

EXAM 6 – CANADA, FALL 2012

7. (2 points)

In a series of decisions rendered in 1978, commonly referred to as the Trilogy, the Supreme Court of Canada established a cap on non-pecuniary damages.

a. (1.5 points)

Describe three justifications presented by the Court for establishing the cap.

b. (0.5 point)

Describe how the cap affects the level of equity in compensation between people with temporary or less severe injuries and those with permanent and more severe injuries.

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and human capital investment and would most likely be a viable option for the larger insurance companies)

Actual candidate answer for full marks:

- a) 1) Standard approach: A rules based approach used by companies to determine the minimum capital requirements and the target (solvency) capital requirement. All insurers use this approach for the minimum capital.
2) Internal model approach: An approach developed internally by each insurer to determine their target capital. The regulator must approve this approach based on individual insurer characteristics before they can use it. Otherwise, insurers will use the standard approach.
- b) The Standard approach since the small insurer may not have enough resources to make its own internal model.

Examiner's report:

Part B was answered well even if part A did not contain the correct answer. For part A candidates often got confused answering as if it were Solvency 2 instead of the OSFI framework.

Question 7

Answer key:

a.

3 of the below:

- 1) The claim of a severely injured person for damages for non-pecuniary loss is virtually limitless. The fact that there is no objective yardstick for measuring such loss leaves this area open to inconsistent and widely extravagant awards.
- 2) Damages for non-pecuniary losses are not really "compensatory" as no money can provide true restitution. Accordingly, such damages should be viewed as simply providing additional money to make life more endurable.
- 3) Under the law, the plaintiff will be fully compensated for future loss of income and future care costs which are arguably more important for ensuring that the injured person is well cared for in the future.
- 4) Exorbitant awards for general damages can lead to an excessive social burden (i.e. unaffordable increases in insurance and social costs).

b.

Relative to actual losses, the liability process tends to over compensate people with temporary or less severe injuries and under compensate those with permanent and more severe injuries. Particularly in recent years, this trend has resulted from rapidly inflating and precedent-setting court awards for non-economic losses (called "general damages" or pain and suffering) in cases of temporary soft-tissue injury. At the other end of the scale, such compensation in cases of more severe and damaging injury is capped both by the policy limits in effect and by an upper limit on general damages by the Supreme Court of Canada in 1978.

Actual candidate answer for full marks:

(a)

- 1) Non-pecuniary damages are not really meant to be compensatory as by nature they can't be. They are just meant to make life more bearable.
- 2) Not having a cap could lead to an excessive social burden. High awards could cause premiums for insurance to be high. Eventually, only the healthy may be able to afford to drive.
- 3) Losses for medical expenses, wage loss, and lost wages are already required by law. These are the more important matters. The claimant must be well cared for.

(b) People with more severe injuries can argue that the benefits are not fair and those with less serious injuries can be fully compensated while they can't. The cap is constitutional and it is fair as the benefits are not meant to totally indemnify the injured person.

Examiner's report:

- a. This was a fairly straight forward question that has been asked in the past. The paper clearly outlines the Supreme Court's justification for the cap in four points. Full marks required a demonstration of a strong understanding of three of the four arguments. Candidates generally answered this question well.
- b. In general, candidates did well on this question. A common error was to answer that non-pecuniary damages are not intended to be compensatory, so compensation was equal between the two groups. Given the potential ambiguity of the wording of the questions, part marks were given for this response.

Question 8

Answer key:

a)

- Did the accident result from ordinary and well known activities to which automobiles are put?
- Is there some causal relationship between the injuries and the user or operation of the vehicle?

b) Is covered.

BC policies have the wording that policyholders are entitled to no-fault benefits for injuries "that arise out of" the ownership, use or operation of a vehicle.

c) Not necessary binding.

Ontario policies have the wording that policyholder are entitled to no-fault benefits for injuries "caused by" the ownership, use, or operation of a vehicle.

Actual candidate answer for full marks:

- a)
 - The purpose test: Does the driver was using his car in a normal activity (normal use)
 - The causality test: Does the link between the use of his care the shooting were related?
- b) The driver was using his car in a normal use and there is a link between the use of his car and the shooting as to be entitled for no-fault benefit in BC, the damage must be "arising out" of the use & ownership of the car. Thus, he is entitled to recovery.