

Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss

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TABLE OF CONTENTS

I.	INTRODUCTION	1521
II.	THE SUPREME COURT OF CANADA'S VIEW ON AGGRAVATED DAMAGES	1522
III.	DEFINING A FUNCTION FOR AGGRAVATED DAMAGES	1530
IV.	THE DIGNITARY INTEREST	1535
V.	THE PRESCRIPTIVE POWER OF THE DIGNITARY INTEREST AND REFERENTIAL LOSS	1542
VI.	CONCLUSION	1549

I. INTRODUCTION

Recently, a number of scholars and law reform commissions have suggested that underlying the award of aggravated damages in Anglo-Canadian law is the protection of a person's dignity. Many of these same commentators suggest either the development of a new tort focused upon the protection of dignity, or that aggravated damages

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should be reconciled with damages for mental distress within a purely compensatory framework. In this Article I argue for the explicit recognition of the “dignitary interest” as a distinct head of damages. In Part I, I analyze recent decisions of the Supreme Court of Canada that have commented on the availability of aggravated damages. These decisions illustrate a degree of incoherence over the function of aggravated damages and how they should be quantified. Part II identifies how the protection of dignity lies at the root of awards for aggravated damages. Part III conceptualizes what is encompassed within the “dignitary interest.” I argue that dignity can be conceptualized on a continuum. At one end lies “fundamental dignity,” which is held by all of humanity, while at the other lies “prosaic dignity,” dignity attained as the result of individual talents, accomplishments, and social position. Important in this regard is the distinction between the feelings associated with a loss of dignity and the loss of dignity itself. Compensation for the former can be achieved through compensatory damages for mental distress. Loss of “fundamental dignity” is a shared loss among all of humanity and generates a plethora of coercive remedies including punitive damages. “Prosaic dignity” is a “referential loss”—one that is only revealed through the eyes of others—and generates compensatory damages. A referential loss basis of quantification creates objectivity and avoids the pitfalls of palm tree justice. Part IV contrasts a purely remedial response with those who advocate a new tort action to protect loss of dignity. Finally, the prescriptive power of explicit recognition of the dignitary interest and referential loss are applied to the Supreme Court of Canada’s decisions from Part II.

II. THE SUPREME COURT OF CANADA’S VIEW ON AGGRAVATED DAMAGES

Over the last fifteen years, the Supreme Court of Canada has on at least seven occasions made significant comment on the awarding of punitive damages, particularly in the area of wrongful dismissal and defamation.² Caught in these pronouncements has been the role performed by “aggravated damages.” While there has been exhaustive comment by the Court on the awarding of punitive damages, far less attention has been devoted to delineating the functions and boundaries of

2. *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595; *Performance Indus. Ltd. v. Sylvan Lake Golf & Tennis Club*, [2002] 1 S.C.R. 678; *McKinley v. BC Tel*, [2001] 2 S.C.R. 161; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Vorvis v. Ins. Corp.*, [1989] 1 S.C.R. 1085.

aggravated damages.³ Yet, the functions performed by the former can only be discharged after the latter have been determined.⁴

In *Vorvis v. Insurance Corporation of British Columbia*, a case dealing with wrongful dismissal, Justice McIntyre, writing for a majority of the Court, distinguished between aggravated and punitive damages in the following way:

“The expression ‘aggravated damages,’ though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant’s insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.”⁵

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.⁶

The issue in *Vorvis* was whether either aggravated or punitive damages could be awarded when the plaintiff was wrongfully dismissed from his employment. The common law had for a long time taken the position that in the case of wrongful dismissal, damages should be limited to the extent of a reasonable notice period and, that damages for the manner of dismissal, for injury to feelings, mental distress, and humiliation were not recoverable.⁷ This position diminished the centrality that employment has to a person’s self-worth and mental well-being. Employees were regarded as a fungible commodity no better than the machines they operated. The Supreme Court did not alter this position, and neither punitive nor aggravated damages were awarded. However, the majority

3. See, e.g., *Whiten*, [2002] 1 S.C.R. at 617.

4. It is recognized that compensatory damages have a dual role both to compensate as well as to deter and punish. Where the combined effect of compensatory and aggravated damages is inadequate to rationally achieve punishment or deterrence, additional damages can be awarded to attain this goal. This is commonly expressed in the phrase that punitive damages are justified if, and only if, the totality of the compensatory award is inadequate to punish and deter.

5. *Vorvis*, [1989] 1 S.C.R. at 1099 (quoting S.M. WADDAMS, *THE LAW OF DAMAGES* 562–63 (2d ed. 1983)).

6. *Id.*

7. *Addis v. Gramophone Co.*, [1909] A.C. 488, 491 (H.L.).

did add, “I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here.”⁸

Justice Wilson, in a partial dissenting judgment, clearly equated the awarding of aggravated damages to compensation for mental suffering.⁹ However, she eschewed the view that such an award could only be supported where a separate actionable wrong lay; rather, she opined, that the award of damages for mental distress conformed to the basic principles of contract law damage assessment. In the employment context, it would be vital that such loss fall within the scope of the rules in *Hadley v. Baxendale* regarding remoteness, and that application of these principles would respond to the fear of excessive awards.

The Supreme Court has returned to the issue of appropriate compensation following wrongful dismissal on two occasions, and in both cases has reaffirmed *Vorvis*. Nevertheless, there has been a change in perception of the place that employment plays in establishing a person’s self-worth. In *Wallace v. United Grain Growers Ltd.*,¹⁰ the majority allowed the extension of the reasonable notice period and, thus indirectly, increased the damages award for an employer’s bad faith conduct in the manner of dismissal. Thus, mental distress, humiliation, embarrassment, and loss of dignity may all be incurred as a result of loss of employment, but only loss occasioned from the manner of dismissal will justify extension of the reasonable notice period. The fact that such injuries have been caused, alone justifies the extension of the reasonable notice period. The fact that the injuries may have the *effect* of exacerbating the difficulty in finding new employment, is not relevant for the purposes of extending the notice period following an employer’s act of bad faith conduct in the manner of dismissal. Justice McLachlin rejected this approach in a partial dissenting opinion. For her, the manner of dismissal should only extend the reasonable notice period where, “the manner of dismissal impacts on the difficulty of finding replacement employment”¹¹ Separate damages for the manner of termination can only be awarded if a specific cause of action can be found which supports the award. Later in her judgment, Justice McLachlin is willing to create an implied duty of good faith dismissal in which the employer must treat the employee being dismissed with dignity and decency. The breach of this duty then constitutes an independent actionable wrong.

8. *Vorvis*, [1989] 1 S.C.R. at 1103.

9. Justice Wilson’s discussion of aggravated damages is framed by the heading “Damages for Mental Suffering.” *Id.* at 1113.

10. *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 739.

11. *Id.* at 751.

In effect, the majority's judgment delinks the direct causation element of the plaintiff's harm to the defendant's conduct. Although the employee must experience humiliation, embarrassment, and loss of dignity to result in an extension of the reasonable notice period, it is only where the employer has acted in an egregious fashion while dismissing the employee that the reasonable notice period is extended. The fact of dismissal, which one suspects is more likely to give rise to the employee's humiliation and loss of dignity, does not result in an extension of the reasonable notice period. The exact period of extension is determined by reviewing the degree of outrageous and bad faith conduct of the employer, and not the extent of the resultant harm to the employee. Interestingly, although I suspect an unintended result, Justice McLachlin's approach does maintain the causative link, such that only where the employer has acted in an egregious manner that has caused actual harm to the employee's prospects of securing new employment, will the notice period be extended. It is somewhat problematic how evidence of actual humiliation, embarrassment, and loss of dignity flowing from the *manner* of dismissal could be distinguished from the loss flowing from the *fact* of dismissal. However, the employee's period of reasonable notice could be considerably longer under Justice McLachlin's approach than under the majority's approach, because it is linked to actual resultant harm—although, presumably, still limited by the principles relating to remoteness of damages.

The ability to compensate explicitly for mental distress, humiliation, embarrassment, and loss of dignity in a wrongful dismissal suit is thus dependent upon establishing an independent actionable wrong. Although some lower courts have been prepared to find an independent actionable wrong of another term, either express or implied, within the contract of employment,¹² the usual actionable wrong has been in tort: assault, defamation, and intentional infliction of mental distress. The majority of these tort actions require an intentional action by the tortfeasor, or that the intentional conduct of the tortfeasor is seen as actually exacerbating the plaintiff's injury. One would expect that upon proof of any one of these independent causes of action compensatory damages for either pecuniary or nonpecuniary losses would follow, and if warranted, aggravated damages would be awarded as additional compensation.

12. *Ditchburn v. Landis & Gyr Powers Ltd.*, [1997] 34 O.R.2d 578 (C.A.); *Ribeiro v. Can. Imperial Bank of Commerce*, [1989] 67 O.R.2d 385, 441, *aff'd*, [1993] 13 O.R.3d 278 (1992) (C.A.).

Invariably, where damages are awarded for these independent wrongs, the awarding of aggravated damages is always dependent upon a finding that the employer's conduct was intentional, and often qualified by one of the following adjectives: harsh, vindictive, reprehensible, or malicious. Thus, the requirement of malice as an element of proof of the independent actionable wrong, which justifies compensatory damages often for nonpecuniary losses, has been viewed as an essential element for an award of aggravated damages.¹³ In fact, one could be excused from believing that the only damages available following proof of an independent wrong are, in fact, aggravated damages, and not simply compensatory damages for whatever injury was caused by the tortious conduct of the employer.

The Supreme Court's pronouncements concerning defamation have explicitly recognized the requirement of malicious or oppressive conduct by the defendant as a precondition to the awarding of aggravated damages. In *Hill v. Church of Scientology*, Justice Cory wrote for the Court:

Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. . . .

....
If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.¹⁴

13. In *Wallace*, Justice McLachlin makes the following comment:

This [view] is consistent with the long-standing distinction affirmed in *Vorvis* between damages for breach of the contractual duty to give reasonable notice of termination and other independent causes of action which may give rise more generally to damages for manner of dismissal. On this view, the first source of damages is the traditional wrongful dismissal action compensating for the failure to give reasonable notice. The second source of damages are actions for independently actionable wrongs. The manner of dismissal may figure in both types of action: in the former, where it impacts on prospects of re-employment; in the latter more generally. When it does so, additional aggravated damages may be awarded if the employer's conduct was so "harsh, vindictive, reprehensible and malicious" that damages representing punishment in addition to compensation should be awarded.

Wallace, [1997] 3 S.C.R. at 753–54. In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, 201, another wrongful dismissal case, the plaintiff argued that there was sufficient evidence to go to a jury on the tort of intentional infliction of mental distress. The Supreme Court disagreed and said that before such a matter went to a jury there would have to be evidence of a "deliberate[] inflict[on of] mental distress" or other action of a "discriminatory manner." *Id.*

14. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 1205–06; *see also* Botiuk v. Toronto Free Press Publ'ns Ltd., [1995] 3 S.C.R. 3, 33–34 (citing *Hill*, [1995] 2 S.C.R. at 1205–06, and adopting its reasoning).

This approach has been severely criticized by Raymond Brown, who argues that, in the context of this case, the factors identified by the court to instruct a jury in determining the quantification of general damages were almost identical to the factors identified to justify an award of aggravated damages.¹⁵ Further, the requirement of proof of malice meant that there was a considerable overlap with the evidence relied upon to justify an award of punitive damages.¹⁶

The difficulty with damage quantification in defamation cases is that compensation is not awarded for a measurable harm but is given to the plaintiff as a vindication of his or her reputation in the eyes of the public and as a solatium.¹⁷ It is compensation for loss of dignity and other intangible injuries that forms the core of the general damages. It is the presence of the defendant's malice that the Supreme Court says justifies the aggravated damages and thus distinguishes them from compensatory damages. But why this should be so is left unexplained. Mental distress, anxiety, humiliation, embarrassment, and loss of dignity can all be experienced without the presence of the defendant's malice. While the defendant's malice may deepen the intensity of the loss, it is not a precondition to its incursion.

15. RAYMOND E. BROWN, 3 THE LAW OF DEFAMATION IN CANADA § 25.3(1.1) (2d ed. 1999). In particular, the jury was instructed to determine the compensatory damages in light of a number of aggravating factors that had surrounded the litigation. For instance, the repetition of the remarks, the demeaning cross-examination of the plaintiff and the failure to admit wrong even after the statements were known by the defendant to be false. These same factors formed the basis of the separate award of aggravated damages.

16. In *Hill*, the defamatory conduct resulted from an allegation made by the defendant to the effect that the plaintiff, a crown prosecutor at the time, had violated a court order relating to sealing of documents in a pending action. [1995] 2 S.C.R. at 1141–42. The jury awarded the plaintiff C\$300,000 general damages, C\$500,000 aggravated damages, and C\$800,000 punitive damages, all of which were upheld on appeal. *Id.* at 1154.

17. This sentiment has perhaps best been caught by Justice Windeyer in *Uren v. John Fairfax & Sons Pty. Ltd.*:

It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways—as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

(1966) 117 C.L.R. 118, 150 (Austl.), *aff'd sub nom.* Austl. Consol. Press Ltd. v. Uren, [1969] 1 A.C. 590, 615 (P.C. 1967).

In *Norberg v. Wynrib*,¹⁸ a case raising the torts of battery and breach of fiduciary duty, Justice La Forest, writing for Justices Gonthier and Cory, indicated that aggravated damages would not be awarded as a separate head of damages, although the plaintiff had framed her case in that way, but that they would be folded into the general damages, “taking into account any aggravating features of the case and to that extent increasing the amount awarded.”¹⁹ Such increase in general damages was said to reflect any “humiliation or undignified circumstances” surrounding the battery.²⁰ Drawing a parallel with cases of assault, particularly rape, Justice La Forest opined, “[i]t is hard to imagine a greater affront to human dignity’ than non-consensual sexual intercourse,”²¹ and that significant aggravated damages can be awarded for the “indignity of the coerced sexual assault.”²²

The last recent Supreme Court of Canada case to mention aggravated damages is *Whiten v. Pilot Insurance Co.*, a decision that provided exhaustive treatment of the function and awarding of punitive damages.²³ The case involved the deliberate and flagrant abuse of the insurer’s duty of good faith and fair dealing in failing to honor the plaintiff’s claim on her fire insurance policy. The defendants disputed the plaintiff’s claim asserting that the fire was caused by arson. The defendants maintained this assertion in spite of overwhelming evidence from their own investigators that there was no evidence of arson. Although the plaintiff did not seek aggravated damages, Justice Binnie, writing for the majority, highlighted the distinctiveness of punitive damages from other compensatory damages when he stated:

18. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226. The plaintiff had been a patient of the defendant being treated for various complaints including drug addiction. *Id.* at 226–27. The defendant had requested sexual favors in return for writing further drug prescriptions. *Id.* at 227. The major difficulty for the court was to find a battery where the person assaulted had in fact consented to the battery. For Justice La Forest this required a vitiating of the plaintiff’s consent. *Id.* The relationship of doctor and patient created a power dependency relationship that had been abused by the doctor resulting in the patient’s consent being coerced. For Justices McLachlin and L’Heureux-Dubé the doctor had breached a fiduciary duty owed to the patient and justified an award of equitable compensation in addition to punitive damages. *Id.* at 230.

19. *Id.* at 263 (endorsing the remarks of Justice Lockwood in *N. (J.L.) v. L. (A.M.)*, [1989] 1 W.W.R. 438, 443 (Man. Q.B. 1988)).

20. Although Justice La Forest points out that battery is actionable without proof of damage and that liability is not confined to foreseeable consequences, this cannot be a valid reason for refraining from itemizing the heads of damages. Similar circumstances surround the award of damages in defamation where itemization is practiced.

21. *Norberg*, [1992] 2 S.C.R. at 265 (quoting *R. v. McCraw*, [1991] 3 S.C.R. 72, 85 (opinion of Cory, J.)).

22. *Id.* at 264.

23. *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595.

Second, it must be kept in mind that punitive damages are not compensatory. Thus the appellant's pleading of emotional distress in this case is only relevant insofar as it helps to assess the oppressive character of the respondent's conduct. Aggravated damages are the proper vehicle to take into account the additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant. Otherwise there is a danger of "double recovery" for the plaintiff's emotional stress, once under the heading of compensation and secondly under the heading of punishment.²⁴

Again, this suggests that aggravated damages are to compensate for emotional distress and, a precondition to their award is proof of reprehensible or outrageous conduct.

I hope that enough has been said to show a level of incoherence emanating from the Supreme Court on the principles that govern the award of aggravated damages. In particular, I would argue that under the present state of the law in Canada, definitive answers could not be provided to the following questions: Are aggravated damages simply a synonym for nonpecuniary damages for emotional distress? Can they only be awarded in the area of intentional torts or for actions actionable *per se*? Do they compensate exclusively for humiliation, embarrassment, and loss of dignity? Can they only be awarded upon proof of a defendant's malicious or oppressive conduct? Are they constrained by rules relating to remoteness of loss? Should they be itemized as a separate head of damages, or are they simply additional factual features that augment general compensatory damages? If awarded, how are they to be quantified?

It should be noted that the cases I have mentioned have all been decided in the last fourteen years, and by a Court largely comprised of the same members. It may be that all we can expect is consistency of principles within a particular substantive cause of action—defamation, wrongful dismissal, or assault. However, there has been nothing explicitly evident in the judgments to suggest such idiosyncratic treatment. Nor would this approach be consistent with other pronouncements by the Supreme Court on damage quantification where they have tried to give overarching principles of common application.²⁵

24. *Id.* at 653.

25. For example, see the most recent exposition on the awarding of punitive damages in *Whiten*, [2002] 1 S.C.R. at 621. *See also* *Canson Enters. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 589 (awarding equitable compensation); *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (awarding same).

III. DEFINING A FUNCTION FOR AGGRAVATED DAMAGES

Defining a function for aggravated damages must include some reference to Lord Devlin's judgment in *Rookes v. Barnard*.²⁶ In proscribing the ambit of exemplary damages to his now famous categories, Lord Devlin intimated that aggravated damages could do much that punitive damages had done in the past.²⁷ Lord Devlin's words have been taken to enshrine the position that aggravated damages are designed to compensate for injuries to the "plaintiff's proper feelings of dignity and pride" attributable to the defendant's exceptional conduct, that is, conduct which is offensive, or which is accompanied by malevolence, spite, arrogance, or insolence.²⁸ It is important to note that Lord Devlin described two distinct ways that the defendant could be found liable for aggravated damages: by offensive conduct, *and* conduct accompanied by malevolence, spite, etc.²⁹ Also, of note, is that the compensation is for injury to a plaintiff's "proper feelings of dignity and pride," and not to the loss of "dignity and pride" itself. From this fact, the English Law Commission concluded that proof of mental distress sustained by the plaintiff was a necessary precondition to the award of aggravated damages.³⁰ In fact, the English Law Commission saw aggravated damages as a subset of damages for mental distress, although one that had caused much confusion. The "exceptional conduct" requirement, and the fact that aggravated damages had been held as unavailable for many forms of wrongful conduct (notably negligence and breach of contract actions), had too often conveyed a message that aggravated damages were imposed as punishment. Contrary to this position was the fact that some courts had indicated that nonpecuniary damages for mental distress and aggravated damages could both be

26. [1964] A.C. 1129 (H.L.).

27. Bruce Feldthusen has suggested that this result was a little disingenuous and that Lord Devlin was driven to this position by an ideological desire to keep the function of punishment out of the civil law while at the same time adhering to the then practice of the House of Lords not to overrule its earlier decisions. Bruce Feldthusen, *Punitive Damages in Canada: Can the Coffee Ever Be Too Hot?*, 17 LOY. L.A. INT'L & COMP. L.J. 793, 795 (1995).

28. See *id.* at 794-95; ONT. LAW REFORM COMM'N, REPORT ON EXEMPLARY DAMAGES 5-6 (1991); LAW COMM'N, AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES 11-12 (1997), available at <http://www.lawcom.gov.uk/535.htm> (last visited Nov. 17, 2004) [hereinafter AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES].

29. That this was intentional can be garnered from an example Lord Devlin gave: "It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages." *Rookes*, [1964] A.C. at 1226.

30. AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, *supra* note 28, at 1, 11.

awarded, which tended to militate against the view that the latter were really part of the former.³¹

The English Law Commission recommendations call for the assimilation, and eventual elimination, of aggravated damages as a distinct category. In their first recommendation, aggravated damages should only be awarded for mental distress and not punishment. In their second recommendation, the terminology, “damages for mental distress” should replace “aggravated damages,” and in their third recommendation, nothing in the first two recommendations should be taken to restrict the circumstances in which damages for mental distress are recoverable.³² In this way, the Law Commission seeks to solely locate aggravated damages within a compensatory framework, and not limit the availability of damages for mental distress from eventually subsuming the area already carved out by aggravated damage awards. All this is to happen within a common law incremental case by case development approach.

There is a notable similarity in conclusions between the English Law Commission and Ontario’s Law Reform Commission (OLRC).³³ The OLRC recommended aggravated damages be abolished, and that the question of compensation for loss of pride and dignity be but an aspect of the already established law on recovery of nonpecuniary losses, namely a new head added to the existing heads of pain and suffering, loss of amenities, loss of expectation of life, and loss of enjoyment. In this way, compensation for loss of pride and dignity would not be subject to any “exceptional conduct” requirement as a precondition to an award. The OLRC doubted that their recommendations would lead to any significant expansion in awards for loss of pride and dignity, and in any case, would become subject to the limitations placed by the Supreme Court of Canada on nonpecuniary damages.³⁴

31. The English Law Commission cited *Appleton v. Garrett*, [1996] P.I.Q.R. P1, as a decision in which an enlightened approach was taken to illustrate how both aggravated damages and damages for mental distress could coincide. The former were awarded to compensate for the “anger, indignation or ‘heightened sense of injury or grievance,’” while the latter were awarded to compensate for the pain and suffering and loss of amenity caused by a trespass, which had inflicted unwanted and nonconsensual dental treatment on the plaintiff. AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, *supra* note 28, at 19–20.

32. AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, *supra* note 28, at 26–27.

33. ONT. LAW REFORM COMM’N, *supra* note 28, at 27–30.

34. Under the cases known as the Supreme Court Trilogy, damages for nonpecuniary losses in personal injury cases are limited to an upper level now standing at approximately

Despite remarkable concurrence in recommendations, there is a significant difference in initial premise under which the respective commissions operate. The English Law Commission's recommendation would provide compensation for loss of feelings experienced by the plaintiff engendered from harm to his or her dignity and pride, whereas the OLRC compensates for the loss of dignity and pride simpliciter.

In contrast to the two law reform commissions, a number of academics have argued for the retention of aggravated damages. However, in doing so they recast, or attempt to clarify, the goal served by such awards.

Michael Tilbury has argued that aggravated damages serve to protect the plaintiff's "dignatory interest"—those cases where the damages are said to be "at large"—and that such interest may be a protected interest in other forms of action where traditionally aggravated damages have not been considered available.³⁵ Tilbury advocates this position because he is a strong proponent of a purely compensatory function in civil law. Like Lord Devlin, realization of the dignatory interest allows aggravated damages to do what others have (incorrectly) left exemplary damages to do. For Tilbury, the defendant's conduct does not have to be of a magnitude to justify exemplary damages, but there must be a causative link between the defendant and increased humiliation, insult, or indignity suffered by the plaintiff.³⁶

Bruce Chapman has suggested that a compensatory rationale can be given which absorbs the award of aggravated damages within its rubric, and can also give a rational explanation for awarding punitive damages in certain circumstances.³⁷ Key to Chapman's analysis is providing a rational reason why the defendant's conduct should play any role in a compensatory scheme. A purely compensatory scheme focuses only upon the plaintiff's harm, and the best and most efficient way those

C\$267,000. *Williams v. Low* [2000] B.C.J. 408; *cf.* *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 1134 (declining to establish a similar cap for nonpecuniary damages for defamation).

35. MICHAEL TILBURY, CIVIL REMEDIES 3208–21 (1990) [hereinafter TILBURY, CIVIL REMEDIES]; Michael Tilbury, *Factors Inflating Damages Awards*, in *ESSAYS ON DAMAGES* 86, 89–90 (P.D. Finn ed., 1992) [hereinafter Tilbury, *Factors*].

36. Tilbury points out an important distinction between compensatory damages simpliciter and aggravated damages. In the former, a court can only review the conduct of the defendant "in the commission of the wrong," whereas in the latter a court is entitled to look at "the whole of the defendant's conduct in connection with the wrong in issue." That is to say, the court may consider a continuum of conduct prior to, during, and after the wrong, but before judgment. Tilbury, *Factors*, *supra* note 35, at 92–95.

37. Bruce Chapman, *Punitive Damages as Aggravated Damages: The Case of Contract*, 16 CAN. BUS. L.J. 269, 275 (1990) [hereinafter Chapman, *Punitive Damages as Aggravated Damages*]; Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 761 (1989).

needs may be met. The narrower path of private adjudicative law compensates for harms through tort law and uses objective fault to determine liability, itself based on corrective justice grounds. Chapman asks why we need a higher standard of fault, that is, adjectives such as malicious, highhanded, and oppressive used to describe the defendant's conduct, to justify an award of either aggravated or punitive damages. Chapman points out that it is not because the defendant is acting maliciously that provides the "grounds" to justify aggravated damages; it is because the defendant's malicious conduct provides the "explanation" for the plaintiff's aggravated sense of loss.³⁸ Chapman calls this notion of a plaintiff's sense of loss, his or her "dignitary loss," as commonly understood in the old adage, "adding insult to injury." While this loss is commonly found in the intentional torts, it is not confined to those causes of action. Chapman suggests that dignitary losses might well be found in intentional breaches of fiduciary duty where victimization by one in whom trust has been reposed raises a distinct form of injury,³⁹ as well as in some contract disputes such as wrongful dismissal.⁴⁰

Chapman asserts that dignity is not a fungible commodity able to be replaced by money. You either have dignity or you do not—there are no gradations. While one may believe it "worthwhile" to sell one's dignity (the current popularity of reality television shows attests to a ready supply of people willing to do this very act), the actual notion that one's

38. See Tilbury, *Factors*, *supra* note 34, at 89–90 (making similar arguments concerning the confusion over what is termed "aggravated damage").

39. Chapman may have been somewhat prescient in this respect. In a series of cases dealing with breach of fiduciary duty, the Supreme Court has indeed taken a different tack with respect to quantifying equitable compensation, often making awards that seem more punitive than compensatory. In Chapman's schema, these awards could be seen as compensating for the affront of being taken advantage of. Chapman & Trebilcock, *supra* note 37, at 765–66; see also Jeff Berryman, *Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals*, 37 ALTA. L. REV. 95 (1999) (arguing that the distinctive features of the fiduciary relationship would be better recognized through the application of punitive damages rather than the distortion of compensation principles).

40. The second part of Chapman's argument centers on the efficient allocation of the risk of loss of dignity. The pure compensation rationale would say that it is like any other nonpecuniary loss and thus should merit a high level of compensation to make the plaintiff whole, defined as the point at which the plaintiff is indifferent to the loss of dignity. In opposition to this point is the "insurance rationale," which asks whether a plaintiff would purchase insurance against the risk of loss of dignity *ex ante*. Because it is a nonpecuniary loss for which money provides no substitute, a plaintiff would be unlikely to insure against its incursion and thus from an insurance rationale the level of compensation should be zero.

dignity can be “bought” is itself a debasement of the concept of dignity. For Chapman, it follows that the quantum set to compensate for loss of the dignitary interest should be the same fixed quantum for everyone. For those who continue to argue that there must be varying degrees of dignity depending on whether, for example, the humiliation is public or not, Chapman argues that this difference is only reflected in the feelings of humiliation experienced by the claimant, and generating damages for mental distress, and not in the level of compensation for the loss of dignity itself.

Allan Beever has also recently argued that aggravated damages protect a claimant’s “moral dignity,” which is assailed when the defendant denies “that the victim is entitled to respect as a moral person.”⁴¹ It follows that loss of dignity does not call for compensation for mental distress because “dignity is not a feeling” and, like Chapman, “[h]uman dignity is absolute, hence not amenable to comparison.”⁴² Beever calls upon a Hegelian structure, dividing wrongdoing into three categories: ordinary (unintentional), recognizing the victim as having rights but disputing whether those rights have a reciprocal claim for observance by the wrongdoer; deception, recognizing that the victim has rights but deceiving them into believing that they have none; and coercion, denying that the victim has any rights at all. Beever states that violations of dignity are not directly observable, and thus, the focus and examination of the defendant’s conduct becomes the “sole epistemological access to the claimant’s injury.”⁴³ But this seems to result in a very narrow conception of the dignitary interest, confining it to circumstances where the defendant’s actions amount to “deception” or “coercion.” Beever’s schema does not readily accommodate more populist notions of dignity. For example, the “dignity of labor” is lost with unceremonious withdrawal of employment that can result from an “ordinary” wrongdoing. We consciously choose not to compensate for its loss because we see that as being inconsistent with the rights attached to employers. Similarly, the violation of a right to “die with dignity,” as in keeping a person on life support despite their clearly expressed intention made before the injury that heroic efforts should not be undertaken, can be done acting out of the most benign intentions.

A number of common threads can be drawn from these divergent approaches:

41. Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 OXFORD J. LEGAL STUD. 87, 89 (2003).

42. *Id.* at 90.

43. *Id.* at 92–93.

1. All agree that aggravated damages should be located within a compensatory framework. Punishment and deterrence only occurs in a collateral sense in that all compensatory damages will lead to the internalization by the defendant of the cost of doing harm.
2. All agree that aggravated damages protect a “dignitary interest.”⁴⁴
3. All distinguish between the feelings that a loss of dignity creates in a claimant and the loss of dignity itself.

IV. THE DIGNITARY INTEREST

To be able to protect the dignitary interest we need to be able to conceptualize what it is—to know it when we see it. Unfortunately, this is not an easy task. One notion of dignity, that utilized to underpin human rights and often found in constitutional documents, is what I will call “human or fundamental dignity.”⁴⁵ The notion of dignity implicit in this usage is that suggested by Kantian philosophy that enjoins us to treat every human being as an end, not a means.⁴⁶ Human dignity requires us to give respect to the intrinsic worth of every human and not to use or coerce humans to the instrumental needs of others. Human

44. Bruce Feldthusen, who headed the OLCRC team investigating punitive damages, also holds this position. Bruce Feldthusen, *Recent Developments in the Canadian Law of Punitive Damages*, 16 CAN. BUS. L.J. 241, 247 (1990); see also Bruce Feldthusen, *Punitive Damages: Hard Choices and High Stakes*, 1998 N.Z. L. REV. 741, 749. Grant Hammond, writing in 1991, referred to developments in the area of aggravated damages for wrongful dismissal and breach of good faith performance in insurance claims as evidence of a nascent recognition of a “personality” or “dignitary interest.” See Grant Hammond, *The Place of Damages in the Scheme of Remedies*, in *ESSAYS ON DAMAGES* 192, 220 (The Law Book Co. 1992).

45. One obvious example is the German Basic Law, Article 1 (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”).

46. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 198 (1977):

Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

dignity here is closely aligned to individual autonomy,⁴⁷ although these values can be in conflict. It is this form of dignity that operates even at a more basic level in distinguishing humans from other animal species.⁴⁸ One does not have to travel far down this path to enter the realm of metaphysics. What does it mean to have “intrinsic worth” or “value” or, what is “respect” and why is it a necessary condition for human dignity? These are significant questions, and were it necessary to have definitive answers before concrete recognition could be accorded the dignitary interest, our pursuit for its protection would be all the more elusive.⁴⁹ Nevertheless, there are points of confluence among those who write in this heady area. First, recognition of human dignity is regarded as a universal value (good). We recognize that a person has value as a person distinct from the value we accord to how that person has lived his or her life. A mass murderer or tyrannical leader is entitled to the same level of human dignity as any other person regardless of the fact that few would argue that his or her life has been usefully engaged. Similarly, equality of individuals, itself an important tenet of human dignity, commands that loss of dignity knows of no degrees or gradations. Secondly, the parameters of what is encompassed within human dignity is as much an issue of social construct as it is of inalienable values (rights). For example, the debate on when life begins and ends is only made more poignant because of recent medical advances that have blurred earlier understandings. Thirdly, human dignity operates in building bridges of social cohesion between individuals, communities, states, and thus between all people of humanity. Human dignity has been seen as truly a transcendent value showing no respect for those who would subjugate others in the name of ethnic, cultural, political, or religious superiority.

A second notion of dignity is that which flows as a consequence of its popular meaning, and what I will call “prosaic dignity.” The Oxford English Dictionary defines “dignity,” from the Latin *dignitas* (meaning worth), as “true worth, excellence, high rank or estimation.” It is in this sense that we hear people say of others that “he or she acted with great dignity,” or “he or she gave an acceptance speech with great dignity,” or the “office holder must maintain the dignity of the office.” This concept

47. See generally G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONT. L. REV. 171 (1984) (discussing the relationship between the concepts of dignity and autonomy).

48. David Feldman, *Human Dignity as a Legal Value—Part I*, 1999 PUB. L. 682, 684.

49. See generally JOSEPH RAZ, VALUE, RESPECT, AND ATTACHMENT 124–76 (2001); THOMAS E. HILL, JR., RESPECT, PLURALISM, AND JUSTICE: KANTIAN PERSPECTIVES (2000); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848 (1983); Roberto Andorno, *The Paradoxical Notion of Human Dignity*, available at <http://www.revistapersona.com.ar/9Andorno.htm> (last visited Nov. 17, 2004).

of dignity is more often the product of individual talents, accomplishments, and earned social position.⁵⁰ This form of dignity exhibits both subjective and objective characteristics. Subjectively, a person can have both a deflated (self-loathing, obsequious) and an inflated (pompous, bombastic, egotistical) sense of his or her own dignity. Objectively, we can recognize the subjective inflated or deflated sense that a person has of his or her own dignity, but in addition, we can recognize of others when they are being humiliated, made the brunt of sarcasm or ridicule, even when the person himself or herself is unaware of the attack. In Hans Christian Andersen's children's fairy tale, the *Emperor's New Clothes*, the emperor has lost his dignity when he is duped into believing that he is wearing a cloak of the finest thread, but is only made aware of that fact when the small child shouts that the emperor is without clothes. While it may be suggested that the emperor is the victim of his own vanity, this is hardly a reason to free the two weavers from blame for taking advantage of his gullibility. But there is also another lesson to be taken from this tale. Arguably, the emperor experiences no loss of dignity until such time as the small boy shouts out the truth. Until that time the emperor's subjects wanted to believe that the emperor was indeed wearing a fine cloak, because it appealed to their own vanity in that only "competent people" in the kingdom could see the cloak. However, once truth is revealed the loss of dignity is plain for all to see. I want to call this type of loss of dignity a "referential loss." Although it is a loss to the emperor, it is only revealed through the eyes of others, initially the small child, and then all the emperor's subjects. The emperor undoubtedly feels this loss of dignity—his feelings are hurt—but it is also a loss of respect and social status in which his subjects hold him, and it will hamper his ability to reign for the future.

Our common law of defamation already recognizes that varying degrees of publication are reflected in the level of damages awarded. The greater the publication, the greater the need for vindication, and the higher the damages must be. This increasing level of damages is clearly premised on the fact that the greater the number of people who have witnessed the defamatory material, the greater the harm occasioned by the plaintiff. This is a nascent form of referential loss. But this type of loss is not peculiar to defamation. Consider the following examples:

50. This is an important distinction in understanding Kant's concept of human dignity. See HILL, *supra* note 49, at 59–86.

1. A person is beaten in a dark alleyway.
2. A person is beaten in an alleyway in front of his family.
3. A person is beaten in an alleyway in front of a large group of strangers.
4. A person is beaten in an alleyway in front of a large group of strangers by a police officer, who yells derogatory ethnic insults at the person.

In all these examples, compensation for the physical injuries should be a given, as should damages for nonpecuniary losses if the victim has experienced pain and suffering. In the second case, the person may have suffered additional mental distress as a result of the humiliation he feels from knowing that his family has witnessed his assault. But there is also potentially another loss here. Undoubtedly, the dynamic of his relationships with his family will have changed. His family will (may) be sympathetic to his plight and help his recovery. They will understand his anguish and possibly lessen its impact. But equally, other clouds will (may) darken his personal relationships. His self-esteem to provide security for his family may be affected, and equally, his children and wife may communicate that fear to him. In the third example, the humiliation of being assaulted before a large crowd may also have repercussions. The victim is aware that he will be the subject of conversations around the dinner tables of strangers, and if seen again by those strangers will be known as the man who got beaten up. In the last example, the feeling of powerlessness before state authority will not only shake the victim's feelings towards the police but it will also diminish the respect of others towards that same authority. The addition of derogatory ethnic epithets by a person in authority affects the victim in that it may legitimate or perpetuate the ethnic stereotyping of others who witness the assault.⁵¹

These examples engage both my conceptions of the dignity interest. The last example engages fundamental dignity in that a person has a right not to expect abuse from public officials or to be the subject of demeaning treatment based upon ethnic grounds.⁵² Examples two and three engage the second conception of the dignity interest. The victim's self-esteem has been lowered in the eyes of others. The loss is not only

51. The examples here present a very male-centric viewpoint. One could equally draw an example from the recent film *The Magdalene Sisters* (Miramax Films 2002), in which one of the girls is viciously raped at a family wedding only to be then put into the care of the Magdalene Sisters by her parents for her alleged licentiousness and shame brought upon the family. In addition to the mental distress in such a case, the woman has experienced the loss of dignity occasioned by the fact that in the eyes of her family and community she is a sinful or fallen woman.

52. Both of these events fall with Professor Schachter's list of normative standards that define an affront to human dignity. Schachter, *supra* note 49, at 852.

attributable to feelings of humiliation felt by the victim, but also to the way others will interact with the victim for the future, or will perceive the victim in the future.

In my assault examples the characterization of the conduct of the assailant is not important for the recognition of the dignitary interest violated, although clearly assault is an intentional tort and more often accompanied with maliciousness. However, whether the assailant acted with malevolence, spite, arrogance, or insolence does not change the fact that the victim's dignity has been violated. The second notion of the dignitary interest as conceived here can arise in other circumstance. Consider the facts in *Soulos v. Korkontzilas* where the plaintiff's real estate broker had acted in breach of a fiduciary relationship owed to his principal, the plaintiff, in purchasing property the principal had wished to acquire.⁵³ The plaintiff, who was of Greek ethnicity, desired to purchase the disputed building because it was leased to his banker. In the Greek community, to be the landlord of one's banker brings prestige. Ultimately, the court awarded a constructive trust of the building in favor of the plaintiff, adding that the protection of the plaintiff's prestige that the building and its tenants brought was one of its reasons favoring a proprietary remedy. In this case the plaintiff's prestige must be viewed as synonymous with his dignity. Changing the facts slightly in this case, and making it one of simple breach of contract, by either the real estate broker, or wrongful termination of the lease by the bank, and one could see that the plaintiff could be confined to a simple damages claim in which much of his alleged loss would be his dignitary interest.

Earlier, I described the violation of the dignitary interest as a referential loss. What does this mean? Behavioral psychologists tell us that humiliation, which can be attributed to the loss of one's dignity, is an intensely personal experience.⁵⁴ Emotional well-being is dependent upon one having "significance," or value in the eyes of others. "Even those who are of little or no importance socially, politically or economically enjoy significance with respect to certain people who are important in their lives."⁵⁵ Feelings of humiliation, shame, guilt, or embarrassment can be experienced alone. When we consciously recall an embarrassing moment from our past, we often physically feel our

53. *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 217–18.

54. See Donald C. Klein, *The Humiliation Dynamic: An Overview*, 12 J. PRIMARY PREVENTION 93 (1991).

55. *Id.* at 101.

embarrassment in a blush, quickened heartbeat, or sudden perspiration. But if we focus upon this event and why it is invoking such a reaction, we soon realize that it is because of the presence of others who witnessed the incident that made it embarrassing. Humiliation is an interpersonal phenomenon that requires a witness.⁵⁶ A person marooned alone on an island can *feel* as if he or she has lost all dignity, but it takes his or her rescuers to witness the person's condition for there to be an actual loss of dignity. It is thus with *reference* to others that actual dignity is lost, although the feelings aroused by its loss, or prospective loss, to an individual may exhibit themselves in humiliation, shame, and mental distress.

Even if the argument on referential loss is accepted with respect to the second conception of dignity, prosaic dignity, can it also address the first conception of human dignity, fundamental dignity?⁵⁷ All humans are born with equal human dignity⁵⁸ and its recognition creates a normative standard of social behavior that defines our humanity. This objective character of fundamental dignity means that any diminishment of an

56. The law of defamation has always recognized this requirement in the essential necessity for there to be "publication" before there is actionable defamation. BROWN, *supra* note 15, § 7.2.

57. I have not addressed the content of what constitutes human dignity, what I call fundamental dignity. This is a contentious issue as exemplified in the debates over what constitutes a crime for the purposes of jurisdiction of an international criminal court. Nevertheless, the list assembled by Professor Schachter, *supra* note 49, at 852, is a sufficient start for my purposes. I suggest that the majority of cases in which aggravated damages are awarded in Canada lie in the realm of my second notion of dignity, what I call prosaic dignity.

The Supreme Court of Canada has expanded on the notion of human dignity as a reflection of the values protected by the equality provision contained in s.15(1) of the Charter. In *Law v. Canada*, [1999] 1 S.C.R. 497, 530, Justice Iacobucci wrote:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

58. Article 1 of the *Universal Declaration of Human Rights* states, "All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another in a spirit of brotherhood." *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948).

individual's human dignity has repercussions for our own human dignity. It is the reason that we can say of the young, the comatose infirmed, the tyrant, and the murderer that they all possess human dignity and are worthy of respect. We cannot exclude an individual from human dignity's normative prescriptions because we legitimate the erosion of its universality, which would threaten our own claims to human dignity and respect. The sense of an individual's "significance" is a common bond shared with all of humanity. The violation of the individual's fundamental dignity has an imperceptible ripple on our own fundamental dignity. Unanswered it leads a slow descent from civil society to barbarism. The loss in fundamental dignity of an individual is not perceived through the eyes of others, rather, it is *shared* by all others. It is for this reason that in legal instruments where protection of human dignity is often found—the Charter, the Criminal Code, human rights and labor codes—determining appropriate remedies for violation is often problematic. Rather than moving to damages as a remedy, other orders—declarations and injunctions for Charter infringement, imprisonment and fines for Criminal Code violations, and orders to apologize, reinstate, remove, or ameliorate the causes of harassment and other discriminatory practices in human rights and labor codes, that is, a form of rehabilitation—are invoked. Damages are seen to simply monetize the injury without dealing with the root causes, and are only turned to as a last resort for pragmatic reasons, and then, are likely to be punitive or vindicatory rather than compensatory in effect. A damages award ascribes a "liability rule" to the loss when an "inalienable rule" is more appropriate.⁵⁹

I have not sought to create clear demarcations between my conceptions of fundamental and prosaic dignity, and indeed there is a great deal of overlap. An ethnic slur is but one degree of expression of contempt toward an ethnic group, but is part of the same continuum that locates ethnic cleansing or genocide at its other pole. Clearly there is a difference in proportionality of these indignities. My concern is that in suggesting compensatory damages for prosaic dignity we do not demean the important values that inhere to the protection of fundamental dignity.

59. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

V. THE PRESCRIPTIVE POWER OF THE DIGNITARY INTEREST
AND REFERENTIAL LOSS

It remains to be seen what consequences flow from the intersection of the protection accorded the dignitary interest and the concept of referential loss. A review of the cases in which the Supreme Court of Canada has awarded aggravated damages, indeed most Canadian cases, shows that they fall into my second category—prosaic dignity.⁶⁰

I have suggested in Part II, like others, that explicit recognition should be accorded a person's dignitary interest. Several consequences flow from this recognition. First, it would allow for a more orderly development of principles of recognition and compensation of an interest that has latently existed in our common law for centuries. Secondly, it would firmly root damage awards for its violation within the compensatory framework of our law, and thus avoid the distortion of both damages for mental distress as well as the role performed by punitive damages. A corollary to this is that it would seem logical to allow other principles of compensatory damage quantification—remoteness and mitigation—to apply where appropriate. Third, it would free the award of aggravated damages⁶¹ from the necessary requirement that the defendant's conduct must be malicious, highhanded, oppressive, etc., although this characterization would still remain relevant to meet requisite fault standards of liability in the area of intentional torts.

I have argued that the dignitary interest should be recognized as a distinct compensatory interest arising from infringement of an established cause of action.⁶² I am not advancing recognition of any new tort or other form of action, only that the full extent of a person's harm can be recognized and compensated to achieve the remedial goal of complete compensation.

Peter Birks has argued for the explicit realization of a new tort, contemptuous harassment—contemptuous meaning treating another as

60. In an electronic search of QL's Canadian Judgments database using the terms "aggravated damages" and "human dignity," only five entries were found. Of these, three hits occurred in cases before the Supreme Court of Canada, and are discussed in Part I of this Paper. In the same database using the simple term "aggravated damages," 1866 hits occurred. I take this to be evidence of the fact that the vast number of cases awarding aggravated damages fall within my prosaic dignity category.

61. Query: whether the term "aggravated" would retain any meaning in the damages nomenclature if dignitary losses were given explicit recognition.

62. I have approached the issue from this perspective because I believe that the law of remedies creates distinctive normative principles but that they are inextricably linked to substantive law. Each informs and shapes the other. See Ken Cooper-Stevenson, *Principle and Pragmatism in the Law of Remedies*, in *REMEDIES: ISSUES AND PERSPECTIVES* 1, 6 (Jeffrey Berryman ed., 1991).

having little worth.⁶³ Birks suggests that if properly understood, where the common law has given enhanced damages (aggravated) it has done so in furtherance of protecting the distinct interest of according a person an “equal measure of respect.” Birks argues that a purely remedial approach should be rejected for two reasons. First, requiring that the protected interest, that is, one entitled to an equal measure of respect, be parasitic to some other actionable unlawful conduct by the tortfeasor results in inhibiting the development of liability in areas where only the protected interest is harmed. In particular, Birks identifies the invasion of privacy as an area ripe for a new tort of contemptuous harassment. Secondly, a purely compensatory model of damage assessment, even if the availability of damages for mental distress is enhanced, cannot do justice to the myriad of circumstance where the right to equal measure of respect has been violated. Birks calls on the availability of punitive damages to provide sufficient vindication of the protected interest.

Denise Réaume has recently articulated a more ambitious enterprise. Drawing from the old tort of intentional infliction of nervous shock, Réaume also argues for the adoption of a new tort called “intentional outrage to dignity.”⁶⁴ An “intentional outrage” threshold standard is retained to determine a wrongdoer’s liability. Réaume uses this standard initially to ensure that we do not create too large a sphere of liability. She argues that requiring the wrongdoer’s conduct to be flagrant, outrageous, and extreme will “direct us to look for behaviour that amounts to a denial of the intrinsic worth of its victim, and not for mere bad manners.”⁶⁵ This approach is seen to build an “objective account of dignity.”⁶⁶ Réaume implies that this is a transition phase toward a time when, after sufficient case development, her tort will take its place in the pantheon of intentional torts. However, it will be much changed from its origins. It will not require inquiry into the subjective intent of the defendant to determine malice or intention. Both these may be imputed

63. Peter Birks, *Harassment and Hubris: The Right to an Equality of Respect*, 32 IRISH JURIST 1, 44 (1997).

64. Denise G. Réaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEEN’S L.J. 61, 86 (2002).

65. *Id.* at 87.

66. *Id.* The reason why characterization of a defendant’s conduct leads to objective recognition criteria of dignity is not clear. Human rights complaints show that it is often banal policies indiscriminately applied that lead to egregious forms of discrimination, constructive dismissal, and violations of dignity. These would be lost if the threshold standard of wrongdoing focused upon the defendant’s conduct as being outrageous, etc.

to the wrongdoer from “[r]eliance on social conventions as to what forms of treatment bespeak a serious denial of dignity.”⁶⁷ In addition, proof of serious harm to dignity will be found “from the nature of the interaction between the parties, without resorting to subjective reporting of consequences.”⁶⁸

Apart from providing an additional cogent analysis for why dignity should be protected, Réaume’s article raises two critical issues: one, how do we avoid conferring too much protection to people’s dignity where such dignity and pride is unwarranted?; and two, how do we remedy the loss of one’s dignitary interest? The answer to the first question is critical for Réaume because it goes to the substantive content of the new tort she is advocating. It is a less serious issue in my analysis because my conception of the dignitary interest as a remedial head only comes into play as an ancillary head of damages following proof of an existing substantive cause of action. My approach has the convenience of making it applicable to other substantive claims in addition to the intentional torts, and would include breach of contract, breach of fiduciary duty, and defamation. However, it would suffer the criticism of Birks in not covering off all the areas where his new substantive tort may eventually be expanded to compensate a person’s loss of dignity.

The key to avoid giving too much protection to a person’s dignity is to subject the claims of violation of dignity to some objective scrutiny. It should not be sufficient for the plaintiff to show some subjective loss of pride or insult to dignity to recover compensation.⁶⁹ Herein lies one advantage to a referential loss conception. Subjective losses of pride and dignity operate only at the level of the alleged victim’s feelings. Because an actual loss of dignity only happens through the eyes of

67. *Id.* at 88.

68. *Id.* at 90.

69. Providing some objective measure to a plaintiff’s loss of human dignity in the context of equality rights under the Charter has preoccupied the Supreme Court of Canada. It is not sufficient for plaintiffs to simply show that they subjectively feel a loss of human dignity as a result of a discriminatory practice contrary to s.15(1) of the Charter. In addition, the plaintiff’s assertion must be scrutinized through the eyes of a “reasonable claimant”—a person “dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.” *Law v. Canada*, [1999] 1 S.C.R. 497, 533. The Supreme Court has advanced the reasonable claimant test so as to avoid the pitfall of always acceding to individual claimant’s subjective feelings of discrimination where the discriminatory law can otherwise be justified. In addition, the Court has advanced the test to ensure that subjective feelings of discrimination are not ignored simply because a majority of the community would not have perceived a loss of human dignity as a result of the discriminatory practice enshrined in the impugned law. This blend of subjective and objective test is still subject to much debate within the Court. See *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 771; Jim Hendry, *The Idea of Equality in Section 15 and Its Development*, 21 WINDSOR Y.B. ACCESS TO JUST. 153, 168 (2002).

others, we have by implication created an objective measure on the victim's claim of loss of dignity. The trier of fact need only ask, with the full knowledge of the facts, would they feel a loss of dignity if placed in similar circumstances as faced by the victim? I use the term "feel" here with caution, but it appears that if we are projecting feelings of humiliation when confronted with similar facts, then we are affirming that in our mind that person has actually been humiliated. It is the type of feeling we experience when we see a person being humiliated—we feel their pain—because they have actually suffered a humiliation. If we, as witness, feel they have been humiliated, then they have been humiliated. We do not have similar feelings when we believe that the person had an inflated sense of importance, or were too thin skinned. In those circumstances we may even delight in seeing the former have their "bubble burst," and in the latter, we may criticize the person for wasting our time and trivializing the notion of loss of dignity experienced by others. We could seek to concretize the loss of dignity. In the case of the wrongfully dismissed and humiliated employee, we could take evidence from co-workers, family, or friends of the change in interpersonal relationships. In the case of the sexually assaulted patient, we may consider statistical evidence of others who have been sexually assaulted and their ability to form lasting relationships as relevant in that it may reveal not only the personality change of the victim, but the perceptions of others to forming a close personal relationship with the victim.⁷⁰ There is also within the interstices of the law a growing jurisprudence on the centrality of dignity—in labor and employment, human rights, and constitutional law—which can serve in an educative capacity to inform triers of fact how others have witnessed a loss of dignity and how it is objectively perceived.⁷¹

70. This type of inquiry is not uncommon in the area of personal injury assessments. Consider the claim for economic loss of competitive advantage, which seeks to put a price on the fact that an employer, if given a choice between two competing potential employees, is less likely to employ a person who has suffered a prior personal injury when the other potential employee has not suffered a prior accident. See M.L. Berenblut, *Calculation of the Economic Loss of Competitive Advantage*, 5 *ADVOCATES' SOC'Y J.* 30 (1986).

71. The process I suggest here for recognition of a loss of dignity has parallels in the protection of equality rights under the Charter and the development of the doctrine of a "reasonable claimant," see *supra* note 69, as well as in the criminal law. In the latter, when determining whether an accused is guilty of a "sexual assault" as against an assault, Canadian courts are now required to consider an objective test that asks, "viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible

How do we remedy a loss of dignity? One approach suggested by Chapman is simply to have a fixed emolument paid to any victim on proof of a violation of his or her dignity. For Chapman this approach would avoid the cost of litigation to determine quantum, and follows the logic of Kantian philosophy that dignity is either had or lost, and that gradations of loss are only felt by a victim in terms of emotional distress.⁷² Chapman's first justification has validity only if the costs involved in any other form of assessment are high relative to his fixed approach. Nor should we be convinced that a fixed approach avoids assessment costs. A high fixed amount may act only to encourage unmeritorious claims of loss of dignity. Equally, a low amount may encourage litigants to isolate incidents of loss of dignity so as to benefit from a cumulative effect in damages. Chapman's second justification may be philosophically sound—although Chapman is drawing a distinct action plan from what Kant intended as a meta-principle⁷³—but it seems intuitively wrong. As witnesses to another's loss of dignity we feel differently depending on the gradation of humiliation and the period of its duration. Our feelings act as a barometer of the victim's actual loss. It also ignores the fact that the administration and quality of justice, that is, the right to determine what constitutes dignity and to order compensation for its loss, necessitates nuance and proportionality.

Assuming, if only for the pragmatic reason that we must find some way to vindicate the dignitary interest, that damages are appropriate, we need means to quantify the loss. In our remedial schema the closest approximation to dignitary losses are nonpecuniary damages. In the context of personal injury assessment these damages are awarded to compensate for loss of expectation of life, pain and suffering, and loss of amenities, and have been capped by the Supreme Court of Canada.⁷⁴ The damages are determined applying a functional approach that calls for the plaintiff to lead evidence on what substitutes could be provided to give the victim solace.⁷⁵ The reality of this approach has been to create a de facto tariff that compares the extent of the plaintiff's injuries against previous decisions and what other courts have awarded. In the area of nonpecuniary damages for mental distress arising in situations where there has not been extensive or permanent personal injury, and in suits

to a reasonable observer." Neither the motive or the perceptions of the victim are determinative; rather it is the "reasonable observer." See *R. v. Chase*, [1987] 2 S.C.R. 293, 293. I am indebted to my colleague Larry Wilson for this analogy.

72. Chapman, *Punitive Damages as Aggravated Damages*, *supra* note 37, at 278–79.

73. See HILL, *supra* note 49, at 26. In addition, recall that the Kantian notion of human dignity finds no place for dignity attributable to the victim's own industry, social status, or talents.

74. See *supra* note 34.

75. *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 721–22.

involving breach of contract or tort where this form of injury has arisen, the awards have been modest and, again, frequently referenced to previous decisions as a guide to quantification.⁷⁶ This cautious approach has been adopted out of a profound fear of awarding compensation for what is viewed as a highly subjective and ephemeral loss and, if routinely awarded, would encourage unmeritorious suits for simple injury to feelings. Both principles of remoteness—the loss does not flow from the reasonable expectations of the parties to the contract—and evidentiary requirements of proof of actual loss—actual medical or psychiatric evidence of debilitation—have been utilized to limit the amount awarded under this heading.

A referential loss approach would assist in overcoming some of the shortcomings revealed in the quantification of nonpecuniary losses. A referential loss approach provides quantitative measures by looking at the exposure to third parties, who have witnessed, become aware of, or have been affected by the victim's humiliation. While the acts of humiliation must be directly proximate to the cause of action, subsequent events that evidence the extent of the humiliation are admissible as proof of the dignitary loss.⁷⁷ This does not mean that the victim would have an incentive to expand knowledge of the humiliation so as to increase damages. The normal principles of mitigation would apply to prevent such action. A referential approach also provides some degree of qualitative assessments of the extent of the dignitary loss. Because the dignitary loss is revealed through the eyes of others it carries with it objectivity that makes the subjective feelings of the plaintiff irrelevant unless the plaintiff wishes to advance a separate claim of damages for mental distress.

How would recognition of the dignitary interest and referential loss impact the cases that prefaced this paper where the Supreme Court of Canada has awarded aggravated damages? In the wrongful dismissal cases, recognition of the dignitary interest would eliminate the current practice of extending the reasonable notice period to reflect problems in the manner of dismissal. We should admit that the Supreme Court's approach is, as Jamie Cassels has stated, "contradict[ory] and incoheren[t]."⁷⁸

76. See generally JAMIE CASSELS, REMEDIES: THE LAW OF DAMAGES 195–225 (2000).

77. This accommodates the important observation of Professor Tilbury. See *supra* note 36.

78. CASSELS, *supra* note 76, at 222. See also a similar conclusion in Lee Stuesser, *Wrongful Dismissal—Playing Hardball: Wallace v. United Grain Growers*, 25 MAN. L.J. 547 (1998).

The humiliation experienced by the plaintiff would give rise to a claim based on harm to his dignitary interest, which would arise either from the fact of wrongful dismissal itself, or based on breach of an implied term of good faith dismissal as adopted by Justice McLachlin. In addition, the plaintiff would be able to argue for damages for mental distress if provable. Other possible consequences from adoption of the dignitary interest approach are that a court may well consider the question of apology as relevant, as it does in defamation. A court may also consider an order for reinstatement of employment, not in derogation of the employer's right to dismiss after reasonable notice, but to assist the plaintiff in securing new employment, on the premise that it is easier to secure a change of employment than it is to secure new employment once unemployed.⁷⁹ Acceptance of the dignitary interest may also require the court to revisit its stance on whether the simple fact of wrongful dismissal causes a loss in dignity. This is not to suggest that every wrongfully dismissed employee would now win a claim for lost dignity. Such an action will still be dependent upon the plaintiff proving that continuous employment was within the reasonable expectations of the parties at the time of contracting. In other words, this is to accept that the dissenting judgments of Justices Wilson and L'Heureux-Dubé in *Vorvis* were correct, although the plaintiff would now have the ability to argue both loss of dignity and mental distress, subject to the contract remoteness rules. If we are to value the dignity of employment, as now accepted by the majority in *Wallace*, then why not call it that?

Since protection of reputation and dignity are core principles that underscore the law of defamation, it is arguable that there is already recognition given to the dignitary interest. Nevertheless, I believe that some of the principles I have articulated here would cause some rethinking of the damage assessment in *Hill*. For instance, the overlap between general damages and aggravated damages that occurred in that case would be avoided, thus correcting what Brown has referred to as an error.⁸⁰ A referential loss approach may also provide guidance on quantification of "at large" damages for defamation. One has to question how much loss of reputation the plaintiff experienced as a result of the defamatory remarks of the Church of Scientology when he was soon after appointed to the judiciary of the Ontario Superior Courts of Justice. The damages imposed, C\$1.6 million, give weight to the concerns about "libel chill" in Canada.

In *Norberg*, explicit recognition of the dignitary interest arising from either the battery or breach of fiduciary duty could be given central

79. See JEFFREY BERRYMAN, *THE LAW OF EQUITABLE REMEDIES* 278 (2000).

80. See *supra* note 15 and accompanying text.

prominence, rather than being accommodated by way of additional aggravating factors used to increase general damages. The plaintiff's violation was to her fundamental dignity in that a doctor who had power over her by virtue of her drug dependency had defiled her bodily integrity. Punitive damages, which were awarded, were warranted.⁸¹ The dignitary interest approach may also have the advantage of avoiding the parade of cases documenting indignities to determine an appropriate amount of compensation. For example, in *Norberg* the court reviewed the amount awarded in civil claims resulting from forced sexual intercourse—rape—to determine an appropriate response to the coerced sexual intercourse before it.⁸²

VI. CONCLUSION

A growing body of opinion suggests that aggravated damages should be either abolished and folded into damage claims for mental distress, or transformed into compensatory damages protecting a dignitary interest. My preference is for the latter. There is more than just feelings of humiliation that is worthy of legal recognition. Although the protection of dignity may still be at the level of what Réaume calls “a final rhetorical flourish,”⁸³ it has attained that position of prominence because of its centrality in describing our individual identity, and the bonds that hold us to the communities in which we participate. The challenge for those advocating such a position is to avoid the specter of simply another subjective, amorphous, and ultimately unprincipled claim. Approached from a remedial point of view, the risks of venturing too far into uncharted waters are lower. I, and others, simply call for the dignitary interest to be recognized as a head of damages dependent upon already established forms of action. Its realization is warranted to come closer to the ideal of giving complete compensation. The skeletal continuum of fundamental and prosaic dignity provides a framework to locate a person's dignitary interest. The concept of referential loss provides a start on how to build objective criteria to choose an appropriate remedy,

81. The awarding of punitive damages in this case is interesting because the actions of the defendant were never harsh, vindictive, or malicious, the usual requirement to justify a punitive award. Rather, punitive damages were awarded because the defendant's conduct had “offended the ordinary standards of decent conduct in the community” and was “reprehensible.” *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 229.

82. *Id.* at 268.

83. *See Réaume, supra* note 64, at 62.

that is, the notion of apology and rehabilitation may assume greater importance, and to quantify compensation if appropriate.