

COMPENSATION FOR NON-PECUNIARY LOSS: IS THERE A CASE FOR LEGISLATIVE INTERVENTION?

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In 1978 the Supreme Court of Canada established a \$100,000 limit on damages for non-pecuniary loss in personal injury cases. The Law Reform Commission of British Columbia has recently recommended that this limit should be abolished by legislation. In this article it is suggested that the 1978 decisions of the Supreme Court of Canada are soundly based, and that some such limit is essential to ensure consistency, fairness, and the application of rational principles in assessing damages for personal injury.

En 1978, la Cour suprême du Canada a décidé de limiter, en cas de blessures corporelles, les dommages et intérêts pour pertes non pécuniaires à 100.000 dollars. La Commission de réforme du droit de la Colombie-Britannique a récemment recommandé que cette limite soit abolie par législation. L'auteur avance dans cet article que les décisions de la Cour suprême de 1978 étaient bien fondées et qu'il est essentiel qu'il existe, pour l'évaluation des dommages et intérêts en cas de blessures corporelles, une limite de ce genre qui assure une certaine uniformité, une certaine impartialité et l'application de principes raisonnables.

In a recent report the Law Reform Commission of British Columbia dealt with the upper limit on compensation for non-pecuniary loss in personal injury cases.¹ The report raises some interesting questions about the role of law reform commissions, of the Supreme Court of Canada, and of legislation. The Commission's recommendation occupies only two lines:²

The rough upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada in the 'trilogy' be abolished.

In this article an attempt will be made to examine the reasons given by the Commission for this recommendation, and to bring out into the open some questions that seem to underlie the recommendation, but which have not been faced directly by the Commission.

The "trilogy" refers to a set of three cases decided in 1978 by the Supreme Court of Canada in which the court made a conscious attempt to rationalize the law of compensation for personal injuries.³ The court held

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¹ Law Reform Commission of British Columbia, Report on Compensation for Non-Pecuniary Losses, L.R.C. 76, (1984).

² *Ibid.* p. 31.

³ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, (1978), 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577; *Arnold v. Teno*, [1978] 2 S.C.R. 287, (1978), 83

that the heads of damages should be itemized, in distinction to the former practice of undifferentiated "global" awards. In principle, full compensation should be made for losses of a pecuniary nature (pre-trial pecuniary losses, cost of future care, and loss of earning capacity) even if this led to very high figures. By way of balance, the court held that non-pecuniary losses (pain and suffering, loss of amenities, and loss of expectation of life), which by their nature could not be accurately translated into money terms, should be subject to a conventional "rough upper limit" of \$100,000. Subsequent cases have made it clear that this is \$100,000 in 1978 dollars, equal now to about \$200,000.⁴

Two questions must be distinguished at this point. First, should the appellate courts indicate any limits on awards for non-pecuniary losses? Second, if so, what should the limit be? On the first point, it is submitted that the arguments in favour of some sort of limit are strong. By hypothesis we are concerned with losses that are unquantifiable in money. The Commission itself says that "[w]e agree that any award on this head must be essentially arbitrary".⁵ The Commission also says that the law before 1978 was defective: "[t]he result was injustice in that like injuries did not result in like awards".⁶ In other words, the Commission itself recognizes the force of the argument that like cases should be treated alike. Plaintiffs similarly injured should be similarly compensated. Fairness must be achieved not only between the parties but between plaintiffs and between defendant and defendant. The Commission says, at one point, that the essentially arbitrary nature of the award is not an argument in favour of an upper limit.⁷ But at a later point it says that it favours "adoption of a reference point for damages for most serious kinds of non-pecuniary loss"⁸ and that if its final recommendation is adopted, "appellate review will quickly restore certainty to assessing damages for non-pecuniary loss and we expect that, in short order, general ranges of compensation for particular kinds of injuries will be established".⁹ The objectives of consistency, predictability, and fairness as between plaintiffs similarly injured surely imply a "rough upper limit" of some sort, for the appellate courts cannot achieve certainty or establish ranges without indicating more or less explic-

D.L.R. (3d) 609, (1978), 19 N.R. 1; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, (1978), 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607.

⁴ *Hatton v. Henderson* (1981), 126 D.L.R. (3d) 50, [1981] 5 W.W.R. 624, (1981), 29 B.C.L.R. 317 (B.C.C.A.); *MacDonald v. Alderson*, [1982] 3 W.W.R. 385, (1982), 18 Man. R. (2d) 6 (Man. C.A.).

⁵ *Op. cit.*, footnote 1, p. 12.

⁶ *Ibid.*, p. 19.

⁷ *Ibid.*, p. 12.

⁸ *Ibid.*, p. 26. See also pp. 28-29.

⁹ *Ibid.*, p. 31.

itly what sort of award is proper as a maximum in the most serious kinds of cases. This is nothing more nor less than a "rough upper limit".

The Commission seems to feel the pull of this argument without quite coming to grips with it. The report says: "Whether left to the courts or to the legislature, damages for non-pecuniary loss will be subject to regulation".¹⁰ The report adds, after referring to the anticipated ranges to be established by the courts:¹¹

[T]hose general ranges of damage awards, however, will be more flexible than an arbitrary upper limit. Moreover, damages for non-pecuniary loss arising from the most serious kinds of injuries would not be subject to an arbitrary and fixed amount.

There is a difficulty in the argument here, and an uncertainty in the meaning to be attached to the word "arbitrary". The Commission has already conceded that the awards are "essentially arbitrary",¹² "certainty" is to be maintained and awards are to fall "within recognizable ranges"; but there is to be no "arbitrary upper limit". If force is given to each of these points it appears that the Commission in fact favours what might well be called a "rough upper limit" to be established, more or less explicitly, by decisions of appellate courts. But it is not explained why the word "arbitrary", now evidently used in a pejorative sense, applies to the decisions of the Supreme Court of Canada, but not to the kind of appellate review envisaged by the Commission. The present limit is not wholly inflexible. The Supreme Court made it clear that the limit (of \$100,000) was a "rough" limit, saying "[o]f course, the figures must be viewed flexibly in future cases in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic conditions".¹³

The Supreme Court of Canada in the 1978 cases was plainly influenced by the anticipated cost of liability insurance consequent upon unlimited and unpredictable awards. The Commission was very critical of the court, suggesting that it was influenced by misleading advertising circulated by American insurance interests.¹⁴ Whether or not the court was influenced by such material, it is surely a sound point to make that the cost of high awards is ultimately borne by large sections of the public through liability insurance premiums, and that unpredictability of awards as well as their large size increases the cost of insurance.

The court linked the limit on non-pecuniary loss with its holding that provable pecuniary loss was to be fully compensated. The Commission says (rightly) that, even so, pecuniary losses will sometimes remain uncom-

¹⁰ *Ibid.*, p. 29.

¹¹ *Ibid.*, p. 31.

¹² *Op. cit.*, footnote 5.

¹³ *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, footnote 3, at pp. 263 (S.C.R.), 477 (D.L.R.), 604 (W.W.R.).

¹⁴ *Op. cit.*, footnote 1, p. 13.

pensated, mentioning legal fees, reduction of damages for contributory negligence, and unforeseen future costs of care.¹⁵ But surely the answer to these points is to enlarge compensation for pecuniary losses in these respects if a convincing case is made out for doing so, not to enlarge compensation for non-pecuniary loss on this ground. Again, the Commission seems to realize the force of this argument without quite meeting it head on.¹⁶

We do not mean to suggest that damages for non-pecuniary loss should be considered as compensation for other heads of loss for which inadequate or no damages are awarded. We merely doubt whether it is safe to assert that adequate compensation on other heads of loss is sufficient reason to assess non-pecuniary losses moderately.

This leaves the reader in doubt as to what point the Commission is making. The word "moderately" could mean reasonably, but the Commission can hardly be arguing against a reasonable assessment. If it means inadequately, it remains for the Commission to show that the rough upper limit (or the rough upper limit adopted by the Supreme Court of Canada) is inadequate.

The Commission asserts also that determination of an upper limit is a matter for the legislature, not for the courts.¹⁷ However, as indicated above, the Commission favours control of awards by appellate review, and it is difficult to see why if such control is a proper part of the judicial role, the 1978 decisions are not equally defensible.

A similar inconsistency appears in the Commission's comment on English law. The Commission says that the English position is "in marked contrast with that of the Supreme Court of Canada",¹⁸ and that "awards . . . for non-pecuniary loss, have settled into predictable patterns, without the benefit of a rough upper limit".¹⁹ But the Commission makes it clear that it favours consistency and predictability:²⁰

Although no upper limit has been adopted, the English approach appears to have achieved an internal consistency so that similar awards are made for similar injuries. That result is the product of limited jury use and rigorous appellate review together with the application of an objective standard to measuring these damages.

The closely knit nature of the English bar, on which the Commission comments, facilitates the use of a tariff or scale, constantly adjusted for inflation, without the formal promulgation of limits. But it is an inevitable part of the concept of a tariff or scale that it has a top end. In a 1982

¹⁵ *Ibid.*, pp. 14-15.

¹⁶ *Ibid.*, p. 15.

¹⁷ *Ibid.*, p. 16.

¹⁸ *Ibid.*, p. 24.

¹⁹ *Ibid.*

²⁰ *Ibid.*

case in which the plaintiff was rendered almost completely incapable, was in extreme and constant pain, and was fully aware of her loss, an English judge held that an award "at the top of the scale" was appropriate. He awarded £70,000.²¹ Two points strike a Canadian reader. First, the concept of "top of the scale" is nothing more nor less than a "rough upper limit". Secondly, the amount awarded is very close to the figure selected by the Supreme Court of Canada in 1978 adjusted for inflation at 1982 rates of exchange. It would seem right then, to say that English law achieves consistency and predictability in awards, but misleading to say that there is no "rough upper limit".

The Commission writes:²²

It [the limit imposed in 1978] has . . . probably led to undercompensating personal injury victims generally . . . The only conclusion that can be reached with absolute certainty is that the current 'limit' is far too low.

It is difficult to see on what these conclusions are based. As the dissenting commissioner points out:²³

Critics of the rule have not shown and indeed cannot show convincingly that the limit is unfair because non-pecuniary losses cannot be objectively quantified and because \$100,000 adjusted for inflation and with court order interest is a substantial sum of money.

The majority of the Commission itself says that the awards must be "essentially arbitrary".²⁴ There is no measure of monetary equivalence on ordinary principles of compensation. It is hard to see therefore why the Commission concludes that the limit has "probably" led to under compensation or what is the source of its "absolute certainty" (an exacting standard) that the limit is "far too low".

At this point we must turn to the second question raised at the beginning of this article. Assuming that there is to be some kind of upper limit on awards (whether called a rough upper limit, or a reference point, or the high end of the tariff, or the top of the scale), and that the limit should be established by the appellate courts, where should the limit be set? It is here that the source of the Commission's difficulties in drafting its report becomes apparent. The Commission had published a working paper in which it favoured an upper limit (or reference point), but proposed that it should be set at \$400,000 in 1983 dollars. The final report still bears the marks of having been drafted to support this conclusion. The Commission says that a "large number" of responses was received to the working paper,²⁵ none of which favoured the Commission's proposal,

²¹ *Brown v. Merton Sutton and Wandsworth Area Health Authority (Teaching)*, The Times, Jan. 27, 1982.

²² *Op. cit.*, footnote 1, p. 21.

²³ *Ibid.*, p. 33 (Anthony F. Sheppard).

²⁴ *Op. cit.*, footnote 1, p. 12.

²⁵ *Ibid.*, p. 2. The Report rightly points out (pp. 7-9) that there are difficulties in

though criticizing it from opposite points of view. "Upon reconsideration"²⁶ the Commission says in its final report that it still favours the proposal made in the working paper for the sake of ensuring certainty, consistency and predictability. The Commission concludes:²⁷

Consequently, we still favour the proposal we made in the Working Paper.

But adds:²⁸

Nevertheless, response to our Working Paper has convinced us to reconsider our position.

Yet as the Commission says that even "upon reconsideration" it still favours its former proposal, it is evident that by the phrase "reconsider our position" the Commission in fact means "abandon our position".

Law reform commissions frequently have to decide how to deal with differing opinions on controversial questions. The Commission in this case published a tentative proposal that it thought, in its best judgment, to be sound. It was criticized from two opposite points of view (some thought there should be no limit; others thought the present law should be maintained). Upon reconsideration, and taking into account all the arguments adduced, the Commission adhered to its former view. That is, taking all factors into account, it continued to think that its former proposal would be in the best interests of the community. It would seem that, in such circumstances, a Commission should have the courage of its convictions, and leave it to the legislature to assess the proper weight to be given to contradictory opinion. It should be borne in mind that a compromise opposed from opposite points of view is not always undesirable, that the law reform commissions are designed not simply to reflect the opinion of the public or of particular segments of it, but to offer their best judgments on rational reform of the law, and that the segment of the public replying to a law reform commission's working paper is not necessarily representative of the public at large. A law reform commission is not well constituted to attempt to achieve a political compromise among opposing groups, and should not feel embarrassment at putting forward its own recommendation based on its own best judgment. If so much weight (indeed decisive weight) is to be put on the opinions of the commission's correspondents, it would be useful to know who they were, and what interest groups they represented, or at least, how they were divided between the two contradictory opinions. But there is no list of respondents.

The history of the working paper and its reception throws much light on the difficulties the Commission must have faced in drafting its final

applying the "functional" approach, adopted in the 1978 cases. The aim of the award is to provide solace, but insofar as the costs of providing solace are quantifiable, they would seem to be recoverable as pecuniary losses.

²⁶ *Ibid.*, p. 28.

²⁷ *Ibid.*, p. 29.

²⁸ *Ibid.*

report. There is an unresolved conflict. The Commission favours a known limit (or point of reference) for the most serious injuries, for the sake of consistency, certainty and predictability. These objectives are manifest throughout the report. Yet the recommendation itself seems to have been drafted so as to satisfy those who would favour a largely unfettered power in trial courts to award such sums as they think fit, free, or largely free, of supervision by appellate courts. The two points of view are not reconcilable. If there is to be consistency and predictability there must be an approximate sum known to be the most that can be expected in the most serious kinds of case. If this sum is not to be set by legislation, it must be established by the appellate courts. If there is a proper role for the appellate courts it is hard to see any objection in principle to the 1978 decisions except possibly that the limit was fixed at the wrong money sum. Any reform should, on this basis, be of the type proposed in the working paper, that is an alteration of the money sum. On the other hand, if it is thought that the appellate courts should have no role or only a very restricted role as in American jurisdictions, in supervising awards of trial courts, then the 1978 decisions were wrong in principle, and the proper reform is to give trial courts wider powers. But the price of such a reform is bound to be a loss of certainty, consistency and predictability. It would seem that this underlying conflict of philosophies has not been directly faced.

It is the failure to resolve this conflict that causes the ambiguity of the recommendation. "The rough upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada in the 'trilogy' be abolished". How would this be put into legislative language? Does it mean that the appellate courts are to have no power to set limits? This would be inconsistent with much of the report, as has been pointed out. Or does it mean that the appellate courts have a power to set limits, and they retain unfettered power to impose any limit they see fit except that mentioned in three named cases decided in 1978? This would be an odd looking piece of legislation and would raise some difficulties. If reference is to the figure of \$100,000, how is account to be taken of the adjustment for inflation (in 1985 to about \$200,000)? Would the legislation allow the court to adopt a lower limit than the present one, or a limit only slightly higher? Is it worth the effort of the law reform enterprise, including working paper, report and legislation, to achieve a reform that may have no substantial effect? If the present law is worth changing, should we not have something to put in its place?

One significant point made by the Supreme Court of Canada in the 1978 cases was the question of national uniformity. Dickson J. had said in *Andrews v. Grand & Toy*.²⁹

²⁹ *Supra*, footnote 3, at pp. 263-264 (S.C.R.), 477 (D.L.R.), 604 (W.W.R.).

The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss, but variation should not be made merely for the province in which he happens to live.

The Commission says on this point:³⁰

It is also open to question whether any rule limiting damages for non-pecuniary loss can have Canada-wide application. If the functional approach is to work, it must be applied with respect to what the dollars awarded to a given plaintiff in given circumstances will buy. Social and economic conditions differ from region to region. A personal injury victim who lives in a small fishing village in Newfoundland may have different needs from one who lives in Vancouver. Even if their needs are the same, the costs of fulfilling them may differ. Despite the assertion of the Supreme Court of Canada that awards should be uniform nationally, these reasons strengthen the case that the question of an upper limit on non-pecuniary loss requires provincial consideration.

In answer to this, it may be said that there is nothing in the 1978 cases to suggest that local variations in costs should be ignored—in fact the whole tenor of the judgments is that the plaintiff's actual reasonable pecuniary losses should be fully compensated, and in the passage quoted above Dickson J. talks about variation for what "a particular individual" has lost. Local variations arise within a province, as well as between one province and another, and the Supreme Court of Canada is fully capable of taking such variations into account. But perhaps a wider point is being suggested, namely, that the role of the Supreme Court on questions of this sort should be restricted. Provincial "consideration" seems perhaps to suggest provincial autonomy, and elsewhere in the report there are hints that tend in the same direction. Criticism of the "rough upper limit" is always associated with the Supreme Court of Canada (not with appellate courts in general); the decision of the British Columbia Court of Appeal in *Thornton v. Prince George School Board*,³¹ upholding in 1975 an award of \$200,000 is praised, and formed the basis of the proposal in the working paper for a \$400,000 limit in 1983 dollars. The Supreme Court of Canada is never mentioned in the context of "appellate review" when this is spoken of as a desirable feature in the interests of certainty, predictability and consistency. Yet, the Supreme Court of Canada is the court of final appellate review in British Columbia.

Again, the point needs to be brought into the open for discussion. What should be the role of the Supreme Court of Canada in tort law, or, more generally, in private law matters? Is national uniformity important? In the opinion of the present writer there are strong arguments in favour of

³⁰ *Op. cit.*, footnote 1, p. 17.

³¹ (1976), 73 D.L.R. (3d) 35, [1976] 5 W.W.R. 240.

uniformity, and these were, curiously, recognized by the Commission itself in comparing the three 1978 cases:³²

In three different cases, plaintiffs who had suffered similarly massive and permanent injuries were awarded \$150,000. (*Andrews* reduced to \$100,000 on appeal) and \$200,00 (*Thornton and Teno*). There was, in these cases, no reason why Thornton and Teno should have been entitled to twice the damages for non-pecuniary loss as were awarded to Andrews. The result was injustice in that like injuries did not result in like awards. This was due largely to the lack of a reference point.

The Commission nowhere suggests that the mere fact that one plaintiff was from British Columbia, one from Alberta and one from Ontario would in itself remove the injustice. Increased mobility and the fact that automobile travellers are at greatest risk of serious injury, surely strengthen the argument for uniformity.

Not all will agree with all aspects of the 1978 decisions, but they undoubtedly represent a conscientious attempt by a careful and competent court to assist, in an area acknowledged to be extremely difficult, in the resolution of disputes in a manner consistent with rationality and justice. In subsequent cases the court has developed the law to meet new arguments and to resolve difficulties. Again, not all will agree on every point, but it has not been shown that any other court could have done better, or that the problem of compensation for non-pecuniary loss has been handled more satisfactorily in any other jurisdiction.

The most interesting general question raised by the Commission's report, though again not openly addressed, is the relationship between legislative reform and judicial development of the law. Legislative intervention for one province only in respect of non-pecuniary loss alone is certain to raise complexities and anomalies. The various heads of damages are interlinked: the principle of full compensation for pecuniary losses, for example, is part of a balanced package of which the limit on compensation for non-pecuniary loss is another part. Let us suppose that legislation were enacted removing the power of appellate courts to control the awards of trial courts in respect of non-pecuniary loss, and that a case comes before an appellate court in which the award for the cost of future care is very low, but there is a very high award for non-pecuniary loss. It will then be quite plausibly argued that the trial court must have intended to include, in its large award for non-pecuniary loss, items that otherwise would have been included under the heading of cost of future care. In the case of a jury award, for which no reasons will be given, it will always be arguable that any apparently excessive award is to be explained as presumably due to a large award for non-pecuniary loss. All the principles for which the 1978 decisions stand, namely itemization of losses, rationality, fairness and consistency in awards, the giving of rational explanations by courts for the amount of awards, and the application of rational

³² *Op. cit.*, footnote 1, pp. 18-19.

principles for the awarding of interest on different elements of the award, would be thrown into jeopardy. It is always tempting to suppose that difficult questions of law (and the assessment of damages for personal injuries is one of the most difficult) can be resolved by legislation, if only the right legislative formula is found. But there is merit also in the case by case resolution of disputes and in the development of principles by the courts in the light of their experience. The present writer remains to be convinced that legislative reform is likely to improve this area of the law.