1. (a) Does your system of law have any rules governing damages for personal injury? If so, what do they provide?

Yes. The onus is on the plaintiff to prove his or her damages. The principles of remoteness and foreseeability of damages apply to any claim for damages. The plaintiff must take all reasonable steps to mitigate the damages suffered. The plaintiff is entitled to a lump-sum award and interest on that award, unless legislation provides otherwise.

1. (b) Is non-patrimonial (non-pecuniary) compensation limited to cases provided by law?

No.

2. Which are the criteria to distinguish patrimonial and non-patrimonial damage? What are the consequences of the distinction if it exists?

Patrimonial (or pecuniary) damages compensate for financial or economic loss such as lost income (past and future), loss of homemaking capacity, medical expenses resulting from the injury, and the cost of care (past and future). These damages are usually capable of being calculated with a reasonable degree of precision.

Non-patrimonial (or non-pecuniary) damages compensate for intangible or non-economic losses such as pain and suffering, disfigurement, loss of amenities of life, loss of enjoyment...
of life, mental anguish, and loss of life expectancy. These damages are not capable of being arithmetically calculated with precision.

Parties may claim for both types of damages arising from the same tort.

3. (a) What are the primary aim and the general principle of the law of damages for personal injury (e.g. prevention, sanction, distributive function, adequate compensation)?

The primary aim of the law of damages for personal injury is restoration. The fundamental principle behind awarding damages for personal injury is “restitutio in integrum”: to restore the injured party to the position they would have been in if they had not suffered any injury, at least to the extent that money can do so. In *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 963 the Supreme Court stated:

> The award is justified, not because it is appropriate to punish the defendant or enrich the plaintiff, but because it will serve the purpose or function of restoring the plaintiff as nearly as possible to his pre-accident state or alternatively, where this cannot be done, providing substitutes for what he has lost.

3. (b) Do different forms of damages for personal injuries exist (e.g. compensatory, exemplary, punitive damages)?

Yes. Most damages for personal injury are compensatory in nature. Aggravated damages are a special category of compensatory damages that are awarded to compensate for increased suffering because of the defendant’s malicious, outrageous, or high-handed conduct. Some damages, however, such as punitive damages are not compensatory. Punitive (or exemplary) damages are awarded after full compensation has already been made. They may also be awarded as a result of the nature of the defendant’s conduct, but instead of being intended to compensate for additional injury, they are intended to punish the defendant for
such behaviour.

Damages are also referred to as “special” or “general”. Special damages are out-of-pocket losses that occur before trial. General damages are for losses that will likely arise at some point in the future.

4. Does your system of law recognize different categories of damages for personal injury, particularly:
   - physical pain
   - mental suffering due to permanent loss of abilities
   - mental suffering due to false imprisonment
   - mental suffering due to damage to intangible rights of personality
   - sentiments of fear (e.g. the worry caused by the fear of developing cancer)
   - mental suffering caused by the death of a close relative

Yes, subject to the principles of remoteness and foreseeability as may pertain to the facts of the case, claims for matters set out above can be made.

In a recent Supreme Court of Canada case released in May 2008 (Mustapha v. Culligan of Canada Ltd., 2008 SCC 27) a man’s claim for mental suffering was rejected as being too remote. The following is a brief headnote of the case and the reasons for dismissal:

In the course of replacing an empty bottle of drinking water with a full one, Mr. Mustapha saw a dead fly and part of another dead fly in the unopened replacement bottle. Obsessed with the event and its "revolting implications" for the health of his family, he developed a major depressive disorder, phobia and anxiety. He sued Culligan, the supplier of the bottle of water, for psychiatric injury. The trial judge awarded him general and special damages, as well as damages for loss of business, but the Court of Appeal overturned the judgment on the basis that the injury was not reasonably foreseeable and hence did not give rise to a cause of action.

...
Mr. Mustapha's damages are too remote to allow recovery. As the manufacturer of a consumable good, Culligan owed Mr. Mustapha, the ultimate consumer of that good, a duty of care in supplying bottled water to him, and it breached the standard of care by providing Mr. Mustapha with contaminated water. The requirement of personal injury, which includes serious and prolonged psychological injury, is also met: Mr. Mustapha suffered a debilitating psychological injury which had a significant impact on his life. Culligan's breach caused that injury in fact, but not in law: Mr. Mustapha failed to show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. Unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable. In this case, the trial judge erred in applying a subjective standard.

5. (a) What methods are used to assess the non-patrimonial damage?
Are there any statutory rules on sums to be awarded (e.g. minimum, maximum sums)?
Are there any judicial tariffs?

Please see the answer to 5(b) for the methods used to assess non-pecuniary damage.

The Supreme Court has imposed a ceiling on non-pecuniary damages based on policy considerations. The ceiling was $310,000 CDN in 2007. Also, some provinces have imposed statutory limitations on the amount recoverable for personal injuries. For example, in Prince Edward Island s. 254.1 of the Insurance Act, R.S.P.E.I. 1988, c. I-4 limits the amount recoverable as damages for minor personal injuries to $2,500 CDN. This legislation, which was passed in 2003, is currently being challenged before the courts. The relevant provisions of the statute are set out below:

254.1 (1) In this section
(a) "accident" means an accident arising out of the use or operation of an automobile;
(b) "minor personal injury" means an injury that does not result in
(i) permanent serious disfigurement, or
(ii) permanent serious impairment of an important bodily function caused by continuing injury that is physical in nature;
(c) "plaintiff" means a plaintiff in an action for damages arising out of an accident;
(d) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform his or her usual daily activities or his or her regular employment.

(2) In an action for damages arising out of an accident, the amount recoverable as damages for the non-pecuniary loss of the plaintiff for minor personal injury shall not exceed $2,500.

(3) This section does not apply to an action for damages in respect of an accident occurring prior to April 1, 2004.

Most provinces are unfamiliar with the concept of “judicial tariffs”.

5. (b) According to your system of law, which circumstances should be taken into consideration in assessing non-patrimonial loss (e.g. nature, intensity and duration of the injury and/or suffering; individual circumstances of the victim; social position; financial situation)?

All of the above listed matters would, in appropriate cases, be taken into consideration. As well, the court would rely on a range of awards previously given in similar cases.

5. (c) What is the role of an expert appointed by the court in assessing non-patrimonial loss?

Experts may be called to testify regarding the degree of pain and suffering, the likely duration of it, and future prospects/problems.
### II - Cases

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<td><strong>6.</strong></td>
<td>A defective product harms V, a 25-year-old woman. Her right eye is severely injured (the sight is reduced to 50%). What kind of non-patrimonial (non-pecuniary) damages is she entitled to?</td>
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<td><strong>6.</strong></td>
<td>Damages could be awarded for such things as pain and suffering, disfigurement, loss of enjoyment of life, and loss of life expectancy.</td>
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<td><strong>7.</strong></td>
<td>A, a 20-year-old student, suffers severe brain injuries. He is reduced to a living dead. Are his parents who take care of him entitled to a compensation for their mental suffering?</td>
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<td><strong>7.</strong></td>
<td>Yes (subject to the usual considerations of remoteness, mitigation, etc.). In some provinces the parents could also sue for the loss of their son’s care and companionship under family law statutes.</td>
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<td><strong>8.</strong></td>
<td>A, a publisher publishes an article, which contains many untrue and offending statements of B's life. B sues for compensation. When assessing the non-patrimonial loss does it make any difference if B is a rock star, a politician or an unknown citizen?</td>
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<td><strong>8.</strong></td>
<td>Yes.</td>
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<td><strong>9.</strong></td>
<td>A who is slightly injured in a car accident misses a trip to Australia he had booked recently. Is he entitled to a compensation because he was prevented from enjoying his holiday (non-pecuniary damages)?</td>
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<td><strong>9.</strong></td>
<td>Yes. If the defendant’s conduct was malicious, high-handed, or particularly egregious, A could be entitled to aggravated or punitive damages. However, even if the defendant’s conduct was not harsh or malicious, the plaintiff could still be entitled to compensatory damages for the lost benefits suffered by the plaintiff.</td>
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10. A's house is burgled and he cannot sleep for months after the event. Is he entitled to monetary compensation of his distress?

Yes (subject to the usual considerations of remoteness, mitigation, etc.).

III

11. Are there any proposals for reform of the legislation governing damages for personal injury?

In Morrow v. Zhang (2008), 86 Alta. L.R. (4th) 137(Q.B.), a trial judge in Alberta held that the statutory cap of $4,000 CDN on non-pecuniary damage for minor injuries caused by a motor vehicle accident was unconstitutional. Specifically, the judge held that the cap violated s. 15 of the Charter of Rights and Freedoms. Section 15(1) of the Charter states:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Based on the Charter, a trial court, after lengthy analysis, rejected the limit, saying, in part:

193. In my view, the cases cited by IBC in this regard do not support the proposition that s. 15 of the Charter protects only obvious physical impairments. Nor is the argument compelling on its own merit. The requirement that one's disability needs to be obvious in order to access the protection provided by s. 15(1) would significantly reduce its purpose which, as stated in Law at para. 51, is to:

... prevent the violation of essential human dignity through the imposition of disadvantage, stereotyping or political and social prejudice, and
to promote a society in which all persons enjoy equal recognition at law as human beings or members of Canadian society, equally capable and equally deserving of concern respect and consideration.

...  

215. By limiting the amount of non-pecuniary damages available to those suffering from Minor Injuries, the legislature has effectively categorized that group of injury victims as less worthy of non-pecuniary damages. The basis of this distinction is the type of injury from which they suffer. In limiting non-pecuniary damages in relation to the complainant group, the MIR effectively signals that the pain and suffering resulting from these medically unverifiable injuries are less deserving of damages than that caused by other injuries. As a result, the MIR perpetuates the unfortunate stereotype that I find exists in relation to Minor Injury victims.

...  

232. This purpose had nothing to do with the needs of the claimant group, but "everything to do with concerns about insurance premiums for those not suffering any loss": Ferraiuolo, at para 112. Moreover, to effect this purpose through the imposition of the MIR the Government chose to target a group of individuals suffering from a specific disability and to limit their ability to recover damages in tort. In my view, the MIR sacrifices the dignity of Minor Injury victims at the altar of reducing insurance premiums. Specifically, the message is that their pain is not as worthy of conventional non-pecuniary damages because of the nature of their injuries, despite that their injuries may be more painful and enduring than other types of injuries. These circumstances are not dissimilar from those in Ferraiuolo. In that case, Fraser C.J. remarked, at para. 116, that the denial of legitimate damages for grief to avoid an increase in insurance premiums was itself a discriminatory purpose and a "classic example of self-interest trumping Charter values". I agree.
266. Having assessed the cap against the four contextual factors set out in Law, I am of the view that a reasonable and dispassionate person, fully apprised of all of the circumstances and possessed of similar attributes as the claimant would conclude that the MIR is demeaning to the dignity of that group and would make them feel less worthy as human beings, or less worthy of full participation or protection in Canadian society. The cap represents more than a simple disappointment to the claimant group, as suggested by the Interveners. It is demeaning to them because it suggests that their pain is worth less than that of other injury sufferers, in particular members of the comparator group. It also confirms prejudices that soft tissue injuries are generally faked or exaggerated. The impact of the discrimination cannot be viewed as trivial when the impugned legislation reinforces prejudicial stereotypes: Egan, at para. 180.

267. The reasonable person in the position of the claimant would know that some automobile injury victims suffer less pain than some Minor Injury victims, and that they are nonetheless able to access more non-pecuniary damages. The reasonable person would also be aware of the legislative state prior to the Insurance Reforms and the improved benefits provided to Minor Injury victims under the Other Regulations. However, those measures do not address the underlying assumption that the pain suffered by Minor Injury victims is worth less, particularly in the face of the existing stereotype that I have found exists. The reasonable claimant would not accept that it is appropriate to deny them individually assessed damages for their pain and suffering, when such assessments are made available to all other automobile accident injury victims, in exchange for adequate treatment. In fact, adequate treatment for Minor Injuries also benefits insurers and indirectly the Crown, as proper treatment and faster healing can be expected to result in reduced claims quantum and less reliance on health care resources. This is evidenced by the fact that one of the purposes of the DTPR is to reduce the incidence of long term or chronic pain injury and, as a result, reduce loss costs to insurers: Gartner Affidavit, at para. 152.

268. The reasonable person in the position of the claimant
would also be aware of the rapidly rising premiums for mandatory automobile insurance prior to the imposition of the cap under the MIR. However, in my view they would feel less worthy as a result of having been the group selected to forgo individually assessed non-pecuniary damages to subsidize those premiums for Alberta drivers generally.

The case is currently under appeal. Similar legislation in other provinces is facing similar challenges.

12. What points would you wish to discuss in greater detail?

13. What subject do you suggest for the next meeting?