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WHAT PRICE DISABILITY? A PERSPECTIVE ON THE LAW OF DAMAGES FOR PERSONAL INJURY

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Introduction

Few deficiencies in the law have been more remarked upon in recent years than the absence of coherent principle in the law on damages for personal injuries. Judges and scholars alike have condemned the accretion of unrelated rules which has long governed the recovery of such damages. Judicial pronouncements have ranged from frustrated expressions of "a sense of inadequacy in doing justice between the tortfeasor and compensation claimant"¹ to bald statements that "the subject needs radical reappraisal".² Academic commentators have been equally vocal. A recent survey of the position in Canada concludes that: "Canadian courts have not yet developed a

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¹ Per Taggart J.A. in *Thornton v. Grand & Toy Alberta Ltd* (1976), 73 D.L.R. (3d) 35, at p. 51 (B.C.C.A.).

² *Lim Poh Choo v. Camden and Islington Area Health Authority*, [1978] 3 W.L.R. 895, at p. 908, [1979] 1 All E.R. 332, at p. 340, per Denning M.R. (C.A.) (dissenting); see also Browne L.J., at p. 926, 357, aff'd [1979] 2 All E.R. 910 (H.L.), the House of Lords stating that existing rules must be followed in the absence of legislation.

satisfactory set of principles or rules to assist them in determining with reasonable accuracy the proper amount of compensation to be awarded in personal injury cases".³

The complaints have evoked response. The recently published *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* under the chairmanship of Lord Pearson has advanced recommendations for reform.⁴ On the judicial front, recent decisions in England and Canada have devoted particular attention to the fundamental principles upon which damages for personal injuries should be predicated. The House of Lords has recently endorsed the concept of "full compensation" for pecuniary loss as the guiding principle upon which such awards should be based.⁵ The concept of "functional compensation" has received the approval of Denning M.R. in the English Court of Appeal⁶ and the Supreme Court of Canada.⁷

This article is primarily concerned with an examination of these concepts. Part I seeks to examine them from the point of view of general principle. Part II is concerned with their relationship to subsidiary principles applicable to the assessment of damages for personal injuries.

I. *Basic Principles.*

1. *Restitutio in Integrum.*

Compensation for personal injuries in tort has traditionally been seen as an attempt to put the injured person in the same position he would have been in, had he not sustained the wrong for which the reparation is awarded. The principle of *restitutio in integrum* was first applied to claims for damage resulting from injury to property. It worked and continues to work well in such cases. The loss has typically been sustained prior to trial and is readily and finally

³ W.H. Charles, *Justice in Personal Injury Awards*, in Lewis Klar, ed., *Studies in Canadian Tort Law* (1977), p. 37, at p. 98.

⁴ March, 1978, Cmnd. 7054-1.

⁵ *Pickett v. British Rail Engineering Ltd.*, [1979] 1 All E.R. 774, [1978] 3 W.L.R. 955 (H.L.). See in particular Lord Scarman, at p. 978 and text accompanying footnotes 11 to 26, *infra*. See also *Lim v. Camden and Islington Health Authority*, *supra*, footnote 2, per Lord Scarman, at p. 920.

⁶ *Supra*, footnote 2.

⁷ *Andrews v. Grand & Toy Alberta Ltd* (1978), 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577 (S.C.C.); *Thornton v. Board of School Trustees of School District No. 52 (Prince George)* (1978), 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607 (S.C.C.); *Arnold v. Teno* (1973), 83 D.L.R. (3d) 609 (S.C.C.). See text accompanying footnotes 33 to 36, *infra*.

computed at the time of trial. The damages awarded permit the plaintiff to restore his property or buy a replacement, thus placing him in the same or very nearly the same position he was in before the accident. The principle of *restitutio in integrum* works less well for claims for damages for personal injuries. It is impossible to compensate a person for permanent personal injury by an award of money, in the usual sense of restoring him to his original position. The person who has sustained damage to property can restore or replace it, but the person who has sustained a permanent personal injury cannot be made whole.

Despite the patent impossibility in many cases of restoring the plaintiff to his original position, courts assessing damages for personal injuries have traditionally paid lip service to the ideal of *restitutio in integrum*. One of the most quoted affirmations of this ideal is that of Lord Blackburn in *Livingstone v. Rawyards Coal Co.*:⁸

I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at 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 compensation. . . .

Courts charged with the impossible task of effecting *restitutio in integrum* have necessarily resorted to more concrete concepts in awarding damages for personal injuries. One such concept was the "global" or "conventional" award which for many years was the norm. In practice, little attempt was made to ascertain what would be required to put the plaintiff, as nearly as possible, in the position he was before his injury in cases of serious and permanent injuries. Rather, damages were awarded on the basis of what had been awarded in similar cases in the past, with an adjustment to accommodate different currency values.⁹

In more recent years, the "global" or "conventional" approach has been found wanting. New concepts aimed at achieving the illusive goal of *restitutio in integrum* have come to the fore.

⁸ *Livingstone v. Rawyards Coal Ltd* (1880), 5 App. Cas. 25, at p. 39 (H.L.). Some judges, noting the impossibility of effecting true restitution for permanent personal injuries, have cast doubt on the applicability to personal injuries cases of the maxim *restitutio in integrum*: see *British Transport Commission v. Gourley*, [1956] A.C. 185, per Lord Goddard, at p. 208, per Lord Reid, at p. 212 (H.L.). See also Earl Jowitt, at p. 198, who finds the principle to afford "some guidance".

⁹ Cases illustrating this approach are set out in Charles, *op. cit.*, footnote 3, at p. 52, n. 65. As to the rationale underlying the conventional award, see *Sims v. William Howard & Son Ltd*, [1964] 1 All E.R. 918, at pp. 919, 921 (C.A.) and *Ward v. James*, [1965] 1 All E.R. 563, at pp. 574, 576 (C.A.).

Chief among them are the concept of full compensation for pecuniary loss and the concept of functional compensation.¹⁰

2. Full Compensation.

The concept of full compensation is the direct offspring of the principle of *restitutio in integrum*. It rests on the assumption that the plaintiff's losses must be restored. It is concerned with a particular type of loss, namely pecuniary loss, past and future. On the theory of "full compensation", this loss, as best it can be calculated, must be borne by the defendant.¹¹

The current emphasis on "full" compensation can be seen in part as a response to vague expressions of judicial conservatism which had been taken, at least by some, to indicate that to give the plaintiff his actual estimated pecuniary loss is to over-compensate him. Appellate courts have frequently cautioned against awarding "perfect compensation". Compensation, it has been said, should be "reasonable", "fair" to both plaintiff and defendant, and "moderate".¹² Such judicial admonitions have been taken as cautions against the danger of making a "compassionate" award or against the danger of making an award on the basis of mathematical calculations without due regard for contingent occurrences which might offset or reduce the loss.¹³ They have also been taken to suggest that the courts ought not to award full damages in the sense of awarding the mathematical total of the plaintiff's projected pecuniary losses.¹⁴ Such an award, the reasoning goes, would be an

¹⁰ The concept of full compensation is obviously based on the assumption that all that the plaintiff has lost should be restored to him. The concept of functional compensation can be seen as an attempt to award a sum which can be used to restore the plaintiff as nearly as reasonably possible to his former position and thus effect *restitutio in integrum*; see Ogus, *Damages for Lost Amenities: For a Foot, a Feeling, or a Function?* (1972), 35 Mod. L. Rev. 1, at p. 16.

¹¹ *Andrews et al. v. Grand & Toy Alberta Ltd et al.*, *supra*, footnote 7, at p. 463 (D.L.R.), where Dickson J. stated: "The focus should be on the injuries of the innocent parties. Fairness to the other side is achieved by assuring that the claims raised against him are legitimate and justifiable." See also *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.*, *supra*, footnote 7, at pp. 485, 486 (D.L.R.).

¹² Early authorities emphasizing that compensation must be moderate include *Rawley v. London & Northwest Ry Co.* (1873), L.R. 8 Exch. 221, at p. 231; *Phillips v. London and South Western Ry Co.* (1879), 4 Q.B.D. 406, 5 Q.B.D. 78 (C.A.).

¹³ See, for example, *Coffey v. Guaranty Trust Co. of Canada*, [1974] 3 W.W.R. 751, at p. 758 (Sask. Q.B.); *Jennings v. Cronsbery sub nom. R. v. Jennings* (1965), 50 D.L.R. (2d) 385, at p. 399 (Ont. C.A.), *aff'd.* [1961] S.C.R. 532. See also McGregor on Damages (13th ed., 1972), para. 1097.

¹⁴ *Supra* footnote 1, at p. 250.

attempt to give "perfect" compensation, something which the court cannot and ought not to do.

The idea that it is wrong to attempt to give a severely injured plaintiff full or complete damages has suffered attack from a number of quarters in recent years. It has been replaced by the view that the plaintiff should receive full compensation for "pecuniary" loss, past and future, arising from the injury.

One of the earlier cases to expound this view was the decision of the High Court of Australia in *Skelton v. Collins* in 1966, where Windeyer J. said:¹⁵

The next rule that, as I see the matter, flows from the principle of compensation is that anything having a money value which the plaintiff has lost should be made good in money.

Scattered statements in subsequent years adopted the language of full compensation.¹⁶ But not until the late seventies did the highest courts in Canada and England expressly elevate it to the status of a prime concept in law of damages for personal injuries. The Supreme Court of Canada endorsed the principle that the injured party should be fully compensated for the pecuniary loss he has suffered in its decisions in 1977 in *Andrews Ltd v. Grand and Toy Alberta Ltd et al.* and *Arnold v. Teno*.¹⁷ Dickson J., speaking for the court in the *Andrews* case stated: "The principle that compensation should be full for pecuniary loss is well-established."¹⁸ Subsequent cases have taken it as established that in Canada "the dominant principle applied is that the injured party should be fully compensated for the pecuniary loss suffered".¹⁹

In 1978, the House of Lords gave its *imprimatur* to the concept of full compensation in *Pickett v. British Rail Engineering Ltd*.²⁰ The issue before the House was whether damages for lost earning capacity could be recovered for the period of normal life expectancy which, due to his injury, the plaintiff was not expected to live. *Oliver v. Ashman* had long been accepted as establishing that damages could not be recovered for lost or diminished earning capacity during the plaintiff's "lost years" on the basis that earnings

¹⁵ (1966), 115 C.L.R. 94, at p. 129 (Aust. H.C.).

¹⁶ See *Gehrman v. Lavoie*, [1973] 5 W.W.R. 599, at p. 600 (B.C.C.A.). The principle of full compensation is also set out in McGregor, *op. cit.*, footnote 13, para. 1097.

¹⁷ *Andrews*, *supra*, footnote 7, at p. 461 (D.L.R.); *Teno*, *supra*, footnote 7, at pp. 630, 639, 640.

¹⁸ *Ibid.*

¹⁹ *Penner v. Mitchell* (1978), 6 C.C.L.T. 132, at p. 136 (Alta S.C.-A.D.). See also *Lan v. Wu*, [1979] 2 W.W.R. 122, at pp. 124, 135 (B.C.S.C.).

²⁰ *Supra*, footnote 5.

during a period in which a plaintiff was not alive would have been of no utility to him.²¹ The House of Lords (Lord Russell of Killowen dissenting) took quite a different view. Several of the speeches cited with approval the view of the Australian High Court in *Skelton v. Collins*²² that all pecuniary loss suffered, past or future, should be made good in money. The most complete exposition of the House's adoption of the principle of "full compensation" was given by Lord Scarman. He first pointed out that in assessing non-pecuniary losses all the court can do is to make an award of "fair compensation", based on a conventional judicial tariff. A different principle however governs the assessment of pecuniary losses:

. . . when a judge is assessing damages for pecuniary loss, the principle of *full compensation* can be properly applied. Indeed, anything else would be inconsistent with the general rule which Lord Blackburn has formulated in *Livingstone v. Rawyards Coal Co.*

Though arithmetical precision is not always possible, though in estimating future pecuniary loss a judge must make certain assumptions (based upon the evidence) and certain adjustments, he is seeking to estimate a financial compensation for a financial loss. *It makes sense in this context to speak of full compensation as the object of the law.*²³

Endorsement of the principle of full compensation for pecuniary loss for personal injury has not been confined to the courts. The Royal Commission on Civil Liability and Compensation for Personal Injury in its recent *Report* stated as a general principle that "pecuniary loss should be compensated in full".²⁴

It is thus seen that the highest courts in Australia, Canada and the United Kingdom as well as the Pearson Commission have endorsed as a fundamental principle the idea that a plaintiff should receive full compensation for all his pecuniary losses, past and future. The idea itself is not new.²⁵ What is significant is its elevation to the status of a fundamental principle. It may be expected to scotch the idea expressed heretofore that to award the mathematical total of a plaintiff's projected pecuniary losses (less appropriate

²¹ [1962] 2 Q.B. 210, [1961] 3 W.L.R. 669, [1961] 3 All E.R. 323 (C.A.). The award was stated to be on account of "opportunity to enjoy what he would have earned" rather than the lost earnings themselves; see at p. 240 (Q.B.), per Willmer L.J.

²² *Supra*, footnote 15.

²³ Pickett, *supra*, footnote 5, at p. 766 (All E.R.), italics added.

²⁴ *Op. cit.*, footnote 4, Vol. 1, para. 330.

²⁵ It is stated as an established principle in McGregor, *op. cit.*, footnote 13, para. 1097. The Pearson Commission points out that the principle of full compensation underlay the practice accepted since the mid-sixties of assessing damages under separate heads, *op. cit.*, footnote 4, vol. 1, para. 330. It derives directly from the fundamental concept of *restitutio in integrum*, *supra*, footnote 10.

deductions) is to erroneously attempt to award "perfect" compensation. Moreover it is likely to lead to results more generous to injured plaintiffs than might otherwise have been obtained. Most important, the principle of full compensation for all pecuniary loss is a more useful guide for assessing damages for personal injuries than the related but vague and unattainable ideal of *restitutio in integrum*.

As has been seen, full compensation represents compensation for actual loss, as best it can be predicted. The logical converse of this proposition is that compensation should not extend beyond the plaintiff's actual predicted loss. This has important implications for a number of subsidiary principles in the law of damages, where it dictates that appropriate deductions be made.

Despite its obvious attractions the concept of full compensation can be criticized. The first objection is founded on the assumption that the law governing compensation for personal injuries ought to be comprised of a set of interrelated rules flowing from a common principle. The concept of "full compensation" does not provide a comprehensive rationale for damages for personal injuries. It is applicable only to pecuniary losses. It provides no theoretical justification for damages for non-pecuniary losses. Full compensation in relation to non-pecuniary losses is meaningless, and arguably, dangerous, since such losses by their nature cannot be fully restored. The result of espousal of the goal of full compensation is that judges must have regard to and juries must be directed on a number of distinct and unrelated principles.

The second objection to the concept of full compensation is founded on the argument that a fair or just award of damages must consider not only the plaintiff's interests but those of the defendant.²⁶ The concept of "full compensation" is solely concerned with the question of what the plaintiff has lost. This, it can be argued, is unfair. The court should be concerned with both parties before it, and should be permitted to weigh the benefit to one against the detriment to the other in determining whether or in what amount an award should be made. The issue is posed most acutely by the case of an insentient plaintiff. There is no question that the defendant should provide sufficient funds to care for the plaintiff in comfort for the rest of his life. But should he also be required to provide a large amount representing the future earnings the plaintiff has lost because

²⁶ It has frequently been said that damages should be just and fair to both plaintiff and defendant. However, few courts have expressly considered the defendant's position, and the Supreme Court of Canada in the *Andrews* and *Thornton* cases expressly rejected such reasoning, *supra*, footnote 11. See also *Lan v. Wu*, *supra*, footnote 19, at p. 133, where it is suggested that contingency deductions have been used "to try to balance the scales".

of his injury? The benefit to the plaintiff of this further award is minimal. On the other hand, the detriment to the defendant is likely to be great. Should not the court in fairness to both parties be permitted to weigh the potential benefit to one party against the potential detriment to the other? Recently Lord Denning M.R. dissenting in such a case rejected the concept of full compensation, which would have dictated full recovery of lost future earnings, in favour of the functional approach based on the practical use to which the award could be put.²⁷

3. *Functional Compensation.*

It has been seen that courts in recent years have recognized the principle of awarding an injured plaintiff full compensation for all his pecuniary losses, past or future. Recent decisions disclose a second emerging theme, the concept of "functional compensation".

By "functional compensation" is meant the approach of assessing damages on the basis of how the award can be reasonably used to "restore" the injured plaintiff as nearly as possible to his pre-trial position. The primary distinction between the concepts of "full compensation" and "functional compensation" is the emphasis placed by the functional approach on the use to which the money can be put. Support for a functional approach can be found in a handful of decisions in the 1960's. In *West v. Shepard*, Lord Devlin defined "fair and reasonable compensation" in terms of "a sum as would ensure that for the rest of her life the plaintiff would not within reason want for anything that money could buy".²⁸ Similarly, in *Warren v. King*, Harman L.J. said that the first consideration in assessing compensation should be "what can be done to alleviate the disaster to the victim, what will enable her to live as tolerably as may be in the circumstances?".²⁹ In 1966, the concept found some support in the judgments of Lord Denning M.R. and Diplock L.J. in *Fletcher v. Autocar & Transporters Ltd.*³⁰ The accepted view, however, has been that since the courts have never exercised control over how damage awards are spent, they should not be influenced by the use to which the award might be put.³¹ The *non*

²⁷ *Supra*, footnote 2.

²⁸ [1964] A.C. 326, at p. 327.

²⁹ [1964] 1 W.L.R. 1, at p. 10 (C.A.).

³⁰ [1968] 2 Q.B. 322, per Denning M.R., at p. 336, per Diplock L.J., at p. 353; [1968] 1 All E.R. 726, [1968] 2 W.L.R. 743 (C.A.).

³¹ *Oliver v. Ashman*, [1962] 2 Q.B. 210, per Lord Holyroyd Pearce L.J., at p. 224 (C.A.); *H. West & Son v. Shephard*, [1964] A.C. 326, per Lord Reid, at pp. 341, 342, per Lord Morris, at p. 349, per Lord Pearce, at p. 364.

sequitur contained in this proposition has been pointed out by Ogus, who nevertheless was unable to describe the concept of functional compensation in connection with lost amenities in higher terms than a "radical proposal".³²

The functional approach to assessment of damages for personal injuries has received recent impetus from two sources—the Supreme Court of Canada in the *Andrews, Teno* and *Thornton* cases,³³ and Lord Denning's dissenting judgment in *Lim Poh Choo v. Camden and Islington Area Health Authority*.³⁴ Although it has been applied mainly to the pecuniary head of cost of future care and to the non-pecuniary heads of damage, it is arguably capable of providing a comprehensive rationale for damages for personal injuries generally.

In the *Andrews, Teno* and *Thorton* cases, the Supreme Court of Canada combined the concepts of full compensation for pecuniary loss with a functional approach. In each of these cases, the court stressed that the primary goal in assessing damages for the severely injured plaintiff should be to ensure that he has sufficient funds to be properly cared for in reasonable comfort for the balance of his life. Indeed, it can be argued that the Supreme Court's decisions support the view that functional considerations should be paramount in assessing damages for personal injuries generally. Thus, Dickson J. stated in *Andrews*:³⁵

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injury. Additional money to make life more endurable should be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

The "coordinated and interlocking basis for compensation" suggested by Dickson J. in this passage is comprised of two heads, damages for cost of future care and damages for non-pecuniary losses, each of which is determined on the functional basis of the use to which the plaintiff can put the money in alleviating the consequences of his injury. However, the court in addition awarded

³² Ogus, *op. cit.*, footnote 10, at p. 16.

³³ *Supra*, footnote 7.

³⁴ *Supra*, footnote 2.

³⁵ *Supra*, footnote 7, at p. 477. See also at p. 458, where Dickson J. states of a periodic payment system that it "would be subject to periodic review and variation in the light of the continuing *needs* of the injured person and the cost of meeting those *needs*". Italics added.

a sum in each of the trio of cases for lost future earning capacity. No attempt was made to justify the award for lost earning capacity on a functional basis.³⁶ In the result, it appears that the Supreme Court of Canada's decisions in these cases were founded partly upon a functional approach and partly upon the principle of full compensation.

A primarily functional approach has recently been advocated by Lord Denning in his dissenting judgment in *Lim Poh Choo v. Camden and Islington Area Health Authority*.³⁷ The problem before the court of Appeal was the assessment of damages for a thirty-six year old doctor who had suffered severe brain damage as a result of the defendant's negligence. While not totally insentient, she required complete care for the remainder of her life, an estimated thirty-seven years. The trial judge, in addition to an award for cost of future care and non-pecuniary losses, awarded £92,000.00 for loss of future earnings and pension. The latter proved the most contentious issue on appeal. Lord Denning M.R. approached the question from the functional perspective of the use to which the money could be put, and concluded that there was no justification for awarding the plaintiff a large sum for loss of future earnings as well as sums on account of her cost of future care and non-pecuniary losses:³⁸

One thing is beyond doubt: fair compensation must mean that she is to be kept in as much comfort and tended with as much care as compassion for her so rightfully demands: and that she should not want for anything that money can buy. But I see no justification in law or in morals in awarding to her large sums of money in addition to those needed to keep her in comfort. Such extra sums will avail her nothing.

In the result Lord Denning disallowed the plaintiff's claim for lost earnings and awarded only a modest "conventional" sum for pain and suffering and lost amenities. The majority of the Court of Appeal and the House of Lords unanimously held that it was bound on the authorities to uphold the substantial award for loss of future earnings, although Lawton L.J. admitted the "compelling attraction" of Denning M.R.'s views.³⁹

The functional approach has the attraction of providing a single rationale for all aspects of the plaintiff's loss. It has the further advantage of ensuring, as closely as may be done so long as the

³⁶ The Supreme Court treated the award for lost future earnings as the loss of an asset, namely earning capacity: see Dickson J. in the *Andrews* case, *supra*, footnote 7, at p. 409; see also *infra*, text accompanying footnotes 113, 114.

³⁷ *Supra*, footnote 2.

³⁸ *Ibid.*, at p. 908.

³⁹ *Ibid.*, per Lawton L.J., at p. 913. See also Browne L.J., at p. 296 in the Court of Appeal; and Lord Scarman, at p. 920 in the House of Lords.

courts are tied to a lump sum award, that the needs of the plaintiff will be met. Finally, it is "fair" to both plaintiff and defendant.

The most problematic aspect of the functional approach is the issue of compensation for lost earning capacity. In the case of an insentient plaintiff whose needs and amenities are provided for by the award for cost of care and non-pecuniary losses, the functional approach might dictate that little or nothing be awarded for lost future earnings, since such damages would serve no legitimate "function". In this situation the result would be fair.⁴⁰

But what of the case of a person who is not permanently or totally disabled but is unable to earn as much as he would have earned had he not been injured? It seems unfair that he should not be able to recover his lost earnings. It is submitted that the functional approach is flexible enough to support an award for lost future earnings in such a case. The test under the functional approach as stated by Denning L.J. in *Lim* and by the Supreme Court of Canada in *Andrews*, is whether the evidence establishes a purpose which the money can usefully and reasonably serve in alleviating the effects of the plaintiff's injury or making up for what has been lost.⁴¹ A sentient plaintiff whose earnings have been reduced or eliminated by his injury can reasonably assert that he should receive compensation for such lost earnings for the purpose of providing the standard of living which he would have enjoyed had he not been injured. Similarly, an insentient plaintiff could recover lost earnings if it is demonstrated that the money is required to support his dependants.⁴² The essential point is that the plaintiff must demonstrate a reasonable or fair function which the money claimed will serve. As these examples illustrate, what is a reasonable or fair function may involve reference to the restitutionary concept of what the plaintiff would have enjoyed or have been able to provide for his dependants had he not been injured. This reflects the fact that the functional approach to damages is not in conflict with the ideal of *restitutio in integrum*, but rather provides a basis for calculating the closest practical equivalent to the goal of restoring the plaintiff to his original position.⁴³ Viewed thus, the functional approach shows promise of providing the

⁴⁰ *Ibid.*, per Denning M.R., at pp. 908, 909.

⁴¹ *Ibid.*, per Denning M.R., at p. 908; *Andrews*, *supra*, footnote 7, per Dickson J., at p. 476 (D.L.R.), commenting on non-pecuniary damages: "Money is awarded because it will serve a useful function in making up for what has been lost." Ogus, *op. cit.*, footnote 10, at p. 17, suggests that it must be for the trial judge "to determine whether and to what extent a proposed 'use' is a reasonable method of alleviating the plaintiff's misfortune".

⁴² *Ibid.*, per Denning M.R., at p. 909; see also Ogus, *op. cit.*, *ibid.*

⁴³ *Supra*, footnote 10.

comprehensive and just rationale for the calculation of damages for personal injuries which has heretofore been wanting.

The question remains whether a consistently functional approach to the assessment of damages is open to the courts on the present state of the authorities. The majority of the Court of Appeal and the House of Lords in the *Lim* case concluded it was not.⁴⁴ The Supreme Court of Canada had no difficulty, however, in advocating losses in *Andrews*. A strong case can be made that the courts are not precluded on the authorities from adopting a functional approach. It arguably more nearly approaches the established ideal of *restitutio in integrum* than any competing concept and it permits the court to weigh benefit to the plaintiff against detriment to the defendant. Moreover, as noted above, the basic precept on which it rests, namely that the award should be based on how it can reasonably be used to restore the plaintiff as nearly as possible to his former position, has been affirmed by a substantial body of authority.⁴⁵

4. Conclusion—General Principles.

The two dominant concepts in recent decisions on damages are the concepts of full compensation and functional compensation. It remains to be seen which of these ideas will ultimately prevail. Either principle, however, spells the end of the "conventional" or "global" award. With the conventional award must go the hitherto relative predictability and uniformity of damage awards. This prospect has been acknowledged and accepted by the courts. Thus Spence J. speaking for the Supreme Court of Canada in the *Teno* case, stated:⁴⁶

A similarity of verdicts may well be considered desirable and of some assistance in the settlement of future cases prior to judicial consideration of them or in the assessment of the damages allowed upon such consideration but it must be realized that the goal of similarity is one quite impossible to attain and that each case of assessment of damages for personal injuries must be determined in the consideration of the individual circumstances, the personality of the plaintiff, and many other particular aspects of each case.

II. Subsidiary Problems and Principles.

It is a truism that subsidiary principles of law should be consistent with fundamental principles. This truism, however, has been more breached than honoured in decisions on the assessment of damages for personal injuries, where subsidiary problems have typically been dealt with on an *ad hoc* basis. Part II of this article seeks to canvas a

⁴⁴ *Supra*, footnote 39.

⁴⁵ *Supra*, text accompanying footnotes 28 to 38.

⁴⁶ *Supra*, footnote 7, at p. 626.

number of subsidiary problems relating to the assessment of damages for personal injuries in the context of the fundamental principles discussed in Part I.

1. *The Form of the Award.*

At common law, damages for personal injuries and death are awarded in the form of a single lump sum. It has been repeatedly held that in the absence of enabling legislation, the courts have no power to award payments on a periodic basis. The traditional attitude is expressed in the oft-repeated maxim that the court is not concerned with how the award will be spent; once the award is made the court's and the defendant's responsibilities are ended and it is up to the plaintiff to manage it so as to provide for his future requirements.⁴⁷ However, the concepts of awarding the plaintiff full compensation for future pecuniary loss and of assessing an award on the functional basis of what a plaintiff so placed will require for the rest of his life have forced the courts to concern themselves with how the award may be spent, despite traditional maxims to the contrary.

The two main arguments raised against the requirement that an award be made in the form of a lump sum are first, the great speculation involved in assessing the cost of future medical expenses and, second, the danger that the plaintiff may waste his award and become a ward of the state.⁴⁸ Recent developments indicate increasing support for a system of periodic payments, at least for the seriously and permanently disabled plaintiff.⁴⁹

The first source of support for a system of periodic payments for the seriously disabled plaintiff is the judiciary.⁵⁰ Dickson J. speaking for the Supreme Court of Canada in the *Andrews* case, stated:⁵¹

When it is determined that compensation is to be made, it is highly irrational to be tied to a lump-sum system and a once-and-for-all award.

The lump-sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to

⁴⁷ *Supra*, footnote 30.

⁴⁸ Tom Elligett, *The Periodic Payment of Judgments*, *Ins. Couns. J.*, Jan. 1979, 130, at p. 131. See also K.C. MacKenzie, *Some Reflections on Negligence, Damages and No-Fault Compensation* (1975), 10 *U.B.C. L. Rev.* 27, at pp. 31, 32; Robert H. Guile, *Actuarial Evidence of the Quantum of Damages in Tort Law* (1976), 10 *U.B.C. L. Rev.* 251, at p. 255.

⁴⁹ Proposals for periodic payments typically posit a threshold below which damages would be awarded in a lump sum. See text accompanying footnote 62, *infra*.

⁵⁰ Judges who have advocated a form of periodic payments include Taggart J.A. in the *Thornton* case, *supra*, footnote 1, at p. 257 (B.C.C.A.) and Dickson J. in the *Andrews* case, *supra*, footnote 7, at p. 458 (D.L.R.).

⁵¹ *Ibid.*, at p. 458 (D.L.R.).

tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

While other courts have not been as blunt in their call for legislation permitting the award of periodic payments, they have indicated their concern that future developments will render their awards either inadequate or excessive. For example, each member of the Court of Appeal in *Lim Poh Choo v. Camden and Islington Area Health Authority* expressed concern that the award would ultimately prove inadequate to provide for the plaintiff's care despite the court's best efforts to forecast the future.⁵² Conversely, the Alberta Appellate Division in *Andrews*⁵³, the British Columbia Court of Appeal in *Thornton*⁵⁴ and Lord Denning M.R. in *Cunningham v. Harrison*⁵⁵ have pointed out that in the event of early death or in the event that the plaintiff chooses to utilize care provided by the state, the award may prove grossly excessive and, in retrospect, unfair to the defendant.

A second source of support for periodic payment of damages for personal injuries is the *Report of the Pearson Commission on Civil Liability and Compensation for Personal Injury*. The majority view of the commission is that provision should be made for damages in the form of periodic payments for future pecuniary loss caused by death or serious and lasting injury. Damages for non-pecuniary losses would continue to be awarded in the form of a lump sum. The majority pointed out that the major component of damages for pecuniary loss (in England) namely, loss of future earnings, is periodic; hence a periodic award most nearly restores the plaintiff to his pre-accident position. The same may be said, it is submitted, for cost of future care. The majority also alluded to the inexactness of calculating future pecuniary loss and the concomitant danger of over-compensation or under-compensation, and the fact that the findings of the commission tended to show that few plaintiffs invested their awards so as to provide for future needs. The majority

⁵² *Supra*, footnote 2, at pp. 912, 916, 926; Denning M.R., at p. 912, suggested a "middle course" between a lump sum award and periodic payments in the form of an undertaking by the defendant Health Service to provide for the plaintiff in the event she would live longer than expected.

⁵³ *Andrews v. Grand & Toy Alberta Ltd* (1976), 64 D.L.R. (3d) 663, at pp. 696, 704, 705, [1976] 2 W.W.R. 385, at p. 430 (Alta S.C.-A.D.).

⁵⁴ *Supra*, footnote 1, at p. 51.

⁵⁵ [1973] 3 All E.R. 463, at p. 470 (C.A.).

concluded that these factors, among others, overrode the advantages of the finality and freedom to the plaintiff offered by lump sum awards, and dictated that awards should be made in the form of periodic payments in cases of serious and permanent injury.⁵⁶

A third indicator that the time for serious consideration of periodic payment schemes is at hand, is the increasing acceptance such schemes are receiving in the United States. In *Frankel v. United States*, it was said that periodic payments for large future damage cases would mean that "in all cases justice through just compensation, no more—no less, would be achieved".⁵⁷ A number of states have passed statutes providing for some form of periodic payments in medical malpractice actions.⁵⁸ A spate of legislative proposals and draft statutes providing for periodic payments in personal injury cases generally are currently under consideration in various states.⁵⁹

Finally, it may be noted that periodic payment schemes are presently in force in a number of situations, such as alimony and

⁵⁶ *Op. cit.*, footnote 4, Vol. 1, paras 555-573.

⁵⁷ (1970), 321 F. Supp. 1331, aff'd. *sub. nom. Frankel v. Heym* (1972), 466 F. 2d 1226 (3rd Cir.).

⁵⁸ Some form of periodic payments in medical malpractice actions are provided by the following:

1. Ala. Code, ss 6-5-486 (1975); effective 9/23/75.
2. Alas. Civ. Proc. Code, ss 55.548; effective 5/29/76.
3. Cal. Civ. Proc. Code, ss 667.7 (& ss 674.7); effective 9/24/75.
4. Del. Code Ann., tit. 18, ss 6864; effective 4/26/76 (Del. Sen. Bill NO. 578, 128th General Assembly, s. 1, subch. VII, s. 6864).
5. Fla. Stat., ss 768-48, 768.51, reenacted and amended 1977 Fla Sess. Law Serv., ch. 77-64, ss 13, 14; effective 7/1/77, alterations effective 7/1/76 (Fla. Stat., ss 768.48, 708.51 (1976 Supp.)).
6. Kan. Civ. Proc. Stat. Ann., s. 60-2609; effective 7/1/76.
7. Md. Ann. Code, s. 3.2A08 (1974); effective 7/1/76.
8. N.H. Rev. Stat. Ann., s. 507. C:7; effective 9/3/77, (1977) Laws, ch. 417:22.
9. N.M. Stat. Ann., ss 58.33.7, 58.33.9, 58.33.10 and 1976 N.M. Laws, ch. 2, s. 30 (expiring 3/1/81); both effective 2/27/76.
10. N.D. Cent. Code, s. 26.40.1.16, (1977 Supp.) N.D. Cent. Code, s. 26.40.1 (1977).
11. Or. Rev. Stat. s. 752.070.
12. Wash. Rev. Code, s. 456; effective 6/25/76 (1975-76, 2d Extra Sess. Wash. Legis. Serv., ch. 56, s. 5).
13. Wis. Stat. s. 655.015; effective 7/24/75. Wis. Adm. Code (Ins.), s. 3.37; issued 11/1/76.

⁵⁹ Draft proposals include:

1. The Michigan Proposal (Michigan Law Revision Commission, 10th Annual Report (1976), pp. 130-132, "Recommendation Re Deferred Damage Payments").

maintenance judgments, workers' compensation statutes, and under the no-fault provisions of standard automobile insurance policies.

Admittedly, a system of periodic payments for serious and permanent personal injury claims would introduce additional administrative problems and expenses.⁶⁰ However, the emerging consensus appears to be that these are not so formidable as once may have been thought.⁶¹ Moreover, the number of cases involved would be proportionately few; schemes for periodic payments typically provide a threshold below which damages would continue to be awarded in the form of a lump sum and the great majority of cases would fall below this threshold.⁶² Indications are that this form of damages would be better for the seriously injured plaintiff.⁶³ It

2. The Oregon Proposal (State of Oregon Interim Task Force on Medical Malpractice, Report, (1976), pp. 65-67).

3. The Defense Research Institute Proposal (Periodic Payments—Preliminary Working Draft), undated.

4. The Uniform Periodic Payments Act (National Conference of Commissioners on Uniform State Laws), undated.

⁶⁰ Among the alterations required would be a system permitting re-evaluation of payments and provision for security. Additional cost would be involved in setting up plans and administering payments under them. For a detailed discussion of such problems, see Elligett, *op. cit.*, footnote 48, at pp. 138-149. See also the Pearson Commission Report, *op. cit.*, footnote 4, paras 596-611 and Marvin E. Verbeck and Stanley J. Michaels, Structured Settlements and the Uniform Periodic Payments Act, Fed. Ins. Comm. (Fall 1978), at p. 17.

⁶¹ The majority view of the Pearson Commission, *op. cit.*, *ibid.*, paras 596, 597, was such that difficulties were not prohibitive. It was based on the assumption that most of the administrative work would be done by the insurance industry, which testified it could do so if necessary. Machinery for judicial review of awards is presently in force for review of maintenance and custody. The problem of security can be handled in a variety of ways including deposit of a lump sum or bond (Pearson Commission Report, para. 610) or establishment of an assurance fund (Elligett, *op. cit.*, *ibid.*, at pp. 143, 144).

⁶² The Pearson Commission (majority) recommended that lump sum awards continue to be made in cases of less serious injuries, *op. cit.*, *ibid.*, Vol. 1, para. 564, with a discretion in the trial judge to award damages in the form of periodic payments in these cases: para. 580. Most of the American proposals contemplate a threshold below which damages would be awarded in a lump sum, Elligett, *op. cit.*, footnote 48, at pp. 137, 138. In practice, the large majority of claims would still be compensated by lump sum awards, as demonstrated by the finding of the Pearson Commission that only about eight per cent of tort payments include compensation for pecuniary loss after judgment, Pearson Commission Report, *ibid.*, para. 553. Moreover, some schemes recommend that damages for non-pecuniary losses be payable in the form of a lump sum in all cases. See Pearson Commission Report, *ibid.*, paras 612, 613.

⁶³ The Pearson Commission Report (majority) lists advantages of periodic awards in serious cases, *op. cit.*, *ibid.*, paras 566-571. At para. 57, it notes the view of the Royal College of Physicians and Surgeons of Glasgow that the danger of periodic payments prolonging incapacity were outweighed by the advantage of such payments in relieving financial anxiety.

appears that it would also be acceptable to defendants. Much of the current interest in periodic payment and structured settlement schemes in the United States stems directly from the concern of defendants and their insurers over how to deal with increasingly huge judgments.⁶⁴

From a theoretical viewpoint, periodic payment of damages for serious and permanent personal injuries is more in accord with the fundamental principles underlying the law on damages than is the lump-sum system presently in force. As noted by the Pearson Commission, periodic payments would "restore the plaintiff more closely to his original position than a lump sum".⁶⁵ More particularly, full compensation for future pecuniary loss can only be determined accurately by a system which permits periodic review and does not require the court to forecast needs over periods up to fifty years. Similarly, the functional goal of providing for the plaintiff's future needs can be better satisfied by a system of periodic payments than by a single lump sum.

2. *The Comprehensive Component Approach.*

In recent years courts assessing claims for damages for personal injuries have increasingly adopted the "component" method. Damages are assessed in separate amounts under different heads of loss, then totalled to arrive at a final award. The two major categories are pecuniary losses and non-pecuniary losses. Pecuniary losses are further divided into the categories of special damages, cost of future care and loss of future earnings. Non-pecuniary losses, representing such things as loss of amenities, pain and suffering and loss of expectation of life are typically not further subdivided for assessment purposes.⁶⁶

Adoption of the component method has undoubtedly been influenced by more sophisticated presentations of evidence by counsel as well as by legislation which in England required such a breakdown to be made for purposes of awarding pre-judgment

⁶⁴ Elligett, *op. cit.*, footnote 48, at p. 130; Verbeck and Michael, *op. cit.*, footnote 60. Structured settlements providing for periodic payments are currently being used in British Columbia by the B.C. Ins. Corp. (pers. comment). See D.A. Cave, *Structured Settlements: an Alternate Resolution of Claims Involving Death or Substantial Personal Injury* (1979), 37 *Advocate* 331.

⁶⁵ *Op. cit.*, footnote 4, para. 567.

⁶⁶ This categorization was approved by the Supreme Court of Canada in *Andrews, Teno and Thornton, supra*, footnote 7. A similar categorization is typically used in England; see for example, *Lim, supra*, footnote 2, and *Pickett, supra*, footnote 5.

interest.⁶⁷ It also bears a direct relation to the concepts of full compensation for pecuniary loss and of functional compensation, implementation of which requires assessment of damages under component heads.

Whatever its origins, the component method of assessing damages is firmly established. Most recently, Lord Scarman in *Pickett v. British Rail Engineering Ltd* lauded the practice of itemizing damages as helping "towards a juster assessment of the capital element in damages for personal injuries", by ensuring that "pecuniary loss and non-pecuniary loss will be assessed separately".⁶⁸ Similarly, the Supreme Court of Canada has recently endorsed this method of assessing damages as the best way short of periodic payments to achieve a just award. Thus Dickson J. stated in *Andrews*:⁶⁹

The method of assessing general damages in separate amounts as has been done in this case, in my opinion, is a sound one. It is the only way in which any meaningful review of the award is possible on appeal and the only way of affording reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby that each of the various heads of damage going to make up the claim has been given thoughtful consideration.

It is thus established that damages should be assessed under different component heads. The further question arises of whether the components typically used are appropriate. Put another way, will their application result in full compensation or alternatively, an award which is functionally capable of restoring the plaintiff as closely as reasonably possible to his pre-injury state? It has been suggested that the components currently used will not achieve this result because they make no provision for the substantial costs of litigation which will typically be paid out of the award before it is transmitted to the plaintiff.⁷⁰ This effect is exacerbated by inadequate tariffs for costs and contingency fee arrangements which may prescribe remuneration substantially above the normal rate.

⁶⁷ Public General Acts & Measures of 1969, c. 58, Part II; *Jefford v. Gee*, [1970] 2 Q.B. 130, [1970] 1 All E.R. 1202 (C.A.); *Cookson v. Knowles*, [1978] 2 All E.R. 604, at p. 616, [1978] 2 W.L.R. 978 (H.L.), at p. 982.

⁶⁸ *Supra*, footnote 5, at pp. 978, 979.

⁶⁹ *Supra*, footnote 7, at pp. 457, 458 (D.L.R.). In *Halliday v. Sanrud* (1980), 15 B.C.L.R. 4 (B.C.C.A.), it was stated that the jury should be informed of the basic components to be considered.

⁷⁰ *Lan v. Wu*, *supra*, footnote 19, at pp. 134, 135. Courts have differed on whether they may award the plaintiff the costs of calling expert witnesses apart from what would be taxable under the Rules of Court; compare *Julian v. Northern and Central Gas Corp. Ltd*, [1978] 5 C.C.L.T. 148 (Ont. H.C.), with *Lamont v. Pederson et al.*, [1979] 6 W.W.R. 577 (Sask. C.A.).

Another factor which frequently results in the plaintiff getting less than full or functional compensation is the fact that the defendant may not carry sufficient insurance to meet the judgment.⁷¹ The solution of these problems lies not in altering the accepted components for damages for personal injuries, but rather in introducing more realistic tariffs of costs and more stringent provisions respecting liability insurance.⁷²

The final question remains of how the amounts under each component are to be assessed and how they are to be integrated in the final award. These issues raise the question of the use of mathematical computations.

3. Use of Actuarial and Economic Evidence.

It is a corollary of the concept of assessing damages by reference to components (although not one always recognized by the courts) that mathematical computations should be used to assess amounts under those heads where such calculations are possible. Because one is not assessing actual loss but attempting to project future loss, the computation requires consideration of statistical probabilities. This type of mathematical evidence is called actuarial evidence. The actuary's evidence typically depends in part upon predictions of interest and inflation rates, or economic evidence.

The authorities disclose three distinct approaches to the use of actuarial evidence. The first approach discourages the use of actuarial and economic evidence. Such evidence is seen as a threat not only to the uniform and predictable "global" award, but to judicial expertise and freedom. There is a substantial body of law in England⁷³ supporting the view which Lord Reid propounded in *Taylor v. O'Connor*.⁷⁴

Judges and counsel have a wealth of experience which is an adequate guide to the selection of the multiplier and any expert evidence is rightly discouraged.

⁷¹ *Lan v. Wu, ibid.*, at pp. 135, 136.

⁷² Present minimum limits for automobile liability insurance are generally woefully inadequate and should be increased; see *Lan v. Wu, ibid.*, at pp. 135, 136. Other possibilities might include compulsory liability insurance with substantial minimum limits for those involved in activities which might result in serious personal injuries, e.g. hospitals, doctors, aircraft carriers, airports. Such measures while they would not ensure full compensation in every case, would greatly improve recovery for the substantial majority of seriously injured plaintiffs.

⁷³ *Watson v. Powles*, [1968] 1 Q.B. 596, at pp. 604, 605, 608, [1967] 3 All E.R. 721 (C.A.); *Fletcher v. Autocar & Transporters Ltd, supra*, footnote 30, at pp. 336, 346 (Q.B.). *S. v. Distillers Co.*, [1969] 3 All E.R. 1412, at p. 420 (C.A.). *Taylor v. O'Connor*, [1971] A.C. 115, at p. 128; *Mitchell v. Mulholland (No. 2)*, [1972] 1 Q.B. 65, at pp. 76, 77 (C.A.).

⁷⁴ *Ibid.*

This view is typically buttressed by the proposition that actuarial evidence is inappropriate since the plaintiff's losses are inherently incapable of precise calculation. Thus Lord Pearson stated in *Taylor v. O'Connor*:⁷⁵

There are too many variables and there are too many conjectural decisions to be made before selecting the tables to be used. There would be a false appearance of accuracy and precision in a sphere where conjectural estimates have to play a large part. The experience of practitioners and judges in applying the normal method is the best primary basis for making assessment.

The second approach to the use of actuarial evidence attempts to combine mathematical calculations and judicial discretion. Various formulae have been suggested for effecting this uneasy alliance. A suggestion which has found favour with some courts is that of using mathematical evidence as a guide only and leaving the ultimate determination to judicial discretion.⁷⁶ Another approach combines the "mathematical" and "judicial" approach in a "cross-check system". Hawley describes the method as follows:⁷⁷

Generally an award is made objectively and checked subjectively. This occurs when an award is arrived at through some mathematical means, regardless of the degree of calculation, and then the total award is looked at (i) in terms of the cost of purchasing an annuity which would provide for the remainder of the plaintiff's life, (ii) in terms of the award being excessive or (iii) in relation to awards for similar injuries or loss as evidenced by other cases.

Finally, the English multiplier system can be argued to combine mathematical evidence and judicial expertise. The calculation is based on a multiplier which is selected after consideration of factors which may include economic and actuarial evidence as well as conventional norms. In practice, however, it appears that mathematical evidence plays only a minor role in the selection of a multiplier.⁷⁸

The third alternative is to accept actuarial calculations as determinative of the award wherever appropriate, on the assumption that calculations based on pertinent evidence are safer guides than

⁷⁵ *Ibid.*, at p. 140. A similar view was expressed by Denning M.R. in *Lim*, *supra*, footnote 2, at p. 911: "So many are the uncertainties and contingencies that I do not think it can be solved by actuarial evidence."

⁷⁶ An example of this approach is found in the judgment of Keith J. at trial in *Teno* (1975), 7 O.R. (2d) 276, at pp. 312-313, 55 D.L.R. (3d) 57: "I cannot and therefore ought not to attempt to base my assessment on any mathematical calculation. Rather, having regard to the evidence, including the mathematical tools placed at my disposal, I must arrive at a composite figure, which without attempting to allocate precise figures, represents what may be considered to be fair not perfect compensation."

⁷⁷ Donna Lee Hawley, *Assessment of Damages for Permanent Incapacitating Injuries* (1975), 13 *Alta L. Rev.* 430, at pp. 442-444.

⁷⁸ See text accompanying footnotes 73 to 76, *supra*.

judicial instinct. Salmon L.J. was one of the first to espouse this view. In his dissenting judgment in *Fletcher v. Autocar Transporters Ltd* he stated:⁷⁹

I confess that I consider instinct is an uncertain guide and should play a very small, if any part, in assessing financial loss.

In Canada, it is now established that mathematical evidence should determine the amount awarded under the pecuniary heads of damage. Dickson J. stated in *Andrews*:⁸⁰

The apparent reliability of assessments provided by modern actuarial practice is largely illusory, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession; but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid and a sharper tool than the "multiplier-multiplicand" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot and does not purport to speak as to the individual sufferer. *So long as we are tied to lump-sum awards, however, we are tied to actuarial calculations as the best available means of determining amounts.*

Similarly, he rejected the suggestion that a limited role for judicial discretion be retained in making the final "overall assessment" as ". . . a hangover from the days of global sums for all general damages".⁸¹

It is submitted that the adoption of mathematical calculations founded on admissible and relevant evidence including economic evidence is the best alternative both in theory and practice. Judicial instinct and convention are instruments too blunt to accomplish the task of assessing what award will best restore to the plaintiff his losses, whether on the approach of full compensation or functional compensation. Attempts to combine mathematical calculations and judicial discretion do not solve the problem of which of the two should prevail in case of conflict. The use of actuarial techniques, inaccurate as the results may prove to be in hindsight, is the best method available of calculating cost of future care and loss of earning capacity. As will be seen later, such methods may even play a role in the assessment of damages for non-pecuniary losses.

4. Calculation of Present Worth.

To award the plaintiff the total of amounts calculated under the heads cost of future care and lost future earnings would be too generous. Most of the award is allocated to losses which will arise

⁷⁹ *Supra*, footnote 30, at p. 360 (Q.B.).

⁸⁰ *Supra*, footnote 7, at pp. 478, 479 (D.L.R.), italics added.

⁸¹ *Ibid.*, at pp. 478, 479 (D.L.R.).

only in the future. Between receipt of the award and presumed loss, accrual of interest or investment earnings will increase the fund. It has thus long been recognized that the award for pecuniary damages must be discounted to reflect the fact that the unused portion of the fund is capable of earning interest or profits.⁸² What has not been so clear is the method to be used to compute the discount rate.

The method by which this discount is determined differs in England and Canada. In England, the use of "multipliers" result in a discount rate of four to five percent in most cases, without the need to resort to actuarial or economic evidence.⁸³ In Canada, the appropriate discount rate is determined on the basis of economic evidence or judicial notice of interest rates and inflation.⁸⁴

The first question which presents itself is whether inflation should be taken into account in assessing damages for future pecuniary loss, and if so, how and to what extent. This is a question of considerable significance. Provision for predicted future inflation may radically increase the amount awarded for loss of future earnings and cost of future care.⁸⁵

⁸² The practice of discounting can be traced to *Royal Trust Co. v. C.P.R.* (1922), 38 T.L.R. 899, 67 D.L.R. 518 (P.C.). See *Allain v. Dunn* (1960), 45 M.P.R. 89, at p. 92, on the development of the practice of discounting. The theory underlying discounting is discussed by Lord Diplock in *Cookson v. Knowles, supra*, footnote 67, at pp. 982, 983 (W.L.R.).

⁸³ Lord Diplock in *Cookson v. Knowles, ibid.*, at p. 611 (All E.R.), stated that the multipliers used by judges in times of stable currency were appropriate to interest rates of four or five per cent. (The House of Lords in that case advocated continued adherence to these rates despite current inflationary trends). Similarly, the Pearson Commission noted that the range of multipliers used by the court approximately corresponds to the assumption that an investor will enjoy a rate of return of four and one-half per cent. After inflation and tax, *op. cit.*, footnote 4, Vol. 1, para. 648. See also *Uhryn v. B.C. Telephone Co.*, [1974] 4 W.W.R. 609, at p. 620 (B.C.S.C.), where the English authorities were considered to support utilization of a "modest interest rate" which "does not ignore the inflationary factor, but recognizes it".

⁸⁴ The Supreme Court of Canada approved the use of such evidence in *Andrews, Teno and Thornton, supra*, footnote 7. It may be requested by the court, as in *Furi v. Ryall*, [1976] 3 W.W.R. 680 (Sask. Q.B.). A few courts have been prepared to take judicial notice of economic factors: *Kidd v. George* (1973), 38 D.L.R. (3d) 278 (Alta S.C.-T.D.); *Foster v. Moore's Taxi (1961) Ltd.*, [1973] 1 W.W.R. 673 (Man. Q.B.). In *Teno, supra*, footnote 7, p. 630, Spence J. *per curiam* expressly took judicial notice of a prediction respecting future inflation of a former head of the Economic Council of Canada, although Dickson J. in *Andrews* treated the rate as a matter of evidence. In *Conklin v. Smith* (1978), 88 D.L.R. (3d) 317, at pp. 324, 325, (1978), 5 C.C.L.T. 113 (S.C.C.), Spence J., *per curiam* accepted a net discount rate of seven percent, arguably on the basis of judicial notice. As to the dangers of such practices, see Pronouncements by Judges on Questions of Economics (1979), 53 Aust. L. J. 7, see also footnote 94, *infra*.

⁸⁵ J.B. Patterson, Effective Presentation of Actuarial Evidence in Permanent Disability Cases, Part II, (1979), 37 Advocate 13, at pp. 20, 21, demonstrates that

It is beyond dispute that inflation is relevant to calculating how much money is required to compensate a plaintiff for his lost future earnings or to provide for his future cost of care. Inflation would have had the effect of increasing the plaintiff's earnings, had he not been injured. Similarly, to the extent it occurs, it will increase the cost of services, including the plaintiff's cost of care. Moreover, the requirement of discounting the award for the fact that the portion of the money unexpended at any given time will earn interest raises the problem of inflation since interest rates reflect predicted inflation.

Until recently, judicial consideration of future inflation showed little consistency. So long as the conventional or global approach was used, the question of inflation did not arise except in the context of "indexing" prior decisions to reflect decreases in the value of money between the date of such decisions and the date of the trial in question.⁸⁶ The dominant view appeared to be that expressed by Lord Diplock in 1970 in *Mallet v. McMongale*⁸⁷ and adopted by Lord Pearson in *Taylor v. O'Connor*⁸⁸ that inflation should be altogether left out of account or "ignored" in calculating damages for future pecuniary losses. This view rested on the theory that future inflation could be offset by prudent investment.⁸⁹ It found acceptance not only in England, but in Canada, Australia and the United States.⁹⁰

Closer examination of the English decisions, however, reveals that the courts were not really ignoring inflation, but rather were making a modest allowance for future inflation. While advocating that the courts should "ignore" inflation, Lord Diplock stated that they should apply a discount rate reflecting the earnings of money in

the award in *Teno* would have been \$1,351,492.00 rather than \$540,000.00 had a discount rate of one per cent (considered by him appropriate) been used, instead of the seven per cent rate actually used. See also *Lan v. Wu*, *supra*, footnote 19 (B.C.S.C.), at pp. 127, 128, where it is noted that a change of one or two per cent in the discount rate can have a substantial effect on the ultimate dollar award.

⁸⁶ See E.R.E. Carter, *Assessments of Damages for Personal Injuries or Death in the Courts of the Common Law Provinces* (1954), 32 Can. Bar Rev. 713, at pp. 719, 720.

⁸⁷ [1970] A.C. 166, at p. 176, [1969] 2 W.L.R. 767, [1969] 2 All E.R. 178 (H.L.).

⁸⁸ *Supra*, footnote 73, at p. 144.

⁸⁹ *Ibid.* See also *Cookson v. Knowles*, *supra*, footnote 67.

⁹⁰ A leading Canadian case adopting the position that inflation should be ignored is *Bisson v. District of Powell River* (1967), 66 D.L.R. (2d) 226, at p. 234 (B.C.C.A.), *aff'd.* (1968), 68 D.L.R. (2d) 765n (S.C.C.). In Australia the view that inflation should be ignored was adopted in *Parente v. Bell* (1967), 116 C.L.R. 528 (H.C.); see also *Tzouvelis v. Victorian Railway Commissioners* [1968] V.R. 112, at pp. 138, 139 (S.C.V.-F.C.). As to the U.S. position see *Frankel v. United States*, *supra*, footnote 57.

a "stable economy" of about five per cent.⁹¹ In fact the rate of five per cent does not "ignore" inflation. Historically, real earnings on money (that is earnings after allowing for reduced capital value by way of inflation) approximate three per cent, not five per cent.⁹² Thus the discount rates of four or five per cent assumed by typical multipliers actually reflect a modest allowance for inflation of one to two per cent, notwithstanding the supposed rule that inflation should be ignored.

In Canada traditional multipliers were not available to blunt the effect of the proposition that inflation should be ignored. Adoption of that proposition in Canada meant that one discounted by current interest rates at the time of trial, without any deduction from those rates for the factor of inflation which they reflected. In the *Bisson* case,⁹³ the leading Canadian authority for the view that inflation should be ignored, the result was not dramatic since the interest rates then prevailing on good securities were a relatively modest six per cent, not far off those which Lord Diplock ascribed to his hypothetical "stable currency": However, the unfairness of discounting at high prevailing rates of interest in more inflationary times became apparent in the 1970's. It amounted to dramatically reducing the plaintiff's award by reason of predicted high interest rates, without taking into account the predictions of inflation which were responsible in large part for the same high rates. Faced with this obvious inequity, a number of Canadian judges felt impelled to ignore the admonition against considering future inflation.⁹⁴

The question was settled in Canada by the Supreme Court's decision in *Andrews, Teno and Thornton*.⁹⁵ The Supreme Court

⁹¹ *Cookson*, *supra*, footnote 83.

⁹² *Patterson*, *op. cit.*, footnote 85, at p. 15 states: "The 'real' interest rate representing the excess of the current market interest rate over current inflation is historically relatively constant and averages about 3%." Similar evidence was presented and accepted in *Lan v. Wu*, *supra*, footnote 19, at p. 129. See also J.E. Pesanda, *The Impact of Inflation on Financial Markets in Canada (1977)*, referred to by Dale Gibson, *Repairing the Law of Damages (1978)*, 8 Man. L.J. 637, at pp. 650, 651, and J.F. Lipnowski, *The Economist's Approach to Assessing Compensation for Accident Victims (1979)*, 9 Man. L.J. 319, at p. 331.

⁹³ *Supra*, footnote 90.

⁹⁴ For cases where specific amounts or percentages were included for inflation, see *Morgan v. Air West Airlines Ltd*, [1976] 4 W.W.R. 225 (B.C.C.A.) and the trial judgment in *Teno*, *supra*, footnote 76, at p. 309 (O.R.). In other cases, it was stated that inflation was being taken into account without specifying how: see *McQuade v. O'Donnell* (1970), 3 N.B.R. (2d) 733 (N.B.S.C.-Q.B.); *Furi v. Ryall*, [1976] 3 W.W.R. 680 (Sask. Q.B.); *Uhryn v. B.C. Telephone Co.*, *supra*, footnote 83.

⁹⁵ *Supra*, footnote 7; see also *Keizer v. Hanna* (1978), 82 D.L.R. (3d) 449, at p. 462 (S.C.C.), where a net discount rate of six and one half per cent reflecting future inflation of three to four per cent was approved.

confirmed that inflation should be taken into account in calculating damages for future pecuniary losses. The method used by the court was to deduct predicted rates of inflation from predicted rates of interest to determine the rate by which the total sum required should be discounted. By reference to the earnings of long-term securities at the time of trial, an interest rate of ten per cent was selected. From this rate the court subtracted a projected inflation rate of three per cent, based on a forecast by the former head of the Economic Council of Canada.⁹⁶ The net result was a discount rate of seven per cent.

While the Supreme Court's method was not in principle wrong, it can be argued that the court used factors which produced an unrealistically high discount rate. It may be that on the evidence before it the court could reach no other conclusion. Thus in *Andrews*, Dickson J. noted: "The result in future cases will depend upon the evidence adduced in those cases."⁹⁷ In a number of subsequent cases, different evidence has led to acceptance of significantly lower interest rates.⁹⁸

The problem of choosing appropriate factors for interest and inflation rates highlights one disadvantage of the method for arriving at a net discount rate endorsed by the Supreme Court of Canada. First, it proceeds on the assumption that the appropriate factors are the long-term interest rates and projections for inflation prevailing at the time of trial. Different discount rates will be used in different

⁹⁶ Dr. Deutch's prediction of a future inflation rate of three and one-half per cent was introduced in the *Andrews* case in the cross-examination of a home economist. It was subsequently referred to in the evidence in *Thornton*. Subsequent decisions have rejected it as a valid prediction: *Julian v. Northern and Central Gas Corp.*, *supra*, footnote 70, at p. 159; *Lan v. Wu*, *supra*, footnote 19, at pp. 128, 129. In the *Julian* case it was said that Dr. Deutch's statement was made in a report to the Minister of Labour, December 27th, 1973 on increased pension benefits to the railroad industry.

⁹⁷ *Supra*, footnote 7, at p. 474 (D.L.R.).

⁹⁸ In *Julian v. Northern and Central Gas Corp.*, *supra*, footnote 70, a discount rate of two per cent was used. In *Yupremiam v. The Scarborough General Hospital*, unreported, May 17th, 1978 (Ont. H.C.), *Sheppard v. Wells*, unreported, June 21st, 1978 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada refused), *Richards v. B. and B. Moving and Storage Limited*, unreported, June 28th, 1978 (Ont. C.A.) and *Dupuis v. Melanson* (1978), 24 N.B.R. (2d) (N.B.Q.B.), a rate of three per cent was endorsed. In the latter case Zuber J.A. *per curiam* expressly rejected the argument that the *Andrews*, *Teno* and *Thornton* trilogy established a discount rate of seven per cent as a matter of law. A number of cases in British Columbia have adopted or approved the seven per cent rate: *Hamburg v. The Queen* (1978), 7 B.C.L.R. 113 (B.C.C.A.); *Lindal v. Lindal*, [1978] 4 W.W.R. 592 (B.C.S.C.); *Lucas v. Antoniuk* (1978), 7 C.C.L.T. 209 (B.C.S.C.). However, in *Lan v. Wu*, *supra*, footnote 19 (B.C.S.C.) a discount rate of three per cent was chosen and in *Malat et al. v. Bjornson et al. (No. 2)*, [1979] 4 W.W.R. 673 (B.C.S.C.) a rate of four per cent was selected.

cases, not because the circumstances of the plaintiffs differ, but rather because the evidence as to future interest rates and inflation rates differs. For example, interest rates may be temporarily at artificially high levels at the time of trial because of government action aimed at attracting money to the country. The plaintiff should not be penalized on that account. Similarly, he should not benefit from the fact that his trial occurs in a period of depression when interest rates may be artificially low. Although sophisticated economic evidence in theory would prevent aberrations based on temporary conditions, the care with which the evidence is prepared and presented may vary from case to case, as may the sophistication of judges. A second objection to the Supreme Court's set-off method is that it is costly and time consuming. In each case it is necessary to call evidence from economic experts to supply predictions, in the absence of agreement by counsel. The increased cost and time related to reliance on actuarial and economic evidence has evoked some concern, at least in England.⁹⁹

An alternative method of computing the discount rate remains to be considered. It involves resort to the concept of the "real" earnings or "net return" of money. Historically, it can be demonstrated that earnings on relatively secure long-term expenses after inflation are in the range of three per cent per annum.¹⁰⁰ Put in economic terms, this is the net price of money as determined in the marketplace over long periods of time. It can be argued that this is the most appropriate discount rate for application to costs and losses which may span long future periods. Moreover, since it does not depend on economic factors and predictions at the time of trial, it could be given recognition by legislation or, possibly, by judicial notice,¹⁰¹ thus obviating the need to call economic evidence in every case. Such an approach, it is submitted, is superior to the Supreme Court's set-off approach, both in terms of economy and justice. It has recently been used in British Columbia in *Lan v. Wu*.¹⁰²

⁹⁹ The reception of actuarial evidence was criticized on this ground by Lord Denning M.R., in *Watson v. Powles*, *supra*, footnote 73, at p. 723 (All E.R.) and by Lord Guest in *Taylor v. O'Connor*, *supra*, footnote 73, at p. 135. In response to this concern, legislation has been enacted in Ontario permitting the Rules Committee to prescribe the rate of interest to be used in determining the capitalized value of an award in respect of damages: S.O., 1979, c. 65, s. 6(5)(bd).

¹⁰⁰ *Supra*, footnote 92.

¹⁰¹ *Supra*, footnote 84. Such legislation has been passed in Ontario, *supra*, footnote 99. While fair over long periods, a fixed rate may not be fair over shorter periods since periods of negative or lower than normal net return may last several years. For this reason it may be desirable to leave some scope for judicial discretion in such legislation. The Ontario legislation does not do so.

¹⁰² *Supra*, footnote 19.

The foregoing comments are based on the assumption that the only factors relevant to calculation of an appropriate discount rate are interest and inflation. It can be argued that other factors, such as the cost of investment advice and increases in productivity should also be considered.¹⁰³ Such factors may reduce the discount rate by a further one and one-half to two per cent, to a final discount rate of no more than one per cent.¹⁰⁴ In *Arnold v. Teno*, it was held that it was appropriate to allow \$35,000.00 as a fund for the payment of such management fees.¹⁰⁵ Proportionate sums have been awarded in subsequent cases.¹⁰⁶

It is now generally recognized that the goal of the courts should be to calculate as realistically as possible the plaintiff's future costs and earnings so as to provide an award which is neither excessive nor inadequate, whether on the theory of full compensation for pecuniary loss or functional provision for the plaintiff's needs. Actuarial and economic considerations are indispensable tools for reaching this goal, so long as courts are tied to a lump-sum award. However, the methods by which this evidence is typically presented and applied are cumbersome and expensive, and may in particular cases produce results which are off the mark.¹⁰⁷ It is to be hoped that the increasing sophistication of both courts and witnesses in these matters, will produce more satisfactory procedures in the future.

5. Allowance for Future Taxation.

Whether they adopt the rationale of full compensation, the functional approach, or a combination of the two, it is clear that the courts seek to provide the severely injured plaintiff with sufficient funds to ensure his care for the balance of his life. In addition, the theory of full compensation, and in most cases, the theory of functional compensation, dictate that the plaintiff be compensated for the future earnings he has lost as a result of his injury. It is arguable that an allowance for taxation should be made under both these heads. The calculation of the award for cost of future care rests on the assumption that the award will earn income and possibly appreciate in value during the plaintiff's life. The income and capital

¹⁰³ Patterson, *op. cit.*, footnote 85, at p. 16.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Supra*, footnote 7, at pp. 635, 636.

¹⁰⁶ *Lan v. Wu*, *supra*, footnote 19, at p. 137; *Dupuis v. Melanson*, *supra*, footnote 98; *Webber et al. v. Lawrie et al.* (1979), 15 B.C.L.R. 289 (B.C.S.C.).

¹⁰⁷ For example, Patterson demonstrates that the award in *Teno* is manifestly inadequate largely as a result of use of an inappropriate discount rate, *op. cit.*, footnote 85. See also *Lan v. Wu*, *ibid.*, at p. 125.

gain will be taxed. It follows that an accurate calculation must provide for such taxation. With respect to loss of earnings, it can be argued that the plaintiff should be compensated only for his actual net loss after tax. On the theory of full compensation it can be argued that the sum which would have been devoted to taxes is not part of his loss since he would never have had such money for his personal use.¹⁰⁸ The result is even clearer on the functional approach, which emphasizes the use to which the money can be put in restoring the plaintiff as nearly as possible to his former position. It follows that a deduction ought to be made of that portion of the plaintiff's future which would have been paid in taxes.

In England, it is in principle open for the courts to take taxation into account in calculating general damages.¹⁰⁹ In fact, however, the multipliers typically used provide only inadequately for taxation.¹¹⁰ The Pearson Commission has recommended that the multipliers traditionally used be revamped to produce a result more adequately reflecting tax considerations and hence more likely to produce an award equivalent to the plaintiff's "net annual loss".¹¹¹

The Supreme Court of Canada in *Andrews, Teno and Thornton*¹¹² declined to follow English authority favouring consideration of future taxation, and instead affirmed the position it had taken in *R. v. Jennings*¹¹³ that future taxation should not be considered in assessing damages for personal injuries. The Supreme Court's position is not only out of step with the view taken in

¹⁰⁸ Against this argument it can be contended that deduction of taxation from future earnings provides less than full compensation since no credit is given for the possibility that the plaintiff could have organized his affairs so as to reduce taxation, an argument accepted in *R. v. Jennings*, [1966] S.C.R. 532, (1966), 57 D.L.R. (2d) 644; see also Vern Krishna, *Tax Factors in Personal Injury and Fatal Accident cases: A Plea for Reform* (1978), 16 Osgoode Hall L.J. 723, at pp. 727, 728. However, it seems unrealistic to assume that the average person would be able to effect significant reductions in taxation by such means. Moreover, this possibility can itself be taken into account as a contingency, perhaps supported by statistical evidence.

¹⁰⁹ *British Transport Commission v. Gourley*, *supra*, footnote 8. While this case was concerned with tax on future earnings, the broad considerations of principle which led to the result can be argued to support consideration of tax factors wherever they are relevant to general damages.

¹¹⁰ See the Report of the Pearson Commission, *op. cit.*, footnote 4, Vol. 1, paras 675-687, where a "more realistic" lower discount rate is urged on the basis of more detailed consideration of the impact of taxation and inflation than obtains presently in England. At para. 676, it is stated that "in practice explicit calculations are not made, awards being based on experience and precedent".

¹¹¹ *Op. cit.*, *ibid.*, Vol. 1, para. 636.

¹¹² *Supra*, footnote 7.

¹¹³ *Supra*, footnote 108, where the court declined to follow the *Gourley* rule, *supra*, footnote 8.

England; it is also inconsistent with its practice in the closely related area of assessment of damages under fatal accidents legislation¹¹⁴ and with the basic principles of functional and full compensation which it claims to support. It was criticized as "unrealistic" in the Nova Scotia Court of Appeal in *Trizec Equities Ltd et al. v. Guy*.¹¹⁵

In these circumstances, the reasons given by the Supreme Court for its refusal to permit consideration of the impact of future taxation on damage awards merit close consideration. The court justified its refusal on two grounds. The first was that the prior Canadian authority precluding consideration of taxation was correct in principle. The second was that from a practical point of view, the calculation required to assess the impact of future taxation would be too difficult and too uncertain.

The first ground, that of principle, was set out most clearly by Dickson J. in the *Andrews* case.¹¹⁶ He referred to the fact that in *R. v. Jennings*¹¹⁷, the Supreme Court had refused to consider taxation in assessing the loss of future earning capacity of a severely injured plaintiff. This was justified, he argued, because it is the "earning capacity and not lost earnings which is the subject of compensation". He went on to apply the same principle to the award for cost of future care. This argument can be criticized on several grounds. First, the distinction between "earning capacity" and lost future earnings is elusive. In practical terms, what the courts do in assessing damages under this head, is to award the discounted value of the plaintiff's future earnings had he not been injured. The triviality of the distinction has been noted by the English Law Commission and the Pearson Commission. The *Report* of the latter states:¹¹⁸

¹¹⁴ The majority of the Supreme Court in *Keizer v. Hanna*, *supra*, footnote 95, held that future taxation should be considered in calculating an award under the Fatal Accidents Act. The disparity is made more glaring by the statement of Dickson J., at p. 462, that the "proper method of calculating the amount of a damage award under the Fatal Accidents Act is similar to that used in calculating the amount of an award for loss of future earnings, or for future care, in cases of serious personal injury".

¹¹⁵ (1978), 85 D.L.R. (3d) 624, (1978), 26 N.S.R. 1, at pp. 654, 655, per MacDonald J.A.; see also at p. 662, where MacDonald J.A. states that the "Jennings principle forces [him] to wear judicial blinkers insofar as income tax on salary is concerned". These criticisms were noted and dismissed on appeal to the Supreme Court, *Ritchie J. for the court*, stating that *R. v. Jennings* governed: *Guy v. Trizec Equities Ltd et al.* (1979), 99 D.L.R. (3d) 243, at p. 250.

¹¹⁶ *Supra*, footnote 7, at pp. 474, 475 (D.L.R.).

¹¹⁷ *Supra*, footnote 108.

¹¹⁸ *Op. cit.*, footnote 4, Vol. 1, para. 338. See also Krishna, *op. cit.*, footnote 108, for a detailed criticism of the Supreme Court's distinction between future earnings and earning capacity.

The Law Commission have suggested that there is no real distinction between damages for loss of earning capacity and damages for future loss of earnings. We agree.

Moreover, the view of lost earning capacity as a capital asset is at odds with the Supreme Court's endorsement of a system of damages in the form of periodic payments.¹¹⁹ Second, even if the concept of "earning capacity" is appropriate for calculating lost earnings, it does not follow that the same reasoning should be applied to the calculation of the award for future care. Whether on the rationale of full compensation for pecuniary loss or on the functional approach, principle dictates that taxation on the award for future cost of care should be considered, so that the plaintiff is left with the net amount required to ensure his care for the remainder of his life. Elsewhere the Supreme Court cites this as its main consideration. Its deviation from it on the question of tax remains unexplained.

The second argument given by the Supreme Court in support of its position is based not on principle, but on pragmatic grounds. In *Andrews*, Dickson J. expresses concern about the complexity of the tax calculation and the uncertainty of future tax laws.¹²⁰ In *Teno*, Spence J. cites the "uncertainty" of calculating future tax.¹²¹ It is submitted that the argument on complexity is unsound. In general courts should not abrogate their responsibility to do justice in accordance with accepted principle on grounds that the matters in question are too complex or difficult. It is up to the litigants to present the complex evidence in a manner which can be understood by the court. If they do so, it should be received if it is otherwise relevant and admissible. To arbitrarily say that as a matter of principle the court will not consider specified matters because they are too complex is to deny proper access to the courts. Moreover, there is no evidence that the question of taxation is so complex that it cannot be properly presented and appreciated by the courts. On the contrary, comments on the question indicate that presentation of such evidence is both possible and desirable.¹²² While the calculation of future taxation is complicated by the differential treatment of taxation on earnings and on capital gain and because of the assumptions which must be made as to where the money will be

¹¹⁹ Krishna, *op. cit.*, *ibid.*, at p. 726.

¹²⁰ *Supra*, footnote 7, at p. 475 (D.L.R.).

¹²¹ *Supra*, footnote 7, at pp. 632, 633.

¹²² Patterson, *op. cit.*, footnote 85, at pp. 26-30, advocates consideration of future taxation and sets out sample calculations. See also Prevett, *The Actuarial Assessment of Damages—I* (1972), 35 Mod. L. Rev. 140, at p. 154; Gibson, *op. cit.*, footnote 92, at pp. 652 to 655; Street, *Principles of the Law of Damages* (1962), p. 117.

invested and what deductions will be available, it would seem that these difficulties are no greater than those associated with predicting the cost of the plaintiff's care for the remainder of his life or what he would have earned had he not been injured. Insofar as the pragmatic argument is concerned with the possibility that tax laws may be changed to make the income obtained on personal injury awards tax free, it can be argued that the courts should not deprive a plaintiff of loss demonstrated on the facts and law at the time of trial on the hypothesis that the law may be changed in the future. Rather they should apply the principles existing at the time of trial and leave it to the legislatures, in the event they choose to enact legislation, to include provisions which will guard against a windfall to persons who received their awards prior to the date of such legislation.

In conclusion, it is submitted that the Supreme Court of Canada's refusal to consider the impact of future taxation on the awards in *Andrews*, *Teno* and *Thornton* cannot be justified either in principle or practice. It is to be regretted that the Supreme Court did not take the opportunity presented by these cases to review the wisdom of its decision to ignore future taxation in *R. v. Jennings*.¹²³ Such a review might have permitted recognition of the fact that tax considerations cannot be categorically excluded from proper assessment of adequate compensation either from a functional perspective or on the principle of full compensation.

6. Deduction for Contingencies.

It has become an established practice for courts to reduce the amounts initially assessed for future pecuniary losses by a deduction for "contingencies".¹²⁴ In the case of loss of future earning capacity, it is said that the deduction reflects the possibilities of unemployment, accident and illness. In the case of cost of future care, it supposedly reflects the possibility that costs may go down, that a less expensive mode of care may be adopted, or that the plaintiff may die prematurely. In England, such factors may be reflected in the multiplier chosen; in Canada they take the form of a percentile deduction ranging from ten to thirty-seven per cent from the gross award for cost of future care and loss of earning capacity.¹²⁵

¹²³ *Supra*, footnote 108. The Supreme Court noted criticisms of its position in *Guy v. Trizec Equities Ltd et al.*, *supra*, footnote 115, but declined to enter upon a review of the *Jennings* case.

¹²⁴ See for example, *Bisson v. District of Powell River*, *supra*, footnote 90, and *Andrews*, *supra*, footnote 7, at p. 470 (D.L.R.), and cases cited therein.

¹²⁵ Charles, *op. cit.*, footnote 3, at pp. 59, 60.

The practice of making a contingency deduction has been convincingly attacked on logical and pragmatic grounds. One argument raised is that it is just as likely that the plaintiff's earnings would have (or his cost of care will) exceeded the projected amount, as it is that they will fall below it. Good contingencies, it is said, cancel out bad contingencies. However, this is not true of all contingencies. Early death or acceptance of institutional care may dramatically reduce or eliminate the amount required for cost of care. It is difficult to find a contingency of corresponding impact and probability favouring the defendant. Critics also argue that contingencies can be properly taken into account by actuarial assessments and that this should be the approach adopted. Improved statistics make this true of an increasingly broad range of contingencies. On the basis of such evidence, it has been suggested that the discount on account of loss of future earnings should be in the range of two to three per cent.¹²⁶ For other factors, however, it is unlikely that satisfactory statistical evidence will ever be available, and, even if it were, uncertain whether it should be automatically applied in the particular case before court. Thus an actuary has written of the contingency of remarriage of the widow in fatal accident cases:

... it must be admitted that, in view of the many factors that may influence a decision to remarry, figures based on averages can in this instance afford only a very rough guide; in particular, it has been sagely remarked that no investigation has been made of the rates of remarriage of widows who have received generous lump sum compensation for the deaths of their husbands.¹²⁷

Similarly, it can be argued that no statistical evidence is available to show whether plaintiffs who have received generous awards for future care in their own homes in fact spend their award to secure such care, and further, that even if such evidence were available, that it should not automatically be applied to individual cases.

There is general agreement that reliable statistical contingencies should be taken into account in assessing damages for future pecuniary losses.¹²⁸ The problematic contingencies are those where statistical evidence is not available or where it seems unjust to apply statistics to the particular case before the court. It can be argued that such contingencies should be ignored on the ground they are too remote. Indeed, members of the Supreme Court of Canada have on occasion expressed doubts about the propriety of a blanket deduction

¹²⁶ Preveitt, *op. cit.*, footnote 122, at p. 150; Traversi, *Actuaries and the Courts* (1956), 29 A.L.J. 557.

¹²⁷ P.C. Wickens, *Actuarial Assistance in Assessing Damages* (1974), 48 Aust. L.J. 286, at p. 291. See also Preveitt, *op. cit.*, *ibid.*

¹²⁸ *Supra*, footnote 126.

for contingencies.¹²⁹ Despite these doubts, the court has consistently approved substantial deductions for future contingencies. In *Bisson* a deduction of twenty per cent was approved.¹³⁰ In *Andrews* a similar deduction of twenty per cent was made from both the heads of lost future earnings and cost of future care.¹³¹ In *Teno*, a twenty per cent deduction was made, but only from lost future earnings.¹³² In *Thornton*, where the trial judge had refused to make an allowance for contingencies, the Supreme Court deducted twenty per cent for contingencies from the head of cost of care while upholding the Court of Appeal's deduction of ten per cent from the head of loss of future earnings.¹³³

The discrepancies in the discounts for contingencies allowed in *Andrews*, *Teno* and *Thornton* are baffling. The court alluded to no factors which might justify them, other than its deference to the views of the courts below. Moreover, the generosity of the deductions, particularly in the *Andrews* case, detracts from the court's stated goal of providing a functional award sufficient to provide the plaintiff with proper care for the balance of his life.¹³⁴ These disparities reflect a more fundamental problem, namely, the absence of a foundation in principle or logic upon which the calculation of a deduction for contingencies unsupported by statistical evidence may be based. Dickson J. in *Andrews* identified the problem when he wrote: "This whole question of contingencies is fraught with difficulty for it is in large measure pure speculation." The solution he proposed was a reduction of speculation by better actuarial evidence.¹³⁵ It is submitted that while this may provide a partial solution to the problem, it will never provide a complete solution. There will always be some contingencies for which reliable and applicable statistical evidence will not be available. From the point of view of general principle, it is submitted that the current practice of making healthy deductions for purely speculative contingencies may conflict with the principles of full compensation

¹²⁹ See *Archibald v. Nesting*, [1953] 2 S.C.R. 423, at p. 427, where it was stated: "The innocent person who has been gravely injured by the fault of another should not be called upon to bear all the risks and uncertainties of the future." In *Andrews*, *supra*, footnote 7, at p. 468 (D.L.R.), Dickson J. acknowledged that "to vary an award by the value of the chance that certain contingencies may occur is to assure either over-compensation or under-compensation, depending on whether or not the event occurs".

¹³⁰ *Supra*, footnote 90.

¹³¹ *Supra*, footnote 7, at p. 470 (D.L.R.).

¹³² *Supra*, footnote 7, at p. 638.

¹³³ *Ibid.*

¹³⁴ Dickson, J. acknowledges this, *supra*, footnote 129.

¹³⁵ *Supra*, footnote 7, at p. 468 (D.L.R.).

and functional compensation endorsed by the courts in recent decisions. This conflict has already led some trial judges since *Andrews* to adopt a more restrictive approach to contingency deductions and in one case to refuse to make a deduction for contingencies.¹³⁶

7. *Type of Care.*

One of the most difficult problems facing the court in assessing damages for personal injuries of a disabled plaintiff is the question of how he should be cared for in the future. If the court determines he should be cared for in his own home, sufficient monies to maintain a home and a staff to care for it and for the plaintiff must be provided. If the court decides that he should be cared for in a private institution, the costs, while lower than for care in his own home, will be high. The third alternative, care in a state institution, will generally be dramatically less expensive. It is not surprising in these circumstances that plaintiffs typically state their preference for home care, while defendants argue that care in a state institution is the most reasonable choice.

In England, the question has arisen only obliquely, since the courts are forbidden by legislation to take into account the possibility that the plaintiff may take advantage of public care under the National Health Plan.¹³⁷ The courts are obliged to proceed on the basis that the plaintiff will seek private care. Usually they base their awards on the assumption that the plaintiff will be cared for in a private institution, rather than in his own private home.¹³⁸ In Canada, however, nothing prevents courts from basing their awards on the assumption that the plaintiff will be cared for in a state institution at minimal cost.

¹³⁶ In *Lan v. Wu*, *supra*, footnote 19, at pp. 132-133, no deduction was made. In *Dupuis v. Melanson*, *supra*, footnote 98 the logic of a deduction was criticised and a deduction of only 10% was made. In *Lamont v. Pederson et al.*, *supra*, footnote 70, at pp. 590-591, a fatal accidents claim, the court refused to consider the possibility that the plaintiff housewife might have worked outside the home had her husband lived, as a contingency.

¹³⁷ Law Reform (Personal Injuries) Act 1948, 11 & 12 Geo. 6, c. 41, s. 2(4) (Great Britain); Law Reform (Miscellaneous Provisions) Act, s. 3(4) (Northern Ireland).

¹³⁸ It is difficult to find examples of English cases where home care (other than by family members) has been used as the basis for calculating the cost of care. Typically, costs are predicted on the cost of care in a private institution: see, for example, *Fletcher v. Autocar & Transporters Ltd*, *supra*, footnote 30, at p. 211; *Cunningham v. Harrison*, *supra*, footnote 55, at p. 470; *Lim Poh Choo v. Camden & Islington Health Authority*, *supra*, footnote 2. This accounts for the finding of the Pearson Commission in England that loss of future earnings is almost invariably the largest head of damages, *op. cit.*, footnote 4, Vol. 1, para. 555.

The decision on choice of care can be made on either of two bases. First, it can be made on medical grounds. On this approach the mode of care selected by the court will be determined by what the medical evidence indicates is best for the plaintiff. Alternatively, the decision can be made on grounds of basic rights. In this case, the court bases its decision on the standard of care and living which it concludes the plaintiff is entitled to enjoy. Unfortunately, the courts have not always made it clear which of these quite different grounds they are adopting.

The first basis on which the decision can be made, medical grounds, has the merit of providing a relatively objective criterion. The Pearson Commission advocates this approach.¹³⁹ It has also received apparent approval from the Supreme Court of Canada in *Andrews, Teno* and *Thorton*,¹⁴⁰ although in some passages in the *Andrews* case, the court seems to rely on the second rationale of basic entitlement.¹⁴¹

Despite the apparent attraction of its simplicity, the medical approach poses several problems. The first concerns the nature of the medical evidence. In a number of recent cases concerning injuries to quadraplegic or paraplegic persons, evidence favouring a home environment has been substantially based on the argument that the plaintiff will be healthier there, not because he will receive better physical care there, but rather because he will be happier there. This introduces the problem of to what extent subjective factors should be considered in making the medical decision as to the most appropriate care. The plaintiff might well be happier if given an award of \$1,000,000.00 over what his evidence demonstrates he needs because it gives him security. He might live longer because of this increased security and happiness. But no one would seriously argue that he should be given the extra money. Similarly, it can be argued that the fact that the plaintiff will be "happier" in his own home should not entitle him to care in that fashion when equally adequate

¹³⁹ *Ibid.*, Vol. 1, para. 510.

¹⁴⁰ In *Andrews*, *supra*, footnote 7, at p. 462 (D.L.R.), the court stated that institutional care was "on all the evidence . . . inappropriate". At p. 465, it was stated of home care: "No other conclusion is open on the evidence adduced in this case." Similarly in *Thornton*, the Supreme Court relied in the finding below that the plaintiff's life expectancy would be enhanced by home care, *supra*, footnote 7, at p. 485 (D.L.R.). In *Teno*, *supra*, footnote 7, at p. 631, Spence J. stated that the choice of home care in *Andrews* and *Thornton* was based on evidence which demonstrated that this was the only adequate provision for the plaintiff's continuing existence, and went on to conclude that in *Teno* as well, the plaintiff could receive proper care only in a home of her own.

¹⁴¹ *Infra*, footnote 146.

physical care is available at a fraction of the cost in an institutional facility. Moreover, the subjective nature of this evidence makes it impossible for the defendant to counter. The defendant cannot prove that the plaintiff will not be happier in his own home, in the face of the plaintiff's declaration that he will be. It can further be argued that deciding the question of the mode of future care on the psychological ground of happiness disregards the rule that the defendant's position should be borne in mind in assessing damages. Surely it is reasonable to weigh the increase in the plaintiff's health which will result from care in the home against the tremendous increase in the burden on the defendant which will be imposed by home care.

In England, it appears that subjective factors based on the plaintiff's particular personality will not justify an award sufficient to provide care for him in his own home.¹⁴² In Canada, in *Andrews* and *Thornton*, where the evidence in favour of home care was based solely on the premise that the plaintiff would be happier, and consequently healthier there, the Supreme Court of Canada endorsed home care without discussing the problems inherent in acceptance of such subjective evidence.¹⁴³ This is to be regretted. The medical test, if confined to objective standards of physical health might prove a good basis for choice of mode of care for the purpose of assessing damages for pecuniary losses. Without such limitation, it amounts to a virtual guarantee of an award large enough to provide home care to any severely injured plaintiff who wishes to claim it.

Alternatively, the mode of care on which the award for future cost of care will be based may be chosen by reference to an assumption that the plaintiff has an inherent right to live and be cared for in a specified way. The problem is choice of the appropriate standard, characterized by Dickson J. in *Andrews*, as an "elusive concept".¹⁴⁴ The authorities disclose two different approaches to selecting this standard.

Some courts have suggested that a sentient quadriplegic plaintiff is entitled to care in his own home. In *Loney v. Voll* it was said that "social justice" dictated that the plaintiff not be denied a comfortable home of her own.¹⁴⁵ Similarly in *Andrews*, Dickson J.

¹⁴² *Cunningham v. Harrison*, *supra*, footnote 55, at p. 469, per Denning M.R.

¹⁴³ The Supreme Court did not discuss this issue. The decisions of the Alberta Appellate Division in *Andrews* and of the B.C. Court of Appeal in *Thornton*, however, indicate that the superiority of home care was based on psychological and emotional factors (*Andrews*, *supra*, footnote 53, at p. 698 (D.L.R.)) or the "mental well-being" of the plaintiff (*Thornton*, *supra*, footnote 1, at p. 41).

¹⁴⁴ *Supra*, footnote 7, at p. 465 (D.L.R.).

¹⁴⁵ [1974] 3 W.W.R. 192, at p. 212 (Alta S.C.-T.D.).

concluded that the plaintiff was in "justice" entitled to be cared for by his own private staff in his own home because he would have lived in his own home had he not been injured.¹⁴⁶ This was an assumption; Dickson J. does not refer to any evidence that *Andrews* would have enjoyed a home exclusively devoted to himself had he not been injured. While this assumption might be queried on the ground that in present socio-economic circumstances shared accommodation for uninjured persons is common, it remains true that uninjured persons do not usually live in institutions.¹⁴⁷ The important point is that for Dickson J. the appropriate standard of care is that which as closely as possible approximates that enjoyed by normal persons.

A more modest view of the standard of social justice required has been taken by other courts. They have said that the appropriate standard is the standard generally acceptable to the general public for care, not of a normal person, but of a person *so injured*.¹⁴⁸ On this test, one looks not to the standard hypothetically enjoyed by uninjured persons but rather to the way society generally provides for persons in the plaintiff's position. The standard of care society sets for such persons is taken as the best evidence of what constitutes reasonable care for the plaintiff. Socially approved standards, gauged by pension plans, workers' compensation schemes or state health facilities become the basis for the award for cost of care. It can be argued that this more modest standard has more foundation in reality than the Supreme Court of Canada's assumption that everyone is entitled to live in a home devoted exclusively to his or her own use. For the time being, however, the Supreme Court's view must be taken as law in Canada.

¹⁴⁶ *Supra*, footnote 7, at p. 465 (D.L.R.): "The standard to be applied to Andrews is not merely 'provision', but 'compensation', *i.e.* what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care. If there was severe mental impairment or the case of an immobile quadriplegic, the result might well be different; but, where the victim is mobile and still in full control of his mental faculties, as Andrews is, it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better."

¹⁴⁷ It would seem difficult to establish that one person households are the "norm" in Canada where homes are typically shared by two or more persons. It was suggested in the evidence in *Thornton* that sharing a home (and thus reducing costs) would be practicable for handicapped persons, *supra*, footnote 143.

¹⁴⁸ This view was taken by the Alberta Appellate Division in *Andrews, supra*, footnote 53, at pp. 701, 702 and in *Hamel v. Prather* (1976), 66 D.L.R. (3d) 109, at p. 128, per Moir J.A. (Alta S.C.-A.D.). Similarly, Denning M.R. in *Cunningham v. Harrison, supra*, footnote 55, stated that the plaintiff should receive "all such reasonable expenses as are appropriate to a person so placed," *i.e.* to a person with similar injuries.

Can it then be concluded that home care with its concomitant high cost is now the appropriate basis for calculation of the award for future cost of care in Canada in all cases involving a totally disabled but sentient plaintiff? It can be argued that the primary ground upon which the court approved of home care in *Andrews*, *Teno* and *Thornton* was the medical evidence in those cases, and that its reference to the test of a standard of care imposed by "justice" was *obiter dicta*. In most cases involving serious injuries, however, medical evidence in support of home care can be expected, so long as the courts permit the medical evidence to be based on the subjective consideration of the plaintiff's happiness. Whatever the basis of the decision, it appears that some form of home care for sentient plaintiffs is virtually assured on the law as presently stated in Canada.

If the court decides on home care, the question arises of whether the plaintiff should be awarded sufficient funds to purchase his own home. It can be argued that such an expenditure is not a loss, since the plaintiff is left with a capital asset. In England, claims for the capital cost of a house have been refused.¹⁴⁹ The Supreme Court of Canada however, in the *Thornton* case, upheld the trial judge's award of \$45,000.00 for a home, as well as \$8,500.00 for a motor van.¹⁵⁰ If the plaintiff already has a house, however, he may recover nothing unless the house is unsuitable, and in that event he may recover only the difference between the cost of the new house and the selling price of the old house.¹⁵¹ Alternatively, the cost of care in the home may be computed on the basis of a monthly rental cost.¹⁵²

8. *Family Care.*

It was held in *Andrews* that an award for future care should not be reduced on the ground that the plaintiff will be cared for by his family. While in fact family members might provide the necessary care for less than other persons would, the test for the purpose of calculating damages should be the cost of care by strangers.¹⁵³ It can be argued that this may give the plaintiff more than the estimated actual cost of his future care and hence more than full compensation for his pecuniary loss. It may also constitute a deviation from the basic principle of functional compensation, giving the plaintiff money which it is not reasonably necessary for him to expend. These

¹⁴⁹ *Cunningham v. Harrison*, *ibid.*; *George v. Pinnock*, [1973] 1 W.L.R. 118.

¹⁵⁰ *Supra*, footnote 7.

¹⁵¹ *Malat v. Bjornson*, *supra*, footnote 98.

¹⁵² *Andrews v. Grand & Toy Alberta Ltd*, *supra*, footnote 7.

¹⁵³ *Ibid.*, at p. 463 (D.L.R.).

points may be countered by the argument that the plaintiff's loss is to be determined objectively on the basis of the "proper and reasonable cost" of supplying his needs.¹⁵⁴ This view is generally accepted in England¹⁵⁵ and has been endorsed by the Pearson Commission.¹⁵⁶

Compensation for pre-trial gratuitous care has given courts difficulty in the past.¹⁵⁷ The Supreme Court in *Thornton* and *Teno* solved the problem by adopting a device previously used by Denning M.R. in England. In each case the court awarded \$7,500.00 to be held in trust for the injured plaintiff's mother.¹⁵⁸ It is submitted that this result is generally in accord with the principles underlying the court's approach to future cost of care: the measure of loss should be the proper and reasonable cost of care rather than the actual cost.

9. Lost Earning Capacity.

The Supreme Court in *Andrews*, *Teno* and *Thornton* accepted without question that in addition to providing for the plaintiff's future care, an allowance must be made on account of his loss of future earnings.

This head of damages raises a number of questions. First how is the level of earnings to be determined? Second, should the calculation be based on the expected lifespan before the accident or after the accident? Finally, the place of an award for lost future earnings in the context of the principles of full compensation and functional compensation must be considered. Each of these questions will be considered in turn.

The first question is that of determining what the plaintiff would have earned had he not been injured. The award under this head is based on the plaintiff's evidence of what he would have earned as a

¹⁵⁴ See *Donnelly v. Joyce*, [1974] Q.B. 454, at p. 462, [1973] 3 All E.R. 475, at p. 480 (C.A.).

¹⁵⁵ *Ibid.*; see also *Cunningham v. Harrison*, *supra*, footnote 55.

¹⁵⁶ *Op. cit.*, footnote 4, Vol. 1, para. 345.

¹⁵⁷ Technically, pre-trial care falls under special damages requiring specific proof of actual loss to the plaintiff. The plaintiff has suffered no loss with respect to gratuitous pre-accident services. Nor can the benefactor claim on the basis of a legal obligation. The "controversial" nature of the Supreme Court's position on the matter in *Teno* and *Thornton* is discussed by *Gibson, op. cit.*, footnote 92, at p. 659. For a review of cases where such damages were awarded, see Igor Ellyn, *Damages for the Injured Plaintiff: Can the Value of Non-Contracted Services Be Recovered in Ontario* (1979), 2 *Advocates Q.* 47. In Ontario, legislation provides a partial answer: Family Law Reform Act, S.O., 1978, c. 2, s. 60(1)(2) and (3).

¹⁵⁸ *Thornton, supra*, footnote 7, at p. 491 (D.L.R.); *Teno, supra*, footnote 7, at p. 640. The same procedure was followed in the *Lim* case, *supra*, footnote 2, at p. 910.

“reasonable probability”. Proof of substantial earnings may be difficult in the case of persons injured at a young age. Consequently, awards under this head for young plaintiffs in England have not been large.¹⁵⁹ Recent cases in Canada, however, show a more generous approach. Without changing the formal requirement of proof on a “reasonable probability” the court has in fact been willing to act on assumptions unsupported by evidence in the particular case. In *Teno*, after pointing out that “the Court is bound not to act on mere speculation”, Spence J. based his calculation on the assumption the infant plaintiff would not be a public charge and chose a figure slightly over the poverty level.¹⁶⁰ In *Thornton*, in the absence of evidence of what career the plaintiff, a high school student of average ability, would have pursued, the court approved a calculation based on the national average of earnings for a person in his age group at the time of trial, without any allowance for increases beyond those indicated by inflation.¹⁶¹ The court’s most recent and explicit comment on the subject came in *Conklin v. Smith*. There Spence J., speaking for the court, said:¹⁶²

It is my view that a Court in considering a claim for loss of future income is in a very different position than a Court considering a claim for damages for breach of contract. . . . If . . . the plaintiff was not gainfully employed at the time of the accident but intended to be and was capable of being so gainfully employed thereafter, the Court must make a reasonable allowance for the probable loss of future income due to the plaintiff having been deprived of that opportunity.

After reviewing the court’s decisions in *Thornton* and *Teno*, he concluded:¹⁶³

I am, therefore, of the opinion that it is the duty of the Court to assess such sum for loss of future income as may be determined from a reasonable appraisal of all the evidence.

The court’s emphasis on compensation for lost opportunity and on making a “reasonable appraisal” of all the evidence, combined with the result in that case, suggest that the court is willing to tolerate greater speculation in determining the proper basis for calculating lost future earnings that was formerly thought permissible. One court has held that where the injury will restrict the infant plaintiff’s

¹⁵⁹ See, for example, *Oliver v. Ashman*, *supra*, footnote 31, where a total award of £11,000 inclusive of loss of earnings was upheld for a totally disabled 20-month old baby. At p. 235, Willmer L.J., stated: “What the future earnings of the child would have been . . . must remain completely speculative; so also must the question of how far such earnings would have exceeded what he would have been likely to spend on living and providing for himself and any dependents he might have.”

¹⁶⁰ *Supra*, footnote 7, at pp. 637, 638.

¹⁶¹ *Supra*, footnote 7, at p. 489 (D.L.R.).

¹⁶² *Supra*, footnote 84, at pp. 118-119 (D.L.R.).

¹⁶³ *Ibid.*, at p. 120 (D.L.R.).

choice of career, an award should be made despite the fact that many career options will remain open to the plaintiff, and there is no positive evidence his earnings will be diminished by the injury.¹⁶⁴

A second question which arises in the calculation of loss of future earnings is the period on which they should be calculated. Where the plaintiff's lifespan has not been reduced by his injury the period is the remainder of his working life. Where it has been reduced, however, the question is whether the period should be based on his actual lifespan before injury or on his reduced lifespan after injury. The Supreme Court of Canada in *Andrews* and *Teno* held that the plaintiff's lifespan prior to his injury should be used, on the ground that the award is not for loss of earnings in his injured state, but rather for those earnings he would have had had he not been injured.¹⁶⁵ Shortly after, the House of Lords came to the same conclusion in *Pickett v. British Rail Engineering Ltd.*¹⁶⁶ This result can be justified on the basis that it gives the plaintiff full compensation for his pecuniary loss.¹⁶⁷ It can also be justified on the functional approach by assuming that provision for one's beneficiaries is a reasonable function or use of an award.¹⁶⁸

The final question raises a point of fundamental principle. Prior to *Andrews*, those courts which accepted the component approach unhesitatingly awarded damages both for cost of future care and loss of future earnings. This was justified on the basis that the purpose of the award was to restore the plaintiff to his former position insofar as was possible. His future cost of care represented a loss which he would not normally have incurred. His lost future earnings represented an additional loss. It followed that he should be compensated for both. The same result follows on the concept of "full compensation" for permanent loss. The functional approach however, would preclude an award for lost future earnings in cases where, because of the plaintiff's incapacity, the award would serve

¹⁶⁴ *Webber et al. v. Lowrie et al.*, *supra*, footnote 106.

¹⁶⁵ *Andrews, supra*, footnote 7, at pp. 469-470 (D.L.R.); *Teno, supra*, footnote 7, at p. 638.

¹⁶⁶ *Supra*, footnote 5.

¹⁶⁷ This is the main justification for the position adopted in the *Pickett* case, *ibid.* Presumably this principle would be limited to cases where the plaintiff in fact has dependents with a legal claim for support, as was the case in *Pickett*.

¹⁶⁸ Denning M.R. in *Lim, supra*, footnote 2, at p. 910, rejected an award for loss of future earnings for an insentient plaintiff on functional grounds, but suggested that the award "should include an item for pecuniary loss suffered by the dependents" of the plaintiff. The same reasoning could be applied to the question of whether such an award should be made for the "lost years".

no useful purpose.¹⁶⁹ In the *Lim* case,¹⁷⁰ Lord Denning would have excluded recovery for lost future earnings on this ground.

It has been suggested above that the functional approach would not produce this result where the plaintiff can demonstrate the award for lost earnings can be used to provide him with amenities or a standard of living which he would have enjoyed had he not been injured.¹⁷¹ Nor would it preclude an item of pecuniary loss suffered by the plaintiff's dependents as a result of the plaintiff's lost earnings.¹⁷² Viewed thus, it is submitted that the functional rationale as applied to lost earning capacity produces a fairer and more defensible result than the principle of full compensation for pecuniary loss which dictates full recovery regardless of the use to which the award can be put.

10. *Overlap.*

It is a corollary of the principle of *restitutio of integrum* and a fundamental axiom of the law of damages that double compensation is to be avoided. Where the recognized heads of damages overlap, appropriate deductions must be made to avoid compensating the plaintiff twice for the same loss. The obvious overlap is between cost of future care and loss of future earnings. Had the plaintiff not been injured, a portion of his earnings would have been spent on providing for his own needs. To allow him both his full cost of care and full cost of future earnings would be to overcompensate him. Insofar as the award for lost future earnings is concerned with the years after the plaintiff's probable or actual death, a deduction can nevertheless be justified on the grounds that had he lived he would have had to maintain himself, and the sum required for this purpose would not have been available to his heirs.

It can also be argued that lost future earnings overlap with the non-pecuniary head of lost amenities, since a portion of the plaintiff's earnings would have been spent on amenities had he not been injured. While it is established that a deduction should be made on account of the overlap between future earnings and cost of future care, the second possible area of overlap between lost earnings and amenities has not been directly recognized in Canada, although it has been in England, where the measure of loss of future earnings has been held to be what the plaintiff, if not injured, would have saved or reserved for the support of his dependents.¹⁷³

¹⁶⁹ This point is discussed in the text accompanying footnotes 39 to 44, *supra*.

¹⁷⁰ *Supra*, footnote 2.

¹⁷¹ See text accompanying footnote 41, *supra*. ¹⁷² *Supra*, footnotes 42, 168.

¹⁷³ *Lim Poh Choo v. Camden and Islington Health Authority*, *supra*, footnote 2, as per Lord Scarman, at p. 920. This measure necessarily excludes both living expenses and what the plaintiff would have spent on amenities.

The first question raised by the overlap between loss of future earnings and cost of future care is what should be deducted. In Canada, it appears that only such amounts as the plaintiff would have spent on "necessaries"—basic food, clothing and shelter—should be deducted.¹⁷⁴ This presumably is based on the assumption that the award for future cost of care includes only necessities. The broader concept of "living expenses" or "what he would have spent on himself" used in England in calculating the award for future earnings during the "lost years"¹⁷⁵ has the merit not possessed by the narrower Canadian definition of accommodating the second area of overlap, namely that between loss of amenities and loss of future income. On either view, what is deducted is what the plaintiff would have spent on himself had he not been injured, and not his expenses in an uninjured state.¹⁷⁶

A further question concerns the mechanics of the deduction for overlap. It has typically been made from the head of lost future earnings. The Supreme Court of Canada in *Andrews* confirmed this practice on the ground that it accorded with the view that the primary function of damages is provision of proper future care.¹⁷⁷ Provided the deduction is calculated in the same manner, the head from which it is deducted ordinarily will not matter. However, the court may have had in mind cases where living expenses exceed the award for future earnings. If the deduction for normal living expenses were made from the head of cost of care in such a case, the plaintiff might find himself with insufficient funds to provide future care. Making the deduction from the head of future earnings raises the possibility that the plaintiff's recovery may exceed his actual probable loss in cases where little or no future earning was likely. The result can be justified, however, on the functional rationale for damages which gives priority to the need to provide adequate care for the plaintiff.

¹⁷⁴ *Andrews*, *supra*, footnote 7, at pp. 468 (D.L.R.); *Thornton*, *supra*, footnote 7 at p. 489 (D.L.R.).

¹⁷⁵ *Pickett v. British Rail Engineering*, *supra*, footnote 5, at pp. 782, 784, 792, 798 (All E.R.). The rationale for deducting "probable living expenses in *Pickett* was that these would not have formed part of the plaintiff's estate", see Lord Salmon, at p. 782. See also *Oliver v. Ashman*, *supra*, footnote 31, where at pp. 235-236, per Willmer L.J., it was said that the appropriate deduction was what the plaintiff "would have been likely to spend on living and providing a home for himself and any dependents he might have". See also *Lim*, *supra*, footnote 2.

¹⁷⁶ In *Andrews*, *Teno* and *Thornton*, *supra*, footnote 7, the deduction was based on what portion of his income an uninjured person in the position of the plaintiff would devote to necessities. In the *Lim* case, *supra*, footnote 2, at p. 921, the House of Lords endorsed a "less hypothetical" alternative, namely deduction of the "domestic" element in the plaintiff's actual cost of care.

¹⁷⁷ *Supra*, footnote 7, at pp. 468-469 (D.L.R.).

11. Collateral Benefits.

No issue in the law of damages reflects the absence of underlying principle so clearly as the question of whether benefits accruing to the plaintiff because of his injury are to be offset against his award. The cases, many of which are inconsistent, disclose no generally recognized principle. The dominant position in England and Canada before the mid-1950's was against such deductions.¹⁷⁸ After a brief period in which the English courts often made deductions for collateral benefits on the ground that to do otherwise would be to over-compensate the plaintiff,¹⁷⁹ the House of Lords in 1969 in *Parry v. Cleaver*¹⁸⁰ swung back to the view that such benefits may not be deductible in appropriate cases. In Canada after the mid-1950's, the picture was one of confusion, with wide variation from province to province and from case to case.¹⁸¹ In this sea of uncertainty islands of settled law appeared. In *Canadian Pacific Ltd v. Gill*,¹⁸² the Supreme Court of Canada established that payments under the Canada Pension Plan are not deductible, and in *Boarelli v. Flannigan*,¹⁸³ the Ontario Court of Appeal took the opportunity to canvass the subject and to settle the question generally in favour of non-deductibility, at least for the province of Ontario. The *Boarelli* approach has now been adopted in many provinces, with the result that collateral benefits generally are ignored.¹⁸⁴ The decision of the Supreme Court of Canada in *Guy et al. v. Trizec Equities Ltd et al.*, endorses this view, at least with respect to benefits based on insurance or private contracts of employment.¹⁸⁵

¹⁷⁸ For earlier English authority against deduction of collateral benefits, see *Bradburn v. Great Western Ry Co.* (1874), L.R. 10 Exch. L. 1. The English authorities are reviewed in *Boarelli v. Flannigan*, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (C.A.). English and Canadian cases to the mid-fifties are discussed in Carter, *op. cit.*, footnote 86, at pp. 728-729. See also K.D. Cooper, A Collateral Benefits Principle (1971), 49 Can. Bar Rev. 501, at pp. 502-506 and Charles, *op. cit.*, footnote 3, at p. 77.

¹⁷⁹ See *British Transport Commissioners v. Gourley*, *supra*, footnote 8; *Browning v. War Office*, [1963] 1 Q.B. 750, [1962] 3 All E.R. 1089 (C.A.).

¹⁸⁰ [1970] A.C. 1, [1969] 1 All E.R. 555.

¹⁸¹ Charles, *op. cit.*, footnote 3, at pp. 77-78.

¹⁸² [1973] S.C.R. 654, [1973] 4 W.W.R. 593.

¹⁸³ *Supra*, footnote 178.

¹⁸⁴ See Charles, *op. cit.*, footnote 3, at p. 81. Examples include *Shroth v. Innes et al.* (1976), 71 D.L.R. (3d) 647 (B.C.C.A.); *Coderre et al. v. Ethier et al.* (1978), 85 D.L.R. (3d) 621 (Ont. H.C.); *Henderson v. Vaillancourt* (1978), 13 A.R. 345, [1979] 1 W.W.R. 345 (Alta S.C.-T.D.).

¹⁸⁵ *Supra*, footnote 115, at pp. 246-248. See also *Jack Cewe Ltd v. Gary William Jorgenson*, unreported, April 29th, 1980. The latter case is arguably distinguishable on the ground it was concerned with damages for breach of an employment contract. Nevertheless, the court cited *Trizec* in support of its decision to exclude deductions for tax and unemployment insurance.

The vacuum left by the absence of fundamental principle on the question of collateral benefits has been filled by a spate of subsidiary considerations, from which various courts at various times have chosen justifications for the decision which they sought to reach.¹⁸⁶ For each argument, an equally compelling counter-argument can be raised. To the argument that the defendant should not have the benefit of a "windfall" it may be replied that equally the plaintiff should not be compensated twice for the same loss. To the argument that the plaintiff should reap the benefits of his industry and foresight in providing insurance or pension benefits for himself, it must be replied that the courts have been equally unwilling to make deductions for collateral benefits to which the plaintiff has contributed only indirectly if at all, such as welfare payments. To the argument that the benefit should not be deducted because it does not result solely or directly from the defendant's conduct, it can be countered that the benefits are caused by the defendant's conduct in the sense that the effects of that conduct required them to be made.

The unsatisfactory state of the law is directly attributable to the fact that the courts have not settled the question of what they are seeking to accomplish with damage awards. If the goal is to make the defendant pay the plaintiff for certain wrongs which he has done to him, then it follows that collateral benefits should not be deducted. The emphasis is not what the plaintiff has lost, but what the defendant should pay. If on the other hand one is attempting to restore the plaintiff to his pre-injury position the emphasis falls on the plaintiff's actual post-injury state as compared with his actual pre-injury position, dictating that collateral benefits should be taken into account.

In other areas of the law of negligence the punitive approach of looking to what the defendant should pay to the plaintiff on account of the wrong done to him has fallen into disfavour. It is thus somewhat surprising that Canadian decisions in recent years have favoured an approach to the problem of collateral benefits which is essentially punitive in character and at odds with the increasing emphasis in the decisions of the same courts on the need to compensate the plaintiff for his actual loss and provide for his actual needs.

Both the theory of "full compensation" and the emerging principle of "functional" compensation dictate that collateral benefits, whatever their source, should be deducted. On the first theory, while compensation is to be full, it is not to exceed the

¹⁸⁶ Charles, *op. cit.*, footnote 3, at pp. 74-75, sets out some of these "principles".

plaintiff's actual loss. On the functional theory, the question is what sum is required to put the plaintiff as nearly as possible into his original position from a practical point of view. The logic of either theory requires that the plaintiff account for collateral benefits.¹⁸⁷ The only exceptions are cases where the benefit is one in which a third party has a subrogated interest or other recognized claim. In such cases an award to the plaintiff in trust for the third party would offend neither the principle of full compensation for pecuniary loss nor the principle of functional compensation.¹⁸⁸

12. *Non-Pecuniary Loss.*

It was suggested at the outset that recent decisions have largely rejected the conventional or global approach as a basis of assessing damages for pecuniary losses.¹⁸⁹ The same decisions, while conceding that the award for non-pecuniary losses cannot be mathematically calculated and must therefore be to some extent arbitrary, have indicated new approaches to the problem of calculating damages for non-pecuniary losses.

Non-pecuniary losses are often denoted by the phrase "loss of amenities". This phrase has been described as "a loose expression . . . intended to denote a loss of capacity of the injured person consciously to enjoy life to the full as, apart from his injury, he might have done".¹⁹⁰ It embraces physical and mental pain and suffering endured and to be endured in the future, various deprivations grouped under loss of faculties and loss of enjoyment of life, and in some cases, loss of expectation of life. These items are typically grouped together for purposes of assessing damages, a procedure approved by the Supreme Court of Canada in *Andrews, Teno and Thornton*.¹⁹¹

¹⁸⁷ In British Columbia, legislation obliges the court to deduct specified collateral benefits in injuries arising out of automobile accidents, Insurance (Motor Vehicle) Act, R.S.B.C., 1969, c. 204, s. 24; see *Halliday v. Sanrod* (1979), 15 B.C.L.R. 4 (B.C.C.A.). Cooper, *op. cit.*, footnote 178, proposes that collateral benefits should be deducted only when the benefit in question is to compensate the plaintiff for a pecuniary loss for which he would have a claim against the defendant. He argues that deductions are inappropriate in other cases because damages recoverable from the defendant are inadequate to restore him to his original position (at pp. 513, 514, 516). However, if the damage award is truly full or functional in the sense of restoring the plaintiff to his original position insofar as this is possible, as the recent cases suggest it should be, this argument loses its validity.

¹⁸⁸ *Supra*, footnotes 149-154 and accompanying text.

¹⁸⁹ *Supra*, text accompanying footnote 46.

¹⁹⁰ Per Taylor J. in *Skelton v. Collins*, *supra*, footnote 15, at p. 112.

¹⁹¹ *Supra*, footnote 7.

Until recently, the courts have typically awarded a "conventional" sum for damages for loss of amenities. Despite apparent uniformity, they were not in agreement on what loss was being compensated by the award. One view was that the loss being compensated was the plaintiff's loss of valuable personal assets, namely his faculties and capacity for enjoying life. This has been called the "objective" or "conceptual" approach¹⁹² and was approved by the majority of the English Court of Appeal in *Wise v. Kaye*,¹⁹³ by the majority of the House of Lords in *H. West & Son v. Shepherd*,¹⁹⁴ and by the Supreme Court of Canada in *R. v. Jennings*.¹⁹⁵ It rests on the theory that "each asset bears an objective value which is fully recoverable in case of loss".¹⁹⁶ The second approach is that damages are awarded for the plaintiff's actual personal unhappiness. This approach has been called the "personal" or "subjective" approach.¹⁹⁷ It was adopted by the dissenters in *Wise v. Kaye*¹⁹⁸ and *H. West & Son v. Shepherd*,¹⁹⁹ and by the High Court of Australia in *Skelton v. Collins*.²⁰⁰ The two approaches produce different results in the case of an unconscious plaintiff or the plaintiff with reduced consciousness. On the objective approach, a plaintiff so situated would receive the same damages as would a fully conscious plaintiff. On the subjective view, such a plaintiff would receive much less, since his personal awareness of his loss is minimal. The objective view may be criticized for requiring the defendant to pay a large sum of money which will be of benefit only to the plaintiff's heirs or the state. The subjective approach may be attacked on the ground that it does not truly compensate the unconscious plaintiff for his grievous loss.²⁰¹

The thorny question of what is being compensated can be avoided by adopting the rationale of functional compensation, which emphasizes how money can be used to compensate the plaintiff for his lost amenities rather than what has been lost. The Supreme Court of Canada endorsed the assessment of damages for loss of amenities

¹⁹² Ogas, *op. cit.*, footnote 10, at p. 2.

¹⁹³ [1962] 1 Q.B. 638, at pp. 654, 670-671 (C.A.).

¹⁹⁴ *Supra*, footnote 31, at p. 368.

¹⁹⁵ *Supra*, footnote 108.

¹⁹⁶ Ogas, *op. cit.*, footnote 10, at p. 2.

¹⁹⁷ *Ibid.*, at p. 3.

¹⁹⁸ *Supra*, footnote 193.

¹⁹⁹ *Supra*, footnote 31.

²⁰⁰ *Supra*, footnote 15.

²⁰¹ Ogas, *op. cit.*, footnote 10, at pp. 3, 15-17.

on a functional basis in *Andrews, Teno* and *Thornton*²⁰² on the ground that it provided a "more rational justification for non-pecuniary loss compensation".²⁰³ Dickson J. stated in *Andrews*:²⁰⁴

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. *Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.* The result is a coordinated and interlocking basis for compensation.

The attractions of a functional approach to the assessment of non-pecuniary damages are considerable. It provides a much needed rationale for such damages. It solves the problem inherent in the traditional compensation model of what the compensation is for. And it is in conformity with the conclusion of Lord Pearson's Commission:²⁰⁵

We think the approach should be to confine non-pecuniary damages only where they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost.

A strictly functional approach would seem to imply that the award be determined on the basis of evidence of the cost of providing amenities to make the particular plaintiff's loss more bearable. The award consequently would not be a conventional award determined by objective factors, but, like the award for pecuniary losses, would be determined on the evidence and the needs of the particular case. Unfortunately, the Supreme Court of Canada, while advocating a functional approach in principle, reverted to the traditional concepts of subjective personal loss and the objective conventional award in portions of its comments on loss of amenities. Thus Dickson J. in *Andrews*, after endorsing the functional approach, suggested that in assessing damages for non-pecuniary losses the court must take account of what the particular plaintiff has lost, amplified by comments reminiscent of the subjective personal approach.²⁰⁶ Finally, he stated that the award should be determined, to some

²⁰² *Andrews, supra*, footnote 7, at pp. 476, 477 (D.L.R.); *Thornton, supra*, footnote 7, at p. 490 (D.L.R.); *Teno, supra*, footnote 7, at pp. 639-640.

²⁰³ *Andrews, ibid.*, at p. 477 (D.L.R.).

²⁰⁴ *Ibid.* Italics added.

²⁰⁵ *Op. cit.*, footnote 4, Vol. 1, para. 397. To this end the minority advocated a threshold of three months within which damages for non-pecuniary loss could not be recovered, and concluded that such damages should not be recoverable in the case of an unconscious plaintiff.

²⁰⁶ *Supra*, footnote 7, at pp. 477 (D.L.R.), where it is stated that the individual situation of the victim must be considered.

extent at least, on the "conventional" basis of other awards to persons in similar circumstances.²⁰⁷ In the result, it remains unclear whether the award should be calculated on a functional basis, or the "personal subjective" basis or on the "objective conventional" basis. Uncertainty will prevail until the matter is clarified by the Supreme Court.²⁰⁸

In one area, however, there is unanimity. Recent decisions on damages for non-pecuniary losses, whether they adopt a functional, compensatory or conventional approach, are united by the view that damages on account of non-pecuniary losses should be moderate. Dickson J., in *Andrews*, suggested that the amount of damages under this head should be controlled by a conventional ceiling:²⁰⁹

There has been a significant increase in the size of such awards under this head in recent years. As Moir, J.A., of the Appellate Division of the Alberta Supreme Court has warned: "To my mind, damages under the head of loss of amenities will go up and up until they are stabilized by the Supreme Court of Canada." *Hamel et al. v. Prather et al.* (1976), 66 D.L.R. (3d) 109, at p. 127, 2 W.W.R. 724, at p. 748. In my opinion, this time has come.

The court set the ceiling at \$100,000.00. Similarly, in the *Lim* case, Denning M.R., averting to the Pearson Commission's *Report*,²¹⁰ indicated that a conservative approach should be adopted.²¹¹

The approach of setting a ceiling on the damages for loss of amenities is not without difficulty. An obvious problem is the question of inflation between the date of the *Andrews* decision and the date of subsequent cases. Although the Supreme Court was silent on the matter, it would seem both reasonable and necessary to adjust the ceiling to reflect diminution in the value of the dollar. More difficult is the question of whether all awards for lost amenities must be scaled down in accordance with the ceiling posited by the court for the very serious injuries before it in *Andrews*, *Teno* and *Thornton*. The Ontario Court of Appeal has stated that it does "not accept the proposition that those three cases have established a scale from which all other personal injury cases are to be measured".²¹² In

²⁰⁷ *Ibid.*

²⁰⁸ For example, in *Lindal v. Lindal*, *supra*, footnote 98, the factors listed in *Andrews* led to the combining of objective and subjective considerations, resulting in an award of \$135,000.00 for non-pecuniary damages on the ground that the plaintiff's injuries were "measurably more serious in terms of what he has lost and what he suffers", than those of *Andrews*.

²⁰⁹ *Supra*, footnote 7, at p. 477, 478 (D.L.R.).

²¹⁰ *Op. cit.*, footnote 4.

²¹¹ *Supra*, footnote 2, at p. 910.

²¹² *Richards v. B. and B. Moving and Storage Limited*, *supra*, footnote 98.

Alberta,²¹³ Nova Scotia²¹⁴ and British Columbia,²¹⁵ however, courts have taken the opposite view. It is submitted that the latter view is the easier of the two to justify. Dickson J.'s comments in *Andrews* leave little doubt that he contemplated that awards for non-pecuniary losses less substantial than those in *Andrews*, *Teno* and *Thornton* would be less than the ceiling proposed.²¹⁶ Nor is there anything to indicate that the ceiling was intended to be confined to cases where there is a substantial award for cost of care or loss of future earnings, as the Ontario Court of Appeal has suggested.²¹⁷ Moreover, to adopt the approach that the Supreme Court's ceiling was not intended to establish a scale would be to introduce inequities between plaintiffs with varying degrees of impairment. Finally, the question arises of when, apart from inflation, it is justifiable to exceed the ceiling. The shopping list of factors set out by the Supreme Court in *Andrews* may offer a pretext for exceeding the ceiling.²¹⁸ While it is too early to know the precise fate of the Supreme Court's ceiling, preliminary indications are that lower courts will treat it more as a guide than as an absolute limit.²¹⁹

²¹³ *Raymond v. Canadian Pacific Limited* (1978), 6 Alta L.R. (2d) 44, where Milvain C.J. stated: "In assessing damages for non-pecuniary loss, I am taking into consideration two things. In the first place, the Supreme Court of Canada in the *Andrews* case has fixed a ceiling of \$100,000. In the second place, I have to assess the degree of loss suffered by Mr. Raymond. Obviously he is not to be compared, except at a distance, with the plaintiff in the *Andrews* case. He clearly has a much greater prospect of enjoying life than would a paraplegic. It is true he has full intellectual capacity of realizing his situation and of knowing what he is missing in life. Yet he cannot come near to approaching the top limited set by the Supreme Court. Dr. Cowie, as noted before, says his potential for enjoying life has been reduced by 25 per cent to 30 per cent. In my view a proper assessment would be the sum of \$30,000."

²¹⁴ *Trizec Equities Ltd v. Guy*, *supra*, footnote 115, at pp. 663, 664.

²¹⁵ *Schultz v. Leaside Developments*, [1978] 5 W.W.R. 620, 6 C.C.L.T. 248 (B.C.C.A.), per Seaton J.A., *per curiam*, at p. 263: "Mr. Schulz can wash himself, dress himself, and drive a car. His injuries though horrible, are not comparable to those of Mr. Thornton. Reflecting that, and looking at a figure of \$200,000 in this court in the *Thornton* case, the trial judge fixed \$175,000 for pain and suffering. This court's award in *Thornton* was reduced to \$100,000 in the Supreme Court of Canada. It is my view that \$85,000 would be the highest sum appropriate in the instant case for pain and suffering and loss of amenities." In *Robson v. Official Administrator* (1979), 12 B.C.L.R. 208 (B.C.C.A.), an award for non-pecuniary damages was substantially reduced on similar grounds. In *Halliday v. Sanrud*, *supra*, footnote 69, (B.C.C.A.), it was said that the jury should be advised of the ceiling set by the Supreme Court.

²¹⁶ *Supra*, footnote 7, at pp. 477-478 (D.L.R.).

²¹⁷ *Supra*, footnote 212.

²¹⁸ *Supra*, text accompanying footnote 208.

²¹⁹ *Ibid.* See in particular *Lindal v. Lindal*, *supra*, footnote 98 and *Richards v. B. and B. Moving and Storage Ltd*, *supra*, footnote 98.

Conclusion

Three models for the assessment of damages for personal injuries may be posited: (1) the full compensation model; (2) the functional compensation model; and (3) the periodic payment model. In addition, various combinations of aspects of the different models are possible.

The model of full compensation for pecuniary loss has the advantage of enjoying general acceptance, at least in principle. Applied logically, it would require changes from the present law in the areas of future taxation, contingencies and collateral benefits. Unfortunately, it provides no rationale for non-pecuniary losses (a deficiency which must be met by resort to the traditional "conventional" award or the functional approach) and is too inflexible to accommodate particular cases as fairly as might be desirable.

The model of functional compensation, applied consistently, would require changes in the law on the treatment of tax benefits, contingencies and collateral benefits. It would make the award for lost earning capacity dependent on demonstration of a reasonable purpose for that award to serve. Finally, it would provide a new and much-needed rationale for non-pecuniary damages.

On either of these models, certain subsidiary principles of the law on damages for personal injuries require re-evaluation. Consideration should be given to adoption of a formula representing the net discount rate for calculating present worth to avoid the cost and uncertainty inherent in the present practice of calling economic and actuarial evidence anew in each case. Recognition of the possibility of weighing the benefit to the plaintiff against the cost to the defendant would be useful on such critical questions as the choice between home and institutional care and whether to make an award for lost future earnings to an insentient plaintiff.

Most of the problems raised above would be circumvented by adoption of the third model of periodic payments which would eliminate the need to forecast the future and the concomitant danger of under-compensation or over-compensation. It is submitted that the time has come for serious consideration of periodic payments for plaintiffs with serious and permanent injuries by the legislatures of the Canadian provinces, as well as for study of more radical alternatives for an accident compensation system not based on fault.²²⁰ In the meantime, it is to be hoped that the courts will devote their conscientious efforts to clarifying and achieving harmony amongst the principles underlying the recovery of damages for personal injury.

²²⁰ See, for example, the suggestions of Terence G. Ison, *The Politics of Reform in Personal Injury Compensation* (1977), 27 U. of T.L.J. 385; Bruce Feldthusen and Keith McNair, *General Damages in Personal Injury Suits: The Supreme Court's Trilogy* (1978), 28 U. of T. L.J. 381, at pp. 481 *et seq.*