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Re-thinking Whitbread v. Walley: Liberal Justice and the Judicial Review of Damages Caps Under Section 7 of the Charter of Rights and Freedoms

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Re-thinking *Whitbread v. Walley*: Liberal Justice and the Judicial Review of Damages Caps Under Section 7 of the *Charter of Rights and Freedoms*

This paper advances a theoretically-driven reconstruction of s.7 Charter *doctrine, which currently precludes protection for personal injury damages. Proceeding from a standpoint built on deontological strains of tort theory, the author dissects the reasoning in* Whitbread v. Walley, *the governing authority on the applicability of s. 7 to legislated damages caps. In three stages, the author argues that in the contemporary context, theoretical and doctrinal support for* Whitbread *is weak. First, when tort rights are theorized non-instrumentally, rights to personal injury damages fall squarely within the irreducible sphere of personal autonomy now protected by s. 7. Second, recent developments, both in civil recourse theory and in* Charter *doctrine, suggest that rights to personal injury damages can no longer be treated as beyond the realm of constitutional jurisprudence. Third, and most importantly, the specter of* Lochner v. New York *can no longer be invoked to justify the wholesale exclusion of tort rights from s. 7 protection. Discrete heads of damage can be separated into two categories: those based entirely on rights to bodily integrity (bodily claims), and those based at least partly on distributive entitlements (distributive claims). The author argues that constitutional doctrine can protect morally legitimate bodily claims by protecting some heads of damage (non-pecuniary damage and cost of care), and by leaving heads of damage based on morally imperfect distributive claims (past income loss and loss of earning capacity) to the policy discretion of the state. The article concludes with a short discussion of s. 1 issues, and of some possible broader applications of the bodily – distributive claim framework.*

Cet article propose une reconstitution théorique de la doctrine sous-jacente à l'article 7 de la Charte, *qui exclut actuellement la protection relative à des dommages pour préjudice corporel. Partant d'un point de vue qui s'appuie sur des souches déontologiques de la théorie du délit, l'auteur dissèque le raisonnement dans l'arrêt Whitbread c. Walley, qui fait autorité sur l'applicabilité de l'art. 7 au plafonnement des dommages par la loi. L'auteur avance, en trois étapes, que dans le contexte actuel, la théorie et la doctrine n'offrent qu'un faible appui à l'arrêt Whitbread. Premièrement, lorsque les droits en matière délictuelle sont définis en théorie, en faisant abstraction de tout concept physique, les droits à des dommages pour préjudice corporel s'inscrivent directement dans la sphère irréductible de l'autonomie personnelle désormais protégée par l'article 7. Deuxièmement, les développements récents, tant en théorie des recours civils que dans la doctrine de la* Charte, *suggèrent que les droits à des dommages pour préjudice corporel ne peuvent plus être traités comme s'ils étaient hors du domaine de la jurisprudence constitutionnelle. Troisièmement, et c'est le point le plus important, il n'est plus possible d'invoquer le spectre de Lochner c. New York pour justifier l'exclusion générale des droits en matière délictuelle de la protection offerte par l'art. 7 de la* Charte. *Les chefs de dommages discrétionnaires peuvent être divisés en deux catégories : ceux qui sont fondés entièrement sur le droit à l'intégrité physique (réclamations pour préjudice corporel) et ceux qui sont fondés, du moins en partie, sur les droits distributifs (réclamations distributives). L'auteur allègue que la doctrine constitutionnelle peut protéger les réclamations pour préjudice corporel moralement légitimes en protégeant certains chefs de dommages (dommages non pécuniaires et coût des soins) et en laissant les chefs de dommages fondés sur des réclamations distributives moralement imparfaites (pertes de revenus antérieurs et perte de la capacité de gagner sa vie) à la discrétion politique de l'État. L'article conclut sur une brève discussion des enjeux liés à l'art. 1 et de certaines applications éventuelles plus large du cadre de réclamations pour préjudice corporel et de réclamations distributives.*

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Introduction

The purpose of this paper is to present an argument in favour of redefining the constitutional status of personal injury damages in Canada. The desirability of redefinition is occasioned by continuing legislative incursions into the realm of compensatory remedies,[1] as well as significant developments in liberal theory, tort theory, and constitutional doctrine. To date, constitutional analysis of damages caps has focused on s. 15 of the *Charter of Rights and Freedoms*.[2] While an understanding of equality issues is critical to a comprehensive view of the field, concerns of liberal justice suggest a second direction for analysis: the rights to liberty and security of the person guaranteed by s. 7 of the *Charter*. Following the reasoning used by the British Columbia Court of Appeal in *Whitbread v. Walley*,[3] affirmed by the Supreme Court of Canada, Canadian courts have

1. For example, the recent enacting of damage caps in the field of motor vehicle accident compensation: *Insurance Act*, R.S.A. 2000 c. I-3, s. 650.1 and *Minor Injury Regulation*, Alta. Reg. 123/2004; *Insurance Act*, R.S.N.B. 1973 c. I-12, s. 265.21 and *Injury Regulation*, N.B. Reg. 2003-20; *Insurance Act*, R.S.N.S. 1989, c. 231, ss. 5, 113 and *Automobile Insurance Tort Recovery Limitation Regulations*, N.S. Reg. 182/ 2003.

2. Part I of the *Constitution* Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. For an example of a s. 15 analysis of damages caps see Barbara Billingsley, "Legislative Reform and Equal Access to the Justice System: An Examination of Alberta's New Minor Injury Cap in the Context of Section 15 of the *Canadian Charter of Rights and Freedoms*" (2005) 42 Alta. L. Rev. 711.

3. (1987), 45 D.L.R. (4th) 729, [1987] B.C.J. No. 2124 (S.C.) [*Whitbread (S.C.)*]; (1988), 51 D.L.R. (4th) 509, [1988] B.C.J. No. 733 (C.A.) [*Whitbread (C.A.)*]; (1990), 77 D.L.R. (4th) 25, [1990] S.C.J. No. 138 (S.C.C.) [*Whitbread (S.C.C.)*].

shied away from granting constitutional status to a right to recover personal injury damages under s. 7. In this paper, my central claim is that viewed from the standpoint of liberal justice, the reasoning in *Whitbread* should be reconsidered. Liberal theories of justice, along with recent doctrinal developments, favour the protection of an analytically circumscribed right to personal injury damages as a key component of liberty and security.

The paper is limited in both theoretical and doctrinal focus. The theoretical focus is limited two ways. First, I restrict my analysis to liberal theories of justice, on the assumption that Canadian constitutional values are informed by a generally liberal understanding of the citizen-state relationship. Second, my analysis is restricted to a deontological (rights-based) rather than utilitarian (teleological) view of liberalism. In general, deontological theory sees the right as connected to the good, while teleological theory sees the right as separate from, and subsidiary to, a conception of social good.[4] Throughout the paper, I am sympathetic to the deontological point of view, and to the general tenets of liberal egalitarianism. Since the publication of Rawls's *A Theory of Justice*, liberal theory has drifted away from utilitarianism, toward deontological conceptions of rights. This shift can, and should, influence our ways of thinking about both tort law and constitutional rights. My arguments reflect this shift: the paper is driven by my suspicion that behind legislative limits on compensatory remedies lies crudely utilitarian thinking.

My doctrinal focus is also twice limited. First, although a fully developed doctrinal discussion of s. 7 requires analysis of three distinct frameworks (the substantive rights guarantee, the principles of fundamental justice, and s. 1 justification), the scope of my analysis is limited to the substantive rights guarantee. This restriction is tied to my deontological approach. In general, deontological theories are more germane to the interpretation of constitutional rights than utilitarian theories, and the substantive rights guarantees of the *Charter* are understood as entrenching a deontological conception of rights.[5] Second, my doctrinal analysis only scratches the surface. While I engage doctrinal points, the paper is primarily a theoretical piece. My doctrinal aim is to suggest areas of jurisprudential traction for the theoretical points presented. I do not attempt a comprehensive recitation of the case law.

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4. John Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1971) at 22-27 [Rawls, *Justice*].

5. L.E. Weinrib and E.J. Weinrib, "Constitutional Values and Private Law in Canada" in D. Friedmann and D. Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart, 2001) 42; R. Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 Queen's L.J. 161 at 180.

I. *Whitbread v. Walley*

The basic principle of tort compensation is that a successful plaintiff is entitled to be put in the same position as he or she would have been in had the tort not been committed, in so far as money can do so.[6] In a restricted context, this paper attempts to analyze whether, and how, this principle should be constitutionally protected. To do so, I use a case-specific approach, focusing on *Whitbread.* I do so simply because *Whitbread* represents the presently authoritative statement of law. Since *Whitbread* addresses a challenge to a legislated damages cap, my analysis focuses on the context of damages caps. But *Whitbread* has had significant impact outside that context. Lower courts have used *Whitbread* not only to dismiss challenges to damage caps, but also to dismiss challenges to ultimate limitations legislation, challenges to aspects of workers' compensation schemes, and challenges to legislation immunizing foreign states from tort liability.[7] The repercussions of my arguments also go beyond the context of damages caps.[8] A detailed analysis of such broader repercussions is beyond the scope of this paper. But I will point to some further areas of tort law that might be affected by my conclusions.

On March 27, 1983, John Whitbread was sleeping aboard a thirty-two foot pleasure craft (the "Calrossie") which was traveling on Indian Arm, part of the Pacific Ocean near Vancouver. While Whitbread slept, Robert Walley piloted the Calrossie. While Walley was piloting the craft, the Calrossie struck some rocks close to shore. Whitbread suffered significant injuries, including a fractured spine and permanent quadriplegia. Whitbread brought a personal injury action against Walley and the owners of the Calrossie. Walley served a summary trial motion, seeking a declaratory judgment limiting his liability pursuant to the *Canada Shipping Act*[9]. Walley relied on s. 647 of the Act, which capped all liability for injuries arising from the acts or omissions of persons involved in navigation of a ship to 3,100 gold francs, the equivalent of roughly $103,000.00. Whitbread defended the motion, in part, on the basis that s. 647 violated his s. 7 rights to life,

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6. *Ratych v. Bloomer* (1990), 69 D.L.R. (4th) 25 at 40, [1990] S.C.J. No. 37 (S.C.C.).

7. *Hernandez v. Palmer* (1992), 15 C.C.L.I. (2d) 187 at 214-216, [1992] O.J. No. 2648 (Sup.Ct.) (no-fault damage cap regime for motor vehicle accidents); *Wittman v. Emmott*, [1989] B.C.J. No. 1188 (S.C.) (ultimate limitation for commencing action); *Budge v. Alberta (Workers' Compensation Board)* (1991), 77 D.L.R. (4th) 361 at 368, [1991] 3 W.W.R. 1 (Alta C.A.) (workers' compensation); *Bouzari v. Iran*, [2002] O.J. No. 1624 (Sup. Ct.) at para. 78, aff'd (2004), 71 O.R. (3d) 675 (C.A.), [2004] O.J. No. 2800, leave to appeal dismissed (2004), 122 C.R.R. (2d) 376, [2004] S.C.C.A. No. 410 (S.C.C.).

8. I am indebted to Professor Vaughan Black for his invaluable assistance in highlighting the broader implications of my argument.

9. R.S.C. 1970, c. S-9 (hereinafter the "Act"). In 2001, the relevant portions of the *Canada Shipping Act* were repealed, and replaced by a liability scheme (which also includes a damages cap) set out in Part III of the *Marine Liability Act*, S.C. 2001, c. 6.

liberty, and security of the person.[10] As a main part of his *Charter* argument, Whitbread argued that his life, liberty, or security of the person was violated because the compensation to which he would be entitled at common law would far exceed the $103,000.00 cap. Contemporary case law suggests that absent the Act, Whitbread would have been awarded compensation exceeding $1,000,000.00 for non-pecuniary loss and future cost of care alone.[11] The chambers justice (MacKinnon J.) dismissed Whitbread's s. 7 challenge, but dismissed Walley's motion on other grounds. Citing case law applying s. 7 in the context of occupational rights and corporate marketing rights, the chambers justice held that Whitbread's claim for damages fell within the economic realm, and was plainly beyond the scope of s. 7.[12] The Court of Appeal allowed Walley's appeal, but dismissed Whitbread's cross-appeal. Whitbread appealed to the Supreme Court of Canada, where the Court dismissed the *Charter* arguments from the bench (per Dickson C.J.), no written reasons provided.[13]

Given the lack of reasons for the Supreme Court of Canada judgment, the Court of Appeal's reasons for judgment form the subject of this paper. Whitbread made two arguments on appeal. Writing for the unanimous panel, McLachlin J.A. (as she then was) summarized the first argument as claiming that "a claim for an economic interest which is founded on a deprivation of life, liberty, or security of the person falls within s. 7." The Court of Appeal summarized the second argument as suggesting that "a claim for an economic interest which may enhance a person's ability to acquire aids and amenities to improve the person's life, liberty, or security of the person, falls under s. 7 of the Charter." The Court of Appeal deployed three main reasons to dispose of these arguments. The first reason, which I will call the framers' intent argument, was that the framers of the *Charter* did not see fit to include compensatory rights within the scope of s. 7. The second reason, which I will call the state action argument, was that Whitbread had suffered his injuries as a result of the accident, not as a result of state action. The third reason, which I will call the anti-*Lochner* argument,[14] was that giving constitutional status to Whitbread's damages claim would grant constitutional status to virtually all property interests.[15]

10. S. 649 of the Act was also challenged on the basis of s. 15 of the *Charter* and the division of powers, and much of the Courts' reasons deal with those issues.

11. See *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, [1985] B.C.J. No. 2762 (S.C.).

12. *Whitbread (S.C.)*, *supra* note 3 at 733-736.

13. *Whitbread (S.C.C.)*, *supra* note 3 at 32. La Forest J., for the Court, gave written reasons on the federalism arguments, but not on the *Charter* arguments.

14. Following the case broadly understood to epitomize the era of constitutional intervention by the United States Supreme Court in matters of economic regulation restricting private property rights, *Lochner v. New York*, 198 U.S. 45 (1905).

15. *Whitbread (C.A.)*, *supra* note 3 at 519-522.

After a short detour to focus our theoretical lens, I will return to assess each of these arguments from the standpoint of liberal justice and contemporary constitutional doctrine.

II. *Locating liberal justice in contemporary tort theory*

The project of this paper is to assess *Whitbread* according to a standpoint of liberal justice: a standpoint that engages liberal theory, *Charter* rights, and tort law. From this perspective, tort law's claim for *Charter* status must be staked out on the common ground of liberal theory. To create this common ground, the standpoint of liberal justice requires two sets of linkages. First, it needs a tie between liberal theory and *Charter* rights. The deontological approach establishes this tie. To that end, where issues of political and constitutional theory arise, I use a framework of analysis generally informed by Rawls's theory of justice as fairness. Second, the standpoint needs to tie liberal theory to the normative content of tort law. For tort law to claim constitutional status there should be some sort of bond between the two. Contemporary tort theory, generally liberal in orientation, provides the tie necessary for this analysis. But tort theory has a broad sweep. To properly focus our theoretical lens, we need to use only those approaches to tort theory appropriate to the deontological and constitutional context.

Tort theory can be broadly classified as instrumental (functionalist) or non-instrumental (non-functionalist). Instrumental theories conceive tort law primarily as a tool for achieving social goals, such as efficiency, compensation, deterrence, wealth redistribution, or loss spreading.[16] For the instrumentalist, understanding tort law involves understanding how tort law does, and ought to, contribute to those independent social goals.[17] Instrumental theory denies that the history, structure, and content of tort law reflect inherently normative features. In general, these theories are motivated by utilitarian concerns. In contrast, non-instrumental theories are generally based on individual moral rights, seen to emanate from the structure and content of tort law itself. Non-instrumental theory argues that tort law does, and should, reflect deeply embedded intuitions about justice and personal responsibility.[18] Most non-instrumentalists are concerned about the individual rights reflected in tort law, not the effects of tort law on wealth, utility-maximization, or other social goals extrinsic

16. Stephen R. Perry, "The Moral Foundations of Tort Law" (1992) 77 Iowa L. Rev. 449 [Perry, "Moral Foundations"].

17. Ernest J. Weinrib, "Understanding Tort Law" (1989) 23 Val. U. L. Rev. 485 at 488 [Weinrib, "Understanding"].

18. Ernest J. Weinrib, "Corrective Justice" (1992) 77 Iowa L. Rev. 403 [Weinrib, "Corrective Justice"].

to the structure and content of tort law itself.[19] Since *Charter* rights are generally understood to entrench a deontological conception of rights, I limit my analysis to non-instrumental theories of tort, which mostly use deontological thinking.

John Goldberg develops a useful and nearly complete taxonomy of contemporary tort theory, covering both instrumental and non-instrumental perspectives. Goldberg marks five broad categories of theories: compensation-deterrence theory, enterprise liability theory, economic deterrence theory, social justice theory, and individual justice theory.[20] Four of these use instrumental approaches. Compensation-deterrence theory, a theory-skeptical approach, sees tort law as a process of ad hoc judicial legislation, undertaken to further two social policy goals: deterrence of antisocial conduct and compensation of the injured.[21] Also skeptical of moral analysis, enterprise liability theory sees tort law as a device, albeit an inefficient one, for providing needs-based relief to the injured.[22] Economic deterrence theories, exemplified in the works of Guido Calabresi and Richard Posner, assume the purpose of tort law is to promote overall social welfare through microeconomic analysis, using economic incentives to deter accidents.[23] Social justice theories, employing a critical perspective, see tort as a device for rectifying imbalances in social power. In the social justice approach, tort law is legitimate to the extent it protects subordinated groups.[24] Taken as a whole, these categories of theories have diverse goals, but a common theme. All are driven in the first instance by instrumental goals, and view the structure and content of tort law as lacking inherent normative properties. For our purposes, these theories are of limited use in establishing points of contact between the normative elements of tort law and liberal justice.

Non-instrumental theories generally fall under the rubric of "individual justice theory," the fifth category in Goldberg's taxonomy. Goldberg identifies three species of individual justice theories: libertarian theory, reciprocity theory, and corrective justice theory.[25] Libertarian theory has

19. Jules L. Coleman, "Adding Institutional Insult to Personal Injury" (1991) 8 Yale J. on Reg. 223 at 228-230 [Coleman, "Personal Injury"].
20. John C.P. Goldberg, "Twentieth-Century Tort Theory" (2003) 91 Geo. L.J. 513.
21. *Ibid.* at 522, 525.
22. *Ibid.* at 537.
23. *Ibid.* at 544-45.
24. *Ibid.* at 560. Ted DeCoste provides the best example of this perspective I have found in Canadian scholarship. In DeCoste's view, the project of tort practice is to "disrupt the ruling consensus so as to claim law's protection for the disempowered." Ted DeCoste, "Taking Torts Progressively" in Ken Cooper-Stephenson and Elaine Gibson, eds., *Tort Theory* (North York: Captus Univ. Publications, 1993) at 240, 272-273.
25. Goldberg, *supra* note 20 at 563.

both instrumentalist and non-instrumentalist varieties, both based on inalienable rights to property and ownership. In its non-instrumental variant, libertarian theory sees certain tort rules, such as strict liability, as reflecting libertarian values.[26] Focusing less on ownership, reciprocity theory derives a Rawlsian principle of equal individual security from the common elements of strict liability and negligence.[27] Corrective justice theory, developed from Aristotelian philosophy, sees tort law as instantiating a rights-vindicating structure, inherent in the correlative relationship of plaintiff and defendant.[28]

In my view, two further species can be added to Goldberg's category of individual justice theories: civil recourse theory and substantive equality theory. In civil recourse theory, tort law embodies individual rights vis-à-vis the state. Citizens are entitled to an institution of private recourse, since tort law entrenches a principle of state-enabled private claims.[29] Substantive equality theory, best articulated in the work of Ken Cooper-Stephenson, views contemporary tort doctrine as reflecting corrective individualism at its core, but distributive egalitarianism in a comprehensive system of social justice.[30] For the purposes of this paper, I leave aside libertarianism, which holds a pre-political view of justice inappropriate for constitutional analysis.[31] The remaining non-instrumental approaches, including reciprocity, corrective justice, civil recourse and substantive equality theories, construct the tort theory component of the standpoint of liberal justice used in this paper.

Common to each theory informing the standpoint of liberal justice is an approach Ben Zipursky calls the "conceptualist premise": the idea that a theoretical account of law must provide an analysis of concepts embedded

26. Goldberg, *supra* note 20 at 565.

27. George P. Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harv. L. Rev. 537 at 550.

28. Ernest J. Weinrib, "The Special Morality of Tort Law" (1989) 34 McGill L. J. 403 at 408 [Weinrib, "Special Morality"]. For a general distillation of these ideas as expressed in variants of contemporary corrective justice theory, see Ernest J. Weinrib, "Correlativity, Personality and the Emerging Consensus on Corrective Justice" (2001) 2:1 Theor. Inq. L. 1 [Weinrib, "Correlativity"].

29. Benjamin C. Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 Geo. L.J. 695 at 735.

30. Ken Cooper-Stephenson, "Corrective Justice, Substantive Equality and Tort Law" and "Economic Analysis, Substantive Equality and Tort Law" in *Tort Theory*, *supra* note 24, 48 at 53, and 131 at 159.

31. This is an argument that I will not fully develop here. My general view is that corrective justice itself can only be partially understood on pre-political terms: Stephen Perry, "The Distributive Turn: Mischief, Misfortune and Tort Law" (1997) 16:3 Quinnipiac L. Rev. 315 at 334 [Perry, "Distributive Turn"]. Further, the libertarian view of personality is illogical in a comprehensive picture of corrective, distributive and political justice, since it derives political principles from a pre-political notion of personality: Arthur Ripstein, "The Division of Responsibility and the Law of Tort" (2004) 72 Fordham L. Rev. 1811 at 1836 [Ripstein, "Division"].

in the law.[32] Conceptualist accounts can be placed on a methodological spectrum. Formalist accounts, on one end of the spectrum, ascribe an immanent rationality to law, founded on a structurally rigid base of moral concepts.[33] On the other end of the spectrum, pragmatic conceptualist accounts identify moral concepts in the law through a framework that is practice based, holistic, and open to revision.[34] Applying this spectrum to our standpoint of liberal justice, corrective justice theory tends to be more formalistic, while reciprocity, civil recourse, and substantive equality theories tend toward the pragmatic end of the spectrum.

I agree with Izhak Englard's argument that a general approach to tort law should incorporate both instrumental and non-instrumental views.[35] But I take a more narrow approach: the project of this paper is to examine the normativity expressed by tort law itself, and the fit of that normativity with constitutional rights. For the purpose of assessing the constitutional status of personal injury damages, we are concerned not with the values tort law should express, but those it does express. In the constitutional and deontological context, the appropriate approach to tort law is non-instrumental and conceptual.

III. *The framers' intent argument: autonomy over bodily integrity, choice, and the normative content of tort rights*

Having constructed our standpoint of liberal justice, we can now return to *Whitbread.* In *Whitbread*, McLachlin J.A. recognized the analytic difficulties posed by the s. 7 issue. The Court of Appeal characterized the Act as a legislative measure with an economic aspect arguably connected to life, liberty, and security of the person.[36] The main analytic problem was that Whitbread's claim fell in the "difficult middle ground" between entirely economic issues, such as a monetary disability imposed on a corporation, and state action directly affecting life, liberty, or security of the person. In analyzing this middle ground, the Court of Appeal characterized personal injury damages as an economic benefit. Rather than theorizing the normative context of the economic benefit, the Court of Appeal simply equated economic benefits with property rights. The Court of Appeal appears to have concluded that since the framers did not include property rights in the text of s. 7, economic benefits were also beyond the scope of s. 7. Granting *Charter* status to Whitbread's claim would require the

32. Zipursky, *supra* note 29 at 705.
33. Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard Univ. Press, 1995) at 23 [Weinrib, *Private Law*].
34. Zipursky, *supra* note 29 at 707.
35. Izhak Englard, "The System Builders: A Critical Appraisal of Modern American Tort Theory" (1980) 9 J. Legal Stud. 27.
36. *Whitbread (C.A.)*, *supra* note 3 at 520.

words "life, liberty and security of the person" to be read as if they were amplified either by the phrase "or such economic benefit as the law may award in their stead," or the phrase "or any benefit which may enhance life, liberty, or security of the person."[37]

In a present day context, two doctrinal points are critical to assessing the framers' intent argument. First, the idea that the s. 7 right to security of the person categorically excludes economic "benefits which may enhance life, liberty, or security of the person" has been thrown into doubt by the decision of the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*.[38] In *Chaoulli*, the Court held that a right to contract for private health insurance is protected as a right to security of the person, in circumstances where the assistance of private health insurance is clinically significant to an individual's current and future health.[39] Second, since *Whitbread*, the Supreme Court of Canada has extended the scope of s. 7 liberty rights. Liberty now includes the right to an irreducible sphere of personal autonomy, where an individual may make inherently private choices free from state interference. Those choices are protected if they go to the core of what it means to enjoy individual dignity.[40] The Supreme Court of Canada now appears to approve the view that instead of invoking a strict dichotomy between *Charter* rights and economic benefits, the proper approach to s. 7 is to accord constitutional status to economic benefits intimately connected to life, liberty, and security of the person.[41] Leaving aside, for the moment, the issue of state interference, the present doctrinal context shifts our focus off the strict reasoning of the framers' intent argument deployed in *Whitbread*. Instead, we must use the standpoint of liberal justice to analyze the bond, if any, between tort law, personal injury damages, autonomy over bodily integrity, and choice.

Within the standpoint of liberal justice, corrective justice theory, particularly the Kantian version, establishes this connection at a highly abstract level. Ernest Weinrib, the main theorist of the formalist school, provides a starkly conceptual account of corrective justice. Drawing on Aristotelian philosophy, Weinrib analyzes tort as a mode of intrinsic ordering, to be understood on its own terms.[42] The structure of an intrinsic

37. *Whitbread (C.A.)*, *supra* note 3 at 521.
38. (2005), 254 D.L.R. (4th) 577, [2005] S.C.J. No. 33 (Q.L.) [*Chaoulli*].
39. *Ibid.* at 627 (per McLachlin C.J. and Major J.).
40. *R. v. Malmo-Levine* (2003), 233 D.L.R. (4th) 415 at 457, [2003] S.C.J. No. 79 (per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache and Binnie JJ.).
41. Indeed, although the author has been unable to locate an English version of the trial decision in *Chaoulli*, it appears the trial judge (Piché J.) used almost precisely this language: *Chaoulli*, *supra* note 38 at 592.
42. Ernest J. Weinrib, "Liberty, Community and Corrective Justice" (1988) 1 Can. J.L. & Juris. 3 at 4 [Weinrib, "Liberty"].

ordering emanates from one conceptual "master feature" of the ordering, defined as the single principle of intelligibility and justificatory impulse necessary to our entire mental representation of the ordering.[43] In the intrinsic order of tort, this master feature is the bipolar, correlative, and unified connection between plaintiff and defendant, reflected in the damages award.[44] Bipolarity entails notional equality, a view that sees the parties, in their pre-interaction positions, as equally entitled to ownership of their physical or material holdings, notwithstanding the fact that distributive inequalities might be reflected in those holdings. In a scheme of notional equality, the quantity of each party's holdings immediately prior to their interaction provides the baseline from which gain and loss are imputed.[45] Pre-interaction comparisons of the parties' wealth, need, virtues, or social positions are irrelevant.[46] In tort law, understood as corrective justice, injustice is akin to disruption of notional equality, rather than noncompliance with distributive norms. On this view, tort law is unconcerned with distributive justice.

For Weinrib, the concepts of correlativity, abstraction, and agency, grounded in notionally equal interaction, infuse tort with normative content. Weinrib distills these concepts into normative precepts, using Kant's philosophy of natural right. In Kantian philosophy, law is understood as the juridical manifestation of self-determining agency. The defining characteristic of self-determining agency is the individual's ability to abstract from his or her particular circumstances; individuals are equal in their bare capacity to abstract.[47] Individuals are possessed with moral personality: the ability to form and promote a conception of their own good, apart from the conception of any particular good. Moral personality is a locus of self-determining activity, separate from the world. Separation from the world allows individuals to use the world for activity and appropriation, and entitles individuals to resist the encroachment of the world upon their personality. In interactive relationships, the right of moral personality is expressed in the idea of juridical honour. The content of juridical honour is expressed in the maxim "do not make yourself into a mere means for others, but be at the same time an end for them." In the formalist theory, tort law, understood as corrective justice, is primarily a system of negative freedom, defined by duties obliging recognition of juridical honour.[48]

43. Weinrib, *Private Law*, *supra* note 33 at 10; *supra* note 18 at 417.
44. Weinrib, "Special Morality," *supra* note 28 at 410.
45. Weinrib, "Corrective Justice," *supra* note 18 at 408, 411.
46. Weinrib, *Private Law*, *supra* note 33 at 78.
47. Weinrib, "Corrective Justice," *supra* note 18 at 423.
48. Weinrib, "Liberty," *supra* note 42 at 7.

The formalist account of positive freedom, built on the Kantian construction of personality, binds the normative core of tort with concerns of autonomy over bodily integrity and choice. The fundamental project of Kantian moral theory is to establish rights that protect the very *capacity* to choose. Weinrib explains that self-determining agency presupposes purposive activity, exercised through free will (the capacity for choice independent of inclination) and practical reason.[49] Peter Benson argues that individual freedom can only be realized, in the here and now, through relationships with particularities from which the individual abstracts. Benson draws a distinction between individuals and these particularities or "things" (also referred to as "objects of choice"[50]). Because things, unlike individuals, have no intrinsic validity, they are morally available for use by individuals. The moral possibility of using things implies individuals have the bare moral capacity to choose to use things ("abstract right").[51] In Benson's view, the capacity for choice is of central normative significance.[52] Indeed, it defines the positive aspect of moral personality.

In the Kantian view, personality is secured by protecting the capacity to choose. This requires two sets of protections: rights to bodily integrity and rights to things. In Weinrib's version, because the body houses free will, each individual has a right to physical security against injury by another.[53] Benson argues that because free choice can only be exercised through corporeal existence, and the relationship between the will and the body is one of identity, rights to bodily integrity are innate and inalienable. Abstract right imposes upon everyone a duty to respect the bodily integrity of others, but imposes no duty on individuals to respect their own bodily integrity.[54] Protecting the capacity to choose also requires both rights to ownership of things (in Weinrib's language, "external objects of the will") and to free exchange of things. Since exercising one's will to acquire a thing is central to personality, individuals have an entitlement to ownership of things which they have brought under their exclusive control, through an external manifestation of will, prior to others, which all others have a duty to respect.[55] Ownership thus understood includes rights to possession, use, and alienation of things. Rights to bodily integrity and rights to things are fundamentally different in their constitutional repercussions, as I will

49. Weinrib, *Private Law*, *supra* note 33 at 88-90.
50. Peter Benson, "The Basis of Corrective Justice and Its Relation to Distributive Justice" (1992) 77 Iowa L. Rev. 515 at 569.
51. *Ibid.* at 562.
52. *Ibid.* at 565.
53. Weinrib, *Private Law*, *supra* note 33 at 128.
54. Benson, *supra* note 50 at 577-578.
55. Benson, *supra* note 50 at 543, 584-585.

argue later in the paper. For the time being, however, we need only note the intimate relationship of tort with autonomy over bodily security and choice, established at a highly abstract level in the formalist account of corrective justice.

Stephen Perry develops a less formal, but similarly pre-political and conceptual "outcome-responsibility theory" of corrective justice. Like Weinrib and Benson, Perry sees tort as based in core, pre-political normative concerns of autonomy over bodily integrity and fundamental choice. Perry argues that while the formalist Kantian version of corrective justice provides a basis for defining morally wrong conduct, it fails to provide a conceptual account of why tort obliges defendants to fully compensate plaintiffs for their loss.[56] To establish this link, Perry argues that personhood is defined by choice and an awareness of being capable of making a difference in the world. Choosing is like betting, where the risks and payoffs are unknown in advance.[57] Because we are aware of our capacity to make a difference, we identify with the outcomes of our actions through a notion of control.[58] In a normative and social sense, we have an awareness of responsibility for our outcomes, and of others' responsibility for their outcomes. We justify our actions through a retrospective evaluation of how our outcomes made a difference in the world. If the outcome of our action is bad, we regret both the action and the outcome ("agent-regret").[59] In a relational setting, harmful outcomes are those that result in a setback to another's personal autonomy, understood as the interest each individual has in choosing projects and opportunities.[60] Agent-regret founds the defendant's obligation to fully compensate the plaintiff for intentional or objectively avoidable harm to bodily integrity or property. Like the Kantian formalist account, Perry establishes a close connection between the structure of tort law and the concerns underlying s. 7. Perry also provides a more specific account of the tie between bodily integrity, choice, and a defendant's responsibility to pay a complete damages award.

The theories of Jules Coleman and Arthur Ripstein straddle corrective justice and reciprocity theory. These theories provide a less abstract, more pragmatically conceptual view of the relationship between tort law, autonomy over bodily integrity, and choice. Instead of starting with the idea of notional equality, Coleman and Ripstein argue that tort, in its purest form, is about balancing the liberty and security interests of plaintiffs and

56. Perry, "Moral Foundations," *supra* note 16 at 479-488.
57. *Ibid.* at 488, 492.
58. Perry, "Distributive Turn," *supra* note 31 at 331.
59. Stephen Perry, "Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice" in *Tort Theory*, *supra* note 24, 24 at 40-41 [Perry, "Loss, Agency, and Responsibility"].
60. Perry, "Moral Foundations," *supra* note 16 at 498.

defendants.[61] Taking this conceptual view, neither theorist can structure the normative content of tort on natural, abstract right. Instead, both need a normative political theory, dovetailing with this structural balance between liberty and security. For Coleman, this theory is developed through the straightforward proposition that the structure and content of tort is coherent with our ordinary liberal moral practices, valuing autonomy and well being.[62] A duty to repair losses is justified because responsibility for our actions is the flip side of a liberal emphasis on autonomous choice.[63] Torts are offences against autonomy and integrity; personal injury damages are specifically designed to affirm autonomy and integrity. As a practical extension of his theory, Coleman objects to policy proposals, such as contracts for care, which restrict plaintiffs' choices of how to use their damage awards.[64]

Ripstein's normative theory of tort is more complicated. Ripstein starts with a Rawlsian conception of moral personality. On this view, individuals are equal in their capacity to have both a sense of their own good, and a sense of justice.[65] Individuals are both rational (self-interested) and reasonable, moved by a desire to live in a society characterized by fair terms of interaction.[66] Because individuals are rational, they require a private realm: a space in which each has the right to pursue his or her chosen life plans, and where each has a corresponding responsibility for what they make of their lives. The private realm is public, in the sense that individuals cannot pursue their own conceptions of the good life in abstraction from others. In order to pursue and give meaning to the life plans each chooses in the private realm, individuals need resources, including their bodily powers and property.[67] Because they are reasonable, individuals must treat everyone as equally free to use their bodily powers and property in the private realm. Each person needs their bodily powers and property to give meaning to their choices, so no one is entitled to injure another's bodily integrity or damage their goods. Like Coleman, Ripstein applies his argument in the practical context of personal injury tort reform. Focusing on concerns of autonomy and choice, Ripstein argues that while

61. Jules Coleman and Arthur Ripstein, "Mischief and Misfortune (Annual McGill Lecture in Jurisprudence and Public Policy)"(1996) 41 McGill L.J. 91 at 109.
62. Jules Coleman, "The Practice of Corrective Justice" (1995) 37 Ariz. L. Rev. 15 at 26. [Coleman, "Corrective Justice"].
63. Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge Univ. Press, 1992) at 437 [Coleman, *Risks and Wrongs*].
64. Coleman, "Personal Injury," *supra* note 19 at 230.
65. Rawls, *Justice*, *supra* note 4 at 505.
66. Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge Univ. Press, 1999) at 7 [Ripstein, *Equality*].
67. Ripstein, "Division," *supra* note 31 at 1832.

some administrative restrictions on the tort system (such as mandatory insurance and no fault liability) are justified under the Rawlsian view, schemes that substitute scheduled payments for private rights infringe too heavily on individual independence.[68]

The original version of reciprocity theory, developed by George Fletcher in the early 1970s, also argues that personal injury damages are essential to autonomy over bodily integrity. While the theory is normatively thin, some points are useful for our purposes. Fletcher uses a doctrinal version of conceptual analysis. Case law in intentional torts, negligence, and strict liability exhibits a consistent theme: liability should be imposed where the defendant has created a non-reciprocal risk, exposing the plaintiff to greater risk than the risks imposed on the defendant by the plaintiff. A single principle of fairness is derived from this theme: all individuals have the right to the maximum degree of security, compatible with a like security for everyone else.[69] As part of this equal right of security, tort law protects a zone of individual interests, including bodily integrity and property, from intrusions designed to further other interests. Damages are the surrogate for the individual's right to equal security.[70] The critical point in Fletcher's analysis is this connection between damages and equal security, expressed as a zone of autonomy over bodily integrity and property rights.

Civil recourse theory, developed by Zipursky and Goldberg, connects tort to autonomy and choice by focusing on the primary role of plaintiffs in the litigation process. Using a pragmatically conceptual approach, civil recourse theory argues that the single master feature of tort (to use Weinrib's language) is the "principle of civil recourse": that a plaintiff is entitled to act against one who has legally wronged him or her.[71] While sympathizing with corrective justice theory, Zipursky critiques the centrality of notional equality in the formalist account. Zipursky points out that there are three basic, structural features of tort law that diverge from notional equality. First, tort law contains many remedies unconcerned with restoring notional equality (for example, punitive damages). Second, tort law often bars recovery in situations where a defendant would have a moral duty to compensate the plaintiff under corrective justice theory. Third, until the plaintiff commences court action and obtains a judgment, tort law imposes only a liability for damages, not a duty to pay damages.[72] Tort law is about the plaintiff's right to sue, not only the defendant's duty to pay. On a structural level, tort is about providing plaintiffs with one

68. Ripstein, "Division," *supra* note 31 at 1837.
69. Fletcher, *supra* note 27 at 550.
70. Fletcher, *supra* note 27 at 568.
71. Zipursky, *supra* note 29 at 735.
72. Zipursky, *supra* note 29 at 709-720.

type of fundamental choice: the choice of whether or not to sue to obtain redress for a wrong.

The normativity flowing from the principle of civil recourse is informed by historical beliefs protecting bodily integrity and choice. These beliefs are founded in two sources: ancient common law theory and contractarian natural rights theory. Following Coke and Blackstone, Goldberg draws on the idea of the Ancient Constitution: the understanding of early common law lawyers that a thick crust of unwritten national and local custom informed the natural structure of ruler and ruled.[73] For Coke, the Ancient Constitution put an obligation on the King, expressed in Chapter 29 of the *Magna Carta*, to ensure each Englishman's best birth right, including his body, life, honour, and goods, was protected from wrongful injury. English liberty was achieved through law, not apart from it.[74] In accordance with this view, Blackstone argued that personal actions were designed to vindicate absolute rights to life, liberty, and property.[75] Similarly, in Locke's construction of the State of Nature, individuals have an inalienable right to self-preservation, which includes the right to seek reparation from those who have harmed their life, health, liberty or possessions. By entering into civil society, individuals give up their right to act as judge and executioner over others, but not their right to self-preservation and redress for wrongs committed against their life, health, liberty or property.[76] Reasoning from this historical and contractarian base, Goldberg argues that the principle of civil recourse puts moral limits on present day measures capping personal injury damages.

Like civil recourse theory, substantive equality theory critiques the formalist account of corrective justice for ignoring basic features of tort law. The substantive equality argument, based on recent doctrinal developments, is less structural than the civil recourse view, and focuses specifically on the Canadian context. Ken Cooper-Stephenson argues that while Canadian tort doctrine has a corrective core, the normative content of tort is driven by distributive egalitarianism.[77] Redefinition by the courts of threshold questions in negligence and nuisance (particularly developments defining loss, fault requirements, and duties of care) consistently protect the disadvantaged at the expense of the privileged.[78] Substantive equality sees tort as a complex mix of corrective and distributive concerns;

73. John Goldberg, "The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs" (2005) 115 Yale L.J. 524 at 533.
74. *Ibid.* at 534.
75. *Ibid.* at 548.
76. *Ibid.* at 541.
77. Cooper-Stevenson, *supra* note 30 at 57.
78. Cooper-Stephenson, *supra* note 30 at 53-56.

depending on the context, one approach or the other might dominate. To the extent tort has a structure, the mode of structuring lies on the middle ground between corrective and distributive justice. While not an entirely "liberal" theory, substantive equality sees the newly distributive drive of tort as ignited, fueled, and defined by the liberal rights enshrined in the *Charter*.[79] For Cooper-Stephenson, the normativity of tort emanates from *Charter* values; in substantive equality theory, the connection between tort and *Charter* rights is indeed tight. In a prescriptive context, substantive equality theory would favour constitutional scrutiny of some types of damages caps, given the adverse effect such caps have on disadvantaged groups.[80]

Applying the constituent theories of the liberal justice standpoint establishes multiple points of connection between tort law, personal injury damages, autonomy over bodily integrity, and choice. Four general observations solidify this bond. First, the connections are broad based: each constituent theory in the standpoint establishes some sort of connection between the relevant concepts. Second, taken as a whole, the bond operates at multiple levels of analysis: from pure philosophical abstraction, to political theory, political culture, and historicism, through to present day doctrinal analysis. Third, several constituent theories, such as corrective justice and reciprocity, establish theoretical connections on the specific issue of damages, particularly personal injury damages. Fourth, several theorists make normative points about tort reform, criticizing certain types of policies that control or cap damages as morally unjust. From a liberal justice standpoint, the bond between the "economic benefit" of personal injury damages and the values underlying s. 7 runs strong and deep.

All of this suggests that a present day court, using s. 7 to scrutinize a damages cap regime, would have little reason to follow the framers' intent argument used in *Whitbread.* This is not to say that *Whitbread*, in its late 1980s context, was wrongly decided. At the time *Whitbread* was decided, it would have been difficult for the Court to find the doctrinal foothold necessary to give Whitbread's damages claim constitutional status. S. 7 doctrine, in the cases discussed earlier, and others, has now solidly established that foothold. Further, at the time *Whitbread* was decided, instrumental theories of tort dominated academic discourse. The

79. Cooper-Stephenson, *supra* note 30 at 68, 160. Cooper-Stephenson does not identify his standpoint as liberal. Although in general, I find Cooper-Stevenson's work expresses heavy liberal egalitarian themes, it also at points has some critical and communitarian flavours. For example, Cooper-Stevenson argues for recognition of some types of difference in tort doctrine, such as a culturally specific reasonableness standard in negligence: Cooper-Stephenson, *supra* note 30 at 60.

80. For a detailed empirical analysis, see Lucinda M. Finley, "The Hidden Victims of Tort Reform: Women, Children, and the Elderly" (2004) 53 Emory L.J. 1263.

bulk of scholarship articulating the bond between liberal justice and tort compensation has been developed in the post-*Whitbread* era.

Having largely disposed of the framers' intent argument, two problems remain in our examination of *Whitbread*. First, the bond we have established relates to private intrusions on choice and autonomy over bodily integrity; we have yet to theorize how the notion of state interference is engaged by restrictions on damages. Second, the bond extends beyond the present doctrinal boundaries of s. 7, including a broad range of property rights within its scope. I turn now to the first of these problems, raised directly by the state action argument.

IV. *The state action argument: equivalence, self-protection, and monopolization*

In *Whitbread*, McLachlin J. reasoned that any interference with Whitbread's life, liberty, and security of the person was not caused by the Act, but by the accident leading to Whitbread's injuries. The Act only inflicted an inability to recover money for physical loss: in large part, Whitbread's physical suffering would continue in any event.[81] For the Court of Appeal, the element of state interference necessary to engage *Charter* protection was not engaged. Examined closely, this argument rests on one fundamental assumption: that a dichotomy can legitimately be posed between post-interaction damages, and pre-interaction rights to liberty and security. Using Weinribian language, the Court of Appeal assumed an instrumentalist characterization of damages as "satisfactions rather than rights."[82] Since we have already seen that liberal justice sees tort as a system for protecting rights, not welfare, we have the perspective necessary to question the legitimacy of this dichotomy.[83] Refining our analysis from this general view, we can analyze exactly how liberal justice equates damages caps to direct interference with individual rights. To make this point, the standpoint of liberal justice uses the distinct but related concepts of equivalence, self-protection, and monopolization.

The standpoint of liberal justice sees damages awards as the juridical equivalent of the plaintiff's pre-interaction rights to bodily integrity, autonomy, and choice. This theme runs consistently throughout the various theories informing our standpoint. In Fletcher's version of reciprocity theory, damages are the surrogate for the right to equal security.[84] In Weinrib's formalist theory of corrective justice, the unity of the plaintiff's pre-interaction rights and the damages award is explained in the correlative

81. *Whitbread (C.A.)*, *supra* note 3 at 522.
82. Weinrib, *Private Law*, *supra* note 33 at 132.
83. Weinrib, *Private Law*, *supra* note 33 at 130.
84. Fletcher, *supra* note 27 at 568.

structure of rights and duties. The commission of a tort does not extinguish the plaintiff's pre-interaction rights; instead, the damages award is the expression of the defendant's continuing duty to respect the plaintiff's pre-interaction rights.[85] Throughout, the structure of right and duty remains the same. Coleman's political theory of corrective justice argues that commission of a tort does not, in itself, restrict the plaintiff's pre-interaction rights to moral autonomy over his or her person and property. Instead, a conventional personal injury damages award preserves the plaintiff's pre-interaction normative status. Tort remedies are designed so that while the plaintiff's particular life plans may be changed by a wrongful injury, his or her normative status remains the same.[86] By restricting the conventional damages remedy, the state violates the plaintiff's normative status — in Coleman's words, adding insult to injury.[87] In explaining the historical basis of civil recourse theory, Goldberg notes that a version of this argument was advanced by 17th century common law theorists, who saw any exercise of the King's dispensing power to limit private suits as a direct violation of fundamental rights guaranteed by the Ancient Constitution.[88] On the equivalence view, there is no conceptual difference between state restrictions on damages, and direct state interference with pre-interaction rights to bodily integrity, autonomy, and choice.

In civil recourse theory, this equivalence between pre- and post-interaction rights is established in a natural right to self-protection.[89] In Locke's social contract theory, individual rights to life, health, liberty and possessions include a right of self-preservation of those rights. As part of self-preservation, individuals have two entitlements: to act in self-defence against forcible attack, and to seek material reparation from wrongdoers through self-help. Both entitlements survive the transition to civil society, albeit in modified fashion. Through the social contract, individuals promise to channel their right to self-defence through criminal law, and their rights to reparation through tort law. In consideration of these promises, the state is affirmatively obliged to provide such law.[90] To abstain from interference with natural rights to life, liberty, and property, the state must allow plaintiffs to act against defendants in a certain way, and is obliged to provide plaintiffs with an avenue of recourse through which they can do this.[91] Using the self-protection argument, civil recourse theorists have

85. Weinrib, *Private Law*, *supra* note 33 at 135.
86. Coleman, "Personal Injury," *supra* note 19 at 230-231.
87. Coleman, *Risks and Wrongs*, *supra* note 63 at 438-439.
88. Goldberg, *supra* note 73 at 540.
89. Zipursky, *supra* note 29 at 736.
90. Goldberg, *supra* note 73 at 541-544.
91. Zipursky, *supra* note 29 at 737.

strenuously argued for the recognition of a constitutional right to a range of damages sufficient to provide plaintiffs with an adequate level of redress for wrongs.[92] Interestingly, recent Canadian jurisprudence provides a doctrinal opening for this argument. Since *Whitbread*, the Supreme Court of Canada has accepted that in some circumstances, a failure by the state to provide certain types of law will constitute a *prima facie* violation of the right to security of the person.[93]

Extending the contractarian argument, civil recourse theory argues that constitutional protection of tort law is morally justified by the empirical fact of state monopolization. Goldberg argues the state should be constitutionally obliged to provide positive rights to certain services, where those services are unique to the state, and historically monopolized by the state.[94] One of these services is an adequate mode of civil recourse. The modern state has covered the field of civil recourse, by legally restricting self-help remedies to civil litigation. As Zipursky points out, criminal law prevents a victim from seizing a negligent wrongdoer's cash, or forcing a newspaper editor, at gunpoint, to retract a defamatory article.[95] This monopolization reasoning has solid doctrinal support in contemporary Canadian *Charter* doctrine. In *Chaoulli*, for example, McLachlin C.J. and Major J. used this type of reasoning to find state interference with life, liberty, and security of the person in the context of prohibitions on private health insurance. The Court wrote:

> The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* do not expressly prohibit private health services. However, they limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme. The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person.[96]

This is actually a more expansive version of Goldberg's argument. To engage the notion of state interference, the "virtual" monopolization by the state of a particular service is sufficient. Applying this reasoning, we can easily conclude that the Canadian state has a "virtual monopoly" over

92. Goldberg, *supra* note 73 (generally).
93. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2003), 234 D.L.R. (4th) 257 at 273.
94. Goldberg, *supra* note 73 at 595.
95. Zipursky, *supra* note 29 at 734.
96. *Chaoulli*, *supra* note 38 at 622.

the field of personal injury damages. On the monopolization view, state interference is engaged by restricting those damages.

The equivalence, self-protection, and monopolization arguments collapse the analytical dichotomy critical to the state action argument in *Whitbread*. If damages are the moral equivalent to rights, if rights include an entitlement to act in protection of one's rights, and if the state monopolizes the means for acting in protection of one's rights, yet provides no mode of so doing, the state has acted to interfere with those rights. In one way, our conclusion here is limited. We have not proven that the state action argument is wrong from all standpoints: from an instrumentalist point of view, the dichotomy between rights and damages may make perfect sense. However, our analysis shows that the state action argument fails to reflect the standpoint of liberal justice, and runs against some recent trends in *Charter* jurisprudence. Perhaps, then, a contemporary court reconsidering *Whitbread* from a liberal perspective would be more concerned with our last problem, expressed in the anti-*Lochner* argument.

V. *The anti-Lochner argument: private justice, distributive justice, and the realm of constitutional adjudication*

The anti-*Lochner* argument used in *Whitbread* has a long history. For the Court of Appeal, granting constitutional status to Whitbread's claim would open s. 7 to claims involving a broad range of property rights, including contract rights and corporate rights to licensing for the purposes of carrying out profit-seeking activities.[97] In the early part of the 20th century, the U.S. Supreme Court, invoking *Lochner*,[98] had used the Fourteenth Amendment to strike down progressive social legislation as unconstitutional state interference with property rights and freedom of contract. While *Lochner* was ultimately overturned, Peter Hogg observes that the shadow of *Lochner* influenced both the exclusion of property rights from the text of the *Charter*, and the Supreme Court of Canada's approach to interpreting s. 7: in Canada, the *Charter* was not to be used to protect laissez-faire economics.[99] The most recent mark of this influence can be seen in the dissenting opinion of Binnie and Lebel JJ. in *Chaoulli*, who explicitly referenced *Lochner* in explaining that s. 7 does not protect freedom of contract.[100] In *Whitbread*, anti-*Lochner* concerns were the primary worry of the Court of Appeal. Simply put, the Court of Appeal was unable to draw a principled distinction between personal injury damages and

97. *Whitbread (C.A.)*, *supra* note 3 at 521.
98. *Supra* note 14.
99. Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. II (Scarborough: Carswell, 1997) (updated to 2005) at 44-9.
100. *Chaoulli*, *supra* note 38 at 650.

property rights for the purposes of the *Charter*, so they excluded both from protection under s. 7.

In the remainder of this paper, I argue that the standpoint of liberal justice establishes such a distinction. At first blush, this seems problematic. On a philosophical level, liberal justice protects rights to both bodily integrity, understood as rights not to have physical harm inflicted on one's body by another, and to property, understood as rights not to have harm or taking inflicted on one's "things" by another. On an abstract level, there are conceptual parallels between the two. For the constitutional purposes of a modern liberal democracy, however, the standpoint of liberal justice draws a clear distinction between these two types of rights. Two justifications support this distinction. First, only rights to bodily integrity are fully morally justified in a comprehensive view of social justice in a modern liberal democracy. Second, only rights to bodily integrity are constitutionally essential in a modern liberal democracy. According to these two justifications, constitutional protection of rights to bodily integrity is desirable. Constitutional protection of property rights is not.

In the context of damages caps, I argue that this distinction allows some limited constitutional protection for personal injury damages. Personal injury awards are composed of several distinct heads of damages: non-pecuniary loss, loss of income and earning capacity, and past and future cost of care, for example. Applying a comprehensive view of justice and the theory of constitutional essentials, I argue that constitutional status can and should be granted to two particular heads of damages: non-pecuniary loss and cost of care. On the view I construct, this can be done without collapsing the constitutional distinction between bodily integrity and property rights. To grant constitutional status to other heads of damage, however, would collapse the distinction.

The first justification for a distinction between rights to bodily integrity and property rights flows from the relationship between private justice and distributive justice. For the purposes of this paper, I use the term "private justice" to describe both corrective justice and redress. Private justice applies in the relationship between two individuals. The standpoint of liberal justice sees private justice as structured more or less on rights to notional equality. Some of our constituent theories see notional equality in quantitative terms, some in qualitative terms, and some see notional equality as merely the primary, not the only, concern of private justice. Despite their differences, all claim that private justice protects the pre-interaction holdings of the parties. As a whole, the standpoint of liberal justice sees tort law as part of private justice. In contrast, distributive justice

involves state allocation of goods, resources, services or commodities.[101] The goal of distributive justice is to allocate these resources to members of the community in compliance with a politically chosen criterion of distribution, on the basis of particular characteristics of each member.[102] Distributive justice applies in the relationship of a group of individuals as members of a community.

From the standpoint of liberal justice, both private justice and distributive justice are required in a comprehensive system of social justice. Liberal theory provides two explanations of this relationship. The first explanation sees distributive justice as a necessary prerequisite for any morally justified exercise of private justice. In *A Theory of Justice*, Rawls takes the view that a system of private justice presupposes an account of what properly belongs to a person and what is due to him.[103] Rawls, of course, goes on to provide such an account of distributive justice. Perry, like Rawls, simply assumes that in corrective justice, the parties' pre-interaction holdings reflect the due of each under distributive justice.[104] For example, Perry argues that if a particular system of private property is justified in moral or political terms, then the obligation of restoration in corrective justice is also justified.[105] Since corrective justice focuses on harm to entitlements, not distributions, it is conceptually and normatively independent of distributive justice. But harm is of no moral significance in corrective justice unless the victim's claim to the harmed entitlement is morally legitimate.[106] Ripstein expands on this Rawlsian assumption. For Ripstein, a comprehensive system of justice involves a "division of responsibility" between corrective and distributive justice. Because both corrective and distributive justice flow from moral personality, corrective justice can only operate against a framework of redistributive institutions.[107]

More intricate versions of this explanation are developed by Cooper-Stephenson and Coleman.[108] For Coleman, distributive justice imposes constraints on the pre-interaction holdings corrective justice sustains. But

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101. Serge-Christophe Kolm, *Modern Theories of Justice* (Cambridge, Mass.: MIT Press, 1996) at 33.

102. Benson, *supra* note 50 at 535-36; Weinrib, *Private Law*, *supra* note 33 at 212.

103. Rawls, *Justice*, *supra* note 4 at 10-11.

104. Perry, "Moral Foundations," *supra* note 16 at 453.

105. Perry, "Moral Foundations," *supra* note 16 at 454.

106. Perry, "On the Relationship Between Corrective and Distributive Justice", in Jeremy Horder, ed., *Oxford Essays in Jurisprudence* (Oxford Univ. Press, 2000) 237 at 254 [Perry, "Corrective and Distributive Justice"].

107. Ripstein, "Distributive Turn," *supra* note 31 at 1836.

108. Perry now appears to approve of Coleman's view on this issue. See Perry, "The Mixed Conception of Corrective Justice" (1992) 15 Harv. J.L. & Pub. Pol'y 917 at 918 [Perry, "Corrective Justice"].

these constraints are broad and pragmatic. So long as distributive justice can justify pre-interaction holdings as worthy of protection against private infringements, those holdings need not perfectly comply with a first-best theory of distributive justice. Within this system of rough justice, the state is at liberty to intervene with measures designed to mould patterns of pre-interaction holdings to the first-best theory.[109] Substantive equality theory takes a more aggressive view. In substantive equality theory, private justice legitimately operates in a corrective mode when pre-interaction holdings are justly distributed. But private justice retains its potency where there is no pre-interaction foundation of distributive justice. In these situations, private justice legitimately departs from its corrective basis and takes a distributive form, ultimately changing the scope and character of pre-interaction holdings.[110] In all its forms, the first explanation argues that private justice requires a foundation of distributive justice.

The second explanation, advanced in Kantian theories of corrective justice, takes the converse view. Weinrib concedes that corrective justice may well operate against a distributive background. But if corrective justice depends on a distributive foundation, corrective justice collapses into distributive justice. Private justice becomes an incoherent, instrumental tool for enforcing distributive justice. To retain coherence as an ordering, corrective justice must theoretically operate on pre-interaction holdings regardless of whether they reflect a just distribution.[111] Benson offers a similar analysis. Because corrective justice flows from abstract right, it operates conceptually (but not temporally) prior to distributive justice, since distributive justice flows from a less abstract view of personality. Principles of distributive justice suitable to a Rawlsian conception of personality, for example, must always respect abstract right because abstract right embodies the most elementary conception of the person. Corrective justice is lexically prior to distributive justice.[112] On the Kantian view, the moral justification of corrective justice requires no theoretical tie whatsoever with distributive justice.

This does not mean that on the Kantian explanation a comprehensive system of justice has no distributive component. While Weinrib sees distributive justice operating independently from corrective justice, he still believes distributive justice is a fundamental mode of ordering relationships.[113] Benson goes further, arguing that distributive justice is

109. Coleman, *Risks and Wrongs*, *supra* note 63 at 351-353.
110. Cooper-Stephenson, *supra* note 30 at 158-159.
111. Weinrib, "Corrective Justice," *supra* note 18 at 419-421.
112. Benson, *supra* note 50 at 606-608.
113. Weinrib, "Corrective Justice," *supra* note 18 at 416.

necessary for corrective justice to operate in concrete circumstances. To work in the real world, corrective justice needs a system to reasonably impose individual claims on others through coercion. There must be public principles to determine how external manifestations of the will are communicated, what things and how much of a thing are acquired through particular manifestations of the will, and the like. Without such principles, there can be no socially established entitlements to anything.[114] To establish these principles, a Rawlsian conception of personality is required, which leads us to adopt Rawlsian principles of distributive justice. What and how much persons can acquire is established by distributive justice.[115] Abstract right and corrective justice are not infringed or collapsed by such a system. Really, then, the two explanations of the relationship are not all that different, since the second explanation of a comprehensive system of justice, like the first, requires that the two modes of justice work together.

We can now return to the constitutional status of personal injury damages. I assume that to have a legitimate claim to constitutional status in the standpoint of liberal justice, a claim in private justice must fully comply with the requirements of a comprehensive system of justice. Having explained the workings of that system, we can analyze how specific categories of private justice claims comply with that system. Our discussion so far tells us that to be morally justified within the comprehensive system, a claim must involve a pre-interaction right acquired and held in accordance with distributive justice. Alternatively, the claim is justified on the comprehensive view if it is not subject to the principles of distributive justice. To prove that a particular category of claim is worthy of constitutional status, we need to prove that it will *always* involve a pre-interaction right acquired and held in accordance with distributive justice, or will *always* involve a right not subject to distributive justice.

A distinction can be drawn between two general categories of claims. The first category of claims (which I will call bodily claims) arises entirely from pre-interaction rights to bodily integrity. The second category of claims (which I shall call distributive claims) arises, directly or indirectly, from pre-interaction rights to the subject matter of distributive justice: goods, resources, or commodities. Bodily claims in private justice are always justified in a comprehensive system of justice. From the standpoint of liberal justice, rights to bodily integrity are not subject to principles of distributive justice. Put simply, liberal justice does not require the redistribution of body parts. From a Rawlsian perspective, we can say that rights to bodily integrity fall within the first principle of justice, as part

114. Benson, *supra* note 50 at 609-10.
115. Benson, *supra* note 50 at 611, 617.

of freedom of the person, lexically prior to distributive justice.[116] From a Dworkinian perspective, we can say that the ownership of bodily powers is not subject to a political scheme of equality of resources.[117] From a Kantian perspective, we can say that since rights to bodily integrity are inalienable, a legitimate system of distributive justice can never violate those rights. Notionally equal rights to bodily integrity are always justified in a comprehensive system of justice. On this comprehensive view of justice, bodily claims are, as a category, worthy of constitutional protection.

The same cannot be said of distributive claims. Since distributive claims always arise from rights to goods, resources, or commodities, the pre-interaction rights founding a distributive claim are always subject to distributive justice. To conclude these rights are worthy of constitutional protection, we would have to prove these rights always comply with a first-best theory of distributive justice. In some futuristic state of affairs, we might be able to draw this conclusion. In contemporary Canadian society, it is impossible. One would be hard pressed to argue that all goods, resources, and commodities in Canadian society are justly distributed. At worst, we can say that private justice operates against a fundamentally unequal and unjust distributive backcloth.[118] At best, we can say that the present distribution is worthy of protection from private intrusion, but is not a first-best distribution.[119] In either situation, distributive claims fit imperfectly with a comprehensive system of justice. In the first situation, granting constitutional status to distributive claims entrenches a system of comprehensive injustice. In the second situation, granting constitutional status to distributive claims prevents the state from implementing a first-best system of distributive justice. That being the case, distributive claims, as a category, are unworthy of constitutional protection.

We now have the tools to understand the first way the standpoint of liberal justice supports my solution to the anti-*Lochner* problem. Claims for non-pecuniary damages are bodily claims. An award of non-pecuniary damages is composed of three conceptually separate but overlapping categories of loss: pain and suffering, loss of amenities, and loss of expectation of life.[120] Quantum awards for pain and suffering are generally assessed without reference to the plaintiff's pre-interaction rights to things other than their corporeal existence. Having suffered a similar injury, Bill

116. Rawls, *Justice*, *supra* note 4 at 61.
117. Ronald Dworkin, "What Is Equality? Part 2: Equality of Resources" (1981) 10 Phil. & Pub. Aff. 283 at 301.
118. Cooper-Stephenson, *supra* note 30 at 160.
119. Coleman, *Risks and Wrongs*, *supra* note 63 at 352.
120. *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 264, (1978), 83 D.L.R. (3d) 452.

Gates and a homeless person will receive a similar pain and suffering award.[121] So too with cost of care claims. The same medical aids and services are required by a wealthy individual rendered a quadriplegic and a poor individual rendered a quadriplegic. Both heads of damages can be assessed in abstraction from the plaintiff's pre-interaction holdings of goods, resources, services, and commodities. For these types of claims, restoring pre-interaction rights can never infringe distributive justice. They will always comply with the requirements of a comprehensive system of justice. Accordingly, they may legitimately claim constitutional status.

The situation is reversed with damages for income loss and future earning capacity. Each of these claims is a distributive claim. Instead of abstracting from particularity, quantum assessment requires an examination of the plaintiff's particular pre-interaction income and earning capacity. Income has value only insofar as it enables the plaintiff to hold or acquire goods, resources, services, and commodities. A plaintiff's right to a certain amount of income is the equivalent of a right to hold or acquire a certain amount of these things; it is a right established in distributive justice. One might plausibly argue that in contemporary society a plaintiff's ability to earn income does depend on his or her bodily integrity: for example, his or her intelligence or physical fitness. But this does not turn a claim for income loss into a bodily claim. Those things affect income only because the current system of distributive justice allows them to affect income. Under a different system of distributive justice, they might affect income to a different degree, or not at all. If we assume some plaintiffs' pre-interaction rights to income are not distributively just, claims for income loss and loss of earning capacity will not always be justified in a

121. In rare cases there will, of course, be differences in non-pecuniary awards based on an assessment of what the particular victim has lost in terms of welfare (utility), not just on the type of injury. My assumption here admittedly passes over a theoretical objection that might be made, to the effect that some individuals are "utility wizards" while others are "utility sinks", especially with regard to the same sort of injury. For example, in *Andrews*, Dickson, J. refers to a concert pianist who loses a finger: *Ibid.* at 263. However, I assume that an empirical argument could be made that similar injuries for the most part result in similar non-pecuniary damages awards. The purpose of an award of non-pecuniary damages is to provide compensation to provide physical arrangements to make life endurable: *Ibid.* at 262. I assume, for the most part, that individuals suffering the same injury would require roughly similar physical arrangements in order to live an endurable life. Even assuming some variation in awards, granting the concert pianist a greater non-pecuniary damage award for a lost finger does not turn a non-pecuniary damages award into a distributive claim, for two reasons. First, since the award is still based on an inalienable right to corporeal existence. Second, it does not necessarily compensate for a loss of naturally unequal talent *per se*: it simply reflects a different way of assessing non-pecuniary loss (on the basis of loss of utility rather than on the basis of loss of resources).

comprehensive system of justice.[122] As a result, these heads of damages are unworthy of constitutional protection. On similar reasoning, contract and property rights are also unworthy of constitutional protection.[123]

The second justification for a principled, constitutional distinction between rights to bodily integrity and property rights flows from the theory of constitutional essentials developed by Rawls in *Political Liberalism*.[124] Rawls says that two types of principles must be contained in a liberal constitution: principles relating to the general structure of government, and principles defining the equal rights and duties of citizenship. It is this second category that concerns us for present purposes. This category includes the right to vote and to participate in politics, liberty of conscience, freedom of thought and association, and the protection of the rule of law.[125] Aside from a right to basic needs, principles of distributive justice are not constitutional essentials. The difference principle is not a constitutional essential; neither is fair equality of opportunity. The role of the constitutional essentials is to protect components of the legal system that are what they morally ought to be, so that the state can legitimately enforce laws flowing from those components on individuals who might regard those laws as wrong.[126]

The content of the constitutional essentials is defined by three basic justifications or criteria.[127] I shall call these reasons the urgency, transparency, and unanimity criteria. The urgency criterion reasons that protection of basic freedoms is the most pressing concern of society; individuals need an immediate, graphic guarantee that all will enjoy the basic liberties.[128] The transparency criterion involves the ability of individuals to tell whether the constitutional essentials have been realized. It is relatively easy to determine whether a constitution effectively protects basic liberties. On the other hand, principles of distributive justice or fair equality of opportunity, in their application in the dense factual matrix of

122. This is a fairly easy assumption to make. For further discussion on this point, see two examples provided by Cooper-Stephenson, *supra* note 30 at 160. One example involves a plaintiff earning an illegally depressed wage, another involves a plaintiff who suffered racial discrimination in hiring practices. We can also easily imagine the flip side of this second example, i.e. a plaintiff who earns an inflated wage because of discriminatory hiring practices.

123. I will not fully develop this reasoning here. However, we can observe that strict property entitlements certainly engage distributive justice, and contract rights, to the extent they embody rights to a certain amount of property, are also subject to distributive justice.

124. (New York: Columbia Univ. Press, 1993) [Rawls, *Political Liberalism*].

125. *Ibid.* at 227.

126. Frank I. Michelman, "Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment" (2004) 72 Fordham L. Rev. 1407 at 1410.

127. Rawls, *Political Liberalism*, *supra* note 124 at 230.

128. Michelman, *supra* note 126 at 1418.

modern society, are too opaque for this kind of compliance check.[129] The unanimity criterion requires that all individuals must be able to agree on the constitutional essentials. As Lawrence Sager points out, principles of distributive justice cannot be made the object of political consensus or anything approaching such consensus.[130] While a just society must strive toward distributive justice, a constitution that enshrines these principles is practically over inclusive.

Expanding on Rawls's theory, Sager draws a distinction between political constitutional essentials and adjudicative constitutional essentials. Sager argues that the U.S. Constitution, in a political sense, enshrines broad and expansive negative and positive rights (including rights to minimum welfare and a right to reparation for historical injustice). Although there is doctrinal evidence to show that the U.S. Supreme Court recognizes such rights as part of the political constitution, the U.S. Supreme Court has not judicially enforced those rights.[131] The same could be said for the jurisprudence of the Supreme Court of Canada, particularly on a reading of cases like *Gosselin v. Quebec*.[132] On Sager's view, the reason these broader rights are underenforced, and rightly so, is that they involve ongoing projects subject to critique, adjustment and refocusing; these rights cannot be enforced through a simple "doctrinal sweep" by a court.[133] At the end of the day, the justiciability criterion restricts the political constitutional essentials to a hard core of judicially enforceable adjudicative constitutional essentials.

Rawls restricts the theory of constitutional essentials to the domain of political justice, consistent with his focus on political justice. But there is no reason that the theory cannot be used to assess the constitutional status of personal injury damages. Doing so, we can see that my solution to the anti-*Lochner* problem accords with the theory of constitutional essentials, in both general and specific ways. Our discussion of bodily and distributive claims in a comprehensive system of justice shows that my solution complies with the role of constitutional essentials: bodily claims (pain and suffering and cost of care) are constitutional essentials because they are what they morally ought to be under a comprehensive system of justice. Distributive claims (loss of income, loss of earning capacity, estate and dependants' claims) are not constitutionally essential because we cannot say they are what they morally ought to be.

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129. Michelman, *supra* note 126 at 1420.
130. Lawrence G. Sager, "The Why of Constitutional Essentials" (2004) 72 Fordham L. Rev. 1421 at 1423.
131. *Ibid.* at 1424-1425.
132. [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85.
133. Sager, *supra* note 130 at 1431.

At a more specific level, my solution complies with the four criteria defining rights as constitutional essentials. As I have argued earlier, rights to bodily integrity are first principle rights in a Rawlsian system. Similarly, a sound argument can be made that parties behind the veil of ignorance have a particular interest in being free from bodily injury.[134] Protecting bodily claims is an important way of providing citizens with a graphic guarantee of their equal rights to bodily integrity. Distributive claims are overwhelmingly based on second principle rights, because the quantum of a distributive claim is overwhelmingly dependent on principles of distributive justice.[135] Recognizing distributional claims has little to do with assuring citizens that their basic liberties are being respected. The same reasoning applies with the transparency criterion. Since damages awards for bodily claims are abstracted from particularity, it is relatively easy for citizens to tell whether equal awards are being given for equal injuries, respecting equal rights to bodily integrity. It is much harder for citizens to tell whether a damages award for a distributional claim accords with the principles of distributive justice necessary to fully justify that claim.

Analyzing the remaining two criteria, we reach similar conclusions. Unanimity cannot be achieved with distributional claims: citizens would likely never be able to agree that any particular distributive claim is justified, since consensus on any system of distributive justice is nearly impossible, as Sager says. To use an example developed by Cooper-Stephenson in another context, while some citizens might think a low loss of income award is justified where a plaintiff was a victim of discriminatory hiring practices, other citizens would disagree.[136] Finally, distributive claims are not justiciable. While it may be relatively easy for a court to make a projection of a plaintiff's past, present, and future income loss resulting from an accident *ceteris paribus*, it would be all but impossible for a court to determine, in a dense factual situation, whether a particular plaintiff's pre-interaction (or projected post-interaction) rights are unequivocally traceable to a just distribution. Further, granting constitutional status to these claims might restrict the ability of the state to implement a first-best system of distributive justice. In contrast, it is relatively easy for a court to assess whether a plaintiff has suffered a certain physical injury, the only pre-requisite to establishing a morally just bodily claim.

134. Ripstein, "Division," *supra* note 31 at 1821.

135. I recognize that Rawls includes the right to hold (personal) property as a first-principle right. However, this does not mean there is a right to any specific income under the first principle.

136. Cooper-Stephenson, *supra* note 30 at 160.

To summarize, bodily claims should be adjudicative constitutional essentials because they involve clearly defined rights, abstracted from distributive justice. Conversely, distributive claims should not be adjudicative constitutional essentials, since they involve morally ambiguous pre-interaction rights. For the same reasons Rawls makes basic liberties constitutional essentials, we must include bodily claims as adjudicative constitutional essentials. For the same reasons Rawls excludes the difference principle and fair equality of opportunity from the constitutional essentials, we must exclude distributive claims from the adjudicative constitutional essentials. Applied to specific heads of damage, pain and suffering and cost of care, being bodily claims, are adjudicative constitutional essentials. Other heads of damage are not.

The implication of my argument is not that distributive claims are unworthy of *any* judicial, legislative, or political protection. Coleman's theory, for example, suggests there are good reasons for protecting these rights as an applied version of a second-best comprehensive theory of justice. There are also strong arguments for according constitutional status to distributive claims in an equality rights context. But that is beyond the scope of this paper. My argument here is simply that heads of damages based on distributive claims should not be protected in the adjudicated realm of s. 7 of the *Charter.*

Like my critiques of the framers' intent and state action arguments, the theoretical basis for a principled distinction between bodily and distributive claims was relatively undeveloped at the time *Whitbread* was decided. Applying theoretical developments, the standpoint of liberal justice provides exactly the type of distinction the Court of Appeal was unable to develop in *Whitbread.* A comprehensive view of justice draws this distinction at a philosophically conceptual level. The theory of constitutional essentials justifies the distinction at a more concrete level, engaging legal and political relationships between individuals, the courts, and the *Charter.* By applying the distinction to legislated damages caps, the courts can protect a sphere of individual autonomy over bodily integrity and choice, while shutting out Lochneresque property claims. While elements of the anti-*Lochner* argument still hold water, the argument needs to be reworked. A realm of protection should be carved out for pain and suffering claims, and for cost of care claims.

Conclusion: re-thinking Whitbread

I have only sketched the beginnings of a possible new approach to the judicial review of damages caps under the substantive rights component of s. 7. Moving forward with the argument requires detailed analysis of the principles of fundamental justice and s. 1 justification. Given the

historical status of compensatory rights in the common law tradition, it may be difficult for the state to prove that untailored caps on damages for non-pecuniary loss and cost of care accord with principles of fundamental justice. Further, it seems unlikely that measures aimed primarily at reducing insurance premiums could ever be justified by a s. 1 analysis.[137] But there may be other goals underlying damages caps; this conclusion would be premature without a detailed historical analysis. My solution does not require that we retain our tort system in its present form, only that we adequately protect the pre-interaction rights of plaintiffs. Schemes that replace our system of tort compensation may be perfectly justified. Systems that impose a *quid pro quo* between no-fault liability and quantum of damages, or that impose a broader system of enterprise liability might be perfectly compatible with the standpoint of liberal justice.[138] In the case of the *Marine Liability Act*, the state interest in complying with Canada's international obligations may justify a damages cap on a s. 1 analysis. Assessment of these further issues requires specific analysis of the aims and means of particular legislative schemes implementing damages caps.

While I have focused on damages caps, my argument has potential significance for other areas of contemporary tort law. Extending my analysis, some aspects of workers' compensation schemes, such as the scheme at issue in *Budge*,[139] would likely infringe the substantive rights guarantee in s. 7. Legislation imposing ultimate time limitations, or abbreviated time limitations for actions against certain types of defendants, such as government bodies and public utilities, might also be subject to review.[140] Statutes that completely bar causes of action, such as the *State Immunity Act*,[141] would be ripe for re-examination.[142] But these provisions might also be justified according to the principles of fundamental justice, or on a s. 1 analysis. Like the situation of damages caps, a contextual examination of the particular aims, purposes, and mechanics of the relevant legislation would be required.

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137. *Ferraiuolo Estate v. Olson* (2004), 246 D.L.R. (4th) 225 at 284-285, [2004] A.J. No. 1054 (Q.L.) (C.A.) (per Fraser, J.A.).

138. See *e.g.* Gregory C. Keating, "Rawlsian Fairness and Regime Choice in the Law of Accidents" (2004) 72 Fordham L. Rev. 1857.

139. *Supra* note 7.

140. These type of cases might arise on facts such as those in *Wittman v. Emmott*, [1989] B.C.J. No. 1188 (Q.L.) (S.C.), which was a s. 7 challenge to an ultimate limitation, or in situations where provisions such as those in the *Local Government Act*, R.S.B.C. 1996, c. 323, ss. 285-86, or the *Water, Gas, and Electric Companies Act*, R.S.A. 2000, c. W-4, s. 15 were applicable.

141. R.S.C. 1985, c. S-18. S. 3 of the Act effectively grants foreign states tort immunity for acts of torture.

142. For example, *Bouzari*, *supra* note 7, and *Arar v. Syrian Arab Republic* (2005) 28 C.R. (6th) 187, [2005] O.J. No. 752 (Sup. Ct.).

Extending the framework might also give rise to hard cases. Most of these cases would involve situations where damage to or defects in property results in actual or potential bodily injury. Three specific examples highlight this point.[143] First, many provincial statutes exempt farm operators for nuisance liability.[144] Although a cause of action in nuisance is, in the first instance, based on interference with a distributive entitlement, damages for personal injury are available in nuisance actions. Second, even in a lawsuit arising from a motor vehicle accident, a plaintiff might sue for property damage to a non-bodily amenity that serves the function of a bodily amenity, such as a wheelchair or a prosthetic limb. Lastly, there are claims for costs to repair negligent defects in property raising a risk of bodily injury.[145] In all three examples, plaintiffs' claims have both bodily and distributive aspects. Further analysis is necessary to assess the viability of my framework for these hard cases.

Whitbread was decided nearly two decades ago. The Court of Appeal was forced to explore the difficult middle ground where rights to life, liberty, and security of the person intersect with claims expressed in monetary terms. In that context, the Court of Appeal emphasized what the *Charter* is not: a tool to impose positive obligations on the state to protect laissez-faire economic rights. In a contemporary context, the courts have theoretical and doctrinal tools necessary to revisit *Whitbread*, without undermining the central concerns underpinning the Court of Appeal's reasoning. It is possible to give *Charter* protection to certain claims for personal injury damages, without enforcing a neo-conservative theory of property rights. I have suggested a solution that reconciles concerns with what the *Charter* is not, with concerns about what the *Charter* is: a tool for protecting rights to autonomy over bodily integrity and choice from state interference. Outside the context of damages caps, my solution may not be completely viable. But at the end of the day, my general point is only that it is possible, and desirable, to redefine the constitutional status of compensatory remedies in a way that more fully recognizes the concerns of liberal justice.

143. Vaughan Black provided these examples.

144. For example, the *Agricultural Operation Practices Act*, S.N.B. 1986, c. A-5.3, s.2.

145. As established in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, [1995] S.C.J. No.2.