCC 62 at paras. 63-64 [hereinafter "*Schreiber*"] and *Cinar Corp. v. Robinson*, [2013] S.C.J. No. 73, 2013 SCC 73 at paras. 100-105 [hereinafter "*Cinar*"].

31 See *e.g.*, *Schreiber*, *ibid*., at paras. 63-64:

> The notion of physical integrity remains at the same time flexible and capable of catching a broad range of interferences with the integrity of the person and the consequences flowing from them. It is not restricted to narrow situations where blood was drawn or bruises appeared on the body. As nervous shock caused by a very rough police operation was held to be a case of "préjudice corporel" as well as the physical pain and suffering caused by a physical interference with the

> person, torture leaving no marks on the body would be covered by the definition.
>
> On the other hand, the requirement to show an actual breach of physical integrity means that interferences with rights properly characterized as being of a moral nature will not be included within this class of claims. Interferences with fundamental rights such as freedom, privacy or reputation interests may give rise to claims characterized as moral or material, depending in the personal interests affected. The shock caused by an unjustified arrest was thus held to give rise to a claim for moral damages, but not to an action for "préjudice corporel." Absent other forms of damage involving the physical integrity of the person, the loss of personal freedom caused by illegal police or state action with the attendant sense of humiliation, the loss of the ability to act independently, and the psychological stresses that flow from such situations, is assimilated into a form of moral damage and must be compensated as such [references omitted].

See also *Andrusiak c. Montréal (Ville)*, [2004] J.Q. no 10296, [2004] R.J.Q. 2655 and *Cinar*, *supra*, note 30 at paras. 100-102.

32 *Cinar*, *supra*, note 30 at para. 102.

33 [1978] 2 S.C.R. 287 [hereinafter "*Arnold*"].

34 [1978] 2 S.C.R. 267 [hereinafter "*Thornton*"].

35 [1978] 2 S.C.R. 229 [hereinafter "*Andrews*"].

36 Indeed, the Supreme Court itself adopts this taxonomy.

37 January 19, 1978.

38 *Supra*, note 33.

39 *Ibid*., at 295. The Court notes, however, that, unlike the plaintiffs in the other cases, "technically she was not paralyzed".

40 *Supra*, note 34.

41 *Ibid.*, at 271 ("Prior to the injury the appellant was 6 ft. 3 in. in height and described in evidence as being the epitome of the all-round athlete").

42 *Ibid*. The Court adds: "At the date of trial he was 18 years of age, physically disabled, unemployable, and wholly dependent upon male orderly assistance for his day-to-day needs, yet with mental faculties wholly intact" (*ibid*., at 271).

43 *Supra*, note 35.

44 See *Thornton*, *supra*, note 34 at 270 and *Andrews*, *ibid.*, at 234.

45 See *Thornton*, *ibid.*, at 270 and *Arnold*, *supra*, note 33 at 295.

46 *Supra*, note 35. Nonetheless, the decision in *Arnold*, *ibid.*, is, overall, longer, largely due to the fact that some of the judges dissented in part.

47 *Andrews*, *supra*, note 35 at 265.

48 *Ibid.*

49 Even the Supreme Court has recently used the word "cap", see *e.g.*, *Cinar*, *supra*, note 30 at paras. 94-103.

50 See *e.g.*, *Uy (Litigation Guardian of) v. Dhillon*, [2020] B.C.J. No. 1386, 2020 BCSC 1302 at para. 101 (noting that the cap was $388,177 in 2020). On indexation, also see generally *Lindal v. Lindal*, [1981] S.C.J. No. 108, [1981] 2 S.C.R. 629.

51 See *e.g.*, *Dubé v. Morneau*, [2017] J.Q. no 13033, 2017 QCCS 4236 at para. 14 [hereinafter "*Dubé*"] and *Stations de la Vallée de St-Sauveur inc. v. M.A.*, [2010] Q.J. No. 8224, 2010 QCCA 1509 at para. 79 [hereinafter "*Stations*"].

52 *Supra*, note 35 at 265.

53 There are, in fact, distinctions in how damages are classified in Quebec and in common law provinces. However, as a result of the cap (as introduced in *Andrews*, *ibid.*, and delineated in future cases), they are not relevant to my argument. On the harmonisation of the relevant principles in personal injury law, see *e.g.*, *Cinar*, *supra*, note 30 at para. 96.

54 See *Patel*, *supra*, note 2.

55 The concept of discounting to present value is discussed in note 23, *supra*.

56 *Andrews*, *supra*, note 35 at 265.

57 *Supra*, note 30.

58 On the latter point, see *e.g.*, *ibid*., at paras. 8-9.

59 *Ibid*., at paras. 100-101.

60 *Ibid*., at para. 98.

61 *Ibid*., at paras. 93-94, 100-103. If you still find these nuances confusing, please do take solace in the fact that the Quebec Court of Appeal did, too.

62 *Ibid*., at paras. 101-103.

63 *Ibid*., at paras. 93-94, 100-103. The Supreme Court notes that this is inconsistent with the elementary principles I set out above, which the Quebec Court of Appeal "lost sight of" (at para. 101).

64 *Supra*, note 28.

[65] *Ibid.,* at 1140-41.

[66] *Ibid*.

[67] *Ibid*., at 1141.

[68] *Ibid*. At the time, this was the largest award for defamation in history. The Church of Scientology was also liable for $500,000 in aggravated damages and $800,000 in punitive damages, a total of over $2.1 million in today's dollars. I used the Bank of Canada's inflation calculator ("Inflation Calculator", online: *Bank of Canada* <www.bankofcanada.ca/rates/related/inflation-calculator/>), with 1992 as a starting point. The jury trial ended in 1991, and the trial decision was rendered in 1992. This is the proper starting point, since the Court of Appeal and the Supreme Court upheld the award (*ibid*., at 1141, 1211).

As is often (and generally appropriately) the case at the appellate level, the decision does not extensively discuss the nature and extent of Mr. Hill's injury. For a more detailed treatment of it, which helps justify the amount awarded, see Peter Bowal & Michelle Barron, "Casey Hill and the Church of Scientology" (2013) 37:4 LawNow 59.

[69] *Ibid*., at 1197-99. As in *Cinar* (*supra*, note 30 at para. 98), the lawyers for the Church and the other defendants unsuccessfully argued that the cap's purview should be expanded.

[70] *Supra*, note 35.

[71] Legislatures have had no appetite to legislate on this point following the trilogy. See *e.g*., Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) (recommending no legislative changes). But see Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss* (September 1984) (recommending legislative changes).

[72] In contrast, see *e.g*., *To v. Toronto Board of Education* [2001] O.J. No. 3490, 55 O.R. (3d) 641 [hereinafter "*To*"] and *Moore v. 7595611 Canada Corp.*, [2021] O.J. No. 3463, 2021 ONCA 459, where Ontario courts adhere to jurisprudential guidelines instead of a cap in awarding damages under statutory regimes. The court in *To* specifically discusses the cap at paras. 28-30. See also Ontario Law Reform Commission, *supra*, note 71 at 89-99, noting the absence of peer jurisdictions where judicially imposed upper limits on such damages are applied as caps. This includes jurisdictions where courts have advocated for moderation or set ranges for damages. The Commission also catalogs many peer jurisdictions where *legislative* caps were enacted.

[73] Quite interestingly, even the Supreme Court acknowledged in *Andrews*, when assigning a maximum dollar amount as compensation for this type of harm, that its quantification is arbitrary (*supra*, note 35 at 262 ("However one may view such awards in a theoretical perspective, the amounts are still largely arbitrary")).

[74] *Supra*, note 30.

[75] *Supra*, note 28.

[76] See *Cinar*, *supra*, note 30 at paras. 12, 93, 147 and *Hill*, *supra*, note 28 at 1141. Mr. Robinson, in *Cinar*, was awarded $400,000 as compensation for his psychological distress. The Supreme Court reinstated the trial judge's award – from the decision in *Robinson c. Films Cinar inc.*, [2009] J.Q. no 8395, 2009 QCCS 3793. The award is equivalent to roughly $447,000 in 2020 dollars. In *Hill*, as mentioned in note 68, above, the plaintiff received over $2 million in 2020 dollars. The general damages alone would be worth approximately $488,000 in 2020 dollars. Again, I used the Bank of Canada's inflation calculator ("Inflation Calculator", *supra*, note 68), with 2009 and 1992 as the respective starting years.

[77] I believe this to be an appropriate pun.

[78] *Supra*, note 35.

[79] *Ibid*. From the very bottom of p. 260 to the middle of p. 265.

[80] *Ibid*., at 261-265.

[81] *Ibid*., at 261 ("[t]his area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest").

[82] *Ibid*., at 261, 264.

[83] *Ibid*., at 264 ("[t]here has been a significant increase in the size of awards under this head in recent years. As Moir J.A., of the Appellate Division of the Alberta Supreme Court, has warned: 'To my mind, damages under the head of loss of amenities will go up and up until they are stabilized by the Supreme Court of Canada'. (*Hamel v. Prather*, at p. 748.) In my opinion, this time has come").

[84] *Ibid*.

[85] See generally *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 and Paul Daly, "Vavilov and the Culture of Justification in Contemporary Administrative Law" (2020) S.C.L.R. (2d) (forthcoming). Since these are

basic concepts of administrative law, I spare you a long and digressive footnote defining them.

[86] See *Andrews*, *supra*, note 35 at 261:

> [t]here is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

[87] See *e.g.*, J.A. Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52:2 I.C.L.Q. 281.

[88] *Ibid.*

[89] These issues were further discussed and referenced in the introduction.

[90] It should be noted that, for a number of reasons generally having to do with behavioural biases, cost constraints, and improper access to information, a significant proportion of personal injury plaintiffs settle with an insurance adjuster, without ever meeting with a lawyer, and often for a fraction of what they could recover. See *e.g.*, Jenny Phillips & Keith Hawkins, "Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims" (1976) 39:5 Mod. L. Rev. 551; John R. Foutty, "The Evaluation and Settlement of Personal Injury Claims" [1964] 1 Insurance L.J. 5; David M. Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984) 18:4 Law & Soc'y Rev. 551; and Chad G. Marzen, "The Personal Liability of Insurance Claims Adjusters for Insurance Bad Faith" (2015) 118:1 W. Va. L. Rev. 411.

[91] *Andrews*, *supra*, note 35 at 261.

[92] To borrow the already famous words of Justice David Stratas, "There is nothing more to it" (*Canada (Attorney General) v. Kattenburg*, [2020] F.C.J. No. 965, 2020 FCA 164 at para. 3).

[93] *Andrews*, *supra*, note 35 at 264. To causally link the two propositions, the Court also seems to rely on a statement from an Alberta appeal court judge, cited at note 83: "As Moir J.A., of the Appellate Division of the Alberta Supreme Court, has warned: 'To my mind, damages under the head of loss of amenities will go up and up until they are stabilized by the Supreme Court of Canada' (*Hamel v. Prather*, at p. 748)" (*ibid.*, at 264). While Justice Moir was most likely a very fine judge, he was not an authority on personal injury law. Furthermore, even a superficial reading of his decision clearly indicates that the statement is mostly speculative, see *Alberta Motor Association v. Hamel*, [1976] A.J. No. 621 66 D.L.R. (3d) 109 [hereinafter "*Hamel*"].

[94] See also Ontario Law Reform Commission, *supra*, note 71 at 106, noting that awards in the United States are "astronomical in Canadian terms".

[95] Again, I used the Bank of Canada's inflation calculator ("Inflation Calculator", *supra*, note 68).

[96] See generally Roscoe Pound, *The Spirit of the Common Law*, 1st ed. (Boston: Routhledge, 1999) and Gerald J. Postema, "Classical Common Law Jurisprudence (Part I)" (2002) 2:2 OUCLJ 155.

[97] See generally *Cunningham v. Wheeler*, [1994] S.C.J. No. 19, [1994] 1 S.C.R. 359. See also *Montréal (Ville de) c. Wilson Davies*, [2013] J.Q. no 98, 2013 QCCA 34 at paras. 51-101.

[98] See *Thornton*, *supra*, note 34 at pp. 276-82 and *Andrews*, *supra*, note 35 at pp. 240-48.

[99] See generally *Townsend v. Kroppmanns*, [2003] S.C.J. No. 73, 2004 SCC 10. See also *Stations*, *supra*, note 51 at paras. 66-74.

[100] See *e.g.*, *Stations*, *supra*, note 51 at paras. 61-63.

[101] See *J.G. c. Nadeau*, [2013] J.Q. no 804, 2013 QCCS 410 at paras. 716-24. While the judge made a constitutional finding that was somewhat ambitious and not strictly necessary to her argument, a seemingly similar argument was successfully made before the Supreme Court in the very recent case of *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28. As the cap predates the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), an analogous argument could be made that the cap violates ss. 7 and 15 of the Charter.

[102] *Supra*, note 35.

[103] *Ibid.*

[104] As mentioned, two of the victims in the trilogy cases became quadriplegic, and the third lost significant mobility and mental acuity.

[105] They have done so by interpreting the Court's implicit indication that each victim's injury should be assessed individually, with attention afforded to the specific circumstances which generally make a comparison of injuries (between cases) inappropriate (*Andrews*, *supra*, note 35 at 262). As examples, see

*Dubé*, *supra*, note 51 at para. 14 and *Stations*, *supra*, note 51 at para. 79.

[106] See *e.g.*, *Patel*, *supra*, note 2; *Wilson Davies c. Montréal (Ville de)*, [2011] J.Q. no 12175, 2011 QCCS 4756; *Quintal c. Godin*, [2000] J.Q. no 485, [2000] R.J.Q. 851; *M.A. c. Stations de la Vallée de St-Sauveur inc.*, [2008] Q.J. No. 537, 2008 QCCS 240; *Laîné c. Viking Helicopters Ltd.*, [1999] J.Q. no 1462, [1999] R.J.Q. 1472; and *Tu c. Cie de chemins de fer nationaux du Canada*, [1999] J.Q. no 5352, [2000] R.J.Q. 170.

[107] In practice, the case would likely be appealed. Then, the appeal court would most likely reverse the decision. The parties could then seek leave to appeal to the Supreme Court. However, as mentioned, the Supreme Court does not seem particularly interested in reassessing the cap's validity.

[108] *Supra*, note 35.

[109] On the latter point, see notes 97 to 99, *supra*, and accompanying text.

[110] On the Supreme Court's treatment of a changing social context, and albeit in a different (and constitutional) context, see *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 and *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5.

[111] Two of the three victims in the trilogy cases (see *Arnold*, *supra*, note 33 and *Andrews*, *supra*, note 35) were victims of an automobile accident, as were the plaintiffs in the two cases the Court referred to in suggesting that victim compensation was becoming excessive (see *Jackson*, *et al. v. Millar*, *et al.*, [1972] 2 O.R. 197 and *Hamel*, *supra*, note 93).

[112] See *e.g.*, *Teno, et al. v. Arnold, et al.* (1975), 7 O.R. (2d) 276 (the trial decision in *Arnold*, *supra*, note 33) and *Bisson v. Powell River (City)*, [1967] B.C.J. No. 19, 66 D.L.R. (2d) 226 (C.A.). See also *Hill*, *supra*, note 28 at 1197.

[113] See *e.g.*, Canadian Judicial Council, "Report to the Canadian Judicial Council on Jury Selection in Ontario" (June 2018), online: <cjc-ccm.ca/cmslib/general/Study%20Leave%20Report%202018%20June.pdf>.

[114] See my comments in note 20, *supra*. See also Cummins, Phillips & Weiss, *supra*, note 20; Devlin, *supra*, note 20; and O'Connell & Tenser, *supra*, note 20. In Quebec, the regime was introduced in 1978. It currently exists under the *Automobile Insurance Act*, C.Q.L.R., c. A-25, and is administered by the Société de l'assurance automobile du Québec (SAAQ).

[115] See *Automobile Insurance Act*, *ibid.*, at s. 83.57.

[116] As mentioned, the regime is administered by the Société de l'assurance automobile du Québec. The indemnities are set out throughout the *Automobile Insurance Act*, *ibid*.

The fact that these regimes differ from province to province also undermines the continued relevance of a secondary justification provided by the Court in the trilogy: that compensation needs to be harmonised across provinces (see *Andrews*, *supra*, note 35 at 263-64). It also negates the Court's concern, which I discussed in section 2.2, above, that compensation is becoming excessive. The concern is moot when the government sets compensation.