

Mitigation, Apology and the Quantification of Non-Pecuniary Damages

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Abstract

The law has historically granted damages for some forms of non-pecuniary losses. In doing so, courts have freely admitted that there is imprecision in quantifying such losses and that there is no quantitative and objective calculus on pain and suffering. Against this background, new research on how hedonic losses are experienced by a victim provide an opportunity to review how non-pecuniary losses should be compensated. Some of this research suggests that experiences of anxiety, frustration and suffering may not affect a victim's happiness as great as is presupposed in current models of compensation, and further, that its impact may also be ameliorated by the offering of an apology. In this essay, the author asks whether the law can incentivize tortfeasors to offer an apology as an element in mitigating compensatory damages for non-pecuniary loss.

Key words

Damages; mitigation; non-pecuniary losses; pain and suffering; happiness; apology

Resumen

Históricamente, el derecho ha concedido daños y perjuicios para algunas pérdidas no monetarias. Al hacer esto, los tribunales han admitido que existe una imprecisión a la hora de cuantificar estas pérdidas y que no existe un cálculo cuantitativo y objetivo del dolor y el sufrimiento. En este contexto, nuevas investigaciones sobre la experiencia de las víctimas frente a pérdidas hedonísticas ofrecen la oportunidad de revisar cómo se deberían compensar las pérdidas no pecuniarias. Algunas de estas investigaciones sugieren que las experiencias de ansiedad, frustración y sufrimiento pueden no afectar a la felicidad de una víctima tanto como se presupone en los modelos actuales de compensación, y además, su impacto puede mejorar al ofrecer una disculpa. En este ensayo, el autor se pregunta si el derecho puede incentivar a los causantes del daño a ofrecer una disculpa como elemento con el que reducir la indemnización por una pérdida no pecuniaria.

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Palabras clave

Daños, mitigación, pérdidas no pecuniarias; dolor y sufrimiento; felicidad; disculpas

Table of contents

1. Introduction	531
2. Part one – Non-pecuniary damages in Canada	532
3. Part two – How do we experience non-pecuniary losses?	535
4. Part three – The psychological experience of an apology and can it be quantified?	538
5. Part four – Implications	540
6. Conclusion	542
References.....	543

1. Introduction

What is the value of an apology and is it of sufficient legal significance that the law should trouble itself over whether it has been given or not? That question is at the heart of this essay, and I raise the question only as far as it extends to situations in which the law awards non-pecuniary damages as a compensatory remedy.

Non-pecuniary damages have always been problematic in the law. It is not so much the sense that the harm cannot be imagined or experienced; it is the problem that it cannot be quantified; it is regarded as being incommensurable. Even after non-pecuniary damages are awarded, what use can they be put to that is in any way connected to the harm actually caused? Imagine a comatose victim, a person that must garner our greatest sympathy. Damages for pecuniary losses are a given; compensation to provide for future health care and to replace lost income and earning opportunity. But, what of non-pecuniary damages? Without any evidence of sensation of pain, or consciousness of loss, and if no evidence that there is a chance of recovery or amelioration of the victim's unconscious state, why award any non-pecuniary damages at all? In such a case, does the offering or rendering an apology have, or should it have, any significance? However, give the victim consciousness and the approach to non-pecuniary damages immediately changes. Most legal systems see justice in giving some level of damages for the non-pecuniary losses that can now be experienced, although the level of compensation may differ dramatically between legal systems. At which point we may ask, what place is there for an apology, and, if given, how should it impact on the quantification of an award of non-pecuniary damages?

An apology can have significance in many ways. Obviously, and the predominate issue in the current apology literature is the personal meaning an apology has to a victim of wrongdoing. Subjectively, an apology can aid a victim in recovery and restoration of the relationship with the wrongdoer. Objectively, the significance of an apology can be seen as vindication to the world at large of a victim's violated rights. The act of giving an apology can have significance as a means of maintaining and reinforcing social cohesion. A stereotypical trait of Canadians is often made that we apologise for other people's wrongdoing. Canadians view this as being an admirable trait and as a defining societal characteristic that makes us distinct from our southern neighbour. Canadians view themselves as being a more caring society as demonstrated by our willing propensity to give such an apology. An apology can have significance as the expression of a cultural or ethnic custom. For example, much has been written on the role an apology plays in Japanese society, which differentiates it from Eurocentric Western societies (Wagatsuma and Rosett 1986, p. 468). An apology can have political significance as evident in national governments from around the world that have found it politically advantageous and morally courageous to issue formal apologies to a number of groups that have been the subject of past discriminatory governmental action.

For my purpose, an apology can have legal significance in at least two ways: one, in a formal direct way where specific legislation makes provision for an apology to be made as part of a court order. Two, in an indirect way, as in where common law doctrine incentivizes an apology to mitigate a court order that, absent an apology, the court would normally have made. An example is provided in the law of defamation. Under Ontario's *Libel and Slander Act* (RSO 1990, c.L.12 s.20) a defendant who makes or offers an apology may argue for a reduction in damages based upon mitigation of loss. In another section of the Act (s.5), a retraction can act to limit the non-pecuniary damages completely where the defendant is a newspaper or broadcaster and has published the defamatory material in good faith and made a full retraction. In other Provinces (all but Ontario, British Columbia and Saskatchewan) the retraction must be accompanied by a full apology to gain the protection of the Act (Berryman 2016).

This essay seeks to explore whether principles surrounding the quantification of damages in other causes of action beyond defamation, could be amenable to similar arguments concerning the offering, or giving, of an apology, in reduction of non-pecuniary damages. In this way, the quantification of damages could be made to incentivize the making of an apology. However, for that to happen we have to be able to determine whether it is possible to monetize the value of an apology, or, at least to determine what weight is to be given to an apology so that it can impact the quantification of non-pecuniary damages. If an apology is given, can that be operationalized in lowering the victim's actual losses and thus the quantification of damages for non-pecuniary loss?

Although, the predominant meaning given to the concept of mitigation imposes a duty upon the victim to act reasonably to lessen losses, what is commonly referred to as the 'avoidable loss' rule, this is not the only meaning. A subsidiary meaning is simply that it is any matter the wrongdoer can point to that demonstrates that the victim's loss is not as great as would first appear (McGregor 2014, para. 9-010, Waddams 2004, para. 15.10). The second meaning is applied in the torts of defamation, false imprisonment and malicious prosecution (McGregor 2014, para. 9-009, Tilbury 1993, para. [11027]). In both situations, the burden lies on the wrongdoer to adduce evidence to show that the loss could have been avoided, or that it did not arise. The law incentivizes an apology by allowing the wrongdoer to demonstrate that the victim's claims for non-pecuniary loss is not as great as first imagined because the wrongdoer made an apology, and/or, that the victim should have reasonably accepted the apology offered by the wrongdoer, where the wrongdoer can show that an apology typically reduces the non-pecuniary loss experienced by a reasonable victim placed in similar circumstances.

In analysing this area, one problem the researcher faces is that proponents of the law's treatment of non-pecuniary damages, have not been engaged in a dialogue with those scholars of the emerging science on hedonic losses who purport to measure how many of the losses encompassed with non-pecuniary damages assessment are experienced by victims of wrongdoing. For example, as yet there are no judgments of any court in Canada that have discussed the emerging literature on hedonic losses and subjective well-being. In a small way, this essay seeks to be part of opening that conversation.

In part one, and for the benefit of non-lawyers who may read this essay, I sketch out the treatment of non-pecuniary damages by Canadian courts. In part two, and largely for the benefit of lawyers, I sketch out the current state of research on hedonic losses. In part three, I introduce the place of an apology and whether it is capable of being monetized. In part four I discuss some of the implications concerning an apology offered as a means to mitigate non-pecuniary damages.

2. Part one – Non-pecuniary damages in Canada

In this part, I simply sketch out the range of harms that are encompassed in legal claims by victims for non-pecuniary damages. I do not suggest there is any particular logic or consistency in these categories of losses. Rather, they describe the current state of Canadian law. In fact, what I hope will become evident is that in many of these claims, the jurisprudential goal underpinning the award is not clear, i.e. whether it is compensation, deterrence, punishment, or vindication. That adds a further level of complexity in determining the impact that an apology should have as an act of mitigation beyond defamation claims. For instance, if deterrence is a dominant reason justifying an award of non-pecuniary damages, then an apology made public, even where the victim puts no value on it, may have an appreciable impact on the level of damages awarded. Equally, if the predominate rationale underpinning the non-pecuniary damages is compensation, then sincerity and acceptance by the victim may be important in determining quantification.

I classify non-pecuniary losses into ten categories. This classification maintains distinctions between personal and other forms of injury, property and economic, as well as a distinction between tort and contractual private law claims.

In personal injury claims, non-pecuniary losses are classified into, pain and suffering [1], loss of amenities [2] and, loss of expectation of life [3]. To these three, some have added disfigurement, although this can also be captured within loss of amenities and suffering. Pain refers to the sensate feelings that are brought to nerves and brain activity. Suffering covers insensate feelings such as fear, sadness, humiliation, embarrassment, and the like. Loss of amenities covers losses from the conscious realization that significant aspects of the victim's life are not going to be experienced in the same way as imagined pre-accident (*Andrews v. Grand & Toy Alberta Ltd.* 1978). The loss of ability to engage in one's hobbies, or employment, the loss of sexual function or pleasure; thus any impediment to normal activities may give rise to claims of loss of amenities. Finally, loss of expectation in life is the simple realization that a severely injured person will, actuarially speaking, experience a shortened life span.

Pure psychiatric losses [4] are accorded separate treatment by Canadian courts. There is a suspicion that the experience of such a loss is extremely subjective and therefore quantification would be fraught with difficulty (*Healey v. Lakeridge Health Corp.* 2011). These are losses that may have arisen from a physical injury to the body which is transitory, but where the psychiatric harm is more permanent. Or they may be permanent harm arising from a tort, breach of contract or equitable right. The loss may lead to a medical diagnosis, or be of a lesser form but still leading to feelings of embarrassment, humiliation, withdrawal, sense of doom, or powerlessness, etc.

Four more types of harm are all lesser forms of psychiatric losses and are characterized by the fact that they are transitory in nature and more common in experience, and may arise from both contractual and tortious actions. They are physical inconvenience and discomfort [5], mental and emotional distress [6], loss of enjoyment including feelings of disappointment [7], and moral damages [8] - damages that flow from the harm inflicted in the manner of dismissal from employment.

Finally, there are harms associated with assaults to dignity [9], and loss of reputation [10].

The treatment at law of these types of losses follows no particular conceptual clarity or consistent theoretical principles. On [1] to [3], I (Berryman 2016) have written elsewhere on the treatment of Canadian courts, which, although supposedly espousing adoption of a 'functional' approach to quantification, have, nevertheless, created a tariff approach similar to other common law jurisdictions. Most jurisdictions accept that damages for non-pecuniary losses arising in personal injuries should be limited to what is often termed, an 'arbitrary and conventional' amount (*Andrews v. Grand & Toy Alberta Ltd.* 1978, p. 261, *Lindal v. Lindal* 1981). The reasons for this are varied, but most focus upon the apparently unassailable fact that no price can be put on pain, that no amount of money can restore the lost function, and that the economic effects of large awards will distort the efficiency and cost effectiveness of insurance or welfare systems without any commensurate gain.

With respect to [4] psychiatric losses, Canadian courts insist upon a certain objective threshold that the injury results from a medically recognized psychiatric illness before awarding damages. This threshold is imposed because, as expressed by Sharpe J. in *Healey v. Lakeridge Health Corp.* (2011, para. 65):

As has been repeatedly stated in the case law, there are strong policy reasons for imposing some sort of threshold. It seems to me quite appropriate for the law to decline monetary compensation for the distress and upset caused by the unfortunate but inevitable stresses of life in a civilized society and to decline to open the door to

recovery for all manner of psychological insult or injury. Given the frequency with which everyday experiences cause transient distress, the multi-factorial causes of psychological upset, and the highly subjective nature of an individual's reaction to such stresses and strains, such claims involve serious questions of evidentiary rigour. The law quite properly insists upon an objective threshold to screen such claims and to refuse compensation unless the injury is serious and prolonged. Even critics of the current rule tend to agree that it is conceptually sound to limit compensable claims for psychological harm to those that are serious. Indeed, as I have mentioned, the appellants themselves do not dispute the need to impose some threshold.

Treatment of [5], [6], [7], and [8] becomes very complex. If the damages flow from a tort claim, Canadian courts have not imposed a similar cap to that applied in personal injury claims that engage [1], [2], and [3] type losses, resulting in quite large awards being made. For example, in a tort claim of negligence in the way a university professor had mishandled a student's plagiarized essay resulting in her name being added to a child sex abuser registry, and thus, adversely affecting her employment prospects and her chance to become a social worker, the Supreme Court of Canada (*Young v. Bella* 2006) did not overrule a jury's award of \$430,000 for losses described as anxiety, embarrassment, insomnia, paranoia and depression. However, the court did caution that had it been trying this case *de novo* it would not have awarded this amount.

Categories [5], [6], and [7] are often engaged in suits brought in contract law. In Canada, such awards are made where they can be brought within the *Hadley v. Baxendale* (1854) principles regarding remoteness of loss, and that the type of harm that has given rise to these forms of loss is within the reasonable contemplation of the parties at the time of contract formation, and that the risk of harm is a risk undertaken in the terms of the contract. However, here the damages have been modest in comparison to tortious awards (*Sun Life Assurance Co. v. Fidler* 2006). The fact that such awards are made subject to the rules on contemplation further constrains the level of awards and confirms the common law's suspicion about how these forms of loss are actually objectively experienced.

'Moral damages' under [8] may reflect an idiosyncratic Canadian response to damages arising from wrongful dismissal suits, and where Canadian law now incorporates a notion of good faith dismissal. In this way, there is a distinction drawn between the feelings and annoyance that arises from the fact of dismissal, which in Canadian law is always a risk to an employee subject only to receiving reasonable notice, and the manner of dismissal, where an employer must maintain respect for the dignity of the employee (*Honda Canada Inc. v. Keays* 2008).

Damages for assaults on a person's dignity [9] have become increasingly important in the law. Evidence of this importance is found in Canada and the recent creation of a private law right to privacy (*Jones v. Tsige* 2012), attention paid to breach of fiduciary duty beyond pure economic claims (*M.(K.) v. (M.(H.))* 1992, *S.Y. v. F.G.C.* 1997), and development of an action based on intentional infliction of mental distress, particularly in employment contracts (*Correia v. Canac Kitchens* 2008, *Boucher v. Wal-Mart Canada Corp.* 2014). I (Berryman 2004) have argued elsewhere that damages for loss of dignity should be unpacked; that dignity covers a spectrum of values from the worst infringements of human dignity that arise in genocide through to the over-inflated sense of self-importance embodied in the modern cult of celebrity. Within this spectrum the forms of harm also range from a shared loss to our entire humanity indicative in extreme assaults to basic norms of human dignity, through to minimal harm caused when the bubble is pricked of the celebrity who has traded both privacy and dignity for financial gain. Damages awarded to those who fall into the middle of the continuum, cover at least two types of loss; the actual feelings of diminished self-worth of the individual which in fact may manifest itself in identifiable changes in personality (i.e. transient depression), and what is classically thought of as non-pecuniary harms of the like [5] to [7]; and two, the decline in

reputation and esteem in the eyes of others, what is called by some vindictory losses, and what I (2004) called referential losses.

Awards of damages for loss of reputation [10] have traditionally been regarded as 'damages at large', according a significant discretion to the trier of fact (jury or judge) to determine amount (Brown 2016 Vol. 8 25.2). However, the damages are still justified as compensating the victim for a real loss in personal reputation. Only recently, these damages have been recast in some jurisdictions as embracing a vindictory purpose. Thus, the new authors of *McGregor on Damages* (McGregor 2014) now have a separate chapter devoted to vindictory damages under which damages for defamation are included.

Damages awarded within the ten categories just outlined are still justified as fulfilling a compensatory goal, compensating a real harm experienced by the victim. This is easiest to see in the first three categories where, for example, we can readily empathise with a quadriplegic victim and the loss he or she has experienced as a result of a catastrophic and life changing event. It is perhaps weakest at the other end, the defamation claim. For example, in one of the highest damage awards for defamation in Canada, the victim was awarded \$300,000 non-pecuniary damages (Also awarded were \$500,000 aggravated damages and \$800,000 punitive damages) (*Hill v. Church of Scientology of Toronto* 1995). Between the filing of the claim and its eventual resolution before the Supreme Court of Canada, the victim was appointed a judge of the Ontario High Court of Justice. It would appear his actual compensable loss of reputation did not injury his reputation sufficient to throw doubt on his suitability for judicial office. I do not mean to suggest that the award was not warranted, only that it was underpinned by other goals, vindication, deterrence and punishment, rather than satisfying a need for compensation of a real decline in reputation. Damages awarded to protect dignity are often underpinned by deterrence, punishment and vindication rationales.

3. Part two – How do we experience non-pecuniary losses?

The common law has had a long-standing aversion to absorbing insights from psychiatry and psychology on human behaviour into its doctrines (Shuman 1993, p. 132, Depianto 2012, p. 115). The current dominant theories of private law, economic analysis, rights-based theories and corrective justice, have little space for a deeper understanding of human behaviour despite the fact that they are underpinned by certain assumptions as to how humans behave; wealth maximizing and deterrence in economic theories, and justice pining and moral equilibrium seeking in the other two.

I now draw a narrower focus on the type of non-pecuniary loss I address in the remainder of this essay. In part one I drew a distinction between pain, being a sensate loss, and suffering an insensate loss. I now want to leave pain aside.¹ Pain is something over which increasing refinements in health care can manage and thus the debilitating effects of pain are mitigated. However, I readily admit, as has Canada's Supreme Court in its recent decision (*Carter v. Canada (Attorney General)* 2015) on physician assisted death,² that there can become a point in time where pain, and the thought that it can never be alleviated, becomes unbearable.³ I also wish to leave aside non-pecuniary loss associated with loss of expectation of life. In some jurisdictions such losses are unrecoverable as a result of statute, and in others there have always been concerns with distinguishing between damages that flow from the actual loss of temporal expectations of life, and the feelings associated with

¹ This is a difficult separation to make because there is an inextricable link between how chronic pain is experienced and the impact on psychological well-being. See M. Schatman and J. Sullivan (2010).

² The court accepted that the plaintiff feared a life wracked with pain and a painful death if not given the right to determine how she should be able to end her life with a physician's assistance.

³ Although it is interesting to note that individual emotional responses associated with pain may induce a rise in positive feelings. See Bastien *et al.* (2014).

the fear of having a shortened life span. Under loss of dignity, I also drew a distinction between actual losses of dignity as against the feelings associated with a loss of dignity. The former loss is one more likely to be protected by damages awarded to vindicate the right than to compensate for its invasion. Thus, we are left with the feelings of suffering, feelings of a loss of dignity, and the other feelings associated with loss of amenities, and varying gradations of inconvenience, annoyance, frustration, anxiety, and unhappiness. These types of losses are what are now encompassed within the term hedonic losses and engage the new understanding drawn from psychiatry and psychology and the study of happiness.

The 'happiness revolution' (Swedloff and Huang 2010) and the science of happiness was popularized by the Nobel laureate, Daniel Kahneman (Kahneman *et al.* 1999b),⁴ and catapulted into legal scholarship by Cass Sunstein (2008).⁵ The scholarship promises a way to more critically approach what is done when compensating for non-pecuniary losses; and in fact has lead Sunstein to suggest controls on jury awards in the United States, somewhat mirroring approaches in Canada, although not quantified on the basis of adopting a 'functional' approach.

To operationalize hedonic loss we must know what and how it is being measured. Let us start with what is being measured. Hedonic losses are premised on the basis that all persons have a certain level, or baseline, of happiness and psychological wellbeing, and that happiness has both an affective dimension (our emotional responses – the subconscious) and a cognitive dimension (what we understand makes us happy – the conscious). Controversial in the literature is whether every individual has a definite set-point of happiness which does not vary over time, unless subject to harm, injury and trauma, or, whether the set-point of an individual will naturally, or can be changed through, for example, social policies, over a person's lifetime.

Harm, injury and trauma disturb our baseline of happiness. A return to our individual baseline is affected by our own personal resilience. We all know of the miraculous healing powers of the physical body over time; it should then come as no surprise that the psychological body exhibits similar recuperative powers. Resilience is the phenomenon of the ability of an injured party to 'bounce back', and to record similar levels of happiness after a period of recuperation (Dunn *et al.* 2009, Bonanno 2004). Similarly, just as we know that exercise and good health can moderate physical bodily injury, we can also build capacity to heal the psychological body, particularly in creating personal and community relationships. One influential model of resilience (Richardson 2002) suggests that a traumatic event will be met with four post-trauma outcomes, the difference between outcomes being affected by the degree to which resilience is present in the individual. Under this model a person may, (a) make a resilient integration (accept limitations imposed by the trauma but develop new interests), (b) reintegrate back to homeostasis (life activities return to the state pre-trauma), (c) reintegration with loss (accept loss but redefine similar positive outcomes i.e. substitute marathon running with wheelchair marathon), and, (d) dysfunctional reintegration (suffer further decline in terms of depression, isolation, drug dependency etc.). Between these four outcomes the greatest influences on building resilience are (a) psychological and dispositional attributes (an individual's beliefs that they can get through the trauma), (b) family support and cohesion, and (c) external support systems (White *et al.* 2008). Thus, individual resilience can be built both before and post trauma to ameliorate the corrosive effects of trauma on the psychological body.

A second, and controversial influence on happiness is the phenomenon of adaptation. Adaptation describes the ability of the psychological body to find alternative avenues

⁴ Hedonic psychology is described as: "the study of what makes experiences and life pleasant and unpleasant. It is concerned with feelings of pleasure and pain, of interest and boredom, of joy and sorry, and of satisfaction and dissatisfaction. It is also concerned with the whole range of circumstances, from the biological to the societal, that occasion suffering and enjoyment." (Kahneman *et al.* 1999a, p. ix)

⁵ A very good introduction for legal scholars and jurists is provided by Christopher Essert (2010).

in pursuit of happiness and well-being. Many studies support the notion that following a life changing event leaving some permanent impairment that, after an initial drop in happiness, people do adapt and return to record similar, although not identical, levels of happiness because they have found new ways to make life meaningful and fulfilling (Oswald and Powdthavee 2008a, Bronsteen *et al.* 2008, Graham and Oswald 2010, Boyce and Wood 2011). Adaptation remains controversial, not in terms of observation of the phenomenon, but, in terms of the extent of adaptation to return people to their set-point. Critics (Lucas 2007) argue that adaptation is not anywhere near as extensive in restoring a person as proponents claim.

Let us now turn to how happiness is measured. Happiness focuses upon subjective well-being (SWB); the concepts often being thought of as synonymous. The concept is a broad one covering a range of emotions and feelings. Nor is the range of emotions strictly linear, positive pleasant emotions don't balance negative feelings, and eliminating suffering doesn't necessarily bring a corresponding increase in pleasure. Existing studies that attempt to measure SWB, and the most popular one (Diener *et al.* 1985), use a 'satisfaction with life scale' applied to five questions.⁶ An alternative measure (Kahneman and Kruger 2006) asks a single question, "How satisfied are you with life, all things considered?" The validity and reliability of these measurements have been subject to criticism (Swedloff and Huang 2010) although most accept that SWB is real and that fluctuations are capable of measurement.

An appreciable impediment to the measurement of SWB to victims of wrongdoing is the concept of focalism or the focusing illusion. Cass Sunstein (2008) has written on this phenomenon. It describes the notion that if our attention is drawn to a particular facet of loss, we will elevate its importance to our overall happiness, where, if not fixated, we would say that the particular facet plays little importance to our overall happiness (Schkade and Kahneman 1998, Kahneman *et al.* 2006, Smith *et al.* 2006).⁷ Thus, a person asked to record their level of SWB in light of a particular injury or traumatic event will in all likelihood give a lower measure of SWB than if they had been asked without reference to the harm or trauma. The focusing illusion is not confined to the injured; it will also influence the trier of fact when asked to assess what they believe is the likely impact of the harm on the victims well-being. Our compassion, and how we internalize this phenomenon, provides another layer of complexity.

A further complication adding to the measurement of victims of some forms of injury and trauma is the effect of memory. Because measurement requires the person to recall what their SWB was pre-accident, it will be subject to recall bias where a person over or under exaggerates how they felt before the injury. Their judgment may be affected by an illusion of how they reconstruct their earlier life (Smith *et al.* 2008, Swedloff 2014).

What conclusions can we draw from the psychology of happiness and the assessment of non-pecuniary damages? For Sunstein (2008, p. S182), who accepts that SWB is restored either fully or partially through adaptation, and that juries will misunderstand the impact of adaptation, damages for non-pecuniary loss should be subject to standardization rather than left to jury assessment. Sunstein (2008) also suggests that in following this approach, another loss may be realized, the loss of a 'capability' to have an alternative outcome in life. We may not notice an appreciable

⁶ The authors apply a seven point scale to the following five questions:

- [1] In most ways my life is close to ideal
- [2] The conditions of my life are excellent.
- [3] I am satisfied with my life.
- [4] So far I have gotten the important things I want in life.
- [5] If I could live my life over I would change almost nothing.

⁷ The concept of priming a response was originally demonstrated in research by Strack *et al.* (1988) that asked a group of students how happy they were with their life in general, followed by a question on how frequently did the person date last month. Reversing the order of the questions considerably influenced the general question on happiness.

loss of SWB when we lose a limb, but we have lost a capability that reduces our capacity to have a fully satisfying life and to which we attach value.⁸ Bagenstos and Schlanger (2007) take the research further, suggesting that courts should no longer award non-pecuniary damages for disabling losses on the belief that such losses do not inhibit a person's capacity to enjoy life and that such awards increase the stigma attached to people with disabilities.

For others, attempts have been made to equate declines in SWB to a monetary amount. Thus, Oswald and Powdthavee (2008b) have suggested an amount can be placed on the decline in happiness associated with loss of a loved one⁹, or onset of disability (Oswald and Powdthavee 2008a). These figures have suggested to others that there is a very strong cost effective argument to be made to extend psychotherapy to many victims to alleviate negative feelings associated with injury and trauma. Indeed, there is a very strong case to be made that this therapy is extremely effective (Boyce and Wood 2010). Such is the effectiveness that one wonders if it should not be an expected legal act of reasonable mitigation in reducing the incursion of non-pecuniary losses in personal injury cases.

From a Canadian vantage, the new psychology on happiness may support the presence of a cap in that the actual compensable damages may well be lower than what has hitherto been thought as flowing from catastrophic personal injuries. Because the cap was imposed to effect a policy decision to prevent spiralling insurance costs, the actual number of litigants impacted by the policy may be lower than previously thought. It is easier to support a policy decision of a cap where it only has an impact on a few cases at the margins of acceptable damage awards. It may also support adoption of the 'functional' approach (although I (Berryman 2016) have argued elsewhere, it is not really applied) to quantifying non-pecuniary losses in personal injury cases because it draws a focus on those aspects that support building resilience to non-pecuniary losses that result from the impact of physical disabilities. For less severe forms of non-pecuniary loss, categories [5] to [7], the evidence must suggest that these harms are of an extremely transient nature. This must also put into question the compensatory rationale that underpins these awards and that we should look to other jurisprudential underpinnings; punishment, deterrence and vindication, to explain these awards. Of course, nothing in the research on happiness addresses the root issue of incommensurability. However, because the research may demonstrate that the intensity of feelings of loss is lessened and duration more transient, this then further undermines the need for monetary redress if the aim of the award is purely compensatory.

4. Part three – The psychological experience of an apology and can it be quantified?

The working hypothesis of my argument is that an apology will show measurable change in the long-term SWB of the victim, or return the victim to their individual set-point more quickly. An apology should show a positive change in SWB where it aids adaptation and/or builds resilience. It might also intensify a momentary downturn in SWB where the apology fuels a focusing illusion by causing the victim to relive painful memories of the event causing harm. There may also be a change in the SWB of the wrongdoer. This would arise where an apology raises feelings of compassion, contrition, regret, remorse and release from guilt in the wrongdoer, or where the victim makes an act of forgiveness to the wrongdoer. These changes would

⁸ The notion of a capability loss is supported by research on persons who have had a colonoscopy or require dialysis treatment later in life. These studies show that patients do not show a decline in life satisfaction, nevertheless, if asked what they would give up not to have to live with a colostomy bag or ongoing dialysis, the invariable answer is an appreciable amount. See George Loewenstein and Peter Ubel (2008, p. 1799).

⁹ And if you wanted to know, the death of a child was placed at US\$230,000 in today's values to restore an equivalent level of happiness.

begin to answer the question I posed at the commencement of this essay, what is the worth of an apology?

If we could measure a positive change in SWB of a victim who has suffered loss as a result of wrongdoing at a point both before and after an apology was made, then we would have an argument to support the incentivizing of tortfeasors to make an apology. To give this action legal significance requires the ability to either demand that an apology be given as part of a court order, or to monetize SWB so that it can be indirectly induced by lowering the damages paid for non-pecuniary loss, either because the wrongdoer can show that the victim's loss is in fact less, or because a reasonable person would have accepted the wrongdoer's apology to lessen the losses experienced as a reasonable act of mitigation. To operationalize the incentive requires the issue of incommensurability to be addressed.

Daniel Shuman (2000) was the first to bring to light the role that an apology may have on awards of damages for the emotional harm caused by the wrongdoing of others. Shuman premised his argument on the incommensurability of damages and emotional loss. He explored alternative rationale for these awards, and, interestingly, took a critical approach to the 'functional' account, on the basis that to identify substitute pleasures was morally indefensible because it cheapened and demeaned these losses.¹⁰ He also argued that the substitute pleasure principle was antithetical to clinical research practice on grieving, that suggests that it is most effective when the person confronts the grief rather than suppresses it. Shuman also pointed to the ethical problem of trying to value an apology. How could you ethically randomly pick some victims and compel wrongdoers to apologize, and not others, simply to measure the long-term effect of the apology? Shuman built his argument on evidence, both laboratory and anecdotal, about the therapeutic value of an apology; that a victim's anger was alleviated, and that forgiveness induced by an apology hastened emotional recuperation. Ultimately, Shuman's argument was to enable juries to take account of an apology as part of the damages quantification exercise, as distinct from determining liability.

The position following Shuman's article does not appear to have changed, and I have not uncovered any empirical research that seeks to demonstrate a connection between an apology and changes in a victim's SWB. There is now extensive research on the psychological impact of an apology as part of what motivates victims to bring suit, settle, or mediate, and what they feel about the civil justice system and the particular wrongdoer (Carroll *et al.* 2016, Vines 2015, 2016). Allan (2008, p. 375) has written to the effect that with respect to intangible losses, a functional apology¹¹ is one in which, "wrongdoers affirm that they are liable for the harm done to the victims and acknowledge that the victims are not at fault." This research addresses the correlation between giving an apology as a way to alleviate victim's anger, bitterness and hatred toward the wrongdoer. It also demonstrates the conditions necessary to invoke forgiveness in the victim and the positive feelings that it generates toward the wrongdoer (Allan 2007). This evidence is consistent with the health model in psychotherapeutic writing that holds where a victim gives up desires for retribution, anger and resentment, there is a consequent reduction in emotional distress and anxiety (Scobie and Scobie 1998). While the alleviation of all these feelings held by a victim may do much to assist healing¹² they do not necessarily demonstrate that a victim's SWB is consequently improved or restored more quickly.

¹⁰ Although he confined his analogy to non-pecuniary awards given in situations of fatal loss of a child, parent or spouse.

¹¹ A functional apology is one that satisfies three components; affirmation – a cognitive requirement in which wrongdoer explains his or her wrongful behaviour and admit liability; affect – a wrongdoer's emotional response evident in feelings of remorse; and action – attempts by the wrongdoer to repair the harm by, for example paying compensation, or taking action to ensure the harm is not repeated in the future.

¹² For an example of a study that demonstrate the healing effects of an apology in a legal setting see Allan *et al.* (2010).

Simply put, anger and happiness are similar to sadness and happiness (Larsen *et al.* 2001) and operate in a bivariate not bipolar fashion.

Shuman (2000, p. 189) asserts that, "while apologies may not always help, there is no evidence that they make matters worse." Shuman argued for the therapeutic potential of an apology to mitigate non-pecuniary damages. Subsequent research (Robbennolt 2003, p. 495) may suggest some revision to this stance, and in fact an apology that doesn't meet some standard of sincerity, or is genuine, can act to exacerbate the victim's well-being, particularly where the injury is severe and the culpability of the wrongdoer not in doubt. This research, which is admittedly not based on extensive sampling, would suggest that care must be taken to ensure that an apology has the requisite attributes of sincerity.

Let us assume that an apology does have a positive impact on SWB, by creating positive feelings, aiding adaptation and building resilience. Is the value of that increase sufficient to warrant judicial attention? We know from Oswald and Powdthavee (2008b) that the decline in happiness experienced for some forms of loss associated with personal injury can be equated to a monetary equivalent at a systematic, if not personalized, level. We also know from another study (Hulst and Akkermans 2011) that looked at the loss of a loved one, where the payment of an amount of money serves a symbolic function in aiding a family to find closure and acknowledgement of social norm violation, and that this is important for emotional recovery. This study reviewed how both Dutch and Belgium family members who lost a family member through crime or accident perceived the payment of a sum of money to meet their emotional needs. The study was part of research aimed at seeing whether the Dutch government's proposal to provide modest compensation to family members of crime or accidents would serve to meet secondary victims' emotional needs. The research did not seek to quantify the amount necessary, but concluded that even modest amounts would appear to achieve results. Interestingly, the authors suggested that an apology would be another way, either on its own, or in conjunction with a modest payment, to achieve the same results (Hulst and Akkermans 2011, p. 259).

Clearly these studies are not measuring the same attributes. The former is measuring the degree of happiness a surviving family member would receive from the victim if they had not been fatally injured. It seeks to monetize that loss and is based on UK data. The latter study accepts the loss, but seeks to identify what can be provided to speed emotional recovery, and is closer to what I seek to illustrate. But the study did not seek to quantify the amount, and it was a study that took place in a legal system that has hitherto not awarded damages for such loss, the Netherlands. However, both studies do confirm a relationship between monetary payments and changes in emotional well-being and allude to the positive benefits of an apology in changing SWB.

Even if these studies were able to measure SWB, the former sought to provide a methodology for quantifying SWB rather than empirical measurement, and the latter accepted self-reporting of emotional needs having been met, neither study goes to the root cause of dealing with the incommensurability of SWB. We are left with the conclusion, identical to Shuman, that an apology likely does no harm, and probably effects benefit, even if we can't measure it, and therefore can't accurately quantify what impact it should have on monetary awards for non-pecuniary losses.

5. Part four – Implications

The current empirical evidence suggests that the decline in SWB experienced by a person who suffers a form of loss that has traditionally been compensated by an award of non-pecuniary damages may not be as great as formally thought. This fact alone must suggest that courts should begin to systematically review the awards of non-pecuniary damages, if not to reduce the levels, then at least to achieve consistency across the forms of actions that generate similar losses compensated by

non-pecuniary damages. For example, in Canada the level of compensation provided in *Young v. Bella* (2006), mentioned above, seems inconsistent with awards given for similar level of anxiety and frustration in contract cases where the awards are very modest, or the cap applied in personal injury cases where one would assume that the level of suffering experienced is greater than that of the victim in *Young v. Bella* (2006). Of course, consistency does not necessarily imply lower levels of awards, although I would argue that the insurance and social cost arguments that animated the Supreme Court of Canada to impose the cap in personal injury cases have application in other civil disputes where the wrongdoer's damages is likely to be borne by insurance.

The empirical evidence suggests that there is reason to believe that a person's SWB will be improved upon receiving an apology. The empirical evidence does not yet overcome the problem of how to monetize SWB, nor is there evidence on how to scale the impact of an apology on SWB. For instance, we cannot reliably say that a person who receives a sincere apology feels one third, or one quarter, or one tenth happier (or correspondingly less unhappy) than what they would have felt without an apology. Even if we did have some objective scale to measure the impact of an apology on a victim's SWB this would not overcome the incommensurability problem of both SWB or how to monetize the value of an apology.

Surprisingly, there are a number of actions where Canadian courts already admit that an apology will mitigate non-pecuniary, aggravated and punitive damages. Defamation has already been mentioned (Brown 2016, Vol 8, para. 25.4(2)). But in addition, the intentional tort of assault, the action of breach of fiduciary duty (*S.Y. v. F.G.C.* 1997 at [57]), and now the new tort related to privacy, intrusion upon seclusion (*Jones v. Tsige* (2012 at [81])), must be added. The last action is interesting, because the specific mention of an apology by the Ontario Court of Appeal in *Jones v. Tsige*, as mitigating general damages (synonymous with non-pecuniary damages), was included in an enumerated list of factors taken from Manitoba's Privacy Act¹³, which creates a statutory action for infringement of privacy, and adopted into Ontario's common law tort of intrusion upon seclusion. In some of these claims, proof of actual loss is not an element of the claim's viability and it is assumed that loss has occurred. Common to all these actions is that the intent of the wrongdoer can be a contributing factor either resulting in aggravated or punitive damages being added to the award. Similarly, an apology can mitigate both aggravated and punitive damages, and appears to impact upon the non-pecuniary damages. However, also common to these causes of action is the fact that a multiple of underlying rationales are used to justify the levels of damages awarded. For example, awards of non-pecuniary damages in breach of fiduciary duty cases are often justified on deterrence grounds, designed to signal wrongdoing in situations where the victim is in a relationship of vulnerability and power imbalance. Similarly, in *Jones v. Tsige* the award was described by the court as modest and justified on grounds of vindicating the rights of the victim. The court in fact established a range for such damages described as 'moral damages', and not to exceed \$20,000.

In the causes of actions just described, courts have incentivized an apology by specifically including it as one of a number of factors that influences the quantum of general damages. The immediate impact of such action is to change legal practice. Counsel advising a wrongdoer in such circumstances will strongly urge a wrongdoer to issue a timely apology, particularly where the jurisdiction has an Apology Act that eliminates the fear that any apology given will be treated as an admission of liability (In Ontario see *Apology Act* S.O. 2009, c 3, s.2(3)). An alternative way to incentivize apologies is for a wrongdoer to give an apology and argue, based upon the empirical evidence discussed above, that the victim's non-pecuniary losses are in fact lessened when a sincere apology has been given, and under circumstances where a reasonable

¹³ C.C.S.M. c. P125. Legislation in British Columbia, Saskatchewan and Newfoundland also creates a tort of privacy but only Manitoba enumerates principles for quantifying damages, s.4(2)(e).

person would have accepted such an apology. Should courts act as described in the former, or accede to the arguments of wrongdoers in the latter, in a wider group of legal actions, particularly those based on negligence?

Arguments over the incommensurability of non-pecuniary losses have been used to justify a variety of policy arguments concerning quantification of non-pecuniary damages. These arguments are most pronounced in state accident compensation schemes, which often limit such awards to modest amounts (Berryman 2009). But as mentioned above, non-pecuniary damage awards for various affronts to dignity have also been the subject of policies designed to prevent large damage awards and are often described as amounting to a conventional sum which then sets a tariff against which other awards are measured (Hammond 2010). Are there compelling policy arguments to support the incentivizing of apologies that could justify lowering the actual damages awarded? Here, the jurisprudence supporting the adoption of apology legislation may prove compelling (Kleefeld 2007, Carroll *et al.* 2015). The common law position assumed that an apology made in the context of a negligent act would be seen as an admission of fault and therefore should never be given. This approach was viewed as being antithetical to moral and social beliefs, although this remains a point of contention (Cohen 2002, Alter 1999, Getz, 2007). Most people wish to apologise where harm has resulted to another, even without fault, as a means to restore harmony, to show empathy with the victim, and to alleviate anger, frustration, and annoyance (Tavuchis 1991, ch.1). Similarly, evidence shows that victims wish to receive an apology as a part of their healing, and acknowledgement by the wrongdoer of being party to the victim's loss (Vines 2015, p. 627-629). To varying degrees, the apology legislation allows for that activity without the apology amounting to an admission of guilt. Apology legislation is premised on the belief that social good comes from making an apology. If legislatures have given their imprimatur to apologies, is this not reason enough for courts to modify common law doctrine to do likewise in a more systemic way?

As mentioned above, state accident compensation schemes often curtail or circumscribe damage awards for non-pecuniary losses (Berryman 2016). The usual argument is that the costs of the awards do not confer sufficient commensurate benefit to victims and that the funds so expended would be better spent on enhancing the pecuniary claims of victims or lowering the cost of the compensation scheme to participants. For economists, the argument that few, if any, would insure for such compensation *ex ante* the loss is used to suggest that such awards over compensate (Chapman 1995). The law has no interest in providing levels of compensation in excess of the true compensable loss. Such a result is inefficient and wasteful.

I believe that the moral/social good, and economic policies arguments just mention are sufficiently strong to suggest that courts should alter common law doctrine and allow an apology to mitigate non-pecuniary damages in a larger number of actions than is currently practiced. The extent or quantum to which an apology should mitigate non-pecuniary damages is something that is best left to courts to determine on an individual factual inquiry of each case, as is the practice in defamation and other intentional torts.

6. Conclusion

The common law has held a degree of scepticism toward claims for non-pecuniary losses. This scepticism is borne on a view that such losses are highly subjective, and even if there is judicial sympathy to the realisation of their incursion, the incommensurability of the loss poses a significant impairment to any award. For these reasons, the common law has responded by adopting a number of policy arguments favouring constraints on awards save in some exceptions, i.e. defamation. New studies on hedonic losses offer a possible way to impose a degree of objectivity on how some forms of non-pecuniary losses are experienced by victims, although such studies will not overcome the incommensurability problem.

Writing in 2009, Professor Craig Brown (2009) argued that the new apology legislation adopted in Ontario was conducive to the goals that underpin tort law. On the goal of compensation, he suggested that the impact of the apology legislation would be to “create an atmosphere conducive to compromise whereby the plaintiffs may be willing to accept payment of, say, their economic losses (but no more) in full settlement” (Brown 2009, p. 133). Brown saw the Act as conducive to early settlement of negligence claims. He confined it to settlement of economic claims, noting the research that suits involving non-pecuniary losses and punitive damages adds considerable complexity to the settlement process resulting in delay and the need for litigation. In a similar vein, a small change in how courts perceive the impact of an apology as an element of mitigating non-pecuniary losses may also be conducive to expediting trial settlement practices, particularly of negligence claims. I have argued that the added incentive of potentially lowering non-pecuniary damages, as the result of a wrongdoer making a sincere apology is a worthy objective equally aligned to the compensation goal of the common law. This approach is justified, either, because the loss as experienced by the victim is actually lessened as a result of an apology. Or, because the weight of policy arguments supporting apologies, as well as the policy arguments that justify constraints on non-pecuniary damages, out weight any arguments that require continued adherence to current levels of non-pecuniary damages in the name of scrupulous adherence to the compensation principle.

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