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THE PRICE OF GOD: UNDERSTANDING REASON AND RELIGION IN THE DUTY TO MITIGATE

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ABSTRACT

Tortfeasors have a responsibility to take their victim as they find them, and victims of tort have a duty to mitigate their damages. Nestled between these two legal principles is a situation where a victim of tort refuses medical treatment following injury on the basis of religious conviction. This paper addresses and predicts possible legal outcomes in this undetermined area of Canadian legal jurisprudence. This paper asks to what extent the thin skull principle in tort embraces a plaintiff's religiously motivated decision to refuse medical treatment following injury. Ultimately, it is more likely than not that the religious thin skull will be supported by Canadian courts. This is necessary due to Canada's commitment to *Charter* values and the realities of living in a multicultural society that values both freedom of religion and equality under the law. However, while it is likely that religious refusal of medical treatment will be treated as a religious thin skull rather than a failure of the duty to mitigate, this would likely be limited to cases where the refusal falls within foreseeable religious requirements that would necessarily exist within a multicultural society.

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INTRODUCTION

In 2018, Canada accepted 321,065 immigrants, setting the record for the highest number of immigrants to enter the country since 1913.[1] The increased number of new Canadian residents has several implications, including a greater proportion of Canadian residents with diverse backgrounds who hold different religious beliefs and practices. Given that the *Canadian Charter of Rights and Freedoms*[2] applies to all people on Canadian soil, novel claims rooted in section 2(a) of the *Charter* regarding fundamental freedoms of conscience and religion are likely to begin to appear in Canadian private jurisprudence. Although *Charter* rights are not directly applicable to common law, the Supreme Court of Canada ("SCC") has made it clear that *Charter* values are indeed relevant in the private legal sphere.[3] Given that a patient may refuse medical care for religious reasons, plaintiffs in personal injury cases may do the same. In the undetermined legal realm that exists between the thin skull principle and the plaintiff's duty to mitigate damages in tort cases, how will Canadian courts determine liability for personal injury damages?

This paper seeks to address the following questions for which there is no clear answer in Canadian legal jurisprudence: To what extent does the thin skull principle embrace a plaintiff's religiously motivated decision to refuse medical treatment subsequent to tortious personal injury? Conversely, could a defendant be justifiably held liable for a plaintiff's sincerely held religious belief that precludes the latter from undergoing medical treatment following personal injury? Finally, what kind of responsibilities does Canadian tort law have with respect to providing equal access to justice for the increasingly multicultural Canadian residents that it exists to serve?

This paper will proceed to address the above questions first by outlining the legal principles of damages in personal injury, including the thin skull principle and the duty to mitigate. Second, this paper will discuss the notion of the religious thin skull, the divergence of Canadian legal authorities on the topic, and international legal perspectives on the issue. Third, this paper will provide the strongest arguments for and against the religious thin skull within the limits of Canadian jurisprudence by first considering religion as a bar to capacity, then by evaluating the extent of *Charter* protection for religiously motivated decisions. Fourth, the limitations of the *Charter* in private law will be evaluated by examining cases where section 2(a) *Charter* rights have been either limited or upheld in private jurisprudence. Fifth, this paper will discuss the positions of lower courts on the religious thin skull. Sixth, this paper will discuss Canada's legal response to the religious refusal of medical treatment in cases involving children. Lastly, the reasonable person and the role of subjectivity in Canadian law will be considered to determine whether or not the religious thin skull will be accepted in Canadian law.

Although this is a contentious issue, the religious thin skull must exist in Canada. This is necessary due to Canada's commitment to *Charter* values and the reality of living in a multicultural society that values both freedom of religion and equality under the law.

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1 Canadian Citizenship & Immigration Resource Center, "Canada Welcomes Highest Number of New Immigrants in More Than a Century" (27 March 2019), online: *Immigration.ca* <https://www.immigration.ca/canada-welcomes-highest-number-of-new-immigrants-in-more-than-a-century> archived at [https://perma.cc/48FH-YGNN].

2 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at para 46, 33 DLR (4th) 174, Beetz J [*Dolphin Delivery*].

I. PRINCIPLES OF DAMAGES

The overarching principle of damages in tort is the notion of *restitutio in integrum*—restoration to original condition. Often cited for this guiding principle is the 1880 House of Lords case *Livingstone v Rawyards Coal Co*,[4] wherein Lord Blackburne famously stated:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. [5]

This statement serves as the goal for monetary damages in the realm of tort law and indicates that each remedy ought to be as close as possible to this sometimes-impossible aim of returning the injured party to their prior position.

The Supreme Court of Canada recently outlined the principles of recovery in negligence personal injury cases in the 2012 case *Clements (Litigation Guardian of) v Clements*.[6] In this case, the plaintiff, Mrs. Clements, sought compensation in negligence for a severe brain injury that she suffered following a motorcycle accident.[7] The Court states that negligence presupposes a relationship wherein there is a duty of care between the parties which upon breach requires compensation from defendant to the plaintiff in order to correct the injury that the plaintiff has suffered.[8] Of course, in the context of personal injury, returning the injured person back to their pre-injury status is often impossible, as no amount of money can replace a lost limb. However, in such cases, the aim of damages is to come as close as possible to putting the injured person back to the position that they were in prior to the tortious conduct.

II. THE THIN SKULL PRINCIPLE

The "thin skull principle" is another core principle in personal injury law, first appearing in the 1901 King's Bench case *Dulieu v White & Sons*.[9] In this case, Justice Kennedy stated:

> If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.[10]

Sixty years later, the Queen's Bench Division addressed this issue again in the 1963 case *Smith v Leech Brain & Co*, where a burn suffered by the plaintiff at work turned into cancer and eventually led to his death.[11] In determining liability for the employer with respect to Mr. Smith's death, Lord Chief Justice Parker stated:

> The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether

4 5 App Cas 25.
5 *Ibid* at 38.
6 2012 SCC 32 [*Clements*].
7 *Ibid*.
8 *Ibid* at 7.
9 [1901] 2 KB 669 at 697, 70 LJKB 837.
10 *Ibid*.
11 [1962] 2 QB 405, [1962] 2 WLR 148.

> these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of the burn, depends upon the characteristics and the constitution of the victim.[12]

The historical case law demonstrates a clear principle with respect to personal injury damages that satisfies most common-sense notions of justice. The negligent wrongdoer must be accountable for the injury that his or her victim sustained as a result of their actions, even if that victim suffered worse injuries than most would have in the circumstance due to a pre-existing vulnerability. This makes sense from a physical injury standpoint, which leads one to consider how the thin skull rule should be applied to victims who suffered increased injury as a result of psychological predispositions rather than physical ones. The notion that the wrongdoer has increased accountability for these non-physical predispositions is referred to as the "psychological thin skull" rule. Historically, the courts gave little certainty as to how this rule should be applied.

The 1974 British Columbia Supreme Court case *Marconato v Franklin* sheds some light on this issue. In this case, the plaintiff sought recovery for psychological harm as a head of consequential losses, as she incurred minor physical injuries but suffered emotional distress including depression, hostility, anxiety, and a distrust of medical professionals following a motor vehicle accident.[13] The Court found that the plaintiff had a paranoid-type personality, but was not mentally ill prior to the accident.[14] The Court stated that the consequences of the plaintiff's injury were *not* the sort that one would ordinarily anticipate using reasonable foresight, although they arose from her pre-existing personality traits.[15] However, when considering her pre-existing personality traits, the Court found her condition to be within the ambit of the thin skull principle and found that the defendant was liable for the psychological injuries suffered by the plaintiff.[16]

The Supreme Court of Canada placed a limit on the psychological thin skull in the 2008 case *Mustapha v Culligan of Canada Ltd*, where Mr. Mustapha—an African immigrant—sought recovery for psychological damage as a standalone claim.[17] Mr. Mustapha suffered psychological injury after looking at contaminated drinking water that he had purchased for the personal consumption of himself and his family.[18] It should be noted that in this case the issue was remoteness at the stage of liability, whereas in *Marconato v Franklin* the issue was consequential loss following the establishment of liability. However, the SCC importantly held that Mr. Mustapha failed to demonstrate that his injuries would be reasonably foreseeable for a person of ordinary fortitude.[19] The Court emphasized expert evidence stating that Mr. Mustapha's injuries were "highly unusual" and "very individual."[20] It was found that the trial judge's application of a subjective standard of reasonable behaviour based on Mr. Mustapha's previous history, particular circumstances, and cultural factors was an error, which resulted in the Court finding that Mr. Mustapha's claim failed as his psychological injury was too remote.[21]

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12 *Ibid* at 415.
13 [1974] BCJ No 704, 6 WWR 676.
14 *Ibid* at 48.
15 *Ibid* at 49.
16 *Ibid*.
17 2008 SCC 27.
18 *Ibid* at 18.
19 *Ibid*.
20 *Ibid*.
21 *Ibid*.

The differing outcome of these seemingly similar cases invites a consideration of what it means to use an objective standard for a person of "ordinary fortitude" as the benchmark for the foreseeable victim. As stated in no uncertain terms by Chief Justice McLachlin, as she then was, Mr. Mustapha did not fit into this category due to his previous history and cultural circumstances.[22] Mr. Mustafa was an African immigrant whose life experience led him to have great concern for the water that he and his family consumed.[23] His concern was so great that he elected to purchase bottled water for consumption rather than drinking tap water. In setting a clear boundary for what is reasonably foreseeable, and for who might be the reasonable person, this case engenders the following question: Where do we draw the line between reasonable behaviour and assumption of risk of injury in life? In a multicultural country, it becomes more difficult to determine what injuries should be considered reasonably foreseeable and what kind of person best meets the expectations of the abstract "reasonable person."

As argued by Olga Redko, the thin skull principle sits at the intersection of two competing understandings of the individual, one as an autonomous actor and the other as a sum of their experiences, conditions, and choices.[24] This tension lies at the very heart of the issue of the religious thin skull, which may be defined as an individual having a pre-existing religious belief that prevents them from accepting certain medical treatments, thereby making them likely to suffer from increased injury as a result of these beliefs following being victim to a tort. Whether or not the religious thin skull should exist is a critical question relating to our assumptions about the reasonable person.

III. THE DUTY TO MITIGATE

The duty to mitigate damages in the context of personal injury cases means that in order to claim full damages, the plaintiff must seek and follow medical treatment in order to minimize their costs.[25] As stated by Lord Justice Pearson in the 1963 case *Darbishire v Warran*, the duty to mitigate is less of a duty and more of a limitation on the claim that the plaintiff can make against the defendant.[26] The plaintiff can be as luxurious as they choose, but the defendant will only be liable for reasonable costs associated with the plaintiff's injury. Thus, the duty to mitigate reflects a legal understanding of the victim as an agent in their life who is capable of making choices that may not be the responsibility of the defendant.[27]

Mitigation is not required in all circumstances. Plaintiffs who do not undergo recommended medical treatment by reason of mental illness[28] or inability to pay[29] are exempted. The SCC test with respect to the duty to mitigate damages once again returns to the concept of reasonableness, and is articulated in the 1985 case *Janiak v Ippolito* ("*Janiak*").[30] In this case, the plaintiff sustained back injuries following a motor vehicle collision and refused to undergo medical treatment that had a 70–75 percent chance of success due to his innate fear of surgery.[31] In her reasons, Justice Wilson stated:

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22 *Ibid*.

23 *Ibid*.

24 Olga Redko, "Religious Practice as a Thin Skull in the Context of Civil Liability" (2014) 72:1 UT Fac L Rev 38 at 50 [Redko].

25 Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law, 2014) at 446 [Cassels].

26 [1963] 1 WLR 1067, 107 Sol J 631, [1963] 3 All ER 310 at 315.

27 Redko, *supra* note 24.

28 *Elloway v Boomars* (1968), 69 DLR (2d) 605 (BCSC) McIntyre J.

29 *Brown v Raffan*, 2013 BCSC 114.

30 [1985] 1 SCR 146 [*Janiak*].

31 *Ibid* at 9.

> It is evident that not every pre-existing state of mind can be said to amount to a psychological thin skull. It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision.[32]

Further, Justice Wilson stated that so long as an individual is capable of making a choice, they then assume the cost of any unreasonable decision, but when the individual cannot make a choice at all, they then fall within the thin skull category.[33]

It is not clear how a court will treat a religious refusal of medical treatment in cases of tort. Would a religious individual fall within a category of having a pre-existing psychological condition that removes any meaningful choice in the matter? The kind of language employed here is not very attractive to use in the context of religion, as it seems to relegate religion into the realm of mental disability. This language also undermines the important purpose that religion holds in many people's lives as an avenue of individual autonomy and self-determination. For most people who practice religion, it is precisely about choice and choosing God. Additionally, to refer to religion in such a way offends a certain sensibility of decency and respect that we are accustomed to using when addressing religion and those with religious beliefs.

On the other hand, there is concern that when "the quality of the religious subject's autonomy or capacity for choice is somehow in question… the law often fears that the choice is not truly free."[34] This concern, which has been addressed by the Supreme Court and will be discussed below, is that the religious individual is being presented with a choice with respect to accessing their full damages in tort and compromising their religious beliefs at an unacceptable cost to their personal identity.[35] This decision is one that is also most likely to impact religious minorities. Is it fair and just to ask certain groups of people to bear the financial burden of their religious beliefs, especially when such beliefs are valued and protected in society?

IV. RELIGION AND THE REFUSAL OF MEDICAL TREATMENT: ARGUMENTS FOR AND AGAINST THE RELIGIOUS THIN SKULL

Religious refusal of medical treatment can appear in tort law in a variety of forms and can include a variety of potential victims. Examples of individuals whose interests are at stake in this issue include a female patient whose doctor negligently provided medication other than birth control and who then refused to get an abortion due to her Christian faith,[36] the Muslim man who would not accept state-altering medical treatment following an accident during the fasting period of Ramadan,[37] and a Jehovah's Witness who refused a blood transfusion due to religious law. For purposes of simplicity and clarity, the Jehovah's Witnesses refusal of medical treatment will be the primary example referred to for the remainder of this paper, as it is one of the most common examples referred to in this area of law.

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32 *Ibid* at 24.

33 *Ibid*.

34 Benjamin L Berger, "Law's Religion: Rendering Culture" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 277.

35 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13 [*Corbiere*].

36 *Troppi v Scarf*, 31 Mich App 240, 187 NW 2d 511 (Mich Ct App 1971).

37 Kate McMahon-Parkes, "Rationality, Religion and Refusal of Treatment in an Ambulance Revisited" (2013) 39:9 at 587.

To assess whether or not a religious-based refusal of treatment is reasonable, one must understand the nature of the claim grounded within the faith. The refusal of blood treatment is an obligatory practice for eight million Jehovah's Witnesses worldwide.[38] The religion views the refusal of blood transfusions as a strategy for protecting the group, and following a 1961 article in *The Watchtower*, a religious magazine for Jehovah's Witnesses, it was made clear that all Jehovah's Witnesses who accepted a blood transfusion should be excluded from the community.[39] The refusal of blood transfusions is viewed as the ultimate act of devotion which can serve to strengthen one's connection to God and is grounded in Biblical passages that include Genesis 9:4, Leviticus 17:10–14, and Acts 15:28–29.[40] An estimated one thousand Jehovah's Witness followers die each year following the refusal to accept blood transfusions.[41] It is clear that within this faith, those who are faced with the decision of accepting a blood transfusion are forced to make a decision between mitigating their injuries and upholding their fundamental beliefs and community values. It is undeniable that the decision to receive a blood transfusion is profoundly different for a Jehovah's Witness than for an atheist person.

Currently, there is no clear consensus on whether the thin skull principle includes religious refusal of medical treatment in Canadian personal injury cases. Leading academics diverge in their predictions of how courts will handle this issue. Jamie Cassels and Elizabeth Adjin-Tettey are not convinced that religious refusal of medical treatment will be covered by the thin skull principle and argue that the significant factors that can determine reasonableness in refusing medical treatment are a plaintiff's financial status, the nature of the medical advice received, and the explanation of the risks and benefits of the procedure.[42] They go on to state that any psychological infirmity preventing a plaintiff from mitigating treatment must be a genuine psychological disorder, and that "a line must be drawn" between those who are capable of rational decision-making and those who are not.[43]

This line of reasoning would appear to exclude those who refuse medical treatment by reason of sincerely held religious belief. As previously mentioned, it is problematic and disrespectful to liken religious belief to a mental disorder. However, barring such an understanding, there seems to be little room within this framework to accept religious refusal of medical treatment as falling within the ambit of the thin skull principle. Therefore, the perception of the thin skull principle and the duty to mitigate as understood by Cassels and Adjin-Tettey indicates that religious refusal of medical treatment should be considered a failure to mitigate damages rather than a thin skull.

Ken Cooper-Stephenson, another leading Canadian authority on tort law, takes the opposing view and says that religious refusal of medical treatment will likely be covered by the thin skull principle.[44] He argues that cultural and religious attributes are part of the defendant taking the plaintiff as he or she encountered them.[45] Noting a general move toward subjectivism in tort law, Cooper-Stephenson cites *Dolphin Delivery Ltd v RWDSU Local 580* and argues that there are significant components of subjectivity within the reasonable person test that accommodate for characteristics such as youth or physical

38 HK Rignes & H Hegstad, "Refusal of Medical Blood Transfusions Among Jehovah's Witnesses: Emotion Regulation of the Dissonance of Saving and Sacrificing Life" (2016) 55:5 J Relig Health 1672 at 1674.

39 *Ibid*.

40 *Ibid*.

41 *Ibid* at 1673.

42 Cassels, *supra* note 25 at 449.

43 *Ibid* at 451.

44 Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2d ed (Scarborough: Carswell, 1995) at 873 [Cooper-Stephenson].

45 *Ibid* at 861.

disability, as well as for a varied higher standard of knowledge in individuals who have expertise in a given area.[46] For instance, the 1981 Manitoba Court of Appeal case *McLeod v Palardy* found that an Indigenous woman who returned to a rural area in Manitoba to be with her family did not fail to mitigate damages.[47] Cooper-Stephenson states that this case points to a respect within Canadian law for the reality that culture may influence post-tort conduct without mitigating damages.[48]

Canadian scholars who argue for the religious thin skull hold that Canada's commitment to equality and freedom of religion necessitates viewing religiously based refusal of medical treatment as reasonable.[49] Ramsey, another academic on this issue, goes further and holds that the objective standard cannot be easily applied in cases of religious refusal of medical treatment and refers to American case law to demonstrate an alternative to the strict objective standard.[50] In the 1997 New York case *Williams v Bright*, Appellate Division of the Supreme Court of New York evaluated the behavior of the plaintiff using the standard of a reasonable Jehovah's Witness rather than a reasonable person.[51] The United States Supreme Court has also determined in *United States v Ballard* that the Court is barred from adjudicating the reasonableness of a religion, as a process of applying an objective standard to determine such an outcome would invariably lead to a loss of recovery for religious plaintiffs and would consistently undervalue their subjective belief.[52]

It is not only American courts that have embraced the religious thin skull. British jurisprudence has also found liability for the full extent of injuries suffered in cases in which victims refused to accept medical treatment based on religious conviction. In the 1975 case *Regina v Blaue*, the accused in a criminal trial stabbed a Jehovah's Witness woman who later died following her refusal of blood transfusions.[53] The England and Wales Court of Appeal held that Blaue was guilty of manslaughter and that a person who inflicts violence on another must take their victim as they find them.[54] Although it may be argued that negligence in tort is different from violence in criminal law due to the *mens rea* requirement, the higher burden of proof in criminal law is a strong indicator that British courts would accept the religious thin skull in tort.

Although these cases point to the acceptance of the religious thin skull in other jurisdictions, the same arguments may not succeed in Canadian cases for the religious thin skull. Adjin-Tettey and Cassels' approach can be strongly supported by citing *Janiak v Ippolito*. In this case, the SCC directly addressed the American analysis of the religious thin skull and discussed the use of a subjective standard of assessment for what can be expected of a particular plaintiff. On this note, the SCC clearly said:

> Where a plaintiff does not suffer from a constitutional incapacity to act reasonably he cannot make the defendant bear the burden of his unreasonable behaviour. Thus, the analytic focus in each case is on the *capacity* of the plaintiff to make a reasonable choice.[55]

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46 *Ibid* at 873.

47 [1981] 124 DLR (3d) 506 1981CarswellMan 60.

48 Cooper-Stephenson, *supra* note 44 at 862.

49 Marc Ramsay, "The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failure of Mitigation?" (2007) 20:2 Can JL & Jur 399 at 400.

50 *Ibid* at 452.

51 632 NYS 2d 760, 167 Misc 2d 312 (1995).

52 322 US 78 (1944).

53 [1975] 3 All ER 446 (CA).

54 *Ibid*.

55 *Janiak*, *supra* note 30 at 26.

Further, other Supreme Court cases have warned against the application of American law, which is at best persuasive rather than authoritative. As stated by former Chief of Justice Beverly McLachlin:

> To blindly follow the paths that American courts have taken in dealing with the *Bill of Rights* would be to not only overlook the significant differences between the *Charter* and the American constitutional guarantees, but to ignore the unique matrix of Canadian society.[56]

This sentiment provides little guidance as to how we should understand the unique matrix of Canadian society in the context of religious refusal of medical treatment. Is Canada uniquely multicultural and diverse, with a specific appreciation and respect for religious freedom? Or does the matrix of Canadian society require a different approach than that taken by the American courts? This remains to be seen. It appears that, at this time, American jurisprudence takes a more subjective approach to the reasonable person test than Canadian law.[57]

Both the Cooper-Stephenson and Cassels-Adjin-Tettey camps provide compelling arguments on the issue. However, there are missing components to the discussion involving both constitutional law and social science. Perhaps examination of how these areas of law and academics interpret the purpose and function of religion may offer some clarity on this grey area of law.

V. RELIGION AS A BAR TO CAPACITY

In order to convince the Cassels-Adjin-Tettey camp that religion can constitute a thin skull, one must successfully frame religious belief as a pre-existing psychological condition that is akin to a psychological infirmity. This is an uncomfortable argument to make, but it is an important consideration in evaluating the viability of the religious thin skull in the strictest interpretation of the law in *Janiak*. Psychologists studying the function of religion in society suggest that religious beliefs may work in part to mitigate the psychological impact that comes with concerns about mortality.[58] This idea has been named "terror management theory," which argues that the human capacity to reflect on the inevitability of death can lead to debilitating anxiety and existential nihilism.[59] The theory posits that humans constructed religion in order to combat these feelings, explain the origins of existence, and provide guidelines for a meaningful life.[60] This theory is further supported by the "mortality salience hypothesis," which posits that increased appreciation of personal mortality correlates with an increased need for structures that offer protection from the awareness of death.[61]

In this understanding of religion, religious beliefs serve a functional purpose of managing concerns about death.[62] Thus, it is not surprising that individuals of religious faith who believe in an afterlife also have lower levels of concern about the prospect of death, and when fears of death are heightened, many people report an increase of their religious faith.[63]

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56 Beverley McLachlin, "*The Charter of Rights and Freedoms*: A Judicial Perspective" (1989) 23:5 UBC L Rev 579 at 582.

57 *Janiak*, *supra* note 30 at 160.

58 Matthew Vess, Jamie Arndt & Cathy R Cox, "Exploring the Existential Function of Religion: The Effect of Religious Fundamentalism and Mortality Salience on Faith-Based Medical Refusals" (2003) 97:2 Journal of Personality and Social Psychology 334 at 335.

59 *Ibid*.

60 *Ibid*.

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

In five concurrent studies, religious fundamentalists were found to be more likely to make treatment-based decisions consistent with the idea that faith alone is a viable treatment option when they have a heightened awareness of personal mortality.[64] In this way, religious refusal of medical treatment can be framed as a self-supporting cycle of mortality concerns. Using this theory as a springboard, it is not a far leap to begin to frame religion as a kind of mental condition that allows an individual to cope with the stress of life.

The comparison of a religious thin skull to psychological infirmities also appears in academic scholarship on the issue. In her paper entitled "Religious Practice as a Thin Skull In the Context of Civil Liability," Olga Redko attempts to draw a parallel to the issue with the 1983 SCC case *Cotic v Gray*.[65] In this case, Nediljko Cotic suffered depressive illness, paranoia, and psychosis and ultimately committed suicide 16 months later following a serious motor vehicle accident.[66] In this case, the Court addressed the issue of whether or not a defendant can be liable for the suicide of a victim of negligence and held that the fact that the psychological vulnerability of the plaintiff resulted in an additional action taken by the plaintiff resulting from his psychological vulnerability did not prevent liability for the defendant.[67]

Upon inspection, the stated arguments likening religious refusal of medical treatment to psychological infirmities are quite harsh. As a result, they are unlikely to be endorsed by the Canadian legal system because of the deeply insulting and disrespectful nature of the claim. Practically, it is unlikely that a lawyer would advance an argument on behalf of a religious plaintiff that frames religion as a mental illness. This notion of religion goes against a general sense of decency and respect that is expected when addressing the topic. To liken sincerely held religious beliefs to a mental health disorder is problematic on many levels. It undervalues other accepted principles of religion that include self-determination, spiritual self-fulfilment, and individual conscience and development which have a long-standing place in Canada's historic and political tradition.[68] Canada has never been neutral in terms of religion.[69] Further, it ignores the special status that religion and religious beliefs hold as an analogous ground in Canadian jurisprudence. In addition, the comparison of religious refusal of treatment to suicide is both unconvincing and macabre; it ultimately fails to provide insight into this issue. An action taken—or not taken—by reason of sincerely held religious belief is fundamentally different from an action taken out of mental health and despair. One can be treated by medical and social intervention; the other is a protected system of beliefs and practices. There is something about extending liability to negligent actors whose victims go on to commit suicide that is distinct from extending liability to negligent actors whose victims refuse treatment by reason of sincerely held religious belief. There is a public function in not assigning blame for one person's suicide onto another. There is a sense of gravity and permanence that comes with assigning liability for this sort of act on someone, especially on a defendant who commits a negligent act rather than an intentional one.

The apparent similarity between the religious refusal of recommended medical treatment and suicide is that they are both actions that would be irrational to a "reasonable person." However, this speaks to the qualities that we attribute to the "reasonable person" and the possibility that there may be an optimal victim who is most likely to achieve *restitutio in integrum* by virtue of their religious affiliation. Given the above issues with respect to

64 *Ibid* at 345.

65 Redko, *supra* note 24 at 46.

66 (1981) 33 OR (2d) 356, 124 DLR (3d) 641 (CA), aff'd [1983] SCJ No 58 at para 1.

67 *Ibid* at 101.

68 Redko, *supra* note 24 at 69.

69 David Schneiderman, "Associational Rights, Religion, and the *Charter*" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 65–67.

framing religion as a bar to capacity, it appears that a different argument must be made if the religious thin skull is to prevail in Canadian law.

VI. THE *CHARTER* AS AN ADVOCATE FOR THE RELIGIOUS THIN SKULL

A more comfortable and likely more convincing argument in favour of the religious thin skull involves examining *Charter* values and emphasizing their application to the common law. Any successful argument for the religious thin skull rooted in the *Charter* would be contingent on the degree of emphasis placed upon these values balanced against the perceived importance of black letter tort law. The relevant sections of the *Canadian Charter of Rights and Freedoms* in this discussion include section 2(a), which provides for freedom of conscience and religion, and section 15, which provides for equal protection and benefit of the law.[70] These two sections are connected to each other, and academics have argued that the fundamental principle of equality requires accepting the religious thin skull, as failure to do so will result in the victim of the tort facing discrimination for personal characteristics, which the principles of equality forbid.[71]

The core idea behind the conception of equal religious citizenship, equality, and freedoms means that religious people can participate equally in Canadian society without abandoning their faith, as long as doing so would not interfere with the rights of others or compelling social interests.[72] As stated by Bruce Ryder, the idea that religious followers should not choose between their faith and full participation of the laws of the land requires a commitment to adjusting rules and policies that appear neutral but have the effect of interfering with a religious practice and belief.[73] Further, scholars have defined religion as something that can only be understood through lived experience and have found that the practice of religious beliefs is about the manner in which religion manifests in daily life.[74]

It is widely accepted that those who are likely to face the greatest struggle in enjoying both freedom of religion and equality in the law are members of religious minority groups whose traditions are poorly understood.[75] Thus, we can identify a vulnerable population of religious minorities who may practice their faith in a manner that may be considered unreasonable by the majority of the population and, as a result, whose religious freedoms are most likely to be limited when other interests and social rights are affected. Although the law is intended to be equal for all citizens, it is apparent that the refusal of the religious thin skull would disproportionately impact religious minorities. The question becomes whether Canada has a responsibility to protect these interests in an increasingly multicultural society. Legal scholars Martha Chamallas and Jennifer B. Wriggins have stated that:

> Close scrutiny of the rules and methods that govern damage awards is a chief way to protect against the devaluation of individuals and social groups to ensure basic equity in the torts systems of compensation.[76]

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70 *Canadian Charter of Rights and Freedoms*, ss 2(a), 15(1), Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

71 Dannis Klimchuk, "Causation, Thin Skulls and Equality" (1998) 11 Can JL and Jurisprudence 115 at 138.

72 Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 87 [Ryder].

73 *Ibid* at 88.

74 Lori G Beaman, "Defining Religion: The Promise and Peril of Legal Interpretation" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 192 at 194.

75 Ryder, *supra* note 72 at 88.

76 Chamallas, M & Wriggins, J, *The Measure of Injury: Race, Gender, and Tort Law* (New York: NYU Press, 2010) ch 6 at 156.

The Supreme Court of Canada in *R v Big M Drug Mart Ltd* specifically stated that the *Charter* safeguards religious minorities from the "tyranny of the majority" and found that the freedom of religion includes the manifestation of religious belief by worship and practice free from coercion.[77] Former Chief of Justice Beverley McLachlin also spoke of the importance of religion as an enumerated ground within the *Charter* in the 1999 SCC case *Corbiere v Canada (Minister of Indian and Northern Affairs)*, in which she stated:

> [T]he fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds... is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.[78]

Although the *Charter* does not directly apply to private litigation, the Supreme Court of Canada stated in *Dolphin Delivery Ltd v RWDSU Local 580* that the common law ought to be applied in a manner consistent with the fundamental values of the Constitution.[79] Given that this is a grey area in the common law, there is room for application of the law in a manner that would reflect *Charter* values of equality and religious freedom. The Supreme Court of Canada re-emphasized this idea of reflecting *Charter* values in the common law in the 1995 case *Hill v Church of Scientology of Toronto*, in which Justice Cory provided guidance regarding the approach courts should use when incorporating these values into private jurisprudence.[80] In writing for the majority, he stated that courts must balance conflicts between principles in a more relaxed fashion than would occur in a traditional section 1 analysis involving a state actor and held that:

> *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.[81]

The history, timing, and method of implementation of the *Charter* may also have significant bearing on the outcome of the religious thin skull and its place within the *Janiak* framework. The *Charter* came into effect in 1982; however, section 15 importantly took effect on April 17, 1985 in order to allow the courts time to align their laws with the equality right enumerated in the section.[82] The Supreme Court of Canada decided *Janiak v Ippolito* on March 14, 1985, one month before equality rights came into effect.[83] At this time in Canadian legal history, *Charter* interpretation in private law was an open question. If the courts were faced with a religious thin skull today, it is likely that they would understand *Janiak* to be pre-*Charter* litigation that did not adequately reflect the implementation of *Charter* values into private jurisprudence. The courts would thus

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77 [1985] 1 SCR 295 at 336, 346, 18 DLR (4th) 321 at 94–96 [*Big M*].

78 *Corbiere*, *supra* note 35.

79 *Dolphin Delivery*, *supra* note 3 at 125.

80 [1995] 2 SCR 1130, 126 DLR (4th) 129, Cory J [*Hill*].

81 *Ibid* at 100.

82 Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms" (22 November 2018), online: Canada.ca <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> archived at [https://perma.cc/9HV9-VUXD].

83 *Janiak*, *supra* note 30.

recognize the religious thin skull given indica in more recent case law that *Charter* values do indeed have a place in private law.

Given the emphasis on freedom of religion and equality in Canadian jurisprudence, it must be determined how these *Charter* values impact the issue of the religious thin skull. The following section will analyze the strongest arguments both for and against the religious thin skull in tort considering *Charter* values and their application. In assessing *Charter* values, two diverging paths once again emerge that both support and reject the religious thin skull.

VII. RECONCILING PUBLIC VALUES AND PRIVATE LAW

It appears, thus far, that case law on the *Charter* contains strong arguments in favour of the religious thin skull. Indeed, the SCC has recognized the fact that religion is an important part of various aspects of daily life for many Canadians.[84] However, when inevitable conflict arises as a result of religion impacting other interests, Chief Justice McLachlin, as she then was, has stated: "Many religious practices entail costs which society reasonably expects the adherent to bear."[85] How do we determine whether the costs associated with cases of personal injury mitigation come at too high a price for the religious person, given that they live in a society that protects their religious freedom and fundamental equality? Is the decision to mitigate damages for the Jehovah's Witness who requires a blood transfusion asking the victim to make a decision that will come at an unacceptable cost to their beliefs? Given that the thin skull rule is concerned with fairness and equality underlying corrective justice, is it in keeping with the thin skull rule to expect the religious victim to bear the cost of their sincerely held belief? Perhaps further clarity can be gained on this issue by determining the extent to which private law has incorporated and limited the application of *Charter* values.

In the 2001 Alberta Court of Appeal case *MacCabe v Westlock Roman Catholic Separate School District No. 110*, the Court grappled with the application of *Charter* values, including equality, to the tort case. In delivering his reasons, Justice of Appeal Wittmann stated:

> While I accept that the common law must try to be consistent with *Charter* values including equality, this consistency cannot be at the expense of the fundamental purposes of compensatory damages in tort law. In this case, to strictly adopt the approach taken by the learned trial judge runs the risk of ignoring, or at the very least, minimizing the essential purpose of compensatory damages in tort law.[86]

More recently, according to the 2016 Ontario Court of Appeal case *Spence v BMO Trust Co*, the *Charter* exists to protect the personal autonomy of Canadians and freedom from governmental activities. It explicitly held that the *Charter* does not apply to testamentary dispositions of a private nature.[87] The Ontario court went on to state that "the *Charter* does not seek to affect the private conduct of individuals in their relations with each other."[88] Here, we see cases that point to the limitation of the use of *Charter* values to influence tort case outcomes. These cases indicate that if the essential purposes of compensatory damages in tort law require psychological thin skulls to be in the form of a foreseeable mental infirmity, then *Charter* values will not succeed in the argument for a religious thin skull.

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84 *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 569 at 611.

85 *Ibid* at 612–613.

86 293 AR 41, 108 ACWS (3d) 823 at para 107.

87 129 OR (3d) 561, 263 ACWS (3d) 550 at para 74.

88 *Ibid* at 125.

However, in other areas of private law, *Charter* values have been applied to determine case outcomes. In the 1994 Supreme Court of Canada case *Willick v Willick*, Justice Sopinka's reasons were influenced by *Charter* values of equality in the context of a divorce case, as he stated:

> Given the profound economic impact on the parties that may follow from differing interpretations of the *Divorce Act*'s support provisions, it follows that in the present case… this court should seek to assure itself that its preferred interpretation is consistent with *Charter* values of substantive equality rather than with the values of formal equality.… Specifically, an interpretation of the *Divorce Act* provisions relating to support and its variation that is sensitive to equality of result as between the spouses must be preferred to an approach that only contemplates equality of treatment and whose effect may be to discriminate by reason of sex.[89]

Those who argue against the religious thin skull may point to the fact that this case is in the context of family law rather than tort. Family law is an area of law that needs to be sensitive to equality, given the gendered vulnerability that arises alongside financial and custody disputes between previous partners. However, advocates of the religious thin skull may argue that this case is authoritative because it is Supreme Court of Canada jurisprudence emphasizing substantive equality and its place within private law. In doing so, *Willick v Willick* demonstrates that private law can indeed bear the imprint of *Charter* values.

Another relevant Supreme Court case with respect to limiting section 2(a) *Charter* rights for a member of a religious minority is the 2012 case of *R v S(N)*.[90] In this case, a Muslim woman who wore a niqab was a complainant who alleged that she had been sexually assaulted by her cousin and uncle as a child.[91] The major issue was whether or not she was able to testify wearing her niqab, as there was concern that allowing a witness to testify with their face covered posed a serious risk of a wrongful conviction.[92] In balancing the competing interests of upholding the complainant's religious freedom with the accused's right to a fair trial, Chief Justice of Canada McLachlin, as she then was, put forth the following test:

> I conclude that a witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if:
>
> (a) requiring the witness to remove the niqab is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; *and*
>
> (b) the salutary effects of requiring her to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion.[93]

It must be noted that this case shows the limitation of religious freedom in the context of religious minorities whose practices do not fit within the expectations of Canadian law. Advocates for the religious thin skull may distinguish this case, as it is a criminal trial where the accused's liberty is at stake as the opposing value—it is not in the sphere of

89 [1994] 3 SCR 670, 119 DLR (4th) 405 at para 54.
90 2012 SCC 72, [2012] 3 SCR 726 [*S(N)*].
91 *Ibid*.
92 *Ibid* at 2.
93 *Ibid* at 3.

private law. However, this case demonstrates a willingness of the Supreme Court to limit religious freedom for a member of a minority group in favour of another social interest.

VIII. LOWER COURTS ON RELIGION AND MITIGATING DAMAGES

Lower level courts have touched on the issue of the religious thin skull, including the 2015 British Columbia Supreme Court case *Sebaa v Ricci*.[94] In this case, the plaintiff suffered both physical and psychological injury following a motor vehicle collision.[95] Pointing to the plaintiff's failure to complete counselling and take anti-depressant medication, the defendant argued that the plaintiff did not adequately mitigate her damages.[96] The plaintiff explained that she grew up in a small community that was religious, and discussing mental health was something that was taboo and personally stressful.[97] Although Justice Brown did not address the issue of the religious thin skull directly, he acknowledged that the question is an open one in Canadian law and that academics have seemed to support the view that culture and religious beliefs can in certain circumstances excuse a failure to pursue an otherwise reasonable treatment option.[98] Importantly, Justice Brown accepted evidence demonstrating that spiritual growth and involvement in religious communities can benefit an individual's mental health and sense of well-being.[99] This case demonstrates a willingness to explore the religious thin skull in Canadian courts.

Another recent British Columbia Supreme Court case discussed the issue in 2012. In *Abdalle v British Columbia (Minister of Public Safety & Solicitor General)*, the plaintiff was struck in a motor vehicle accident by an RCMP officer and refused to follow some of the recommended treatments.[100] In his refusal, he claimed that his religious beliefs precluded him from taking any strong medications.[101] Justice Ross stated that "unless Mr. Abdalle's spiritual objections provide a reason to refuse treatment, I conclude that Mr. Abdalle's refusal to follow the recommendations of his physicians was unreasonable."[102] Elaborating further, Justice Ross held that the question of the religious thin skull includes two issues: first, whether and to what extent religious or cultural beliefs can be taken into consideration in addressing a plaintiffs duty to mitigate, and, second, whether in this particular case the failure to follow a recommended course of treatment is the result of adherence to a religious belief or practice.[103]

Ultimately, Justice Ross determined that arguing for or against the religious thin skull was not appropriate in this case, as there was no factual support to Mr. Abadelle's claim of religiously motivated refusal of medical treatment.[104] Justice Ross stated that there was no evidence before him to indicate if Mr. Abdalle's claims were formal tenants of his faith or personal to him, citing a specific lack of religious texts, spiritual advisor testimony, or widespread conviction among members of the faith.[105] Because of these shortcomings,

94 257 ACWS (3d) 346, 2015 CarswellBC 2419.
95 *Ibid*.
96 *Ibid* at 3.
97 *Ibid* at 36.
98 *Ibid* at 133.
99 *Ibid* at 138.
100 2012 BCSC 128, [2012] BCWLD 7812.
101 *Ibid* at 71.
102 *Ibid* at 72.
103 *Ibid* at 78.
104 *Ibid* at 79.
105 *Ibid* at 80.

Mr. Abdalle's argument failed and his refusal to follow recommended treatment was deemed to be an unreasonable breach of his duty to mitigate.[106]

The merit of Justice Ross's requirement of evidence including religious texts, testimony, and widespread conviction may be questioned by examining the nature of the freedoms associated with *Charter* values. In *R v Big M Drug Mart*, the SCC stated that the freedom of religion is "the right to entertain such religious belief as a person chooses."[107] The importance of protecting individual understandings of religion was further emphasized by Justice Iacobucci in *Syndicat Northcrest v Amslem*, where he emphasized that the definition of religion must be inherently subjective, as it is "integrally linked with an individual's self-determination and fulfillment and is a function of personal autonomy and choice."[108] Further, in the same case, the Supreme Court adopted a low threshold in order to establish sincerity of belief.[109] Such inquiries must be as limited as possible, and must have the purpose "only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice."[110] Importantly, Justice Iacobucci emphasizes that courts are not arbiters of scriptural interpretation.[111] Therefore, in order to prove that a religious belief is sincerely held in the subjective, it is unclear what sort of evidence ought to be required by courts.

IX. RELIGIOUS REFUSAL OF MEDICAL TREATMENT FOR CHILDREN

One area where Canadian law has made the limit of religiously based refusal of medical treatment clear is where parents refuse medical treatment for their children. In these cases, Canadian courts have clearly held that the right to freedom of religion can be limited when it is weighed against the best interests of the child.[112] In the 1995 Supreme Court of Canada case *B(R) v Children's Aid Society of Metropolitan Toronto*, the Court held that restrictions on the rights of parents who refuse medical treatment for their children are amply justified.[113] Justice Iacobucci stated that "freedom of religion, like all other rights, applicable ... in its private dimension as against another individual, may be made subject to overriding societal concerns."[114] There are few societal interests more important than the protection of children, and Canadian law has taken the position that medical treatment can be forced upon unwilling child patients if it is in the best interests of the child.

In the 2009 SCC case *Manitoba (Director of Child & Family Services) v C(A)*, A.C., a 14-year-old Jehovah's Witness, was apprehended by Child and Family Services and was ordered to undergo blood transfusions as she was suffering from life-threatening internal bleeding.[115] The order was made and carried out despite the fact that A.C. herself had signed an advance medical directive indicating that it was her wish for blood transfusions to not be administered.[116] Writing for the majority, Justice Abella upheld the constitutionality of section 25(8) of the *Child and Family Services Act*; this section allowed for the order of blood transfusions to be made.[117] The Court dismissed A.C.'s appeal on the grounds

106 *Ibid* at 81.
107 *Big M*, *supra* note 77 at 94.
108 2004 SCC 47, [2004] 2 SCR 551 at 39 [*Amselem*].
109 *Ibid* at 52.
110 *Ibid*.
111 *Ibid* at 45.
112 [1995] 1 SCR 315, 122 DLR (4th) 1 [*B(R)*].
113 *Ibid* at 113.
114 *Amselem*, *supra* note 108 at 63.
115 2009 SCC 30, [2009] 2 SCR 181 at para 7.
116 *Ibid* at 21.
117 *Ibid*.

that no determination was made in the prior proceedings of her ability to make a mature, independent judgment with respect to her medical treatment but found that she had successfully argued that the provisions should be interpreted in a manner that allows an adolescent under the age of 16 who demonstrates sufficient maturity to have their decisions respected.[118] This case presents an important limitation in Canadian law, indicating that children's religious beliefs can be overruled if the court deems that it is in their best interests to do so. This limitation on the ability of a child to determine their medical treatment is important, as it touches on an underlying issue of when the court allows someone to make a health-related decision based on religious values and to what extent and for what reason religious freedom is protected.

Religion is often not only a personal choice; it can be deeply rooted in an individual's social, cultural, and private life.[119] Social science demonstrates that religion is something that is very often inherited and is a function of circumstances at birth and the socialization that follows.[120] The most determinative factor with respect to a child's religious orientation is their home environment and parental impact, particularly that of the mother.[121] In light of this social science, there is a risk that children may follow their parent's advice and refuse medical treatment without having a full appreciation of the decision that they are making. It is on these grounds that Canada can be justified in overriding the child's refusal of treatment and ordering medical intervention where a child refuses medical treatment on religious grounds.

This presents a potential argument against the religious thin skull. If Canadian law can order that it is in the best interests of a child to set aside their religious beliefs in favor of medical treatment, is it then fair that Canadian law may require a defendant in tort to financially compensate the plaintiff for making the same decision as an adult that would not be permitted in a child? Is the crux of this issue really about the maturity to appreciate the risks associated with the decision, as *Manitoba (Director of Child & Family Services) v C(A)* would appear to indicate, or is it about protecting children from making a decision that is not in their best interests? What does this tell us about Canada's view of an individual's best interests in terms of the hierarchy of medical care and religious freedom? Perhaps most importantly, does Canadian law view the religious refusal of medical treatment to be an immature, incorrect, or irresponsible decision? This argument could be made in the rejection of the religious thin skull.

Advocates for the religious thin skull can distinguish this case on the very basis that it is a child making the decision who may not have the life experience required to develop a sincerely held religious belief. The advocate for the religious thin skull can argue that these cases involve state actors and, as such, involve a different standard of adjudication of *Charter* rights. By this standard, *Charter* rights can yield to other competing social interests. As previously mentioned, there are few social interests more compelling than protecting children and their safety. If children are not able to fully assert the sincerity of their religious beliefs because they are simply too young to appreciate them and may be mirroring the attitudes of influential people in their life, Canada is rightly justified in protecting their health until they have reached a stage of life development that permits them to make such a decision.

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118 *Ibid* at 121.

119 Richard Moon, "Religious Commitment and Identity: Syndicat Northcrest v Amselem" (2005) 29:2 Sup Ct L Rev (2d) 201 at 213.

120 Scott M Myers, "An Interactive Model of Religiosity Inheritance: The Importance of Family Context" (1996) 61:5 American Sociological Review 858 at 858.

121 Bruce Hunsberger & LB Brown, "Religious Socialization, Apostasy, and the Impact of Family Background" (1984) 23:3 Journal for the Scientific Study of Religion 239 at 250.

CONCLUSION: THE RELIGIOUS THIN SKULL, CANADIAN MULTICULTURALISM, AND THE REASONABLE RELIGIOUS PERSON

It is unclear how Canadian law will respond to the inevitable question of the religious thin skull. Redko argues for a case-by-case balancing approach, focusing on the particularities of the parties, but her argument is unconvincing.[122] A case-by-case approach leaves too much room for discretion and may result in a manifestation of unequal outcomes across similar cases. Further, a case-by-case approach does not provide the kind of clarity that is being sought on this issue. This is a narrow area of tort law in which a victim's injuries are made more severe owing to a religiously based refusal of medical treatment. In all cases, the defendant's interests in limiting their costs are the same. Similarly, in all cases the plaintiff's interests in realizing the full extent of their damages from the defendant are also the same. One legal principle should be capable of covering such a niche area and be applied equally to different religious groups.

A court may take an approach similar to Cassels, Adjin-Tettey, *McCabe v Westlock*, and *Janiak v Ippolito*, drawing on the fundamental principles of tort which suggest that the plaintiff ought to bear the financial burden of their religious beliefs and treat the religious refusal of medical treatment as a failure to mitigate. In the alternative, a court may agree with Cooper-Stephenson and *Willick v Willick*, influenced by *Amslem, Big M*, and the *Charter*, holding that *Charter* values ought to be implemented into private law to ensure that the rights of freedom of religion and equality for vulnerable groups are not curtailed due to the structure of the law. This paper has demonstrated that the academic divergence on this topic indicates that people who are educated in the law can justifiably hold different conclusions with respect to this issue. The answer that each person will come to with respect to the religious thin skull is ultimately dependent on their answers to two questions that are both simple yet complicated: What is law? And what is religion?

For many, the purpose of law is the pursuit of justice, with the aim of allowing people to engage freely in the world while providing recourse for when things go wrong. In contrast, perspectives on religion will likely include much more diversity, particularly in a society which respects a myriad of beliefs ranging from atheism to fundamentalism. An individual's opinion will be informed by their personal perspective and lived experience with respect to religion. It is unclear whether an atheist would support the religious thin skull, given that they will never benefit from it but may bear its financial burden as a defendant in tort. Should an individual's belief in a religious doctrine impose a financial burden on another person who may be a non-believer? Perhaps it is simply a "tax" that must be paid in a multicultural a society that acknowledges the profundity of religious belief.

Canada is a multicultural society that welcomes immigrants from around the world who come for the promise of a better life in a country that values freedom and equality. Further, Canadians are often willing to make accommodations and accept that diversity of beliefs and practices are part of modern Canadian life. In order to be a society that truly reflects the values that it espouses, we must ensure that Canadian law serves the Canada that currently exists rather than the Canada that existed in the past.

It seems that the only solution to this issue is to accept the Canadian religious thin skull so long as the plaintiff is making a decision that is in keeping with the subjective requirements of their faith and is borne out of a sincerely held belief. The religious thin skull should be limited where the decision goes beyond the realm of foreseeable religious requirements that necessarily exist within a multicultural society where freedom of religion

122 Redko, *supra* note 24 at 77.

and equality are both valued. Rather than asking what the reasonable Jehovah's Witness would do, we should ask if the religious refusal of medical treatment is within the realm of our multicultural commitment to equality and freedom of religion. Instead of a subjective analysis of the individual, we ought to approach this question from an objective lens that is consistent with the values of Canadian society. In doing so, judges should ask first if the victim of the tort who is refusing medical treatment is doing so as a result of following a religious practice that could be reasonably found in a multicultural society, and second, whether the refusal of medical treatment can be found to be rooted in a foreseeable interpretation of that religion. This approach will ensure that *Charter* values are respected while simultaneously upholding core concepts of private law. Given the implementation of section 15 of the *Charter* immediately following the Supreme Court's ruling in *Janiak*, as well as the jurisprudence of the relevance of *Charter* values that followed, the Supreme Court of Canada would likely recognize the religious thin skull.

The effect of limiting the religious thin skull to foreseeable religious requirements that would exist within a multicultural society is twofold. First, it means that individuals who follow diverse religions will be considered to have a religious thin skull, rather than having failed to mitigate. This is important, as it respects religious diversity and therefore upholds *Charter* values such that Canadian residents can manifest their religious beliefs equally without having to pay for the cost of doing so following tortious injury. Second, it means that tortfeasors do not have to pay for refusals of medical treatment that claim to be rooted in religion but cannot be sourced to any religious dogma or requirements. Limiting the religious thin skull in such a way will prevent claims that are inconsistent with the reasonable expectations of a multicultural society. This is important as it ensures that the religious thin skull remains something that is truly a protected interest of the ability and right for Canadians to practice and manifest their religion as they see fit.

While the acceptance of the religious thin skull is consistent with current legal trends and the application of *Charter* values to private law, in reality, the question of whether or not the religious thin skull should exist engages a high degree of personal bias surrounding one's understanding of law and religion. A case demanding a final decision on this matter will likely appear in the near future given the increasing diversity of Canadian residents and this apparent gap in the law. It is possible that this decision will hinge on the facts of the case and the degree of sympathy which the plaintiff can garner. Until such a decision arises, the question remains open in Canadian law.