

CAPPING DEFAMATION DAMAGES

Adora Bustard and Hilary Young¹

The law governing defamation damages is problematic. Injury is presumed, without the need for any supporting evidence. Damages are at large and reflect intangible injuries, so their quantification is inevitably arbitrary. Amounts are increasing at far greater than the rate of inflation. Particularly given the free speech consequences of large defamation damages awards, the law should do more to restrict them.

*One possibility is to cap non-pecuniary damages in defamation law. While the Supreme Court of Canada rejected this approach in *Hill v Church of Scientology*, several things have changed since that case was decided in 1995. First, courts have consistently modified defamation law to provide greater protection for freedom of expression. Second, the quantum of defamation damages awards has increased dramatically since *Hill*. Third, non-pecuniary defamation damages have been capped in England and Australia, and subject to ranges or caps in other jurisdictions. Fourth, Ontario and other provinces have created privacy torts, protecting interests similar to reputation, which generate relatively low damages awards. Finally, the reasons given in *Hill* for rejecting a cap were, in our view, unconvincing even in 1995.*

We therefore argue that the time has come for a cap on non-pecuniary defamation damages in Canada, or for a set of ranges to guide the damages assessment. Since cap thresholds are arbitrary, it is difficult to defend any specific number. However, we argue for a cap of half the personal injuries damages cap—\$50,000 in 1978 dollars, or about \$234,000 in 2026 dollars.

Le droit régissant l'octroi de dommages-intérêts en matière de diffamation est problématique. En effet, le préjudice est présumé, sans qu'il soit nécessaire de fournir une preuve à l'appui. Les dommages intérêts accordés sont évalués globalement et visent notamment à indemniser des préjudices immatériels, de sorte que leur quantification comporte nécessairement une part d'arbitraire. Les montants accordés progressent à un rythme nettement supérieur à celui de l'inflation. Compte tenu des répercussions que peuvent

¹ Adora Bustard is a graduate of the University of New Brunswick Faculty of Law. She would like to express her sincere thanks to Professor Young for her research mentorship. Hilary Young is a Professor in UNB's Faculty of Law. She wishes to thank Nate Hood for research assistance and Nakisa Tamjidi for generous and speedy statistical assistance. Both authors wish to thank the participants of the 2024 Canadian Law of Obligations conference for their valuable feedback. The raw data and statistical analysis relied on for this article are available by request of Professor Young at hyoung@unb.ca.

avoir les dommages-intérêts élevés accordés en cas de diffamation sur la liberté d'expression, le droit devrait prévoir d'autres mécanismes pour les limiter.

Une solution possible consisterait à plafonner les dommages-intérêts non pécuniaires en matière de diffamation. La Cour suprême du Canada a écarté cette solution dans l'arrêt Hill c Église de scientologie; toutefois, plusieurs éléments ont changé depuis que cette décision a été rendue en 1995. Premièrement, les tribunaux ont constamment fait évoluer le droit de la diffamation de manière à protéger davantage la liberté d'expression. Deuxièmement, le montant des dommages-intérêts octroyés en matière de diffamation a augmenté considérablement depuis l'arrêt Hill. Troisièmement, les dommages-intérêts non pécuniaires en matière de diffamation ont été plafonnés en Angleterre et en Australie et pourraient, dans d'autres pays, être assujettis à des fourchettes ou à des plafonds. Quatrièmement, l'Ontario et d'autres provinces ont créé des délits civils fondés sur l'atteinte à la vie privée, protégeant ainsi des intérêts semblables à l'intérêt réputationnel, tout en donnant lieu à des condamnations pécuniaires relativement modestes. Enfin, à notre avis, les motifs invoqués dans l'arrêt Hill pour refuser l'imposition d'un plafond étaient peu convaincants, même à l'époque.

Les auteurs soutiennent donc qu'il est temps de plafonner les dommages-intérêts non pécuniaires accordés en matière de diffamation ou, subsidiairement, d'établir des fourchettes destinées à encadrer leur évaluation. Comme tout seuil de plafonnement comporte une part d'arbitraire, il est difficile de justifier un montant précis. Nous préconisons néanmoins que le plafond soit fixé à la moitié de celui applicable aux dommages-intérêts accordés en matière de préjudices corporels, soit 50 000 \$ en dollars de 1978, ce qui correspond à environ 234 000 \$ en dollars de 2026.

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I. Introduction

The law governing defamation damages is problematic. Injury is presumed, without the need for any supporting evidence, once the elements of the tort are established.² Damages are at large and tend to compensate for intangible injuries, so their precise quantification is inevitably arbitrary. Their quantum is increasing at far greater than the rate of inflation. Indeed, the internet era seems to have given rise to a dramatic increase in non-pecuniary damages in defamation. Particularly given the free speech consequences of large defamation damages awards, the law should do more to restrict them.

One possibility is to cap non-pecuniary damages³ in defamation law. While the Supreme Court of Canada rejected this approach in *Hill*,⁴ several things have changed since that case was decided in 1995. First, courts have consistently modified defamation law to provide greater protection for freedom of expression. Second, the quantum of defamation damages awards has increased dramatically. Third, non-pecuniary defamation damages have been capped in England and Australia, and subject to ranges or caps in other jurisdictions. Fourth, Ontario and other provinces have created privacy torts, protecting interests similar to reputation, and they generate relatively low damages awards. The gap between defamation and privacy damages is unjustifiable. Finally, the reasons given in *Hill* for rejecting a cap were, in our view, unconvincing even in 1995.

The time has therefore come for a cap on non-pecuniary defamation damages in Canada, or alternatively for a set of ranges to guide the damages assessment. Since cap thresholds are arbitrary, it is difficult to defend any specific number. However, as Justice Lamer did in his dissent in *Snyder*

² *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC) at para 164 [*Hill*]; *Grant v Torstar Corp*, 2009 SCC 61 at para 28 [*Grant*].

³ Such damages are sometimes referred to as “general damages” but we prefer the term “non-pecuniary” because general damages include pecuniary damages for loss incurred after trial.

⁴ *Hill*, *supra* note 2.

v Montreal Gazette Ltd,⁵ we argue for a cap of half the personal injuries damages cap—\$50,000 in 1978 dollars, or about \$234,000 in 2026 dollars.⁶

II. The Starting Point: *Hill v Church of Scientology*

In 1995, the Supreme Court of Canada rejected a cap on defamation damages.⁷ The Church of Scientology and its lawyer had made very serious accusations against Hill, a lawyer, including that he had misled a judge and breached a court sealing order. These were known by Scientology to be untrue. A jury awarded damages totalling \$1.6 million (more than \$3 million in 2026 dollars)⁸ of which half were compensatory and half were punitive.

In upholding this award, the Supreme Court stated principles for quantifying defamation damages. Citing *Gatley on Libel and Slander*, it noted that damages are “the province of the jury”; they are a question of fact, not law.⁹ They are at large¹⁰ and the trier of fact should consider the following factors [*Hill* factors] in quantifying damages:

the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and “the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. [The jury] may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action,” and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow “for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused.” They should also take into account the evidence led in aggravation or mitigation of the damages.¹¹

Scientology had argued for a US-style actual malice rule, requiring the plaintiff to prove that the defendant knew the words at issue were false, or was reckless as to falsity. The Supreme Court of Canada rejected this approach, considering that Canadian defamation law struck the right

⁵ *Snyder v Montreal Gazette Ltd*, 1988 CanLII 66 (SCC) [*Snyder*].

⁶ All inflation calculations are done using the Bank of Canada’s inflation calculator: Bank of Canada, “[Inflation Calculator](https://www.bankofcanada.ca/inflation-calculator/)”, online: <tinyurl.com/bp9mz47y> [perma.cc/UG4Y-PAKD] [BOC Calculator]. We indicate search date here (accessed May 16, 2026) as results sometimes vary by search date.

⁷ *Hill*, *supra* note 2.

⁸ BOC Calculator, *supra* note 6 (accessed May 16, 2026).

⁹ *Hill*, *supra* note 2 at para 182.

¹⁰ *Ibid* at para 164.

¹¹ *Ibid* at para 182.

balance between freedom of expression and protection of reputation, even in the relatively young *Charter* era. For similar reasons, it rejected a cap on defamation damages, which Scientology had also sought.

Specifically, Justice Cory wrote that there was no apparent problem with the state of defamation damages in Canada. Whereas the Supreme Court had capped non-pecuniary damages for personal injury nearly twenty years earlier, largely due to effects of high damages on car insurance premiums, the Court was unconvinced that defamation damages were as variable or constituted the same pressing social concern.¹² Justice Cory stated that the average general damage award had decreased by \$10,000 between the periods of 1987 to 1991 and 1992 to 1995, where it had fallen to less than \$20,000¹³ (\$38,394 in 2026 dollars).¹⁴ Moreover, Justice Cory expressed concern that, since general damages constituted most of the damages in defamation cases, a cap would allow defendants to “look upon that sum as the maximum cost of a licence to defame.”¹⁵

Despite this precedent rejecting a defamation damages cap, we argue that much of the reasoning in *Hill* was not persuasive at the time, and since then, there have been significant changes that militate in favour of limiting non-pecuniary damages in defamation cases.

III. Problems with the Status Quo

1) The Nature of Defamation Damages Encourages Large Awards

Defamation damages awards are exceptional in several ways: they consist largely of general damages, compensating for non-pecuniary losses; greater than nominal damages are presumed from a finding of liability; and the quantification of compensatory general damages relies on factors, some of which do not relate to the nature or extent of damage to reputation.

Though defamation may lead to pecuniary losses, in practice, special damages are rarely pleaded and seldom awarded.¹⁶ Past pecuniary losses are often difficult to prove, while general damages for non-pecuniary

¹² *Ibid* at para 168.

¹³ *Ibid* at para 169.

¹⁴ BOC Calculator, *supra* note 6 (accessed May 16, 2026, using 1995 as the reference date).

¹⁵ *Hill*, *supra* note 2 at para 170.

¹⁶ Hilary Young, “The Canadian Defamation Action: An Empirical Study” (2017) 95 Can Bar Rev 591 at 616 [Young 2017]. See also later in this article where we demonstrate that between 2013–22, only 17 out of 221 claims where damages were awarded included an award of special damages.

losses are available, as a matter of right, upon a finding of liability.¹⁷ What's more, the quantum of such damages can be quite high, even in the absence of proof of *any* loss—pecuniary or otherwise. Liability in defamation flows from having communicated words with a *tendency* to injure reputation rather from words proven to have caused injury.

Given this, instead of trying to prove a causal connection between someone's words and particular pecuniary loss, most plaintiffs seek only general damages, which are presumed, at large, and usually far greater than nominal.¹⁸ Indeed, it is because it is hard to prove a causal connection between words and particular injuries (pecuniary or otherwise) that general damages are presumed from a finding of liability.¹⁹

Thus, defamation damages tend to be non-pecuniary damages which, like special damages, are compensatory. They seek to restore the plaintiff to their position if the libel had not occurred. Specifically, their purpose is to compensate successful plaintiffs for any reputational and emotional harms caused by the defendant's defamatory act.²⁰

Quantifying damages is easier when a loss has inherent monetary value, as with lost income or property damage. This is one reason the law distinguishes between general and special damages: plaintiffs should have to prove with greater precision the value of a loss that is inherently quantifiable.²¹

However, while it is not very controversial that non-pecuniary losses, such as pain and suffering, or damage to reputation, are worthy of

¹⁷ *Hill*, *supra* note 2 at para 164.

¹⁸ Because they are at large, such damages needn't be tied to proven loss. "Presumed damages" is a liability rather than a damages rule so there is no presumption that damages in definition will be significant. However, the Court of Appeal for Ontario has said that greater than nominal damages are presumed from a finding of liability. See *Walker v CFTO Ltd*, [1987] OJ No 236 (QL), 1987 CanLII 126 (ONCA) at para 22, citing *Carter-Ruck on Libel and Slander*. See also *Barrick Gold Corp v Lopehandia*, 2004 CanLII 12938 (ONCA) at para 49 [*Barrick Gold*]. However, *Acumen Law Corp v Nguyen*, 2018 BCSC 961 at paras 23–28 [*Nguyen*] discusses the case law and considers that nominal damages may be awarded, particularly where the libel was minor or otherwise caused little harm.

¹⁹ See e.g. *Zhong v Wu*, 2019 ONSC 7088 at para 35; *Curtis v Bank of Nova Scotia*, 2024 ONSC 2308 at para 143; and *Gertz v Robert Welch, Inc*, 418 US 323, 94 S Ct 2997 at 394, 41 L Ed 2d 789 (1974) (White J., dissenting).

²⁰ See e.g. *Best v Weatherall*, 2010 BCCA 202 at para 46. See also *Brown v Cole*, 1998 CanLII 6471 (BCCA) at para 107 [*Brown*], indicating that compensatory defamation damages are awarded for "insult offered and pain given".

²¹ See e.g. *Galand Estate v Stewart*, 1992 CanLII 334 (ABCA) at paras 45–52 Harradence JA, dissenting (but not on this point).

compensation,²² assigning a dollar value to them is inherently arbitrary.²³ It is “a philosophical and policy exercise more than a legal or logical one”.²⁴ “The principle *restitutio in integrum* can find only limited application in the matter of non-pecuniary losses.”²⁵

Reputational injury is incommensurable with money in the sense that “[o]ne is neither better, worse, nor equal in value to the other.”²⁶ Values are arbitrary because of “the difficulty of constructing equivalences between any two ontologically different phenomena.”²⁷ There can be guidance: worse reputational injury warrants more compensation than an injury that is less bad, and similar cases provide anchors,²⁸ notwithstanding *Hill*’s admonition that “there is little to be gained from a detailed comparison of libel awards.”²⁹ Further, as noted above, *Hill* sets out factors to be considered in quantifying defamation damages.³⁰ Thus, damages awards are not *random*, but they *are* arbitrary. These factors help in determining where on the scale of trivial to serious the libel falls, not the dollar value of an award, because each *Hill* factor is no less incommensurable with money than reputation itself. In addition, the weight given to any factor will vary based on the values of judges and juries,³¹ emotional appeals, and the arguments presented by each party.

²² Some argue against compensating for non-pecuniary losses, often because *restitutio in integrum* isn’t possible. See e.g. Richard Abel, “General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)” (2006) 55 DePaul L Rev 253 at 315 [Abel].

²³ *Ter Neuzen v Korn*, 1995 CanLII 72 (SCC) at para 108 [Ter Neuzen].

²⁴ *Andrews v Grand & Toy Alberta Ltd*, 1978 CanLII 1 (SCC) at 261 [Andrews].

²⁵ *Lindal v Lindal*, 1981 CanLII 35 (SCC) at 635 [Lindal].

²⁶ Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge: Harvard University Press, 1993) at 55, defining incommensurability generally, rather than in the context of reputation.

²⁷ Abel, *supra* note 22 at 282.

²⁸ Anchors, however, are not always available to the trier of fact, who quantifies damages. The ability to inform juries as to conventional ranges depends on the province and the cause of action. Per *Hill*, *supra* note 2 at para 163: “If guidelines are to be provided to juries, then clearly this is a matter for legislation.” Some provinces permit, through common law or statute, damages ranges or awards in similar cases to be provided in personal injury cases. While that is not the case with defamation claims, judges in defamation cases often assess damages by analogy to awards in other cases, see e.g. *Huff v Zuk*, 2019 ABQB 691 at para 266; *Brown*, *supra* note 20 at paras 54–60.

²⁹ *Hill*, *supra* note 2 at para 187.

³⁰ *Ibid* at para 182.

³¹ See Abel, *supra* note 22 at 290.

There is therefore no formula for quantifying non-pecuniary damages in defamation.³²

When Professor Hilary Young asks her students to quantify non-pecuniary damages based on the facts of *Hill*, considering the *Hill* factors, the results vary to an astounding degree. In the fall of 2023, students proposed general damages ranging from \$25,000 to \$1,000,000—a difference of forty times (4000%). The lowest aggravated damages award was \$5000 and the highest \$1,500,000—three hundred times (30,000%) more. For punitive damages, the range was \$0 to \$3,000,000. Richard Abel runs a similar experiment in his Torts class, with damages awards “ranging from little or nothing to tens of millions of dollars”.³³

This variability is found in real jury decisions and settlements,³⁴ and is much greater for general than special damages.³⁵ Unpredictability in expected settlement amounts can make cases harder to settle.³⁶

Solutions such as tariffs (\$x for a lost thumb, \$y for a lost year of life expectancy) introduce other problems³⁷ and seem particularly ill-suited to reputational injuries, which vary significantly based on the nature of the libel, the plaintiff’s own subjective feelings, their prior reputation, occupation, the opinions of family, friends, potential clients, etc.³⁸

Because the quantum of non-pecuniary damages awards is arbitrary, such awards are vulnerable to “widely extravagant claims,”³⁹ which have a propensity to increase over time at a rate that exceeds inflation.⁴⁰

³² Randy Pepper *et al*, *Canadian Defamation Law and Practice* (Toronto: Canada Law Book, 2012) (loose-leaf updated 2014) at 5–15.

³³ Abel, *supra* note 22 at 258.

³⁴ *Ibid* at 292–93.

³⁵ Shari Seidman Diamond, Michael J Saks & Stephan Landsman, “Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency” (1998) 48 DePaul L Rev 301 at 313–14.

³⁶ Ronen Avraham, “Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change” (2006) 100:1 Nw UL Rev 87 at 96 [Avraham].

³⁷ Abel, *supra* note 22 at 295–300.

³⁸ See *MacKay v Southam Company*, 1955 CanLII 286 (BCCA) at 4; see also *Padraig Higgins v The Irish Aviation Authority*, [2022] IESC 13 at para 161 [Higgins]: “while in law every case depends on its own fact [*sic*], the observation is particularly valid in defamation”.

³⁹ *Andrews, supra* note 24 at 261.

⁴⁰ Henry Kaufman, “Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation” in Everette Dennis & Eli Noam, eds, *Cost of Libel: Economic and Policy Implications* (New York: Columbia University Press, 1989); Donna Benedek, “Non-Pecuniary Damages: Define, Assessed and Capped” (1998) 32 RJT 607 at 616 [Benedek];

Not only is quantification arbitrary, but factors considered in assessing compensatory defamation damages also reflect punitive and other non-compensatory goals. While the *Hill* factors are all potentially relevant to the nature and extent of reputational harm, the emphasis on the defendant's conduct, that of their lawyer, and the absence of an apology creates the possibility of a quantum of damages based more on disapproval than a genuine assessment of the plaintiff's loss. "Damages being at large, it became in time indisputable that a jury could in all cases consider 'not only what the plaintiff should receive, but what the defendant should pay'."⁴¹ This was one reason why Justice Lamer, dissenting in part in *Snyder*, would have introduced a cap on non-economic damages in defamation—at least in Quebec. "I am in any case inclined to be wary of high amounts designed to compensate for nonpecuniary loss, as it is hard to know whether such amounts do not to some extent conceal a punitive aspect."⁴²

This risk is exacerbated by the explicit availability of aggravated damages in defamation, which, while compensatory, relate to harm caused by the defendant's egregious conduct.

Another oddity of general damages in defamation is their goal of vindicating reputation, in the sense of signalling to the audience that the impugned words were false, thereby actually undoing some of the reputational harm.⁴³ While it makes sense to try to undo harm if possible, this leads to a paradox: the greater the damages award, the more likely it is—at least in principle—to vindicate, which eliminates (some of) the harm, thereby suggesting compensatory damages should be lower.⁴⁴ It is hard to quantify damages that are simultaneously intended to compensate and vindicate.

Joseph Sanders, "Reforming General Damages: A Good Tort Reform" (2008) 13 *Roger Williams U L Rev* 115 at 123; Joseph Sanders, "Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (and Why This Is Too Bad)" (2006) 55:2 *DePaul L Rev* 489; Mathew Good, "Non-Pecuniary Damage Awards in Canada—Revisiting the Law and Theory on Caps, Compensation and Awards at Large" (2008) 34 *Adv Q* 389 at 399–400.

⁴¹ Windeyer J. in *Uren v John Fairfax and Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 151. See also *John Fairfax and Sons Ltd v Carson* (1991) 24 NSWLR 259 at 275, in which damages awards were overturned because they were so excessive as to "smack of the punitive" (per Kirby P).

⁴² *Snyder*, *supra* note 5 at para 32.

⁴³ See *Hill*, *supra* note 2 at para 166; Hilary Young, "Adding Insult to Injury in Assessing Damages for Corporate Defamation" (2013) 21 *Tort L Rev* 127 at 130–31 [Young 2013].

⁴⁴ The ability of a damages award to vindicate, and for a higher award to vindicate more than a lower one, has been questioned. See e.g. Young 2013, *supra* note 43 at 142–49.

Thus, while the goal of general damages in defamation is to compensate for non-pecuniary losses suffered as a result of the libel, in practice quantifying them is an exercise so discretionary, untethered to any anchors, and so focused on bad behaviour, that it should be reconsidered.

2) The Quantum of Damages Awards has Increased over Time

Given how defamation damages are quantified, it is unsurprising that they have, in fact, increased significantly over time.

A 2017 quantitative study examining trends in Canadian defamation awards provided the first evidence that general damages had increased at a rate greater than the rate of inflation. Professor Young found that the median defamation damages award in the decade ending in 2012 was almost double that in the decade ending in 1982, even after adjusting for inflation.⁴⁵

For this article, we asked whether this trend has continued, particularly given the impact of the internet on defamation litigation since 2012. We reviewed damages awards between 2013 and 2022, using methodology very similar to Young's.⁴⁶ We searched CanLII, Westlaw, and LexisNexis for cases decided between January 1, 2013, and December 31, 2022. Search terms used were “(‘defamation’ or ‘libel’) AND damages [in Tort]”. Board and tribunal cases were excluded as were federal cases and cases from Quebec. This methodology will have captured almost all the reported defamation decisions in which damages were awarded.

As in Young's Empirical Study, each award was then manually adjusted for inflation. Both the new data and the figures from Young's study were inflation-adjusted to 2026 dollars using the Bank of Canada's Inflation Calculator.

This methodology revealed 221 defamation awards between 2013 and 2022. The average total damages award has increased, as have general, aggravated and punitive damages. For instance, between the 1973–82

⁴⁵ Young 2017, *supra* note 16 at 614.

⁴⁶ Young's study used different search terms for different databases, while we used the same search terms for all databases. We considered the risk that this would affect our ability to compare the results from the different studies, but determined that the methodologies were similar enough to permit comparison. The primary risk is that the inclusion of the search term “slander” in the earlier study would capture lower damages awards that are then excluded from the later study, artificially inflating the average award in the later study. However, we dismissed this risk because: a) slander cases are relatively rare; b) most provinces have abolished the distinction between libel and slander; and c) the CanLII search in the 2017 study excluded the term “slander”.

period and 2003–12 period, Young’s 2017 study revealed that the average total damage award increased by 93% from \$44,681 to \$86,340. Our review of the 2013–22 period revealed a further 38% increase from the previous decade, with the average defamation award reaching \$119,276 in the later period. Caution is warranted, however, because the 38% increase between the 2003–12 and 2013–22 periods is not statistically significant ($p\text{-value} = 0.1324 > \alpha = 0.1$). There is therefore insufficient evidence of a continuing upward trend; the increase between 2003–12 and the most recent period could be due to chance, such as a coincidence of cases involving more serious libels than usual.

We draw some additional observations about the data. The averages were sometimes skewed by extraordinarily low or high awards. For instance, in the 2013–22 period, total damage awards ranged from \$1.00⁴⁷ to \$3,090,842.⁴⁸ We therefore also calculated the median award, which was \$49,924.

In the 1973–82 and 2003–12 periods the median total damages awards were \$16,646 and \$40,316, respectively. In the 2013–22 period, the median reached \$49,924. Recall that all figures are inflation-adjusted to 2026 dollars.

Table 1

	1973–82	2003–12	2013–22
Average Total Award	\$44,681	\$86,340	\$119,276
Median Total Award	\$16,646	\$40,316	\$49,924

When it comes to specific heads of damages, average values have increased since 2012, but caution is warranted in interpreting these numbers given the small number of data points. Averages for aggravated, special and punitive damages are averages of the values in claims in which that head of damages was awarded, not the average for all claims. The average of special damages awards is especially unreliable because there were so few awards of such wildly varying amounts. Of 221 claims, only 17 included an award of special damages and the amounts ranged from \$289 to \$714,638. Because of the small numbers of awards, we did not run tests of statistical significance of the results by head of damages, except for general damages, where the increase since 2003–12 was not statistically significant ($p\text{-value} = 0.3263 > \alpha = 0.1$).

⁴⁷ See *Nguyen*, *supra* note 18 (\$1 award inflation-adjusted to 2026 on May 16, 2026).

⁴⁸ See *Paramount v Kevin J Johnston*, 2019 ONSC 2910 (\$2.5 million award inflation-adjusted to 2026 on May 16, 2026).

Table 2

	1973–82	2003–12	2013–22
Average General Damages Award	\$37,335	\$64,688	\$80,113
Average Special Damages Award	\$0	\$77,724	\$99,089
Average Aggravated Damages Award	\$59,995 (based on only 2 awards)	\$42,645	\$49,830
Average Punitive Damages Award	\$24,998	\$19,026	\$52,627

Punitive damages awards do not seem to be getting more common. In the 1973–82 period, they were awarded in 24% of cases. In the 2003–12 period that figure was 27% and for the 2013–22 period, 29%. A test of statistical significance failed to find any meaningful difference between these rates ($p\text{-value} = 0.7339 > \alpha = 0.1$).

Aggravated damages are more frequently awarded, however. They were awarded in 2% of the 1973–82 period claims, 28% of the 2003–12 period claims, and 35% of the 2013–22 period claims. However, while the increase since 1973–82 is statistically significant, the increase between 2003–12 and 2013–22 is not statistically significant ($p\text{-value} = 0.1625 > \alpha = 0.1$).

We hypothesize that the increase in damages over time (which is statistically significant between the 1973–82 and 2013–22 periods) is influenced by three things. First is the tendency, noted above, of non-pecuniary damages to increase at a rate greater than the rate of inflation because they lack real-world anchors.⁴⁹ Second is *Hill*, which refused to overturn a \$1.6 million damages award (over \$3 million in 2026 dollars) and rejected damages caps in defamation cases.⁵⁰ The third is the tendency of courts to view internet publication as aggravating, best reflected in the Court of Appeal for Ontario’s decision in *Barrick Gold Corp v Lopehandia*. That case emphasized the internet’s “instantaneous, seamless, inter-active, blunt, borderless and far-reaching” effects.⁵¹ And while this approach has been criticized for overgeneralizing, resulting in unjustifiable increases in damages,⁵² it has been influential. As of the time of writing, a CanLII search

⁴⁹ See *supra* note 40.

⁵⁰ Young 2017, *supra* note 16 at 613. See also Benedek, *supra* note 40 at 653.

⁵¹ *Barrick Gold*, *supra* note 18. See also *Nesbitt v Neufeld*, 2010 BCSC 1605 at para 7, *aff’d* 2011 BCCA 529; Lyrissa Barnett Lidsky, “Silencing John Doe: Defamation and Discourse in Cyberspace” (2000) 49 Duke LJ 855 at 862–65.

⁵² Robert Danay, “The Medium is not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation” (2010) 56:1 McGill LJ 1 at 14,

showed it has been cited more than 220 times, often for the proposition that internet publication is an aggravating factor in quantifying damages. We therefore hypothesized that damages would be greater since internet use became widespread, though we were ultimately unable to prove that hypothesis with the 2013–22 data.

3) The Chilling Effect and the Importance of Freedom of Expression

This section addresses the consequences of large compensatory defamation damages awards. Not only do they overcompensate plaintiffs⁵³ and effectively punish defendants who have defamed, without resort to the more stringent test for punitive damages; they may also prevent people from expressing themselves out of fear of the consequences. Where defamation law deters false or otherwise harmful speech, the law works as it should, but for decades, courts and scholars have recognized the law's ability to chill valuable speech, including speech that is not actually defamatory, because of the costs of litigation and the risk of significant damages awards.⁵⁴ This affects us all by limiting “open debate”, which is a “cornerstone of a free and democratic society.”⁵⁵

Anyone familiar with “prepub” review in newsrooms knows that liability risk informs what gets published.⁵⁶ Additionally, the recent enactment of anti-SLAPP laws in Ontario and BC suggests a concern with the potential of litigation to silence public interest speech.⁵⁷

16–17 [Danay].

⁵³ That said, if awards are arbitrary, it is hard to say that someone is overcompensated.

⁵⁴ David Boies, “The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution” (1994) 39 Saint Louis ULJ 1207; Bob Tarantino, “Chasing Reputation: The Argument for Differential Treatment of Public Figures in Canadian Defamation Law” (2010) 48 Osgoode Hall LJ 595; Hilary Young, “Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs” (2013) 46:2 UBC L Rev 529; Judith Townend, *The Routledge Companion to Media and Human Rights*, (London: Routledge, 2017) at ch 7 “Freedom of Expression and the Chilling Effect”; *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 15 [WIC Radio]; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 170; Benedek, *supra* note 40; Rosalie Jukier, “Non-Pecuniary Damages in Defamation Cases” (1989) 49 RB 5 [Jukier].

⁵⁵ *Hansman v Neufeld*, 2023 SCC 14 at para 2 [Hansman].

⁵⁶ See e.g. Reporter's Committee for Freedom of the Press, “[A Reporter's Guide to Pre-Publication Review](#)” (accessed Jan 28, 2025) online: <tinyurl.com/axd7965z> [perma.cc/L3CP-8S5W]. See also David Anderson, “Libel and Press Self-Censorship” (1975) 53 Texas L Rev 422 at 431.

⁵⁷ The purposes of Ontario's legislation include: “to reduce the risk that participation by the public in debates on matters of public interest will be hampered by

While the chilling effect of litigation is not the same as the chilling effect of high damages awards, it follows that the chilling effect will increase as the cost of potential damages increases.

Thus, even before *Hill*, but especially in the thirty years since, the courts, including the Supreme Court of Canada, have recognized the chilling effect of liability and large damages awards on speech. Three years before *Hill*, the British Columbia Court of Appeal wrote:

it would in my view be wrong of this court to ignore the significance of the so-called “chilling effect” which large damage awards in defamation cases can have on the freedom of expression ... And I am of the view that once the existence of that effect is acknowledged, it becomes our duty to ensure that the common law principles governing the assessment of damages in defamation cases reflect the need to minimize the danger which it presents.⁵⁸

In the context of personal injury damages, the Supreme Court of Canada has stated that “[t]he social impact of the award must be considered ... in calculating the damages for non-pecuniary loss.”⁵⁹ This social impact related to the affordability of automobile insurance. The social impact on freedom of expression is surely no less relevant to quantifying non-pecuniary damages in defamation.

In *Hill*, Justice Cory found no evidence that sizeable damages awards had any chilling effect in Canada. This conclusion was partly based on a finding that general damages awards in defamation tended to be modest,⁶⁰ and in part on a lack of evidence demonstrating that large awards chilled expression in Canada.⁶¹

Neither reason remains persuasive. The chilling effect of liability and damages on freedom of expression are well-documented, and the Supreme Court now recognizes the potential of liability and damages to chill speech.⁶² And if defamation damages were once modest, they no

fear of legal action.” *Courts of Justice Act*, RSO 1990, c C.43, s 137.1(1)(d); *Protection of Public Participation Act*, SBC 2019, c 3.

⁵⁸ *Derrickson v Tomat*, 1992 CanLII 8669 (BCCA) at para 49.

⁵⁹ *Lindal*, *supra* note 25 at 639.

⁶⁰ *Hill*, *supra* note 2 at para 169.

⁶¹ Scientology provided no evidence of a chilling effect. However, Justice Cory left the door open for such evidence to be provided in a subsequent case, particularly where the media are involved. *Ibid* at para 203.

⁶² See e.g. *Grant*, *supra* note 2 at paras 53, 81; *WIC Radio*, *supra* note 54 at para 15. In the context of anti-SLAPP law, see *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 80 where the Supreme Court indicated that the potential of litigation

longer are. As discussed above, damages have risen considerably since *Hill*, and likely in part because of it.⁶³

4) Privacy Damages

Another potential problem with the status quo of defamation damages is how much greater they are than privacy damages.

In 2012, the Court of Appeal for Ontario in *Jones v Tsige* recognized a tort of intrusion upon seclusion, protecting a subset of privacy interests.⁶⁴ The Court set a \$20,000 cap (\$27,520 in 2026 dollars) on non-pecuniary damages, which it described as “symbolic” or “moral.”⁶⁵ Citing Professor Stephen Waddams, Justice Sharpe felt a “conventional range” was “necessary to maintain ‘consistency, predictability and fairness between one plaintiff and another’.”⁶⁶ He then considered the quantum of damages in privacy cases under other provinces’ statutory torts as well as in early common law cases, concluding that “[a]bsent proof of actual pecuniary loss, the awards are, for the most part, modest.”⁶⁷ So while provinces other than Ontario do not necessarily have privacy damages caps, awards tend to be small.

As to whether the Ontario cap includes aggravated or punitive damages, Justice Sharpe left the door open, but stated: “I would not encourage such awards as, in my view, predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to the range I have identified.”⁶⁸

The \$20,000 cap on damages in intrusion upon seclusion cases reflects an entirely different approach than that taken to defamation damages in *Hill*. Justice Cory worried that the difficulty in calculating damages would result in under-compensation, while Justice Sharpe worried it would result in over-compensation. Justice Cory found “little to be gained from

to chill speech was a relevant consideration in anti-SLAPP law’s balancing exercise. See also *Hansman*, *supra* note 55 at paras 75–76; *Bent v Platnick*, 2020 SCC 23 at para 165.

⁶³ See Benedek, *supra* note 40 at 653: “Is the Supreme Court [in *Hill*] itself creating a problem of an explosion of damage awards to soaring heights as discussed in the trilogy as the main motivation for the imposition of a cap? This is an issue which the courts may have to attend to if the awards for damages in defamation suits continue at this level.”

⁶⁴ *Jones v Tsige*, 2012 ONCA 32 [*Jones*].

⁶⁵ *Ibid* at paras 75, 87.

⁶⁶ *Ibid* at para 75.

⁶⁷ *Ibid* at para 83.

⁶⁸ *Ibid* at para 88.

a detailed comparison of libel awards,”⁶⁹ while Justice Sharpe emphasized the need for consistency and predictability. Justice Cory was concerned about setting a price on a licence to defame, while Justice Sharpe didn’t address the possibility that \$20,000 might be a price someone would be willing to pay to invade privacy. However, this is presumably why he refused to exclude the possibility of aggravated or punitive damages in an amount greater than the cap. A plaintiff willing to pay \$20,000 or less to invade someone’s privacy will not be assured of that maximum because of the risk of significant punitive or aggravated damages.

The approach to damages in *Jones* has been criticized, with scholars noting that individuals will not be willing to sue for \$20,000 or less given the costs of litigating, which might easily dwarf a damages award even at the ceiling of the range.⁷⁰ Another privacy tort, based on misuse of information, includes no such cap and indeed, damages have tended to be higher, particularly in non-consensual distribution of intimate images cases.⁷¹ Courts have also found ways to avoid the *Jones* cap by analogizing to defamation or to sexual battery, where non-pecuniary damages are often much higher than \$20,000.⁷²

However, particularly since *Jones*’ explicit \$20,000 cap, it has become difficult to defend the radically different responses to compensating similar kinds of injuries in defamation and privacy claims. Defamation and privacy both primarily implicate dignitary interests rather than tangible ones. Injuries are hard to measure and often have no pecuniary component. Both torts implicate freedom of expression interests. One would therefore expect the range of damages to be similar.⁷³ Indeed, the

⁶⁹ *Hill*, *supra* note 2 at para 187.

⁷⁰ Teresa Scassa, “[The Failure of Privacy Law](https://www.terescassa.com/the-failure-of-privacy-law/)” (14 March 2013), online (blog): <tinyurl.com/yp4myv3a> [perma.cc/VW6B-9393] in which she says: “The high cost of litigation combined with the fact that courts give relatively small damage awards for the difficult-to-quantify harms that flow from privacy invasion mean that these [privacy] torts are of little practical use to most Canadians.”; Omar Ha-Redeye, “Class Action Intrusions: A Development in Privacy Rights or an Indeterminate Liability?” (2015) 6:1 Western J Leg Studies 1 at 4.

⁷¹ *Jane Doe 464533 v ND*, 2016 ONSC 541 [*Doe 1*]: damages of \$50,000 general, \$25,000 aggravated and \$25,000 punitive; *Jane Doe 72511 v NM*, 2018 ONSC 6607: damages of \$50,000 general, \$25,000 aggravated and \$25,000 punitive; *ES v Shillington*, 2021 ABQB 739: damages for multiple torts including battery and misuse of private information of \$80,000 general, \$25,000 aggravated and \$50,000 punitive; *SB v DH*, 2022 SKKB 216: \$85,000 general, \$75,000 aggravated and no punitive damages, because a jail sentence had been imposed.

⁷² E.g. *Doe 1*, *supra* note 71.

⁷³ David Rolph, “The Interaction of Remedies for Defamation and Privacy” (2012) 108 U Sydney Leg Studies 14. See also David Rolph, “Vindicating Reputation and Privacy” in Andrew Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge:

Australian Law Reform Commission recommended capping privacy damages at the same rate as defamation damages.⁷⁴

The existing approaches to damages in defamation and privacy are incompatible given the similar nature of the wrongs and injuries involved. This justifies change, though not necessarily a cap on defamation damages: the argument equally supports eliminating or significantly increasing privacy damages. As discussed below, we think defamation damages should be capped at a rate higher than \$20,000. Though we don't argue for a higher privacy damages cap explicitly, we are convinced by many of the criticisms that the low cap makes it hard to vindicate one's rights, while also wanting to avoid what we perceive to be excesses in defamation compensation.

IV. A Better Approach

If defamation damages are problematically high, the solution is for them to decrease. Since the opposite is happening, appellate or legislative intervention is justified.

This could take several forms, the simplest of which is a cap on defamation damages. While this would ideally be legislated by the provinces, Canada's federal system, and the ability to bring a defamation action in any province where a libel was accessed,⁷⁵ make this undesirable unless the provinces work together to adopt uniform laws, as Australia's states have done. Alternately, there is precedent for appellate courts, especially the Supreme Court of Canada, setting caps.⁷⁶ (While such a cap would only be binding in the province from which the case originated, in practice, the Court's pronouncements on defamation law have been treated as binding in all common law provinces.) Other possibilities include setting a range of damages, with indications of the kinds of cases that fall under each category, as Ireland has done. This too could be achieved by statute or common law, with the same federalism issue arising.

Each approach has benefits and detriments.

Cambridge University Press, 2016); *Hill*, *supra* note 2 at para 121: "reputation is intimately related to the right to privacy which has been accorded constitutional protection."

⁷⁴ Australian Law Reform Commission, "[Serious Invasions of Privacy in the Digital Era \(DP80\)](#)" (2014) online: <tinyurl.com/4sn9m3jn> [perma.cc/78FU-YGNQ] at proposal 11.43.

⁷⁵ *Haaretz.com v Goldhar*, 2018 SCC 28.

⁷⁶ The personal injury damages cap adopted in *Andrews* provides a precedent. Note too that the English and Irish caps or ranges on defamation damages are common law rather than statutory.

1) A Damages Cap

One way to limit non-pecuniary defamation damages is to cap them. By a cap we mean a hard upper limit, as with personal injury damages in Canada, and perhaps those for intrusion upon seclusion.⁷⁷ The benefits of a cap are simplicity and clarity: the only change is to preclude awards above a certain amount.

Whereas *Hill* noted that no other common law jurisdictions had caps,⁷⁸ England now has a “notional ‘ceiling’” of £300,000 in 2020 pounds (about \$674,000 in 2026 Canadian dollars) for the “gravest of allegations, such as imputations of terrorism or murder.”⁷⁹ However, another case referred to a ceiling of £350,000 in 2021.⁸⁰

Australia now has uniform defamation statutes in each state, setting a damages cap of \$250,000 in 2005 dollars.⁸¹ As of July 2025, the inflation-adjusted amount is \$500,000 (the Canadian and Australian dollars tend to have a similar value).⁸² The legislation notes that the maximum is to be reserved for “a most serious case”⁸³ and explicitly excludes aggravated damages from the cap. Punitive damages are not available in Australian defamation actions.⁸⁴ It is therefore possible for non-pecuniary damages to exceed the cap, via aggravated damages. Special damages are also in addition and not capped.

⁷⁷ *Jones*, *supra* note 64 at para 87, it is less clear that the intrusion upon seclusion \$20,000 maximum is a true cap. Justice Sharpe refers to this amount as the upper limit of a “range”; *ibid* at para 88, and allows for the possibility of a higher award in “truly exceptional circumstances”. While *Andrews*, *supra* note 24 at 263 refers to a “rough upper parameter” and acknowledges the need for flexibility, courts have consistently rejected awards above the cap. See *Lindal*, *supra* note 25 and *Lee v Dawson*, 2006 BCCA 159 [*Lee*], in which the upper limit survived a constitutional challenge. The Supreme Court has called it a “cap” in *Cinar Corporation v Robinson*, 2013 SCC 73, e.g. at paras 15, 94.

⁷⁸ *Hill*, *supra* note 2 at paras 171–72.

⁷⁹ *Gilham v MGN Ltd Reach PLC* [2020] EWHC 2217 at para 32, Lewis J, citing *Barron & Others v Collins* [2017] EWHC 162 (QB), at para 26, Warby J.

⁸⁰ *Lachaux v Independent Print Ltd & Anor* [2021] EWHC 1797 at para 222.

⁸¹ See e.g. *Defamation Act 2005*, New South Wales, s 35 [NSW Act].

⁸² See e.g. Tasmanian Numbered Regulations, “[Defamation Order 2025](#)” (accessed May 16, 2026) online: <tinyurl.com/3vxe55w4> [perma.cc/6LZ4-ATCX].

⁸³ NSW Act, *supra* note 81, s 35. Each year, the government publishes the increase in the maximum amount in the Gazette. For more on the Gazette see [Federal Register of Legislation, “Gazettes”](#) (accessed May 16, 2026) online: <tinyurl.com/4z8rbt37> [perma.cc/8CG3-BBEA].

⁸⁴ See each state’s Defamation Act, e.g. *Defamation Act 2005*, Victoria, s 35.

New Zealand does not cap defamation damages, but defamation litigation is much less frequent there and even so, concerns have been raised about amounts of defamation damages.⁸⁵

In principle, we view a cap as wholly justifiable and desirable. We are not convinced by the critique that, since the quantum of damages is almost always lower than any likely cap amount, a cap would be largely ineffective.⁸⁶ If there is a cap, and it is not at issue in most cases because the seriousness of the injury doesn't warrant an award near the cap, no harm is done.

Another argument against caps is that their effect is regressive, since they only affect those most seriously libelled.⁸⁷ However, the quantum of non-pecuniary damages is not grounded in anything real. Plaintiffs subject to a cap have not been denied some of their *compensation* (though they may be denied damages) because the thing lost has no market value. Thus, while only plaintiffs whose injuries are at the high end of the range are affected, we do not consider them *unfairly* affected. And while non-pecuniary damages in defamation may include unproven pecuniary losses, because damage is presumed, plaintiffs are still welcome to lead evidence in support of special damages.

We are much more concerned by a cap's potential to *increase* defamation damages. A cap could create an anchor which judges would use in assessing damages below the cap. With no cap, the only anchors are other cases, but if a cap were set at \$250,000, then judges might start awarding the midpoint—\$125,000—for average libels, whereas they might otherwise have awarded only \$50,000. If a cap is understood as the end point of a range, a mid-range libel might be thought to warrant damages of half the cap.⁸⁸

⁸⁵ For a list of defamation actions between 1996 and 2019, see the appendix of *Craig v Williams* [2019] NZSC 38 (New Zealand). That same case, at the Court of Appeal, overturned a jury's award of damages as "out of all proportion to the injury suffered": *Craig v Williams* [2018] NZCA 31 (New Zealand) at para 37.

⁸⁶ Avraham, *supra* note 36 at 98.

⁸⁷ David Studdert, Tony Yang & Michelle Mello, "Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts" (2004) 23:4 Health Affairs 54.

⁸⁸ Department of Justice, Home Affairs and Migration (Ireland), "[Report of the Review of the Defamation Act 2009](#)" (Dublin: Government of Ireland, 2022) at 209, online (PDF): <tinyurl.com/3zxawakn> [perma.cc/9P99-QD9E] [Ireland Report]: "A high cap on damages could be seen as a benchmark for the settlement of disputes and could make plaintiffs reluctant to accept lower settlements."

Andrews v Grand & Toy Alberta Ltd is sometimes understood this way,⁸⁹ despite appellate case law holding that the cap is irrelevant until it is reached.⁹⁰ It seems principled to award damages in a way that reflects the degree of injury relative to the range of damages a cap creates. This is a highly approximate exercise, but an overall increase in damages is a foreseeable consequence of a cap, given that most defamation damages awards are considerably below the average award. In the present study, the average total damages award in the 2013–22 period was \$119,276. The median was less than half that: \$49,924. The median *general* damages award was \$33,908, less than half the average. That could change if the midpoint of the range becomes the anchor for “average” cases.

One alternative, to set a much lower cap of, say, \$75,000, seems undesirable given the very wide range of injuries that defamation can cause. Further, experience with the privacy tort damages cap suggests that if the cap is perceived to be set too low, courts will resist it.

2) A Range of Damages

One way to avoid such an increase in damages is instead to create a range of damages for different types of cases, as Ireland has done. Ireland has no statutory defamation damages cap,⁹¹ but its courts have set out four “general ‘categories’ or ‘brackets’” for defamation damages.⁹² “[V]ery moderate” defamation warrants damages of €0 to €50,000 (\$0–\$90,000).⁹³ This amount is based on what courts have typically awarded for defamation at the lower end of the scale.⁹⁴ The second bracket is €50,000–€125,000 (\$90,000–\$225,000). The Irish Supreme Court referred to this as “medium range” and stated this bracket is “necessarily wider”. It provided an example of a case falling within this range.⁹⁵ The third category is reserved

⁸⁹ See e.g. *Koukounakis v Stainrod*, [1995] OJ No 1369 (QL), 1995 CanLII 621 (ONCA) at para 21.

⁹⁰ See e.g. *Boyd v Harris*, 2004 BCCA 146; *Lee*, *supra* note 77 at para 78, citing *Leischner v West Kootenay Power & Light Co Ltd*, 1986 CanLII 889 (BCCA). The same case (*Lee*) at para 79 states: “Those authorities are consistent with the view that non-pecuniary awards are not proportional to the severity of the injury suffered by the plaintiff, because the rationale for a non-pecuniary award provides no direct relationship between the degree of the injury sustained and the quantum of non-pecuniary damages that is appropriate.”

⁹¹ See Ireland Report, *supra* note 88 at 207–12, which recommends maintaining the status quo (no cap on non-pecuniary defamation damages).

⁹² *Higgins*, *supra* note 38 at para 156.

⁹³ *Ibid* at para 157. Amounts have been converted from Euros to Canadian dollars (as of July 2026) and then adjusted for inflation from 2022 to 2026. Amounts are rounded to the nearest \$1000.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* at para 158.

for “seriously defamatory material”. The damages range is €125,000–€199,000 (\$225,000–\$358,000) and the Court considered that the case at issue in *Padraig Higgins v The Irish Aviation Authority* fell within that range.⁹⁶ It involved emails alleging that Higgins, a pilot, had flown an airplane without proper authorization. At the top of the general scale were cases with awards between €200,000 and €300,000 (\$360,000–\$539,000), and the Court provided two examples.⁹⁷ Finally, in “truly exceptional” cases, damages could exceed €1.25 million. The Court also noted that none of this was “written in stone.”⁹⁸

This approach has several benefits but also some disadvantages. It has the benefit of being relatively easy for an appellate court to adopt. It is not setting a hard and fast rule. It is instead looking to existing ranges and attempting to use them as anchors. It is therefore not exceeding its role in making incremental change to the law of damages.

Nor does it improperly interfere with the role of the jury. Caps have sometimes been rejected on the grounds that damages are a question of fact, not law, so should be left to the trier of fact.⁹⁹ In some jurisdictions, this raises constitutional concerns, which helps explain Ireland’s approach.¹⁰⁰ By identifying ranges based on what has been done in other cases, the court isn’t substituting its own damages assessments for those of the trier of fact.

Another advantage is that the range for minor or moderate defamation could be set much lower than the mid-range of damages awards generally. This would acknowledge that many cases involve injuries that are not very severe, while avoiding the risk that a cap alone might pose, in terms of increasing damages at the lower end of the scale.

The primary disadvantage of setting ranges in this way is that if damages are already generally too high, this approach “crystallizes such high awards. Non-pecuniary damages at the high end of the range in Canada are in the high hundreds of thousands and even millions of dollars. This article argues that such awards are unjustified, so we reject an approach that would endorse this as the high end of a range of damages.

⁹⁶ *Ibid* at paras 159, 163–64.

⁹⁷ *Ibid* at para 160.

⁹⁸ *Ibid* at para 161.

⁹⁹ See e.g. *Ter Neuzen*, *supra* note 23, L’Heureux-Dubé J; Ireland Report, *supra* note 88 at 201.

¹⁰⁰ While Ireland’s Department of Justice stated that it was constitutional not to have juries assess damages, the constitutional right to reputation was considered in deciding what the role of juries should be in defamation actions. Ireland Report, *supra* note 88 at 132–44.

Perhaps creative judges could choose representative cases carefully to militate against this, but it seems hard to avoid the problem entirely if, indeed, general damages have been too high for some time.

That said, given the waning role of juries in defamation litigation, and the fact that these ranges only apply to non-pecuniary damages, which are inherently arbitrary, it might indeed be feasible for courts to create ranges while lowering the amounts relative to what has historically been awarded. This isn't more problematic than the Supreme Court creating a personal injury damages cap.

3) Relevance of a Personal Injury Damages Cap

A cap on non-pecuniary damages in personal injury cases is arguably relevant to whether to cap defamation damages and if so, where the cap should be set.

The *Andrews* trilogy established a cap on personal injury damages of \$100,000 in 1978 dollars. The relevance of this cap for other kinds of damages has been debated.¹⁰¹ The cap could be argued to support a cap on defamation damages of a certain quantum. There are “strong” and “weak” forms of this argument. First, a trier of fact could simply consider the quantum of non-pecuniary personal injury damages awards, like any other non-pecuniary damages award, in assessing the quantum of a defamation damages award. This is the “weak relevance” version.

Second, and more controversial, is the idea that non-pecuniary damages in defamation should rarely or never be higher than non-pecuniary damages in personal injury cases. If the law declares the amount of compensation for the very worst kind of suffering due to personal injury to be \$x,¹⁰² then some argue that compensation for reputational harm and associated suffering due to a libel cannot be greater than \$x, and certainly not several times \$x. It should perhaps never even be as high as \$x. This is the “strong relevance” version.

Both strong and weak relevance approaches support a defamation damages cap. Weak relevance simply means looking to personal injury damages amounts given the facts of those cases and the defamation case at issue. Since these amounts are never higher than the personal injury

¹⁰¹ See e.g. *SY v FGC*, 1996 CanLII 6597 (BCCA) at paras 30–31.

¹⁰² In setting a cap on personal injury damages, courts have said that the amount of the cap is not, in any meaningful sense, the true monetary value of this worst form of suffering. Nevertheless, the exercise is clearly an attempt to compensate for a given loss.

damages cap, that cap is indirectly relevant in assessing defamation damages.

The strong relevance approach more strongly supports a damages cap in that if the worst non-pecuniary defamation injuries are not as bad as (or are no worse than) the worst non-pecuniary losses in personal injury cases, and if damages for the latter are already capped, then defamation damages should also be capped at a rate no higher—and perhaps lower—than that for personal injury claims.

Of course, one might disagree with having a personal injury damages cap at all, yet *Andrews* is well-established Canadian law. One might also disagree that the worst reputational harm cannot be as bad as the worst personal injury, in terms of non-pecuniary losses.

In *Hill*, the defendant argued for a cap on non-pecuniary defamation damages given the *Andrews* trilogy's cap on personal injury damages. The Supreme Court, however, rejected any relevance of non-pecuniary personal injury damages to defamation damages. Justice Cory distinguished personal injury damages from damages in defamation in several ways. First, in personal injury, "the plaintiff is compensated for every aspect of the injury suffered", of which the non-pecuniary losses are only part.¹⁰³ In defamation, by contrast, the non-pecuniary damages are often the only damages.

Second, high general damages awards in personal injury cases caused auto insurance premiums to rise, affecting many individuals and businesses. Justice Cory saw no similar consequence of defamation damages.

Third, defamation was said to be an intentional tort, unlike personal injury negligence cases, and this justifies higher non-pecuniary damages, lest the cap set a price on the cost of defaming someone.

On the first two points, Justice Cory seems to have meant that because personal injury plaintiffs tend to receive significant damages for pecuniary losses, compensating them fully for those losses, it is appropriate to consider societal consequences such as insurance premiums in capping damages for non-pecuniary losses in personal injury cases.¹⁰⁴ Since most of the damages in personal injury are pecuniary, any unfairness or arbitrariness in a cap on the non-economic damages award matters less. This echoes the reasoning in *Andrews*. The logic is then that since

¹⁰³ *Hill*, *supra* note 2 at para 168.

¹⁰⁴ *Ibid.*

the injury in defamation is largely *non-pecuniary*, we should hesitate to impose a cap. The same point was made in a 1982 case comment on *Munro v Toronto Sun Publishing Corp.*¹⁰⁵ While the Court in *Munro* considered personal injury damages highly relevant to defamation damages, Jerome Morse disagreed, raising the point that for personal injury, pecuniary damages are fully compensated.¹⁰⁶ The injury in defamation is presumed, as it is hard to know the past and future consequences of a libel. There may be little evidence to rely on and there is no guarantee that injuries flowing from libels, whether monetary or not, are fully compensated.

We disagree that the fact that pecuniary losses in personal injury cases are fully compensated justifies a damages cap on non-pecuniary damages. Indeed, we reject the premise. It is not always the case that personal injury is more tangible, its consequences more predictable or its impact mostly financial. Where someone loses a limb or their vision, for example, but will not suffer income loss or incur significant medical expenses, the injury is primarily non-pecuniary. Yet the cap still applies. Thus, in 1989, Rosalie Jukier debunked the logic in *Hill*, calling its “fallacious nature” “obvious.”¹⁰⁷

Even if it were true that personal injury generally entails significant pecuniary loss and defamation rarely does, we think *Hill* (and Morse) misunderstand *Andrews*’ logic. While *Andrews* emphasized the importance of compensating for pecuniary losses, especially future care costs, this was not what justified a cap. Primarily, this justified a more rigorous approach to calculating *pecuniary* damages. A cap on non-pecuniary damages was warranted because they are arbitrarily quantified, and this quantification had demonstrable negative societal impacts in the form of higher insurance premiums. *Andrews* does not support uncapped non-pecuniary damages wherever there is no pecuniary loss to compensate. The arbitrariness and potential for societal impacts (e.g., a chilling effect) remain highly relevant.

A third distinction drawn by Justice Cory was that since defamation is an intentional tort, while personal injury generally results from negligence, a cap is inappropriate for defamation damages. Setting one would set the price of a licence to defame. We reject the underlying premise as well as the conclusion Justice Cory drew from it. Defamation is *not* an intentional tort in the way Justice Cory implies.¹⁰⁸ And if the goal is avoiding setting

¹⁰⁵ *Munro v Toronto Sun Publishing Corp.*, 39 OR (2d) 100, 1982 CanLII 1758 (ONSC).

¹⁰⁶ Jerome Morse, “The Applicability of Personal Injury Damage Principles to Libel and Slander Cases—Case Comment on *Munro v The Toronto Sun*” (1983) 4 Adv Q 112.

¹⁰⁷ Jukier, *supra* note 54 at 9.

¹⁰⁸ Defamation is a strict liability tort. See *Hodgkinson v Economical Mutual Insurance Co.*, 2003 CanLII 36413 (ONCA) at paras 23–24.

the price of a licence to defame, this can be addressed through punitive damages.

As to whether reputational and personal injuries are so different that they cannot meaningfully be compared for the purpose of damages quantification, the difference is arguably no greater than that involved in comparing different kinds of personal injuries, such as the loss of the use of an eye and constant physical pain. Yet judges compare these losses in assigning values to them. (And while the Supreme Court has endorsed a functional approach to quantifying non-pecuniary personal injury damages rather than trying to set a value for non-pecuniary losses, it's clear that courts quantify damages by considering the extent of the injury and comparing to damages in other cases.)¹⁰⁹

The goal of vindication is unique to defamation, so some have suggested that personal injury and defamation damages cannot reasonably be compared.¹¹⁰ Indeed, this approach once prevailed in Australia and England. However, the problem lies in the attempt to simultaneously take two different approaches to quantifying damages. As noted above, the amount required to vindicate and the amount required to compensate are inversely related, and considering both is likely to result in overcompensation. Regardless of our approach to limiting the quantum of damages, this problem will persist so long as vindication remains a goal of defamation damages awards.

Though courts were once unwilling to compare personal injury and defamation damages, in the decades since *Hill*, other jurisdictions have accepted the relevance of the former to the latter. The weak and apparently also strong relevance approaches were most famously endorsed in England by Lord Diplock in *McCarey*:

I am convinced that it is not just ... that in equating incommensurables when ... reputation has been injured the scale of value to be applied bears no relation whatever to the scale of values to be applied when equating those other incommensurables, money and physical injuries. I do not believe that the law today is more jealous of ... reputation than of ... life or limb.¹¹¹

While, according to Carter-Ruck, this statement was likely not intended to set a cap on non-economic damages in defamation equivalent to the cap on such damages for personal injury, that seems to have been its

¹⁰⁹ Benedek, *supra* note 40 at 624–27.

¹¹⁰ *Broome v Cassell and Co*, [1972] AC 1027 at 1071.

¹¹¹ *McCarey v Associated Newspapers Ltd*, [1964] 3 All ER 947 at 960.

effect.¹¹² And while this was for some time controversial, the English Court of Appeal has since endorsed looking to personal injury damages in assessing defamation damages. Sir Thomas Bingham, Master of the Rolls, adopted the strong relevance approach, stating:

[i]t is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable.¹¹³

The English defamation damages ceiling of £300,000 in 2020 pounds (about \$674,000 in 2026 Canadian dollars) reflects the range of non-pecuniary damages for personal injuries in England, as set out in *Guidelines for the Assessment of General Damages in Personal Injury Cases*.¹¹⁴

Australia too has implicitly accepted the strong approach. While its High Court once rejected even the weak approach,¹¹⁵ Australia now has a statutory defamation damages cap of \$250,000 in 2005 dollars that is lower than that for personal injury in all states.¹¹⁶ David Rolph explains that this legislation reflects a desire for defamation damages to be lower than personal injury damages, and follows court decisions which often ignored a statutory requirement to consider personal injury damages when assessing defamation damages.¹¹⁷ Thus, both Australia and England

¹¹² Cameron Doley & Alastair Mullis, *Carter-Ruck on Libel and Privacy*, 6th ed (London: LexisNexis, 2010) at 15.25–15.26 [Doley & Mullis], citing, among others, Eady J. in *Lillie v Newcastle City Council* [2002] EWHC 1600 (QB) at para 1549.

¹¹³ *John v MGN Ltd*, [1997] QB 586 at 614.

¹¹⁴ Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs*, 4th ed (Oxford: Oxford University Press, 2019) at 235–36. See also Busuttil *et al*, *Gatley on Libel and Slander*, 13th ed (London: Sweet & Maxwell, 2022) at 10-008 [Busuttil].

¹¹⁵ *Coyne v Citizen Finance Ltd* [1991] HCA 10; (1991) 172 CLR 211. Justice Toohey, writing for the majority, rejects even weak relevance at para 33 of his reasons.

¹¹⁶ It is sometimes difficult to assess the relative amounts of defamation and personal injury caps because the defamation damages cap is uniform in Australia whereas personal injury damages caps vary by state both in the quantum and in the year to which they are indexed for inflation. Thus, New South Wales' \$350,000 statutory cap on personal injury damages, per Michael Daley, "[Civil Liability \(Non-economic Loss\) Amendment Order 2025 under the Civil Liability Act 2002](#)" (2025), online (PDF): <tinyurl.com/3ka29da4> [perma.cc/E3S6-8NKF] at s 16, is inflation-adjusted to 2002, which as of October 2025 stood at \$804,000. This is higher than the \$250,000 cap on defamation damages in all states, which is inflation-adjusted to 2005 to \$500,000 as of July 2025. See New South Wales, "[Government Gazette of the State of New South Wales](#)" (6 June 2025), online (PDF): <tinyurl.com/3uf75r8y> [perma.cc/M95M-GVYH].

¹¹⁷ David Rolph, "A Critique of the national uniform defamation laws" (2008) 16:3 Torts LJ 207 at 241–42.

now have upper limits on non-pecuniary damages in defamation that are tied to caps on personal injury damages.

Our own view is that despite the different nature of reputational and personal injury, personal injury damages are relevant to quantifying defamation damages. To have radically different scales for non-pecuniary losses in defamation, personal injury, and privacy claims, is unjustifiable in principle. Further, we think non-pecuniary defamation damages should not exceed non-pecuniary personal injury damages. It is contrary to many people's intuitive sense of harm to set the compensation for a loss of reputation at an amount potentially greater than compensation for non-pecuniary aspects of a catastrophic personal injury. While we acknowledge that the quantum of damages is not meant to represent the actual monetary value of such losses,¹¹⁸ it is not arguable that worse injuries and more suffering warrant a higher damages award than lesser injuries and lesser suffering. In our view, while libels can have devastating effect, that effect does not exceed the devastating effect of the most harmful personal injuries. We find strong relevance compelling.

However, one needn't accept the relevance of personal injury damages to support a cap on, or range of, defamation damages. Our primary argument is not tethered to personal injury damages, such that if the cap on non-pecuniary personal injury damages were abolished, increased, or decreased, we would not necessarily advocate for a similar change to non-pecuniary defamation damages. But so long as there is a cap on non-pecuniary personal injury damages, this helps justify a cap on non-pecuniary defamation damages. This is both because similar practical arguments apply, substituting a chilling effect on expression for *Andrews*' cost of insurance premiums, and because there should be some similarity between how damages are assessed for non-pecuniary injuries, regardless of the cause of action.

A similar set of arguments could be made with reference to intrusion upon seclusion damages which, as discussed above, are capped at \$20,000 (\$27,520 in 2026 dollars). A strong relevance argument regarding privacy damages might support a very low damages cap for defamation. However, while we agree with the rationale for the well-established *Andrews* cap and, broadly, its quantum, we have concerns about the practical effects of the low intrusion upon seclusion damages cap.

¹¹⁸ See the discussion of non-pecuniary damages and the functional approach in *Andrews*, *supra* note 24 at 260–63.

4) Aggravated and Punitive Damages

A court or legislature instituting a cap or range should explicitly address the issue of whether aggravated and punitive damages are available, if they would bring damages above a cap.

Aggravated damages, in our view, should be abolished—at least in defamation actions—as they add nothing and risk double-counting injuries.¹¹⁹ While this is not the place to argue for their abolition, if aggravated damages continue to be available, they must fall within the cap. This is defensible in that they are a form of compensation for non-pecuniary injuries. There is no reason to treat them differently than other non-pecuniary damages. Australia has allowed aggravated damages in excess of the cap.¹²⁰ However, this is likely because punitive damages are not available in defamation in Australia. Aggravated damages that may exceed the cap therefore prevent the cap from becoming the cost of a licence to defame.

This leaves punitive damages. In principle they should not be subject to a cap or range on non-pecuniary general damages, since they are not compensatory. Their role is fundamentally different than the role of compensation for non-pecuniary losses. They should therefore be available, where warranted, regardless of a cap or range. One concern, however, is that parties or courts that prefer an uncapped approach to compensatory damages could simply argue for or impose a higher punitive damages award than they would have, absent a cap, thereby negating the free speech benefits of having a cap. Consider the unsurprising tendency of lawyers to seek greater amounts in uncapped heads of damages when caps are introduced.¹²¹ Punitive damages are already relatively common—perhaps too common—in defamation.¹²² The risk of substituting punitive damages for what would otherwise be general damages can be mitigated

¹¹⁹ The Ontario Law Reform Commission recommended abolishing aggravated damages, as did Professor Brown. See Ontario Law Reform Commission, “[Report on Exemplary Damages](#)” (1991) at 103, online: <tinyurl.com/yma4m54x> [perma.cc/NK5Z-Q6VW] and Raymond Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed. (Toronto: Thomson Reuters Canada, 2017) (loose-leaf updated 2016, release 1), ch 25 at 79: “A separate award of aggravated damages is a pernicious development in the law; it is absurd in theory and mischievous in practice”.

¹²⁰ NSW Act, *supra* note 81, s 35(2B): “An award of aggravated damages is to be made separately to any award of damages for non-economic loss to which subsection (1) applies.”

¹²¹ Herbert Kritzer, Guanya Liu & Neil Vidmar, “An Exploration of Non-Economic Damages in Civil Jury Awards” (2014) 55 Wm & Mary L Rev 971 at 1010.

¹²² As noted above, in the most recent 2013–22 period, punitive damages were awarded 29% of the time and the average award was over \$50,000.

by rigorously applying the law regarding punitive damages, but this remains a concern.

Exemplary (i.e., punitive) damages are available in defamation in England, and are said to be “relatively common”, though there is empirical evidence to the contrary.¹²³ This is both controversial and complicated as, since 2013, the law of punitive damages operates differently with respect to some media publishers.¹²⁴ It is unclear whether an award of aggravated or exemplary damages could take a defamation damages award over the common law ceiling, but presumably aggravated cannot and exemplary can.¹²⁵ This is because aggravated damages are a subset of non-pecuniary compensatory damages, while exemplary damages are not compensatory and serve the independent goals of punishing the defendant and deterring others.

The strongest reason for allowing punitive damages to exceed the cap is to avoid the problem, identified in *Hill*, of setting a price on the right to defame. If someone were trying to profit from a false story, they might be better off financially by paying the maximum amount of the range in damages. In such a case, punitive damages should be available. This may be why Justice Sharpe allowed for the possibility of aggravated and punitive damages in “truly exceptional” intrusion upon seclusion cases, despite wanting consistency and predictability in damages awards.¹²⁶

While we are concerned about the potential for excessive punitive damages, we recognize that forbidding them in defamation actions would likely be perceived as unduly tying judges’ and juries’ hands where reprehensible conduct warrants punishment and deterrence. Nevertheless, alternatives to punitive damages include a disgorgement remedy where someone published because the profits to be made exceeded the potential damages under the cap. In our view it is much more important to restrain and ideally even eliminate aggravated damages, which despite being

¹²³ Mark Lunney, Donal Nolan & Ken Oliphant, *Tort Law: Text and Materials*, 6th ed (Oxford: Oxford University Press, 2017) at 784 say exemplary damages are “relatively common” while Goudkamp and Katsampouka find no defamation cases between 2000 and 2015 in which exemplary damages were awarded. That said, the sample size was small: James Goudkamp & Eleni Katsampouka, “An Empirical Study on Punitive Damages” (2018) 38:1 Oxford J Leg Stud 90 at 105.

¹²⁴ Per the English *Crime and Courts Act 2013*, there are special rules for exemplary (i.e., punitive) damages against media defendants. See also Doley & Mullis, *supra* note 112 at 15.40.

¹²⁵ See also Busuttill, *supra* note 114 at 10-029: “An award of exemplary damages may properly exceed the award of compensatory damages by a large margin ... but there should be some proportion between the two.”

¹²⁶ Jones, *supra* note 64 at para 88.

compensatory have a punitive element and risk overcompensating. We therefore recommend that aggravated damages may not lead to non-pecuniary damages that exceed a cap or range, but that punitive damages would not be subject to a cap or range.

5) Getting Down to Numbers

In arguing for limits on non-pecuniary damages in defamation, we consider it necessary to suggest dollar values for those limits. This is difficult because, as emphasized above, any figure is arbitrary. However, we are guided by limits in other jurisdictions and by the Canadian personal injury damages cap. To a lesser extent, we consider the Canadian privacy damages cap and practical consequences of higher or lower cap amounts.

We suggest a cap amount of half of the *Andrews* cap, or \$50,000 in 1978 dollars. This is about \$234,000 in 2026 dollars.

Justice Lamer, dissenting in *Snyder*, recommended a damages cap on defamation damages of half the personal injury damages cap in *Andrews*.¹²⁷ *Snyder* was a Quebec case and one might argue that the suggested cap amount is too low for common law Canada, because defamation damages tend to be lower in Quebec.¹²⁸ Yet the principle for quantifying damages in Quebec is *restitutio in integrum*¹²⁹ and the quantification of damages is a question of fact. Surely the reputations of Quebecers are not worth less than the reputations of Canadians in common law provinces, which is what the common law's higher damages awards imply. Thus, although Justice Lamer's suggestion was not taken up by the majority, his recommended reduction in defamation damages would have the incidental benefit of moving private common and civil law in Canada toward greater convergence on an issue where a divergent approach is not justified.

The proposed cap is lower than the Australian and English defamation damages caps, and significantly higher than the Canadian privacy damages cap. In comparing our damages law to that of other jurisdictions, or to caps that apply to different kind of injuries, we are mindful that we are not comparing apples to apples. The substantive and procedural law of defamation is different, although not radically so, in England, Australia and Canada. The inability in Australia to add punitive damages to a damages award within the cap is relevant, given that this is possible in England.

¹²⁷ *Snyder*, *supra* note 5 at para 29.

¹²⁸ *Ibid* at para 37, Lamer J, dissenting (but not on this point). See also Benedek, *supra* note 40 at 659.

¹²⁹ *Snyder*, *supra* note 5 at para 27, Lamer J, dissenting (but not on this point).

Other relevant differences in the costs of access to justice, taxation, cost of living, and social factors affecting freedom of expression mean that comparisons must be approximate. Canadian jurisdictions should not simply adopt a cap in the same amount as in Australia, for example.¹³⁰

Other reasons for a cap lower than those of England and Australia include the \$20,000 cap on intrusion upon seclusion damages in the relevant Canadian provinces and the lack of a significant tabloid journalism culture in Canada. While we suggested above that the privacy damages cap may be so low as to be a barrier to access to justice, its underlying logic of wanting to keep damages for non-pecuniary losses modest is, in our view, compelling.

As for where to set ranges for defamation that wouldn't warrant the maximum, we leave that to courts or legislatures. That said, a helpful starting point is to look at representative cases for injuries of different degrees, as Ireland did. While defamation injuries are notoriously difficult to compare, Ireland's experience suggests it is feasible. In deciding on representative cases, courts should be guided not only by actual awards, but also by the goal of creating ranges in the first place—to maintain reasonable limits on damages for practical purposes. Therefore, courts should not look to cases with the highest damages in any category of injury—or even necessarily to average awards. Another consideration is that most cases should fall in a low to moderate range, on the assumption that the highest amounts are reserved for exceptional cases. This is also consistent with the finding—here and in Young's 2017 study—that most cases are awarded lower-than-average damages awards.¹³¹ Thus, average severity cases don't necessarily warrant damages at the mid-range of the scale.

V. Conclusion

Canadian defamation law should cap non-pecuniary damages or suggest ranges for such damages. The precedent in *Hill* should not prevent defamation law from evolving. While the trend in defamation law has been toward greater protection of freedom of expression—for example through the responsible communication defence and anti-SLAPP laws—

¹³⁰ See also *Snyder*, *supra* note 5 at para 5, where the majority cited with approval the words of Justice L'Heureux-Dubé of the Court of Appeal of Quebec (as she then was): "I would not look for bases of comparison in this matter in France, the United States or even the Commonwealth countries. Custom, usage and the law are so different there that, in my opinion, such comparisons cannot serve as useful guides for our courts."

¹³¹ This is what it means that the median award is significantly below the average in each of the three studied periods.

defamation damages have increased at a rate far greater than inflation.¹³² Left untethered, the quantum of damages risks chilling important expression. Non-pecuniary damages aim to compensate for real injuries, but their quantification is inherently arbitrary. Given this, we argue, as as Justice Dickson did in 1978 in *Andrews*, that pragmatic considerations warrant limits on non-pecuniary damages. With personal injury, the issues were certainty, fairness and insurance rates, in light of ever-increasing damages amounts. With defamation, the issues are certainty, fairness and the impact on freedom of expression—certainly no less worthy of protection than car insurance affordability.

Limits on non-pecuniary damages have always been controversial, but they are a well-established feature of Canadian remedies law. They are not inconsistent with the goal of compensation, though the arbitrariness of the quantum of non-pecuniary damages means that the search for a “correct” amount of compensation is futile. Given this, it makes sense to consider the consequences of high awards in setting limits.

¹³² While we were not able to establish a statistically significant difference between the values in 2003–12 and 2013–22, the statistical significance of the increase since 1973–82 is established.