A Comparative Analysis of Compensation for Non-Pecuniary Loss in the Award of Damages for Personal Injury

Institute of Comparative Law
McGill University, Montreal

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ABSTRACT

This comparative legal analysis of compensation for non-pecuniary loss in cases of non-fatal personal injury examines the underlying principles and methods of assessment in certain statutory and non-statutory compensation systems in England, New Zealand, the common law provinces of Canada and the civil law jurisdiction of Quebec. At both a conceptual and practical level each assessment body is faced with a complex metaphysical question of how to provide compensation for inherently intangible consequences of personal injury, such as pain and suffering, inconveniences, loss of enjoyment of life or loss of expectation of life. This thesis explores the current theories and approaches to the quantification of damages for such losses, through an analysis of pertinent laws, regulations, cases, doctrine and literature, with the aim of providing an insight into the rationale behind and calculation techniques involved in the assessment of compensation for non-pecuniary loss.

RESUME

Cette analyse comparative des systèmes anglais, néo-zélandais et canadien d'indemnisation des pertes non pécuniaires associées à des accidents non mortels examine les principes et les méthodes sur lesquels se fonde l'évaluation de telles pertes. Tant au plan théorique qu'au plan pratique, l'évaluation de ces pertes présente, un problème métaphysique complexe qui tient aux difficultés de monnayer des dommages tels que la douleur, la souffrance, les inconvénients, les pertes de jouissance de la vie et d'espérance de vie reliés à un accident. Cette thèse examine les théories et les approches actuellement utilisées pour convertir en argent ces pertes par le biais d'une analyse des lois, des règlements, des opinions doctrinales et des décisions judiciaires pertinents. Elle vise essentiellement à explorer la logique et les techniques de calcul qui président à l'indemnisation des pertes non pécuniaires.

To my mother and father.

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The comparative analysis of compensation for non-pecuniary loss will examine the common law jurisdictions of England and New Zealand, the common law provinces of Canada and the civil law jurisdiction of Quebec.

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Through an analysis of the legisation, case law, doctrine and literature on the subejct of damages for non-fatal personal injury, with particular reference to the aspect of compensation for non-pecuniary loss, it is the intention to provide a clear picture of current theories and trends both in the principles applicable to and the assessment of compensation for non-pecuniary loss. The evaluation of the material in the jurisdictions investigated is by a comparative analysis which will outline the differences in approach taken by a particular jurisdiction. The case analysis in Part Two, Section III has been dealt with in part by a tabular approach which indicates the present level of awards for non-pecuniary loss. It is intended to outline the major difficulties in the compensation of the intangible aspects of non-pecuniary loss which do not lend themselves easily to a financial calculation and to assess the attitude of the courts in the jurisdictions concerned. The recommendations for reform of the present approaches to the assessment of compensation for non-pecuniary loss will take the form of proposals for a scheme of assessment. The proposed schemes would create guidelines for the courts to follow as a matter of consistency in all cases, while allowing sufficient scope for the wholly subjective aspects of the assessment. The English Pearson Commission Report[2] is studied in

depth in connection with the critical analysis of the current systems of assessment. The reports which preceded formulation of the statutory system operating in New Zealand, under the Accident Compensation Act[3], provide interesting material for the comparative analysis of the different methods of assessment of non-pecuniary loss.

3. Definition of "personal injury".

In the interests of clarity it is proposed to offer a brief note on the general definition of the term "personal injury" that will be adopted in this work. Personal injuries are generally considered to be bodily injuries suffered by the victim in terms of the apparent physical impairment to the person's physique, for example, the loss of a limb. The term is also viewed as extending to the general personal consequences that a person may suffer following a defendant's tort, breach of contract, delict or breach of statutory duty and encompasses the victim's general state of health, not only concerning physical fitness, but also the mental and emotional state of the victim. The latter types of injury exist on the fringe of the traditional "physical" definition of personal injury, but it is submitted that they do have a rightful place within the definition of the term "personal injury" since the psychological and emotional impact of an event, even if there is no physical impact, may have serious consequences for the individual. In short the term personal injury is used to cover both physical and mental injury or their consequences.

INTRODUCTION

In the unfortunate event of personal injury and an ensuing claim for compensatory damages, a host of philosophical, political and practical questions are raised in connection with the principles and assessment of the compensation for non-pecuniary loss. Once all pecuniary losses (i.e. those which are capable of financial assessment) emanating from an injury have been calculated, the court or assessment body is faced with the formidable task of quantifying, in financial terms, the nebulous concepts of physical and emotional pain and suffering, loss of enjoyment of life and, among others, loss of expectation of life. These factors do not accomodate a simple mathematical calculation or an all-embracing rationale and it is, in essence, a metaphysical problem which must be surmounted in estimating how loss can be translated into money and money into compensation for a physical loss. It is the aforementioned "translation" which is the subject of this thesis and, in a comparative analysis of the approaches taken by the common law jurisdictions of England and New Zealand, the common law provinces of Canada and the civil law jurisdiction of Quebec, it is intended to clarify and attempt to rationalize the bases of the award of compensation for non-pecuniary loss.

Part One will examine the underlying principles of compensation for non-pecuniary loss in the common law and civil law systems. Section I deals with the juridical bases of claims in, first, the common law jurisdictions of England and Canada where claims can be based on the law of tort, contract and on statutory grounds. The New Zealand Accident Compensation Act is discussed under the statutory analysis. The second part of Section I examines the juridical bases of claim in the civil law of Quebec under the extra-contractual and contractual régimes of civil responsibility and on the basis of a statutory claim. Section II discusses

the inter-relationships between the basic elements of compensation for non-pecuniary loss in personal injury claims. The three major heads, pain and suffering, loss of amenities and loss of expectation of life receive full consideration in addition to other discernible elements that are apparent from the approach of the courts and assessment bodies.

Part Two offers a more in depth analysis of the practical application of the principles and the different systems of assessment in the recovery of compensation for non-pecuniary loss. In addition to discussions on the major theories of assessment and the economic factors relevant, Section III examines the different systems of assessment, both legislative and non-legislative, and the varying methods and mechanisms adopted in the different jurisdictions. The current level of awards for a range of injuries as regards compensation for non-pecuniary loss is provided in tabular form.

Finally, Part Three offers recommendations for reform of the present approaches to the assessment of compensation for non-pecuniary loss. The major problem areas will be identified and a proposal for assessment will be made that may help to rationalize the award of compensation for non-pecuniary loss. This should enable assessment bodies to arrive at a figure that is not exhorbitantly high or unsympathetically low and which reflects the needs of the individual case. It is a challenging problem and it is hoped that the present work will provide a further degree of insight into the complex issues involved.

PART ONE

The Underlying Principles of Compensation for Non-Pecuniary Loss in Common Law and Civil Law Systems.

Introduction

Part One of this work is intended to provide a comprehensive overview of the fundamental principles that govern the recovery of compensation for non-pecuniary loss on a statutory and non-statutory basis in common law and civil law jurisdictions. Both systems have as their paramount goal "full" compensation for a victim of personal injury in terms of the damage, loss or injury that has been and will be suffered and it will be seen how this aim is encompassed within the ambit of basic principles of compensation for personal injury. The first task has been to establish the juridical bases of claims in common law (tort, contract and statutory) and in civil law (contract, extra-contractual and statutory) which sets the scene for a compensatory award of damages to be made. In Section II the basic elements of the claim for compensation for non-pecuniary loss will be examined. The relationships between the three major elements of such a claim, pain and suffering, loss of amenities and loss of expectation of life are described, in addition to other discernible elements in a claim for compensation for non-pecuniary loss.

At the outset it is important to outline the scope of an analysis of compensation for non-pecuniary loss in the damages award. The entire cause of action cannot be discussed in a work which will concentrate on the issue of the remedy of damages in a personal injury action, and as a result the existence of liability will only be dealt with to the extent that issues of liability and damages overlap or the presence of policy rules limiting existence

and extent of liability are apparent. A theoretical distinction between liability and damages can be made[4] since the two concepts spring from different policy considerations. Liability is founded on notions of culpability whereas assessment of damages is centered on compensation. It is the balancing of these two policies that may cause friction, for instance, when the defendant is only marginally at fault but the plaintiff suffers extensive damage. How should the measure of damages be approached? Various rules have developed which are designed to limit the extent of a defendant's liability but it is not possible to completely isolate and compartmentalize these rules in the civil action in damages for personal injury. Ogus[5] classifies the issues to be assessed in the general law of damages into four divisions:

1) breach
2) injury
3) loss
4) compensation.

It is the latter two categories "loss" and "compensation" that are the concern of this work. In the sphere of non-pecuniary loss it is often difficult to pinpoint clearly (because the plaintiff may have subtle changes to his way of life) how far such losses are legally recoverable and thus compensable. The question of an assessment in financial terms is then raised. It is even submitted that in this area there may be no

> "intelligible legal principle which can be used as a basis for prediction by legal advisers...",[6]

and the quantification of compensation for non-pecuniary loss is not merely an arithmetical process but moral,

social and economic policies deserve detailed attention in the interests of not only the victim but also the defendant and the community at large who may be absorbing the cost of damage awards.

It is interesting to note the policy behind the differing statutory systems of compensation for personal injury, notably the New Zealand Accident Compensation Act which postulates various theories as the basis for compensation and it will be seen that the issue of non-pecuniary loss receives mixed treatment under such schemes. There are many channels through which financial assistance may be made in the case of personal injury, the major statutory schemes being Workmen's Compensation and Road Accident Insurance schemes which, in addition to the Criminal Injuries Compensation schemes, form the substance of the analysis on the statutory grounds for a basis of claim in both the common law and civil law jurisdictions.

I. Juridical Bases of Claims.

A. Common Law Jurisdictions.

(1) Tort

Introduction.

In England and common law Canada the law of tort is the bastion of claims in personal injury cases, with less use being made of the law of contract. In the common law system of New Zealand all personal injury actions in tort and contract are abolished under the Accident Compensation Act of 1972 in favour of the "no-fault" system whereby a victim may claim to the Accident Compensation Commission for compensation in respect of an accident howsoever caused. The jurisdictions to be examined in section (1) are England and common law Canada where a claim may still be made in the law of tort or contract in a personal injury suit.

It has long been recognised in the common law of tort that a person is entitled to compensation for non-pecuniary loss[7]. In a personal injury action in the law of tort a claim for non-pecuniary loss is traditionally dealt with under the headings of pain and suffering, loss of amenities of life or loss of expectation of life. Personal injury may be inflicted by a number of different torts, most commonly the tort of negligence, and non-pecuniary losses "flourish"[8] in this area of the law. In the torts of defamation, malicious prosecution, or false imprisonment there may or may not be an injury to the reputation or feelings of a plaintiff that results in loss of good health or injury to feelings (mental distress), which are personal injuries which may give rise to a claim for compensation for non-pecuniary

loss. The same situation is true for other torts (assault, deceit, trespass, nuisance and certain statutory torts) but whatever the grounds for liability the "measure of damages"[9] will be tackled according to the same basic principles[10]. As long as a wrong has been committed a victim may claim under the ambit of the law of tort for compensation for the injury. This is a statement of the underlying compensatory principle enshrined in the law of tort which aims to provide full indemnity for the victim. An express reference to the principle is made by Lord Blackburn in Livingstone v. Rawyards Coal Co.[11] in 1880 as follows,

> "that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".[12]

This general rule requires refinement before it represents an accurate reflection of the law because the courts have refused to follow the rule "relentlessly"[13], since it would be too harsh on defendants. There have been various formulations of the "full" compensatory theory of damages for personal injuries, some courts investing the concept with qualifications of reasonableness and fairness, others rejecting the notion of full or perfect compensation[14]. In Canadian common law the Supreme Court of Canada established that there is a difference of emphasis in the compensatory principle relating to, on the one hand, pecuniary loss, and on the other, non-pecuniary loss. Dickson J. in Andrews v. Grand and Toy (Alta.) Ltd.[15] made a strong endorsement of the "well-established"[16] principle that compensation should be "full" for pecuniary loss, whereas non-pecuniary losses are governed by notions of fairness and reasonableness. In addition to these principles, which are in fact more pertinent to the later discussion on assessment of damages in

Part Two, there are more general rules of practice and policy that must be analysed in the context of a juridical basis of claim in the law of tort.

There are various rules which may

> "delimit the consequences and losses for which the plaintiff can recover compensation".[17]

It may be quite apparent that a defendant's conduct was the "cause in fact" of the plaintiff's injury but the latter may be unable to establish the juridical basis of a claim because the damage may be considered to be unforeseeable or totally unexpected so as to render the defendant not liable. The damage may be deemed to be too "remote" because even though a defendant is liable for his wrongful conduct he is not liable ad infinitum for all the consequences of the conduct. The law has to draw a line somewhere and the various rules are grouped under the all embracing term "remoteness of damage" which, along with other pre-requisites for the existence of liability, will be examined in section (a). These policy rules of remoteness are often referred to, in addition to other rules, when the court tackles the second step in the process towards awarding compensation which is the issue of extent of liability or extent of recovery. The limiting rules governing the extent of recovery for the compensable loss arising out of the injury for which liability exists will be discussed in section (b).

It should be noted that this complex area of the law has received extensive coverage in the literature and understandbly authors view the problem from structurally different angles[18], and then one faces the varying approaches of the courts which may or may not be expressed with utmost clarity. Ogus summarises the problem succinctly in this way,

> "causal problems provoke philosophical discussion; verbal formulae are used to draw distinctions which are at most a question of degree; there is no uniformity as to what are the problems which the various theories are attempting to solve. Above all, there is no neat and universally accepted conceptual framework for the subject. It straddles the distinction between 'liability' and 'compensation'".[19]

In this work a structure has been devised that does not follow any one author, but is an attempt to denote, as clearly as possible, the various stages in the progress towards recovery of damages for personal injury. Since this work is concerned in particular with the actual assessment of the "measure of damages" emphasis will be placed on the second stage of the juridical basis of the claim, that of the extent of liability.

(a) Existence of Liability.

To establish the first stage of the juridical basis of claim in tort the plaintiff must prove on a balance of probabilities the existence of the defendant's liability for the personal injury suffered by the plaintiff. In the tort of negligence the plaintiff must prove that he was owed a general duty of care governed by a standard of care applicable for the particular situation and that the defendant was in breach of this duty. Then rules of causation come into operation. The breach, as a matter of fact[20], and, as a matter of law[21], must have caused the injury of which the plaintiff complains. The cause-in-fact is usually determined by the "sine qua non" or "but-for" test of causation. As Lord Denning held in Cork v. Kirby Maclean Ltd.[22];

> "If the damage would not have happened but for a particular fault, then that fault is the cause of the

> damage; if it would have happened just the same, fault or not fault, the fault is not the cause of the damage. It is to be decided by the ordinary plain common sense of the business".[23]

Causation-in-law is decided, as a matter of policy, on the question of how far the consequences of a breach may be allowed to reach with the resultant attaching of liability. This is traditionally a question of "remoteness of damage" based on the rules of foreseeability, i.e. the injury must have been a foreseeable consequence of the breach of duty[24]. The policy behind rules on remoteness depends on the balancing of many issues some of which are discussed by Fleming as follows;

> "All systems of compensation, however ambitious, have their limits in respect of the class of beneficiaries and the type of relevant losses no less than the monetary size of awards, in view of the practical need to draw a line somewhere so that the cost will not crush those who have to foot the bill. If this is true even of such comprehensive social security systems as workmen's compensation and social welfare, moderation is the more imperative for any system of compensation, like the common law, which purports to place liability on individuals rather than society as a whole, lest they be saddled with more than a fair share of the social cost of accidents".[25]

Thus the decision to attach liability and also how far to attach liability is a "major policy choice"[26].

> "The question is one of policy, not logic; its resolution lies in the realm of values, and 'what you choose depends on what you want'".[27]

However, one still has to uncover how the limits are to be drawn, a question which may be answered by returning to an examination of the aims of tort law in the light of current societal values. The compensatory function of tort law has been necessary to meet the demands of justice which require that a person who commits a fault should be called upon to compensate the victim of the wrongful conduct. But there is also a deterrent function in the law of tort as can be seen in the award of punitive damages. Tort law is also used to create more exacting duties[28] and in statutory negligence cases often demands a higher standard than that required at common law. Remoteness rules, for example, must therefore reflect changes in attitude in modern society on the basis, in Fleming's words,

> "of the need to conserve all human resources and material resources by applying the pressure of liability at those strategic points where accident-prevention can be most effectively promoted".[29]

The foreseeability test is as stated in Overseas Tankship U.K. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound No. 1)[30] by the Judicial Committee of the Privy Council and as expanded by the House of Lords in Hughes v. Lord Advocate[31]. The former case held that

> "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen".[32]

The Wagon Mound thus bars liability and therefore recovery for unforeseeable types of damages. Recovery may still be made if the damage is foresseable but the extent is not, hence allowing the "thin - skull" type case[33], or if the precise manner in which the damage occurred is not foreseen. The latter position was enunciated by Hughes since to demand "too great precision"[34] in the foreseeability test

would be unfair to the plaintiff. The Supreme Court of Canada adopted a similar view in R. v. Côté[35] where Dickson J. held;

> "It is not necessary that one foresee the precise concatenation of events, it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred...".[36]

In this area one is often dealing with value judgements by the court and it is interesting to note briefly the evolution of the law in the case of recovery for nervous shock, a non-pecuniary loss, which clearly indicates the premise that value judgements are involved.

At one time a person could not claim for wounded feelings or mental suffering encompassing nervous shock in personal injury cases[37]. Various reasons for refusal to acknowledge a juridical basis of claim for this more intangible injury were based on the lack of a duty, and at times on the grounds of lack of causation and remoteness. With the growth of medical knowledge, particularly psychiatric knowledge, it is clear that even where there is no physical impact, a person may suffer severe psychological injury in terms of shock, anxiety or neurosis which come within the parameters of personal injury. By the early 1900's the courts recognised that nervous shock should be compensated, if it

> "arises from a reasonable fear of immediate injury to oneself".[38]

This limitation was later reduced and the test became one of foreseeability of nervous shock. Even though a plaintiff may suffer physical injury which results in nervous shock, or the nervous shock suffered may cause the physical damage, the

> "foreseeability of one type of injury cannot be automatically assumed from the foreseeability of another. For this reason the test must be the foreseeability of nervous shock itself".[39]

It seems that there must be some form of recognisable medical diagnosis such as psychoneurosis or a psychosomatic illness[40], but it is generally accepted that

> "an illness of the mind set off by shock is not the less an injury because it is functional, not organic and its progress is psychogenic".[41]

A recent English decision by the House of Lords[42] indicates that policy considerations are rife although they may be hidden behind "pseudo-legal arguments"[43] of no duty of care or lack of foreseeability. The plaintiff had suffered nervous shock and organic depression on hearing the news of her family's accident and seeing its consequences soon afterwards. Although an earlier case of Hinz v. Berry[44] establishes that the sight of an accident occasioning nervous shock may give rise to a claim, the situation was somewhat different in McLaughlin v. O'Brian[45]. Lord Wilberforce, in the leading judgement, laid down guidelines for the existence of liability in these cases,

> "the shock must come through sight or hearing of the event or of its immediate aftermath".[46]

Mrs. McLaughlin was held to be within the aftermath of the accident and her claim succeeded. Foreseeability is clearly not an issue in this limitation and it appears to be a pure decision of policy. "Aftermath" requires definition and it may be interpreted, as suggested by Lewis[47], to mean part of the accident, or part of the res gestae otherwise

a wide range of people could recover for shock, a situation which the courts were keen to avoid.

It should be noted that this area has been settled by legislation in Australia. The New South Wales Law Reform (Miscellaneous Provisions) Act, as early as 1944 allowed recovery for nervous shock suffered by a close relative of a person "killed, injured or put in peril"[48]. In McLaughlin Griffiths L.J. of the Court of Appeal had stated;

> "There should be an opportunity for public debate... If it is at the end of the day thought desirable by society to extend the remedy it can be done by simple statute on the lines of those in force in Australia".[49]

Other areas where policy rules are well in evidence working to limit the existence of liability are in claims for damages for wrongful life, and to a lesser extent for attempted suicide. In the former situation recent decisions in England and Canada[50] have rejected the possibility of a claim being established, predominantly as a matter of policy, since the court would be interfering with the sanctity of human life. The essence of a child's claim for "wrongful life" is on the basis that a duty of care is owed to the child in utero, for example, in the form of advice to a mother on abortion, and if the duty is breached and the child is born with disabilities the child may claim damages on the basis that he or she would have been better off not born. However these claims have failed, as in the recent decision by the English Court of Appeal in February 1982, on the grounds that there has been no breach of the duty of care owed to the foetus and the fact that it is

impossible to assess damages. Thus the courts have rejected the claim entirely at both stages of establishing the juridical basis of claim in the law of tort.

In the case of attempted suicide the English Court of Appeal[51] dismissed an appeal for the payment of £200,000 to a patient who was rendered tetraplegic after a failed suicide attempt in hospital. The judgement is not clear whether the claim was rejected on the basis of lack of a duty by the hospital, or on the basis of lack of causation. Lord Denning stated,

> "It was wrong that the law should chase consequence upon consequence - possibility upon possibility - right down a hypothetical line so as to award damages to a man who attempted to commit suicide".[52]

He continued that as a matter of policy such claims should be disallowed "at the outset" implying that no legal duty exists whereas the other two judges, Watkins L.J. and O'Connor L.J., held that no breach of duty had been established. An earlier case, Selfe v. Ilford and District Hospital Management Committee[53] had, on the contrary, awarded damages in similar circumstances, including £15,000 for pain and suffering and loss of amenities.

In the ensuing discussion of the rules governing the limitation of the extent of recovery for compensable loss arising out of the injury for which liability exists, it will be seen that policy considerations, which sometimes go back to "remoteness" type questions, play a crucial role. Section (b) will commence with a brief introduction on the concepts of "injury" and "loss" in the field of a claim for compensatory damages, and the examination of limitations of

policy are grouped under the subheadings of (1) limitation of amount; (2) limitation of reasonableness and (3) limitation from conduct. The aspect of certainty of damage will also be considered in this section and it will be followed by a brief comment on deductions in the award due to overlap with other heads of damage.

(b) Limitations on the Extent of Recovery.

Having established liability for the injury the plaintiff moves to the next stage in the process of recovery of damages, that of the extent of liability. This section is concerned purely with "damages" questions and the rules on quantification that are applied by the courts. The "injury" suffered will result in "losses" for which the plaintiff claims compensation in the form of damages, and non-pecuniary losses may form part of the consequences of the injury. There are causational issues at involved here in terms of the link between the injury and the loss which must be established since if the particular loss is not "caused" by the injury one must go back to the first stage of the juridical basis of claim to see whether or not it is possible to establish causation and hence the existence of liability for that loss. It is considered that a brief synopsis of the terms "injury" and "loss" is relevant, although this will receive greater attention in Part Two in the analysis of the concepts of "injury", "loss" and "compensation".

(1) "Injury" and "Loss".

"Injury" for present purposes refers to a physical or mental injury such as broken limbs, brain damage, or impaired vision, which is the

> "immediate result of the unlawful activity",[54]

and "loss" is the

> "pecuniary or non-pecuniary consequence of the 'injury'".[55]

As Lord Reid held in Baker v. Willoughby[56];

> "A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg: it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned if there had been no accident".[57]

In the ambit of non-pecuniary losses in tort one finds loss of expectation of life, loss of enjoyment of life, and pain and suffering and it is these issues that the court looks to for the purposes of assessing compensation.

Although causation may be established between the injury and the loss, the court as a matter of practicality and policy will limit compensation for some consequences[58]. The policy rules employed are reminiscent of "remoteness" type issues, but "foreseeability" is not a relevant principle. The consequences of foreseeable injury do not have to be foreseeable in the same way that the injury itself must be a foreseeable fact arising from the breach. The limiting rules of the extent of liability may now be discussed.

(2) Limitations of Policy.

(i) Limitations of Amount.

Since the trilogy of cases decided by the Supreme Court

of Canada[59] in 1978 and the more recent case of Lindal v. Lindal[60] decided by the same court in 1981, it may be argued that damages for non-pecuniary losses are subject to a rough upper limit of $100,000 in Canada. This amount would be penetrable

> "in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic circumstances".[61]

Although Dickson J. refers merely to differing "injuries" it is presumed that he is referring to the consequences of those injuries, i.e. the loss and the differing degrees of loss in terms of, for example, loss of enjoyment of life, that the plaintiff endures. The term "changing economic circumstances" was classified by the Lindal case to include inflationary trends and a consideration of the erosion of the value of money on the worth of the $100,000 ceiling. As will be seen in Part Two the courts' reactions to the imposition of a fixed limit has been mixed mainly on the basis of a lack of guidance on how to apply the limit in different cases. Mr. Andrews was rendered quadraplegic in a car accident and suffered extremely severe physical disabilities although mentally he was unimpaired. He was awarded the maximum $100,000 and it may be submitted that it is only in the most severe cases that the upper limit may be awarded. Howevere there is growing dissatisfaction with the concept of an upper limit in situations involving non-pecuniary losses which per se cannot be evaluated accurately in financial terms. It is interesting to note that the High Court of Australia in Barrell Insurances v. Pennant Hills Restaurants[62] argued that it is not part of the judicial function to depress the level of awards on policy grounds, and only the legislature may intervene on grounds of policy. The justification for the limitation of amount appears to stem from social policy arguments. Dickson J. states that the area of non-pecuniary losses has the "clearest justification" for moderation in the light of the excessive bur-

den of expense that may ensue for the defendant and ultimately society, and so a maximum limit ensures that exhorbitant awards for non-pecuniary loss are avoided.

In England there is no maximum limit as such and limits are placed on the amount of damages primarily on the basis of the second type of limit referring to "fairness" and "reasonableness". However the English approach could be argued to encompass a "limitation of amount" policy because in essence a tariff scheme exists which places limits on the amount of damages available for different types of injury. At present Atiyah[63] notes that up to £60,000 may be awarded as damages for non-pecuniary loss for the most severe injuries. It should be noted that a fixed limit is placed upon the loss of expectation of life element of non-pecuniary loss by the English courts. Although not always followed and despite strong criticism on the propriety of such an award, notably by the Pearson Report[64], an award of £1,250 is made[65].

It is interesting to note that the $100,000 limit established by the Supreme Court of Canada has now been extended from the rather narrow ambit of damages for non-pecuniary loss arising from personal injuries and the Andrews limitation has been followed in the realm of compensatory damages for libel[66]. It may be that the limitation is now becoming an established principle of law to be abided by in all cases of non-pecuniary loss in damages awards, and is not merely a general rule of practice to be followed in appropriate circumstances.

(ii) Limitation of Reasonableness.

In addition to laying down a maximum limit in the Canadian trilogy, the Supreme Court of Canada also refers to concepts of "fairness" and "reasonableness". "Fairness" is to be gauged by earlier decisions which reflects the desire for consistency not only between cases but between respondents. "Reasonableness" is required because it is argued

that the victim is already provided for in terms of costs of future care and the absence of an objective yardstick for translating pain and suffering into monetary terms opens the area to "wildly extravagant claims"[67]. Dickson J. observed that;

> "The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one".[68]

The English courts adopt the "fair and reasonable" limitation and to illustrate one case Salmon L.J. has stated,

> "damages must be real and amount to what the ordinary reasonable man would regard as fair and sensible compensation for the injuries suffered".[69]

An analogous situation in which the courts adopt a policy of reasonableness is in the tort of damage to property. In Jens v. Mannix Co. Ltd. B.C.[70] Meredith J. held that,

> "the first consideration must be whether the plaintiff's claim to replacement of the building is reasonable as between the plaintiff on the one hand and the defendant on the other".[71]

The term "reasonable" is open to many sources of interpretation and it is a matter of pure conjecture as to how a judge will apply this rule. It is salutary to recall Diplock L.J.'s words of caution that,

> "the rational principles upon which damages ... are to be assessed ... tend ... to be obscured by familiar phrases which lawyers use but seldom pause to analyse".[72]

(iii) Limitation from Conduct.

There are three elements to this rule, known as mitigation of damage, which may serve to limit the damages award:

a) the plaintiff must take all reasonable steps to mitigate the loss to him following the defendant's wrong;

b) the plaintiff can recover for loss incurred in taking the reasonable steps required by a);

c) the plaintiff cannot recover for loss avoided through taking the reasonable steps as required by a).

The classic statement on mitigation was made with reference to a breach of contract by Viscount Haldane L.C. in British Westinghouse Co. v. Underground Ry.[73] where he stated that a duty[74] is imposed on the plaintiff to take

> "all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps".[75]

The principle applies equally in tort[76] and to pecuniary and non-pecuniary losses[77]. In tort the principle, particularly in cases of personal injury, is linked to the conduct of the plaintiff in following medical advice. In McAuley v. London Transport Executive[78] Jenkin L.J. held in 1957 that;

> "In as much as ... it is the duty of the injured party to mitigate damages, it is his duty to act on medical advice".[79]

Nowadays it would appear that such a rigid view is not wholly accurate and a number of factors are considered by the court when determining whether a plaintiff's refusal to follow medical treatment is reasonable. These may be[80] the risk -

to the plaintiff in undertaking treatment[81], the benefit and chance of success of the treatment (which may reveal conflicting medical opinion[82]) and the consequences if treatment is refused[83]. A failure to act on medical advice to relieve psychosomatic pain caused by compensation neurosis[84], due to a plaintiff's failure to bring his claim with reasonable speed, is a further example of a breach of the duty to mitigate, as in James v. Woodall Duckham Construction Co.[85] where six and a half years had elapsed since the injury and when the case was heard.

The test adopted by the court to judge the plaintiff's conduct is that of the reasonable and prudent man, which is an objective assessment. Despite earlier refusals to consider personal idiosyncracies of the plaintiff, such as fear of hospitals and even if these were occasioned by the injury[86], the courts do take account of more subjective factors affecting the plaintiff's conduct, for example, impecuniosity[87] or religious or moral beliefs[88]. The line between objective and subjective factors is a difficult one to draw, but it would seem advisable for a plaintiff to take appropriate reasonable steps to alleviate his condition if his award of damages is not to be limited on account of his failure to mitigate his loss.

In a discussion of limitation of the extent of the defendant's liability by the plaintiff's conduct it is pertinent to refer to the issue of contributory negligence on the part of the plaintiff. Contributory negligence in fact is a limitation on the existence of liability since the plaintiff is held to have caused part of the damage through his own fault and it is relevant at the first stage of establishing liability. Discussion has been included at this point because the effect of the limitation on the existence of liability due to the plaintiff's contributory negligence is seen at the later stage of the recovery process in the apportionment of the amount of damages to be awarded.

In England under the Law Reform (Contributory Negligence) Act[89] there is an apportionment of the damages when the damage suffered is due partly to the plaintiff's own fault. The judge has a discretion to decide on a "just and equitable" amount to award the plaintiff, according to the latter's degree of blameworthiness. Some common law provinces of Canada have adopted similar legislation[90]. It is interesting to note that judges rarely apportion negligence and feel able to decide liability one way or the other on the facts before them[91]. More use of the comparative negligence legislation is made by the jury trials which as Linden and Summer submit is,

> "a practice that may well accord better with the true position with regard to blameworthiness".[92]

A common example of contributory negligence is the non-use of seat belts when a person is injured in a road accident not caused by his fault, but the damage is more severe due to the failure to wear a seat belt. The rationale behind the contributory negligence rule would appear to be that although the accident may be caused by bad driving, the damage may be caused by both the bad driving and the plaintiff's failure to wear a seat belt, consequently the plaintiff is deemed to have some share in the responsibility for the injury and apportionment of damages will occur[93].

(3) Certainty of Damage.

The court must with reasonable certainty be able to infer that damage exists but the fact that some damages, such as non-pecuniary losses, cannot be assessed with accuracy does not result in a refusal to make a damages award in the victim's favour. Although non-pecuniary losses are speculative in nature, the difficulty of evaluation in pecuniary terms is not a bar to recovery. The doctrine of certainty

is concerned with future events or hypothetical situations that may arise. For instance, in the case of personal injury where the plaintiff suffers injury to his arm it is unlikely that he will be able to follow his previous interest of mountaineering and the court must hypothesize about these future events when considering the loss of amenities head of non-pecuniary loss. Certainty is often confused with remoteness of damage rules and may not receive separate treatment by the courts when assessing the validity of a claim for compensation. There is no doubt however that non-pecuniary losses are not excluded despite their inherently speculative nature. As Lord Halsbury, L.C. stated in The Mediana[94],

> "How is anybody to measure pain and suffering in money's counted? Nobody can suggest that you can by arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident ... But nevertheless the law recognises that as a topic upon which damages may be given".[95]

In the compensation of non-pecuniary loss one is providing money as a,

> "substitute for that which is generally more important than money".[96]

(4) Deductions for Overlap.

The aim of the compensatory remedy of damages is to provide "full" compensation not "over" compensation and the courts are aware of the possibility of overlap between the pecuniary loss awards for loss of earnings and future care and the non-pecuniary loss award for loss of amenities. The courts in England reason that if a person is no longer able

to continue a previous pastime due to an injury a saving will will have been made because the expense is no longer required and a deduction is made in the award for loss of amenities[97]. McLachlin[98] observes that the possible overlap between loss of amenities and loss of earnings has not been "directly" recognised in Canada, although Cooper-Stephenson and Saunders submit that with the advent of the functional approach[99] to compensation the court in the above situation would be faced with the problem of whether damages for loss of earnings should be reduced on account of "reduced need" or "reduced capacity to enjoy those damages"[100] because the previously enjoyed activities are no longer possible.

In connection with overlap with the cost of future care Dickson J. held in Andrews that to prevent overlap the award for non-pecuniary loss should be moderate since the victim is already well-provided for in terms of "assistance, equipment and facilities"[101], which apertain directly to the injuries. In practice it is submitted[102] that caution must be shown because if the expense of, for example, cosmetic surgery is included in the award for future care, the award of pain and suffering for disfigurement should be reduced to the extent that the impairment has been eliminated[103].

(2) Contract.

Introduction.

As in the case of a claim in tort the general rule for compensatory damages in contract finds expression in Lord Blackburn's statement in Livingstone v. Rawyards Coal Co.[104]. In relation to contract the rule for assessing damages is based on a concept of putting the plaintiff in the position he would have been in if the contract had been performed[105]. In comparison in tort one is concerned with the position he would have been in if the tort had not been committed. Although the underlying principle is to

provide "full" compensatory damages in the event of a breach of contract there are limitations both at the existence of liability stage and in connection with the extent of recovery. The limitations are particularly apparent in the field of non-pecuniary losses which are more the exception than the rule in contract damages. The latter are primarily within the sphere of commercial financial losses but more recent Canadian and English cases indicate that a firm claim may be made for non-pecuniary losses such as pain and suffering, loss of amenities and loss of expectation of life, inconvenience and mental distress.

At one time the courts were reluctant to compensate non-pecuniary loss in contract as evidenced by Hallett J.'s statement in Sunley v. Cunard White Star[106],

> "in an action founded on breach of contract the only kind of loss ... which is subject for compensation is financial loss".[107]

This drastic limitation is now no longer followed most notably in the availability of compensation for mental distress, a trend which, it is submitted, has shown similar evolution to the award of compensation for nervous shock analysed in connection with a claim in tort. A brief mention will be made of the traditional rules on limitation of the existence of liability particularly the rules relating to remoteness of damage which play an important rôle in contractual claims for breach of contract. Causation is dealt with primarily on the basis of the "sine qua non" test as in tort. The limitations on the actual extent of recovery whether by policy or other means are illustrated in the context of a claim for compensation for mental distress, a personal injury giving rise to non-pecuniary loss.

(a) The Test of "Reasonable Contemplation".

> "Damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it".[108]

These were the words of Alderson B. in Hadley v. Baxendale[109] who outlined the basic principles in 1854. The "either" and the "or" effectively state two separate rules. The rule in Hadley's case was refined in 1949 in Victoria Laundry Ltd. v. Newman Industries Ltd.[110] and received further interpretation in 1967 in The Heron II: Koufos v. Czarnikov[111], before the House of Lords. Asquith L. J. in the former case[112] outlined six propositions which emerge from the authorities as a whole and the two predominant principles achieving clear recognition were, first, that the extend of liability is governed by the amount of loss "reasonably foreseeable" as liable to result from the breach of contract and, secondly, that the test of reasonable foreseeability depends on the knowledge, actual or imputed, possessed by the parties, or "at least"[113] by the party who commits the breach. The House of Lords in Koufos v. Czarnikov were concerned about confusion of the term "reasonable foreseeability" with the more liberal test in tort and they sought to find precision by adopting the terms "a serious possibility" and "a real danger"[114]. Ogus[115] submits that "reasonable contemplation" is the preferable view to adopt.

Various authors[116] suggest that as far as personal injuries are concerned there may be a fusion between principles of tort and contract as McGregor states;

> "It is submitted that, in contract as in tort, it should suffice that, if personal injury or damage is within the contemplation of the parties, recovery is not to be limited because the degree of physical injury or damage could not have been anticipated".[117]

The traditional Hadley v. Baxendale formulation was rejected as early as 1878 in Phillips v. London and South Western Railway Co.[118] for cases involving personal injury. In the more recent case of Parsons v. Uttley Ingham (H) Livestock and Co.[119] Lord Denning proposed that a distinction should be made between the remoteness principles of "foresight" and "contemplation" according to whether the damage suffered from the breach of contract is personal or economic injury. If the latter the tests of "serious possibility" and "reasonable contemplation" should apply in determining the extent of liability. If the former one asks of the defendant,

> "ought he reasonably to have foreseen at the time of the breach, that something of this kind might happen in consequence of it?"[120]

The Supreme Court of Canada in Asamera Oil Corp. v. Sea Oil and General Corp.[121] took a similar viewpoint and an English Court of Appeal decision Sciuviaga v. Powell[122] stated (per curiam);

> "the law must be such that in a factual situation, where all have the same actual or implied knowledge and the contract contains no term limiting the damages recoverable for the breach, the amount of damages recoverable does not depend on whether as a matter of legal classification the plaintiff's cause of action is breach of contract or tort".[123]

It is submitted that for cases involving compensation for personal injuries where there is often a concurrent claim in tort and contract it may be fairer between the parties and future plaintiffs to apply the principles applicable in the law of tort. The court will assess foreseeability of damage in tort at the time of the breach of duty, whereas in contract, reasonable contemplation of the parties is assessed at the time of the formation of the contract and the extent of recovery in either situation may vary greatly.

(b) Mental Distress - Injury to Feelings.

As in the law of tort in personal injury cases[124] it was once not possible to claim compensation for injured feelings in contract[125] since such injury was regarded as "intangible and incapable of economic evaluation"[126], and as not being relevant in the commercial world of contracts. The "purely sentimental" inconveniences such as

> "annoyance and loss of temper or vexation, or for being disappointed in a particular thing which you have set your mind upon..."[127]

were not compensable. It has however been submitted by McGregor[128] that if the contract is not a purely commercial one and it concerns a plaintiff's "personal, social and family interests" the court should consider carefully whether mental suffering on breach of the contract would have been in the contemplation of the parties and thus be a compensable loss. Since the decisions of the "spoiled holiday" cases in the 1970's[129] it is now firmly established that a plaintiff may claim for disappointed feelings and physical discomfort and inconveniences suffered in addition to any pecuniary loss. The defendants in Jarvis v. Swans Tours Ltd.[130] had undertaken to,

> "provide a holiday of a certain quality with 'Gemutlichkeit', (that is to say geniality and cosiness) as its overall characteristics, and a 'great time', the enjoyable outcome of which would surely result to all but the most determined misanthrope".[131]

The parties to the contract were held to have contemplated that breach of the contract might cause injured feelings and such a possibility was not too remote under the Hadley v. Baxendale principles. The Jarvis decision was followed in Canada in cases such as Keks v. Esquire Pleasure Tours Ltd.[132], Newell v. Canadian Pacific Airlines Ltd.[133], and Tippett v. International Typographical Union Local[134].

Kidd submits[135] that the trend in more recent cases such as Heywood v. Wellers[136] and Cox v. Philips Industries Ltd.[137], indicates that a new principle is evolving whereby damages for mental distress are treated as falling within the rules generally establishing recoverability and are not merely exceptions to a "restrictive general principle" which does not contemplate them as recoverable. It seems that it is not only in "personal, social and family" relationships that compensable mental suffering may result. This is shown by the Newell case in which the plaintiffs sued for compensation for mental distress arising from an airline's failure to safely transport two pet dogs. Unfortunately one of the dogs died and the plaintiffs recovered non-pecuniary damages for mental distress invoking Hadley v. Baxendale rules.

Special mention should be made of contracts of employment and wrongful dismissal which may attract a claim for mental distress. In Cox v. Philips Industries Ltd.[138] the plaintiff was dismissed and he claimed in breach of contract for the depression, anxiety and frustration requiring medical treatment. However damages were not awarded for the dismissal but for the demotion which occurred prior to the dismissal. The more recent case of Pilon v. Peugeot Canada

Ltd.[139] did award damages for mental distress for which medical treatment was necessary and Galligan J. stated;

> "In my opinion it cannot fail to have been in the contemplation of the defendant, that if it suddenly, without warning, unlawfully discharged a man whom it had led to believe was secure in his job for his working life, there would be the gravest likelihood that such a man would suffer vexation, frustration, distress and anxiety".[140]

The employment contract in this case was distinctive because of the "father figure" role exercised by the employer, but the case offers the opportunity to scrutinize the characteristics of a particular contract to determine whether damages for wrongful dismissal may be extended to cover compensation for mental distress arising from the breach. The relationship between the employer and employee must be of a "special" nature which if breached would lead to

> "serious and deleterious effects upon the mental health and enjoyment of life of the plaintiff".[141]

Although there seems to be a requirement for the mental distress to amount to a medically recognisable condition in the cases of wrongful dismissal[142], in contracts involving the more personal, family and social relationships, this would not appear to be the case and damages may be recovered. In Sciuviaga v. Powell[143] it is noted by the commentator Douglas[144], that the court made no mention of whether the types of losses compensated were either a natural consequence of the breach, or of a type that ought to have been within the parties' contemplation. £750 was awarded for pain and suffering including anxiety, distress and other mental suffering caused by a doctor's breach of contract to perform a

termination of the plaintiff's pregnancy. If the claim had been made in tort damages for mental distress may not have been recovered so readily[145] as a separate element of compensation for non-pecuniary loss.

The present position would suggest that if a contract, although a commercial bargain, is intended to confer "some benefit"[146] on the plaintiff or is of a "special nature" a loss such as mental distress resulting from the breach of the contract is in the reasonable contemplation of the parties and is compensable[147].

(3) Statute.

Introduction.

The third section to be examined in the analysis of the juridical bases of claims for compensation for non-pecuniary loss in common law jurisdictions is the statutory basis of claim. It is intended to provide a basic outline of the main statutory sources that provide a compensatory remedy in the event of personal injury. Some of these alternatives may provide more recognition than others for the compensation of non-pecuniary loss and this will be noted. The policies behind the different statutory schemes will be mentioned, but further illustration of the actual workings of the system, the administrative framework employed and the different methods of assessment will be explored in Part Two, Section III, and the following analysis is intended to complete the picture of the juridical bases of claim that are open to a victim of personal injury in his claim for compensation for non-pecuniary loss.

In England and Canada the major statutory bases for claims are the laws concerning Workmen's Compensation for those persons injured at work, Road Accident Compensation

schemes, and the Criminal Injuries Compensation schemes which compensate victims of crime who suffer personal injury. The situational context of the injury must therefore be identified and a claim may then be made to the appropriate compensation body. In stark contrast is the compensation system that operates in New Zealand, under the Accident Compensation Act[148]. Pursuant to this Act a person may receive compensation for injuries sustained in an accident howsoever caused. It is not possible to make a claim for compensation through any other channel and it will be seen that this "no-fault" system, the principle of which is also adopted in Workmen's Compensation schemes[149] and some Road Accident schemes[150], may have far-reaching implications for the field of personal injury compensation. For the present, the primary concern is to compare the underlying principles of the different statutory bases of the claims for compensation for non-pecuniary loss. The New Zealand system will be examined first followed by an overview of the Criminal Injuries Compensation schemes, the Workmen's Compensation schemes and finally the Road Accident Compensation option.

A passing mention should be made of other sources of compensation, which although will not receive further attention within the current work, will provide a comprehensive picture of possible sources of compensation for a victim of personal injury. They encompass welfare payments, social security payments by the State, tax benefits, sickness and unemployment benefits, in addition to personal insurance funds, and most importantly in the case of personal injury, health care benefits.

(a) The New Zealand Accident Compensation Act.

The Accident Compensation Act (A.C.A.) enacted by the New Zealand legislature in 1972 represented a thorough re-appraisal of fundamental principles governing the award of compensation to victims of accidental injury[151]. The tradi-

tional common law system of the law of tort which had been invoked for so long in cases of personal injuries was swept away and the new law brought into operation a system under which everyone was entitled to claim compensation from the Accident Compensation Commission[152] regardless of how the accident resulting in injury occurred. Under s.5[153] the Act effectively abrogates the right to bring an action, at common law or under statute, for damages arising out of personal injury or death suffered by accident within New Zealand and in some cases outside New Zealand. Hailed as a "new development in modern social legislation"[154] Gaskins describes the Act as eliminating

> "the central role of judges, juries, and lawyers and by-passes the services of insurance companies in the settlement of personal injury claims. In place of the common law, the A.C.A. establishes a state administrative commission to award compensation in accordance with a detailed body of rules and schedules. In moving to a state-run scheme, the A.C.A. also abolishes the notorious fault principle; the compensation commission makes no enquiry into the negligence of anyone connected with the accident".[155]

The scheme seeks to present a unified and comprehensive scheme of accident compensation, rehabilitation and prevention on the basis of consistent principles which must meet the five guiding requirements of the overall system. These principles which form the foundation of the system are[156]:

1) community responsibility
2) comprehensive entitlement
3) complete rehabilitation
4) real compensation
5) administrative efficiency.

For the purposes of "non-economic" or non-pecuniary loss the compensation scheme is divided into two parts. S.119 deals with the permanent loss or impairment of bodily function on an objective basis with the assistance of a schedule of anatomical injuries and their appropriate percentage of $7,000[157]. S.120 deals with the more subjective aspects of a claim for compensation for non-pecuniary loss and covers the loss of amenities or capacity for enjoying life, including loss from disfigurement and pain and mental suffering, including nervous shock and neurosis. The workings and application of these sections will be discussed in Part Two Section III. The novel idea which the scheme encompasses is described as

> "the recognition that all personal injuries whether incurred on the road, connected with work or suffered anywhere else should be redressed on the same basis applying an identical process".[158]

The system emphasises "real compensation"[159] in which a loss is deemed compensable without reference to the individualistic concept of the fault of the defendant and, on the basis of the theory of cause and effect, presents a "distinct philosophy of social responsibility"[160]. It is submitted that in the assessment of non-economic loss there is less divergence from the common law approach than would be supposed. Despite the statutory guidelines and ceiling[161] on the amount of an award under the A.C.A. there is considerable discretion exercisable by the Accident Compensation Commission. Gaskins comments on the wide discretionary powers that the Accident Compensation Commission has under s.120 and states that the term "real compensation" in this area

> "is invoked simply to lend an impression of objectivity to a package of benefits inspired by a mixture of public welfare goals and special interests".[162]

The "special interests" to which the author referred were campaigns by the New Zealand Law Society for court type proceedings to the assessment of non-economic losses. It has been observed[163] that it was at the urging of the "negligence lawyers" that the pain and suffering provision should be included in the Act and Palmer[164] reports that this is one of the most heavily contested provisions of the law. The Woodhouse Report had made no mention of awarding damages for pain and suffering in its proposal that a schedule method would be the most appropriate method of assessment of damages in cases of permanent disability[165].

In compensating a claim for non-pecuniary loss the A.C.A. will adopt basic common law guidelines but the ability of the Commission to provide compensation is not restricted by principles such as those on remoteness of damage. If a claimant's injury is established to be the consequence of an accident, it does not matter whether the injury was foreseeable. The compensation of mental consequences of an accident, such as nervous shock, provides a clear illustration of the basic difference in the underlying principles of a claim in the law of tort and a statutory claim under the A.C.A. At common law the foreseeability test will usually be applied in a case where a plaintiff has suffered shock although not directly involved with the negligent act, as in Bourhill v. Young[166]. It is accepted in common law that damages can be given for nervous shock[167] and it is submitted by Blair[168] that borderline situations under the A.C.A. are dealt with by different criteria. The scope of compensation under the Act is wider than at common law and although a causal link is required the determination of the "cut-off line" is a delicate matter. In the case of mental consequences it may bedifficult to draw the distinction between injury by accident and injury by sickness and disease, the latter not being covered by the Act. However, by observing policy con-

siderations which can be determined by studying the philosophy behind the Act, the Commission may avoid an over-liberal interpretation of the Act and avoid providing compensation. This may be compared with the concern of the common law judges to limit claims for mental injury[169].

(b) Criminal Injuries Compensation Schemes.

Criminal Injury Compensation for non-pecuniary loss is generally available in the common law jurisdictions examined. In New Zealand compensation for victims of crime suffering non-pecuniary loss comes within the scope of s.120. A lump sum will be awarded to the victim himself provided that the loss of amenities or pain and suffering are of "sufficient degree" to justify payment of compensation. A victim of crime is treated as a person suffering personal injury "by accident" and so is entitled to make a claim to the Accident Compensation Commission. Similarly in England the Criminal Injuries Compensation Board will make an award for non-pecuniary loss such as pain and suffering. The scheme, introduced in 1964, is not operated on a statutory basis, as it is in Canada, but compensation is assessed "on the basis of common law damages"[171], and the Board has clearly stated that non-pecuniary loss such as pain and suffering will be compensated[172]. There are some exceptions to the common law principle in terms of the extent of recovery and the unique non-adversarial administrative structure that allows for interim payments instead of a lump sum payment as at common law. These issues, among others, will be discussed in Part Two in the section concerning the various systems of assessment for awarding compensation. In Canada there is express reference in the statutes of five provinces[173] to provision for the specific award of compensation for non-pecuniary loss to victims of crime, and

these will be discussed after the ensuing explanatory note on the rationale behind the underlying principle to award compensation for non-pecuniary loss to victims of criminal injury.

Compensation for victims of crime can be viewed as a public fulfilment of

> "a sense of responsibility for, and sympathy with, the innocent victim and 'it is right' that this feeling should find practical expression in the provision of compensation by the community".[174]

True compensation demands that as many factors as is practically possible should be considered in living up to this sense of responsibility and it is submitted that non-pecuniary loss considerations have a fundamental part to play in this task. They are particularly relevant for victims of crime because there may be little or no pecuniary loss[175] and the major effect of the crime may be psychological in that it causes increased tension, anxiety, or nervousness in every day activities such as, walking the streets after an assault or rape attack. The Pearson Commission in England supported the existence of an award for criminal injuries stating that it was

> "morally justified as in some measure salving the nation's conscience at its inability to preserve law and order".[176]

If the scheme is designed to salve the conscience of the nation it is surely important for the complete "salving" process that a victim's pain and suffering should be compensated. As Starrs vehemently commented;

> "In some crimes, particularly rape, kidnapping and some robberies, the unliquidated claim for compensation for pain and suffering is all that the victim

> generally has. Thus it would appear to mark the victim and play havoc with consistency to urge compensation of a forceable rape victim ... and in the next breath to reject her claim for pain and suffering".[177]

Burns[178] has referred to various pragmatic and theoretical reasons for not compensating non-pecuniary loss under the Criminal Injuries Compensation schemes. These include, for example, the difficulty of assessment, the difficulty of detecting fraudulent claims and the cost of a programme with the incorporation of non-pecuniary loss heads of compensation. To take the cost question, one asks should the financial burden on the state be a valid consideration for excluding an award for non-pecuniary loss? Burns points to interesting evidence, with the aid of detailed information and cost analysis of Canadian schemes, which illustrates that it is extremely difficult to pin-point the inclusion of an award for non-pecuniary loss as the reason why a scheme is expensive[179]. Equality of treatment for victims of personal injury is another argument raised against criminal injury compensation. Why should a victim of crime be entitled to more compensation than victims of industrial accidents? In England the latter victim would be compensated according to a "tariff" approach which offers a fixed amount of compensation, but the more generous tort system governs the compensation to a victim of crime. It should be noted however that the nature of the victim is different in the criminal sphere since it is often the young and the old who suffer as victims of crime[180], and these categories of people may arouse more public sympathy than a worker for whom accidents may be expected. If the compensation system has a dual purpose to fulfill in its aim of pacifying both the public and the victim it is submitted that this desire will not be assauged unless non-pecuniary losses are included as a basic matter for consideration. Whether this is so may be seen from the following analysis of the statutory basis for claims in the Canadian common law provinces.

There is express provision in the statutes of Newfoundland, Ontario, Yukon, Saskatchewan and New Brunswick[181] for the victim of a crime to make a claim for compensation before the Criminal Injuries Compensation Board for pain and suffering endured as a result of injury caused by the commission of a crime. In the first three provinces mentioned it is also possible for a deceased victim's dependants to claim for their own pain and suffering since the statutes do not specifically state that the compensation must be for the pain and suffering of the victim. It is submitted however that a successful claim by a dependant for pain and suffering may require that a greater degree of suffering be demonstrated than would be required with respect to a victim. It seems that, as at common law, compensation for grief and sorrow at the loss of a loved one is not a compensable head of damage, but if the required degree of pain and suffering can be shown an award could be made for the victim's dependants. Similarly, an award could theoretically be made to a person responsible for the maintenance of the victim. It is presumed that a greater degree of pain and suffering would be needed by the claimant in these cases too. This basis of claim is a clear divergence from the common law position in that the category of potential claimants is much larger.

The basis of claims for compensation for non-pecuniary loss in Alberta, Manitoba and North West Territory is more limited. In the former two provinces recovery may only be allowed in the "Good Samaritan" cases, for example, when the injury occurred while the person was endeavouring to assist any person preserve the peace[182]. In the Northwest Territories there is no provision for the award of damages for pain and suffering, but compensation may be given for "humiliation, sadness, and embarassment caused by disfigurement"[183], which it is submitted has some overlap with the concept of suffering. In British Columbia the contrary position is found and a claim may be made by a victim (not the dependants or those responsible for maintenance) for an award on the basis of pain and suffering,

loss of amenities of life and loss of enjoyment of life[184]. This is the only province amid the "legislative schizophrenia"[185] of this area, that allows an award for non-pecuniary loss on a more comprehensive basis. There is no express reference in the British Columbia statute to the separate heads of non-pecuniary loss, leaving the Board free to choose relevant heads of damage, which it has done by following the common law approach and the precedents set by the five provinces boasting coverage of the head of non-pecuniary loss damages for victims of crime.

The statutory basis of claims in this area presents a marked divergence in approach in different provinces on the issue of compensation for non-pecuniary loss. It is of major concern that the provinces tackle the problem in such an inconsistent manner which may lead to

> "the inexorable conclusion that such schemes offer incomplete compensation".[186]

(c) Workmen's Compensation Schemes.

In England compensation for injury sustained at work falls within the industrial injuries compensation scheme which is part of the social security system provided for by the Social Security Act of 1975[187]. The origins of the scheme are found in the Workmen's Compensation Act of 1897 which abolished the traditional fault concept to invoke the "insurance principle"[188] which provided compensation for all work related accidents. The scheme was developed by the National Insurance Act (1946)[189] and the National Insurance (Industrial Injuries) Act[190] (1946) which have now been amalgamated in the Social Security Act.

When a person suffers accidental injuries arising "out of and in the course of employment"[191] he is entitled

to make a claim to the Office of the Department of Health and Social Security. This claim must be supported by a medical certificate of unfitness for work and an acknowledgement by the employer that the injury arose out of and in the course of employment. The injury will be evaluated by a medical board who will assess the degree of disability and a disablement pension or disablement gratuity will be made on the basis of the board's decision on disability. If the degree of disablement is more than 20% a pension will be awarded according to statutory maxima for the level of disability. If the evaluation is less than 20% a scale of gratuities for the disablement is available. It should be noted that the disablement benefits apertain only to long-term incapacity for periods exceeding six months, while short-term incapacity is compensated by a flat-rate injury benefit. The injury benefits or disablement benefits are made in addition to earnings related awards and, if necessary, "constant attendance allowances" for medical care, invalidity allowances, mobility allowances and so on. The evaluation of the percentage of disability is assisted by Schedule 8 of the Social Security Act[192]. It is a purely objective assessment and it appears that there is very little scope for a full analysis of the non-pecuniary loss aspects of the injury, in terms of pain and suffering and loss of amenities[193]. Schedule 8 referred to above states that;

> "The assessment shall be made without reference to the particular circumstances of the claimant other than age, sex and physical and mental condition".[194]

Paragraph 1(a) of the same Schedule provides that the evaluation is to be based on all disabilities

> "to which the claimant may be expected, having regard to his physical and mental condition at the date of the assess-

> ment, to be subject ... as compared with a person of the same age and sex whose physical and mental condition is normal".

Consequently a comprehensive consideration of non-pecuniary loss elements is not possible. The assessment body must work within the confines of factors such as age, sex and "physical and mental condition" which does not provide much room for manoeuvre, although "mental condition" may encompass more wide-randing psychological effects of injury.

In Canada each of the provinces has a Workmen's Compensation Act[195] which provides for the provision of compensation to a worker who suffers personal injury in the event of an accident arising out of and in the course of his employment. Compensation is paid by employers of a collective group of industries from an Accident Fund to which the employers contribute annually, although in certain areas of employment there is individual liability on the part of the employer. An application for compensation is filed with the Accident Compensation Board along with a medical certificate and notice from the employer detailing the accident. There is no evidence that traditional non-pecuniary loss elements of an injury will be considered since the Board's primary concern is with the impairment of earning capacity caused by the injury. There is provision in some statutes to compensate a worker who has been seriously and permanently disfigured about the face or head or otherwise permanently injured and the Board may recognise an impairment of earning capacity whether or not there has in fact been such impairment, and compensation may be made accordingly[196]. This may be argued to be a "non-pecuniary" type of compensation for the injured worker in recognition of the disability itself, and its consequences on the life of the victim. Expenses of rehabilitation to assist in lessening or removing handicaps resulting from injuries are also included in the compensation award[197].

(d) Road Accident Compensation Schemes.

In response to complaints[198] concerning the inadequacies of the tort system in compensating road accident victims certain Canadian provinces have enacted no-fault insurance schemes which provide compensation for the injured victim of an automobile accident. Criticisms were based on various factors notably the delay in the process of litigation[199], the low percentage of recovery for the injured victim[200] and the high cost of administration of the system which acted as deterrent to claims being made. The first moves to improve the situation came with the Automobile Accident Insurance Act[201] of 1946 in Saskatchewan whereby everyone is

> "insured against loss resulting from bodily injuries sustained by him directly ... through accidental means ... as a result of driving, riding in, or on, or operating a moving motor reside, or collision with or being struck, run down, or run over by a moving motor vehicle".[202]

Compensation for disability is available under section 23 in the form of a payment for impairment of bodily function which is assessed on the basis of a schedule of injuries and their appropriate percentage of a maximum amount of $10,000. The impairment must prevent the individual from performing his duties relating to employment and occupation. The schedule does not relate specifically to pain and suffering or traditional non-pecuniary loss claims, merely to the physical degree of impairment[203]. It is interesting to note that Regulations in December 1979[204] added an extra category to the schedule of physical impairments and referred to brain disabilities. It seems that detailed medical evidence would be required since the ten new categories of disability are described as, inter alia, slight, mild, very

moderate, moderate, mildly severe, moderately severe, very severe, extremely severe, profoundly severe and total. S.39 of the Regulations provides that the American Medical Association's "Guides to the Evaluation of Permanent Impairment"[205] should be used if a disability is not provided for in s.38, when estimating the nature, extent, and degree of the permanent disability. The Scheme is run as a governmental office and, although no-fault liability is introduced, the option to sue under the law of tort is not abolished. Similar state run schemes operate in Manitoba[206] and British Columbia[207].

In Ontario a "limited accident benefits" scheme[208] is in existence under which an "insured person" is entitled to compensation, irrespective of fault, for bodily injury or death arising out of the use or operation of an automobile. However it seems that non-pecuniary loss elements do not receive separate consideration, unless they form part of the "substantial inability"[209] to carry out employment or occupational duties. The Osgoode Hall Study[210] on compensation for road accident victims had found that pain and suffering was strongly favoured as a consequence of the injury deserving of compensation, predominantly on the ground that injury is an unpleasant experience and that additional hidden expenses would have to be met in the future. This position was adopted in particular by those who had suffered large economic losses perhaps indicating that lost material advantages are viewed most seriously, and that such losses are liable to cause suffering, in addition to the physical pain endured from the injury. This attitude does not seem to be fully reflected in the scheme operating in Ontario, although a person may sue in tort for additional compensation over and above that offered by the scheme. It is interesting to note that the Ontario Law Reform Commission in their Report on Motor Vehicle Accident Compensation[211] of 1973 proposed that there should be no compensation for non-pecuniary loss on the grounds that such damages are only valid for a small

percentage of accident victims and have "such offsetting disadvantages" that they should be sacrificed in a system which provides for compensation for pecuniary losses[212].

In England there is no "no-fault" scheme to compensate road accident victims and a claim must be made in tort to recover compensation unless a settlement is made under personal motor vehicle insurance policies. A Motor Insurers' Bureau exists to provide compensation for those injured by uninsured drivers or unidentified drivers. Atiyah notes that road traffic insurance policies predominantly cover pecuniary losses such as loss of income and medical expenses and cover for non-pecuniary loss such as the fact of permanent disablement in severe injury cases is minimal[213]. Road accident victims would be compensated under the statutory system in New Zealand which does provide cover for non-pecuniary loss.

B. Civil Law of Quebec.

(1) Extra-Contractual Régime of Responsibility.

Introduction.

The law of obligations provides two sources for the regulation of relations between citizens and, depending on the circumstances of the case, a plaintiff may bring an action under the conventional contractual régime of responsibility or the legal, extra-contractual (delictual) régime, as the juridical basis for his personal injury claim. Compensatory damages may be awarded for the non-pecuniary loss or the "préjudice moral" as it is more commonly known which is described as,

"le dommage atteignant les intérêts extra-patrimoniaux et non économiques

de la personne, en lésant ce que l'on appelle les droits de la personnalité".[214]

Legal rules of civil responsibility require that when an individual commits a fault which causes damage to another he is liable to indemnify the victim for the loss that he has caused. The obligation to indemnify arises from the inexecution of a contractual obligation or from a fault occurring in an extra-contractual setting. Despite the application of the same basic legal rules in the context of civil responsibility there are a number of different principles which exist in the operation of the two régimes and these will be noted in the discussion of the "option" between the régimes in section (3). It will be seen that in establishing a claim for damages it is important to note the practical consequences of suing under either one or the other of the two régimes. It is the intention of section (1) to establish the conditions required to enable a victim of personal injury to recover damages, with particular reference to the award of compensation for the "dommage moral", in the extra-contractual régime of civil responsibility and section (2) will deal with a claim based on the contractual régime. Section (1) will cover some of the principles relevant for the contractual regime and, to avoid repetition, section (2) will serve to point out differences in the two régimes in terms of the principles relevant in the damages assessment as they relate to the contractual régime.

Under the notion of delictual or quasi-delictual responsibility the law of obligations provides for the fundamental principle of reparation for damage caused to a person by the fault of another. Art. 1053 of the Civil Code of Quebec (C.C.) states the principle as follows;

> "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to

another, whether by positive act, imprudence, neglect or want of skill".[215]

Arts. 1054 to 1056(c) C.C. provide for the more detailed application of this general principle. It is submitted[216] that four paramount conditions can be drawn from Art. 1053 in order to establish delictual responsibility. These are:

(i) competence to perceive right from wrong,

(ii) existence of damage,

(iii) fault,

(iv) causal relationship between (ii) and (iii).

These elements will be considered in turn with particular reference to the existence of damage and the principles of evaluation of damage as laid down in the Civil Code.

(a) Competence to Perceive Right from Wrong.

The condition of competence is in fact a condition of the existence of fault because a person will not be held responsible for a fault committed if, for example, he is an infant, mentally incompetent or unable, through drugs, alcohol or illness to comprehend the act[217].

(b) Existence of Damage.

Arts. 1053 et seq. do not define the nature of the damage in terms of injury and loss which must exist as a condition of responsibility. It seems that certainty is a necessary characteristic of the damage suffered[218]. This requirement would be fulfilled for loss already suffered by the time of trial, but future loss is also indemnifiable if it is a probable result of the injury and not hypothetical or a matter of pure conjecture. In personal injury cases

particularly in the cases of non-pecuniary loss or considerable discretion is left to the judge[219], which is an inevitable occurrence unless one adopts the position that only sustained losses should be compensated as long as there is an opportunity for appeal by the victim if circumstances change[220]. The aspect of certainty overlaps with a further recognisable characteristic of the damage which is that the loss must be "direct" in nature. This requirement is closely linked with the condition of a causal link between the damage and fault and it is often the direct quality of the causal link between the fault and damage that is at issue rather than an analysis of the direct nature of the loss per se. As Monsieur le juge A. Monet held in Le Sabot v. Blumer's[221],

> "Le dommage doit être à la fois direct et actuel. Ces termes ne sont pas à l'abri de la critique. D'abord c'est la relation de cause à effet qui doit être directe, de sorte que le caractère direct ne concerne pas le dommage proprement dit...".[222]

Reference may be made to Art. 1075 C.C. which relates to the award of damages in the case of an inexecution of the obligation and states that,

> "damages comprise only that which is the immediate and direct consequence of its inexecution".

A question that is also posed in connection with the "direct" nature of the damage is the interpretation of the words "damage caused ... to another" in Art. 1053, and the meaning of "another". Does it cover the immediate victim or all those affected by the fault; for instance in the case of nervous shock when a mother hears news of her child's accident? There has been conflicting jurisprudence on the

interpretation of "another" some cases investing the word with wide scope as in Regent Taxis v. Congregation des Petits Frères Marxistes[223] and Hôpital Notre-Dame de l'Espérance v. Laurent[224] others limiting the scope[225]. In the case of nervous shock more recent cases have taken the same approach as the common law and have allowed a claim on these grounds, particularly where there are psychological and physical ramifications[226]. The whole question of the interpretation may in fact be misplaced if the approach of Prof. Baudouin is followed:

> "Les tribunaux doivent déterminer dans chaque cas particulier si oui ou non le dommage réclamé est une conséquence directe de la faute commise indépendamment de la personne du réclamant et non pas si le demandeur est le victime immédiate".[227]

The emphasis is placed on the causal relationship between the fault and the loss to determine the existence of the condition of damage which is capable of indemnification.

(c) Fault.

As stated by Art. 1053 the act or behaviour occasioning fault may be by positive act, imprudence, neglect or want of skill. The existence of fault is essential for establishing delictual responsibility and is viewed as "l'élément générateur"[228] of such responsibility. As a dynamic concept the notion of fault must be assessed,

> "en regard du standard et de la mesure fixée par les tribunaux et le législateur à un moment particulier de l'évolution sociale".[229]

Crépeau has noted the concept of fault as:

> "A violation of one's pre-existing duty whether it be one voluntarily assumed by contract (contractual obligation) or one imposed by law (legal or extra-contractual)".[230]

The defendant's act is considered in the light of a "bon père de famille", the objective test of the reasonable man placed in the defendant's circumstances. Judge Rivard held in L'Oeuvre des Terrains de Jeux du Québec c. Canton[231],

> "Le plus sur critère de la faute dans des conditions données, c'est le défaut de cette prudence et de cette attention moyennes qui marquent la conduite d'un bon père de famille; en d'autres termes, c'est l'absence des soins ordinaires qu'un homme diligent devrait fournir dans les mêmes conditions. Or, cette somme de soins varie suivant les circonstances, toujours diverses, de temps, de lieux et de personnes".[232]

(d) Causal Relationship Between the Fault and Damage.

The requirement for damage to be direct in nature has been referred to in the context of the existence of damage, but a direct link is also required between the fault and the damage in order to establish the fourth condition of responsibility. This task will be self-evident in many cases for the immediate victim of the fault, but as noted above this may be more difficult for the plaintiff to prove if he is not the immediate victim. In general the causal relationship is a matter of fact for the court to decide as a matter of reasonable probability. The jurisprudence surrounding the interpretation of "another" in Art. 1053 is also relevant in assessing this fourth condition of civil responsibility[233].

(e) Evaluation of the Award of Damages.

Baudouin observes that the main goal of an action in civil responsibility is to permit the victim to obtain

> "une juste compensation pour le préjudice subi".[234]

He continues;

> "L'indemnité accordé doit donc l'être uniquement à titre compensatoire et non à titre de punition de l'acte, aussi malintentionné soit-il, de l'auteur du délit".[235]

As in the common law the reasonableness concept is in evidence in the evaluation of damages, once all the conditions for the existence of civil responsibility have been established[236]. There must be no unjust enrichment[237] and factors such as the victim's own fault in contributing to the loss, for example, by not following a doctor's advice, will be considered although this is probably an element to be dealt with in the issue of causality[238]. The undertaking of treatment is an important aspect in the mitigation of damage and the predominant view in Quebec civil law in contrast to the common law is that a patient's refusal to undergo treatment is justified since it is impossible to make the distinction between dangerous and painful treatments and those which are not[239].

The principles used by the Quebec courts in the evaluation of compensatory damages for non-pecuniary loss are now drawn from the Supreme Court of Canada's trilogy of cases decided in 1978[240]. It must be mentioned that the principles of common law in these cases are not binding in the civil law of Quebec, but the Civil Code is silent on

methods of quantification of the damages award and an analysis of Quebec cases indicates that the principles laid down by the Supreme Court of Canada have been followed in the majority of cases[241]. The lack of guidance in the Civil Code on the quantification and assessment of non-pecuniary loss adds strength to the applicability of the Supreme Court principles in this area. Dickson J. in Andrews was dealing with fundamental principles to be applied in all provinces as a matter of consistency and fairness and the compensatory function of the damages award for non-pecuniary loss was stressed. This function is the same, it is submitted, whether working within the jurisdiction of common law or civil law. Montgomery J.A. held in Corriveau c. Pelletier[242] in the Court of Appeal;

> "While none of these appeals came from Quebec,I see no reason to make a distinction in the role of the court here and in other provinces in assessing damages for non-pecuniary losses...".[243]

Nadeau J., expressed a contrary opinion in La Pierre c. P.-G. du Québec[244] holding that common law cases did not have the same weight as cases decided under the Civil Code. A long-standing controversial question arises when the Supreme Court of Canada must decide a case involving the interpretation of the Quebec Civil Code and certain authors[245] have viewed such decisions as "contaminating" the civil law by invoking common law principles to solve the issue in dispute. It is conceded that the Supreme Court of Canada has a unifying role to play in the web of federal-provincial and common law - civil law jurisdictional problems of interpretation. This well-established approach can be seen in the nineteenth century case of Canadian Pacific Railway Co. v. Robinson[246] where it was stated;

> "I think it would be much to be regretted if we were compelled to hold that

> damages should be assessed by different rules in the different provinces...".[247]

This opinion is similar to that of Dickson J. in Andrews[248]. It is submitted that in the assessment of damages it is a matter of fairness between plaintiffs, defendants and the community at large that comparable rules should apply.

(2) Contractual Régime of Responsibility.

A brief mention will be made of the conditions required for the existence of a contract before the conditions of civil responsibility (fault, damage and causality) are examined in the context of contractual régime of responsibility. Reference must be made to Art. 984 C.C. which provides for the necessary conditions for the existence and validity of a contract. These are: -

1) the parties must be legally capable of contracting
2) their consent must be legally given
3) something must form the object of the contract
4) there must be a lawful cause or consideration.

A contract is an expression of the will of the parties recognised by the consent of the parties to undertake certain obligations which have a lawful cause. The inexecution[249] or breach[250] of the obligation may render the debtor liable in damages if the fault or inexecution of the obligation results in damage to the creditor and if there is a causal link between the fault and the damage. Art. 1075 C.C. provides that damages comprise only that which is "an immediate and direct" consequence of the inexecution. As noted in the analysis of delictual responsibility this question of the "direct" nature of the damage is one of fact

in deciding where to draw the line in the chain or "cascade de malheurs"[251] that may result from the fault. A further limitation of the damages rules finds expression in Art. 1074 C.C. which limits damages to those which have been foreseen at the time the contract was made. This is a limiting condition that is not relevant in the determination of damages in delictual responsibility. The foreseeability rule applies as long as the breach of contract is not accompanied by fraud[252]. The test is whether the reasonable man would in similar circumstances have foreseen the event. The creditor's own imprudence or fault will lie to reduce the damages.

(3) The Question of "Option" and "Cumul".

These problems arise when a plaintiff suffers damage caused by the fault of the defendant and both the contractual and delictual régimes of responsibility may be adopted as the basis of the claim for damages. Is the plaintiff permitted to choose between the two bases of responsibility according to which is the most favourable for his case? This question is particularly important when dealing with the issue of rules relating to the assessment of damages since if the contractual régime applies the conditions of Art. 1074 must be observed. One is faced with a perplexing theoretical and practical problem which has received attention from authors and disparate treatment by the courts[253]. The subject has received extensive academic coverage since the recent Supreme Court of Canada decision in Wabasso Ltd. v. The National Drying Machinery Co.[254]. The court allowed the existence of the principle of "option" between delictual and contractual responsibility to enable the plaintiff to establish a delictual claim despite the existence of a contract between the parties. The principle of option has had an uncertain history, at times being favoured by the courts

and at others being criticised[255], and it remains to be seen whether the Wabasso case has clarified the picture for the future application of the principle.

The practical differences between the two régimes concern matters such as prescription periods which are larger in the case of contractual responsibility[256], rules relating to liability for interest[257], and rules referring to the payment of all direct and foreseeable damages in the case of breach of contract which was noted earlier in the discussion of Arts. 1074-1075 C.C. Anglin J. in Regent Taxi and Transport Co. v. Congrégation des Petits Frères de Marie[258] was adamant that it would be "heretical" to apply such limitations to a case of delictual responsibility under Art. 1053 C.C. If rules of delictual and contractual responsibility are mixed in their application in a particular case, the principle of "cumul" comes into play, but this concept has been sharply criticised and is not invoked[259]. It seems that the controversial debate on the question of option will continue, at least in academic circles, between those who believe that if a contract exists between two parties this is "the law"[260] between the parties and those who vehemently argue that a plaintiff has an option to sue in contract or delict despite the existence of a contract, if the delictual option of responsibility is adopted.

(4) Statute.

Introduction.

In Quebec there are three main statutory sources on which a claim may be made for compensation for personal injury. The particular statute adopted will depend on the situational context of the case, but in terms of a clear claim for compensation for non-pecuniary loss the victim of a road accident has the most advantageous position under

the Loi sur l'assurance-automobile[261]. The two other statutes, the Loi sur l'indemnisation des victimes d'actes criminelles[262] and the Loi sur les accidents du travail[263], provide only indirect compensation for the more intangible losses of a non-pecuniary character and compensation is only awarded if the loss affects the earning capacity of the victim in terms of his permanent disability. The Workmen's Compensation scheme will be discussed first, followed by the Criminal Injuries scheme. The latter adopts the principles of the former for the heads of compensation and the analysis of the statutory basis of claims will conclude with an explanation of the Road Accident Insurance scheme.

(a) Workmen's Compensation Scheme.

In Quebec civil law any employee who suffers personal injury at work may receive compensation under the Loi sur les accidents du travail[264] if he suffers a loss of salary[265]. The personal injury may be of any type, including industrial diseases recognised as characteristic of the employment[266]. The injured worker does not have to prove that the employer was responsible for the accident, merely that the injury was caused by an accident at work. In some cases it may be difficult to prove that the injury was sufficiently linked to the accident at work, particularly in the case of psychological injury where an illness may not be itemised in the annexed schedule to the Act. In the case of a heart attack for example, a worker must prove that it was not caused by, for example, existing hypertension, age, or arteriosclerosis but by the accident at work[267]. The claim for compensation to the Commission de la Santé et Sécurité de Travail (C.S.S.T.) effectively suppresses any other claim to public bodies or an action in civil responsibility against any employer. This is laid down in Art. 1056(a) C.C. and Art. 16 of the Loi sur les accidents du travail. The situation differs if the accident was caused by a third party[268] or if the accident

was caused by an automobile the worker may make a "topping up" claim under Art. 18(1) Loi sur l'assurance-automobile[269].

The claim for compensation arises under three heads: loss of revenue[270], medical costs and expenses[271] and costs of readaptation[272]. The emphasis is on pecuniary rather than non-pecuniary matters and there is no specific provision for compensation of non-pecuniary losses such as pain and suffering and loss of enjoyment of life and aesthetic impairment. These factors may be compensated if objectively they form part of the injured worker's degree of permanent incapacity which affects the victim's ability to work. Thus the Act is only concerned with the effect of such losses on the earning capacity of the victim. The practical administration of the system and the actual calculation of the indemnity will be discussed in Part Two. It should merely be noted at this stage that non-pecuniary loss type factors such as the effect of the injury on occupation, on educational level or geographic mobility are considered in calculating the degree of "permanent disability"[273] in accordance with Impairment Tables and Variables[274] set out in Regulations to the Act. However, traditional heads of damage for non-pecuniary loss are not expressly covered and there is no compensation for the fact of pain and suffering, merely indirect compensation if the pain and suffering has an effect on the victim's earning capacity.

(b) Road Accident Compensation Scheme.

> "The victim of bodily injury caused by an automobile shall be compensated by the Régie ... regardless of who is at fault".[275]

This is the provision of s.3 of the Loi sur l'assurance-automobile of Quebec allowing for a road accident victim to make a claim for compensation to the Régie de l'assurance-

automobile du Québec. Under s.44 there is express provision in division III of the Act on "other indemnities" for

> "the victim who sustains injury, disfigurement, dismemberment, suffering or loss of enjoyment of life in an accident",

to receive compensation in the form of a lump sum up to the value of $20,000, and according to prescribed terms and conditions. It is the Régie that has "exclusive jurisdiction"[276] to deal with any matter concerning the right to indemnity and the quantum in a case of personal injury.

(c) Criminal Injuries Compensation Scheme.

In Quebec there is scope for victims of crime to be compensated under the Loi sur l'indemnisation des victimes d'actes criminels . However, as under the Workmen's Compensation scheme, there is little possibility for the victim to make a claim for compensation for non-pecuniary loss because Art. 5 provides that the benefits payable are the same as those to be administered under the Loi sur les accidents du travail. It was thought that to divert from the system of compensation for workmen in the case of victims of crime would be "indécent et injuste"[277], thus compensation for pain and suffering, loss of amenities and loss of expectation of life are not compensable factors for a victim of crime in Quebec. There may be indirect compensation as outlined in the section discussing Workmen's Compensation if the pecuniary losses are affected by non-pecuniary factors.

II. The Basic Elements of Compensation for Non-Pecuniary Loss.

Introduction.

It is well accepted in both the civil law[278] and common law[279] that the basis on which compensation for non-pecuniary loss is awarded may be sub-divided in the attempt to unravel the extent and nature of a person's non-pecuniary losses. Although a composite lump sum is the usual mode of payment the court or assessment body will often, as a matter of convenience, articulate the elements to be considered. The traditional division is composed of three heads, firstly, pain and suffering, secondly, loss of amenities or enjoyment of life and, thirdly, loss of expectation of life. The breakdown provides welcome assistance in this area of "intangible losses"[280] where there is an infinite variety of classes of loss and different interpretations and nuances on similar losses abound[281]. Much depends on the subjective reaction of an individual, one person may have a high threshold for pain, another may have a lower tolerance, one person may adapt quickly to a new life-style after a debilitating accident, while another remains traumatized with serious psychological and emotional effects.

It is the intention of this section to lay out the overall picture of the basic elements that a claim for compensation for non-pecuniary loss may encompass and the practicalities of the actual quantification in financial terms of these elements will be considered in Part Two. All the major discernible divisions in each of the jurisdictions covered will be described, with an explanation of the relationship between the elements. It must be noted that the kaleidoscope of intangible losses is still unfolding and it will be seen that there may be some differences between the approach of the civil law and the common law in the process of this evolution. Certain heads of damage for non-pecuniary loss

may serve a merely illustrative purpose in some jurisdictions whereas in other jurisdictions these basic elements may be treated in a more definitive manner with completely separate awards being made for particular heads, as in England where the conventional award for loss of expectation of life is £1,250. Whether the heads are treated as exhaustive guidelines or merely as general indications of the issues to be considered there is bound to be overlap in this area when dealing with such nebulous concepts as loss of enjoyment of life and pain and suffering. These areas of overlap will be discussed in the following analysis of the basic elements of compensation for non-pecuniary loss.

(1) Pain and Suffering.

All the jurisdictions examined recognize pain and suffering as compensable elements[282], but constant usage of the term pain and suffering has left the phrase with an indistinct meaning merely having the status of a term of art. Pain has always been difficult to define[283] and this phenomenon is clearly seen by looking back at the work of philosophers and scientists since the Middle Ages. The heart was originally considered to be the centre for pain, as argued by Aristotle, but during the Middle Ages and up to the eighteenth century there was a change in belief and the relevance of the brain and the central nervous system was discovered. The study of dolorology continued by, for example, Charles Bell in the nineteenth century, and more recently by Melzack and Wall's findings of a "gate theory" which they argued showed that parts of the spinal cord acted as "gates" to signals received from the skin, allowing only a selection of pain signals to pass through to the brain[284]. However the meaning of pain and its causes remains mysterious despite enormous scientific advances in the discovery of, for example, enkephalins, and substance P[285] and despite the creation of pain clinics which

all assist in the understanding of this concept[286].

It has been suggested that pain is the

> "immediately felt effect on the nerves and brain, of some lesion or injury to a part of the body".[287]

and suffering, as a separate concept, is described as,

> "distress which is not felt as being directly connected with any bodily condition".[288]

Cassell[289] is also of the opinion that although pain and suffering are closely related concepts they are phenomenologically distinct. He reports that suffering is noted when pain is overwhelming, out of control, chronic, when the source is unknown, or when the meaning is dire, and pain is seen as a threat to continued existence, and to physical and personal integrity. Models for pain and suffering are presented by Koskoff[290] for use by an expert witness or a lawyer and he views anxiety as at the core of suffering[291]. Cassell submits that one must take account of the "personal meaning" of a situation for a victim, since the reactions to pain and the resulting suffering from the effects of an illness or incapacity may be due to certain personal characteristics and experiences previously endured by the victim. His indepth analysis of the "nature of suffering" and his presentation of the topology of the person outline the many facets of "personhood" that should be explored when examining a person and his reaction to pain[292]. This type of approach is most welcome if one is to understand the rationale behind the traditionally composite award of compensation for pain and suffering, and provides guidance to the court when faced with the task of evaluating the loss.

The court, in treating pain and suffering as a "unitary concept"[293], will assess past, present and future pain and suffering, which arise from the original incapacity and from medical treatment and operations that are rendered necessary[294]. There is some overlap with the other sub-heads, for example, one may foresee suffering occasioned by the prospect of a shortened life due to an injury which results in loss of expectation of life, and emotions such as, sadness, embarassment, humiliation and worry may have a bearing on the person's enjoyment of life. However, since a global award is made these overlaps may have little practical significance. Pain may have less relevance today due to the use of pain-killing drugs and as Baudouin comments, the

> "soulagement par drogues ou médicaments doit donc motiver en principe une indemnité plus faible".[295]

There may be a problem with severe side effects from pain-killing drugs, and this would require appraisal by the courts. If the plaintiff is unconscious damages are not normally recoverable for pain and suffering[296].

Finally an issue that should be addressed here is whether a plaintiff can claim for pain and suffering where there is no original physical injury to be found, i.e. the pain and suffering is unaccompanied by physical bodily injury. Awards are made in these cases and Cooper-Stephenson and Saunders[297] refer to such a situation as "conversion hysteria" referring to the case of Krahn v. Rawlings[298], where complaints of pain in the shoulder, neck and back could not be medically authenticated. One is essentially considering the psychological effects of a traumatic event but to recover compensation such cases need to fulfil recoverability requirements similar to those in nervous shock cases. Mere grief and sorrow are not compensable as elements

of non-pecuniary loss per se. A similar situation is that of compensation neurosis which may, according to some commentators, result in pathological symptoms or it may merely represent

> "a complaint of disabling subjective functional symptoms following accidental injury and sometimes fright without physical injury of any kind".[299]

This type of complaint could equally fall within the element of mental distress, or within inconvenience, as a form of disruption or instability in the plaintiff's daily life and the problem of overlap between elements is clearly indicated. However, one must not lose sight of the overall purpose of compensation for non-pecuniary loss by becoming entangled in academic distinctions between the various elements. The division into subheads, of which pain and suffering is treated as a major component in both common law and civil law and in the statutory system in New Zealand under s.120(1) (b) A.C.A., should be viewed as a means of more efficient practice which will enable the court to consider every aspect of a plaintiff's case.

(2) Mental Distress - Injury to Feelings.

The element of mental distress has been included in this section on the basic elements of a non-pecuniary loss claim because once liability is established the assessment body may pay particular attention to the recoverability of compensation for mental distress per se. This factor is not concerned with compensation for clear physical injury, even though severe mental distress may in fact manifest itself on some physical way, but this element is directed towards the more subtle effects that a defendant's action may have on a plaintiff.

Traditionally at common law and civil law

"mental suffering caused by grief, fear, anguish and the like is not assessible".[300]

However compensation may be claimed in the law of torts designed to protect reputation, such as defamation or malicious prosecution, as evidenced by cases such as McCarey v. Associated Newspapers[301] where it was held that damages include the "natural injury to feelings". In the law of contract it was once not possible to claim compensation for injured feelings, since they were regarded as being incapable of economic evaluation, but, as evidenced by the discussion on mental distress in Section I, inroads have been made into this entrenched principle and its foundations have been somewhat loosened, notably in contracts of a personal nature. It is recognised that there may be more to a contract of employment than simply work and wages and lawyers should consider this area of the law with more scrutiny, bearing the possibility of compensation for mental distress in mind.

Under the statutory system in New Zealand a claim for compensation for non-pecuniary loss must come within the ambit of s.119 and s.120 of the Accident Compensation Act. Analysis of the Act's provisions indicates that there is clear scope for a claim covering compensation for "mental suffering" in s.120(1)(b), but the distress must arise from personal injury suffered in an accident in respect of which there is cover under the Act. This limitation would presumably preclude claims for mental distress occasioned by a breach of a contract of employment since the Act only compensates those losses resulting from personal injury by "accident". It could be argued, that unemployment and the consequent distress and anxiety caused to the community is a social "accident" for which the community is responsible and, following the principles on which the Accident Compensation Act rests, it is the social duty

to compensate such injury. This leads to the separate question of what is the policy behind the Accident Compensation Act. One could argue that losses caused by illness should also be covered, since it is the community responsability to provide for those members of society who suffer from disease and disability on the road to social progress. If a person may be compensated under the Act for injury resulting from "exposure to the elements"[302] it is difficult to understand why the community is responsible in this case but not where the individual suffers from illness not caused by an accident. It is submitted that these are far-reaching issues which in essence are based on the use of discretion in where to draw the line on the extent to which compensation may be made.

In the civil law of Quebec mental suffering is consistently a factor that the courts consider in the assessment of compensation for non-pecuniary loss in personal injury cases[303]. Mental distress in the context of injury to feelings is available as a separate head of damage. An illustration is found in the area of breach of professional secrecy by a doctor, where it was stated in Hart v. Thérien[304] that,

> "un médecin n'a pas le droit de publier dans un compte pour services professionnels la nature de la maladie pour laquelle il réclame le prix de ses services, lorsque telle publication est de nature à blesser ou injurier son débiteur".[305]

It should be noted that in Quebec an individual's dignity, honour, reputation and respect for his private life is safeguarded by statute in the Quebec Charter of Human Rights and Freedom[306], which also provides for the right to a professional duty of non-disclosure of confidential information[307]. Damages may also be recovered for mental distress in a contractual claim, using Art. 1024 C.C. In a contract between a professional person and his client there is a duty of confidentiality

which is an obligation arising from the nature of the contract. If there is a breach of the duty it is forseeable that mental distress may result and damages could be awarded under Art. 1075 C.C. It has been argued that,

> "toute divulgation dommageable des contestations professionnelles est susceptible d'entraîner la responsabilité contractuelle du médecin".[308]

(3) Inconvenience.

Inconvenience and discomfort are often dealt with under the head of the pain and suffering but there are some instances, particularly in the civil law of Quebec and in the law of contract, where a person may not endure pain and suffering in its usual sense, but undergoes some type of inconvenience which need not be connected to physical injury, although very often it will be. Inconvenience refers to the disruption of a victim's personal, family and social life and it is often referred to as a specific head of a non-pecuniary loss claim or the "dommage moral"[309]. In this respect there is some overlap with the loss of enjoyment of life head, but it is used more frequently where traditional notions of pain and suffering are not readily apparent as being fulfilled.

As McGregor observes the term "damages for inconvenience"[310] is not generally found in the law of tort, except where the interference with the plaintiff's person results in some form of physical inconvenience but not physical injury[311]. In the law of contract Mellor J. set out in 1875 the scope of a claim for inconvenience in the case of Hobbs v. L.S.W. Ry.[312] and held that there must be more than mere loss of temper, vexation or disappointment unless there is some physical discomfort. This principle has been followed in the "disappointing holiday" situations, but the courts have shown a readiness to depart from this requirement and grant damages for inconvenience even where there is no physical inconvenience[313]. This would reflect the general

trend of the courts in this area of the law in their awareness of the more personal effects of a breach of contract, for example, the ailment of compensation neurosis in which the plaintiff suffers from a nervous condition in the event of delay in the settlement of the action for personal injury. However the borderline between the elements of pain and suffering, which would cover compensation neurosis, and elements such as inconvenience and mental distress is unclear. It can be said that these elements are being considered more readily by the courts particularly in the civil law, in terms of compensation for non-pecuniary loss, although the actual content of each element is impossible to identify precisely.

(4) Aesthetic Harm - "préjudice esthétique".

There is a marked distinction between the civil law and common law in the court's consideration of aesthetic harm resulting from an injury. In the civil law of Quebec this element of "préjudice esthétique" receives, in the majority of cases, separate analysis as a head of damage in the compensation of non-pecuniary loss and may show the more open concern for preservation of the personal integrity of the individual, which is an integral part of the civil law of Quebec[314]. The concept of "préjudice esthétique" covers disfigurement through scarring, burns, deformity, and general changes in appearance and the consequences that the victim may suffer such as loss of marriage prospects, friendships, and psychological problems. These latter issues will also be interwoven in the loss of enjoyment of life and pain and suffering heads in the light of the mental and emotional suffering that such disabilities may cause. Research conducted on cases in Quebec from 1950 to 1975 by Barakett and Jobin[315] has found that cases involving "préjudice esthétique" occur frequently in the province and more recent research conducted for the purpose of the present

work indicates that "préjudice esthétique" is an element that receives frequent separate attention by the courts in personal injury cases[316]. The visibility of the disfigurement will often attract a more generous award, although the crux of the basis of the claim for this compensation is on the grounds of interference with the right to physical integrity. Barakett and Jobin refer to eight factors that the court may take into consideration in its analysis of "préjudice esthétique". These are:

> "- la gravité de l'atteinte;
> - la partie du corps atteinte;
> - les inçonvénients et la perte de jouissance de la vie;
> - la douleur mentale;
> - l'état matrimoniale;
> - le sexe;
> - l'âge;
> - éventuellement les circonstances spéciales telles que l'apparence antérieure particulière de la partie atteinte (beauté remarquable, etc.), l'atténuation progressive du préjudice esthétique, ...".[317]

The court may award extra sums to cover costs of cosmetic surgery to enable a victim to resume an occupation in which physical appearance plays a crucial role[318].

It should be observed that the element of aesthetic harm transgresses the boundaries of the different heads of damage in the compensation of non-pecuniary loss. Scarring and disfigurement are in one sense purely physical injuries and the damages for aesthetic impairment reflect the victim's perception of the physical injury and the consequences such as other people's reactions to the injury. These factors could equally be assessed under the heads of pain and suffering and loss of enjoyment of life. But in the civil law of Quebec, where the general right to inviolability of the person is established in the Civil Code under Art. 19, the award of damages for "préjudice esthétique" appears to go further than simply compensation for the fact of physical injury and its consequences. Can we say therefore that the civilian is

more concerned with his appearance and personal integrity than his common law neighbours? Maybe in a society in which great emphasis is placed on physique and beauty the civil law approach is merely reflecting this cultural value but as will be seen in Part Two, the inconsistencies that abound in the actual awards made for this element of compensation for non-pecuniary loss would tend to negative arguments that the civil law has consciously adopted this approach. What can be said however is that the courts show a concern for the emotional well-being of the victim and that purely cosmetic and disagreeable effects of injuries deserve compensation. The psychological effects of personal injury are therefore clearly identified and are not merely subsumed within the head of pain and suffering and loss of enjoyment of life, although they do permeate these areas to some extent.

Under the New Zealand system s.120(1)(a) makes specific reference to the availability of a claim for compensation for "loss from disfigurement", which would cover scarring and other physical and cosmetic disabilities suffered as a result of personal injury. It is unclear to what extent the more psychological aspects of disfigurement would be incorporated.

(5) Loss of Amenities or Enjoyment of Life.

This element of compensation for non-pecuniary loss is perhaps the most important aspect of this part of the damages award and it is treated as a distinct element in all the jurisdictions concerned. The head covers a variety of matters connected with the negative effects that an injury has on the plaintiff's enjoyment of life encompassing his general inability to pursue previously enjoyed activities. Past and prospective loss is assessed within the broad examination of the effect of the injury on the victim's personal, intellectual, sporting, social, sexual, occupational and other pursuits. Loss of marriage prospects and the loss of the

role as a wife/mother or husband/father are also part of the assessment. The effect of physical impairment in terms of loss of any of the five senses and also the impairment per se, in the context of the personal circumstances of the plaintiff, may be viewed as a loss of "health and vitality" which is "a loss of a good thing in itself"[319]. Factors such as disfigurement and aesthetic harm fall under this head but they may receive separate treatment as noted earlier. The effects on a person's employment, for example, the loss of an interesting and enjoyable career[320], or the loss of leisure due to the necessity of working extra hours to make comparable earnings with income received before the injury are both factors to be considered[321]. The age of the victim and gravity of the injury play an important role since, as Ogus observes,

> "the object of the award is to compensate the plaintiff for the physical disability sustained as a result of the accident, and the effect of that disability on his enjoyment of life".[322]

In the civil law of Quebec this head may be described in a more general way as "préjudice d'agrément" but the factors mentioned above are all considered under this title, the test of which has been described as an analysis of

> "des activités que la victime avait antérieurement à l'accident".[323]

Within the ambit of the discussion of loss of enjoyment of life one must face the controversial question that arises when the plaintiff is unconscious and, as far as we know, is unable to appreciate his loss of amenities. Should he be entitled to receive the same amount of damages for non-pecuniary loss as someone who can fully appreciate the

incapacity and condition that he has been reduced to?

The term "unconscious" defies precise definition and is merely described as "not conscious or insensible"[324], whereas "consciousness" is defined as,

> "awareness, perception of physical facts or mental concepts; a state of general wakefulness and responsiveness to environment. Impairment of consciousness may be of any degree of severity".[325]

There are many levels of consciousness such as stupor, coma, or semicoma which are capable of some definition, but there is no unanimity on the precise meaning of these terms. In cases of personal injury a person may be left completely unconscious, i.e. totally unaware of his surroundings, others and self, or partially unconscious where there is some degree of perception and response - the different types or degrees of impairment of consciousness would seem to be infinite, particularly if one extends the debate into a consideration of hyper-consciousness.

The approach taken by the civil law and the common law towards this problem differs. In England the courts have held that although damages for pain and suffering cannot be awarded to the unconscious plaintiff, a sum to compensate for loss of amenities or faculties may be available, the rationale being that damages are awarded for the objective fact of "loss". The House of Lords in Lim Poh Choo v. Camden and Islington Area Health Authority[326] adopted the view that the fact of unconsciousness does not eliminate the actuality of the deprivation of the ordinary experiences and amenities of life[327]. Minority arguments were based on the premise that it is no more possible to compensate an unconscious man than it is to compensate a dead man, but the majority views arose from the opinion that it should not be cheaper to kill than to maim. It is questioned whether this view may be mis-

conceived to the extent that it is based on punitive concepts, that is concepts of punishing the wrongdoer rather than of compensating the victim. In tackling this problem one is facing the crucial question of what is the rationale or theory behind the compensation of non-pecuniary loss in personal injury cases. The theories are addressed in Part Two and the present analysis of the unconscious plaintiff offers an illustration of the use of an objective or subjective approach in the assessment process. Social and ethical considerations are relevant, as stated by Lord Denning in the Lim case, where he held that a decision to keep someone alive should not be influenced by a law which says,

> "if she is kept alive there will be large sums of compensation payable for the benefit of the relatives, whereas if she dies there will be nothing".[328]

In Canadian common law the Supreme Court in R. v. Jennings[329], adopted the English approach, but a contrary position exists in the civil law of Quebec.

The leading case in Quebec civil law is Driver v. Coca-Cola[330] decided by the Supreme Court of Canada in 1961. The issue before the court was whether the parents as "les héritiers légitimes" had a right of action under article 607 C.C. to sue for pain and suffering and loss of life expectancy endured by their daughter after a road accident. It was held that the victim must have actually felt the effects of the injuries before dying and must have seen before her the

> "triste perspective d'avoir devant elle une vie abrégée, de traîner une existence miserable, remplie d'infirmités, de douleurs physiques, et d'angoisse et d'inquiétudes morales".[331]

Since Beverley Driver was unconscious she was held to have

not felt the effects of the injuries. A similar case is Covet v. Jewish General Hospital[332] in which the patient was reduced to a "vegetable" state due to lack of oxygen during an operation and, without regaining consciousness, died several months later. It was held that her position would have been the same, in terms of the compensation available for loss of enjoyment of life, as if she had died during the operation. Monsieur le juge Basillon stated,

> "De même, si les souffrances physiques de morales ne forment pas un chef de réclamation, parce que la victime ne les ressent pas, la cour ne peut admettre que la perte des jouissances de la vie puisse aussi former un chef de réclamation lorsque cette perte ne peut être perçue par la victime".[333]

The rationale in the cases of complete unconsciousness and lack of perception and responsiveness to the environment is that since the victim cannot be compensated by the provision of alternative enjoyment, there should be no award since the money would pass to the relatives[334]. A rudimentary distinction should perhaps be made between cases of:-

1) complete unawareness (intellectual and physical)
2) impaired awareness (conscious but unaware of the loss of enjoyment or shortening of life caused by the effects of the injury)
3) lucidity.

Monsieur le juge Kaufman in R. Fontaine et R. Boucher v. Dame Jeannette Paquette Lefebvre et B. Jobin[335] made a distinction between cases of permanent brain damage where the victim,

> "ne réalise pas la condition pathétique dans laquelle il est plongé",[336]

but where there is some degree of consciousness[337], and cases of total physical handicap, but where the individual is lucid. In the latter class it was recognised that money can buy a "great deal of comfort"[338]. The actual amount of award in these cases will be mentioned in Part Two, but it should be noted that the English Pearson Commission recommended that there should be no recovery for permanent unconsciousness[339], although the report did not expressly deal with the problem of the unaware but conscious plaintiff.

The New Zealand system under s.120(7) of the Accident Compensation Act states that there must be awareness or knowledge of the injury before an award will be made. The degree of awareness in terms of awareness of the effects of injury is not stated, so it could be that it may be only the fully lucid victim who may claim. In many respects the problem is really one of philosophy rather than law[340], but a clearer identification of the mental state of the victim may help in explaining the ratipnale behind the award of compensation to a mentally impaired plaintiff.

(6) Loss of Expectation of Life.

In English and Canadian common law loss of expectation of life forms a separate element of the compensation for non-pecuniary loss. The plaintiff is entitled to damages for the objective fact of the shortening of his expectation of life due to injury, as enunciated in Flint v. Lovell[341]. The principle was modified in Benham v. Gambling[342] to incorporate a notion of subjectivity by introducing a conventional award of £200[343] for this head, which could be varied in exceptional circumstances. The House of Lords referred to the concepts of "happiness" and the "prospect of a predominantly happy life"[344] which should have more relevance than merely compensating the loss of years, but somewhat confusingly introduced a rule imposing a conventional amount for this head. There appears to be overlap with the loss

of enjoyment of life head of damage, since if the court viewed the prospective life before the accident as indicating unhappiness, a reduced award would be made[345]. In the civil law of Quebec a person may be indemnified for loss of expectation of life[346], although this element does not receive separate treatment as in the common law. It has been commented[347] that this element arises more commonly in cases where the victim has died, and the victim's representatives are claiming under Art. 1053 or Art. 1056 C.C. on behalf of the victim's estate. Baudouin submits that a separate assessment should be made in these instances since this loss is certain and is worthy of compensation within the global award. Since the majority of claims for loss of expectation of life have been made in survival actions which have held that only a conventional sum is available, the logical result is that the same approach should exist towards living plaintiffs. In Oliver v. Ashman[348] it was held that

> "no distinction between damages for loss of expectation of life awarded to a living plaintiff and those awarded to the executors of a dead man",[349]

should be made. This allows more scope for the elements of pain and suffering and loss of enjoyment of life to enter the scene when the plaintiff is conscious of his loss of expectation of life. If he is not aware of this loss the objectively assessed amount will remain, but there will be no increase in the other heads due to his lack of awareness. The confusion that surrounds this element was criticised by the Pearson Commission in England and the abolition of this head was recommended. It was stressed that the award is purely symbolic and it does not fulfil the true aims of compensation to award a sum for lost years.

> "In our view, damages for loss of expectation of life have an air of un-

> reality. It is not possible to assess how happy the victim might have been if he had lived out his days. Still less is it possible to evaluate such a loss. These difficulties have led the courts to fix damages for loss of expectation of life at a level which means they are usually of no practical significance".[350]

The Administration of Justice Bill, currently progressing through the British parliament, reflects the Pearson Committee's recommendations. The first clause provides for an abolition of claims for damages for loss of expectation of life, but states that in assessing damages for pain and suffering the court shall take account of suffering caused to the plaintiff by awareness that his expectation of life has been reduced.

There is no express reference to compensation for loss of expectation of life under the New Zealand system and it would probably come within the ambit of s.120(1)(a) which refers to the loss suffered by the person of "capacity for enjoying life", or under s.120(1)(b) within the scope of "pain and mental suffering"[351].

(7) Consortium and Servitum.

In the interests of completeness the action "per quod consortium et servitum" should be mentioned since it is well-established in both civil law and common law. It originated in medieval times when the wife, child and servant were considered to be the property of the husband, father or master. If tortious conduct was suffered by the wife, child or servant the man, husband or master could make a claim for loss of consortium or servitum. The action today is based on the loss of a wife's companionship and society and the wrongful interference in the relationship. The action, acknowledged in the

civil law of Quebec in Lister v. McAnulty[352], allows a claim by the husband, and sometimes the spouse, for the

> "privation temporaire ou permanente des services, de l'affection, de l'amour et des relations sexuelles, à la suite de l'incapacité physique ou mentale subie par le conjoint".[353]

Awards for loss of consortium are still made by the courts although they are regarded as somewhat of "an anachronism"[354] these days and only a modest sum may be awarded. It should be noted that this head of damage will be abolished in the United Kingdom when the Administration of Justice Bill becomes law in the near future[355]. This would bring the English system in line with the New Zealand scheme which abolished this claim under s.5(2) of the Accident Compensation Act.

(8) Partial, Total Permanent Incapacity - "Incapacité partiel, totale permanente".

This element, as a separate head of damage in the context of non-pecuniary loss, exists in the civil law of Quebec and is also relevant in the approach taken by the Accident Compensation Commission in New Zealand. The "incapacité partiel permanente" (I.P.P.) percentage is not used by the non-statutory common law systems of compensation for the assessment of non-pecuniary loss, but in Quebec there is some confusion concerning the courts' usage of I.P.P. as a separate head of damage. I.P.P. is regularly referred to in the pecuniary loss assessment in terms of loss of capacity to earn an income due to the injury. However, in cases where there is no discernible pecuniary loss, a separate award is sometimes made for I.P.P. perhaps on the basis of compensation for interference with physical integrity, and in some cases I.P.P. is treated as an integral element in the non-pecuniary loss award. The actual

meaning of the term I.P.P. requires clarification since it may merely define the degree of physical or mental impairment that the victim suffers or it may refer to wider issues such as the effects of the physical incapacity on the personal activities of the victim, which relates to the loss of enjoyment of life head of damages. It is submitted that the confusion may be rectified by limiting the I.P.P. percentage to a uniquely medical evaluation of the victim's physical and mental condition which is only used in the area of compensation for non-pecuniary loss.

The New Zealand System has a somewhat similar approach whereby an award for non-economic loss is made for the fact of physical impairment according to a fixed statutory scale[356], (see Appendix A). At common law, although there may be no reference to an I.P.P. percentage, there may be an inherent acceptance of the right to compensation for the fact of physical injury[357] within the context of compensation for non-pecuniary loss.

Conclusion

Part One has presented the legal framework surrounding a claim for compensation for non-pecuniary loss in a common law and a civil law setting on a statutory or non-statutory basis. The basic elements of the non-pecuniary aspects of loss arising from personal injury are extremely wide-ranging. With the constant increase in medical, societal and general understanding of the implications of personal injury, whether from the point of view of pain and suffering or loss of ability to live life in the "normal" manner, it seems that these basic elements will continue to unfold and develop. These elements must however be viewed within the sometimes limiting scope of the legal principles underlying a claim for compensation for non-pecuniary loss. The law has certainly evolved in a most welcome fashion in the provision of compensation for, in many cases, nervous shock and mental distress. However there are limiting rules of policy and practice which, rightly or wrongly, have narrowed the scope of the discussion of non-pecuniary loss factors. The restriction is clearly illustrated in the statutory context in the Workmen's Compensation laws and Road Accident legislation, but as will be noted in Part Three, the fundamental purpose behind such legislation must not be ignored and, if the thrust of a personal injury compensation scheme is rehabilitative rather than compensatory, the traditional elements of non-pecuniary loss may have less significance. Other examples of limiting policy rules are evidenced by limitations on amount of the award or adherence to ill-defined concepts of "reasonableness" or "fairness".

In the ensuing analysis in Part Two of the practical application of the principles and the different methods of assessment of compensation for non-pecuniary loss, further insight will be gained into the particular methods of recovery in the different compensation systems.

PART TWO

The Application of Principles and the Different Systems of Assessment in the Recovery of Compensation for Non-Pecuniary Loss.

Introduction

The principles of law laid down by the courts and legislation are not the only determinants of how much compensation will be awarded and it is the intention of Part Two to examine in more detail the practical framework of the application of principles and the differing systems of assessment which exist for the compensation of non-pecuniary loss. It is hoped that such an analysis will display the various trends in each of the jurisdictions covered and that a detailed comparison of the treatment of compensation for non-pecuniary loss will be possible.

Section I will examine the major theories underlying the assessment of compensation for non-pecuniary loss. It should be noted that in some cases one cannot state definitively that a certain theory has been adopted and that the quantification process has followed the theory through to its ultimate result. The methods of quantification may be biased in a particular way, for instance, one jurisdiction may take a more subjective stance on some issues or may be subject to an increased awareness of social or economic factors. Section I will establish the rudiments of the theories of assessment which may form the basis from which courts take the next step in their calculation of awards. However it is important to note that many other factors and variations may interact before the final award is determined. Discussion will center on the judicial approach since the statutory schemes present a more clearly defined course towards calculating the assessment and they are considered in Section III. Section I also contemplates the concepts of "injury", "loss" and "compensation" which provides further insight and aids in com-

prehending the assessment process.

Section II deals generally with economic factors relevant in the assessment of the amount of compensation. First, the form of payment receives consideration involving an analysis of the advantages and disadvantages of the lump sum or periodic payment systems and the more recent adoption of structured settlements. Secondly, a range of economic factors are examined, notably the issue of inflation and other economic questions. The discussion in the second part of Section II is also relevant for the assessment of compensation for pecuniary loss but it was considered pertinent to include such an analysis because a more comprehensive picture of the structure of an award is achieved.

Section III is of major importance and is divided into a detailed consideration of the systems of assessment of, first, the legislative systems and, secondly, the non-legislative systems of assessment of compensation for non-pecuniary loss. The practical application of the principles and methods of assessment are examined and a comparison of the assessment mechanisms in each of the jurisdictions is made. The approach of non-legislative systems will be illustrated with the aid of tables to indicate clearly examples of the scale of awards.

I. The Underlying Theories in the Assessment of Compensation for Non-Pecuniary Loss.

A. The Major Theories of Assessment

Introduction

Strict observance of the traditional doctrine of "restitutio in integrum", whereby the plaintiff is placed in the position he would have been in before the injury occurred, is not feasible when dealing with compensation for non-pecuniary loss. As one enters the morass of differing theories of assessment the words of Lord Denning come to mind, "Ye fearful saints, fresh courage take"[358]. It certainly requires a degree of boldness to undertake an explanation of the theories that abound in damages for personal injuries where pragmatism, instinct and sheer arbitrariness are in evidence in the solving of the metaphysical questions which require a translation of the value of physical impairment into hard cash terms. It is the intention of this section to set out the major theories of assessment that exist in the compensation of non-pecuniary loss, whilst not losing sight of the limited scope within which these theories can operate because "true" or "full" compensation is not possible. One cannot restore a lost limb or sight, and mental or emotional anxiety cannot be quelled completely with the award of monetary compensation, and it is these perplexing problems that the various theories of assessment attempt to deal with. The treatment of the main elements of non-pecuniary loss, pain and suffering, loss of expectation of life, and loss of amenities will be analysed in terms of the different theoretical approaches that may be adopted. The practical application of the theories in terms of methods of quantification is discussed in the third section of Part Two, but a brief mention will be made at this stage of these methods to provide a more

comprehensive understanding of the various theories. It will be seen in Section III that although a certain theory may be expressly adopted it may be "contaminated" by other methods of assessment that a court may use, for instance, by the observance of a fixed limit of damages for non-pecuniary loss. Thus although one may be able to identify certain theories of assessment on a purely theoretical analysis, in practice one has to be aware, of other issues that may be superimposed on a single theory during the quantification process. Section III will explain this phenomenon in more detail in the examination of the differing methods of assessment in the jurisdictions concerned.

(1) The Major Theories.

The three major theories or approaches to assessment, as postulated by Ogus[359], are

a) the conceptual approach;

b) the personal approach;

c) the functional approach.

(a) The Conceptual Approach.

This approach is totally objective and treats the plaintiff's life, faculties and capacity for enjoying life as "valuable" personal assets to which the plaintiff has a "proprietary right". The use, enjoyment or happiness derived from the asset are irrelevant considerations and, in effect, a tariff system operates, whereby the most serious injuries attract the highest awards and

> "each asset bears an objective value which is fully recoverable in the case of loss".[360]

The exact philosophical premise of the conceptual approach is difficult to define. As Ogus comments,

> "the integrity of the body becomes something sacrosanct".[361]

and the pleasures of the body are of minor importance, indicating that a distinction is made between injuries to the body and mind. As will be shown in Section II it is important to make a theoretical distinction between the actual injury sustained and the losses accruing as a result of the injury. If the courts apply the "greater the injury, the greater the damage" approach the victim is effectively being assessed on the original injury and not the ensuing losses. The tariff system of the conceptual approach is, it is argued, not "wholly efficacious" nor "internally consistent"[362], since categories of injury are often ill-defined and very general and there may be dispute as to the seriousness of the injury.

The practical mechanics of the conceptual theory have precedents in the Workmen's Compensation schemes that operate in Canada or the National Insurance scheme that exists in England and the New Zealand scheme. These systems are geared to an assessment of pecuniary loss and contain a detailed list of injuries, with each item presented as a percentage of total disability. A variable operates to distinguish between temporary and permanent injuries and the compensation payable for total disability is geared to the cost of living index. To avoid a purely "conventional award" which is based solely on awards in comparable cases and to allow for flexibility in the conceptual approach Ogus submits that a variation of the original tariff could be made on the basis of the personal or functional theories in the manner described below in b) and c). The major elements of a non-pecuniary loss claim would all be compensated under the conceptual theory.

Pain and suffering would be compensated because the plaintiff has been deprived of one of his personal assets, freedom from pain. The loss of amenities head would relate to the actual injury for which a fixed sum of compensation would be awarded and, since a person has a right to his natural lifespan, damages under the conceptual theory would be awarded for the number of years lost.

(b) The Personal Approach.

This theory approaches the award of compensatory damages in terms of "human happiness", rejecting the notion that different parts of the body and human life can be "valued" independantly of a person's feeling. It is a purely subjective assessment in monetary terms of the past, present and future loss of pleasure and happiness as a result of being deprived of the use of injured limbs. It is not necessarily assumed that a serious injury will result in a greater degree of unhappiness, for example, the conscious plaintiff who, due to mental impairment, is unaware of the loss.

In the context of pain and suffering the personal theory will deal with this element of non-pecuniary loss on the basis that the injury gives rise to a loss of happiness of which the plaintiff is aware. Awareness is a crucial factor in the personal theory and the element of loss of expectation of life would be, according to Ogus,

> "nothing more than an addition to the award for pain and suffering".[363]

The link with the pain and suffering element is also apparent in the personal approach theory to loss of amenities because one is concerned with the loss of happiness arising from the injury and both elements, in the view of Ogus, depend "at root" on loss of pleasure.

The main objection to the personal approach is that its totally subjective nature makes the test of loss of happiness highly elusive at the theoretical level although in practice conventional awards may be made on the basis of comparable cases since there is no effective loss of happiness/cash translation device. Ogus suggests that the court may be able to start with an average tariff representing the unhappiness that is likely to be inflicted on the reasonable man, for the category of injury suffered by the plaintiff. This figure would be varied according to the situation of the individual plaintiff[364].

(c) The Functional Approach.[365]

The third theory of assessment outlined by Ogus adopts the premise of the personal approach but a different standard of compensation is prescribed. The damages award to compensate non-pecuniary loss is only justified if it can be effective in providing some consolation or solace for the victim's misfortunes. No "value" is attributed to loss of happiness and, as in the personal approach, the award is based on the individual subjective circumstances and the gravity of the injury does not per se justify a higher award. McLachlin[366] observes that the "thorny" question of what is being compensated can be avoided by placing emphasis on how money can be used to compensate the victim for non-pecuniary loss, rather than on what has been lost. In this way the functional approach may achieve the next best alternative to the fundamental notion of "restitutio in integrum" by supplying the plaintiff with the means to obtain some alternative pleasure. Ogus stresses that

> "true compensation is obtained not by the mere possession of money, but in the uses to which it may be put to improve the plaintiff's lot".[367]

If future solace is the aim of the functional theory a distinction may have to be made between past and future pain and suffering as an element of non-pecuniary loss. Past suffering would not be compensable because the prior suffering would not come within the ambit of the functional theory which concentrates on the enhancement of the plaintiff's future situation. In the context of loss of expectation of life the functional theory follows the approach of the personal theory, but the plaintiff must prove in addition that a sum of money would provide him with solace from disappointment and sadness at the knowledge of a reduced life expectancy. Similarly, under the loss of amenities head of non-pecuniary loss, a plaintiff will receive an award of damages that will provide "reasonable solace" for the loss of pleasure caused by the injury. Different items of proof would be relevent to provide guidance in the assessment of each of the distinctive theories[368]. In the case of the functional approach it would appear that evidence would be needed on the cost of "the something" which will be used to provide solace for the victim. A conventional sum under the conceptual approach may of course provide solace in its barest sense, but by pursuing the purpose to which money will be used, the functional approach reflects a deeper understanding of the victim's needs in the compensation of his non-pecuniary losses.

B. An Analysis of the Concepts of Injury, Loss and Compensation.

Introduction.

This section involves an analysis of the concepts of "injury", "loss" and "compensation" in an attempt to provide additional insight into the approach taken by the assessment bodies, both legislative and non-legislative, in their assessment of compensation for non-pecuniary loss in personal injury claims. It was established in Part One that the traditional elements[369] of non-pecuniary loss in personal injury cases do not receive express consideration in all the statutory schemes of assessment, whereas in a tort action in common law or a delictual action in civil law such aspects of non-pecuniary loss are recognised as

established heads of a personal injury claim. However it should be noted that the concept of injury has wider scope in most non-statutory claims since it covers, for example, nervous shock, injury to feelings and mental distress which may all give rise to non-pecuniary losses although there may be no pure physical impact. It is clear that the interpretation of the terms "injury" and "loss" has profound effects on the actual assessment of the compensation award. Certain aspects of this interpretation process have been discussed in Part One in the considerations of limitations on the extent of recovery, but this section aims to provide a more comprehensive overview, from the wider perspective of the approach taken by different compensation schemes, to aid in the comprehension of both the theories of assessment and the methods and systems of assessment in the compensation of non-pecuniary loss. A number of observations will also be made on the concept of "compensation" in terms of the aims and purposes of the concept in the personal injury setting, with reference to the application of compensation principles to the notions of "injury" and "loss". Whether the award compensates the "injury", ie. the degree of physical, mental or psychological impairment, or the "loss", i.e. the actual consequences of the injury for the individual, or whether the compensation covers both, one is always dealing with a non-pecuniary or non-economic loss, unless the injury and its consequences are only interpreted with reference to pecuniary losses, such as the lack of capacity to earn a living, and this forms part of the award for pecuniary compensation.

(1) Injury and Loss

The working definition of the concept of personal injury has been noted in the methodology of this work. There seems to be a difference in approach between the common law and the majority of the statutory schemes in their treatment of the concept of injury. The common law takes a more expansive view of injury incorporating psychological and emotional harm within the definition, in addition to the consideration of physical

damage. The statutory systems make use of statutorily drafted categories of physical and sometimes mental injuries into which a victim's injury will be fitted to find an overall percentage of disability. It is conceded that these percentages of disability are generally then used to determine a victim's pecuniary loss, but it is interesting to compare the approach taken towards the concept of injury. However, under the statutory system in New Zealand, there is express provision in s.119 A.C.A. for an award for "non-economic" loss which is based on a purely objective assessment according to the percentage of impairment. Under s.119 a maximum of $7,000 may be awarded for 100% disability and if, for example, a person loses a leg this is deemed to be 75% impairment, attracting an award of $5,250 (75% of the maximum $7,000)[370]. Medical evidence will be brought to prove the gravity of the injury but despite such evidence in common law non-statutory systems the courts will rarely take a "percentage approach" in considering injury, whether in the context of a pecuniary or non-pecuniary assessment. In comparison, the courts in the civil law of Quebec do make use of a determination of the percentage of disability (I.P.P.) in their awards for both pecuniary and non-pecuniary loss[371]. The Quebec Workmen's Compensation Act[372], is a typical example of a statutory system and the approach taken towards the concept of injury. Impairment is described as

> "the medically established sequelae to an injury that adversely affects the accident victim's physical and psychic integrity".[373]

The impairment percentages are listed in an Impairment Table. The final award does not reflect any direct consideration of the traditional non-pecuniary losses arising from injury and is based on the assessment of "permanent disability. This is the sum of the impairment percentages and the "unfitness to continue employment" percentage[374]. The Quebec Automobile Insurance Act categorises injuries as a percentage of disability but it recognises a wider interpretation of "bodily injury" in its definition of the concept as "physical, psychological or mental" injury and the rather vague phrase of "any damage caused to a victim in an accident"[375].

The injury or impairment is of course a loss in itself thus it is difficult to make a clean-cut distinction between the two concepts. On a purely objective level a person who loses a finger, a leg, or sense of smell or sight has suffered a physical loss in terms of the physical injury. Loss however may be more widely construed by assessing the actual consequences of the injury for the individual on a more personal, subjective level, and it is this aspect, it is submitted, which is the essence of a claim for compensation for non-pecuniary loss. One must assess the relationship between the injury and loss to determine which aspects require consideration for the purposes of compensation. Obviously the evaluation depends on the theory of assessment adopted by the assessment body, since under an objective statutory scheme such as Workmen's Compensation, or the conceptual approach to assessment, a specific figure is awarded for a particular injury and losses in their wide sense are not compensated. One may be faced with a question of causality when, for example, two separate accidents cause injury to the victim and the loss from the first injury may be increased or perhaps reduced by the second accident. This particular problem was dealt with in the English House of Lords in Baker v. Willoughby[376] and, more recently in Jobling v. Associated Dairies Ltd.[377].

The plaintiff in Baker suffered fairly severe injury to his left leg and ankle causing pain and loss of amenities of life. Three years later he was shot in his injured leg in an attempted robbery at his work place and the leg had to be amputated with the result that he had an artificial limb instead of a stiff leg. The question before the court was how the loss should be assessed between the two defendants at the trial. It seems that one has to look to the nature and result of the second injury because it will do one of three things. The disabilities arising from the original injury may 1) be increased, 2) they may be reduced or 3) the second injury may merely become a concurrent cause of the disabilities sustained from the former accident.

The general rule is that a defendant is only liable in damages for the loss caused by his negligent act and so in the first instance the second defendant will be liable for the additional loss over and above that created by the original injury. In the second situation the first defendant will pay less compensation because the loss has been diminished and in the third case the first defendant's damages award will not be reduced since the second defendant will take the plaintiff as he finds him[378]. The first defendant in Baker v. Willoughby argued that the

> "consequences of the original accident have been submerged and obliterated by the greater consequences of the supervening event",[379]

but this argument was viewed as producing "manifest injustice" because the loss arising from the first injury ("the inability to lead a full life", the inability to enjoy amenities depending on freedom of movement and the "inability to earn as much as he used to earn"[380]) had not been eliminated due to the amputation, but on the contrary, it had increased, although an adjustment would have to be made in the award for pain suffered because there would be no pain in the leg and ankle after amputation. The court relied on the Canadian case of Long v. Thiessen and Laliberté[381], and also a workmen's compensation case of Harwood v. Wyken Colliery Co.[382]. The latter case is authority for the fact that there may be two concurrent causes and even if there is a supervening disease of unconnected origin which disables the plaintiff in the same manner as the original injury the damages against the defendant will not be reduced. It is when the supervening natural disease aggravates the loss that the original defendant will not be held liable for the loss as from the onset of the natural event[383]. This point was made in Jobling v. Associated Dairies Ltd. by the House of Lords on the grounds that the

"vicissitudes of life", such as supervening disease, should be allowed for and, as a result, an original defendant would not be liable for any increased loss caused by the disease. This question of causation appears to be intricately bound up with policy considerations. However if the increased loss arises from a disease which is connected with the previous accident, for instance, if a heart condition erupts after an accident at work and it is proved that the eruption of the condition is caused by the accident and not age, hypertension and so on, the original defendant will be liable for the entire loss.

The House of Lords in Jobling sharply criticised Lord Pearson's "concurrent causes" argument in Baker v. Willoughby and questioned the rationale for the decision. But, Lord Wilberforce stressed that there are no "general, logical or universally four rules" which can cover cases of supervening events caused by "tortious, partially tortious, non-culpable or wholly accidental events"[384]. In the light of this difficulty a more wide-ranging approach to compensation was suggested which takes account of all available means of compensation whether through insurance funds, or as in Baker v. Willoughby the possibility of Criminal Injuries Compensation. It is submitted that Jobling and Baker may be distinguished at the factual level, yet the cases raise similar questions of causation, policy and the desire of the courts to maintain justice at the expense of logical principle.

(2) Compensation.

The 14th report of the English Criminal Injury Compensation Board[385] notes that despite an increase in the annual number of crimes there has been a decrease in the number of applications for compensation for injury suffered by the victims of crime. The Board merely suggests that

there is a general lack of knowledge among the public about sources of compensation but it is submitted that there may be deeper reasons. Why is it that a victim does not claim his right to compensation for the loss that he has suffered following an injury? Is it because the individual is aware that economic recovery does not fully resolve the situation? Are compensation systems anti-therapeutic, for instance, due to delays in the legal system? Even if a case is not litigated does the individual feel inhibited in claiming a right to compensation because a claim necessitates time and effort in making an application, providing medical evidence and generally taking initiative to enforce a legally established right to compensation? Although there may be a clear-cut "prima facie" case for the plaintiff there are administrative, financial and psychological hurdles for the plaintiff to surmount before he has the compensation in his pocket. On the other hand in some circles, notably in the United States, one sees a surge of "litigation mania" particularly in the area of medical negligence. Publicity surrounding large damages awards arouses interest and a patient may identify with a television or newspaper report[386] detailing a victim's claim. The patient may also have high expectations of medical treatment, which if not met, result in issues of negligence being raised by the patient. But what does the individual gain from the compensation that may eventually be awarded and, in particular, how does the award of compensation for non-pecuniary loss fit into the picture? These are only a few of the questions that come to mind in exploring the meaning and purposes of compensation. Some of these issues will now be dealt with.

It is vehemently denied by the courts[387] that there is a punitive or retributive element in the award of compensation for personal injury. Dickson J. in Andrews[388] held that the size of award must not be swayed by the pitiful condition of a victim or by indignation at the behaviour

of the defendant. However, it is submitted that it is extremely difficult for the court to isolate itself and not to sympathize with a crippled victim, particularly if the injuries have long-term agonizing effects. It is pertinent to refer to Atiyah who comments that;

> "The fact is that even where we do not wish to punish, our decisions as to what misfortunes should be compensable and by how much, are apt to be profoundly influenced by the question whether the party likely to pay the compensation was in some sense to blame for the misfortune".[389]

The desire to see someone brought to justice is probably reduced when the victim knows that an insurance company or a governmental fund is making the payment[390], but on the other hand, the victim may feel no qualms or sense of greed if he holds out for a large award knowing that a more impersonal body is financing the award. There is a conflicting force that operates against the victim in the settlement process, which takes the form of "tactics" by an insurance company to induce the victim to settle the dispute at an early stage and for an amount that in reality is not sufficient. The gradual psychological wearing down of the injured plaintiff, who has the additional disadvantages of learning to adapt to a new life-style or coping with pain and inconvenience due to the disabilities, may serve to dim the desire to seek retribution. In addition there is the stigma of losing a negligence claim. A deterrent function may also be present in the compensation award although this may be diminished if the person at fault is not personally paying the damages but an insurance fund is doing so.

In the analysis of different compensation systems for personal injury it has been seen that non-pecuniary losses or "human losses" which reflect the "infringement of the right to remain a whole and unimpaired person"[391] re-

ceive more recognition in the régimes of civil responsibility in the common law (tort and contract) and in the civil law of Quebec (contractual and extra-contractual) than in the statutory systems, although the New Zealand scheme and the Criminal Injuries Compensation schemes are notable exceptions. Compensation for the non-economic consequences of personal injury are thus treated in different ways according to the situational context in which the injury occurred. Statutory systems offer compensation for the fact of the injury in recognition of the tangible result of an accident, but it is submitted that it is unfortunate that such schemes do not expend sufficient energy in tackling the fundamental issues that should be dealt with in an assessment of compensation for non-pecuniary loss. The basic elements of such an assessment have been elucidated in Part One, Section II and the ensuing discussions in Part Two will hopefully provide more insight into the issues involved.

II. Economic Factors Relevant in the Assessment of the Amount of Compensation.

A. The Form of Payment.

Introduction.

The goals of the parties to a settlement dispute, not only in personal injury actions but in any case involving the payment of money by one party to another, are, from the moment the settlement process commences, at loggerheads. As Atiyah observes;

> "A settlement is a business bargain in which the plaintiff sells his claim to a private buyer for what he can get, and the buyer buys for as little as he has to pay".[392]

The bargain is not wholly realistic however because it cannot be struck on the open market with any buyer since it is restricted by the "bilateral monopoly"[393] that inextricably ties the payor (the defendant) and the payee (the plaintiff) together. The injured victim requires payment of compensation at going-market rates in order to provide redress for losses already suffered and an assessment must be made of prospective losses, both pecuniary and non-pecuniary. The gauging of future loss is impossible to predict with any degree of accuracy despite the growing use of actuarial evidence and, even when a court or assessment body (which is more often than not an insurance company) arrives at a final award, there is no guarantee that the money will be used for its intended purpose. Cave[394] refers to an insurance survey which found that within five years of settlement nine out of ten persons have nothing left[395], and dissipation of the award is a major concern among assessment bodies. Despite obvious difficulties a pecuniary loss is more easily quantifiable than a non-pecu-

niary loss, which does not lend itself to evaluation on the "personal injury market". Economic factors such as inflation, discount rates, taxation, interest and deductions for contingencies are all issues that justifiably receive more weighty and detailed attention in an examination of compensation for pecuniary losses because when a person is rendered incapable of working for the rest of his life it is vital that all possible variables are included in the assessment, since the award will be deemed to provide the individual with, inter alia, the lost capacity to earn for the remainder of his life. If the calculation falls short it is the injured victim, his family and the community at large who will suffer. It should be noted that the award of a lump sum, instead of more flexible periodic payments or structured settlements, may be to blame for distressing cases in which an individual's award has been needlessly exhausted due to lack of appropriate guidance on economic aspects. It is these important questions which are addressed in the discussion of the form of payment and, although compensation for non-pecuniary loss is generally paid as a lump sum, the viability of other forms of payment and an explanation of the economic mechanics involved serves to illustrate available options and their suitability and real effect for application in the case of compensation for non-pecuniary loss.

The assessment of compensation for non-pecuniary loss is not geared to observance of intricate mathematical formulae. But it is submitted that economic principles should not be ignored simply because an element such as pain and suffering is incapable of definitive monetary assessment. In order to make a realistic award, adopting, for instance, the functional approach to compensation for non-pecuniary loss, it would be pertinent to bear in mind inflation and the fall in the value of money if the intended functional purpose of solace or substituted enjoyment is to be ful-

filled. The specific economic factors of a discount rate, contingency deductions, and taxation in addition to inflation will be examined in Section B because despite their apparent lack of direct relevance to an analysis of compensation for non-pecuniary loss, a knowledge of these concepts is of value when recommendations for reform are made in Part Three, which requires a basic understanding of economic variables that may be employed.

(1) Lump Sum v. Periodic Payment.

Despite growing academic and judicial furor in the criticism of the inadequacies of the lump sum award this is still the accepted mode of payment for damages in the majority of cases. Certain statutes such as the Workmen's Compensation Acts[396] provide for payment of indemnities by way of periodic payments but these statutes are structured to compensate pecuniary loss and not the traditional elements of non-pecuniary loss. The compensation of non-pecuniary loss is rooted in a lump sum award and it seems set to remain this way in the view of certain authors[397] and reform committees[398]. Feldhusen and McNair[399] submit that non-pecuniary losses should be paid in a lump sum because

> "their valuation is in no way dependent upon future contingencies, and it is consistent with the purpose of the award to restrain the victim's freedom to deal with it as little as possible".[400]

With respect, this statement appears too sweeping and it is suggested that a lump sum award should not be the automatic choice for the form of payment. Future events are crucial in the assessment of the degree of pain and suffering to be endured and the possibility of the development of, for example, arthritis or epilepsy, are clear examples of serious consequences that may arise from an injury at a

later date. The ensuing analysis of the arguments for and against the payment of damages in either a lump sum or periodic payment will illustrate the problems involved and will hopefully indicate the way in which compensation for non-pecuniary loss should be treated.

A lump sum is a once-and-for-all payment which is awarded, with no scope for revision, in "complete and final satisfaction"[401] of the victim's claim. This has been the traditional practice in the courts in both the common law[402] and the civil law of Quebec[403], the underlying rationale being that the court should not be concerned with how a victim's money is spent. Conflicting notions of paternalism on the one hand and freedom on the other are apparent and the utopian solution may be a harmonious balance between the two approaches, but whether this would succeed in practice is a perplexing question. The finality of the lump sum is seen to bring psychological advantages for both parties. The victim has a sum of money in hand, there is no more worry or susceptibility to compensation neurosis, and the defendant does not have to set up administrative schemes in order to pay the plaintiff. The capital sum offers the recipient a wide choice of alternatives, for instance, to channel the money into business investments, to buy property, or to purchase an annuity to make provision for future unforeseen contingencies. Dissipation is however a serious problem and it was one of the reasons given by the Woodhouse Report[404] in their recommendation that periodic payments should be made so that the community, who will ultimately support the individual if the money is exhausted, has a claim in the determination of the form of payment[405]. Despite their inexperience in handling large sums of money claimants seem to desire a lump sum settlement[406] and insurance companies favour such an approach to avoid the additional supervision that would be required to administer periodical payments. A management fee is sometimes included

in the damages award, as in Arnold v. Teno[407] where the Supreme Court awarded $35,000 in order to assist in the use of the award, which is a welcome step in dealing with the practical effects of, first, being injured and, secondly, receiving a vast amount of money at one fell swoop.

The delay in arriving at the final award, which may amount to a number of years, has been the subject of severe criticism but delay may be essential if a lump sum payment is made. As Linden stated, "hurried justice may be justice denied"[408], and it is important to wait as long as possible before the final settlement to determine a more definite medical prognosis of the victim's future condition. A "split trial"[409] should perhaps be made in cases of serious injury whereby the issue of liability is decided first and quantum of damages is dealt with when the injury has stabilized. The New Zealand A.C.A. makes specific provision for this delay in assessment in s.120(1) for a period of up to two years. The Administration of Justice Bill, soon to be enacted in England, recognises the need to provide for an award of provisional damages,

> "where there is a chance that at some future date the injured person will suffer some serious deterioration in his physical or mental condition".[410]

The provisional payment is made on the assumption that the contingency will not occur but a plaintiff may secure additional damages if it does. If more time is required to evaluate the extent of injuries the possibility of re-opening awards is raised and, in the case of non-pecuniary loss, this would be a useful means of keeping track of the more personal effects of the injury on the victim's life. Once an award is made it could be re-opened if the victim's condition deteriorated and since pain and suffering may be an

on-going disability recognition should be made of this fact. There are obvious difficulties with the problem of malingering by some individuals and it may only be possible to accomodate such a proposal in cases of more severe injury, thereby installing a threshold below which there would be no re-opening. A more flexible appeal system, to allow for additional evidence to be brought out of time, is another possibility. It should be noted that the New Zealand system allows for the re-opening of a case after the lump sum has been awarded if the victim develops epilepsy after a head injury, or in other situations as detailed by the Governor-General by Order-in-Council[411]. The system of periodical payments would however alleviate the duty to make prophecies about the future and the concern over dissipation of the damages would be reduced.

In theory the adoption of periodical payments instead of a lump sum would seem to far outweigh the advantages of finality and freedom offered by the lump sum. A periodic payment, which is revisable according to changes in circumstances, both personal and economic (i.e. inflationary trends), affords a more accurate evaluation of damages over a longer period of time and provides the victim with compensation for his needs, while avoiding over-compensation at the defendant's expense. The judiciary in England[412] and Canada[413] have favoured the introduction of a periodical payment system and the Pearson Report also advocated such a system although the report recommended that non-pecuniary loss should remain in the form of a lump sum[414]. The report examined the advantages of periodic payments, particularly for cases of serious injury, and observed that although there may be some chance of prolonging incapacity because the settlement process is never finished, the regular source of income relieves financial anxiety[415]. A lump sum will only produce sufficient income if it is prudently invested and this is a very big "if"[416] in the majority of cases. A

major disadvantage attributable to the periodic payment scheme is the administrative cost involved, although it may be less within the context of a no-fault system since the administrative machinery will have been established when such a system is initially set up[417].

It is clear that there are strong arguments both for and against a lump sum or a periodic payment system and the most equitable solution may be a hybrid of the two systems for both pecuniary and non-pecuniary loss assessment. To accomodate an increase in the extent of non-pecuniary loss in serious cases, such as the occurrence of epilepsy, it may be advisable to provide for provisional payments within a set time limit, after which the award would be finalized. It is submitted that it is of paramount concern to make an award of compensation for non-pecuniary loss that meets the personal needs of individual victims and a blanket use of the lump sum system may not adequately reflect these needs in cases of serious injury. A more recent approach, particularly in the United States, has been to adopt structured settlements, which are a more refined example of the periodic payment approach and are examined in the following section.

(2) Structured Settlements.

A structured settlement may be used in an out-of-court or a judicially approved court settlement and it offers a "unique and flexible negotiating instrument"[418] which more fully reflects the interests of the parties. The principle of the structured settlement is based on an annuity, purchased by the defendant or his insurer, which will provide for the series of periodic payments to be made to the victim during his life. The terms of the settlement will be tailored to the individual needs of the victim and are usually indexed to allow for inflation[419], and any contingencies

that might affect the victim's financial needs. It is submitted that a contingency to be considered is the possibility of complications in the victim's condition, which may require more extensive medical treatment involving additional pain and suffering and the periodic payment could be increased on this basis. It should be noted that once the structure of the settlement is agreed upon it cannot be altered once it comes into existence and the negotiators must carefully consider the future situation of the victim. At present structured settlements predominantly consider the financial requirements of the victim and non-pecuniary loss may still be compensated in the form of a lump sum described as "front-money"[420], but it is suggested that as such settlements become more elaborate a more detailed perusal of the psychological and personal state of the victim, on a long-term basis, should be encouraged. The following example, provided by McKellar[421], illustrates the structure of a typical settlement and additional suggestions to encompass more specific non-pecuniary loss elements have been outlined[422].

Debbie is an eleven-year old girl who was rendered paraplegic after a motor vehicle accident. The structured settlement provides:

1) $300 a month to Debbie's parents until she is 18;
2) $5,000 annual payment to Accountant of the Supreme Court, to cover extraordinary expenses before Debbie reaches 18, when they are paid over, plus interest;
3) $3,859.76 per month ($46,317.12 per annum) for a minimum of 25 years on reaching 18;
4) Monthly income is indexed at 4%, compounded, so that after 10 years annual payments will be $64,399.80 and after 15 years $77,522.20;

5) $150,000 general damage payment at 25 as a lump sum.

The total of this settlement is worth a considerable amount of money to the victim and the general damage payment 5), may be treated as compensation for non-pecuniary loss elements and the annual payments for extraordinary expenses while under 18 could also be used to compensate, for example, increased disability and the need to finance alternative pleasures. McKellar notes that the cost of such a settlement would be less than $450,000 to the defendant insurer and it would seem that a prudently drawn up settlement with a clearly demarcated structure would, in the majority of cases, be well suited to the amicable settlement of personal injury disputes. A relatively simple computer programme could be utilized, once all salient facts are gathered together, to provide an accurate breakdown of the payments to be made, so that the negotiators may form a precise picture depicting the scope of the settlement in question.

B. Economic Factors to be Considered.

(1) Inflation.

It has been established that compensation for non-pecuniary loss is, as a rule, paid in the form of a lump sum. A critical question which is posed in the calculation of the lump sum is the extent to which the assessment body takes into account the effects of inflation. Statutory systems of compensation such as the Road Accident schemes[423] and Workmen's Compensation schemes[424] impose an obligation to revalorize the indemnity according to annual trends in inflation, but the economic phenomenon of inflation presents a troublesome issue for non-legislative systems in the assessment of both pecuniary and non-pecuniary loss and in the approach to be adopted towards the general increase in the

cost of living and the subsequent effects on the value of a lump sum payment. A periodical payment system which may be reviewed at regular intervals is more suited to cope with inflationary trends and the payment may be increased to maintain its initial value in the light of up-to-date inflation rates. The examination of the treatment of inflation by the courts in their calculation of the lump sum for non-pecuniary loss has been divided into, first, the effect of past inflation and, secondly, the effect of future inflation. The latter division involves more detailed economic analysis, which is only used at present in the calculation of awards for pecuniary loss. Lump sum awards for non-pecuniary loss are not intended to serve as a source of income replacement or to meet the costs of the victim's future medical care, which are issues that undoubtedly require as high a degree of accuracy as possible. If the lump sum award for non-pecuniary loss is destined to provide the victim with a source of extra comfort or solace over a long period of time it may be necessary to consider in more detail economic and actuarial evidence so that the lump sum is sufficient to afford the victim a certain amount per annum for the additional luxuries that may make an injury more tolerable. This submission may be somewhat controversial in a system in which compensation for non-pecuniary loss has traditionally been a lump sum award, increased on a discretionary basis by judges without the aid of economic evidence and governed by the intuition of the individual judge. It is suggested in Part Three, in the recommendations for reform of the present systems of assessment of non-pecuniary loss, that to create more consistency among cases, at least at the level of economic factors considered, there should be more awareness of the economic realities behind a lump sum award and the mechanics involved will be briefly analysed.

The rationale for the award of compensation for non-pecuniary loss also comes into question at this point. If

the compensation system intends the lump sum to do nothing more than provide recognition of the facts of injury, pain and suffering, loss of amenities and inconveniences, no consideration of future economic factors such as inflation is necessary since the award of the lump sum per se has fulfilled its purpose. If the award is intended to do more and be a more long-lasting source of additional finance for the solace of the individual and for his individual happiness, it may be that a more realistic approach in terms of appropriate economic variables should be pursued.

(a) Past Inflation.

Once a court is furnished with basic economic evidence of past inflationary trends it would not be a difficult task to assess the revalorised amount to be awarded in the form of a lump sum for non-pecuniary loss. If the conceptual tariff approach to compensation is adopted, which provides a specific figure for a particular injury, the amount would be increased to take account of the diminution of the value of money. If the personal or functional approaches to compensation for non-pecuniary loss are adopted there is no pre-determined scale that has to be revised according to inflationary patterns and the court will assess the award according to the existing economic climate at the time of the action. If the award for non-pecuniary loss is subject to a maximum limit, as it arguably is in Canada, it would seem "reasonable and necessary"[425] to adjust the maximum in accordance with the value of money. The Supreme Court of Canada in Andrews did not explicitly mention the issue of inflation but stated that the maximum of $100,000 should be viewed flexibly in the light of changing economic conditions[426]. This has been taken to refer to inflationary points and the later case of Lindal v. Lindal clarified this matter with a strong endorsement by the Supreme Court of Canada that inflation "should" be considered, on proof of, or agreement as to, the inflationary pattern. However despite this ex-

press committment the court does not possess the practical ability to put it into effect because Dickson J. merely states that the court "may" take judicial notice of the fact that an inflationary trend exists but,

> "the precise monthly or yearly inflation rate is [not] normally a fact of which such notice may be taken".[427]

It would seem that precise evidence should be introduced before the court can, with any accuracy, estimate by how much the value of $100,000 has been eroded since 1978. Inflation was not considered to be relevant in Lindal because the case was decided only four months after Andrews and there was held to be "no measurable increase" in inflation during this period. It is respectfully submitted that, although the court adopts this attitude, if inflation is moving at 12% per annum an erosion of approximately $4,000 would be made. Clearer guidelines are required if the awards for non-pecuniary loss are to be treated consistently in all cases, since at present inflation will only be considered in detail if the judge is inspired to hear economic evidence of the economic realities that the ravages of inflation may inflict on the value of the dollar.

In Quebec the courts have in a number of cases increased, on the basis of inflation, the $100,000 limit set by Andrews. In Corriveau v. Pelletier[428] the Quebec Court of Appeal recognised that;

> "Le plafond indiqué est quelque peu flottant et déjà les coéfficients d'inflation ont pu le faire bouger".[429]

This case was decided in 1981, and the case of Hite v. Jim Russel International Racing Drivers School Ltd.[430], decided in the same year, concluded that the $100,000 limit would

be worth $135,000. These important issues will be more fully discussed in Section III. This section will also show that the English courts have adopted a tariff like approach to compensation for non-pecuniary loss and it should be noted there is adjustment in the amount of awards on the basis of past inflation. However the obligation for the court to assess economic evidence is not stressed at all and the Canadian courts indicate a much more precise attitude to the issue of inflation in the context of compensation for non-pecuniary loss. The House of Lords in Lim Poh Choo v. Camden and Islington Area Health Authority[431] held that non-pecuniary loss awards are dependent "only in the most general way"[432] on the movement in money values and if the

> "sum awarded is a substantial sum in the context of current money values, the requirement of the law is met".[433]

Kemp and Kemp[434] argue that the courts should keep abreast with inflation but until the case of Walker v. John McLean and Sons Ltd.[435] the awards in England had increased only by "fits and starts"[436]. This case pointed out that more recent awards had not kept pace with inflation and awards for loss of amenities were worth "significantly less" than in earlier years. A table reproduced by Kemp and Kemp (See Appendix B) which shows the value of the pound at various dates was referred to by the Court of Appeal in Walker.

It may be concluded that courts have treated the fact of inflation "gingerly"[437] in the past and it has even been said that they

> "keep the damages down on the ludicrous hypothesis that there is no such thing as inflation".[439]

It is submitted that there is no rational justification for

victims of non-pecuniary loss in personal injury suits to undergo diminution in the value of their awards because of the reduction in the value of money. If the courts merely adopt the amounts used in previous awards in which the value of the pound was higher for the non-pecuniary calculation, yet evaluate pecuniary loss from the value of money at the date of trial and in the light of future inflationary trends, the courts are basing their assessments on inconsistent grounds and an injustice is suffered by the victim. Public policy and the need to avoid extravagant awards for non-pecuniary loss have been cited for the more conservative approach, but it is suggested[439] that these matters should be covered by legislation and not by reliance on arbitrary judicial intuition.

(b) Future Inflation.

If the lump sum awarded for the compensation of non-pecuniary loss is destined to provide a source of solace in the form of additional financial means for the rest of the victim's life expectancy, the calculation of the lump sum may require consideration of more detailed economic and actuarial evidence on the actual effect of inflation on the future worth of a lump sum. The court may decide, on the basis of the functional approach to compensation for non-pecuniary loss, that the victim is entitled to certain substituted pleasures such as stereo or video equipment, computers, holidays abroad and so on and the court must then make sufficient funds available to provide for these pleasures on an on-going basis. The court could decide on a yearly, monthly or daily rate for the payment of compensation for non-pecuniary loss[440], and if so, the final lump sum may need to be assessed in terms of investment rates and inflationary trends that will affect the sum and which may reduce its value extensively, if no provision is made to accomodate these factors in the calculation. The possibility of

this situation arising in the context of compensation for non-pecuniary loss will be discussed in Part Three, and the present analysis of the treatment of future inflation is intended to present a more comprehensive analysis of approaches that may be adopted in the assessment of a lump sum from the economic point of view. It is conceded that arguments against the use of detailed economic evidence in the case of compensation for non-pecuniary loss are valid to a certain extent because money cannot hope to compensate for loss of physical function[441], but this inability should not preclude the assessment of the future worth of the award in pure economic terms.

The need to consider future inflation has not always been recognised by the courts in England and Canada and it has been intentionally ignored in the calculation of the award for some time. The non-observance of future inflation was based on various theories, for example, if the lump sum was prudently invested the effects of future inflation would be offset. In Lord Diplock's words in Cookson v. Knowles[442];

> "Inflation is taken care of in a rough and ready way by the high rates of interest obtainable as one of the consequences of it and no other practical basis of calculation has been suggested that is capable of dealing with so consequential a factor with greater precision".[443]

A Canadian case adopting the same approach is Bisson v. District of Powell River[444]. This view does "consider" inflation, if only to disregard it, but it is at least more realistic than the view which holds that no allowance for inflation is warranted[445], on the grounds that to increase an award on the basis of inflation would result in

the over-compensation of the victim. The courts are aware of the need to be "fair" between the parties but it is now recognised that future inflation should be considered in the assessment of the lump sum. The Canadian Supreme Court in Andrews, Teno and Thornton gave full support to this practice, admonishing any system that did not follow this approach. As Dickson J. stated;

> "One thing is abundantly clear: present interest rates should not be used with no allowance for future inflation. To do so would be patently unfair to the plaintiff".[446]

In his desire to compensate accident victims with "justice and humanity"[447] Dickson J. strongly advocated the inclusion of inflation in the calculation of the award rather than a mere acceptance of the relevance of the principle of inflation at a theoretical level. In order to fulfil this aim the court had to assess the factors that should be incorporated into the "capitalization rate" or "discount rate". A lump sum which is accurately discounted will result in a self-extinguishing sum which is exhausted at the end of the victim's life expectancy and which will provide sufficient financial means to cover a victim's needs. The appropriate discount rate is a critical factor in determining whether adequate funds are provided for the victim, which is sadly not the position in many cases[448]. If the type of discount rate enunciated by the Supreme Court of Canada is adopted the court must assess, on the basis of actuarial evidence in each case, the level of long-term inflation rates and the present rates of return on long-term investments. The court assumes that the former rate is incorporated into the latter because the present expectation of future inflation is reflected in the long-term investment rate. The difference between the two rates is the appropriate discount rate to apply, which in the particular case of Andrews was

deemed to be 7%. There has been vigorous debate[449] on the validity of the 7% rate which has been held to be too high, but for present purposes it is instructive merely to note the drastic effects that a variable discount rate may procure. Patterson[450] observes that the award in Teno of $540,000 using a 7% discount rate would have been $1,351,492 if a 1% discount rate had been adopted. The difference is somewhat startling.

Dexter, Murray and Pollay[451] explain the mechanics of the discount rate as follows;

> "In short the court calculates how large a lump sum is needed today to provide a yearly income of dollars made up of both capital and interest that will last the lifetime of the plaintiff".[452]

Table A and Table B will hopefully serve to show the rudimentary operation of the mathematics behind the workings of the discount rate. The aforementioned authors refer to the discount rate as the "real rate of interest" being the difference between the nominal rate of interest offered by borrowers of capital and the rate of inflation. A speculative element is of course a necessary phenomenon in the forecast of future inflationary trends[453] and some economic circles argue that the "real" rate of interest can be estimated by a historical overview which points to a relatively stable figure. It is observed that

> "a view of over 40 years history of the real interest rate shows that it is most typically between zero and 3% and becomes negative during periods of rapid inflation".[454]

This type of theory has been adopted by the English courts

Table A: To Show the Effect of Not Using a Correctly Adjusted Capital Sum.

INDEMNITY: $1000 a year adjusted for inflation

INVESTMENT RATE: 17%

INFLATION RATE : 10%

DISCOUNT RATE : 7%

LIFE EXPECTANCY: 10 years

CAPITAL: $10000

Year	Paid	Balance 1	Balance 2
0-1	1000	9000	10530
1-2	1100	9430	11033
2-3	1210	9823.10	11493.02
3-4	1331	10162.02	11889.57
4-5	1464.10	10425.47	12197.80
5-6	1610.51	10587.29	12387.13
6-7	1771.56	10615.57	12420.21
7-8	1948.71	10471.50	10649.51
8-9	2143.58	8505.92	9951.92
10	2357.94	7593.97	8884.95

Note: At the end of the 10 year life expectancy there is still $8,884.95 left because the capital figure of $10,000 was not correctly adjusted.

Balance 1 is the balance left in the account after each yearly indemnity (inflation linked at 10% per annum) has been paid. Balance 2 is the balance in the account after the amount in Balance 1 has been invested for one year at 17% investment rate.

Table B: To Show the Effect of Using a Discount Rate Which Takes Into Account Both the Investment Rate and the Inflation Rate

INDEMNITY: $1000 a year adjusted for inflation	INDEMNITY: $1000 a year adjusted for inflation
INVESTMENT RATE: 17%	INVESTMENT RATE: 13%
INFLATION RATE : 10%	INFLATION RATE : 10%
DISCOUNT RATE : 7%	DISCOUNT RATE : 3%
LIFE EXPECTANCY: 10 years	LIFE EXPECTANCY: 10 years

	CAPITAL: $7695.32				CAPITAL: $8886.06		
Year	Paid	Balance 1	Balance 2	Year	Paid	Balance 1	Balance 2
0-1	1000	6695.32	7833.52	0-1	1000	7886.06	8911.24
1-2	1100	6733.52	7878.22	1-2	1100	7811.24	8826.71
2-3	1210	6668.22	7801.82	2-3	1210	7616.71	8606.88
3-4	1331	6470.82	7570.86	3-4	1331	7275.88	8221.74
4-5	1464.10	6106.76	7144.91	4-5	1464.10	6757.64	7636.14
5-6	1610.51	5534.40	6475.24	5-6	1610.51	6025.63	6808.96
6-7	1771.56	4703.68	5503.31	6-7	1771.56	5037.40	5692.26
7-8	1948.71	3554.60	4158.88	7-8	1948.71	3743.55	4230.21
8-9	2143.58	2015.30	2357.91	8-9	2143.58	2086.63	2357.90
10	2357.94	(.02)		10	2357.94	(.03)	

Note: At the end of the 10 year life expectancy the correctly adjusted capital sum has been extinguished.

in the "multiplier" method used to calculate the lump sums.

The English courts have consistently refused to regard future inflation in the assessment of awards for various reasons which even cover their desire not to seek "perfection" because it is "beyond the inherent limitations of the systems"[455]. Lord Diplock, in the celebrated "Diplock approach"[456], used a multiplier which reflected rates of a more stable economy and in practice it is stated that this results in the use of a "discount rate" of four to five percent in most cases[457]. A "multiplier" is the figure by which the yearly lump sum is multiplied in order to arrive at a correctly adjusted final lump sum. The higher the multiplier the higher the lump sum whereas the lower the discount rate the higher the lump sum achieved. It is submitted that a more sophisticated analysis of the relationship between interest rates and inflation rates would be required[458], which is beyond the scope of the present discussion which has been geared towards illustrating that there is more to the assessment of a lump sum than is at first apparent. A perceptive, flexible attitude is needed by the courts in order to arrive at a sum which fulfills its intended purpose, which is to compensate the victim for the loss which he has suffered. In the case of compensation for non-pecuniary loss the English Pearson Report suggested[459] that full account should be taken of the approximate capitalized value of social security payments[460] when deciding what would be a reasonable amount. As a guide to the capitalized value of the benefit a multiplier based on a 2% discount rate for all plaintiffs was proposed.

(2) Other Economic Factors Relevant in the Assessment.

(a) Taxation.

In a realistic and comprehensive analysis of the assessment of the award of compensation for personal injury one must consider the effects of taxation on the value of the award. In the calculation of pecuniary losses and taxation effects there is a difference in approach between the courts of England[461] and Canada[462] and fatal and non-fatal accident cases receive different treatment[463]. If one adopts the Canadian position that it is undesirable to launch an inquiry into future taxation implications because the issue is too complex, uncertain and swings "with the political wings"[464] it is questionable whether the victim is receiving fair treatment[465]. It is acknowledged[466] that there is an element of arbitrariness if the assessment considers such future contingencies as the length of working life, rates of inflation, tax rates, future governmental policy, types of investment and related tax deductions, but in the desire to accomodate a victim for the rest of his life if permanently disabled, it is surely imperative to make a detailed assessment of this kind. There is no taxation of the actual lump sum award for reasons such as those expounded by Sheppard that because

> "the human body is neither property nor capital, it is philosophically repugnant to consider taxation of amounts received for bodily injury".[467]

Whatever the philosophical rationale there is no "explicit tax" on capital (apart from capital gains tax) and so the victim does not pay tax on the lump sum for pecuniary and non-pecuniary losses. It is submitted that one should look further ahead to consider the investment income tax for

which the victim will be liable once the lump sum is invested. In the case of non-pecuniary loss a victim may feel aggrieved to a certain extent because the value of the lump sum will be severely curtailed by the liability for investment income tax and the amount of money available for his needs will be reduced. In these situations some courts have awarded a "special extra allowance"[468] to overcome the tax liability, but it may be necessary to provide for more generous treatment by legislative means for funds established by judicial decision[469].

(b) Contingencies.

A contingency deduction is made by the courts in the case of pecuniary loss on the basis that certain expenses will probably not be incurred. For example, when assessing lost earning capacity the court, both in Canadian common law and Quebec civil law, may make a percentage deduction, or the use of the multiplier in England, will reflect the possibility that the victim may have suffered from unemployment, accident or illness which would have reduced his earning potential. This practice has been vehemently criticised by a number of authors[470] who view the imposing of the contingency deduction as an "unncessary impediment"[471] which may operate as a "severe detriment"[472] to the plaintiff. Courts have also recognised that the question of contingencies is a troublesome area describing it as

> "a small element of the illogical practice of awarding lump-sum payments for expenses and losses projected to continue over long periods of time".[473]

If a system of periodic payments were introduced speculation over the victim's likelihood of premature death or a fall in the cost of future care would be eliminated, and there would be no need to present evidence before the court on the

chance of an event occurring and, most importantly, the victim would not run the risk of his award being reduced to an inadequate level.

Contingency deductions are not made in the calculation of the award for non-pecuniary loss and it is submitted that this is a practice which should undoubtedly continue because the inherently subjective nature of the subject matter would not lend itself to an arbitrary deduction, on the basis of an objectively determined figure, which is intended to reflect the possibility that pain and suffering may cease because the victim may fully recover or he may die. Lost earning capacity and future medical care are issues that may be quantified with substantial accuracy when compared with the non-pecuniary elements of pain and suffering, loss of amenities of life and loss of expectation of life and to make arbitrary and purely speculative deductions from the non-pecuniary loss assessment would be a disservice to the victim.

(c) Interest.

In Quebec civil law there are provisions in the Civil Code dealing with interest that may be paid on a lump sum award and the rules differ depending on whether the action is based on a contractual or extra-contractual basis. The former is governed by Art. 1077 and the latter by Art. 1056(c). Art. 1077 provides for interest to be paid at the agreed rate between the parties, or if there is none, at the legal rate of interest and under Art. 1056(c) the interest rate may be higher than the legal rate due to certain tax regulations on interest rates[474].

The English courts have laid down guidelines for the payment of pre-judgement interest in personal injury cases, notably in the case of Jefford v. Gee[475] decided by the

Court of Appeal in 1970. This case held that interest is payable on a lump sum award for pain and suffering and loss of amenities of life from the date of service of the writ to the date of trial and the House of Lords in Pickett v. British Rail Engineering Ltd.[476] endorsed this view. There is also a statutory duty on the court as there is in Canada, to exercise its power to award interest on damages or on such part of the damages as the court considers appropriate[477]. The rate of interest is generally the rate payable when money is placed on short term investment account[478]. Recent cases, such as Birkett v. Hayes[479], have presented other guidelines on the rate of interest on payments for non-pecuniary loss stating that a rate of 2% per annum should be awarded (9% per annum had been awarded in Pickett v. British Rail Engineering Ltd.).

Arguments have been raised[480] in Canada on the grounds that there may be a problem of duplication if the court considers both pre-judgement interest and past inflation in the award of damages for non-pecuniary loss. However this fact has been rejected as being merely "incidental" when the main thrust of the damages assessment for pain and suffering and loss of amenities of life is to find the "real" value of the loss for the victim in the future[481].

It is beyond the scope of this work to deal in detail with such issues as pre- or post-judgement interest, but there factors should be borne in mind when considering the award of compensation for non-pecuniary loss from a more procedural and administrative legal setting.

III The Systems of Assessment.

A. Introductory Overview.

The analysis of the practical mechanics of the systems of assessment of compensation for non-pecuniary loss has been divided into two sections and the first task will be to examine the legislative systems of assessment and the second stage will concentrate on the non-legislative systems. The discussion will emphasize the approach taken towards the assessment of compensation for non-pecuniary loss in the light of different methods of calculation in the various jurisdictions, which may result in extremely disparate awards for the same set of facts. The ultimate intention is to present a clear picture of legislative and judicial trends in the jurisdictions covered in terms of the scale, the structure and the practical methods of assessment of awards for non-pecuniary loss in cases of non-fatal personal injury. It is hoped that the comparative and critical analysis in section D will serve to illustrate the existing position with regard to the compensation of non-pecuniary loss and that it will provide a basis for the ensuing discussion in Part Three on the recommendations for reform of the present approaches to compensation for non-pecuniary loss.

B. The Legislative Systems.

Introduction.

Within the confines of the present work it is not possible to examine each statutory scheme of assessment on an individual basis and, in addition, compensation under, for example, the auspices of the Workers' Compensation Acts is very often awarded according to the same methods, the major principles of which have been outlined in Part One. This section will concentrate on a selected group of legislative

systems of assessment which pay more attention to the compensation of non-pecuniary loss, and these are, firstly, the New Zealand Accident Compensation Act which will be examined in depth, secondly, the Criminal Injuries Compensation Schemes, and, thirdly, the Workers' Compensation scheme of Quebec, which illustrates how a compensation system which is geared towards a pecuniary loss assessment may operate in the sphere of compensation for non-pecuniary loss.

(2) The New Zealand Accident Compensation Act.

(a) S.119 and 120 of the Accident Compensation Act.

The compensation of "non-economic" loss is dealt with under s.119 and s.120 of the Accident Compensation Act (A.C.A.) and provides for the payment of lump sums which should not, in the aggregate, exceed $17,000. S.119 covers compensation for non-economic loss related to permanent physical injury or impairment of bodily function including the loss of any part of the body. A lump sum is paid on the basis of a scale provided in the Second Schedule to the Act (See Appendix A) which lists injuries and their appropriate percentage of $7,000. This list of anatomical injuries is detailed and comprehensive ranging from losses of part of the body (80% for total loss of an arm, 14% for total loss of an index finger, 75% for total loss of a leg) to assessments of shortening (15% for 1-1/2" to 2"), spinal disabilities, (100% for paraplegia), blindness (100%), deafness (75%) and loss of teeth. If a person's injury is outside the scope of the Schedule, the Accident Compensation Commission may make an "appropriate"[482] lump sum on a "quasi-schedule" approach using medical and other available evidence. S.119(1) requires a deduction to be made in respect of any "demonstrable, pre-existing, related permanent

loss or impairment" of the bodily function which can be established by the Commission. This part of the award is entirely objective on the basis of the actual permanent loss or impairment, which must be certified by a medical practitioner according to s.119(9). Other provisions of s.119 provide for a further assessment by the Commission if the person suffers additional losses and impairment arising out of the original injury (s.119(6)) and no payment will be made unless the injured person is living at the expiration of twenty-eight days from the date of the accident (s.119(8)). There seems to be no maximum time limit for the assessment of the lump sum under s.119 and the award may be made when it appears to the Commission that sufficient evidence is available.

The Commission is merely concerned to establish on the basis of medical evidence the percentage of injury as measured by a scale of injuries and there is no scope for assessing psychological damage, the age of the victim and his life expectancy, or his awareness of the injury. The Second Schedule to the Act states;

> "Where there are subjective symptoms of pain without demonstrable clinical findings of abnormality or demonstrable structural pathology, no assessment should be made under s.119 of this Act".

Psychological and emotional disability emanating from the injury would presumably be covered by the second part of the award for non-economic loss under s.120, which deals with the subjective factors relating to the injury[483].

Once the objective award on the basis of the injury for non-pecuniary loss has been determined s.120 enables the Accident Compensation Commission to make a discretionary award, not exceeding $10,000, in respect of;

"(a) The loss suffered by the person of amenities or capacity for enjoying life, including loss from disfigurement;

and

(b) Pain and mental suffering, including nervous shock and neurosis".[484]

The loss, pain or suffering, having regard to its "nature, intensity, duration and any other relevant circumstances", must have been, or may become, or currently be of a "sufficient degree" which, in the opinion of the Commission, justifies payment. A brief perusal of the quantum of awards in the Accident Compensation Commission's Digest indicates that this degree is relatively high and the full $10,000 is awarded in only a small number of cases. The following illustrations demonstrate, in summary form, the scale of awards under s.120.

1. 74/R00345[485]. Claimant suffered fractured left collar bone, cracked ribs on the right side, a bruised sternum and abrasions to both knees in a motor accident. He suffered pain made worse by coughing; the ribs were painful for about four weeks. There was no permanent disability. Held, on review, loss, pain and suffering insufficient to warrant an award.

2. 75/R0396. An 81 year old woman was knocked unconscious in a motor accident. The report from the neurosurgeon showed that she now suffered from headaches aggravated by the accident and she had become nervous and upset. Held, on review, that claimant suffered from significant mental shock bordering on accident neurosis. While there would be no grounds for an award to a younger person in these circumstances she was awarded $350.

3. 75/R0660. A keen rugby player who had reached

the stage of being an All Black trialist and whose leg and ankle injuries made it highly improbable that he would ever regain his previous level of competence..... Under s.119 the applicant received $200 for loss of bodily function. On review the applicant argued he was entitled to compensation under s.120 for loss of amenities and pain and suffering or capacity to enjoy life. In the reasons for the decision delivered by the Commission in declining the claim, it was said:

> "I do not think, however, that the words can be read as implying that changes in the way of life on their own should be compensated... I cannot accept that his enjoyment of life will be impaired because he lost a possible chance of selection as an All Black. The legislation is not designed to reward those who are able to lead perfectly normal, healthy, full and active lives".

4. No. 253[486]. Laceration to both knees - Loss of sensory response to right back teeth - Impairment of back teeth on left side - Area of numbness to left lower lip - s.119 award 11% - Female - 29 - Single - Clerk/teacher - Considerable post-accident pain - Was a hockey and volleyball representative - Does not play sport for fear of further injuries to face - Spent some time on tranquillizers, still becomes irritable at times - Scar on left lower lip gives major distortion to mouth - Lacks concentration - Eye - strain, photophobia and double vision after half-hour reading makes teaching more difficult - Normal household chores no problem - Occasional parasthesia in both legs - May require knee surgery in future - Award of $2,500.

5. No. 254. Traumatic cataract left eye - Can barely appreciate hand movements with left eye with pre-existing vision of only 15% in right eye[487] - s.119 award 80% -

Male - 48 - Married, two children - Farmer - Still has gritty feeling in eye - Very embarrassed when he fails to recognize friends and walks into objects - Has ceased farming, just potters about in the house, depends greatly on his wife - All previous activities including horse-riding, golf, bowls, reading, denied him now - Award $10,000.

6. No. 280. Fracture left femur - One inch shortening - S.119 award 15% - Male - 18 - Single - Storeman/driver - Continuing discomfort at fracture site especially after activity - Bowing deformity of thigh, operation scar - Coping with job - Difficulty with strenuous support, ceased rugby, basketball - Award $1,000.

Review - Further medical report submitted - S.119 award increased by 5% - Claimant embarrassed by scarring, bowing of leg - Gait is awkward - Arthritis likely to develop in later years - Award increased to $1,500.

7. No. 283. Multiple fractures right femur, tibia and fibula - Left index finger and thumb - Fracture right humerus - Fractured skull - Limitation of right shoulder movement - Three-quarter-inch shortening of right leg with slight muscle wasting - Loss of thumb movement - S.119 award 22% - Male - 21 - Single - Factory worker - Headaches felt towards end of day, some low back pain, shoulder aches after use - Well healed scars on right hip and thigh, slight deformity of left index finger D.I.P. joint - Planned career as physical educational officer in army, unlikely to be accepted now, will continue to work in factory - Can only run slowly - Has pain in fracture sites - Was an accomplished sportsman, very limited now - Has slight blurring of vision, but no reason can be found for it - Award $2,500.

8. No. 294. Severe facial laceration - Minor fracture left forearm - No residual disability - S.119 award nil - Female - 16 - Single - Student - Laceration extended deeply to zygomatic arch and fasia over parotid gland, involving mandible diversion of facial nerves - Scar therefore extended down whole side of face and under jaw - No improvement expected - Award $3,000.

9. No. 98[488]. Severe fracture left elbow - Trauma right shoulder - Fractured pelvis - Crush fracture T12 with nerve root damage - 50% loss of function of arm - Lack of spinal function with neurological problems - Loss of sexual function - S.119 award 67% - Male - 61 - Married - Equipment operator - Lost job - Fit for light duties only - Continual back pain - Can no longer garden or renovate house which were his spare-time activities - Award $10,000.

10. No. 99. Fractures left, right tibia - Severe compound fractures shaft left humerus - Fracture dislocation right shoulder, partial bronchial plexus palsy - Lack of grip, muscle power both shoulders, arms - S.119 award 83% - Male - 43 - Married - Farmer - Pins-and-needles right hand all the time - Right arm aches - Suffers dizzy spells, vomits - Extensive scarring from skin grafts - Cannot do heavy work - Wife does more - Cannot dress, do numerous tasks around house - Ceased boating, duck shooting, repairing and modifying cars - Award $8,000.

It should be noted that little guidance is given in the Act to aid the Commission in their assessment under s.120. Under s.120(1) they must wait until the medical condition has, in their opinion, sufficiently stabilized or make the payment forthwith on the expiration of two years from the date of the accident, whichever is the earlier. There is no such time limit in s.119. The use of a time threshold was advocated by the Pearson Report[489]

which suggested a three-month limit before the award for non-pecuniary loss should be made. Temporary pain and suffering, unless of an acute level meeting the "sufficient degree" requirement, would not be compensated under the New Zealand Scheme[490]. The Commission may take into consideration "enhancement factors"[491] where the effect of the injury is "specially serious" by reason of a pre-existing loss or impairment of, for example, a kidney, lung or other paired organ. The enhancement factor serves to increase the award, whereas the recognition of pre-existing loss or impairment in s.119(1), acts to reduce the percentage of injury hence diminishing the award under s.119. The two situations deal with certain pre-existing disabilities differently.

S.120(6) enables the Commission to increase the lump sum as it thinks fit if it considers that the cumulative award under s.119 and s.120 is not adequate having regard to the "special circumstances" of the case. The maximum of $17,000 still applies. The interpretation of "special circumstances" has received attention by the Accident Compensation Appeal Authority, for example, in Re H: Decision 391 decided in 1980[492]. Blair J. first pointed out that resort to s.120(6) may only be taken once the maximum of $10,000 has been awarded under s.120 and he then dealt with the term "special circumstances". Inadequacy per se was not considered enough to justify the use of s.120(6)[493] but if coupled with the non-payment of compensation under s.119, considered together with the serious loss and damage under s.120, the special circumstances requirement would have been satisfied. The case was followed in Re F: Decision 423[494]. Both s.119 and s.120 state that no payment will be made after the death of the injured person although there is no 28 day survival period in s.120(9) as in s.119(8), which aims to reduce the risk that a payment may benefit only the dependants. S.120(7) refers to the Commission's duty,

(the word "shall" is used) to have regard to the injured person's awareness and knowledge of his injury and loss.

It is observed[495] that there is some doubt as to the meaning of "loss from disfigurement" in s.120(1)(a). The term may refer to all losses that may result from disfigurement such as loss of opportunities, loss of matrimonial prospects, and loss of affection, or it may mean losses within the ambit of loss of amenities and capacity for enjoying life. If the latter interpretation is adopted the scope of claims for the effects of loss from disfigurement may be more limited, if a narrow view is taken of such losses.

The illustrations above have indicated that the Commission does enquire in detail into the subjective circumstances surrounding the victim's injury and the degree of injury does not sway the Commission to give a lower or higher award, although a greater degree of incapacity will, in many cases, lead to a higher award on the subjective analysis. Comments have been made[496] that the Woodhouse Commission were seeking a "rule of thumb" method of assessment rather than a discretionary, arbitrary and individualized means of calculation. This approach, the Commission argued, would best be achieved by making scheduled fixed sums for the losses. Acknowledging that the problem of assessing disabilities is a perlexing issue, it was stated in the Woodhouse Report that

> "there are great advantages in using some broad schedule method of assessing these cases in order to achieve a fair and reasonable predetermined level of compensation. It should be accepted that while the method will not enable absolute justice to be achieved, nevertheless the speed and certainty of assessment must far outweigh the expense and effort which would be associated with attempting to make the most meticulous adjustments in every case. In

> any event we think it unlikely that assessments of such delicacy are possible if broad uniformity is to be realized up and down the country".[497]

The existing system varies somewhat from the original proposal by the Woodhouse Report and, as the illustrations and discussion have shown, the award is subject to considerable variation due to the exercise of the Commission's wide discretionary powers, subject to the statutory ceiling on the amount. Under s.120 each case is assessed individually on a purely subjective basis and, although they may operate in isolation, in most cases s.119 and s.120 will be considered jointly by the Commission, who take into account the amount awarded under one section before the second award is made[498]. There is more scope for a higher award under s.120 and it is this section which provides for an increase in the award if it is considered inadequate in the special circumstances of the case. However, it has been noted that the requirement for the pain and suffering to be of a "sufficient degree" before an award is made is a stringent rule and, as a result, the awards are not high. As will be explained in the critical analysis in section D it may not be valid to merely compare the quantum of awards and one must look to the purposes and overall methods of compensation which are different under the common law and under the A.C.A. The award for non-economic loss in New Zealand is in financial terms much less than in the common law jurisdictions and civil law jurisdiction examined but the award forms part of a whole range of benefits and services that are made available to a successful claimant under the A.C.A.. Rehabilitation and retraining programmes and the provision of prosthetic equipment all add in a practical manner to the amelioration of the victim's position in New Zealand and a more wide-ranging and searching consideration of the system of assessment must be borne in mind before determinations are made on the practical methods of assessment

and the value of the awards to the recipient.

(b) The Administration of the Accident Compensation Act.

A brief description of the administration of the A.C.A. in the context of the lump sum awards under s.119 and s.120 will provide a clearer explanation of the workings of the New Zealand System. The Accident Compensation Commission is invested with the overall duty to administer the A.C.A. and although it is not entirely free from government control, because it must "give effect to the policy of the Government in relation to" the Commission's "functions[499] and powers as communicated to it from time to time in writing by the Minister"[500] of Labour, the Commission is free to run the day to day administration of the compensation system. A claim for compensation must be made to the Commission within twelve months of an accident[501] and if the claim is not granted or the claimant is dissatisfied with the decision of the Commission, its committees or agents[502] an application for review[503] may be filed to the Commission's Legal Division. The claim is fully investigated afresh in the light of new evidence and the Commission may utilize its power under s.151(1D) to revise a decision "made in error". The review may be assisted by Hearing Officers and medical committees and the applicant, if he has acted reasonably, may be awarded costs. In the case of permanent impairment a separate assessment section within the Commission will deal with the provisions of s.119 and s.120[504], and the final assessment is aided by liaison officers around the country, who visit those suffering from permanent incapacity with a view to the rehabilitation of the individual. The decision is notified to the applicant in writing and the letter explains the possibility of review under s.153 which must be made within one month of the notification of the decision. After a review decision

has been made an appeal lies to the Accident Compensation Appeal Authority which consists of a judge, or lawyer with the experience of judicial office. The Authority may be assisted by an expert asessor, although Palmer[505] submits that it will be difficult to achieve an alteration in the award because an interference with the Commission's lawful discretion may be unsound from an administrative law point of view[506] and the daily running of the Commission's activities would be sorely taxed. From the Appeal Authority an appeal lies to the Administrative Division of the Supreme Court on a matter of general or public importance or on a point of law[507]. By way of case stated an appeal lies to the Court of Appeal[508].

Harris[509] comments that the assumption behind the Act is that accident prevention and rehabilitation will be "more efficiently handled" if a single, national organisation is responsible for the payment of compensation rather than separate organisations. This would seem to be a valid observation but one must also consider other factors such as the size of the country and the population which may have a bearing on the efficiency of the scheme. These more general issues on the suitability of a no-fault system of compensation will be discussed in greater depth in the critical analysis and in Part Three, but it is important to keep the administrative framework in mind when this discussion arises.

(2) Criminal Injuries Compensation Schemes.

(a) Administration of the Criminal Injury Compensation Schemes.

Compensation for criminal injuries is awarded either by an independant Criminal Injuries Compensation Board, or by the Worker's Compensation Board. In Canada three pro-

vinces, Quebec, British Columbia and Manitoba use the latter means and the other provinces, as in England, make use of a distinct Criminal Injuries Compensation Board. In New Zealand the compensation awarded by the Accident Compensation Commission covers injuries sustained by a victim of a criminal act.

(i) Administration by the Criminal Injuries Compensation Board.

In Canada the Criminal Injuries Compensation Boards operate under a similar administrative and procedural structure. The scheme is viewed by Burns[510] as representing

> "a form of state charity or social welfare based at least in part on the moral duty to aid innocent sufferers of an egregious event that might befall any of us".[511]

Any person who is injured in connection with an act or omission in the commission of certain offences in the Criminal Code ("Scheduled Offences")[512] may make an application to the Board for compensation. There are various time limits within which the application must be made, which is usually within one year after the crime and the crime must have been reported within a reasonable time after its commission. The Board will then hold a hearing in which all evidence that the Board considers relevant may be heard and the victim may be requested to undergo a medical examination by the Board's physician. A compensation award may still be made even if the alleged offender is not charged, convicted or acquitted. The availability of an appeal[513] from a decision of a Board is not uniform across the provinces and it is denied in Saskatchewan, Alberta and Newfoundland whereas in Ontario, New Brunswick, North West Territories and the Yukon a claimant has the opportunity to make an appeal. In Ontario there is only scope for a hearing and

review if the decision has been made by a single Board member but the ultimate decision by the Board is final, except to allow an appeal on a point of law to the Supreme Court[514].

In England the Criminal Injuries Compensation Board, as in Canada, avoids the adversary process and the application for compensation is dealt with by a single member of the Board, who aims to arrive at the appropriate award uninfluenced by the interests of either party. There is a right of appeal to a tribunal consisting of three Board members who assess the case along common law lines and a right to appeal before the Court of Appeal, but the administration is not similar to a claim in the law of tort. The Board may make interim awards where, for example, the medical prognosis is not clear or where other benefits have not yet been computed and Atiyah[515] notes that this ability to make interim awards operates to produce a much more efficient system. Any person who suffers "personal injury directly attributable to a crime of violence"[516] is entitled to claim compensation and the cases indicate that the term "crime of violence" is extremely wide-ranging and arbitrary in scope and covers reckless, unintentional and accidental injuries[517]. The case of R. v. CICB, ex parte Clowes[518] illustrates that intention to cause violent injury is not necessary and violence to property, in which personal injury is a probable outcome, is sufficient to come within the definition "crime of violence". Although the English scheme does refer to the acts of poisoning and arson it has a much looser foundation than the Canadian schemes which are linked to the commission of a "scheduled offence"[519]. A Working Party Report, published in 1978, which examined the English system in the light of encompassing the scheme in statutory form, rejected the idea of listing offences as an impracticable task[520]. The same Working Party also recognised that although payments made by the Board are ostensibly "ex gratia", and not as of

right, the Courts may investigate whether the Board has acted in compliance with the stated objectives of the scheme, as set out in the consolidated version of the Scheme in 1969[521].

(ii) Administration of Compensation for Criminal Injuries by the Workers' Compensation Boards.

The Criminal Injuries Compensation Schemes in Manitoba, Quebec and British Columbia are administered by the Workmen's Compensation Boards and deserve separate treatment in the analysis of the administration of these systems. It is seen on closer analysis that despite the provisions of the Manitoba statute which states that the victim of a crime must be awarded an amount that is equivalent to the award for a person injured in the course of employment[522], the reference to the Workmen's Compensation Scheme is limited to this aspect only and the administration follows a similar pattern to awards made by the Criminal Injuries Compensation Boards. The compensation of non-pecuniary loss is a distinct head of damage (although to varying extents[523]) in all the provinces, except Quebec and British Columbia, and it is this omission, in addition to the administration under the Worker's Compensation Boards that sets these two provinces apart in the compensation of criminal injuries. There are Criminal Injuries Compensation Boards in these provinces but their powers of administration are devolved from the Workmen's Compensation Acts and, in Quebec in particular, the Workmen's Compensation Commission plays a predominant role in the investigation of a claim for compensation. For instance, the investigating officer in Quebec works full-time for the Workmen's Compensation Commission and only a small part of his time is devoted to criminal injuries compensation claims. Burns[524] comments that this administrative method has caused some dissatisfaction because in a criminal injury claim different factors

should be noted as compared with a workmen's compensation claim, for example, increased anxiety or tension may be more relevant in the former claim. It was pointed out in Part One that it is not possible to make a claim for non-pecuniary elements of pain and suffering and the like under the Quebec Criminal Injuries Compensation scheme because such aspects do not receive direct compensation under the Workmen's Compensation scheme. This is, it is submitted, a serious drawback to the system which is designed to compensate personal injury and its different effects. Major consequences of criminal injury may be of a non-pecuniary nature and this is not recognised in the Quebec system. The application form for compensation contains only basic information on the victim's position and state of health and based on this and the medical and police reports the Board makes its decision on compensation. In Quebec the Attorney-General's Department must approve the award before the claimant is notified[525], but no such requirement is imposed in British Columbia. It is perhaps unfortunate that the Quebec system, which was modelled on the system operating in British Columbia, was not able to evolve in the same manner. The flexibility offered by the latter scheme, which under the auspices of one Board is able to deal with two types of claimant, the injured worker and the criminally injured victim, yet provide compensation which meets the need of each individual, is a system which has shown initiative and foresight on the part of its administrators.

(b) Assessment of Compensation for Non-pecuniary Loss under the Criminal Injury Compensation Systems.

There are various aspects to be considered in the examination of the practical analysis of the assessment process in the systems of criminal injury compensation. First, one must note the statutory financial limits, both maximum and minimum, on the claim to compensation and, secondly, the

deductions that are imposed on the award on the basis of, for example, the unworthy conduct of the victim or collateral benefits that are available to the victim. The particular approach taken towards the quantum of the awards for pain and suffering will then be discussed.

In England, where the system is not subject to statutory control, the Criminal Injury Compensation Board meets from time to time to discuss the proper basis of assessment of compensation. Pain and suffering awards do not figure in these assessment exercises but the Board makes an assessment which may be adjusted depending on the circumstances of the case along common law guidelines. The figures for 1982[526] allow, inter alia, £2,250 for rape, £850 for male scar, £6,500 for female scar, £10,000 for loss of vision in one eye, £45,000 for total loss of vision. The amount for rape compensation seems low in comparison with the award for female scarring which may reach £6,500, the reason perhaps being that the Board has no prior guidance because a rape victim does not often make claims in the civil courts. It is submitted that the Board should in these cases concentrate on the emotional and psychological effects of the assault which may more readily represent a more accurate appraisal of the victim's position. There is a minimum award under the English Scheme of £150[527] (which is more generous than most of the Canadian Schemes to be discussed shortly) and no maximum limit exists for the overall award, apart from a maximum level for loss of earnings. The Pearson Commission Report suggested that in order to eradicate claims for the compensation of temporary pain and suffering a three month threshold should be imposed during which there would be no payment for non-pecuniary loss[528]. The Criminal Injury Compensation Board considered this proposal in their Fourteenth Annual Report[529] but it is submitted that to follow the Pearson recommendation would create an injustice for those who would fall below the £150

threshold if the first three months of non-pecuniary loss was not considered.

In Canada there are statutory minimum limits in seven provinces[530] ranging from $50 in Saskatchewan to $150 in Manitoba. As Burns[531] observes the effect of these minimum loss levels is "almost insignificant" in the jurisdictions which make an award for the non-pecuniary loss of pain and suffering because the award will be larger than the statutory minimum. In addition as inflation increases there are fewer cases that become caught by the minimum levels. Maximum limits are laid down in seven provinces commencing at $5,000 in New Brunswick[532], Saskatchewan[533] and Newfoundland[534] and rising to $15,000 in British Columbia[535], North West Territories[536] and Ontario[537]. These limits, which may be viewed as types of "proportionality"[538] principles, are illustrations of the desire not to over-burden the state with excessive claims. In Newfoundland a specific limit of $2,000 has been placed on the amount awarded for pain and suffering.

Awards for criminal injury compensation are subject to deductions to avoid double compensation of the victim and in both England and Canada collateral benefits will be deducted. The award may be further reduced if the claimant is not considered by the Board to be sufficiently worthy to receive full compensation. The victim's conduct and responsibility for his action or inaction is assessed and the victim is dependant on the sympathy or leniency of each Board when all relevant circumstances of the case are discussed. The type of issue of which the Board will make particular note are drunkeness of the victim at the time of the criminal act, the need for self-defence, whether there was voluntary participation in a fight, the personal characteristics of the victim, for example, if he has a previous criminal history, the sexual habits of the victim or pro-

vocation on behalf of the victim. Illustrations of this examination of worthiness of the applicant can be given: the Saskatchewan Board reduced the award of $3,000 for pain and suffering to Mr. Chester Parada[539] by 25% because of intoxication and failure to exercise proper judgements with respect to his own safety, and Miss Shelly Bergen's award of $450 was reduced by 15% for her failure to wear a seat belt[540]. The Ontario Board also adopts a stringent approach to this issue and Mr. Stanley D. Smith's award of $1,000 for pain and suffering due to facial scarring was reduced by 50% because his evidence was "inconsistent, irregular and somewhat evasive"[541].

The following summary of quantum of awards compiled from cases before the Criminal Injuries Compensation Board in Saskatchewan and Ontario indicates the amount awarded for pain and suffering. The awards are not broken down into more detailed divisions for the head of non-pecuniary loss and so it is impossible to indicate whether an award is biased towards, for instance, aesthetic impairment in the form of scarring, psychological impairment, or loss of amenities and one must draw individual conclusions from a perusal of the facts of each case. Burns, in his comprehensive analysis of the treatment of compensation of non-pecuniary loss by the Criminal Injuries Compensation Boards[542], observes that the largest awards for pain and suffering are made to victims of sexual attacks and higher than average awards are made to persons victimized in their own homes[543]. He also notes[544] that awards for pain and suffering have increased, as the court awards have done, which perhaps reflects inflationary trends or a growing awareness of the more personal and psychological effects of personal injury, particularly if the injury occurs to the innocent victim of a criminal attack. The following summary indicates the level of awards for pain and suffering in two of the Canadian provinces, the maximum award in

Saskatchewan being $5,000 and $15,000 in Ontario. The cases are drawn from the Criminal Injuries Compensation Board Reports in each province.

Saskatchewan:

1) Award No. 992/81, 857/82[545] - Female - 15 years - concussion, headaches, bruising around left eye cervical stiffness after been thrown out of moving vehicle in robbery attempt - Award $450 reduced by 15% to $382.50 due to failure to wear seat belt.

2) Award No. 791/79, 867/82[546] - Male - 52 years - Fractured left arm, bruises and cuts to head - Loss of hearing in left ear alleged but no medical confirmation due to failure to attend doctor's appointments - Award $750.

3) Award No. 1013/82, 859/82[547] - Male - 17 years - .22 calibre bullet wound to chest, perforated lung - Lead fragments lodged in posterior chest wall - Award $1,200.

4) Award No. 872/82, 1002/82[548] - Female - 45 years - sprained right knee, anxiety caused by kidnap, assault and robbery - Award $2,500.

5) Award No. 986/81, 856/82[549] - Female - 48 - Sexual assault, rape, abrasions to neck, elbows and left knee, anxiety and trauma - Award $3,500.

6) Award No. 942/81, 822/82[550] - Female - 32 years - Gunshot wound to right eye, fracture of right inferolateral orbital floor, communited fracture of the zygomatic arch, large laceration of upper eyelid - Enucleation of right eye - Plastic surgery - Award $4,950.

Ontario:

1) Case File No: 200-2480[551] - Female - 53 years - Severe rupture of right eye requiring its removal - Replacement of glass eye in 5 years time - Award $4,500.

2) Case File No: 200-2271[552] - Male - 30 years - Lacerations to head, headaches and pains - Surgery to remove dense scar tissue in left occipital and parictal area - Pain for ten months on moderate to severe level - Award $5,000.

3) Case File No: 200-3227[553] - Male - 52 years - Injuries to lower back, shoulders and face - Serious post-traumatic neurosis with opening up of old psychological wounds experienced as a survivor of Dachan concentration camp - Award $7,500.

4) Case File No: 200-2996[554] - Male - 28 years - Gunshot injury to right shoulder, loss of bone substance and an inadequate gleno-humeral joint, loss of strength and motion - Award $8,500.

5) Case File No: 200-3116[555] - Male - 49 years - Fracture of left knee, periodic pain and instability - Award $2,050 (lump sum) and $150 monthly payments for a total of $7,950 which provides grand total of $10,000.

6) Case File No: 200-2236[556] - Female - 14 years - Extradural haematoma, injury of facial nerves causing paralysis on one side of face, severe mental impairment and general impairment of victim's health and strength - Psychological problems, facial asymmetry - Award $11,800.

(3) Workers' Compensation Schemes.

The basic outline and principles of the Workers' Compensation Schemes have been explained in Part One and it is the intention of this section to elucidate a little more fully on the workings and calculation of the award for disability. It has been noted that the traditional elements of non-pecuniary loss are not expressly incorporated into the assessment of compensation in the case of a person injured at work, yet it will be seen that non-pecuniary loss type factors may be brought into the assessment, if they have an effect on the victim's capacity work and earn money. The Workers' Compensation scheme that operates in Quebec will be discussed but it is submitted that similar investigative procedures would be adopted by other schemes in the assessment of an award. Since there is no direct award for non-pecuniary loss the examination will be of less depth than the previous analysis of Criminal Injuries Compensation schemes and it should be noted that Road Accident Compensation schemes adopt a similar approach to Workers' Compensation schemes in the emphasis placed on pecuniary, rather than non-pecuniary loss.

In calculating the appropriate indemnity in Quebec the Commission de la Santé et Sécurité de Travail (C.S.S.T.) utilize the relevant percentage of the victim's permanent partial or total disability or the temporary partial or total disability, according to Arts. 38 and 42 of La Loi sur les accidents du travail. The impairment of earning capacity is of paramount concern and it is

> "estimated from the nature of the injury, having always in view the workman's fitness to continue the employment in which he was injured or to adapt himself to some other suitable occupation". 557

The impairment suffered by the accident victim may be deduced from the Impairment Table in Schedule A of Regulations to the Act which lists

> "the medically established sequelae of an injury that adversely affect the accident victim's physical and psychic integrity".[558]

There are also Draft Regulations[559] which provide detailed proposals for the assessment. The permanent disability referred to in Art. 38 of the Act is the sum of these impairment percentages and the percentages for unfitness to continue employment. Chapter III and Schedule B of the Draft Regulations refer to the evaluation of the percentage of unfitness to continue employment (which is calculated after the impairment percentage has been determined or after the accident victim is completely rehabilitated socially[560]) and its substance is derived from s.8 of these Regulations which states that eight variables will be taken into account, in addition to the age adjustment factor, the impairment resulting from the accident, occupational disease or aggravation. The variables are, educational level, vocational training, work experience, geographic mobility, level of employment in his milieu, economic milieu, force of character and the nature of the injury with respect to principal occupation. The victim will be allocated a score under each variable according to the effect and consequences of the injury. It is submitted that non-pecuniary loss elements such as pain and suffering, loss of amenities or loss of expectation of life may be of relevance when determining the score of, for example, force of character and the nature of the injury with respect to principal occupation. The force of character variable has four aspects:

1) psychological aspect - the accident victim's reactions after his accident, his degree of confidence in himself, in his potential and his awareness of his limits, his perception of the reactions in

various milieus with respect to himself, his ability to adapt, his resourcefulness in adaptation;

2) family aspect - the victim's attitude inside the family unit before and after the accident;

3) social aspect - the social milieu of the victim, his ethnic origin and fitness to adapt to new work environments, his behaviour vis-à-vis society;

4) financial aspect - his financial position before and after the accident.

The psychological effects of an injury, for example, a fear of heights after a severe fall, may necessitate a change of job or emotional trauma at the prospect of working in a milieu in which the accident occurred may need to be considered. The indemnity will be based on a detailed assessment of the victim's needs as they arise from the injury and it is submitted that non-pecuniary type factors are relevant and may be incorporated into this assessment, although schemes such as Workmen's Compensation do not expressly refer to such elements. If successful rehabilitation is to be achieved all aspects of an injury need to be looked at and rehabilitation is regarded as a major goal in the field of Workmen's Compensation. The 1981 Report of the Workers' Compensation Board in Nova Scotia reflects this aim as it strives to enable the accident victim, through his indemnity, to

> "meet the demands of [his] job and to obtain a normal family and community life as soon as possible, striving for minimal loss to the worker's sense of social and economic well-being".[561]

C. The Non-Legislative Systems.

Introduction.

This section will present an examination of the current approach taken by the courts in their assessment of compensation for non-pecuniary loss in terms of the factors considered and the calculation techniques adopted. The current level of awards for non-pecuniary loss is illustrated in tabular formation on the basis of twenty recently decided cases which are considered to be representative of awards for different types of injuries. A separate table is provided for each of the jurisdictions covered, those of England, common law Canada and Quebec. These tables will be presented first and the ensuing discussion of the calculation techniques will be divided into, first, an analysis of the approaches taken in the common law of Canada and the civil law of Quebec, and, secondly, the current position in England. The analysis of common law Canada and the civil law of Quebec has been treated in unison, because since the trilogy of cases, (Andrews v. Grand and Toy (Alta.) Ltd., Thornton v. Prince George Board of School Trustees, and Arnold v. Teno)[562], decided by the Supreme Court of Canada in 1978, an upper limit of $100,000 has, arguably, been imposed on the award of compensation for non-pecuniary loss. The observance or non-observance of the limit and the general reaction of the courts to the limit and the Supreme Court's guidelines to the assessment of the award for non-pecuniary loss in common law Canada and Quebec civil law will be examined. In the third section a comparative analysis of factors assessed by the courts, in addition to the traditional heads of pain and suffering, loss of amenities of life and loss of expectation of life will be undertaken. The differences in approach between the non-legislative systems will be noted.

(1) Quantum of Awards for the Compensation of Non-Pecuniary Loss.

The Tables present examples of twenty recent awards for non-pecuniary loss in non-fatal cases of personal injury. Not all the cases are reported, some being drawn from the compilation of cases collated by Kemp and Kemp[563] in the case of England (Table I). In Table II it is noted that personal injury cases arising in British Columbia feature slightly more often but this is merely because there have been a number of relevant decisions, particularly at the appeal court level, which provide pertinent examples of the attitude taken in personal injury cases. The cases in this Table have occurred in the last four years since the trilogy of cases in 1978 which were expanded on by the decision of the Supreme Court in Lindal v. Lindal[564] in 1981. In Table III the percentage of "incapacité partiel permanente" (I.P.P.) has been included because the Quebec courts sometimes make an award for non-pecuniary loss on the basis of the I.P.P. level. At other times the I.P.P. is solely relevant in the pecuniary loss assessment. The breakdown of the award may also include a separate award for "préjudice esthétique" and this practice has been reflected in the structure of Table III. These two differences of approach are more fully discussed in the analysis of factors considered by the courts in their assessments of compensation for non-pecuniary loss.

Abbreviations are as follows:

P.S. - Pain and Suffering
L,A.L. - Loss of Amenities of Life
L.E.L. - Loss of Expectation of Life
N.P.L. - Non-Pecuniary Loss
I.P.P. - "Incapacité partiel permanente"
P.E. - "Préjudice Esthétique"
P.S.I. - Pain, Suffering and Inconvenience.

Table I: A Summary of English Decisions on the Quantum of the

Case	Sex	Age	Injury and Effects
(1) Moore v. Maidstone and District Motor Services (1979)	M	57	Broken arm, 2 fractured ribs, intermittent pain, no permanent injury.
(2) Farr v. Thomas Allen (1981)	M	24	Burns to face and neck. Discolouration of skin. Pain.
(3) Daly v. London Transport Executive (1981)	M	69	Fell down stairs, rib fracture. Full recovery. "Exquisite tenderness" from fracture.
(4) Morrison v. G.R. Carr Essex (1982)	M	33	Knee injury. Discomfort osteo-arthritis. Difficulty on open job market.
(5) Chaunt v. Herts Area Health Authority (1982)	F	44	Unsuccessful laparoscopic sterilization. Became pregnant, normal termination. Second sterilization. Haemorrhage, infection, abcess.
(6) Lemon v. Bower (1982)	F	63	Leg injuries. Shortening. Lump. Pain. Operation scars. No fashion shoes to be worn.

ırd for Non-Pecuniary Loss[565]

.,	L.A.L.,	L.E. L.,	Other	Total for (฿) N.P.L.	Comment
400				400	7 weeks off work, approx. ฿60 per week for p.s.
500				500	
500				1,500	Award noted to be on the high side.
4,000	)			4,000	
)00				7,000	฿2,000 for second sterilization. ฿5,000 for infection etc. Inconvenience included No award for operation scars.
)00				10,000	A general damages award.

Case	Sex	Age	Injury and Effects
(7) Dermody v. Mottram (1981)	F	16	Loss of use of left eye. Scarring. Change in shape of eye.
(8) Jefferson v. Cape Insulation (1981)	F	48	Inhaled asbestos fibres, mesothelioma. Chest pain. Cancer. Life expectancy 3 months.
(9) Lim Poh Choo v. Camden and Islington Area Health Authority (1977)	F	36	Brain damage. Intermittently sentient. Constant care.
(10) Herbert v. Ward (1981)	M	19	Fractured jaw, fractured ribs, "one of the worst compound fractures of lower end of left femur doctor had seen in 30 years". Left arm paralysed, amputation considered. Pain.
(11) Mariarty v. McCarthy (1978)	F	24	Paraplegic. Loss of marriage prospects.

S.,	L.A.L.,	L.E. L.,	Other	Total for (฿) N.P.L.	Comment
,250				11,250	฿6,000 for loss of vision ฿4,000 for cosmetic disability ฿1,250 for past P.S. and future anxiety.
,000		1,500		19,500	Major factor in P.S. was prospect of being parted from family.
20,000	)			20,000	
27,000	)			27,000	
			7,500	35,000	A general damages award. ฿7,500 for loss of marriage prospects.

Case	Sex	Age	Injury and Effects	P.S.,
(12) Croke v. Wiseman and Brent and Harrow Area Health Authority (1979)	M	21 months	Brain damage. Quadriplegic. Life expectancy 33 years. No appreciation of injury.	(35,0
(13) Lewis v. Gardner (1981)	F	16	Brain injury. Personality impairment appreciated by victim. Disappointment in lost expectations of life.	(35,0
(14) Wylde v. Booth (1981)	F	16	Leg injuries, severe lacerations. Unstable knees. Osteo arthritis "Horrifying" scars.	(30,0
(15) Connolly v. Camden and Islington Area Health Authority and Bunton (1981)	M	17 days	Mentally abnormal from overdose of anaesthetic. Life expectancy 22¾ years. Will become aware of abnormality.	(50,0
(16) Darwood v. Humberside Area Health Authority (1982)	M	14	Brain damage from anaesthetic. Blind. Life expectancy 10-25 years. Chest infection.	(55,0

L.A.L.,	L.E. L.,	Other	Total for (£) N.P.L.	Comment
00)			35,000	Per Griffiths L. J. - £35,000 could not be said to be too much.
00)			35,000	
0)		7,500	37,500	Other: £7,500 for the "snatching away of career". Victim had been a promising ice-skater.
0)			50,000	Per Comyn J.. "no objective test could fault the figure of £50,000 here in the light of the evidence and the reports".
0)			55,000	

Case	Sex	Age	Injury and Effects	P.S.
(17) Singh v. Sherwood (1981)	M	36	Eye injury. Blind. Pain and discomfort.	£ 5
(18) Taylor v. Glass (1981)	M	9	Brain damage from meningitis. Appreciation of disability.	£ 6
(19) Brown v. Merton, Sutton and Wandsworth Area Health Authority (1981)	F	36	Quadriplegic. Persistent pain. Full appreciation. Life expectancy 17-22 years.	£ 7
(20) Albon v. Poulter (1981)	M	23	Multiple injuries. Brain injury. Sight loss. Full appreciation. Personality change.	£ 8

L.A.L.,	L.E. L.;	Other	Total for (E) N.P.L.	Comment
,000)			55,000	Had enjoyed reading.
,000)			60,000	
,000)	1,250		71,250	
,000)			85,000	

Table II: A Summary of Decisions in the Common Law Provinces of Ca
Pecuniary Loss

Case	Sex	Age	Injury and Effects	P.S.
(1) White v. Turner (1981)	F		Unsuccessful mammoplasty. Scarring. Malformed breasts. Anxiety.	(
(2) Savard v. Richard and Richard (1979)	F	54	Neck injuries. Whiplash injuries to cervical spine. Severe neck pain requiring major surgery 2-5 years after accident.	(1
(3) Woelk v. Halvorson (1980)	M	38	Skull fracture. Drooping eyelid. Personality change, irritable, recluse, "capacity to enjoy life greatly diminished". Severe emotional injury affecting outlook on life.	(3
	F	41	Loss of consortium, society and comfort from husband. No assistance in upbringing of children.	

ada on the Quantum of Awards[566] for Non-

L.A.L.,	L.E. L.,	Other	Total for ($) N.P.L.	Comment
,000)			8,000	
,500)			12,500	Trilogy did not establish a scale from which all personal injuries to be measured.
,000)			30,000	S.C.C. restored trial judgement of $30,000.
		10,000	10,000	$10,000 for loss of consortium. Based on s.35 of Domestic Relations Act, R.S.A. 1970, C.D.-37.

Case	Sex	Age	Injury and Effects	P
(4) Brunski v. Dominion Stores Ltd. (1981)	M	50	Eye injury from exploding Coca-Cola bottle. Scarring. Vision impaired. Photophobia. Possibility of cataract.	(
(5) Rawlings v. Lindsay (1982)	F	-	Damage to left and right alveolar nerves producing anesthesia (numbness) in lower lip and chin after removal of wisdom teeth.	(
(6) Epstein v. Wyle and Wyle (1980)	M	63	Injuries to cervical and lumbar spine, headaches, pain in lower back and thumb, sleeplessness, fatigue, severe depression.	(
(7) Guy v. Trizec Equities Ltd. (1979)	M	54	Neck strain. Psychological side effects. Prevented from working.	(

S.,	L.A.L.,	L.E. L.,	Other	Total for ($) N.P.L.	Comment
20,000	)			20,000	Covers P.S., L.A. L. and future L. A.L. involving danger of injury to good eye.
20,000	)				A general damages award.
25,000	)			25,000	Award reduced from $75,000 at trial.
40,000	)			40,000	

Case	Sex	Age	Injury and Effects	P.
(8) Johnstone v. Sea-land Helicopters Ltd. (1981)	M	42	Severe injuries from deceleration in a high speed helicopter. Rotary fracture dislocation of thoracic spine. 25% limitation of movement. Hip injuries. Shoulder injury. Pain.	(
(9) Henderson v. Hatton and Hatton (1981)	F	28	Fractures to legs, right arm and ankle. Head and internal injuries. Pregnant. Traction. Impaired gait. Pain. Scarring.	(
(10) Russell v. Kostichuk (1980)	M	56	Extensive injuries treated successfully. Main loss anxiety neurosis, accident neurosis, psychosomatic injuries.	(
(11) McLeod v. Palardy (1981)	F	31	Multiple injuries, head injuries. Brain damage. "Massive destruction" of right hip. Pain.	(

.,	L.A.L.,	L.E. L.,	Other	Total for ($) N.P.L.	Comment
50,000	)			50,000	
50,000	)			50,000	
50,000	)			50,000	"At first blush" the award seems high but it was not considered "so inordinately high as to be wholly out of proportion".
50,000	)			50,000	The award was considered "far from generous" yet not "so inordinately low as to invite the intervention of an appeal court".

Case	Sex	Age	Injury and Effects
(12) Ostapowich v. Benoit, Hoover, Stachruk and Saskatchewan Telecommunications (1982)	M	16	Paralysis from mid-chest down. Broken ribs, punctured lung, broken hip and leg.
(13) Rezanoff v. Gogal (1981)	F	55	Serious injuries causing incontinence. Leg brace required. Vision impaired. Became unemployable. No social activities.
(14) Andrews v. Grand and Toy (Alta) Ltd. (1978)	M	21	Quadriplegic. No normal bowel, bladder or sex functions. Mentally unimpaired. Life expectancy 45 years.
(15) Lindal v. Lindal (1981)	M	19	Extensive brain injury, severe dysarthia (speech impairment). Spasticity. Personality and emotional disorder. No reconciliation to the injury.

.S.,	L.A.L.,	L.E. L.,	Other	Total for ($) N.P.L.	Comment
73,000	)			73,000	A $50,000 award adjusted for inflation to $72,943.98 and rounded up to $73,000.
75,000	)			75,000	
100,000	)			100,000	"Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature".
100,000	)			100,000	S.C.C. confirmed award of $100,000 from $135,000 awarded at trial.

Case	Sex	Age	Injury and Effects
(16) Thornton v. Prince George Bd. of School Trustees (1978)	M	15	Quadriplegic. Mentally unimpaired. Life expectancy 49 years.
(17) Arnold v. Teno (1978)	F	4½	Mental impairment. Spasticity, not fully paralysed. Speech impaired. Life impairment 66.9 years.
(18) Fenn v. City of Peterborough (1981)	F	24	Severe burns. Legs amputated. Fifth fingers amputated. "Excrutiating pain". Depression. Nightmares. Lost all children. Confined to wheelchair.
(19) Blackstock and Vincent v. Patterson (1982)	F	24	Impairment of intellect. Right hemiplegia, some impairment of left hand and leg. "Devastating" injuries. Epilepsy. Eye injury.

P.S.,	L.A.L.,	L.E. L.,	Other	Total for ($) N,P.L.	Comment
(	100,000	)		100,000	Followed Andrews case.
(	100,000	)		100,000	Although injuries of a different type to those of Andrews, held to justify the $100,000.
125,000	)			125,000	No scale established by trilogy in view of Ontario Court of Appeal but upper limit recognised.
128,366.10	)			128,366.10	$100,000 award increased from 1978 level by $28,366.10 on basis of inflation.

Case	Sex	Age	Injury and Effects	P.S.,
(20) MacDonald v. Alderson (1982)	M	19	Brain damage, mental impairment, personality changes. Lost sight in one eye, no sense of taste or smell. Disability in all four limbs. Serious speech impairment. Appreciated the loss.	(

.A.L.,	L.E. L.,	Other	Total for ($) N.P.L.	Comment
,000	)		130,000	$150,000 awarded at trial, reduced to $130,000 by Manitoba Court of Appeal.

Table III: A Summary of Decisions in Quebec on the Quantum of Award

Case	Sex	Age	Injury and Effects	P.S.I.
(1) Lacroix c. Forget (1980)	F	32	Burns. Scars on one foot. Pain.	2,500
(2) Drapeau-Gourd c. Power (1982)	F		Tampon left in vagina after birth of child. Inconvenience, embarassment.	2,000
(3) Laramée c. Coutu (1982)	F		Injury to sciatic nerve. Pain. I.P.P. 3%.	(
(4) Scavano c. Shahim (1982)	M		Head injuries. Severe scars on face, neck and left arm. Extreme sensitivity in scar areas. I.P.P. 9%.	(1
(5) McLeod c. Bouchard (1982)	F	11	Scars. Limp. I.P.P. 10%.	10,000
(6) Fournier c. Raby (1982)	F	3	Very severe scars caused by faulty toys I.P.P. 15%.	8,000
(7) Cavathas c. Venne (1982)		16	Fracture to left leg. Complications, infections. Scars. 25%.	(15,0

or Non-Pecuniary Loss[567]

A. P.E.	I.P. P.	Other	Total for ($) N.P.L.	Comment
3,500			6,000	Aesthetic damage only.
			2,000	
000 -	)		7,000	
00	) 30,000		40,000	I.P.P. award on basis of injuries' effect on job.
000 (25,000)			50,000	
30,000			38,000	Of $8,000 for P.S.I. $3,000 for future P.S.I.
)(75,000)			90,000	$75,000 evaluated on basis of 1% I.P.P. = $3,000.

Case	Sex	Age	Injury and Effects	P.S.I.
(8) Bois c. Hôtel-Dieu de Québec (1980)	M	42	Loss of eye. Infection. I.P.P. 25%.	3,000
(9) Lesieur-St-Amand c. Gingras (1981)	F	51	Injury to sciatic nerve caused by injection. Walking difficult. "Les douleurs sont continuelles". I.P.P. 30%.	15,750
(10) Ellenberg c. Bertrand (1982)	F	31	Multiple injuries. I.P.P. 35%.	7,500
(11) Therrien c. Labrecque (1982)	F	60	Multiple injuries. Replacement of hip. Depression. Difficulty in walking. Pain. I.P.P. 38%.	(10,00
	M	63	Scar.	500
(12) Schierz c. Dodds (1981)	F	20	Stroke. Partial paralysis of right side of body. Difficulty in walking. Psychological incapacity. I.P.P. 58%.	(40,00

A. P.E.	I.P. P.	Other	Total for ($) N.P.L.	Comment
10,000)	35,000		48,000	
6,300			22,050	Equation used for P.S.I. = 17.5 (life expectancy) x 1,000 per annum less 10% (hazards of life = $15,750. Equation for P.E. (400 x 17.5) - 10% = $6,300.
4,750	50,000		62,250	
)	50,000		60,000	
250		5,000	5,750	$2,000 for consortium. $3,000 for servitum.
)25,000	117,488		65,000	I.P.P. included in pecuniary loss award.

Case	Sex	Age	Injury and Effects	P.S.I.
(13) Corriveau c. Pelletier (1981)	F	18	Scars. Unable to bear children. Multiple fractures. Psychological damage. I.P.P. 58%.	(
(14) Campeau c. Société Radio-Canada (1979)	M	30	Paraplegic. No mental impairment. Spasms. I.P.P. 80%.	(
(15) Dugal c. P.-G. de Québec (1982)	M	25	Paraplegic. Use of upper limbs retained. Full mental faculties. I.P.P. 85%.	(73
(16) Peck-Johnson c. Peck (1982)	F	10	Brain injury. Risk of epilepsy. I.P.P. 95%.	(75,0
(17) La Pierre c. P.-G. de Québec (1979)	F	5	Encephalitis after a measles vaccination. Brain damage. "Une vie complètement brisée". I.P.P. 95%.	(
(18) Daoust c. Fernand Bérubé	M	21	Quadriplegic. No mental impairment. I.P.P. 100%.	(

.A. L.	P.E.	I.P. P.	Other	Total for ($) N.P.L.	Comment
65,000		)		65,000	
90,000		)		90,000	One doctor considered I.P.P. to be 100%.
0	3,500	)		76,500	$85,000 had been awarded at trial on equation of 85% I.P.P. = $85,000 i.e. 1% I.P.P. = $1,000.
)	250,000			75,000	I.P.P. award for employment prospects, lack of autonomy.
,000	)			25,000	
00,000		)		100,000	

Case	Sex	Age	Injury and Effects	P.S I.
(19) Bastien c. Carle (1982)	M	24	Hemiplegic. Brain damage. Reduced mental function. Epilepsy. I.P.P. 100%.	(10
(20) Hite c. Jim Russel Racing Drivers School (1981)	M		Facial damage. Personality change. Psychological effects. I.P.P. 100%.	(

L.A. L.	P.E.	I.P. P.	Other	Total for ($) N.P.L.	Comment
00)	1,000			101,000	
110,000		)		110,000	$100,000 limit would be equal to $135,000 in 1981.

(2) Analysis.

(a) Common Law Canada and Quebec Civil Law.

The courts' approach in the common law jurisdictions of Canada and the civil law system of Quebec have been treated together in the ensuing analysis because the principles of evaluation used by the Quebec courts are now predominantly drawn from the Supreme Court of Canada's trilogy of cases decided in 1978. The issues raised by the Supreme Court are referred to in the following section.

(i) Explanation of the Trilogy and Lindal v. Lindal.

A brief résumé of the questions recently tackled by the Supreme Court of Canada in the context of compensation for non-pecuniary loss in personal injury is considered to be the most efficacious starting point in the current analysis. In all four cases the victims suffered severe personal injuries. Andrews and Thornton, young men of twenty-one years and fifteen years respectively at the time of their accidents, were both rendered quadriplegic. Andrews is dependent for his very survival on others in terms of dressing, personal hygiene, feeding and so on, yet with the aid of a wheelchair and a specially designed van he has a certain amount of mobility. His intellect is unimpaired and, as Dickson J. states, Andrews "wants to live as other human beings live"[568]. Thornton's position is essentially the same as in Andrew's case and an award of $100,000 for non-pecuniary loss was made in each case. In the third case of the trilogy, Arnold v. Teno, Diane Teno suffered different injuries, yet the same award as in Andrews and Thornton was made. Diane Teno was four years old at the time of the accident in which she suffered brain injuries with resultant physical disabilities and considerable mental

impairment. Medical evidence presented by a doctor to the court concluded that Diane Teno was "one of the most disabled children"[569] he had ever seen and the Court of Appeal of Ontario[570] had confirmed an award of $200,000 for non-pecuniary loss for Diane Teno's case, but this was reduced to $100,000 by the Supreme Court of Canada who saw fit to follow the "upper limit" set by the Andrews decision. In Lindal v. Lindal Brian Lindal also suffered mental impairment resulting in speech impairment and spasticity. In addition to the severe brain damage and physical injuries, Lindal suffered personal and emotional disorder. Fulton J., at trial[571] stated that Lindal is unable to understand his impairment and unable to reconcile himself mentally to his condition which leads to daily frustration, irritability and depression. $135,000 was awarded for non-pecuniary loss at trial and this was reduced to $100,000 by the Court of Appeal and confirmed by the Supreme Court of Canada in 1981, following the "rough upper limit" established in Andrews.

The Andrews case provides welcome assistance in the comprehension of the assessment of compensation for non-pecuniary loss. The Supreme Court adopts the functional method of assessment of compensation to aid it in the calculation of the amount of damages to be awarded. In the search for "reasonable solace" for the victim's misfortunes the court strives to provide funds for "physical arrangements" "above and beyond" those relating to the injury, which will help to make life more endurable. There is no explanation as to what constitutes "more general physical arrangements" and it is unclear whether this would also encompass the satisfaction of intellectual and emotional desires. Dickson J. states[572] earlier in the case that although money is a "barren substitute for health and personal happiness" it may, "within reason", form part of the claim if the mental or physical health of the victim may be sustained or improved. The reference to mental health could be interpreted to cover the emotional and psychological con-

dition of the victim. At the same time as the court adopts the functional approach, which opens the path to a more detailed consideration of the needs of individual victims, on the basis of providing money which will serve a useful function, it is also stating that guidelines are needed to translate into monetary terms what has been lost, which is a goal of the conceptual approach to compensation[573]. The concern for moderation and a "fair" and "reasonable" award are reflected in the adoption of the functional approach which enables the court to assess what is needed to alleviate the effects of the disaster for the victim. The possibility of the award for non-pecuniary loss creating an excessive burden of expense, which would involve a major reallocation of resources, would be avoided[574]. However the reason behind the "upper" of $100,000 which the Supreme Court imposes in cases of a young, adult quadriplegic appears to be based solely on the extent of the very severe injuries suffered by Andrews. The court observes that,

> "it is difficult to conceive of a person of his age losing more than Andrews has lost".[575]

Thus, the age of the victim (although not the life expectancy), and the severity of the injuries, are major factors to consider and there is no express consideration in the case of additional "physical arrangements" that could have been provided to bring Andrews some solace. The court seems to base its assessment on the degree of physical injury rather than looking to the effects of the injuries and what could be done to provide the victim with solace.

The $100,000 upper limit has been argued to apply only in cases of severe injuries and to have no relevance for cases involving injuries with no comparison to those of Andrews, Thornton and Teno and these points will be discussed in the analysis of courts' observance or non-observance of the upper limit. The Andrews case appears to introduce a scale, in which the maximum injury should be awarded the

maximum amount on the scale which would be $100,000. It is submitted that although the limit is to be viewed flexibly in future cases,

> "in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic conditions", 576

such a scale approach is in total contradiction to the perspective of the functional approach and resembles a conceptual approach in the method of assessment. With respect there is clearly considerable confusion in the Supreme Court's judgement because the practical effect of the $100,000 limit for damages for non-pecuniary loss is unclear.

Notwithstanding the confusion surrounding the practical effect of the functional approach, the opportunity was present in the Lindal decision to provide clarification on the use of the upper limit in two important areas. First, the interpretation of "changing economic circumstances", which has been treated by the courts as referring to inflationary trends, and, secondly, "exceptional circumstances" which has been taken to refer to differences in injuries which justify an increase in the $100,000 limit. It is now accepted that inflation "should" be considered and it is surprising that the Supreme Court in Lindal should not state more strongly that judicial notice "should" be taken, rather than simply "may" be taken, of inflationary trends. The Supreme Court had said that precise evidence must be laid before the court before inflation could be considered, yet the words of Duff C.J.C. in 1938 seem more to the point;

> "It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally...". 577

The Supreme Court's concern to keep a tight lid on the $100,000 limit for non-pecuniary loss is also reflected in

the failure to indicate in what circumstances the limit could be increased on the basis of a difference in injuries. The court in Lindal held that a difference in injuries alone does not justify exceeding the upper limit and stated that such cases of increase would be "rare indeed". It is submitted that the elimination of extravagant claims seems to be the major reason for upholding the limit so strictly and guidance as to factors constituting "exceptional circumstances" is lacking.

Other issues raised by Andrews in connection with the assessment of compensation for non-pecuniary loss are;

1) That there should be no variations between individual provinces. The Supreme Court argues for an equal measure of compensation to all victims of similar non-pecuniary loss[578], yet this underlines the confusion on the methods of assessment. The conceptual theory refers to equal compensation for equal injury but the Supreme Court endorses the functional theory as the method of assessment to be applied, which does not reflect such a principle. It is submitted that consistency of treatment of those suffering personal injury is a valid aim, but not at the expense of avoiding all subjective assessments in the desire for uniformity.

2) That a composite award should be made[579]. The overlap between the elements of non-pecuniary loss, pain and suffering, loss of amenities of life and loss of expectation of life, favours a composite award. The award for non-pecuniary loss should also be made separately from the pecuniary loss assessment of damages[580].

3) That the award must be "fair" and "reasonable". Fairness is to be gauged by earlier decisions which approach reflects the desire for consistency not only between plaintiffs but also among defendants. Yet it is questioned how earlier decisions are to be used. If they are used to indicate the

amount of the award according to different types of injury, the conceptual approach to compensation is more in evidence. But if earlier decisions are used as a guide to illustrate how courts should approach the question of providing solace for the victim's misfortunes, the endorsed functional method of compensation would hold sway. Reasonableness is required because the victim is already provided for in terms of future care and the absence of an objective yardstick for translating pain and suffering into monetary terms opens the area to "wildly extravagant claims". It is observed that in many cases a future care award will not be necessary because the award for special damages will cover all expenses incurred, particularly if one notes the long delay that often exists between the date of injury and the date of judgement. The major award in many cases will be for the compensation of non-pecuniary loss.

The attitude taken by the courts in common law Canada and the civil law of Quebec will now be examined.

(ii) The Observance of the Maximum Limit.

(1) Acceptance of the Limit.

In the common law jurisdictions of Canada there is no uniform acceptance of the Supreme Court's maximum limit in all cases of personal injury. Although some cases accept the limit unquestionably and do not challenge its validity for cases of less severe injury than quadriplegia, other cases make a clear distinction between cases of severe injuries, to which the limit applies, and cases of less severe injury, to which it does not. In British Columbia cases such as Rezanoff v. Gogal[581] and Epstein v. Wyle[582] indicate acceptance of the limit, for all aspects of the assessment of non-pecuniary loss in personal injury cases, and the same attitude is found in Manitoba[583] and Saskatchewan[584]. Cases in Ontario[585], New Brunswick[586] and Newfoundland[587]

approach the existence of a limit or an implied scale with more caution in situations of less severe injury and this practice will be considered in the next section. In Quebec the courts treat the $100,000 figure as a fixed ceiling in cases such as Dugal c. P.G. de Quebec[588], Campeau c. Radio-Canada[589] and Daoust c. Bérubé[590], where the circumstances of the cases are comparable to those of the Andrews case. It is observed that in cases where there is a sizeable I.P.P. assessment the court will refer to the Andrews principles and observance of a limit, as M. le juge Letarte stated in Dugal,

> "la Cour ne peut oublier que les précédents de la jurisprudence créent jusqu'à un certain point, en faveur des parties, des droits, mais aussi des limites".[591]

subject to inflationary trends, in cases of severe physical injuries comparable to those suffered by the victims of the cases coming before the courts, and the majority of cases will be approached in different ways depending on the jurisdiction involved. However, one must not lose sight of the fact that the Supreme Court may have intended the $100,000 limit to apply to all cases of non-pecuniary loss damages and one is dealing with the application of that amount in different cases.

Whether or not a jurisdiction accepts the limit for cases of less severe injury which may have devastating effects, there is general agreement that the value of the $100,000 limit should keep abreast with inflation. The effect of inflation is calculated from 19th January 1978[592], the date of the Supreme Court's judgement in Andrews but the means by which the practice is followed is dismally inaccurate and inconsistent. The British Columbia Court of Appeal[593] held that the date from which inflation should be calculated is 1978, yet upheld the trial judge's award which was calculated from 1974. In McLeod v.

Palardy[594] the Manitoba Court of Appeal held that the $100,000 limit in March 1980 was worth approximately $150,000 due to the "erosion of the value of currency" yet, the same court in MacDonald v. Alderson adopted a much lower figure of $130,000 to take account of the "inflation rate" between 1978 and July 1980. In April 1981 Proudfoot J. in Rezanoff v. Gogal held that, on the basis of the Consumer Price Index without considering actual testimony as to the rate of inflation, the limit of $100,000 would be of $135,000 in value, and in September 1981, the Cour Supérieure in Montreal, Quebec, in Hite c. Jim Russel Racing Drivers School[595] came to the same conclusion. This increase is approximately 10.5% per annum, yet a lower rate of approximately 9.9% is used by the court in Ostapowich v. Benoit[596]. In the latter case the court in 1982 increased an award of $50,000 by $23,000, to take into account "inflation" in order to replace the "purchasing power" of $50,000 in 1978. However not all courts will increase the limit and the inconsistency is illustrated by the case of Bastien c. Carle[597] in Quebec, in which the court did not see fit to increase the $100,000 award on the basis of inflation since 1978, although inflation was considered in the award for the loss of the victim's spouse and only child.

It is submitted that despite a semblance of uniformity in the acceptance of a maximum limit which will be awarded for at least the most severe injuries, there appears to be little consistency in how the value of the limit should be treated. Should the court rely on the judge's personal knowledge of inflationary trends, or should actuarial evidence be brought? Should the Consumer Price Index be used as a guide or would this not be sufficient in cases of damages awards? It can be seen that although there may be acceptance by the courts of the need for a limit to prevent extravagant claims, the future use and treatment of the limit by different courts across Canada requires detailed review. The Supreme Court

allowed for flexibility for "changing economic conditions" and it would appear that this phrase is in need of urgent clarification.

(2) Non-Acceptance of the Limit.

The non-acceptance of a maximum limit occurs predominantly in cases of less severe physical injuries. Some courts have interpreted the $100,000 limit as implying a scale, ie. quadriplegia = 100% and 100% = $100,000. The scale approach to the assessment of non-pecuniary loss will be examined in the following section and its rejection is among the arguments raised by courts against the "limits allegedly set by"[598] the trilogy in 1978. Dickson J. in Andrews stated that;

> "This court is called upon to establish the correct principles of law applicable in assessing damages in cases such as this where a young person has suffered wholly incapacitating injuries and faces a lifetime of dependency on others".[599]

A strict interpretation of this statement would mean that the limit may only be applied to a young victim who, due to his injuries, would be dependent on others. This is an extremely narrow category of persons and certain cases such as Savard v. Richard and Richard[600] and Johnstone v. Sealand Helicopters Ltd.[601] take the view that,

> "these decisions [the trilogy] fall into a separate division and apply principally and essentially to cases involving severe personal injuries where large awards are justified on the side of special or pecuniary damages. It is now my view that they provide only limited guidelines for cases involving the ordinary and less severe types of injuries".[602]

Zuber J.A. in Evelyn Richards v. B. and B. Moving and Storage Ltd.[603], giving judgement for the Ontario Court of Appeal, held that the upper limit was undoubtedly established in the assessment of damages for non-pecuniary loss but only for "those plaintiffs who have been made economically whole" by the provision of damages for the cost of future care and so on. A scale for the measurement of all personal injury cases was firmly rejected. The same court held in Fenn v. City of Peterborough[604] that the trilogy did "not establish an absolute limit" for the award of non-pecuniary damages, but this case may be distinguished because the injuries were held to be more painful than in Andrews, Thornton or Teno, and were classifiable under Dickson J.'s flexibility clause of the "inevitable differences in injuries" which could justify an increased award. Mrs. Fenn had suffered "incapacitating injuries" which required "dependency on others" and her case fulfils Dickson J.'s exception to the limit. However Michael Hite in Hite c. Jim Russel Racing Drivers School was wholly autonomous and his injuries were not "wholly incapacitating", but the Quebec court considered that his hideous facial damage, which left him unrecognisable, was sufficient to justify an increase in the $100,000 limit, in addition to the effects of inflation. It seems that the maximum limit may be coming "unstuck" on the issue of the type of injuries that it covers but this is only a recent development and it remains to be seen how the maximum limit will be accepted in the future.

It should be noted that cases of more minor personal injuries may make no reference at all to the Andrews trilogy, for instance, White v. Turner[605], Rawlings v. Lindsay[606] and Laramée c. Coutu[607]. These were cases involving predominantly cosmetic, psychological or emotional inconvenience in the case of women, with awards ranging from $7,000 to $20,000.

It is submitted that it is surprising that the issue

of the maximum limit and whether it applies to all cases or only those of severe incapacitating injuries, should attract so much debate because it is surely the principles of assessment and the methods outlined by Dickson J. that should bear more weight. The examination of the functional approach to the assessment of compensation for non-pecuniary loss receives scant attention from the courts and emphasis appears to be placed on Dickson J.'s reference to a "fair" and "reasonable" award which has to be guided by awards in previous cases. In Quebec there is regular reference to the principles set out by the Supreme Court, for example, in Bastien c. Carle, Peck-Johnson c. Peck[608] and Cavathas c. Venne[609], but there is little explanation concerning the actual calculation of the award for non-pecuniary loss. The approaches taken by the courts towards the calculation will now be discussed.

(b) The Calculation Techniques.

(i) Functional Approach.

Despite the endorsement of the functional approach to compensation by the Supreme Court, which was an approach designated to entice the degree of moderation desired by the court in order to contain Canadian damages awards for non-pecuniary loss within stringent bounds, the courts in Canada have made only passing reference to the functional approach. One does not see the courts investigating the methods by which a victim could be provided with solace or more "general physical arrangements" to make life more amenable and endurable. However in Ostapowich v. Benoit the court referred to the functional approach and the need to provide the injured person with "solace for his misfortune" and in an earlier case of Fraser v. Yellow Cab Ltd.[610] it was held that the plaintiff could be provided with "other things in life" which she could enjoy in "place of those things she

has lost". It is submitted that further references to the functional approach are difficult to find.

(ii) Comparative Approach.

The comparative approach seems to be the most favoured approach in the calculation of damages for non-pecuniary loss. The courts, at all levels and in all jurisdictions, compare the injuries sustained by the case in hand with the injuries suffered by the victims in the trilogy. The "comparative method" for "gauging the appropriateness" of awards for non-pecuniary loss is described by the British Columbia Court of Appeal as being "firmly established as part of the law of this province"[611]. This view is expressed despite prior reference to the Supreme Court of Canada's endorsement of the functional perspective which results in a "more rational justification for non-pecuniary loss compensation"[612]. In the same court, in Blackstock v. Patterson, counsel for the appellant argued that the award of the trial judge should be reduced on the basis of the functional approach, with its emphasis on the need for solace, but the Appeal Court held that since the respondent's injuries were "devastating" and were "fairly close to Teno" they fell within the $100,000 category fixed by the trilogy. Other jurisdictions that adopt a comparative approach are Ontario in Brunski v. Dominion Stores Ltd.[613], Newfoundland in Johnstone v. Sealand Helicopters Ltd., and Manitoba in McLeod v. Palardy. In Johnstone[614] the Trial Division, affirmed by the Court of Appeal, criticised the "over-reverent worship" of the concept of "uniformity" in cases of assessment of damages for personal injury which may deprive the victim of "just recompense" for injuries sustained. However the court does make comparison with cases of similar injury and the approach of "just recompense" would suggest that emphasis is placed on the degree of injury rather than on a damages award designed

to provide solace and a functional use for the money. It is submitted that the court in Johnstone had plenty of scope to consider the functional method of compensation. Mr. Johnstone was full of determination not to let his injuries curtail his hobbies or work, yet the court recognised that eventually his future enjoyment of life would be "greatly diminished". Other sources of enjoyment and interest could have been discussed particularly because Mr. Johnstone was keen to overcome his injuries.

In Quebec the courts take an extremely mixed approach to the assessment of non-pecuniary loss. In cases where the victim suffers a smaller percentage of I.P.P. such as in Drapeau-Gourd c. Power[615] or Scaran c. Shahim[616], there may be no reference to a comparison with the trilogy, yet in cases of approximately 25% I.P.P. to 50% I.P.P. the principles of Andrews will be referred to, although a comparison may not be made, as in Bois c. Hôtel-Dieu de Québec[617] and Lesieur St-Amand c. Gingras[618]. In the cases of larger I.P.P. percentage the severity of injuries sustained by Andrews is usually referred to and a comparison is made on which the final assessment is calculated, as in Campeau c. Radio Canada[619], Hite c. Jim Russel Racing Drivers School or Schierz c. Dodds[620]. However it is observed that some Quebec courts place more emphasis on the effect of the injuries, as in Hite or Schierz, in their comparison with the effect of the injuries in the Andrews trilogy. There is little reference to the functional approach except in direct quotations from the Andrews case.

It may be argued that the comparative approach is merely following the practice set by the Supreme Court itself in Thornton and Teno. In these cases the Court was making direct comparison with the injuries sustained by Andrews and those suffered by Thornton and Teno. A separate consideration of the victims needs in terms of solace and the cost of providing solace is not made.

(iii) Scale Approach.

In some cases courts have interpreted the Andrews decision as impliedly establishing a scale or equation from which all other calculations of compensation for non-pecuniary loss should be made. The implied scale would be based on the equation of 100% I.P.P. (ie. maximum injury) = $100,000. There was express reference to such an equation in Dugal c. P.-G. de Quebec[621] in which the victim who suffered 80%-85% I.P.P. in a road accident was awarded $85,000. This has recently been reduced to $73,000 on appeal because the victim's circumstances changed and he had married and fathered a child[622]. It had been held at trial;

> "Sans doute peut-on résoudre le problème, en formulant l'équation voulant qu'une incapacité partielle permanente équivalent à 100% se traduise par l'action d'une somme de $100,000 et que par voie de conséquence l'incapacité du demandeur 80% à 85% suivants les médecins experts, justifie pour lui l'octroi de $80,000 ou $85,000".[623]

In Henderson v. Hatton[624] Craig J.A. refers to the trial judge's award of approximately 30% of the upper limit set by Andrews and this amount is affirmed by the Court of Appeal. This approach, which presents a purely objective method of calculation, may not reflect an accurate interpretation of the functional approach and it is openly rejected in some instances. In Godin, Brun and Caissie v. Bourque[625] Meldrum J. stated that the trilogy is

> "not intended to set a $100,000 limit for a quadriplegic against which every trial judge must find a proportion. I do not ask, 'If a quadriplegic is 100%, what percentage is a broken hip?'".[626]

A similar attitude has been taken in Ontario[627] and Newfoundland[628].

(iv) "Fair" and "Reasonable" Approach.

There is consistent reference to the notions of fairness and reasonableness in the calculation of the award for non-pecuniary loss. In Quebec one sees the Court of Appeal in Corriveau c. Pelletier[629] refer to its award of $65,000, as being "reasonable" for the case, but Montgomery J. does not explain why "two-thirds of the ceiling of $100,000" impressed him as "reasonable". In Brunski v. Dominion Stores Ltd.[630] compensation of $20,000 for an eye injury was deemed to be "fair" after considering a number of items, including future pain and suffering and loss of enjoyment, the danger of potential future damage to the victim's good eye and the recognition that eyesight is extremely important and valuable to people in our society. A "fair" award was also referred to in Rezanoff v. Gogal yet the court merely referred to a general consideration of "all the circumstances of the case" and the "outside limit" of $100,000.

(v) Other Approaches.

(1) Life Expectancy x "Compensation Equitable" Less 10% for Hazards of Life.

In Lesieur-St-Amand c. Gingras[631] a Quebec court devised a calculation technique for the assessment of non-pecuniary loss. $1,000 per annum was considered to be an equitable sum for the compensation of pain, suffering and inconvenience and this sum was then multiplied by the objectively determined fact of life expectancy (17.5 years) and reduced by 10% for the contingencies of hazards of life. The calculation is similar to a pecuniary loss calculation since it makes deductions for contingencies. There is no

explanation as to why $1,000 per annum for pain and suffering and $400 per annum for aesthetic impairment (to which the same formula applied) were considered reasonable sums, yet at least the awards for non-pecuniary loss were assessed consistently.

(2) $3,000 = 1% I.P.P.

In the Quebec case of Cavathas c. Venne[632] the court considered the victim's age and life expectancy and different hazards of life to arrive at an equation which awarded $3,000 for each 1% of I.P.P. This was treated as a non-pecuniary award and an additional separate award for pain, suffering, inconvenience, and loss of enjoyment of life was made taking into account the individual circumstances of the case and bearing in mind the maximum of $100,000. It appears that the court is making two assessments, first, on an objective basis and, secondly, applying a more subjective approach, to encompass particular circumstances of the case.

(vi) Comment.

Since the trilogy in 1978 developments have occurred in the assessment of damages awards in personal injury cases in the common law and civil law jurisdictions of Canada. A separate, composite award is generally made for non-pecuniary loss in the common law provinces although a few general damages awards (in which one award is given for pecuniary and non-pecuniary loss) are still made[633]. In Quebec the awards are not always of a composite nature for non-pecuniary loss and there is often a separate amount for "préjudice esthétique"[634]. Andrews called for uniformity of assessment and elimination of variation among the provinces for cases of similar non-pecuniary loss. It is submitted that the call for consistency in the method of assessment is a welcome approach. However clarification is required on the practical method of calculation that should be used because the Supreme Court of Canada's present guidelines display a number of "fundamental flaws"[635]

in both the theory behind and the practical application of the methods of assessment for non-pecuniary loss.

(c) England - Calculation Techniques.

(i) Comparative Approach.

In England the comparative approach to the assessment of compensation for non-pecuniary loss is of a much more rigid nature than in Canadian common law and the civil law of Quebec. The comparative approach applies in the assessment of damages for non-pecuniary loss arising from all types of injury and indicates a tariff approach towards the award for pain and suffering and loss of amenities of life, in which the victims of similar injuries will receive a similar award for the conventional heads of non-pecuniary loss. In Lim Poh Choo v. Camden and Islington Area Health Authority[636] Lord Scarman held that in the case of an award for the "conventional" items, such as pain and suffering, "comparability with other awards is certainly of value"[637] in the desire to achieve consistency among cases. Yet the court recognises that awards for pain and suffering should depend on the "personal awareness" of pain and a subjective approach should be taken according to the circumstances of the case, but the overriding concept of comparability dominates the assessment. However some recent awards have departed from this convention and much larger awards for non-pecuniary loss have been made notably in Brown v. Merton, Sutton and Wandsworth AreadHealth Authority[638] and Albon v. Poulter[639] in which £70,000 and £85,000 were awarded respectively. These were cases of severe injury, in Brown's case the victim was rendered paraplegic suffered from paraplegia (for which average awards for non-pecuniary loss were in the range of £35,000 to £50,000) and suffered "very severe life-destroying pain" described as "continuous, unpleasant and horrible"[640]. In Albon the victim had suffered multiple injuries, blindness, personality change and brain damage. Both victims were fully aware of their

incapacities. The traditional conventional tariff approach is the usual practice in England and in 1981 the Court of Appeal in Croke v. Wiseman[641] held that £35,000 for non-pecuniary loss was the "right figure for the gravest injuries". Under this approach there may be divergence from the observance of a strict tariff for each injury because the court may allow for a small increase or reduction in the tariff figure in order to accomodate the different facts in each case. In Croke the court compared other cases[642] which had awarded up to £15,000 more or less than the £35,000 figure awarded in Croke for non-pecuniary loss. However the assessment of non-pecuniary loss is essentially founded on an objective tariff system. There is no detailed examination of the personal effects of an injury and the mere fact that a monetary award is made for non-pecuniary loss is considered to be the solace that the victim needs[643]. The functional purpose of such an award is not addressed by the courts despite surveys which indicate that handicapped persons would welcome an award that provided assistance to remove restrictions on movement, increase mobility and improve social contact, rather than awards geared to compensate physical pain and suffering[644].

The Pearson Commission were equally divided on whether to impose an upper limit in cases of an award for non-pecuniary loss. It was proposed[645] that the maximum would be calculated on the basis of five times the average annual industrial earnings (about £100,000 in 1979). This would serve to increase many English awards. Atiyah notes that the tendency of the courts to "objectivize" the damages awards for non-pecuniary loss may be viewed as

> "an expression of the belief in equal treatment of like cases as an ultimate value of justice",[646]

but he observes that such an approach is an important aspect of the administration of the tort system[647]. The tariff for a particular injury drawn from comparable cases must be treated with some caution because figures may change with inflation and some courts, as in Moriarty v. McCarthy[648] still

make general damages awards which include damages for lost earnings as well as for pain and suffering. It is interesting to notice that the desire to keep awards at the same level seems to have dominated the comparative tariff approach and there is no adequate account taken of the value of awards today compared with the amount awarded of ten years ago. As a result the value of awards for non-pecuniary loss now is much lower than in the past and this trend is fully shown by Tables provided by Kemp and Kemp[649]. For example an award for quadriplegia in 1970 or 1974 of £20,000 would in 1981 be worth £85,000 and £60,000 respectively. These levels are only matched in one or two of the more recent cases. Table I indicates the various levels of recent awards in England.

(ii) Comment.

In Pickett v. British Rail Engineering Ltd.[650] Lord Scarman considered it inevitable that a "flexible judicial tariff" would become the basis of an award for non-pecuniary loss because this would be the only means of awarding "fair" compensation. "Fair and reasonable" compensation was stressed as an aim by the House of Lords in Lim Poh Choo and a means of achieving this is to take a "second look" at the total award utilizing "native caution and acquired cynicism"[651] in the evaluation of the correct amount to see if it does not look "outrageously high"[652]. The rationale for taking the "second look" seems to be to avoid overlap between subheads of damage. It is noted that the Pearson Report[653] considered it wrong in principle to reduce the size of one award by reason of the size of another. It is submitted that awards in England are somewhat less, on a dollar for dollar basis, than those made in common law Canada and Quebec but the difference is not substantially great. If the Pearson Commission's upper limit was adopted for awards of non-pecuniary loss, English awards would

undoubtedly be much higher than those in Canada.

(d) Factors Affecting the Level of Awards for Non-Pecuniary Loss.

The Tables and the analysis of calculation techniques by the courts have hopefully provided an insight into how the court will approach the financial calculation of compensation for non-pecuniary loss. The following analysis is intended to further the understanding of this calculation by examining, in more detail, the factors considered by the courts in making their general awards under the headings of pain and suffering and loss of amenities of life within the all embracing definition of non-pecuniary loss. The treatment of and attitude towards factors such as the age and sex of the victim, the appreciation of the injury's effects, or the psychological consequences of injury will be discussed in the light of the court's sympathy, receptiveness or understanding of these issues, in terms of the final amount of the award made for non-pecuniary loss.

(i) Psychological Factors.

Psychological, personality and emotional changes and disorders occasioned by the injuries receive detailed consideration by the courts in common law Canada and the civil law of Quebec, but there seems to be less direct reference to these factors by the English courts. In the aforementioned jurisdictions the psychological factors are dealt with in a general way and are not categorised under a particular element of non-pecuniary loss. In Arnold v. Teno[654] Spence J. stated that the "personality of the plaintiff" must be determined and presumably any alterations in the personality that had taken place. The personality and emotional changes and their effect on the victim's behaviour were also stressed by the Canadian Supreme Court in Lindal

v. Lindal and similar effects were noted in MacDonald v. Alderson by the Manitoba Court of Appeal. In Quebec, even though a victim of personal injury may still be autonomous and able to lead a "normal" life a court may pay particular attention to severe psychological and personality disturbances that have been initiated by the injury. In Hite's case the court examined the implication's of Hite's completely changed appearance which had led to,

> "une personnalité différente qui se présentera sous un visage laid et bien entendu de sérieux inconvénients".[655]

In Woelk v. Halvorson[656] the Supreme Court of Canada felt that the most significant damage stemmed from the "non-physical results" of injuries to Mr. Woelk, who had become a virtual recluse and had undergone a marked change in personality since his accident. In some cases there may be no permanent physical impairment, as in Drapeau-Gourd c. Power[657] and La Croix c. Forget[658], and awards of up to $6,000 are made for discomfort, embarassment and emotional disturbance that is suffered. In the former case it was noted;

> "La demanderesse a donc vécu une période où elle était inconfortable, humiliée, qui a certes pu l'ébranler au point de vue emotionnel et psychologique".[659]

The court considers nervousness, anxiety, depression and fear occasioned by the injury itself and the treatment procedures that may be necessary to alleviate the injury, in addition to loss of the ability to bear or father children[660].

Canadian and English courts are sympathetic to the psychological anxiety state of "accident neurosis" or "compensation neurosis". In Russell v. Kostichuk[661] an award

of $50,000 was made in which the main loss was referrable to such neurosis. The English case of Harrington v. West Glamorgan County Council[662] the court awarded £4,500 for a chronic anxiety state observing that the conclusion of litigation would lead to an improvement in symptoms. Whether this is a valid conclusion is open to debate, as indicated by Bass and Wright's study of whiplash injuries[663].

The loss of ability to indulge in many of life's pleasures may cause severe trauma and depression in some victims. Detailed medical and psychiatric evidence as to the type of treatment, whether through drugs, physiotherapy, psychotherapy or other means is valuable information which the court may use in its assessment of damages for non-pecuniary loss. In Epstein v. Wyle[664] the court paid close attention to reports by an orthopaedic surgeon, a psychiatrist, a neurological surgeon and a psychotherapist in order to understand the effect of the curtailment of an active life due to depression, pain, loss of sleep, headaches and consequent disabilities. It is submitted that it is imperative for the courts to make use of detailed medical reports presented to them[665] and the opportunity to see and hear witnesses is valuable evidence for the assessment process. The Supreme Court of Canada recognised this point in Guy v. Trizec Equities Ltd.[666] and stated that higher courts should be cautious of reducing awards for non-pecuniary loss because the lower courts have had the "advantage" of hearing the witnesses. Since the recent case of Brown v. Merton, Sutton and Wandsworth Area Health Authority (Teaching)[667] in England an amendment has been made to the Rules of the Supreme Court in relation to the disclosure of medical reports, referring to the condition and prognosis of the plaintiff and, if the medical reports are not in agreement, there should be one witness for each party[668]. It is submitted that limitation to one witness in the case of disputed medical evidence may be desirable from the efficiency and speed of administration

points of view, but surely the court requires as much information as possible on the victim's conditions in order to make as accurate assessment of the amount of an award as possible.

(ii) Appreciation of Injury.

The courts, in all the jurisdictions examined, pay attention to the victim's awareness or future appreciation of his injury, although the quantum of awards will vary greatly depending on the approach taken by the court. It appears that full awareness and insight into the debilitating effects that an injury has on the victim's lifestyle is a strong determinant in making a higher award. In Andrews, Thornton, Brown, Daoust[669] and Dugal[670] the victims were in full possession of their mental faculties and fully realised the implications of their injuries. In cases of some mental impairment, as in Connolly v. Camden and Islington Area Health Authority[671], Birkett v. Hayes[672], Lindal v. Lindal, MacDonald v. Alderson[673], and Fontaine and Boucher c. Lefebvre and Jobin[674], there is realization, although perhaps in an impaired way, of the effects of the disabilities. This appreciation by the victim is a major factor in the courts determination of the amount to be awarded in the compensation for non-pecuniary loss. In Connolly Cumyn J. stressed the "unhappiness" of the plaintiff and that the

> "feeling and appreciation of this little boy and the indignities to which he will find himself subjected and the frustration which he will feel all have to go into this calculation".[675]

An award of £50,000 was made for non-pecuniary loss. In Fontaine and Boucher c. Lefebvre and Jobin Lefebvre was described as being in a euphoric state of mind which was barely conscious, yet he was awarded $100,000 for non-pecuniary loss.

It has been mentioned[676] that a more definitive identification of the mental state of the victim may help in the assessment of compensation for non-pecuniary loss, particularly in the cases of impaired consciousness. If the functional approach is fully adopted in Canada as the method of calculation very little should be awarded, if the victim cannot appreciate any physical improvements to his or her way of life that could be provided by the award based on a functional assessment. In Quebec small awards are made for cases of complete unawareness, as in Perron c. Hôpital Générale de la Région de l'Amiante Inc.[677], in which $10,000 was awarded, despite the grave injuries, because the victim could not appreciate the deprivation of the joys of normal life[678]. At common law in England and Canada (until the Andrews decision) the award is made, following the conceptual method of assessment, for the objective fact of the loss of amenities of life. This is despite the victim's apparent lack of appreciation of the loss as evidenced by Croke v. Wiseman[679], Lim Poh Choo[680] and R. v. Jennings[681]. However the common law and the civil law are in unison in their refusal to make large awards for pain and suffering if the victim cannot experience these effects of an injury.

If one takes an overall look at the award of compensation for non-pecuniary loss, the various elements of pain and suffering and loss of amenities may, in the opinion of Cooper-Stephenson and Saunders[682], be only "illustrative of the range of possible psychological suffering". They submit that the factor of "mental distress" is, in essence, the sole factor that the non-pecuniary loss award aims to compensate and, within the confines of the functional method of compensation, the court must,

> "focus on the plaintiff's state of mind as a whole and on his need for solace, rather than on the various causes of stress".[683]

It appears that mental consequences of an injury, both in terms of appreciation and the ability to deal with the effects of injury, are forceful issues in the court's assessment process.

(iii) Age, Sex and Aesthetic Factors.

Youth of the victim receives consistent reference by the courts and this factor serves to boost an award for non-pecuniary loss. In the trilogy the plaintiffs were all under twenty-one, with long life-expectancies, ranging to 66.9 years in the case of Diane Teno, and the fact of youth was stressed by the Supreme Court. In Quebec young victims, as in Corriveau c. Pelletier[684], Schierz c. Dodds[685] and Daoust c. Bérubé[686], aged in their twenties, will be treated sympathetically by the courts, and a similar approach is taken by the English courts[687]. Youth, particularly in the case of a woman, coupled with aesthetic impairment, such as scarring or burns, presents a strong case for compassionate treatment by the courts. The courts' language in such cases of Fenn v. City of Peterborough[688], and Corriveau c. Pelletier where "young, attractive" women have suffered "hideous" injuries and "excrutiating" pain which causes embarassment, inconvenience and, very often, psychological problems, is sufficient to indicate that the combination of these factors is influential in sustaining a larger award for non-pecuniary loss. In Quebec aesthetic impairment is frequently compensated by a separate award as Table III illustrates. Age is a particularly important factor to be considered when a person's life has been utterly disrupted and he or she has the memory of a past life and the knowledge that the future life holds little prospect of, as in the case of MacDonald v. Alderson[689], being a husband, father or a friend.

(iv) Gravity of Injury.

It is evident that the courts will stress the gravity of a victim's injuries when making the assessment of compensation for non-pecuniary loss, and the severity, in many cases, may induce the court to make a larger award. In Andrews, Thornton and Teno the degree of injury is one of the guiding factors in arriving at the $100,000 figure, despite the endorsement of the functional approach to compensation. The latter method requires the court to look further than the medical report, but the common law courts of Canada seem to emphasize the gravity of the injuries, as in MacDonald v. Alderson[690], Blackstock v. Patterson[691] or Fenn v. City of Peterborough[692]. This approach does not necessarily reflect the effect of the injuries in terms of, for example, the pain and suffering endured. The Quebec courts will assess the gravity and intensity of pain and lengthy observations may be made on this point by the court[693]. In addition, issues such as the number of operations endured, problems caused by infection, the length of stay in hospital away from the family and the disruptions that these events cause to the personal, family and social life of the victim are all to be examined. In England the gravity of the injury is certainly a major factor in the courts' assessment of the non-pecuniary award, as evidenced by Croke and Lim Poh Choo, and the effects of the injuries for the victim are considered to a lesser degree.

The emphasis on the gravity of the injuries for the assessment is to approach the calculation from a more conceptual level, and although each case is considered on its particular facts, the approach is of an objective nature.

(v) Other Factors.

(1) Marriage Prospects.

Whether a victim's injuries affect the marriage prospects has a strong link with the age, sex and type of injury suffered. The reduced chance of marriage is referred to consistently as a factor to consider which may serve to inflate an award for non-pecuniary loss[694]. In Blackstock v. Patterson the British Columbia Court of Appeal referred to two Australian cases[695] in respect of a woman's lost opportunity to marry and stressed that the impaired chances of marriage, if she married, her reduced chance of a satisfactory marriage, was "significant" in both the economic and non-economic fields and "substantial" damages should be awarded.

The effect of injuries on a marriage is noted by the Supreme Court of Canada in Woelk v. Halvarson, in which a statutory claim under the Alberta Domestic Relations Act[696] was being made by Mrs. Woelk, for the deprivation of the society and comfort of her husband. Traditionally the right to claim for loss of consortium at common law was restricted to the husband's claim and the award was a modest amount. However, the Supreme Court held that the statutory enactment in Alberta did not intend to perpetuate an action leading to only "insignificant recovery" and $10,000 was awarded to Mrs. Woelk, whose husband's "zombie" state was considered to be a deprivation of a spouse's society.

(2) Physical Integrity.

The concept of physical integrity and the right to its preservation is often referred to by the Quebec courts, perhaps reflecting an observance of the concept of inviolability as stated in Art. 19 C.C. In Therrien c. Labrecque[697] the interference with physical integrity caused by the in-

fliction of personal injury was described as follows:

> "En un mot, l'intégrité physique de cette personne de 60 ans fut gravement affectée, sa vie personnelle, sa vie familiale fut bouleversé".[698]

The references to physical integrity are closely linked to the court's awareness of the degree of injury suffered by the victim. Nevertheless the concept of physical integrity seems wider than simply an evaluation of the injury. It encompasses the more nebulous notions of privacy, autonomy and general freedom of the person which are all factors which are worthy of compensation if they are interfered with, even if there is no identifiable physical impairment to the victim[699]. Some of these factors are compensated by actions in intentional torts such as assault, battery and intentional infliction of mental suffering in common law jurisdictions.

(3) Punitive Factors.

Punitive damages may be awarded by a court if the case merits such an award, but in awarding compensatory damages for non-pecuniary loss it is stressed that the court must assess the compensation that the victim needs and not the punishment that a defendant may deserve. In Andrews Dickson J. held;

> "Clearly, compensation must not be determined on the basis of sympathy, or compassion, for the plight of the injured person. What is being sought is compensation, not retribution".[700]

If the court is to be fair between the parties the size of the award should not be influenced by the pitiful condition of the victim or by indignation at the behaviour of the defendant. Judge Mayrand expressed a similar opinion in the Court of Appeal in Quebec;

> "Il faut donc résister à la tentation d'accorder des dommages-intérêts

> punitifs en dépit de la conduite imitante de l'appelant. L'indemnité doit être proportionnée au préjudice subi, non à la gravité de la faute commise".[701]

In Quebec punitive damages are only awarded under statute as under Art. 49 of the Quebec Charter of Human Rights and Freedoms. It is submitted that it is very difficult to draw a line between punitive and non-punitive factors. The courts may expressly reject the inclusion of punitive elements in their damages awards, since this would serve to increase the award on the basis of punishing the defendant for causing the injury. But as stated by Lord Diplock in Fletcher v. Autocar and Transporters[702], there may be a "social purpose" thrust behind the award for non-pecuniary loss which satisfies the sense of outrage felt when healthy people are reduced to cripples. The fact that an individual has been "brought to justice" for the injuries inflicted on a victim may relieve the horror and anguish felt by society. Castel[703] observes that there is a "fonction satisfaire" to fulfil in the damages award and although courts do not acknowledge a punitive element there does seem to be an attempt to arrive at an amount for non-pecuniary loss which is sufficiently large to act as a "shock-absorber" or an "adoucissement" for emotional and mental anguish, pain and suffering. It is suggested that it is extremely difficult for a court to isolate itself and not sympathize with an injured victim, particularly if the injuries have agonizing long-term effects.

The English Pearson Commission considered that one of the functions of an award for non-pecuniary loss was to act as a palliative for pain and suffering endured[704]. The Commission does not include punitive elements in the assessment of the award for non-pecuniary loss but it is submitted that such factors may have relevance if the award is to act as a palliative. For example an injured plaintiff may feel less "wronged" or may suffer less if he or she knows that the defendant must meet the costs of a damages award for non-pecuniary loss.

D. Comparative and Critical Analysis of the Systems of Assessment.

Introduction.

In the critical and comparative analysis of the non-legislative and legislative systems of assessment of compensation it is intended to provide, from a general perspective, the discernible trends in approaches to the compensation for non-pecuniary loss. These trends will be categorised under three headings which have been chosen as indicative of the broad approaches to non-pecuniary loss and its assessment. These are first, a restrictive approach, secondly, a comparative discretionary approach and thirdly a hybrid approach.

(1) Discernible Trends in the Assessment of Non-Pecuniary Loss.

(a) Restrictive Approach.

A restrictive approach, in its purest form, is found in the Workmen's Compensation schemes which do not provide, in a direct manner, compensation for non-pecuniary loss. Compensation for the more personal, non-economic consequences of an accident occurring within the workplace are denied, although indirect reference may be made to psychological factors if they have a bearing on the victim's fitness to continue employment. The scope for the influence of non-economic factors in the assessment, as indicated by the examination of the Quebec system, is small. It has been commented by Mr. Justice Laycraft that

> "the lack of a working system of individual assessment and the failure to compensate for non-economic losses produced a sense of injustice".[705]

in persons covered by workers' compensation.

The application of statutory limits on awards for personal injury in general are evidenced by provisions in Workmen's Compensation laws, Road Accident legislation and the Canadian Criminal Injuries Compensation schemes[706]. They all illustrate a restrictive approach to compensation. The latter systems generally allow for the compensation of non-pecuniary loss and it is only in Newfoundland where a further financial limitation is placed on the award for pain and suffering[707]. The limits provide less scope for the award of compensation for non-pecuniary loss, whereas the English Criminal Injuries Compensation system imposes no maximum limit on the award for non-pecuniary loss. Use of a statutory maximum limit is also adopted under the New Zealand Accident Compensation Act[708] in which awards for non-economic loss are limited to $17,000. A restrictive limit, although not statutory, is established by Andrews v. Grand and Toy (Alta.) Ltd., on the level of an award for non-pecuniary loss in cases of "wholly incapacitating injuries" and the Canadian Supreme Court's "upper limit" of $100,000 is clearly far in excess of maximum limits ranging from $5,000 to $15,000 under the aforementioned Criminal Injury Compensation schemes. As previously pointed out the justification for restrictive limits on the size of awards seems to be predominantly a matter of policy in order to avoid extravagant claims. The effect of large awards for non-pecuniary loss on society may result in larger insurance premiums which only the wealthy could afford and this "very real and serious social burden"[709] is viewed as a major factor worthy of recognition.

(b) Comparative Discretionary System.

In essence the non-legislative systems, in which there is no statutory limit on the award for non-pecuniary loss, allow for a completely full use of judicial discretion. Nevertheless the final sum has to be made on an arbitrary basis because there can be no true compensation for the elements of

non-pecuniary loss, and one sees that the courts tend not to utilize the scope that is available to them. The trend in the courts is to adopt a type of "comparative discretion" in which cases are compared to earlier cases mainly on the basis of the degree of injury. In England such an approach appears to be the norm, implying that a judicial tariff exists for non-pecuniary loss arising from certain injuries. The courts make regular reference to "scales" and "tariffs" in arriving at the award of a lump sum for non-pecuniary loss[710]. The Canadian system, operates in practice under the comparative discretionary approach, but in theory the approach endorsed by the Supreme Court could be described as a type of "directed discretion". The Supreme Court endorsed the functional method of assessment of compensation under which the assessment is based on the victim's need for solace and the non-pecuniary award is geared to providing substituted pleasures and alternative sources of enjoyment to provide solace for the victim's misfortunes. The judges are "directed" to use this method which was thought to be a more rational assessment of damages for non-pecuniary loss. However the analysis of Canadian common law cases indicates that a more comparative approach is taken in practice, which has elements of a conceptual theory of assessment[711]. In Quebec the traditional breakdown of elements of non-pecuniary loss includes provision for compensation of not only pain and suffering and loss of amenities, but also the aesthetic impairment and the interference with physical integrity[712]. Thus, at a more basic level, the civil law system operates from a slightly different bias. The courts seem to be fully aware of the Supreme Court of Canada's directions on assessment of non-pecuniary loss and reference is made to the principles enunciated by the higher court, but there seems to be more alacrity and alertness to use more expansive judicial discretion in the assessment process. Osborne[713] points to two possible practices that may emerge from the introduction of the functional approach. First, the "normative func-

tional approach"[714] in which one commences with the presumption that plaintiffs with similar injuries will require a similar amount to alleviate distress and provide solace. Secondly, the "strict functional approach" which is geared to an individual assessment of each victim and is a purely subjective calculation. The former method allows for an objectively determined basis, from which the award would be varied according to evidence showing that the victim has suffered notably more or less distress.

In general awards for non-pecuniary loss have streaks of both trenchant uniformity and haywire arbitrariness which makes a clear analysis and understanding of the bases of made in non-legislative system at times an unfathomable task.

(c) Hybrid System.

A clear example of a hybrid system, which has both restrictive and discretionary aspects, is the statutory scheme of no-fault accident compensation that operates in New Zealand under the auspices of the Accident Compensation Act. In the assessment of the lump sum award for non-pecuniary loss the Commission makes use of a statutorily enacted tariff of injuries and their appropriate percentage of $7,000. Once this objective calculation is made a more subjective assessment, based on the Commission's discretion in the light of factors such as pain and suffering or loss of amenities, becomes the focus in the decision-making process. The Commission's scope is limited however to a maximum award under both heads of assessment, to $17,000, a level which is considerably less, in dollar for dollar terms, than awards for non-pecuniary loss under non-legislative schemes in Canada and England and the civil law of Quebec.

An example of other hybrid systems is the English Criminal Injuries Compensation Scheme which has a minimum

financial threshold for damages claims, but no maximum limit. A threshold approach has a restrictive quality because certain claims will be excluded because they are only worth a small value, but once the threshold is passed, the award is subject simply to the discretion of the assessment body. The Criminal Injuries Compensation scheme that operates in British Columbia is an interesting example of a hybrid system. The overall award has a limit of $15,000 and although the administration of the scheme falls within the sphere of the Workmen's Compensation Act, which does not permit direct recovery for traditional elements of non-pecuniary loss, the administrators have interpreted the power within the Act to award compensation for all heads under which most persons agree that compensation "should"[715] be made. The lack of guidance under the Criminal Injury Compensation Act[716] allowed the administrators of the British Columbia Board to step in and provide the most comprehensive system, in terms of factors of non-pecuniary loss covered in Canada. Burns refers to the Second Report of the Board which stated;

> "Compensation awards include ... other pecuniary loss or damages including and reflecting intangible elements such as pain and suffering, loss of amenities [and] loss of life expectancy".[717]

The hybrid system that has emerged in British Columbia is an example of the mixture of approaches to the assessment of compensation that exist in today's web of compensation systems. The merits of such a hybrid system, which may combine objectively determined limits and scales, with the subjective assessment of more personal consequences of injuries may, as will be seen in Part Three, present the most accurate structure which provides a means of calculating an award for non-pecuniary loss.

Conclusion

Part Two has consisted of a lengthy excursion into the world of conceptual theories, economic variables and practical techniques of quantification, which all have a crucial role to play before the final curtains are drawn on the saga of the assessment of compensation for non-pecuniary loss. One has viewed the range of theories behind the methods of assessment, the realities of putting these theories, or a mixture of them, into practice, the effect that basic economic facts of life may have on the value of an award and, lastly, the current approaches taken by courts and assessment bodies towards the intricate and perplexing problem of awarding a dollar amount for losses that are, in reality, unquantifiable. It is the latter research and analysis that has perhaps been the most valuable because the differences and trends in approach and attitude to the treatment of the assessment of compensation for non-pecuniary loss have presented a vivid illustration of the blatant inconsistencies, the failed attempts to rationalize and, at times, the complete incomprehension, on the part of the assessors, of the fundamental issues that are involved in the recovery of compensation for non-pecuniary loss. Part Two has also aimed to show that "compensation" is an extremely wide-ranging topic for discussion and it raises a host of political and economic questions, some of which will be considered in the ensuing examination in Part Three on recommendations for reform of the present approaches to the assessment of compensation for non-pecuniary loss. In conclusion it is acknowledged that it is all too easy to condemn present approaches in this area of compensation on the basis of inconsistency, irrationality and lack of understanding, when there is no concrete, comprehensive guidance to be found. But in order to bring about a reformed approach, for which there is a genuine desire on the part of the courts in particular, the present inadequacies must be addressed

so that new life can be brought to the existing systems of assessment.

PART THREE

Recommendations for Reform of the Present Approaches to the Assessment of Compensation for Non-Pecuniary Loss

Introduction

Recommending the correct approach to the assessment of the compensation for non-pecuniary loss is a reformist's nightmare. The issue of whether the awards should, in the words of Atiyah, be "multiplied or divided by two overnight"[718] or, as Ison observes, remain steeped in "uncertainty and mysticism"[719], underlines the precarious nature of the present approach, and whatever the solution it is, as the old adage states, a sixty-four thousand dollar question. However, one must not be daunted in the seemingly insurmountable task and in taking "fresh courage" the difficulties of assessment may be overcome. Part Three will outline major problem areas in the assessment process and detail a number of recommendations for reform of the approach to the perplexing question of compensation for non-pecuniary loss.

The problems of assessment have been tackled by lawyers and economists alike and ingenious ideas, some bordering on the absurd, have been proposed over the years in attempting to discover the "value" of life and limb. These schemes and others will be discussed in Section B, which presents recommendations for reform of the present approaches to the assessment of compensation for non-pecuniary loss. The analysis in Section A will examine the compensation of non-pecuniary loss from the more general perspective of difficulties, limitations, barriers and problems which are inherent in the underlying principles of the different types of compensation systems that are available to provide compensation for the victim of personal injury. The majority of compensation systems can be categorised at the basic level

of the fundamental principles on which the system is founded, which may be either the "fault" principle or the "no-fault" principle. In simple terms, under the "fault" based system the person who commits the fault must compensate the victim who suffers damage and loss caused by the fault, whereas under the "no-fault system" the injured individual is compensated for the disability and its consequences howsoever caused, in the nature of a comprehensive social insurance coverage. Section A thus poses more wider ranging questions which may point to the need for a major reappraisal of many of the underpinnings of existing compensation systems.

A. The Compensation of Non-Pecuniary Loss in a "Fault" and in a "No-Fault" System.

Introduction.

It is the intention of Section A to take a step back from the analysis of compensation for non-pecuniary loss within the individual statutory and non-statutory systems of compensation examined in this thesis, in order to assess some aspects of compensation for personal injury from the perspective of a "fault" and a "no-fault" based system. This will allow for a more general discussion of the policies behind compensation for personal injury which, as a highly-charged subject for debate, raises many political, legal and social policy issues. There are conflicting interests groups involved encompassing not only the injured victim or his representatives, but also insurance companies, lawyers or governmental agencies because the principles on which a compensation system for personal injuries is run will determine, for example, the range of victims who may claim compensation, the amount claimable for different injuries and losses or, most importantly, the person, group or body who must fund the compensation award. It is submitted that the compensation of non-pecuniary loss is an integral part of this general discussion and particular reference will be made to the treatment of this element of compensation.

A "no-fault" system may provide comprehensive compensation for personal injury howsoever caused, yet the "no-fault" systems examined in the course of this thesis have been "activity - specific"[720], i.e. related to injury by "accidents" under the New Zealand Accident Compensation Act[721], accidents in the course of employment under the Workers' Compensation Acts and automobile accidents under the Road Accident legislation. There are other compensation systems that operate on a "no-fault" basis in society such as unemployment or welfare insurance schemes, government -

funded medical insurance or first-party private insurance schemes. "Fault" based systems are illustrated by the negligence laws of the common law of England and Canada and the theories of extra-contractual responsibility in the regime of civil responsibility in the civil law of Quebec. Notions of fault and moral culpability are also evident in the Criminal Injuries Compensation schemes that operate in England and Canada. The examination of methods of assessment of compensation for non-pecuniary loss in Part Two has clearly shown that non-pecuniary loss is calculated differently depending on the method of assessment available in a given system. The ensuing discussion is intended to provide further analysis of the very varied approaches to this aspect of personal injury compensation. The advantages, problems, and limitations in assessment will be examined under the headings of, first, policy and, secondly, administration. Finally, a commentary, with reference to Prof. Ison's plan for reform of the "fragmented array of categorised systems of disability compensation"[722], will follow.

(1) Approach to Compensation.

(a) Policy.

In terms of the policy and the purpose behind the "no-fault" systems examined in this thesis, the major discernible goal has been to provide rehabilitation for the victim of personal injury. The New Zealand system exemplifies this aim in its five guiding principles which encompass the particular goal of complete rehabilitation. The Woodhouse Report[723] stressed that the scheme should foster the physical and vocational recovery of citizens while at the same time providing a real measure of money compensation for their losses. Similar rehabilitative goals are found in the purposes behind the Workmen's Compensation Acts and the Road Accident Insurance schemes. The "fault" system, on the

other hand, requires that someone be found liable for causing the injury and, under the example of the tort system, one finds goals of not only compensation, but also appeasement, justice and deterrence[724]. The different purposes may account for the disparate treatment of non-pecuniary loss in the two systems since the far larger awards under the "fault" based system may be indicative of a different purpose being served. Even though damages in the "fault" system will very often be payable by insurers it is recognised that there is a "penal element underlying damages for non-pecuniary loss"[725], whereas such punitive elements would not be found in a "no-fault" system. Whether the latter approach is the correct one to take is a difficult question because there may be a strong "unarticulated desire to punish individuals who cause accidents"[726] which cannot be dismissed lightly. The psychological satisfaction of seeing the person who caused catastrophic injuries being "brought to justice" may be a vital aspect to the award of compensation for non-pecuniary loss, and an important part of the compensation system in general.

However, a major criticism of the "fault" system is that it does not reach all the victims of personal injury and although the successful claimants under this system may emerge with a windfall in terms of the amount of compensation, there are far more "losers". This fact is acknowledged by the courts who operate under the "fault" system and is a major reason supporting their calls for a reform of the system. Dickson J. stated in Andrews v. Grand and Toy (Alta.) Ltd.;

> "The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing".[727]

English courts have made similar pleas for reform[728]. Under the "no-fault" system everyone who is injured may be entitled to compensation although there are limitations if the injury has not been "caused" in the situational context prescribed by the system. For example, the New Zealand system provides compensation for injured citizens howsoever caused, but the injury must have been caused by an "accident"[729]. One may have a difficult problem in determining whether the injury was caused by an "accident". Similarly under the Workmen's Compensation Schemes the injury must have arisen out of or in the course of employment and the victim is dependant on the Workmen's Compensation Board's application of this clause. Glasbeck and Hasson[730] note that the Board's decision has often been tainted with notions of fault, similar to arguments of contributory negligence in the "fault" based tort system at common law, and a claim has been denied for reasons which "amount to nothing more than that a worker was at fault"[731]. Legal restraints on the victim's path to compensation thus occur in both the "fault" and the "no-fault" systems and are evidenced by rules concerning the victim's own conduct, policy limits on the amount of the damages award, rules on establishing a cause of action, and the extent of a damages award with reference to diagnostic and evidentiary problems on the cause of a disability. An injury may have many causes, which may be linked to factors such as disablement from disease, or aging, and the assessment body, whether under the "fault" or "no-fault" system, has a number of issues to consider before the final award is made.

On the question of compensation for non-pecuniary loss the advocates of a "no-fault" system argue that the large awards which may be made under the "fault" systems are an "unwarranted distortion of an already cruel system"[732] and that such awards reflect the "compassionate face" of, for example, the law of torts. Ison[733] points to self-

interest on the part of lawyers who foster the element of uncertainty surrounding the heads of pain and suffering and loss of amenities since the lack of clarity demands advocacy, and therefore lawyers. Palmer[734] comments that under the "no-fault" system in New Zealand the most litigated area has been in relation to s.120 on the issue of an award for non-economic loss. It is submitted that in an area such as the compensation of non-pecuniary loss it may be healthy and advantageous for the whole recovery process to encourage open discussion of the issues involved. This would help to ensure fairness for all concerned, since the more "personalized remedy"[735] is a valuable part of the assessment of compensation for personal injury.

(b) Administration.

There are a variety of factors that should be mentioned in connection with the assessment of compensation under either "fault" or "no-fault" systems, which may, as a matter of convenience, be grouped under the heading of administration.

"No-fault" systems, such as the New Zealand Accident Compensation Act, were devised to procure "relatively low cost, fast and secure benefits"[736] for the victims of personal injury. It is reported[737] that in New Zealand decisions are made in a matter of months whereas delays in the "fault" system operating in the courts may extend for a number of years, which may be a source of tension and undue anxiety for the victim. In the case of the assessment of non-pecuniary loss however, delay may be a beneficial factor because an injury has time to stabilize during the delay and a more accurate assessment may be made, yet uncertainty over the progress of the assessment process weighs equally strongly, and may, as suggested by Feldhusen and McNair[738], induce many claimants to "trade the 'justice'

and 'satisfaction' of litigation and the non-pecuniary damages" for the more speedy, systematic, cheaper and reliable elements of the "no-fault" approach. It is interesting to note that under the New Zealand system delays in the review of applications under s.120, which allows compensation for "inter alia", loss of amenities and pain and suffering, have built up and wherever the compensation of non-pecuniary loss is subject to a discretionary award, as it is under s.120 and under the "fault" system, it seems inevitable that such a problem will emerge. The difficulty could only be avoided if the entire assessment of non-pecuniary loss was made strictly according to a legislative tariff based on a schedule of injuries, in a purely objective manner. This would perhaps eliminate the often time-consuming, exaggerated or avaricious claims that may be made for compensation under the ambit of compensation for non-pecuniary loss.

The "security" of benefits under a "no-fault" system has been suggested as an advantage over the "fault" system. Under "no-fault" compensation schemes there is a permanent fund which provides for the compensation payment which may be financed by various ways, such as general taxation, or compulsory private contributions. Victims would not be subjected to rigours suffered by, for example, the thalidomide victims in England who must apply to a specially created Thalidomide Trust, administered by two ex-Royal Air Force group captains, for specific amounts to cover their needs. Victims have complained that the Trust encourages a "begging bowl" regime which is "high handed" and "autocratic" in its administration[739]. The Pearson Commission Report recommended that victims injured by a defective product, such as a drug, should be compensated on a "no-fault" basis, i.e. without the burden of proving that a manufacturer has been negligent[740]. These recommendations have so far not been put into effect.

Criticisms have been levied against the "fault" system on the grounds that the awards for pecuniary loss do not provide adequate compensation for the victim's needs[741]. Consequently, awards for non-pecuniary loss, whatever their basis of assessment, may be used to bolster the award for pecuniary loss and, in reality, are a support system for the pecuniary loss award, which due to the fluctuations in the economy or merely an inaccurate assessment of the pecuniary loss, do not provide adequate compensation for the victim's needs. The Pearson Commission stated that the award for non-pecuniary loss "may help to meet hidden expenses"[742] caused by the injury and, as stressed by the Supreme Court of Canada in Andrews[743], the main aim of the compensation award should be to make good the pecuniary loss and proposals for the assessment of non-pecuniary loss should take this into account. Under the "no-fault" system the award for non-pecuniary loss is part of an overall rehabilitation and compensation programme and the award may have a less crucial role in terms of providing a survival mechanism to allow the victim extra sources of finance to meet his needs.

(2) Commentary.

Prof. Ison's[744] plan for reform of compensation for personal injury takes the form of a comprehensive system of social insurance, in which all causes of action in tort for damages for personal injury or death would be abolished, along with worker's compensation, automobile insurance, compensation for victims of crime, sickness benefits and other governmental systems of dealing with disability[745]. These systems would merge into an all-embracing plan which would include coverage in respect of "non-monetary consequences of disability". There would be no compensation for the specific heads of pain and suffering, loss of amenities or enjoyment of life. Rather, statutory

tables drawn up to guide the assessment body on the compensation to be awarded for a particular injury would take into account the traditional non-pecuniary loss elements[746]. It appears that there would be no discretion available to the assessment body and this approach precludes a return to "fault" based, common law notions, which was a major concern in the practical application of s.119 and s.120 of the A.C.A. in New Zealand[747]. It is very difficult for a "no-fault" system to emerge from a "fault" system and operate with no "fault-like" characteristics, unless as Ison's proposal may do, one completely cuts out all such possibilities[748] by imposing an objective, scheduled approach.

B. Recommendations for Reform of the Present Approaches to the Assessment of Compensation for Non-Pecuniary Loss.

Introduction.

The momentous up-rooting of firmly entrenched social institutions which Prof. Ison's proposal would require is clearly a matter for long term legal, social and political consideration. In the meantime one is left with the troublesome task of establishing a clearer, more consistent approach to the assessment of compensation for non-pecuniary loss. This section will present a number of proposals geared to the reform of the assessment in the non-statutory systems of compensation, and it will be seen that the statutory system in New Zealand offers a substantial number of ideas that may be adopted. At present the non-statutory schemes appear to be in urgent need of reappraisal in all aspects of the compensation for personal injury[749] and the ensuing suggestions are only one part of that monumental undertaking, which has been the subject of voluminous debate in recent years . The techniques of assessment of compensation for non-pecuniary loss have been described as an "arcane new science: dolorimetrics"[750] and it is to this

world that one now turns. Various proposals collated from a number of authors will be commented on and the author's own proposal will conclude the section.

(1) "Dolorimetrics" - Proposals for the Assessment of Non-Pecuniary Loss.

(a) "Ten-Point Scale".

The Canadian commentator Gibson[751] has suggested that the courts should adopt a ten-point scale which, if used in conjunction with the trilogy of cases decided by the Supreme Court of Canada in 1978, would allow a degree of consistency in the assessment of non-pecuniary loss. The plaintiff's non-pecuniary losses would be graded on the scale which would be linked to a time factor of up to, for example, ten years, and the $100,000 maximum limit would be used. This limit would then be divided into ten annual sums of $10,000 and the "impact" of the victim's "detriment" would be awarded a point from the scale of 0 to 10, according to the intensity of the pain suffered, the emotional or psychological effects of the injury, and so on, using the trilogy as examples of cases receiving a 10 on the scale.

It is submitted that the aim of consistency is of paramount importance and the structuring of the use of a maximum limit directs a court in both the amount to be awarded and the period of the victim's life that is the subject of assessment. The latter is a particularly effective method in considering the award for past pain and suffering i.e. the detriment endured before the date of the trial which is a factor that can be assessed with more accuracy. However the entire proposal is tied to a more conceptual approach which is based on the degree of injury rather than an investigation of what could be done to alleviate the injury and provide solace for the victim, and

the award is limited to a maximum of $100,000.

(b) Legislative Tariff.

A legislative tariff approach to the assessment of compensation may introduce consistency into the calculation because each case will be assessed from the same starting point, i.e., a conventional award which reflects the degree of disability and the "normal" amount of unhappiness for the injury in question which requires the "normal" amount of solace according to the "normal" cost. This approach has been advocated by Cooper-Stephenson and Saunders[752] and it incorporates the functional method of assessment of non-pecuniary loss. The use of a tariff approach is argued to be a "valuable saving" in both time and expense in the assessment and the courts would concentrate on hearing evidence from the parties on the question of adjustment of the conventional award depending on the circumstances of the case. The tariff would contain an exhaustive list of injuries tabulated under medical criteria and described as a percentage of total disability.

This approach has similarities to the New Zealand system which under s.119 of the A.C.A. has a statutory tariff denoting certain injuries and their percentage in relation to maximum disability. However the tariff is not exhaustive and it is submitted that to complete an exhaustive tariff is a nearly impossible feat. The issue of disabilities which do not have a physical or medical diagnosis creates problems, yet to exclude such cases is clearly a disservice to the victims. The New Zealand system does not assess non-economic loss solely on the basis of the objectively determined tariff and s.120 provides for the subjective assessment which is allowed more scope both in terms of the use of discretion by the Accident Compensation Commission and in the amount that may be awarded. The

creation of an assessment of non-pecuniary loss based simply on the objective tariff, although there is room for adjustment to meet the circumstances of each case, is to over-objectivize the assessment and there would be a danger of courts relying on the objective amount alone and rejecting other evidence. Courts have a tendency to adopt a comparative approach to the assessment of non-pecuniary loss based on the concept of "the greater the injury, the greater the loss" test. This is testimony to their bias towards objectivity which, it is submitted, is an approach which requires tempering because it is too easy to merely objectivize the assessment and not face the real problems involved both at an economic and personal level for the victim involved. The keeness of assessment bodies to adopt an objective tariff is noted by Palmer[753], who reports that in March 1978 the chairman of the Accident Compensation Commission in New Zealand suggested that a tariff approach could be utilized for awards under s.120 of the A.C.A. which is a blatant rejection of the discretionary approach outlined under s.120. The chairman proposed that a victim of paraplegia should "always" receive the maximum of $10,000 N.Z. which is obviously a conceptual approach based on the rationale that the most serious injuries require the highest awards.

(c) Per Diem.

The per diem approach exemplifies the difficulties involved in the assessment of an award for non-pecuniary loss. It recognises that any award is a "leap of faith"[754] and it is based on a view that pain and suffering is easier to assess if it is considered on a daily basis. This approach is used predominantly in American jurisdictions where lawyers will suggest to juries a sum for each day the pain is suffered and this amount will be multiplied by the number of days that pain has been or will probably be endured. Under this approach damage awards may be "staggering" in

their enormity although only a small sum per day is proposed. For instance, if $1.00 per hour is suggested as the appropriate sum for pain and suffering and loss of enjoyment of life and the victim suffers for 16 hours a day, the figure will be $5,480 per year. The sum will be over three times higher than this amount if one adopts 5 cents per minute as the figure on which the calculation is to be based and $17,520 per year would be awarded[755].

This approach has a semblance of certainty because a mathematical approach is taken, yet this is only an illusion and the completely arbitrary nature of the approach shines through. However, it is another mode of viewing the calculation and has been used with a great deal of success in terms of achieving high awards in the United States of America. It does not add any insight into the rationale for a non-pecuniary loss award and it has been noted that the main result of such awards for non-pecuniary loss may have been to finance the contingency fee system, which, if true, does not help to aid the victim.

(d) Pain and Suffering Insurance Policy.

The introduction of a "no-fault" scheme of compensation for personal injury may reduce the scope for an award on the traditional grounds of pain and suffering. In order to alleviate any dissatisfaction that this may cause, it has been suggested[756] that an insurance company should offer optional first-party insurance to provide benefits for pain and suffering. In a survey of members of the Casualty Actuarial Society in America there was a mixed response to such a proposal and the most favoured approach was insurance coverage for pain and suffering on the basis of a scheduled dollar indemnity for designated injuries.

It is submitted that this type of plan should be borne

in mind if the "no-fault" systems of compensation become more widespread.

(2) The Search Continues: A Proposal to Resolve the Dilemma.

The preceding section has investigated various proposals for reform of the present approaches to the assessment of non-pecuniary loss, some of which are more defensible than others. This section will make a further proposal. Whether one asks how much an individual would be willing to pay to reduce the risk of injury or death, or how much he would accept to incur the injury, it may be that the assessment process demands a more empathetic approach on the part of the judge or assessment body. The ability to make use of "empathetic introspection"[757] may be the most valuable asset in the understanding of the position of the victim in terms of the personal consequences, both physical and emotional, of the injury. Once there is a breakthrough at this "deeper" level the assessment may be able to follow a less troublesome course. This approach would require a reversal of the current trend in comparison and would encourage the courts to analyse the individual subjective facts more carefully. However, if the judges are to use this opportunity to peruse the facts in more detail, there must be no danger of the non-pecuniary loss award being relied on as a support mechanism for the pecuniary award. But, on the assumption that this will not be the case, one may proceed to examine at greater length the substance of the present proposal.

It is submitted that the award for non-pecuniary loss should be assessed in two stages, first, on an objective level and secondly, on a subjective level. Uniformity and consistency of approach is achieved if every victim, as of right, is entitled to an objectively determined yearly lump

sum for impairment based on a medical report, an I.P.P. evaluation and a life expectancy evaluation. The subjective "personal" assessment allows scope for a more empathetic approach on the basis of, most importantly the psychological effects of the injury, and the individual's reaction and adaptation to the injury. It is submitted that the proposal eliminates the confusion that has occurred in Canada on the choice of approach (conceptual, personal or functional) and the English tendency to over-objectivize is contained.

(a) "Impairment Award".

The impairment award is to be based on a medical report, an I.P.P. evaluation and a life-expectancy evaluation. The I.P.P. assessment should be presented in a medical certificate and if there are a number of values (e.g. psychological, aesthetic, sexual, orthopaedic, station and gait) they are not simply added together but should be combined following guidelines laid down by the American Medical Association[758]. The I.P.P. evaluation would be treated as solely referable to the non-pecuniary loss assessment. Life expectancy evaluations will be based on the Life Tables such as those compiled by Statistics Canada, 1975-1977. The reason for compiling these evaluations is so that a yearly indemnity for impairment may be made to the victim. The entire objective assessment would be allocated a maximum amount of say, $100,000, which would be awarded in a case of maximum I.P.P. and maximum life expectancy (77-79 years for females and 70-17 for males[759]). The basic equation would be:

M.L.E. x M.I.P.P. = $100,000 (inflation indexed)
(where M.L.E. - maximum life expectancy and M.I.P.P. = maximum I.P.P.)

The equation would make use of a discount rate[760] in order to arrive at a self-extinguishing lump sum at the end of the life expectancy.

(b) "Personal Award".

The court should also aim to achieve a comprehensive picture of the subjective aspects of a particular case. The victim's knowledge and awareness of the injury and its effects are relevant considerations for the court to note. The judge in exercising the opportunity to empathize should gain a general overview of the effects of the injury on the victim's immediate family, the change in life-style, the ability to adapt and cope with the injury. In addition the physical and mental effects of pain, in terms of its duration, intensity and the personal traumas that pain and suffering may cause for the individual should be considered. The various aspects of "personhood" outlined by Cassell[761] in his examination of suffering were noted in Part One in the discussion of pain and suffering and they are pertinent considerations in the estimation of the non-pecuniary loss award. They include matters such as cultural influences that may have a substantial effect on the sick, or personal perceptions of a role that may not be fulfilled due to sickness. There are numerous considerations, but the court should be encouraged to find its way through the facts and with the aid of suggestions from the parties to the case to arrive at an award which reflects the needs of the victim.

Conclusion

There are formidable problems at the conceptual and practical level in an assessment of compensation for non-pecuniary loss, yet the challenge for reform of the present approaches to assessment must be met. The lack of consistency or clear understanding of the factors involved are obvious weaknesses which require rectification if the award for non-pecuniary loss is to be just and serve a useful purpose in the compensation of personal injury. The traditional assessment of non-pecuniary loss in terms of pain and suffering, loss of amenities of life and loss of expectation of life may have to be altered to take a more realistic view of what the victim requires to alleviate his personal loss which includes having adequate resources to enable him to live as full a life as possible[762]. It has been seen that one has to consider the compensation system as a whole and the relevance that an award for non-pecuniary or non-economic losses has in achieving the overall purpose behind the system. One cannot escape the fact that when a person is physically injured there will be intangible losses of varying degrees which are worthy of compensation and the search for a rational system should continue unabated.

CONCLUSION

"Things without all remedy
Should be without regard; what's
done is done".

[Shakespeare: Macbeth III.ii.]

The evolution of the fundamental principles of compensation for non-pecuniary loss in cases of personal injury have developeddramatically over the years. In other eras the motto of "an eye for an eye, a tooth for a tooth", which may have adequately fulfilled all retributive and punitive desires on the part of the plaintiff, sufficed. But this took no account of how to deal with the less tangible features of personal injury. In the late 1800's it was considered by some to be "unmanly" to make a claim for the compensation of "bodily suffering" on the grounds that such injuries were part of the "ills of life of which every man ought to take his share"[763]. Nowadays it is possible to claim compensation for the mere fact of interference with physical integrity, whether or not there is lasting physical impairment, and compensation for conditions of mental distress or nervous shock may be for purely emotional or psychological detriment and do not require concommitant physical impairment. Knowledge and understanding of the more subjective effects of personal injury on the victim are increasing. Yet still there is a tendency towards the adoption of a rather rigid, comparative, tariff approach by the assessment bodies in awarding damages for non-pecuniary loss, which does not adequately reflect the true "loss" which the injury creates.

The consideration of non-pecuniary aspects of personal loss is an undeniably tortuous task and there can be no true compensation for such losses. However it is submitted that the difficulty of the task should not be a barrier to the assessment process. Compensation for non-pecuniary loss under the illusive concepts of pain and suffering, inconvenience, loss of

amenities, aesthetic impairment or loss of expectation of life, fulfills a vital and necessary purpose in the general award of compensation, although it is unfortunately neglected in some legislative compensation systems. At the least it is a tangible recognition of the suffering experienced by a victim. At the most, it is an award of money, however paltry it may seem in light of the devastating effects that a given injury may have on an individual's life, which may be designed to enable a victim to find alternative pleasures in life and cushion the effects of that injury. The psychological desire for revenge by the victim may, at first, be of paramount importance but this may fade with the increasing need to adapt to a different life-style which may require additional financial support. In this respect it is important to consider economic factors, as enunciated in Part Two, both in the form of the payment and the economic variables that may affect the ultimate value of the award.

One can never hope to fully compensate for physical impairment or psychological and emotional trauma. Nevertheless, it has been the intention of the present thesis to illustrate that the future union of a more purposeful and empathetic attitude with a carefully defined structure of assessment, which is applicable in all cases of personal injury, may serve to dispell some of the mystique, confusion and uncertainty surrounding the present evaluation of compensation for non-pecuniary loss.

NOTES*

* This thesis has relied in part on the citation system used in the Harvard Uniform Code of Citation 13th ed.

1. This work will only cover awards to still living persons and claims by relatives or by the victim's estate will not be discussed. For compensation in respect of fatal accidents see

   1) England: Lord Campbell's Act (Fatal Accidents Act), 1846 9 & 10 Vict., c. 93.

   2) Quebec: Code Civile Art. 1056. Text as in CREPEAU, P.-A., Les Codes civils - The Civil Codes (2nd ed., 1982) [hereinafter cited as C.C.].

   3) Canada:

   Fatal Accidents Act, R.C.S. 1980, c. F-5.
   Families Compensation Act, R.S.B.C. 1979, c.120.
   Fatal Accidents Act, R.S.M. 1970, c. F-50.
   Fatal Accidents Act, R.S. Nfld. 1970, c.120.

   Fatal Injuries Act, R.S.N.S. 1979, c. F-5.
   Family Law Reform Act, R.S.O. 1980, c.152.
   Fatal Accidents Act, R.S.P.E.I. 1974, c. F-4.
   Fatal Accidents Act, R.S.S. 1978, c. F-11.

2. Report of the Royal Commission of Inquiry into Compensa- for Personal Injury, Cmd. 7054 (1978), [hereinafter cited as Pearson Report].

3. Reprinted as in Accident Compensation Act, 1975, N.Z. Stat., 1409. [hereinafter cited as A.C.A.].

4. COOPER-STEPHENSON, K.D. and SAUNDERS, I.B., Personal Injury Damages in Canada, (1981), at 26.

5. OGUS, A.I., The Law of Damages, (1973), at 1.

6. ATIYAH, P.S., Accidents, Compensation and the Law, (3rd ed. 1980), at 127.

7. Fair v. London and North Western Rail Co., (1869) 21 L.T.R. 326. See also Phillips v. London and S.W. Rail Co., (1878) 4 Q.B.D. 406.

8. McGREGOR, H., McGregor on Damages, (14th ed. 1980), at para. 57.

9. ROGERS, W.V.H., Winfield and Jolowicz on Tort, (10th ed. 1975), at 84.

10. A thorough analysis of the methods for recovery of compensation for non-pecuniary loss may reveal that there are diverging trends, particularly on a comparative level of analysis, in the practical application of the principles.

11. (1880) 5 App. Cas. 25.

12. Ibid, at 39.

13. Victoria Laundry v. Newman, [1949] 2 K.B. 528, at 539, per Asquith L.J. "This purpose, if relentlessly pursued, would provide [the plaintiff] with a complete indemnity for all loss "de facto" resulting from a particular breach, however improbable, however unpredictable".

14. See Livingstone v. Rawyards Coal Co., (1880) 5 App. Cas. 25, on "full" compensation, Rowley v. London and North Western Rail Co., (1873) 8 L.R.-Ex. 221 on "reasonable" and "fair" compensation, Fletcher v. Autocar and Transporters Ltd., [1968] 1 All E.R. 726 on reasons for refusal of full compensation.

15. Andrews v. Grand and Toy (Alberta) Ltd., [1978] 2 R.C.S. 229.

16. [1978] 2 R.C.S. 229, at 241.

17. McGREGOR, supra note 8, at para. 11.

18. See McGREGOR, supra note 8, chs. 4 and 6. OGUS, A.I., supra note 5, ch. 3. FLEMING, J.G., The Law of Torts (5th ed. 1977), ch. 9. ROGERS, W.V.H., supra note 9, ch. 6. MUNKMAN, J., Damages for Personal Injuries and Death, (5th ed. 1973), ch. 1. WRIGHT, C.A. and LINDEN, A.M., Canadian Tort Law, Cases, Notes and Materials (7th ed. 1980), ch. 9. SOMERVILLE, M.A., A Diagramatic Approach to Causation, (1978) 24 McGill L.J. 422. COOPER-STEPHENSON, K.D., and SAUNDERS, I.B., supra note 4, ch. 11.

19. OGUS, supra note 5, at 60.

20. Factual causation is variously described as the "causa sine qua non"; "causal conditions" divided by SOMERVILLE, M.A., A Diagramatic Approach to Causation, (1978) 24 McGill L.J. 442, at 442, as "causal factors" and "causal conditions"; "scientific cause", "cause-in-fact". On causation generally see HART, H.L.A. and HONORE, A.M., Causation in the Law, (1959).

21. Legal causation is variously described as "causation-in-law"; the "causa causans"; "proximate cause".

22. [1952] 2 All E.R. 402.

23. Ibid, at 406-407.

24. In the interests of clarification SOMERVILLE, supra note 20, at 443, submits that a separation may be made of rules on causation and rules on remoteness. The former require "directness, foreseeability, or foreseeability and directness of that type of damage for its recoverability by the plaintiff from the defendant. The rules on remoteness may be regarded as those regulating the extent of the damage which is recoverable, for instance under the 'thin-skull doctrine', or requiring some degree of foreseeability of the way in which the damage occurred".

25. FLEMING, J.G., The Law of Torts, (5th ed. 1977), at 189.

26. Ibid, at 190.

27. FLEMING, J.G., The Passing of Polemis, (1961) 39 Can. B. Rev. 489, at 502.

28. The constantly changing standards are well illustrated in the area of informed consent to medical treatment. The position in England and Canada differs on the extent of the doctor's duty, of disclosure of risks interest in medical treatment. In England the duty is fulfilled if the doctor acts in accordance with a practice adopted as proper by a body of skilled and experienced medical men, and whether the patient would have consented is governed by the question of whether the particular patient would have consented, (Sidoway v. Bethlem Royal Hospital, The Lancet April 3, 1982 808). In Canada the test is whether a reasonable man would have consented, see Reibl v. Hughes, [1980] 2 R.C.S. 880.

29. FLEMING, supra note 27, at 504.

30. [1961] A.C. 388.

31. [1963] 2 All. E.R. 705 (H.L.).

32. [1961] A.C. 388, at 426, per Viscount Simonds.

33. See Dulieu v. White, [1901] 2 K.B. 669, and Smith v. Leech Brain, [1962] 2 Q.B. 405. In these cases, which held that liability exists if the "nature" and "type" of damage is forseeable, but the "particular" kind of

damage is not, one begs the question of how much scope the terms "nature" and "type" of damage are endowed with. In a personal injury claim, the mere nature of the damage i.e. "personal injury" is extremely wide.

34. [1963] 1 All E.R. 705, at 715, per Lord Pearce.

35. (1974) 51 D.L.R. 3d 244.

36. Ibid, at 252.

37. Such damage could be claimed in actions for defamation because the compensatory element is said "to operate in two ways - as a vindication of the plaintiff to the public and as a consolation to him for the wrong done", in Uren v. John Fairfax and Sons Ltd., (1966) 117 C.L.R. 118, at 150, per Windeyer, J. Approved in Cassell and Co. Ltd. v. Broome, [1972] A.C. 1027.

38. Dulieu v. White, [1901] 2 K.B. 669, at 675, per Kennedy L.J.

39. Marshall et al v. Lionel Enterprises Inc., [1972] 2 Ont. R. 177, at 186, per Haines J. This case contains a comprehensive review of the case law on nervous shock. See also Duwyn v. Kaprielian, (1978) 7 C.C.L.T. 121 (Ont. C.A.).

40. See Fenn v. Peterborough City Corp'n., (1979) 9 C.C.L.T. 1.

41. Mount Isa Mines v. Pusey, (1971) 125 C.L.R. 383, at 395, per Windeyer, J.

42. McLaughlin v. O'Brian, [1982] 2 All E.R. 298 (H.L.).

43. LEWIS, C., Damages for Nervous Shock, (1982) 79 Law Soc'y Gazette, No. 30, 1004.

44. [1970] 2 Q.B. 240.

45. [1982] 2 All E.R. 298. See also Abramzik v. Brenner, (1967) 65 D.L.R. 2d 657 (Sask. C.A.).

46. Ibid, at 305.

47. LEWIS, supra note 43, at 1004.

48. Law Reform (Miscellaneous Provisions) Act, 1944, No. 28, s. 3(1).

49. [1981] 1 All E.R. 809, at 828 (C.A.).

50. McKay v. Essex Area Health Authority and Dr. Golver-Davies, [1982] 2 All E.R. 771 (C.A.). Cataford v. Moreau, (1981) 114 D.L.R. 3d 585.

51. Hyde v. Tameside Area Health Authority, The Times, 22 Apr. (1981).

52. Ibid.

53. The Times, 26 Nov. (1970).

54. OGUS, supra note 5, at 61.

55. Ibid.

56. [1970] A.C. 467.

57. Ibid, at p. 492.

58. See Liesbosch Dredger v. S.S. Edison, [1933] A.C. 449, at 460, per Lord Wright. "In the varied web of affairs, the law must abstract some consequences as relevant not perhaps on grounds of pure logic but simply for practical reasons".

59. Andrews v. Grand and Toy (Alberta) Ltd., [1978] 2 R.C.S. 229. Arnold v. Teno, [1978] 2 R.C.S. 287. Thornton v. Board of School Trustees of School District (No. 57) (Prince George), [1978] 2 R.C.S. 267.

60. [1982] 1 W.W.R. 433.

61. [1978] 2 R.C.S. 229, at 263, per Dickson J.

62. (1981) 34 A.L.R. 162 (H.C.), at 185, per Stephen J. The Canadian cases have not all accepted the ceiling established by the Supreme Court as a "new rule", see Henderson v. Hatton, [1981] 5 W.W.R. 624, at 628, per Nemet J. C.J.B.C.

63. ATIYAH, supra note 6, at 221.

64. Pearson Report, supra note 2, at para. 371.

65. See Gammell v. Wilson, [1981] 2 W.L.R. 248.

66. See Munro v. The Toronto Sun, (1982) 21 C.C.L.T. 261. See also Vogel v. C.B.C., (1982) 21 C.C.L.T. 105, where $100,000 compensatory damages was awarded for shock, distress, physical effects and harm to reputation, although Andrews was not specifically mentioned.

67. [1978] 2 R.C.S. 229, at 261, per Dickson J.

68. Ibid.

69. Gardner v. Dyson, [1967] 1 W.L.R. 1497, at 1501.

70. [1978] 5 W.W.R. 486.

71. Ibid, at 493.

72. Wise v. Kay, [1962] 1 Q.B. 638, at 553-664.

73. [1912] A.C. 673.

74. It is not a legally enforceable "duty" to mitigate the loss, merely an obligation that the plaintiff owes to himself. See OGUS, supra note 5, at 89, and Darbishire v. Warran, [1963] 3 All E.R. 310 (C.A.).

75. [1912] A.C. 673, at 689.

76. Admiralty Commissioners v. S.S. Susquehanna, [1926] A.C. 655.

77. McAuley v. London Transport Executive, [1957] 2 Lloyd's List L.R. 500 (C.A.). James v. Woodall Duckham Construction Company, [1969] 1 W.L.R. 903 (C.A.).

78. [1957] 2 Lloyd's List L.R. 500 (C.A.).

79. Ibid, at 505.

80. See COOPER-STEPHENSON, K.D. and SAUNDERS, I.B., supra note 4, at 593-596.

81. See Taylor v. Addems, [1932] 1 W.W.R. 505 (Sask. C.A.). Dominey v. Sangster, (1980) 38 N.S.R. 2d 403 (T.D.). Schulz v. Leeside Devs. Ltd., [1978] 5 W.W.R. 620 (B.C.C.A.). Although the duty to mitigate non-pecuniary loss was not considered as pronounced as in the case of mitigation of pecuniary loss for the cost of future care, the judge made a reduced award for non-pecuniary loss on the basis of less need, if the operation, a reasonably safe procedure, was performed. This, in effect, forced the person to risk the operation.

82. See Savage v. Wallis, [1966] 1 Lloyd's List L.R. 357 (C.A.).

83. See Payne v. Hillcrest Rent-a-car, (1979) 21 Nlfd. & P.E.I. 520 (Nfld. T.D.), cited in COOPER-STEPHENSON, K.D. and SAUNDERS, I.B., supra note 4, at 294.

84. See THOMSON, W.A.R., Accident Neurosis, (1982) 22 Med. Sci. L. 143. Compensation neurosis (accident neurosis, litigation neurosis, the post-traumatic syndrome) presents a "baffling" medico-legal problem. It has been described by Prof. H. Miller (1966), quoted by THOMSON, W.A.R. at 143, as a "complaint of disabling subjective functional symptoms following accidental injury and sometimes fright without physical injury of any kind". Miller concludes that the condition is not the result of the accident but is motivated by the obsession for financial gain, and "to compensate a man financially because he is deceiving himself as well as trying to deceive others is strange equity and stranger logic". The other school of thought on compensation neurosis advocated principally by Reginald Kelly is that any "minor trauma to the skull can produce organic brain damage", ibid, at p. 144. He concentrates on the "pre-morbid personality" of the person with so-called compensation neurosis whose degree of resentment becomes a pathological symptom. See also PECK, C.J., FORDYKE, W.E., BLACK, R.G., The Effect of the Pendency of Claims for Compensation upon Behaviour Indicative of Pain, (1978) 53 Wash. L. Rev. 251.

85. [1969] 1 W.L.R. 903 (C.A.).

86. Marcroft v. Scruttons Ltd., [1954] 1 Lloyd's List L.R. 395 (C.A.).

87. Smith v. Richardson, (1977) 23 N.S.R. 2d 407 (T.D.).

88. Lange v. Hoyt, (1932) 159 Atl. Prov. 575.

89. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28. S.1(1) states: "Where any person suffers damage [this includes personal injury according to S.4] as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

90. For example, in Ontario, The Negligence Act, R.S.O. 1980, c. 315, s.4 states: "In any action for damages which is founded upon the fault or negligence of the defendant, if fault or negligence is found on the part of the plaintiff that contributed to the damage, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively".

91. See LINDEN, A.M., and SOMMERS, R.J., The Civil Jury in the Courts of Ontario: A Postscript to the Osgoode Hall Study, (1968) 6 Osgoode Hall L.J. 242.

92. Ibid, at 255.

93. Froam v. Butcher, [1975] 3 All E.R. 520 (C.A.). Gagnon v. Beaulieu, [1977] 1 W.W.R. 702.

94. [1900] A.C. 113.

95. Ibid, at 116.

96. McGREGOR, supra note 8, at para. 265.

97. Fletcher v. Autocar and Transporters Ltd., [1968] 1 All E.R. 726 (C.A.), at 739. See also Lim Poh Choo v. Camden and Islington Health Authority, [1979] 2 All E.R. 910 (H.L.), at 920. See OGUS, supra note 5, at 221.

98. McLACHLIN, B.M., What Price Disability? A Perspective on the Law of Damages for Personal Injury, (1981) 59 Can. B. Rev. 1, at 42.

99. Infra, Part Two, Section I.

100. COOPER-STEPHENSON and SAUNDERS, supra note 4, at 287.

101. [1978] 2 S.C.R. 229, at 262.

102. COOPER-STEPHENSON and SAUNDERS, supra note 4, at 339.

103. See Khales v. Svenson, (1957) 24 W.W.R. 24 (Man. Q.B.).

104. (1880) 5 App. Cas. 25, at 39.

105. Robinson v. Harman, (1848) 1 Ex. 850.

106. [1939] 2 K.B. 791.

107. Ibid, at 799.

108. Hadley v. Baxendale, (1854) 9 Ex. 341, at 354.

109. Ibid.

110. [1949] 2 K.B. 528 (C.A.).

111. [1969] 1 A.C. 350 (H.L.).

112. [1949] 2 K.B. 528, at 539, (C.A.).

113. Ibid.

114. [1969] 1 A.C. 350 (H.L.), at 425 per Lord Upjohn. The difference between the two tests, reasonsable foresight in tort, and reasonable contemplation in contract, may even be a matter of semantics as Scarman L.J. stated in Parsons (Livestock) v. Uttley Ingham and Co., [1978] 1 All E.R. 525 (C.A.) where he held, at 536, that the difference was "not substantial".

115. OGUS, supra note 5,,at 74.

116. McGREGOR, supra note 8, at para. 192. COOPER-STEPHENSON, K.D. and SAUNDERS, I.B., supra note 4, at 575-586. DOUGLAS, G., Damages for Unwanted Births, (1982) 126 S.J., at 58.

117. McGREGOR, supra note 8, at para. 192.

118. (1878) 4 Q.B.D. 406.

119. [1978] 1 All E.R. 525 (C.A.).

120. Ibid, at 533.

121. (1979) 89 D.L.R. 3d 1 (S.C.C.).

122. (1979) 123 S.J. 406.

123. Ibid.

124. Except torts designed to protect reputation, for example, defamation or malicious prosecution.

125. Hamlin v. Great Northern Railway Co., (1856) 1 H. & N. 408.

126. KIDD, C.J.F., Damages for Injured Feelings in Contract: Recent Developments in English and Canadian Laws, (1977-80) 11 U. Queensland L.R., at 42.

127. Hobbs v. London and South Western Railway Co., (1875) 10 L.R., Q.B. 111, at 122, per Mellor J. aff'd. by House of Lords in Addis v. Granophene Co. Ltd., [1909] A.C. 488.

128. McGREGOR, supra note 8, at para. 70A.

129. Jarvis v. Swans Tours Ltd., [1973] Q.B. 233 (C.A.) followed by Jackson v. Horizon Holidays, [1975] 1 W.L.R. 1468 (C.A.).

130. [1973] Q.B. 233 (C.A.).

131. Ibid, at 239, per Edmund Davies L.J.

132. [1974] 3 W.W.R. 406 (Man. Co. Ct.), a holiday case.

133. (1977) 74 D.L.R. 3d 574.

134. (1977) 71 D.L.R. 3d 146.

135. KIDD, supra note 126, at 47.

136. [1976] Q.B. 446 (C.A.).

137. [1976] 1 W.L.R. 638.

138. Ibid.

139. (1981) 114 D.L.R. 3d 379.

140. Ibid, at 383.

141. Vorvis v. Insurance Corp. of British Columbia, (1982) 134 D.L.R. 3d 727, at 734, per Macfarlane J.

142. See Montreal Gazette, Sept. 22, 1982, where Mr. Bertal Grant was awarded $8,500 for mental distress resulting in weight loss, insomnia and embarassment caused by his dismissal.

143. (1979) 123 S.J. 406.

144. DOUGLAS, supra note 43, at 58.

145. See Hinz v. Berry, [1970] 1 All E.R. 1074.

146. KIDD, supra note 126, at 52.

147. See also RAMSAY, I., Contracts Damages for Mental Distress, (1977) 55 Can. B. Rev. 169. EVANS, R., Breach of Contract, Mental Distress, (1978) 11 Melb. U.L. Rev. 593.

148. A.C.A.

149. See R.S.A. 1980, c. W-15, and R.S.M. 1970, c. W-200.

150. See R.S.Q. 1977, c. A-25.

151. The A.C.A. evolved from a number of official documents notably the Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand [hereinafter cited as the Woodhouse Report], Dec. 1967, and the Report of the Select Committee on Compensation for Personal Injury in New Zealand [hereinafter cited as the Gair Report], Nov. 1970.

152. A.C.A., s.24.

153. S.5(1) provides that "no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act...".

154. GASKINS, R., Tort Reform in the Welfare State: The New Zealand Accident Compensation Act, (1980) 18 Osgoode Hall L.J. 238, at 239.

155. Ibid, at 238.

156. Woodhouse Report, supra note 151, at paras. 55-63:

1) "community responsibility" - the community has a vested interest in urging forward the physical and economic rehabilitation of every citizen whose activities bear upon the general welfare;

2) "comprehensive entitlement" - every person should be treated in the same way, based on the injury itself, not the cause;

3) "complete rehabilitation" - the scheme could foster the physical and vocational recovery of citizens while at the same time providing a real measure of money compensation for their losses;

4) "real compensation" - this demands for the whole period of incapacity the provision of income - related benefits for lost income and recognition that any permanent bodily impairment is a loss in itself, regardless of its effect on earning capacity.

5) "administrative efficiency" - the achievement of the system will be eroded if benefits are delayed or are inconsistently assessed.

157. See Appendix A for Schedule.

158. SZAKATS, A., Reform of Personal Injury Compensation: The White Paper on the Woodhouse Report, (1970) 4 N.Z.J.L. Rev. 139, at 141.

159. GASKINS, supra note 154, at 238.

160. Ibid, at 239.

161. A maximum of $17,000 for the cumulative award - $7,000 for s.119, $10,000 for s.120.

162. Supra note 154, at 258.

163. GASKINS, R., Accident Compensation in New Zealand: The First Two Years, Aug. 1976, Unpublished paper. Referred to by PALMER, G., Lump Sum Payments Under Accident Compensation (1976) N.Z.L. Rev. 368.

164. PALMER, G., Lump Sum Payments Under Accident Compensation, Palmer comments that lawyers seem to have been involved in these claims more frequently than they have been with other sections of the Act.

165. Woodhouse Report, supra note 151, at para. 303.

166. [1943] A.C. 92.

167. See Hinz v. Berry, [1970 1 All E.R. 1074, Mount Isa Mines Ltd. v. Pusey, [1970] 125 C.L.R. 383. See discussion supra, at p. 20.

168. BLAIR, A.P., Compensation for the "Mental Consequences" of an Accident, (1982) N.Z.L.J. 105, at 107.

169. See McLaughlin v. O'Brian, [1981] 1 All E.R. 809 (C.A.), [1982] 2 W.L.R. 982 (H.L.). Although the Court of Appeal found that the plaintiff's mental state was a reasonably forseeable consequence of the defendant's negligence (her husband was seriously injured and daughter killed) the court held as a matter of policy that a duty of care would not be imposed on the defendant except to those persons at or near the scene of the accident, at or near the time it occurred. This limitation was extended by the House of Lords to include the "aftermath" of the accident and it was held that the plaintiff fell into this category and therefore could recover damages for the nervous shock that she suffered.

170. The 1969 version, as amended, Hansard (5th series) H.C. 21 May 1969, col. 100, [hereinafter cited as 1969 scheme].

171. Criminal Injuries Compensation Board, (1975) Eleventh Report, Cmd. 5291, at para. 10.

172. "The Board will consider applications for compensation arising and of rape and sexual assaults, both in respect of pain, suffering and shock and in respect of loss of earnings ... and ... in respect of the expenses of child birth". Ibid, at para. 9.

173. Criminal Injuries Compensation Act, R.S. Nfld. 1970, c. 68, s.16(e). Compensation for Victims of Crime Act, R.S.O. 1980, c. 82, s.7(1)(d). Compensation for Victims of Crime Ordinance, R.O.Y.T. 1971, c. C-10.1, s.4(1)(e). Criminal Injuries Compensation Act, R.S.S. 1978, c.

C-47, s.13(e). Compensation for Victims of Crime Act, R.S.N.B. 1973, c. C-14, s.17(1)(d).

174. Views of the Working Party Report, Cmd, 1406, (1964) referred to by ATIYAH, supra note 6, at 341.

175. See LINDEN, A.M., Report of the Osgoode Hall Study on Compensation for Victims of Crime, (1968) at 35, Table VIII. The findings show that a large percentage of victims of crimes had no out-of-pocket losses (44%) while an equal percentage (28%) showed victims with losses of under $100 on the one hand and over $100 on the other.

176. Pearson Report, supra note 2, at para. 1588.

177. STARRS, A Modest Proposal to Ensure Justice of Victims of Crimes, (1965) 50 Minn. L.R. 285, at 306.

178. BURNS, P., Recovery for Pain and Suffering Under the Criminal Injury Compensation Schemes, (1980) 29 U.N.B.L.J. 47.

179. Ibid, at 65-68.

180. Ibid, at 70.

181. See references cited supra note 173.

182. Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33, s.13(1). Criminal Injuries Compensation Act, S.M. 1970, c. 56, s.12(1). Criminal Injury Compensation Ordinance, R.O.N.W.T. 1974, c. C-23, s.5(1).

183. R.O.N.W.T. 1974, c. C-23, s.5(1)(f).

184. Criminal Injury Compensation Act, R.S.B.C. 1979, c. 83.

185. BURNS, supra note 178, at 59.

186. Ibid, at 72.

187. Social Security Act, 1975, c. 14.

188. ATIYAH, supra note 6, at 361.

189. National Insurance Act, 1946, 9 & 10 Geo. 6, c. 67.

190. National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, c. 62.

191. S.50(1).

192. According to para. 15 the degree of disablement must be expressed in percentage form.

193. S.57(2) of Social Security Act does make specific reference to disfigurement in the loss of physical faculty.

194. Para. 1(c) of Schedule 8 to the Social Security Act.

195. R.S.A. 1980, c. W-15.
R.S.B.C. 1979, c. 437.
R.S.M. 1970, c. W-200.
R.S.N.S. 1979, c. W-10.
R.S.P.E.I. 1974, c. W-10.
R.S.S. 1978, c. W-18.
R.O.N.W.T. 1974, c. W-4. R.O.Y.T. 1971, c. W-5.

196. See R.S.A. 1980, c. W-15, s.43(4). R.S.M. 1970, c. W-200, s.32(2).

197. See R.S.B.C. 1979, c. 83, s.16. R.S.S. 1978, c. C-47, s.88.

198. See among many other books and articles, ATIYAH, supra note 6. LINDEN, A.M., Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents, (1965) [hereinafter cited as the Osgoode Hall Study]. DUNLOP, B., No-fault Automobile Insurance and the Negligence Action: An Expensive Anomaly, (1975) 13 Osgoode Hall L.J. 439. SAUNDERS, I.B., The Future of Personal Injury Compensation. A Symposium, (1978).

199. The Osgoode Hall Study, supra note 198, ch. 5.

200. Ibid, ch. 4.

201. Currently the Automobile Accident Insurance Act, R.S.S. 1978, c. A-35.

202. Ibid, s.22.

203. Ibid, s.23(6).

204. Sask. Gaz. pt. 2, Reg. 343-79, s.38-39.

205. American Medical Association, Committee on Rating of Mental and Physical Impairment, Guides to the Evaluation of Physical Impairment (1971).

206. Automobile Insurance Act, S.M. 1970, c. 102.

207. Insurance Act, R.S.B.C. 1979, c. 200.

208. Insurance Act, R.S.O. 1980, c. 218.

209. Ibid.

210. Supra note 198, ch. 8, at 13-15.

211. Ontario Law Reform Commission, Report on Motor Vehicle Accident Compensation, Seventh Report, 1973, at 9.

212. Ibid.

213. ATIYAH, supra note 6, at 537.

214. TANCELIN, M.A., Théorie du droit des obligations, (1975), at para. 595, quoting MARTY, G. et RAYNAUD, P., Les obligations, (1962) T. II, 1er volume. See also BAUDOUIN, J.-L., La responsabilité civile délictuelle, (1973), at para. 11.

215. Art. 1503 C.c.

216. BAUDOUIN, supra note 214, at para. 28.

217. Daudelin c. Roy, [1974] Que. C.A. 95, concerning act of an infant.

218. TANCELIN, supra note 214, at para. 384. See also PINEAU, J. and OUELLETTE-LAUZON, M., Théorie de la responsabilité civile, (1977), at 12.

219. See Poulin c. Ducharme, [1974] Que. C.A. 615, concerning the probability of loss of sexual pleasures and ability to reproduce, and Sirois c. Ville de Montréal, [1973] Que. C.S. 863.

220. BAUDOUIN, supra note 214, at para. 109.

221. [1972] C.S. 1.

222. Ibid, at p. 10.

223. [1929] R.C.S. 650.

224. [1978] 1 R.C.S. 605.

225. André Elliott v. Enterprises Côte-Nord, [1976] C.A. 384. La Reine v. Sylvain, [1965] R.C.S. 164.

226. Santos v. Annett, [1967] Que. C.S. 617.

227. BAUDOUIN, supra note 214, at para. 104.

228. TANCELIN, supra note 214, at para. 280, quoting MARTY, G., and RAYNAUD, P., Droit civil, Les obligations (1962) T. II, 1er volume.

229. BAUDOUIN, supra note 214, at para. 49.

230. CREPEAU, P.-A., Liability for Damage Caused by Things from a Civil Law Point of View, (1962) 40 Can. B. Rev. 222, at 223.

231. (1940) 69 B.R. 112.

232. Ibid, at 114.

233. See cases cited at notes 223-226.

234. BAUDOUIN, supra note 214, at para. 112.

235. Ibid.

236. Ibid, at para. 100.

237. PINEAU and OUELLETTE-LAUZON, supra note 218, at 205.

238. See Hôpital Notre-Dame de l'Espérance et Theoret c. Laurent, [1974] C.A. 543.

239. BERNARDOT, A. and KOURI, R.P., La responsabilité civile médicale, (1980), at para. 96.

240. [1978] 2 R.C.S. 229. [1978] 2 R.C.S. 287. [1978] 2 R.C.S. 267.

241. Gilles Campeau c. Société Radio Canada, [1979] Que. C.S. 637, at 644, M. le juge Gratton stated,

> "Je me sens lié par les arrêts de la Cour suprême".

Dugal c. Procureur général du Québec, [1979] C.S. 617, C.A. (Québec, 200-09-000358-79) 1982.

242. Corriveau c. Pelletier, C.A. (Québec, 200-09-000490-786) 22 Apr. 1981.

243. Ibid, at 3.

244. [1979] Que. C.S. 907, at 919-920.

245. See BAUDOUIN, J.-L., L'Interprétation du Code civil québécois, (1975) 53 Can. B. Rev. 715. CREPEAU, P.-A., Les lendemains de la reforme du Code civil, (1981) 59 Can. B. Rev. 625.

246. (1890) 14 R.C.S. 105.

247. Ibid, at 124.

248. [1978] 2 R.C.S. 229, at 263.

249. Arts. 1070, 1071 C.c.

250. Art. 1065 C.c.

251. PINEAU, and OUELLETTE-LAUZON, supra note 218, at 258.

252. See Girard c. National Parking Ltd., [1971] C.A. 329.

253. See generally, CREPEAU, P.-A., Des régimes contractuel et délictuel de responsabilité civile en droit civil canadien, (1962) 22 Can. B. Rev. 501, PINEAU and OUELLETTE-LAUZON, supra note 218, at. 196-201.

254. [1981] 1 R.C.S. 578. See generally on implications of this case, (1982) 27 McGill L.J. 788-872.

255. Ross v. Dunstall, (1922) 62 R.C.S. 393. The dissenting judgement of Brodeur J. should be noted. For a contrary view point see also X. v. Mellen, (1957) B.R. 389 (C.A.). Bank of Montreal v. Att. Gen. of Quebec, [1979] 1 R.C.S. 565.

256. Arts. 2242, 2260-2262 C.C.

257. Art. 1056(c), 1077 C.C.

258. [1929] 2 R.C.S. 650.

259. See among others, CREPEAU, supra note 253, at 528-529.

260. CASTEL, J.-G., The Civil Law Systems of the Province of Quebec, (1962) at 519.

261. R.S.Q. 1977, c. A-25.

262. R.S.Q. 1977, c. I-G.

263. R.S.Q. 1977, c. A-3.

264. Ibid, s.3.

265. Ibid, s.3(1)(a).

266. See Schedule D.

267. A.T. No. 49 1979 C.A.S. 477.

268. R.S.Q. 1977, c. A-3, s.7, 8.

269. R.S.Q. 1977, c. A-25, s.18.

270. R.S.Q. 1977, c. A-3, s.38.

271. Ibid, s.53.

272. Ibid, s.56.

273. Ibid, s.38.

274. Regulation Respecting Impairment Table, Q.R.R. 1981, c. A-3, r. 3.

275. R.S.Q. 1977, c. A-25, s.3.

276. R.S.Q. 1977, c. 25-25, s.52.

277. M. Remi Paul, of Union Nationale, quoted in BURNS, P., Criminal Injuries Compensation, (1980), at 178.

278. Low v. Canadian Pacific Express Railway, (1939) 77 Que. C.S. 31.

279. Phillips v. South Western Rail Co., (1879) 4 Q.B.D. 406, at 407 per Cockburn C.J.,

> "a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained, the pain undergone; the effect on the health of the sufferer according to its degree and its probable duration as likely to be temporary or permanent...".

See also Fair v. London and North Western Rail Co., (1869) 21 L.T.R. 326.

280. ATIYAH, supra note 6, at 213.

281. See FAIRLEY, P., The Conquest of Pain, (1978), at 68-71, refers to Profs. R. Melzack and W.S. Torgerson who, on a perusal of medical literature, found 102 adjectives to describe pain.

282. See Phillips v. South Western Rail Co., (1879) 4 Q.B. D. 406, for the common law. Cutnam c. Léveillé, (1931) 37 R.L. n.s. 84, for the civil law of Quebec. and s.120 A.C.A. for the statutory position in New Zealand. It is inte-

resting to note that no compensation is given for this head in the Sino-Sorret approach to non-pecuniary loss. See (1969) 11 Int'l. Ency. Comp. L. ch. 9 Personal Injury and Death, ed. McGREGOR, H., paras. 36-38.

283. CRAMER, C.R., Loss of Enjoyment of Life as a Separate Element of Damages, (1981) 12 Pac. L.J. 965, at 969, "Depending on the severity of the injury an individual may describe pain as lancinating, sharp, dull, smarting, exquisite, shooting, severe, mild, local, generalised, tormenting, agonising or intense".

284. See FAIRLEY, supra note 281, at 32-48.

285. Enkephalins are a natural opiate - like substance produced in the body for the purpose of controlling pain. Substance P, discovered by Swedish researchers, transmits pain information from the source of the pain to the decoding centre in the brain.

286. See MELZACK, R., The Puzzle of Pain, (1973), at 13,

> "Pain is such a common experience that we rarely pause to define it in ordinary conversation. Yet no one who has worked on the problem of pain has ever been able to give it a definition which is satisfactory to all of his colleagues. Pain has obvious sensory qualities, but it also has emotional and motivational properties. It is usually caused by intense, noxious stimulation, yet it sometimes occurs spontaneously without apparent cause. It normally signals physical injury, but it sometimes fails to occur even when extensive areas of the body have been seriously injured; at other times it persists after all the injured tissues have healed and becomes a crippling problem that may require urgent, radical treatment".

287. McGREGOR, supra note 8, at para. 1213.

288. Ibid.

289. CASSELL, E.H., The Nature of Suffering and the Goals of Medicine, (1982) New Eng. J. Med. 639, at 641.

290. KOSKOFF, V.D., The Nature of Pain and Suffering, (1977) 13 Trial 22.

291. Ibid. See also CRAMER, supra note 283, at 970-972.

292. Dr. Cassell's topology of the person can be described as follows:

1) persons have personality and character;

2) a person has a past. The personal meaning of a disease may arise from the past and past experiences of the family;

3) a person has a cultural background. The cultural influences have a substantial effect on the sick;

4) a person has roles. This is where the full range of human emotion finds expression;

5) a person is a political being;

6) persons do things;

7) a person has a body. There may be a decrease in sense of self;

8) a person has a secret life with private pain;

9) a person has a perceived future. There may be loss of hope;

10) a person has a transcendent dimension, a life of the spirit.

293. CRAMER, supra note 283, at 972.

294. See Roy v. Richardson, (1968) 68 D.L.R. 2d 352.

295. BAUDOUIN, supra note 214, at para. 158.

296. See Driver v. Coca-Cola, [1961] R.C.S. 201. Fostey v. Moore's Tax, (1961) Ltd., [1973] 1 W.W.R. 673. R. v. Jennings, (1966) 57 D.L.R. 2d 644 (S.C.C.).

297. COOPER-STEPHENSON and SAUNDERS, supra note 4, at 353.

298. (1977) 16 Ont. 2d 166 (C.A.). See also Hinz v. Barry, [1970] 2 Q.B. 40.

299. THOMSON, supra note 84, at 145.

300. Behrens v. Bertram Mills Circus, [1957] 2 Q.B. 1, at 28, per Devlin J.

301. [1965] 2 Q.B. 86 (C.A.).

302. Woodhouse Report, supra note 151, at para. 289.

303. See Hite c. Jim Russel Racing Drivers School, C.S. (Montreal, 500-05-016023-788) 3 Sept. 1981.

304. (1879) 5 R.J.Q. 267 (C.A.).

305. Ibid, at 273, per Routhier J.

306. R.S.Q. 1977, c. C-12.

307. Ibid, ss. 4, 5, 9.

308. CREPEAU, P.-A., La responsabilité médicale et hospitalière dans la jurisprudence québécoise récente, (1960) 20 Rev. B. de Québec 433, at 455-456.

309. See Therrien c. Labrecque, C.S. (Quebec, 200-05-001457-77) 2 Feb. 1982.

310. McGREGOR, supra note 8, at para. 59.

311. See Bailey v. Bullock, [1950] 2 All E.R. 1167 where a plaintiff was awarded damages for "discomfort and inconvenience" since due to a solicitor's negligence he and his family had been forced to live in uncomfortable circumstances.

312. (1875) 10 L.R. - Q.B. 111.

313. See also Piper v. Daybell Court Cooper and Co., (1969) 210 E.G. 1047.

314. Art. 19 C.c., "la personne humaine est inviolable", and Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s.4 states: "Every person has a right to the safeguard of his dignity, honour and reputation". S.5 states, "Every person has a right to respect for his private life".

315. BARAKETT, F.D. and JOBIN, P.-G., La réparation du préjudice esthétique, (1976) 17 C. de D. 965, at 966.

316. See cases in Part Two, Section III.

317. BARAKETT and JOBIN, supra note 315, at 974-975.

318. BAUDOUIN, supra note 214, at para. 157.

319. Rose v. Ford, [1937] 3 All E.R. 359, at 379, per Lord Roche.

320. Hearnshaw v. English Steel Corporation, (1971) 11 K.I.R. 306.

321. Cram and Howland v. Ryton Marine Ltd., Nov. 30, 1976 C.A. No. 424.

322. OGUS, supra note 5, at 206.

323. BAUDOUIN, supra note 214, at para. 154. This point is also made by GOLDSMITH, I., Damages for Personal Injury and Death, (1980), at xxiv.

324. Stedmans Medical Dictionary, (4th ed. 1976), at 1509.

325. Ibid, at 312.

326. [1979] 2 All E.R. 910 (H.L.) following H. West and Son Ltd. v. Shepherd, [1963] 2 All E.R. 625 and West v. Kaye, [1962] 1 All E.R. 257.

327. [1979] 2 All E.R. 910, at 918.

328. [1979] 1 All E.R. 332 (C.A.), at 341.

329. [1966] R.C.S. 532.

330. [1961] R.C.S. 201.

331. Ibid, at 207, per Tachereau J.

332. [1976] Que. C.S. 1390.

333. Ibid, at 1395.

334. Since it is the family of the victim who will be using the money for the victim's benefit, one might even suggest that they should be able to claim for compensation to satisfy their sense of loss and emotional anguish, although at present a claim of grief and sorrow is not permitted.

335. C.A. (Montreal, 500-09-000119-776) 1 Nov. 1979.

336. Ibid, at 7.

337. Situation 2) of the proposed distinctions outlined above.

338. C.A. (Montreal, 500-09-000119-776) 1 Nov. 1979, at 9.

339. Pearson Report, supra note 2, at para. 398.

340. VEITCH, E., The Pearson Report, Guidelines for Canada?, (1979) 28 U.N.B.L.J. 19, at 27.

341. [1935] 1 K.B. 354. See also Rose v. Ford, [1937] A.C. 826 (H.L.).

342. [1941] A.C. 157.

343. Increased to £1,250 in Gammell v. Wilson, [1981] 2 W.L.R. 248. The English courts have kept to this figure, but as will be seen in Part Two Section III the Canadian courts have strayed from the conventional award as indicated by Crosby v. O'Reilly, [1974] 6 W.W.R. 475 (S.C.C.) where Laskin C.J.C. stated at 478, "I do not think that damages can be so exactly defined by putting them on the basis of a legal limitation". $10,000 had been awarded in this case for loss of expectation of life.

344. [1941] A.C. 157, at 166.

345. Burns v. Edman, [1970] 2 Q.B. 541.

346. Driver v. Coca-Cola Ltd., (1961) R.C.S. 201.

347. BAUDOUIN, supra note 214, at para. 155.

348. [1962] 2 Q.B. 210 (C.A.).

349. [1962] 2 Q.B. 210 (C.A.), at 231, per Holroyd Pearce L.J. This case had laid down the rule that damages for lost earnings could only be recovered during the expectation of life after the accident. This was overruled by the House of Lords in Pickett v. British Rail Engineering Ltd., [1979] 19 All E.R. 774. See generally on "lost years" MESHER, J. and TODD, S., "Damages for Lost Years" - Recent Developments in the United Kingdom, (1980) 29 Int'l. Comp. L.Q. 719 and Damages for Lost Years, (1981) Notes, 97 L.Q. Rev. 353.

350. Pearson Report, supra note 2, at para. 371.

351. See KAHN-FREUND, O., Expectation of Happiness, (1941) 5 Mod. L. Rev. 81, at 82, "The prospect, expectation or anticipation of an early death is just as much part of the victim's mental suffering as the loss of a limb or his eyesight".

352. [1944] R.C.S. 317.

353. BAUDOUIN, supra note 214, at para. 106.

354. Ladd v. Jones, [1975] R.T.R. 67.

355. This is stated in Pt. 1, cl. 2 of the Bill, which deals with personal injuries. The Bill received its 3rd reading in the House of Lords on 21 May 1982. Some Canadian provinces, such as Alberta, have enacted legislation which in essence provides for a -

loss of consortium claim, by either spouse. See R.S.A. 1970, c.113.

356. A.C.A., s.119.

357. See MUNKMAN, J., Damages for Personal Injuries and Death, (1973) 5th ed., at 122-123. H. West and Son Ltd. v. Shepherd, [1963] 2 All E.R. 625, at 643, per Lord Pearce, "The practice of courts hitherto has been to treat bodily injury as a deprivation which in itself entitles a plaintiff to substantial damages according to its gravity".

358. Croke v. Wiseman, [1981] 3 All E.R. 852, at 856.

359. OGUS, supra note 5, at 194-218. See also OGUS, A.I., Damages for Lost Amenities: For a Fact, a Feeling or a Function?, (1972) 35 Mod. L. Rev. 1.

360. OGUS, supra note 359, at 2.

361. Ibid.

362. Ibid, at 12.

363. OGUS, supra note 5, at 200.

364. OGUS, supra note 359, at 14.

365. Described as "substitute (or solace) compensation" by ATIYAH, supra note 6, at 537-539.

366. McLACHLIN, B.M., What Price Disability - A Perspective on the Law of Damages for Personal Injury, (1981) 59 Can. B. Rev. 1, at 47.

367. OGUS, supra note 359, at 17.

368. KLAR, L.N., The Assessment of Damages for Non-Pecuniary Losses, (1978) 5 C.C.L.T. 258.

369. Pain and suffering, loss of amenities, loss of expectation of life.

370. This is the first calculation that is made, and an increase may be made under s.120 A.C.A..

371. See Dugal c. P.G. du Québec, (1979) Que. C.S. 619.

372. The Workmen's Compensation Act, R.S.Q. 1977, c. A-3.

373. Regulation Respecting Impairment Table, R.R.Q. 1981, c. A-3, r.3.

374. This formula was proposed by the Draft Regulation Respecting Temporary Disability and Permanent Disability, Gaz.Off. Que. 1981, Pt. 2,113, 1409 which does not appear to have been fully incorporated into the Regulation cited in note 373.

375. Automobile Insurance Act, R.S.Q. 1977, c. A-25, s.1.

376. [1970] A.C. 467.

377. [1981] 2 All E.R. 752.

378. See Performance Cars Ltd. v. Abraham, [1962] 1 Q.B. 33.

379. [1970] A.C. 467, at 495 per Lord Pearson.

380. Ibid, at 492 per Lord Reid.

381. (1965) 65 W.W.R. 577.

382. [1913] 2 K.B. 158.

383. Carslogie Steamship Co. Ltd. v. Royal Norwegian Government, [1952] 1 All E.R. 20. Jobling v. Assoc. Dairies Ltd., [1981] 2 All E.R. 752.

384. [1981] 2 All E.R. 752, at 755.

385. Criminal Injuries Compensation Board, (1978) Fourteenth Report, Cmd. 7396, at para. 1.

386. Medical Defence Union, (1982) Annual Report, at 9.

387. [1978] 2 R.C.S. 229, at 242. See also Corriveau c. Pelletier, C.A. (Quebec, 200-09-000490-786) 22 Apr. 1981, at 2, per Mayrand J.,

> "Il faut donc résister à la tentation d'accorder des dommages-intérêts punitifs en dépit de la conduite irritante de l'appelant. L'indemnité doit être proportionnée au préjudice subi, non à la gravité de la faute commise".

388. [1978] 2 R.C.S. 229, at 242.

389. ATIYAH, supra note 6, at 533.

390. The desire to seek revenge and see someone brought to justice for the injury suffered by the victim is a clear motivational factor. This view was strongly endorsed at an interview conducted by the author with M. Trudeau and J. Laliberté of the Canadian Paraplegic Association, 22 Sept. 1982, Montreal office.

391. SAUNDERS, I.B., The Future of Personal Injury Compensation, (1978) Ed., at 42.

392. ATIYAH, supra note 6, at 316.

393. Ibid, at 307. In the case of a plaintiff and insurer the plaintiff may only "sell" his claim to one buyer which is the insurer and the insurer may only "buy" from one seller which is the plaintiff.

394. CAVE, D.A., Structured Settlements: An Alternate Resolution of Claims Involving Death or Substantial Personal Injury, (1979) 27 Chitty's L.J. 234.

395. Ibid, at 235.

396. See R.S.Q. 1977, c. A-3, ss.38(2), R.S.O. 1980, c. 539, s.43(5).

397. See ATIYAH, supra note 6, at 190, FELDTHUSEN, B. and McNAIR, K., General Damages in Personal Injury Suits: The Supreme Court's Trilogy, (1978) 28 U. Toronto L.J. 381, at 420.

398. Pearson Report, supra note 2, para. 614.

399. FELDHUSEN, B. and McNAIR, K., General Damages in Personal Injury Suits: The Supreme Court's Trilogy, (1978) 28 U. Toronto L.J. 381.

400. Ibid, at 420.

401. (1969) 11 Int'l. Ency. Comp. L., ch. 9, para. 49.

402. See Metcalfe v. London Passenger Transport Board, [1938] 2 All E.R. 325,

403. Fournier v. Canadian National Railway, [1927] A.C. 167 (P.C.).

404. Supra note 151, at para. 122.

405. Dissipation is seen as an insurmountable problem by the Canadian Paraplegic Association. In an interview conducted 22 Sept. 1982 M. J. Laliberté expressed concern that it was a common occurrence for an award of over $150,000 to be dissipated within two years of the settlement.

406. FLEMING, J.G., Damages: Capital or Rent?, (1969) 19 U. Toronto L.J. 295, at 299.

407. [1978] 2 R.C.S. 287. See also CHARLES, W.H.R., The Supreme Court of Canada Handbook on the Assessment of Damages in Personal Injury Cases, (1981-82) 18 C.C.L.T. 1, at 34.

408. Quoted by HASSON, R., in The Future of Personal Injury Compensation, A Symposium, supra note 391, at 36.

409. Pt. 1, cl. 6. For text see (1982) 79 L. Soc'y. Gazette, No. 30.

410. This approach has been supported by the Court of Appeal in England in Coenen v. Payne, [1974] 2 All E.R. 1109.

411. A.C.A., s.120(4).

412. See Lim Poh Choo v. Camden and Islington Area Health Authority, [1979] 1 All E.R. 332 (C.A.).

413. Andrews v. Grand and Toy (Alta.) Ltd., [1973] 2 S.C.R. 229.

414. Pearson Report, supra note 2, at para. 614.

415. Ibid, at para. 571 reflecting the view of the Royal College of Physicians and Surgeons of Glasgow.

416. See FELDHUSEN and McNAIR, supra note 399, at 421.

417. Ibid, at 425.

418. CAVE, supra note 394, at 234.

419. The index is usually set at 3% to 5%; McKELLAR, F., Structured Settlements - A Current Review, (1981) 2 Advocates Q. 389, at 390.

420. CAVE, supra note 394, at 234.

421. McKELLAR, supra note 419, at 390.

422. See Yepremian v. Scarborough General Hospital, (1981) 15 C.C.L.T. 73 for a Canadian example of a judicially approved structured settlement, and Martin v. Bouchard, (1980) 32 N.B. 2d 678.

423. See R.S.Q. 1977, c. A-25 ss.48-50. The lump sum entitlement under s.44 is included in s.49.

424. See R.S.Q. 1977, c. A-3, ss.38-41, R.S.B.C. 1979, c. 437, s.25.

425. McLACHLIN, supra note 366, at 49.

426. [1978] 2 R.C.S. 229, at 263.

427. [1982] 1 W.W.R. 433, at 443.

428. C.A. (Quebec, 200-09-000490-786) 22 Apr. 1981.

429. Ibid, at 3, per Mayrand J.

430. C.S. (Montreal, 500-05-016023-788) 3 Sept. 1981.

431. [1979] 2 All E.R. 910, per Scarman L.J.

432. Ibid.

433. Ibid.

434. KEMP, D.A., and KEMP, M.S., The Quantum of Damages - Personal Injury Reports, (1975) Vol. 2, at 602. Hereinafter cited as KEMP and KEMP

435. [1979] 1 W.L.R. 760.

436. Yorkshire Electricity Board v. Naylor, [1968] A.C. 529, at 552 per Upjohn L.J.

437. FLEMING, J., The Impact of Inflation on Tort Compensation, 26 Am. J. Comp. L. 51, at 59.

438. ATIYAH, supra note 6, at 208, quoting Elliott and Street, Road Accidents (1968).

439. KEMP and KEMP, supra note 434, at 621.

440. See Part Two Section III for examples.

441. CHARLES, W.H., Justice in Personal Injury Awards, The Continuing Search for Guidelines, in Studies in Canadian Tort Law, (1977) ed. KLAR, L., ch. 2, at 69.

442. [1978] 2 All E.R. 604.

443. Ibid, at 611.

444. (1967) 66 D.L.R. 2d 226 (B.C.C.A.), aff'd. (1968) 68 D.L.R. 2d 765 (S.C.C.).

445. See HUNTER, J. and TYREE, A.L., The Rising Interest in Inflation, (1981) 9 Aust. Bus. L. Rev. 410, at 414, concerning arguments against inflation.

446. [1978] 2 R.C.S. 229, at 255.

447. Ibid, at 237.

448. See PATTERSON, J.B., Effective Presentation of Actuarial Evidence in Permanent Disability Cases, Part II, (1979) 37 Advocate 13, at 20-21. See also Lan v. Wu, [1979] 2 W.W.R. 122 (B.C.S.C.) and CHARLES, supra note 407, at 26, for range of discount rates used in personal injury cases.

449. See REA, S.A., Inflation, Taxation and Damage Assessment, (1980) 58 Can. B. Rev. 280; FELDHUSEN and McNAIR, supra note 397, at 390-400; GIBSON, B., Repairing the Law of Damages, (1978) 8 Man. L.J. 637, at 648-652.

450. PATTERSON, supra note 448, at 20-21.

451. DEXTER, A.S., MURRAY, T.D. and POLLAY, R.W., Inflation, Interest Rates and Indemnity: The Economic Realities of Compensation Awards, (1979) 13 U.B.C.L. Rev. 298.

452. Ibid, at 299.

453. See BOYLE, P.P. and MURRAY, T.D., Assessment of Damages: Economic and Actuarial Evidence, (1981) 19 Osgoode Hall L.J. 1, at 4. CONNELL, H.B.M., Discount Rates - The Current Debate, (1980) 2 Advocates Q. 138, at 143.

454. DEXTER, MURRAY and POLLAY, supra note 451, at 303.

455. Lim Poh Choo v. Camden and Islington Area Health Authority, [1979] 2 All E.R. 910, at 923, per Scarman L.J.

456. See Mallett v. McMonagle, [1970] A.C. 166; Cookson v. Knowles, [1978] 2 All E.R. 604.

457. See McLACHLIN, supra, note 366, at 23. McLachlin observes that, "the discount rates of four to five percent assumed by typical multipliers actually reflect a modest allowance for inflation of one to two

two percent, notwithstanding the supposed rule that inflation should be ignored", at 24.

458. See HUNTER and TYREE, supra note 445, at 425 for reference to such studies.

459. Supra note 2, at para. 612.

460. The main relevant benefit would be the disablement benefit which is paid as a weekly pension where the disability is assessed as 20% or more.

461. In British Transport Commission v. Gourley, [1956] A.C. 185, the House of Lords did not take into account the tax on investment income that would be earned on the lump sum, but income tax that would have been paid on the lost earnings was deducted. In Taylor v. O'Connor, [1971] A.C. 115, the House of Lords made an increase in the award on account of the taxes to be paid on investment income. The Pearson Commission, supra note 2, at paras. 675-687, recommended a more detailed consideration of the effects of taxation.

462. In R. v. Jennings, [1966] S.C.R. 532, aff'd. Andrews v. Grand and Toy (Alta.) Ltd., [1978] 2 S.C.R. 229, the Supreme Court of Canada held that future effects of taxation should not be considered in the assessment.

463. Canada: Keizer v. Hanna, (1978) 82 D.L.R. 3d 449 (S.C.C.) the courthheld future taxation should be considered in the assessment of an award under the Fatal Accidents Act. For explanation of the difference in approach in Canada see Andrews v. Grand and Toy (Alta.) Ltd., [1978] 2 S.C.R. 229, at 259, per Dickson J.

England: Taylor v. O'Connor, [1971] A.C. 115.

464. [1978] 2 S.C.R. 229, at 260.

465. See FELDHUSEN and McNAIR, supra note 397, at 402-403; McLAGHLIN, supra note 366, at 31.

466. See REA, supra note 449, at 297.

467. SHEPPARD, A.F., A Comment Upon Gehrmann v. Lavoie, (1976) 24 Can. Tax J. 115, at 116.

468. CHARLES, W.H., A New Handbook on the Assessment of Damages in Personal Injury Cases from the Supreme Court of Canada, (1978) 3 C.C.L.T. 344, at 359: $58,000 was added by the B.C.C.A. in Thornton v.

Prince George Board of School Trustees, [1976] 5 W.W.R. 240.

469. BISSETT-JOHNSON, A., Damages for Personal Injuries - The Supreme Court Speaks, (1978) 24 McGill L.J. 316, at 336, notes that tax exemptions exist for those under twenty-one for income arising from damages awarded for personal injury.

470. See FELDHUSEN and McNAIR, supra note 397, at 389; McLACHLIN, supra note 366, at 32-33; GIBSON, supra note 449, at 647.

471. GIBSON, supra note 449, at 647.

472. FELDHUSEN and McNAIR, supra note 397, at 389.

473. Andrews v. Grand and Toy (Alta.) Ltd., [1978] 2 R.C.S. 229, at 249-250, per Dickson J.

474. See BERNARDOT and KOURI, supra note 239, at para. 102.

475. [1970] 1 All E.R. 1202 (C.A.).

476. [1979] 1 All E.R. 774 (H.L.).

477. See Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5 c. 41, s.3, as amended by Administration of Justice Act, 1969, c. 58.

478. See Halsbury's Laws of England 1204 (4th ed. 1975).

479. [1982] 2 All E.R. 710. See also Goodall v. Hall, Apr. 1, 1982, Times, 2% per annum interest was awarded on damages for loss of expectation of life.

480. See Henderson v. Hatton, [1981] 5 W.W.R. 624, at 636, per Craig J.A.

481. Ibid, at 637.

482. A.C.A., s.119(4).

483. It is submitted that psychological disability can be quantified in terms of a permanent or temporary incapacity and its omission from the schedule could be criticised since psychological damage is often a major element in the consequences of personal injury.

484. These elements tend to be considered together according to PALMER, G., Lump Sum Payments Under Accident Compensation, (1976) N.Z.L.J. 368, at 371.

485. Examples 1 to 3 are taken from PALMER, ibid, at 374.

486. Examples 4 to 8 are taken from Accident Compensation Digest for legal practitioners, Permanent Disability Awards, May 1979, s.120 Quantum of awards, No. 5.

487. In the case of eye injuries s.119(7) provides that "for the purposes of the said Second Schedule the permanent loss of the sight of one eye by a person who is already permanently without the sight of the other eye shall be deemed to be the permanent loss of the sight of both eyes".

488. Examples 9 and 10 are taken from Accident Compensation Commission Digest for legal practitioners, Permanent Disability Awards, July 1978, s.120 Quantum of Awards, No. 1.

489. Supra note 2, at para. 388.

490. See Gair Report, supra note 151, at 418, which suggests that "very little weight, if any" should be attached to temporary pain and suffering.

491. A.C.A., s.120(2).

492. [1981] N.Z.A.C.R. 26. This case also holds that the word "may" in s.120(6) is to be interpreted as having the force of the word "shall".

493. Ibid, at 29.

494. [1981] N.Z.A.C.R. 126.

495. WILLY, A.A.P., The Accident Compensation Act and Recovery for Losses Arising from Personal Injury and Death by Accident, (1975) 6 N.Z.U.L. Rev. 250, at 256.

496. HARRIS, D.R., Accident Compensation in New Zealand: A Comprehensive Insurance Systems, (1974) 37 Mod. L. Rev. 361, at 372.

497. Woodhouse Report, supra note 151, at para. 200.

498. PALMER, supra note 484, at 373.

499. A.C.A., ss.43-53.

500. A.C.A., s.20.

501. A.C.A., s.149.

502. For example, the State Insurance Office.

503. A.C.A, s.153.

504. See PALMER, supra note 484, at 373.

505. Ibid, at 375.

506. See de SMITH, J.A., Judicial Review of Administrative Action, (1973) 3rd ed.

507. A.C.A., s.168.

508. A.C.A., s.169.

509. Supra note 496, at 365.

510. BURNS, P., Criminal Injuries Compensation, (1980). This book provides a comprehensive analysis of criminal injury compensation schemes in Canada on all aspects of the compensation system.

511. Ibid, at 140.

512. See BURNS, supra note 510, at 31. Ontario is the only province that does not have a schedule of offences listed in its Act and reference is made "a crime of violence" in R.S.O. 1980, c. 82, s.5(a).

513. Ibid, at 383-389.

514. R.S.O. 1980, c. 83, ss.10,22.

515. ATIYAH, supra note 6, at 357.

516. 1969 Scheme, supra note 170, at para. 5.

517. ATIYAH, supra note 6, at 343-344.

518. [1977] 3 All E.R. 854.

519. BURNS, supra note 510, at 36, submits that even though Ontario does not list "scheduled offences" the only offences that are permitted are those of scheduled offences and "the scheduled crimes across Canada can be said to be uniform".

520. Review of the Criminal Injuries Compensation System: Report of an Interdepartmental Working Party, (1978), 20-22. The working party recommended that the scheme be restructured on a statutory footing.

521. See R. v. CICB, ex parte Lain, [1967] 2 Q.B. 864.

522. S.M. 1970, c. 56, s.22(3).

523. Supra, Part One, Section I (3) (c).

524. Supra note 510, at 376.

525. R.S.Q. 1977, c. I-6, s.15.

526. See (1982) 132 New L.J. 183.

527. 1969 scheme, supra note 170, at para. 6(a).

528. Pearson Report, supra note 2, at para. 386.

529. Criminal Injury Compensation Board, (1978) Fourteenth Report, Cmd 7396, at para. 53.

530. Alta. $100, B.C. $100, Man. $150, N.W.T. $100, Sask. $50, Yuk. $100.

531. BURNS, supra note 510, at 291.

532. R.S.N.B. 1973, c. C-14, s.17(2)(b).

533. Sask. O.I.C. 1968-80.

534. Nfld. O.I.C. 1972, 1083-22.

535. R.S.B.C. 1979, c. 83, s.13(2)(a).

536. R.O.N.W.T. 1974, c. C-23, s.22(2)(a).

537. R.S.O. 1980, c. 82, s.19(1)(a).

538. BURNS, supra note 510, at 293.

539. In the Matter of the Application of Chester Parada, 24 Sept. 1981, Regina, Sask., 895/80, 829/82.

540. In the Matter of the Application of Shelly Bergen, 18 Feb. 1982, Saskatoon, Sask., 992/81, 857/82.

541. In the Matter of a Claim by Stanley D. Smith, 21 Feb. 1978, Toronto, Ont., 200-3573, at 3.

542. BURNS, supra note 510, ch. 4.

543. Ibid, at 188.

544. Ibid, at 198.

545. In the Matter of the Application of Shelly Bergen, 18 Feb. 1982, Saskatoon, Sask.

546. In the Matter of the Application of Edward Caminghay, 30 July 1980, Saskatoon, Sask.

547. In the Matter of the Application of Barton Johnson, 17 June 1982, Regina, Sask.

548. In the Matter of the Application of M.H., 21 July 1982, Prince Albert, Sask.

549. In the Matter of the Application of C.D., 6 May 1982, Saskatoon, Sask.

550. In the Matter of the Application of Diane Dahl, 3 Dec. 1981, Regina, Sask.

551. In the Matter of a Claim by Mrs. Josetta Legue, 22 Aug. 1977, Ottawa, Ont.

552. In the Matter of a Claim by Carl G. Buder, 16 Nov. 1977, Toronto, Ont.

553. In the Matter of a Claim by Inne Hammerman, 15 Mar. 1978, Toronto, Ont.

554. In the Matter of a Claim by John Cecil Johnston, 6 Dec. 1977, Toronto, Ont.

555. In the Matter of a Claim by Thomas W. Homby, 14 Sept. 1977, Toronto, Ont.

556. In the Matter of a Claim by William Campbell and William Campbell on behalf of Main L. Campbell (Minor), 22 Sept. 1977, Toronto, Ont.

557. R.S.Q. 1977, c. A-3, s.38(4).

558. R.R.Q. 1981, c. A-3, r.3.

559. Gaz. Off. Q. 1981, Pt. 2, 113, 1409, c.3.

560. Ibid, s.12.

561. Workers' Compensation Board, Annual Report, Nova Scotia, (1981), at 8.

562. [1977] 2 R.C.S. 229; [1978] 2 R.C.S. 287; [1978] 2 R.C.S. 267.

563. Supra note 434.

564. [1982] 1 W.W.R. 433.

565. (1) Kemp and Kemp, 12-033, 15 Feb. 1979.
(2) Kemp and Kemp, 12-011/6, 12 Jan. 1981.

(3) Kemp and Kemp, 12-011/1, 13 Apr. 1981.
(4) (1982) 9 Current L., 4 Mar. 1982.
(5) Kemp and Kemp, Supp. June 1982, at 4, 30 Apr. 1982.
(6) (1982) 9 Current L., 30 Apr. 1982.
(7) Kemp and Kemp, 5-122/2, 10 Feb. 1981.
(8) Kemp and Kemp, Supp. June 1982, at 4, 31 Dec. 1981.
(9) [1979] 2 All E.R. 910 (H.L.).
(10) (1982) 132 New L.J. 32, 23 July 1981.
(11) [1978] 2 All E.R. 213.
(12) [1981] 3 All E.R. 852.
(13) (1982) 9 Current L.
(14) (1982) 132 New L.J. 32, 2 July 1981.
(15) [1981] 3 All E.R. 250 (C.A.).
(16) The Times, 27 Apr. 1982.
(17) Kemp and Kemp, Supp. June 1982, at 3, 7 Dec. 1981.
(18) Kemp and Kemp, 1-501/2, 23 May 1979.
(19) Kemp and Kemp, 1-009, 31 Dec. 1981.
(20) Kemp and Kemp, 1-950, 9 Mar. 1981.

566. (1) (1981) 15 C.C.L.T. 81.
(2) (1979) 25 N.B. (2d) 45.
(3) [1980] 2 R.C.S. 430.
(4) (1982) 20 C.C.L.T. 14.
(5) (1982) 20 C.C.L.T. 301.
(6) (1981) 25 B.C.L.R. 341 (B.C.C.A.).
(7) (1979-80) 10 C.C.L.T. 197.
(8) (1980) 28 Nfld. and P.E.I. 429, aff'd. (1981) 35 Nfld. and P.E.I. 76 (C.A.).
(9) [1981] 5 W.W.R. 624 (B.C.C.A.).
(10) (1981) 15 C.C.L.T. 247 (B.C.C.A.).
(11) (1981) 124 D.L.R. 3d 506 (Man. C.A.).
(12) (1982) 14 Sask. R. 232.
(13) (1981-82) 19 C.C.L.T. 1.
(14) [1978] 2 R.C.S. 229.
(15) [1978] 2 R.C.S. 267.
(16) [1978] 2 R.C.S. 287.
(17) [1982] 1 W.W.R. 433.
(18) (1978) 9 C.C.L.T. 104, aff'd. (sub. nom. Consumers' Gas Co. v. Fenn), (1981) 18 C.C.L.T. 258 (S.C.C.).
(19) [1982] 4 W.W.R. 519.
(20) (1982) 20 C.C.L.T. 64.

567. (1) C.S. (Hull, 550-05-001953-77) 4 Nov. 1980.
(2) C.S. (Montreal, 500-05-004294-755) 16 Mar. 1982.
(3) C.S. (Montreal, 500-05-027588-787) 17 Mar. 1982.
(4) C.S. (Montreal, 500-05-020715-775) 3 Mar. 1982.
(5) C.S. (Chicoutimi, 150-05-000273-77) 19 Mar. 1982.
(6) C.S. (Frontenac, 235-05-000119-79) 9 Mar. 1982.
(7) C.S. (Montreal, 500-05-013571-789) 15 Jan. 1981.
(8) C.S. (Quebec, 200-05-6218) 29 Feb. 1980.
(9) C.S. (Trois-Rivières, 400-05-000217-79) 5 June 1981.

(10) C.S. (Beauharnois Valleyfield, 760-05-000727-77) 4 Feb. 1982.
(11) C.S. (Quebec, 200-05-001457-77) 2 Feb. 1982.
(12) C.S. (Montreal, 500-05-00363-798) 19 May 1981.
(13) C.A. (Quebec, 200-09-000490-786) 22 Apr. 1981.
(14) [1979] Que. C.S. 637.
(15) [1979] Que. C.S. 617.
(16) C.S. (Hull, 550-05-000Z011-78) 4 Feb. 1982.
(17) [1979] Que. C.S. 907.
(18) (1978) Que. C.S. 618.
(19) C.S. (Trois Rivières, 400-05-000956-77) 2 Mar. 1982.
(20) C.S. (Montreal, 500-05-016023-788) 3 Sept. 1981.

568. [1978] 2 R.C.S. 229, at 238.

569. [1978] 2 R.C.S. 287, at 318. A detailed résumé of the injuries, their effects and prognosis is set out at 317-319.

570. (1976) 11 Ont. 2d 585.

571. (1978) 5 C.C.L.T. 245, at 249.

572. [1978] 2 R.C.S. 229, at 241-242.

573. Ibid, at 263.

574. LIPNOWSKI, I.F., The Economist's Approach to Assessing Compensation for Accident Victims, (1979) 9 Man. L.J. 312, at 332.

575. [1978] 2 R.C.S. 229, at 263.

576. Ibid.

577. References re Alta. Legislation, [1938] R.C.S. 100, at 128.

578. [1978] 2 R.C.S. 229, at 263.

579. Ibid, at 264.

580. Ibid, at 235.

581. (1981) 29 B.C.L.R. 25.

582. (1981) 25 B.C.L.R. 341.

583. See McLeod v. Palardy, (1981) 124 D.L.R. 3d 506.

584. See Ostapo ich v. Benoit, (1982) 14 Sask. R. 232.

585. Fenn v. City of Peterborough, (1978) 9 C.C.L.T. 1.

586. Savard v. Richard and Richard, (1979) 25 N.B. 2d 45.

587. Johnstone v. Sealand Helicopters Ltd., (1980) 28 Nfld. and P.E.I. 429.

588. [1979] Que. C.S. 617.

589. [1979] Que. C.S. 637.

590. [1978] Que. C.S. 618.

591. [1979] Que. C.S. 617, at 63.

592. See Lindal v. Lindal, [1982] 1 W.W.R. 433 (S.C.C.), at 443, per Dickson J.

593. Henderson v. Hatton, [1981] 5 W.W.R. 624.

594. (1981) 124 D.L.R. 3d 506.

595. C.S. (Montreal, 500-05-016023-788) 3 Sept. 1981.

596. (1982) 14 Sask. R. 232.

597. C.S. (Trois Rivières, 400-05-000956-77) 2 Mar. 1982.

598. Johnstone v. Sealand Helicopters Ltd., (1980) 28 Nfld. and P.E.I. 429, at 437, per Hickman, C.J.T.D.

599. [1978] 2 R.C.S. 229, at 235.

600. (1979) 25 N.B. 2d 45.

601. (1980) 28 Nfld. and P.E.I. 429.

602. (1979) 25 N.B. 2d 45, at 50, per Richard J.A.

603. Unreported 28 June 1978 (Ont. C.A.).

604. (1978) 9 C.C.L.T. 104, at 73.

605. (1981) 15 C.C.L.T. 81.

606. (1982) 20 C.C.L.T. 301.

607. C.S. (Montreal, 500-05-027588-757) 17 Mar. 1982.

608. C.S. (Hull, 550-05-0002011-78) 4 Feb. 1982.

609. C.S. (Montreal, 500-05-013571-789) 15 Jan. 1982.

610. (1979) 16 A.R. 336, at 352.

611. Epstein v. Wyle, (1981) 25 B.C.L.R. 341, at 353, per Aikins, J.A.

612. [1978] 2 R.C.S. 229, at 262.

613. (1982) 20 C.C.L.T. 301.

614. (1980) Nfld. and P.E.I. 429, at 456.

615. C.S. (Montreal, 500-05-004294-755) 16 Mar. 1982.

616. C.S. (Montreal, 500-05-020715-775) 3 Mar. 1982.

617. C.S. (Quebec, 200-05-013571-789) 15 Jan. 1982.

618. C.S. (Trois Rivières, 400-05-000217-79) 5 June 1981.

619. [1979] Que. C.S. 637.

620. C.S. (Montreal, 500-05-00363-798) 19 May 1981.

621. [1979] Que. C.S. 617, C.A. (Quebec, 200-09-000358-793) 15 Oct. 1982, (sub. nom. P.-G. du Québec c. Dugal).

622. The reduction on appeal indicates that, in a matter of 3 years, a person's circumstances may alter, for better or worse, and adds strength to the argument that compensation should be paid in periodic payments which would allow a review of changed circumstances.

623. [1979] Que. C.S. 617, at 635, per René Letarte, J.

624. [1981] 5 W.W.R. 624, at 635.

625. (1980) 28 N.B. 2d 643.

626. Ibid, at 653.

627. E. Richards v. B. and B. Moving Storage Ltd., Unreported 28 June 1978, (Ont. C.A.).

628. Johnstone v. Sealand Helicopters Ltd., (1980) 28 Nfld. and P.E.I. 429.

629. C.A. (Quebec, 200-09-000490-786) 22 Apr. 1981.

630. (1982) 20 C.C.L.T. 14, at 26.

631. C.S. (Trois Rivières, 400-05-000217-79) 5 June 1981.

632. C.S. (Montreal, 500-05-013571-789) 15 Jan. 1982.

633. See Ippolito v. Janiak, (1981-82) 18 C.C.L.T. 39,

Stante v. Boudreau, (1981) 112 D.L.R. 3d 172.

634. See LaCroix v. Forget, C.S. (Hull, 550-05-001953-77) 4 Nov. 1980; Schierz c. Dodds, C.S. (Montréal, 500-05-00363-798) 19 May 1981.

635. BRANIFF, M. and PRATT, A., Tragedy in the Supreme Court of Canada, New Developments in the Assessment of Damages for Personal Injuries, (1979) 1 U. Toronto Faculty L. Rev. 1, at 36.

636. [1979] 2 All E.R. 910.

637. Ibid, at 917.

638. Kemp and Kemp, 1-009, 31 Dec. 1981.

639. Kemp and Kemp, 1-950, 9 Mar. 1981.

640. Kemp and Kemp, 1-009, 31 Dec. 1981.

641. [1981] 3 All E.R. 852.

642. A comparison was made between cases ranging from £20,000 to £50,000, at 859, by Griffiths, L.J.

643. Ibid, at 855, per Lord Denning.

644. ATIYAH, supra note 6, refers to the survey, Handicapped and Impaired in Great Britain, (1971).

645. Supra, note 2, at paras. 391-2.

646. ATIYAH, supra note 6, at 216.

647. The process is generally conducted by negotiation and settlement and if there is no consistency it would be difficult to predict the outcome of a case and could consequently cause more difficulties and delay in negotiations.

648. [1978] 2 All E.R. 213.

649. Supra note 434, at 601, 606.

650. [1979] 1 All E.R. 774.

651. Huskisson v. Holmes, 3 May 1974, unreported, Manchester H.C., per Kilner Brown J.

652. Croke v. Wiseman, [1981] 3 All E.R. 852, at 856, per Lord Denning.

653. Supra note 2, at para. 675.

654. [1978] 2 R.C.S. 287.

655. C.S. (Montreal, 500-05-016023-780) 3 Sept. 1981, at. 56-57.

656. [1980] 2 R.C.S. 430.

657. C.S. (Montreal, 500-05-004294-755) 16 Mar. 1982.

658. C.S. (Hull, 550-05-001953-77) 4 Nov. 1980.

659. C.S. (Montreal, 500-05-004294-755) 16 Mar. 1982, at 17, per Macerola J.

660. See MacDonald v. Alderson, (1982) 20 C.C.L.T. 64; Campeau c. Radio Canada, [1979] Que. C.S. 637.

661. (1981) 15 C.C.L.T. 247.

662. (1982) 1 Current L., 17 Dec. 1981.

663. BASS, A.B., and WRIGHT, M., An Objective Study of the Whiplash Victim and the Compensation Syndrome, (1975) 6 Man. L.J. 333.

664. (1981) 25 B.C.L.R. 341.

665. A practice which is not followed in many cases according to an interview with a lawyer acting for plaintiffs in Montreal, 16 Dec. 1982.

666. (1979-80) 10 C.C.L.T. 197.

667. [1982] 1 All E.R. 650 (C.A.).

668. (1982) Sup. Ct. R. 0.38, r.38/37 - 39(3).

669. [1978] Que. C.S. 618.

670. [1979] Que. C.S. 617.

671. [1981] 3 All E.R. 250.

672. [1982] 2 All E.R. 710.

673. (1982) 20 C.C.L.T. 64.

674. C.A. (Montreal, 500-09-000119-770) 1 Nov. 1979.

675. [1981] 3 All E.R. 250, at 254.

676. Supra, Part One, Section II.

677. C.A. (Quebec, 200-09-000479-763) 6 Sept. 1979.

678. See Peck-Johnson c. Peck, C.S. (Hull, 550-05-0002011-78) 4 Feb. 1982.

679. [1981] 3 All E.R. 852.

680. [1979] 2 All E.R. 910.

681. (1966) 57 D.L.R. 2d 644 (S.C.C.).

682. COOPER-STEPHENSON and SAUNDERS, supra note 4, at 372.

683. Ibid.

684. Aged 18 years.

685. Aged 20 years.

686. Ages 21 years.

687. See Connolly v. Camden and Islington Area Health Auth., [1981] 3 All E.R. 852.

688. (1978) 9 C.C.L.T. 1. See also White v. Turner, (1981) 15 C.C.L.T. 81; Rawlings v. Lindsay, (1982) 20 C.C.L.T. 212; Moriarty v. McCarthy, [1978] 2 All E.R. 212; Henderson v. Hatton, [1981] 5 W.W.R. 624.

689. (1982) 20 C.C.L.T. 64.

690. (1982) 20 C.C.L.T. 64.

691. [1982] 4 W.W.R. 519.

692. (1978) 9 C.C.L.T. 1.

693. See Hite v. Jim Russell Racing Drivers School, C.S. (Montreal, 500-05-016023-788) 3 Sept. 1981.

694. See Lindal v. Lindal, [1982] 1 W.W.R. 433; Corriveau c. Pelletier, C.A. (Quebec, 200-09-000490-786) 22 Apr. 1982; Moriarty v. McCarthy, [1978] 2 All E.R. 212, where a separate amount of £7,500 was awarded.

695. Jackson v. Jackson, [1970] 2 N.S.W.R. 454; Graham v. Fogarty, [1970] 92 W.N. 452 (N.S.W.).

696. R.S.A. 1980, c. D-37.

697. C.S. (Quebec, 200-05-001457-77) 2 Feb. 1982.

698. Ibid, at 11, per Vincent J.

699. See LaCroix v. Forget, C.S. (Hull, 550-05-001953-77) 4 Nov. 1980.

700. [1978] 2 R.C.S. 229, at 242.

701. Corriveau c. Pelletier, C.A. (Quebec, 200-09-000490-786) 22 Apr. 1982, at 6.

702. [1968] 1 All E.R. 726.

703. CASTEL, J.-G., The Civil Law System of the Province of Quebec, (1962), at 491.

704. Supra note 2, at para. 387.

705. SAUNDERS, I.B., The Future of Personal Injury Compensation - A Symposium, (1978) ed, at 23.

706. Supra, Section III, B.

707. A limit of $2,000 is imposed.

708. A $17,000 limit.

709. See Arnold v. Teno, [1978] 2 R.C.S. 287, at 333, per Spence J.

710. See Pickett v. British Rail Engineering Ltd., [1979] 1 All E.R. 774, at 796, "a flexible judicial tariff". Cookson v. Knowles, [1977] 2 All E.R. 820, at 823, "the 'scale' for figures".

711. This stems from the reliance on the gravity of the injury in the quantification of the award. OSBORNE, P.H., Lindal v. Lindal - Annotation, (1981-82) 19 C.C.L.T. 3, at 8, refers to this position as a "modified conceptual approach".

712. Separate awards may be made under these heads.

713. Supra note 711, at 7.

714. This approach is favoured by COOPER-STEPHENSON and SAUNDERS, supra note 4, at 373.

715.

716. R.S.B.C. 1979, c. 83.

717. BURNS, supra note 510, at 181.

718. ATIYAH, supra note 6, at 213.

719. ISON, T.G., The Politics of Reform in Personal Injury

Compensation, (1977) 27 U. Toronto L.J. 385, at 392.

720. FELDHUSEN and McNAIR, supra note 399, at 426.

721. See A.C.A., s.2(1). There is no exhaustive definition of "personal injury by accident" although HARRIS, supra note 496, at 363, states that a medico-legal committee had produced a "lengthy" definition (not enacted) of the term covering damage caused to the "human system" including all bodily and mental consequences. Sickness is excluded.

722. ISON, supra note 719, at 389. See also ISON, T., Human Disability and Personal Income in Studies in Canadian Tort Law, (1977) ed. Klar L., at ch. 15.

723. Woodhouse Report, supra note 151, at paras. 55-63.

724. See WILLIAMS, G. and HEPPLE, B.A., Foundations of the Law of Tort, (1976).

725. ATIYAH, supra note 6, at 223.

726. FELDHUSEN and McNAIR, supra note 399, at 431.

727. [1978] 2 R.C.S. 229, at 236.

728. See Croke v. Wiseman, [1981] 3 All E.R. 852 (C.A.), at 856, per Lord Denning. Lim Poh Choo v. Camden and Islington Area Health Authority, [1979] 2 All E.R. 910 (H.L.), at 914, per Lord Scarman.

729. See comment, supra note 721.

730. GLASBECK, H.J. and HASSON, R.A., Fault - The Great Hoax in Studies in Canadian Tort Law, (1977) ed. Klar L., ch. 14.

731. Ibid, at 419, quoting ISON, T.G., The Infusion of Private Law in Public Administration, (1976) 17 C. de D. 799, at 816.

732. Supra note 719, at 392.

734. Supra note 164.

735. GLASBECK and HASSON, supra note 730, at 396.

736. FEUDHUSEN and McNAIR, supra note 399, at 428.

737. PALMER, supra note 164, at 363.

738. Supra note 399, at 428.

739. See Thalidomide - We Won The Battle. Are We Losing the War?, 3 Oct. 1982, Sunday Times, at 13.

740. Pearson Report, supra note 2.

741. See PHILLIPS, J. and HAWKINS, K., Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims, (1976) 39 Mod. L. Rev. 497.

742. Supra note 2, at para. 386.

743. [1978] 2 R.C.S. 229, at 262.

744. Supra, note 719.

745. Ibid, at 389-390.

746. ISON, supra note 722, at 432.

747. PALMER, G., Compensation for Incapacity, (1979), at 227.

748. In the context of Criminal Injuries Compensation schemes, BURNS, supra note 510, at 401, states that "fault can be easily jettisoned" because as "creatures of statute" the schemes are versatile.

749. See Andrews v. Grand Toy (Alta.) Ltd., [1978] 2 R.C.S. 229, at 236; Lim Poh Choo v. Camden and Islington Area Health Authority, [1979] 1 All E.R. 910, at 914.

750. GIBSON, supra note 449, at 658.

751. Ibid, at 657.

752. COOPER-STEPHENSON and SAUNDERS, supra note 4, at 372-374.

753. Supra note 747, at 227.

754. DOBBS, D.B., Remedies; Damages - Equity - Restitution, (1973), at 545.

755. Ibid, at 546.

756. BRAINARD, C.H. and LORD, B.M., First-Party Pain and Suffering Coverage: A New Direction for No-Fault?, (1978) Ins. L.J. 319.

757. LIPNOWSKI, supra note 574, at 327.

758. American Medical Association, Committee on Rating of Mental and Physical Impairment, Guides to the Evalua-

tion of Permanent Impairment, (1971), at 158. The combined values chart is based on the formula A% + B% (100% - A%) = combined value of A% and B% (where A% and B% are written as decimals).

759. Statistics Canada, Life Tables for Males and Females All Marital Statures, 1975-77, Tables 9 and 14.

760. Supra, Part 2, Section II, B, (1)(b).

761. Supra note 289.

762. See Pearson Report, supra note 2, at paras. 448-464, per Prof. Stevenson, who argued that compensation for pain and suffering should be abolished and the non-pecuniary assessment should be based on loss of amenity.

763. Theobald v. Railway Passengers Assurance Co., 26 Eng. L. and Eq. R. 438, per Pollack, C.B., quoted in PALMER, supra note 164, at 362.

Appendix A

Accident Compensation Act, Reprinted as in 1975, N.Z. Stat. 2-1409.

SECOND SCHEDULE

Section 119

Compensation for Permanent Loss or Impairment of Bodily Function

Nature of Permanent Loss or Impairment of Bodily Function	Percentage of [$7,000] Payable
Loss of Part of Body	
1. Total loss of an arm or the greater part of an arm	80
2. Total loss of a hand or of the lower part of an arm	70
3. Total loss of a thumb	28
Total loss of one segment of a thumb	14
Loss of the pulp of a thumb	8
4. Total loss of an index finger	14
Total loss of two segments of an index finger	12
Total loss of one segment of an index finger	8
Loss of the pulp of an index finger	4
5. Total loss of the middle finger	12
Total loss of two segments of a middle finger	10
Total loss of one segment of a middle finger	8
Loss of the pulp of a middle finger	3
6. Total loss of a ring or small finger	8
Total loss of two segments of a ring or small finger	6
Total loss of one segment of a ring or small finger	4
Loss of the pulp of a ring or small finger	2
7. Total loss of all fingers, thumb intact (Treat as 90 percent of loss of a hand)	63
8. Total loss of a leg	75
Total loss of a foot or of the lower part of a leg	60
9. Total loss of a great toe	10
Loss of one segment of a great toe	5
10. Total loss of a lesser toe	2½
11. Total loss of both legs by above-knee or below-knee amputation	100
12. Loss of both arms, above-elbow or below-elbow amputation	100

Note: For the purposes of section 119 of this Act, when applying the foregoing provisions of this Schedule for the purpose of assessing permanent loss or impairment of bodily function affecting the hand and its digits, if multiple digits are involved assessment shall be made both by summating the individual losses specified in the foregoing provisions of this Schedule, and on the basis specified in subsection (3) of that section in relation to the permanent loss or impairment of bodily function affecting the hand or lower arm as a whole as a gripping organ.

In relation to the last-mentioned method of assessment, complete loss of finger/palm grip in all its components shall be treated as constituting 60% loss of function of the hand, and complete loss of opposition or pincers grip shall be treated as constituting 40% loss of function of the hand, these figures to be apportioned into four equal parts for the individual digits.

Example: Finger/Palm Grip—

Index	Middle	Ring	Little finger
15%	15%	15%	15% loss of function of hand, equalling altogether 60% of loss of function of hand.

Opposition or Pincers Grip—

Index	Middle	Ring	Little finger
10%	10%	10%	10% loss of function of hand equalling altogether 40% of loss of function of hand.

SECOND SCHEDULE—*continued*

Nature of Permanent Loss or Impairment of Bodily Function		Percentage of [$7,000] Payable
The higher figure arrived at after assessment by both these methods shall be the figure awarded.		
If in the case of injury to a limb or part of a limb it is considered desirable in order to obtain the best functional result that the limb or portion of the limb be amputated at a more proximal level than the part injured, the disability shall be assessed as if the injury itself had necessitated the amputation at the more proximal level.		
Assessment of Arthrodeses		
The following figures are to be used for a sound arthrodesis in the position of optimum function, partial joint stiffnesses to be proportionally assessed under section 119 (3) of this Act.		
Shoulder	Treat as 35% loss of function of the arm	28
Elbow	Treat as 40% loss of function of the arm	32
Wrist	Treat as 30% loss of function of the lower arm	21
Hip	Treat as 50% loss of function of the leg	37.5
Knee	Treat as 40% loss of function of the leg	30
Ankle	Treat as 35% loss of function of the lower leg	21
Triple (foot arthrodesis)	Treat as 30% loss of function of the lower leg	18
Assessment of Shortening		
0–½ in. inclusive	Treat as 5% loss of function of the leg	3.75
½–1 in.	Treat as 10% loss of function of the leg	7.5
1–1½ in.	Treat as 15% loss of function of the leg	11.25
1½–2 in.	Treat as 20% loss of function of the leg	15
Patellectomy		
Where there is full extension of the knee and full flexion in the knee with minimal quadriceps thigh muscle wasting, treat as 15% loss of function of the leg, this figure to be varied in less successful results related to residual joint stiffness		11.25
Excision of Head of Radius		
Where full elbow extension and flexion movement is regained with full forearm rotation movement in either direction, treat as 15% loss of function of the arm, this basic figure to be varied in less successful cases related to residual joint stiffness		12
Excision of Lower End of Ulna Forearm Bone		
Where full forearm rotation movements are preserved and the wrist is normal, treat as 10% loss of function of the lower arm, this figure to be varied in less successful cases related to residual joint stiffness		7
Ligamentous Injuries of the Knee Joint with Residual Instability and Including Quadriceps Insufficiency with Comparable Instability		
Moderate laxity	Treat as 15% loss of function of the leg	11.25
Multiple Disabilities		
If the disability affects more than one limb the assessment shall be made by summating the figures, but if the disabilities involve the one limb the method of progressive extraction of losses, i.e., regarding the limb as a whole shall be used.		

SECOND SCHEDULE—*continued*

Nature of Permanent Loss or Impairment of Bodily Function	Percentage of I$7,000] Payable
[*Spinal Disability and Other Disabilities*]	
1. *Cervical Spine*	
(a) Persistent muscle spasm, rigidity, and pain substantiated by loss of anterior curve revealed by X-ray, although no demonstrable structural pathology, moderate referred shoulder/arm pain	10
(b) In cases similar to those mentioned in the immediately preceding paragraph, but with gross degenerative changes consisting of narrowing of intervertebral spaces and osteoarthritic lipping of vertebral margins	20
2. *Thoracic Spine*	
(a) Spinal strain related to trauma with persistent discomfort, moderate degenerative changes with osteoarthritic lipping, no X-ray evidence of structural trauma	10
(b) *Fracture*:	
(i) Compression 25% involving one or two vertebral bodies, no fragmentation, healed, no neurologic manifestations	10
(ii) Compression 50% with involvement posterior elements, healed, no neurologic manifestations, persistent pain	20
3. *Lumbar Spine*	
(a) Mild to moderate persistent muscle spasm with pain, with moderate degenerative lipping revealed by X-ray	10
(b) *Fracture*:	
(i) Vertebral compression 25%, one or two adjacent vertebral bodies, little or no fragmentation, no definite pattern or neurologic change	15
(ii) Vertebral compression 50%, one or two adjacent vertebral bodies, little or no fragmentation, no definite pattern or neurologic changes	20
(iii) In cases similar to those mentioned in the immediately preceding subparagraph, but with successful fusion, mild pain	25
4. *Neurogenic Low Back Pain—Disc Injury*	
(a) Surgical excision of disc, no fusion, good result, no persistent sciatic pain	10
(b) Surgical excision of disc, no fusion, moderate persistent pain and stiffness aggravated by heavy lifting with necessary modification of activities	20
(c) Surgical excision of disc with fusion, activities of lifting moderately modified	15
(d) Surgical excision of disc with fusion, persistent pain and stiffness aggravated by heavy lifting necessitating modification of all activities requiring heavy lifting	25
5. *Tetraplegia and Paraplegia*	100
6. *Blindness*	
(a) Total blindness	100
(b) Total loss of vision in one eye (normal vision in the other eye)	30

7. Deafness

(a) Total deafness	75
(b) Total deafness in one ear (normal hearing in other ear)	17

NOTE: Where there are subjective symptoms of pain without demonstrable clinical findings of abnormality or demonstrable structural pathology, no assessment should be made under section 119 of this Act.

8. Total Loss of Natural Permanent Teeth

1. Anterior Teeth	
Loss of 1, 2, or 3 teeth	4
Loss of 4, 5, or 6 teeth	5
Loss of 7 to 12 teeth	6
2. Posterior Teeth	
Loss of 1 tooth	1
Loss of 2 to 5 teeth	2
Loss of 6 to 16 teeth	4[1]

In this Schedule the expression "$7,000" was substituted for the expression "$5,000", in each place where it occurs, by s. 9 (1) of the Accident Compensation Amendment Act 1974. As to accidents before 1 October 1974, see s. 9 (2) of that Act.

In this Schedule the words *"Spinal Disability and other Disabilities"* were substituted for the words *"Spinal Disability"* by s. 60 (1) of the Accident Compensation Amendment Act (No. 2) 1973, and item 8 in square brackets was added by s. 60 (2) of that Act. See s. 1 (3) of that Act.

Appendix B.

SHOWING THE VALUE OF £ AT VARIOUS DATES

In the left-hand column of this table is the year and in the right-hand column the multiplier which should be applied to the £ in January of that year to show its value in terms of the £ in December 1981.

1948	9.44	1965	5.41
1949	9.06	1966	5.18
1950	8.75	1967	5.00
1951	8.46	1968	4.87
1952	7.72	1969	4.59
1953	7.48	1970	4.37
1954	7.37	1971	4.03
1955	7.16	1972	3.72
1956	6.85	1973	3.46
1957	6.61	1974	3.09
1958	6.38	1975	2.58
1959	6.26	1976	2.09
1960	6.26	1977	1.79
1961	6.19	1978	1.63
1962	5.93	1979	1.49
1963	5.77	1980	1.26
1964	5.66	1981	1.11

This table has been calculated from the Official Retail Prices Index, the value of the £ being taken from the figures published in January of each year, ending with January 1981.

Reproduced from KEMP and KEMP, The Quantum of Damages - Personal Injury Reports, Vol. 2, (1975), at 601.

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