

5. (2.5 points)

An insured suffered severe brain injuries in a car accident as a result of another driver's negligence and will no longer be able to work. The insured's future income is estimated to be \$2 million.

a. (0.5 point)

Describe how the cap established by Supreme Court of Canada in the Trilogy cases will be applied in the situation described above.

b. (0.75 point)

Identify three rationales behind the establishment of the cap in part a. above.

c. (0.75 point)

Briefly discuss three of the arguments presented in the case of Lee v. Dawson that support the removal of the cap.

d. (0.5 point)

Briefly discuss the two arguments used by the British Columbia Court of Appeal to uphold the cap.

EXAM 6C SPRING 2015 SAMPLE ANSWERS AND EXAMINER'S REPORT

QUESTION 5	
TOTAL POINT VALUE: 2.5	LEARNING OBJECTIVE: A3 knowledge statement b
SAMPLE ANSWERS (BY PART, AS APPLICABLE)	
Part a: 0.5 point	
<ul style="list-style-type: none"> • Cap of \$100,000 as set forth by the Trilogy will be used; the cap will be indexed for inflation and applied on the compensation for his non-pecuniary damages. The cap will provide a rough upper limit to the award of non-pecuniary damage; rough upper limit is \$100k with indexation of inflations. • The cap will only apply to non-economic damages for pain and suffering ,etc. and will not affect the economic damage to compensate for the loss of future income. The cap will impose a maximum of \$100,000 for non-economic damages with indexation considering inflation. 	
Part b: 0.75 point	
<p>Any three of the following received full credit:</p> <ul style="list-style-type: none"> • Extravagant awards will lead to social burden, resulting in availability and affordability issues. • Economic damages are fully compensated. • To ensure predictability and stability of awards. • Claims for pain and suffering of severely injured individuals are virtually limitless. The absence of an appropriate yardstick for awards can lead to inconsistent and wildly extravagant awards. • Non-economic damages are not meant to be compensatory, and should be viewed as additional money to make life more endurable. 	
Part c: 0.75 point	
<p>Any three of the following received full credit:</p> <ul style="list-style-type: none"> • The most important argument is the argument for equity in the context of the Charter <ul style="list-style-type: none"> ○ Cap discriminated against seriously injured victims of negligence as less seriously injured victims were entitled to full compensation for pain and suffering ○ Full compensation was denied to the most seriously injured victims as a result of the cap ○ Seriously injured victims also discriminated when compared to seriously injured victims of other torts where cap does not apply ○ Trilogy predated the Charter and had never been subject to a Charter analysis • Rough upper limit was not a strict rule of law • Considerations contemplated in the trilogy, such as skyrocketing awards and insurance premiums had proven to be false • Upper limit precluded juries from keeping up with the pace of social, economic and technological change in society • Cap is inconsistent with modern community values, which are more accepting of disabilities than previously. • Rough limit disregards juries and the importance of juries outweighs the hypothetical benefits that the guidelines might bestow • Limit constitutes a radical change in the common law contrary to the accepted incremental method of achieving such changes 	

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<ul style="list-style-type: none">• Cap produces unjust results for plaintiffs whose situations differ from the plaintiffs in the trilogy• Cap is arbitrary and lacking a logical foundation
Part d: 0.5 point
<ul style="list-style-type: none">• The British Columbia Court of Appeal: Arguments based on Charter were rejected as awards for general damages were never meant to provide full compensation, so it should not be dependent on the seriousness of injury• The British Columbia Court of Appeal: Court recognizes it might be time to rationalize and examine the cap and the submissions seem compelling, but the court of appeal cannot overturn the trilogy
EXAMINER'S REPORT (BY PART, AS APPLICABLE)
<ul style="list-style-type: none">• Candidates were expected to know how Canadian Cap is applied for non-pecuniary general damages.• Most candidates seemed having troubles with part d, failing to identify that it is not up to the court of appeal to overturn the ruling of the trilogy.
Part a
<p>Most candidates did not receive full credit for this part. Common errors include:</p> <ul style="list-style-type: none">• Neglecting to mention inflation indexation of the Cap.• Neglecting to mention the cap should only be applied to non-pecuniary damage.• Some candidates did not mention the application of the cap and instead mentioned that the \$2M future income will not be capped.
Part b
<ul style="list-style-type: none">• Roughly half of candidates got full marks on this part.• Candidates received partial credit for only discussing only one or two rationales.• A few candidates were confused by answering the cap with punitive damage, not general damage and thus losing credits.
Part c
<ul style="list-style-type: none">• Roughly half of candidates got full marks on this part.• Candidates received partial credit typically were able to discuss only one or two arguments.
Part d
<ul style="list-style-type: none">• Very few candidates got full marks on this part• The vast majority failed to mention that the court of appeal cannot overturn the ruling of the trilogy.• Another common mistake was using answers from part b for this part.