

The Implications of *Lindal*

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In its decision in *Lindal v. Lindal*, the Supreme Court expressed again its desire to lay out an orderly approach to the calculation of personal injury and wrongful death awards. After a brief examination of the origins of the non-pecuniary head of damages and of recent developments in the assessment of such damages, the author evaluates the implications of the *Lindal* decision. The purpose of the non-pecuniary head of damages, as established in the 1978 trilogy of damage cases and confirmed in *Lindal*, is to provide the victim with resources with which he can purchase solace for his injuries. The Court has limited the award to no more than \$100,000. But Mr Justice Dickson added an element of complexity to that rule in his *dicta* which would permit a court to breach the \$100,000 limit in the presence of changed economic conditions and the erosion of money value. The precise circumstances which would justify an increased award remain undefined, as does the effective base-date for measuring the erosion of money value. It appears that, despite attempts to rationalize awards for non-pecuniary damages, trial courts, and even the Supreme Court itself, continue to measure awards by comparison, relying for guidance upon atavistic impulses of sympathy and the discarded notion of "lost assets".

Dans l'arrêt *Lindal*, la Cour suprême a une fois de plus exprimé son souci d'établir une approche méthodique pour calculer les dommages-intérêts versés pour des blessures corporelles. L'auteur retrace les origines du chef de dommages non-pécuniaires et expose les développements récents dans le domaine de l'évaluation de tels dommages, pour ensuite examiner les effets de l'arrêt *Lindal*. Le but du chef de dommages non-pécuniaires a été établi dans trois arrêts de la Cour prononcés en 1978, et confirmé dans l'arrêt *Lindal*: il s'agit de donner les ressources nécessaires à la victime pour qu'elle soit adéquatement dédommée des préjudices subis. La Cour a fixé à 100 000 \$ la somme totale pouvant ainsi être versée. Dans son *obiter dictum*, l'honorable juge Dickson démontre que la règle est plus complexe: Il suggère que la Cour pourrait dépasser la limite maximale de 100 000 \$ afin de tenir compte de l'érosion monétaire et de grands changements dans la situation économique. On n'a pas encore défini quelles circonstances sauraient justifier une telle augmentation, ni quelle date de base serait retenue pour évaluer l'érosion monétaire. Il semble, malgré les efforts de rationalisation des dommages-intérêts non-pécuniaires, que les tribunaux de première instance et même la Cour suprême, continuent à évaluer les dommages-intérêts par voie de comparaison, fondant en effet leurs décisions sur des sentiments ataviques de compassion et sur la notion dépassée de "perte d'actifs".

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Introduction

At nineteen years of age, Mr Lindal was injured in an accident while a passenger in a vehicle driven by his brother. The car struck a telephone pole causing Mr Lindal to suffer the permanent loss of control of his limbs, some impairment of his speech and considerable disordering of his personality. His resulting fits of depression, coupled with paranoia, rendered him irritable, erratic and quite unable to accept his personal tragedy. The trial judge awarded damages in the amount of \$454,000, of which \$135,000 comprised the non-pecuniary assessment.¹ The learned Judge found that the exceptional circumstances of the case justified the breaching of the upper limit of \$100,000 for intangible harm set by the Supreme Court of Canada in 1978.² The British Columbia Court of Appeal³ did not agree with that finding and reduced the award to the ceiling figure.⁴ At the same time the Court declined to hear evidence on the erosion of money value because the evidence had not been introduced at trial. In the subsequent appeal to the Supreme Court of Canada,⁵ Mr Justice Dickson reaffirmed the upper limit, addressed the poli-

¹*Lindal v. Lindal* (1978) 90 D.L.R. (3d) 668 (B.C.S.C.).

²*Andrews v. Grand & Toy Alberta Ltd* [1978] 2 S.C.R. 229, (1978) 83 D.L.R. (3d) 452 [hereinafter *Andrews*; cited to S.C.R.]; *Arnold v. Teno* [1978] 2 S.C.R. 287, (1978) 83 D.L.R. (3d) 609 [hereinafter *Teno*; cited to S.C.R.]; *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 [hereinafter *Thornton*; cited to S.C.R.]. These cases are referred to collectively as the *trilogy*.

³*Lindal v. Lindal* (1981) 115 D.L.R. (3d) 745, (1981) 25 B.C.L.R. 381 (C.A.).

⁴The British Columbia Supreme Court found that Lindal, although less disabled physically than the parties in the trilogy, had suffered greater mental damage. On the other hand, the Court of Appeal found the plaintiffs in the three earlier cases to be immeasurably more disabled.

⁵*Lindal v. Lindal* (1981) 129 D.L.R. (3d) 263, (1981) 39 N.R. 361 (S.C.C.). See also annotation by Osborne in (1982) 19 C.C.L.T. 1, 3-8.

cies implicit in such a conventional award and, while encouraging argument on the issue of inflation, peremptorily resolved the debatable question of the effective date of measurement by selecting 19 January 1978, the date of the Court's judgment in the well known decisions in *Andrews*, *Teno* and *Thornton*.⁶

The expressed desire of our highest Court to lay out an orderly structure for the calculation of personal injury and wrongful death awards finds further expression in the *Lindal* decision. It is now appropriate to consider briefly the origins of the non-pecuniary head of damages, to examine its development up to the present and more importantly, to assess the implications of *Lindal*.

I. Origins of the Non-Pecuniary Head of Damages

In the calculation of pecuniary or compensatory damages we have now passed from discussions of fairness⁷ as between plaintiff and defendant to the pursuit of perfect compensation,⁸ albeit with occasional dissent.⁹ Yet, in the calculation of the non-pecuniary losses, compensation has never formed the basis for evaluation of the monetary substitute which has been offered by the courts to the plaintiff as solace for his distress. This result is clear from a reading of a House of Lords decision in a Scottish appeal of only a decade ago.¹⁰ The dispute concerned a claim by relatives against an employer for the death of their kinsman. The remedy sought was *assythment*, which itself was derived from the older claim for *wergeld* or blood-money. The basis of the claim lay in the buying-off of vengeance, often provoked by a perceived element of intent, which over time has metamorphosed into a sum of money which serves as the acknowledgement, rather than as compensation, for the plaintiff's pain, grief and distress. While the remedy was measured originally on a tariff scale reflecting social status, in modern times this has become a

⁶*Supra*, note 2.

⁷See, e.g., *Rowley v. London and North Western Railway Co.* (1873) 8 Ex. D. 221, [1861-73] All E.R. Rep. 823; *Phillips v. London and South Western Railway Co.* (1879) 5 Q.B.D. 78, [1874-80] All E.R. Rep. 1176 (C.A.).

⁸*Andrews*, *supra*, note 2, 240-2.

⁹See, e.g., *H. West & Sons Ltd v. Shepherd* [1964] A.C. 326, [1963] 2 All E.R. 625 (H.L.); *Taylor v. University of Saskatchewan* (1955) 15 W.W.R. 459 (Sask. C.A.); *Yawney v. Clayton Rural Municipality* (1956) 1 D.L.R. (2d) 65, 70-1 (Sask. C.A.) *per* Procter J.A.; *Ficko v. Thibault* (1967) 59 W.W.R. 500, 507-8 (Sask. C.A.); *MacDonald v. Deson* (1970) 73 W.W.R. 241 (B.C.C.A.).

¹⁰*McKendrick v. Sinclair* [1972] S.L.T. 110 (H.L.), *aff'g* [1971] S.L.T. 234 (2d Div.), *aff'g* [1971] S.L.T. 17 (Outer House). See also the earlier decision in *Eisten v. North British Railway Co.* (1870) 8 M. 980 (1st Div.).

conventional award.¹¹ The early English cases¹² give scant indication of the basis of the award and in light of the tradition of global awards, there is little hint of the evaluation of the intangible component.

II. Recent Developments in the Assessment of Non-Pecuniary Awards

The non-pecuniary award ancillary to the compensatory award, developed in the United States and Canada after the Second World War. This development has been attributed to the following factors:¹³ the growth in the use of contingency fees, the markedly increased leading of demonstrative evidence particularly before juries and the affluence of North America as compared to Europe. These factors in turn culminated in the *per diem* argument for pain and suffering, the errors of which were recognized in the context of non-pecuniary awards in Canada in the decision in *Bisson v. Corp. of Powell River*.¹⁴ Before 1978, there was some academic examination of the proper assessment of the non-pecuniary award which influenced the ultimate decision of the Supreme Court of Canada in 1978.¹⁵ For example, Professor Ogus¹⁶ articulated three possible modern justifications for a substantial award for distress. He suggested that it might be approached objectively by placing a value on the physical and mental capacities of the human being which would be neither reduced nor enhanced by the plaintiff's use of these capacities. Alternatively, he argued that assessment might be done subjectively by evaluating a particular plaintiff's need for *solatium*. And finally, he suggested that since the capacities of the individual were beyond measure in cash, it would be preferable for the award to mirror the costs of substitutes to console the victim. This last formulation was adopted by Mr Justice Dickson in *Andrews* although it has not gone unnoticed that the distinguished Justice appeared to run the three justifications together.¹⁷

¹¹ See Veitch, *Solatium — A Debt Repaid?* (1972) 7 Ir. Jur. n.s. 77, where developments under Irish and Scottish law are examined.

¹² See, e.g., *Scott v. Shepherd* (1773) 3 Wils. K.B. 405, (1773) 95 E.R. 1124; *Pippin v. Sheppard* (1822) 11 Price 400, (1822) 147 E.R. 512 (Exch.). See also O'Connell & Bailey, *The History of Payment for Pain & Suffering* [1972] U. Ill. L.F. 83.

¹³ See O'Connell & Simon, *Payments for Pain & Suffering: Who Wants What, When & Why?* [1972] U. Ill. L.F. 1, 4-5.

¹⁴ [1968] 62 W.W.R. 707, 725-6 (B.C.C.A.) *per* Bull J.A., *aff'd* [1968] 64 W.W.R. 768 (S.C.C.).

¹⁵ *Supra*, note 2.

¹⁶ Ogus, *Damages for Lost Amenities: For a Foot, a Feeling or a Function* (1972) 35 M.L.R. 1; A. Ogus, *The Law of Damages* (1973) 195; and earlier, Kahn-Freund, *Expectation of Happiness* (1941) 5 M.L.R. 81.

¹⁷ Klar, *The Assessment of Damages for Non-Pecuniary Losses* (1979) 5 C.C.L.T. 262, 266-7; McLachlin, *What Price Disability? A Perspective on the Law of Damages for Personal Injury* (1981) 59 Can. Bar Rev. 1, 48-9. Conflating the three justifications has since become something of a tradition with Canadian trial judges. See, e.g., K. Cooper-Stephenson & I. Saunders, *Personal Injury Damages in Canada* (1981) 369-70.

Some lower courts have accepted the notion of restraint¹⁸ but not the \$100,000 ceiling *per se*; others have rejected the upper limit or confused the formulation.¹⁹ One jurisdiction appears ambivalent.²⁰ Not surprisingly therefore, Mr Justice Dickson took the opportunity presented by *Lindal* to reassert the earlier policy of the Court. Thus he confirmed the Court's belief that no amount of cash can compensate for intangible losses and that the gravity of the injury should not determine the award. By adopting this so-called "functional" approach, courts must now be concerned with the awareness or appreciation of the victim of his losses and be convinced of the victim's potential use of the substitutes which dollars can purchase.²¹ In this assessment, the lower courts have been reminded that they must strive (a) to avoid overlapping with the economic or compensatory award and (b) to adopt a policy of moderation reflecting the concerns of society about the inflation of awards. It was also made clear that assessments must eschew both feelings of sympathy and desires for retribution. Furthermore, the Supreme Court upheld the ceiling figure of \$100,000 on the twin bases of a need for uniformity of awards and a desire for predictability for the purposes of advice and settlement. Mr Justice Dickson recognized the cogency of the arguments for reassessment of the upper limit due to inflation but he required that evidence be led to establish the degree of erosion.²²

III. The Implications of *Lindal*

A. Components of the Award

In a nutshell, the above discussion represents the reclarified position of the Supreme Court. How are we to work it out in practice? How should the courts below render their awards and how are counsel to prove the damage to support a substantial award? First, with regard to the award itself: although the 1978 decisions²³ brought an end to the global award and ratified itemized assessments, there is no logic to the itemizing of the intangible portion of a damage claim since any award is a response to only one form of damage — distress or grief. Nevertheless, from the perspective of counsel faced with the

¹⁸ See Charles, *The Supreme Court of Canada Handbook on Assessment of Damages in Personal Injury Cases* (1981) 18 C.C.L.T. 1, 14-5, where the author lists those jurisdictions which have accepted the \$100,000 guideline as British Columbia, Alberta, Manitoba and Prince Edward Island.

¹⁹ These include Saskatchewan, Ontario, Newfoundland and New Brunswick. *Ibid.*, 15.

²⁰ Nova Scotia. *Ibid.*

²¹ *Lindal*, *supra*, note 5, 269-72.

²² *Ibid.*, 275.

²³ *Supra*, note 2.

onerous task of proving the appreciation of loss by his client²⁴ along with the burden of substantiating the costs of substitutes and their possible uses by the victim, it will be essential to utilize the traditional sub-heads of pain and suffering, loss of amenities and loss of expectation of life. In order for counsel to establish the basis of the plaintiff's need for solace, it will be necessary to determine the nature of the pain and suffering by evidence of its degree, intensity and duration, past and future.²⁵ Such proof will often be led together with the facts of detention in a hospital and the attendant unpleasantness of medical procedures such as anaesthesia.

Loss of or damage to limbs or faculties doubtless will be argued in terms of the expenses incurred to replace the lost use and enjoyment.²⁶ We can expect the continuation of the harrowing testimony relating to damage to the central nervous system, to the digestive organs and functions of the bowel or bladder, and to the respiratory system. Equally, where there is damage to the sex organs²⁷ or to the reproductive system, we are likely to hear more of the foreseeable consequences such as the intrusion upon the victim's prospects for a full relationship with another person or persons,²⁸ whether formerly enjoyed²⁹ or merely anticipated.³⁰ It is not unlikely that we may see some exaggeration by counsel, but this embellishment can be controlled if it is borne in mind that we are concerned with the dislocation of the way of life of the victim and not with the fact of the injury itself. As every lawyer should know, many permanent injuries to the individual, such as loss of a spleen, have little or no impact upon the way of life of the person.³¹ On the other hand, temporary or permanent disfigurement will continue to play an important part in the assessment of damages under this head as will evidence of loss of a sense, be it sight, smell, hearing, touch or taste. All of these types of injuries can have an impact upon the individual's capacity for work and upon his enjoyment of leisure. As before, proving mental injury by the use of medical

²⁴ See Gibson, *Repairing the Law of Damages* (1978) 8 Man. L.J. 637, 657-8, fn. 77 who suggests the spurious discipline of "dolorimetrics".

²⁵ See *Phillips v. South Western Railway Co.* (1879) 4 Q.B.D. 406, 407-8 per Cockburn C.J.

²⁶ This position is contrary to the older loss of assets argument which measured the profitable and pleasurable use of a limb. See *H. West & Sons Ltd v. Shepherd*, *supra*, note 9, 355 per Lord Devlin.

²⁷ See *Meglio v. Kaufman Lumber Ltd* (1977) 16 O.R. (2d) 678, (1977) 79 D.L.R. (3d) 104 (H.C.) [hereinafter cited to O.R.], where Cory J. suggests that "[s]uch an impairment could be considered under the heading of 'Loss of Amenities of Life' or under the claim for general damages". See also discussion at 681.

²⁸ See *Harris v. Harris* [1973] 1 Lloyd's Rep. 445 (C.A.).

²⁹ See *Lampert v. Eastern National Omnibus Co.* [1954] 2 All E.R. 719 (Q.B.).

³⁰ See *Gray v. LaFleche* (1949) 57 Man. R. 396, [1950] 1 D.L.R. 337 (K.B.).

³¹ J. Clerk & W. Lindsell, *Torts*, 15th ed. (1982) 232, fn. 79.

testimony, with restraint,³² will continue to establish nervous shock, anxiety neurosis and other personality disorders. Although traditionally the courts have feared such claims on the grounds that they are difficult to assess, that they can be evanescent and even spurious, and that they are the most subjective of injuries, today the acceptance of expert testimony has assured the recognition of this type of loss. The proof of incapacity here is often revealed in the inability or unwillingness of the victim to participate in recreational pursuits and other normal incidents of living.³³

Moreover, counsel will be asked to sustain arguments for substantial damages for the loss of expectation of life. The law recognizes that every person has a legal right not to have his life shortened by the tortious act of another.³⁴ The loss is not the loss of a particular number of days, but rather the denial of the chance to live a full life. Thus the relevant factors are the age of the victim, his prospects prior to the accident and his possibilities in his changed condition.

There are certain factors and policies which are irrelevant to the calculation of a non-pecuniary award. Mr Justice Dickson properly discarded the policies of sympathy for the plaintiff and retribution against the defendant in his judgment in *Lindal*. Other irrelevant factors include the *de facto* adjustment or happiness of the specific victim; this has no place in the calculation because the goal is to purchase substitutes for activities denied to the victim by his injuries.³⁵ Equally, social status and income level,³⁶ or assets of the plaintiff, have no place in the assessment because we are dealing objectively with the individual's requirement for substitutes, their costs and his capacity

³² See *Franco v. Woolfe* (1975) 6 O.R. (2d) 227, (1975) 52 D.L.R. (3d) 355 (H.C.), *rev'd* in part on other grounds (1976) 12 O.R. (2d) 549, (1976) 69 D.L.R. (3d) 501 (C.A.). In the Court of Appeal, Houlden J.A. upheld the admissibility of medical testimony as to the psychological consequences of the loss on the survivors. Houlden J.A. rejected, however, testimony by the same medical witness relating to the character of the deceased based on tests conducted on the survivors.

³³ See *Cook v. J. L. Kier & Co.* [1970] 2 All E.R. 513 (C.A.).

³⁴ See, e.g., *Flint v. Lovell* [1935] 1 K.B. 354, [1934] All E.R. Rep. 200 (C.A.); *Rose v. Ford* [1937] A.C. 826, [1937] 3 All E.R. 359 (H.L.). See also, Braniff & Pratt, *Tragedy in The Supreme Court of Canada: New Developments in the Assessment of Damages for Personal Injuries* (1979) 37 U.T. Fac. L. Rev. 1, 31; H. McGregor, *McGregor on Damages*, 14th ed. (1980) 41; J. Fleming, *The Law of Torts*, 5th ed. (1977) 222; R. Heuston, *Salmond on the Law of Torts*, 17th ed. (1977) 577.

³⁵ See, e.g., *Wise v. Kaye* [1962] 1 Q.B. 638, [1962] 1 All E.R. 257 (C.A.); *Povey v. Governors of Rydal School* [1970] 1 All E.R. 841 (Manchester Ass.); *Holmes v. Board of Hospital Trustees of the City of London* (1977) 17 O.R. (2d) 626, (1977) 81 D.L.R. (3d) 67 (H.C.).

³⁶ These factors were raised in *Fletcher v. Autocar and Transporters Ltd* [1968] 2 Q.B. 322, 359-60, [1968] 1 All E.R. 726 (C.A.) *per* Salmon L.J. See also the earlier Scottish decision in *Young v. Glasgow Tramway and Omnibus Co.* (1882) 10 Sess. Cas. 242 (1st Div.).

to utilize them. And last, the sex of the victim *per se* is not a relevant factor although there are certain costs which derive from the fact of one's sex which may have a negligible influence on the award through the costs of substitutes.

Lindal has implications for our handling of the unaware plaintiff. Past practice with regard to unconscious or unaware victims has been based on a policy of ensuring that it is not cheaper to render a person comatose than it is to ruin him physically. Yet this policy is quite illogical when it is proclaimed in our highest court that it is not the function of a damage award in negligence to punish the defendant. It is only possible to support an award to an unconscious plaintiff if one believes that the intangible award is still coloured by its origins as blood-money. We have not in the past given the unconscious party monies for pain and suffering but we have given awards for loss of faculties, loss of amenities and loss of expectation of life.³⁷ As a consequence of the judgments in *Andrews*, *Teno*, *Thornton* and *Lindal* it can be argued logically that no award should be made since there is no distress felt and correspondingly no need for solace nor its tangible substitutes.³⁸ This view has commended itself to members of the British Pearson Commission,³⁹ to the judges of the High Court of Australia⁴⁰ and would seem to be the logical next step for our Supreme Court.

B. *Changed Economic Conditions and the \$100,000 Limit*

Although Mr Justice Dickson described his task in *Lindal* as an opportunity to continue the exposition of rational and cohesive principles for the guidance of trial courts in personal injury cases,⁴¹ he did, at the same time, add a further wrinkle. This additional complexity derives from his *dicta* which would allow a court to breach the ceiling of \$100,000, relying on an argument of changed economic conditions and the erosion of money value. The learned Justice concluded that inflation could not be argued in the instant case because of the close proximity of the date of the trial judgment, 27 April 1978, to the decisions of the Supreme Court of Canada in the trilogy, 19 January 1978.⁴²

³⁷The problem was examined in both the dissenting and majority opinions of the Alberta Court of Appeal in *Prather v. Hamel* (1976) 66 D.L.R. (3d) 109.

³⁸Cooper-Stephenson & Saunders, *supra*, note 16, 378.

³⁹*Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978), Cmnd 7054, 91-2, paras 393-8. See also Veitch, *The Pearson Report: Guidelines for Canada?* (1979) 28 U.N.B.L.J. 19.

⁴⁰*Skelton v. Collins* (1966) 115 C.L.R. 94 (Aust. H.C.). Some English judges have also expressed support for this view. See Lord Justice Winn's references to *Skelton* in *Andrews v. Freeborough* [1967] 1 Q.B. 1, 12, 18 and 20 (C.A.). But see, in the House of Lords, *Lim Poo Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 188, [1979] 2 All E.R. 910 *per* Lord Scarman.

⁴¹*Lindal*, *supra*, note 5, 265.

⁴²*Ibid.*, 275.

Earlier, a majority of the British Columbia Court of Appeal had reached a similar conclusion that the effective base-date for inflationary adjustment arguments should be 19 January 1978.⁴³ However, Chief Justice Nemetz, although concurring in the holding, suggested an alternate approach. He identified three possible base-dates: (a) the date the cause of action arose in *Andrews* — 1972; (b) the date of the trial judgment in that case — 1974; and (c) the date of the judgments in *Andrews*, *Teno* and *Thornton* in the Supreme Court — 1978. Finding no authority for the first date, he selected 1974 over 1978⁴⁴ despite arguments for the latter date founded on the assumption that the Supreme Court was establishing a new policy thence forward rather than writing the judgments of the three trial judges.⁴⁵ Chief Justice Nemetz was persuaded that the 1974 base-date was appropriate in view of the plain language of the British Columbia *Court of Appeal Act*⁴⁶ which he found to be “virtually identical”⁴⁷ to the federal *Supreme Court Act*.⁴⁸ He also relied upon a similar judicial pronouncement in Ontario.⁴⁹ The relevant sections of the *Supreme Court Act* state:

47. The Court may dismiss an appeal or give the judgment and award process or other proceedings that the court, whose decision is appealed against, should have given or awarded.

...

53. The judgment of the Court in appeal shall be certified by the Registrar to the proper officer of the court of original jurisdiction, who shall thereupon make all proper and necessary entries thereof; and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the last mentioned court.⁵⁰

The rule that appellate courts routinely write the judgments which should have been given by the court below has always been taught to law students and it has been the conventional wisdom of the Supreme Court since the early years of this century.⁵¹ It is important, however, to bear in mind the policy implicit in s. 54(1) of the *Supreme Court Act* which describes the Court as the “exclusive ultimate appellate civil and criminal jurisdiction within and for

⁴³ *Hatton v. Henderson* (1981) 126 D.L.R. (3d) 50, (1981) 29 B.C.L.R. 316, 319-20 (C.A.) [hereinafter cited to D.L.R.].

⁴⁴ *Ibid.*, 53 per Nemetz C.J.B.C.

⁴⁵ *Ibid.*

⁴⁶ R.S.B.C. 1979, c. 74.

⁴⁷ *Supra*, note 43, 54.

⁴⁸ R.S.C. 1970, c. S-19.

⁴⁹ *Fenn v. City of Peterborough* (1979) 25 O.R. (2d) 399, 451-2, (1979) 104 D.L.R. (3d) 174 (C.A.).

⁵⁰ *Supreme Court Act*, R.S.C. 1970, c. S-19.

⁵¹ See, e.g., *Boulevard Heights Ltd v. Veilleux* (1915) 52 S.C.R. 185, (1915) 26 D.L.R. 333; *Murray v. Delta Copper Co.* [1926] S.C.R. 144, [1925] 4 D.L.R. 1061; *K.V.P. Co. v. McKie* [1949] S.C.R. 698, [1949] 4 D.L.R. 497.

Canada".⁵² It may be that the \$100,000 figure was a new rule based primarily upon policy considerations which can only be considered by the Supreme Court of Canada.⁵³ We are therefore led to the thorny issue of the proper extent of judicial lawmaking. One cannot escape the fact that the possibility of adjusting the \$100,000 ceiling as enunciated in *Lindal* appears as no more than an after thought at the close of the judgment. It is to be hoped that clarifying litigation will soon reach the Court.

Conclusion

The confirmation of the ceiling and the discussion of its suggested manner of alteration still leave us with the question of whether the upper limit is the measure of the worst case imaginable or whether it is to be regarded as a conventional figure attainable by all claimants whose injuries are beyond the modest. One can see from the cases since *Andrews* that many judges, including the Justices of the Supreme Court of Canada in *Lindal* itself, measure awards by comparison. This kind of comparative analysis suggests a calculus in which quadriplegia equates with \$100,000. Yet the underpinning of the theory of measurement is the need for solace, the costs and possibilities of obtaining substitutes and the victim's capacity to enjoy them. It is therefore illogical to equate the worst possible injury with the upper limit for reasons of sympathy or the discarded notion of "lost assets". Yet the judgments in both *Andrews* and *Lindal* hint at confusion between theory and practice, while the behaviour of trial judges reveals manifold divergences of approach.⁵⁴ It may well be that the best-intentioned theorizing and logic-setting must give way to the primitive or atavistic impulses which still appear to govern the assessment of damages. Simply put, it may be difficult to purge the spirit of *wergeld* from the judicial arteries. If so, it may be some time before we can teach the acceptance of the rule in *Lindal's* case.

⁵² *Supreme Court Act*, R.S.C. 1970, c. S-19, s. 54(1).

⁵³ However, it is interesting to note that our "sister" court, the High Court of Australia, takes the very opposite position. As Mr Justice Stephen recently held: "It is not part of the judicial function to depress the level of awards on policy grounds. The courts have no mandate to entertain any such policy." *Barrell Insurance Pty Ltd v. Pennant Hills Restaurants Pty Ltd* (1981) 34 A.L.R. 162, 185 (H.C.).

⁵⁴ See, e.g., *Laird v. Costain* (1978) 24 N.B.R. (2d) 510 (N.B.S.C., Q.B.Div.); *Savard v. Richard* (1979) 25 N.B.R. (2d) 45 (N.B.S.C., App.Div.); *Godin v. Bourque* (1980) 28 N.B.R. (2d) 643 (N.B.Q.B., T.D.).