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The Question of the Constitutionality of Non-Economic Damage Caps in Personal Injury Cases in Canada

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I. INTRODUCTION

In the interest of equal protection and justice, injured plaintiffs are no longer limited in their ability to recover damages for their pain and suffering. The abolition of previously imposed non-economic damage caps in medical malpractice cases throughout the United States marks a dynamic example of the courts' shift towards favoring more complete compensation for the most severely injured plaintiffs over the state's interest in discouraging exorbitant damage awards and managing insurance premiums. Development of the law tends "to generate litigation in which the limits of revised principles are tested."[1] The issue of the legality of non-economic damage caps in personal injury cases demonstrates the principle that developments in the legal system tend to result in legal disputes.[2] Questions regarding the constitutionality of non-economic damage caps have been continuously litigated throughout both the United States and Canada. This has led to significant controversy between the most severely injured plaintiffs seeking compensation for their pain and suffering and the defendants being held liable in such cases. In the case of non-economic damage caps, the courts in Canada reference legal developments in the United States when resolving its own similar legal issues.

This article explores the current constitutionality of caps on non-economic damage awards in medical malpractice actions in Florida

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[1] Law Reform Commission of British Columbia, Report on Compensation for Non-Pecuniary Losses, 76 L.R.C. 1, 5 (1984).

[2] *See id.*

and across various Canadian provinces.[3] Part I provides an introduction to the current non-economic damage caps climate and the most significant decisions shaping that climate. Part II discusses the Supreme Court of Florida's decision in *N. Broward Hosp. Dist. v. Kalitan*,[4] and the precedent relied on by the *Kalitan* court, *Estate of McCall v. United States*.[5] Part III begins with a comparative introduction to the United States and Canadian legal systems and discusses the background and precedent that established the non-pecuniary damage award caps in Canada. Part IV compares the constitutional challenges made to the caps in both Florida and Canadian provinces, and the court's' reasoning in each case. Part V discusses the likelihood that the Supreme Court of Canada will similarly find non-pecuniary damage award caps in medical malpractice actions unconstitutional as an Equal Protection violation. This article concludes with a prediction that Canada will follow in the footsteps of the United States and rule that non-pecuniary damage award caps are unconstitutional.

The United States plays a central role in the controversy surrounding non-economic damage award caps and has long been considered the trendsetter for the judicial systems of other countries 'on this issue.[6] In the United States, non-economic damages, also referred to as non-pecuniary damages, are characterized as non-monetary, intangible losses suffered by an injured plaintiff.[7] Non-economic damage awards are intended to "make the plaintiff whole" by compensating the plaintiff for "non-pecuniary harm caused by malpractice."[8] Non-economic damages and non-pecuniary damages are

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[3] *See generally* N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49 (Fla. 2017).

[4] *Id.*

[5] *See* Estate of McCall v. United States, 134 So. 3d 894, 894 (Fla. 2014).

[6] Selina Koonar, *Justice Systems in Canada and the United States*, http://apps.americanbar.org/buslaw/committees/CL983500pub/newsletter/200906/koonar.pdf (last visited Oct. 2, 2018) ("Canada's legal system is quite open to using case precedents from both England and the United States when there are insufficient ones in the realm of Canadian law.").

[7] *See* Allyson Fish, *Noneconomic Damage Caps in Medical Malpractice Litigation: Finding a Solution That Satisfies All Affected Parties*, 17 NEXUS: CHAP. J. OF L. & POL'Y 135, 136 (2012) (internal quotation marks omitted).

[8] *Id.*

one in the same.[9] Non-pecuniary harm includes the following: "pain and suffering, mental and emotional anguish, inconvenience, decreased quality of life, and loss of consortium, society, companionship, love, and affection."[10] Non-economic damages "cannot be compensated solely based on the principle of *restitution in integrum*,"[11] meaning that the plaintiff cannot be restored to his or her original position had no injury been suffered.[12] As non-economic damages are not quantifiable, the calculation of non-economic damage awards is difficult and uncertain.[13] Further, "[s]ince no 'objective yardstick' exists for gauging non-pecuniary damages into monetary value, this form of damages is characterized by vastly lavish claims."[14] The jury may award non-economic damages at its discretion based on the circumstances of each individual case.[15] In an effort to counterbalance this wide discretion, legislatures have created non-economic damage caps in medical malpractice claims in an effort to limit the plaintiff's recovery and ensure judicial uniformity and fairness.[16]

In *Kalitan,* a Florida plaintiff, Susan Kalitan, brought a medical malpractice action against multiple defendants, seeking damages for severe injuries suffered after carpal tunnel surgery.[17] The case was first filed in June of 2008, and the trial court reached a' verdict in June of 2011.[18] The jury awarded Kalitan more than USD $4.7 million; however, the trial court reduced the non-economic damages

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[9] *Id.*

[10] *Id.*

[11] Donna Benedek, *Non-Pecuniary Damages: Defined, Assessed and Capped,* 32 R. J. T. n.s. 607, 616 (1998).

[12] *What is RESTITUTIO IN INTREGRUM?,* THE L. DICTIONARY, https://thelawdictionary.org/restitutio-in-integrum/ (last visited Oct. 1, 2018).

[13] Fish, *supra* note 7, at 137.

[14] Benedek, *supra* note 11, at 617; Herbert Kritzer, Guangya Liu & Neil Vidmar, An Exploration of "Noneconomic" Damages in Civil Jury Awards, 55 WM. & MARY L. REV. 971, 976 (2014) ("Critics claim that the non-economic portion of awards if often much greater than the actual economic loss, suggesting that emotion rather than reason influence juries."); Lee v. Dawson, [2006] B.C.J. No. 679, para. 8 (Can.) (awarding CAD $2,000,000 in non-pecuniary damages, which was later reduced to CAD $294,600).*""*""

[15] Benedek, *supra* note 11, at 617–18.

[16] Fish, *supra* note 7, at 137.

[17] N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 50 (Fla. 2017).

[18] Barry Univ., Inc., v. Kalitan, 2012 WL 6962692 1, 1 (Fla. 4th DCA 2012).

award by nearly USD $3.3 million.[19] In July of 2015, the defendants appealed the trial court's decision.[20] The Fourth District Court of Appeal directed the trial court to reinstate the total damages awarded by the jury, holding that "[p]er *McCall*, Plaintiff's non-economic damages were improperly limited by the application of the caps in [S]ection 766.118."[21] Subsequently, in 2017, the Supreme Court of Florida granted review, holding that the statutory limits[22] imposed on non-economic damages in medical negligence suits violated the Florida Constitution's Equal Protection Clause's provision that "all natural persons, female and male alike, are equal before the law."[23] The court's decision relied heavily on the court's previous decision in *McCall*,[24] reasoning that to arbitrarily reduce a plaintiff's compensation, regardless of the degree of injury suffered by the plaintiff, bore no rational relationship to the State of Florida's interest in addressing the medical malpractice crisis.[25] The Florida Legislature feared that exorbitant non-economic damage awards would result in increased medical malpractice liability insurance rates, forcing physicians to practice without insurance, avoid risky operations, retire prematurely, or flee Florida altogether.[26]

Similar to the courts in the United States, the Supreme Court of Canada concluded that because "non-pecuniary damages is the area where the risk of an excessive burden of expense is most significant, it is in turn the domain where there is the clearest grounds for moderation."[27] Because "[n]o money can provide true restitution" for

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19 *Kalitan*, 219 So. 3d at 52.

20 *Id.* at 56.

21 Estate of McCall v. United States*,* 134 So. 3d 894, 909 (Fla. 2014).

22 Benedek, *supra* note 11, at 617–18.§ §

23 FLA. CONST. art. I, § 2.

24 *See McCall*, 134 So. 3d at 894.

25 N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 56 (Fla. 2017).

26 *McCall*, 134 So. 3d at 909.

27 Benedek, *supra* note 11 at 617–18; *see also* Peter C. Coyte et al., *Medical Malpractice–The Canadian Experience,* 324 NEW ENG. J. MED. 89, 89 (1991).

non-pecuniary damages, awards may be extravagant as they are determined through a qualitative jury inquiry.[28] Constitutional challenges to the statutorily imposed non-economic damage caps continue to flood courtrooms throughout the United States and Canada.[29]

In British Columbia, Canada, in *Lee v. Dawson*,[30] the plaintiff, Ik Sang Lee, brought a personal injury claim against multiple defendants for severe injuries suffered in an automobile accident.[31] There, the jury awarded Lee CAD $2,000,000 in non-pecuniary damages.[32] This greatly exceeded the legally imposed non-pecuniary damage cap, which was then CAD $294,600.[33] The trial judge reduced the non-pecuniary damage award to the rough upper limit, and Lee appealed to the Canadian Court of Appeals.[34] Lee argued that the non-pecuniary damage cap violated the equal protection guarantee of the Canadian Charter of Rights and Freedoms.[35] The Court of Appeals held that it was bound by *stare decisis*,[36] namely, a trilogy of Canadian Supreme Court cases,[37] and as a result, tbe Court of Appeals could not rule in Lee's favor.[38] However, the Court of Appeals reasoned that "the rationalization or conceptual underpinning for having a rough upper limit on non-pecuniary damages

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[28] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 261 (Can.) (considering factors including compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, and loss of expectation of life).

[29] Benedek, *supra* note 11, at 611.

[30] Lee v. Dawson, [2006] B.C.J . No. 679, para. 2 (Can.).

[31] *Id.*

[32] *Id.* at para. 8.

[33] *Id.* at para. 1.

[34] *Id.*

[35] *Id.* at para. 17 (explaining that the Canadian Charter of Rights and Freedoms is equivalent to the United States Bill of Rights).

[36] *See* discussion of the principle of *stare decisis infra*.

[37] *See* Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 261 (Can.); *see* Thornton v. Prince George School Dist. No. 57, [1978] 2 S.C.R. 267, 267 (Can.); *see* Arnold v. Teno, [1978] 2 S.C.R. 287, 288 (Can.).

[38] Lee v. Dawson, [2006] B.C.J. No. 679, para. 90 (stating that in 1978, the Supreme Court of Canada decided a trilogy of cases, establishing non-pecuniary damage award caps).

[should] be re-examined."[39] Ultimately, the Supreme Court of Canada declined to hear *Lee* without reason.[40] In declining to hear *Lee*, the Supreme Court of Canada forfeited its opportunity to examine the constitutionality of the non-pecuniary damage caps imposed by its precedent.

II. BACKGROUND

Exploring the American and Canadian courts' treatment of the damage cap requires a basic understanding of the structure and function of both nations' court systems and underpinnings of tort awards.

A. The United States Federal Court System: An Overview

The United States Court System has "two parallel and sovereign judicial systems."[41] The federal system applies federal laws, while the state system applies state laws.[42] The primary role of the court in the United States is to "decide what really happened" in a particular controversy and "what should be done about it."[43] The United States is a democracy comprised of fifty states.[44] The Supreme Court is the chief court in the United States.[45] There are a total of ninety four district trial courts and thirteen appellate courts below the Supreme Court.[46] The ninety four district trial courts are divided into twelve regional circuits.[47] Each regional circuit has its own appellate court.[48] The role of the appellate court is to determine if the

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[39] *Id.*

[40] Matthew Good, *Non-Pecuniary Damage Awards in Canada–Revisiting the Law and Theory on Caps, Compensation and Awards at Large,* 34 THE ADVOC. Q. 389, 390–91 (2008).

[41] Koonar, *supra* note 6.

[42] *Id.*

[43] ADMIN. OFF. U.S. CTS., *Court Role and Structure*, http://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Oct. 2, 2018).

[44] *See generally About the Organization of the U.S. Government,* U.S.A.GOV (Updated March 21, 2018), https://www.usa.gov/organization-of-the-us-government.

[45] U.S. CONST. art. III, § 1; ADMIN. OFF. U.S. CTS., *supra* note 43.

[46] ADMIN. OFF. U.S. CTS., *supra* note 43.

[47] *Id.*

[48] *Id.*

lower court correctly applied the law.[49] Appellate court decisions are made by a panel of three judges, rather than a jury.[50] The district courts "resolve disputes by determining the facts and applying legal principles to decide who is right."[51] Typically, a district court judge tries the case, and the jury makes the ultimate decision.[52]

Stare decisis, one of the most basic principles of the United States judicial system, is "the notion that courts will follow prior decisions of the same or higher courts unless sound reasons exist for departure."[53] *Stare decisis* ensures that judicial decisions are "based on sound principle rather than personal opinion."[54] *Stare decisis* "promotes predictability[,] . . . institutional stability and efficiency."[55] Further, "[a] system of binding precedent also creates impetus for judges to state reasons and principles for distinguishing current decisions from past ones, and to push to get the defects in past opinions corrected."[56] The Supreme Court of the United States typically defers to its past decisions when making future decisions.[57] However, the Supreme Court may decide to depart from the doctrine of *stare decisis* if a previous decision is "unsound"[58] or "unworkable."[59] In addition, the Supreme Court considers an evolving understanding of the circumstances "now versus the time the precedent was decided."[60] The Supreme "Court repeatedly has cautioned that

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] ADMIN. OFF. U.S. CTS., *supra* note 43.

[53] Arthur H. Bryant & Richard Frankel, *Comments on Proposed Federal Rule of Appellate Procedure 32.1*, TLPJ FOUND. 1, 6 (Feb. 14, 2004), http://www.uscourts.gov/sites/default/files/fr_import/03-AP-406.pdf.

[54] *Id.*

[55] Randy J. Kozel, *Stare Decisis as Judicial Doctrine,* 67 WASH. & LEE L. REV. 411, 464 (2010).

[56] Bryant & Frankel, *supra* note 53.

[57] Timothy Oyen, *Stare Decisis*, CORNELL L. SCH. LEGAL INFO. INST. (Updated Mar., 2017), https://www.law.cornell.edu/wex/stare_decisis.

[58] Kozel, *supra* note 55, at 416 (meaning that "the Court might explain its decision to overrule a precedent by asserting that the precedent is 'badly reasoned.'").

[59] Oyen, *supra* note 57 (meaning that decisions may be "unworkable" when the legal theory cannot be fairly applied to real cases).

[60] Kozel, *supra* note 55, at 426.

stare decisis is a flexible 'principle of policy' as opposed to 'an inexorable command.'"[61] The Supreme Court has moved away from a strict "legalistic theory" and now "anchor[s] the law to new social, economic and political concepts, which have taken form in the slow process of social change."[62] Like the Supreme Court, most appellate courts have maintained the presumption against overruling established precedent.[63] "There appears to be a widespread assumption that statutory *stare decisis* is simply part of our interpretive doctrine."[64]

B. The Canadian Federal Court System: An Overview

Although the Canadian and American system both originate from the common law system, the two Federal Court systems have key differences.[65] Unlike in the United States, the Canadian system is a unified system, meaning that the Supreme Court of Canada and all lower courts are part of the same system.[66] Like the American system, the primary role of Canadian courts is to administer justice.[67] Canadian courts interpret and apply Canada's constitution, common law, and government legislation.[68] Canada is a constitutional monarchy comprised of ten provinces and three territories.[69] Canada has four levels of courts, each with its own jurisdiction.[70] In each of the ten provinces, with the exception of Quebec, the Canadian judiciary consists of provincial and territorial courts, superior

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[61] *Id.* at 414.

[62] Wendell E. Green, *Stare Decisis and the Supreme Court of the United States,* 4 NAT'L B. J. 191, 195 (1946).

[63] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals,* 73 THE GEO. WASH. L. REV. 317, 327 (2004-2005).

[64] *Id.* at 328.

[65] Koonar, *supra* note 6.

[66] *Id.*

[67] GOV'T OF CAN., *How Does Canada's Court System Work?,* DEP'T OF JUST. (Updated Sept. 9, 2016), http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/01.html ("[S]ignificant societal changes may also prompt the Court to overrule precedent; however, any decision to overrule precedent is exercised cautiously.").

[68] *Id.*

[69] N.Y.U., *Guide to Foreign and International Legal Citations*, 1 J. OF INT'L L. AND POL. 1, 26 (2006).

[70] GOV'T OF CAN., *How the Courts are Organized,* DEP'T OF JUST. (Updated July 27, 2017), http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html.

courts, and courts of appeal.[71] The highest court is the Supreme Court of Canada, which presides over the entire judiciary system.[72]

The provincial and territorial courts manage most cases and are established by provincial and territorial governments.[73] Superior courts have complete jurisdiction and handle more consequential cases and hear appeals from the provincial and territorial courts.[74] Provincial and territorial courts of appeal hear appeals from the decisions of the superior courts and the provincial and territorial courts.[75] The decisions of the court of appeals can only be appealed to the Supreme Court of Canada.[76] The Federal Court and the Federal Court of Appeals correspond to the provincial and territorial court systems.[77] The judges of these courts of appeal travel across Canada to hear cases involving actions rooted in federal statutes, national security, and international affairs.[78] The Federal Court acts as Canada's national trial court and may review the decisions of most federal boards, commissions, and tribunals.[79] The Federal Court of Appeals reviews decisions of the Federal Court, Tax Court of Canada, and judicial reviews of some federal tribunals.[80] Again, its decisions can only be appealed to the Supreme Court of Canada.[81] The Supreme Court of Canada is the final court of appeal and has

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[71] *See The Quebec Judicial System,* EDUCALOI, https://www.educaloi.qc.ca/en/capsules/quebec-judicial-system (last visited Oct. 1, 2018). Quebec has its own legal system based on French law and the Napoleonic Code. *Id.* The Quebec court system includes municipal courts, the Court of Quebec, the Superior Court of Quebec, and the Court of Appeal of Quebec. *Id.* The Supreme Court of Canada is ultimately the highest court in Quebec. *Id.*

[72] *See generally* N.Y.U., *supra* note 69.

[73] GOV'T OF CAN., *supra* note 70.

[74] *Id.* (finding that more serious civil and criminal cases "include divorce cases and cases that involve large amounts of money").

[75] *Id.*

[76] GOV'T OF CAN., *Courts and Other Bodies Under Federal Jurisdiction,* DEP'T OF JUST. (Updated Sep. 22, 2016), http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/03.html.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

jurisdiction over all actions.[82] The Supreme Court has one Chief Justice and eight additional justices appointed by the federal government.[83] The Supreme Court of Canada solely hears cases that it deems to be of public and national significance.[84] Once a case has exhausted all available lower level appeals, the Supreme Court of Canada still has discretion to grant or deny permission to appeal before it will hear a case.[85] These requests for appeal can be granted or denied by the Supreme Court of Canada without reason.[86]

In Canada, the principle of *stare decisis* is "the idea that courts ought to stand by their previous decisions[,] . . . is not immutable."[87] Like its American counterpart, the Canadian judicial principle of *stare decisis* is defined as "the doctrine of precedent, according to which the rules formulated by judges in earlier decisions are to be similarly applied to later cases."[88] The doctrine of *stare decisis* ensures judicial consistency and predictability in similar cases and "that prior decisions of higher courts are binding on lower courts of the same jurisdiction."[89] Lower courts are typically expected to follow all pronouncements of higher level courts.[90] Today, the Supreme Court of Canada, as well as the provincial and territorial courts of appeal, are not strictly bound by prior decisions.[91] The Supreme Court of Canada may "overrule on its previous decision when it is compelled to do so . . . ."[92] The Supreme Court of Canada has flexibility and can set aside or overrule previous decisions when there is good reason.[93] This more flexible application of *stare decisis* doctrine allows the Canadian courts "to restate the law in keeping

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82 GOV'T OF CAN., *supra* note 76.

83 *Id.*

84 *Id.*

85 *Id.* (noting that some situations warrant an automatic right to appeal).

86 *Id.*

87 Neil Guthrie, *Stare Decisis Revisited*, 31 ADVOC. Q. 448, 448 (2006).

88 John E.C. Brierley, *Stare Decisis*, HISTORICA CAN. (Updated July 24, 2015), http://www.thecanadianencyclopedia.ca/en/article/stare-decisis/.

89 *Id.*

90 Adryan J.W. Toth, *Clarifying the Role of Precedent,* 22 DALHOUSIE J. OF LEGAL STUD. 34, 41 (2013).

91 Brierley, *supra* note 88.

92 Toth, *supra* note 90, at 42.

93 George F. Curtis, *Stare Decisis at Common Law in Canada*, 12 U. BRIT. COLUM. L. REV. 1, 5 (1978).

with changed wants and expectations in those areas where the law has lagged behind the times."[94]

C. The Fundamental Right of Equal Protection

Both the United States and Canada have Equal Protection Clauses. In the context of equal protection, both the Supreme Court of the United States and the Supreme Court of Canada share a common goal: "to reconcile the principal of equal protection with the clear reality of the consequence of law making that legislation commonly impacts groups unevenly."[95]

1. The American Equal Protection Clause

The Fourteenth Amendment of the United States Constitution declares that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[96] Similarly, the Florida Constitution states that "all natural persons, female and male alike, are equal before the law . . . ."[97] The right to equal protection allows all individuals "to stand before the law on equal terms . . . to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation."[98] When a government action is challenged on equal protection grounds, the court employs one of three tests: the rational basis test, the intermediate scrutiny test, or the strict scrutiny test.[99] Which test applies is determined by the type of legislative action in question.[100]

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[94] *Id.* at 14.

[95] Joseph M. Pellicciotti, *The Constitutional Guarantee of Equal Protection in Canada and the United States: A Comparative Analysis of the Standards for Determining the Validity of Governmental Action*, 5 TULSA J. OF COMP. & INT'L L. 1, 7 (1997).

[96] U.S. CONST. amend. XIV, § 1.

[97] FLA. CONST. art. I, § 2.

[98] Caldwell v. Mann, 26 So.2d 788, 791 (Fla. 1946) (citing Southern Ry. Co. v. Greene, 216 U.S. 400, 412 (1910)).

[99] Pellicciotti, *supra* note 95, at 3.

[100] *Id.*

2. The Canadian Equal Protection Clause

The Canadian Charter of Rights and Freedoms, part of the Canadian Constitution, has a similar Equal Protection Clause to that of the United States Constitution.[101] In addition, similar to the Florida Constitution, one of the purposes of the British Columbia Human Rights Code is to "promote a climate of understanding and mutual respect where all are equal in dignity and rights."[102] Section Fifteen of the Canadian Charter of Rights and Freedoms states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . ."[103] However, in Section One, the Charter provides a caveat for legislation challenged as a violation of equal protection under Section Fifteen.[104] Section One states that equality rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[105] Therefore, a discriminatory legislative action may be constitutional if the action is justified under Section One of the Charter.[106] Unlike the United States, when a government action is challenged on equal protection grounds, the court always employs the same test to determine Section Fifteen of the Charter is violated.[107] If a violation has occurred, the court then considers whether Section One justifies the stated discrimination.[108]

Under the Canadian Constitution, judicial decisions are inconclusive.[109] Meaning, "[t]he government can make the policy determination that a given law is necessary for the public welfare that it should be enacted, despite the judiciary's advice that the proposed law violates the Charter."[110]

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101 *See Constitution Act*, 1982, C 11 (U.K.*), reprinted* in R.S.C. 1985, app II, no 44 (Can.)*'*.

102 *Human Rights Code,* R.S.B.C. 1996, c 210 (Can).

103 *Constitution Act*, *supra* note 101*'*.

104 *See* Pellicciotti, *supra* note 95, at 6–7.

105 *Id.* (internal quotation marks omitted).

106 *Id.* at 7.

107 *Id.* at 8.

108 *Id.* at 9.

109 Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms,* 59 NOTRE DAME L. REV. 1191, 1234 (1984).

110 *Id.*

D. Non-Economic Damages: An Overview

Economic damages are easily quantifiable as they represent lost earnings, which have monetary values.[111] However, non-economic damages, also referred to as non-pecuniary damages, as a general matter, are not easily quantified because non-economic damages do not represent financial (i.e., wage-based) losses.[112] Non-economic damages include the following: "pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other non-financial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act."[113] Non-economic losses have no monetary or market value and are not determined on a monetary scale.[114] Although non-economic damages are non-financial, such damages "symbolically affirm that the plaintiff has been wrongfully deprived of something of value."[115] Non-economic damages "compensate the plaintiff through a symbolic sum" because the plaintiff cannot be made whole.[116] The "Canadian function approach" suggests that non-pecuniary damages "'may somewhat re-establish the plaintiff's self-confidence, wipe out his sense of outrage,' or 'may be a consolation, a solatium.'"[117] This approach suggests that non-pecuniary damages provide solace, meaning a dollar amount "that allows the plaintiff to purchase physical arrangements that can make life more endurable in the face of the non-economic loss."[118]

Nevertheless, calculating the appropriate amount of compensation for damages that have no monetary value is especially difficult.[119] In both the United States and Canada, non-economic damage awards are "within the jury's discretion."[120] Fact finding is left to

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111 *See generally* Harry Zavos, *Monetary Damages for Non-monetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages,* 43 LOY. L.A. L. REV. 193, 195 (2009).

112 FLA. STAT. § 766.202(8) (2017).

113 *Id.*

114 Zavos, *supra* note 111, at 196–99.

115 *Id.* at 197.

116 *Id.* at 198.

117 *Id.* at 197.

118 *Id.* at 245.

119 Jack Effron, *A Comparative Study of Non-pecuniary Damages in Common Law Countries,* 10 HOUS. J. INT'L L. 211, 211 (1988).

120 *Id.* at 213–17.

the jury so that it "can tailor the award to the unique circumstances of the plaintiff's injuries, as well as represent community standards."[121] Judgments by Canadian trial and appellate level courts "suggest[] that non-pecuniary damages are calculated much like pain and suffering damages in the United States. The court picks a sum that it feels fairly represents the gravity, duration and effect of the injuries on the plaintiff."[122]

1. United States Non-Economic Damages

In the United States, non-economic damages are awarded to compensate injured plaintiffs for their "pain and suffering, emotional distress, loss of consortium or companionship, and other intangible injuries."[123] Further, non-economic "damages involve no direct economic loss and have no precise value."[124] In the United States, non-economic damage limits in personal injury actions are imposed by individual state statutes rather than by a uniform federal law.[125] Federally imposed damage caps would not be "subject to challenge under state constitutions [or] vulnerable to federal constitutional challenges under existing precedents."[126] However, past proposed legislation was never approved.[127]

Currently, only four states—Florida, Illinois, New Hampshire, and Washington—have found non-economic damage caps in personal injury cases unconstitutional.[128] Only eleven states impose non-economic damage caps in general tort or personal injury cases.[129] In medical malpractice cases specifically, the following six

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121 *Id.* at 213.

122 *Id.* at 218.

123 *Noneconomic Damages Reform*, ATRA, http://www.atra.org/issue/noneconomic-damages-reform/ (last visited Oct. 1, 2018).

124 *Id.*

125 *See generally* Leonard J. Nelson, III, David J. Becker, & Michael A. Morrisey, *Medical Liability and Health Care Reform*, 21 HEALTH MATRIX: J. OF L.-MED. 443, 445 (2011).

126 *Id.* at 460.

127 *Id.*

128 N.Y. LAW SCH., *Facts Sheet: Caps on Compensatory Damages: A State Law Summary,* CTR. FOR JUST. & DEMOCRACY AT N.Y. LAW SCH. (June 22, 2017), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary.

129 *Id.*

states have found non-economic damage caps unconstitutional: Alabama, Florida, Georgia, Illinois, New Hampshire, and Washington.[130] Over half of the United States, twenty six states to be exact, impose non-economic damage caps in medical malpractice cases.[131]

2. Canadian Non-Pecuniary Damages

In Canada, non-pecuniary damages are awarded for the following non-quantifiable injuries: pain and suffering, loss of companionship, emotional distress, loss of life enjoyment, and loss of life expectancy, similar to non-economic damages in the United States.[132] Mirroring their United States counterpart, non-pecuniary damages in Canada are awarded for similar non-quantifiable injuries and in order to put the plaintiff in the same position that he or she would have been in but for the negligent injury.[133] In order to obtain non-pecuniary damages, "the plaintiff must demonstrate a reasonable or fair function which the money claimed will serve."[134] In other words, "non-pecuniary damages should be awarded only when they can serve some useful purpose."[135] Both the United States and Canada place similar caps on non-economic damage awards.[136]

In Canada, non-pecuniary damage awards for pain and suffering were limited to CAD $100,000 in 1978, which is currently upwards of CAD $370,000 after adjustment for inflation.[137] The damages cap

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130 *Id.*; *see* Nelson, *supra* note 125, at 458.

131 N.Y. LAW SCH., *supra* note 128.

132 Katherine L. Ayre & D. Bruce Garrow, *The Recovery of Non-Pecuniary Damages in Canada: The Cap on Recovery, Jury Trials, and other Unique Considerations for General Damage Awards,* CONF. ON INT'L AVIATION LIABILITY & INS. 1, 3 (2009), http://monmexique.com/5-Garrow.pdf.

133 *Id.* at 3–4.

134 Lindal v. Lindal, [1981] 2 S.C.R. 629, 638 (Can.) (quoting Beverley M. McLachlin, *What Price Disability? A Perspective on the Law of Damages for Personal Injury,* 59 CAN. BAR REV. 1, 12 (1981)) ("[W]hat is a reasonable or fair function may involve reference to the restitutionary concept of what the plaintiff would have enjoyed or have been able to provide for his dependents had he not been injured.").

135 *Lindal,* 2 S.C.R. at 638.

136 *See* Ayre, *supra* note 132, at 4.

137 *Id.*; *see Non-Pecuniary Damages Upper Limits,* MCKELLAR STRUCTURED SETTLEMENTS (2017), http://www.mckellar.com/statistics (last visited Oct. 1, 2018).

is imposed regardless of the severity of the plaintiff's injury.[138] Factors that influence non-pecuniary damage awards include the following: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, martial, and social relationships; impairment of physical and mental abilities; and loss of lifestyle.[139] Factors irrelevant to non-pecuniary damage awards include the following: sympathy for the plaintiff, retribution against the defendant, emotional adjustment of the plaintiff, social status, income, or assets of the plaintiff, and the sex of the plaintiff.[140] In *Andrews v. Grand & Toy Alberta Ltd*.,[141] Justice Dickson, writing for the Supreme Court of Canada, stated that "[t]he monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one," thereby illuminating the court's prioritization of social good over legal theory.[142] To echo this tenet, Justice Dickson stated that awards must be fair yet arbitrary because "[n]o money can provide true restitution" in cases of such great harm.[143]

III. CASE SUMMARY

A. The United States: The Fundamental Court Cases Barring Non-Economic Damage Caps in Florida

On June 8, 2017, in *Kalitan*, which is now the current rule in Florida, the Supreme Court of Florida held that the statutory cap on wrongful death non-economic damages in medical malpractice actions, under Section 766.118, Florida Statutes, violated the right to

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138 Ayre, *supra* note 132, at 4.

139 Stapely v. Hejslet*,* [2006] 34 B.C.C.A., ¶ 46 (Can).

140 Edward Veitch, *The Implications of Lindal*, 28 MCGILL L. J. 116, 122–23 (1982).

141 *Andrews,* 2 S.C.R. at 261.

142 *Id.* ("There is no medium of exchange for happiness. There is no market for expectation of life.").

143 *Id.*

equal protection afforded by the Florida Constitution.[144] The Supreme Court of Florida based its decision on *McCall*, another Supreme Court of Florida case decided just three years prior.[145]

In *Kalitan*, in 2011, plaintiff Susan Kalitan brought an action for medical malpractice, arising from the negligence of multiple medical practitioners and other defendants.[146] Suffering from carpal tunnel syndrome, Kalitan went to defendant North Broward Hospital District for wrist surgery in 2007.[147] After a complication of intubation for general anesthesia, Kalitan suffered a perforated esophagus.[148] When Kalitan awakened from surgery, she complained of extreme pain in her chest and back.[149] The anesthesiologist administered medication for chest pain and discharged Kalitan.[150] The following day, Kalitan was found unresponsive and was rushed to the emergency room.[151] Kalitan underwent lifesaving emergency surgery to repair her esophagus.[152] Subsequently, Kalitan was in a medically induced coma in the intensive care unit for several weeks.[153] Further, she required several additional surgeries and intensive therapy in order to regain mobility and the ability to eat normally.[154] Kalitan testified to experiencing continuing pain, serious mental disorders, and loss of independence all caused by the traumatic incident.[155]

The jury awarded Kalitan a total of USD $4 million in non-economic damages: USD $2 million for past pain and suffering and USD $2 million for future pain and suffering.[156] However, the trial court capped the non-economic damage award to around USD $2

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144 FLA. CONST. art. I, § 2. (stating that all-natural persons are equal before the law); *Kalitan,* 219 So. 3d at 56; *McCall*, 134 So. 3d at 900–01.

145 *Kalitan,* 219 So. 3d at 56; *McCall,* 134 So. 3d at 894 (holding that the non-economic damage award cap in wrongful death actions was unconstitutional as a violation of equal protection).

146 *Kalitan*, 219 So. 3d at 50.

147 *Id.* at 51.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Kalitan*, 219 So. 3d at 51.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id*. at 52.

million, in accordance with Section 766.118, Florida Statutes.[157] In addition, the trial court denied Kalitan's challenge to the constitutionality of the statutory caps on non-economic damages in medical negligence actions.[158]

In 2015, the Fourth District Court of Appeal disagreed with the trial court; instead, relying on *McCall* to hold that, in personal injury medical malpractice actions, the statutory non-economic damage award caps are unconstitutional.[159] The Fourth District recognized that although *McCall* was limited to the context of wrongful death actions, the decision still applied in this case because Section 766.118, Florida Statutes, applies to both wrongful death and personal injury actions.[160] Thus, the district court ordered the trial court to issue the jury's total damage award.[161]

The Supreme Court of Florida granted review of *Kalitan*, addressing the issue of the constitutionality of the non-economic damage caps in medical malpractice actions imposed by Sections 766.118(2) and (3), Florida Statutes.[162] The court first looked to *McCall* to decide its approach in *Kalitan*.[163]

In *McCall*, in 2014, the Supreme Court of Florida addressed whether the statutory cap on non-economic damage awards set forth in Section 766.118, Florida Statutes, violated the Equal Protection Clause of the Florida Constitution.[164] The plaintiff, Michelle McCall, received prenatal care at a United States Air Force medical

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[157] *See* FLA. STAT. § 766.118 (2011) (limiting non-economic damages for negligence of practitioner defendants and non-practitioner defendants); *Kalitan*, 219 So. 3d at 52.

[158] *See* FLA. STAT. § 766.118 (2011); *Kalitan*, 219 So. 3d at 52.

[159] *Kalitan*, 219 So. 3d at 51; *McCall*, 134 So. 3d at 894 (holding that the non-economic damage award cap in wrongful death actions was unconstitutional).

[160] *Kalitan*, 219 So. 3d at 52.

[161] *Id.*

[162] *See* FLA. STAT. § 766.118(2) (2011) (limiting non-economic damage awards for negligence of practitioners to $500,000, or $1 million for negligence of practitioners resulting in a permanent vegetative state or death); *see also* FLA. STAT. § 766.118(3) (2011) (limiting non-economic damage awards for negligence of non-practitioners to USD $750,000, or $1.5 million for negligence of non-practitioners resulting in permanent vegetative state or death); *Kalitan*, 219 So. 3d at 52–53.

[163] *Kalitan*, 219 So. 3d at 53–54.

[164] *See* FLA. CONST. art. I, § 2; *see also* FLA. STAT. § 766.118(2) (2011); *see also* FLA. STAT. § 766.118(3) (2011); *McCall*, 134 So. 3d at 897.

clinic.[165] In her last trimester, McCall suffered from high blood pressure and severe preeclampsia.[166] Her labor was induced by the family practice department, rather than the OB/GYN department, at Fort Walton Beach Medical Center.[167] McCall delivered a healthy baby boy; however, the Air Force family practice physicians were unable to manually extract her placenta.[168] The Air Force family practice physicians called Dr. Archibald, an Air Force obstetrician, for assistance.[169] Unbeknownst to the family practice physicians, McCall's blood pressure began to drop rapidly.[170] The nurse anesthetist reported to Dr. Archibald that McCall's vitals were stable, failing to inform Dr. Archibald of McCall's dangerously low blood pressure.[171] Dr. Archibald never checked McCall's vital signs himself.[172] Subsequently, McCall went into shock and cardiac arrest due to severe blood loss and never recovered.[173] The Estate of McCall filed suit, and the district court concluded that the non-economic damages totaled USD $2 million.[174] In addition, the district court limited the recovery of wrongful death non-economic damages to USD $1 million in accordance with Section 766.118(2), Florida Statutes.[175] The district court denied the Estate's constitutional challenge to the statutory cap on wrongful death non-economic damages in medical malpractice actions.[176] On appeal, the Eleventh Circuit affirmed the application and constitutionality of the statutory cap under Article X of the Florida Constitution.[177] However, the Eleventh Circuit granted the Estate's motion to certify to the Supreme Court of Florida the constitutionality of the statutory cap under the Florida Constitution.[178]

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165 *McCall*, 134 So. 3d at 897.
166 *Id.*
167 *Id.* at 897–98.
168 *Id.* at 898.
169 *Id.*
170 *Id.* at 898.
171 *Id.*
172 *Id.*
173 *Id.* at 899.
174 *Id.*
175 *Id.* at 899.
176 *Id.*
177 *Id.*
178 *Id.*

The Supreme Court of Florida, in a plurality opinion, held that the statutory cap on wrongful death non-economic damages in medical malpractice actions, under Section 766.118, Florida Statutes, violated the right to equal protection afforded by the Florida Constitution.[179] The court applied the rational basis test, stating that "a statute must bear a rational and reasonable relationship to a legitimate state objection, and it cannot be [arbitrarily] or capriciously imposed."[180] The court reasoned that the statutory cap failed because it imposed unfair and arbitrary burdens on injured plaintiffs when there were multiple claimants.[181] The greater the number of survivors and the greater their losses, the less likely they will be fully compensated.[182] In addition, the statutory cap did not bear a rational relationship to its stated purpose: to address the medical malpractice insurance crisis in Florida.[183] The court reasoned that "the Legislature's determination that the increase in medical malpractice liability insurance rates is forcing physicians to practice medicine without professional liability insurance, to leave Florida, to not perform high-risk procedures, or to retire early from the practice of medicine [was] unsupported."[184] Further, even if Florida were facing a medical malpractice insurance crisis, the statutory caps would not alleviate such a crisis.[185] Lastly, the plurality pointed out that statutes implemented during times of crisis may become invalid because times of crisis are temporary.[186] The concurring opinion agreed with the plurality opinion's application of the rational relationship test, stating that "the arbitrary reduction of survivors' non-economic damages in wrongful death cases based on the number of survivors lacks a rational relationship to the goal of reducing medical malpractice premiums."[187]

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179 *See* FLA. CONST. art. I, § 2. (stating that all-natural persons are equal before the law); *McCall*, 134 So. 3d at 900–01.§

180 *McCall*, 134 So. 3d at 901.

181 *Id.*

182 *Id.* at 902.

183 *Id.* at 901.

184 *Id.* at 909 (internal quotation marks omitted).

185 *McCall*, 134 So. at 909.

186 *Id.* at 913.

187 *Id.* at 916.

In *Kalitan*, the Supreme Court of Florida considered the applicability of *McCall* to the personal injury context.[188] As in *McCall*, because Kalitan was not a member of a suspect class, the court applied the rational basis test.[189] The court held that the statutory caps on non-economic damage awards in personal injury actions, imposed by Section 766.118, Florida Statutes, violated equal protection.[190] The statutory cap failed the rational basis test because "the arbitrary reduction of compensation without regard to the severity of the injury does not bear a rational relationship to the Legislature's stated interest in addressing the medical malpractice crisis."[191] The court agreed with the plurality and concurring opinions in *McCall* that there was no evidence of a continuing medical malpractice insurance crisis to warrant the necessary implementation of the statutory cap.[192] Ultimately, the Supreme Court of Florida concluded that Section 766.118, Florida Statutes, "unreasonably and arbitrarily limit[s] recovery of those most grievously injured by medical negligence."[193] Because Section 766.118, Florida Statutes, was deemed unconstitutional, it was subsequently amended, most recently in 2018.[194]

B. Canada: The Trilogy of Fundamental Court Cases Establishing Canadian Tort Cap Law

1. Introduction to the Trilogy

Three cases—*Andrews v. Grand & Toy Alberta Ltd*., *Thornton v. Prince George School Dist. No. 57,* and *Arnold v. Teno*—created the fundamental basis on which all following Canadian tort cap law relies. All three cases were decided by the Supreme Court of Canada

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188 *Kalitan*, 219 So. 3d at 56.
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.* at 57.
193 *Kalitan*, 219 So. 3d at 58.
194 *See* 2018 Fla. Sess. Law Serv. Ch. 2018-24 (C.S.C.S.S.B. 622) (West).

in 1978, resulting in a "rough"[195] upper limit on non-pecuniary damage awards in personal injury actions.[196] Adopting a functional approach,[197] the Supreme Court of Canada determined that non-pecuniary damage awards should provide "solace" to injured plaintiffs.[198] Solace requires that money is "used to buy substitutes with which to ameliorate the situation of the injured party," meaning that any monetary award must be used to mitigate an injured plaintiff's loss.[199] Ultimately, the Supreme Court of Canada created the rough upper limits on non-pecuniary damage awards "as a result of the fear of largely extravagant awards likely to create an immense social burden, as [was] presently the case in the United States, coupled with the fact that non-pecuniary damage awards are susceptible to excessive claims, and that the victim has already been compensated for pecuniary loss,"[200] reflecting, once again, the trend of the Canadian courts looking to the American courts for guidance.[201] The non-pecuniary damage award caps were designed to make awarding damages straightforward, to prevent excessive jury awards, and to provide a reasonable scope for awards.[202] The trilogy indicates the Supreme Court of Canada's "willingness to group cases according to the general issues they raise and to resolve these issues broadly, providing guidance for lower courts."[203] Further, the trilogy echoes the court's interest in reasonable yet conventional non-pecuniary

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195 *Lee*, B.C.C.A.159 at para. 10 (adjusting the set upper limit for inflation).

196 *See id.* at para. 1.

197 *Andrews*, 2 S.C.R. at 261–62 (viewing non-pecuniary damage awards from a functional approach as "attempts to assess the compensation required to provide the injured person 'with reasonable solace for his misfortune'").""

198 *See* Good, *supra* note 40, at 391–92.

199 *See id.* at 392; *Andrews,* 2 S.C.R. at 262 ("'Solace' . . . mean[s] physical arrangements which can make his life more endurable rather than 'solace' in the sense of sympathy.").

200 Benedek, *supra* note 11, at 637; *Andrews*, 2 S.C.R. at 261 ("This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years.")."

201 *See Andrews,* 2 S.C.R. at 261.

202 Good, *supra* note 40, at 392.

203 Bruce Feldthusen & Keith McNair, *General Damages in Personal Injury Suits: The Supreme Court's Trilogy,* 28 U. TORONTO L. J. 381, 382 (1978).

damage awards.[204] Today, the trilogy is still considered to be good law and acts as binding precedent on lower courts.[205]

a. Andrews v. Grand & Toy Alberta Ltd.

In *Andrews*, a traffic accident left the plaintiff, James Andrews, a quadriplegic, facing a lifetime of dependency.[206] The trial court awarded CAD $1,022,477.48 in damages, which was reduced by the Court of Appeals to CAD $516,544.48.[207] The Supreme Court of Canada granted review as to the assessment of damages.[208] The court held that the plaintiff should be awarded CAD $100,000 in non-pecuniary damages stating, "save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature."[209] It is important to note that the Supreme Court of Canada established only a "rough" upper limit, meaning the limit could be exceeded in rare cases.[210] After the Supreme Court of Canada's decision in *Andrews*, "the search for solace through the acquisition of goods and services became the aim of the compensation of non-pecuniary damages in accordance with the functional view."[211] This trend was perpetuated by the two other cases in the trilogy.

b. Thornton v. Prince George School Dist. No. 57

In *Thornton*, an accident in a physical education class left eighteen-year-old Gary Thornton a quadriplegic.[212] Previously an all-around athlete, the plaintiff attempted to do a somersault when he fractured his neck "with comminuted fracture of the fourth cervical vertebrae."[213] The plaintiff's injuries resulted in either "total or partial paralysis to each of his four limbs."[214] The trial court awarded

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204 *See Andrews*, 2 S.C.R. at 261.
205 *See* Good, *supra* note 40, at 392.
206 *See Andrews*, 2 S.C.R. at 229.
207 *Id.*
208 *Id.*
209 *Andrews*, 2 S.C.R. at 233.
210 *See* Law Reform Commission of British Columbia, *supra* note 1.
211 Benedek, *supra* note 11, at 620.
212 *Thornton*, 2 S.C.R. at 267.
213 *Id.* at 271 ("Prior to the injury the appellant was 6 ft. 3 in. in height and described in evidence as being the epitome of the all-round athlete.").
214 *Thornton*, 2 S.C.R. at 271.

CAD $1,534,058.93 in damages.[215] Subsequently, the Court of Appeals reduced the damages award to CAD $649,628.87.[216] The Supreme Court of Canada granted review as to the assessment of damages.[217] Citing *Andrews*, the court held that the award for non-pecuniary damages should be reduced to CAD $100,000 in accordance with the rough upper limit.[218] The court agreed with the Court of Appeals stating that the non-pecuniary losses experienced by Thornton were similar to that of the plaintiff in *Andrews*.[219] The court reasoned that the plaintiff could not be "awarded perfect compensation" and that fairness on each side was essential to the principles of judicial consistency and reasonableness.[220]

c. Arnold v. Teno

In *Arnold*, the four-and-a-half-year-old plaintiff, Diane Teno, was struck by a car while crossing the street after purchasing ice cream from an ice cream truck.[221] Subsequently, Teno suffered significant physical and mental impairments.[222] The trial court awarded the plaintiff CAD $200,000 in non-pecuniary damages and CAD $750,000 in pecuniary damages.[223] The Court of Appeals lessened the award for pecuniary damages by CAD $75,000.[224] The defendants appealed, and the Supreme Court of Canada granted review.[225] The Supreme Court of Canada stated that "[t]here should be uniformity, always allowing flexibility to meet each differing individual case, in awards for non-pecuniary damages."[226] Citing *Andrews* and *Thornton*, the court held that the award of CAD $100,000 in non-pecuniary damages was proper in this case.[227] The court's reasoning involved a comparison between the plaintiff Teno's injuries

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215 *Id.* at 267.
216 *Id.* at 268.
217 *Id.*
218 *Id.* at 270.
219 *Id.* at 284.
220 *Id.* at 275.
221 *Arnold*, 2 S.C.R. at 288.
222 *Id.*
223 *Id.*
224 *Id.* at 289.
225 *Id.*
226 *Arnold*, 2 S.C.R. at 292.
227 *Id.* at 292–93.

and the plaintiffs' injuries in *Andrews* and *Thornton*.[228] Like the plaintiffs in *Andrews* and *Thornton*, the plaintiff in this case, although not paralyzed, suffered a significant physical and mental disability.[229] Unlike the plaintiffs in *Andrews* and *Thornton*, the plaintiff in this case would not require frequent treatment; however, the court reasoned that the award was proper because the plaintiff in this case had a longer life expectancy and would suffer continuous embarrassment throughout her life.[230] Further, the court emphasized the soaring non-pecuniary damage awards in the United States as reasoning for capping the non-pecuniary damage award at the rough upper limit.[231]

2. The Supreme Court of Canada's Reasoning Behind the Trilogy

Throughout the trilogy, the Supreme Court of Canada gave a number of reasons for setting the upper limits on non-pecuniary damage awards. First, the court was responding to escalating damages awards in the United States.[232] Second, the court cited the need for national consistency to damage awards.[233] Third, the court stressed the importance of considering the social burden of large non-pecuniary damage awards.[234]

In *Andrews* and *Arnold*, both Justice Dickson and Justice Spence respectively referenced soaring non-economic damage awards in the United States as support for non-pecuniary damage caps in Canada.[235] In *Andrews,* Justice Dickson stated that "the subject of damages for personal injury is an area of law which cries out for legislative reform."[236] Justice Dickson further noted that non-pecuniary damage awards may be "widely extravagant," observing that non-economic damage awards had recently soared in the United States.[237] Likewise, in *Arnold*, Justice Spence referenced increasing

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228 *Id.*
229 *Id.*
230 *Id.*
231 Benedek*, supra* note 11, at 636.
232 Ayre, *supra* note 132, at 5.
233 *Id.*
234 *See Andrews,* 2 S.C.R. at 261.
235 *Id.; see also Arnold,* 2 S.C.R. at 332.
236 *Andrews*, 2 S.C.R. at 236.
237 *Id.* at 261.

non-economic damage awards in the United States, specifically in the area of medical malpractice.[238] Justice Spence said, "We have a right to fear a situation where none but the very wealthy could own or drive automobiles because none but the very wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards."[239] Further, Justice Spence agreed with Justice Dickson that the impossibility and subjectivity of assessment and compensation of such losses makes non-pecuniary damage caps necessary.[240]

In *Andrews,* Justice Dickson stressed the need for uniformity of such awards throughout Canada, but noted that flexibility for greater compensation was necessary in certain cases and under changing economic circumstances.[241] This again demonstrates the court's prioritization of social good over legal theory.[242] Justice Dickson stated that such variation should not be determined by a victim's province.[243] Nevertheless, Justice Dickson emphasized the need for caps or "guidelines for the translation into monetary terms what has been lost."[244] Likewise, in *Arnold*, Justice Spence agreed with Justice Dickson, citing "uniformity of awards" as a key reason for non-pecuniary damage limits; however, like Justice Dickson, Justice Spence also emphasized the need for flexibility in certain cases.[245]

In *Andrews,* Justice Dickson emphasized the significance of the social burden of excessive non-pecuniary damage awards.[246] He stated that "the sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms" was reason enough to consider "other policy factors" when evaluating the moderation of non-pecuniary damage awards.[247]

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238 *See Arnold, 2 S.C.R.* at 332.
239 *Id.* at 333.
240 *See id.*
241 *See Andrews,* 2 S.C.R. at 263.
242 *Id.* ("In my opinion, this does not mean that the courts should not have regard to the individual situation of the victim. On the contrary, they must do so to determine what has been lost.").
243 *Id.*
244 *Id.*
245 *See Arnold,* 2 S.C.R. at 334.
246 *Andrews,* 2 S.C.R. at 261.
247 *Id.*

3. Canadian Courts Beyond the Trilogy

Generally, after the Supreme Court's trilogy of cases, Canadian courts have "ignored the trilogy cases; paid lip service to them by noting that they had considered the comments of the Supreme Court in setting an award; distinguished them; or followed the Supreme Court's action in claiming to use the 'functional' approach . . . ."[248] The following cases give examples and insight into these departures.

a. Lindal v. Lindal

Three years after the trilogy, in *Lindal v. Lindal*, the Supreme Court of Canada discussed what circumstances would allow the trial court to render an award that exceeded the non-pecuniary damage cap set forth in the trilogy.[249] The court followed the solace analysis, concluding that it was not beneficial to quantify the difference in worth between the losses caused by the severity of different injuries.[250] In *Lindal,* the plaintiff was injured in an automobile accident while riding as a passenger in his brother's car.[251] Lindal suffered permanent and severe physical and mental impairments.[252] The trial court awarded CAD $135,000 in non-pecuniary damages, reasoning that exceptional circumstances justified an award in excess of the non-pecuniary damage award cap.[253] The Court of Appeals reversed, and the Supreme Court of Canada granted review.[254] The Supreme Court of Canada held that the caps may not be extended based on the severity of a plaintiff's injury alone or "to compensate for loss of amenities, but rather to provide compensation for loss of amenities in order to ameliorate the victim's condition and make his life more bearable."[255] The court stated that the circumstances that justify exceeding the upper limit were extremely rare.[256] However, the court did agree that the limits may be altered due to changing

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248 Effron, *supra* note 119, at 217–18.
249 *See Lindal,* 2 S.C.R. at 629; *see also* Ayre, *supra* note 132, at 6.
250 Law Reform Commission of British Columbia, *supra* note 1.
251 Veitch, *supra* note 140, at 117.
252 *Id.*
253 *Id.*
254 *See id.*
255 *Lindal,* 2 S.C.R. at 629.
256 Law Reform Commission of British Columbia, *supra* note 1.

economic conditions or inflation.[257] Justice Dickson noted that "it is fruitless to attempt to put a dollar value on the loss of a faculty in the way that we put a dollar value on the loss of a piece of property."[258] As in *Andrews*, Justice Dickson stressed the importance of considering the social impact of non-pecuniary damage awards for the following three reasons: (1) the awards for severely injured plaintiffs may be virtually limitless; (2) plaintiffs are already wholly compensated for loss of future earnings; and, (3) non-pecuniary damages awards are not necessarily "compensatory."[259] While consenting that placing upper limits on non-pecuniary damage awards is arbitrary, Justice Dickson thus endorsed the caps in personal injury cases.[260] Ultimately, the court held that the circumstances in this case did not justify exceeding the non-pecuniary damage cap even though Lindal's injuries were different from those suffered by the plaintiffs in the trilogy.[261]

b. Ter Neuzen v. Korn

In 1995, in *Ter Neuzen v. Korn*,[262] the Supreme Court of Canada again reinforced the position that limits on non-pecuniary damage awards were now a "rule of law."[263] There, the plaintiff contracted HIV after undergoing artificial insemination.[264] The jury awarded CAD $460,000 in non-pecuniary damages, and the Court of Appeals set aside the verdict.[265] Similar to *Lindal*, the Supreme Court of Canada discussed the circumstances that would warrant exceeding the non-pecuniary damage award cap.[266] The Supreme Court of Canada cited *Lindal* and established that when a jury award surpasses the rough upper limit, it should be reduced as a matter of law.[267] As in *Lindal*, the court held that although the plaintiff's injuries differed from that of the plaintiffs in the trilogy, the cost of the social burden

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257 *Lindal,* 2 S.C.R. at 641.
258 *Id.* at 636.
259 *Id.* at 639; *see Andrews,* 2 S.C.R. at 261.
260 *Lindal,* 2 S.C.R. at 640.
261 Law Reform Commission of British Columbia, *supra* note 1.
262 *See* Ter Neuzen v. Korn*,* [1995] 3 S.C.R. 674, 674 (Can.).
263 Ayre, *supra* note 132, at 7.
264 *Ter Neuzen*, 3 S.C.R. at 674.
265 *Id.* at 675.
266 Benedek, *supra* note 11, at 639–640.
267 Good, *supra* note 40, at 392.

outweighed that factor.[268] Therefore, a non-pecuniary damage award that exceeded the non-pecuniary damage cap would be inappropriate in this case.[269]

c. Lee v. Dawson

In 2006, *Lee v. Dawson* challenged the non-pecuniary damage cap set forth by the trilogy.[270] The seventeen-year-old plaintiff, Ik Sang Lee, was injured in an automobile accident.[271] The plaintiff suffered a traumatic brain injury and severe physical injuries.[272] The jury awarded CAD $2,000,000 in non-pecuniary damages, exceeding the rough upper limit.[273] The trial court subsequently reduced the award to the upper limit, which was CAD $294,600 at the time.[274] The defendants appealed to the Court of Appeal for British Columbia, and the plaintiff cross-appealed seeking to reinstate the jury's damage award.[275] The Supreme Court of Canada denied review without reason.[276]

The plaintiff argued that the non-pecuniary damage cap set forth in the trilogy discriminated against persons injured in civil negligence actions, which was inconsistent with Section 15 of the Canadian Charter of Rights and Freedoms.[277] Section 15 of the Canadian Charter of Rights and Freedoms provides an equality and non-discrimination guarantee.[278] The plaintiff further asserted that the court would not be bound by *stare decisis* if it found that the non-pecuniary damage cap set forth by the trilogy was inconsistent with the values of the Canadian Charter of Rights and Freedoms.[279] The

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268 Benedek, *supra* note 11, at 641.

269 *Id.*

270 *See Lee*, B.C.C.A. 159 at para. 1.

271 *Id.* at para. 2.

272 *Id.* at para. 4.

273 *Id.* at para. 8.

274 *Id.* at para. 1; *Statistics Canada, Government of Canada,* http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/cpis01a-eng.htm (stating that non-pecuniary damage upper limits are adjusted for inflation each month by the Government of Canada using a Consumer Price Index (CPI), which reflects changes in Canadian consumer prices).

275 *Id.*

276 Ayre, *supra* note 132, at 7.

277 *Lee*, B.C.C.A. 159 at para. 17.

278 *Id.* at para. 45.

279 *Id.* at para. 17.

plaintiff argued that the damage limits resulted in deferential treatment, favoring plaintiffs who are not severely injured.[280] The plaintiff further reasoned that, "[t]hose less seriously injured plaintiffs are not subject to any limit because courts are to assess non-pecuniary damages without regard for the upper limit until the limit is reached."[281]

While the court found the plaintiff's argument persuasive, citing *Ter Neuzen* and *Lindal,* the court held that it was bound by the trilogy.[282] However, the court ultimately agreed that non-pecuniary damage caps need to be revisited by the Supreme Court of Canada in the future.[283]

In refusing to grant review without reason in *Lee*, the Supreme Court of Canada dismissed "the opportunity to provide comprehensive guidance and current reasons on the status of the upper limit."[284] The Supreme Court of Canada has maintained that the law set forth by the trilogy is binding precedent and remains good law.[285]

IV. ARGUMENT

Ultimately, this article argues that a recent and a critical shift is taking place—namely, that the highest level of courts in American States (like the Supreme Court of Florida) and Canadian Provinces are holding statutory non-economic damage caps unconstitutional as a violation of equal protection and that such trend will translate to Canada as well. Not only does Canada continuously look to the United States for guidance, but the statutory non-economic damage caps do not serve the purpose suggested by the government. Further, the purported policy reasons behind the caps lacks evidentiary support. In sum, this article predicts that because the Supreme Court of Canada is not strictly bound by *stare decisis*, the Supreme Court of Canada will follow the shift in the United States and hold that non-economic damage caps violate equal protection.

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280 *Id.* at paras. 51–53.
281 *Id.* at para. 51.
282 *Lee,* S.C.C.A. No. 192 at para. 20.
283 *Id.* at para. 90.
284 Good, *supra* note 40, at 390–91.
285 *Id.* at 392.

A. Comparing Lee and Kalitan: The Equal Protection Argument

The plaintiffs in both *Lee* and *Kalitan* asserted equal protection arguments, questioning the constitutionality of the government imposed non-economic damage award caps.[286]

The Supreme Court of Florida was convinced in *Kalitan* that the non-economic damage caps violated equal protection under the rational basis test.[287] To meet the rational basis test, "a statute must bear a rational relationship to a legitimate state objective," and cannot be arbitrarily imposed.[288] Here, the plaintiff, Kalitan, met her burden by proving that the statutory caps on personal injury non-economic damages in medical negligence actions did not bear a rational relationship to the state of Florida's objective of alleviating the alleged medical malpractice crisis and such caps were arbitrarily imposed.[289] The court was convinced that the damage caps "created arbitrary distinctions between classes of medical malpractice victims, and they unreasonably and arbitrarily limited recovery of those most grievously injured by medical negligence."[290] Further, the court agreed that "even if caps were rationally related to a legitimate government purpose when the statute was enacted, no evidence of continuing crisis justified arbitrary application of the caps that discriminated between medical malpractice victims."[291]

The Supreme Court of Canada declined to hear *Lee* without reason.[292] Although the Court of Appeals was convinced by plaintiff Lee's argument, the Court of Appeals was unable to overrule the established precedent to rule in Lee's favor.[293] The plaintiff argued that the non-pecuniary damage caps allowed those plaintiffs who suffered less serious losses to be fully and fairly compensated, while those plaintiffs suffering from more serious losses would not be.[294] Further, the plaintiff asserted that "the fact that juries are not informed of the cap unless the plaintiff has sustained a serious injury

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286 *See* N. Broward Dist. Hosp. v. Kalitan, 219 So. 3d 49, 56 (Fla. 2017); *see also* Lee v. Dawson, [2006] B.C.J. No. 679, para. 17 (Can.).

287 *Kalitan,* 219 So. 3d at 55.

288 *Id.* at 56.

289 *Id.* at 55.

290 *Id.*

291 *Id.*

292 *See* Good, *supra* note 40, at 390.

293 *See* Lee v. Dawson, [2006] B.C.J. No. 679, para. 20 (Can.).

294 *Id.* at para. 51.

underscores the point that plaintiffs with less serious injuries have the advantage of a jury's assessment of their damages without the constraints imposed by the cap."[295] The plaintiff cited a decision of the Supreme Court of Alabama, *Moore v. Mobile Infirmary Association.*[296] In *Moore,* the plaintiff, Moore, challenged a statutory non-economic damage cap in medical malpractice actions.[297] The court held that the cap was unconstitutional as a violation of equal protection because it favored those plaintiffs who were less severely injured.[298] Similarly, Lee ultimately asserted that "[i]n failing to permit full compensation for serious injury and loss, the common law perpetuates the disadvantage of people who are already disadvantaged."[299] Further, Lee stated that "the effect of the cap is the imposition of an extra layer of discrimination to the plight of the disabled in our society, who, unfortunately, face many challenges as a result of prevailing social attitudes and the lack of accessibility of jobs, education, and society generally."[300] Lastly, Lee argued that the non-pecuniary damage caps were selected arbitrarily, without "correspondence between the non-pecuniary damages available to a plaintiff and the needs, capacity, or circumstances of the disabled plaintiff."[301]

As in Florida, one of the Supreme Court of Canada's justifications of the non-pecuniary damage caps set forth in the trilogy was the desire to avoid skyrocketing insurance premiums.[302] However, Lee argued that "a law that deprives plaintiffs of legitimate damages in order to avoid an increase in premiums for other people, has a discriminatory purpose."[303] Rejecting Lee's argument, the court cited *Lindal*, stating that "the Supreme Court of Canada has clearly

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295 *Id.* at para. 52.

296 *Id.* at para. 54; *see also* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 156 (Ala. 1991).

297 *See Moore*, 592 So. 2d at 156.

298 *See id.*

299 *Lee,* [2006] B.C.J No. 679 at para. 62 (Can.).

300 *Id.*

301 *Id.* at para. 63.

302 *Id.* at para. 65; *see* Estate of McCall v. United States, 134 So. 3d 894, 906 (Fla. 2014).

303 Lee v. Dawson*,* [2006] B.C.J. No. 679, para. 65 (Can.); *see* Ferraiuolo v. Olson, [2004] A.B.C.A. No. 218, paras. 112–66, 51–159 (Can.).

indicated that the amount of non-pecuniary damages should not depend solely on the severity of the injury, 'but upon its ability to ameliorate the condition of the victim considering his or her particular situation.'"[304] Lee asserted additional arguments to emphasize the need to re-examine the justifications for the damage caps and the "conceptual and practical difficulties" in its application.[305] Additionally, Lee asserted that the trilogy's purported "rough" upper limits have unintentionally become a strict rule of law, rather than a guideline as it was originally intended.[306] Further, the policy reasons justifying the trilogy's rough upper limit—namely, increased insurance premiums set over twenty-five years ago—no longer existed.[307] Ultimately, the court agreed with the plaintiff, Lee, stating that "the time may have come for the rationalization or conceptual underpinning for having a rough upper limit on non-pecuniary damages to be re-examined."[308] However, the court felt that it was in no position to overturn the precedent set forth in the trilogy."[309]

B. The Justification for Statutory Damage Caps in Florida: The Malpractice Liability Insurance Crisis

In *McCall*, the Florida Legislature (the "Legislature") alleged that the justification for the non-economic damage cap was "a medical malpractice insurance crisis of unprecedented magnitude."[310] The Legislature noted that excessive damage awards by runaway juries resulted in increased malpractice liability insurance premiums.[311] Furthermore, the Legislature asserted that increased malpractice liability insurance premiums resulted in the following: phy-

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304 *See* Lee v. Dawson*,* [2006] B.C.J. No. 679, para. 81 (Can.); *see also* Lindal v. Lindal, [1981] 2 S.C.R. 639, 637 (Can.).

305 *Lee,* [2006] B.C.J No. 679 at para. 84 (Can.).

306 *See id.* at para. 84 (i).

307 *See id.* at para. 84 (iii, viii).

308 *Id.* at para. 90.

309 *Id.*

310 Estate of McCall v. United States, 134 So. 3d 894, 906 (Fla. 2014) (internal quotation marks omitted).

311 *See id.* at 907.

sicians fleeing Florida, physicians retiring early, and physicians refusing to perform high-risk procedures.[312] However, such allegations were unfounded.[313] Government reports indicated an increased number of physicians throughout Florida and provided no evidence of increased frivolous lawsuits or exorbitant jury verdicts.[314] Regardless of the existence of the medical malpractice liability insurance crisis, the non-economic damage caps would not alleviate such a crisis.[315] Ultimately, the plurality and concurring opinions in *McCall* agreed that the existence of non-economic damages caps would not lessen insurance rates.[316] While the statutory damage caps resulted in savings for insurance companies, such savings did not translate to decreased insurance premiums for physicians.[317] Further, the court reasoned that although the statutory caps may have been enacted during a malpractice liability insurance crisis, a crisis is not a permanent condition.[318] Once again citing flexibility, the court stated, "Conditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation."[319] As a result, the court in *Kalitan* adopted the findings of the court in *McCall,* that there was no evidence of a continuing malpractice liability insurance crisis in Florida.[320] Furthermore, the court in *Kalitan* agreed that even if a malpractice liability insurance crisis existed, the statutory caps would not be justified.[321]

C. The Justifications for Statutory Damage Caps in Canada

Non-pecuniary damage award caps "unfairly impact those who are victims of personal injury and whose situations could be improved by a reasonable award."[322] By upholding the non-pecuniary damage award caps, the Supreme Court of Canada has essentially

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312 *Id.* at 906.
313 *Id.*
314 *Id.* at 908.
315 *Id.* at 911.
316 *Id*. at 910.
317 *See id.*; *see also McCall*, 134 So. 3d at 919 (Pariente, J., concurring).
318 *Id.* at 913.
319 *Id.*; *see also McCall*, 134 So. 3d at 920 (Pariente, J., concurring).
320 N. Broward Dist. Hosp. v. Kalitan, 219 So. 3d 49, 57 (Fla. 2017).
321 *Id.* at 59.
322 Good, *supra* note 40, at 390.

prioritized consistency and simplicity of judgments rather than justice for the most severely injured plaintiffs.[323] The impact of the Supreme Court of Canada's "refusal to address the question posed by *Lee* was to pass up the opportunity to provide comprehensive guidance and current reasons on the status of the upper limit."[324] Further, as a result of the Supreme Court of Canada's refusal to hear the plaintiff's argument in *Lee*, the constitutionality of the non-pecuniary damage caps remains uncertain.[325] Future clarification is essential to resolve such ambiguity.[326]

The Supreme Court of Canada looked to the United States to support its assertion that increased insurance premiums would result from exorbitant damage awards.[327] However, the evidence provided was misleading and lacked factual backing.[328] The Supreme Court of Canada's decision to enforce the non-pecuniary damage caps "was based on an apprehension of crisis in the insurance industry and the costs of insurance" and made without any material evidence.[329] High damage awards and non-pecuniary loss are not the sole reason for high insurance premiums.[330] Other factors that increase insurance premiums include the following: "poor claims control, inadequate standards of practice and financial mismanagement."[331] Further, in reality, "[t]he perception of an insurance crisis [in both the United States and Canada] was being fostered by a vigorous publicity campaign conducted by the insurance industry."[332] "If a decision is to be taken that someone who has been injured is to be deprived, on the ground of social costs . . . that decision should rest on a firmer basis than the cursory examination of the experience of another jurisdiction."[333] Further, "[i]t is particularly troubling that a misleading view of that experience may have been fostered by an

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323 *See id.*
324 *Id.* at 390–91.
325 *Id.* at 391.
326 *Id.*
327 *See* Law Reform Commission of British Columbia, *supra* note 1, at 13.
328 *See id.*
329 *Id.*
330 *Id.*
331 *Id.*
332 *Id.*
333 *Id.*

extensive advertising campaign sponsored by interested parties."[334] Non-economic damage caps not only lack sufficient justification, but the caps also fail to effectively lower insurance premiums.

D. Non-Economic Damage Caps: Do the Ends Justify the Means?

As suggested in *McCall* and *Kalitan*, the non-economic damage caps do not effectuate their stated purpose.[335] The caps in Canada also fail for similar reasons, as suggested in *Lee*.[336] There is uncertainty as to the association between non-economic damage caps and insurance premiums.[337] However, "non-economic damage caps seem to be only a small factor affecting increases in malpractice insurance rates."[338] Some studies conducted within the United States suggest that damage caps effectively reduce medical liability insurance premiums.[339] The presumption is that once non-economic damage caps are legislated, medical insurance providers reduce insurance premiums due to decreased risk exposure.[340] However, in practice, states that have adopted non-economic damage caps show that premiums are unlikely to be reduced due to uncertainty surrounding the constitutionality of the damage award limits.[341] Further, some studies found no association between non-economic damage caps and insurance premiums altogether.[342]

The principal advantages to the non-pecuniary damage caps include decreased litigation and increased judicial consistency and efficiency of evaluation of non-pecuniary loss.[343] Namely, some non-pecuniary damage limit may be "essential to ensure consistency,

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334 *Id.*

335 *See McCall*, 134 So. 3d at 911; *see also* N. Broward Dist. Hosp. v. Kalitan, 219 So. 3d 49, 57 (Fla. 2017).

336 *See* Lee v. Dawson, [2006] B.C.J No. 679, para. 84 (Can.).

337 *See* Fish, *supra* note 7, at 139.

338 *Id.* at 140.

339 Nelson, *supra* note 125, at 463; *see* Leonard J. Nelson III, Michael A. Morrisey, & Meredith L. Kilgore, *Damages Caps in Medical Malpractice Cases*, 85 THE MILBANK Q. 259, 260 (2007).

340 *See* Fish, *supra* note 7, at 139.

341 *See id.*

342 *See id.*

343 *See* Law Reform Commission of British Columbia, *supra* note 1, at 18.

fairness, and the application of rational principles in assessing damages for personal injury."[344] Non-pecuniary damage award caps may be reasonable by allowing "a substantial sum of money to be allocated for the purchase of substitute pleasures without going to ridiculous extremes."[345] Non-pecuniary damages are unquantifiable monetarily and are therefore necessarily arbitrary to some degree.[346] Further, removing the non-pecuniary damage caps in Canada "may upset the balance that has been arrived at in determining fair compensation."[347] However, doing away with damage award caps "would not alter the fact that compensation for loss consists of interrelated considerations."[348]

There are significant disadvantages to non-pecuniary damage award caps, principally that non-pecuniary damage award caps violate the constitutional rights of plaintiffs.[349] Such caps may be unnecessary to impose non-pecuniary damage awards and are unlikely to increase, except to account for inflation.[350] The non-pecuniary damage caps created by the Supreme Court of Canada and continuously imposed by the trilogy have proven "not to be moderate but in many cases wholly inadequate."[351] Non-pecuniary damage caps have "created a situation where victims of massive injuries are receiving only marginally more than victims of less severe injuries."[352] Ultimately, "an upper limit, designed to suppress damages for non-pecuniary loss to a moderate level, has affected the measurement of these damages at every level."[353]

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344 S.M. Waddams, *Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention*, 63 CAN. B. REV. 734, 734 (1985).

345 Dale Gibson, *Repairing the Law of Damages,* 8 MAN. L. J. 637, 657 (1977-78).

346 *See* Waddams, *supra* note 344, at 735.

347 Law Reform Commission of British Columbia, *supra* note 1, at 18.

348 *Id.*

349 Fish, *supra* note 7, at 142; *see* Watts v. Lester E. Cox Med. Centers, 376 S.W. 3d 633, 636 (Mo. 2012) (holding that a statutory non-economic damage cap for medical negligence violated the constitutional right to a trial by jury); *see generally* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 738–40 (2010) (holding that a statute limiting non-economic damage awards is unconstitutional).

350 Law Reform Commission of British Columbia, *supra* note 1, at 23.

351 *Id.*

352 *Id*.

353 *Id.*

An analysis of large Canadian claims found that non-pecuniary damages made up 15% of the aggregate awards, while non-economic damages in United States medical negligence claims represented nearly half of the aggregate awards.[354] Further, "empirical studies in [Canada] have found that states[355] with caps on damages in medical malpractice cases have reduced overall claims severity by 23% to 40%."[356] "Awards of increasingly high non-economic damages in medical liability cases, with the resulting impact on the cost of liability insurance and the availability of care in some cases, led to the passage in many states of limits on non-economic damages or, in some cases, to limits on total damages recoverable in medical negligence actions."[357] Further, "a number of those limits were subsequently struck down by state courts as unconstitutional, although a number were upheld, and the issue of limits on non-economic damages remains a flash point in the debate over reform."[358]

V. CONCLUSION

The future remains uncertain as to whether Canada will follow the shift in the United States, and Florida specifically, and reverse the trilogy to rule that non-economic damage award caps should be eliminated altogether. The need for and the fairness of non-economic damage award caps has been repeatedly questioned in recent years and will likely be the subject of litigation in the future.

In *Kalitan,* the Supreme Court of Florida held that the statutory limits[359] imposed on non-economic damages in medical negligence suits violated the Florida Constitution's Equal Protection Clause.[360] Similarly, in *Lee*, the plaintiff argued that the non-pecuniary damage

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354 *See* Theresa M. Hottenroth, *Lessons from Canada: A Prescription for Medical Liability Reform*, 13 WIS. INT'L L. J. 285, 298 (1994).

355 Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence,* 49 L. & CONTEMP. PROBS 57, 64 (considering California, Illinois, Maryland, New Jersey, New York, and Arizona in the study).

356 *See* Hottenroth, *supra* note 355.

357 *Id.* at 302–03.

358 *Id.* at 303.

359 *See* FLA. STAT. § 766.118(2) (2011); *see also* FLA. STAT. § 766.118(3) (2011).

360 FLA. CONST. art. I, § 2; N. Broward Dist. Hosp. v. Kalitan, 219 So. 3d 49, 60 (Fla. 2017).§

cap set forth in the trilogy discriminated against persons injured in civil negligence actions, which is inconsistent with Section Fifteen of the Canadian Charter of Rights and Freedoms.[361] Section Fifteen of the Canadian Charter of Rights and Freedoms provides an equality and non-discrimination guarantee.[362] The court in *Lee* upheld the non-pecuniary damage award cap because it was bound by *stare decisis*, namely, the precedent established by the trilogy.[363] Although the "rough" upper limit to non-pecuniary damage awards proposed by the Supreme Court of Canada in *Andrews* was initially a guideline, the Supreme Court of Canada's holding in *Lindal* essentially made such limit a rule of law.[364] However, the court in *Lee* reasoned that "the rationalization or conceptual underpinning for having a rough upper limit on non-pecuniary damages [should] be re-examined."[365] Ultimately, the Supreme Court of Canada declined to hear *Lee* without reason.[366] *Lee* likely is not the last word on non-pecuniary damage award caps in Canada.[367] It is still possible for the Supreme Court of Canada to reassess its previous decisions, but "[w]hen and whether that will happen, however, remains to be seen."[368]

There are significant disadvantages to non-pecuniary damage award caps, principally that non-economic damage caps violate the constitutional rights of plaintiffs.[369] Non-pecuniary damage award caps likely do not effectuate their stated purpose. The Supreme Court of Canada looked to the United States to support its assertion that increased insurance premiums would result from exorbitant damage awards.[370] However, the evidence provided is misleading and lacks factual basis.[371] The Supreme Court of Canada's decision

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361 *See* Lee v. Dawson, [2006] B.C.J. No. 679, para. 17 (Can.).

362 *Id.* at para. 45.

363 *See id.* at para. 17.

364 *Id*. at para. 45.; *see* Andrews v. Grand & Toy Alberta Ltd., [1978] S.C.R. 229, 263 (Can); *see also* Lindal v. Lindal, 2 S.C.R. at 637.

365 Lee v. Dawson, [2006] B.C.J. No. 679, para. 90 (Can.).

366 *See* Good, *supra* note 40, at 390–91.

367 *Id*. at 414.

368 *Id.*

369 Fish, *supra* note 7, at 142.

370 *See* Law Reform Commission of British Columbia, *supra* note 1, at 13.

371 *See id.*

to enforce the non-pecuniary damage caps "was based on an apprehension of crisis in the insurance industry and the costs of insurance," without any material evidence, and was made nearly forty years ago.[372]

There is significant doubt as to a correlation between non-economic damage caps and insurance premiums.[373] Although there are some advantages to the non-pecuniary damage award cap, including decreased litigation and increased judicial consistency and efficiency of evaluation of non-pecuniary loss,[374] such advantages likely do not outweigh the substantial costs. The non-pecuniary damage caps created by the Supreme Court of Canada and continuously imposed by the trilogy have proven "not to be moderate but in many cases wholly inadequate."[375] Non-pecuniary damage caps have "created a situation where victims of massive injuries are receiving only marginally more than victims of less severe injuries."[376] Ultimately, the Supreme Court of Canada should revisit the issue of the non-pecuniary damage award rough upper limits in the interest of fairness and justice.[377] The Supreme Court of Canada should consider the shift in the United States and abolish the non-pecuniary damage award caps as they are unconstitutional.

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372 *Id.*
373 *See* Fish, *supra* note 7, at 139.
374 Law Reform Commission of British Columbia, *supra* note 1, at 18.
375 *Id.* at 23.
376 *Id.*
377 *See* Good, *supra* note 40, at 415.