TABLE OF ARTICLES


# Report of the Royal Commission

to Inquire into

the Circumstances of the Convictions

of

## Arthur Allan Thomas

for the Murders of

## David Harvey Crewe

and

## Jeanette Lenore Crewe

1980

8. Other than Mrs Donaghie's reports to me, I had no direct information as to the identity of the woman seen by Mr Roddick on 19th June 1970. I am, however, of the view that the identification is supported to some extent by:

(a) Mr Roddick's original description of the woman he saw in his statement to the Police dated 23rd June 1970;

(b) Mr MacLaren's comment set out in the fourth to last paragraph of my letter to the Prime Minister attached hereto and marked with the letter "A".

Affirmed at London by the said DAVID ANTHONY YALLOP this 28th day of October 1980.

"David A. Yallop".

Before me,

"G. W. Shroff", Commonwealth Representative, New Zealand High Commission, London.



## APPENDIX III

### EXPENSES

| | $ |
|---|---|
| W. J. Bridgman and Co. ... ... ... | 2,600.00 |
| P. D. Sporle ... ... ... ... ... | 5,542.28 |
| Gerald Ryan ... ... ... ... ... | 500.00 |
| Prof. B. J. Brown ... ... ... ... | 750.00 |
| R. L. McLaren ... ... ... ... | 2,671.07 |
| A. G. Thomas (refund legal fees paid) ... ... | 16,500.00 |
| K. Ryan (legal fees outstanding) ... ... ... | 8,500.00 |
| P. A. Williams (legal fees outstanding) ... ... | 12,100.00 |
| | $49,163.35 |

## APPENDIX IV

| | $ |
|---|---|
| Mr and Mrs Hooton ... ... ... ... | 1,350.00 |
| Mr and Mrs Stuckey ... ... ... ... | 2,100.00 |
| Raymond Thomas ... ... ... ... | 5,400.00 |
| Lloyd Thomas ... ... ... ... | 5,322.00 |
| Desmond Thomas (including costs of preparation of claim $300.00) | 5,420.00 |
| Richard Thomas ... ... ... ... | 1,800.00 |
| Lyrice Hills (including costs of preparation of claim $150.00) | 3,050.00 |
| Rita Tyrrol ... ... ... ... ... | 1,275.00 |
| Allan G. Thomas ... ... ... ... | 2,250.00 |
| Vivien Harrison ... ... ... ... | 10,500.00 |
| | $38,467.00 |

BY AUTHORITY
P. D. HASSELBERG, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND
S72181H 80PT

H. 6


# Report of the Royal Commission

to Inquire into

## the Circumstances of the Convictions

of

## Arthur Allan Thomas

for the Murders of

## David Harvey Crewe

and

## Jeanette Lenore Crewe

1980

*Presented to the House of Representatives by Command of His Excellency the Governor-General*

BY AUTHORITY

ROYAL COMMISSION TO INQUIRE INTO AND REPORT UPON THE CIRCUMSTANCES OF THE CONVICTIONS OF ARTHUR ALLAN THOMAS FOR THE MURDERS OF DAVID HARVEY CREWE AND JEANETTE LENORE CREWE

*Chairman*

The Honourable R. L. Taylor, a former Justice of the Supreme Court of New South Wales.

*Members*

The Right Honourable J. B. Gordon,
The Most Reverend A. H. Johnston, C.M.G., LL.D

*Secretary*

Mr M. G. Werner

*Administrator*

Mr J. H. Blackaby

# TABLE OF CONTENTS

## APPENDICES



*Royal Commission to Inquire Into and Report Upon the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe*

ELIZABETH THE SECOND by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith:

To Our Trusty and Well-beloved The Honourable ROBERT LINDSAY TAYLOR, of Sydney, Australia, One of Her Majesty's Counsel Learned in the Law and retired Chief Judge at Common Law, Supreme Court of New South Wales; The Right Honourable JOHN BOWIE GORDON of Heriot, lately Minister of the Crown; and the Most Reverend ALLEN HOWARD JOHNSTON, C.M.G., of Hamilton, Archbishop of New Zealand:

GREETING:

WHEREAS, in 1971, Arthur Allan Thomas was tried and convicted, in the Supreme Court at Auckland, of the murders of David Harvey Crewe and Jeanette Lenore Crewe; And whereas, in 1973, following the making by the Court of Appeal of an order directing a new trial, Arthur Allan Thomas was again tried and convicted, in the Supreme Court at Auckland, of those murders; And whereas Arthur Allan Thomas, having been sentenced to imprisonment for life for those murders, was detained in prison under that sentence until the 17th day of December 1979 when His Excellency the Governor-General was pleased to grant to Arthur Allan Thomas a free pardon in respect of his conviction of those murders:

And whereas it is desirable that inquiry should be made into the circumstances of the two convictions:

KNOW YE that We, reposing trust and confidence in your integrity, knowledge, and ability, do hereby nominate, constitute, and appoint you, the said

The Honourable ROBERT LINDSAY TAYLOR,
The Right Honourable JOHN BOWIE GORDON, and
The Most Reverend ALLEN HOWARD JOHNSTON,

to be a Commission to inquire into and report upon—

1. Whether the investigation by the Police into the deaths of David Harvey Crewe and Jeanette Lenore Crewe was carried out in a proper manner; and, in particular,—

(a) Whether there was any impropriety on any person's part in the course of the investigation or subsequently, either in respect of the cartridge case (Exhibit 350) or in respect of any other matter?

(b) Whether any matters that should have been investigated were not investigated?

(c) Whether proper steps were taken, after the arrest of Arthur Allan Thomas, to investigate any matter or information, if any, which suggested that he was not responsible for those deaths?

2. Whether the arrest and prosecution of Arthur Allan Thomas was justified?

3. Whether the prosecution failed at any stage to perform any duty it owed to the defence in respect of—

(a) The disclosure of evidentiary material which might have assisted the defence?

(b) Any other matter?

4. Whether, in respect to the jury list for either trial,—

(a) The Crown or the Police or the defence obtained preference in respect of the time at which the list was supplied?

(b) Any persons named on the list were approached by representatives of the Crown or the Police or the defence before the jury was selected?

(c) Anything was done otherwise than in accordance with normal practice or was improper or was calculated to prejudice the fairness of the subsequent trial?

5. Whether, after each trial,—

(a) The Crown or the Police made an adequate investigation into new matters, if any, which may have related to the deaths of David Harvey Crewe and Jeanette Lenore Crewe or to the trial and which were placed before the Crown or the Police by any person or persons?

(b) Any relevant facts became known to the Crown or the Police which were not known to them at the time of the trial?

6. What sum, if any, should be paid by way of compensation to Arthur Allan Thomas following upon the grant of the free pardon?

7. Such other matters as are directly relevant to the matters mentioned in paragraphs 1 to 6 of these presents:

But nothing in paragraphs 1 to 7 of these presents shall empower you to inquire into or report upon the actual conduct of the trials, whether by the Courts or on the part of the Crown or the defence:

And We hereby appoint you, the said

The Honourable ROBERT LINDSAY TAYLOR,

to be the Chairman of the said Commission:

And for the better enabling you to carry these presents into effect you are hereby authorised and empowered to make and conduct any inquiry or investigation under these presents in such manner and at such time and place as you think expedient, with power to adjourn from time to time and place to place as you think fit, and so that these presents shall continue in force and any such inquiry may at any time and place be resumed although not regularly adjourned from time to time or from place to place:

And you are hereby strictly charged and directed that you shall not at any time publish, save to His Excellency the Governor-General, in pursuance of these presents or by His Excellency's direction, the contents of any report so made or to be made by you, or any evidence or information obtained by you in the exercise of the powers hereby conferred on you, except such evidence or information as is received in the course of a sitting open to the public:

And you are hereby directed that where documents of a confidential nature, such as Police files, solicitors' files, and other confidential documents of the Crown or of any other person, are disclosed to you, you shall disclose the contents of those documents, whether in your report or to other persons (including parties to the inquiry), only to the extent that, in your opinion, such disclosure is proper and necessary in the interest of making full inquiry into any of the matters set out in paragraphs 1 to 7 of these presents or of reporting thereon:

And it is hereby declared that the powers hereby conferred shall be exercisable notwithstanding the absence at any time of any one of the members hereby appointed so long as the Chairman or a member deputed by the Chairman to act in his stead, and one other member, are present and concur in the exercise of the powers:

And We do further ordain that you have liberty to report your proceedings and findings under this Our Commission from time to time if you shall judge it expedient to do so:

And, using all due diligence, you are required to report to His Excellency the Governor-General in writing under your hands, not later than the 31st day of January 1981, your findings and opinions on the matters aforesaid together with such recommendations as you think fit to make in respect thereof:

And, lastly, it is hereby declared that these presents are issued under the authority of the Letters Patent of His Late Majesty King George the Fifth, dated the 11th day of May 1917, and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand.

In witness whereof we have caused this Our Commission to be issued and the Seal of New Zealand to be hereunto affixed at Wellington this 24th day of April 1980.

Witness The Right Honourable Sir Keith Jacka Holyoake, Knight Companion of the Most Noble Order of the Garter, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Member of the Order of the Companions of Honour, Principal Companion of the Queen's Service Order, Governor-General and Commander-in-Chief in and over New Zealand.

KEITH HOLYOAKE, Governor-General.

[L.S.]

By His Excellency's Command—

R. D. MULDOON, Prime Minister.

Approved in Council—

P. G. MILLEN, Clerk of the Executive Council.

## FOREWORD

On 17 December 1979 Arthur Allan Thomas, who had been twice tried and convicted in the Supreme Court at Auckland and sentenced to imprisonment for life for the murders of David Harvey Crewe and Jeanette Lenore Crewe, was released from prison pursuant to a free pardon granted in respect of his conviction for those murders by the Governor-General of New Zealand.

On 24 April 1980 the warrant for this Royal Commission was issued. Its terms of reference, the public hearings to be held, and the procedures to be followed by all wishing to make submissions, were widely publicised before the first public hearing.

On 21 May 1980 the Commission's proceedings were formally opened in Auckland. On 9 June it began hearing evidence, usually sitting in public but occasionally in private. The hearing occupied 64 days and concluded on 30 October.

During the proceedings we inspected portions of the former Crewe property, Pukekawa district, and Waikato River; test fired the Thomas rifle at the Navy range, and viewed a pantograph at the Engineering Faculty of Auckland University.

The Commission received 12 formal written submissions and heard evidence from 132 witnesses, of whom 5 were from Australia and 1 from England. The transcript of evidence of these witnesses occupies approximately 3500 pages. Two hundred and ten exhibits were received and in addition the Commission considered approximately 1800 pages of evidence given in other judicial proceedings, approximately 5000 pages of police files, and various books, letters, articles, and affidavits.

The evidence was recorded on a DEC Tabletop Data System PDT 151 machine and copies made available twice daily to the Commissioners and all Counsel appearing, a system which worked well.

The Commission expresses appreciation and gratitude to the Secretary, M. G. Werner, and his staff; the Administrator, J. H. Blackaby; Counsel Assisting, H. C. Keyte, and M. P. Crew; Research Assistants, Miss S. B. Powdrell and B. W. Morley; the Chairman's Associate, Mrs F. Brown; and the Stenographers, Miss S. Smith and Mrs L. Jackson. We also record our thanks to the Navy for the use of its firing range, to the Government Printing Office, Auckland, for their help in copying large quantities of material, and to Detective Chief Superintendent Wilkinson and his staff for their co-operation in providing the many documents and records called for. We also wish to pay tribute to all Counsel appearing for their helpful submissions.

## INTRODUCTION

### 1. Background

1. On 22 June 1970, Constable Wyllie of the Tuakau Police received a telephone call about 2.20 p.m. It was from a Mr Owen Priest, who told what must have seemed then, and still seems today, a bizarre story of a bloodstained house, empty but for a weeping infant. That telephone call marked the start of the Police investigation into the deaths of Mr and Mrs Harvey Crewe.

2. Jeanette Lenore Crewe was born in 1940, the elder daughter of Mr and Mrs L. W. Demler. She grew up on their farm at Pukekawa and attended the local primary school, but completed her secondary education in Auckland. She trained as a teacher and taught in a number of places in the North Island after her training was completed. In 1961–62 she travelled overseas and returned to New Zealand to teach in Maramarua and then in Wanganui.

3. In 1942 her younger sister, Heather Demler, was born. In 1950, upon the accidental death of an uncle, Jeanette and Heather Demler inherited his farm in equal shares. This farm became known as the Chennell Estate and it was to be run by a series of managers until the sisters reached the age of 25.

4. David Harvey Crewe, usually known as Harvey, had a similar background to Jeanette Demler, in that he was born and raised in a farming district in the lower North Island, but attended school in Wellington. Upon leaving school he was employed on various farms in the Woodville and Wanganui districts, and also spent 2 years as a shepherd in the Kumeroa area, employed by his friend from teenage years, Graham Hewson.

5. It was while Jeanette Demler was living and teaching in Wanganui that she met Harvey Crewe. In June 1966 they were married. At this time Harvey Crewe bought Heather Demler's half share of the Chennell Estate. Thus when they moved onto the farm it was as joint owners.

6. The property itself is located on Highway 22, the house some 60 yards off that road. The Crewes set to with vigour, determined to increase the efficiency and profitability of their farm. Perhaps this may account for the fact that Mr and Mrs Crewe appear to have made few friends in Pukekawa in the ensuing 4 years. It seems that they retained a circle of friends who lived away from the area. Nevertheless, this hardworking and competent couple appeared contented and happy. On 1 December 1968 their daughter Rochelle was born.

7. In February 1970 Jeanette Crewe's mother died. Lenard Demler continued to live by himself at his farm which adjoined the Crewe farm on Highway 22. Following his wife's death Mr Demler became a regular visitor at the Crewe household for meals.

8. Arthur Allan Thomas was born in 1938, one of a family of nine children, four brothers and four sisters. He was raised on his parents' 272 acre farm at Mercer Ferry Road, some 8 miles away from the Crewe farm. He attended the local primary school and left at the age of 14, having reached standard 6.

9. On leaving school he began work on his father's dairy farm. Later he worked on an uncle's farm, then moved to Roose Shipping Company as a labourer. He also spent some time in Maramarua as a forestry worker. Later he was an employee of Barr Brothers, an aerial topdressing firm.

10. In November 1964 he married Vivien Carter who had recently arrived from England and was staying with her uncle in Wellsford. Following his marriage he worked on a number of farms until in June 1966 he entered into a 5-year lease with his father to take over the running of the family farm at Pukekawa. With his wife he farmed the property efficiently. Evidence suggests that they mixed well into the community as one would expect local persons to do, and to all appearances their marriage was a stable and happy one.

## 2. Police Investigation

11. Detective Inspector Hutton, who became officer in charge of the case, had arrived at the house by 4 p.m. on 22 June 1970, with a party of detectives. On that day, and in the following 7 weeks, he organised an investigation which was intense, thorough, and painstaking. It was however without result in two vital respects; neither body had been found, although it seemed likely from analysis of the many bloodstains, and from a small amount of brain tissue found on the arm of a chair, that both Mr and Mrs Crewe were dead. It had not been possible to obtain anything amounting to sufficient evidence against Mr L. W. Demler, Mrs Crewe's father, who was initially Inspector Hutton's main suspect.

12. The situation changed on 16 August 1970, when Mrs Crewe's body was found in the Waikato River. Fifteen fragments of the bullet from her head were recovered. These included one large fragment on the base of which the number 8 had been embossed. The fragments were immediately sent to Dr D. F. Nelson of the Department of Scientific and Industrial Research (DSIR) for comparison with bullets test-fired from rifles collected from relatives and associates of Mr and Mrs Crewe, and from residents within 5 miles of their farm and from other persons who had in some way become involved in the inquiry. An intense search for a ·22 cartridge case was also carried out in the house and enclosure, both of which had already been carefully searched in June.

13. Because Police inquiries had revealed some association between Jeanette Demler and Arthur Thomas in earlier years, Mr Thomas's ·22 rifle was collected by the Police on 17 August 1970. No ·22 rifle was collected from Mr Demler because he was not registered as the owner of one. Nor, despite a thorough investigation, could the Police establish that he had had access to a ·22 rifle at the time Mr and Mrs Crewe disappeared.

14. Dr Nelson told Mr Hutton on 19 August of his preliminary conclusion that neither Mr Thomas's rifle, nor another owned by the Eyre family, could be excluded as having fired the fatal bullet. The fragments of bullet from the head of Harvey Crewe, also containing the remnants of an 8 on the base, but more badly damaged and therefore of less assistance in identifying the rifle from which they were fired, were taken to Dr Nelson following the discovery of Mr Crewe's body on 16 September.

15. It was not however until later, between 13 and 16 October, that Dr Nelson confirmed his preliminary view that of the 64 examined, only the Eyre rifle and the Thomas rifle could not be excluded as having fired the fatal bullets. It is clear to us that in this conversation he made Mr Hutton aware of a distinctive scoring mark in one of the 6 lands in bullets test fired from the Thomas rifle, and that such a mark had not been found on either of the fatal bullets. Therefore a positive identification of the fatal bullets as having come from the rifle could not be made. We shall deal with this matter in detail in due course but say at this stage that Dr Nelson's notes



make it clear, and he and Mr Hutton should have realised, that it could not be stated affirmatively that the fatal bullets came from Mr Thomas's rifle.

16. With Mr Crewe's body was recovered a car axle, which had obviously been tied to the body with wire as a weight and was soon identified as coming from a 1928/9 model Nash motor car series 420; by 13 October it had been established that, until about August 1965, this had been in use on a trailer owned by Mr A. A. Thomas's father, Mr A. G. Thomas.

17. At about this time two Police officers from Christchurch, Detective Inspector Baker and Detective Senior Sergeant O'Donovan, were sent to Auckland to conduct an overview of the Crewe homicide file. It is evident that they regarded the concentration on Mr Demler as the prime suspect by Mr Hutton's team as misguided, and that they encouraged the investigating team to search for other avenues of inquiry. During 2 weeks from 13 October 1970, the Police investigating team did just this. While they had been unable during the previous 4 months to uncover a single item of hard evidence against their initial suspect, Mr Demler, they succeeded during this period in building up what amounted virtually to the whole of the case against Mr A. A. Thomas.

18. On 13 October, Detective Johnston picked up from Mr Thomas's farm a box of ·22 ammunition, uncounted, which was to become exhibit 318. He appears also to have visited a tip on the farm that day, searching for parts connected with the axle. That evening, the Police staged a reconstruction of the way in which Mr Crewe may have been shot, which involved the murderer shooting from outside the house, through the louvre windows with one foot on a brick parapet beside the steps leading to the back door, and the other foot on the windowsill.

19. On 14 October, other members of the Thomas family were interviewed concerning the axle. On 15 October, Mr Johnston was again on Mr Thomas's farm, this time looking for trailer parts and obtaining a statement which Mr Thomas had written out in his own hand. He returned on 20 October with Detective Parkes and located, after a cursory search of one of the three tips on the farm, two stub axles on which broken welds matched welding at either end of the axle itself. Wire samples, to be analysed and compared with the wire taken from the two bodies, were also taken by Mr Johnston on 13 and 20 October. On the latter date, Mr Thomas's rifle was again uplifted by the Police.

20. There is evidence from Mr and Mrs Priest, which establishes that two shots were fired by Mr Hutton and one other Police officer, probably Mr Johnston, at the Crewe house at some time between 30 September 1970 and 27 October 1970. Extensive inquiries into the financial affairs of Mr Thomas were carried out by the Police on 23 and 24 October. Finally, on 27 October 1970, Detective Sergeant Charles and Detective Sergeant Parkes were sent to the Crewe farm to search an area of garden beside the fence outside the back door of the house. It was thought that, if the murder of Mr Crewe had been carried out in the manner of the reconstruction of 13 October, a shellcase might have been ejected from the rifle into that garden. On any view of the matter, the garden had already been searched on two occasions, but the two detectives located in the course of their sieve search a shellcase, later to become exhibit 350, within 2 hours of beginning the search.

21. Mr A. A. Thomas was arrested and charged with the murders of Mr and Mrs Crewe on 11 November 1970.

## 3. Judicial and Other Proceedings on both Charges of Murder

22. Mr Thomas first appeared in Court on 11 November 1970. He was remanded in custody until 25 November 1970, and then again to 14 December 1970 for the taking of depositions. The Lower Court hearing lasted until 22 December 1970, on which date he was committed to the Supreme Court for trial on both charges.

23. The first trial took place between 15 February and 2 March 1971. The jury found him guilty on both counts. His appeal to the Court of Appeal was dismissed by that Court on 18 June 1971.

24. In late 1971 Mr Thomas, his father Mr A. G. Thomas, and Mr P. G. F. Vesey, submitted a petition to the Governor-General, pursuant to section 406 of the Crimes Act 1961, seeking a new trial. The material contained in that petition was considered by Sir George McGregor, a retired Judge of the Supreme Court. His report of 2 February 1972 gave as his view that no further reference to the Court should be granted; there had in his opinion been no miscarriage of justice. That recommendation notwithstanding, following a further petition of 2 June 1972, the matter was put before the Court of Appeal on what has become known as the First Referral. Evidence and submissions were heard on 4 days between 5 February and 16 February 1973. On 26 February 1973 the Court of Appeal ordered a second trial.

25. That second trial began on 26 March 1973. It lasted until 16 April 1973 on which date Mr Thomas was convicted of both murders and again sentenced to life imprisonment. An appeal against this second conviction was dismissed by the Court of Appeal on 11 July 1973.

26. Mr Thomas's case had always attracted widespread publicity and public concern. A leading forensic scientist, Dr T. J. Sprott, had given evidence on behalf of Mr Thomas at the second trial. After the trial he began, in company with Mr P. J. Booth, to pursue an inquiry into a question raised late in the second trial, namely whether the cartridge case, exhibit 350, found by Detective Sergeant Charles could have any connection with the bullets found in the heads of Mr and Mrs Crewe.

27. Their efforts led to a further petition to the Governor-General, and the case was referred to the Court of Appeal for the second time. The hearing took place between 9 December 1974 and 8 January 1975. On 29 January 1975 the five Judges of the Court of Appeal gave a unanimous judgment to the effect that Thomas had not excluded a reasonable possibility that exhibit 350 contained a pattern 8 bullet.

28. The only other proceeding of a judicial nature in Mr Thomas's case was an attempt to appeal from the judgment of the Court of Appeal at the Second Referral to the Privy Council. In 'Reasons for Judgment', dated 4 July 1978, the Privy Council advised that they had no jurisdiction to entertain such an appeal. There was no slackening of effort on the part of those concerned with Mr Thomas's case. Dr Sprott and Mr Booth particularly, continued their investigation into the cartridge case question following the judgment of the Court of Appeal on the Second Referral. Mr Booth published a book *Trial by Ambush* and Dr Sprott and Mr Booth jointly were responsible for the publication *ABC of Unjustice*.

29. In 1978 the British author, Mr D. A. Yallop, took an interest in the case. He spent a considerable time researching and writing his book *Beyond Reasonable Doubt?* This book stated his belief in Mr Thomas's innocence and his opinion that his conviction amounted to a serious miscarriage of justice. The nature and seriousness of the allegations made were such that the Prime Minister appointed Mr Adams-Smith, QC. to report to him. Mr Adams-Smith gave two reports to the Prime Minister dated 16 January 1979 and about December 1979. It was as a consequence of the second that Mr Thomas received a free pardon pursuant to section 407 of the Crimes Act 1961. Shortly afterwards this Commission was set up to investigate the circumstances of his convictions.



## 4. Crown Case Against Mr A. A. Thomas

30. The evidence presented by the Crown against Mr Thomas at the Depositions hearing in the Otahuhu Magistrates Court, and at the two trials, falls into the following categories:

(i) Motive: it was said that Mr Thomas had a motive, based on jealousy, to kill Mr and Mrs Crewe.

(ii) The fact that both of the fatal bullets could have been fired in Mr Thomas's rifle.

(iii) The fact that the cartridge case, exhibit 350, found by Detective Sergeant Charles on 27 October 1970, had undoubtedly been fired in Mr Thomas's rifle.

(iv) The fact that the axle found beneath Mr Crewe's body had belonged to Mr A. G. Thomas; that a Mr Rasmussen remembered removing it from a trailer owned by Thomas about August 1965 and said that it had been sent back to the farm with the two stub axles and other material removed from the trailer; and that the two stub axles were found on 20 October 1970 by Detective Johnston in the Thomas tip.

(v) The fact that wire samples, taken by the Police from Mr Thomas's farm, were found by the DSIR to be in agreement with the wire used to bind the two bodies, and not to agree with wire taken from a number of other farms, including Mr Demler's farm.

## TERM OF REFERENCE 1

31. Whether the investigation by the Police into the deaths of David Harvey Crewe and Jeanette Lenore Crewe was carried out in a proper manner; and in particular—

(a) Whether there was any impropriety on any person's part in the course of the investigation or subsequently, either in respect of the cartridge case (exhibit 350) or in respect of any other matter?

(b) Whether any matters that should have been investigated were not investigated?

(c) Whether proper steps were taken, after the arrest of Arthur Allan Thomas, to investigate any matter or information, if any, which suggested that he was not responsible for those deaths?

32. We propose to deal first with the specific questions raised by the term of reference under (a), (b), and (c); the answers to these specific questions will enable an answer to be given to the general part of this term of reference.

## TERM OF REFERENCE 1(a)

### 1. General

33. This term deals with impropriety in the course of the investigation or subsequently, either in respect of the cartridge case, exhibit 350, or in respect of any other matter.

34. We propose to deal first with exhibit 350, and we state at the outset that the allegation of impropriety here is, and has been since 1970, that it was planted on the Crewe property by the Police to incriminate Mr Thomas. The Police deny this allegation, and say that exhibit 350 came into the garden on the Crewe property by being left there by Mr Thomas on the evening of 17 June 1970. The Police further state, and of course we accept, that it is irrelevant if evidence of this suggests that Mr Thomas committed the murders.

35. We do not wish there to be any suggestion that we have excluded from our consideration any evidence which the Police, or any other party for that matter, considered relevant to this or any other issue. We admitted, subject to relevance, the whole of the evidence given at the second trial of Mr Thomas.

36. We propose to deal with the issue whether there occurred any impropriety in relation to exhibit 350 by considering the whole of the evidence. Our consideration of exhibit 350 will take up a significant part of our report. Exhibit 350 is the most important issue in this whole inquiry.

### 2. Exhibit 350

37. This fired .22 cartridge shell was found by Detective Senior Sergeant Charles on 27 October 1970 in the garden inside the fence surrounding the Crewe house. He was searching that garden with Detective Senior Sergeant Parkes on the instructions of Detective Inspector Hutton, given the evening before at a conference held at the Otahuhu Police Station. The sequence of events which led to these instructions being given is important.



38. It is said that on 11 October, Detective Johnston had noticed in photographs taken at the scene as discovered by the Police on 22 June 1970, that the kitchen louvre windows were open. He thought that possibly the murderer had fired his first shot from outside the house, with one foot on the parapet beside the back door and his other foot on the windowsill beneath the louvre windows. A reconstruction on the evening of 13 October showed that a shot could be fired into the head of a person sitting in the large armchair known as 'Harvey's chair' by a rifleman in that position. However, the evidence establishes that a shooting in this manner is so unlikely that this possibility can safely be disregarded. (See paragraphs 200 to 202.)

39. On 26 October there occurred a discussion or conference, of which there are no notes in existence, at Otahuhu Police Station, including at the least Detective Sergeant Jefferies, Detective Inspector Hutton, Detective Sergeant Charles, and Detective Sergeant Parkes, and probably also other officers. Because of the lack of any written record of what was said, and the natural difficulty of those concerned at remembering events which occurred 10 years ago, we have not received a clear or satisfactory account of exactly what went on during that discussion. It is evident that there was a conversation between Mr Hutton and Mr Jefferies wherein Hutton asked Jefferies if the relevant flower bed had been sieve searched in August. Jefferies said it had not. As a consequence of that conversation, Mr Hutton detailed Messrs Parkes and Charles to search it the next day.

40. We find this discussion between Messrs Hutton and Jefferies on 26 October very curious.

41. Mr Hutton must have been aware which gardens had and had not been sieve searched, because he gave Mr Jefferies his instructions and received his report. If the Police evidence that the garden was not sieve searched in August is correct, Mr Hutton would have been aware of that fact on the evening of 13 October. That very evening was, therefore, the obvious time to order a search of the garden for a shellcase ejected from beside the louvre windows. We find it incomprehensible that Mr Hutton waited nearly 2 weeks to order that search.

42. By 27 October, the Police had the Thomas rifle, and cartridges with cases identical to exhibit 350, for at least a week, and thus the opportunity to fire a cartridge in that rifle and to plant the shellcase in the garden. We make no findings at this stage, but we point out that the timing and circumstances of the conversation between Mr Hutton and Mr Jefferies are so curious as to lead to a suspicion that it may have been staged for the benefit of those listening to it, namely Messrs Charles and Parkes.

43. It was clear that Mr Charles and Mr Parkes were instructed to use their discretion as experienced officers and members of the armed offenders squad to search the garden, from the back gate forward as far as they believed a shellcase might have been ejected had a shot been fired in the manner suggested by the reconstruction. We place no particular significance on a distance of five yards mentioned in a job sheet by Mr Parkes, since the evidence made it clear that the matter was left to the discretion of the two officers.

44. Mr Charles and Mr Parkes arrived at the Crewe house at about 10 a.m. on 27 October. They carefully weeded the area of flowerbed to be searched, examining the vegetation as they went. The vegetation was light



Sig 2*

and easily removed. It is of significance that Mr Parkes did not remember their having to remove from the garden a large plant, shown in a photograph taken on 23 June as growing immediately beside the back gate. This fact suggests, although it does not on its own establish, that the August search was at the very least a thorough one, and possibly a sieve search, for the simple reason that it is clear that the photograph to which we refer was taken after the initial search in June. In other words the plant was not removed in the initial search in June and must have been removed in August. We shall return to this factor at a later stage.

45. About 10.30 a.m., the two officers began their search of the earth in the garden. They initially used a small garden fork and a sieve, but soon found that the soil was puggy and damp, and would not break up even if shaken. They therefore adopted the system of Mr Parkes moving ahead to loosen and break up the earth with the fork as far as possible, while Mr Charles moved along behind breaking the soil down with his bare hands. The soil was searched to a depth of about 6 inches.

46. After between 1–2 hours of searching, i.e. some time between 11.30 a.m. and 12.30 p.m., Detective Charles found the shellcase which was to become exhibit 350. The shellcase was buried in the garden, and we accept Detective Charles' estimate that it was buried to a depth of approximately 2–3 inches.

47. The colour of the cartridge case when found is of importance in relation to the corrosion evidence, considered below. We consider particularly relevant in this regard the evidence of Mr Charles and Mr Parkes, who after all found it. Mr Charles said that his recollection was that there was a tarnishing, discolouring effect, with the colour being a dark brown, darker than the normal colour of brass. Mr Parkes said that it was a sort of brassy coppery brown, with a darkish look about it. Neither had any recollection of seeing on the cartridge case the inky black stains which evidence established is one characteristic of corrosion. Nor, significantly, did Mr Shanahan of the DSIR, who first saw the cartridge case the next day, and who was obviously trained to notice such matters, see such a stain.

48. Despite the pugginess of the soil, the cartridge case, curiously enough, contained bone dry soil, which fell out as Mr Charles handled it.

49. Having examined the shellcase with Mr Charles, Mr Parkes went to their car to attempt to contact Inspector Hutton by radio-telephone. He was not able to do so, probably because Mr Hutton was interviewing Mr and Mrs Thomas at their farm at that stage. The two accordingly continued their search until 1 p.m., at which time Mr Parkes was able to contact him by radio-telephone and arrange a rendezvous at the home of Mr and Mrs Priest. There they showed him the cartridge case. Its importance was obviously realised by all of them; all three went back to the Crewe house; Inspector Hutton was shown the position where the shellcase had been buried, marked by a stake by Mr Charles. That position was 15 ft 10 ins from the wall of the house, a measurement which will become of importance at a later stage.

50. We have found it necessary to set out findings of exhibit 350 in some detail because it is clearly a most important issue in the case. We draw attention at this stage to the fact that Inspector Hutton, in a job sheet completed on 28 October in relation to this matter, mentioned in some detail the colour and condition of the shellcase when he first saw it at the house of Mr and Mrs Priest. He mentioned in particular an inky stain on the cartridge case, and the terms of the description are consistent with a cartridge case subject to a fair degree of corrosion.



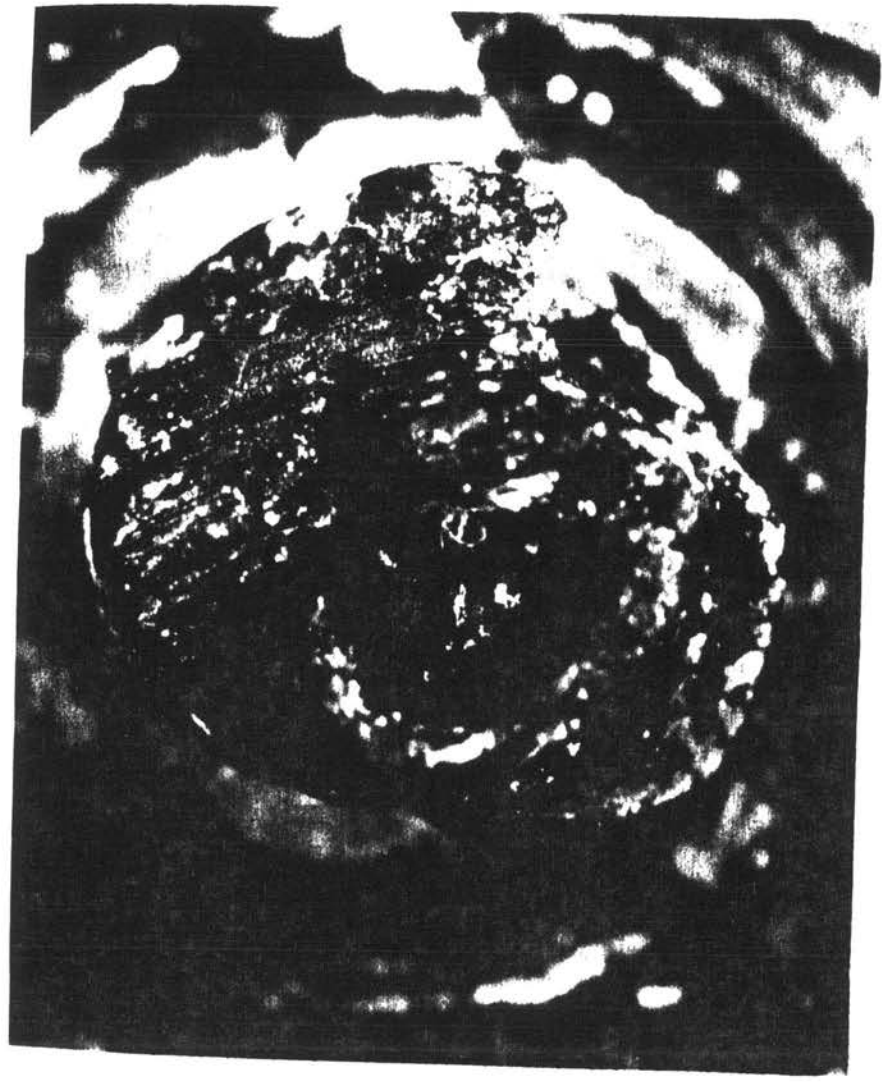


ILLUSTRATION 1

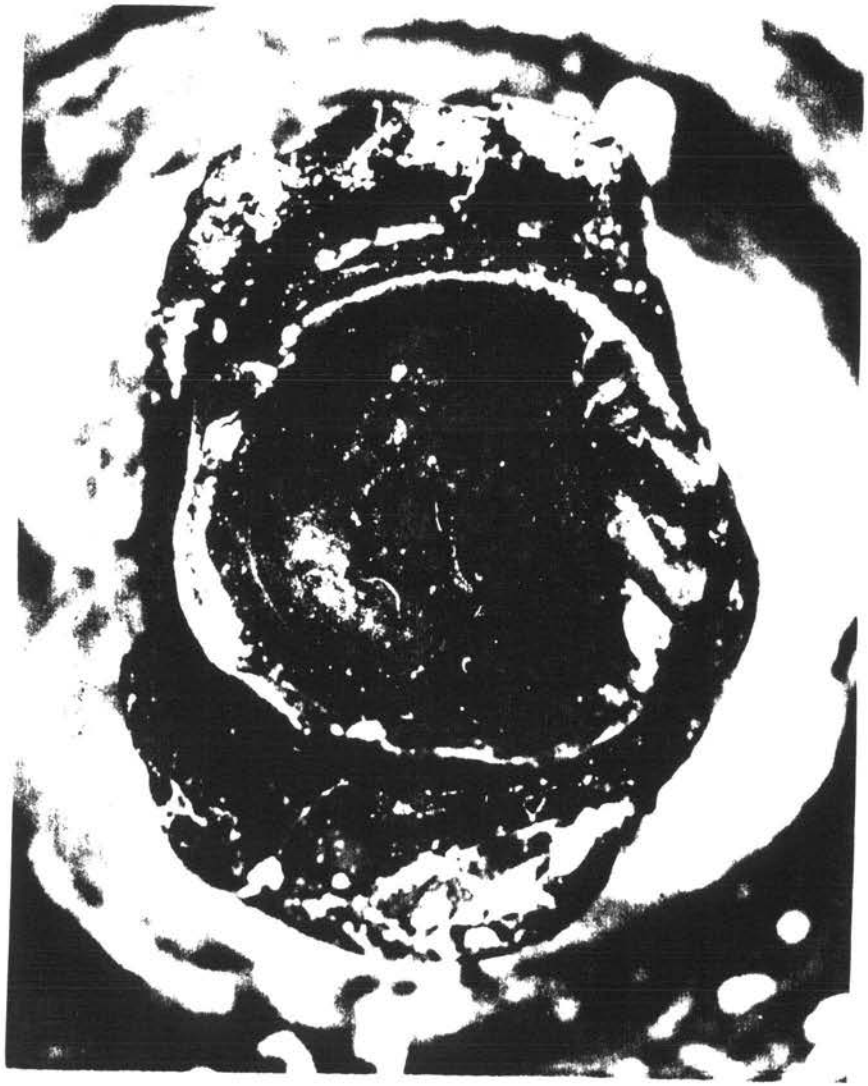


ILLUSTRATION 2



51. Mr Hutton, however, fails to mention that he was contacted by radio-telephone and arranged to meet Mr Charles and Mr Parkes at the Priest house; his version is that he was having lunch at the Priest house when Charles and Parkes arrived and asked to see him. Mr and Mrs Priest, however, gave evidence, which we accept, that Mr Hutton arrived with Mr Charles and Mr Parkes, and that he did not have lunch at their house. In our view, these inconsistencies are significant. We do not accept Mr Hutton's evidence as to the degree of corrosion, preferring instead that of Mr Shanahan, Mr Charles, and Mr Parkes.

52. Mr Charles kept the shellcase in his pocket for the rest of that day, and in his locked desk drawer overnight, and took it to the DSIR next day. The examination by Mr Shanahan conclusively established one fact which we accept and which indeed has always been accepted by all concerned with this case—that it had been fired in Mr Thomas's ·22 pump action Browning rifle, and in no other rifle. Mr Hutton was informed that this was the case on 28 October.

## 3. Exhibit 350—Identification

*(i) Preliminary*

53. Our terms of reference preclude our inquiring into or reporting upon the conduct of the trials by the Crown. We do not propose to do so. We do, however, consider that we are entitled to make two observations:

(a) The first is that the case put by the Crown at both trials was that exhibit 350 contained one of the fatal bullets, probably that which had killed Mr Crewe. Only at the Second Referral to the Court of Appeal in 1974, when doubt was being cast on the connection of exhibit 350 with the fatal bullets, did the Crown advance the possibility that exhibit 350 was a spent shell in the breech of the murderer's weapon, which he ejected as he loaded his rifle prior to approaching the Crewe house. That it took the Crown 4 years to think of that possibility speaks eloquently of its intrinsic unlikelihood.

(b) The second observation follows from the first: The keystone of the Crown case was exhibit 350. The Crown said that this shellcase contained the projectile fired from the Thomas rifle and which killed Harvey or Jeanette Crewe.

*(ii) The Fatal Bullets*

54. Both leaden ·22 bullets recovered from the heads of Mr and Mrs Crewe are shown as illustrations 1 and 2. One had stamped on its base the number 8; and the other had remnants of the number 8. This indicated that the bullets had been manufactured by CAC Industries Limited, of Auckland, (which we shall call 'CAC'). The '8' signified bullets of a particular design, called 'pattern 8', manufactured in great quantities between 1948 and 1963. The last production of them is shown by the company's records to have occurred on 8 November 1963. On that date, they were loaded into gilding metal or copper cartridge cases. The last batch to be loaded into brass cartridge cases was manufactured on 10 October 1963.

55. After 8 November 1963, the records show that CAC changed to making pattern 18 or 19 bullets. These may be distinguished from pattern 8 bullets as follows:

(a) There is no number stamped on their base.
(b) The shape of the nose of the bullet is less rounded and more pointed than is the nose of a pattern 8 bullet.
(c) The bullet has two grooves, or cannelures, around its waist rather than three as is the case with pattern 8 bullets. Pattern 18 and 19 are identical save for the fact that pattern 19 is hollow nosed and pattern 18 solid nosed.

56. Evidence from CAC to this effect was advanced at the first and second trials, since a complete cartridge, exhibit 343, found by Detective Keith in a garage used by Mr Peter Thomas on 21 October 1970, was found when dissected to have a pattern 8 bullet. The inference which the Crown drew was, that a person who had on his property in 1970 one round of ammunition 7 years old, might well have had further rounds of the same age including the fatal bullets. In any event, the effect of the evidence was that the ammunition used by the murderer had been manufactured on or before 8 November 1963.

57. Mr A. M. Aitken of CAC was called to give evidence to the same effect before this Commission. By the time he gave his evidence, following the cross-examination of Dr Nelson and the evidence of Mr Cook and Mr Leighton, to which we shall refer below, it must have become clear to the DSIR that the evidence was steadily mounting to support the proposition that exhibit 350 could not have been manufactured before 1964 at the earliest, and thus could have no connection with bullets manufactured before 8 November 1963.

58. An attempt was therefore made to establish that an '8' may have been stamped on the base of pattern 18 or 19 bullets manufactured after that date, and that the fatal bullets may have been of this type, manufactured after 8 November 1963.

59. The basis of the suggestion that an '8' may have been stamped on the base of a pattern 18 or pattern 19 bullet was that the punches with '8' on the base used in the manufacture of pattern 8 bullets remained in the CAC factory after 8 November 1963. The physical measurements of the pattern 8 punches were the same as the physical measurements of the pattern 18 or 19 punches, which did not have the '8' on the base. Mr Aitken said that it was possible, but highly improbable, that the old punches would have been used in the manufacture of pattern 18 or 19 bullets. We accept his evidence in this regard.

60. One would expect, had this highly improbable possibility ever become a reality, that there would be in existence a large number of pattern 18 or 19 bullets with an 8 on the base. Not a single one has been produced to us and we are certain that an assiduous search has been carried out.

61. Dr Sprott, who has dissected many thousands of cartridges, and whose integrity we accept, said that he had looked for one in vain as a means of disproving his theory. We find that there is not the slightest evidence to support the suggestion that pattern 18 or 19 bullets might have been manufactured with an '8' stamped on the base. Even strong cross-examination failed to produce any evidence to support this possibility now advanced for the first time by the DSIR.

62. It follows that the bullets which killed Mr and Mrs Crewe were manufactured before 8 November 1963. It also follows that, if they were



connected with exhibit 350, then that cartridge case must have been manufactured before 10 October 1963, that being the last date on which CAC loaded pattern 8 bullets into brass cartridge cases.

*(iii) Exhibit 350—Definitions and Background*

63. Most unfortunately, exhibit 350 is no longer in existence. It was disposed of by the Police on the Whitford tip on 27 July 1973, following the Second Appeal being dismissed. There are, however, in existence the following photographs of it:

(a) A series of black and white photographs of excellent quality taken by the DSIR of the base of the cartridge case soon after its discovery, for the purpose of showing the firing pin impressions. These include one photograph showing the whole of the base, which is illustration 3, and others showing parts of it:
(b) A colour photograph of exhibit 350 and of other cartridge cases was taken by the DSIR to illustrate Mr Shanahan's corrosion evidence.
(c) A black and white photograph of exhibit 350 taken by the defence before exhibit 350 and other exhibits were sent to England on 26 June 1972, for examination by the Home Office.

Those who examined the cartridge case before its destruction were also, of course, able to give evidence about it.

64. A cartridge or round of ·22 ammunition consists of a metal cartridge case, and a bullet or projectile. The cartridge case is cylindrical in shape, and has a rim at the base wider than the body of the case. It is this rim which contains the priming substance in rimfire ammunition. The body of the cartridge case contains gunpowder. The leaden bullet fits into the open mouth of the cylindrical cartridge case so that the cannelures are visible.

65. The letters ICI stamped in the base of exhibit 350 identified it as a product of the Ammunition Division of ICI Australia Limited, which was renamed at a later stage IMI Australia Limited. We shall refer to this company as 'ICI'. It was part of the world-wide Imperial Chemical Industries Limited group of companies, which had ammunition factories in other parts of the world. The ICI trademark which they stamped on their ammunition in other countries is different from that used by ICI in Australia, at their Melbourne factory.

66. It is clear on the evidence, and all parties accept, that exhibit 350 was a dry primed brass long rifle rimfire cartridge case of ·22 calibre. A number of terms should at this stage be defined for the sake of clarity.

67. The term 'dry primed' refers to a technique of priming in the course of manufacture of the cartridge case, which Dr Sprott explained. The final stage of manufacture of the cartridge case involves priming and the formation of the rim. Up until that stage, the cartridge case consists of a blank-ended tube with an outside diameter of 0.22 inches and of a length sufficient to form the final cartridge case. At this stage, a small disc of primer material is inserted into the cartridge case and forced to the bottom against the blank end of the tube. The tube is then placed over a mandrel which is a neat fit inside the tube and which extends down until it touches the primer. Another piece of metal, known as a bumper, is then forced against the closed end of the tube.

68. The bumper carries the lettering, in reverse and embossed, which is to be incused into the cartridge case. As the bumper is forced against the

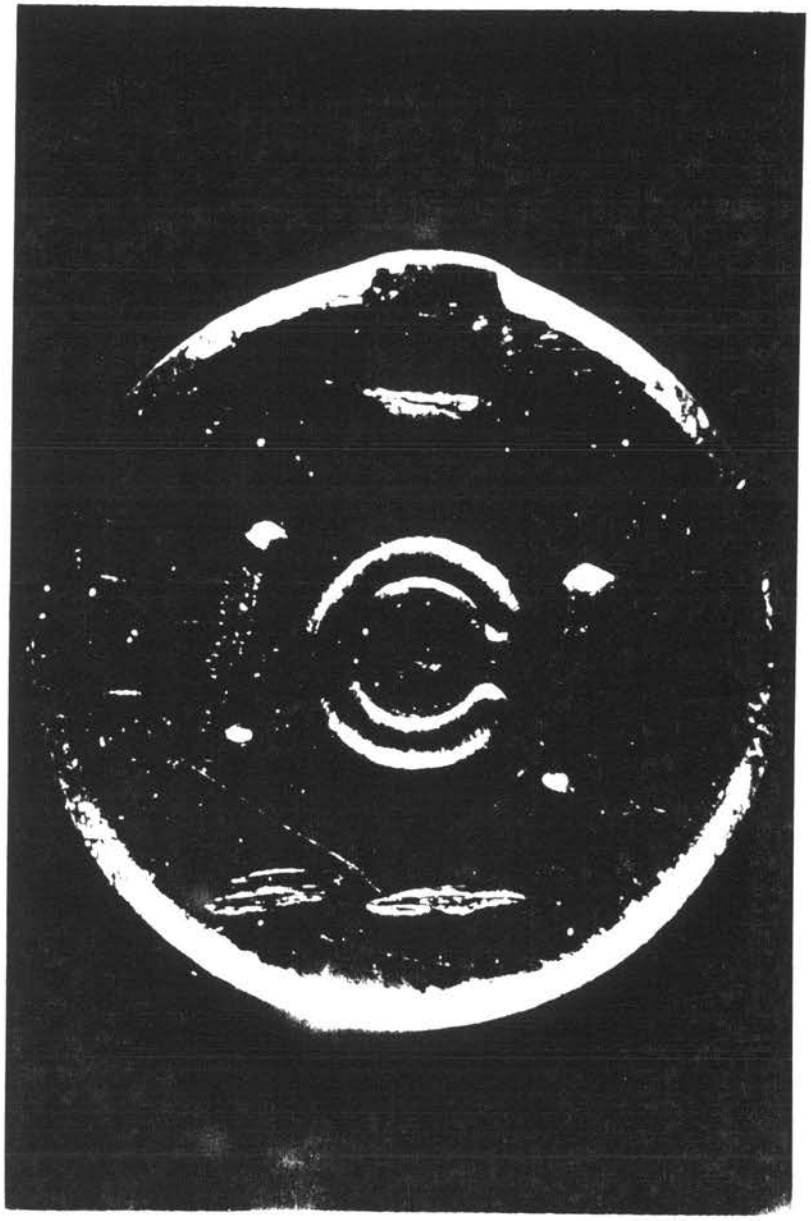


ILLUSTRATION 3



bottom of the tube it causes a considerable compression force to be exerted on the metal, which then expands sideways together with the priming material so as to form the rim of the cartridge case. Since the priming substance is in solid form during this operation, the process is called 'dry priming.'

69. Dry priming is to be distinguished from wet priming, which involves priming of the cartridge case by injecting a liquid slurry of the priming substance into the cartridge case after it has been formed by a different process. The technical details of that process are unimportant, but it results in a subtle yet distinct variation in the shape of the rim of the cartridge case which enables experts to distinguish wet primed cartridge cases from dry primed without difficulty. We are best able to express the difference by saying that wet primed cartridge cases appear to us to have a broader and more rounded rim than do dry primed cartridge cases. The difference in shape is of vital significance in relation to a cartridge case known as exhibit 1964/2, to which we shall return.

70. The term 'long rifle' refers to the length of the cartridge case. A 'long rifle' case contains more powder than an ordinary case, and is accordingly more powerful. The term is of no significance to what follows.

71. The term 'rim fire' means that the priming substance is contained in the rim of the cartridge case and that the firing pin of the rifle must therefore strike the rim of the cartridge case. When that occurs, the priming substance explodes and ignites the gunpowder contained in the body of the cartridge case. The rapid combustion of the gunpowder produces gases which force the bullet out of the mouth of the cartridge case and through the barrel of a rifle. The photograph of exhibit 350, which is illustration 4, shows the rectangular firing pin impression of Mr Thomas's rifle.

72. The letters 'ICI' on the base of exhibit 350 are of the 'Sans Serif' type, which was introduced by the company in the late 1950's. The exact date is immaterial, but Mr I. K. Cook gave as his educated guess June 1959. Since he started at ICI in 1951, took over as Superintendent of the Rimfire Section in October 1958, and was Manager of the Ammunition Division at its closure in 1979, he was an ideal witness to give evidence on what occurred in the ICI factory. We unhesitatingly accept his evidence on the various matters to do with ICI's manufacture of ammunition with which he dealt.

73. It is appropriate that we mention at this stage that the evidence of those witnesses such as Mr Cook, Dr Sprott, and Dr Nelson who had first hand contact with the records and manufacturing process of ICI was of great importance, since the factory has now closed and all records have been destroyed. Such records and other documents as were produced before the Commission had been extracted by those concerned with the matter in the years 1973 to 1975.

74. Before 1959, various motifs, including 'ICI' in serif style lettering, and 'ICI' inside a broad arrow were used to identify the ·22 ammunition manufactured by ICI. The sans serif style lettering with which we are concerned was used until 1971 when the lettering was changed to a single 'I' consequent upon the change in the name of the company to IMI Australia Limited.

75. The process of manufacture of dry primed cartridge cases has been outlined in paragraph 42 above. The bumper there mentioned is a small steel tool with raised lettering embossed on its surface which stamps the impression 'ICI' in the base of the cartridge case.

ILLUSTRATION 4



76. Bumpers were manufactured from steel tools known as hobs which had the letters 'ICI' engraved in their surface. A large number of bumpers, up to 400 at a time, were made from any particular hob. A bumper was used in one of up to 24 machines suitable for the manufacture of ·22 cartridge cases. Mr Cook estimated, and we accept, that on average 10 machines were employed in the manufacture of ·22 long rifle brass cartridge cases. Each was capable of making 100 per minute, or about 40 000 per day. It will thus be apparent that the average daily production of the cartridge cases with which we are concerned was of the order of 400 000. The significance of these enormous numbers will become apparent when we consider a suggestion put forward by the DSIR that exhibit 350 belongs to a special category of cartridge case produced before 1963, and is, it would seem, the only example of that category which can be found.

77. Prior to use, bumpers were covered with chrome plating, which wore off as they were used. Mr Cook's memory was that the average life of a bumper before replating was necessary was about a day, and that the average bumper could be replated 6–10 times before the lettering was worn to such an extent that the bumper would no longer give a distinct print. Mr Cook said that he had in 1973 checked the company's records and established that during the years 1960–1965 bumpers were ordered on the following dates:

26 May 1960
6 February 1961
30 August 1962
30 November 1963
7 July 1965.
17 September 1960
27 September 1961
1 April 1963
29 September 1964

These dates are consistent with Mr Cook's memory of the length of time for which a bumper could be used, and the number of times it could be replated, when one bears in mind that fewer than 400 bumpers were manufactured on occasions.

78. Although there were many bumpers in use, there were few hobs. A hob is a steel tool used to manufacture bumpers in a hydraulic press, the steel bumper being pressed into the hob with such force as to cause raised lettering to appear on the head of the bumper.

79. ICI manufactured their own bumpers from hobs which they also produced but which were engraved for them by C. G. Roeszler & Son Pty. Ltd. to their specifications. Both hobs and bumpers were produced from tool drawings which specified their measurements.

80. The earliest of the relevant tool drawings in respect of bumpers is P3054. It is clear that it was originally drawn on 13 August 1953 with serif style lettering. The drawing records that, on 28 January 1959, the dimensions of the letters were changed. The specification had previously been a thickness of .012 inches and a height of .062 inches. It was changed to a thickness of .012 to .015 inches and a height of between .065 and .070 inches. On 9 February 1960, the drawing records 'Form of lettering changed to suit hob.' Since the later version of the drawing is marked 'Use hob P4773', it is a reasonable inference that P4773 is the hob drawing referred to.

81. The next drawings in time are P4643 in respect of bumpers and P4646 in respect of hobs, both drawn on 11 August 1958. The dimensions of the sans serif letters 'ICI' on the two drawings are identical, namely a height of .062 inches and a thickness of .012 inches. The obvious inference

is that they were intended to be used together. P4643 has written on it an undated note 'Not to be used—see P3054'. P4646 has written on it an undated note—'Do not use see P4773'.

82. P4773 is a hob drawing. The copy available is the second issue which was drawn on 16 March 1959. Mr Cook said that what was done on that date may merely have been a redrawing of a drawing completed only a short time earlier. The drawing has sans serif style lettering with a height of .065 to .070 inches, and a width of .012 to .015 inches, that is, the same dimensions as P3054 from 9 February 1960.

83. In our view there are clearly two pairs of drawings involved, one in each case for a bumper and the other for a hob. The pair with smaller lettering comprises P4643 for bumpers and P4646 for hobs; the pair with larger lettering comprises P3054, as redrawn, for bumpers and P4773 for hobs.

84. Mr Cook of course gave evidence that the change to sans serif style lettering occurred in June 1959. Drawings P4643 and P4646 were in existence at that time and may have been used for the changeover. This is not, however, a point on which it is necessary for us to make a definite finding.

*(iv) Dr Sprott's Category Theory*

85. It is appropriate at this stage to move forward in time to the development of the theory which has enabled the categorisation of the headstamps of cartridge cases manufactured by ICI. In the last week of Mr Thomas's second trial, on Tuesday, 10 April 1973, Mr Vesey, Chairman of the Arthur Allan Thomas Retrial Committee, brought to Dr Sprott a matchbox containing a number of cartridges and a letter. The letter drew attention to the fact that pattern 8 bullets seemed to be allied with certain types of lettering on the base of cartridge cases and not with others. The letter and matchbox had been forwarded by a Mr J. B. Ritchie of Dannevirke, a sports goods dealer, and apparently a former member of the New Zealand Police Force.

86. By the evening of Thursday, 12 April, Dr Sprott had established the following four categories of cartridge cases:

Category 1 'Broad arrow' enclosing letters 'ICI'.

Category 2 serif style ICI lettering.

Category 3 sans serif style ICI lettering, small letters.

In his evidence at the second trial given the next day, Dr Sprott drew attention particularly to the letter 'C' which he said had a height of approximately 1.2 mm or ·057 inches.

Category 4 sans serif style ICI lettering, larger letters.

In his evidence at the second trial, Dr Sprott said that the letter 'C' of category 4 had a height of 1.5 mm or ·064 inches.

87. The point of Dr Sprott's analysis was that categories 1, 2, and 3 always contained a pattern 8 bullet, category 4 a pattern 18 or 19 bullet. Dr Sprott had also examined exhibit 350 and exhibit 343 in circumstances to which we shall refer in some detail at a later stage. He found that exhibit 350 fell within category 4, exhibit 343 within category 3. The effect of his evidence was that exhibit 350 had no connection with the fatal bullets.

88. Evidence in rebuttal was subsequently given by the Crown. The main evidence was that of Dr D. F. Nelson of the DSIR who had been given the opportunity to examine both exhibits 343 and 350 during an



adjournment. He said that the height of the letter 'C' was identical in both cases and was 1.57 mm, which corresponds with the height which Dr Sprott had given for his category 4. The point was that there was no difference between exhibit 350 and exhibit 343, it having of course been established that the latter had contained a pattern 8 bullet.

*(v) Evidence before the Commission*

89. Considerably more evidence has been put before this Commission that was put before the jury at the second trial. That evidence is the fruit of years of dedicated investigation by Dr Sprott and Mr P. J. Booth, of thoughtful analysis by Professor N. A. Mowbray, and of thorough preparation for the Second Referral and for this hearing by the DSIR. We have had the opportunity of reading the material put before the Court of Appeal at the Second Referral; it is quite apparent, and we do not mean to criticise anyone concerned with the case in the Court of Appeal on either side when we make this comment, that this matter was far more extensively canvassed before us than before the Court of Appeal. It follows that we are in a better position to examine the evidence on the cartridge case issue and to draw conclusions from it than either of the other Tribunals which have examined the matter.

90. We propose to refer first of all to the whole of the evidence now adduced for and against Dr Sprott's theory, with the exception of exhibit 343. We shall then consider exhibit 343. Its importance is, of course, that if Dr Nelson's measurements are accepted, it is the example of a pattern 8 bullet combined with a category 4 cartridge case which in Dr Sprott's theory should not exist.

91. Dr Sprott's categorisation of cartridge cases has changed over the years only in two essential respects. The first is the inclusion of one additional category, the so-called 'wide I' which is similar to category 4, but has an overall width of the letters ICI about ·012 inches greater than the ·125 inches of category 3 and category 4. We shall return to the explanation of this odd discrepancy in due course. The second is a sub-category of category 3 with slightly smaller letters.

92. We heard evidence on the validity of Dr Sprott's categorisation theory from Dr Sprott himself, from Mr Booth, from Professor N. A. Mowbray, formerly Professor of Engineering at the University of Auckland, and now Professor Emeritus, and from Dr D. F. Nelson and Mr I. F. MacDonald of the DSIR. Mr MacDonald is the Dominion Analyst and Director of the Chemistry Division of the DSIR. We do not propose to traverse the whole of their evidence, which was often of a highly technical nature, is not susceptible to proper presentation without extensive use of photographs and graphs, and is in any event to be found in the transcript of our proceedings.

93. It is a fair summary of the position to say that all were agreed that differences do exist in the shape of sans serif ICI headstamps. The point at issue is whether the different headstamps can be placed into different categories and, if so, the number of these categories. Dr Sprott asserts, as he has done since 1974, with the support of Professor Mowbray, that there are only three categories, namely: Category 3 (a and b), Wide I, category 4.

94. The DSIR witnesses on the other hand contended for a larger number of categories and were initially at least disposed to argue that even their investigations had not isolated every category.

95. Dr Nelson was the first witness on this topic. He was extensively cross-examined. Dr Sprott was the next witness. Before beginning to cross-examine him, counsel for the DSIR made a concession which was important. It was that, were it not for the uniqueness of exhibit 350 and the fact that exhibit 343 had a pattern 8 bullet, the DSIR would probably be able to accept on the balance of probabilities the correctness of Dr Sprott's categorisation and accordingly that exhibit 350 would not have had a pattern 8 bullet.

96. Dr Sprott was then cross-examined. Mr MacDonald was the next witness. At the end of his prepared brief, he had stated his conclusion that exhibit 350 may have had a pattern 8 bullet. He was asked by counsel assisting us how probable that was. His answer is quoted in full:

> 'I would think that we have always said that it may have happened. I would think that the chances are it probably did not happen.'

It will be noted that this answer was not qualified by any reference to the uniqueness of exhibit 350 or by any reference to exhibit 343. No further questions were asked of Mr MacDonald save by his own counsel, and the effect of those questions was merely to expand on the reasons for his concession. The evidence of Professor Mowbray, confirming Dr Sprott's categorisation, was then heard.

97. At the conclusion of this evidence we were in a position to identify exhibit 350 and this we did in a statement dated 8 July 1980, the text of which is found in appendix 1. Counsel for the Police has submitted that we so ruled only on the balance of probabilities. That is incorrect, since we avoided expressing the ruling in terms of any standard of proof. In view of that submission, however, we now state that, although the concession of the DSIR was only on the balance of probabilities, we are satisfied beyond all reasonable doubt that exhibit 350 contained a pattern 18 or pattern 19 bullet.

*(vi) The reasons for our Accepting Dr Sprott's Theory*

98. We now propose in the paragraphs which follow to set out the factors, apart from the concession by the DSIR, which have brought us to this view of the matter.

99. We found Dr Sprott's evidence extremely helpful. The beauty of his theory, if we may say so, is its simplicity. The differences between a category 3, a category 4 and a wide I cartridge case can be discerned by the naked eye. Each of us has been able to appreciate the various categories in this way. We think it important that we emphasise that Dr Sprott's theory is not a matter of recondite and abstruse scientific reasoning. It is rather a matter of a difference in shape which, so Mr Booth said in evidence, even his children could readily appreciate.

100. The existence of three categories, rather than the indeterminate larger number for which the DSIR contended, is consistent with Mr Cook's evidence of ICI production techniques and practice. Our earlier description of bumpers and hobs will have made it evident that a cartridge case will bear the same imprint as a bumper (raised lettering) and as a hob (engraved lettering) from which the bumper is made. Having regard to the number of bumpers made from a hob, and the number of cartridge cases manufactured from a bumper, very many identical cartridge cases were of course manufactured from any single hob.

101. Furthermore, one category of cartridge cases, stemming from a particular hob, would remain in production for a long time, since many



bumpers were made at the same time and more could be made until the hob collapsed under the pressure of the hydraulic press or its lettering became outmoded. The comparatively small number of bumper orders to which we have already referred is consistent with few hobs, each giving rise to many bumpers and cartridge cases, all of one category, rather than many hobs and many categories.

102. In general terms, therefore, Dr Sprott's theory is consistent with the evidence which was given as to production techniques and practice in the factory where the cartridge cases were made. The DSIR theory, suggesting a larger number of categories, is not consistent with this evidence.

103. On 1 October 1963, two hobs engraved by C. G. Roeszler & Son Pty. Ltd. in accordance with drawing P4773 were delivered to ICI. Those hobs were produced to us. One has scratched on it the word 'new', the other the words 'P3054-11.11.63 current use.' Both are of Dr Sprott's category 4 and they are indistinguishable.

104. It should be explained that it was the practice of ICI to take samples from its production for testing over a period of 10 years. In 1973, there were available for examination by Dr Sprott and Mr Cook samples dating back to September 1963. Examination of the first of these samples showed wide I shellcases only, in March 1964 the first category 4 shellcases; and from 23 September 1964 exclusively category 4 shellcases. The inference is that the two hobs marked 'new' and 'P3054-11.11.63 current use' were those delivered on 1 October 1963, and put into production shortly after that date.

105. Dr Sprott said that exhibit 350 was of category 4. Dr Nelson and Mr MacDonald said that it was different from Dr Sprott's category 4 because of its unusually thick right hand letter I. Professor Mowbray and Dr Sprott explained to us that the variation in the thickness of the letters was due to wear in the bumper. We do not find it difficult to accept that a steel bumper brought down with force against brass cartridge cases resting on a steel mandrel will suffer considerable wear in the course of its working life. Such wear is the reason for the replating which Mr Cook mentioned.

106. Nor do we find it difficult to accept that the effect of wear could be to cause the raised letters to become slightly thicker and fatter, thus causing a wider impression. Professor Mowbray explained to us exactly how such wear may occur, and was able to illustrate his thesis by reference to a series of photographs of the raised letters of a worn bumper in cross-section, taken by the DSIR. Those photographs graphically demonstrate and put beyond doubt the existence of a 'swaging effect' to which Professor Mowbray referred. In our view, the DSIR demonstrated by their own evidence, which we commend them for producing, that the explanation of the thick righthand letter I of exhibit 350 lies in a worn bumper.

107. It is thus apparent that exhibit 350 must have been produced by one of the hobs which were delivered to ICI on 1 October 1963 unless another, virtually identical, hob was in existence at an earlier date. In 1975, Mr Cook had a search of ICI's toolroom records carried out for hob orders prior to and after 1 October 1963. At that time, the records extended back only to 1959. Mr Cook, however, said that they were complete and well kept and we accept his evidence in that regard in preference to that of Dr Nelson, which tended to suggest the contrary. There was no record of any hob being ordered between 1959 and 1963. It

is clear, however, that the following hobs were in existence during that period: two category 3 hobs, and one wide I hob.

108. Category 3 cartridge cases are consistent with having as their progenitor a hob produced from drawing P4646. A hob actually marked 'P4646' has been produced, and Dr Sprott and Professor Mowbray have evidence which establishes that it produced most of the category 3 cartridge cases. Wide I cartridge cases are consistent with having as their progenitor a hob produced from drawing P4773. It may be that these hobs were produced before the date in 1959 (which is not known) at which ICI's records began. Production in that period would be consistent with the dates of drawings P4646 (11 August 1958) and P4773 (redrawn on 16 March 1959).

109. The search revealed also that further hobs were delivered on 8 September 1965 and 12 September 1965. No further hobs were apparently required until the changeover to a different trademark in 1971. We have no need to resolve the matter, but it may be that a hob marked 'Expt' produced to us which is generally of a wide I type, but not the progenitor of Dr Sprott's wide I category was one of these hobs. To summarise, there is nothing in the extant hobs or in the toolroom orders, which we accept as complete, to establish that an additional category 4 type hob was ordered and used before 1963.

110. That such a hob was ordered and used becomes improbable in the highest degree in the light of evidence given to us by Mr George Leighton, Works Foreman of C. G. Roeszler & Son Pty Ltd. That company engraved lettering on hobs supplied by ICI in accordance with a drawing such as P4773; the engraving was carried out on a pantograph machine, which enables stock letters, or templates, to be reproduced on the object to be engraved at a given smaller size. We must thank Professor Meyer of the University of Auckland for giving us the opportunity to see a pantograph machine in operation.

111. The height of lettering required by ICI was very small—between ·062 inches for P4646 and ·065 to ·070 inches for P4773. The pantograph machine did not enable one reduction of this magnitude from template to hob to be achieved. It was, therefore, necessary to make an intermediate template on a piece of scrap metal. Mr Leighton said, and we accept, that such a template had little value. Although it might have been put in a 'template cupboard' which the company maintained, it would not have been the practice for an engraver fulfilling a later order to look assiduously through that cupboard to find an earlier template. He would in any event probably have been unsure whether one existed. It would have been much easier for an engraver simply to make his own fresh intermediate template.

112. Mr Leighton was firmly of the view that it was most unlikely that two engravings made from the same drawing on different occasions would be identical for the following reasons:

(i) Because tolerances existed on drawings such as P4646 and P4773 it is likely that the engravers on each occasion would achieve different final results within those tolerances;

(ii) Both drawings P4646 and P4773 allow the engraver some licence in the positioning of the letters. The engraver would so position the letters as to achieve an effect pleasing to the eye; that effect would vary on different occasions. Mr Leighton referred in particular to the positioning of the letter C relative to the letters I. Measurements which have been taken from extant cartridge cases and from the hobs themselves reveal that the C has been positioned differently on occasions;

(iii) The specification of drawing P4773 does not specify how far apart the 'horns' of the letter C should be. Mr Leighton said that the engraver would consider in this regard the question of an effect pleasing to the eye. Even to the naked eye, it is evident that the horns of the letter C in Dr Sprott's category 4 cartridge cases are much closer together than the horns of the letter C in his category 3 cartridge cases;

(iv) Mr Leighton finally said that wear on the cutting tool could affect the shape of the letters generally. He pointed out that, if the end of the cutting tool had become worn, it would be possible to continue cutting with the same tool to the same depth by lowering the tool slightly. This would cause a slight widening in the lettering.

113. We accept Mr Leighton's evidence, to the effect that the chances of two hobs engraved on different occasions being identical are minimal. We also accept that it was unlikely that an engraver would use on a subsequent occasion an intermediate template of the type which would have been made to engrave the letters ICI. It follows from his evidence that, were two hobs ordered at the same time, the same intermediate template would in all likelihood have been used for both of them.

114. The use of the same intermediate template is in our view almost certainly the explanation of the fact that the hobs 'new' and 'P3054—current use 11.11.63' are virtually identical; it would also appear from the evidence that there existed at one time a further category 3 hob in addition to that marked 'P4646' and which was virtually identical with 'P4646'. In our view, the explanation again probably lies in the use of the same intermediate template for the two hobs.

115. Mr Leighton's evidence is graphically supported by the existence of the wide I category. The heights of the letters of the wide I cartridge cases make it clear that the hob from which they were made (which is no longer in existence) was engraved in general in accordance with P4773. That drawing called for an overall width of lettering of ·125 inches, with a width for individual letters of between ·012 and ·015 inches. Professor Mowbray explained to us that normal engineering practice requires that the engraver work from the centre lines or skeletons of the letters. Half the width of each individual letter would of course be on either side of its centre line. The actual centre to centre distance should, therefore, be ·125 inches less ·012 to ·015 which gives ·113 to ·110 inches. According to Professor Mowbray these are close to the values for categories 3 and 4, namely, ·115 and ·116 inches respectively. Wide I has, however, a distance from the left hand edge of the left hand letter I to the right hand edge of the right hand letter I of about ·125 plus ·012 to ·015 inches, or ·137 to ·140 since, as Mr Cook explained, the lettering served only to identify the product and the only requirement was that it be distinct. Illustration 5 showing a wide I cartridge case and a category 4 cartridge case clearly points out the difference.

116. In summary, then, the wide I category is a fortuitous illustration of Mr Leighton's assertion that an engraver working from a given drawing will in all probability not produce an identical engraving on two separate occasions. We should mention that Professor Mowbray outlined at least nine choices which the individual engraver would have to make, each of

which would vary from engraver to engraver and the existence of which explains from a more theoretical standpoint the reasons for the probable differences in the two engravings. We mean no disrespect to Professor Mowbray when we say that Mr Leighton himself thoroughly satisfied us on the matter by his own explanation given in wholly practical terms.

117. Reference was made in cross-examination of Dr Nelson to a draft affidavit prepared for Mr Leighton during the course of a visit made by Dr Nelson and Mr Hutton to Melbourne in October 1973, which resulted in a document known as the 'Nelson/Hutton report'. We shall refer further to this document in due course. That draft contained the following paragraphs:

> "11. That by using a 'template' on the pantograph machine a high degree of accuracy in the reproduction of similar orders to set specifications is attained. The orders reproduced at different intervals of time with the use of a 'template' would, in my opinion, be identical, provided the same reduction ratios were used."
>
> "20. That in my opinion if on more than one occasion between 1960 and 1963 hobs (female) were engraved by Roeszlers to identical specification drawings for 'IMI' and a retained 'template' was used, such hobs and lettering thereon would be indistinguishable."

118. Mr Leighton altered these paragraphs to read as follows:

> "11. That by using a 'template' on the pantograph machine a high degree of accuracy in the reproduction of similar orders to set specifications is attained. The orders reproduced at different intervals of time with the use of a 'template' would, in my opinion, be similar, provided the same reduction ratios and cutting tool angle and face were used."
>
> "20. That in my opinion if on more than one occasion between 1960 and 1963 hobs (female) were engraved by Roeszlers to identical specification drawings for 'IMI' and a retained 'template' was used, such hobs and lettering thereon would be similar if same reduction, tool angle, and face were used."

119. The reduction, cutting tool angle, and face of the cutting tool are three of the variables which cause the differences between hobs, to which we have referred.

120. The difference between the two drafts is, of course, that the possibility of differences even in two hobs made from the same template on the same day is emphasised by Mr Leighton. It is apparent that Dr Nelson pressed Mr Leighton to agree to the original wording. We propose merely to comment that this incident is indicative of a tendency on the part of Dr Nelson, manifested in other areas in far more serious ways, to shape the evidence to fit his own theories rather than to shape, and if necessary abandon his own theories in the light of the evidence.

121. We have in paragraphs 103 to 115, dealt with the evidence for and against the propositions that the hobs 'new' and 'P3054—current use—11.11.63', were the hobs delivered on 1 October 1963 to ICI, and that exhibit 350 was produced from one of them in 1964 or later. That evidence satisfies us that both propositions are correct. It was, however, powerfully reinforced by further evidence from Professor Mowbray and Dr Sprott to which we shall now refer.

122. At the Second Referral to the Court of Appeal, Mr MacDonald gave evidence on this matter for the first time. He had examined some 150 headstamps and made careful measurements of the dimensions of the letters. He had then had the idea, to which Professor Mowbray was



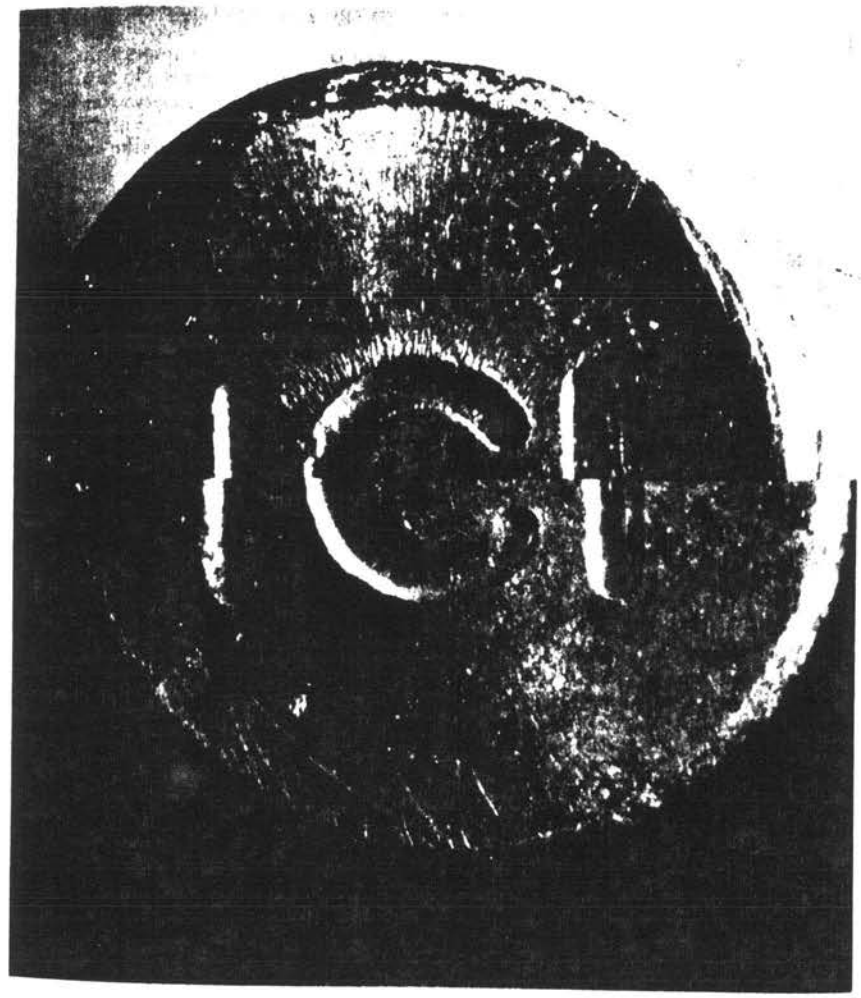


ILLUSTRATION 5

prepared to give his admiration, of plotting certain of the measurements on a graph so as to provide a readily understandable visual illustration of the results. He produced his evidence given to the Court of Appeal to us, and the conclusions which he drew then remained unchanged. They were that the headstamps fell into seven groups, although Mr MacDonald did very fairly concede that the groups fell into three discernible 'patterns', which could be identified as Dr Sprott's category 3, wide I, and category 4.

123. Mr MacDonald had examined exhibit 350 from photographs. Because of its unusually thick right hand letter I, he saw exhibit 350 as an outlier, not falling within any of his groups. We produce as illustration 6 Mr MacDonald's figure 3, which puts exhibit 350 fairly close to a number of cartridge cases which Dr Sprott described as category 4, but to the side of their grouping.

124. Professor Mowbray was brought into the case by Dr Sprott to give an independent opinion following Mr MacDonald's evidence at the Second Referral. Dr Sprott had appreciated that an expert engineering opinion was necessary. We unreservedly accept that Dr Sprott left Professor Mowbray to form his own view on Mr MacDonald's evidence.

125. Professor Mowbray immediately appreciated the worth of Mr MacDonald's system of transferring measurements to graphs. He also realised at once, however, that Mr MacDonald had made one serious error. An engineer, he explained to us, always works on so-called 'skeletal' measurements, from centre line to centre line, for the simple reason that such measurements are exact and absolute, and not subject to variables such as the width of a cutting tool, the amount of wear on a cutting tool, or wear on a bumper used in forming a final cartridge case.

126. To obtain the skeletal measurements of headstamps, Professor Mowbray worked from blown-up photographs. A cutting tool rotates to form the impression left in a hob, eventually reproduced in cartridge cases. At the end of each letter, therefore (i.e., in six positions in all on the letters ICI), semicircular impressions are thus made by the cutting tool. By using a simple yet ingenious device called a 'fillet template' consisting of a series of differently shaped circular lobes, each with a hole at its centre point, Professor Mowbray was able to find the centre of these semicircular impressions and thus the end points of the skeletons of each of the letters 'ICI'. It was then, of course, possible for him to make accurate measurements of these skeletons.

127. The letter C is usually drawn as a uncompleted O. Professor Mowbray had early realised the possible significance of the angle between the centre point of the O and the end points of the skeletons of the C. Since the horns of the C are closer together in category 4 than in category 3, even to the naked eye, that angle must be less for category 4 than it is for category 3. Professor Mowbray wished to measure the angle to establish it as a possible discriminate.

128. He did so by the application of what he was disposed to call simple schoolboy geometry. We reproduce as illustration 7 his figure 8. The principle of geometry to which he referred is that the angle subtended at any point drawn on the skeleton of the letter C by horn centres R and S is half the angle subtended at the centre of the C (or incomplete O) by points R and S. We shall call this the 'horn angle'. There was no difficulty in finding a point on the skeletal line of the letter C and it was thus possible to calculate the 'horn angle'.



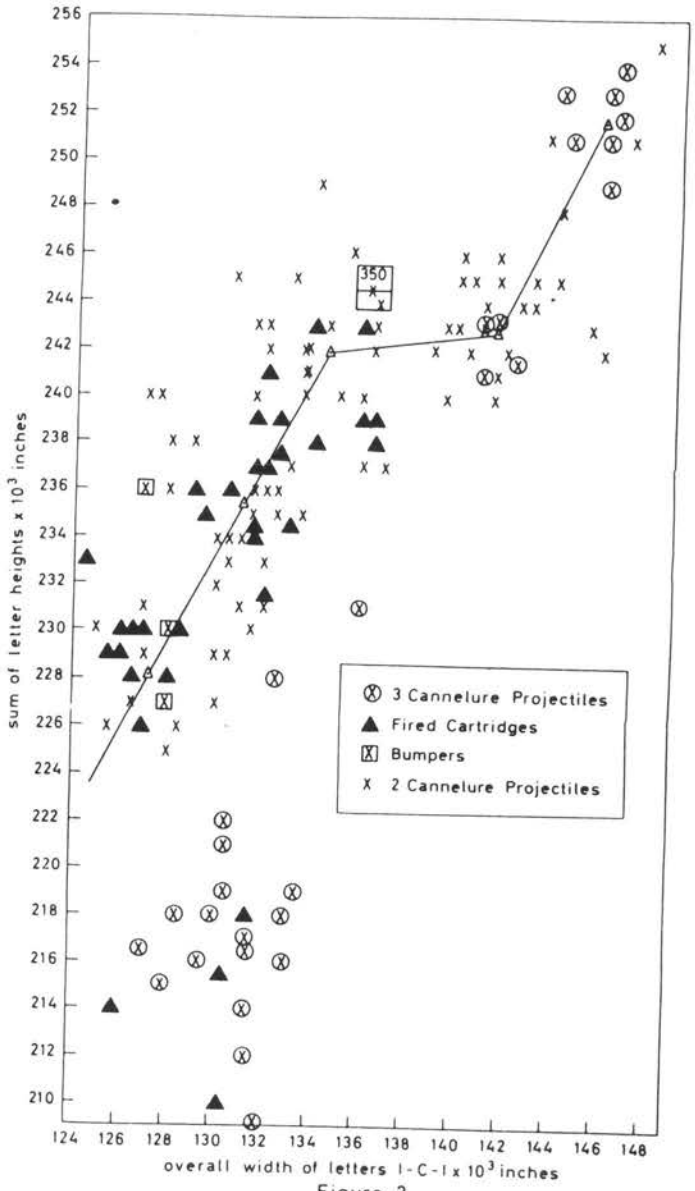



Figure 3.

ILLUSTRATION 6

129. Professor Mowbray found the most useful parameters to be the horn angle and the overall skeletal width of the letters ICI. These are as follows for the various categories:

Category 3: Horn angle—84 degrees, overall skeletal width .115;

Wide I: Horn angle—64 degrees, overall skeletal width .125;

Category 4: Horn angle—62 degrees, overall skeletal width .116.

130. When Professor Mowbray plotted those results on his graph 22, which we reproduce as illustration 8, a dramatic picture of what he described as three islands separated by vast stretches of 'wide open sea' emerged. Exhibit 350 falls, it will be seen, squarely into the centre of the category 4 island.

131. It is Professor Mowbray's view, to which we have already referred in paragraph 71, and which we accept, that the abnormally thick right hand I of exhibit 350 is a product of bumper wear.

132. The point of Professor Mowbray's method of skeletal measurement, including measurement of the horn angle, is that it enables all cartridge cases from a particular hob to be grouped together in one category, irrespective of whether they were produced by a near-new or a badly worn bumper. At the conclusion of his evidence, Professor Mowbray produced a drawing showing category 3, wide I, category 4, and P4773 superimposed one upon the other. We produce this as illustration 9. It demonstrates in graphic form the differences between the various categories.

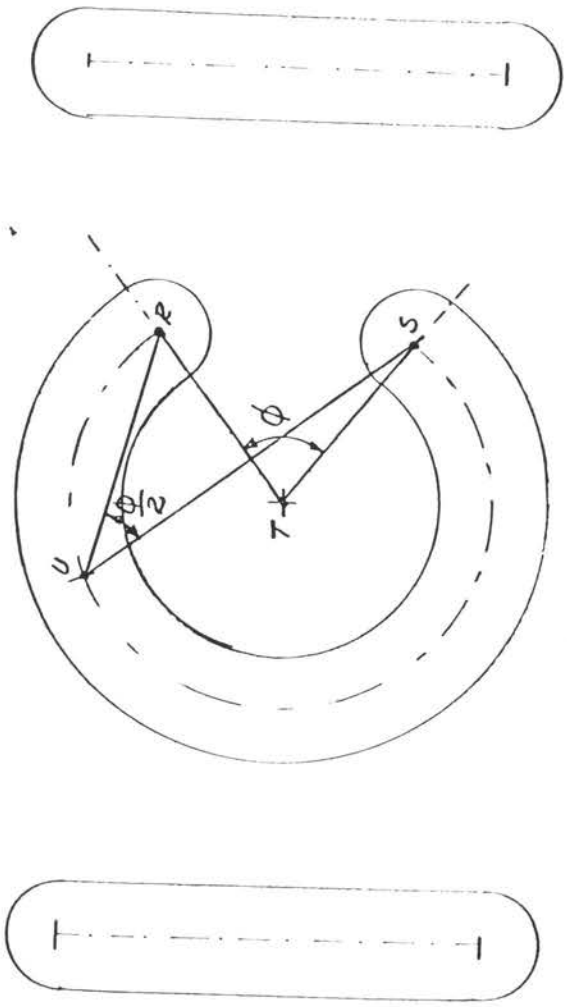
133. Professor Mowbray characterised his parameters as being in the nature of clones, which are immutable whatever the particular and superficial variations between given individuals. The fallacy of Mr MacDonald's method, in his view, which we accept, was its concentration on the particular and superficial variations at the expense of the immutable discriminates. We do not mean to criticise Mr MacDonald, whose scientific ability and integrity we recognise. But his expertise is that of a chemist. Professor Mowbray is an engineer and a most distinguished one. The most sincerely meant compliment which we can pay him is that, ultimately, he succeeded in making an exceedingly complex subject look very simple to us.

134. The other evidence which reinforced our conclusion, referred to in paragraph 99, was that of Dr Sprott. He told us that, at the time of the Second Referral, he has examined nearly 2700 cartridges. Following the Referral, he decided that the only way of proving his theory, which of course involves the negative proposition that exhibit 350 could not have contained a pattern 8 bullet, was to attempt so far as possible to disprove it.

135. At his own expense, he therefore advertised in the press and on the radio seeking from the public as many cartridge cases as possible. He eventually obtained some 26 000. He examined most of them himself, but some were examined by his assistant. All of them were placed in the various categories. The combination of category 4 and pattern 8 was not found. That fact alone speaks eloquently for Dr Sprott and his theory. Mr MacDonald, it must be remembered, examined only 150 headstamps. Dr Nelson said in evidence that he had examined only 64 cartridge cases and 5 hobs.

136. It was established that approximately 8–10 percent of ICI's production was exported to CAC in New Zealand. The evidence revealed regular shipments throughout the year, and it may be assumed that what CAC received accurately reflected changes in the shape of headstamps at






MOWBRAY 8

ILLUSTRATION 7

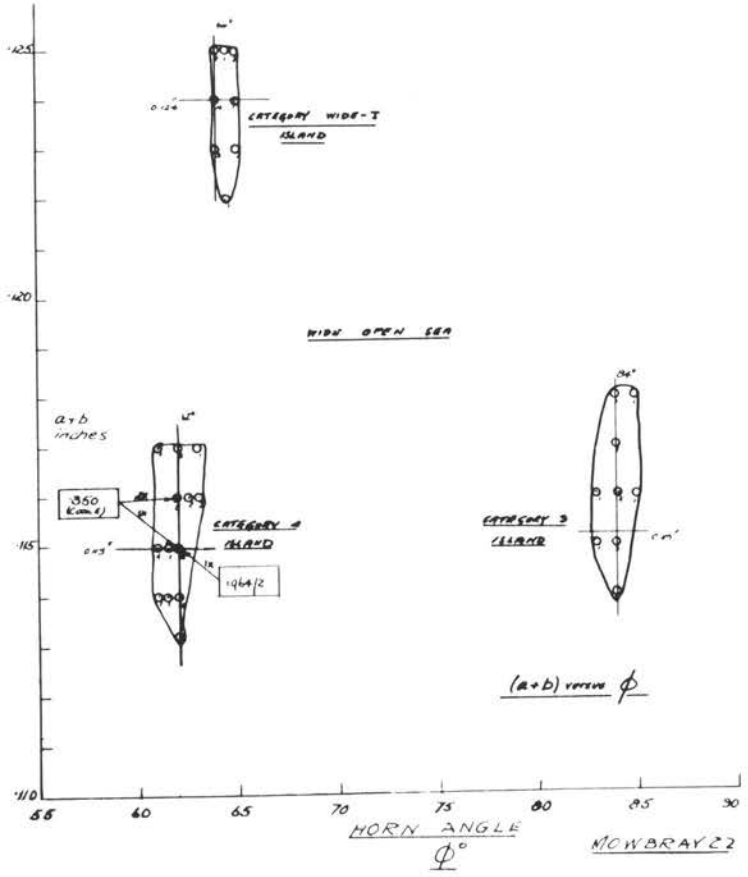



ILLUSTRATION 8



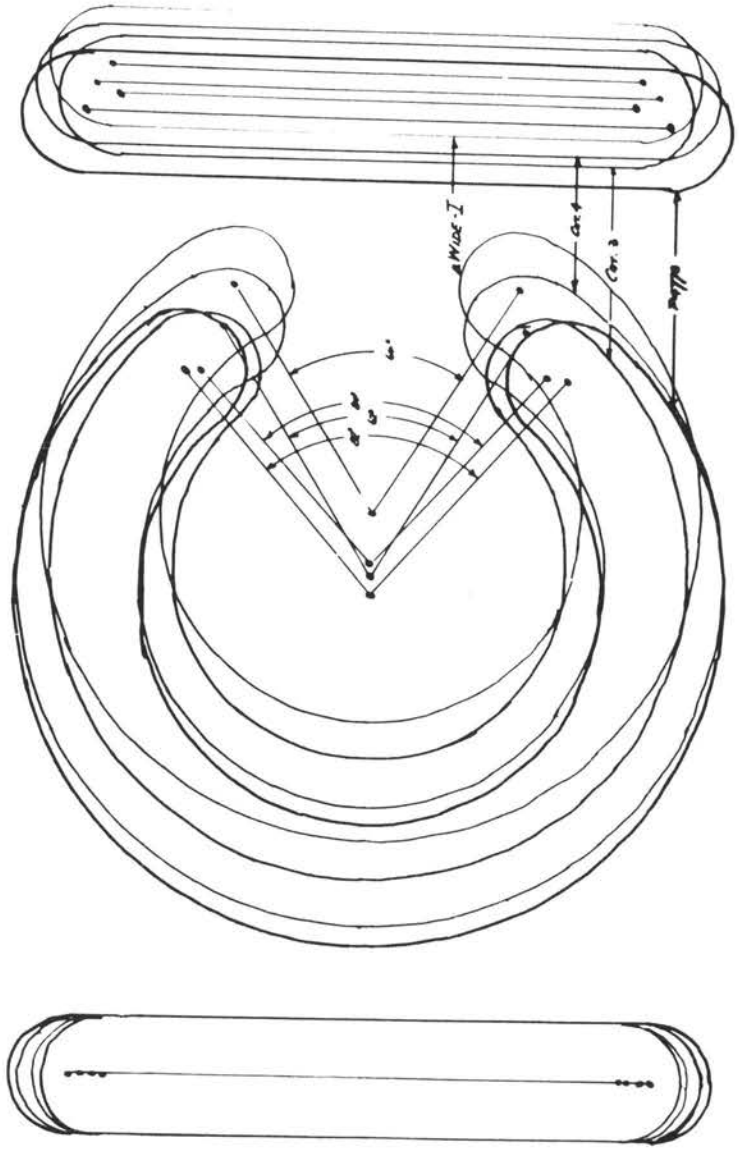



ILLUSTRATION 9

ICI. Mr MacDonald said that, if exhibit 350 was the product of an individual bumper and 8–10 percent of the total production of that bumper had been exported to New Zealand, then one might expect to find only three samples from the same bumper in the Sprott collection. He said, and we accept, that a painstaking search would be needed to find them.

137. The fallacy in Mr MacDonald's reasoning is that it fails to take account of the basic facts of production in the ICI factory. There is no evidence that only a single bumper was ever produced from a particular hob. The evidence is, to the contrary, that up to 400 bumpers were produced from any one hob. One might, therefore, expect up to 1200 brothers and sisters of exhibit 350 in Dr Sprott's collection, each with a pattern 8 bullet, if exhibit 350 had been manufactured from a hob made before 1963. The fact is, of course, that they are simply not there.

138. Many of the cartridge cases came to Dr Sprott in the packets in which CAC had packed them. It was the practice of CAC to stamp packets with their batch number, which changed daily. The date of manufacture of a particular box of ammunition could thus be established. It must of course be remembered that Dr Sprott had no guarantee that each box contained the original ammunition, since members of the public may have packed any odd rounds they could find into a packet. The results shown by the survey make it abundantly clear that this did occur on occasions, because some packets contained cartridges which on no view of the matter could have been manufactured at the date of the particular batch.

139. Overall, the collection, which was displayed to us in its entirety, demonstrates the production sequence which Dr Sprott had postulated. In particular, the changeover from category 3 to wide I to category 4, of which the last portion was seen in the ICI retained samples dating back only to 1963, is seen in the collection. Category 3 cartridge cases have, of course, exclusively pattern 8 bullets, category 4 cartridge cases exclusively pattern 18 or 19 bullets. Only the wide I category has both. The wide I category appears from the collection to have been manufactured for a shorter period than category 3 or category 4.

140. It is fortuitous in the extreme that the wide I category was being manufactured at the time the changeover to pattern 18 and 19 bullets occurred in New Zealand. Had the wide I hob never been produced, and production in Australia moved from category 3 directly to category 4, there would inevitably have occurred the combination of category 3 pattern 18 or 19, and, much more significantly, category 4 pattern 8. In view of the findings which we shall be making later in this report, the existence of the wide I category may be seen as providential.

141. We mention briefly at this stage, and only for the sake of completeness, two matters put forward by DSIR witnesses as counting against Dr Sprott's theory.

142. The first is the so-called 'deep trapezium' theory put forward by Dr Nelson. The substance of it is that Dr Nelson says that the letters on exhibit 350, as well as those on exhibit 343 and on 1964/2, had relatively sharp trapezium-or trough-shaped edges. This is, according to Dr Nelson, in contrast to the more rounded profile of the lettering of the hobs 'new' and 'P3054—current use 11.11.63', and demonstrates that these hobs did not produce those cartridge cases.

143. We do not regard it as established that exhibit 343, exhibit 350, and 1964/2 had trapezium-shaped letterings. We had the benefit of



evidence from Sergeant Bryan Thompson, Officer in Charge of the Firearms Identification Section of the Forensic Science Laboratory of the Victorian Police in Melbourne and an excellent skilled witness. He had made a cast of the outline of the letters of 1964/2 in a dental impression material. The outline is rounded, not trapezium. If 1964/2 is not trapezium-shaped, then we wonder whether exhibit 350 and exhibit 343 were so shaped. Because they are no longer in existence, no one can now tell.

144. Equally significant in this regard, however, is Dr Sprott's explanation of the dynamics of the dry priming process. He explained to us that the forming of the rim involves a stretching of the brass over the raised lettering of the bumper. As the rim is formed, the initially rounded impression of the bumper can be converted into a trapezium-shaped trough as the metal of the cartridge case is drawn over the lettering of the bumper.

145. The second matter is what the DSIR term a discrepancy between hobs 'new' and 'P3054—current use—11.11.63' and category 4 cartridge cases which Dr Sprott says were made from bumpers produced from one of those hobs. Again, we think that the dynamics of the manufacturing process provide a sufficient explanation of any such discrepancy. We do not find it difficult to suppose that a bumper might strike one cartridge case slightly more unevenly than another, and thus leave a shallower impression.

146. Further, Dr Sprott explained to us that the chromium plating of bumpers in an electroplating process would tend to put a thicker layer of chrome on the raised letters of the bumper than on its flat surface; the eventual lettering of the cartridge case could thus be deeper than the lettering on the hob from which the bumper had been produced.

147. Sergeant Thompson gave evidence of measurements of the depth of the lettering on the left hand I of 1964/2. He said that the depth was ·00287 inches at the lower end and ·00370 inches in the middle. That discrepancy within the lower half of one letter demonstrates the lack of consistency in these depths, and their relative unimportance.

148. Finally, it should be noted that no measurement of the depth of the lettering of 350 or 343 was ever made. Mr MacDonald made an effort to compare a photograph of 350 with a photograph of an extant cartridge case, the depth of the lettering on which has been measured. The photograph of exhibit 350 was, however, taken in lighting conditions designed to illuminate the firing pin impression, rather than the lettering. In addition, the photograph of the cartridge case is of course in two dimensions. These factors convince us that it would be quite unsafe, and indeed fanciful, to attempt to draw conclusions as to the depth of the lettering on exhibit 350 from any of the extant photographs of it.

*1964/2 and the Nelson/Hutton Report*

149. One further matter should be mentioned while we are dealing with the reasons we have for accepting Dr Sprott's theory. It relates to a cartridge case which has always been referred to as 1964/2, that being the number which Dr D. F. Nelson gave to it in his cartridge case collection. That cartridge case was at the centre of what we referred to in paragraph 117 as the Nelson/Hutton report, which in fact consisted of a report by Mr Hutton dated 24 October 1973 and an affidavit by Dr Nelson dated

25 October 1973, together with certain other material, forwarded to the Commissioner of Police.

150. This had been prepared in response to a letter and other material from Dr Sprott and Mr Booth enclosed with a letter from Dr Sprott dated 27 September 1973 to the Minister of Justice. The conclusion of the Nelson/Hutton report was that Dr Sprott and Mr Booth's material should be discounted.

151. The then Assistant Commissioner of Police, Mr R. J. Walton, made a report to the Commissioner of Police giving his recommendations on the material put forward by Dr Nelson and Mr Hutton. Mr Walton is of course now the Commissioner of Police. The recommendation was that the material not be disclosed to Dr Sprott and Mr Booth. It is fortunate that the Minister of Justice, Dr Finlay, insisted that it be disclosed, since 1964/2 would otherwise never have been investigated. It does the Police little credit that they were prepared to conduct behind closed doors a private investigation of this crucial matter, with themselves and the DSIR as judge and jury.

152. In his affidavit, Dr Nelson swore that he picked up 1964/2 from CAC between 26 January 1964 and 6 February 1964. It contained an experimental bullet, rather than the pattern 8, pattern 18, or pattern 19 bullets to which reference has so far been made. He swore that, in terms of the height of the letters ICI, their width, their spacing, their shape and their horizontal and vertical relationship to each other, there was no material difference between the lettering on exhibit 350 and on exhibit 1964/2.

153. According to Dr Sprott, exhibit 350 could not have been produced until after January 1964 in Australia and certainly could not have been in New Zealand at the time Dr Nelson said he picked up 1964/2. Dr Nelson's contention was that the existence of 1964/2, and the fact that its lettering was virtually identical to that on exhibit 350, pointed to a hob which could have produced exhibit 350, being in existence in Australia in 1963, if not earlier, and in any event in plenty of time to produce cartridge cases which could have been shipped to New Zealand and filled with pattern 8 bullets.

154. We have earlier mentioned the technique of wet priming in the manufacture of cartridge cases. Mr Cook gave evidence which establishes that, in the years relevant to this case, ICI had only one wet priming machine. The bumpers for the machine were kept in bin 707–9. The original record card for that bin shows that 5 bumpers were put into it on 4 September 1963 and 10 on 11 December 1963. Mr Cook said that those bumpers had been manufactured in England, were of a different shape from dry primed bumpers and had different lettering. We had the opportunity to inspect one of them.

155. Mr Cook also said that, as those wet primed bumpers were used up, ordinary dry primed bumpers were ordered, and delivered on 20 October 1965. At some time after that date, the wet priming machine would have been retooled to take those bumpers, which were presumably produced from either the hob marked 'new' or the hob marked 'P3054—current use—11.11.63'. The only point of importance is that, until 20 October 1965, the English bumpers were in use and in 1963 Australian experiments were in gilding metal. Since it was a wet-primed brass cartridge case, it follows that exhibit 1964/2 could not have been manufactured until after 20 October 1965, and that its similarity to exhibit 350 is entirely unremarkable.



156. How then was Dr Nelson able to say that he picked it up in Auckland in early 1964? It emerged in cross-examination of him, though not we may say in his prepared brief of evidence, that he first gave it that number in 1973. He did so because it was in a container with another cartridge of a different type which, in about 1965, he had labelled 1964/1, because of his recollection then of picking 1964/1 up during a visit he made to CAC in January or February 1964.

157. It is obvious that 1964/2 had little significance to Dr Nelson when he picked it up since he failed to label it then. It is clear that he made a number of visits to CAC over the years. We are quite unable to believe that, finding it in 1973 in a box in his laboratory, he was able to remember picking it up, along with other ammunition, 9 years before. The fact that it was wet primed, and therefore not manufactured until after 20 October 1965, shows conclusively that he could not have done so.

158. We have given considerable thought to Dr Nelson's state of mind in swearing in his affidavit, and again before this Commission, that he picked 1964/2 up in 1964. In our view, he succumbed in 1973 to the temptation to support the Crown case by putting forward a date on which he uplifted 1964/2 which was solely dependent on recollection and surmise. We do not believe that he lied in his affidavit, but we do consider that he was far too ready to put forward 1964/2 as a cartridge case which he had picked up in 1964 for the simple reason that it fitted into his theory.

159. We believed Dr Nelson when he told us that he was not aware of the difference between wet and dry priming in 1973. It must have come as a rude shock to him when Dr Sprott established that there was such a difference, that 1964/2 was wet primed, and that it could not have been produced until after 20 October 1965. At that stage, Dr Nelson had the opportunity to admit his mistake. That would also, of course, have meant admitting that his theory was probably wrong and Dr Sprott's probably right. He failed to take that opportunity.

160. Dr Nelson has for many years been an expert forensic witness for the Crown in criminal cases. It is clear that the fundamental obligation of such a witness is to tell the whole truth in the interests of justice. It is irrelevant whether his evidence helps the Crown or the defence. In our considered opinion, it is grossly improper for an expert witness for the Crown in criminal trials to allow personal vanity, and a stubborn determination to be right at all costs, to colour his evidence as Dr Nelson has done in relation to 1964/2.

*Exhibit 343*

161. Exhibit 343 was found by Detective Sergeant Keith during a search of a garage on Mr Thomas's farm on 21 October 1970. It was found in an applebox with rusty nails and bolts in a garage used by Mr Peter Thomas. It was dissected at the Otahuhu Police Station the same evening, and it was discovered that the bullet had an '8' embossed on its base. It was therefore of significance as being of the same type as the fatal bullets.

162. Those present when exhibit 343, along with a number of other cartridges that had been found in the scullery of Mr Thomas's house, were examined, were Mr Keith, Detective Sergeant Tootill, and Mr Hutton. All agree that some cartridge cases were fired that evening to remove the primer from them. Since the bullets had already been removed when the cartridge cases were placed in the rifle, the firing involved merely exploding the primer.

163. Mr Keith says that exhibit 343 was fired in this way. Mr Hutton says that it was not. We have no hesitation in accepting Mr Keith's evidence for the following reasons:

(a) He has given the same evidence now at the Depositions hearing, two trials, and before this Commission.

(b) There is no evidence that Mr Hutton said it was unfired until he made his report to the Assistant Commissioner of Police, dated 24 October 1973. At that stage it was important to Mr Hutton to establish that Mr Keith was wrong.

(c) Mr Tootill's initial reaction in evidence before us was that exhibit 343 had been fired. His qualification of his answer at a later stage in response to questions from counsel for the Police we found unconvincing.

(d) At the depositions hearing in December 1970, Dr Nelson said that exhibit 343 was fired when he examined it on 19 November 1970. He now says that this may have been a mistake. The particular sentence in his evidence reads:

'On 19 November 1970, I received from Detective Keith exhibit 343, comprising an unfired lead bullet bearing the figure 8 on the concave base and a fired shellcase.'

164. The word 'base' was a correction, the word 'face' having been typed in initially. Dr Nelson initialled that correction. We find it extraordinary that he should now attempt to say that his use of the word 'fired' may have been mistaken.

165. Up until the end of the second trial, the only significance of exhibit 343 was that it showed that Mr Thomas had on his farm one round containing a bullet of the same type as the fatal bullets. It was regarded by Mr Hutton as an important exhibit. Evidence, which we find very significant, was given that Mr Hutton instructed Mr Keith to check on the security of exhibit 343 and exhibit 350 each morning during the course of the second trial once they had been produced.

166. We find it equally extraordinary that the Court staff allowed him to do so without demur. It is again significant that Mr Hutton should have been so concerned about exhibits 343 and 350 even before Dr Sprott had developed his theories.

167. Towards the end of the second trial Dr Sprott examined both exhibits 343 and 350 in the Supreme Court at Auckland. The dates on which these examinations took place have been the subject of considerable evidence. We accept Dr Sprott's evidence in this regard; it is that he examined exhibit 350 first on Wednesday, 12 April 1973, and then exhibit 343 the following day. We accept Dr Sprott's evidence because of his proven integrity and also because he was able to support it with a request dated 11 April 1973 addressed to Mr Kevin Ryan, asking that he be given the opportunity to examine exhibit 350 'very urgently', and with a letter dated 17 April 1973 addressed to Mr Ryan which mentioned in passing that he examined exhibit 343 on Thursday, 12 April. Those are the only contemporaneous documents dealing with the point and what they establish is in our view to be preferred to the memory of other witnesses asked to recall the sequence of dates much later. We also accept a further point made by Dr Sprott, that there was little point in his examining exhibit 343 first, since exhibit 350 was the vital exhibit around which the whole theory was being developed.

168. In his letter to the Minister of Justice of 27 September 1973, Dr Sprott said he examined exhibit 343 on Friday 13 April during the luncheon adjournment. Since the record shows he had completed his



evidence by that stage, that date and time are clearly wrong. Dr Sprott frankly acknowledged as much in his evidence. We find this willingness to admit a clear mistake indicative of Dr Sprott's honesty, rather than the reverse. We accept that his examination of exhibit 343 occurred on Thursday, 12 April after his examination of exhibit 350 the previous day.

169. Dr Sprott gave his evidence on Friday, 13 April. He said that exhibit 343 fell into his category 3. He gave an approximate measurement for the height of the letter 'C' for category 3 as 1.2 mm or ·0157 inches.

170. We observe that Professor Mowbray, whose parameters we have accepted as definitive, had defined the height of the letter 'C' in category 3 as ·0160 inches, which is in good agreement with Dr Sprott's figure. Dr Sprott did not say in evidence that he had actually measured the letter 'C' on exhibit 343, merely that it fell into category 3. He explained to us that the measurement was done on a comparison basis with a pair of dividers preset against a category 4 cartridge case, being placed against the lettering of exhibit 343. This was done under a microscope so that the lettering and the position of the dividers could be clearly seen. Dr Sprott produced a photograph showing the dividers set to the centre of the letter 'C' on a category 4 cartridge case. A further photograph showed one arm of the dividers set approximately in the centre of the letter 'C' of a category 3 cartridge case. The other arm was virtually at the edge of the letter 'C'. The difference is immediately apparent. That difference is what Dr Sprott says caused him to categorise exhibit 343 as a category 3 cartridge case.

171. If Dr Sprott's categorisation of exhibit 343 was incorrect and it was in fact a category 4 cartridge case, then he is either untruthful or inept. All of the other evidence he has given has convinced us that he is a man of integrity and a meticulous scientist. We accept his categorisation of exhibit 343 on 12 April 1973 was correct.

172. Dr Sprott says, and we accept, that the cartridge case of exhibit 343 was unfired when he examined it. His evidence in this regard is supported by that of Mr Miller, the Registrar of the Court, who had been inspecting exhibit 343 with Detective Keith each morning. Mr Miller recalled that exhibit 343 was unfired.

173. In light of our earlier conclusion that the cartridge case was fired originally, this means of course that Dr Sprott examined a different shellcase from that which Detective Keith found. We shall return to this point in due course.

174. Dr Sprott, supported by his assistant Mr Gifford (who was present throughout), by Mr Miller and by Mr Gerald Ryan, says that Mr Hutton came into the courtroom while he was examining exhibit 343 and said words to the following effect: "You have no right to touch that exhibit. It is a Crown exhibit, I intend to call further evidence on it." Such remarks were, if made, quite improper because the exhibits were in any event in the custody of the Court and not in the custody of the Police. They also offend the vital principle of our system of justice, that the defence should have full and unrestricted access to the exhibits. We accept that Mr Hutton made the remarks attributed to him, and we find his action improper.

175. Dr Sprott says that his reaction to Mr Hutton's remarks was to mark the cartridge case of exhibit 343 with the classical sign of the fish, drawn in the upper arm of the letter 'C'. He says that he did so because Mr Hutton told him not to mark the exhibit and because he had a real fear that another shell could be substituted for the one he was examining. Illustration 10 is a photograph of the headstamp of a different category 3

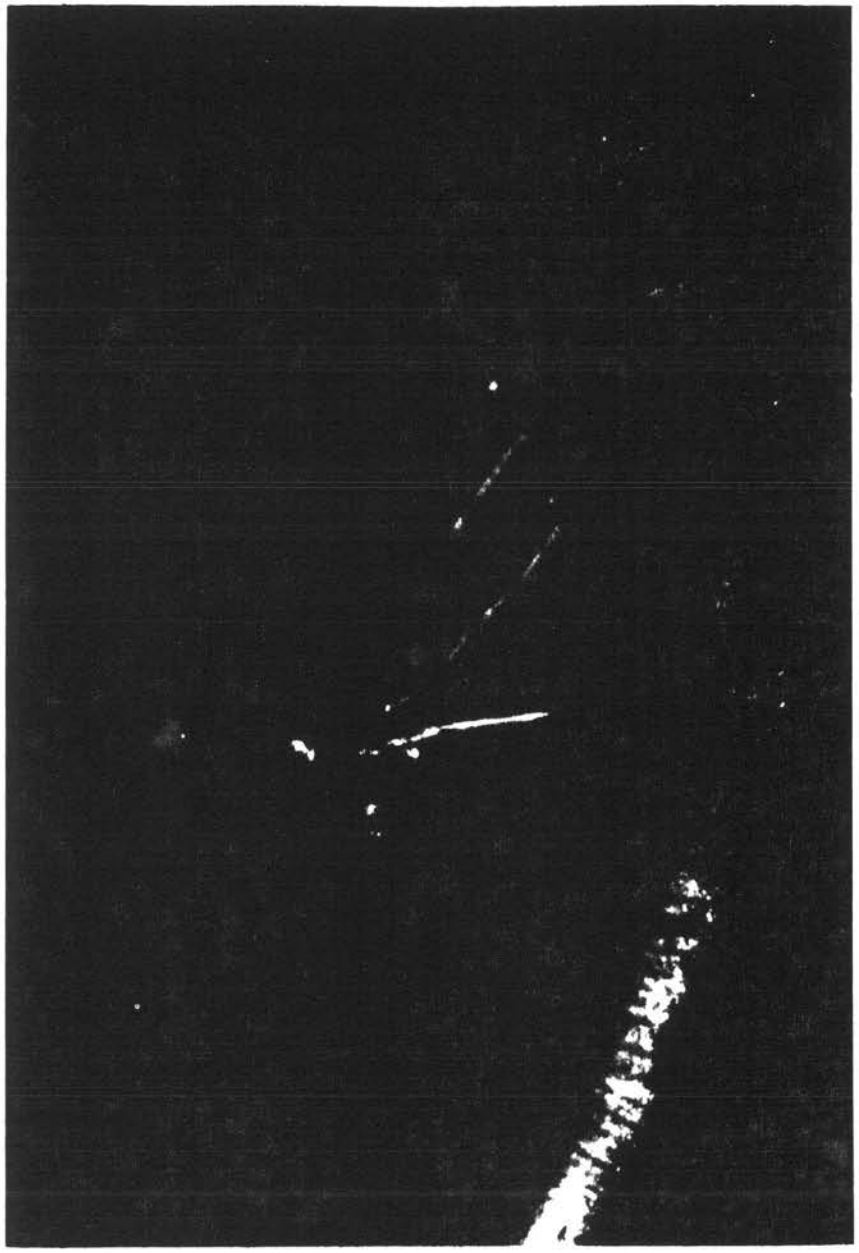


ILLUSTRATION 10



cartridge case, exhibit 343 now having been destroyed, showing the same mark, which has again been made for us by Dr Sprott. It should be mentioned that the mark having been made in a letter approximately ·012 of an inch wide, it is not visible to the naked eye. Dr Sprott says that he was able to make it only because he was looking at exhibit 343 under the microscope. It is to be noted that this is the man whose hands, according to Mr Miller and Detective Abbott, were at this time shaking badly. We do not accept their evidence.

176. Dr Sprott has not previously given evidence of having marked exhibit 343 in this way. It was suggested by counsel for the DSIR and the Justice Department that such reticence on his part suggests that he did not so mark it. That is no more and no less than a suggestion that Dr Sprott is a liar and contrasts oddly with counsel's fulsome praise of Dr Sprott at the end of his submissions for the DSIR.

177. Dr Sprott on the other hand points out that he mentioned marking exhibit 343 as early as 1976 in his booklet (written with Mr Booth) *The ABC of Injustice*. He said he did not specify the mark at that stage or at any time before he gave evidence to us, for fear that a category 4 cartridge case, graced with the sign of the fish in the upper part of the letter 'C' would be produced and put forward as the exhibit.

178. The material which has been put before us demonstrates most graphically the atmosphere which pervaded the second trial and which has haunted this case ever since. It is quite apparent to us that considerations of honesty, fairness to the defence, and proper practice, were of no weight whatsoever to Mr Hutton in his desire to see Mr Thomas convicted for a second time. Dr Sprott's apprehension as to what might occur, were he to make public that he had marked exhibit 343 with the sign of the fish, was in our view well justified. We accept that he marked the cartridge case with the sign of the fish on 12 April 1973.

179. Dr Nelson examined exhibit 343 on 13 April 1973, first in the Crown room at the Supreme Court, later in his laboratory at the DSIR. He also examined exhibit 350. He was unable to find any significant difference at all between the measurement of the 'C' on exhibit 343 and on exhibit 350, which was 1.572 mm for exhibit 343, 1.575 mm for exhibit 350, (i.e. about the same measurement given earlier by Dr Sprott in respect of exhibit 350). He gave those measurements in evidence later that day. When giving his evidence, he also said that exhibit 343 was an unfired cartridge case. He put forward the fact of it being unfired as a possible explanation of such minute differences as he had found between the measurement of the 'C' on exhibit 350 and the measurement of the 'C' on exhibit 343.

180. Dr Nelson's evidence of his measurements was confirmed by Mr Shanahan of the DSIR. We therefore accept that Dr Nelson measured exhibit 343 carefully and that the figures he gave in evidence were accurate.

181. Dr Nelson was questioned as to whether he saw the sign of the fish on exhibit 343 when he examined it. He said that he would probably have seen it, had it been there, during his examination with a hand lens at the Supreme Court, and certainly during his examination with a microscope in his laboratory. He said that he would have noted its existence had he seen it. He said, and we accept, that the sign of the fish was not on exhibit 343 when he examined it.

182. It is appropriate at this stage that we summarise the findings of fact which we have made in paragraphs 161–181:



Sig 4*

(a) The emptied shellcase of exhibit 343 was fired in a rifle at the Otahuhu Police Station on 21 October 1970.
(b) When Dr Sprott examined the cartridge case of the exhibit labelled exhibit 343 on 12 April 1973, the shellcase was of category 3 and unfired. He marked it with the classical sign of the fish in the upper part of the letter 'C'.
(c) When Dr Nelson examined the shellcase of the exhibit marked 343 on 13 April 1973, the shellcase was of category 4 and unfired. The classical sign of the fish was not marked in the upper part of the letter 'C'.
(d) It would therefore appear that exhibit 343 as examined by Dr Sprott on 12 April 1973 was not the shellcase of the cartridge originally found by Detective Keith on 21 October 1970. That fact alone, of course, makes it wholly irrelevant to the Police case against Mr Thomas. We are unable to say in what circumstances the original fired shellcase of exhibit 343 was replaced by an unfired shellcase, but we consider that the circumstances point to negligence rather than deliberate substitution.

183. In this regard, it is significant that all the exhibits, including exhibit 343, were in Police custody from 24 June 1971 until they were produced at the second trial. The evidence establishes that the Police had misplaced cartridge case exhibits during the course of this matter. We refer to the 14 cartridge cases test fired by Mr Shanahan in Mr Thomas's rifle on 29 October 1970, all of which were placed in a labelled container. They were produced as an exhibit at the depositions hearing and at the first trial. They were returned to Police custody along with the other exhibits on 24 June 1971.

184. Arrangements were made for them and other exhibits to be sent to England in June 1972. It was found that only 13 cartridge cases were in the container when it was inspected by representatives of the Police, Defence, and DSIR at Auckland Central Police Station on 26 June 1972. The missing case was later located, according to a report made by Mr Hutton, in a container on its own. The incident is important only insofar as it indicates that the mere fact that exhibits are in Police custody is by no means a guarantee of their validity.

186. It would also appear that the cartridge case of exhibit 343, as examined by Dr Nelson on 13 April 1973, was neither the original cartridge case nor the cartridge case examined by Dr Sprott the previous day. In our view, the substitution must have been a deliberate one, carried out by some person aware that Dr Sprott had found a significant difference between the headstamps of exhibit 350 and the cartridge case of exhibit 343. That difference is, as we have already stated, obvious even from a careful visual examination.

185. We are not able to say when the unfired shellcase was substituted for exhibit 343. Mr Keith was asked whether he inspected the shellcase to confirm that it was in a fired condition when he produced it at the second trial on 4 April 1973. He was obviously surprised by the question. He said after a moment's consideration that he did inspect it and that the shellcase was fired at that stage. We accept that answer, which was confirmed by his subsequent evidence of noticing on that occasion that the firing pin impression was a shallow one.

187. The terms of Mr Hutton's remarks to Dr Sprott during his examination of exhibit 343 on 12 April 1973 may be taken as suggesting



that Mr Hutton was by this stage aware of the potential significance of exhibit 343. It is clear that Mr Hutton had a source of category 4 cartridge cases available to him in the form of exhibit 318. Some of those cartridges had been dissected. It would have taken only a moment to open the phial of exhibit 343, remove the cartridge case and substitute an unfired category 4 cartridge case from exhibit 318 or some other source.

188. It was suggested on behalf of the Police that such a substitution would have been precluded by the fact that the exhibits were in the custody of the Courts. Mr Miller's evidence that Mr Keith was permitted to inspect exhibit 343 and exhibit 350 every morning graphically reveals, however, that the Police were allowed a licence not permitted to the defence in their contact with the exhibits. We are quite certain that the Police would have had no difficulty in obtaining access to exhibit 343 and also exhibit 318 for the purpose of effecting a substitution. In our view, Mr Hutton must have known of the substitution although it may have been carried out by some other person.

189. We summarise our conclusions as follows:
(a) Exhibit 343 was fired in the Otahuhu Police Station on 21 October 1970; an unfired shellcase was substituted for it at some time between that date and 12 April 1973, probably as a result of carelessness on the part of the Police.
(b) An unfired category 4 shellcase was deliberately substituted by the Police to the knowledge of at least Mr Hutton, for the unfired category 3 cartridge case examined by Dr Sprott, between Dr Sprott's examination on 12 April 1973 and Dr Nelson's examination on 13 April 1973.
(c) It follows that Dr Nelson's measurements of the shellcase which he examined on 13 April 1973 do not detract from Dr Sprott's theory.

190. In paragraphs 54–189 we have stated our reasons for believing that exhibit 350 did not contain a pattern 8 bullet and that it, therefore, did not contain either of the bullets that killed Mr and Mrs Crewe. In this we are supported by the final concession of the DSIR accepting that in all probability exhibit 350 contained a pattern 18 or 19 bullet.

191. We now propose to examine the evidence and submissions as to how and when exhibit 350 came into the garden where it was found by Detective Sergeant Charles on 27 October 1970.

## 4. Theories Advanced by the Police to Explain the Presence of Exhibit 350 in the Garden

### *(i) The Louvre Window Theory*

192. Mr and Mrs Crewe lived in a four bedroomed home on their Pukekawa farm. A floor plan is attached as illustration 11. Large bloodstains and other evidence indicated that they were murdered in the lounge and their bodies removed from the house via the front hallway and front door. Large bloodstains of Harvey Crewe's blood grouping and brain tissue were found on one armchair. The evidence suggested that Harvey Crewe was probably in this chair when he was shot.

193. There is room for some differences of opinion concerning the exact positioning of the chair when the deeds were carried out. The evidence of Mr Demler regarding its usual position and that of the Police concerning

the position in which it was found by them when they first entered the house, satisfies us that it was in the lounge in general proximity to a sliding door between that room and the kitchen. This door was normally kept open.

194. In the first few days of their investigation the Police searched the interior of the house thoroughly. They found no evidence indicating the use of a firearm such as spent shellcases, bullets, or bullet marks.

195. On 16 August 1970 the Police learnt that Jeanette Crewe had been shot with a ·22 bullet. A further intense search of the lounge was carried out, specifically looking for evidence of the use of a firearm. No such evidence was found.

196. At the beginning of their investigation, before moving or changing anything at the scene, the Police took a number of photographs. From these photographs it can be seen:

(a) That a flyscreen door at the back door was in a fully opened position against a brick parapet. This was as Mr Dagg saw it on the morning of 22 June.

(b) That alongside the back door there is a set of three windows to the kitchen. The middle set of windows are louvre windows, the top half and bottom half of which can be opened separately. The bottom half of the louvre windows were closed, while the top half were fully open with the panes of the glass in a horizontal position.

(c) The sliding door already referred to between the kitchen and the lounge was open.

(d) One light in the kitchen was on.

(e) An exterior light by the back door was on.

197. From the outset, the Police believed the murders to have taken place within the house. After learning on 16 August that Mrs Crewe had been shot, and, on 16 September that Harvey Crewe had also been shot, the Police continued their investigations in the belief that the shots had been fired within the house.

198. On 11 October 1970, Detective Johnston is said to have raised for the first time the possibility of the murderer having fired the first shot from outside the house by the back door, standing with one foot on the brick parapet, the other on the sill of the kitchen windows, firing his rifle through the open louvre windows and open sliding door towards Harvey Crewe seated in the chair already described.

199. On the evening of 13 October a party of Policemen and DSIR personnel returned to the scene and successfully fired shots in this manner, indicating that it was possible. There is, however, a conflict of evidence as to whether the reconstruction was carried out with the flyscreen door open.

200. The Commission concludes that the first shot was not fired in this way for the following reasons:

(a) Evidence heard by us indicates that such a shot is only possible with the upper half of the louvre windows fully open. The evening of 17 June 1970 was wet, cold, and windy. We do not believe that Harvey Crewe would be seated in the lounge chair within a few feet of such an open window. It was suggested that the window may have been almost closed, but in such a position that the murderer could open it from the outside in preparation for his shot. We consider this would have created a draught which Harvey Crewe could have noticed.



(b) We accept the lighting conditions to have been such that it would have been difficult for the murderer to have seen his rear sight sufficiently well to aim accurately.

(c) The flyscreen door was open. Therefore, on a windy night the murderer had to clamber up and balance himself on a 4 inch wide brick parapet, take a long step of at least 33 inches across to place one foot against a wet, if not slippery windowsill, probably open the window, and set himself in a very awkward position for his shot (and all without touching the flyscreen door which on Police evidence squeaked noisily, or without knocking the rifle barrel on the glass).

(d) By comparison the rear door had the key on the outside, establishing ease of entry by this means.

201. We do not accept the louvre shooting theory to be any more than an impracticable and highly improbable theory without any evidence to support it. Nor do we accept that the first shots would have been carried out that way when the murderer could open the back door and walk straight in and obtain a much better shot. If it were really tenable, we find it inconceivable that observant Policemen would not have directed their minds to such a possibility well before 11 October 1970. Later in this report we will discuss what we see as the significance of the late date upon which this theory was first put forward, and the reason why it was deliberately put forward at the trials as necessary to implicate Arthur Allan Thomas via the finding of exhibit 350 in the garden.

202. A witness skilled in the use of firearms told us that on a wet windy night such a procedure would have been practically impossible.

*(ii) Could Shellcase 350 have come into the Garden as a Result of Being Thrown Out of a Window by the Murderer?*

203. This highly improbable theory requires both an open window and a murderer disposed to use it. We reject this suggestion for the following reasons:

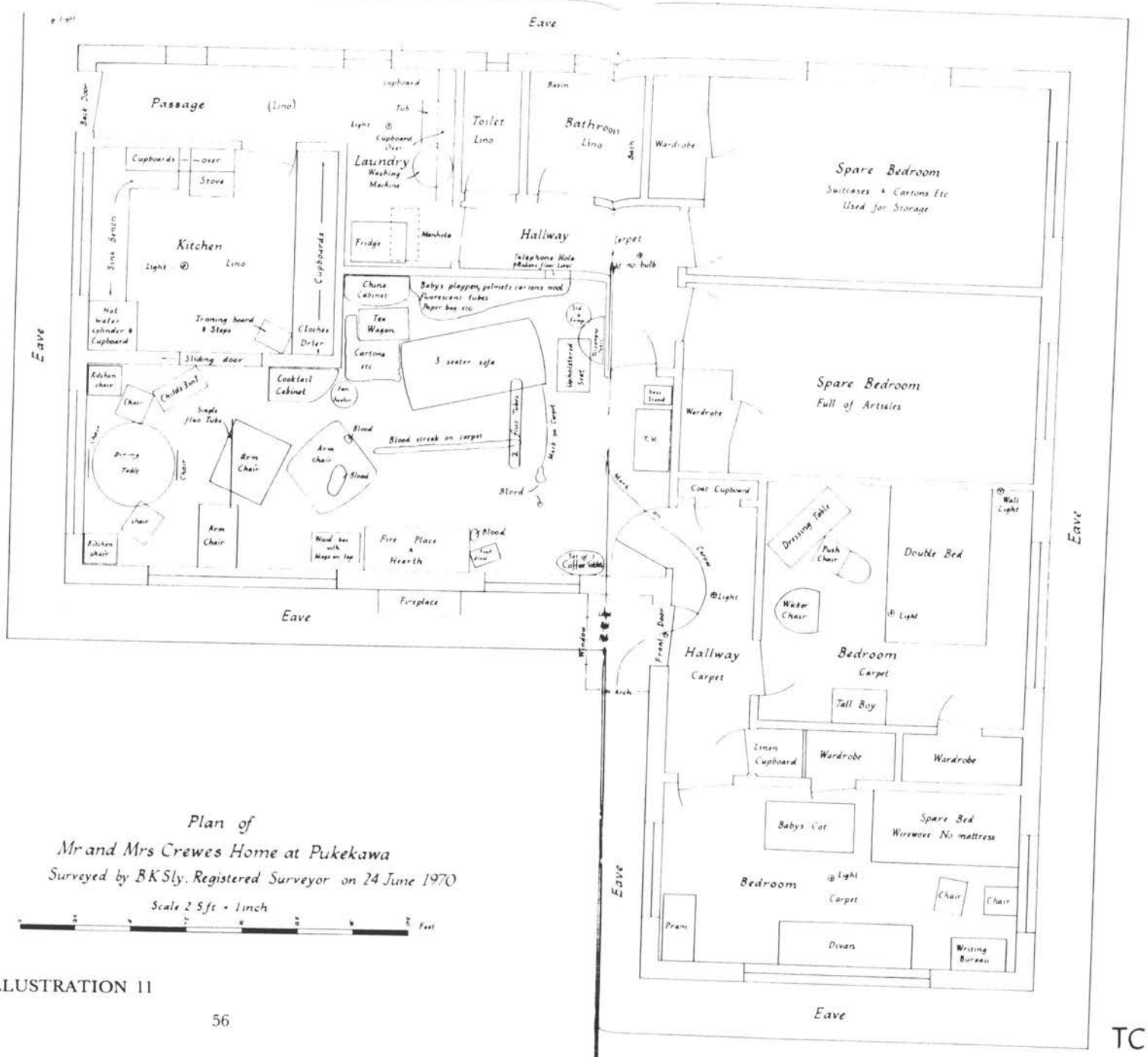
(a) The evidence does not suggest such a light article would be likely to travel the necessary distance to land in the garden.

(b) At least two shots were fired; only one shellcase was found. If the murderer were so careless as to throw one away, one would expect that the second would also be found.

(c) In many respects the murders indicate that they had been carried out with some care by a person of some intelligence. We find it remarkable that such a person would be so careless as to leave such telltale evidence at the scene by throwing it out a window.

*(iii) The 'Cold Shell in the Rifle' Theory*

204. We were informed that during the course of argument before the Court of Appeal at the time of the Second Referral, counsel for the Crown suggested for the first time that shellcase 350 may have been dropped in the garden in the following manner. Arthur Allan Thomas owned a Browning pump action rifle which it is suggested he carried around with a spent shell left in the breech. When a live shell is then to be loaded into the breech in preparation for firing the rifle, the one pump action both ejects the spent shell and places a fresh, live one in the breech. It is suggested that on the evening the murders were carried out, as the murderer approached the house he loaded his rifle in the above fashion with the ejected shell falling into the garden.




*Plan of*

*Mr and Mrs Crewes Home at Pukekawa*

*Surveyed by B K Sly. Registered Surveyor on 24 June 1970*

Scale 2 5ft • 1inch

Feet

ILLUSTRATION 11



TC 104/80[B]

205. This theory, albeit unsupported by any evidence, presents the following difficulties. The first concerns the noise of the pump action of the Thomas rifle, which has been demonstrated to us. Even when carried out as quietly as possible, it still makes a very significant noise. It seems unlikely that a murderer would take such a risk of discovery, particularly when contrasted with the easy alternative of loading the rifle a substantially greater distance away and then approaching the house with the weapon rendered safe by the use of what is an almost silent safety catch.

206. The second difficulty is that as we have already set out earlier in this chapter, shellcase 350 contained a Sprott category 4 headstamp. Therefore, it not only could not have contained either of the bullets recovered from the bodies of Jeanette and Harvey Crewe, but also was manufactured at a different time. It seems to us strange and extremely unlikely that a rifle would have loaded in it adjacent to each other, two shells which were so different that they must have been acquired at different times and come from different packets.

207. From the arrest of Arthur Allan Thomas through 3 years of Judicial proceedings, the Prosecution steadfastly placed before the Courts their louvre window theory as the explanation for the finding of shellcase 350 in the garden. It is significant that this 'cold shell in the breech theory' is brought forward by the Prosecution at the hearing of the Second Referral in December 1974 for the first time. Then it was beginning to appear that shellcase 350 could not have contained either of the death bullets and therefore did not get into the garden as a result of any shooting through the louvre window.

208. We have dealt with these three impractical theories because they were raised before us. The only purpose they serve is to highlight the unlikelihood and complete lack of evidence that exhibit 350 could have arrived in the garden in any other way than being deliberately placed there.

## 5. Other Evidence Suggesting that Mr Arthur Allan Thomas was Present at the Crewe Property on 17 June 1970 to Deposit Exhibit 350

209. It was established in paragraphs 54–189 that exhibit 350 had nothing to do with the fatal bullets; in the light of that finding, we have now examined the theories which have been advanced by the Police as to how it may have come into the garden on the night of the murders, and have rejected them.

210. We have considered all relevant evidence presented at the second trial.

211. We shall deal with the various heads of evidence against Mr Thomas in the order in which we summarised them in paragraph 30. We shall, finally, examine fresh evidence put forward by the Police to this Commission to suggest that Mr Thomas was on the property on 17 June 1970.

### *(i) Motive*

212. The allegation as to Mr Thomas's alleged motive for the murders involved the proposition that he was obsessively jealous of Mr and Mrs Crewe. The evidence said to support this proposition came under three heads.



213. Under the first head, it was said that Mr Thomas had, in the late 1950's at least a 'passion' for Mrs Crewe; that he had pestered her at dances and followed her to Maramarua at a slightly later stage when she went there to work as a teacher. Evidence was given at the second trial of a visit made by Mr Thomas to a fortune teller to find out what, if anything, was to develop of his relationship with Jeanette Demler. It was inferred at the trial that this passion may have endured up until 1970, despite Mr Thomas's marriage in 1964, Mrs Crewe's marriage in 1966, and the fact that there was no evidence of any but the most casual association or rare contact between the two in the intervening years.

214. Secondly, evidence was given that Mrs Crewe and her husband were comparatively wealthy and that Mr Thomas was, in company with many other farmers in the Pukekawa district, under a degree of financial pressure during the winter of 1970. The inference to be drawn from this circumstance, so said the Prosecution, was that financial pressure added to romantic frustration produced in Mr Thomas a deep resentment and smouldering jealousy of Mr and Mrs Crewe.

215. Thirdly, evidence was given of a burglary and two fires which occurred at the Crewe home in the years preceding the murders. The burglary occurred on 29 July 1967. Mrs Crewe reported a handbag, a row of pearls, a watch, an engagement ring, two brooches, and a brush and comb set as having been stolen.

216. The first fire occurred on 7 December 1968 in a spare bedroom. The second occurred in June 1969, when a haybarn on the farm went up in flames.

217. The person or persons responsible for these three incidents have never been traced and there never was any evidence that Thomas had anything to do with them. It was stressed by the Prosecution that a brush and comb set was taken in the burglary, this being connected with the fact that Mr Thomas had some years before given Jeanette Demler a brush and comb set which was in fact discovered unopened in a spare bedroom after the murders. The Prosecution sought to draw the inference that, had Mr Thomas been obsessed with Mrs Crewe and resentful of her husband, he might have committed the burglary and lit both fires as well as murdering Mr and Mrs Crewe.

218. We raised the question as to the relevance of the burglary and the fires, there being no evidence that Mr Thomas committed any of them. We received the following reply from counsel for the Police:

> "These are relevant in that taken together with the murder itself they suggest a connected and regular course of conduct in each year of the Crewe marriage by a local person with a continuing grudge against either or both Crewes, the grudge being of a personal nature in that as with the murder, there was evidently no monetary motive (nothing of value stolen except items of personal significance to Jeanette, suggesting possible sexual or romantic significance), a person with particular interest in the brush and comb set, someone not acting on an impulse, but on the basis of personal animosity of depth and longstanding, and a person other than Demler, in that he had an alibi for at least one of the nights in question."

219. That this submission should come from experienced counsel demonstrates the lack of any reasonable answer to Thomas's contention that he never was on the Crewe farm that night. Even taking all the Prosecution evidence at its face value, however we are unable to see that it suggests any more than that Mr Thomas had at one stage a romantic

interest in Jeanette Demler; that in common with many dairy farmers in a year of drought he had a degree of financial difficulty in 1970; and that a burglary and two fires occurred in the Crewe house in the early years of their marriage.

220. To link the three factors together into a motive for Mr Thomas killing Mr and Mrs Crewe is quite unjustified. We are of the view that the Prosecution evidence utterly fails to establish any motive on the part of Mr Thomas to kill Mr and Mrs Crewe. It follows that it in no way supports the proposition that he might have been on their property on 17 June 1970 to deposit exhibit 350 there.

*(ii) Were the Bullets which Killed Jeanette and Harvey Crewe Fired from the Thomas Rifle?*

221. The interior bore of a rifle contains helical grooves between which are raised portions of metal called 'lands'. When a bullet is forced through the barrel the lands leave corresponding marks on the bullet. The bullet recovered from Jeanette Crewe's body was incomplete and in a damaged condition. When examined by Dr Nelson of the DSIR it was found to contain four land marks and part of a fifth. From a consideration of the position of those land marks Dr Nelson was able to conclude that the bullet had been fired through a rifle containing six lands with a right hand twist.

222. The bullet recovered from the body of Harvey Crewe was in a more damaged condition. Only one complete land and portion of each of two other adjoining lands could be examined on it. The direction and size of these land markings on Harvey's bullet were the same as those on Jeanette's bullet. Dr Nelson also found on one of the lands of Harvey's bullet two marks which were not present on any of the surviving lands from Jeanette's bullet.

223. As part of their investigation, the Police collected 64 rifles of ·22 calibre. All of them were test fired by Dr Nelson and the bullets recovered for careful examination. He said that 29 of the 64 rifles were shown to have 6 lands with a right hand twist, but on only 5 of them were the dimensions of the lands closely similar to the bullet from Jeanette Crewe. After a further detailed comparative study of the widths and sizes of the land marks, Dr Nelson determined that 3 of the remaining 5 rifles had not fired Jeanette's bullet, Two rifles were left, one of which belonging to Thomas, and the other to Eyre.

224. In evidence before us Dr Nelson explained that in addition to examining the widths and sizes of the lands, attention can also be given to any individual marks on the lands and grooves which frequently occur because of microscopic defects in the barrel of the rifle. When examining the three bullets test fired from the Thomas rifle in August 1970, Dr Nelson told us he found a heavy score mark on one of the lands, and finer score marks on some of the other lands. We did not get a clear answer from him concerning whether he saw this score mark on all three test fired bullets or only on one of them. We know that it was on the one later sent to England (bullet 'F'). It is clear from his notes, and from his evidence before us, that he regarded this score mark as a rifling characteristic of the Thomas rifle.

225. Dr Nelson was not able to find any corresponding score mark on the surviving lands of Jeanette Crewe's bullet. He told us that while the damage incurred on impact can erase some score marks, he would still



have expected the heavily scored mark on the test bullet to have survived and to have been visible on any one of the five surviving lands of Jeanette's bullet. From this it would follow that Jeanette's bullet could only have been fired from the Thomas rifle if the heavy score mark had been on the missing sixth land.

226. At the time of his comparative examination of Jeanette's bullet with the bullets test fired from the Thomas rifle, Dr Nelson made notes which were produced to us. They include reference to one land on the test bullet being heavily scored: state that, 'Rifling class identical, but no match seen'; and contain the following comment, 'i.e. if have possibility that scored land mark of T (i.e. test bullet) was missing mark of fatal then cannot exclude'.

227. In the trials Dr Nelson confined his evidence to stating that on a class characteristic (i.e. the size and number of lands) he was able to exclude all but two of the 64 rifles given to him for testing; he also stated that the width and spacing of the surviving lands on Harvey's bullet were consistent with it having been fired from the same rifle as Jeanette's bullet. He failed to give evidence of the following four matters, all of which must have assisted the defence:

(a) That his notes contained the statement 'no match seen'.
(b) That one land of a bullet test fired from the Thomas rifle contained a heavy scoring mark not seen on any of the surviving lands of the Jeanette bullet.
(c) That other lands on a test fired bullet contained individual marks not seen by him on any of the surviving lands of the Jeanette bullet.
(d) That individual markings seen by him on the surviving whole land of the Harvey bullet were not seen on any of the surviving lands of the Jeanette bullet.

228. In our opinion, these four matters if true, substantially reduced the chances that either or both of the fatal bullets could have come from the Thomas rifle, but Dr Nelson gave no evidence relating to them at either trial. His evidence was so incomplete in the light of all these matters that it presented to the jury a false picture of his examination and findings and which of itself could have resulted in a miscarriage of justice.

229. In 1972 the Thomas rifle, fragments of the bullets recovered from the deceaseds' heads, the test fired bullet 'F', and certain other exhibits were sent to England for further examination by the Nottingham Forensic Science Laboratory of the Home Office. Immediately before the departure of these exhibits to England, a further four bullets were test fired through the rifle in Auckland and these bullets retained by DSIR.

230. The Nottingham Laboratory's Chief Forensic Officer, Mr Price, test fired some more bullets through the rifle. He compared the fragments of bullet recovered from Jeanette Crewe with bullet 'F' (test fired through the Thomas rifle in August 1970), and with his test fired bullets. A number of photographs were taken. Mr Price's major conclusion, as stated in a written report dated 2 August 1972 was:

> "I have microscopically examined the bullet (referring to the Jeanette Crewe fatal bullet). Although I have been unable to establish conclusively whether or not it was fired in the rifle exhibit 317, the limited individual bore characteristics it shows indicate that it could well have been fired in this rifle."

231. In late September 1980 a representative of the New Zealand Police made contact with the Nottingham Laboratory seeking to know

whether any information was still available from the investigation carried out in 1972. Mr Price having retired, the inquiry was dealt with by the Laboratory's present principal Scientific Officer in Charge of Firearms, Mr Prescott. The inquiry in due course led to Mr Prescott examining the photographs on the laboratory file, and the bullets test fired by Mr Price in 1972. Mr Prescott then made a written statement, dated 30 September 1980, which we have read, the major conclusion of which is:

"I have formed the opinion that it is highly probable that the rifle (317) fired the bullet (234) (i.e. from Jeanette Crewe)."

232. On 13 October 1980, Detective Chief Superintendent Wilkinson handed this statement to counsel assisting us, and formally requested on behalf of the Police that Mr Prescott be brought to New Zealand to give evidence before the Commission. We agreed to this request, somewhat reluctantly, because it seemed to us that Mr Prescott was really saying the same as Mr Price had said in 1972.

233. To assist Mr Prescott we requested DSIR to produce the other two bullets test fired through the Thomas rifle in 1970, and also the three bullets test fired through the Eyre rifle at the same time. We were informed that they could not be found, although those test fired through 58 of the other rifles in 1970 were still in the possession of DSIR.

234. On his arrival in New Zealand Mr Prescott test fired further bullets through both the Thomas and Eyre rifles, and examined these and all other bullets available through a comparison microscope.

235. Mr Prescott's major conclusions, as given in evidence before us were as follows:

(a) He remained of the view as expressed in his report of 30 September 1980 that it was highly probable that the Thomas rifle fired the fatal bullets recovered from Jeanette Crewe.

(b) He agreed that he was not in as good a position to form a view as was Mr Price in 1972, for he had not had the opportunity of a direct examination of the fatal bullets, having come to his conclusions only from photographs. He agreed there was no difference between his conclusions and those of Mr Price; they were simply expressed in different words.

(c) On his examination of bullet 'F' he saw the score mark referred to by Dr Nelson, but it did not appear on any of the other bullets he examined which had been test fired through the Thomas rifle in New Zealand in 1972, in Nottingham in 1972, and in New Zealand in 1980. Therefore, he concluded that the score mark was not a rifling characteristic of the Thomas rifle. That conclusion brings into question whether Dr Nelson did see the score mark on the other two bullets test fired in August 1970, and if he did not, why he proceeded as if the score mark was a rifling characteristic.

(d) That the Eyre rifle (a Remington model 12) fired a bullet with only 5 lands and grooves; and therefore could definitely not have fired the fatal bullets. This conclusion (which is now agreed with by counsel for DSIR as being correct) makes nonsense of Dr Nelson's statements and evidence that the Eyre rifle had 6 lands and grooves. In this Dr Nelson made a fundamental error of observation which was perpetuated throughout the trials.

236. In paragraphs 398–401 we consider the rather myopic criteria the Police adopted in collecting the 64 rifles test fired in 1970. In the context of there being approximately 800 000 firearms in the Auckland Police



District alone, we regard the sample as being so limited that there is no benefit derived from a conclusion that of those 64, the Thomas rifle was the only one which could have fired the fatal bullets. How many more might there have been in the Auckland Police District, or in New Zealand?

237. We conclude that it is not proved that the Thomas rifle fired the fatal bullets. Further, even if the Thomas rifle did fire them, there is no evidence putting the rifle in the hands of Arthur Allan Thomas at the time. We are satisfied there was opportunity for others to have used the Thomas rifle.

*(iii) The Axle*

238. In 1956, a Mr C. E. Shirtcliffe, who was the owner of a 1929 Nash sedan, acquired the front assembly of a 1928 Nash motor car, and used it to make up a trailer. He did not weld the assembly at all, fixing the steering arms so as to make the wheel assembly rigid by cutting and flattening the ends of the tie rod, drilling a half inch hole in it, and bolting it to the axle beam.

239. Mr Shirtcliffe sold his trailer to a Mr G. A. Whyte in 1957. There was no welding or other work done on the trailer while Mr Whyte owned it.

240. Mr Whyte sold his trailer to Mr A. G. Thomas in early 1959. Mr Thomas used the trailer for various work connected with his Pukekawa farm. Maintenance was carried out on it from time to time, and Mr Thomas was able to present to us a number of receipts from his obviously extensive and complete financial records dating back over many years. He was, for example, able to produce two invoices showing that new tyres for the trailer were purchased on 19 May 1964 and 23 March 1965 respectively. He was quite adamant that, apart from a job carried out in November 1963 involving the welding of studs to the left hand stub axle, no welding was carried out on the axle assembly.

241. We are prepared to accept Mr Thomas's evidence that, had any more significant welding, such as for example welding of the axle beam to the stub axles been carried out, he would have been aware of it. He said that no such welding was carried out and we accept his evidence.

242. In July 1965, Mr Thomas took his trailer to a Mr R. M. Rasmussen to have the axle assembly removed. It was to be replaced with a drop axle assembly, made from a length of boiler tube, and Zephyr wheels compatible with the vehicle which was then being used to tow the trailer, Mr Richard Thomas's Zephyr car.

243. There are two versions of why the work was done. Mr Rasmussen said, as he has consistently said in evidence, that the trailer assembly was in a bad state of repair, in that the bearings on one side were badly worn, and Mr Thomas also wished to change the assembly to a more modern one, with wheels interchangeable with the car used to tow the trailer. Mr Thomas, on the other hand, said that the purpose was simply to make the wheels interchangeable and that there was nothing which needed to be repaired. We prefer Mr A. G. Thomas's evidence in this regard because:

(a) Mr Rasmussen made a statement to the Police on 24 October 1970 in which there was no mention of any mechanical fault needing to be repaired, but merely confirmation of Mr Thomas's version of the reasons for the repairs. This statement was not produced by the Crown to the jury at either trial.

(b) On April 13 1965 a warrant of fitness had been obtained for the trailer. The issue of the warrant is inconsistent with wear in the bearings on one side to the extent which Mr Rasmussen depicts, and the use of the drawbar coupling produced at the trials and to this Commission.

244. It is common ground Mr Thomas paid Mr Rasmussen £30 for his work. Mr Thomas says that this was on the basis that Mr Rasmussen retain the parts which had been taken from the trailer, which had some value, particularly the tyres and stub axles. Mr Rasmussen said that he wanted to retain the stub axles because of the possibility of reconditioning them, but that Richard Thomas took them home. We find significant the way he put this matter in his original statement to the Police:

"Young Thomas, about 2–3 days later, called and picked up the new assembly, i.e. the reconditioned trailer . . . mention was made of the old parts unused by me on the new assembly. I would not have bought them as they were of little value in the state they were in. Therefore, Thomas took them back with him. He would have left nothing behind from the original assembly."

We note that the last two sentences appear to rely on a process of reasoning rather than on memory. It may be of significance that the stub axles had by this time been found on the Thomas farm and shown to Mr Rasmussen. It may, therefore, have appeared to him that they had gone back to the Thomas farm, rather than remaining with him. We shall return to this inconsistency in due course.

245. Soon after the trailer had been picked up from Mr Rasmussen, the new axle was bent as a result of a combination of overloading and badly positioned springs. The trailer was returned to Mr Rasmussen, who was disposed to repair the damage for the cost of materials only—£3/10s. Mr Thomas presented in evidence a book of cheque butts containing the butt of a cheque to Mr Rasmussen dated 30 August 1965 for this amount.

246. When Mr Crewe's body was recovered from the Waikato River on 16 September 1970, there was recovered also a Nash motor car axle. The axle had obviously been tied to the body with wire as a weight. It would appear that over the months during which the body had been in the river the axle had come away from the body to the extent that it was merely hanging by one last strand of wire on 16 September. It would appear that that last piece of wire was broken during the recovery of the body, and the axle itself was found on the bed of the Waikato River immediately underneath the body.

247. Although no strands of wire were actually found on the axle, we are satisfied that the axle recovered from the river had in fact been used to weight the body, and that was the axle produced at the trials, and before this Commission, as an exhibit.

248. There is in our view no truth in various allegations which have been made that the Police produced at the trials an axle different from that found in the river. The axle was almost at once identified as a front axle from a 1928–29 Nash motor car series 220, 320, or 420. Extensive inquiries were mounted by the Police with a view to tracing the axle. We accept that approximately 200 people were seen throughout the whole of New Zealand, from Kaitaia in the north to Invercargill in the south. Photographs of the axle were published in the newspapers, in particular in *The New Zealand Herald* on 19 September 1970. Mr R. C. Carlyon, a television news editor of Television New Zealand, told us that the axle was shown on television on the evening of 18 September 1970.



249. On 19 or 20 September 1970, Mr Shirtcliffe contacted the Police to advise that an axle of the type found on the body had been mounted in his motor car, which was no longer in his possession, and also on the trailer which he had sold. It was established by 4.00 p.m. on 20 September, that the car, which had been abandoned at Tuakau, still had its axle intact. Mr Shirtcliffe was initially unable to assist the Police as to what had happened to the trailer. He was, however, a little later able to locate a photograph of his own car and trailer which he made available to the Police and which was published in *The New Zealand Herald* on 10 October 1970.

250. On 13 October, Mr Shirtcliffe's stepdaughter, Miss Cowley, telephoned the Police to say that her father's trailer had eventually been sold to a Mr Thomas Senior, now known to be Mr A. G. Thomas, and that she had seen it often on his property when going to school in the school bus. By 13 October, therefore, Mr Shirtcliffe's trailer had been traced back to the Thomas family. Detective Johnston saw Mr A. A. Thomas on his farm on 13 October 1970. Mr Johnston's job sheet reveals that Mr Thomas pointed out the dump on the farm to him on that date.

251. Mr Rasmussen had first been seen by the Police on 4 October, and the job sheet completed by Detective Johnston in relation to that interview at a later stage, namely 23 October 1970, is significant. It reads:

"The axle was shown to Rasmussen who was unable to recall the axle itself—he said that the method of cutting on one end of this axle was similar to the way he used to remove the stub axles from the axle itself."

252. On 14 October 1970, Detective Johnston and Detective Sergeant Parkes travelled to Matakana to see Mr A. G. Thomas, who mentioned the repairs done by Mr Rasmussen, and gave the Police access to his financial records. Detective Johnston searched through the records and uplifted a number of documents. It is most unfortunate that Police practice was not to give a receipt, so that there could be no argument about what was and was not taken. As the matter stands, the only record of what was taken is Detective Johnston's job sheet.

253. On 15 October at 10.45 a.m., Mr Rasmussen was again seen by the Police. He said that he remembered a Mr Thomas; the job sheet completed on 23 October in relation to this interview states that his memory was that the parts discarded from the trailer had been returned to Mr A. G. Thomas. At 2.00 p.m., Detective Johnston saw Mr A. A. Thomas who, according to the job sheet, took him down to the dump 'Where a cursory search was made without trace of the wanted trailer or parts thereof.'

254. It is therefore apparent that by 15 October, on their own records, the Police knew:

(a) That Mr Rasmussen said that parts had been returned to the Thomas farm.

(b) That there was a dump on that farm where old motor vehicle parts were to be found.

255. The next visit to the Thomas farm was made by Detective Johnston and Detective Parkes on 20 October 1970. Detective Parkes said that he had earlier been instructed to pick up the Thomas rifle, and that he understood Detective Johnston was concerned to pick up wire samples.

256. Inspector Parkes gave evidence that they collected their wire samples and that Detective Johnston then borrowed a spade and began foraging around on the tip. He said that, of three tips on the farm, Detective Johnston was concerned to search only one. After only a few minutes, to use Inspector Parkes' words, 'Detective Johnston located two

stub axles. One was probably partly uncovered, but the other was buried.' Inspector Parkes said that Mr Johnston knew what they were, and seemed quite excited by his find.

257. He did not search the tip any further that day. Inspector Parkes very fairly agreed that it was an extraordinary piece of luck that the two stub axles, which were to become such significant exhibits, just fell into Detective Johnston's hands. We can only agree, particularly having regard to the fact that he had already searched the tip 5 days before. We find the circumstances in which the stub axles were located peculiar in the extreme.

258. We repeat that it is most unfortunate that Detective Johnston is dead and was not able to give evidence before the Commission. We are very conscious, that, had he been here to give evidence, he may have been able to put forward a proper and innocent explanation of matters such as the finding of the stub axles from which the most serious of inferences can on the face of it be drawn.

259. The significance of the stub axles is that they matched either end of the axle recovered with Mr Crewe's body. On the right hand end, the stub axle had been removed by cutting the stub axle eye with the kingpin still in place, the kingpin remaining attached to the axle beam. The two halves of the eye, one on the stub axle and the other on the axle beam, matched exactly. On the left hand end, a weld on the upper part of the axle beam assembly matched a weld on the stub axle.

260. It follows that both stub axles found on Mr Thomas's tip had clearly been connected at one stage with the axle found on Mr Harvey Crewe's body. The inference which the Crown invited the jury to draw at the second trial was that both stub axles and the axle itself had been placed on the Thomas tip following their return to the farm after the conversion by Mr Rasmussen, and that the murderer had used the axle only to weight Mr Harvey Crewe's body, leaving the two stub axles on the tip to be found by the Police on 20 October 1970.

261. We have had the benefit of considerably more evidence on the axle than was put before the jury at the second trial. We have been particularly fortunate in obtaining the expert evidence of Professor N. A. Mowbray. In our view, the inference which the Crown sought to draw at the second trial is not justified when one considers the whole of the evidence which is now available. We take this view because of the following factors:

(a) The circumstances in which the stub axles were found are so peculiar as to call for an explanation. This the Police are unable to provide, because of Mr Johnston's death. We expressly do not make a finding of impropriety or even suggest that one is appropriate, but we do say that an explanation is called for in the light of the following matters:

(i) Detective Johnston was first shown the tip on 13 October by Mr A. A. Thomas, who told him that motor vehicle parts were dumped there. Mr Thomas would in our view not have been so open about the matter, and so co-operative with the Police, had he been the murderer and had taken the axle from the tip a few months earlier.

(ii) Detective Johnston searched the tip for trailer parts on 15 October 1970 without finding the stub axles.

(iii) The stub axles fell into Detective Johnston's hands on 20 October 1970 with extraordinary ease.



(b) (i) The evidence establishes that the right hand stub has a badly worn bearing. Professor Mowbray gave as his opinion, which we accept, that it was wholly unserviceable. In that condition it could not have been driven out the gate and could not have obtained a warrant of fitness. The Thomas trailer had, however, obtained a new warrant of fitness on 13 April 1965, about 3 months before the trailer went to Mr Rasmussen. Furthermore, it was Mr Rasmussen's recollection that he had intended to recondition both stub axles and to resell them, had Mr Thomas been disposed to leave them with him.

(ii) Professor Mowbray's evidence, which again we accept, is that the right hand stub axle is not capable of being reconditioned. The marks of the gas cutting torch establish beyond all doubt that the right hand stub axle belongs with the axle beam. If, therefore, the axle beam does come from the Thomas trailer, it would appear likely that the axle beam and the right hand stub axle have been used after the conversion work was carried out by Mr Rasmussen.

(c) (i) Professor Mowbray examined the grease in the two stub axles. He found that the grease in the right hand stub axle was consistent with an assembly which had received no attention for a very long time while in service. Mr Thomas's receipts, of course, show regular maintenance. This discrepancy again suggests that the right hand stub axle, along with the axle beam, was used after it left Mr Thomas's possession at the time that Mr Rasmussen did his work.

(ii) So far as the left hand stub axle is concerned, Professor Mowbray told us that the grease is in a condition consistent with regular maintenance. Such maintenance would of course be consistent with Mr Thomas's records, and he was in fact prepared to accept that ⅜th inch S.A.E. bolts welded into the hub flange were the studs welded in November 1963. We regard this evidence on the part of Mr Thomas as most important so far as his credibility is concerned. Had Mr Thomas not been prepared to accept the left hand stub axle as his own, then there would have been no evidence to identify it as such. There must have been a tremendous pressure on Mr A. G. Thomas to disavow any knowledge of the axle, stub axles, or anything connected with them in an effort to clear his son's name completely of any involvement in the Crewe murders. The fact that Mr Thomas was prepared to concede that the left hand stub axle had indeed at one stage been on his trailer, in our view does him credit and leads us to accept his evidence as that of an honest witness.

(d) No witness was able to identify the axle itself as the axle which Mr Shirtcliffe put into the trailer which he built. The following matters suggest that it was perhaps not the same axle:

(i) Mr Shirtcliffe has consistently denied welding the axle. If the axle found on the Crewe body is the one on which he had worked, then the tie rod which he bolted on to it must have been welded at a later stage. Mr Whyte denies of course that any welding was done while he owned the trailer and Mr Thomas says that only the left hand studs were welded. If the axle did come from the Thomas trailer therefore, it would appear that



Sig 5*

welding work was carried out after it was removed from the trailer. Such work implies further use of the axle after it left Mr Thomas's possession, and is consistent with the further wear on the right hand stub axle which we have already mentioned.

(ii) Furthermore, welding has also been carried out at either end of the axle beam, to affix it to the stub axles on either side. It would appear that this welding, also, was not carried out while the trailer was in the possession of Mr Shirtcliffe, Mr Whyte, or Mr Thomas. To summarise the matter, this evidence suggests either that the axle beam and the two stub axles were used by some person after they left Mr Thomas's possession, or alternatively that neither the axle nor the right stub came from the trailer which Mr Thomas owned.

(e) (i) It is clear from Mr A. G. Thomas's evidence that the trailer was in regular use up until the time it was taken to Mr Rasmussen. It was used to transport a weekly load of pigs to Auckland, returning with a load of stale bread. Professor Mowbray was good enough to devote his energy and expertise to making precise measurements of the left hand stub axle assembly in its relation to the axle beam. He established that, when the welds are matched up, neither a proper kingpin nor an appropriate thrust bearing can be inserted. Both items would be essential if the trailer were to be used on a road. If they were absent, the whole weight of the trailer on the left hand side would be supported only by what may be described as a 'tack weld'. Professor Mowbray said the trailer would be dangerous in this condition, and certainly would not obtain a warrant of fitness.

The fact that neither the kingpin nor the thrust bearing would fit, suggests that the welding was done when neither the kingpin nor the thrust bearing was in place. We note that Mr Rasmussen's recollection was that both kingpins were present when he received the trailer from Mr Thomas to carry out his conversion work. This means that the left hand stub axle was not in the condition in which it is now when he received it.

(ii) The Police called Dr Miller of the DSIR to rebut Professor Mowbray's evidence. Dr Miller operated under a considerable disadvantage in that he was first asked to consider the matter only a few days before he gave evidence. He was not able in our view convincingly to challenge Professor Mowbray's analysis, which was a product of careful work over a period of 2 months. He indeed accepted that the standard Nash thrust bearing would not fit into the stub axle/axle assembly. Dr Miller pointed out, and Professor Mowbray was prepared to accept, that the inconsistencies involved are very small. For example, the misalignment which prevents a kingpin being inserted is of the order of $\frac{1}{16}$th inch. The space left for the standard thrust bearing is of the order of ·575 inch, this being ·050 inch less than the required space for a bearing measuring ·625 inch.

(iii) We are of the view that, while the fact that these measurements are so small no doubt explains the fact that no-one noticed the inconsistencies until Professor Mowbray turned his eye to them, they are nonetheless important. We accept without



question that, in engineering terms, even a misalignment of this degree can be crucial. We are not prepared to accept the supposition that a worn kingpin may have been inserted, since the measurements of the yoke bronze bushes and the axle beam hole were compatible (axle boss ·860 inch, bushes ·862 inch), nor do we accept that a thrust bearing of a different size, not standard for this assembly, may have been used. While we accept Dr Miller's expertise and are grateful for the assistance which he endeavoured to give to the Commission, we accept Professor Mowbray's evidence on this point without qualification.

(f) (i) If Mr Rasmussen's evidence is correct, then all parts, including the axle and stub axles taken from the trailer, were returned to Mr A. G. Thomas. One would expect to find these on the tip with the stub axles. Despite a careful search of the tip by the Police on 21 October 1970 however, the following parts which should have been there were not located:

Right steering arm
left steering arm
left steering arm keys
2 steering arm nuts
2 steering arm cotter pins
3 steering arm ball studs
3 ball stud nuts
1 cotter pin
2 hub caps
2 disc wheels
2 wheel locking rungs
4 right hand wheel nuts
4 5/8 inch S.A.E. nuts
2 parts of tie rod with ends
2 tyres
2 inner tubes
1 king pin
2 king pin cotters
2 king pin cotter nuts
2 king pin cotter lock washers
2 thrust bearings
2 king pin spring washers

(ii) The Police recovered from the tip the following parts, apart from the stub axles:

a. 1 split rim
b. 1 steel wheel rim
c. 1 metal drawbar coupling
d. 2 wooden planks
e. 1 numberplate—R11052.

The evidence of Mr Shirtcliffe and the Thomas family establishes positively that c. the drawbar coupling had nothing to do with the trailer. Since Mr Rasmussen did not remove a numberplate, e. is wholly irrelevant; since he did not touch the body of the trailer, d. is equally irrelevant. a. and b. are the only parts which could on any view of the matter be regarded as having been removed by Mr Rasmussen. It must, however, be remembered that the Thomas family agreed that

the trailer was at their farm from 1959 to 1965, and maintenance was carried out and parts presumably interchanged over that period. There is nothing to establish that, if items a. and b. indeed belonged with the Thomas trailer, then they were removed by Mr Rasmussen. To the contrary, the fact that so few of the parts whose presence one would expect were in fact found on the tip suggests that Mr Thomas may be correct in his recollection and Mr Rasmussen wrong, and that the parts did remain with Mr Rasmussen. Indeed, there is some significance that the tyres which would have a good resale value were not found. Two affidavits suggest that Mr Rasmussen may later have sold them.

(g) Mr D. Eyre, Mr B. Eyre, Mr R. W. Mills, Mr T. J. Salmons, and Mr J. L. Martin gave evidence to establish that an axle similar in shape to the axle used to weight Mr Crewe's body was removed by them from the Thomas farm in the winter of 1965. It was removed from the place where Mr Thomas said it would have been dumped had it been returned by Mr Rasmussen. These five men are those referred to by Mr Yallop in his book *Beyond Reasonable Doubt?* as establishing that the axle found with Mr Crewe's body was in fact removed from the Thomas farm. That is a conclusion which it is not possible to draw, since none of them was able to identify the axle beyond saying that its shape was similar to the axle which they remembered. In fairness to them we should point out that they do not appear on any occasion ever to have gone further than that.

The significance of their evidence is that, if the Crown evidence be accepted in its entirety, including Mr Rasmussen's recollection that all parts left over from the conversion were returned to the Thomas farm, then at least there is a real possibility that the axle was removed from the property in 1965. The finding of the stub axles in the tip would have then of course been wholly without significance so far as the responsibility for putting the axle on Harvey Crewe's body was concerned. We treat their evidence as another of the factors to be weighed in reaching our ultimate conclusion, rather than a matter definitive in itself.

(h) Mr R. A. Closey, a vintage motor cycle enthusiast, gave evidence of searching the Thomas farm in company with a group of like-minded persons about 3 months prior to the time the murders occurred, namely in March 1970. Despite searching the tip area closely, they located nothing but model 'T' parts. They did not use a spade and so did not investigate what may have been under the surface of the tips. We have evidence from Mr Parkes, however, that at least one of the stub axles was partly visible in October. The Closey evidence is not conclusive, but does tend to suggest that the axles and stub axles were not on the tip in March 1970. This confirms Peter Thomas's statement.

(i) We have already mentioned that Mr Rasmussen and Mr Thomas differ in their recollection of whether the parts left over from the conversion, including particularly the stub axles and the axle beam, were returned to the Thomas farm. Mr Thomas said that Mr Rasmussen would have retained the parts, and that this resulted in a reduction in price. He said that he would have noted this fact on the butt of the cheque with which he paid Mr Rasmussen.

(j) (i) We have already stated that the evidence as to price is on its own inconclusive. Most unfortunately, Mr Thomas's cheque butt is now missing. The book in which that butt appears is the only one which is absent from Mr Thomas's collection. The view that Mr Thomas takes of the matter is that the cheque book was removed either by Detective Johnston on 14 October, or by Detective Sergeant Parkes on 24 October, on which date Detective Parkes went through Mr Thomas's records in his absence.

(ii) Detective Sergeant Parkes took the precaution of submitting a complete job sheet listing all the books of cheque butts which he took. It is a pity that he did not take the further precaution of giving Mr Richard Thomas, who was present at the property that day, a receipt for what he had taken. Be that as it may, we have heard Mr Parkes give evidence before us on a number of occasions. We have been impressed by his honesty and his readiness to help the Commission. We unhesitatingly accept that Mr Parkes had no knowledge of the missing book of cheque butts. The bank statement produced by Mr A. G. Thomas confirms his evidence concerning the total charge for the trailer conversion.

(k) Mr Johnston's job sheet in respect of 14 October 1970, makes it clear that he was aware that a conversion of the trailer had been completed by Mr Rasmussen when he went through Mr Thomas's records on that date. The job sheet lists a number of documents which he took with him on that date. Again, it is unfortunate that he did not give Mr A. G. Thomas a receipt for all documents taken. Because Mr Johnston is not available to give evidence before us, in respect of the book of cheque butts and its absence, we must leave the matter there.

*Conclusions*

262. We consider that the evidence as to the two stub axles and the axle beam is a morass of inconsistencies, unexplained discrepancies, and alternative possibilities. While we consider that it seems likely that the axle beam and the right hand stub axle were used by some person or persons unknown after Mr Rasmussen carried out his conversion work, we make no findings of fact as to the axle whatsoever. Nor are we in a position to find any impropriety on the part of the Police in relation to the stub axles or in relation to Mr Thomas's book of cheque butts. We do find, however, that the one matter which has been clearly established is that it would be quite unsafe to draw any inference connecting Mr A. A. Thomas with the axle found on Harvey Crewe's body, merely because of the presence of the two stub axles on his tip.

*(iv) Wire*

263. When the bodies of Jeanette and Harvey Crewe were recovered from the Waikato River, lengths of wire were found tied around each body. At the trials scientific evidence was called by the Crown and by the Defence on the question of whether the wire could be compared with wire samples taken from the Thomas farm, or from nine farms in the district.

264. Both the scientists, Mr Todd for the Crown and Mr Devereaux for the Defence, are experienced scientists. They employed different methods of scientific analysis of the wire to establish, in the case of Mr Devereaux that the wires on the bodies could not be said to come from the Thomas farm, and in the case of Mr Todd, that they might be similar to wire from the Thomas farm, but not similar to wire from any of the other nine farms.

265. Our conclusions are:

(a) Samples of wire were collected from only nine farms in the area. Such a limited sample cannot be said to be helpful in establishing anything. Even if wire from the bodies were to be accepted by us as similar to wire samples from the Thomas farm, who is to say whether or not there are other farms in the vicinity with wire of similar characteristics?

(b) In the face of conflicting expert evidence and opinion as to which method is best suited to this examination and whether or not the differences in the measurements are significant, we consider that it is not possible fairly to adopt one view or the other.

(c) In any case it is not possible to draw any inference which would connect Mr Thomas with the wire on the bodies. There is no evidence putting the wire in his hands.

266. That the subject is a matter of some difficulty will be seen by the ultimate expression by Mr Todd that in comparing wire from the bodies with samples from the Thomas farm, he could not say the wires differed, but nor could he say they were the same. On that note we leave the wire.

### *(v) Additional Material put before the Commission by the Police*

267. The Police made available to the Commission briefs of evidence for two separate categories of witnesses who had not previously given evidence. In both cases, the evidence was designed to associate Mr Thomas with the murders. It was put forward as establishing that, if it were accepted that he had committed the murders, then it was surely likely that he had dropped exhibit 350 at the same time.

268. No doubt because of what emerged as the dubious nature of the evidence, and of these persons giving it, the Police were reluctant to put forward the witnesses as witnesses they were asking to be called; they preferred to suggest that, having seen that the briefs disclosed relevant evidence, we should no doubt wish to hear it. That suggestion we regard as mere playing with words. There is no doubt but that these witnesses were put forward to us by the Police.

269. We heard both categories of witnesses in private, because it seemed to us that the evidence was on the face of it highly improbable, and unfair to Mr Thomas unless the credibility of the witnesses was first established. Mr Thomas, having now been pardoned after 9 years in jail, was entitled to have such evidence heard by us initially in private so that we could decide whether it should be made public. Having heard the evidence, we have no hesitation in deciding that it not be made public. We recommend that the evidence and exhibits received by us in private be kept confidential by the Government.

270. The first category of witnesses related to an alleged confession made by Mr Thomas to a fellow prison inmate in 1978. Mr Thomas was alleged to have confessed to the crimes in great detail. The confession was supported by a number of maps of the Pukekawa area, the Crewe house, and the Thomas house, which were in Mr Thomas's handwriting.



271. The inmate concerned had a criminal record which included a large number of convictions for offences involving fraud. He is clearly what may be called a 'confidence trickster'. Furthermore, he was in a mental institution from 1969 to 1974. He gave evidence before us for a substantial period. The nature of his evidence and his manner of giving it compelled disbelief. A psychiatrist who had treated him during the time he was in the institution, and who heard his evidence before us, then gave evidence. He said that the man represented 'a classical case of grandiose paranoid schizophrenia' and that he was 'chronically psychotic'. He said 'I would not put credence on anything (he) said with any emotional or important connotation. If he said it was 12.30, I might believe him, but for an inside knowledge of trials of this importance, I would not put any credence on it at all without an awful lot of corroboration.'

272. In May 1980 he was examined by another consultant psychiatrist who then reported of him:

> "His manner throughout suggested he believed what he was saying and that he was suffering from paranoid schizophrenia and delusions of grandeur and intrigue . . . ."

273. In the light of the doctors' evidence, we directed counsel assisting us not to lead any further evidence from the witness. We indicated to counsel for the Police that, in our view, the evidence clearly established the man's unreliability, that he was mentally ill, and to continue his examination was inhuman. We invited counsel to seek instructions that he not ask the witness any questions. We adjourned for this purpose. Counsel for the Police informed us that he was unable to obtain those instructions. He continued his examination.

274. Counsel for the Police put a number of matters forward as corroborating the man's evidence. We propose to deal specifically only with two, namely the plans to which we have referred and the evidence of a supporting witness. We think it sufficient in relation to the other matters raised as constituting corroboration to comment that there was nothing in the alleged confession which could not have been invented by a person with access to Mr Thomas and to the various books, including *The ABC of Injustice* by Dr Sprott and Mr Booth and *Trial by Ambush* by Mr Booth, which had by 1978 been written on the matter. The inmate concerned was of course in prison with Mr Thomas. Mr Thomas would have had both books, and it is clear that he was at all times willing to discuss his case with anyone who was interested.

275. We turn now to the plan. It is truly remarkable that, if Mr Thomas confessed in such detail, no incriminating remark appears on the plan. They have the appearance of plans drawn by a man anxious to explain the circumstances in which he came to be convicted. They do not corroborate the notion that he confessed to the crimes and that he was therefore rightly convicted.

276. The supporting witness was unwilling to testify before us because he feared reprisals in the prison, should it become known that the had given evidence. Such reprisals could take the form of physical violence to the extent that his life could be in danger. We were not prepared to force the man to give evidence in these circumstances. We did, however, accept in evidence all of the statements which he has made to the Police. We have also obtained from the Justice Department his personal prison file.

277. This second inmate was prepared some years ago to break the law for the purposes of personal gain. He is as a consequence serving an exceptionally long sentence. His prison file reveals him as shrewd,

cunning, devious and manipulative, and a man who would go to considerable lengths to shorten his sentence. He made efforts to use the Commission's influence to have him transferred to one of the minimum security prison farms.

278. In addition, evidence we received established that he has been a police informer on other matters.

279. This second inmate would have had every reason to lie in support of the first. He must have hoped, realistically or not, that the Police would use their influence to shorten his sentence or improve conditions for him. The only possible disadvantage which his story could bring him would be a prosecution for perjury. It may be that he refused to give evidence before us because he feared just such a prosecution.

280. We are satisfied that the 'prison confessions' never took place, and that the evidence of the two prisoners was a tissue of lies. It causes us grave concern that very senior Police officers were so obviously ready to place credence on such unreliable, self-interested, and, in the case of the first inmate, deluded evidence. It was but another instance of the Police being unwilling to accept the pardon.

281. The second category of evidence revolved around one witness. This man still lives in the South Auckland area and has a young family. We therefore, do not propose to report on his evidence in terms which could lead to his identification.

282. The substance of his evidence was that at 7 a.m. on the morning of 18 June 1970 (the morning after the murders, if the Crown case be accepted) he was driving past the Crewe farm. In a lay-by a short distance past their gate he saw, so he said, Mr Thomas's car and trailer. The trailer had in it two covered bundles.

283. This witness first came forward to the Police with this evidence only in 1980, after Mr Thomas had been pardoned and released from prison. He had, however, given a statement to the Police nearly 10 years earlier, on 24 June 1970. He had, curiously enough, omitted to mention this incident in that statement.

284. Documentary evidence which was produced to us revealed that the man could not have been in the vicinity of the Crewe farm until 9 a.m. on the morning of 18 June 1970. There is evidence which convinces us that Mr Thomas could not have been there at that time. Furthermore, his evidence revealed envy of Mr Thomas for the attention which his case has received from the news media and for the compensation which public opinion suggests that he will receive from the Government following our report. All of these factors, taken with the demeanour of the man as he gave evidence, lead us unhesitatingly to reject this man's evidence as a complete fabrication.

285. The evidence of the last witness to whom we have referred was the subject of a front page article in a newspaper called *Sunday News* on 28 September 1980, after our public hearings had concluded. That action was quite improper. The publication of the material, which is shown by the cross-examination recorded in the transcript to be wholly unreliable, seems to us to have been an act of calculated and callous cynicism on the part of the newspaper.

286. Our conclusion is that none of the additional evidence we have considered in paragraphs 267 to 285 supports the proposition that Mr Thomas may have been on the Crewe property on 17 June 1970 to deposit exhibit 350 there. There is in our view no evidence which suggests that Mr A. A. Thomas was on the Crewe property on 17 June 1970. There is



thus no evidence that he deposited exhibit 350 there, other than the mere fact that exhibit 350, bearing the firing pin mark of his rifle, was found in the garden on 27 October 1970. We now propose to examine the searches which the Police carried out of that garden prior to October, and the degree of corrosion of exhibit 350 when it was found, in an effort to establish how and when it came into the garden.

## 6. The Searches

287. The Police team were confronted on 22 June 1970 by a bloodstained house, and no sign of the occupants, Mr and Mrs Crewe. Mr Hutton was in his evidence disposed to argue that he treated the matter only as a 'possible homicide' until Dr F. J. Cairns, the pathologist consulted by the Police, confirmed that material found by the Police on the arm of the large armchair in the lounge and forwarded to him on 2 July 1970 was brain tissue, and that Harvey Crewe, with whose blood the armchair was stained, was accordingly almost certainly dead.

288. The evidence makes it apparent, however, that all concerned in the investigation suspected from the start that at least one, probably two murders, had occurred. We are satisfied that the matter was from the beginning treated with the thorough attention which the New Zealand Police apply to homicide investigations. We do not consider that Dr Cairns' finding that Harvey Crewe was in all probability dead caused the Police to alter in any way the approach they had taken to the matter from the beginning.

289. It was obviously necessary that the house and enclosure within the fence be searched with particular thoroughness for any item of evidence which could provide a clue as to what had occurred. Mr Hutton entrusted this task to the officer in charge of the scene, Detective Sergeant Jefferies, under whose direction it was carried out over the ensuing days. The Police file makes it clear that Mr Jefferies carried out his task with meticulous care. By way of example, he prepared an inventory of the property found in the house and car which ran to 51 pages.

290. Detective Parkes, Detective Constable Higgins, and Constable Meurant were assigned by Mr Jefferies to search the area bounded by the fence around the Crewe house, which we have called the enclosure. There was a considerable amount of evidence concerning the instructions which they received. Mr Hutton stated that the search was for a blunt instrument, or some large instrument such as a knife, tomahawk, hammer, piece of wood or other similar instrument, since the consensus of opinion, including that of Dr F. J. Cairns and Dr D. F. Nelson of the DSIR, at that stage was that the great amount of blood present indicated that a blunt instrument had been used. We accept that a blunt instrument was regarded as the most likely possibility at that stage. We reject, however, the proposition that the Police were searching solely or predominantly for a blunt instrument for the following reasons:

(a) Even Mr Hutton was careful to mention that he included in his instructions for the interior search a careful examination for bullet holes, especially in the walls of the lounge, which indicates an awareness on his part of alternative possibilities. That is no more than one would expect.

(b) All officers concerned in the search, including Mr Jefferies, emphasise that it was a search for anything which might constitute evidence, not merely a search for tomahawks and the like.

(c) The search was carried out as a pattern search, which meant that the entire garden was pegged off and divided into strips by lengths of twine. Mr Higgins and Mr Meurant searched the individual strips on their hands and knees or squatting on their haunches, with Mr Parkes following behind to supervise them and to check that no area was left unsearched. It is nonsensical to suggest that such a thorough search would have been required to find a tomahawk or other blunt instrument.

(d) We were much assisted by evidence given by Detective Inspector O'Donovan as to Police practice so far as pattern searches are concerned. Detective Inspector O'Donovan is an experienced officer who has for the last 10 years had a large hand in courses run for the training of detectives at the Police College, Trentham. He described a pattern search as one which is designed to find anything which may be evidence on the surface of the ground. His evidence was that one aspect of detective training is to bring home to potential detectives the importance of searching thoroughly, of overlooking nothing of possible significance, and of not allowing an investigation to proceed on the basis that an early reconstruction of how a crime may have occurred is probably correct. Detective Inspector O'Donovan's evidence does the Police credit. We accept that the search for which Mr Parkes and his team were responsible was carried out in accordance with the guidelines which he explained to us.

291. The area of garden in which exhibit 350 was later found by Detective Sergeant Charles was searched by Constable Meurant. He gave evidence that his search was thorough and methodical, and that evidence was confirmed by Mr Parkes and Mr Jefferies. He said that, if exhibit 350 had been on the surface of the garden, it is most likely he would have found it, although he was not prepared to say definitely that he would have done so. We understand Mr Meurant's reluctance, as an officer still serving in the force, to state categorically that he would have found exhibit 350. In our view, however, taking into account all the evidence, including that of Mr O'Donovan, Mr Meurant would almost certainly have found exhibit 350 had it been on the surface of the garden on 23 June.

292. The possibility cannot of course be excluded that exhibit 350 was buried in the garden when Mr Meurant searched it on 23 June and that he failed to find it for that reason. We find this possibility exceedingly remote. A shellcase is an exceedingly light object. Our own experiments have satisfied us that a shell case ejected from a rifle would not bury itself to any extent even in freshly tilled soil. Even had a murderer or a careless Policeman stood on the cartridge case, we doubt very much whether he would have buried it to the depth at which it was found at a later stage by Detective Charles. The simple fact of the matter is that the depth at which the cartridge case was found by Detective Charles points to the cartridge case having been deliberately buried in the ground,

293. It is appropriate that we mention at this stage two further matters which cause us grave concern. First of all, Mr Hutton said in his evidence that he told Mr Jefferies to be particularly thorough in the pattern search outside the front door and windows and in the area leading to the front gate, because drag marks and blood stains suggested that the bodies had been removed via the front door and front gate. The implication is of course that a less than thorough search was acceptable in other areas. No hint of any such instruction appears in Mr Parkes' job sheet.



294. A photograph of the scene taken by a New Zealand Herald photographer shows Mr Parkes and Mr Meurant digging at the back of the section on 23 June, which establishes that the search was thorough in an area which has never been suggested to have any significance in the case, as one would expect from Mr O'Donovan's evidence of Police practice. We do not accept that any part of the garden was searched in anything other than a careful and methodical manner.

295. Secondly, the evidence of Mr Hutton and Mr Jefferies particularly, and to a much lesser extent the evidence of Inspector Parkes, demonstrated a tendency to denigrate the thoroughness and care of the officers carrying out the search. The object of this evidence was obviously to establish that it is not very surprising that exhibit 350 was not found during the June search. We find it unacceptable that the Police should now say that their own investigation was casual and slip-shod, although we can understand that they are anxious to avoid the conclusion that exhibit 350 was planted.

296. The Commission is of the view that the tenor of the evidence of Mr Hutton and Mr Jefferies was quite unfair to their subordinates, Mr Parkes, Mr Higgins, and Mr Meurant. The explanation of exhibit 350's presence in the garden on 27 October 1970 does not lie in any failure by these officers to carry out their instructions in a proper manner. We are of the view that they conducted the June search carefully and methodically and that they would almost certainly have located exhibit 350 had it been on the garden where it was later found.

297. No further search was made of any of the gardens in the enclosure until August. On 16 August, Mrs Crewe's body was found in the Waikato River. It was quickly established that she had been shot in the head by a ·22 bullet. The fragments of that bullet which the Police recovered from her head gave them their first concrete piece of evidence which might lead to the murderer.

It was obvious that, if a ·22 shell case could be found in the Crewe house or on the Crewe property, that could also lead back to the murderer. Inspector Hutton therefore instructed Mr Jefferies that a further search was to be carried out specifically for ·22 cartridge cases and fragments of lead. Mr Jefferies carried out this search with Detectives Higgins, Gee, and Meurant on 18 and 19 August 1970.

298. The instructions which were given, and the extent of the search carried out, are matters on which we have heard a great deal of evidence. Mr Hutton said that he instructed Mr Jefferies to sieve search the garden against the walls of the house, the gardens on the side of the front path, and the garden adjacent to the fence for a short distance to the left and right of that front gate. In terms of the plan of the house and enclosure reproduced in illustration 12 gardens B, C, E, D, and part only of A and F were to be searched.

299. Mr Jefferies confirmed in his evidence that these were the instructions which Mr Hutton had given to him, and said that only those gardens mentioned were sieve searched, as indeed did Detectives Gee, Higgins, and Meurant. All four officers said that the portion of garden A which we have marked with a cross, where exhibit 350 was later found, was not sieve searched in August. All of them said, and we accept, that nothing of any significance was located in this search.

300. Evidence along these lines was put forward at Mr Thomas's first trial in 1971. Later that year, *The New Zealand Herald* published a booklet entitled, *The Crewe Murders* by one Evan Swain. On p. 34 of that booklet

there appeared a photograph taken on 29 October 1970 of the garden in which exhibit 350 was found, clearly showing its relation to the back door of the Crewe house. When he saw that photograph, a Mr Hewson, who had been a friend of Mr and Mrs Crewe and who had come to Pukekawa from Woodville to assist the Police at the start of the inquiry, contacted Mr Thomas's legal advisors to say that the garden had been sieve searched in August 1970 by the Police party, with his assistance.

301. There is a direct conflict of evidence between Mr Hewson and four Police officers on this vital point. Clearly, the jury at the second trial resolved the conflict in favour of the Police. We have had access, however, to considerable material, some of it from the Police files, which was not put before the jury at the second trial. This material corroborates what Mr Hewson says. For that reason, we are prepared to accept that the garden in which exhibit 350 was found on 27 October 1970 had been thoroughly sieve searched in August. Because of the importance of this point, we propose to set out in some detail the matters which led us to our conclusion.

302. Mr Jefferies completed on 21 August 1970 a job sheet which stated that on 18 August 1970 'All gardens were cleared and the earth sifted and examined'. Taken at face value, that job sheet supports Mr Hewson's version of the matter. It is very significant that the job sheet was written before any 'planting' allegation in respect of exhibit 350 was made. We consider that the terms of the job sheet are to be given a great deal of weight.

303. The notes of a conference held on 18 August 1970 show Mr Jefferies as saying:

> "A search was made of the lawn and the garden was completely dug up, that is all gardens, and sieved. There were several parts of the garden where we could scratch over and look visually that weren't actually sieved and I am satisfied there was not anything there. We had Graham Hewson—he helped us up there today . . . we have got to the little gate now within the confines of the immediate house."

304. The reference in this document to some gardens not being sieve searched was siezed upon by the Police as a reference to the part of garden A where exhibit 350 was found. We do not accept this proposition. Mr Jefferies specifically refers in the conference note to all gardens. The reference to parts of gardens was in our view to particular parts where, probably because of a lack of vegetation, it was possible to carry out a thorough search by 'scratching over'. The reference is certainly not specific enough to enable us to conclude that almost the whole of garden A was not searched. Furthermore, the reference to a little gate is clearly to the gate outside the back door near where exhibit 350 was eventually found, and suggests that the garden was in fact sieve searched.

305. All four officers conceded that Mr Hewson was present on 18 August, but have said that he assisted them only by searching the roof and guttering, a task that had already been completed. That task would only have taken a short time and the Police say that it was the only assistance which Mr Hewson gave them. The clear implication is that Mr Hewson was an embarrassment rather than an assistance to the Police. The conference note of 18 August 1970 to which we have already referred explicitly states, however, that Mr Hewson was helping the Police. It does not support Mr Jefferies' evidence that he humoured Mr Hewson by allowing him to climb on to the roof.



CREWE HOUSE and SECTION

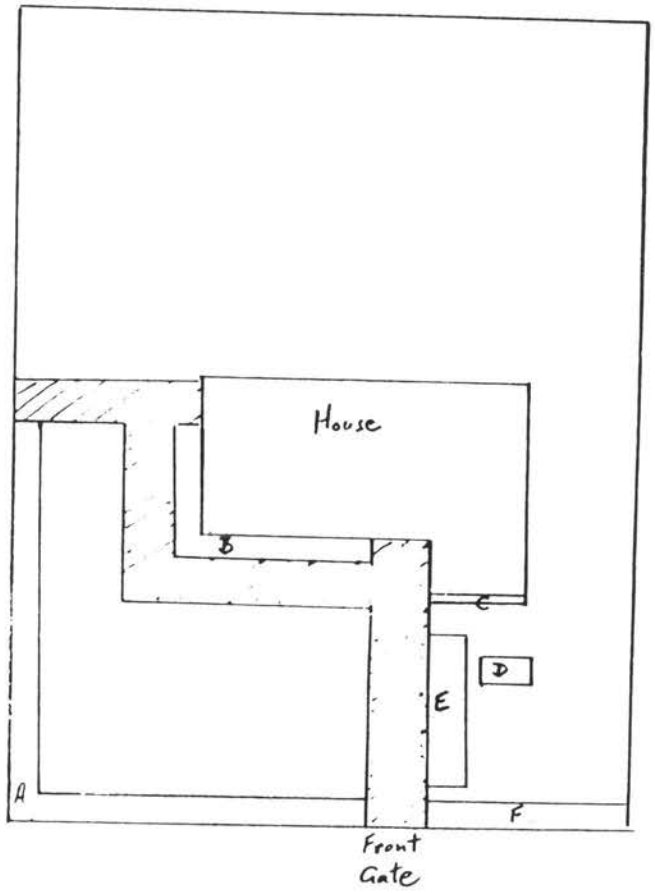



ILLUSTRATION 12

306. Detective Sergeant Tootill completed on 19 August 1970 a job sheet recording that he saw Mr Hewson on the Crewe property on 18 August 1970, 'Assisting in (the) search.' We take that job sheet at its face value.

307. There are a number of job sheets which confirm that, at an earlier stage of the inquiry, Mr Hewson did assist the Police, and that he was in fact asked to report to them any odd behaviour on the part of Mr Demler, with whom he was residing. On 8 July, he was given a letter signed by Mr Hutton authorising him to drive the Crewe car to Tuakau to register it and to obtain a new warrant of fitness. We have also heard evidence that on 20 August 1970 at Mr Hutton's request he went to Hamilton to pick up the Crewe car, and drove it back to Auckland. Detective Abbott confirmed that Mr Hewson handed a bedspread from the Crewe car to him at the Otahuhu Police Station on 20 August 1970. All of these matters suggest that Mr Hewson's relationship with the Police was as close and cordial as he says it was, and are inconsistent with the picture which Mr Jefferies would paint of a man who was a nuisance to the police and had to be humoured.

308. Mr Jefferies denied that Mr Hewson was present at the house at all on 19 August, on which date the area of paddock between the enclosure and road was mown. Mr Parkes however recalled seeing Mr Hewson there that day. Mrs Chitty and her husband, very significantly, recalled Mr Hewson borrowing and returning a lawnmower at about that time for the purposes of assisting the Police with their search. We therefore accept Mr Hewson's evidence that he was at the property on 19 August.

309. Mr Hewson has always asserted that he was driven to the Crewe house on 18 August 1970 in a Police car, with Mr Jefferies, Mr Meurant, Mr Higgins, and Mr Gee. He says that they called at one place, possibly a council yard, and then at another yard, to borrow a sieve. All four officers concerned denied that Mr Hewson travelled in the Police car with them and said that they called at only one place, Dricon Industries Limited, to borrow a sieve.

310. So far as the sieve is concerned, Mr Samonds and Mr Kelly, employees of the Tuakau Borough Council, gave evidence that some time in the winter of 1970, the Police called to borrow a sieve, which they were unable to supply. They could not be more specific, but the Police have not produced evidence that any Police officers called at the council depot about that time to borrow a sieve in connection with any other matter. So far as it goes, their evidence therefore, tends to support Mr Hewson.

311. On the issue of whether Mr Hewson travelled in the Police car at all, Mr Hewson himself said that his car was in the garage on 18 August to have the tyres changed. Mr Marr, of Howe & Weston Ltd., Pukekohe, produced a receipt dated 21 August 1970, made out to Mr Hewson. He said that he remembered that the tyres had been changed, and that the work had been done 2 or 3 days before the date of the receipt. Neither Mr Hewson's nor Mr Marr's evidence was challenged on this point, and we therefore accept that Mr Hewson, having brought Mr Crewe's mother to Pukekohe on 17 August 1970 following the discovery of Jeanette Crewe's body in the Waikato River, left his car at Howe & Weston Ltd. on the following day.

312. All concerned agree that Mr Hewson was at the property on that date, no-one has suggested that he walked there or made his way there by public transport. It seems likely that he did in fact travel in the Police vehicle.



313. Mr Handcock, who was the manager of the Crewe farm, confirmed evidence which he gave at an earlier stage to the effect that he saw Mr Hewson with the Police party inside the enclosure on 18 August, and that Mr Hewson seemed to be loosening the soil with a fork or similar implement.

314. There are no photographs showing the state of the gardens after the August search. The Police relied on photographs taken on 29 October, and showing rather more vegetation in garden A than in garden B to establish that garden A had not been sieve searched in August. We make the following comments on this evidence:

(a) Mr Parkes and Mr Charles made no mention of having to remove in October a large bush which was growing in June near the rear gate, at the point where exhibit 350 was found. Detective Meurant's evidence establishes that that bush was not removed in June. It was therefore, removed in August, which is consistent with sieve searching of that area:

(b) We agree that there is rather more growth in garden A than in garden B in the October photographs. There are nonetheless plants in garden B comparable in growth with those in garden A. In our view, the explanation of any extra vegetation in garden A may have been given by Detective Gee, who explained that the Police had put some plants back onto the garden when they had finished searching, had left others on the lawn and thrown still others over the fence. In our view, the difference between garden A and garden B lies in the fact that more plants and bulbs were put back into garden A than into garden B. Very significantly, we can see at least one plant growing on the lawn beside garden A in one of the October photographs, which suggests it was left there on the lawn, and hence supports the proposition that the garden was sieve searched in August.

(c) Overall on this issue, we are conscious that we are working from photographs taken to show things other than the gardens. We think it very dangerous to place too much weight on what is or is not shown in the photographs, and we base our finding that the garden was sieve searched on 18 August on other matters.

315. The photographs taken on 23 June show a white board along the bottom of the fence beside the back gate intact after the search of that date had been completed; the October photographs show it broken off, and lying away from the fence. Mr Charles could not remember removing it in October; it therefore seems likely that it was removed in August during the sieve search.

316. For these reasons, we accept the evidence of Mr Hewson and reject that of the four Police officers, and of Mr Handcock, then manager of the Crewe farm, to the effect that garden A was not sieve searched in August. We do so with some reluctance, since Mr Handcock is a member of the public obviously anxious to be of assistance to us, and since the four officers are men to whom a reputation for integrity is vital.

317. Mr Handcock was in our view simply mistaken in his recollection, and it is significant that he first approached the Police about the matter only in 1972, when there had already been a sustained degree of controversy about Mr Thomas's case for some considerable time.

318. Despite counsel for Mr Thomas urging that we consider a more severe approach so far as the four Police officers are concerned, we find also merely that they were mistaken.

319. We accordingly find that the garden where exhibit 350 was eventually found on 27 October had been thoroughly and carefully searched on 23 June, and sieve searched on 18 August. We are satisfied that, had exhibit 350 been deposited in the garden on 17 June, it would have been located in either the June or the August search. Since it was not so located, it follows that it did not find its way into the garden until after 18 August 1970.

## 7. The State of Corrosion of Exhibit 350.

320. In paragraph 47 we have already referred to the description of exhibit 350 given by Messrs Charles and Parkes when they first found it, and of Mr Shanahan when it was examined by him the next day at the DSIR. Their evidence of its condition is not consistent with that of Mr Hutton. We prefer the evidence of the other three.

321. We heard evidence from a metallurgist suggesting that the speed and extent of corrosion of brass in soils exposed to weather might be expected to vary greatly. We also heard evidence of a number of tests of corrosion carried out by exposing brass cartridge cases in soil in various localities, with the predictable result of substantial variations in the corrosion found after 18 weeks. Of more interest is the appearance of shellcases buried at the Crewe property in the garden where shellcase 350 had been found, and left there for 18 weeks between June and October 1972. When recovered both these shellcases showed a substantial amount of inky blue corrosion products present. A similar test carried out by the defence in burying shellcases nearby produced a similar result. This is to be contrasted with the appearance of shellcase 350 when found by Charles and Parkes. No inky black corrosion was seen by them.

322. Dr Sprott examined exhibit 350 under a microscope in September 1972, specifically to consider the degree of corrosion it showed. Knowing that it had already been substantially handled, and possibly cleaned, he concentrated his attention on the small radius where the cartridge body joins the rim. There the metal is folded so tightly that a hand cannot touch the metal surface and it would also be extremely difficult to clean the same area. He found no corrosion in that area; and so was unable to reconcile its condition with the shellcases, test buried by the defence at the Crewe property.

323. Exhibit 318 is a box containing some .22 cartridges which were found by the Police in the Thomas home and retained by them as an exhibit. It now contains 13 whole unfired cartridges, and another two which have been dissected. Though these cartridges have never been exposed to weather, in appearance some look to us to be similar to exhibit 350 so far as the degree of corrosion is concerned. It must be appreciated that we can only make this comparison by the use of a photograph of exhibit 350, and we are not unmindful of the evidence that the handling of exhibit 350 could have removed some of the corrosion products present when it was first found.

324. We believe all this evidence to be too inexact on its own for us to rely heavily upon it. Nevertheless, we find that the degree of corrosion apparent on exhibit 350 is not such as we would expect to find if it had been in the ground from 17 June to 27 October 1970.



## 8. Summary of Findings to This Point on Term 1

325. We have found that the shellcase exhibit 350 did not contain either of the bullets which killed Jeanette and Harvey Crewe respectively. (See paragraphs 63 to 189.)

326. We have rejected the three explanations as to how exhibit 350 could have arrived in the garden on the night the murders were committed—these are the louvre window theory, the suggestion that the murderer threw the shellcase out the window, and the theory that it was a cold shell ejected from the murderer's rifle. (See paragraphs 192 to 208.)

327. In examining the possibility that exhibit 350 was left in the garden by the murderer we have also examined the weight which should be given to the other evidence purporting to show Mr Thomas's presence on the Crewe property on 17 June. We have found:

(a) That the Crown evidence utterly fails to establish any motive on the part of Mr Thomas to kill Mr and Mrs Crewe. (See paragraphs 212 to 220.)

(b) That the scientific examination of the bullets recovered from the bodies of Jeanette and Harvey Crewe compared with the markings on bullets test fired from Mr Thomas's rifle, does not establish that his was the firearm used in the murders. (See paragraphs 221 to 237.)

(c) That the only evidence to connect the axle found with Harvey Crewe's body with Mr Thomas was the stub axles. We have found that it would be quite unsafe to draw any inference connecting Mr A. A. Thomas with the axle found on Harvey Crewe's body merely because of the presence of the two stub axles on his tip, particularly bearing in mind all the inconsistencies, unexplained discrepancies, and alternative possibilities concerning the history of that axle. (See paragraphs 238 to 262).

(d) The wire evidence proves nothing. (See paragraphs 263 to 266).

(e) The additional evidence put forward by the Police to incriminate Mr Thomas is wholly unreliable, and in at least one case, the delusion of a diseased mind.

(f) None of this evidence in (a) to (e) above establishes to our satisfaction that Mr Thomas was on the property that night.

(g) In addition, there was the evidence from the second trial of Mr Thomas, his wife, and his cousin Peter that he was at home on the evening of the murders. We have noted that their evidence was not shifted to any degree in cross-examination. On the contrary, as we will find later, evidence used to discredit Mr Thomas in the trials has itself been proved to be false.

(h) Therefore, in examining the possibility that exhibit 350 was left in the garden by Mr Thomas that night, we conclude that the evidence before us fails to prove that he was there.

328. We have found that the garden where exhibit 350 was eventually discovered on 27 October had been thoroughly and carefully searched on 23 June, and sieve searched on 18 August. We are satisfied that had exhibit 350 been deposited in the garden on 17 June it would have been located in either the June or the August search. Since it was not so located, it follows that it did not find its way into the garden until after 18 August 1970. This in itself indicates that it was not left there by the murderer. (See paragraphs 287 to 319.)



Sig. 6*

329. We have also found that the degree of corrosion seen on exhibit 350 when it was recovered from the garden on 27 October 1970 was not such as we would have expected if it had been there from 17 June. (See paragraphs 320 to 324.)

### 9. The Police Investigation During October 1970

330. In the light of those findings we turn to consider afresh the course of the Police investigation during the month of October 1970.

331. The Police had begun their investigation on 22 June 1970. Months had passed without them making an arrest, or indeed, discovering any evidence of weight pointing to the identity of the murderer. Mr Demler had been their prime suspect, but at a Police conference on 2 October 1970, the investigation team was told by the Crown Prosecutor that there was insufficient evidence to charge Demler with the murders.

332. Two detectives from further south, Mr Baker and Mr O'Donovan, were called to Auckland to review the inquiry, providing a fresh perspective or overview. This review was carried out by them between 2 October and 19 October.

333. On 13 October 1970 the Police were able, by virtue of Miss Cowley's telephone call, to trace the axle which had weighted Harvey Crewe's body back to the Thomas family. We have now found that there is no acceptable evidence to connect the axle with Mr A. A. Thomas, but to the Police officers involved in the case, its supposed identification must have been seen as giving a fresh impetus to the case. The impetus was in the direction of Mr A. A. Thomas.

334. It may be significant that on the same date, 13 October, there was carried out the reconstruction of the louvre window theory, which we have dealt with in paragraphs 192 to 202. We question what the purpose of carrying out this reconstruction was. Whether the Crewes, or either of them were shot by a person from inside or outside the house did not advance the prospect of establishing the identity of the murderer. It could not provide any new evidence. Both inside and outside had been searched in accordance with proper police practice twice, in June and in August. On the other hand, the possibility of an outside shooting through the louvre window could be seen as a reason for searching the garden again with the object of finding an ejected shellcase.

335. Some time between 13 and 16 October, Dr Nelson informed Mr Hutton of his final report, that he could not positively show that the bullets recovered from the bodies had come from the Thomas rifle.

336. The Police conference on 19 October reviewed the findings of Mr Baker and Mr O'Donovan. After reviewing once more the problems of lack of evidence against Mr Demler, the conference spent some time discussing Mr Thomas. Near the end of the discussion Mr Hutton summarised the position as follows:

Points against Thomas:

1. Possible motive—jealousy.
2. Previous relationship—infatuation.
3. Firearm (suspect rifle).
4. Proximity to scene.
5. Availability of transport.
6. Knowledge of Crewe farm through having worked there
7. Axle (yet to verify whereabouts of similar axle on trailer formerly the property of Shirtcliffe).
8. Fires and burglaries.



Points in favour of Thomas not being the offender:

1. Alibi for the evening of 17 June 1970—appears as though wife and boarder will verify that he was home on the night in question and did not go out.
2. Well thought of in the district.
3. Married man—well settled on homestead farm.
4. Time lapse since association with Jeanette.

The conference concluded that every effort must be made to 'Either confirm Thomas as a suspect or exclude him altogether.'

337. It is plain that Mr Thomas was by now the focus of the Police investigation. His family was interviewed. His financial and personal affairs were investigated. Wire samples were taken from his farm. He was asked for all ammunition he had on his property and handed over a packet of ·22 birdshot ammunition, (exhibit 345) and 14 loose cartridges from the scullery (exhibit 344). It should be noted that the Police already had a packet of ·22 cartridges uncounted (exhibit 318).

338. On 20 October the stub axles were found on his property in circumstances which we have already described. On the same date his rifle was again taken by the Police. On 21 October exhibit 343 was found, more wire samples were taken, and some other exhibits such as the number plate from the old Thomas trailer also picked up.

339. However, none of the information obtained since the conference on 19 October did much to strengthen a case against Arthur Allan Thomas. There was still no evidence putting either axle or wire into his hands. There was no positive identification of the death bullets having come from his rifle. There was no evidence putting him on the property on the evening of 17 June, and against that lack of evidence there was still his alibi to contend with. We consider that by now the Police were exhibiting a readily understandable desire to bring to a successful end a long and difficult homicide investigation by ensuring the conviction of the one suspect against whom there seemed to be any evidence at all, weak as that evidence has now been shown to be.

340. By 20 October 1970 the Police has in their possession the Thomas rifle and exhibit 318, the packet of cartridge cases containing cartridges of the same type as exhibit 350.

341. Mr Keith gave evidence that the Thomas rifle was kept in his locker, to which he alone had the key. We regard Mr Keith as an honest witness, but we do not accept that he is in a position to guarantee that no other Police officer had access to the rifle. His locker was apparently of standard government issue, and we have no doubt that it would not have been difficult for a determined person to gain access to it. Furthermore there is evidence given at the second trial by Mr Thomas that on 25 October 1970, Mr Hutton had the rifle in his office with a packet of ammunition attached to it. Mr Thomas gave this evidence under cross-examination and was not challenged on it. That evidence indicates that officers other than Mr Keith had access to the rifle between 20 October, when it was picked up from the Thomas farm, and 27 October when exhibit 350 was found.

342. A further significant piece of evidence on this point occurs in the Exhibit Register kept by the Police. Alongside the entries for the rifle and the packet of cartridge cases exhibit 318 appear two entries each with the words 'held Johnston'. Both are made in Mr Johnston's handwriting. We understand it is not possible to obtain an accurate dating of when these words were written. We can only say that they appear to be in the same

handwriting as the remainder of the two entries, and all have the appearance of having been made at the same time.

343. An attempt was made by the Police to establish that the entry in respect of the Thomas rifle cannot have been in the register in 1972, because it was not recorded by Mr R. J. Walton when he conducted a Police investigation at that time. There may be a number of reasons why the remark was not noted by Mr Walton. One may be that he did not regard it as being of significance. We are not able to accept that it was made after 1972 in the absence of evidence to establish such was the case. The plain fact is that the handwriting is the same as the handwriting of the entry itself which was made in 1970.

344. We believe the words 'held Johnston' indicate that at some stage during the Police Investigation Mr Johnston held both the Thomas rifle and the packet of ammunition in his possession.

345. In paragraphs 39–41 we have already related the curious conversation which took place at the Otahuhu Police Station on 26 October 1970 between Mr Hutton and Mr Jefferies, and which led to Mr Hutton instructing Messrs Parkes and Charles to search a particular garden of the Crewe property the next day. We repeat our misgivings. If the garden in question had not been sieve searched in August, Mr Hutton must on his own evidence have known this and did not need to ask Mr Jefferies. Furthermore, if that garden had not been properly sieve searched we cannot understand why Mr Hutton did not order it to be done immediately following the reconstruction of the louvre window theory on the evening of 13 October instead of waiting nearly 2 weeks.

346. Our curiosity is further heightened by the following extract from a report on this subject forwarded to the Commissioner of Police on 26 October 1973 by Assistant Commissioner Walton as he then was.

> "The experts conducted a physical reconstruction which confirmed the theory. A logical deduction then was that the offender, having just killed Harvey Crewe, and knowing that he must enter the house urgently and deal with Mrs Crewe has reloaded his weapon in a hasty and violent manner thereby ejecting the fired cartridge case. The ejection range of a .22 rifle was studied and as a consequence the O/C investigation ordered a sieve search of other gardens over the possible ejection radius from the back steps."

The truth of the matter is that there was no study of ejection ranges of the Thomas rifle until March 1973. Furthermore, Messrs Parkes and Charles were ordered to sieve search only one garden—i.e. the garden where the shell was found.

347. The conversation of 26 October, looked at in the light of all the above circumstances, forces us to the conclusion that it was staged for the purpose of providing the excuse for sending Parkes and Charles back to the particular garden to find the shellcase.

348. Mr and Mrs Priest told us that one afternoon after 30 September 1970 they were standing near the roadway on their property when they heard two shots from the direction of the Crewe home. They looked in that direction and saw two men near the back door. A short time later, while they were walking along the road, Mr Hutton and Mr Johnston came along in a car. A conversation followed. We accept the evidence of Mr and Mrs Priest that Mr Priest asserted the two Policemen had just fired two shots at the Crewe farm. Far from denying this, Mr Johnston said 'How do you know?' To which Mr Priest replied 'We heard you'. Giving evidence before us, Mr Hutton denied firing the shots, but we do not



believe him. We find that Mr Hutton and Mr Johnston fired two shots at the Crewe home that day.

349. After 20 October 1970, the Police then had the opportunity to plant a cartridge case in the Crewe garden. They had the cartridges from exhibit 318 in their possession as well as the Thomas rifle. They could fire one of these cartridges from exhibit 318 in the rifle and plant it in the garden.

350. We conclude that on the occasion referred to by Mr and Mrs Priest, Mr Hutton and Mr Johnston planted the shellcase, exhibit 350 in the Crewe garden, and that they did so to manufacture evidence that Mr Thomas's rifle had been used for the killings.

351. We consider that this explains why Mr Hutton described shellcase 350 as containing blue-black corrosion when in fact it did not. It also explains his odd behaviour at the Supreme Court upon discovering Dr Sprott examining one of the shellcases. Furthermore, it provides an understandable motive for the switching of exhibit 343 after it had been examined by Dr Sprott.

## 10. Any Impropriety in Destruction of the Exhibits at the Whitford Tip

352. Exhibits 350 and 343 were important and significant in the trial of Arthur Allan Thomas. Exhibit 350 was the cartridge case found by Charles and Parkes in the flowerbed adjacent to the back steps of the Crewe house on 27 October 1970. Since it was undoubtedly fired from the Thomas rifle and was a ·22 long rifle shell and the Prosecution said could have contained the bullets in the heads of Jeanette and Harvey Crewe, it became the cornerstone of the Crown case against Thomas.

353. Exhibit 343 which has been called the most discredited exhibit in the history of criminal trials, was a ·22 long rifle cartridge found in an applecase in a shed at the Thomas premises by Detective Sergeant Keith. It was taken to the Otahuhu Police Station, dissected by Inspector Hutton, and found to contain a ·22 long rifle projectile branded 8 on the base. This shell was subsequently fired for reasons of safety in a ·22 rifle at the Police Station. The cartridge and the projectile became exhibit 343.

354. Significantly, it showed that Thomas had on his premises ammunition of the same type which killed the Crewes. Later its significance was that since the shellcase was taken to be the same in all respects as 350, it proved that it was possible for a shellcase with the same headstamp as 350, Dr Sprott's category 4, to have contained a pattern 8 bullet, and it devastated the defence theory that the bullets in the heads of the Crewes could not have come from a category 4 cartridge case, i.e. 350.

355. At depositions in the Magistrates Court, 343 was described by Dr Nelson as a 'fired shell of a ·22 long rifle cartridge'. Later at another hearing he described it as being fired or unfired and said that he may have fired it himself by using a pin and hitting it with a ruler or some such object. When exhibit 343 was first examined by Dr Sprott towards the end of the second trial, it was an unfired shell and of category 3. At some time later, and after it had been returned from the examination by the DSIR it became a category 4, the same as exhibit 350, and it was an unfired shell. What it is today we will never know because it lies deep in the Whitford tip.

356. The appeal by Thomas against his conviction at the second trial was dismissed by the Court of Appeal on 12 July. When he heard this Mr Morris rang Mr Hutton, told him the results, and in the course of the

conversation Mr Hutton asked whether there was any reason why he should not pick up the exhibits for disposal in the normal way. Mr Morris said he could see no reason why the normal practice should not be followed. This normal practice, according to Mr Morris, was that leaving aside exhibits that had to be destroyed because of their nature, bloodstained clothing and the like, the exhibits were to be returned to their owners or at least persons entitled to them.

357. On instructions from Mr Hutton, Detective Sergeant Keith attended at the Supreme Court on 12 July 1973 and picked up all the exhibits. These he conveyed to the Otahuhu Police Station. Subsequently on 27 July he took a large number of these in the boot and the back seat of a police car to the Whitford tip near Auckland and there disposed of them. He had listed them by exhibit numbers. Included in those destroyed were exhibits 350 and 343, and exhibits 243 and 289. (Particles of bullets respectively found in the heads of Jeanette and Harvey Crewe.)

358. He disposed of them by placing the smaller exhibits into cardboard cartons still in their containers; he then emptied the contents on to the Whitford tip. He did not remove the exhibits from their containers, but some of the containers may have been broken when he was putting them into a carton. He was able to indicate to us on photographs of the tip, exhibit 112, the place where he put them as being to the left of a small group of trees shown in the foreground of that picture. He said the space covered by the contents of a carton would be about the size of a typewriter, and he indicated the word processor in Court. His method of ejecting them was 'To heave them out of the carton.'

359. A person seeking to recover exhibits 350 and 343 would therefore not be looking for an empty ·22 cartridge case, but for a complete or broken phial amongst a heap of recognisable exhibits. Mr Keith thought that as a result of the bulldozing, the rubbish he put there would be distributed over an area of 20–30 square yards.

360. The destruction of the exhibits was the subject of a statement from the Minister of Justice. Publicity had been given by Mr Pat Booth in his articles in the *Auckland Star* newspaper, and in the publication *The ABC of Injustice* that exhibits 350 and 343 had been destroyed at the tip. When he heard of this, the Minister of Justice was reported to have said he was 'desolate and deeply troubled'. Following this there were investigations by the Police:

(a) As to the circumstance under which these exhibits were destroyed; and

(b) As to the prospect of their being recovered.

The friends of Thomas were active in the matter and anxious to try and recover these two exhibits.

361. On 6 September 1973 Mr Hutton had a telephone conversation with Assistant Commissioner Walton, and on that day dispatched to him a telex. This is a lengthy document and some of its paragraphs were put to Detective Sergeant Keith in the witness box. Where he is in conflict with statements made by Hutton in the telex, we accept his evidence. Patently many of the statements in the telex are false and could only have been designed to misrepresent the position to the Assistant Commissioner.

362. For example:

(a) In paragraph 2 Inspector Hutton claims that following the first trial, despite being instructed by the regional supervisor to dispose of the exhibits, he deemed it prudent to retain all the exhibits, and following the trial of Arthur Thomas for the second



time, he again retained all Crown exhibits until after the result of an appeal by Thomas against conviction for both murders. It is curious that Mr Hutton should claim that he retained the exhibits. Quite plainly, until the appeal was disposed of, the exhibits would remain in the control and custody of the court and Inspector Hutton would not or should not have had any access to them, except by permission.

(b) In the telex he appears anxious to create the impression that his every wish at all times was to retain these exhibits. He said in paragraph 6 that he obtained the approval of Mr Morris to dispose of the exhibits in the normal manner.

(c) In paragraph 8 he said he and Mr Keith sorted out the exhibits. Mr Keith said he carried out this task and prepared a list of 137 exhibits to be taken to the tip. Mr Hutton said in the same paragraph that in the company of Detective Sergeant Keith he took those 137 exhibits to the Whitford tip. This is quite untrue. Mr Keith says, and we accept him, that he took the exhibits to the tip in a Police car in the boot and the back seat. He was unaccompanied.

(d) Mr Hutton says in paragraph 13 that of the 137 exhibits destroyed, he only really intended to retain possession of exhibit 350, since he had promised to give this to Detective Sergeant Charles as a souvenir. He goes on to say, 'In my haste in going through the many bullet and shell exhibits for destruction, I overlooked this fact due to the impression I had that this exhibit was locked away in my office.' We are prepared to accept that whatever Mr Hutton did towards the disposal of these exhibits was done in haste, and it may well be, having regard to other instances where exhibits have been retained by Police officers rather than kept in the exhibit room, his statement about it being locked in his office could be true.

(e) He describes going back to the tip with Mr Keith, and the nature and extent of the work which had gone on since they were last there. Mr Hutton says both he and Mr Keith became unsure exactly as to the precise spot where the exhibits had been thrown out. He goes on to recite facts as to the building up of the tip by layers of rubbish that would 'need a miracle to happen for us to recover the ·22 shells and cartridges disposed of.' He commented that exhibit 343 in particular had no markings on it and was therefore unidentifiable. Mr Keith knew of course where he had put the exhibits in relation to the clump of trees, and it was his evidence they would have covered an area of 20–30 square yards. The telex paints a picture of 343 and 350 being cartridge shells apart from their containers, and with no markings. 350 as we have said before, would have been in its container with cotton wool, and have a tag, as would 343, unless these phials had been broken.

363. We recall that before the appeal had been determined Mr Pat Booth had an interview with Mr Morris in his office, in which he told him that the friends of Thomas, he, and Dr Sprott, were not finished with the matter and they would continue to fight on.

364. If the exhibits 350 and 343 had been disposed of in accordance with normal practice, they would have been returned to the Thomas family or their legal representatives because even on the Police view of the

matter they belonged to Thomas. This may seem to be a somewhat trifling point, as they had as objects no real value. Their value to Thomas and his legal advisors was immense since they were the exhibits on which Thomas's fight for freedom had been based. Equally, so long as they existed, they were a threat to the prosecution case, and although Mr Morris may have said that the dimissal of the appeal was the end of the road, enough had been said, seen, and done up to this stage to make it clear that this was not so as far as Thomas and his supporters were concerned.

We draw the following conclusions:

365. Exhibit 350 and exhibit 343 were clearly the property of Arthur Allan Thomas and should have been returned to him or his solicitors. They, in company with other exhibits, were dumped on the Whitford tip on 27 July as a result of the direction by Hutton to Keith. Hutton's statement that he was present with Keith when they were taken to the dump and distributed was false. His description of the manner of their destruction was false to his knowledge. Hutton had both these exhibits destroyed because he knew exhibit 350 had been planted, and exhibit 343 was a suspect exhibit for which an unfired shell had been substituted.

366. We find the disposal of these exhibits and the reasons for it has an added significance. It strongly supports the case against Hutton of planting 350 to procure the conviction of Thomas. The destruction of exhibits 350 and 343, and the telex report from Hutton, constitute impropriety on the part of the Police. The telex sent by Hutton to Assistant Commissioner Walton was in part false, and intended to misrepresent the position so that a further search for exhibits 350 and 343 would not be undertaken by the Police.

## 11. Mr A. A. Thomas's Prior Visits to the Crewe Farm

367. In a typed job sheet, signed by Detective Sergeant J. R. Hughes on 3 July 1970, he recorded an interview with Arthur Allan Thomas the previous day. It includes the following statement:

> "Thomas said he had been to the Crewe home while working for one of the local agricultural contractors when sowing manure. He had met Harvey then who appeared to him to be a decent type of bloke. He had had morning and afternoon teas in the home. This would have been as late as three or four years ago. He said that he had not been to the house since . . ."

368. In a job sheet dated 8 September 1970, Detective B. M. Parkes recorded an interview with Arthur Allan Thomas at the Tuakau Police Station on the previous day. This contains the following statement:

> "During the 1960s, Thomas was employed by Barr Brothers as a loader driver. The firm was engaged in topdressing operations, and he would have been on the Chennell Estate property between 4–6 times. At this stage, Jack Handcock was the manager of the estate, and Thomas would have eaten meals in the house while working there. This would have been about 7 years ago, and he has not been on to the property since."

369. A written statement was signed by Arthur Allan Thomas on 15 October 1970. In it he stated:

> "My next position was for Barr Brothers who worked from Ardmore. I was again a loader driver: I left them in May 1965; I worked on Crewe's property several times; Jack Handcock was the manager at Crewe's farm then; I used to eat with the Handcocks when working there; they were then living in the Crewe house."



370. At the second trial in particular, Arthur Allan Thomas was strenuously cross-examined concerning Hughes' evidence which contradicted his own, and his credibility was attacked both then and again during the Crown Prosecutor's final address. The evidence assumed substantial importance, first as establishing whether Thomas had been in the company of Mr and Mrs Crewe in their own home, and secondly from the point of view of the credibility of Thomas in the witness box.

371. The facts of the matter are quite clear. In evidence before us Mr J. Barr, Managing Director of Barr Brothers Limited, gave evidence and produced simple records which establish:

(a) That Mr A. A. Thomas worked for his company as a loader driver for a number of years until 28 May 1965 (which is more than a year before Mr and Mrs Crewe moved onto the Chennell farm at Pukekawa).

(b) That after 28 May 1965 Mr Thomas was never employed again by Barr Brothers Limited except for one day in 1967 when he was employed by them as a loader driver for the topdressing of a specified farm which was not the Crewe farm.

(c) That the last occasion upon which his firm applied fertiliser to the Chennel Estate farm was in April 1966. His firm never topdressed the farm after it was taken over by Harvey Crewe.

372. This evidence from Mr Barr was clear. The records which he produced are simple and clear. They are available to us now and must have been available in both 1971 and 1973.

373. In evidence before us the Crown Prosecutor, Mr Morris, stated that on two separate occasions, once before the commencement of the First Trial in 1971 and again on the occasion of the Second Trial in 1973, he specifically requested the Police to check with Barr Brothers the date upon which Mr Thomas ceased to work for them. He stated that he received an answer on each occasion indicating that an inquiry had been made and that the records were inconclusive. On one of these occasions Mr Hutton was involved with the requests of Mr Morris. Though Mr Hutton denies any knowledge of this, we accept Mr Morris's evidence.

374. We are aware that some inquiries were made of Barr Brothers Limited by the Police on other matters, but we can find no evidence that the Police did properly pursue the answer to Mr Morris's requests. If they had, the Barr Brothers' records were available to establish the position so clearly. We are forced to conclude that the Police preferred instead to leave the matter in a state which allowed the Crown Prosecutor to cross-examine Mr Thomas and address the jury as he did. Undoubtedly the matter should have been investigated and was not. We find the Police failure to establish the truth of the matter was improper conduct.

## 12. Whether the Claim by Bruce Roddick to have seen a Woman at the Crewe Property on Friday, 19 June 1970 was adequately investigated by the Police?

375. Across the road from the Crewe property is a farm occupied by Mr Chitty. In 1970 Mr Chitty sometimes hired a young man called Bruce Roddick to assist him on a casual basis. Bruce Roddick lived in the district with his parents. Mr Chitty called on his help for feeding out to his stock on Friday morning, 19 June. It was the only day that week that Mr Roddick did help him. Mr Roddick told us in evidence that on that Friday

morning he was feeding out hay from the back of Mr Chitty's tractor in a paddock immediately opposite the Crewe home. He looked across and saw a lady standing in front of the house, and a car nearby. He described the lady and the car to us as far as he was able. At that time Mr Roddick did not know Mr and Mrs Crewe, but did understand that they occupied that farm. He assumed that the lady he saw was Mrs Crewe.

376. The following Monday evening the Roddick family learnt of the Crewes disappearance from the T.V. news; and the following morning heard further details on the radio news at breakfast time. On hearing that it was thought the Crewes had disappeared the previous Wednesday, Bruce Roddick immediately told his parents this could not be right because he had seen Mrs Crewe the Friday morning. At the suggestion of his parents he went to the Police and related what he saw. He was interrogated very thoroughly and the Police clearly concluded that the information he was giving was accurate. Two days later he saw a photograph of Jeanette Crewe and told the Police that though the face of the women he had seen was similar, her hair was the same length, but seemed to be a little lighter in colour.

377. On 30 October 1970 Mr Roddick attended an identity parade of nine women including Mrs Vivien Thomas. After the parade Mr Roddick was asked by the Police whether he saw the person whom he had seen at the Crewe farm, he replied that no one in the identity parade looked similar to the woman he saw at the Crewe farm. Vivien Thomas was known to Mr Roddick, but he did not tell the Police that at that time. He has told us that the woman he saw on the morning of 19 June 1970 was definitely not Vivien Thomas. It has been questioned as to whether the Police should have given Roddick the opportunity to specifically exclude Vivien Thomas. We do not consider that the failure by the Police to do so constitutes any impropriety on their part. He had after all indicated that none of those in the parade were similar to the person he saw on the Crewe farm.

378. In the years since, the attention of many people has been held by the questions of whether the child Rochelle was fed between 17 and 22 June 1970 and, if so, by whom. Mr Roddick's sighting of a woman at the Crewe property on 19 June does not stand alone in this respect, for one may also point to the sighting by both Mr and Mrs McConachie of a child in the front paddock of the property on Saturday, 20 June, and there are also other sightings, besides that of Mr Roddick, of a car seen in the front paddock between those dates. The controversy reaches its culmination in a claim made by Mr David Yallop in his book *Beyond Reasonable Doubt?* in which he said:

> ". . . I have discovered the identity of the woman who fed and tended Rochelle Crewe."

379. The identity of the woman named by Mr Yallop has been known to us since the start of our inquiry. We invited Mr Yallop to come to New Zealand to give evidence to us of the source of his information. He was unable to do so. By a coincidence Mr M. P. Crew, counsel assisting us, was in London in October 1980 and was able to interview Mr Yallop on our behalf. He obtained from him an Affidavit annexed as appendix II. The exhibits to that Affidavit are not attached for reasons which will become apparent. We emphasise that we are quite satisfied in relation to this matter and generally that Mr Yallop had no material information not already in the possession of the Commission.



380. The information upon which Mr Yallop was relying in identifying the woman may be summarised as follows:

At Mr Yallop's request Bruce Roddick was visited in November 1977 by four persons who showed him a number of photographs. Affidavits were later signed by three of these persons, and what they say occurred is best described by the following extract from one of the Affidavits:

> "Mr Roddick examined all the photographs very carefully and thoroughly, while we watched. No conversation took place during the study of the photographs. Finally Mr Roddick selected two from the sixteen (16), namely number 11 and number 7. Annexed hereto and marked "A" is a copy of photograph 11. Photograph 11 was his first selection. Mr Roddick then stated—quote—'That's her' unquote—I asked him to elaborate and he told us—quote—'The lady on photograph number 11 is the woman I saw outside the Crewe farm with a car behind her to the left and I am positive'—unquote. Regarding photograph number 7 Mr Roddick said 'The lady in this photograph who is dressed in green is in exactly the same clothes with the correct colour and standing in the same way as the woman I saw that day, however this woman is older and my identification applied only to her clothes, the colour, the way she is standing, her height and vaguely the hairstyle'.
>
> "I then asked Mr Roddick to sign the photographs being relevant to the Crewe case which he did, signing number 11 and number 7".

The other two persons made Affidavits to the same effect. This information was relayed to Mr Yallop and is the basis of his claim.

381. In November 1978 Mr Roddick was visited by Mr Pat Booth. On this occasion he signed an Affidavit in which he said *inter alia*:

> "30. That, early in 1978, I was approached by a woman I understand to be June Donaghy from Auckland who said she was contacting me on behalf of an author David Yallop who had earlier had some discussions with my parents in Auckland.
>
> "31. That at her insistence, after she had questioned me about the woman I had seen at the Crewe house and after she had shown me a collection of photographs, I initialled one as being of a woman who was similar to the woman I had seen on those occasions in 1970–71.
>
> "32. That I stressed in front of witnesses that the photograph was of a woman who was similar but that I was not saying she was the one."

382. In 1979 Mr Roddick was seen by R. A. Adams-Smith. Of that interview Mr Adams-Smith had said:

> "Roddick advised me that at no stage has he recognised any person in a photograph as being one and the same person as he saw on that Friday morning the 19th June. At no stage has he said other than that the women which he has indicated, are similar to the woman that he saw. I refer to "women" because Roddick advises me that at the interview in Sydney with Yallop's representatives, he in fact selected photographs of two women. One was the person a photograph of whom has been referred to the Prime Minister while the other according to remarks made by Mr Yallop's representative, was a woman in Scotland who had not ever been to New Zealand and therefore could not in any way be associated with the case. Roddick absolutely denies that he told Yallop's representative that he positively identified any woman."

383. When Mr Roddick was giving evidence before us the photograph sent by Mr Yallop to the Prime Minister was put to him. He stated that the woman in the photograph was similar to the woman he had seen at the

Crewe property but could not positively identify her. He also denied that he had ever positively identified the woman in the photograph as being the woman he had seen. Bearing in mind that he was 118 paces by his own reckoning away from the place where the woman was standing on the Crewe property, we accept that it is unlikely that Bruce Roddick could positively identify the woman, and to claim a positive identification some 8 years later from a photograph would seem to us to have little merit.

384. In our view it is clear that Roddick has retreated from an initially more positive identification than he gave before us. That having been said we are satisfied that there is insufficient evidence that the woman in the photograph named by Mr Yallop in his letter to the Prime Minister is the woman seen on the Crewe property by Mr Roddick on 19 June 1970. We say that, not only on the basis of Mr Roddick's evidence, but also on the basis of certain other investigations which were carried out to determine whether the woman concerned could have been on the property that day. It is clear that it is not now possible to establish whether the woman named by Mr Yallop was the woman seen by Mr Roddick.

385. Mr Yallop named the woman in his letter to the Prime Minister in good faith on the information available to him. There is, however, simply no means of justifying to an acceptable standard of proof his statement that the woman he named was the woman seen by Mr Roddick.

386. The members of the Commission have discussed at length whether we should publish the name of the woman in this report. The Chairman has been of the view that the purpose of our seeking to have Mr Yallop give evidence has been to dispel the doubt which has always existed as a result of his saying:

"I know who fed the child"

and that the woman should therefore be named; the other members have placed weight on the enormous prejudicial effect which publication of the name would have on the woman and her family. We are all conscious that our report will carry absolute privilege and that it would not be possible for the woman, if she were named, to put forward her side of the story through the Courts. The public pressure, criticism, and vilification of her and her family were we to name her, would be enormous. Furthermore all the members agree that there is no satisfactory evidence that she was the woman seen by Bruce Roddick. Predominantly for this reason, but also to be fair to her and her family, we have decided not to name her. To do so would only promote endless speculation and suspicion.

387. We should now deal with the question of the adequacy of the Police Investigation. We need state only that we are satisfied that the Police inquiries on the indentity of the woman seen by Mr Roddick were adequate when undertaken.

## 13. Timing of the Murders

388. The last recorded sighting of Jeanette and Harvey Crewe took place on 17 June 1970 when they were seen in their car driving south on the main road at Tuakau between approximately 3.30 and 4.15 p.m. At approximately 5.10 p.m. that day a neighbour saw the Crewe car parked at the south end of the Crewe farm. There is every indication that Harvey Crewe was at that time shifting some stock on his farm in that vicinity.

389. It is known that the last meal eaten by the Crewes contained peas and fish. Some remains of flounder were found on plates on the dining



table, while in the kitchen a dirty frying pan and a flour covered plate indicated the likelihood of the fish meal having recently been cooked there.

390. In paragraph 416 we refer to the evidence of Mrs Priest that she heard three shots on the evening of 17 June 1970 at a time which we fix between 8.30 p.m. and 11 p.m It cannot be said definitely whether or not those shots related to the murders.

391. In the lounge knitting was found with seven dropped stitches and a bent knitting needle found near some of the blood stains. This may indicate that Jeanette had been knitting in the lounge when the crime was committed.

392. The television set stood in the lounge, and was connected by means of a long lead which led from the lounge through the front hall into one of the bedrooms. When the Police arrived at the scene on 22 June, the television set switch was found to be on. A join in the cable in the hallway was pulled apart while in the bedroom the three-point plug was pulled out of the wall fitting and the switch there was in the off position. We draw no inferences as to timing from these facts.

393. It seems that Harvey Crewe was sitting in one of the lounge chairs when he was shot. The bed in the main bedroom was found to made up with the night attire under the pillows.

394. The rural delivery contractor left milk, bread, and a newspaper in the Crewes' letterbox at approximately 9.30 a.m. on 18 June. Those items were never collected.

395. During the afternoon of Thursday, 18 June, there were several phone calls to the Crewes, all of which went unanswered.

396. In the preceding paragraphs we have set out what seemed to us to be the available facts of importance concerning the possible timing of the murders. We see no indication that the Police failed to properly pursue any avenue of inquiry relating to this.

397. In a letter dated 8 February 1979 Commissioner Walton stated:

"The key to the date of death, apart from other factors, is that a flounder meal purchased on 17 June was still on the table in the house when the murders were first discovered."

The Police had in their possession two statements indicating that a couple, the identity of which is subject to doubt, bought some fish and chips at a shop in Pukekohe somewhere between 6 p.m. and 7 p.m. on 17 June. Though there was a suggestion that the couple were Mr and Mrs Crewe, this cannot be reconciled with other information suggesting that the Crewes had gone home well before that time, and that the flounder on the dining room table had not been purchased in a cooked condition that evening, but was cooked in the kitchen of the Crewe home. This is supported by information that Mr and Mrs Crewe bought six flounder at Meremere a few days earlier. It is quite apparent from the Police file that they themselves considered the flounder meal to have been cooked at home. The reference in Commissioner Walton's letter of 8 February 1979 was a mistake.

## 14. Collection of Rifles

398. Immediately following the discovery on 16 August 1970 that Jeanette Crewe had been shot with a ·22 calibre firearm, Detective Inspector Hutton instituted the collecting of a number of firearms in accordance with the following criteria:

(a) Relatives of both Harvey and Jeanette Crewe.
(b) Friends and associates of them.
(c) Persons residing within a 5-mile radius of their farm at Pukekawa.
(d) Any other persons who became involved in the inquiry (that is, suspects.)

In accordance with the above criteria 64 rifles were collected and tested. They included some from the district in which Harvey had lived before moving to Pukekawa. They also included Thomas's rifle because, while he lived outside the 5-mile radius, the Police were aware of his past association with Jeanette Crewe.

399. If a person living 8 miles away from the Crewe farm had 'opportunity' to carry out the killings, it seems to us that anyone living 80, 280, or 580 miles away would have very little different opportunity. We consider that the person responsible could have come from anywhere to commit these murders. Within New Zealand, how many firearms could have fired the bullets? No one will ever know.

400. We find no impropriety on the part of the Police and in particular are not critical of a failure to collect firearms on any wider basis, for we accept the impossibility of attempting to identify and test every similar weapon. We were told that there are approximately 800 000 firearms registered in the Auckland district alone, which stretches from Wellsford in the north to Rangiriri in the south.

401. However, we do consider that the narrow context from within which Thomas's rifle and one other were said to be the only ones which could have fired the bullets which killed the Crewes, was prejucicial to Thomas. That the other rifle has now been excluded does not alter our view.

## 15. Conclusions on Term of Reference 1

402. We find that:

(a) The shellcase exhibit 350 was planted in the Crewe garden by Detective Inspector Hutton and Detective Sergeant Johnston.
(b) The shellcase of exhibit 343 was switched on two occasions, the first probably accidentally but the second deliberately.
(c) The destruction of some of the exhibits in the Whitford Tip was an improper action designed to prevent any further investigation of exhibit 350. We also find that Detective Inspector Hutton improperly misled his superiors concerning the chances of recovering the exhibits from the tip.
(d) There was impropriety on the part of the Police in failing to investigate properly the records of Thomas's employment with Barr Brothers Ltd.
(e) Detective Inspector Hutton's behaviour in the Courtroom at the time of Dr Sprott's examination of one of the shellcase exhibits was unacceptable.
(f) Dr Nelson's refusal to accept his error concerning the shell 1964/2 showed a disturbing lack of neutrality by a scientific witness. His error as to the number of lands in the 'Eyre' rifle was a fundamental error of observation.
(g) The Police failed to protect properly an important exhibit in their possession, namely material found near the wheelbarrow. (See paragraphs 428–434)



(h) We are satisfied that the Police properly investigated the sighting by Bruce Roddick of a person on the Crewe property on 19 June 1970.
(i) We are satisfied with the investigation of the Police into the question of the timing of the murders.
(j) We are not critical of the criteria adopted by the Police in the collecting of ·22 firearms.
(k) There was a number of other issues raised before us under this Term of Reference. We will not mention them all, but it does seem proper to record that we do not find any impropriety in respect of the axle, phone tapping, or questioning of witnesses.
(l) Term of Reference 1(c) asks whether proper steps were taken after the arrest of Arthur Allan Thomas to investigate any matter or information, if any, which suggested that he was not responsible for those deaths. We have already made references to the steps taken on several matters, and others we raise in our answer to Term of Reference 5. There is nothing further we wish to add here.



Sig. 7

## TERM OF REFERENCE 2

### Whether the Arrest and Prosecution of Arthur Allan Thomas was Justified?

403. On 10 November 1970 a conference was held at the Central Police Station, Auckland, at which the question for discussion was whether to arrest Arthur Allan Thomas and charge him with the murder of Jeanette and Harvey Crewe. We know that those present at this conference included Assistant Commissioner Austing, Detective Inspector Hutton, and Mr D. S. Morris.

404. The evidence against Arthur Allan Thomas which was available to the Police for discussion at this conference is said to be all that which was subsequently presented in the preliminary hearing in the Magistrate's Court. Mr Morris told us that on the material discussed with him at this conference he gave his opinion to the Police that the arrest and prosecution was justified. At the conclusion of the meeting Assistant Commissioner Austing made the decision to arrest Mr Thomas and charge him with the murders.

405. The following day, 11 November 1970, Detective Inspector Hutton swore an Information alleging that he had just cause to suspect and did suspect that Arthur Allan Thomas on or about 17 June 1970 at Pukekawa murdered Jeanette Lenore Crewe. He swore a second Information similarly alleging the murder of David Harvey Crewe.

406. We have read the Depositions presented at the preliminary hearing in the Magistrate's Court at Otahuhu in December 1970. We are not critical of the decisions made and opinions expressed by Assistant Commissioner Austing and the Crown Prosecutor respectively, for the inclusion of all that evidence in the form shown to them made the case against Arthur Allan Thomas appear much more powerful than it really was. We accept that at that time neither Assistant Commissioner Austing nor the Crown Prosecutor were aware of the difficulties with this evidence which we now relate.

407. We believe, for reasons already detailed earlier in this Report:

(a) That shellcase exhibit 350 was planted by the Police, and that this was known by Detective Inspector Hutton.

(b) The chances of the bullets which killed the Crewes having come from the Thomas rifle were significantly reduced by the factors omitted from Dr Nelson's evidence. Again, Detective Inspector Hutton knew of these matters, for he referred to them at a Police conference on 19 October 1970.

(c) The evidence of Detective Hughes concerning Thomas having been on the Crewe property and had morning tea with them was wrong; and, as we have already set out in paragraph 374, if this was not known to be so by the Police on 10 November 1970, it should have been and could easily have been found to be so by them.

408. If we then leave to one side the evidence referred to in the preceding paragraph the only other evidence which the Police had then in their possession and would sustain the arrest and prosecution was as follows:

(a) **Motive**—We have already considered this in paragraphs 212–220. We reject entirely the notion that any of the evidence put forward in this respect established a motive by Arthur Allan Thomas to kill the Crewes.



(b) **Wire**—Again we have dealt with this in paragraphs 263–266. At best for the Prosecution, wire attached to the bodies was very similar to wire from the Thomas farm. No positive identification was made, and there was nothing placing the wire in Arthur Allan Thomas's hands.

(c) **The axle,** recovered from the river with Harvey Crewe's body, matched stub axles found on the Thomas farm. The Police were at that stage justified in inferring that the axle had come from the father's trailer in former years. There was no evidence that Thomas knew of its existence, let alone had it in his physical possession at any time.

(d) That Thomas owned a rifle of the appropriate calibre, and one which could not positively be excluded.

409. There was no evidence placing Thomas on the Crewe property on the evening of 17 June 1970; and even if both wire and axle did come from the Thomas farm others had equal access to them with Arthur Allan Thomas. That he owned a rifle of the correct calibre from which there was a possibility the bullets could have been fired hardly strengthens a case against him, and again others had equal access to the rifle. We believe that on this remaining evidence, even taken on its own, the arrest and prosecution of Arthur Allan Thomas was not justified.

410. We hasten to add, however, that the matters referred to in the last paragraph do not stand on their own. They should be looked at in the context of:

(a) Evidence that exhibit 350 was fabricated by the Police. Perhaps theoretically a discovery that some evidence was fabricated by certain Police should not prevent the bringing of a charge against an accused if the remaining available evidence is convincing enough. But in this instance we agree with the instinctive reaction of a person of such long experience as Detective Chief Superintendent Wilkinson. When this point was first put to him in evidence he replied without hesitation that if he had been in charge of the investigation and discovered that exhibit 350 was fabricated evidence, the charge against Arthur Allan Thomas would not have been brought. It is true that after reflecting further, Mr Wilkinson modified that view; but we consider his first reaction was the correct one.

(b) The evidence of Arthur Allan Thomas and his wife (confirmed as it was by the cousin Peter Thomas) that Arthur Allan Thomas did not leave their property on the evening of 17 June. Though we accept that credibility is for the courts to decide, we believe it is relevant to point out that there is no evidence of a direct nature which contradicts their statements in this respect.

411. Overall then we conclude that on 11 November 1970 the Police did not have just cause to suspect that Arthur Allan Thomas on or about 17 June 1970 at Pukekawa murdered Jeanette Lenore Crewe or David Harvey Crewe. His arrest and prosecution for their murders was not justified.



Sig 7*

## TERM OF REFERENCE 3 (a)

**Whether the Prosecution failed at any stage to perform any duty it owed to the Defence in respect of the disclosure of Evidentiary Material which might have assisted the Defence.**

412. At all relevant times Police General Instruction C143 stated:

"When Police decide not to call a person as a witness for the Prosecution, the Defence should be advised of the name and address of the person so that, if desired, the person can be called as a witness for the Defence. This Instruction, however, applies only to a person who is able to give material evidence (particularly when favourable to accused), and not a person who because he is unable to give any material evidence is not being called."

413. We note this makes no reference to assessing the credibility of a witness.

414. At the time of the first trial of Arthur Allan Thomas in 1971 we accept the following passage from 10 Halsbury's Laws of England (3rd Edition), page 418, paragraph 765, as a basic statement of the law then applicable:

"When the Prosecution have taken a statement from a person who can give material evidence, but decided not to call him, they must make him available as a witness for the Defence, but need not supply the Defence with a copy of the statement they have taken."

In New Zealand this was further clarified in 1975 in the case of *R* v. *Mason* [1975] 2 N.Z.L.R. 289 where the Decision of the Court was that where the Police have interviewed a person who can give evidence upon a material subject and the Prosecution does not intend calling that person, whether the Prosecution considers him creditworthy or not, it must make his name and address available to the Defence.

415. A number of issues on this topic were raised and we will consider each in turn.

416. On Tuesday, 16 June 1970, Mr and Mrs Priest, who live on a property at Pukekawa within sight of the Crewe home, attended a ball in Auckland. One evening later in the week Mrs Priest retired to bed early; after which she heard three shots which she thought came from the direction of the Crewe home. She cannot fix accurately the time she heard them. Her husband was watching TV; he did not hear them, but his wife mentioned them to him when he went to bed at approximately 11.00 p.m. Both fix the evening of this incident as Wednesday, 17 June, the evening following the ball.

417. The timing is uncertain. Mrs Priest told us that she usually went to bed at approximately 9.30 p.m. but on this particular evening, because she was tired, she went to bed earlier. She was reluctant to be any more definite than that. When first relating the incident to the Police, on 20 August 1970, she said that the time of her retiring to bed would not be before half past 8. In his book *Beyond Reasonable Doubt?* Mr Yallop asserts that in conversation with him Mrs Priest placed the time of hearing the shots as between 8.15 p.m. and 8.45 p.m., but giving evidence before us Mrs Priest denied saying this to Mr Yallop and denied that it was accurate. Mrs Priest's reluctance to attempt to fix the time of retiring to bed that evening at this late stage is very understandable. Accepting that her statement of 'not before half past 8' on 20 August 1970 is a reasonable starting point it seems to us that the timing of her hearing the shots cannot be fixed more accurately than sometime between 8.30 p.m. and 11.00 p.m.



418. On Monday, 22 June Mr Priest went to the Crewe house with Mr Demler. After looking at Rochelle Crewe in her cot they searched the house and the outbuildings for any sign of Mr and Mrs Crewe. From his observations of the lounge on that occasion, and no doubt assisted by some knowledge from the Police of what they also initially thought, Mr and Mrs Priest understood that blunt instruments were thought to be involved. Because no mention was made of a firearm, neither of them thought to mention to the Police the shots which Mrs Priest had heard.

419. On 16 August it was found that Mrs Crewe had been shot. Immediately the Priests heard this they went to the Police and Mrs Priest related what she had heard.

420. The Police appear to have disregarded Mrs Priest's evidence on the grounds, first that she did not relate it them until 2 months later, secondly, that there may be other explanations for the shots (e.g., oppossum shooters), thirdly, because of misgivings about the accuracy of the date, and fourthly, because as a result of a test later carried out by the Police they did not believe the sound of shots would carry from the Crewe home to the Priests' home. So far as the last matter is concerned, Mr and Mrs Priest both related to us a test which had been carried out the evening before they came to give evidence before us, in which they heard very distinctly indeed, from in the bedroom of the Priest home, some shots fired from outside the Crewe home.

421. We consider Mrs Priest's evidence was significant. It would have been open to a jury to accept or reject that what she heard related to the Crewe murders. If accepted, it affected the timing of the murders, and the fact that there were three shots leads one to speculate about the possibilities in a number of directions which, while not directly relevant to our Terms of Reference, may well have assisted the Defence. We accept that the Crown Prosecutor and his junior did not read the Police file and were not informed of this matter by the Police. Mrs Priest was not called to give evidence and it was not made known to the Defence that she may be able to give material evidence. In our view the Defence should have been informed, and the failure to do so was a breach of the duties of the Police in this respect.

422. In paragraph 348 we have already related the evidence of Mr and Mrs Priest concerning their hearing two shots from the direction of the Crewe home one afternoon, looking across and seeing two men by its back door, and subsequently having a conversation concerning the matter with Mr Hutton and Mr Johnston. In the Second Trial, the question of whether exhibit 350 was planted by the Police was raised by the Defence and was an issue before the jury. In our opinion this evidence of Mr and Mrs Priest was very relevant to that question and should have been revealed to the Defence. Again, the Crown Prosecutor did not know of it; it was the Police who failed in the duty to reveal it to the Defence.

423. On 23 February 1971, during the course of the First Trial of Arthur Allan Thomas, a Pukekohe jeweller, Mr Eggleton, approached the Police and gave them a written statement to the effect that Arthur Allan Thomas had bought a watch into him for repair shortly after the discovery of the Crewe murders. He stated that the watch had blood and mucus upon it. Mr Eggleton subsequently gave evidence of this at the First Trial.

424. Two residents of Tuakau, Mr and Mrs McGuire, told us that they read in the newspapers of Mr Eggleton's evidence. While the trial was still in progress they went to the Supreme Court at Auckland, and in the grounds approached Mr Hutton, knowing he was a policeman involved in the matter. They related to him a conversation in Mr Eggleton's shop the

previc ecember during which Mr Eggleton had indicated to them that he did not recognise Arthur Allan Thomas's photograph in the local newspaper. According to Mrs McGuire, Mr Hutton stated that he was not interested. Mr Hutton told us that he recalled speaking to Mrs McGuire but denied that Mr Eggleton was mentioned during the conversation.

425. Though Mr and Mrs McGuire were cross-examined concerning possible errors in the dates involved, we accept their evidence that they did have a conversation with Mr Hutton in which they related to him the incident in Mr Eggleton's shop. It is clear no action was taken by Mr Hutton to advise either the Crown Prosecutor or the Defence of this and Mrs McGuire was not called to give evidence for the Prosecution. Though Mr Hutton was in breach of his duty in this respect, it is clear that Mrs McGuire did make contact with the Defence Counsel in relation to this point, so that probably no great harm was done in the end result.

426. In November 1971, a Mr J. B. Fisher, then living at Feilding, read of Mr Eggleton's evidence. He contacted the Police and gave them a written statement stating that in 1970 (he thought in about October or November) while living in Pukekohe, he killed some pigs for a friend. The same day he took his watch to Mr Eggleton's shop for repairs. The watch had 'slime and fat and mucus' on it. He took it to Mr Eggleton only once. The Police checked marks on Mr Fisher's watch made by various repairers. One mark identifies the date of Mr Eggleton's repair work on the watch as 12 January 1971. Of course this is 6 months after the Crewe murders, is after date of the preliminary hearing of the Prosecution against Arthur Allan Thomas, and is a rather different date from the October or November given by Mr Fisher in his original statement to the Police. On these grounds, deciding it had no relevance, the Police took no action concerning Mr Fisher's statement. They did not reveal his existence to the Defence at the time of Mr Thomas's Second Trial in 1973.

427. We believe they should have. Mr Eggleton did not approach the Police until 23 February 1971—6 weeks after Mr Fisher's watch had been repaired by him. We consider it was for the court to decide whether Mr Eggleton's evidence was affected by what Mr Fisher had to say: It was wrong for the Police not to give the Defence the opportunity of putting forward Mr Fisher if they wished to. Again there is no evidence suggesting that the Crown Prosecutors were aware of the existence of Mr Fisher at the time of the Second Trial.

428. When the Police commenced their inquiries into the Crewe murders they took a substantial number of photographs of the scene as they first found it. Several of these photographs show some cloth or material with ragged edges lying on the grass alongside a wheelbarrow near the back door of the house. The Police considered the wheelbarrow was used by the murderer, for flakes of rust from it were found by the front door adjacent to some blood stains. Also, it gave the appearance of having been washed.

429. The true nature of the material on the ground is not clearly established. One Police witness said it was an oilskin coat and remembered seeing its sleeve. Another said it was not a coat, but an old canvas cow cover. Whatever it was the photographs show it to have be in a ragged condition.

430. It seems that one of the first Policemen on the scene did examine this material visually and saw nothing which obviously connected it with the murders. However, it was never subjected to any close scrutiny or



testing, and its close proximity to the wheelbarrow which seemingly was involved incurs one's attention. The material never formally became an exhibit or was tested in any way, because, according to the Police, it was burnt accidentally.

431. Extraordinary as this may seem at a murder scene under control of the Police team, at a time when the grounds were being subjected to a systematic search for any clues (which, we were told, would include cigarette butts), one Policeman related that having smoked a cigarette he flicked the butt away as he went into the house by the back door. Later, having found the material was burnt, this Policeman concluded that his cigarette must have been the cause. We are told it was completely consumed, leaving only charred grass behind it.

432. We heard a good deal about the weather at about this time. Lying outside, the material must have been damp. We do not believe that unaided a cigarette butt could have caused a fire which completely consumed the material including a long ragged tendril lying out to one side on its own. We know that at one stage the Police searchers left the scene to have a refreshment break, and that it was in their absence that the material disappeared.

433. Other evidence suggests the murderer returned to the scene—e.g., the cleaning up inside the house, and the sightings by Roddick and the McConachies. We believe that some person with an interest in the material, rather than the Police, was responsible for its destruction or removal.

434. There is no reference whatever to these events on the Police file. Mr Hutton and Mr Morris both say they were not aware of its existence. The issue for consideration is whether information concerning it should have been given to the Defence. The Defence were of course given the photographs which showed its existence, but we consider the Police had a duty to advise the Defence of its fate and the witnesses who could give evidence about it.

435. In paragraph 227 we considered the evidence relating to Dr Nelson's findings of certain characteristics on the bullets recovered from the Crewe's bodies, and others on the bullet test fired from Thomas's rifle, which he failed to cover in evidence. We identify Dr Nelson with the Prosecution in terms of the question raised in Term of Reference 3 (a), for in fact if not in form he was working as part of the Police team. Further, Mr Hutton knew of at least some of the matters which Dr Nelson failed to cover in his evidence. We repeat what we said in paragraph 228. We consider there was a duty owed to the Defence to reveal the four aspects of the scientific examination which were not covered in evidence by Dr Nelson and which indeed were not revealed until Dr Nelson produced his notebook for our perusal.

436. It is considered most likely that Mr and Mrs Crewe were murdered on the evening of 17 June 1970. The alarm was raised 5 days later, on the afternoon of 22 June 1970. The infant, Rochelle Crewe (then under 2 years of age), was found in her cot. Was she alone and unattended all that time, or was she fed and tended in the interval? That this is one of the questions which has perplexed so many people for so long is not the issue under consideration. We must examine the issue of whether the Prosecution failed in any duty to reveal to the Defence the names and addresses of any witnesses who could give evidence on the question of whether the child was fed.

437. In fact the Police received opinions from four doctors on this matter—two were of the opinion that Rochelle had been fed; two were of

the co. ry opinion. At the First Trial of Arthur Allan Thomas the Prosecution called only one of the four—Dr Fox, whose opinion it was that the child had been fed. The Defence were not specifically told of the names and addresses of the other three doctors.

438. At the Second Trial, in addition to Dr Fox, the Prosecution also called Dr Caughey whose opinion was that the child had not been fed. The names and addresses of the other two doctors were not given to the Defence.

439. However, we note that an Affidavit was sworn by Mr Hutton, dated 25 January 1971, in which he said:

> "That apart from any persons whose testimony is similar to that of evidence already given by witnesses at the hearing of Depositions, such as further Police officers who took part in searches, doctors who examined and supplied opinions on the condition of Rochelle Crewe, and persons who can speak of the movements by either of the deceased or by the accused, I know of no other witnesses who can give evidence material to this case and I know of no material evidence whatsoever that has not been given."

440. This Affidavit was filed in Court and served on the Defence prior to the First Trial. It must have been available to the Defence at the time of the Second Trial. In the face of its wording we do not consider there was any significant breach of a duty owed to the Defence concerning doctors who could give evidence about the feeding of the child Rochelle.

441. Finally, under Term of Reference 3 (a), we draw attention again to the passage just quoted from the Affidavit of Mr Hutton sworn on 25 January 1971. We are unable to reconcile the statements in that passage with some of our findings under this Term of Reference.

## TERM OF REFERENCE 3 (b)

442. Under Term of Reference 3 (a) we have already dealt with the question of whether the Prosecution failed at any stage to perform any duty it owed to the Defence in respect of the disclosure of evidentiary material which might have assisted the Defence. This Term of Reference asks whether the Prosecution failed at any stage to perform any duty it owed to the Defence in respect of any other matter.

443. In paragraphs 464–466 below we deal with the former association between one member of the jury in the second trial and Detective Senior Sergeant Hughes. We consider that the Prosecution owed a duty to tell the Defence of this matter, a duty which was not carried out because Detective Inspector Hutton took no action on being advised of it by Mr Hughes.

444. In paragraphs 467–468 below we deal in more detail with the circumstances in which some of the Police witnesses were eating in the same room as the jury at the Station Hotel. We consider the Prosecution failed to perform the duty it owed to the Defence to keep right away from the jury.

445. In paragraphs 449–463 below we set out our findings in relation to the investigation of the jury lists.

446. In paragraph 174 we have made a finding that Detective Inspector Hutton's behaviour in the courtroom at the time of Dr Sprott's examining one of the shellcase exhibits was unacceptable. In this respect we consider the Prosecution breached a duty it owed to the Defence to allow Defence experts, under the supervision of the Court, a fair opportunity to examine exhibits.



447. During the hearing before us, it was suggested by two witnesses that Detective Inspector Hutton had improperly observed the trial proceedings through a window of the courtroom. We make no finding about whether this did in fact occur, but in any event point out that if it did, the evidence of the complainants makes clear that this would have been after Mr Hutton had given evidence. From that point on Mr Hutton was entitled to remain in the courtroom.

## TERM OF REFERENCE 4

448. Term of Reference 4 reads as follows:

"4. Whether, in respect of the jury list for either trial,—

(a) The Crown or the Police or the Defence obtained preference in respect to the time at which the list was supplied?

(b) Any persons named on the list were approached by representatives of the Crown or the Police or the Defence before the jury was selected?

(c) Anything was done otherwise than in accordance with normal practice or was improper or was calculated to prejudice the fairness of the subsequent trial?"

We propose to present under this heading the whole of our report on matters to do with the jury. Because of an obvious similarity in subject matter, we shall consider under term 4 (c) matters relating to the jury falling within term 3 (b), which reads as follows:

"3. Whether the Prosecution failed at any stage to perform any duty it owed to the Defence in respect of— . . .

(b) Any other matter?"

### Term 4 (a)

449. Mr M. J. Hawkins, Registrar of the High Court at Auckland, gave evidence as to Department of Justice practice under the Juries Act 1908 over the period with which we are concerned. Section 14 of that Act provides for the preparation of master jury lists each year following the Parliamentary elections. From that list, the Sheriff, about 6 weeks before the date for which the jurors are required, draws by lot the names of a number of jurors called the common jury panel. It would appear that about 200 names were drawn at the time at which we are concerned. The names were drawn in public, and a notice of the date on which they were drawn was given on the High Court notice board. Summonses were then prepared and delivered to the persons whose names were drawn.

450. Various categories of exemptions are set out in section 6 of the Juries Act 1908. Over the 6-week period before the jurors are required, many of those on the panel contact the Court to take advantage of their right to exemption. Their names are struck off the list. In the week before the trial, a clean copy of the common jury panel, commonly called the 'jury list' is prepared. It would appear that our terms of reference use the colloquial expression 'jury list' in preference to the technical term 'jury panel'. We shall use the term 'jury panel'. It is the clean copy of the jury panel which is made available to the public pursuant to sections 98 and 99 of the Juries Act 1908, which read as follows:

> "98. A copy of every common or special jury panel shall, three days before such precept as aforesaid is returnable, be made by the Sheriff, and shall during such three days be kept in his office for inspection.
>
> "99. A copy of such panel shall be delivered by the Sheriff to any person requiring the same on payment of 2/-."

451. It may be observed that the terms of section 98 prescribe a minimum period within which the clean copy of the jury panel is to be made available. There is nothing in the Act to prevent it being made available sooner.

452. Mr Hawkins said, and Mr E. M. Comerford, Assistant Secretary for Justice, confirmed, that the Police were until 1960 responsible for serving summonses on potential jurors in terms of section 96 of the Juries



Act. The provision to that effect was removed in 1960. But the Department of Justice instruction sheets of procedures to be followed within the Court did not change. Until well after Mr Thomas's second trial, the instructions provided that copies of the jury panel were to be sent to the Police at the time they were made up, 6 weeks before the date for which the jurors were summoned.

453. There was before us no specific evidence of the date on which the Police received their copies of the jury panel in respect of either trial. We accept, however, that the Department of Justice instructions would have been followed and that the Police would have received a copy of each of the jury panels at about that time. In respect of the second trial, it is established by the evidence that the Police had a copy of the jury panel by 10 March 1973, 16 days before the start of the trial.

454. There is no evidence that the Defence received a copy of the jury panel any earlier than 4 days before the start of the trial. Mr Vesey's evidence was that he was able to obtain a copy on behalf of Mr Kevin Ryan only at about 2.40 p.m. on Thursday, 22 March, 4 days, but less than 2 working days before the start of the second trial. It may be observed that he had to go to the Court on three occassions before he was finally given it. He was also required to obtain a letter of authority from Mr Ryan. There is nothing in the Juries Act which justified the Department of Justice in imposing that last requirement.

455. The answer to term 4 (a) is accordingly that the Police obtained preference over the Defence in respect of the time at which the jury list was supplied in both trials.

456. Term 4 (b) can be dealt with in short order. A research assistant contacted 128 of the 168 persons whose names appeared on the jury panels for the weeks in which the first and second trials began. Each of them was questioned as to whether there had been any contact with representatives of the Crown, the Police or the Defence. All said that there had been no such contact. We, therefore, answer Term 4 (b) "no.".

457. Under Term 4 (c), we shall consider, as we have mentioned above, matters raised under Term 3 (b).

458. Detective Senior Sergeant Ryan and Sergeant Henderson gave evidence of checking the jury panel for the second trial, Mr Ryan said that he met the Crown Prosecutor, Mr Morris, and Mr Hutton on 10 March 1973 and received instructions to check the jury panel. We may observe at this stage that there is nothing in the Juries Act 1908 requiring or authorising the Police to carry out any such check. The only provision which is relevant is section 5, which disqualifies from jury service the following categories of persons:

(a) Anyone who is not a British subject:

(b) Anyone who has been convicted of an offence punishable by death or by imprisonment for a term of 3 years or more:

(c) Anyone who is an undischarged bankrupt:

(d) Anyone who is of bad fame or repute.

459. Sergeant Henderson was at the time of both trials officer in charge of the Information Section at Auckland Central Police Station. He could not specifically recall the jury list for either trial. The value of his evidence was the insight it gave into Police practice. He said that the names on all jury lists were checked against the Police Department alphabetical lists of criminal offenders. That list includes all but the most minor convictions. It includes, e.g., many convictions under the Police Offences Act carrying

a maximum penalty of less than 3 years imprisonment. Any name appearing was ruled out on the jury panel with a red pencil. A copy of the relevant criminal history sheet was attached to the panel. The purpose of the procedure was to prevent any person with a criminal conviction becoming a member of the jury.

460. Detective Senior Sergeant Ryan was in our view a fair, open, and honest witness. The effect of his evidence was that the panel was checked for persons who would be well disposed to the Police and persons who could be regarded as anti-Police. The check was clearly of an internal Police nature only. Sergeant Henderson's evidence revealed, however, that the Police, as might be expected, have a pool of information which goes beyond mere criminal histories. Sergeant Henderson said that Mr Ryan would have had access to this information. Furthermore, Mr Ryan's inquiry involved visiting various Police stations in the Auckland region so as to inquire whether local Policemen had knowledge of persons whose names appeared on the jury panel, and if they did, were such persons likely to be well-disposed to the Prosecution.

461. Detective Senior Sergeant Ryan worked on the inquiry full time for 4 days, and part-time for 7 days. Detective Sergeant James assisted him for a day and a half. Since there were less than 200 names on the panel, we have no doubt that a thorough and meticulous inquiry was carried out. Mr Ryan in fact said that he had never before engaged in such a thorough vetting of a jury panel.

462. We requested on a number of occasions that the Police produce to us all documentary material they held in relation to either jury. We were particularly interested to receive the documents which Mr Ryan said his investigation would have produced, including particularly copies of the jury panel with his notes on them. We should also have been interested in the criminal history sheets which Sergeant Henderson's section would have attached to the jury panel. There were produced to us a copy of the original jury panel, a copy of the so-called 'jury list' of the type given to Mr Ryan before the trial, and subsequently established to be that used by the Crown Prosecutor, and a document giving the names of those on the jury panel broken down into Police districts. The further documents which must at one stage have existed were not produced. We can only speculate as to their contents and whereabouts.

463. In our view, the thoroughness of the checking of the jury by the Police was excessive, improper and calculated to prejudice the fairness of the subsequent trial. We have reached this view for the following reasons:

(a) The check by Sergeant Henderson's section the normal routine practice, revealed criminal convictions less serious than those specified under category (c) of s. 5 of the Juries Act 1908. Its effect was to exclude from jury service persons having convictions carrying a maximum of less than 3 years imprisonment. This situation arose because of the Crown Prosecutor's unrestricted right to stand aside persons. It was Sergeant Henderson's evidence that the purpose of marking names with a red pencil was to ensure that the persons whose names were marked were stood aside. The Act provides that persons with criminal convictions, carrying a maximum of less than 3 years imprisonment have a right to be on a jury unless they fall within the other disqualifications:

(b) The check by Mr Ryan and Mr James went well beyond the disqualifications set out in s. 5. We do not think it correct to say



that, because a person is ill-disposed to the Police, he is thereby 'of bad fame and repute'. The right to trial by a jury of one's peers necessitates in our view, the possibility that a jury will include persons who are anti-Police, such persons being a minority in the community. So long as jury trials continue, that is an inconvenience which the Police must accept:

(c) There is nothing in principle or logic to justify a system that allows the Police to inform the Crown Prosecutor which potential jurors are likely to favour his case. The mere possession of that information must allow the Crown Prosector to stand aside other jurors until those favourable to the Crown case are called. The system in New Zealand whereby the Crown Prosecutor has an unlimited right to stand aside as well as the right to challenge six, and the accused six challenges only, means of course, that in theory the Crown can guarantee that 12 out of any given 18 persons from a jury panel will be members of the eventual jury. This enables a jury to be selected which is not impartial. We understand that as this report is being written there is a Bill before Parliament to make changes to this system.

464. The foreman of the jury at the second trial had served in the Navy with Detective Senior Sergeant Hughes, one of the Police witnesses. His evidence, to which we have referred in paragraphs 367–374, was significant. Detective Senior Sergeant Hughes said, and we accept, that he reported the matter to Mr Hutton at an early stage in the Trial as soon as he became aware of the identity of the foreman. Mr Morris, the Crown Prosecutor, said that he was not aware of the matter at the time of the second trial. Mr Hutton, by contrast, said that there had been a conversation between Mr Morris, himself and Mr Kevin Ryan in which Mr Ryan had been appraised of the relationship and had indicated that he had no objection to the foreman staying on the jury. Mr Ryan strenuously disputed from the bar that this conversation had ever taken place. We unreservedly accept Mr Morris's evidence in preference to that of Mr Hutton.

465. It follows that Mr Ryan was not told of the relationship between Mr Hughes and the foreman. In our view, Mr Hutton as officer in charge of the case owed a duty to the Defence to tell Mr Ryan either directly or by informing the Crown Prosecutor of any relationship between a material Police witness and a member of the jury. It was then for Mr Ryan to decide what, if any, action he should take. It is in our view wholly irrelevant, and indeed a matter quite outside our Terms of Reference, that the matter may have been reported to the Judge through the Registrar. The point is in our view, that Mr Hutton owed a duty to the Defence to tell them.

466. We do not of course mean to imply that the foreman himself was biased, or 'acted in any way improperly'. The validity of the point does not depend in our view on proof that the trial was actually affected. It is a salutary maxim that justice must not only be done but that it must also be seen to be done. In our view, the fact that the Defence was not told of the relationship between Detective Senior Sergeant Hughes and the foreman of the jury on its own justifies the description of Mr Thomas's second trial as a miscarriage of justice.

467. The jury were kept together during the second trial by order of the Judge. They were accommodated at the Station Hotel. On an evening towards the end of the trial, they were at dinner when a party of Police

Officers also had dinner at the Station Hotel in the same diningroom. We regard as irrelevant the question which party entered first. The Police Officers knew that the jury were staying at the Station Hotel. They should have been aware of the sinister inferences which could be drawn from their own presence there. They should not in our view, have been at the Station Hotel, much less in the same diningroom as the jury.

468. We are satisfied, however, that there was no contact between the Police party and the jury. It was suggested that Mr Hutton at least was on the dance floor at the same time as members of the jury. There is no satisfactory evidence to support this suggestion. In our view, the incident as a whole involved no impropriety. It does, however, demonstrate a clear lack of judgment on the part of the Police Officers involved. Furthermore, it indicates an arrogant disregard for the fundamental principle that justice should not only be done, but should also be seen to be done.

469. We are conscious that our Terms of Reference relate to a specific matter, namely the case of Mr Thomas, and not to the justice system as a whole. We are aware that the Royal Commission on the Courts has recently considered reform of the jury system and we have read with interest and care the relevant portions of their report. Mr Comerford indicated, however, that the Juries Act 1908 is under review and that the proposals of the Department of Justice in this regard would doubtless be made in the light of our findings. It seems that it may be of assistance if we indicate the areas in which change seems to us to be desirable. They are as follows:

(a) Any necessary checking of the jury panel to remove the names of disqualified persons should be carried out by the Department of Justice, not the Police;

(b) The Police should not have access to the jury panel any earlier than the Defence. Because we accept that excessive jury vetting is undesirable, it seems sensible that the period of access for both sides be strictly limited. It is noted with interest that in New South Wales neither the Crown nor the accused can become aware of the names of any jurors until a criminal trial commences;

(c) The right of the Crown Prosecutor to stand aside an unlimited number of jurors is in our view an anachronism which invites abuse; the Crown should have the same number of peremptory challenges as the Defence;

(d) Where jurors are kept together, the practice appears to have been to nominate Police officers as escorts. It seems desirable that officers of the Department of Justice take over that role.



## TERM OF REFERENCE 5 (a)

470. Term of Reference 5 (a) asks whether, after each trial, the Crown or the Police made an adequate investigation into new matters, if any, which may have related to the deaths of David Harvey Crewe and Jeanette Lenore Crewe, or to the trial, and which were placed before the Crown or the Police by any person or persons.

471. New matters which the Commission have looked at are as follows:

(a) In paragraphs 53–160 we have already dealt with investigations concerning exhibit 350 carried out since the second trial. We will not repeat our findings here.

(b) There was some discussion before us concerning the drafting of the Terms of Reference of the Second Referral to the Court of Appeal under s. 460 of the Crimes Act 1961. While this matter is allied to investigations into exhibit 350, we do not believe that a consideration of the drawing of the Terms of Reference for that Referral falls within our Terms of Reference.

(c) On 10 May 1973 a paper called *Rolling Stone* published an article containing allegations concerning the jury for the second trial. These allegations were investigated by a representative of the Department of Justice in 1973, and have been investigated again by us. In paragraphs 448–469 we consider the preference given to the Crown in the issue of the jury panel, and also contact between the Police and the jury during the second trial. These are the only allegations from the *Rolling Stone* article falling within our Terms of Reference of which we have found any supporting evidence. We express no criticism of the investigation carried out by the Department of Justice in 1973. We note that it led to a change in their procedures to the handing out of the jury panel.

(d) In 1977 two television producers obtained a number of affidavits relating to various aspects of the Crewe murders. The major topics concerned were the axle, investigations into exhibit 350, Mr Roddick's sighting, and an allegation that Detective Charles had spoken of a planted bullet. We heard evidence concerning the actions taken by the Police to investigate all the above material when it first came to their notice. We are satisfied that the various allegations and suggestions were properly investigated. Most have been covered again before us during the course of our hearing.

(e) Similarly, the Police were asked to and did investigate various points raised by Mr R. A. Adams-Smith QC during the preparation of his reports. We have no criticism of the adequacy of the investigations undertaken by the Police in this regard. Particular reference should be made here to the suggestion in Mr Yallop's book *Beyond Reasonable Doubt?* that he knows who fed the child Rochelle. We have dealt with this in paragraphs 378–387.

(f) A perusal of the Police files made available to us indicates that over the years there have been a multitude of questions raised and dealt with by them. The Thomas investigation was an on-going saga throughout the 1970's. We have mentioned those new matters of substantial significance which were placed before the Crown or the Police by any person after each trial. We do not consider it necessary to mention every such matter specifically.

Suffice to say that, apart from our findings with reference to exhibit 350 dealt with earlier, we would answer question 5 (a) in the affirmative.

472. Term of Reference 5 (b) asks whether after each trial any relevant facts became known to the Crown or the Police which were not known to them at the time of the trial. In several places through this report we have made reference to new facts which became known for the first time after one or both of the trials. We regard some of them as highly relevant. Some examples are:

(a) The establishing of Dr Sprott's categories for cartridge cases, showing that exhibit 350 could not have contained a pattern 8 bullet.

(b) The establishing of the fact that exhibit 1964/2 could not have been manufactured until 1965.

(c) The fact that Thomas was not employed by Barr Brothers Limited on the Crewe farm after the Crewes commenced to live there.

(d) The existence of a number of witnesses who asserted that an axle was removed from the Thomas farm in 1965.

473. It is fair to say that we have had the benefit of the on-going investigations carried out by many people throughout the last decade.



## TERM OF REFERENCE 6

"What sum, if any, should be paid by way of Compensation to Arthur Allan Thomas Following upon the Grant of the Free Pardon?"

474. Compensation is not claimable as of right. It is in the nature of an ex gratia payment, sometimes made by the Government following the granting of a free pardon, or the quashing of a conviction. Being in the nature of an ex gratia payment, there are no principles of law applicable which can be said to be binding.

475. We have obtained as much information as possible from other Commonwealth countries concerning this subject. Even in England there is no other case we can find to be at all similar to that of Arthur Allan Thomas, i.e., of a man who served 9 years in prison not because of a mistake, but because of evidence fabricated by the Police.

476. However, the Home Office in England has provided for our information the guidelines under which compensation is usually assessed there and these have been very helpful.

477. There, following a decision from the Home Secretary that compensation should be offered in a particular case, an explanatory note is sent to the claimant. We quote from its contents:

"A decision to make an ex gratia payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability, for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages."

"In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and nonpecuniary loss arising from the conviction and/or loss of liberty, and any or all of the following factors may thus be relevant according to the circumstances:

Pecuniary loss.

Loss of earnings as a result of the charge or conviction.

Loss of future earning capacity.

Legal costs incurred.

Additional expense incurred in consequence of detention, including expenses incurred by the family.

Nonpecuniary loss.

Damage to character or reputation.

Hardship, including mental suffering, injury to feelings and inconvenience."

"When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation."

"In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the Police or other public authority, or might have been contributed to by the accused person's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages."

"The claimant is not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections."

478. The free pardon granted to Arthur Allan Thomas on 17 December 1979 included the following words:

"And whereas it has been made to appear from a report to the Prime Minister by Robert Alexander Adams-Smith QC, that there is real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt."

479. Section 407 of The Crimes Act 1961 states:

"**Effect of free pardon**. Where any person convicted of any offence is granted a free pardon by Her Majesty, or by the Governor-General in the exercise of any powers vested in him in that behalf, that person shall be deemed never to have committed that offence: provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted."

480. We have now been given some guidance by a full Court of the High Court of New Zealand concerning the effect of this pardon. In their decision dated 29 August 1980 the full Court stated:

"In the terms of the pardon Thomas is to be considered to have been wrongly convicted, and he cannot be charged again with the murder of either Harvey or Jeanette Crewe."

"He is, by reason of the pardon, deemed to have been wrongly convicted."

"The language of section 407 does not indicate any intention to create any such radical departure from the normal effect of a prerogative pardon as would be involved in reading into the language an intention to create a statutory fiction, the obliteration by force of law of the acts of the person pardoned. It is much more sensibly read to be as, first a reaffirmation of the basic effect of the prerogative pardon, and, secondly, an attempt to minimise residual legal disabilities or attainders."

481. We approach the question of the compensation in the light of that guidance, and also in the light of our findings as set out earlier in this report.

482. The pardon alone makes it clear that Mr Thomas should never have been convicted of the crimes, since there was a real doubt as to his guilt. He should accordingly have been found not guilty by the juries. Our own findings go further. They make it clear that he should never even have been charged by the Police. He was charged and convicted because the Police manufactured evidence against him, and withheld evidence of value to his defence.

483. At our hearings there have been often repeated statements about whether Mr Thomas can be proved innocent. Such a proposition concerns us. It seems to imply that there falls on to him some onus positively to prove himself innocent. Such a proposition is wrong and contrary to the golden thread which runs right through the system of British criminal



justice, namely that the Prosecution has the duty to prove the accused guilty and until so proved he had to be regarded as innocent. Once we are satisfied the Prosecution case against Mr Thomas has not been proved (and we are so satisfied on the totality of evidence before us) then, just as a Court would acquit him and the community thereafter accept his innocence, so we believe we are entitled to proclaim him innocent and proceed accordingly. Mr Thomas has always asserted his innocence. Taking all these factors into account, along with the pardon, it is our view that Mr Thomas is entitled to have the question of compensation determined on the basis that he is innocent. To determine it on any other basis would be to do him the gravest injustice.

484. This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals.

485. The British system of criminal justice is an adversary system. It receives only such facts as are put before it by the parties, discovering only so much of the truth as this permits. Any such system to function properly is dependent upon fair and truthful information being put before it. Like a computer, given the wrong facts it will without doubt produce the wrong answers, and this it did in the Thomas case.

486. This Commission is not in an adversary situation. We have searched for the truth, probed, inquired, and interrogated where we thought necessary; made our displeasure apparent at prevarication and reluctance to speak the truth. We have not been content with so much of the truth as some saw fit to put before us. With the aid of scientists we were able to demolish the cornerstone of the Crown case, exhibit 350, and demonstrate that it was not put in the Crewe garden by the hand of the murderer. It was put there by the hand of one whose duty was to investigate fairly and honestly, but who in dereliction of that duty, in breach of his obligation to uphold the law, and departing from all standards of fairness fabricated this evidence to procure a conviction of murder. He swore falsely, and beyond a peradventure, was responsible for Thomas being twice convicted, his appeals thrice dismissed, and for his spending 9 years of his life in prison; to be released as a result of sustained public refusal to accept these decisions. The investigation ordered by the Government led finally to his being granted a free pardon and released by the ultimate Court of a democratic system—what Lord Denning calls 'The High Court of Parliament.' Common decency and the conscience of society at large demand that Mr Thomas be generously compensated.

487. Arthur Allan Thomas was arrested on 11 November 1970 and remained in custody until 17 December 1979. During that time he was held in three prisons—Mount Eden, Auckland (commonly known as Paremoremo), and Hautu. We heard evidence from Mr Thomas and others concerning the conditions of his imprisonment and its effects on him. Evidence was also brought of the tribulations and anguish attaching to the judicial procedures. We accept that his formerly happy marriage was destroyed by this whole affair. Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years.

488. We now consider the amount of compensation to be awarded to him to compensate him for all the damage, suffering, and anguish he has sustained mentally and physically as a consequence of h[illegible] wrongful

convictions and subsequent years in prison. His learned counsel has listed these:

(a) Loss of reputation.
(b) Humiliation.
(c) Pain and suffering.
(d) Loss of wife.
(e) Physical assaults whilst in prison, and degradation.
(f) Loss of enjoyment of life.
(g) Loss of potential family (the Thomas couple had commenced the procedures for adopting a child).
(h) Deprivation of liberty.
(i) Loss of civil rights such as voting rights.
(j) Loss of social intercourse with his friends and neighbours in particular at Pukekawa.
(k) The indignation of being imprisoned for an offence of which he was innocent.
(l) The harm and pain caused to him in the destruction of his reputation by press coverage and any other media broadcasting and disseminating false and incorrect information about his alleged involvement in the said homicides.
(m) The anguish of judicial proceedings and in particular hearing wrong verdicts being announced.
(n) The ignominy of prison visitation and all matters relating to being a prisoner, including prison dress, prison diet, maximum security conditions, and all matters relating to his life in prison. It should be borne in mind that Arthur Thomas had always been an outdoor man and his first 7 years were spent in Paremoremo where he never was outside on any occasion except to attend Court proceedings.
(o) Adverse effects on future advancement, employment, marriage, social status, and social relations generally.

489. It is clear that at the outset, Mr Thomas put his trust in the Police. That trust must have been shaken when the Police arrested him. Even then, he may have seen the arrest as an honest mistake. Such trust as remained must have been shattered when exhibit 350 was produced as an exhibit. Mr Thomas must have known from the first that it had been planted by the Police. He must then have realised that the Police were determined to convict him. It is undoubtedly a deep form of mental anguish to listen to false evidence being given against oneself.

490. At that stage, Mr Thomas put his faith in the judicial system. It is clear that he expected the charges against him to be dismissed at the preliminary hearing. They were not. He must then have relied on the commonsense and the fairness of the jury at the first trial. They convicted him. His state of mind in hearing announced a verdict he knew to be wrong, must have been one of unspeakable anguish.

491. Mr Thomas spent 9 years in prison. That a man is locked up for a day without cause has always been seen by our law as a most serious assault on his rights. That a man is wrongly imprisoned for 9 years, is a wrong that can never be put right. The fact that he is imprisoned on the basis of evidence which is false to the knowledge of Police Officers, whose duty it is to uphold the law, is an unspeakable outrage.

492. Such action is no more and no less than a shameful and cynical attack on the trust that all New Zealanders have and are entitled to have in their Police Force and system of administration of justice. Mr Thomas



suffered that outrage; he was the victim of that attack. His courage and that of a few very dedicated men and women who believed in the cause of justice has exposed the wrongs which were done. They can never be put right. In a civil claim exemplary damages may be awarded where there has been oppressive, arbitrary, or unconstitutional action by the servants of the Government. If ever there was a situation where such an award was warranted, it is this case. However, in awarding compensation this is only one of many features to which regard will be had in arriving at the final figure.

493. In assessing compensation one purpose is to put the claimant back in the financial position in which he would have been but for the wrongs which were done to him. Accordingly, we now consider Mr Thomas's pecuniary losses. In June 1966 he leased from his father, for a term of 5 years, three blocks of land at Pukekawa formerly run as one farm unit. Two of these blocks were owned by his father who leased the third block from the Maori Affairs Department. Arthur Thomas and his wife both worked on the farm. They ran dairy cows, dairy beef, and sheep. Various improvements were made during the term of the lease. There is clear evidence in documentary form establishing that, at the time some of the improvements were carried out, Arthur Thomas discussed with his father the possibility of acquiring an interest in the land at the conclusion of the lease in June 1971. Their discussion envisaged the acquiring of the freehold of the Maori Affairs land, the transferring of the titles to all three properties to a company, the stock (owned by Arthur Thomas) also to be transferred to the company, with Arthur's share in the company to be calculated in accordance with the value of the stock transferred and value of improvements carried out by him during the term of the lease. In evidence it was suggested that the company may also have proceeded to acquire other adjoining blocks of land. However, it has also been suggested that instead of using the suggested company as a vehicle, Arthur Thomas might alternatively have simply purchased the farm from his father.

494. Mr P. D. Sporle, Farm Appraiser and Valuer, gave helpful evidence in relation to the Thomas farming operation. In 1971 a fair valuation of the whole farming unit was $45,200. We also accept the financial feasibility of Arthur Thomas being able to purchase this land in June 1971 if events had so transpired.

495. At the time of his arrest in 1970 Arthur Thomas owned his own stock (milking cows, replacements, dairy beef, and sheep) and farm plant, in addition to which he had an interest in certain substantial improvements carried out by him under the terms of the lease which we have already referred to. Following his arrest, although his wife with assistance from other members of the family did manage to carry on the farming operation for some time, these assets have clearly been dissipated by the expenses incurred in the judicial procedures.

496. Since 1970, as is well known, the value of farm land has increased very substantially. Mr Sporle considered that present day values for this or a comparable farm are in the region of $380,000 to $400,000. He also set forth a realistic progression for such a farm in the intervening 9 years, particularly in terms of stock and plant. In the result we accept that by 1980 such a farming operation would be likely to have involved stock, plant, and other necessary investments such as dairy company shares all to the value of approximately $100,000. The acquisition of personal effects and chattels is also borne in mind.

497. There are various contingencies which are to be borne in mind. At the time of Arthur Thomas's arrest no decisions had in fact been made about the future of the farm. Arthur was one of nine children. While it seems clear that his father was satisfied to see Arthur acquire the farm, we do not believe this would have been done on a basis which would have disadvantaged the other eight children. We have formed a view of Arthur Thomas as being a capable farmer who, unless prevented by some unknown contingencies of life, would be likely to have proceeded to acquire the farm or an interest in it. It seems reasonable to suggest that from the value of the farm, stock, and plant, we should allow for the likelihood of there being some mortgage commitments at this stage of his life. We consider a reasonable sum to put him back in the position where he would have been, in respect of the farm, stock and plant, and personal effects, is $450,000.

498. Mr Thomas incurred liabilities relating to his arrest and prosecution, in the form of legal and other expenses. In addition, further outgoings have been incurred in preparing his claim for compensation for presentation before us. Details of these outgoings are set out in appendix III attached.

499. We have received claims for compensation from the parents of Arthur Thomas, all his brothers and sisters (including their spouses), a cousin, two members of the Arthur Allan Thomas Retrial Committee (one of whom is related by marriage to the former Mrs Thomas), and the former Mrs Vivien Thomas (now Mrs Harrison).

500. These claims raise three questions of principle:

(a) Does Term of Reference 6 envisage or allow us to consider them either directly or indirectly as part of Arthur Allan Thomas's own claim?

(b) Apart from the Terms of Reference does experience elsewhere in the Commonwealth or any principle of law by analogy suggest that such claims should be entertained?

(c) If such claims are to be considered favourably, who should be regarded as eligible to make them, and in what respect?

501. We proceed to deal with each of those questions, and it is convenient first to deal with (b).

502. Reference has already been made to the explanatory note forwarded to all claimants by the English Home Office. That note states that one of the factors which is relevant to the assessors' consideration of the claim is—'Additional expense incurred in consequence of detention, including expenses incurred by the family.' It seems to us that this specifically envisages as falling within the claim of the detained person, expenses incurred by his family in consequence of his detention.

503. We have also given consideration to a number of cases in the field of claims in tort for damages arising from personal injuries, where there are to be found successful claims by the injured person to recover damages for himself which included amounts for nursing and other services provided by relations. In these cases the loss has been regarded as the plaintiff's loss.

504. We consider that both the direction in the English explanatory note, and the personal injury cases to which we have referred, support the concept that within the claim of Arthur Allan Thomas there should be considered certain expenditure incurred and services rendered by members of his family.



505. It being accepted that the need for relatives' services about which we are speaking is to be regarded as part of the claimant's own loss, then it is within Term of Reference 6 to include such amounts in the award made.

506. The third question concerns the persons from whom such claims should be entertained and the nature of those claims. We must immediately make clear that in our view there is no question of anyone other than Arthur Allan Thomas recovering compensation for non-pecuniary losses. We sympathise with the plight of some of the family, particularly the parents, in the physical and mental injury they have suffered. But we are bidden to determine the amount of compensation to be paid to Arthur Allan Thomas; subject to the limited extent of services rendered by relatives to meet a need caused by his arrest and imprisonment, there is no other category of compensation included.

507. The expenses and services of the family which we believe should be regarded as within the claim of Arthur Allan Thomas are:

(a) Help on the farm after his arrest.

(b) Expenses incurred in visiting him in prison (which we consider to have been an assistance to his well-being).

We do not feel able to include any sum for the time spent, or out of pocket expenditure, in searching for further evidence, attending judicial hearings, or attending meetings, etc., aimed at securing his release.

508. The above statements of principle largely answer the question of whose services and expenditure should be regarded as falling under this category. It also seems reasonable to limit it to members of the immediate family.

509. On the above basis we set out in appendix IV the sums which we consider should be paid to Arthur Allan Thomas in recompense for the physical help and services rendered by members of the family.

510. Finally on this topic, we turn to consider the position of Dr T. J. Sprott, the man who in our view more than any other was responsible for the eventual release of Mr Thomas. It was well summed up by senior counsel for the DSIR in his final submission when he said 'I say without qualification that his dedication to, and development of, the categories theory, which has played such a large part in this inquiry invokes any impartial observer's admiration. . . . It is difficult to single out anyone who has been more committed or effective in advancing (Mr Thomas's) case than Dr Sprott.'

511. Dr Sprott himself acknowledges that his work was not carried out under any contractual arrangement with Mr Thomas or his legal advisors. On the other hand, the researches which he carried out over a number of years were directly related to a key issue of the question of Thomas's guilt or innocence, and were as essential to the findings of this Commission in regard to the identification of the fatal bullets as they were to the events leading to the pardon. The guidance from the Home Office states, 'When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence, or pursuing the claim for compensation.'

512. Dr Sprott has entered a formal claim for $150,000 compensation based on the hours which he estimates were spent in this scientific work.

513. By a majority (Mr Gordon dissenting) we consider that some financial recompense for this scientific work is justified and recommend the payment of an amount of $50,000.

## CONCLUSIONS

514. Money cannot right the wrongs done to Mr Thomas or remove the stain he will carry for the rest of his life. The high-handed and oppressive actions of those responsible for his convictions cannot be obliterated. Nevertheless all these elements are to be reflected in our assessment, as also are his suffering, loss of enjoyment and amenities of life, and his pecuniary loss.

515. We recommend that the following sums be paid to Arthur Allan Thomas as compensation:

| | $ |
|---|---|
| (a) In repayment of the expenditure set out in appendix III the sum of ... ... ... | 49,163.35 |
| (b) In repayment of the services of members of his family set out in appendix IV the sum of ... | 38,287.00 |
| (c) By a majority, in payment of the services rendered by Dr Sprott, the additional sum of ... ... ... ... ... | 50,000.00 |
| (d) To cover all those matters referred to in paragraphs 497–507 the additional sum of ... | 950,000.00 |
| Total ... ... ... | $1,087,450.35 |

516. We draw attention to the immense labour of Mr Patrick Booth in the field of investigative journalism. This was carried out as a private enterprise and at some considerable sacrifice to family life. He has formally claimed only a token $1. We are more than glad to include our recognition of the devotion of Mr Booth to this cause.

### Addendum of the Right Honourable J. B. Gordon to Term of Reference 6.

517. Our report is unanimous except for one aspect in which a majority decision is recorded. I set out hereunder the reasons I could not support my fellow Commissioners in relation to a payment of compensation through Arthur Allan Thomas for recognition of a suggested debt owed by him to Dr Sprott.

518. The Term of Reference is specific:

"6. What sum if any should be paid by way of compensation to Arthur Allan Thomas following upon the grant of a free pardon?"

519. My fellow Commissioners here decided to follow the Home Office advice (which is not binding in any case):

"When making his assessment the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation."

520. My colleagues believe that the term 'otherwise' can be loosely interpreted as covering any expenses. My reading of the paragraph as a whole, including particularly the words 'incurred by the claimant' suggests that it in fact covers legal costs or contractual debts, and to this extent Dr Sprott's claim, in which he very fairly states there is no contractual or legal liability, cannot be accepted. In my view he was under no such obligation to Thomas, the claimant.



521. It is with some regret that I must make this decision, but find it in line with the Commission's unanimous finding that it cannot within the Terms of Reference compensate Arthur Allan Thomas's parents for their own pecuniary loss or debilitation. I find that the Home Office advice on these particular matters is quite distinct from the Commission's decision to recompense Thomas for the costs incurred to the family for care and solicitude. While I can sympathise with Dr Sprott and several other claimants, it was Dr Sprott himself who told us he saw his monumental task 'as a crusade'. My opinion is, I respectfully suggest, enhanced by Mr Booth's claim for $1.

522. We have had many 'crusaders' in New Zealand attempting to right a wrong or fight for a principle (with some success in both) at great personal sacrifice in time and money. Some have been rewarded in other ways, and this in my opinion is the only avenue open for this Commission to make a recommendation within our Terms of Reference.

523. I do so recommend.

## APPENDIX I

### IDENTIFICATION OF EXHIBIT 350

Before the Commission continues hearing evidence relating to Term of Reference 1(a), it is desirable to identify and define the cartridge case (exhibit 350) (8 July 1980).

1. Exhibit 350 was a dry primed brass long rifle cartridge case, manufactured by IMI Australia Ltd.

2. Such dry primed cartridge cases as exhibit 350 were made by IMI with a steel tool known as a bumper, which stamped the lettering ICI on the base of the cartridge case as it formed its rim. The bumper was in turn manufactured from a steel tool known as a hob, which had the letters ICI engraved on its surface.

3. The engravers of hobs used by IMI were C. G. Roeszler & Son Pty Ltd., and Mr Leighton of that company gave evidence that from a practical point of view, two hobs engraved on different occasions would have lettering of distinguishable shape and overall appearance. His opinion was supported on a theoretical basis by Professor Mowbray's eloquent exposition.

4. Mr Cook's evidence, confirmed by that of Dr Sprott from his examination of the IMI records, was that:

(a) Two hobs engraved by Roeszlers arrived at IMI on 1 October 1963;

(b) Retained samples of cartridge cases consistent with those hobs, and with exhibit 350, and of the type called by Dr Sprott category 4, first appeared in the retained samples of IMI in March 1964. We are satisfied that the hobs which arrived on 1 October 1963 were the source of Dr Sprott's category 4, and of exhibit 350.

5. Some of the ·22 long rifle cartridge cases manufactured by IMI were then shipped to Auckland, New Zealand where the Colonial Ammunition Co. Ltd., (CAC) then loaded them with projectiles and distributed them to the New Zealand market as full cartridges. Until 10 October 1963 ·22 brass cartridge cases were loaded by CAC with their pattern 8 projectiles, bearing 3 cannelures. After that date pattern 18 or 19 projectiles bearing 2 cannelures were used. It follows that exhibit 350 was loaded with a pattern 18 or pattern 19 projectile.

6. At the conclusion of his evidence, Mr MacDonald, the senior DSIR witness accepted that it was less than probable that exhibit 350 contained a pattern 8 bullet.

7. Therefore, the Commission identifies exhibit 350 as a dry primed, ·22 long rifle brass cartridge case, manufactured by IMI in Australia after March 1964, bearing the headstamp 'ICI', and loaded by CAC in Auckland with a 2 cannelure pattern 18 or 19 projectile. It was fired in the Thomas rifle, exhibit 317, but when and where we are unable to say at this stage.

8. This identification of exhibit 350 will enable those who are concerned with the first paragraph of the Terms of Reference to be aware of the subject matter and area of the inquiry into 'Whether there was any impropriety on any person's part in the course of the investigation or subsequently, in respect of the cartridge case, Exhibit 350.'



## APPENDIX II

### AFFIDAVIT BY MR DAVID YALLOP

IN THE MATTER of a Royal Commission to enquire into and report upon the convictions of Mr A. A. Thomas for the murder of Harvey and Jeanette Crewe

I, DAVID ANTHONY YALLOP of 6 Gladwell Road, London N.8, England, author and playwright, solemnly and sincerely affirm as follows:

1. I am the author of the book *Beyond Reasonable Doubt?* published in October 1978.

2. Chapter 8 of that book is an open letter to the Prime Minister of New Zealand and refers to another, private, letter which I wrote to the Prime Minister. In that private letter, a copy of which is annexed hereto and marked with the letter "A", I identified the woman who, I believed, had fed Rochelle Crewe between the 17th and 22nd June 1970 and had been seen by Mr Roddick outside the Crewe house on the morning of 19th June 1970.

3. The source of my information was a discussion which Mrs June Donaghie had with Mr. Roddick on my behalf in Sydney in November 1977. I did not go to Sydney myself because I could not afford to do so. Attached hereto and marked with the letter "B" is a copy of the photograph of the woman who, as I understand, was identified by Mr. Roddick as the woman he saw on 19th June 1970.

4. On 15th October 1980 I was shown by Mr. M. P. Crew, Counsel assisting the Royal Commission, a copy of an Affidavit sworn on 16th November 1978 by June Donaghie in relation to this matter. I had not previously seen the Affidavit. I confirm that it accurately reflects what June Donaghie told me had occurred during her discussion with Mr. Roddick. I understand that there are in existence further Affidavits sworn by witnesses confirming June Donaghie's account.

5. Attached hereto and marked with the letter "C" is an undated letter postmarked 17th November 1977 which June Donaghie wrote to me from Australia following her discussion with Mr Roddick. The terms of that letter are consistent with what June Donaghie told me had occurred and with her Affidavit dated 16th November 1978.

6. Following the publication of my book, Mr P. J. Booth visited Mr Roddick in Australia. I had previously told Mr Booth the name of the woman Mr Roddick had identified and given him the source of the photograph. I made it clear to Mr Booth that Mr Roddick should not be told the name of the woman to avoid his becoming frightened by the implications of the identification. I am aware, however, that Mr Booth did tell Mr Roddick the name of the woman.

7. I understand that Mr Roddick said in evidence before the Royal Commission that the woman in the photograph was similar only to the woman he saw. I further understand that he denied ever positively identifying the woman in the photograph as the woman he saw on 19th June 1970. It is my belief that realisation of the implications of his evidence may have caused Mr Roddick to modify his evidence, as I feared might happen. This is confirmed to some degree by paragraph 21 of the first report made to the Prime Minister by Mr Adams-Smith Q.C. I would not have been categoric regarding the identity of this woman if Roddick had not previously been as equally categoric.

# CHAPTER 3

# DAMAGES FOR NON-PECUNIARY LOSS

## 1. INTRODUCTION

In this chapter, the Commission will consider the nature and role of compensation for non-pecuniary loss suffered by an injured person. Although the view of what constitutes non-pecuniary loss has changed somewhat over the years,[1] the modern tendency is to describe such loss as involving three distinct elements: pain and suffering; loss of amenities (sometimes called loss of enjoyment of life); and loss of (or shortened) expectation of life.

It is obvious that not all forms of non-pecuniary loss are necessarily present in every personal injury case. Where two or more are present, however, the Supreme Court of Canada, in a series of cases commonly referred to as the "trilogy",[2] has held that it is proper and necessary to assess a single global sum to cover all non-pecuniary loss. As we shall see, this view reflects the essential similarity of purpose, as well as the basic imprecision, at least in monetary terms, of the three heads of damage.

Until recently, damages for pain and suffering, including mental distress, could be recovered only by a plaintiff who had also suffered a personal injury as a result of negligence or a nominate intentional tort. Mental distress alone could not form the basis for a separate award or an independent action. Emotional distress sufficiently serious to cause "objective and substantially harmful physical or psychopathological consequences"[3] can now provide the basis for a separate claim, although in such circumstances it is possible to label the harm a "personal injury" and it is likely that the plaintiff will have suffered pecuniary loss as well. However, the law in this

---

[1] The concepts of pecuniary and non-pecuniary loss did not, in fact, appear until the 19th century, by which time there was a distinct law of torts. See Cherniak and Sanderson, "Tort Compensation—Personal Injury and Death Damages", in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada 1981[:] New Developments in the Law of Remedies* (1981) 197, at 202.

[2] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to [1978] 2 S.C.R.); *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609; and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480 (subsequent reference is to [1978] 2 S.C.R.).

[3] Fleming, *The Law of Torts* (6th ed., 1983), at 146.

area is evolving at a relatively rapid pace. The English Court of Appeal, for example, has allowed damages for emotional distress in breach of contract cases,[4] and Ontario courts seem prepared to follow suit.[5]

In Ontario, there may also be an award of damages for non-pecuniary loss arising from the interference with relational interests where such loss flows from the injury or death of an individual. This type of award is provided for in section 61(2)(e) of the *Family Law Act, 1986*,[6] which states that the damages recoverable include "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred". While it was at one time asserted that damage of this kind was pecuniary in nature, it now appears to be generally accepted that such a classification was something of a fiction. Those entitled to make a claim under the Act are the spouse, children, grandchildren, parents, grandparents, brothers, and sisters of the person injured or killed. Other jurisdictions have statutes that limit recovery to cases of wrongful death and include a less extensive family group, omitting brothers and sisters. Most also limit recovery to pecuniary loss.[7]

In our examination of damages for non-pecuniary loss, the Commission will consider whether such damages should continue to be awarded to a living plaintiff and, if so, whether there should be any change in the law—more particularly, the $100,000 limit—set forth by the Supreme Court of Canada in the trilogy, that is, *Andrews v. Grand & Toy Alberta Ltd.*,[8] *Arnold v. Teno*,[9] and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*.[10] Given our endorsement of awards of damages for non-pecuniary loss, we shall examine several further matters that arise in connection with such awards. The first matter concerns whether, and, if so, the degree to which, guidance should be given by the trial judge to the jury in respect of the quantum of damages awardable, and whether counsel should be entitled to speak to this issue. In this context, we shall also consider the review of jury and court awards by appellate courts.

The second matter arising in connection with awards for non-pecuniary loss concerns the survival of actions in favour of the estate of a deceased

[4] *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233, [1972] 3 W.L.R. 954 (C.A.), and *Heywood v. Wellers*, [1976] Q.B. 446, [1976] 2 W.L.R. 101 (C.A.).

[5] *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711, 114 D.L.R. (3d) 378 (H.C.J.). See, also, *Brown v. Waterloo Regional Board of Police Commissioners* (1983), 43 O.R. (3d) 113, 150 D.L.R. (3d) 729 (C.A.).

[6] S.O. 1986, c. 4.

[7] For a discussion of third party claims, including claims for loss of guidance, care, and companionship, under the *Family Law Act, 1986*, see *supra*, ch. 2.

[8] *Supra*, note 2.

[9] *Supra*, note 2.

[10] *Supra*, note 2.



injury victim. The Commission will discuss whether there should be any change in the law that now permits the estate to recover damages in respect of the deceased's pain and suffering and, apparently, loss of amenities, although not loss of expectation of life.

The final related matter pertains to damages for emotional distress. The Commission will consider whether damages for such distress, standing alone, should be recoverable, and, if so, whether the right to recover them should be enshrined in legislation.

## 2. THE NOTION OF NON-PECUNIARY LOSS

The essential idea of a pecuniary loss is relatively straightforward. An injury or death may generate a variety of expenses and reduce or eliminate a number of opportunities and expectations having a clear pecuniary component. While the calculation of the dollar value of these losses may not always be simple to perform—because, in the case of permanent injury or death, the lump sum damage award involves predictions or educated guesses as to the future—it is not difficult to think of these as losses.

The notion of a non-pecuniary loss is more difficult. Certainly there is a sense of loss experienced by someone who, because of some physical impairment, can no longer enjoy life to the same extent as before the injury, or who suffers continuing discomfort or disability, or who now has a shorter lifespan. And while there may be no physical pain, emotional distress, or frustration experienced by an unconscious victim, there is still the loss of the ability to enjoy life, as well as, in many cases, the loss of expectation of life. But, whereas an objective pecuniary value can be determined, or at least approximated, where a person, for example, requires medical care or can no longer earn income because of a disability,[11] one cannot, except arbitrarily, attach a dollar value to non-pecuniary loss. Thus, we are here considering a "loss" of a different order.

It is not, of course, essential, in order to justify an award of damages or to decide on the appropriate amount of compensation, to continue to refer to these conditions as losses. One may well choose other labels. But the issues canvassed in this chapter clearly transcend the matter of characterization. Rather, they deal with the central questions of policy respecting awards of damages for non-pecuniary loss—for example, whether they should continue to play a role in a future compensation regime and, if so, the principles on which they should be calculated. In order to be able to make these determinations, it is necessary first to consider the purpose of such awards.

[11] But see United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as "Pearson Report"), Vol. 1, para. 360, at 85, where it is said that "[a]lthough in theory all expenses resulting from injury are recoverable as pecuniary loss, in practice some of them may well be unquantifiable...".

## 3. THE PURPOSE OF DAMAGES FOR NON-PECUNIARY LOSS

### (a) INTRODUCTION

Before examining briefly the three heads of damage for non-pecuniary loss, a general comment relating to awards of damages for such loss ought to be made. The Supreme Court of Canada's approval in the trilogy of a global award for non-pecuniary loss involved a recognition of the essential similarity of purpose of the three heads of damage and that a separate assessment would suggest a capacity for precision that would simply be misleading. In *Andrews v. Grand & Toy Alberta Ltd.*, Mr. Justice Dickson, delivering the reasons for judgment of the unanimous Court, asserted:[12]

> It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses.

### (b) PAIN AND SUFFERING

The use of the two words "pain" and "suffering" usually denotes two conditions: physical discomfort and mental or emotional distress. As in the case of the other heads of non-pecuniary loss, an award of damages under this head can be expected to do nothing more than to provide solace. It cannot function in the fashion of an analgesic to deaden the pain or as a tranquillizer to lighten the distress. It cannot replace the physical comfort or emotional tranquillity that may be considered to have been "lost". But it may have an important consoling effect nonetheless, in that it signifies a recognition by the law of the unhappy consequences that a personal injury has brought upon its victim. An award may also help to alleviate some pain and suffering or distract the injured party by permitting him to purchase material or other comforts that he may otherwise lack.

Few seem to question the propriety of an award for this purpose,[13] although it seems to be agreed that, if the injury victim is unconscious and, therefore, unaware of his condition, there should be no award for pain or suffering.[14] It has also been suggested "that giving damages for physical pain

[12] *Supra*, note 2, at 264.

[13] Although, as will be noted *infra*, this ch., sec. 6, some no-fault proposals would omit all non-pecuniary heads of compensation.

[14] No such damages were awarded in *The Queen in right of Ontario v. Jennings*, [1966] S.C.R. 532, 57 D.L.R. (2d) 644. See, also, *Lim v. Camden and Islington Area Health Authority*, [1980] A.C. 174, [1979] 3 W.L.R. 44 (H.L.) (subsequent reference is to [1980] A.C.), and Pearson Report, *supra*, note 11, para. 394, at 91. Concerning the distinction between pain and suffering, on the one hand, and the other two heads of damage, on the other, with respect to the question whether an award should be made to an unconscious plaintiff, see text accompanying notes 22-25, 35-36, and 101-04, *infra*.



that is wholly past, not continuing and not expected to recur, is simply an anomaly, for there can be no solace for past pain".[15] But unlike the unconscious injury victim, the victim whose pain is a thing of the past is nevertheless aware of having had that experience; arguably, therefore, it is still possible for the law to signify to the injury victim, by an award of damages, its recognition of the fact that he has had an unpleasant experience, the memory of which may well continue.[16]

Where pain and suffering are permanent or long term, it is normally because the injury is disabling to some degree. Thus, there is also likely to be a loss of amenities, that is, a loss of the capacity to do certain things or to enjoy doing them. There may not necessarily be a shortened expectation of life. However, as we have noted, the Supreme Court has established that a global sum should be assessed, thereby recognizing, among other things, the similarity of the three heads.[17]

### (c) LOSS OF AMENITIES AND SHORTENED EXPECTATION OF LIFE

The independent claim for loss of expectation of life was first explicitly recognized by the courts in *Rose v. Ford*.[18] The loss was seen as something in the nature of a loss of a property interest. As Lord Wright stated:[19]

> [A] man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given.

[15] *Skelton v. Collins* (1966), 39 A.L.J.R. 480 (H.C.), at 496, *per* Windeyer J.

[16] For pain that is past, damage awards tend to be moderate, although in minor injury cases—which represent the majority of cases—pain and suffering is often the biggest single head of damages. An examination of Stonehouse *et al.* (eds.), *Goldsmith's Damages for Personal Injury and Death in Canada* (Digest Service) discloses that, for minor injuries, non-pecuniary damages can go as high as $10,000, but that the usual range is from $500 to $3,500. A not untypical case described injuries that required no treatment other than ice packs and analgesics, cleared up completely and brought an award of $1,500 in non-pecuniary damages. See, also, Cheng, *Report on Modified No-Fault Automobile Insurance Plan in Ontario* (February 25, 1986), in State Farm Insurance Companies, *Submission To The Ontario Law Reform Commission Project on Compensation for Personal Injury and Death* (May 31, 1986), Appendix A. "Nuisance" and "minor injury" cases accounted for 72% of claims, "non-economic loss" for 86% of damages paid in "nuisance" cases and 76% in "minor injury" cases (Exhibit 2A to Appendix A).

[17] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2, at 264.

[18] [1937] A.C. 826, [1937] 3 All E.R. 359 (H.L.) (subsequent reference is to [1937] 3 All E.R.).

[19] *Ibid.*, at 371-72.

In *Benham v. Gambling*,[20] the House of Lords stated that damages should be assessed on the basis of "an *objective* estimate of what kind of future on earth the victim might have enjoyed. . .". A reasonable and moderate figure should be awarded.[21]

As we have said, loss of the amenities of life refers to the loss of the ability to engage in normal activities and, therefore, the loss of the ability to enjoy life to its fullest. Loss of the amenities of life, together with shortened expectation of life, have frequently been distinguished from pain and suffering on the basis that the last mentioned head of damage is said to be subjective, whereas the first two are said to be objective. This means, presumably, that pain and suffering depend upon an awareness of these conditions on the part of the victim, while loss of amenities and shortened expectation of life can be said to exist notwithstanding the victim's lack of awareness. Thus, in *H. West & Son Ltd. v. Shephard*,[22] a majority of the House of Lords declined to award damages for pain and suffering to an unconscious plaintiff, but did award damages for loss of amenities and shortened expectation of life.

This case was followed by the Supreme Court of Canada in *The Queen in right of Ontario v. Jennings*,[23] but without any analysis of the issues. However, the minority in the House of Lords in *H. West & Son Ltd. v. Shephard* and the majority of the High Court of Australia in *Skelton v. Collins*[24] believed that the damages awarded under the three different heads served roughly the same purpose—solace—and that that purpose would not be advanced by an award to an unconscious plaintiff.[25]

### (d) Conclusion

Professor Anthony Ogus[26] has outlined three approaches to the assessment of damages for lost amenities:[27] the conceptual approach, which treats

[20] [1941] A.C. 157, at 167, [1941] 1 All E.R. 7 (H.L.) (emphasis added).

[21] See, also, *Bechthold v. Osbaldeston*, [1953] 2 S.C.R. 177, 4 D.L.R. 783, and *Northland Greyhound Lines Inc. v. Bryce*, [1956] S.C.R. 408, 3 D.L.R. (2d) 81.

[22] [1964] A.C. 326, [1963] 2 W.L.R. 1359 (H.L.). This case followed *Wise v. Kaye*, [1962] 1 Q.B. 638, [1962] 2 W.L.R. 96 (C.A.).

[23] *Supra*, note 14.

[24] *Supra*, note 15.

[25] In the words of Mr. Justice Windeyer of the High Court, damages for non-pecuniary loss are "solace for a condition created" rather than "payment for something taken away" (*ibid.*, at 495). See, also, Pearson Report, *supra*, note 11, paras. 393-95, at 91-92.

[26] Ogus, "Damages for Lost Amenities: For a Foot, a Feeling or a Function" (1972), 35 Mod. L. Rev. 1.

[27] Professor Margaret Somerville suggests that the three different methods could be applied to pain and suffering as well: see Somerville, "Pain and Suffering at Interfaces of Medicine and Law" (1986), 36 U. Toronto L.J. 286, at 291-92.



faculties as personal assets, each having an objective "value"; the personal approach, which attempts to evaluate the past, present, and future loss of pleasure and happiness of each injured person; and the functional approach, which awards such a sum as might be used to provide the injured individual with reasonable solace.[28]

In the trilogy, the Supreme Court of Canada considered these three methods of assessment and purported to choose the functional approach. In *Andrews*, Mr. Justice Dickson stated:[29]

> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

At the same time, however, the Court brought an element of subjectivity into the calculation. Notwithstanding that such awards are arbitrary or conventional and that assessability, uniformity, and predictability are important, the Court was of the view that they must have some regard for the individual situation of the victim:[30]

> For example, the loss of a finger would be a greater loss of amenities for an amateur pianist than for a person not engaged in such an activity. Greater compensation would be required to provide things and activities which would function to make up for this loss.

Thus, the view of the Supreme Court of Canada may be summed up in the following propositions. There should be recognition by the law, through an award of damages, that the injury victim has suffered distress and a sense of loss. There is, however, no conclusive test of the appropriate amount of damages to compensate the victim. The award, which must be arbitrary, should be substantial, but limited and, in a sense, conventional. The amount of the award was set by the Supreme Court of Canada at $100,000, in 1978 dollars,[31] in cases involving two quadraplegic plaintiffs and one-brain damaged plaintiff, and was described by the Court as a "rough upper limit" for non-pecuniary loss generally.

[28] Professor Somerville argues that different approaches could be taken to the award of damages for non-pecuniary loss. For example, a subjective approach could be taken to the award of damages for pain and suffering, while an objective approach could be taken to loss of amenities. See *ibid.*, at 291.

[29] *Supra*, note 2, at 262.

[30] *Ibid.*, at 263.

[31] This figure is now just under $200,000. See, for example, *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273, 39 C.C.L.T. 20 (S.C.), where an award for non-pecuniary damages of

In the subsequent case of *Lindal v. Lindal*,[32] in which the Supreme Court of Canada took the opportunity to "continue the exposition" of the principles sketched in the trilogy,[33] the Court rejected what has been called the comparative approach to determining damages for non-pecuniary loss. It was of the view that the amount recovered does not depend on the seriousness of the injury or the extent of the plaintiff's "lost assets"; accordingly, courts should not measure the difference in value between the losses caused by different injuries, so that a person injured only half as seriously would receive only half as much.[34] However, while a sliding scale for awards was rejected, the Court did countenance some degree of flexibility in the awards given to different plaintiffs; consequently, some sort of comparison between victims was, it seems, necessarily contemplated.

On the question whether damages should be awarded for lost amenities to someone who is not aware of the loss, the Supreme Court's decision in *Andrews v. Grand & Toy Alberta Ltd.* may be seen to imply that they should not, although the point is not made explicit and there is no reference to *The Queen in right of Ontario v. Jennings*. If the objective of the damage award is the provision of reasonable solace for misfortune—that is, physical arrangements that can make life more endurable—then that objective cannot be met. Money will not, to use Dickson J.'s words, "serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way".[35] However, as we have seen, conflicting approaches have been taken in England and Australia, and distinctions have been drawn between pain and suffering, on the one hand, and loss of amenities, on the other.[36]

## 4. SURVIVAL OF ACTIONS

As we have seen,[37] at common law, tort actions did not survive the death of the injured person in favour of his estate.[38] However, all Canadian

$188,842 was made; *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382, 38 C.C.L.T. 1 (S.C.), where there was an award for non-pecuniary damages of $181,783; and *Mitchell v. U-Haul Co. of Can. Ltd.* (1986), 47 Alta. L.R. (2d) 193 (Q.B.), where an award was made for non-pecuniary damages of $181,000.

[32] *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263 (subsequent references are to [1981] 2 S.C.R.).

[33] *Ibid.*, at 630.

[34] *Ibid.*, at 641-43. See, also, *Richards v. B & B Moving & Storage Ltd.*, unreported (June 27, 1978, Ont. C.A.).

[35] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2, at 262.

[36] See text accompanying notes 13-14 and 22-25, *supra*.

[37] *Supra*, ch. 2, sec. 2(b)(i).

[38] For a discussion of survival actions, see Waddams, *The Law of Damages* (1983), ch. 12; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), ch. 8; and Luntz, *Assessment of Damages for Personal Injury and Death* (2d ed., 1983), ch. 9, sec. 1.



jurisdictions have adopted legislation reversing this position,[39] although no two jurisdictions have enacted precisely the same provisions. Presumably reflecting the controversial nature of the issues involved, Canadian provisions respecting damages for non-pecuniary loss vary from outright refusal to permit such an award (in Alberta, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island) to allowance of an award under some heads of non-pecuniary loss, although, except in the Yukon and the Northwest Territories, not for loss of expectation of life.

In Ontario, section 38(1) of the *Trustee Act*[40] provides for the survival of actions as follows:

> 38.—(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the [*Family Law Act, 1986*[41]].

Two points should be noted concerning section 38(1). First, damages for death or for loss of the expectation of life are excluded only "if death results from such [tortiously caused] injuries". Accordingly, such damages are presumably recoverable by the injured person's estate where that person's death is caused independently of the injuries brought on by the conduct of the defendant tortfeasor.

Secondly, while at first blush loss of amenities appears to be recoverable under section 38(1)—because it has not been expressly excluded—in the British Columbia case of *Child v. Stevenson*[42] it was held that the statutory exclusion "for the death" of an injured person effectively precluded an award for loss of amenities.[43] However, "if death was delayed, the claim for loss of amenities (which relates to the period while the deceased remained alive) seems untouched by the statute; the loss is not 'for the death' nor 'for the loss of expectation of life' ".[44]

It has been argued that, given the similarity of the British Columbia and Ontario provisions, the award of damages for loss of amenities in Ontario is

[39] See Waddams, *supra*, note 38, at 593, *n.* 2.

[40] R.S.O. 1980, c. 512.

[41] *Supra*, note 6.

[42] (1973), 37 D.L.R. (3d) 429 (B.C.C.A.). But see *Krujelis v. Esdale* (1971), 25 D.L.R. (3d) 557 (B.C.S.C.).

[43] *Supra*, note 42, at 436-37.

[44] Cooper-Stephenson and Saunders, *supra*, note 38, at 394, *n.* 92, commenting on *Child v. Stevenson*, *supra*, note 42.

subject to the same restrictions, that is, damages "are restricted to the period before death, and the death must have been independently caused".[45]

In the trilogy, the Supreme Court of Canada said that damages for the non-pecuniary losses of a living plaintiff should not be assessed separately; rather, a global award ought to be made. Presumably, however, in a survival action by the estate, the exclusion of loss of the expectation of life and, perhaps, loss of amenities, would serve to reduce the award. Section 38(1) of the *Trustee Act* does, in fact, differentiate between the usual heads of non-pecuniary loss—by specifically excluding one and perhaps inferentially excluding another—thereby compelling the courts to focus on each head separately.

While, in Ontario, damages under certain heads of non-pecuniary loss are recoverable by the deceased's estate, the measure of damages is clearly affected by the death. Two commentators have stated the general rule in Anglo-Canadian jurisdictions in this way:[46]

> But though a claim survives, the death will frequently affect the measure of damages, sometimes drastically. . . .[W]here the victim dies his estate will almost invariably recover less than would have been recovered *inter vivos*; so much so that in some instances the right of the estate to sue turns out to be illusory.
>
> . . . .
>
> Since the law preserves only such rights as were vested in the deceased immediately before he died, the general rule is that an estate can recover in respect of all the losses for which the injured party would have been compensated had he survived to pursue his claim, subject only to the effect of the death on the substance of those losses. However, most jurisdictions have legislatively modified this rule, in one or both of two ways: (a) by excluding some damages normally allowed, *e.g.*, damages for non-pecuniary loss, and (b) by allowing some damages normally excluded, *e.g.* funeral expenses. In the result, the measure of damages in a survival action is the above-stated general rule as amended, if at all, by the statute in question. This measure is applicable to all relevant heads of damage. . . .

With respect to the quantification of non-pecuniary loss in survival actions, the commentators argue that "generally speaking this cannot be on

[45] *Ibid.*, at 394. Another suggestion respecting s. 38(1) is that the phrase "for the death" has much the same scope as damages for loss of expectation of life, which is expressly dealt with in the section: Waddams, *supra*, note 38, para. 1036, at 598.

[46] Cooper-Stephenson and Saunders, *supra*, note 38, at 386 and 387-88. See, also, Waddams, *supra*, note 38, para. 1038, at 601, where he says that damages for pain and suffering, recoverable in Ontario by the estate, are limited by the plaintiff's shortened life. In the case of instantaneous death, it has also been held that the claim for loss of amenities and the claim for shortened expectation of life are duplicative, although this may not be so where the deceased survived for a while before dying; in the latter case, a claim for loss of amenities could refer to the period prior to death. See *Crosby v. O'Reilly*, [1975] 2 S.C.R. 381, (1974), 51 D.L.R. (3d) 555 (subsequent reference is to



the same basis as in personal injury suits",[47] where the Supreme Court of Canada's functional approach governs. As a result, courts tend to utilize "a modified version of the personal approach", described earlier,[48] focusing mainly, although not exclusively, on the deceased's age. However, the functional analysis of damage awards for non-pecuniary loss does have a moderating effect on the quantum of such awards in survival actions, since it is recognized that the sum awarded cannot, in fact, benefit the victim. On the other hand, it has been noted that, unlike English courts, Canadian courts generally do not award what amounts to a conventional sum and are more generous than their English counterparts.[49]

Yet, notwithstanding moderation in awards of damages for non-pecuniary loss in survival actions, both in Canada and elsewhere, such awards have come under attack in several jurisdictions. The "principal criticism" of a possible claim for loss of expectation of life by the estate of the deceased has been "that such a claim [is] personal to the deceased and when vested in his personal representative, [does] not further the purposes of compensation", since the "award benefitted someone who had not suffered any loss".[50] As we have seen, in Canada this argument has prevailed in all but one jurisdiction, insofar as loss of expectation of life is concerned, but (at least in terms of express statutory language) not universally in respect of claims for pain and suffering and loss of amenities: damages under the latter two heads remain recoverable in some jurisdictions despite the apparent theoretical applicability of the "principal criticism" just described.

In the end, however, the prevailing judicial theory underlying the measure of damages in survival actions, and the way in which the courts actually quantify non-pecuniary loss in such actions, render the issue of much less importance than compensation to a living victim. Indeed, it appears that, in Canada, except for the two territories, "the question of compensation for non-pecuniary loss in survival actions is, practically speaking, insignificant".[51]

## 5. OTHER JURISDICTIONS

In this section, the Commission will describe briefly the law and major approaches to reform in other jurisdictions in respect of damages for non-pecuniary loss. We shall consider awards to living plaintiffs as well as awards

[47] Cooper-Stephenson and Saunders, *supra*, note 38, at 396.

[48] See *ibid.*, at 397, and *supra*, this ch., sec. 3(d).

[49] Cooper-Stephenson and Saunders, *supra*, note 38, at 398-99. See *Benham v. Gambling*, *supra*, note 20, where the House of Lords held that the award for loss of expectation of life was to be a conventional sum. See, also, Waddams, *supra*, note 38, para. 1037, at 599-600.

[50] Manitoba Law Reform Commission, *Report on The Estate Claim for Loss of Expectation of Life*, Report #35 (1979), at 4.

[51] Cooper-Stephenson and Saunders, *supra*, note 38, at 393, and Supplement (1987), at 27.

in favour of the estates of deceased victims. It bears noting at the outset that, with respect to compensation to living victims for pain and suffering, loss of amenities, and shortened expectation of life, a policy of restraint is to be found in other Canadian jurisdictions, and, as we shall see, in England and Australia. This policy is reflected as well in awards to the estates of deceased victims.

### (a) CANADA

In 1984, the Law Reform Commission of British Columbia published its *Report on Compensation for Non-Pecuniary Loss*.[52] In its Report, the Commission, critical of the Supreme Court's imposition of what the Court called a "rough upper limit", argued that no such limit was necessary in order to ensure that damage awards would not escalate beyond what was justified by inflation.[53] Moreover, the Commission believed that it was undesirable to roll back damages for non-pecuniary loss awarded by the courts prior to the trilogy "to what the Supreme Court of Canada perceived to be moderate levels".[54] Accordingly, the Commission recommended that legislation should abolish the upper limit as established by the trilogy. However, at the same time, it argued in favour of a "fair upper reference point",[55] which it thought was represented by the trial award of $200,000 in *Thornton*. Adjusted for inflation, because the award was made in 1975, the Commission, in its earlier Working Paper,[56] had "tentatively proposed that legislation should confirm that the rough upper limit for damages for non-pecuniary loss be set at $400,000 as of April, 1983".[57] The Commission reaffirmed this position in its subsequent Report.[58] After what it said would be some "temporary uncertainty", "[a]ppellate review will quickly restore certainty to assessing damages for non-pecuniary loss and ... in short order, general ranges of compensation for particular kinds of injuries will be established".[59]

The British Columbia Commission recognized that, in one sense, the $400,000 limit was no more readily justifiable than any other level, except that it accorded with what the courts had been assessing, whereas in the trilogy the Supreme Court of Canada "had rolled back damages for non-

[52] Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss*, LRC 76 (1984) (hereinafter referred to as "B.C. Report").

[53] *Ibid.*, at 26.

[54] *Ibid.*

[55] *Ibid.*

[56] Law Reform Commission of British Columbia, *Compensation for Non-Pecuniary Loss*, Working Paper No. 43 (1983).

[57] B.C. Report, *supra*, note 52, at 27. Note the reference to a "rough upper limit".

[58] *Ibid.*, at 29.

[59] *Ibid.*, at 31.



pecuniary loss by selecting an upper limit which was significantly less than awards that had been made for the most serious kinds of injuries".[60]

Survival of actions for damages for non-pecuniary loss has been considered by law reform agencies in two Canadian jurisdictions. In 1977, the Alberta Institute of Law Research and Reform issued a Report on the subject.[61] The Institute's conclusions respecting the estate's claim for damages for loss of expectation of life—conclusions that the Institute said applied equally to loss of amenities and pain and suffering—were as follows:[62]

> We think that the estate's claim for damages for loss of expectation of life should be abolished. By its very nature it cannot go to the person who has suffered the injury because he is dead; it must be a windfall for others who may be creditors, non-dependant beneficiaries or dependant beneficiaries. It is against the whole conception of the common law to compensate a person who has not suffered. Secondly, the amount of the award is artificial and continues to create problems. . . . Thirdly, the award does not help dependants because if they are beneficiaries of the estate the sum they receive is deducted from the amount they are entitled to under the Fatal Accidents Act.

The Institute accepted the argument that "the natural feelings of the survivors call for some pecuniary recognition".[63] However, it was of the view that such recognition should come not by means of an estate claim for damages for non-pecuniary loss, but rather in the form of compensation for "bereavement",[64] which would not survive to the estate of the deceased relatives who would be given this right of action.[65]

The Institute acknowledged that a consequence of its proposal would be that "the plaintiff's recovery of damages for loss of expectation of life will depend on his surviving to judgment, which is a matter of chance".[66] However, it viewed its proposed compensation for bereavement as a sufficient counterbalance.

The Legislative Assembly of Alberta subsequently enacted the *Survival of Actions Act*.[67] Section 5 of this Act provides, among other things, that

[60] *Ibid.*, at 27.

[61] Alberta, Institute of Law Research and Reform, *Survival of Actions and Fatal Accidents Act Amendment*, Report No. 24 (1977).

[62] *Ibid.*, at 14.

[63] *Ibid.*

[64] *Ibid.*, at 16 *et seq.*

[65] *Ibid.*

[66] *Ibid.*, at 15.

[67] R.S.A. 1980, c. S-30.

where a cause of action survives, "damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable".

In 1979, the Manitoba Law Reform Commission reported on survival of actions in respect of loss of expectation of life.[68] The Commission described the origins of the claim by living plaintiffs and the difficulties faced by courts in attempting to assess damages under this head. Existing legislation and law reform agency proposals to preclude such claims vesting in the estate of a deceased were discussed and endorsed. A majority of the Commission recommended that the estate's claim for damages for loss of expectation of life should be abolished, to be replaced by a new cause of action, vested in third parties, for loss of guidance, care, and companionship.[69]

One Commissioner dissented, quoting with approval the passage by Lord Wright in *Rose v. Ford*, reproduced earlier in this chapter.[70] He dismissed several arguments against the retention of claims by the estate for the shortening of the deceased's life, including the contention that, since the deceased cannot benefit directly from the award, it ought not to be made.[71] He also attempted to counter the view that an award would amount to a windfall to the estate:[72]

> It has been stated that an estate's creditors are sometimes the only ones to benefit from an award granted under '*The Trustee Act*'. Where is the windfall in this regard? Surely it is the honourable discharge of an executor's or personal representative's duties to pay all debts that are justly incurred by the deceased. Most certainly, the deceased, if he were alive, would be gratified in having his economic liabilities discharged. This is in furtherance of a proper policy of the law, and in many instances would directly benefit a deceased's heirs and beneficiaries. It would lead, in many instances, to more money being available upon the ultimate distribution of an estate's assets to estate beneficiaries.

Finally, responding to the proposal of the majority for a new "fatal accidents" cause of action, he stated:[73]

> In my respectful opinion, to award damages for loss of expectation of life under the guise of 'solatium' or for 'loss of guidance, care and companionship' is unconscious intellectual subterfuge. If a layman were to be asked why a deceased's estate should not receive a payment for loss of expectation of life, his probable response would be 'why not?'. This is no more illogical than other

[68] *Supra*, note 50.

[69] *Ibid.*, at 25. See *An Act to Amend The Fatal Accidents Act and The Trustee Act*, S.M. 1980, c. 5.

[70] *Supra*, note 18. The passage is quoted in the text following note 19, *supra*.

[71] *Supra*, note 50, at 29.

[72] *Ibid.*, at 30.

[73] *Ibid.*, at 32.



> illogicalities in the field of law. It would appear to be the most direct, responsible and cogent method of awarding damages. It would serve, in most respects, to assuage the anomaly that is raised by the oft quoted maxim 'it is cheaper to kill than to maim'. A direct payment to the estate would not serve to fully eradicate this anomaly; but I do not think that it is the proper function of the law to attempt to do so.

### (b) United Kingdom

In the United Kingdom, starting with *Phillips v. London and South Western Railway Co.*,[74] which allowed damages under non-pecuniary heads, but which specified that the amount awarded should be "fair and reasonable compensation under all the circumstances of the case", the courts have used language calculated to induce restraint.[75]

The decision of the Court of Appeal in *Walker v. John McLean & Sons Ltd.*,[76] upholding an award of £35,000 to a sixteen and a half year old paraplegic for pain and suffering, loss of amenities of life, and shortened expectation of life is consistent with this view and with Canadian decisions. So, too, is the decision of the House of Lords in *Lim v. Camden and Islington Area Health Authority*.[77] While neither of these cases discusses the issue as thoroughly as the Supreme Court of Canada, there is a clear indication in the *Lim* case that conventional, moderate awards are justified, but with the recognition that increases to offset inflation are necessary "if only to prevent the conventional becoming the contemptible".[78]

In 1971, the English Law Commission published its Working Paper on assessment of damages,[79] followed in 1973 by its final Report.[80] The

[74] (1874), 4 Q.B.D. 406, at 408.

[75] See *Scott v. Musial*, [1959] 2 Q.B. 429, at 432, [1959] 3 W.L.R. 437 (C.A.), the report of which reproduces the following direction to the jury given by Mr. Justice Paull at the trial of the action (the appeal from which was unanimously dismissed):

> It is not going to be a grossly extravagant sum in the sense that you would say: 'I would not have that happened to me for a million pounds'.... Obviously it is not going to be a small sum; obviously it will be a substantial sum—you may think a pretty substantial sum, but of course not absurdly extravagant.... [A]lthough you realise that these injuries are very serious and the results are very unpleasant, you must not run away and give him a fantastic sum; you must take some sum which you think is reasonable for the defendant to pay and for the plaintiff to receive, and I can help you no further about that.

[76] [1979] 1 W.L.R. 760, [1979] 2 All E.R. 965 (C.A.).

[77] *Supra*, note 14.

[78] *Ibid.*, at 189.

[79] England, The Law Commission, *Personal Injury Litigation—Assessment of Damages*, Working Paper No. 41 (1971) (hereinafter referred to as "Law Commission W.P.").

[80] England, The Law Commission, *Report on Personal Injury Litigation—Assessment of Damages*, Law Com. No. 56 (1973) (hereinafter referred to as "Law Commission Report").

Commission was of the general view that it was not possible to devise legislative guidelines concerning the assessment of damages for non-pecuniary loss. Existing law in this regard, including the rule that no account should be taken of the fact that the victim cannot, in fact, use the damages awarded to him in respect of loss of amenities and loss of expectation of life, should continue to govern.[81] In addition, courts should assess damages without the use of a legislative tariff.[82]

In terms of the types of claim for non-pecuniary loss, the Law Commission recommended that "claims for damages for loss of expectation of life as a separate head of non-pecuniary loss be abolished, but that the court should be required to take into account, in assessing damages for pain and suffering, any suffering caused or likely to be caused by awareness of lost expectancy".[83] Even if damages were to continue to be awardable for loss of expectation of life, the Law Commission would preclude recovery of such damages by the deceased victim's estate, "mainly because persons who have not suffered any loss may get the benefit of the award".[84] However, the Law Commission was of the view that the survival of other claims for non-pecuniary loss raised different issues. The Report quoted[85] the following passage from its earlier Working Paper[86] in endorsing the survival of these claims:

> The deceased may have suffered severe pain over a considerable period before death and may even, during that time, have spent some of the damages he was advised he would recover; and, during this period, relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them. We can see no reason why, in justice, a victim's death, perhaps wholly unconnected with the injury, should lead to this compensation being taken away.

[81] *Ibid.*, para. 31, at 10. See *Wise v. Kay*, *supra*, note 22, and *H. West & Son Ltd. v. Shephard*, *supra*, note 22 (discussed *supra*, this ch., sec. 3(c)), concerning the proposition that damages for loss of amenities and loss of expectation of life, "should not be reduced because the plaintiff could not use them" (Law Commission W.P., *supra*, note 79, para. 90, at 46). The Working Paper did note, however, that "there are ... considerable difficulties in defining what is meant by 'use' " (*ibid.*, para. 91, at 47). For example, "[i]s money 'used' if it is bequeathed by will?" (*ibid.*). Must the victim be aware of such potential "use"? The Working Paper stated that "[e]ven in cases of lack of consciousness there is no reason why the money should not be spent by the relatives in seeking to establish contact with the plaintiff and in helping him, where possible, to return to some form of life" (*ibid.*, para. 92, at 47).

[82] Law Commission Report, *supra*, note 80, paras. 32-35, at 10-11.

[83] *Ibid.*, para. 99, at 26.

[84] *Ibid.*, para. 100, at 26.

[85] *Ibid.*, para. 101, at 27.

[86] Law Commission W.P., *supra*, note 79, para. 67, at 36. For a comment on the quoted passage in the Working Paper, see Luntz, *supra*, note 38, para. 9.1.05, at 396, reproduced *infra*, note 166.



After the publication of the Working Paper, criticism was levelled at this view on the ground that the money would not benefit the victim, but would be distributed to some relative or even to the deceased's creditors. But for reasons that relate in part to certain procedural changes in the United Kingdom, the Law Commission affirmed its earlier provisional proposal that claims for damages for non-pecuniary loss, other than for loss of expectation of life, should continue to survive for the benefit of the estate.[87]

In 1978, the United Kingdom Royal Commission on Civil Liability and Compensation for Personal Injury issued its Report (the Pearson Report).[88] The Report noted that "[t]here was no significant pressure ... for the abolition of damages for non-pecuniary loss".[89] However, while it did "consider that there is a place for damages for non-pecuniary loss",[90] and did recommend the retention of awards for loss of amenities[91] and, by a majority, for pain and suffering,[92] the Report proposed that "damages for loss of expectation of life as a separate head of damage should be abolished".[93] Such damages, it said, had "an air of unreality"[94] and should be replaced by "an award [to specified relatives of the deceased] for loss of society on Scottish lines".[95]

Insofar as loss of amenities and pain and suffering are concerned, the Report rejected a legislative tariff to control awards. However, "struck by the high cost of compensation for non-pecuniary loss",[96] the Report did recommend, by a majority, that "no damages should be recoverable for non-pecuniary loss suffered during the first three months after the date of injury".[97] The Royal Commission was equally divided on the issue whether a "ceiling" should be imposed on awards for non-pecuniary loss: some members were of the view that "a maximum could ... act as a useful point of reference for the courts",[98] while others believed that the appellate courts "can—and do—secure a reduction of awards which are excessive", so that "the introduction of a statutory maximum would be an unnecessary

[87] Law Commission Report, *supra*, note 80, para. 104, at 28.

[88] *Supra*, note 11.

[89] *Ibid.*, para. 361, at 86.

[90] *Ibid.*, para. 362, at 86.

[91] *Ibid.*, para. 380, at 89.

[92] *Ibid.*, para. 381, at 89.

[93] *Ibid.*, para. 372, at 87.

[94] *Ibid.*, para. 371, at 87.

[95] *Ibid.*, para. 370, at 87. See *ibid.*, paras. 418 *et seq.*, at 96 *et seq.*

[96] *Ibid.*, para. 382, at 89.

[97] *Ibid.*, para. 388, at 90.

[98] *Ibid.*, para. 391, at 91.

complication".[99] However, all were agreed that the "emphasis in compensation for non-pecuniary loss should ... be on serious and continuing losses, especially loss of faculty"[100] and that some type of control on awards should exist.

The Report also concluded that the assessment of damages raised particular difficulties in the case of the permanently unconscious plaintiff. The Royal Commission noted the widely divergent views on this issue, depending in part on whether one sees the award as compensation for a loss, determined objectively, or as solace.[101] The Commissioners did "not think it is possible to regard either of these approaches as necessarily right and the other as necessarily wrong".[102] However, on balance it recommended that "non-pecuniary damages should no longer be recoverable for permanent unconsciousness",[103] since such damages should be awarded "only where they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost".[104]

Finally, in dealing with the survival of actions, the Report recommended that "claims for pain and suffering and loss of amenity should continue to survive for the benefit of the claimant's estate".[105] The Report quoted with approval the passage in the English Law Commission's Working Paper reproduced above.[106]

Insofar as claims for loss of expectation of life are concerned, the proposals in both the English Law Commission Report and the Pearson Report ultimately had their effect. In 1982, Parliament in the United Kingdom enacted the *Administration of Justice Act 1982*,[107] section 1(1) of which provides as follows:

> 1.—(1) In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries—
>
> (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but

[99] *Ibid.*, para. 392, at 91.

[100] *Ibid.*, para. 384, at 90.

[101] *Ibid.*, paras. 394-95, at 91-92.

[102] *Ibid.*, para. 396, at 92.

[103] *Ibid.*, para. 398, at 92.

[104] *Ibid.*, para. 397, at 92.

[105] *Ibid.*, para. 444, at 100.

[106] *Ibid.*, para. 442, at 100. The passage is reproduced in the text following note 86, *supra*.

[107] C. 53. The abolition of claims in respect of loss of expectation of life made it unnecessary to amend, in this respect, the *Law Reform (Miscellaneous Provisions) Act, 1934*, c. 41, which provides for the survival of causes of action to a deceased's estate. This was noted by the Law Commission: Law Commission Report, *supra*, note 80, para. 100, at 26.



> (b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced.

### (c) New Zealand

In 1982, New Zealand passed the *Accident Compensation Act 1982*,[108] which consolidated and revised the *Accident Compensation Act 1972*[109] and its subsequent amendments.[110] Pursuant to these enactments, a no-fault accident compensation plan was introduced in New Zealand. The plan provides for awards for non-pecuniary loss, but sharply limits them. Section 78 of the 1982 Act permits an award of up to NZ$17,000 as compensation for non-pecuniary losses involving "the permanent loss or impairment of any bodily function", assessed on the basis of a schedule that attributes a percentage loss to each part of the body. Where an injury does not appear on the schedule, the Accident Compensation Corporation is empowered to pay the sum it considers appropriate. Under section 79, up to NZ$10,000 may be awarded for loss of amenities or capacity for enjoying life, including disfigurement and pain and mental suffering (the latter of which would comprehend nervous shock). No compensation is payable under this section unless the Corporation is of the opinion that "having regard to its nature, intensity, duration, and any other relevant circumstances", the loss or the pain is serious enough to justify payment.[111] According to one commentator, section 79 has been the most contentious section in the Act.[112]

### (d) Australia

In Australia, the case law reflects an outlook similar to that manifested in the English cases. While the courts have rejected the idea of a tariff and have indicated that each case must be judged on its own facts, at the same time they have favoured consistency and, evidently, moderation in awards for non-pecuniary loss.[113]

[108] 1982, No. 181.

[109] 1972, No. 43.

[110] See *supra*, note 108, Second Schedule, Part I.

[111] *Supra*, note 108, s. 79(1).

[112] Palmer, "Lump Sum Payments Under Accident Compensation", [1976] N.Z.L.J. 368, at 370.

[113] For example, in *Sharman v. Evans* (1977), 138 C.L.R. 563 (H.C.), the High Court of Australia reduced an award of AUS$80,000 for pain and suffering and loss of amenities experienced by a young quadraplegic to AUS$55,000. A separate award of AUS$6,000 for shortened expectation of life was reduced to AUS$2,000.

### (e) UNITED STATES

In the United States, on the other hand, damages for non-pecuniary loss tend to be much higher, although there are significant variations from area to area, in part, no doubt, because tort law is a state matter and different courts have different attitudes to compensation for non-pecuniary loss.

American terminology is not precisely parallel to our own. Section 905 of the Second Restatement of the Law of Torts states:[114]

> Compensatory damages that may be awarded without proof of pecuniary loss include compensation
>
> (a) for bodily harm, and
>
> (b) for emotional distress.

Sometimes American courts speak of pain and suffering as embracing both physical and emotional distress and, apparently, as taking into account loss of amenities and shortened expectation of life.

An example of how dramatic a difference there can be in the American outlook, as compared with our own, is a decision of the Arizona Court of Appeals upholding a jury award of $2.5 million for pain and suffering in the case of a motor vehicle accident victim who had suffered brain damage that changed his personality, and scarring that is described as amounting to deformity, but who had a normal life expectancy.[115] The Court indicated that it would not interfere with a jury award unless it were "so outrageously excessive as to suggest, at first blush, passion or prejudice".[116] This, evidently, was not such a case. The Court rejected the idea of a conventional award or a schedule, on the basis that no two injuries and no two plaintiffs were the same. The Court also rejected the argument that awards should be limited for various policy reasons, asserting that there was no justification for restricting a plaintiff to less than appropriate compensatory damages. The Court evidently saw no circularity in this argument.

In 1986, the American Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability recommended limiting non-pecuniary damages, including punitive damages, to $100,000.[117] In fact, a considerable number

[114] American Law Institute, *Restatement of the Law, Second—Torts 2d* (1979), § 905.

[115] *Wry v. Dial*, 503 P. 2d 979 (Ariz. Ct. App. 1973).

[116] *Ibid.*, at 991.

[117] *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (1986), at 69.



of American states have now enacted dollar limits with respect to such damages.[118]

In California, for example, the Medical Injury Compensation Reform Act[119] provides that non-economic damages, to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other intangible damages, should be limited to $250,000 in personal injury accidents against health care providers. While the California limit is greater than the current value of the $100,000 upper limit set in the Supreme Court of Canada's trilogy, it is also fair to say that California is identified as one of the areas in the United States where jury awards have tended to be most generous. Hence, in a sense, the California limit established by statute represents an even more dramatic policy decision than that represented in Canada by the trilogy, which merely adopted as a "rough upper limit" an amount that had been among the highest awarded in personal injury cases prior to the decisions of the lower courts in *Thornton*, *Andrews*, and *Arnold*.[120]

## 6. ARGUMENTS AGAINST THE APPROACH IN THE TRILOGY

There is, of course, no demonstrably correct approach to the awarding of damages for non-pecuniary loss. It is, as Canadian, English, and other courts have repeatedly pointed out, an undertaking for which there is no objective measure.[121] The process can, however, be informed by a coherent policy so that the decision will not be arbitrary in the particular case; that is, it need not be contingent solely upon the unfettered discretion of a judge or a jury.

In this section, we shall examine briefly the contention that the present law, represented by the trilogy in the Supreme Court of Canada, is deficient and therefore ought to be reformed.[122] We leave to the next section the narrower questions of the respective roles of the judge and jury, survival of actions, and the award of damages for emotional distress alone.

[118] See Council of State Governments, *Backgrounder* (December, 1985), which lists 32 states with such legislation.

[119] Cal. Civ. Code § 3333.2.

[120] But see, for example, *Jackson v. Millar*, [1972] 2 O.R. 197 (H.C.J.), where $150,000 was awarded for non-pecuniary loss. This award was left untouched in the Court of Appeal ([1973] 1 O.R. 399) and the Supreme Court of Canada ([1976] 1 S.C.R. 225).

[121] It has been said that, in the trilogy, the "monetary evaluation of non-pecuniary losses was held to be more a philosophical and policy exercise than a legal or logical one": Cherniak and Sanderson, *supra*, note 1, at 212.

[122] See, generally, B.C. Report, *supra*, note 52, esp. at 16-17. For a response to that Report, see Waddams, "Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention?" (1985), 63 Can. B. Rev. 734.

With respect to the recommendation in the B.C. Report to "abolish" the rough upper limit established in the trilogy, Waddams notes the "unresolved conflict" in the

In some cases, criticism of the present law has led to the conclusion that no award should be made for non-pecuniary loss. Two arguments can be raised in favour of such a policy. The first is that because many injury victims now go uncompensated for their pecuniary losses, it would be preferable to direct the money to meeting that shortcoming of the system rather than add it to the compensation of those whose pecuniary awards are adequate.

The other argument raised for abolishing damages for non-pecuniary loss is that such damages constitute a barrier to rehabilitation. It is said that the injury victim's belief that damages for non-pecuniary losses will be reduced by successful efforts on his part to overcome his injury can be subversive of rehabilitation.[123]

With respect to the first argument, it bears emphasizing that the abolition of the right to damages for non-pecuniary loss under the present tort system would not, in itself, serve to redirect the money to any other particular purpose. Redirection—in order to provide full compensation for pecuniary losses, where this is thought to be lacking, or for any other reason—would occur only where it is expressly mandated by a different type of compensatory regime. For example, the denial of damages for non-pecuniary loss tends to be associated with schemes of universal no-fault compensation, either for victims of a particular type of accident or for injury victims generally. In this connection, reference may be made to the Commission's *Report on Motor Vehicle Accident Compensation*,[124] in which we proposed a no-fault compensation scheme in respect of motor vehicle accidents. In that Report, it was recommended that "no compensation should be paid for non-pecuniary losses suffered as a result of a motor vehicle accident".[125] Workers' compensation schemes frequently exclude the possibility of such damages under certain circumstances. By providing compensation for all accident victims in respect of their pecuniary loss, they concentrate resources on the cost of care.

The second argument—concerning the allegedly negative effect of an award of damages for non-pecuniary loss on the rehabilitative efforts of injured persons—is, it appears, a factor in the abolition or limitation of such damages in many of the schemes described above. However, to the extent that the argument carries any weight, it does so only in respect of the period

Report between the desire to impose a known limit, or "reference" point, on damages for non-pecuniary loss and the desire to give a "largely unfettered power in trial courts" to award such damages (*ibid.*, at 740).

[123] Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (1973) (hereinafter referred to as "O.L.R.C. Report"), ch. VI. In the B.C. Report, *supra*, note 52, at 18, it was said that one argument allegedly favourable to an upper limit on non-pecuniary damages was that, without it—that is, if damages were "at large"—there would be "an incentive for personal injury victims to dwell on their misfortunes".

[124] O.L.R.C. Report, *supra*, note 123.

[125] *Ibid.*, at 107.



of time between the injury and the judgment. Once the quantum has been fixed by the court, any malingering by the plaintiff would serve no purpose and, accordingly, any disincentive to rehabilitation would be removed.

Finally, it should be noted that the two arguments considered above may, in fact, be used to advance a cause other than that of completely abolishing awards of damages for non-pecuniary loss. Assuming their validity, at least under some circumstances, it may be said that both of these arguments could be made by those who favour a conventional, limited award, like that endorsed in the trilogy, rather than no award at all.

Criticism of existing law also comes from those who favour a policy of higher awards, sometimes with no upper limit. Several arguments have been advanced in favour of higher awards. One argument that had been raised in the past is that a fixed limit involves the prospect of erosion by inflation.[126] But arguments based purely on the adverse effects of this factor can be easily countered. The courts are now prepared to take inflation into account in applying the upper limit imposed by the trilogy. In *Fenn v. City of Peterborough*,[127] the Ontario Court of Appeal justified an award of $125,000 for non-pecuniary damages on the ground that there had been an erosion in the value of money since the upper limit was established. The case went to the Supreme Court of Canada, which upheld the award, without commenting on the Court of Appeal's reasoning.[128] In *Lindal v. Lindal*,[129] although the Supreme Court of Canada upheld the decision of the British Columbia Court of Appeal to reduce a trial judgment from $135,000 for non-pecuniary damages to $100,000, it also stated:[130]

> Account may be taken of inflation in awarding damages and it is not suggested that the figure of $100,000 should not vary in response to economic conditions, in particular, the debasement of purchasing power as a result of inflation.

It has also been argued that, with an upper limit of $100,000, the amounts available for less serious injuries quickly diminish; but, again, the courts seem to have rejected the notion that there is a sliding scale, with the person injured only half as seriously receiving only half as much.[131] In *Lindal v. Lindal*, the Court explained:[132]

[126] Cherniak and Sanderson, *supra*, note 1, at 220 *et seq.*

[127] (1979), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (C.A.).

[128] *Sub nom. Consumers' Gas Co. v. City of Peterborough*, [1981] 2 S.C.R. 613, 129 D.L.R. (3d) 507.

[129] *Supra*, note 32.

[130] *Ibid.*, at 643.

[131] *Ibid.*

[132] *Ibid.*, at 637.

> [T]he amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the 'need for solace will not necessarily correlate with the seriousness of the injury' (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a 'tariff'. An award will vary in each case 'to meet the specific circumstances of the individual case' (*Thornton* at p. 284 of S.C.R.).

A further argument in favour of higher awards for non-pecuniary loss is that greater deterrence would thereby be achieved. While that proposition is no doubt true, the important issue from an economic perspective is obtaining the correct level of deterrence. Whether one is thinking in terms of deterring individuals from rash behaviour or deterring people generally from engaging in a particular activity, the economic argument is that the appropriate degree of deterrence is achieved by requiring that potential wrongdoers face the full social cost of their activities. Accordingly, on this analysis, the appropriate amount of damages from a deterrence standpoint is the social cost of the losses occasioned by the wrongful activity. But this principle does not readily dictate the appropriate amount of damages because the inquiry returns to the question, "What is the appropriate evaluation of the loss?". Unless it can be shown that the Supreme Court's approach does not amount to an adequate assessment of the injured person's losses, the economic conception of deterrence requires no greater award than that endorsed in the trilogy.

Some have argued, in effect, that damages for non-pecuniary loss should be sufficiently high—that is, beyond the Supreme Court of Canada's "rough upper limit"—to compensate the injured person for pecuniary losses not specifically dealt with or foreseen at trial.[133] The Commission cannot, however, see why the courts, or the Legislature, should do indirectly what

[133] See Pearson Report, *supra*, note 11, para. 360, at 85. See, also, B.C. Report, *supra*, note 52, at 14-16. After appearing to make this type of argument, the B.C. Report stated (*ibid.*, at 15):

> We do not mean to suggest that damages for non-pecuniary loss should be considered as compensation for other heads of loss for which inadequate or no damages are awarded. We merely doubt whether it is safe to assert that adequate compensation on other heads of loss is sufficient reason to assess non-pecuniary losses moderately.

But then the B.C. Report made these comments (*ibid.*, at 16):

> Because of the uncertainty inherent in accurately estimating pecuniary loss, an award for non-pecuniary loss often provides a sum which safeguards the plaintiff from a financial shortfall arising because the assumptions made were wrong. Placing a ceiling on damages for non-pecuniary loss may seriously impair a function performed by those damages as an element of the whole process of adequately compensating the plaintiff.



they might do directly. If it is thought to be essential to expand the heads of damage for pecuniary loss in order to compensate the victim more fully, this ought to be done expressly. Damages to provide solace for such intangible "losses" as pain and suffering, loss of amenities, or loss of expectation of life should not be used as a means of rectifying any basic deficiency in the law relating to awards of damages for pecuniary loss.

Finally, it is said that the policy adopted by the Supreme Court of Canada in the trilogy simply results in inadequate compensation for injured persons with respect to non-pecuniary loss. In other words, it is an argument in favour of greater generosity—basically, more solace—to the victims of injury.

As we have said already, since all agree that there is no truly objective measure of the loss suffered, the determination concerning what constitutes appropriate compensation is a policy decision based on a number of considerations. The Supreme Court, in the trilogy, clearly directed its attention to whether the amount it was awarding was enough to compensate the injured party adequately for non-pecuniary loss. One may disagree,[134] but one cannot prove the Court wrong.[135]

In the trilogy, the Supreme Court of Canada partly justified its policy of restraint on the basis of what it considered to be the likely adverse effect on liability insurance premiums of unlimited and unpredictable awards. The Law Reform Commission of British Columbia was highly critical of the Supreme Court's reasoning with respect to the impact of insurance. The British Columbia Commission was of the opinion that the Court's assessment of the matter was superficial, resting partially on what it said was misleading—and, it appears, ultimately withdrawn—publicity, sponsored by the insurance industry in the United States, claiming that high damage awards would lead to prohibitively high insurance premiums. Indeed, it would appear that the Court's statements on the effect of damage awards on insurance premiums were not based on any empirical evidence; nor was the issue even argued before the Court.

See, also, *ibid.*, at 12: "[W]e have doubts whether damages for non-pecuniary loss serve any one narrow purpose. Confining the level of those damages overlooks a number of other kinds of loss for which a plaintiff usually receives no compensation".

[134] The B.C. Report, *ibid.*, at 21, stated:

> It [the limit imposed in the trilogy] has ... probably led to undercompensating personal injury victims generally. ... The only conclusion that can be reached with absolute certainty is that the current 'limit' is far too low.

[135] In the B.C. Report, the dissenting Commissioner stated as follows (Memorandum of Dissent by Anthony F. Sheppard, *ibid.*, at 33):

> Critics of the rule have not shown and indeed cannot show convincingly that the limit is unfair because non-pecuniary losses cannot be objectively quantified and because $100,000 adjusted for inflation and with court order interest is a substantial sum of money.

The British Columbia Commission stated that damages for non-pecuniary loss generally represent a small portion of the total damage award, that awards are not as high as one would believe simply by reading newspaper accounts, and that American awards are, and will likely remain, higher than British Columbia awards because the cost of medical care is much greater in the United States.[136] The Commission conducted a study "to predict the impact on motor vehicle insurance premiums of higher awards for non-pecuniary loss",[137] and drew the conclusion that "concerns over the costs of insurance with respect to compensating for non-pecuniary loss were overstated by the Supreme Court of Canada".[138] It said that increases in premiums, while not nominal, would not be prohibitive.

We are of the view that the question whether the abolition of the trilogy's "rough upper limit" would result in dramatically increased liability insurance premiums cannot be answered conclusively without further empirical data. Arguments have been marshalled on either side; yet, since most evidence is anecdotal, answers are generally speculative and, we believe, will remain so for some time.[139]

The British Columbia Commission raised a further argument against the approach taken by the Supreme Court of Canada in the trilogy. The argument was that, in settling a "rough upper limit" for damages for non-pecuniary loss, the Supreme Court was usurping the role of the Legislature. While, for example, the Commission was willing to countenance the Court "[defining] the role to be played by damages for non-pecuniary loss", the

[136] *Ibid.*, at 13.

[137] *Ibid.*, at 30.

[138] *Ibid.*

[139] However, it has been argued that "the cost of high awards is ultimately borne by large sections of the public through liability insurance premiums, and that unpredictability of awards as well as their large size increases the cost of insurance": Waddams, *supra*, note 122, at 736. The Ontario Task Force on Insurance also referred, *inter alia*, to the effect of large damage awards on liability insurance premiums (Ontario, *Final Report of the Ontario Task Force on Insurance* (1986), at 38):

> There is no doubt that the current insurance crunch is dominated by a crisis in liability insurance. As noted above, the causes of this crisis are difficult to discern but relate primarily to the extreme uncertainty associated with 'long-tail' risks. The insurer's exposure may extend for many years beyond the time when the insured occurrence took place, and systemic socio-legal and economic changes are constantly shifting the parameters of liability and quantum of damage. This uncertainty has made it impossible for insurers to price the various types of risks and has led directly to the severe problems in availability, adequacy and affordability of liability insurance coverage.

The Task Force indicated that the problem was not serious in all areas of liability-generating activity. The problem seemed most pressing for product manufacturers, municipalities, tavern owners, hotels, hospitals, volunteer groups, contractors, truckers, bus operators, and newspapers. The Task Force called for responses broader than the mere limitation of damages for non-pecuniary losses. But its conclusions do support such a limitation.



Commission was of the view that the Court "was not in the best position to determine whether to impose an arbitrary limit on damages for non-pecuniary loss".[140]

We cannot agree. We believe that it is the proper function of appellate courts to control damage awards. An appellate court, and particularly a court of last resort, must ensure that such awards are fair and consistent, that is, that they are fair as between plaintiffs similarly injured and as between defendants, as well as between the parties in individual cases. It does not appear to us that the objectives of fairness and consistency can be achieved unless there is some sort of scale for comparing one case with another. Any such scale must have an upper end, more or less clearly defined. In our opinion, it is not beyond the proper jurisdiction of an appellate court to indicate, for the guidance of trial courts, where that upper end lies.

## 7. CONCLUSIONS

### (a) The Approach in the Trilogy

The Commission has come to the conclusion that, in a compensation regime based on the idea that a "wrongdoer" should pay for the injury done to another person, it is not appropriate to abolish awards of damages for non-pecuniary loss. We are unaware of any significant public sentiment in favour of abolishing the award of damages under this head.[141] While some surveys have suggested that people might be prepared to give up such compensation in favour of a system that provided compensation for all pecuniary losses on a no-fault basis,[142] this option does not come within the terms of reference of this Report. However, it bears emphasizing that even the no-fault accident compensation regime in New Zealand permits awards for non-pecuniary loss, although of a very modest amount.

Our endorsement of awards of damages for non-pecuniary loss applies equally to past, as well as present, pain and suffering. For some, the notion of "solace", the purpose advanced by the Supreme Court of Canada in the trilogy as the basis of damages for non-pecuniary loss, involves the spending of the award in order to furnish some form of comfort only for anticipated on-going pain and suffering. We believe, however, that the need for solace is not inconsistent with the memory and experience of past pain and suffering, and that it is the *receipt* of the award that furnishes that solace.[143]

[140] B.C. Report, *supra*, note 52, at 16.

[141] In this connection, see Pearson Report, *supra*, note 11, para. 361, at 86.

[142] O.L.R.C. Report, *supra*, note 123, at 79.

[143] See Cooper-Stephenson and Saunders, *supra*, note 38, at 353-54, and Waddams, *supra*, note 38, para. 393, at 226-27.

In our view, once the decision has been made to retain awards of damages for non-pecuniary loss, the realistic choice is between accepting the general approach laid down by the Supreme Court of Canada in the trilogy, which embraces the idea of moderation in awards and a rough upper limit or, alternatively, recommending more liberal or indulgent awards, perhaps with no upper limit. At this level, the Commission has no trouble endorsing the approach enunciated by the Supreme Court of Canada. It is probably fair to say that no system fully accepts an approach that would involve no upper limit. Even in American jurisdictions, where awards that would be regarded as astronomical in Canadian terms have been permitted, it is nevertheless accepted that an appellate court has the authority to limit or reduce amounts assessed by juries. The importance of recognizing a sense of loss and attempting to provide solace must be balanced against the social burdens of indulgent awards, as well as the impossibility of equating distress with money.

Having said this, the question for the Commission ultimately comes down to what the upper limit should be. The argument for a higher, but still moderate, limit, consistent with the approach adopted by the Supreme Court of Canada, involves several strands, for example, that it would permit more flexibility and give greater scope for assessing adequate awards in less serious cases. In the end, however, the argument seems to be founded on the subjective belief that $100,000, adjusted for inflation but otherwise forming the limit except in very exceptional circumstances, is simply not enough and that the "laddering" effect this has on awards for less serious, but still severe, injuries results in inadequate awards for these injuries.

As we have indicated, in its 1984 Report the Law Reform Commission of British Columbia recommended that "[t]he rough upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada in the 'trilogy' [should] be abolished".[144] In its place, the Commission proposed a "fair upper reference point",[145] represented by the 1975 trial award of $200,000 in *Thornton*. The difference between the British Columbia Commission's "reference point" and the Supreme Court of Canada's "rough upper limit" is not altogether clear.[146] Both attempt to keep damages from escalating in an uncontrolled fashion and to provide consistency and certainty in awards for various kinds of injuries. Fundamentally, then, the distinction would appear to be simply that the reference point imposes the limit at a higher dollar figure.

By way of summary, the Commission believes that the goals of consistency, predictability, and fairness—as between one award and another, and as between awards in one province and awards in another—necessitate the retention of some sort of limit. Since money cannot alleviate pain and

[144] *Supra*, note 52, at 31 (emphasis deleted).

[145] *Ibid.*, at 26.

[146] See Waddams, *supra*, note 122, at 735-36.



suffering or return to the injured person the lost years or lost amenities of life, and given the social burdens of indulgent awards, a reasonable, moderate award is required. In order to advance the goals referred to above, appellate review of lower court awards is essential. So long as some flexibility is assured, in order to deal with very exceptional cases demanding higher awards,[147] and so long as there is an adjustment for inflation in the level of awards, we believe that injured persons are adequately protected by the existing law respecting damages for non-pecuniary loss. If such persons are not properly compensated in respect of pecuniary losses, the remedy clearly lies in reform of that facet of the law. Indeed, it is an essential goal of our recommendations to ensure full recovery for such losses. Accordingly, the Commission recommends that there should be no change in the present law and practice, as enunciated by the Supreme Court of Canada in the trilogy, respecting awards of damages for non-pecuniary loss.[148]

[147] After a review of the jurisprudence, Waddams concludes that "though in principle the limit might be exceeded on grounds of seriousness of injury, it will in practice be difficult to establish such a case" (*supra*, note 38, para. 381, at 219). See, generally, *ibid.*, paras. 379-81, at 217-19.

[148] Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation:

> As Chairman of the Ontario Law Reform Commission, I was a signatory of its 1973 *Report on Motor Vehicle Accident Compensation*. The Commission at that time, apart from the Chairman, comprised three legal practitioners, one of whom specialized as counsel in these particular areas of litigation, and the fourth was the distinguished former Chief Justice of the High Court of Ontario whose judicial career necessarily involved in this area an intimate knowledge of the law and a broad experience in its decision making. The Report of the Commission was unanimous, including the recommendation that "no compensation should be paid for non-pecuniary losses suffered as a result of a motor vehicle accident."
>
> Nothing that I have read or heard since then has persuaded me that our decision at that date was wrong and it is therefore with regret that I must dissent from the recommendation of my colleagues in the current Report with respect to the award of non-pecuniary damages. It goes without saying that if there is to be compensation for non-pecuniary loss I would support the view that an upper limit, adjusted from time to time for inflation, be fixed by legislation. The figure of $100,000 was determined in the *Andrews* case by the Supreme Court of Canada to be a proper award and my colleagues have recommended that the practice of our courts on this point since that case be confirmed. It is clear, of course, that the fixing of the figure at $100,000, subject to adjustment for inflation, is no less arbitrary and no more logical than any other figure.
>
> It was said in the *Andrews* case that there is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. It must also be said that as a philosophical matter it is highly doubtful whether money can buy back happiness or palliate pain, and even assuming that it can, when does one establish where an infusion of dollars begins to be palliative and at what point in future dosage does one run into the law of diminishing returns? It is a given, of course, that everything that can reasonably be provided in terms of present and future care ought to be provided and certainly one should not skimp on the one with an expectation that the slack will be taken up on the other.
>
> It has been said in our current Report that some surveys have suggested that the people might be prepared to give up damages for non-pecuniary losses as a *quid*

### (b) Jury Assessment of Damage Awards

One point that has given rise to difficulty is whether, and, if so, the degree to which, guidance should be given to a jury in respect of the $100,000 limit. It has been the established rule that no specific figures should be mentioned by the trial judge, and this rule was reaffirmed by the Ontario Court of Appeal in 1984.[149] However, we believe that it is impossible to reconcile this approach with the requirement of rational analysis, rational explanation, and consistency of damage awards. It is true that empowering the judge to give guidance to the jury will reduce the independence, or at least the power, of the jury. But reduction of the jury's independence or power is not necessarily objectionable. Indeed, the history of trial by jury has witnessed the development of several devices for controlling the jury.[150]

---

*pro quo* in a system that provided compensation for all pecuniary losses on a no-fault basis. As a factual matter that may very well be, but it must be stressed that this was not stated as the reasoning behind the recommendation in the Commission's 1973 Report. Whether my colleagues at that time, or any of them, harboured that view is not known. I certainly did not.

I have given much thought to the question whether any one of the customary tripartite divisions of non-pecuniary damages—loss of amenities of life, pain and suffering and loss of expectation of life—might justify the retention of an award. It seems to me that there are a few cases where the nature and the severity of the loss of an amenity would justify an award even where compensation for lost earning capacity was *not* a factor. One thinks in this connection of an accomplished and dedicated but non-professional pianist. Apart from quantum which would remain a substantial problem there would be the difficulty of separating this factor from, say, suffering. In result, I would not favour the award of damages even for loss of amenities. And I am aware that the *Andrews* case counsels us that there should be no attempt to hive off any one of the trilogy of factors in non-pecuniary loss.

As a policy matter we do not attempt to compensate our wounded soldiers, injured workers, and generally incapacitated persons for non-pecuniary loss. It is, of course, no answer to say that in the tort regime we are dealing with a matter strictly between the parties. In today's society compensation for personal injury under the tort regime is far from a private matter. This particular manifestation of social engineering is called loss distribution and affects us all. Compulsory automobile insurance is an obvious but certainly not the only example of this.

One is also aware that New Zealand's comprehensive no-fault accident compensation scheme provides for compensation for pain and suffering. Recent experience with the funding of the New Zealand plan and the "massive cost blow-out" in compensation payments has prompted a review committee to say that the scheme "could not continue in its present form".

In the end it comes down to this, that to attempt to compensate for non-pecuniary loss we are inevitably driven out of the realm of rationality and logic and into the type of guesswork which has earned for this particular branch of the law the sobriquet "the forensic lottery".

[149] *Howes v. Crosby* (1984), 45 O.R. (2d) 449, 6 D.L.R. (4th) 698 (C.A.). But see *Crosby v. O'Reilly*, *supra*, note 46, at 386-87, *per* Laskin C.J. (for the Court). See, also, Waddams, *supra*, note 38, at 218, *n*. 157.

[150] Watson, "Assisting the Jury in Assessing General Damages—*Gray* v. *Alanco Developments* Revisited" (1970), 48 Can. B. Rev. 565, at 574.



Against the advantages of jury independence must be weighed the need for fairness, consistency, and rationality in damage awards, and the expense and inconvenience—some might say the absurdity—of compelling the trial judge to enter judgment for an amount that he knows is contrary to law, and must be set aside on appeal, with the consequent necessity of another jury assessment with, perhaps, the same defects as the first.[151] We believe, therefore, that complete deference to jury awards is no longer appropriate. Accordingly, it is recommended that, in the trial of an action for damages for personal injuries, the judge should be empowered to give guidance to the jury concerning the quantum of damages for non-pecuniary loss.[152]

It is further recommended that, in order to advance the goals of fairness and rationality, counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of damages.[153] We believe that any excess by counsel in this regard can and should be dealt with by the trial judge in the same way in which he would deal with any inappropriate behaviour, that is, pursuant to the judge's overriding discretion to control proceedings of the court.

Finally, the Commission recommends that an appellate court should have power, when setting aside a jury assessment of damages for non-pecuniary loss, to substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.[154] A similar power should continue to be exercisable in the case of an appellate court review of a judicial assessment of damages.

### (c) Survival of Actions

A further matter arising in connection with non-pecuniary loss concerns damages awarded to the estate upon the death of an injured person. We have seen that section 38(1) of the *Trustee Act*[155] permits the estate of an

---

[151] See *Vieczorek v. Piersma* (1987), 58 O.R. (2d) 583, 36 D.L.R. (4th) 136 (C.A.), where a husband and wife were injured in an automobile accident, sustaining fractures, with some loss of arm movement in the husband. A jury awarded damages to the husband for non-pecuniary loss of $54,600, and damages under the former *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 60 (now s. 61 of the *Family Law Act, 1986*, *supra*, note 6) of $52,000 and $39,000 to the husband and wife, respectively. The Ontario Court of Appeal set the awards aside as extravagantly high, but held that it had no power to substitute its own assessment in the absence of consent of both parties.

[152] See the draft *Personal Injuries Compensation Act* proposed by the Commission (hereinafter referred to as "draft Compensation Act"), *infra*, Appendix 1, s. 15.

[153] *Ibid*.

[154] *Ibid*., s. 16(1). See *supra*, note 151. Reform of the law on these lines has recently been recommended by the Law Reform Commission of British Columbia: *Report on Review of Civil Jury Awards*, LRC 75 (1984). See, also, the Memorandum of Dissent by Anthony F. Sheppard, in B.C. Report, *supra*, note 52, at 34.

[155] *Supra*, note 40, s. 38(1), reproduced *supra*, this ch., sec. 4.

injured person to recover damages for pain and suffering and, apparently, loss of amenities, but not loss of expectation of life. In addition, as we have indicated, section 61(2)(e) of the *Family Law Act, 1986*[156] provides that certain named relatives of the person injured or killed may recover "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred".[157]

The Commission recognizes that there are certain anomalies respecting the theoretical basis of damages awarded to the estate of the deceased. If one accepts the functional approach to such awards, as adopted by the Supreme Court of Canada in the trilogy, then it seems difficult to justify an award where the victim is dead:[158] if, in other words, the sole purpose of awards for non-pecuniary loss is solace for the injured person, this purpose cannot be realized after death.[159] Some commentators have also expressed the view that "intangible losses are purely personal to the plaintiff", with "no loss at all to the estate".[160] Difficulties in this area have, therefore, led to calls for the abolition of awards for non-pecuniary loss in survival actions.[161]

The Commission believes, however, that the abolition of survival actions would give rise to significant problems. The Alberta Institute of Law Research and Reform, which recommended the abolition of damages for non-pecuniary loss (although it proposed compensation for "bereavement" in its place), acknowledged two such problems in this way:[162]

> We recognize that a consequence of this recommendation is that the plaintiff's recovery of damages ... will depend on his surviving to judgment, which is a matter of chance. We recognize also, that on the one hand, that state of the law may put pressure upon a plaintiff to sue early, and, that on the other, it may provide some inducement to a defendant to delay matters.

---

[156] *Supra*, note 6. See discussion *supra*, this ch., sec. 1.

[157] The Commission's recommendations concerning such claims appear *supra*, ch. 2.

[158] It has been acknowledged by one commentator that, since the Supreme Court of Canada's "functional theory [respecting the calculation of non-pecuniary loss] is inapplicable where the victim is dead", "if assessment is to continue as before, it must be under either the conceptual or personal approach": Cooper-Stephenson and Saunders, *supra*, note 38, at 397. These approaches are described *supra*, this ch., sec. 3(d).

[159] Cooper-Stephenson and Saunders, *supra*, note 38, at 396-97, and Luntz, *supra*, note 38, para. 9.1.04, at 395.

[160] Cooper-Stephenson and Saunders, *supra*, note 38, at 399.

[161] See, for example, Alberta, Institute of Law Research and Reform, *Survival of Actions and Fatal Accidents Act Amendment*, *supra*, note 61, and *Survival of Actions Act*, *supra*, note 67.

[162] *Supra*, note 61, at 15.



In the absence of survival actions, then, a victim's estate would not be entitled to benefit from an award for non-pecuniary loss where the victim died immediately before judgment, but would be able to do so where the victim died immediately after judgment.[163]

The Commission does, of course, recognize the difference between these two situations.[164] Where the plaintiff is alive at the time of judgment, damages for non-pecuniary loss are awarded in the belief that they will, in fact, provide some solace to her for the anticipated duration of her life. Clearly, as we have said, no such purpose can be realized where the victim dies before judgment.

However, we do not believe that this difference is significant enough to warrant the imposition of different legal consequences. We believe that it would be unjust and undesirable to make the recovery of damages for non-pecuniary loss dependent on what the Alberta Institute acknowledged to be a "chance" occurrence, namely, when the victim died.

Moreover, we are of the view that the argument that the present law countenances a "windfall" to the estate, and on that basis ought to be rejected, is not conclusive. Even assuming that the damages recoverable by the estate are properly characterized as a windfall, such good fortune is not unique to survival actions: whether the victim dies either immediately before or immediately after judgment, it will be the estate, not the victim, that benefits from an award.[165] Furthermore, in some cases the injured party may have expended funds prior to judgment in a manner consistent with the purpose of an award for non-pecuniary loss. Recovery by the estate in respect of such expenditure seems to us to be reasonable and hardly a windfall to the beneficiaries.[166]

---

[163] Luntz, *supra*, note 38, para. 9.1.06, at 396-97.

[164] See Luntz, *ibid.*, at para. 9.1.06, at 397:

> Nevertheless, hard cases make bad law and if at the time when judgment is to be pronounced it is known that damages can no longer compensate, effect should be given to that knowledge. If the plaintiff, having obtained judgment for damages—including damages for non-pecuniary loss—then dies, a court on appeal would probably have to regard the claim as merged in the judgment and the death alone would not be a good ground for allowing the appeal (cf *Ryan v. Davies Bros Ltd.* (1921) 29 CLR 527); but if there are other grounds for allowing the appeal, the court should not shirk its duty because on the retrial or reassessment damages for non-pecuniary loss would be excluded.

[165] Of course, the estate may also benefit where the injured party never spends any of the damage award before he dies.

[166] Law Commission W.P., *supra*, note 79, para. 67, at 36 (see the passage quoted in the text following note 86, *supra*); Law Commission Report, *supra*, note 80, paras. 100-07, at 26-29; and Pearson Report, *supra*, note 11, paras. 442-44, at 100. In response, see Luntz, *supra*, note 38, para. 9.1.05, at 396:

On balance, therefore, we recommend that there should be no change in the law, under section 38(1) of the *Trustee Act*, respecting the entitlement of the estate of an injured person to recover damages for non-pecuniary loss.[167] We do recognize that, as a result of this proposal, estates would continue to be unable to recover damages for loss of expectation of life. Two main factors have influenced our decision. First, while perhaps justifiable on a conceptual level, the introduction of new legislation permitting an estate to recover damages for loss of expectation of life would add new and perhaps unanticipated complexities to an already controversial area of the law. We are mindful of the arguments marshalled specifically against such recovery in a survival action. Secondly, the Commission's other proposals in this Report are designed to provide, as much as possible, full compensation to an injured person and adequate protection to certain named dependants and others. In this sense, then, the provision of a new right to recover damages is unnecessary if its purpose is simply to secure better compensation.

### (d) Mental Distress

A final matter relates to damages for mental distress, standing alone. We noted earlier that, in the absence of any physical injury, such distress may well be regarded as a species of personal injury.[168] However, tort law has been reluctant to compensate such losses unless they amount to actual bodily harm, although it has been said that the law "seems to be moving in the direction of enlarging liability".[169]

> The first reason is, it is believed, specious. Issues of liability, contributory negligence and quantum are usually too doubtful to allow victims to act confidently on such predictions. In any event, it cannot be assumed that such expenditure was motivated by the expectation of receiving damages for non-pecuniary, as opposed to economic, loss.
>
> It is not at all clear why the alleged doubtfulness of the award and the motivation of the injured person are telling factors against the Law Commission's argument. Where the prejudgment expenditure was clearly to provide an amenity "lost" to the victim as a result of his injury, recoupment by the estate is, we believe, justifiable.
>
> The Law Commission also stated that "relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them" (Law Commission W.P., *supra*, note 79, para. 67, at 36). Luntz responded as follows (*supra*, note 38, para. 9.1.05, at 396):
>
> > With regard to the deserving relatives, it would be fortuitous if the ones to benefit from the award of damages to the estate for non-pecuniary loss were the ones who rendered the services, or if there was any correspondence between the value of the services and the amount received.

[167] See draft Compensation Act, s. 4(1), which begins: "In addition to damages otherwise recoverable in law". This statutory language would refer, *inter alia*, to s. 38(1) of the *Trustee Act*, *supra*, note 40.

[168] *Supra*, this ch., sec. 1. See, also, Waddams, *supra*, note 38, paras. 448 *et seq.*, at 263 *et seq.*

[169] *Ibid.*, para. 448, at 263.



In respect of negligence claims, it may be argued that any extension of the law in this area would have the effect of putting a premium on protestations of misery, lead to enormous difficulty in bringing about the settlement of claims, create heavy systemic costs, impose an enormous burden on those whose careless acts cause emotional distress, and drastically affect liability insurance premiums. In the case of intentional behaviour, on the other hand, other than that constituting an assault and battery or other nominate tort, it may be more justifiable to impose liability in the kind of case contemplated by the following provisions of the American Second Restatement of the Law of Torts:[170]

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

It may be thought anomalous, as Prosser once pointed out, to have "a rule which permitted recovery for a gesture that might frighten the plaintiff for a moment, and denied it for menacing words which kept him in terror of his life for a month".[171]

The issue of awarding damages for emotional distress associated with a breach of contract not producing a physical injury is one that has been explored by the courts. In recent years, there have been a number of contract cases that have imposed liability.[172] Some commentators have argued against the extension of damages in such cases,[173] and, in several instances, the scope of liability has been restricted in various ways.[174]

As in the torts context, the law of contract in this area exhibits some degree of uncertainty, but is also developing rapidly. Having regard to this state of affairs, there does not appear, at present, to be a convincing case for legislative intervention. Accordingly, the Commission recommends that the law respecting the award of damages for emotional distress alone should be allowed to develop on a case-by-case basis, without such intervention.

[170] *Supra*, note 114, § 46(1).

[171] Prosser, *Handbook of the Law of Torts* (3d ed., 1964), at 44.

[172] See cases cited in Waddams, *The Law of Contracts* (2d ed., 1984), at 564-69.

[173] Rea, "Nonpecuniary Loss and Breach of Contract" (1982), 11 J. Legal Stud. 35. On the other hand, the developments were defended in Harris, Ogus, and Phillips, "Contract Remedies and the Consumer Surplus" (1979), 95 Law Q. Rev. 581.

[174] In *Brown v. Waterloo Regional Board of Police Commissioners*, *supra*, note 5, it was held that a claim for mental distress could not be attached to an unconnected breach of contract, and the Court stressed the need for the loss to have been within the contemplation of the parties at the time of the contract. In wrongful dismissal cases, only the *additional* distress, if any, caused by the failure to give proper notice is compensable.

### RECOMMENDATIONS

The Commission makes the following recommendations:

*1. There should be no change in the present law and practice, as enunciated by the Supreme Court of Canada in the trilogy, respecting awards of damages for non-pecuniary loss.

2. (1) In the trial of an action for damages for personal injuries, the judge should be empowered to give guidance to the jury concerning the quantum of damages for non-pecuniary loss.

   (2) Counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of damages, subject to the trial judge's overriding discretion to control proceedings of the court.

   (3) An appellate court should have power, when setting aside a jury or court assessment of damages for non-pecuniary loss, to substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.

3. There should be no change in the law, under section 38(1) of the *Trustee Act*, respecting the entitlement of the estate of an injured person to recover damages for non-pecuniary loss.

4. The law respecting the award of damages for emotional distress, standing alone, should be allowed to develop on a case-by-case basis, without legislative intervention.

* Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation: see *supra*, note 148.

# CHAPTER 4

# COST OF CARE

## 1. INTRODUCTION

As we noted earlier,[1] the method of assessing general damages in separate amounts received the *imprimatur* of the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*[2] As a result, subsequent damage awards for personal injury have been divided, typically, into four separate heads of damage.[3] In recent cases involving serious personal injury the largest component in the assessment of general damages has been the award for cost of care. Such an award is intended to provide compensation for the future cost of medical and rehabilitative treatment judged necessary for the injured person by reason of the accident. "[T]he prime purpose of the court", it has been said, "is to assure that the terribly injured plaintiff should be adequately cared for during the rest of her life."[4]

The court's determination of the future care award involves a two-fold task. First, it must decide the kind of care to which the plaintiff is entitled. This will include, for example, a consideration of whether the plaintiff ought to be awarded the cost of home or institutional care, what special equipment ought to be paid for and whether rehabilitative or counselling services are warranted. The court must then decide how best to calculate the award in order to enable those goods and services to be provided during the entire period of disability. These are clearly determinations of two very different sorts. The first raises questions of broad social values; considerations of policy will undoubtedly affect whether a given level of compensation is considered adequate. The second requires resolution of financial and legal issues of a rather more concrete and technical nature.

It is this two stage process in the assessment of damages for future care that is addressed in this chapter. First we shall examine the standard of care, that is, the level of care appropriate for an injured tort victim. In the

[1] *Supra*, ch. 1.

[2] [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to [1978] 2 S.C.R.).

[3] The four heads of damage are: (1) special damages; (2) damages to compensate for lost future income; (3) damages to compensate for pain and suffering (non-pecuniary loss); and (4) damages to compensate for the cost of future medical and related care necessitated by the injury. See *supra*, ch. 1.

[4] *Arnold v. Teno*, [1978] 2 S.C.R. 287, at 320, 83 D.L.R. (3d) 609 (subsequent references are to [1978] 2 S.C.R.).

insurer is under no obligation to make any further payments in respect of that loss.[61] Double recovery with respect to future payments may be avoided simply by giving notice to the indemnity insurer that the loss has been fully paid. If the indemnity insurer nevertheless decides to continue making payments, such payments would be equivalent to a gift.

The same holds true for a benevolent or *ex gratia* source of a collateral benefit. Our recommendations with respect to *ex gratia* payments assume that the donor would not have made the payments, or would have expected to recover the payments, if damages in respect of the loss had been paid by the wrongdoer. If notice of full payment of a specific loss is given to the benefactor, and she nevertheless continues to make payments, it may be assumed that such payments are intended as gifts.

### RECOMMENDATIONS

The Commission makes the following recommendations:

1. Where an injured person has received an indemnity, including an *ex gratia* payment, in respect of any specific pecuniary loss claimed from a wrongdoer, the damages in respect of that loss should be held in trust for the collateral source.

2. (1) The wrongdoer, or her insurer, should be entitled to make payment of such damages directly to the collateral source, and should be entitled to receive a discharge of liability to the extent of such payment.

   (2) Payment of damages to the collateral source should include prejudgment interest.

3. Recommendations 1 and 2 should not apply until the injured person has been fully indemnified for her entire loss from any source or combination of sources.

[61] Parkington, O'Dowd, Leigh-Jones, and Longmore, *supra*, note 17, at 780.

# CHAPTER 7

# PREJUDGMENT INTEREST

## 1. INTRODUCTION

Considerable time can elapse between an accident and the final resolution of a resulting personal injury claim. In the absence of prejudgment interest, this creates a natural advantage for the defendant, who has the use of the money pending disposition of the claim. The lapse of time can create difficulties for a plaintiff, who will usually suffer a loss of income, but who must nevertheless cover normal living costs as well as accident-related expenses. To meet such expenses, most injured persons must either draw on savings or borrow money, thereby incurring an additional loss, that is, the loss of interest on savings or the cost of interest on money borrowed.

Most persons agree that some form of interest should be paid on losses incurred prior to judgment. There is disagreement, however, concerning the date from which interest should begin to accumulate and the rate of interest that should be paid. These issues form the subject matter of this chapter.

## 2. THE PRESENT LAW

At common law, a defendant was not required to pay interest on damages that had accrued to the time of trial.[1] This rule has been explained as reflecting the view that no debt was owed by the defendant until the court had decided in favour of the plaintiff.[2] It has also been attributed to the longstanding prejudice in Christian countries against usury.[3]

In Ontario, legislation was introduced in 1977 to provide for payment of prejudgment interest.[4] Section 138 of the *Courts of Justice Act, 1984*,[5] which governs prejudgment interest, provides, in part, as follows:

[1] See Waddams, *The Law of Damages* (1983), para. 870, at 495-96.

[2] Bruce, *Assessment of Personal Injury Damages* (1985), at 209.

[3] McGregor, *McGregor on Damages* (14th ed., 1980), para. 447, at 328.

[4] *The Judicature Amendment Act, 1977 (No. 2)*, S.O. 1977, c. 51, s. 3.

[5] S.O. 1984, c. 11.

138.—(1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated,

. . . .

(b) where the order is made on an unliquidated claim, from the date the person entitled gave notice in writing of his claim to the person liable therefor to the date of the order.

(2) Where the order includes an amount for special damages, the interest calculated under subsection (1) shall be calculated on the balance of special damages incurred as totalled at the end of each six-month period following the notice in writing referred to in clause (1)(b) and at the date of the order.

(3) Interest shall not be awarded under subsection (1):

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the proceeding;

(d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(e) where the order is made on consent, except by consent of the debtor; or

(f) where interest is payable by a right other than under this section.

An action for damages for personal injury is a claim for unliquidated damages. Under section 138(1)(b), therefore, the date from which prejudgment interest begins to run is the date that written notice of the claim is given.

The whole of the pre-trial loss generally does not arise at one time; rather, it cumulates from the date of the injury until judgment. For example, where an injured person is not compensated for two years, he may have a total income loss of $30,000 prior to trial. However, the injured person would have received only a portion of that total amount on a weekly or monthly basis, and, accordingly, can only be considered to have suffered the loss of its use from the time each portion of the amount would have become due. In response to this problem, section 138(2) provides that interest is to be calculated on the balance of "special damages" incurred, as totalled at the end of each six-month period following written notice of the claim, and at the date of judgment.

The term "special damages" is not defined by the Act. Furthermore, the term has no settled meaning in the law of damages. In personal injury cases, "special damages" generally refers to actual pecuniary losses incurred between the dates of the injury and the trial.[6] However, some uncertainty

[6] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. See, also, *Jefford v. Gee*, [1970] 2 Q.B. 130, at 146, [1970] 1 All E.R. 1202 (C.A.) (subsequent references are to [1970] 1 All E.R.).



remains as to when damages will be considered "special", as opposed to "general", in nature.[7]

The rate of interest paid on pre-trial loss is established by section 137(1)(d) of the *Courts of Justice Act, 1984*, which defines the prejudgment interest rate as follows:

137.—(1) In this section and in sections 138 and 139,

. . . .

(d) 'prejudgment interest rate' means the bank rate[8] at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent;

The rate used when prejudgment interest was first introduced was not the "bank rate", but, rather, the "prime rate",[9] which is the rate at which the chartered banks lend to their best, or "prime", customers.[10]

Section 140 of the Act confers on the court a discretion with respect to the award of prejudgment interest, "having regard to changes in market interest rates, the circumstances of the case, the conduct of the proceeding or any other relevant consideration". The court in its discretion may disallow interest, or may allow interest at a higher or lower rate, or for a period other than that provided by section 138. Such variation may be made in respect of the whole or any part of the amount on which interest is payable under section 138.

The current provision for prejudgment interest prohibits the award of compound interest. Section 138(3)(b) of the Act provides that "[i]nterest shall not be awarded under subsection (1). . .on interest accruing under this section".

The same rate of prejudgment interest currently applies to both pre-trial pecuniary loss and non-pecuniary loss awarded at trial. In *Borland v. Muttersbach*,[11] the Ontario Court of Appeal upheld the lower court decision

[7] See discussion in Waddams, *supra*, note 1, paras. 857-61, at 488-91.

[8] Section 137(1)(a) of the *Courts of Justice Act, 1984* defines "bank rate" as follows:

(a) 'bank rate' means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to the chartered banks;

[9] *The Judicature Amendment Act, 1977 (No. 2)*, *supra*, note 4, s. 3.

[10] Apparently, the bank rate was adopted under the *Courts of Justice Act, 1984* as a result of difficulties that had been encountered using the prime rate, arising from the fact that the *Bank of Canada Review* is not published until some time after the rates are set. The bank rate, on the other hand, can be determined immediately: Watson and Perkins (eds.), *Holmested and Watson, Ontario Civil Procedure*, Vol. 1, at CJA-158.

[11] (1985), 53 O.R. (2d) 129, 23 D.L.R. (4th) 664 (subsequent references are to 53 O.R. (2d)).

in which Barr J. awarded the same rate of prejudgment interest for both pecuniary and non-pecuniary loss. The issue had been addressed in an earlier case, *Graham v. Persyko*,[12] in which the Court had apparently accepted the argument that the rate of interest reflects not only compensation for loss of the use of money, but also an allowance for the decline in the value of money, that is, an adjustment for inflation. Because non-pecuniary losses already are adjusted to reflect inflation to the date of trial,[13] Holland J., in *Graham*, reduced the rate of prejudgment interest on that portion of the damage award to 2.5 percent.[14]

In *Borland v. Muttersbach*, the trial judge rejected this argument explicitly.[15] The Ontario Court of Appeal upheld this decision on the ground that there was no evidence that the trial judge had erred.[16] The Court did not expressly consider the argument accepted by Holland J. in *Graham*.

---

[12] (1984), 27 D.L.R. (4th) 701, 30 C.C.L.T. 85 (Ont. H.C.J.), cross-appeal related to the issue of prejudgment interest allowed (1986), 27 D.L.R. (4th) 699 (C.A.), at 717 (subsequent references are to 27 D.L.R. (4th)).

[13] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629, at 643, 129 D.L.R. (3d) 263, the Supreme Court of Canada recognized that the $100,000 limit on non-pecuniary losses, established in *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, should be indexed for inflation occurring after January, 1978.

[14] *Graham v. Persyko*, *supra*, note 12, at 715.

[15] (1984), 49 O.R. (2d) 165, at 187-88, 15 D.L.R. (4th) 486 (H.C.J.). The Court's reasons were as follows:

> The award of $170,000 will purchase no more goods and services than $100,000 in 1978. The plaintiff receiving $170,000 in 1984 is receiving the same compensation as the plaintiff receiving $100,000 in 1978 although expressed in different dollars. Whatever the award, the statute gives the plaintiff the *prima facie* right to receive prejudgment interest on it at the prime rate prevailing in the month before it was issued. A defendant who is prepared to forgo investment income may reduce or extinguish the plaintiff's claim for prejudgment interest by making an advance payment or payments. An insurer who wishes to invest the money at current high rates should not profit by having the benefit of such rates while being required only to pay a nominal rate of interest to the plaintiff. In my view, this would discourage advance payments, thereby adding to the distress of the victims and would be contrary to the policy reflected by s. 36.
>
> I am troubled too by the practical application of the *Graham* case. The context suggests that the trial judge there had in mind inflation occurring since the Trilogy. If inflation continues the upper limit, and presumably awards, will double in a matter of years if awards are adjusted for inflation. A case tried ten years hence will have an upper limit (assuming inflation at 7% per annum continuing) of $350,000, an increase of $250,000, an amount which will undoubtedly exceed the prejudgment interest accumulated after the statutory rate. To follow the *Graham* case would result in a refusal of prejudgment interest and, in effect, the abolition of prejudgment interest on non-pecuniary damages in such cases.
>
> I conclude that the fact of inflation is not a proper ground to deprive the plaintiffs of their *prima facie* right to receive prejudgment interest at the prime rate.

[16] *Supra*, note 11, at 145-47.



## 3. THE LAW IN OTHER JURISDICTIONS

### (a) ENGLAND

While the courts in England were given the discretion to award prejudgment interest on personal injury damages as early as 1934,[17] prejudgment interest was rarely granted until 1969, when legislation was amended to make such an award mandatory in respect of judgments over £200, in the absence of "special reasons why no interest should be given".[18] Under the English legislation, prejudgment interest accrues from the date when the cause of action arose, and the court has a discretion to award simple interest at such rate as it thinks fit, on the whole or any part of the damages, and for the whole or any part of that period. In *Jefford v. Gee*,[19] the Court of Appeal set out general guidelines with respect to the award of prejudgment interest, including the manner in which the discretion regarding the rate is to be exercised. The Court observed that the rate of prejudgment interest should reflect the earning capacity of the money during the time the plaintiff has been kept out of his money. The Court held that, in practice, a court should be guided by the rate payable on money in court that is placed on short-term investment account.[20]

The Court in *Jefford v. Gee* also dealt with the issue of special damages, which it defined as actual pre-trial pecuniary loss.[21] Unlike the position in Ontario, where special damages are cumulated at regular intervals until the date of trial, the Court held that special damages should earn interest at one-half the interest rate "determined to be appropriate", that is, one-half the rate paid on the short-term investment account established for payments into court.[22] The explanation for this rule is that this half-rate basis of calculation is "designed to provide a rough and ready but fair method of averaging out compensation for losses of earnings and out-of-pocket expenses which range over a period and comprise an aggregate of smaller, and often trifling, individual sums".[23]

In *Jefford v. Gee*, the Court of Appeal held that non-pecuniary losses should carry interest from the date of service of the writ to the date of trial.[24]

---

[17] *Law Reform (Miscellaneous Provisions) Act, 1934*, c. 41 (U.K.), s. 3(1).

[18] *Administration of Justice Act 1969*, c. 58 (U.K.), s. 22. See, now, *Supreme Court Act 1981*, c. 54 (U.K.), s. 35A, as en. by *Administration of Justice Act 1982*, c. 53 (U.K.), s. 15.

[19] *Supra*, note 6, at 1206.

[20] *Ibid.*, at 1210 and 1212.

[21] *Ibid.*, at 1208.

[22] *Ibid.*, at 1212.

[23] England, The Law Commission, *Law of Contract: Report on Interest*, Law Com. No. 88 (1978), at 33.

[24] *Supra*, note 6, at 1209 and 1212.

This rule was subsequently altered by the Court of Appeal in *Cookson v. Knowles*,[25] where it was held that no interest should be awarded on non-pecuniary losses. The English Law Commission also took the view that no interest should be awarded on such losses. The rationale given by the Commission was that, since these losses are calculated in dollar values as of the date of trial rather than injury, the injured person has already "gained" by the increase in the award due to inflation, and ought not to have interest as well.[26]

The Royal Commission on Civil Liability and Compensation for Personal Injury (the "Pearson Commission") took a similar position with respect to damages for non-pecuniary loss, but for slightly different reasons:[27]

> [W]e agree...that no interest should be awarded on non-pecuniary damages. As we have pointed out elsewhere, in present economic conditions an investor may well be unable to do more than maintain the real value of his investment, once tax and inflation are taken into account, if indeed he can manage to do this. To award no interest on non-pecuniary damages may therefore be at least as favourable as the award of interest at a market rate on damages for past pecuniary loss. A more important justification, however, lies in the conventional nature of non-pecuniary damages. We do not think that it would be appropriate to subject essentially arbitrary figures to detailed financial calculations.

This position was subsequently rejected by the House of Lords in *Pickett v. British Rail Engineering Ltd.*,[28] where the Court held that interest should be awarded on damages for non-pecuniary loss, in order to "compensate for being kept out of that real value" of money. However, the Court did not say anything in that case about the appropriate rate that should be allowed.

In *Wright v. British Railways Board*,[29] the House of Lords accepted two percent as the real rate of interest after accounting for inflation. This rate was not fixed, however, but constituted a guideline that might be subject to revision in the event of fresh economic evidence.

---

[25] [1977] 1 Q.B. 913, [1977] 3 W.L.R. 279.

[26] England, The Law Commission, *Report on Personal Injury Litigation—Assessment of Damages* Law Com. No. 56 (1973), at 74.

[27] United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as the "Pearson Report"), Vol. 1, para. 747, at 162.

[28] [1980] A.C. 136, at 151, [1979] 1 All E.R. 774.

[29] [1983] 2 A.C. 733, at 784-85, [1983] 2 All E.R. 698. The 2% real rate was first adopted by the English Court of Appeal in *Birkett v. Hayes*, [1982] 1 W.L.R. 816, [1982] 2 All E.R. 710 (subsequent references are to [1982] 1 W.L.R.), where Lord Denning observed, at 821:

> [T]he plaintiff in 1981 received £30,000. I can see no possible justification for giving her interest on that inflated figure for the 4 2/3 years...she was not kept out of £30,000 for those 4 2/3 years. She was only kept out of £20,000.



### (b) Canada

#### (i) General

All Canadian common-law provinces, except Saskatchewan,[30] have passed legislation that provides for the award of prejudgment interest in personal injury actions.[31] With the exception of Ontario, those provinces that have provided for the award of prejudgment interest have specified that interest accrues from the date upon which the cause of action arose. As in England, all prejudgment interest provisions in Canada use mandatory language, providing that the Court *shall* award prejudgment interest. However, in each of those provinces that have provided for prejudgment interest in personal injury actions, except British Columbia, the court has a discretion, if the circumstances warrant, to refuse to award prejudgment interest, or to award such rate of interest as the court considers appropriate.[32]

As a number of reform issues relating to prejudgment interest have been considered recently by the British Columbia Law Reform Commission,[33] it will be useful to consider the law in that jurisdiction in more detail.

#### (ii) British Columbia

British Columbia was the first Canadian jurisdiction to provide for the award of prejudgment interest on personal injury awards.[34] As is the case in most other Canadian jurisdictions, prejudgment interest is calculated from the date on which the cause of action arose to the date of the order, and the award of prejudgment interest is mandatory. However, unlike the position elsewhere in Canada, the court in British Columbia has no discretion to

---

[30] Section 46 of the Saskatchewan *Queen's Bench Act*, R.S.S. 1978, c. Q-1, provides as follows:

> 46. Interest is payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it.

In *Lamont v. Pederson* (1981), 7 Sask. R. 18, at 32, [1981] 2 W.W.R. 24, the Saskatchewan Court of Appeal disallowed a claim for prejudgment interest in a personal injury action, stating that "[s]ince damages have to be assessed and are not generally payable until they have been determined by a court, it has not been the practice of this jurisdiction to allow interest before judgment".

[31] *The Judgment Interest Act*, S.A. 1984, c. J-0.5, s. 2; *Court Order Interest Act*, R.S.B.C. 1979, c. 76, s. 1; *The Judgment Interest and Discount Act*, S.M. 1986, c. 39, s. 13(4)(1); *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 45; *The Judgment Interest Act*, S.N. 1983, c. 81, ss. 3-4; *Judicature Act*, S.N.S. 1972, c. 2, s. 38, as am. by S.N.S. 1980, c. 55, s. 1; and *Judicature Act*, R.S.P.E.I. 1974, c. J-3, s. 33, as am. by S.P.E.I. 1982, c. 13, s. 1.

[32] See statutory provisions cited *supra*, note 31.

[33] Law Reform Commission of British Columbia, *Report on the Court Order Interest Act*, L.R.C. 90 (1987) (hereinafter referred to as "B.C. Report").

[34] *Prejudgment Interest Act*, S.B.C. 1974, c. 65.

deny interest to a successful litigant. The rate of interest awarded is, on the other hand, discretionary in part: section 1(1) of the *Court Order Interest Act* provides that the rate should be such as "the court considers appropriate in the circumstances", although "the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada)".[35] The current minimum rate is five percent.

As in Ontario, calculation of interest that accrues during the prejudgment period on "special damages" is made at six month intervals.[36] The term "special damages" is not defined. The British Columbia legislation also prohibits the award of compound interest.[37]

In its 1987 Report,[38] the British Columbia Law Reform Commission recommended that prejudgment interest should continue to be mandatory, and should be awarded based on a non-discretionary fixed rate established by statute.[39] Under this proposal, the only discretion available to the court would arise with respect to cases in which foreign interest rates are in issue.[40]

In determining the appropriate rate of prejudgment interest, the British Columbia Commission considered both the bank rate and the "prime" rate; the latter rate was defined as the rate charged on prime interest loans. The British Columbia Commission opted for the prime rate because, in its view, that rate responds quickly to changes in the marketplace and to inflation.[41] The Commission was further influenced in its choice by the fact that, in British Columbia, the rate payable on funds in court, and on default judgments, has been set by reference to the prime rate charged by that province's banker.[42]

The British Columbia Commission recommended that prejudgment interest should be compounded, because compounding "reflects more accurately the operation of the marketplace and more fully and accurately measures the cost of delay to the successful plaintiff".[43]

---

[35] *Court Order Interest Act*, *supra*, note 31, s. 1(1).

[36] *Ibid.*, s. 1(2).

[37] *Ibid.*, s. 2(c).

[38] *Supra*, note 33.

[39] *Ibid.*, at 26.

[40] *Ibid.*

[41] *Ibid.*, at 30-31.

[42] *Ibid.*

[43] *Ibid.*, at 31. The Commission was satisfied that any difficulties in calculation would be addressed by the operation of the "multiplier" mechanism that had been proposed in its Report for the calculation of prejudgment interest.



The Commission recognized that use of the undefined term "special damages" had resulted in uncertainty. Accordingly, the Commission recommended that the term "special damages" should be replaced by the term "past pecuniary loss" to describe pecuniary loss arising before judgment.[44]

On the issue of non-pecuniary loss, the British Columbia Commission accepted the argument that the full award of prejudgment interest would result in double compensation for loss due to inflation. Pointing out that non-pecuniary losses are adjusted for inflation to the date of trial, the Commission stated as follows:[45]

> To the extent that prejudgment interest attempts to compensate the plaintiff for loss of value of money, an award of prejudgment interest at market rates will compensate the plaintiff twice over for the loss of value of money—once when the principal value of the judgment is calculated, and again when interest is added to it.

Accordingly, the Commission recommended that interest on non-pecuniary loss should be awarded at a "real rate" of return, which was defined as the actual recovery of interest in times of stable currency. The Commission chose as the appropriate real rate 3.5 percent, which is the discount rate established by the Chief Justice of the Supreme Court under section 51(3)(b) of the *Law and Equity Act*.[46]

## 4. CONCLUSIONS

### (a) General

Two different rationales may be advanced for an award of prejudgment interest. The first is a compensatory rationale that characterizes prejudgment interest as but one aspect of the primary goal of the tort system, that is, corrective justice through full compensation of the injured person for losses caused by the wrongdoer. From this perspective, an injured person is entitled to recompense for her loss as of the date of the injury, or as her losses arise, until the date of the resolution of the claim. If prompt payment had been made, the injured person would have been able to invest the moneys, or to avoid the cost of borrowing to cover expenses. Prejudgment interest is intended to compensate for the distinct loss that arises as a result of the injured person being kept out of that money. The compensatory purpose of prejudgment interest was recognized very early in the context of admiralty law, in the following statement by Dr. Lushington:[47]

---

[44] *Ibid.*, at 54.

[45] *Ibid.*, at 61.

[46] R.S.B.C. 1979, c. 224, as am. by S.B.C. 1981, c. 10, s. 30.

[47] *The Amalia* (1864), 5 New Rep., at 164*n*.

> Interest is not given by reason of indemnification for the loss, for the loss was the damage which had accrued, but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money it is a loss in the common sense of the word, but of a totally different description and clearly to be distinguished from a loss which has occurred by damage done at the moment of a collision.

The compensatory rationale is not dependent on any notion of wrongful withholding or delay in payment by the defendant. Nor is the award of prejudgment interest intended to punish a wrongdoer. Indeed, since proof of loss by the injured person is a necessary element of the operation of the tort system, it is often entirely reasonable that payment by the wrongdoer should be delayed. The compensatory rationale simply recognizes that, without an award of prejudgment interest, the injured person would be undercompensated.

The alternative rationale offered for awards of prejudgment interest is that such awards are intended to encourage expeditious resolution of claims and proceedings. In the absence of prejudgment interest, a wrongdoer has an obvious, and often significant, incentive to delay payment to the injured person, in order to have the benefit of the continued use of the money. Accordingly, from the perspective of the settlement rationale, prejudgment interest is imposed as an incentive to achieve a quick resolution of the claim or action by, in effect, penalizing the defendant for delay.

The Commission recognizes that expeditious settlement of personal injury claims is an important goal that should be fostered. In our view, the ideal prejudgment interest rules should be neutral with respect to settlement behaviour, in the sense that such rules should operate in such a way that neither the injured person nor the wrongdoer can benefit from delaying settlement or resolution of the action. However, we reiterate our belief, expressed throughout this Report, that the goal of full compensation of the injured person should remain the paramount concern of the tort system. To the degree that there exists any tension between the goal of expeditious settlement and that of full compensation, compensation should take precedence.

This position has guided the policy choices embodied in the recommendations that follow. However, we are satisfied that the reforms proposed address the overall concerns that have been expressed with respect to the current operation of the prejudgment interest rules, and satisfy, to a large measure, the goals of both settlement and compensation.

### (b) Time Period During Which Prejudgment Interest Accrues

As we have discussed, prejudgment interest currently begins to run from the date upon which written notice of a claim is given by the injured person to the wrongdoer. This rule was probably originally designed to induce timely claims on the part of the injured person, and is consistent with the goal of expeditious settlement or resolution of the action. Nevertheless, the time period is subject to criticism from both the settlement and compensation perspectives.



From the point of view of compensation, the existing rule may be said to be unsatisfactory because it fails to compensate the injured person for the period between the date the loss was incurred and the date when written notice of the claim is given. The goal of full compensation requires that prejudgment interest be calculated from the date upon which the cause of action arose.

The Canadian Bar Association—Ontario ("C.B.A.O."), on the other hand, has proposed a change in the current rule that is clearly intended to encourage more expeditious resolution of claims. The Association has urged that prejudgment interest should not begin to accrue until a defendant can be reasonably expected to make payment of the claim.[48] The C.B.A.O. suggests that the appropriate time from which interest should run is the date upon which the injured person offers to submit to medical examination, since it is only then that the defendant has the information upon which to assess the validity of the claim.

As we have said, the Commission recognizes that wrongdoers and their insurers have a legitimate interest in avoiding undue delay in the resolution of claims. However, we are of the view that sacrificing full compensation in order to promote prompt settlement is unfair to the injured person, and contrary to the primary aim of tort law.

It may be entirely reasonable for an injured person to delay in making a claim; some injuries, for instance, can be slow in manifesting themselves. In the meantime, the wrongdoer or the insurance company has the use of the money. An injured person who unreasonably delays settlement or litigation may be penalized by use of other available mechanisms, including costs penalties and the exercise of the court's discretion with respect to the award of prejudgment interest. Occasional undue delay by some injured persons should not deprive the majority of claimants of the fair and proper measure of compensation.

We are not alone in this view. As discussed,[49] England, and all Canadian provinces that have provided for prejudgment interest awards in personal injury actions, have chosen the date upon which the cause of action arose as the relevant starting point for accrual of such interest.

---

[48] See Canadian Bar Association—Ontario, Committee to Review Problems in the Casualty Insurance Industry, *Submission to the Ontario Task Force on Liability Insurance* (April, 1986), at 10.

[49] *Supra*, this ch., sec. 3.

For the reasons given above, we recommend that section 135(1) of the *Courts of Justice Act, 1984*[50] should be amended to provide that prejudgment interest should accrue from the date upon which the cause of action arises.[51]

### (c) Rate of Interest on Pre-Trial Pecuniary Loss

As discussed, the rate of prejudgment interest currently awarded is the bank rate prevailing on "the first day of the last month of the quarter preceding the quarter" in which the action was commenced, rounded to the next higher whole number where the bank rate includes a fraction, plus one percent. This choice of prejudgment interest rate raises a number of issues.

The first relates to the date upon which the rate itself is established. A significant period of time, sometimes several years, can elapse from the date of the injury until the trial or settlement of an action. Interest rates can fluctuate widely during that period of time. Fixing the interest rate as of the last month prior to the quarter in which the action is commenced can lead to anomalies that, in turn, may affect settlement behaviour. Where interest rates fall after the action is commenced, the injured person has an incentive to delay in order to obtain the beneficial interest rate on the amount due. Conversely, where interest rates have risen, the wrongdoer may benefit from delay and the investment of the amount payable at a higher interest rate.

It has been suggested that a more precise award of damages, more accurately reflecting the injured person's actual loss, would be obtained by a revision of the interest rate at regular intervals during the period in which prejudgment interest is payable. We agree with this position. In order to reflect more closely changes in interest rates generally, we recommend that the prejudgment interest rate should be adjusted on a quarterly basis.[52]

The current choice of prejudgment interest rate, one percent above the bank rate, rounded up to the next highest percentage point, has been criticized. The current rate is approximately the same as that charged to corporate borrowers. Because the interest rate charged to other, non-corporate borrowers is generally higher, the current prejudgment rate may not fully compensate some injured persons who must borrow to meet expenses.

On the other hand, the wrongdoer or insurer would almost certainly earn less than the current prejudgment rate on short-term investments prior to judgment; an insurer would probably earn about two percent less than

[50] *Supra*, note 5.

[51] See the draft *Courts of Justice Amendment Act* proposed by the Commission (hereinafter referred to as "draft CJA Act"), *infra*, Appendix 2, s. 3(1).

[52] *Ibid.*



that rate. Moreover, the current prejudgment interest rate is generally higher than the rate of return that can be earned by individuals on short-term investments, so that some injured persons who have not borrowed may be overcompensated.

It has been argued that injured persons do not generally borrow money, and that awarding a rate higher than they might otherwise earn encourages delay. It is also pointed out that, where an injured person is forced to borrow, the cost of such borrowing can be proved at trial, and awarded by the court as an aspect of special damages, or through the exercise of the court's discretion under section 140 of the *Courts of Justice Act, 1984* to depart from the usual rate.

On balance, we believe that, subject to the recommendation that follows, the appropriate prejudgment interest rate should be the average bank rate for each quarter, and we so recommend.[53]

It has also been suggested that the current prejudgment interest rate formula, which rounds a fractional rate up to the next percentage point, may increase unduly the amount of prejudgment interest payable to an injured person. The purpose of rounding up is apparently to simplify calculations. However, such an increase can represent a large amount of money over time and can result in significant overcompensation: a bank rate of 9.1 percent would be rounded up to ten percent, an increase of almost a full percentage point.

This seems difficult to support. Fairness requires a more precise calculation of the loss to the injured person, which could be achieved by rounding the bank rate, either up or down, to the nearest tenth of a percentage point. We so recommend.[54]

### (d) Compound Interest

As discussed, existing prejudgment interest provisions prohibit the award of interest on interest, that is, compound interest. This prohibition may reflect a concern that compound interest involves complex calculations that can result in practical difficulties.[55] However, it has been strongly argued that the prohibition against awarding compound interest can result in significant undercompensation. If the injured person had been promptly paid, the money could have earned compound interest. While the defendant holds the money, compound interest may be earned. The difference

[53] *Ibid.*, s. 2.

[54] *Ibid.*

[55] This appears to be the view taken by the English Law Commission, which opted to retain simple, rather than compound, interest: *supra*, note 23, at 45-47. See, also, *Sun Alliance Insurance Co. v. Alvin Keenan Ltd.* (1985), 32 A.C.W.S. 254 (N.B.C.A.).

between simple and compound interest can be significant. For example, if the prejudgment interest rate were ten percent, denial of compounding would reduce the effective rate to 9.1 percent on a three year debt.

We share the view expressed by the British Columbia Law Reform Commission that compounding prejudgment interest more accurately reflects the operation of the marketplace and the cost of delay to the injured person.[56] The calculation of compound interest has been simplified immeasurably by computerization and there would appear to be no reason to deny this method of ensuring full compensation. Accordingly, we recommend that prejudgment interest should be compounded, with quarterly calculations.[57]

### (e) Interest on Non-Pecuniary Loss

As discussed, prejudgment interest is awarded at the same rate for both pecuniary and non-pecuniary losses. This practice has been criticized on the ground that it overcompensates the injured person. The $100,000 limit on non-pecuniary loss established by the Supreme Court of Canada is adjusted for inflation from the date of injury to the date of trial. Because commercial interest rates comprise not only an amount reflecting the "real rate" of interest, but also an amount reflecting the loss of the value of money over time, an award of prejudgment interest at the full prejudgment interest rate, in effect, allows double recovery in respect of the loss due to inflation.

The argument for a reduction of the current rate of prejudgment interest awarded on non-pecuniary losses seems to us compelling. There appears to be no good reason why an injured person should be doubly compensated for inflation. A person who, in 1978, suffers a non-pecuniary loss for which the maximum of $100,000 in non-pecuniary damages would be awarded, but who is not compensated until 1987, will receive almost $200,000. To paraphrase Lord Denning in *Birkett v. Hayes*,[58] that person was not kept out of $200,000 for nine years; she was only kept out of $100,000. We agree with the position taken by Holland J. in *Graham v. Persyko*,[59] the House of Lords in *Wright v. British Railways Board*,[60] the Province of Alberta,[61] and the British Columbia Law Reform Commission,[62] that prejudgment interest should be awarded only for that component that represents the "real rate" of interest.

[56] B.C. Report, *supra*, note 33, at 31, discussed *supra*, this ch., sec. 3(b)(ii).

[57] Draft CJA Act, s. 3(1).

[58] *Supra*, note 29.

[59] *Supra*, note 12.

[60] *Supra*, note 29.

[61] Section 4(1) of the Alberta *Judgment Interest Act*, *supra*, note 31, provides that interest on non-pecuniary damages shall be calculated at the rate of 4% per year.

[62] B.C. Report, *supra*, note 33, at 64.



In taking this position, the Commission accepts that some awards—particularly awards for less serious injuries—may not be adjusted for inflation with the same degree of precision as maximum awards, which are directly referable to $100,000 in 1978. However, it is our view that this concern can be addressed through careful submissions by counsel, who can alert the courts to the assumption underlying the reduced interest rate, that is, that all awards have been properly adjusted for inflation. We fully expect that the courts will, over time, come to make the appropriate adjustments as a matter of general practice.

As to the appropriate "real rate", in *Graham v. Persyko*,[63] the Court awarded an interest rate of 2.5 percent for damages for non-pecuniary loss. This is the same rate used for discounting future losses.[64] On balance, this would appear to be a fair choice. Accordingly, a majority of the Commission recommends[65] that prejudgment interest should be awarded on damages for non-pecuniary loss at the rate specified in the Rules of Civil Procedure, from time to time, in respect of the discount rate, which, at present, would be 2.5 percent.[66]

### (f) Special Damages

As discussed, the term "special damages" is undefined by the *Courts of Justice Act, 1984*, and its meaning is uncertain at common law. Such uncertainty is unnecessary. Accordingly, we recommend that section 138(2) of the *Courts of Justice Act, 1984* should be amended by replacing the term "special damages" with the term "past pecuniary loss".[67]

### (g) Scope of Recommendations

Despite the limited scope of the present project, the foregoing recommendations in respect of prejudgment interest are not restricted to cases of personal injury or wrongful death. There seems to be no plausible argument for a distinction, on these questions, between different kinds of cases in which damages are awarded, and it would appear to be introducing an anomaly to set up such a distinction.

## 5. STATEMENT OF DISSENT AND EXPLANATION BY EARL A. CHERNIAK, Q.C.

I am unable to agree with the recommendation of my fellow Commissioners that prejudgment interest on non-pecuniary general damages

[63] *Supra*, note 12, at 715.

[64] Rules of Civil Procedure, O. Reg. 560/84, r. 53.09.

[65] One of the Commissioners, Mr. Earl A. Cherniak, Q.C., dissents from this recommendation: see *infra*, this ch., sec. 5.

[66] Draft CJA Act, s. 3(1a).

[67] *Ibid.*, s. 3(2).

# AGGRAVATED, PUNITIVE AND EXEMPLARY DAMAGES IN CANADA

*Earl A. Cherniak, Q.C.* and *Jerome R. Morse*







| Case | Awards | |
|---|---|---|
| *Logan v. Lovesy* (1983), 18 A.C.W.S. (2d) 229 (Southey, J.) | | |
| | Parents | 5,000 each |
| | Brothers ages 20 and 24 | 1,000 each |
| | sister age 15 | 1,000 |
| **II. Death of an Adult** | | |
| **Deceased** | | |
| 23-year-old man | Husband | 35,000 |
| | Daughter age 18 | 15,000 |
| 46-year old woman | | |

## I. *Introduction*

"Moral",[1] "at large", "aggravated", "retributory", "vindictive", "punitive",[2] "deterrent",[3] "penal",[4] "smart money",[5] "swingeing",[6] "indignant",[7] and "exemplary",[8] are some of the words found in the legal reports and journals to describe the kind of damages that lawyers think of under the general name "punitive damages". The purpose of this paper is to try to bring some order to the confusion that this terminology has created in the law, to describe the current law of punitive damages in Canada, and to predict the direction that the courts may take in the future.

## II. *Terminology*

Just as the calendar is recorded in terms of before and after Christ, similarly the development and evolution of "punitive" and related damages should be described in terms of before and after *Rookes* v. *Barnard*, [1964] 1 All E.R. 367 (H.L.). The controversy over the applicability of that decision to Canadian law has tended to obscure the important role of that case in bringing order to the very real confusion in terminology that preceded it. Unfortunately, that confusion is sometimes still evident in the judgments of courts which have not taken the time to read and understand *Rookes* v. *Barnard*.

An understanding of the terminology is mandatory to trace the roots from which this body of law has grown. Prior to *Rookes* v. *Barnard*,

[1] *Chartier* v. *Attorney-General of Quebec* (1979), 104 D.L.R. (3d) 321 at 344 (S.C.C.).

[2] *Cassell & Co. Ltd.* v. *Broome and another*, [1972] 1 All E.R. 801 at 825 (H.L.).

[3] *Dalsin et al.* v. *T. Eaton Company* (1975), 63 D.L.R. (3d) 565 at 567 (Alta. D.C.J.).

[4] *Denison* v. *Fawcett*, [1958] O.R. 312 at 325 (C.A.).

[5] *Karas* v. *Rowlett*, [1944] S.C.R. 1 at 19.

[6] Cooper-Stephenson, K., *Personal Injury Damages in Canada* (Toronto: Carswell, 1981).

[7] Ibid.

[8] *Supra*, note 2.



confusion in terminology abounded in the case law. In 1972, Lord Hailsham rendering one of the majority decisions in *Cassell* v. *Broome*, observed at page 825: "the expressions 'at large', 'punitive', 'aggravated', 'retributory', 'vindictive', and 'exemplary' have been used in . . . inextricable confusion". The terms "deterrent" and "penal" have been advanced at one time or another to describe these damages. Finally, "smart money" and "moral damages", terms found in U.S. and civil code jurisdictions respectively, express the same or related notions.[9]

The "inextricable confusion" referred to by Lord Hailsham is evident in numerous cases[10] where the court mistakenly interchanged or misused these terms, thereby hindering a clear concept of what elements actually made up an award.

The air was cleared by the speech of Lord Devlin in *Rookes* v. *Barnard*. The importance of what he said was underscored by Lord Hailsham in *Cassell* v. *Broome* as follows:

> "My own view is that in no English case, and perhaps even in no statute, where the word 'exemplary' or 'punitive' or 'aggravated' occurs before 1964 can one be absolutely sure that there is no element of confusion between the two elements in damages. It was not until Lord Devlin's speech in *Rookes* v. *Barnard* that the expressions 'aggravated' on the one hand and 'punitive' or 'exemplary' on the other acquired separate and mutually exclusive meanings as terms of art in English law." (page 824)

Lord Devlin's judgment in *Rookes* succinctly delineates the two distinct elements of what had been termed "punitive" damages, being on the one hand compensation, and on the other exemplification or punishment. He states (at page 407):

> ". . . it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved. Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they

[9] In *Chaput* v. *Romain*, [1955] S.C.R. 912, the Supreme Court of Canada held that "dommages moraux" are in lieu of exemplary or punitive damages which cannot be awarded in civil code jurisdictions (p. 841 of Taschereau, J.).

Fridman, G.H.L., in "Punitive Damages in Tort" (1970) 48 Can. Bar Rev. 373 at 381, suggests an award of moral damages in civil law jurisdictions is an effort to award aggravated damages as opposed to exemplary or punitive damages. To the extent "moral damages" are compensatory, they are distinguishable from punitive or exemplary damages. It may be said of an award of moral damages that such an award is an indirect attempt to sanction reprehensible conduct in a civil action in those jurisdictions precluding punitive or exemplary damages.

[10] *S.* v. *Mundy*, [1970] 1 O.R. 764 (Co. Ct.); *Whitehouse* v. *Reimer* (1979), 107 D.L.R. (3d) 283 (Alta. Q.B.); *Paragon Properties Ltd.* v. *Magna Investments Ltd.* (1972), 24 D.L.R. (3d) 156 at 164 (Alta. C.A.); *Canadian Ironworkers Union No. 1* v. *International Association of Bridge Structural and Ornamental Ironworkers Union, Local No. 97* (1972), 31 D.L.R. (3d) 750 (B.C.S.C.).

aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed.

There are also cases in the books where the awards given cannot be explained as compensatory. . . ."

Lord Devlin refers with approval to the passage from the judgment of Chief Justice Pratt in *Wilkes* v. *Wood* (1763), Lofft 1. The *Wilkes* case represents the planting of the seed in the common law of "punitive" damages from which these damages grew forth. The Chief Justice stated at page 18:

"Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty to deter from any such proceeding for the future and as proof of the detestation of the jury to the action itself."

Lord Devlin explains that no matter what terminology was used prior to *Rookes*, these awards are readily classifiable into one or the other of two kinds of damages. "At large" or "aggravated", or "retributory" (in one sense of its use) damages have their roots in compensation. Exemplary or punitive and retributory (used in its other meaning) damages, on the other hand, express the court's outrage or desire to deter with no compensatory element.

The term "aggravated" is most commonly used to express the compensatory element because it best conveys the basis of the concept, i.e., damages based on the impact of the defendant's malice or misconduct upon the plaintiff's feelings of dignity and pride.[11] These damages sound in compensation and are personal to the plaintiff. The term "aggravated" properly conveys the sense of additional compensation awarded the plaintiff for hurt or injury actually experienced flowing from the nature of the conduct complained of.

The term "at large" is also used to describe this kind of general damages. Its use for the most part is in awards of damage in libel and slander cases. It is generally accepted that pecuniary compensation in libel and slander is not capable of precise calculation. Hence the award of "at large" damages in such cases is to compensate both injured reputation and feelings, and the pecuniary loss that can never be known. There is conflicting authority as to the appropriateness of an "at large" award which includes the kind of true punitive damages which are non-

[11] Catzman, Marvin A., "Exemplary Damages: The Decline, Fall and Resurrection of Rookes v. Barnard", *Law Society of Upper Canada 1973 Special Lectures* (Toronto: De Boo, 1973) at p. 52.



compensatory.[12] The better view is that the award of "at large" and "punitive" damages should be made under separate heads of damage.[13] This is so because the "at large" award properly construed should be compensatory, contrasted with "punitive" damages which bear no relation to what the plaintiff ought to receive as compensation.

"Retributory" is objectionable as a term to convey the notion of the compensatory kind of damage because of its ambiguity. It has been observed that this term "can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example".[14]

The second kind of damages characterized by Lord Devlin as punitive or exemplary, which have also been described as "vindictive", "deterrent", "penal", and "retributory", are for the purpose of punishing or deterring the defendant and others of like mind and are unrelated to the function of compensating the plaintiff. The terms "exemplary" and "punitive" are most commonly used since they relate to the principle upon which this second type is based: punishment of the defendant and deterrence of the defendant and others of a like mind.

This distinction between aggravated damages on the one hand and exemplary or punitive damages on the other has been characterized as "true" damages versus "fictional" or "judicial" damages. Aggravated damages are ". . . true damages in the sense of being genuinely awarded to reinstate the plaintiff in the situation he was before the misconduct of the defendant."[15] If the misconduct of the defendant is of a kind which aggravates or magnifies the harm suffered, then aggravated damages that reflect this additional or aggravated hurt are in order. Since *Rookes* v. *Barnard* it seems clear that exemplary or punitive damages are ". . . fictional or judicial damages, designed to indicate the displeasure of the court, whether judge or jury, to indicate the heinousness of the defendant's conduct"[16] so as to punish and deter the defendant and likeminded individuals.[17] These damages are characterized as fictional in the sense of not bearing a direct relation to the harm suffered by the plaintiff, but rather, for the most part, are a function of the court's perception of the objectionable nature of the defendant's conduct. Additionally they are judicial in that they are imposed by and emanate from the court (judge or jury), as opposed to originating from or relating back to the harm suffered by the plaintiff. Hence these damages are aptly termed exemplary because their purpose is to make an example of the defendant. They are

[12] *Hubert* v. *DeCamillis* (1963), 44 W.W.R. 1 at 21 (B.C.S.C.); *Morgenstern* v. *Oakville Record Star* (1962), 33 D.L.R. (2d) 354 at 372 (Ont. H.C.).

[13] *Supra*, note 9 and note 2.

[14] *Supra*, note 2, p. 826.

[15] Fridman, p. 379.

[16] Ibid.

[17] *Rookes* v. *Barnard*, *supra*, p. 407.

appropriately termed punitive to connote the punishment or penalization of the wrongdoer. Thus, as terms of art to describe "fictional" or "judicial" damages, these two terms are used together or interchanged without distinction.

It is interesting to note that in Quebec the civil law does not permit exemplary or punitive damages. In *Chaput* v. *Romain*, "dommages moreau" were awarded in lieu of exemplary or punitive damages. The plaintiff was not entitled to recover punitive damages but he was "entitled to recover 'moral' damage, a term which . . . may be said to be analogous to 'general' damages in the common law" (page 860). Consistent with this authority are cases in Quebec which have awarded moral damages when the conduct complained of was distressing to the plaintiff and thereby analogous to aggravated damages. It has been suggested that moral damages may be the civil law's method of overcoming or offsetting the exclusion of punitive or exemplary damages.[18] The use of "dommages moreau" in civil code jurisdictions restricts the court's expression of abhorrence toward the defendant's conduct to those situations where actual damages have been occasioned to the plaintiff requiring compensation.

The distinction between aggravated compensatory damages and punitive or exemplary judicial damages is useful and if adhered to will avoid confusion. Judges and lawyers should be careful to distinguish between them even where the case contains elements of both. There should be no blending of the award and no duplication. Unfortunately, some courts still do not make this distinction. A recent example is *Whitehouse* v. *Reimer et al.* (1979), 107 D.L.R. (3d) 283 (Alta. Q.B.), where Moshansky, J. said (at page 305):

> "The measure of damages in certain torts such as false imprisonment and malicious prosecution may be affected by the conduct, the character and circumstances of both plaintiff and defendant. These factors may be said to go in aggravation or in mitigation of the damage. 'Aggravated damage' indicates that the loss to the plaintiff is increased. '*Aggravated damages' can refer equally to compensatory damages and to exemplary damages.* As *MacGregor on Damages*, 13th ed. (1972), states at p. 146, paragraph 207 'thus the damages most commonly aggravated, and the damage correspondingly increased'." [Emphasis added.]

This statement of the law is misleading and serves to perpetuate the confusion. A close examination of the passage in *MacGregor* reinforces the fundamental distinction between aggravated damage and exemplary or punitive damage, although without the distinction in terminology laid down in *Rookes*. Professor MacGregor, referring to the use of the term "aggravated damages", states:

> "[I]t is preferable to adhere to the singular word 'damage' for two reasons. First, this is the logical order, as the damage must be aggravated or mitigated before the damages can be aggravated or mitigated. Secondly, in relation to aggravation, this helps to keep separate damage awarded as compensation to the plaintiff and damage awarded as punishment of the defendant a distinction which, as explained by Lord Devlin in *Rookes* v. *Barnard*, [*supra*], has in the past been too frequently blurred. 'Aggravated damage' indicates that the loss to the plaintiff is increased and can therefore only have reference, or lead on to compensatory damages; but 'aggravated damages' [preferably 'aggravation of damages'], is ambiguous in this respect and could refer equally to compensatory damages and to exemplary damages."[19]

Professor MacGregor points out that "aggravated damages" or, it is suggested more appropriately, "aggravation of damages", not to be confused with "aggravated damage", are a proper consideration in assessing both "aggravated" damage and exemplary or punitive damage. While Professor MacGregor has undoubtedly seen the distinction between the two kinds of damage, the use of the phrase "aggravated damages" in relation to punitive or exemplary damages is unnecessarily confusing. While in some cases, some of the elements which justify an award of aggravated compensatory damage will also justify or even make larger an award of punitive or exemplary damages, each head should stand alone and be separately assessed, although the court must be careful not to duplicate the damages. The term "aggravation of damage" (or damages) should properly refer to either element of these damages. This ought to avoid confusing the aggravated damage award in any way with the exemplary or punitive damage award.

The correct position is that aggravated damage or damages are compensatory to the plaintiff and are to be distinguished from exemplary or punitive damage or damages which are awarded where it is proper to punish and deter by the example of such punishment (or penalty), like-minded individuals.[20] The amount of punitive or exemplary damages will depend, as will be discussed later in this paper, on many factors, one of which will include the seriousness of the conduct itself, and its effect on the plaintiff or others who might be exposed to it. These factors may be said to go to the issue of aggravating the punitive damage award.

In the balance of this paper the terminology used will be as discussed in this section. Until this terminology becomes generally understood and applied by judges, all reported cases must be scrutinized carefully to determine what kind of damages are really being awarded no matter what words are used. Our courts frequently, through a lack of analysis of *Rookes* v. *Barnard*, still interchange the teminology, hindering the development of a clear rationale for these awards in Canada.[21]

[18] *Robbins* v. *CBC* (1958), 12 D.L.R. (2d) 35 (Que. S.C.); *Charron* v. *Piche*, [1960] R.L.N.S. 440.

[19] McGregor, H., *McGregor on Damages* (1972) 13th ed. (London: Sweet & Maxwell, 1972) 13th ed., 146.

[20] *Rookes* v. *Barnard*, *supra*, p. 407.

[21] *Supra*, note 10.

## III. *Purpose of an Award of Punitive Damages*

As we have seen, *Wilkes* v. *Wood* is the earliest authority for an award of punitive damages. The plaintiffs' house was searched under a general warrant because he was in possession of an allegedly published libellous pamphlet. This search was the basis upon which he founded his action for trespass. Chief Justice Pratt gave effect to Sergeant Glym's submission for "large and exemplary damages since trifling damages would put no stop at all to such proceedings" (page 3). In the result, something theretofore unknown to civil law in a common law jurisdiction was given effect. Since that case, damages unrelated to compensating the plaintiff for harm suffered as a result of the conduct complained of could be awarded in an appropriate case.

Lord Devlin in *Rookes* v. *Barnard* drew attention to the anomalous presence of exemplary or punitive damages in the civil law and its overlap with criminal law:

> "The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. . . . [Y]our lordships . . . have to consider whether it is open to the House to remove an anomaly from the law of England." (page 407)

His Lordship, persuaded by the force of precedent, concluded:

> "there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal." (page 410)

There is often a blurring of the line between the damages awarded because of the aggravation of the plaintiffs' damages by the outrageous conduct, and the damages which are meant to be exemplary and punitive. It is easy to see why the confusion in terminology has arisen. Professor Fridman, in his article "Punitive Damages in Tort", is of the view at page 388 that "there is an aspect of aggravated damages which relates to the degree or quality of culpability on the part of the defendant, in other words the seriousness or other unpleasant feature of the defendant's conduct which deserves some extra penalization in the form of damages so as to reveal the extent of the law's abhorrence of what he has done".

Professor Fridman points out that damages to compensate the plaintiff for aggravated injury related to the defendant's wrongful conduct are difficult to distinguish from an award of exemplary or punitive damages, wholly unrelated to the compensatory function, which reflects the court's disapproval and abhorrence of the offending conduct.

In *Rookes* v. *Barnard* at page 407, Lord Devlin indicates that where damages are:



> "at large the jury . . . can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation."

Lord Devlin's view of the matter seems to be that in the context of aggravated damages, the defendant's conduct is only relevant to ascertain the extent to which the sum to compensate the plaintiff's injury is to be increased.

The judgment in *Loomis* v. *Rohan* (1974), 46 D.L.R. (3d) 423 at 426 (B.C.S.C.) suggests that there must be actual injury or hurt to the plaintiff's feelings by the defendant's conduct before the court will award damages for aggravation of the usual compensatory damages:

> "there is no evidence from the plaintiff that the defendant's bizarre and wholly unexplained activity injured the plaintiff and his feelings or gave particular offense to his dignity. There is no evidence that the plaintiff was humiliated in the presence of friends in such a way that his dignity was affected. The evidence does not go any further, in my view, than show the defendant had made a nuisance of himself; and all it amounts to is that the plaintiff at various times had to put up with the attentions of a person who was a nuisance."

The refusal to award aggravated damages in the situation where the defendant shot and killed the plaintiff on the basis there was no personal humiliation or indignity suggests that an award of aggravated damages cannot be triggered solely by the court's abhorrence of the defendant's conduct. There is no reason, however, why punitive or exemplary damages should be affected by such a consideration, when the defendant's conduct merits such an award.

Since *Rookes* the theory of aggravated and exemplary or punitive damages is clear. There may be uncertainty, however, as to whether an award of aggravated damages may reflect the court's aversion to the defendant's conduct from the perspective of deterrence without regard to compensating the extra injury to the plaintiff as a result of such conduct. Lord Hailsham, in the case of *Cassell & Co.* v. *Broome*, adopted the view expressed by Professor McCormick in *The Law of Damages* (1935) page 278 as to the state of this law before *Rookes*:

> "In England, where exemplary damages have their origin, it is still not entirely clear whether the accepted theory is that they are a distinct and strictly punitive element of the recovery, or they are merely a swollen or 'aggravated' allowance of compensatory damages permitted in cases of outrage. It is only in America that the cases have clearly separated exemplary from compensatory damages and it is only here [America] that the doctrine, thus definitely isolated, has been attacked and criticized." (page 822)

It ought to be clear from the *Rookes* case that true punitive or exemplary damages must and do stand on their own, apart from any compensatory feature. There is no doubt as to that proposition. Where the uncertainty seems to arise is in the nature of the aggravated damage award. There is one view of Lord Devlin's speech in *Rookes* that the aggravated damage award can reflect the court's aversion to the defendant's conduct.[22] The award in such a case reflects not only the aggravation that the defendant's conduct has added to the plaintiff's damages, but also the court's abhorrence of that conduct.

This uncertainty does not detract from the proposition that true punitive damages may be awarded in the proper case, so long as the court is careful to avoid duplication, and punitive damages can be awarded where the conduct merits it even if there has been no aggravation of the plaintiff's damages.

Prior to the *Rookes* case, it could not be said that English law had "committed itself finally and fully to exemplary damages, and many of the cases pointed to the rationale not of punishment of the defendant but of extra compensation for the plaintiff for the injuries to his feelings and dignity. This is, of course, not exemplary damages at all. It is another head of non-pecuniary loss to the plaintiff."[23] Since *Rookes* v. *Barnard*, punitive damages are awarded on the basis of punishment and deterrence without reference to compensation.

It has been observed that the distinction between aggravated and exemplary damages makes it possible for general, aggravated and exemplary damages to be awarded in a given case in any combination or one without the other.

> "There it is theoretically sound for the courts to assess aggravated damages (because the defendant's behaviour has caused the plaintiff distress) while refusing exemplary damages (because on the facts the defendant does not warrant check); to deny aggravated damages (no distress) while imposing exemplary damages (a need for check); or to assess both aggravated and exemplary damages against the same defendant in respect of the same misconduct (distress plus need for check)."[24]

Both aggravated and exemplary or punitive damages may be awarded in the same case where the plaintiff suffered aggravated damage and the defendant's conduct merits punishment and the deterrence of others. There is a danger in such cases of punishing for the same conduct twice when considerations of the defendant's conduct which do not aggravate the plaintiff's injury are allowed to come into play in the damage award under that heading. Properly understood, they should not do so. If it is

[22] Fridman, p. 388.

[23] *Supra*, note 2, pp. 821-22.

[24] Cooper-Stephenson, p. 688.



kept in mind in such a case that the aggravated damages are compensatory, and compensate only the extra damage suffered by the impugned conduct, and punitive or exemplary damages are to express the court's outrage and to punish suitably the defendant for his conduct, then no duplication will occur.

## IV. *Rookes* v. *Barnard*

*Rookes* v. *Barnard* decided that in England only three categories of cases permit an award of exemplary or punitive damages:

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government . . . [t]the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff . . . [and thirdly] [a]ny category in which exemplary damages are expressly authorized by statute." (pages 410-11)

Lord Devlin, at page 410, left no doubt that category one was not to extend to an action by private corporations or individuals, in that the big man bullying a small man made the case one for aggravated damages, not punitive damages.

In Lord Devlin's view, category two contemplated the situation where the defendant, in his cynical disregard for a plaintiff's right, "has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk". (pages 410-11)

In addition to the three categories, Lord Devlin provided three considerations for the court when granting an award of exemplary damages:

> "First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. . . . Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case, [*supra*], can also be used against liberty. . . . Thirdly, the means of the parties, irrelevant in the assessment of compensation, is material in the assessment of exemplary damages." (page 411)

A fourth consideration, referred to elsewhere in the judgment, may be "everything which aggravates or mitigates the defendant's conduct".

The first consideration ensures that the court, in expressing its displeasure at the heinousness of the defendant's conduct when awarding punitive or exemplary damages, does so only in favour of a wronged plaintiff, that is, a victim of such heinous conduct so as to avoid windfalls to unvictimized plaintiffs. Clearly heinous conduct which gives rise to a cause of action but does not victimize the plaintiff is not a proper case for the award of exemplary or punitive damages (page 411). *Guaranty Trust Co. of Canada* v. *Public Trustee et al.* (1978), 20 O.R. (2d) 247 (H.C.J.), held that "there can be no punitive award for conduct unrelated to the plaintiff's loss even though that conduct was admittedly aimed at the plaintiff

and even though it was other conduct of the same defendant which did cause the loss".[25]

The second consideration is formulated in a negative as opposed to a positive way. The judge or jury is not to be over-zealous in the exemplary or punitive damages awarded. Such damages must not effect a punishment not commensurate with the extent or degree of the wrong committed. In Lord Devlin's view, if a judge (or jury) admonished a wrongdoer by an award of exemplary or punitive damages in an amount exceeding that commensurate with the heinousness of such conduct then the wrongdoer would be deprived of his liberty (page 411).

Another interpretation of this second consideration is particularly appropriate to the context in which it was made. In libel and slander cases, as was *Rookes* v. *Barnard*, newspapers have waived the "liberty" flag in the form of the argument that freedom of the press ought not to be inhibited by large libel and slander awards. This argument is strongly relied upon in arguing for moderation in the quantum of both the "at large" and punitive damage award. Newspapers argue that their usefulness as the "people's watchdog" in reporting controversial stories will be greatly reduced if there is the threat of a substantial libel and slander award for inaccurate but good faith reporting. This "freedom of press" argument has not experienced in Canada its success in the United States.[26] It can be met squarely by a twofold response. First, to the extent that the inaccurate but "good faith" story defames, and occasions compensatory damages, the newspaper ought to be in no better position than the negligent manufacturer of a product who must be held responsible for the injured parties' total pecuniary damages and modest non-pecuniary general damages. Secondly, the appropriateness of a punitive damage award is predicated upon a reckless, wanton and contumelious disregard of the plaintiff's rights or some other kind of heinous conduct, and will not be awarded against the newspaper for a libel published in good faith but inaccurately. Only compensatory damages in such a case could be awarded when proven, subject to the usual defences of privilege available in such actions.

This second consideration likely reflects Lord Devlin's concern that the civil function not usurp the criminal. The wrongdoer, having voluntarily undertaken the offensive conduct giving rise to the civil liability, should suffer the reasonable consequences of his conduct, accepting that such consequence cannot be an invasion of liberty.

Lord Devlin's third consideration ensures that an award of punitive damages will punish and deter rather than amount to a mere license fee for the conduct complained of. This is tempered by the attendant consideration that in these awards the civil law function should not overlap

[25] Cooper-Stephenson, p. 696.

[26] *Vogel* v. *CBC* (1982), 21 C.C.L.T. 105 at 201 (B.C.S.C.).



unduly the criminal law function. Presumably if there had been a criminal law prosecution and penalty, this would affect the award.

Considerations two and three are in keeping with Lord Devlin's view that exemplary or punitive damages should be kept strictly within their civil law function, distinct and apart from the criminal law.

There is no real controversy about the fourth consideration. Prior to and after *Rookes* v. *Barnard*, courts have been prepared to hear evidence of facts which go to increase or reduce the damages awarded and it would be hard to assess damages without full evidence of all relevant facts. The quantum of an award must depend on the individual circumstances.

In 1972, Lord Denning, M.R. rendered the decision of the English Court of Appeal in *Broome* v.*Cassell & Co.*, [1971] 2 All E.R. 187 (C.A.), which considered the restrictive categories for punitive and exemplary damages laid down by Lord Devlin in *Rookes* v. *Barnard*. He thought (at page 198) that *Rookes* v. *Barnard* threw over and knocked down all that the common law ever knew about punitive and exemplary damages as it had existed for centuries.

Lord Denning refused to follow the principles laid down by the House of Lords in *Rookes* v. *Barnard* for four reasons:

> "(a) the common law on the subject had been so well settled before 1964 that it was not open to the House of Lords to overthrow it;
> (b) counsel who had appeared in *Rookes* v. *Barnard* had not argued the point, and indeed had accepted the common law as it was then understood;
> (c) contrary to what Lord Devlin had said there were two previous decisions of the House of Lords approving awards of exemplary damages; and
> (d) the doctrine laid down by *Rookes* v. *Barnard* was 'hopeless illogical and inconsistent'."[27]

In the view of Lord Denning, (at page 202), "judges should direct the juries in accordance with the law as it was understood before *Rookes* v. *Barnard*" as the House of Lords clearly wrongly decided that case.

Lord Hailsham, one of the law lords hearing the appeal of *Broome* v. *Cassell & Co.* from the Court of Appeal, commented on the propriety and desirability of that court determining the decision of *Rookes* v. *Barnard* to be *per incuriam*:[28]

> "In the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers." (page 809)

Lord Hailsham did acknowledge that, in principle, *Rookes* needed reconsideration by the House of Lords in that, as Lord Denning had

[27] Catzman, p. 48.

[28] *Supra*, note 2, p. 827.

pointed out in the *Broome* case, the failure of *Rookes* v. *Barnard* to be well received in Australia, Canada and New Zealand warranted it. His Lordship stated:

> "I view with dismay the doctrine that the common law should differ in different parts of the Commonwealth, which is the effect of the decision in *Australian Consolidated Press Ltd.* v. *Uren* and anything one can do in this case to bring the various strands of thought in different Commonwealth countries together ought to be done." (page 821)

The House of Lords affirmed, at pages 827-28, the result of the lower court in the case, on the basis that the facts came within category two of *Rookes* v. *Barnard*. In so doing, their Lordships confirmed that *Rookes* v. *Barnard* accurately stated the law of England.[29]

In *Australian Consolidated Press Limited* v. *Uren*, [1967] Argus L.R. 54 (H.C.), the High Court of Australia examined extensive earlier Australian authority and concluded (at page 74) that the law as set out in *Rookes* v. *Barnard* did not accord with the law that prevailed in Australia and for that reason was not to be followed. On appeal to the Privy Council, their Lordships had to decide whether the High Court of Australia was wrong in deciding not to change the law in Australia in the aftermath of the *Rookes* case.[30]

The Privy Council determined the development of the law in Australia was:

> "sufficiently well settled to be incapable of eradication or alteration in consequence of the *Rookes* decision. The law in Australia was not developed by processes of faulty reasoning, nor had it been founded on misconceptions, for it was not necessary to change it."[31]

In 1973, Professor Fridman commented on the significance of this decision so as to predict the reception of *Rookes* in Canada.

> "If this is an acceptable situation [the High Court of Australia not to be interfered with by the Privy Council] where there is a system of law in which the final Court of Appeal is the Privy Council [as is the case in Australia] how much more so is it likely to be where there is a system of law in which the final court of appeal is not outside the system itself. There would seem to be even less reason for Canadian courts to adopt the reasoning and approach of *Rookes* v. *Barnard* than courts in Australia."[32]

## V. *Rookes* v. *Barnard in Canada*

*Rookes* v. *Barnard* has met a mixed reaction in Canada. In Ontario the law is virtually settled that the principle restricting the availability of an

[29] Catzman, 51.

[30] [1967] 3 All E.R. 523 (P.C.).

[31] Fridman, 389.

[32] Ibid.



award of exemplary or punitive damages to the three categories as laid down in *Rookes* has been rejected. In *Gouzenko* v. *Lefolii*, [1967] 2 O.R. 262 (C.A.), the Ontario Court of Appeal held that whatever may be the law in England laid down by the House of Lords in *Rookes*, it was not the law of Ontario, thereby upholding (at page 268) earlier Ontario authority providing for the award of exemplary or punitive damages in broader circumstances than the three categories described in *Rookes*.

*Pretu* v. *Donald Tidey Co. Ltd*, [1966] 1 O.R. 191 (H.C.J.), is the most compelling authority in Ontario and, perhaps, Canada for the proposition that *Rookes* v. *Barnard* is not good law in Canada. In *Pretu* the defendant, a private company, entered onto the plaintiff's premises with bulldozers and similar equipment and proceeded to excavate a portion of the plaintiff's land (among other acts). (page 195) Brooke, J. (as he then was) found that the defendant was liable in trespass to the plaintiff and had acted in a malicious and high-handed manner. There was no finding that the defendant acted in the manner complained of to produce a calculated gain at the plaintiff's expense so as to come within the second category laid down in the *Rookes* case. Certainly the defendant was not a servant of the government and no statute was involved. Punitive as well as compensatory damages were awarded, but no breakdown was made. *Rookes* v. *Barnard* was not mentioned in the reasons.

The Ontario Court of Appeal dismissed the defendant's appeal without reasons and upheld the award for exemplary or punitive damages. Application for leave to appeal to the Supreme Court of Canada was refused by that Court in December 1965 (page 197).

In *Dodge* v. *Bridger* (1977), 4 C.C.L.T. 83 at 100 (Ont. H.C.J.), Keith, J. relied on both the *Pretu* and *Gouzenko* cases to support his view that it was settled law that Ontario courts were not bound by the restrictions imposed by the House of Lords in *Rookes*. He further relied on *McElroy* v. *Cowper-Smith* (1967), 62 D.L.R. (2d) 65 (S.C.C.), wherein Spence, J., dissenting on an unrelated point, dealt (at page 71) with the applicability of *Rookes* v. *Barnard* in Canada and refused to follow that case. Mr. Justice Spence's dissent in *McElroy* v. *Cowper-Smith* has been cited with approval in numerous decisions[33] in Canada as authority for the proposition that the *Rookes* v. *Barnard* categories have no place in Canada, usually with the reservation that Spence, J.'s reasons were a dissent from the majority of the court hearing the case. The majority of the court sent the case back (at page 66) for reassessment on a point completely different from the issue as to the applicability of the *Rookes*' decision.

[33] *Cardinal Construction Ltd.* v. *The Queen in Right of Ontario et al.* (1981), 32 O.R. (2d) 575 (H.C.J.); *Fraser* v. *Wilson* (1969), 6 D.L.R. (3d) 531 (Man. Q.B.); *McKinnon* v. *Woolworth* (1968), 70 D.L.R. (2d) 280 (Alta. C.A.); *Dodge* v. *Bridger*, *supra*; *Gouzenko* v. *Lefolii*, *supra*; *Barltrop* v. *CBC* (1978), 25 N.S.R. (2d) 637 (N.S.C.A.); *Roundall* v. *Brodie* (1972), 7 N.B.R. (2d) 486 (Q.B.); *Turnbull* v. *Calgary Power Ltd.* (1974), 51 D.L.R. (3d) 562 (Alta. S.C.); *Unrau* v. *Barrowman* (1966), 59 D.L.R. (2d) 168 (Sask. Q.B.); *Eagle Motors* v. *Makaoff* (1970), 17 D.L.R. (3d) 222 (B.C.C.A.); *UNB* v. *Strax* (1968), 1 N.B.R. (2d) 112 (Q.B.).

In *McElroy*, Spence, J. said (at page 71):

> ". . . I am of the opinion that in Canada the jurisdiction to award punitive damages in tort actions is not so limited as Lord Devlin outlined in *Rookes* v. *Barnard*."

His view was on the basis of Canadian authority preceding *Rookes* v. *Barnard*, which he felt should not be interfered with, even in the face of the *Rookes* case. Spence J. referred to *Pretu* v. *Tidey* and noted that application for leave to appeal to the Supreme Court of Canada from the Ontario Court of Appeal was dismissed after the decision in *Rookes* had been given. However, not only was the statement set out above in the course of a dissent, but it was *obiter*. Preceding Spence, J.'s statement concerning the jurisdiction to award these damages in Canada, he commented:

> ". . . even if the award of punitive damages in tort actions is as limited as outlined by Lord Devlin then the present case would fall within the second class which he sets out."

In May 1981, the Ontario High Court of Justice in *Cardinal Construction* v. *The Queen in Right of Ontario et al.* (1981), 32 O.R. (2d) 575 (H.C.J.) adopted the view (at page 578) that *Rookes* is not good law in Ontario with respect to the categories therein set out. In addition, Boland, J. held that even if *Rookes* were good law in Canada, with respect to category one of that case, it has no application in Ontario because of section 17 of the *Proceedings Against the Crown Act*[34] which provides:

> 17. Except as otherwise provided in this Act, in proceedings against the Crown, the rights of the parties are as nearly as possible the same as any suit between persons and the court may make any order that it may make in proceedings between persons, and may otherwise give such appropriate relief as the case may require.

The Ontario Court of Appeal[35] upheld the decision on an unrelated issue and no view was expressed with respect to this aspect of the case.

This view will be of particular interest in the event that the Supreme Court of Canada specifically decides that the law of Canada ought to follow *Rookes* v. *Barnard*. If *Rookes* v. *Barnard* has application in Ontario, and Boland, J. is correct about the effect of section 17 set out above, then exemplary or punitive damages in Ontario may be limited to fewer circumstances than the three categories in the *Rookes* case. This would be so because section 17 of the *Proceedings Against the Crown Act* would have the effect of precluding punitive damages in an action for arbitrary acts of government officials.

[34] R.S.O. 1980, c. 393.

[35] (1981), 128 D.L.R. (3d) 662 (Ont. C.A.).



Although there are many decisions rejecting the *Rookes*' restrictions in the other provinces,[36] there are a substantial number of decisions[37] that have followed *Rookes*. However, many of these cases that purportedly follow *Rookes* do so on a very broad interpretation of category two.[38] In holding such a view, the Court did not have to choose between *Rookes* as opposed to the dissent by Spence, J. in *McElroy*, since the case before them came within one of the categories of restrictions laid down by the House of Lords.[39]

There is, however, a well-reasoned decision following *Rookes*. In *MacDonald* v. *Hees* (1974), 46 D.L.R. (3d) 720 (N.S.S.C.) the Nova Scotia Supreme court noted that the dissent of Mr. Justice Spence in *McElroy* and the other cases rejecting the English law were decided prior to the House of Lords decision in *Cassell & Co.* v. *Broome*. The Court in *McDonald* (at page 732) followed the English law because *Rookes* had been reaffirmed in *Cassell* and gave effect to the English categories of restriction in Canada.

Notwithstanding *McDonald*, there is no compelling reason that a House of Lords decision is to be preferred to what a judge of the Supreme Court of Canada has said in dissent, since neither of the two authorities are binding. The refusal of the Supreme Court of Canada to grant leave to appeal in *Pretu*, although not binding, should be very persuasive to Canadian courts that the Canadian notion of an award of exemplary or punitive damages is not restricted by the English law. The strength of relying on *Pretu* as authority for this proposition is reinforced somewhat by the decision of the Supreme Court of Canada in *H. L. Weiss Forwarding Ltd.* v. *Omnus et al.* (1975), 63 D.L.R. (3d) 654 (S.C.C.), where that court heard an appeal as to the proper quantum of punitive damages awarded at trial.

In that case, the plaintiff succeeded at trial in establishing the liability of the defendant for inducing the plaintiff's employees to breach their contracts of employment. Laskin, C.J.C., (at page 656) was impressed by the following facts compelling him to interfere with the trial judge's award of $6,000 by reassessing punitive damages at $10,000.

> "This was not only a case of the illegal drawing away of the plaintiff's principal employee, who was in complete charge of its business, and

[36] *Supra*, note 33.

[37] *Karpow et al.* v. *Shave*, [1975] 2 W.W.R. 159 (Alta. S.C.); *MacDonald* v. *Hees* (1974), 46 D.L.R. (3d) 720 (N.S.S.C.); *Sharkey* v. *Robertson* (1969), 67 W.W.R. 712 (B.C.S.C.); *Banks* v. *Campbell* (1973), 45 D.L.R. (3d) 603 (N.S.S.C.); *Sulisz* v. *Flin Flon*, [1979] 3 W.W.R. 728 (Man. Q.B.); *Wasson* v. *California Standard* (1964), 47 D.L.R. (2d) 71 (Alta. C.A.); *Taylor et al.* v. *Ginter* (1979), 19 B.C.L.R. 15 (S.C.).

[38] E.g., *Taylor* v. *Ginter*, *supra*.

[39] *Johnston Terminals and Storage Ltd.* v. *Miscellaneous Workers Wholesale and Retail Delivery Drivers and Helpers, Local 351*, [1976] 1 W.W.R. 341 (B.C.S.C.); *Loomis* v. *Rohan*, *supra*; *McKinnon* v. *Woolworth*, *supra*.

drawing away his assistant, in order to capture their talents for a competing operation, but it was a case of coupling this tortious conduct with a wider scheme of taking over the plaintiff's business through solicitation of its major customers in order to put an end to the plaintiff as a going concern. In this the defendant succeeded."

If the case does not come within the three categories of *Rookes* v. *Barnard*, then drawing the same inference from the *Pretu* case it may be concluded that the English restrictions have no application to the law of Canada. The strength of this argument is weakened when one considers the trial judge's finding which Laskin, C.J.C., at page 655, acknowledged was most important.

"The German company, Omnus and Eisen combined together to obtain the plaintiff's business and its goodwill without paying for it and succeeded in doing so."

In this light, it may be that the case comes within category two of *Rookes* v. *Barnard* in that the defendant's conduct was calculated to make a profit and the assessment of punitive damages in the case is impliedly predicated upon having come within category two. The Court, however, did not address this issue.

In *Ronald Elwyn Lister Ltd. et al.* v. *Dunlop Canada Ltd.* (1982), 135 D.L.R. (3d) 1 (S.C.C.), punitive damages were awarded when the defendant made an unlawful seizure of the plaintiff's assets, a case clearly not within one of the three categories of *Rookes* v. *Barnard*. The Supreme Court of Canada, however, had this to say (at page 18) about what the case should be taken to mean:

"The facts and circumstances of the receivers entry into possession with an armed guard and the protracted delay by Dunlop in replying to the demand for the return of the Autopar parts to Chrysler are a sufficient basis in my view for the exercise of the trial judge's discretion to award exemplary damages here. The place in the law of Ontario of exemplary damages for wrongful seizure was not argued here, nor does the record reveal any argument being directed below to the right of a trial judge to make such an award in law. Accordingly, the matter is taken no further than to restore that aspect of the trial judgment."

Although it is often folly to predict what the Supreme Court of Canada will do, given that broadly-based punitive damages have a history in Canada going back many years, and since in the three cases where the Supreme Court of Canada has dealt with the matter it has impliedly rejected *Rookes*, it seems more likely that the Court will follow the Australian lead and reject the strictures of *Rookes* v. *Barnard* rather than adopt the English restrictive categories.

Whatever the ultimate result, in so far as the analysis of the terminology of aggravated, punitive and exemplary damages is concerned, *Rookes* v. *Barnard* is good law and has been followed many times. It must be kept in mind that the controversy about the applicability of *Rookes* v. *Barnard* in Canada relates only to punitive and exemplary damages. Aggravated damages, being compensatory, can be awarded when present in all cases, both in Canada and in England.



## VI. *Intentional Torts*

The earliest authorities for an award of exemplary or punitive damages were cases of false imprisonment, [40] trespass to land[41] and trespass to the person (or assault).[42] These are still the most common types of cases where such damages are awarded, but awards in other cases are starting to increase in the percentage they represent of punitive damage awards. They come under the heading of intentional tort for the most part. In Ontario, courts have upheld exemplary or punitive damages "in cases involving assault, unlawful arrest, trespass to ships, conversion of goods, defamation, conspiracy to defraud and deceit".[43]

The Ontario Court of Appeal in *Denison* v. *Fawcett*, [1958] O.R. 312 (C.A.) laid to rest the issue as to whether deceit was within the class of intentional torts giving rise to an award of exemplary or punitive damages. The defendant (appellant) contended that the damage from deceit for which the plaintiff (respondent) brought action was the same as the consequences of a breach of contract for which (it was argued at page 319) no exemplary or punitive damages could be awarded. The Court of Appeal affirmed deceit as a cause of action for which aggravated or exemplary and punitive damages may be awarded, and went on to say at page 319:

"Generally . . . such damages may be awarded in actions of tort such as assault, trespass, *negligence*, *nuisance*, libel, slander, seduction, malicious prosecution and false imprisonment." [Emphasis added.]

Negligence and nuisance, which are unintentional torts, are discussed later in this paper. This passage makes it clear that every conceivable intentional tort, including seduction and malicious prosecution, may support an award of aggravated, punitive or exemplary damages.

Assuming the jurisdiction to award exemplary or punitive damages is unfettered by the categories laid down in the English law, what test or standard of misconduct have the courts established when awarding aggravated and exemplary or punitive damages, or both, in the case of an intentional tort?

The conduct for which the court may award damages not merely to compensate but to punish the defendant in an exemplary manner has been

[40] *Huckle* v. *Money* (1763), 2 Wils. K.B. 265.
[41] *Wilkes* v. *Wood*, *supra*.
[42] *Benson* v. *Frederick* (1776), 2 Burr. 1846.
[43] *Supra*, note 11.

characterized as "high-handed",[44] "insolent",[45] "vindictive",[46] "malicious",[47] "showing a contempt of the plaintiff's rights",[48] "disregarding every principle which actuates the conduct of gentlemen",[49] "shockingly contemptuous, callous and high-handed trampling of the plaintiff's rights",[50] "wanton and oppressively without ground for belief that one had right to do as one did",[51] "bullying fashion",[52] "flagrant disregard and careless indifference to the plaintiff's rights",[53] "glaring abuse of power",[54] "inexcusable, disgraceful and outrageous",[55] "cruel and heartless standard of morality",[56] and "reprehensible and offensive to ordinary standard of community or decent conduct".[57] Clearly, reprehensible conduct of almost any kind may fit within the phrases of the type of conduct which have warranted an award of exemplary or punitive damages.

The least stringent test giving rise to these damages is found in *Townsview Properties Limited* v. *Sun Construction and Equipment Co. Ltd* (1973), 42 D.L.R. (3d) 353 (Ont. H.C.J.), where Stark, J., applied the test as follows (at page 359):

> "[T]his is a case for the inclusion of punitive or exemplary damages in my award. By their trespass, the defendants have gained a substantial saving in the construction of their own building, the amount and nature of which I have described elsewhere."

The marked resemblance of this test to category two from Lord Devlin's speech in *Rookes* leads to the suspicion that Stark, J. was confusing a restrictive category for a test as to when the damages ought to be awarded. The judgment of Stark, J. represents a significant departure from precedent in that the element of some form of reprehensible behaviour by the defendant was absent. Whether the case is an aberration or is a harbinger of a new direction remains to be seen.

[44] *The University of New Brunswick* v. *Strax* (1968), 1 N.B.R. (2d) 112 (N.B.Q.B.).

[45] *Wasson* v. *California Standard Co. et al.* (1964), 47 D.L.R. (2d) 71 (Alta. C.A.).

[46] *Rookes* v. *Barnard*, (*supra*).

[47] *Tefft* v. *Kooiman*, [1978] 5 W.W.R. 175 (Mta. Q.B.).

[48] *Johnston Terminals & Storage Ltd. et al.* v. *Miscellaneous Workers Wholesale and Retail Delivery Drivers and Helpers Local 351 et al.*, [1976] 1 W.W.R. 341 (B.C.S.C.).

[49] *Merest* v. *Harvey*, [1814-23] All E.R. Rep. 454 (Court of Common Pleas).

[50] *Nantel* v. *Parisien*, (*supra*).

[51] *Hankai* v. *York County Hospital* (unreported decision of the Ontario Court of Appeal released June 24, 1981).

[52] *Johnston* v. *Barrett and Kinney* (1973), 8 N.B.R. (2d) 499 (N.B.Q.B.).

[53] *Jeans* v. *Potter Limited* (1977), 19 N.S.R. (2d) 272 (N.S.S.C.).

[54] *Gershman* v. *Manitoba Vegetable Producers Marketing Board* (1975), 65 D.L.R. (3d) 181 (Mta. Q.B.).

[55] *Karpow et al.* v. *Shave*, [1975] 2 W.W.R. 159 (Alta. S.C.).

[56] *Unrau* v. *Barrowman et al.* (1966), 59 D.L.R. (2d) 168 (Sask. Q.B.).

[57] *Townsview Properties Ltd. et al.* v. *Sun Construction & Equipment Co. Ltd. et al.* (1973), 2 O.R. (2d) 213 (H.C.J.).



The essentials of the characterization of the type of conduct upon which these damages are founded is generally clear. What is not clear is whether, taken by itself, conduct so characterized, in the absence of an intent directed at the plaintiff, warrants exemplary or punitive damages. There are divergent authorities on this issue.[58]

In *Kaytor* v. *Lions Driving Range* (1962), 35 D.L.R. (2d) 426 at 429-30 (B.C.S.C.), the Supreme Court of British Columbia relied on well established authority to the effect

> ". . . that exemplary damages may only be awarded when the conduct of the defendant merits punishment, and by implication, it states, a limitation on this general proposition, the limitation being that exemplary damages will not be awarded where the defendant's conduct is simply such as to merit punishment, there must be, as well, some element of intent on the part of the defendant to cause the injury or to do the act which results in injury."

The court in *Kaytor*, however, went further than the authorities it relied on in its view of the nature of the requisite intent to permit an award of such damages where it was said (at page 430): ". . . in order to attract exemplary damages the act of the wrongdoer must have been consciously directed against the person, reputation or property of the plaintiff". Finally the court concluded at page 431:

> ". . . in order for exemplary damages to be awarded against a person, the act done by that person must not only be such an act as itself merits punishment but must also be an act intentionally directed to the person or property injured."

This is at odds with Lord Hailsham's view of the matter in the *Cassell & Co.* v. *Broome* case. He commented:

> "What is necessary . . . is knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal. . . ." (page 831).

If Lord Hailsham is correct, then so long as the defendant intended the conduct complained of, or such conduct amounted to a reckless disregard to the legal consequences flowing therefrom, the damages thereby payable by the defendants may be in the nature of aggravated and exemplary or punitive damages.

In *Canadian Iron Workers Union #1* v. *International Association of Bridge Structural and Ornamental Iron Workers Local #97*, (1972), 31

[58] *Nichols* v. *Guiel* (unreported decision of Esson, J., of B.C.S.C., released February 17, 1983), is the most recent authority. It discusses the apparent difference in the views expressed by the Court in the *Kaytor* case, (*infra*), and the *Robitaille* case, (*infra*), and held that the tortious conduct for which an award of punitive damages will be made must be directed at the plaintiff. The correctness of this decision is doubtful in view of the Court of Appeal decision in *Robitaille*.

D.L.R. (3d) 750 (B.C.S.C.), Munroe, J., confronted with an action founded on a conspiracy to induce breach of contract, or, alternatively, the tort of intimidation, at page 754 adopted the statement of law laid down in the *Cassell* v. *Broome* case as to the nature of the intent exhibited by the defendant from which such damages will flow.

> "Here the rights of the plaintiff and its members were illegally extinguished by the defendant with knowledge of such illegality or alternatively, with a reckless disregard of whether its actually legal or otherwise for the motive that chances of economic advantage outweigh the chance of economic . . . penalty as Lord Hailsham said in *Cassell* v. *Broome*, [*supra*]."

The British Columbia Court of Appeal in *B.C. Lightweight Aggregate Ltd.* v. *Canada Cement LaFarge Ltd.*, [1981] 4 W.W.R. 385 at page 419 (B.C.C.A.), indirectly addressed these two issues:

> "There was . . . ample evidence upon which to exercise his [the trial judge's] discretion not to award such damages.
>
> There are two major factors which weigh against the imposition of aggravated or punitive damages. The first of these was alluded to by the trial judge when he said 'as the defendant's actions were not principally directed at the plaintiff I do not intend to award punitive damages.'
>
> He also said at an earlier point in his judgment 'in my view there is insufficient evidence that the defendant deliberately conspired to drive the plaintiff out of business'."

There is other authority in Canada which casts some doubt on the intent requirement laid down in *Kaytor*. There appear to be two issues: (1) whether the defendant must intend to commit the tort causing the harm suffered by the plaintiff; and (2) whether the defendant must consciously direct the intended wrongful conduct complained of at the plaintiff. Perhaps the correct view is that the action complained of must be intended, but whether it was principally directed at the plaintiff, is compelling but not determinative.

In *Robitaille* v. *Vancouver Hockey Club* (1979), 19 B.C.L.R. 158 (B.C.S.C.), the trial court, upheld on appeal by the British Columbia Court of Appeal, held that *Kaytor* was wrongly decided on the issue of the necessity of the presence of the defendant's intent. *Robitaille* was an action founded on negligence without direct intent to injure the plaintiff and the court therefore had to squarely address the intent issue.

Mr. Justice Esson, who rendered the trial decision in *Robitaille*, held that the conduct of the defendant complained of constituted an exception to the rule that exemplary damages cannot be awarded for a negligent act. The trial court, however, departed from the principle of law set out in *Kaytor* with respect to intent when it held at page 179:

> "Furthermore, it may no longer be part of the law of British Columbia that there must be intent on the part of the defendant to cause the injury or to do the act which results in injury. It would seem to follow from the judgment of the majority of the Court of Appeal in *Vancouver Block Ltd.* v. *Empire Realty Company Ltd.*; *Wilkeshire Investments Ltd.* v. *Reid Jones Chistopherson Ltd.*, 10 June 1979 (not yet reported) that the only matter which needs to be considered is the conduct of the defendant."



The majority of the British Columbia Court of Appeal in *Vancouver Block Ltd.*, a trespass case, held that the defendant's disregard and insensitivity to the rights of the plaintiff constituted "high-handedness and reckless inadvertence" from which aggravated and exemplary or punitive damages flowed. Intent did not appear to be a factor.

It therefore seems that, in the case of an intentional tort and some types of negligence, the fact that the defendant did not consciously direct the intended conduct at the plaintiff or intend to harm him will not disentitle the plaintiff to an award of aggravated, exemplary or punitive damages. There is always the intent to do the acts themselves, and the courts no doubt presume that the defendant is responsible for the likely consequences of those acts, whether or not he intends them.

## VII. *Negligence*

Until recently there was some doubt as to whether an award of aggravated or exemplary and punitive damages was proper in a case founded in negligence. The earlier view was that intent was a prerequisite.

In *Denison* v. *Fawcett*, *supra*, the Ontario Court of Appeal, without any discussion of the subject, appeared to hold at page 319 that an action for negligence can attract aggravated or exemplary and punitive damages:

> "Generally, however, [exemplary or aggravated] damages may be awarded in actions of tort such as assault, trespass, *negligence*, *nuisance*, libel, slander, seduction, malicious prosecution and false imprisonment." [Emphasis added.]

Negligence and nuisance, neither intentional torts, were included in the Court of Appeal's broad statement setting out the causes of action in which aggravated or exemplary and punitive damages can be awarded. The force of this passsage is weakened because (1) no authority is relied upon for it; (2) the action was based on deceit, an intentional tort, so the court's comments with respect to the unintentional torts of negligence and nuisance, must be taken as *obiter dicta*; and (3) the passage cited is identical to 11 *Halsbury's Laws of England*, Third Edition, page 224, the correctness of which has been doubted.

Mr. Justice Aitkens in the course of judgment in *Kaytor* commented at page 431 on the dearth of authority respecting exemplary and punitive damages in negligence actions.

> "As negligence cases are numerous, the lack of any case dealing with the issue of exemplary damages is a cogent indication that the law is

that exemplary damages are not to be awarded against a defendant guilty of negligence only."

This reasoning is suspect, but was consistent with the court's decision, which held at page 431 that since "[n]egligence does not involve any intent to do that which causes injury," no exemplary or punitive damages followed.

Aitkens, J. refers to the passage from 11 *Halsbury's Laws of England* and points out that the authorities in the footnote to the text do not support the proposition in so far as negligence is concerned, since the case relied upon in the case of negligence involved intent.

A conclusion consistent with *Denison* v. *Fawcett* was reached in 1975 in the Prince Edward Island Supreme Court in *Blacquiere's Estate* v. *Canadian Motor Sales Corporation* (1975), 10 Nfld & P.E.I.R. 178 (P.E.I.S.C.), which considered whether the negligent manufacture of goods, i.e., a product's liability claim, was a proper case for an award of punitive damages. The court stated at page 205:

". . . The court has discretion to award exemplary damages in appropriate circumstances in actions of tort — such as negligence — where the conduct of the defendant may be classed as an aggravating circumstance."

In *Robitaille*, the British Columbia Court of Appeal rejected the appellant's (defendant) contention that exemplary or punitive damages may not be awarded in actions based on negligence. The Court in *Robitaille* adopted Schroeder, J.A.'s statement in *Denison* v. *Fawcett* to the effect that negligence and nuisance were among the class of causes of action from which such damages could flow. The British Columbia Court of Appeal dealt with the holding in *Kaytor* squarely in this way at page 258:

"The reason why awards of exemplary damages and negligence cases are rare because in most negligence cases the conduct of the defendant's, apart from lack of care, has not been blameworthy."

Accepting that punitive damages may be awarded in the case of an action founded on negligence, is the test for awarding damages in such cases different than in the case of an intentional tort?

In *Blacquiere's Estate*, *supra*, the court applied the following test at page 207:

"The authorities are clear that punitive or exemplary damages should only be awarded when the conduct of a defendant goes beyond mere negligence and as such may be characterized as wanton, reckless and outrageous."

The court concluded that the defendant's conduct did not attract exemplary or punitive damages because they had not "acted maliciously or with such recklessness as to indicate an indifference to the safety of others".



In *Rowland's Transport Ltd.* v. *Nasby Sales & Services Ltd.*, (1978), 16 A.R. 192 (T.D.), the plaintiff bought a truck at an auction on the basis that it was clear of encumbrances. In fact it was subject to a lien under a conditional sales contract, and the lien holder had the truck seized and sold. The plaintiff recovered punitive damages in this case even though the negligence did not amount to recklessness.

The British Columbia Court of Appeal in *Robitaille* described the conduct attracting aggravated and exemplary or punitive damages in the case of negligence as follows at page 258:

". . . [t]he negligence of the defendant flowed from and was directly linked with the arrogant and highhanded conduct of the officers and servants of the defendant. . . . The trial judge was justified in awarding exemplary damages because, on the facts, the conduct of the defendants was such as to merit condemnation and, in addition, cause damage to the plaintiff."

These authorities establish that a reckless disregard as to the legal rights of another, or recklessness as to the consequences of one's acts on such rights, or recklessness so as to amount to indifference to others, may attract aggravated and exemplary or punitive damages in the case of negligence. As discussed earlier, the intent requirement in so far as the conduct being directed at the plaintiff, referred to in *Kaytor*, is doubtful even when the action is founded on an intentional tort. Clearly, the intent requirement of any kind is not applicable in the case of negligence. If the negligent conduct complained of is intended, (but not necessarily intended to cause the harm suffered by the plaintiff), and it may be properly characterized as reckless, then such damages will flow. If the *Rowland Transport Ltd.* case is correct, then recklessness may not be a requirement. In *Vancouver Block Ltd.* v. *Empire Realty Company Ltd.*, referred to with approval in the *Robitaille* case, the proposition was stated that the intent on the part of the defendant to cause the injury is not required.[59]

Mr. Justice Esson, who rendered the trial decision in *Robitaille*, made a distinction between the ordinary case of negligence and the case of negligence before him. He stated at page 178:

"In [the *Kaytor* case] there could be no suggestion that the negligence of the defendant was directed against the plaintiff or that there was any intent to do the act which resulted in the injury. That, of course, is so in most actions arising out of personal injury caused by negligence. The plaintiff is entitled to recover if the defendant reasonably should have foreseen that his want of care could cause harm to the plaintiff. Rarely was the defendant shown to have had any particular knowledge of the plaintiff or any intent with respect to him.

In that respect this case is quite different. The negligence here consisted in a course of conduct, deliberately undertaken and persisted in, which was directed solely against the plaintiff. *There was no intention to*

[59] Cf. *Guaranty Trust Co. of Canada* v. *Public Trustee*, (*supra*)

*cause the injury, but there clearly was intention to do the act which resulted in the injury, an act intentionally directed against the plaintiff. . . .*" [Emphasis added.]

He went on to say at page 183:

> "The circumstances of this case would justify an award of aggravated damages. There is the element of damage to the plaintiff's feelings, to his pride and self respect. There is also the fact that the wrongful conduct of the defendant, by robbing him of the chance for retirement with honour, has caused additional pecuniary loss. Almost certainly had the plaintiff had the blessing of organized hockey and the benefit of the opportunity for business contacts, which is part of the system, he would not have been left so much to his own resources in seeking employment. The award which I make can, then, be considered as being of aggravated as well as exemplary damages."

The Court of Appeal upheld the trial judge. There was a separate award made of $35,000 over and above the substantial compensatory damages awarded. Thus the Court lumped the aggravated and exemplary damages, rather than separating them as has been suggested would be preferable.

If Mr. Justice Esson is correct, then the force of the earlier authority to the effect that recklessness attracts such damages must be tempered. The trial decision taken alone without intent left that matter unresolved but suggests the recklessness must be intended to affect or be directed at the plaintiff. The British Columbia Court of Appeal did not qualify its view that recklessness in the absence of intent to injure the plaintiff attracts punitive damage awards. The Court of Appeal held that negligence attracts these damages when the defendant's conduct was reckless notwithstanding the absence of intent to do the act. In that Court's view (at page 258) the fact that the ". . . negligence of the defendant flowed from and was directly linked with, the arrogant and high-handed conduct of the officers and servants of the defendant" justified the punitive damage award. The Court of Appeal did not include a requirement that the conduct be directed at the plaintiff although on the facts of the case it was. Perhaps this represents the best approach to making these awards i.e., the character of the conduct is the focus of the court when making or refusing these awards as opposed to establishing intent requirements. This suggested approach is in keeping with the purpose of the award; to deter and punish the defendant rather than compensate the plaintiff.

## VIII. *Contract*

Until recently the generally understood rule as laid down in the judgment of the House of Lords in *Addis* v. *Gramophone Co. Ltd.*, [1908-10] All E.R. Rep. 1 (H.C.), was that aggravated and exemplary or punitive damages could not arise in the case of a breach of contract. Lord Loreburn, rendering at page 3 one of the judgments in this leading case, stated the law as follows:



> ". . . there was a breach of contract in not allowing the plaintiff to discharge his duties as manager. . . . I cannot agree that the manner of dismissal affects these damages. Such consideration has never been allowed to influence damages in this kind of case. . . . If there be a dismissal without notice, the employer must pay an indemnity, but, that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

In the same case Lord Atkinson said at page 4:

> "I do not think that this case is any authority whatever for the general proposition that exemplary damages may be recovered for wrongful dismissal, still less, of course, for breach of contract generally. . . . I have always understood that damages for breach of contract were in the nature of compensation, not punishment. . . ."

His Lordship continued at page 5:

> "In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select that form of mode of redress he may, no doubt, recover exemplary damages, for what is sometimes styled 'vindictive' damages; but if he should seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action. . . . one of the consequences is, I think, that he is to be paid adequate compensation and money for the loss of which he would have received had his contract been kept and no more."

Numerous Canadian cases refused to reconsider the principle laid down in *Addis*, which until recently was considered clear, if not good, law.

There are four traditional exceptions to the general rule laid down in the *Addis* case. Lord Atkinson in that case at page 5, outlined three of them as follows:

> "namely actions against a banker for refusing to pay a customer's cheque when he has funds of the customers to meet it; actions for breach of promise to marry; and actions like that in *Flureau* v. *Thornhill* (1776), 96 E.R. 635 where the vendor of real estate, without any fault on his part, fails to make a title."

The fourth exception is where a public service company discontinued service in circumstances showing wantonness or malice and had aggravated and exemplary or punitive damages awarded against it in those special circumstances.[60]

In the case of a bank's refusal to honour its customer's cheque, the courts appear to rely on the notion of foreseeability of damages at the

[60] *Williston on Contracts* (3rd ed. 1967), p. 213.

time of the entering into of the contract. In *Robin* v. *Stewart* (1854), 139 E.R. 245, Williams, J. stated (at page 250):

> "When it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract: just as in the case of an action for slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage."

In *Smith and Harrison, Smith and Company* v. *Commonwealth Trust Company* (1969), 72 W.W.R. 201 (B.C.S.C.), MacDonald, J. acknowledged the "foreseeability" test giving rise to the basis of this exception to the general rule in *Addis*. His Lordship said (at page 209):

> "This special rule for the benefit of a trader whose cheque has been dishonoured without justification, is not in lieu of, but is supplementary to the general principles governing assessment of damages for breach of contract stated in *Hadley* v. *Baxendale*" [*infra*].

The rule in *Hadley* v. *Baxendale*, [1843-60] All E.R. Rep. 461, providing for the assessment of damages arising out of breach of contract is found at page 465:

> ". . . Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such a breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it."

The application of the "foreseeability" test in *Hadley* v. *Baxendale* has been wide and consequently, the types of damage arising from breach of contract have been expanded in recent years. The "holiday cases" exemplify the expansion of this principle.

> "[I]t is established that where there is a contract to provide some type of sentimental, non-pecuniary consideration, failure to do so will mean that the plaintiff can be compensated for that loss, that is, for his disappointment. Thus a string of 'holiday cases' has shown that failure to provide the enjoyment bargained for sounds in damages".[61]

*Victoria Laundry (Windsor) Limited* v. *Newman Industries Limited*, [1949] 2 K.B. 528 (H.C.), refines the test established in *Hadley* v. *Baxendale*. Lord Asquith said at page 539 (quoting Lord Duparcq in *Monarch Steamship Company Ltd.* v. *A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1 (H.L.):

[61] Krasnick, Harry "Punitive Damages in Contract", *The Advocate* 11 at p. 17.



> "Now finally to make a particular loss recoverable need it be proved that on a given state of knowledge the Defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee that it was likely so to result. It is enough to borrow from the language of Lord Duparcq in the same case, if a loss, or some factor without which it would not have occurred, is 'a serious possibility' or 'a real danger'. For short, we have used the word liable to result. Possibly the colloquial 'in the Cards' in the case of the shade of meaning was some approach to accuracy."

Finally, *H. Parsons (Livestock) Ltd.* v. *Uttley Ingham and Co. Ltd.*, [1978] 1 All E.R. 525 (H.C.), is authority for the proposition that no real difference exists between the test of reasonable foreseeability in contract and tort. If the parties at the time of the making of the contract had directed their minds to the breach which gives rise to proceedings, then the test of foreseeability is what those parties at that time would have reasonably foreseen or expected the damages to be flowing from such breach.

Lord Denning, M.R., rendering the decision of the English Court of Appeal in one of the leading "holiday cases", *Jarvis* v. *Swan Tours*, [1973] 1 All E.R. 71 at page 74 (H.C.), commented on the expansion of the application of the foreseeability test.

> "In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities."

Given the clear trend in contract cases to compensate a plaintiff for the foreseeable non-material or non-commercial injury arising out of breach of contract the earlier authorities' rationale for rejecting aggravated or exemplary damage in contract must be reconsidered.

In *New Brunswick Electric Power Commission* v. *International Brotherhood of Electrical Workers* (1976), 22 N.B.R. (2d) 364 (N.B.S.C.), the New Brunswick Supreme Court awarded substantial punitive damages arising out of the defendant's breach of a collective agreement.

> "The plaintiff also asks exemplary or punitive damages. Such may be awarded where one party has set about wilfully and maliciously to harm another by tortious acts or by breach of contract."

There is no reference to *Addis* v. *Gramophone Co. Ltd.* but the Court must be taken to have rejected the principle that a breach of contract cannot result in punitive damages.

In *Cornell* v. *Pfizer C. & G. Inc.* (1981), 23 C.P.C. 286 (Ont. H.C.J.), the Ontario High Court was confronted with a statement of claim for wrongful dismissal in which punitive damages (and other relief) were included in the prayer for relief. Osler, J. dealt with the issue as to whether a breach of contract can give rise to an award of aggravated, exemplary or punitive damages. The Court considered the rule laid down in *Addis*, which, if good law, would support the defendant's application to strike out the claim for punitive damages. Osler, J. said at pages 291-92:

> "It is said that punitive damages for breach of contract has never been granted except in exceptional cases such as breach of contract to marry. Little modern or Canadian authority has been advanced on this proposition, which is said to depend largely on *Addis* v. *Gramaphone Co. Ltd.*, [*supra*]. . . . The authority of this case has undoubtedly been departed from in recent decisions in this and other courts as it is now entirely customary, in considering the period for which compensation should be granted, to take into account the fact that the dismissal of itself makes it more difficult for an employee to obtain fresh employment. In my view, it is going too far to state that a trial judge might not properly award punitive damages in such a case as the one at bar should he reach certain conclusions of fact about which it would not here be proper for me to speculate."

In *Jennett* v. *Federal Insurance Company* (1976), 13 O.R. (2d) 617 (H.C.J.), a similar conclusion was reached where a statement of claim alleging breach of contract by failing to pay no-fault benefits claimed for punitive damages.

However in *Cardinal Construction* v. *The Queen*, *supra*, Boland, J. dismissed an application to amend a statement of claim to add a claim for punitive damages in a breach of contract action and said:

> "[a]ccording to the authorities, it is quite clear that punitive damages will not be awarded in a breach of contract action in Canada: Williston on Contracts 24th Ed (1977) Vol. I at pages 731-2 . . . *McMinn* v. *Town of Oakville* (1978), 19 O.R. (2d) 366 at page 369." (page 576)

The Ontario Court of Appeal heard the plaintiff's appeal from Madame Justice Boland's decision and upheld it on the basis of the plaintiff's delay and procedural grounds, and did not comment on the punitive damage issue.[62] The Court was not persuaded that it was a case where it "should relieve against the effect of Rule 246(4) or disagree with the *conclusions* of the motion court judge" (page 663). [Emphasis added.]

This decision cannot be taken as conclusive in deciding the very important issue as to whether punitive damages are recoverable in the case of breach of contract.

An additional gloss to these cases deciding the right to punitive damages in contract on interlocutory applications is provided in *Cleary* v.

[62] *Supra*, note 35.



*Cabletronics Inc.* (1982), 140 D.L.R. (3d) 110 (H.C.J.), where the defendant moved to strike out the Statement of Claim, which sought damage to reputation in a wrongful dismissal action. Montgomery, J., referred to the decision of Du Pont J. in *McMinn* v. *Town of Oakville* (1978), 19 O.R. (2d) 366 (Ont. H.C.J.), where damages for injury to reputation were not allowed to be claimed in a breach of contract action, and said at pages 112-13:

> "[W]ith great respect, I disagree. In my view, the erosion [of the principal precluding such damages for breach of contract] is such that at this stage of proceedings the Plaintiff should not be deprived of asserting its claim under this head of damage.
>
> . . . I am not, therefore, prepared to strike out any part of the Plaintiff's claim. The issue is one for the Judge at trial. . . ."

Recent Ontario cases, however, decided by the Masters have further clouded the issue.[63]

Certainly Montgomery, J.'s approach is to be preferred to permit these important issues to be heard by trial judges and subsequent appellate courts when these matters go that far as they ultimately will do.

The restrictive view of the law applies in other parts of Canada. For instance in *Vorvis* v. *Insurance Corp. of British Columbia* (1982), 134 D.L.R. (3d) 727 (B.C.S.C.), the plaintiff sought punitive damages (amongst other relief) for wrongful dismissal. MacFarlane, J., said at page 735:

> "What the plaintiff is really asking me to do in this case is to award additional damages for the harsh and humiliating way in which he was treated by Mr. Reid. If exemplary damages could be awarded in a wrongful dismissal case I would award them here . . . It [the defendant's conduct in dismissing the plaintiff] became an inquisition, and as the pressure increased the plaintiff became tense, agitated and distressed, finally resorting to medical attention and tranquillizers . . . A colourable attempt was made to find him other employment within the company but all it did was to emphasize his shortcomings and damage his reputation. The authorities hold, however, that he is to be compensated only for his financial loss. He is to be put in the same financial position as he would have been in had he been given reasonable notice."

Only pecuniary losses were awarded and the mental distress and punitive damage claims dismissed. There was a denial of damages for mental distress in *Dobson* v. *T. Eaton Co. Ltd.*, [1983] 1 W.W.R. 418 (Alta. Q.B.), in an action for wrongful dismissal. The law in Ontario in wrongful dismissal cases appears to be developing differently from the West. Galli-

[63] See *Mack* v. *Dresser Industries Canada Ltd.* (1982), 38 O.R. (2d) 765 (Master Peppiatt), where the Master struck out the claim for punitive damages in an action founded on breach of contract, i.e., wrongful dismissal. With respect to the Master, the better approach it is suggested is found in the decision of Montgomery, J. in the *Cleary* case, (*supra*).

gan, J., in *Pilon* v. *Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711 (H.C.J.), allowed damages for mental distress in a wrongful dismissal case. In *Brown* v. *Waterloo Regional Board of Commissioners of Police* (1982), 37 O.R. (2d) 277 (H.C.J.), the plaintiff, the Chief of Police of the City of Waterloo, had been dismissed by the defendant Board. Linden, J. canvassed numerous authorities to determine whether the plaintiff's claim for general damages, mental distress, aggravated damages and exemplary or punitive damages ought to be allowed in an action founded in breach of contract, i.e., wrongful dismissal. His Lordship's comments (at pages 289-90) concerning the appropriateness of an award of aggravated or punitive damages in such a case are instructive (although *obiter* in the case of punitive damages).

> "Canadian law seems to have recognized the need for something like aggravated damages in contract law by awarding damages, not only for financial losses, but also for any mental suffering incurred by the plaintiff in appropriate cases. (see *Pilon* v. *Peugeot Canada Ltd.*, [*supra*], for example). The purpose behind allowing such damages is to compensate for hurt feelings, anxiety and stress caused by certain types of contractual breach, where they are in contemplation of the parties. Where the conduct of a defendant which violates a contract is particularly callous, the likelihood of mental suffering would be more foreseeable to him."

Linden, J. awarded the plaintiff $10,000 under the mental distress head of damage. When the appropriateness of an aggravated damage award was addressed, he viewed damages under such head to be analogous to mental distress. Consequently, the plaintiff could not obtain double recovery for the hurt feelings suffered by receiving an award of aggravated damages which already had been compensated for by the award for mental distress.

Linden, J. confronted the issue of punitive or exemplary damages for breach of contract at page 290:

> "As for punitive or exemplary damages for breach of contract, the Canadian law is in a state of uncertainty. There has been no reluctance evinced by Canadian courts in awarding punitive damages in tort cases. . . . So far, however, exemplary or punitive damages have rarely been granted for breach of contract. It has been widely assumed that the obiter statement of Mr. Justice Judson in *Dobson* v. *Winton and Robbins Ltd.*, [1959] S.C.R. 775 to the effect that such a claim was 'obviously untenable' accurately reflected the law. Madame Justice Boland has declared that 'it is quite clear that punitive damages will not be awarded in a breach of contract action in Canada'. (see *Cardinal Construction Ltd.* v. *The Queen in Right of Ontario et al.*, [*supra*], at 576: aff'd 128 D.L.R. (3d) 662, without reference to this issue; see also *Harvey Foods Ltd.* v. *Reid* (1971), 18 D.L.R. (3d) at 93 (C.A.)). These views are based on *Addis* v. *Gramophone Co.*, [*supra*], at 495."

Mr. Justice Linden went on to consider the *Cornell* and *Jennett* cases wherein motions to strike out pleadings alleging these damages for breach of contract failed. He referred with approval to *New Brunswick Electric Power Commission* v. *International Brotherhood of Electrical Workers, Local 1733*, *supra*, and *Nantel* v. *Parisien et al.*(1981), 18 C.C.L.T. 79 (Ont. H.C.J.)) as the strongest authorities in favour of punitive damages for breach of contract. The *Nantel* case is a decision of Galligan, J., awarding $35,000 punitive damages against a landlord for high-handed conduct in the wrongful termination of a lease. Linden, J. viewed the cause of action in that case as a breach of contract. The defendant had leased premises to the plaintiff. It is true there was a breach of the contract to lease, but the case must also be seen as an action for trespass as the defendant virtually demolished the plaintiff's premises when it had no right to possession of the leased property. Linden, J., concluded his view of the issue as follows at page 292:



> "Although the *general* principle that punitive damages are not awarded for breach of contract survives, there is no requirement that the general principle be followed invariably. Certainly in the vast majority of situations of contract breach, there would be no possible issue of punitive damages arising. However, just as our courts have recognized the utility of awards for damages for mental suffering caused by breach of contract in appropriate circumstances, so too should punitive damages be allowed where the facts demand that they be awarded. It is clear that such damages would rarely be awarded, but this does not mean that it should *never* be done. To tie the hands of the courts by denying them the power to penalize defendants, who flout contract law in a high-handed and outrageous fashion, is unwise and unnecessary. Punitive damage awards should be part of the judicial arsenal in contract cases in the same way as they are in tort cases. I can see no sound reason to differentiate between them. Canadian courts, unlike English courts, have retained their broad power to award punitive damages in tort cases. Thus, if a high-handed breach of contract also happens to amount to tortious conduct, punitive damages would be awardable pursuant to tort theory. It is said that if this conduct is purely a breach of contract and not tortious then no punitive damages can be awarded, despite the callousness of the conduct. That makes no sense. It is wrong to treat one contract breach different from another merely because one violates tort principles while the other does not. In recent years the principles of damages in tort and contract are becoming more consistent. That is good and should be encouraged. By allowing punitive damages for contract breach, that laudable trend will be advanced. Moreover, hopefully those who plan to breach contracts in a callous fashion will think twice.
>
> Consequently, I conclude that it is not beyond the power of this court to award punitive damages in those rare situations where a contract has been breached in a high-handed, shocking and arrogant fashion so as to demand condemnation by the court as a deterrent."

Therefore, the defendant's conduct was tested against the kinds of cases that attract punitive damages in tort. It was found that the defendant's conduct did not amount to callous, arrogant or outrageous conduct demanding judicial condemnation. In the result, Linden, J.'s comments concerning this issue have to be taken as *obiter*. Notwithstanding, the

judgment is persuasive given the useful analysis of the authorities and the soundness of the view that the fundamental rationale for these damages is deterrence and judicial disapproval, unrelated to the nature of the cause of action.

Until the appellate courts definitively rule on this issue, it must be considered to be open. It is difficult to see any reasonable principle why conduct which would attract aggravated, or punitive and exemplary damages in tort should not similarly attract them where the subject matter involves a breach of contract. Given that the rule against recovery of non-commercial loss for breach of contract laid down in *Addis* v. *Gramophone* has been eroded by the foreseeability in *Hadley* v. *Baxendale* and the "holiday" cases to the point where non-material or non-commercial loss is properly compensable for breach of contract, there is no rationale for a rule precluding punitive damages in cases founded on a breach of contract. There is every reason to follow the example of Linden, J. and carefully reconsider the general rule against punitive damages in these cases so as to give effect to a well rationalized approach to punitive damage awards for breach of contract.

## IX. *Insurance Cases*

Generally, an action for breach of an insurer's statutory obligation to provide accident benefits pursuant to the standard policy of automobile insurance within the terms of the *Insurance Act*,[64] or for breach of a contract of insurance for first party coverage, or for a breach of a contract of indemnity for third party liability, sounds in contract. In the case of no-fault benefits, the liability to pay is part statutory obligation and part contractual and for this reason has received special treatment from the courts on the subject of punitive damages.

### A. *No-Fault Benefits*

In *Jennett* v. *Federal Insurance Company*, *supra*, Southey J., heard an appeal from the decision of Master McBride striking out that part of a statement of claim for no-fault insurance benefits against an insurer claiming punitive damages. The court explained at page 618 that under the then section 234 of the *Insurance Act*,[65] the plaintiff was entitled to recover under the contract between the insured and the insurer in the manner and to the extent as if named therein as an insured. This analysis led the court to conclude that the plaintiff was deemed to be a party to the contract and to have given consideration therefor.

[64] R.S.O. 1980, c. 218.

[65] R.S.O. 1970, c. 224.



There was no authority on point in Ontario. Southey, J. commented at page 618, on the applicability of the general principles concerning a claimant's right to punitive damages in an action for breach of contract as follows:

> "It is . . . clear that none of the cases in which it has been held that punitive damages were not recoverable in an action for breach of contract involved claims that were in any way similar to the plaintiff's claim, in that they were not based on statutory rights. Where there is such statutory right, there is a statutory obligation or liability on the part of the defendant.
>
> Counsel for the plaintiff has referred me to one American authority at least, in which punitive damages were permitted in a similar action. That case was State of *Montana* v. *Eighth Judicial District Court* (*Montana*) *et al.* (1967), 423 p. 2d 598. The Supreme Court of Montana held in that case that the statutory obligation on the insured to provide certain benefits made the ordinary rule against awarding exemplary damages in an action for breach of contract inapplicable in a claim for such benefits, even though the claim could be said to be a claim under a contract of insurance."

Southey, J. concluded that a claim for punitive damages in such a case should not be struck out of the pleadings. His Lordship acknowledged, however, that on an interlocutory application to strike out pleadings, his Order could not be taken to have decided that punitive damages are or could be recoverable. This issue was not one to be determined on an interlocutory application.

There is authority in the United States for the proposition that the purpose served by an award of punitive damages is to enable the plaintiffs to secure their legal rights in a case where the compensable pecuniary damage is small and litigation otherwise would not be worthwhile. The insurer's failure to pay policy benefits is cited as an example in this context. "A . . . contemporary example is that of the insurance company which takes advantage of a policy holder by demanding that he bring action in order to collect money clearly owed to him under the insurance contract."[66]

In *Rex Insurance Company* v. *Baldwin*, 323 N.E. (2d) 270 (Ind. Ct. App. 1975), economic oppression was recognized as justifying an award of punitive damages.

There are two distinct situations to be dealt with by the courts, both often arising in the same case: (1) where the plaintiff has personally been affected by the failure to pay the money owing, as might be the case where the accident cut off the only income source and the failure of the insurer to pay aggravates the damages; (2) where the court wishes to punish the insurer for its conduct so as to deter it and others from withholding properly payable benefits.

[66] Krasnick, H. (*supra*, note 61, at p. 22)

In the first situation, an approach which may be greeted with a better reception in Canada than the principles established in jurisdictions in the United States, is the *Hadley* v. *Baxendale* foreseeability test as expanded by the more recent authorities referred to above. Specifically, it may be argued that, accepting the legal fiction that by statute all no-fault beneficiaries are contracting parties with the insurer as if a named insured, then at the time of the entering into of that contract, it would have been in the contemplation of the parties that a foreseeable consequence of the breach of the obligation imposed on the insurer by statute may well be non-material injury such as economic hardship in addition to what was owing under the schedule of benefits set out in the *Insurance Act*.

In any event, *Jennett* suggests that because of the special circumstances presented by a third party claim against the insurer to enforce a statutory obligation, the traditional rule to the effect that punitive damages do not flow from contract may be inapplicable. No Canadian authority yet exists where punitive or aggravated damages have been awarded in no-fault cases. but many such cases are before the courts and we should soon have some jurisprudence.[67]

### B. *Bad Faith*

There is a considerable body of law in the United States dealing with the obligation of an insurer to act in good faith toward its insured in honouring claims of its insured, i.e., first party claims, and settling a claim against the insured when it exceeds the policy limits of the insured with the insurer, i.e., third party claims.

The consequence of failing to abide the good faith requirement in both situations is to pay damages that are both compensatory and punitive. The right to compensatory damages is based on the usual principles of assessment in contract cases. The right to punitive damages appears to be tied up in establishing tortious liability against the insurer *vis-à-vis* its duties to the insured. The right to punitive damages in a first party claim is better established in the United States than in third party claim cases. "The subject of punitive damages in cases involving liability in excess of the policy limits has not received as much attention from legal writers as has such liability in first party cases. . . ."[68] It turns out, however, that the tort duty to act in good faith has received greater attention in the third party claim case than in the first party claims. Cases dealing with both kinds of actions must be carefully examined.

[67] *Thompson et al.* v. *Zurich Insurance Company* (unreported reserved decision of Pennell, J. (heard March 23 and 24, 1983). The plaintiff advanced a claim for punitive damage by reason of the defendant's refusal to pay no-fault insurance benefits.

[68] Magarick, P., *Excess Liability: Duties and Responsibilities of the Insurer* (N.Y., C. Boardman, 1982) 2d ed., 79.



The distinction between the compensatory nature of the damages and their punitive aspect must always be kept in mind. It is one thing in these cases to order the insurer to pay the policy limits which should have been paid (a first party claim), or the excess judgment where the case should and could have been settled within the policy limits and judgment was obtained against the insured in excess of the limits (a third party claim), and the interest, legal and other costs in either case. It is something quite different to award punitive damages on top of such compensatory awards. Both situations will be examined to ascertain if and when punitive damages can be awarded.

#### (i) *First Party Claims*

The first hurdle that one must consider to establish the right to punitive damage in first party claim cases is whether punitive damages can be awarded in contract. As discussed, the law in Canada is uncertain as to whether the rule excluding those damages in such cases will be applied. There are jurisdictions in the United States which uphold the general rule. To overcome this rule in those jurisdictions, the courts have developed a notion of tort obligation tied into the insurer's first party contractual obligations in order to make punitive damage awards in these cases.

> "The majority of recent decisions [in the United States] hold that punitive damages may be awarded for tort arising out of a breach of the first party insurance policy contract for various offensive wrongdoings. In *MacDonald* v. *Penn Mutual Life Insurance Co.* 276 S.O. (2d) 232 (Fla. App. 1973) for instance, the court held that punitive damages are not recoverable as a result of a breach of contract unless the breach amounts to an independent tort. In *Richardson* v. *Employer's Liability Assurance Corp.*, 102 Cal. Rptr. 547 (App. 1972) punitive damages were awarded on the basis of a 'tortious breach of contract', indefinite though that might be."[69]

The two traditional situations for an award of punitive damages in first party insurance contract claims are: (1) failure to pay the claim, or (2) an unreasonable delay in paying. Both types of conduct can amount to a breach of tort.[70] The tests, applied as to when punitive damages are awarded, for the most part reflect the tests developed in the negligence cases. They are as follows:

1. fraud,
2. malice, oppressive or outrageous conduct,
3. intentional infliction of emotional distress,
4. wilful or wanton misconduct,
5. gross negligence,

[69] Ibid., pp. 319-20.

[70] Ibid., pp. 320-21.

6. intentional interference with a protective property right, and
7. breach of good faith and fair dealings.[71]

The seventh test — breach of good faith and fair dealing — as a ground for a punitive damage award is unique to an insurance contract action and warrants close analysis.

> "Breach of good faith and fair dealing has historically been the most often quoted basis for establishing an action for damages in excess of the policy limits in third party cases. It is only recently, however, that this same implied duty of an insurer has been used to award punitive damages in first party cases. These cases usually involve unreasonable refusal to pay a claim or to make proper and timely payment. These cases basically hold that the implied covenant of good faith and fair dealing creates a duty to pay a just claim fairly and promptly . . . [I]n *Egan* v. *Mutual of Omaha Insurance Co.* 157 Cal. Rptr. 482 (1979) . . . [it was said:] '. . . we [the court] recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, especially in the context of disability policies, an insurer cannot reasonably and in good faith deny payments to its insurer without thoroughly investigating the foundation for its denial."[72]

Evidence which goes to show a failure to make any effort to investigate the claim in a timely fashion will go a long way to establish a breach of good faith, the presence of which in and of itself would usually amount to conduct of the kind attracting punitive damages.

In *Fletcher* v. *Western National Life Insurance Company*, 89 Cal. Rptr. 78 (Cal. App. 1970), the Court upheld a $180,000 punitive damage award against the disability carrier for its bad faith refusal to pay benefits and commented as follows, at page 78:

> "We think that . . . the violation of that duty [to withhold or threaten to withhold payments from insureds] sounds in tort notwithstanding it also constitutes a breach of contract.
>
> The theory of tort in the case of an insurer's bad faith was expanded upon in *Jarchow* v. *Transamerica Title Insurance Company* 122 Cal. Rptr. 470 (Cal. App. 1975), where the Title Insurance Company negligently failed to discover and refused to take any action to remove a recorded lien on the plaintiff's property, thereby breaching the insurer's implied covenant of good faith and fair dealing and was liable for $50,000.00 to each of the four plaintiffs for severe emotional disturbance."

In *Bibeault* v. *Hanover Insurance Co.*, 417 A. 2d 313 (R.I. 1980), the court held a similar view to the one expressed in the *Fletcher* case. The court rejected the traditional view that recovering contract damages for breach of an obligation to pay a sum of money is confined to the actual

[71] Ibid., p. 321.

[72] Ibid., pp. 330-31.



amount owed under the contract plus legal interest. Again, this was on the theory that a violation amounting to bad faith gives rise to an independent claim in tort with the attendant right to broader kinds of damage.

(ii) *Third Party Claims*

An insured's action against its insurer for bad faith in refusing to settle within policy limits exposing the insured to liability for an award in excess of those limits sounds in contract. Liability for compensatory damages in such a case is not a departure from the general rules of damage assessment for breach of contract. Whether punitive damages in addition to the usual damages, are available from the third party when the action is framed solely in contract will depend upon how our courts resolve the general controversy with respect to the availability of punitive damages for breach of contract. If Canadian courts establish a rule against punitive damages for breach of contract, then the only recourse will be to frame the action against the insurer for the excess claim based on the tort of bad faith in a similar fashion as has been done in the United States in the first party claim cases. It has been observed with respect to the U.S. experience that "[i]n . . . dealing with first party claims involving punitive damages, the subject of tort actions arising out of breach of contract as related to insurance policies is discussed in detail. Basically, the same rules apply to both situations [the third party claim] . . .".[73] To date there is one case in Canada which has considered the appropriateness of a claim for compensatory damages in the context of an excess claim. Punitive damages in that case were not discussed and no other Canadian cases have yet considered such damages in that context.

It should be noted that the distinction relied upon by Southey, J. in *Jennett* is inapplicable here in that in excess liability actions, the insurer's liability is contractual in the true sense of the obligation as opposed to a statutorily imposed contractual obligation, as was the case in *Jennett*. However, in the case of motor vehicle liability policies, it might be argued that since the policy is by regulation a standard form, the same consideration applies.

*Pelkey et al.* v. *Hudson Bay Insurance Co. et al.*; *McKitrick, Erikson, Jones (Third Party* (1981), 35 O.R. (2d) 97 (H.C.J.), is the only reported case in Canada where an excess claim has been prosecuted. The plaintiffs in the action for the excess claim were Pelkey and Fortes, the former the operator of the vehicle owned by the latter. Fortes was insured with the defendant, Hudson Bay Insurance Co. and the Royal Insurance Co., referred to collectively in the case as "Royal".

Pelkey was operating the Fortes motor vehicle on December 18, 1974 when it went out of control, crossed into the wrong lane, struck a cement abutment, turning over on its roof, causing severe injury to Soderberg which left her a quadriplegic, and moderate injuries to Proulx. Soderberg

[73] Ibid., p. 281.

and Proulx, the plaintiffs in the original action, each sued Pelkey, as the driver, and Fortes as the owner of the car involved in the accident. Thrasher was the solicitor representing Soderberg and Proulx in this original action.

Fortes and Pelkey engaged Watkins as their solicitor. The Royal Insurance Co. retained Erikson as their solicitor in the original action. In the excess claim Erikson was a third party at the suit of Royal.

When the original action was commenced by Soderberg and Proulx, Erikson considered whether his client, Royal, should deny liability on the ground the insurance policy had been obtained by material misrepresentation. In the course of the original action, Royal abandoned their denial of coverage and, with the concurrence and assistance of Watkins, Erikson assumed the complete defence of the original action both as to Royal's policy limits and the excess claim against Pelkey and Fortes.

The evidence in the excess action disclosed that both Pelkey and Fortes had given clear instructions to Watkins to settle the original action as close to the policy limits as possible. Watkins advised Erikson of these instructions. Prior to the trial of the original action, Thrasher, the solicitor for the plaintiffs in the original action, made an offer of settlement to accept Royal's $50,000 policy limits, plus reasonable costs. Erikson did not accept this offer, nor did he advise Royal of it or the ramifications of Royal's failure to settle.

At the trial of the original action, Erikson advanced the defence of *volenti no fit injuria*, although Watkins had expressed the view he felt the defence would fail. Madame Justice Van Camp heard the original action and found Pelkey liable for gross negligence in the operation of the motor vehicle owned by Fortes. The defence of *volenti* against Soderberg and Proulx was dismissed, although both plaintiffs in the original action were found contributorily negligent to the extent of 25 per cent and 40 per cent respectively.

In the result, judgment in the original action was granted in favour of Soderberg for $137,060.43 and in favour of Proulx for $12,000 plus their costs. An appeal to the Court of Appeal was heard and dismissed. Following the appeal Royal honoured the judgment to the extent of their policy limits of $50,000.

In the excess action Pelkey and Fortes sought damages for breach of contract and negligence against Erikson and his principal, Royal, the liability insurer, for damages caused with respect to the judgment in the original action in excess of the insurance policy limits.

Mr. Justice Catzman held, at page 108, that a solicitor and client relationship existed between Pelkey and Fortes with Erikson: "As a result he [Erikson] was under a duty, in my view, to Pelkey and Fortes that was, at its lowest, no less than his duty to Royal."

Catzman, J. considered whether Erikson's pursuit of the *volenti* defence was an error in judgment or negligence. The stated object of that inquiry was to determine whether Erikson was negligent in reaching the conclusion to rely on the defence. His Lordship had this to say at page 114 about



the test to be employed in ascertaining whether the decision to go forward with the defence amounted to negligence:

> "In attempting to answer the difficult question of whether the decision made by a solicitor in the conduct of such a case constitutes negligence (which gives rise to liability) rather than mere error in judgment (which does not) the court will consider whether the error is so erroneous as to constitute the former rather than the latter: *Demarco* v. *Ungaro et al.* (1979), 41 O.R. (2d) 673 (H.C.J.) at p. 693; *Karpenko* v. *Paroian, Courey, Cohen and Houston* (1980), 30 O.R. (2d) 776 (H.C.J.) at p. 791. I adopt as accurate the statement of the general rule as to the standard of care expected of solicitors set forth in the reasons of Grant, J., in *Brenner et al.* v. *Gregory et al.*, [1973] 1 O.R. 252 at 257 which was specifically adopted by Anderson, J., in *Karpenko* at p. 780. O.R., as follows:
>
> > 'In an action against a solicitor for negligence it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinary competent solicitor would not have been made or shown. . . .'"

On balance, Catzman, J. concluded Erikson's assessment of the *volenti* defence and his pursuit thereof at trial was an error of judgment but not such as a reasonably competent solicitor would not have made.

The next issue to be considered was the duty of the insurer. His Lordship stated at page 115: "It is common ground that there is no precedent in Canada or in England dealing with the situation, and the Court may in such circumstances properly look to American authorities for guidance: *Cory & Sons* v. *Burr* (1882), 9 Q.B.D. 463; *Keefer et al.* v. *Phoenix Ins. Co. of Hartford* (1900), 31 S.C.R. 144."

The test established in *Crisci* v. *Security Insurance Co. of New Haven Connecticut*, 58 Cal. R. 13 (1967), was adopted in *Pelkey*:

> ". . . the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose the duty; that in determining whether to settle the insurer must give the interests of the insured at least as much consideration as it gives to its own interests; and that when 'there is a great risk of recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interests requires the insurer to settle the claim'. (50 Cal. 2d at p. 659, 328 P. 2d at p. 201). . . ."

The liability issue in the excess claim was not determined by applying this test for bad faith established in the *Crisci* case. Catzman, J. stated at page 117: "In my opinion Erikson ought not to have ignored, without instructions, the first and only settlement proposal reduced to writing by the solicitors for the plaintiffs in the original action and ought not to have proceeded to trial in the face of the proposal without first endeavouring to obtain such instructions".

Accordingly, Royal, as Erikson's principal, was vicariously liable for damages occasioned by Erikson's inaction in not communicating the offer of settlement to Royal or Pelkey and Fortes. Royal was entitled to indemnification from Erikson for the liability.

This case is authority on the bad faith issue and the duty of a solicitor to an insurer. However, it offers no guidance as to whether punitive damages in addition to the compensatory aspect of such action will be awarded. But just as the American authorities were looked to for guidance on the compensatory damage and bad faith issues, so too may our courts examine the American authorities to ascertain tests for the awards of punitive damages in these cases when they arise.

An example of a typical American case is *Christina Pickett* v. *State Farm Mutual Automobile Insurance Co.*, 23 Alta. L. Rep. 340, where the insurer's bad faith in refusing to settle within policy limits gave rise to its insured's claims for damages for the excess liability award. The facts remarkably resemble the *Pelkey* case.

Approximately one year after the accident, the third party's attorney wrote a letter demanding that State Farm pay its policy limits of $20,000 on the basis that the insured would receive a full and final release. State Farm did not see fit to respond to the offer of settlement, nor advise their insured of the same. The matter proceeded to trial, and the third party was awarded $1,000,000 against the insured.

In the trial of the bad faith excess action, the Court pointed out at page 341 that State Farm's failure to pursue the offer of settlement in the amount of the $20,000 policy limits and, more importantly, its failure to advise its insured of the opportunity to settle for same, constituted bad faith. A punitive damage award was sought in addition to the compensatory damages for indemnity.

When the bad faith failure to defend the insured with respect to a third party claim meets one of the tests of conduct established for awards of punitive damages in negligence cases, the foregoing analysis suggests that a punitive damage award may be made against the insurer.

### C. *Rationale*

An American writer, referring to a principle much akin to category two of Lord Devlin's judgment in *Rookes* — that being the defendant whose conduct is calculated to make a profit — has noted that if the rules of recovery in contract are such that it is more profitable for a contracting party to break its promises and pay whatever compensatory damages are awarded, then those rules will act as an inducement to do so. In that writer's view this is so because:

> ". . . in the absence of punitive damages, the most serious consequence threatening the company is that it may be forced eventually to pay only what it owed in the first place. Meanwhile the delay will permit the company to use the contested money at a very favourable rate of interest, and additionally it will permit the company to take advantage of the statistical certainty that a significant number of claimants will be persuaded to give up or compromise their claims."[74]

This argument applies to insurance cases: (1) where the insured or others entitled attempt to enforce their right to no-fault benefits; (2) insured's first party claim pursuant to a contract of insurance; and (3) where an insured's action arises out of awards in excess of their liability limits because of the insurer's bad faith refusal to settle within the policy limits.

In Ontario, given the presence of section 36 of the *Judicature Act*[75] permitting pre-judgment interest at market rates, the interest advantage gained by the insurer is not a concern when the plaintiff's damages do not approach the defendant insured's policy limits. Where damages are obviously in excess of the policy limits, an insurer in Ontario, when not obligated to pay interest in excess of the policy limits, stands to benefit by delaying the payment of the policy limits, at the expense of the insured who will become liable for the balance of the judgment. In the case of no-fault benefits, disability payments and other first party claims, though interest is payable a court can draw an inference from the evidence that the real reason for the failure to pay was based on the expectation that an impecunious plaintiff could not bother suing for small amounts. This is particularly so when one considers the inevitable financial hardship that ensues from a failure to pay no-fault benefits. In these cases, it is suggested that reprehensible conduct of that kind warrants sanction by an award of punitive damages.

## X. *Procedure*

There are a number of procedural aspects peculiar to aggravated and exemplary or punitive damages which must be examined to properly prepare and advance a case when circumstances exist that may attract these awards.

### A. *Plea*

Surprisingly, the authorities have held that a plea of exemplary or punitive damages is not essential to their recovery.[76]

---

[74] *Bibeault* v. *Hanover Ins. Co.*, *supra*, as reported at 23 Alta. L. Rep. 346.

[75] R.S.O. 1980, c. 223.

[76] *Paragon Properties Ltd.* v. *Magna Investments Ltd.* (1972), 24 D.L.R. (3d) 156 (Alta. C.A.); *Starkman* v. *Delhi Court Ltd.* (1961), 28 D.L.R. (2d) 269 (Ont. C.A.); *Grenn* v. *Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9 (Ont. C.A.); *Booth* v. *B.C. Television Broadcasting System Ltd.*, W.W.R. 78 (B.C.S.C.).

In *Becker* v. *Cleland's Estate* (1980), 30 N.B.R. (2d) 12 at 14 (Q.B.), Leger, J. referred with approval to Kane, J.A. in *Paragon Properties Ltd.* v. *Magna Investments Ltd.*, which held that exemplary damages could be awarded where the claim in the prayer for relief was for "general damages". The Ontario Court of Appeal in *Grenn* v. *Brampton Poultry Co. Ltd.* held, at page 14, that exemplary or punitive damages "need not be specifically claimed but are a part of the general damages and need not be claimed separately".

The safer course is not to rely on these decisions. *Rookes* v. *Barnard* has made it clear that exemplary or punitive damages are not relevant to the awarding of general damages. They are a separate head. Hence the plea requirement may be re-examined by our courts and Lord Hailsham's dicta in *Cassell* v. *Broome* that these damages ought to be expressly pleaded adopted. The safe approach is to plead a claim for these damages and set out the facts relied upon in support.

In *Guaranty Trust Co.* v. *Public Trustee*, *supra*, it was held that where alleged conduct in respect of which an exemplary damage award is sought does not appear causally related to the plaintiff's injury, the paragraph is offensive and will be struck out. This is in keeping with Rule 139 of the Ontario Rules of Practice which permits a pleading to be struck out when it tends to prejudice, embarrass or delay the fair trial of an action. The plaintiff should be vigilant to plead facts justifying an exemplary or punitive damage award referable to the causal relation of such facts and conduct to the plaintiff's injury. Reprehensible conduct pleaded without reference to the plaintiff's injury will not be permitted to stand.

### B. *Proper Evidence and Onus*

In *Hankai* v. *York County Hospital et al.*,[77] the Court held that the trial judge erred in charging the jury that it may consider certain evidence to determine whether an award of punitive damages was justified. The jury had awarded $25,000 punitive damages against the defendant doctor for performing a meatatomy (opening of the urethra) when the consent obtained from the plaintiff was only for a dilatation and curettage because of a miscarriage. The trial judge permitted the jury to consider evidence of the doctor yelling at the plaintiff, criticizing her for attempting to have a fourth child (which had miscarried), and telling her that she ought to be sterilized.

The Court of Appeal found that this evidence "had no relevance to the meatatomy", the injury for which redress on the basis of battery or trespass to person was sought. Impliedly, evidence of reprehensible conduct not going to the cause of the injury is not properly adduced on the issue of whether punitive damages should be awarded.

[77] Unreported decision of the Ontario Court of Appeal, released June 29, 1981.



In *Turnbull* v. *Calgary Power Ltd.* (1974), 51 D.L.R. (3d) 562 at page 577 (Alta. S.C.), the Court dismissed the plaintiff's claim for exemplary or punitive damages in an action founded on trespass to property with the following comment:

> "I might add that no evidence was adduced as to the extent of the area or the period covered by the trespass complained of. Nor do we have anything to indicate . . . that the conduct of the respondent [defendant] was sufficiently censurable to invoke this principle upon which awards of exemplary damages are based."

This passage suggests that the Court will not imply punitive damages from the mere fact of a trespass or other like conduct, and the onus to satisfy the Court in that regard rests with the plaintiff.

The Ontario Court of Appeal in *Hankai* put the onus issue as follows: "In order to recover exemplary damages, the onus was on the respondent [plaintiff] to prove that the appellant acted wantonly and oppressively and without any reasonable ground for a belief that he had the right to do as he did" (page 5). In *Hankai*, the defendant doctor did not testify at trial which underlines the need for counsel to canvass all the necessary matters on the examination for discovery to satisfy the onus requirement having to do with the defendant's malice or wanton and oppressive conduct if that be the case and lack of justification.

In *Cassell & Co.* v. *Broome*, Hailsham, J. stated at page 833 "that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the category". Clearly the plaintiff has the onus to make out the special circumstances justifying an award of these damages.

### C. *Charge to the Jury*

In *Cassell & Co.* v. *Broome*, the Court put it this way concerning the charge to the jury:

> ". . . (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories;
>
> (ii) that the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character; they can and should award nothing unless
>
> (iii) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium in the sense I have explained, and
>
> (iv) that in assessing the total sum which the defendant should pay the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay.
>
> (v) I would also deprecate, as did Lord Atkin in *Ley* v. *Hamilton* (1935), 153 L.T. 384 at 386, the use of the word 'fine' in connection with the punitive or exemplary element in damages, where it is appropriate." (page 833)

In *Manson* v. *Associated Newspapers Ltd.*, [1965] 2 All E.R. 954 at 960 (Q.B.D.), the need to impress upon the jury moderation in these awards was discussed:

> "If you treat this as a case for exemplary damages, then you must award a sum which you think is *a proper punishment* for the defendants for what they have done. Again . . . *please be careful how you approach such an assessment. You must not allow yourselves to be carried away by inflammatory speeches. You must not allow yourselves to let your feet leave the ground, if I may put it in that way. You must . . . have regard to reason and see that the sum you award is not a fantastic sum.*" [Emphasis added.]

Compensatory awards are based upon considerations independent of the defendant's conduct with the exception that aggravated damages awarded as an element of compensatory damages do relate in part to the nature of the defendant's conduct. However, for the most part, compensatory damages relate solely to the plaintiff's injury and consequent damage. The converse is not true as the size of an exemplary damage award may be influenced by the size of the compensatory award. Lord Devlin stated in *Rookes* v. *Barnard* at page 411:

> "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation . . . is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, they can award some larger sum."

In *Denison* v. *Fawcett* at page 322 Schroeder, J.A. adopted a passage of Riddell, J.A. in *Klein* v. *Jenoves* [1932] O.R. 504 (C.A.),:

> "It is, of course, elementary that evil intent or motive may be considered in aggravation of such damages [exemplary or punitive damages] and logically it should follow that absence of evil intent to injure and that the act complained of had an ultimately legally proper object, should be considered in mitigation."

*Slater* v. *Watts* (1911), 16 B.C.R. 36 at 43 (B.C.C.A.), is to the same effect.

In summary, four factors must be reflected in the charge to the jury: (1) the plaintiff's onus; (2) moderation; (3) the effect of the amount of the compensatory award; and (4) aggravating and mitigating factors.

## XI. *Limitations on the Award*

There are well accepted limitations on the availability and amount of an award of aggravated and exemplary or punitive damages.

### A. *Double Punishment*

Aggravated damages and exemplary or punitive damages have received separate treatment when a defendant in a civil suit has been involved in criminal proceedings arising out of the same circumstances. There are two issues:

(1) whether a criminal prosecution for assault or battery bars civil proceedings where the conduct complained of is the subject criminal offence; and

(2) what effect a criminal prosecution has on the right to an award of punitive damages when the injury complained of is a result of conduct subject to criminal prosecution?

In *Kenmuir* v. *Huetzelmann* (1977), 3 C.C.L.T. 153 (B.C.Co. Ct.), the proposition that in certain jurisdictions and circumstances a criminal prosecution for assault or battery bars civil proceedings arising therefrom wa affirmed. Not all provinces abide this general proposition as the governing criminal legislation and relevant amendments must be considered province by province.

In *Loedel* v. *Eckert* (1977), 3 C.C.L.T. 145 (B.C.S.C.), and the *Kenmuir* case, the effect of a criminal prosecution was:

> ". . . that if a defendant in a civil suit had already been punished as a result of criminal prosecution, exemplary or punitive damages should not be awarded against him. A person should only be punished once for this same crime — this is the theory behind this approach. . . . in the cse of *Kirisits* v. *Morell* (1965), 52 W.W.R. 123 (B.C.), where this approach was adopted, the court did award 'aggravated damages' against the defendant."[78]

The availability of aggravated damages, even though punitive damages are not available, is clear. For instance, in *Loomis* v. *Rohan*, (*supra*, page 425), it was held that punitive damages were not proper because the defendant had been punished in criminal proceedings, however, the plaintiff could recover aggravated damages.

The nature of the punishment in the criminal proceedings makes a difference to the result. "Canadian decisions universally refused punitive damages where defendants have been imprisoned, the rationale being that to award them on top of a criminal penalty would amount to double punishment."[79]

This principle of excluding these damages is predicated upon punishment to be contrasted with a conviction. The *Loedel* case made this distinction as punitive damages were awarded because the defendant had been conditionally discharged in the criminal proceedings and consequently not subject to punishment. Similarly, in *Connors* v. *Doak* (1978), 24 N.B.R. (2d) 85 (C.A.), exemplary damages were awarded against the defendant who was conditionally discharged in criminal proceedings re-

[78] Elman B.P. and Klar, L.N., "A Case Annotation to *Loedel* v. *Eckert* (1977)", 3 C.C.L.T. 145 at 148.

[79] Cooper-Stephenson, p. 699.

lated to the conduct out of which the civil action was founded. There are other cases to this same effect.[80]

### B. *Estates*

The law is unsettled as to when an estate can be involved in an action as plaintiff or defendant where exemplary or punitive damages are sought or are being defended.

"In six provinces it is expressly declared that a claim [by a deceased plaintiff] for exemplary damages shall not survive for the benefit of the estate."[81] The wisdom of the legislators' enactment of these statutes is questionable given the theory that such an award is based on punishment and disregards the fact that the plaintiff received a windfall. There is no reason in principle to treat deceased claimants differently.

No province prohibits by statute exemplary or punitive damages against an estate. However, in *Breitkreutz Estate* v. *Hummel* (1978), 11 A.R. 228 (Alta. S.C.), the court refused to make an award of punitive damages against the innocent beneficiaries of the defendant estate. The facts of the case were extraordinary. The deceased, whose estate was the defendant, shot the plaintiff and thereafter turned the gun upon himself. The Court was satisfied that the conduct was censurable but not of the kind where punitive damages would serve to deter others similarly inclined to such bizarre behaviour. Notwithstanding the clear right to sue, the Court was persuaded that the success of an estate plaintiff in these cases should be infrequent.

In Ontario, section 60 of the *Family Law Reform Act*[82] gives the administrator or executor of an estate the right to bring an action on behalf of the deceased's estate, to include those dependants who have suffered pecuniary loss as a result of the wrongful death. In the absence of an estate going forward with its claim, the dependants are entitled to bring an action on their own behalf. The cause of action is individual to each dependant. In *Blacquiere's Estate* v. *Canadian Motor Sales, supra*, it was held that the *Survival of Actions Act* (New Brunswick) which prohibited the right of an estate to recover punitive damages from a defendant did not preclude dependants from so claiming under the relevant fatal accidents legislation. In Ontario, the combined effect of section 60 of the *Family Law Reform Act* and the reasoning in the *Blacquiere Estate* case may permit dependants' claims for punitive damages against defendants who have caused the wrongful death.

[80] Fenwick v. *Staples* (1978), 18 O.R. (2d) 128; *Amos* v. *Vawter* (1969), 69 W.W.R. 596 (B.C.S.C.), and *S.* v. *Mundy*, *supra*, note 11.

[81] Cooper-Stephenson, p. 689.

[82] R.S.O. 1980, c. 152.



### C. *Vicarious Liability*

When an employee is guilty of conduct which attracts exemplary or punitive damages, is the employer vicariously liable for such damage? The short answer appears to be "yes" where the employee is acting in the course of his employment, but the rationale for same has not yet been developed in any detail. *Munro* v. *Toronto Sun et al.* (1982), 21 C.C.L.T. 261 (Ont. H.C.J.), is the most recent reported decision on point. The defendant newspaper was held vicariously liable for its employee's wrongful conduct obligating the employer to respond to an award of punitive damages to the plaintiff in the amount of $25,000. J. Holland, J. held, at page 306: "It is . . . an appropriate case in which to award punitive damages against Ramsay and Raguly [the employees] and to provide that the corporate defendant [the employer] be vicariously liable therefor".

In *Dalsin* v. *T. Eaton Co.*, *supra*, punitive damages were awarded against the employer for the wrongful acts of its employee.

There has been academic criticism of such an approach.[83] This criticism contends that the purpose of the award to punish is not accomplished when someone other than the wrongdoer must respond to the award.

In *Vogel* v. *CBC*, *supra*, a number of senior management employees of the CBC had failed to review the TV newscast that the plaintiff established was libellous. Esson, J. found these members of senior management abdicated a required function. He identified this abdication with the corporation and held it responsible. This was so because the CBC possessed a unique degree of influence and power. It is not clear that the CBC was liable based on the doctrine of vicarious liability for its employees' conduct in attracting these damages. In any event, where the employer is a corporation it makes sense to attempt to identify that corporation with the wrongful conduct of its controlling or operating minds so that the corporation will not be entitled to use the corporate veil as a shield and succeed on the argument that only its employees are responsible for the wrong. It is important as a practical matter to do so since the employer may well be insured, while the employee rarely has insurance.

### D. *Insurers' Liability*

One writer states that, in general, principal insurers ought not to be liable for punitive damages:

> "Where a contract of insurance calls for the insurer to pay exemplary damages assessed against the insured, is the obligation enforceable? No Canadian case has yet addressed the question, but the better view is that the obligation is unenforceable as contrary to public policy."[84]

[83] Cooper-Stephenson, 705-6, and Luntz, H., "Assessment of Damages" (1974) as quoted at p. 48 of Cooper-Stephenson.

[84] Cooper-Stephenson, p. 687.

The U.S. experience affords some guidance on the issue. In *Northwestern National Casualty Co.* v. *McNulty*, 307 Fed. (2d) 432 (5th Cir. 1962), a compelling argument was advanced not to permit insurance coverage for these kinds of awards. Wisdom, J. wrote:

> "Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. . . . If that person [insured] were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be to pass along to the premium payers. Society would then be punishing itself for the wrong committed by the insured."

There are, however, U.S. authorities which have not given effect to this argument. The meaning of the insurance policy clause which reads, "to pay all funds which the insured shall be obligated to pay by reason of liability imposed by law",[85] has been construed to include awards for punitive damages in the absence of specific exclusions in such policies. There is controversy in the U.S. as to whether that construction of the clause is a proper one. A Canadian court has yet to deal with this issue.

A generally accepted exception to the rule that insurance for punitive damages is unavailable is where the insured's liability arises solely vicariously because of the master/servant relationship. In *Ohio Gas Insurance Co.* v. *Welfare Finance Co.*, 75 Fed. (2d) 58 (8th Cir. 1934), it was held that where liability is imposed upon an employer for punitive damages vicariously for the employee's wrongful conduct, "there [is] no direct or indirect volition upon the part of the master in the commission of the act, no public policy is violated by protecting for the unauthorized, unnatural act of his servant".

On the one hand, is it reasonable to permit insurance coverage to an employer for unauthorized unforeseen reprehensible conduct? On the other hand, the cost to the employer to insure against vicarious loss is borne by the public in the cost of the product purchased or increased insurance rates charged by the insurance industry to cover these risks. It seems absurd that damages which in principle are intended as penalties to protect the public are paid for by the public.

Hopefully Canadian courts will undertake a careful analysis of the competing interests to be served when such issues come before them. It is suggested that a reasonable resolution is to develop tests for employer's vicarious liability requiring the employer to respond only to punitive

[85] Magarick, p. 291.



damage claims when the wrongful conduct is committed by an employee in the course of employment.

A plaintiff must carefully consider the question of the defendant's liability insurance coverage when framing his action, to ensure that the bulk of the recovery does not fall under an uninsured head if the defendant found liable is impecunious.

### E. *Joint versus Several Liability*

Where there is more than one defendant, are all the co-defendants jointly or severally liable for punitive damages, and in what amount? The answer may create a practical problem for counsel faced with having to sue on behalf of a plaintiff to recover these damages from multiple defendants.

In *Cassell & Co.* v. *Broome* the issue was resolved in this way:

> "I think that the inescapable conclusion to be drawn from these authorities is that only one sum can be awarded by way of exemplary damages where the plaintiff elects to sue more than one defendant in the same action in respect to the same publication, and that this sum must represent the highest common factor, that is the lowest sum for which any of the defendants can be held liable on this score. Although we are more concerned with exemplary damages, I would think that the same principle applies generally, and in particular to aggravated damages and that dicta or apparent dicta to the contrary can be disregarded. As counsel conceded, however, plaintiffs who wish to differentiate between the defendants can do so in various ways, for example, by electing to sue the more guilty only, by commencing separate proceedings against each and then consolidating, or in the case of a book or newspaper article, by suing separately in the same proceedings for the publication of the manuscript to the publisher by the author." (page 817)

In Canada, however, several liability as to exemplary damages appears to be the rule. *Gillett* v. *Nissen Volkswagen Ltd.* (1978), 58 D.L.R. (3d) 104 (Alta. T.D.), is the authority relied upon to this effect from which it should follow that the plaintiff's right to punitive damages is not limited by the lowest amount recoverable against any one defendant.

*Vogel* v. *CBC* addressed this issue. The plaintiff, in the course of trial, moved to discontinue against one of the defendants against whom the evidence at trial disclosed that liability for libel could not be made out. There was no hope for exemplary or punitive damages against that defendant. Counsel for the CBC (and all defendants) opposed the plaintiff's application, arguing that the remaining other defendants would be prejudiced, having conducted their defence to the claim for exemplary and punitive damages in reliance on the passage in *Cassell & Co.* v. *Broome* set out above. The defendants, in the course of preparing the defence, felt their risk of a punitive damage award was substantially reduced given the

presence of this co-defendant who had conducted himself in a way that could not attract an award of punitive damages.

Esson, J. acknowledged a general rule that a plaintiff's right to discontinue at any stage of a proceeding is predicated upon there being no injustice to those defendants that remain. He analyzed at length the relevant passages from the various law lords who considered the subject point in the *Cassell* case. Esson, J., concluded that the passages dealing with the issue were first, *obiter*, and secondly, a rule of procedure as opposed to substantive law. In Mr. Justice Esson's view, in the *Cassell* case, the law lords were more concerned that the jury would not be able to segregate the evidence against one defendant inadmissible against another, although the passage referred to above does not appear to bear out this distinction. In any event, Esson, J. concluded at page 90:

> "I see nothing in our rules of court which would preclude awarding judgment against joint defendants in differing amounts making them jointly liable only for the lower amount. The requirement that a plaintiff must bring separate actions, if it is to seek higher damages against a more guilty defendant, is one contrary to the spirit of those rules, the object of which is said in Rule 1(5) to be to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> On the other hand, the reason for the rule has no application to this case, the parties having elected trial without a jury. For that matter I can can see no reason to think that a jury would have had any serious difficulty in segregating the evidence against the several defendants. Juries in this province are frequently called upon, in trying both criminal and civil cases, to make that kind of distinction.
>
> The rule is not one of substantive law but of procedure based on what is practical in a jury trial. . . . I therefore hold that it is open to me to fix damages in different amounts against the separate defendants."

The plaintiff was permitted to discontinue against that defendant against whom punitive damages could not have been awarded and proceed against the balance of the co-defendants for these damages.

In *Munro* v. *Toronto Sun et al.*, punitive damages were awarded severally against the two employees guilty of reprehensible conduct and their employer, the corporate defendant. The other four co-defendants who held senior management positions with the corporate defendant were not liable for the punitive damage award assessed at $25,000 against the two employees guilty of reprehensible conduct. The court was satisfied that the senior management defendants' conduct was not of the kind to attract punitive damages.

In light of the *Vogel* and *Munro* cases, the law of Canada appears to reject the principle set out in *Cassell & Co.* v. *Broome*. If that is so, then there is no joint liability between co-defendants for punitive damage awards, and the court is not limited by the amount assessable against the least culpable defendant. However, the issue has not yet been addressed by an appellate court in Canada.



### F. *Interest*

Section 36 of the *Judicature Act* (*Ontario*),[86] provides generally for damage awards to attract pre-judgment interest at the prime rate. There is however, specific reference to the availability of interest on punitive damage awards in subsection (5) as follows:

> (5) Interest under this section shall not be awarded,
> (a) on exemplary or punitive damages;

Accordingly, in Ontario pre-judgment interest on exemplary or punitive damages is precluded. There is no such limitation on aggravated damages. The rationale for this limitation may be found in the explanation that punitive damages are not for the plaintiff's benefit (who obtains a windfall in any event), but rather are to deter the likeminded and make an example of the defendant.

### G. *Contributory Negligence*

In the *Robitaille* case, the trial judge found 20 per cent contributory negligence on the part of the plaintiff in failing to take reasonable action to protect his own interests. The 20 per cent contribution was assessed against both the compensatory damages, i.e., the awards for general and aggravated damages, and the punitive damages. On appeal to the British Columbia Court of Appeal by the defendant with respect to the entire judgment, the Court refused the plaintiff's cross-appeal against the finding of 20 per cent contributory negligence with respect to the two aspects of compensatory damages.

The plaintiff's cross-appeal on the reduction of the punitive damages by the 20 per cent contributory negligence was allowed and the defendant was ordered to pay 100 per cent of the exemplary damages ordered by the trial judge. There is no discussion in the case explaining that part of the cross-appeal. The result makes good sense since the punitive damage award amount is wholly referable to the defendant's conduct. The plaintiff's conduct, whether amounting to contributory negligence or not is no consideration in assessing an amount to punish and deter that defendant and the likeminded. However, as will be discussed later, provocation may make a difference.

In theory, aggravated damages should be reduced to reflect contributory negligence given that such damages are to compensate the plaintiff and should reflect the extent to which a plaintiff has caused or contributed to them. The $35,000 awarded by the trial judge was for both aggravated and punitive damages. The Court of Appeal's decision to award the plaintiff the full $35,000 may be taken to mean that a plaintiff's contributory negligence does not reduce aggravated or punitive damages. In this

[86] R.S.O. 1980, c. 223.

context, once again the need for awarding these damages under separate heads of damage is evident.

### H. *Multiple Actions*

If a defendant has multiple actions commenced against it arising out of one cause, then the issue arises as to whether multiple awards for punitive damages can be made. The most frequent situation envisaged is the products liability case. As well, a large scale disaster case based on negligent operations (e.g., operation of a commercial airline) is another situation of the kind under consideration.

Again the U.S. experience may shed light on the Canadian cases when they arise:

> ". . . in *Roginsky* v. *Richardson-Merell Inc.* 378 F. 2d 832 (2d Cir 1967) . . . a lower court decision [was reversed] that had granted punitive damages previously awarded in a prior suit arising out of the same series of events. The [lower] court stated that it knew of no principle that precluded multiple punitive damage awards, and did not think it fair or practical to limit recovery to those plaintiffs who went to trial for it. On the other hand, a federal district Court held that it would require a substantial change in the law to hold that simply because there might be other suits filed against the defendant, punitive damages should not be recovered."[87]

This passage would likely offend the sensibilities of Lord Devlin given the purposes which he intended the punitive damage award to accomplish. In Canada, given that punitive damages are awarded without regard to the plaintiff and must not offend the defendant's liberty, it seems unlikely that plaintiffs in subsequent actions against a defendant subjected to a punitive award in a previous action arising out of the same cause will recover punitive damages, unless the earlier award were to take into account the existence of other lawsuits in setting the quantum; this in itself would be a novel legal proposition.

## XII. *Quantum*

### A. *Nature of Award*

There are authorities that award aggravated damages and punitive or exemplary damages or both with general damages in a lump sum.[88] These authorities should be contrasted with the cases that have awarded general, aggravated and exemplary or punitive damages under separate heads.[89]

The merit of awarding these damages under three distinct heads has been put thus:

1. The process of quantifying aggravated damages differs, or at least ought to differ, from that of quantifying exemplary damages. For example, whereas the defendant's means are irrelevant to an aggravated sum because it is compensatory, they are crucial (though in practice rarely evidenced) to the intelligent imposition of punishment.
2. Whereas a principal can be held vicariously liable for aggravated damages, again because they are compensatory, arguably he ought not to be vicariously liable for an exemplary sum assessed on account of the conduct of others — for example, a servant acting within the scope of his employment.
3. Whereas concerted joint wrongdoers, and perhaps other joint wrongdoers too, will be jointly liable for all aggravated damages joint wrongdoers ought never to be jointly liable for exemplary damages. Each should be liable only for such sum as the individual merits by way of punishment.
4. Contracts of insurance covering exemplary damages may be void as contrary to public policy while those covering aggravated damages are probably valid.
5. Itemization of the exact sum imposed for punitive damages will facilitate appellate review. For one thing it will indicate that exemplary damages were in fact awarded, global sums being sometimes ambiguous even on this score. Additionally, the actual quantum considered appropriate by the trial court will be capable of scrutiny.
6. Whereas exemplary damages are a matter of judicial discretion, aggravated damages are obligatory provided the plaintiff's distress is proven. For example, whereas each court will decide for itself whether exemplary damages should be excluded by virtue of the defendant's prior subjection to the criminal process, double jeopardy can never bar aggravated damages. As a matter of basic principle, if a plaintiff has suffered loss, he is entitled to compensation for it."[90]

Given the possible combinations of these awards, that is, aggravated damages without punitive damages, or punitive damages without aggravated damages, or both aggravated damages and punitive damages, or general damages with punitive damages but without aggravated damages,

[87] Magarick, p. 304.

[88] See *Delta Hotels Ltd.* v. *Magrum* (1975), 59 D.L.R. (3d) 126 (B.C.S.C.); *Dalsin* v. *T. Eaton Co., supra*; *Gershman* v. *Manitoba Vegetable Producers' Marketing Board* (1975), 65 D.L.R. (3d) 181 (Man. Q.B.); *Johnston Terminals and Storage Limited* v. *Workers Wholesale, supra*; *Whitehouse* v. *Reiner, supra*.

[89] See *Barltrop* v. *CBC, supra*; *Klein* v. *Jenoves, supra*; *Munro* v. *Toronto Sun et al., supra*; *Robitaille* v. *Vancouver Hockey Club et al., supra*; and *Vogel* v. *CBC, supra*.

[90] Cooper & Stephenson, pp. 57-58.

etc., the separation of heads of damage facilitates appellate review. This will go to establish well reasoned approaches to these damages. To the extent the governing principles are clear, these damages will accomplish their intended purpose to regulate reprehensible conduct by means of civil liability. If there is no doubt of the governing principles related to punitive damages, then its principal purpose of deterrence can be realized. Lumping together the general damage and punitive damage awards does little to assist an understanding of what kinds of conduct will be viewed by our courts as abhorrent, attracting substantial punitive damages. To give effect to the deterrence aspect, the party contemplating the wrongful conduct must know what the penalty is, so as to weigh it against the benefit to be gained. When properly assessed, punitive damages will always outweigh the benefit to be gained. If our courts take the approach of awarding these damages under separate heads and make them substantial, then that will go far in eliminating reprehensible conduct.

The breakdown of personal injury awards into specific heads of damage laid down in the trilogy of personal injury cases (rather than global awards, as previously had been done), was to make awards that rationally met their purpose, i.e., to satisfy the doctrine of *resitituto integrum*: putting the plaintiff in as good a position as if the wrong had not occurred. In the same way, awards under separate heads of damage will give effect to the purpose of aggravated and punitive damages.

### B. *Fine*

The test to be applied by the court has been characterized as the award of an appropriate fine (a concept which meets with some disapproval because the term is generally reserved for criminal law which some authorities are loathe to see infringe upon the civil law function), as contrasted with awards which amount to nothing more than a mere license fee.

Lord Devlin in *Rookes* expressed the concern that, because these awards are analogous to a fine in criminal law, the liberty of the defendant ought not to be deprived by assessing these damages in amounts which significantly vary from fines for comparable criminal acts. Lord Devlin stated at page 411:

> "Some of the awards that juries made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover, punishment imposed without the safeguard which the criminal law gives to an offender."

This concern is easily seen when reviewing assessments for punitive damages in the case of intentional tort given the connection of such



conduct to criminal acts. Examples of the range of damages are: $200; $1,000; $1,500; $4,500; and $7,500.[91]

Libel and slander, intentional trespass to property, negligence (more recently), and breach of contract (potentially) are causes of action giving rise to damages not easily assessed by analogy to fines imposed for criminal acts. For the most part, awards found in these cases are based on considerations unrelated to criminal penalties and fines.

### C. *Undue Profit*

> "Where the defendant's misconduct results in a profit exceeding the compensation which he, as opposed to someone else such as his insurance company, will in fact pay to the plaintiff, exemplary damages should be assessed in an amount at least equal to the excess profit. Otherwise the defendant continues to gain from his wrongdoing — hardly either punishment, deterrence or justice."[92]

Undue profit as a factor in assessing punitive damages is similar to the second category of cases in which punitive damages may be awarded in English law, i.e., where the defendant's reprehensible conduct is calculated to make a profit.

### D. *Means*

In *MacGregor on Damages* it is stated:

> "Clearly a small exemplary award would go unnoticed by a rich defendant while even a moderate award might cripple a poor defendant, so that for the size of the defendant's bank balance to influence the size of the award is fully appropriate."[93]

It has been observed that in Canada

> "the defendant's wallet typically goes unspecified forcing the courts to speculate on the matter, for example by assessing the parties in the witness box.
>
> [In the U.S.] the main technique of proof [of quantum] is to explore the defendant's wealth. . . . a $200 punitive liability may be sufficient punishment for a man of limited means; a $100,000 punitive liability might be inadequate for a man of great wealth. For these reasons the courts permit the plaintiff claiming punitive damages to introduce

---

[91] Respectively, *Pettis* v. *McNeil* (1979), 8 C.C.L.T. 299 (N.S.T.D.); *Roundall* v. *Brodie* (1972), 7 N.B.R. (2d) 486 (Q.B.); *Kingsmith* v. *Denton* (1977), 3 A.R. 315 (T.D.); *Loedel* v. *Eckert*, *supra*; *Dodge* v. *Bridger* (1978), 4 C.C.L.T. 83 (H.C.), varied as to damages 6 C.C.L.T. 71 (Ont. C.A.).

[92] Cooper-Stephenson, p. 701.

[93] MacGregor, *MacGregor On Damages* (1972) 13th ed., at p. 231.

evidence showing something of the defendant's financial resources, net worth, for example."[94]

This inquiry underlines the overriding concern that the award not amount to a mere licence fee.

### E. *Licence Fee*

In *Nantel* v. *Parisien et al.*, *supra*, Galligan, J. put his view of the issue forcefully at page 89:

> "In this country we live by the rule of law; that woman [the plaintiff whose business premises were demolished as a result of the defendant's breach of contract and wilful and intentional trespass to property] in my opinion, had the right to occupy those premises until August 31, 1980. Not only must the law not sanction the deliberate and callous disregard by the powerful of the weaker person's rights, the law must do what it can to ensure, by whatever means are at its disposal to ensure that the legal rights of a citizen are protected from the tyranny of another. *Many cases have said that exemplary damages must not merely amount to a licence fee to a reasonable cost or expense of doing business.*" [Emphasis added.]

Galligan, J. introduced a consideration not theretofore expressed when in the same case he stated at page 90:

> "It is difficult to decide on an amount which will demonstrate to the plaintiff and others who lack resources and apparent power, that if they wish to stand upon their rights, they will be protected by the law."

The $35,000 punitive damages awarded to the plaintiff by Galligan, J. was to let the defendant know that no matter how important it perceived its own business interests to be, it was not justified in its reprehensible conduct of brushing the plaintiff aside on the theory that it was good business to do so. It is suggested that this is the course our courts must take if punitive damages are to be given the effect of their stated intended purpose. Recent cases indicate a trend that the courts view the award of punitive damages as a very useful tool to effect the purpose of condemning wrongful conduct in the context of civil law.

### F. *Mitigating Factors*

The courts are prepared to increase the punitive damage award in the absence of an apology or expression of regret. In *Karpow et al.* v. *Shave*, *supra*, the defendant, unprovoked, struck the plaintiff violently in the face breaking the plaintiff's nose. Punitive damages of $500 in addition to general damages of $2,000 were awarded. The Court took into account

[94] Cooper-Stephenson, p. 703.



> "In assessing the amount [punitive damages] . . . the failure of the defendant at any time before trial, or during the trial — either by himself or by his counsel — to tender any apology to the plaintiff. As in *London* v. *Ryder*, [1953] 1 All E.R. 741, where a jury award of £3,000 exemplary damages for assault was not disturbed by the Court of Appeal of England, the defendant offered no expression of regret or explanation." (page 161)

This principle was followed in *Whitehorse* v. *Reiner*, *supra*.

In *Taylor* v. *Ginter*, *supra*, the Court expressed a view on what ought to be taken into account in mitigation of these damages:

> "Here it was quite evident that the wrongdoing was accomplished peacefully, without insult to the person or outrageous conduct [i.e. a case for punitive damages within category number two of *Rookes* v. *Barnard*, in that the defendant's conduct was calculated to make a profit]. He [the defendant] did make a rather lame apology and did offer to make amends. He felt that he had some justification because the plaintiff was not performing as he had expected him to perform." (page 21)

An apology, preferably by the defendant, but at least by his counsel, would be in order when defending these claims.

The *Whitehorse* case was an action for false imprisonment. The Court refused to consider the defendant's spurning of the plaintiff's suggestion to withdraw the criminal charges. Ultimately the charges were dismissed as there was no basis for having imprisoned the plaintiff on the suspicion of those charges. The Court would not take into account the spurning of the plaintiff's suggestion to withdraw those charges in assessing the punitive damages awarded for the false imprisonment.

In *Holt* v. *Verbruggen* (1981), 20 C.C.L.T. 29 (B.C.S.C.), the plaintiff brought an action for injury suffered in the course of a hockey game. The defendant hit the plaintiff heavily into the boards. In retaliation of the body check, the plaintiff slashed the defendant with his hockey stick. The referee signalled a penalty against the plaintiff for the slash. The referee's description of the slash was that it was "not really that bad" (page 38). The defendant responded to the slash with a wild swing, described by the referee as "a lot heavier than any ever seen directed toward another player in a hockey game" (page 38). Apparently the defendant shortened his grip on the hockey stick and swung it" very similar to a baseball bat" (page 39), breaking the plaintiff's forearm.

Berger, J. was not prepared to award exemplary or punitive damages but addressed the issue of provocation broadly at pages 40-41:

> "I hold that provocation does, in this jurisdiction, operate to reduce an award of damages including an award of compensatory damages. The case of *Miska* v. *Sivec*, [1959] O.R. 144 (C.A.), is authority for this proposition. It is true that the Ontario Court of Appeal in *Shaw* v. *Gorter* (1977), 16 O.R. (2d) 19 and *Landry* v. *Patterson* (1978), 22 O.R. (2d) 335, opted to follow the authority of *Lane* v. *Holloway*, [1967] 3

All E.R. 129, a decision of the Court of Appeal in England rejecting *Murphy* v. *Culhane*, [1976] 3 All E.R. 533. But it is to be noted that the Ontario Court of Appeal in neither *Shaw* v. *Gorter* nor in *Landry* v. *Patterson*, cited *Miska* v. *Sivec*. I think the reasoning in *Miska* v. *Sivec* is representative of the present authority in Canada . . . I am aware that my brother Locke, J., in a recent case tried before a jury apparently . . . told the jury that provocation only operated to reduce exemplary or punitive damages . . ."

*Short* v. *Lewis* (1833), 3 U.C.Q.B. (O.S.) 385 (C.A.), is the earliest Canadian authority establishing what for many years was thought to be the rule that proof of provocative conduct on the part of the plaintiff was a factor to be taken into account in reducing *both* punitive and compensatory damages. The Canadian rule was not followed in its entirety elsewhere in the Commonwealth.[95] In the Commonwealth, *Fontin* v. *Katapoldis* (1962), 108 D.L.R. 177 (Austl. H.C.), established the rule that provocation reduced only an award of exemplary or punitive damages.

In *Lane* v. *Holloway*, [1967] 3 All E.R. 129 (C.A.), Lord Denning, M.R. commented:

"I think that the Australian High Court [in the *Fontin* case] should be our guide. The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any *element of aggravation* but not to reduce the *real* damages."[96]

Is this statement to be taken to mean that provocation reduces aggravated damages but not other compensatory damages? Perhaps Denning, M.R. used the term "real damages" to mean compensatory damages which he likely understood to include aggravated damages. "Solomon L.J. [in the *Lane* case] . . . in his acceptance of the rule of *Fontin* v. *Katapodis* . . . stressed that damage in tort since *Rookes* v. *Barnard* must be regarded as purely compensatory with the exception of the narrow categories of punitive damages".[97] If provocation does not reduce compensatory damages, then this passage may be useful to advance the argument that aggravated damages as an aspect of compensatory damages are not to be reduced by provocation.

In *Check* v. *Andrews Hotel Co.* (1975), 56 D.L.R. (3d) 364 (Man. C.A.), the rule in the *Fontin* and *Lane* cases was considered. "The majority of the court . . . followed *Lane* v. *Holloway* and accepted the proposition that a plaintiff's provocative conduct could not be invoked to reduce compensatory damages."[98] In part, the reason for following *Lane* and rejecting

[95] Osborne, P.H., "Case Annotation to *Holt* v. *Verbruggen*" (1981), 20 C.C.L.T. 29 at 30.

[96] As quoted by Osborne, p. 31.

[97] Ibid.

[98] As quoted by Osborne, p. 32.



earlier Canadian cases was that "the Canadian cases had never considered the dichotomy between compensatory and punitive damages . . .".[99]

The Ontario Court of Appeal in *Shaw* v. *Gorter* followed *Lane* v. *Holloway* and adopted the rule that provocation only goes to reduce punitive damages and not compensatory (and arguably aggravated) damages.

In 1978, the Ontario Court of Appeal in *Landry* v. *Patterson* (1979), 7 C.C.L.T. 202 (Ont. C.A.), cast some doubt on the view expressed in the *Shaw* case where *Lane* v. *Holloway* was followed. This was so because of *Murphy* v. *Culhane*, [1976] 3 All E.R. 533, (C.A.), an English decision which upheld that in a proper case it is appropriate to reduce compensatory damages on the basis of provocation. If *Murphy* is followed in Canada, then there is no question that provocation reduces aggravated damages.

In the *Holt* case, Berger, J., as noted above, felt the *Murphy* case should be abided in Canada. In so doing, he relied heavily on the Ontario Court of Appeal decision in *Miska* v. *Sivec*, [1959] O.R. 144 (C.A.).

Therefore, punitive damages will be reduced to the extent that the plaintiff has provoked the defendant's wrongful conduct for which punitive damages are awarded. If the controversy above described is resolved to reduce compensatory damages when the plaintiff is guilty of provocation, then undoubtedly provocation reduces aggravated damages. If provocation is subsequently determined not to reduce compensatory damages, then arguably aggravated damages are not reduced by provocation because such damages must be viewed as compensatory, separate and apart from punitive damages.

### G. *Aggravating Factors*

Two aggravating factors concerning the assessment of these damages were identified in *Vogel* v. *CBC*, *supra*. The *Vogel* case was an action founded in libel and slander and both factors for the most part are unique to that kind of action. Esson, J. indicated at page 198 that,

". . . the identity of the accuser is an important factor. The accusation might have [been] made by some nasty little tabloid scandal sheet and have done no harm. Strident scandal mongering is the stock-in-trade of certain publications . . . and they have little or no effect upon the opinions of anyone whose good opinion matters. To their ugly accusations it is a sufficient response to say: 'Regard the source'."

"Regard the source" could not be said of the CBC. The three television news broadcasts which were libellous were likely to be believed by those whose good opinion did matter and for this reason damages on the highest scale were awarded.

[99] Ibid.

The second aggravating factor of these damages identified in the *Vogel* case has some application generally to punitive damage assessments though really it is a consideration in libel and slander awards. Esson, J. stated at page 180:

> "The plaintiff is on stronger ground in relying upon as aggravating the damages, the attempt at the end of the trial to call a surprise witness who was to testify to some phone call by the plaintiff to support an allegation of interference unrelated to the issues raised by the pleadings and during trial."

The plaintiff's objection to the admissibility of that evidence had been sustained at trial, but Esson, J. went on to regard the episode as putting the "plaintiff in the position of appearing to try to hide something because, of course, the proper significance of an objection based on relevancy is not likely to be reflected in the news reports" that were made by the CBC during the course of trial.

The broader principle which may be extracted from this case is that a defendant's conduct in the course of a trial may be an aggravating factor in the assessment of aggravated or punitive damages.[100] This is particularly so, of course, in libel and slander cases and in any case where the trial proceedings themselves may be publicized.

## H. *Recent Trends*

### (i) *Aggravated Damages*

In *Munro* v. *Toronto Sun et al.*, *supra*, the $25,000 aggravated damage award is the largest of such awards in Canada for purely aggravated damages. The plaintiff, Munro, was a Member of Parliament for the federal riding of Hamilton East and Minister of the Crown in the federal Cabinet, about whom an article was published on June 2, 1981 in the *Toronto sun* and simultaneously in its sister papers, the *Calgary Sun* and *Edmonton Sun*.

At trial, the defendants conceded the offending article to be gravely defamatory of Munro. The Court found on the evidence that the words of the article amounted to a charge that the plaintiff was guilty of criminal behaviour and in violation of the provisions of federal and provincial statutes.

The deleterious effect of the article was mitigated somewhat by the trial judge's finding (at page 305) that "the impact [of the article] . . . was for short duration and was substantially eliminated by the publication of the apology on June 9, 1981. Moreover, the ability of Mr. Munro to successfully weather storms of this nature was proven by past performances."

[100] See also *Captain Developments Ltd.* v. *Nu-West Group Ltd.* (1982), 37 O.R. (2d) 697 at 710, (H.C.J.), where conduct of the defendant up to the eve of trial was considered a factor when assessing punitive damages.



Compensatory damages exclusive of aggravated damages were assessed at $25,000 on the basis that the "injury, while serious, falls short of that suffered by the plaintiffs in the trilogy cases and in *Lindal*" (page 306). There is some doubt as to the correctness of applying personal injury damage principles to libel and slander cases,[101] but taken with the separate award of aggravated damages of $25,000, the judgment can be viewed as an 'at large' libel and slander award of $25,000. In addition, $25,000 punitive damages were awarded.

The reporters were guilty of malice and gross misconduct as it was found they were "out to get Munro" (page 306). This was the basis for the aggravated damage award. The aspect of distress and injured feeling of Munro, given the grave defamatory aspect of the story and the national prominence of the false revelation, makes the $25,000 aggravated damage award a fair assessment.

In *Vogel* v. *CBC*, *supra*, the plaintiff, the Deputy Attorney General of British Columbia, was libelled in three separate CBC television newscasts. Vogel was temporarily suspended from his duties pending investigation of the libellous allegations. It was found that:

> ". . . the effect of the programme and the subsequent events was to cause the plaintiff and his family mental and emotional distress, to subject him literally to hatred, ridicule and contempt, and to attach to his name a false stigma which seriously affected his standing as a lawyer and his reputation as a deputy minister. That stigma will grow less with time but will never be erased." (page 186)

The assessment of damages was made under the general and punitive heads of damage. Aggravated damages were not awarded under a separate head but there is no doubt that they represented a significant aspect of the general damages awarded in the sum of $100,000. It should be noted, however, that some pecuniary loss was included in the general damage award. Esson, J. said at page 197:

> "It . . . would be unrealistic to find that the plaintiff's capacity to earn income has not been impaired to a significant degree. He is not a career civil servant. . . . It is reasonable to assume that Mr. Vogel will, at some point, consider [returning to the world of business or the legal profession from whence he came]."

In addition, there was a "future" non-pecuniary aspect of the compensatory damages that cannot be said to be a part of the aggravated damages.

> "Compensatory damages are not confined in their scope to pecuniary losses:

[101] See Morse, J.R., "Case Comment on *Munro* v. *The Toronto Sun*" (1983), 23 C.C.L.T. 52.

> '[defamation] actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel, driven underground, emerges from its lurking place at some future date he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.'
>
> *Broome* v. *Cassell* at page 824 All E.R." (page 206)

Esson, J. maintained at page 202 that the case "required an award of damages at the highest end of the scale". To do so, the effects of inflation were acknowledged when examining earlier authorities for comparison. He stated: "in making any comparison to earlier damage awards it is of course now necessary to have regard to the effects of inflation. The present equivalent to an award of $35,000 in 1964 [using the *Rookes* case as a comparison] would be an amount two to three times as large." (page 204)

The element of aggravated damages in the compensatory award was to reflect Lord Devlin's view expressed in the *Rookes* case, that aggravated damages should reflect the natural indignation of the court at the conduct causing the injury inflicted on the plaintiff. Mr. Justice Esson concluded that "clearly that [Lord Devlin's] view applies here. The injury to Mr. Vogel was greater because of the reckless and deliberately damaging actions of the defendants. . . ." (page 205).

Conceivably more than half the $100,000 compensatory award is attributable to the aggravated damages when one considers that His Lordship was sufficiently abhorred by the defendants' conduct to make a separate award of punitive damages in the sum of $25,000. It is unfortunate that the aggravated damage amount was not awarded under a separate head as was done in *Munro*. This case is an example of how useful an itemized award can be, contrasted with a lump sum award. The suggested approach would assist the subsequent analysis of these cases and enhance the usefulness of these awards to punish and deter.

In *Brown* v. *Waterloo Board of Education*, *supra*, Linden, J. allowed the plaintiff's action for wrongful dismissal and awarded $10,000 for mental distress. It is difficult to draw much of a distinction between aggravated damages and mental distress with the exception that mental distress does not allow for the court's expression of indignation with reference to the defendant's conduct. To the extent that mental distress reflects the plaintiff's hurt, such injury is of a kind analogous to aggravated damages. It was observed that "though [aggravated damages] are based on the quality of the defendant's conduct, [they] are compensatory in purpose" (page 289).

Accordingly, Linden, J. concluded at page 290:

> "I have already indicated that Chief Brown is to receive $10,000.00 for his mental distress as a result of the breach of contract in this case. The reasons underlying this award include not only that he suffered such loss, but also a consideration of the quality of the conduct of the defendant in seeking to remove Chief Brown and thereafter. Consequently, the type of loss meant to be redressed by aggravated damages and the conduct it is based on have already been compensated for on another legal basis. There cannot be double recovery for the hurt feelings suffered here; that loss can only be compensated for once."



Aggravated damages in the case of assault and battery warrant a separate treatment from the negligence and libel and slander cases since for the most part they are modest awards.[102]

In the case of *Bahner* v. *Marwest Hotel* (1969), 6 D.L.R. (3d) 322 at 330 (B.C.S.C.), the plaintiff was falsely imprisoned by the defendant restaurant employee when he refused to pay for a bottle of wine under the misapprehension that he was not obliged to do so. The restaurant's employees prevailed upon the local constabulary (co-defendant in the proceedings), who attended the scene and committed a second act of false imprisonment against the plaintiff.

In the Court's view, the plaintiff

> ". . . was publicly humiliated by detention by the security officer in the hotel in the presence of staff and a dozen guests, and by subsequent interrogation and arrest by a uniformed policeman. [The plaintiff] was known to a considerable number of people, who . . . in all probability and very naturally, told other persons about it . . . The degradation consequent upon the experience suffered by the plaintiff is sore and not easily forgotten." (page 330).

Aggravated and exemplary or punitive damages were awarded the plaintiff against both defendants. The defendant hotel was ordered to pay $2,500 aggravated and $1,000 punitive damages. The defendant police constable had $1,500 aggravated and $1,000 punitive damages assessed against him.

There must actually be evidence of such aggravation. For instance, in *Ball* v. *Manthorpe* (1970), 15 D.L.R. (3d) 99 (B.C.Co. Ct.), Tyrwhitt-Drake, Co. Ct. J., was not prepared to award aggravated or exemplary and punitive damages notwithstanding the plaintiff suffered some humiliation as a result of having been falsely imprisoned by the defendant. In that case, the plaintiff had been forcibly propelled through a crowded department store in an ignominious fashion. The Court commented:

> "Here, there was no serious accusation, nor any reflection upon the honesty of the plaintiff. None of the conditions requisite for an award of substantial damages as canvassed in the *Bahner* case [*infra*], are present." (page 102).

In the absence of personal humiliation or hurt measured by some reasonable objective standard, the courts are not prepared to award aggravated damages.

---

[102] See *Johnston* v. *Barrett* (1973), 8 N.B.R. (2d) 499 (Q.B.), where $1,200 was awarded, and *Golnik et al.* v. *Gerssinger* (1967), 64 D.L.R. (2d) 754.

In summary, the trend of aggravated damage awards in cases of libel and slander, wrongful dismissal and negligence, represented by the *Munro, Vogel, Brown* and *Robitaille* decisions respectively, is that they are significant and will increase proportionate both to the injury and its deleterious effect on the plaintiff and the indignation of the court toward the defendant's wrongful conduct.

(ii) *Punitive Damages*

The amounts awarded in punitive damage cases should be divided into two categories, the assault and battery cases, and the balance of the cases.

Traditionally the intentional tort of assault and battery (really any intentional physical infliction of harm) attracts modest punitive damage awards. As discussed, the range is from $200 to $7,500[103] and probably is in keeping with the sense of justice of the combatants in these cases, who usually are uninsured and without substantial means.

The balance of the cases where punitive damages have been awarded recently have received careful attention. The trend appears to be to make awards consistent with their stated purpose of deterrence.

Thus far, two cases have awarded $50,000,[104] the largest punitive damage award in Canada. Three cases have awarded $35,000[105] and one case $30,000.[106] Three awards have been for $25,000,[107] one award each for $20,000[108] and $16,000.[109] Finally, there are two $15,000[110] awards, one $12,000 award[111] and two $10,000 awards.[112] There may well be other unreported cases in this range which have not yet come to our attention.

[103] *Supra*, note 6, p. 704.

[104] *Captain Developments Ltd.* v. *Nu-West, supra*; *N.B.E.P.C.* v. *International Brotherhood, supra.*

[105] *Robitaille* v. *Vancouver Hockey Club Ltd., supra*; *Pro Arts Inc.* v. *Campus Craft Holdings Ltd., et al.* (1980), 28 O.R. (2d) 422 (H.C.J.); *Nantel* v. *Parisien, supra.*

[106] *Canadian Ironworkers Union No. 1* v. *International Association of Bridge Structural and Ornamental Ironworkers Union, Local No. 97, supra.*

[107] *Munro* v. *Toronto Sun et al., supra*; *Vogel* v. *CBC, supra*; *Hankai* v. *York County Hospital et al., supra*; *Vancouver Block Ltd.* v. *Empire Realty Co. Ltd.* (unreported decision of the British Columbia Court of Appeal released June 10, 1979) as reported at *Robitaille* v. *Vancouver Hockey Club, supra*, 182.

[108] *Cherry Processing and Packaging Equipment Ltd.* v. *Chrysler Canada Ltd. et al.*, (unreported decision of J. Holland, J., S.C.O. released July 15, 1982).

[109] *Marcoe Realty Limited* v. *Parisien et al.*, (unreported decision of Osborne, J., S.C.O. released November 6, 1980).

[110] *Chrysler Canada Ltd.* v. *The Clarkson Company Limited and The Bank of Montreal*, (unreported decision of J. Holland, J., S.C.O. released July 15, 1982; *Johnson et al.* v. *British Columbia Hydro and Power Authority* (1981), 123 D.L.R. (3d) 340 (B.C.S.C.).

[111] *Norkan Lodge Company Limited* v. *Gillum et al.*, (unreported decision of S.C.N.W.T. released September 17, 1982).

[112] *Mayo* v. *Hefferton* (1972), 3 Nfld. & P.E.I.R. 236 (Nfld. S.C.); *West City Motors Limited et al.* v. *Delta Acceptance Corporation Limited* (unreported decision of Master Kimber, S.C.O., released August 15, 1962.



In addition to the assault and battery cases awarding punitive damages of less than $10,000 there are numerous trespass to property cases within the $10,000 ceiling.[113]

In *Captain Developments Ltd.* v. *Nu-West Group Ltd.*, punitive damages in the sum of $50,000 were awarded for the tort of slander of title. Montgomery, J. put the competing principles in a nutshell in formulating the basis for his punitive damage award:

> "Nu-West gambled to make a profit and lost and should bear the responsibility that goes with that type of conduct. . . . Too light an assessment under this head of damage is but a licence fee to ride market savings. Too great an assessment emphasizes the penal nature of the award . . . I bear in mind the extensive operations of Nu-West, their clout in the marketplace and their ability to pay." (page 518.)

In *N.B.E.P.C.* v. *International Brotherhood of Electrical Workers Local 1733*, $50,000 punitive damages were awarded against the defendant, a union local, for a week-long wildcat strike. The strike occurred in winter, nearly closing down the supply of electricity to the residents of the province. General damages of $75,000 for disruption were awarded in addition to punitive damages. This case is significant not only for the quantum of the award, but the fact that the award flowed from an action based on a breach of a collective agreement, i.e., an action founded on breach of contract. Dickson, J. commented on the assessment of $50,000 for punitive damages:

> "While the amount is appreciable it does not seem to me to be out of keeping with the size of the Union membership and the degree of irresponsibility displayed by the Union leaders." (page 376).

*Nantel* v. *Parisien*, *Pro Arts* v. *Campus Holdings Ltd.*, and *Robitaille* v. *Vancouver Hockey Club* are the three cases where $35,000 was awarded as punitive damages. Galligan, J. in the *Nantel* case felt that $35,000 would express the Court's aversion to the strong, the powerful and the rich trampling the weak without paying a significant penalty. If he was affected by an earlier action against the same defendant for similar conduct awarding $16,000, he did not say so.[114] The *Pro Arts* case awarded damages to the plaintiff for the improper use of the plaintiff's copyright to the right to sell and distribute the Farah Fawcett poster, which sales were very successful. The economic benefit the defendant could expect to derive by infringing the copyright, measured against the risk of successful legal recourse being brought against it, required that something more than the costs of the proceedings to sanction such conduct. In *Robitaille*, the assessment included the aggravated damages awarded to the plaintiff against the defendant.

[113] *Pretu* v. *Tidey, supra*; where a $6,000 award was made.

[114] See *Marcoe Realty Limited* v. *Parisien, supra.*

The foregoing for the most part indicates that the courts have accepted the role of punitive damages as part of the civil law function to control or regulate the conduct of the society. These damages are and can be substantial and the society's conduct will no doubt be influenced by these substantial awards.

## XIII. *Summary*

Moral, at large, retributory, vindictive, deterrent, penal, smart money, swingeing and indignant are the words found in the legal reports and journals at one time or another to express one or the other of aggravated or exemplary and punitive damages. This various terminology, which preceded *Rookes* v. *Barnard*, is best forgotten.

*Rookes* v. *Barnard* is the watershed of a new order to these two basic kinds of damages: aggravated damages on the one hand being compensatory, and exemplary or punitive damages on the other representing a penalty to the wrongdoer and a deterrent to others of a like mind. In either case, the underlying basis for the award is the defendant's reprehensible conduct of a kind warranting the court's expression of abhorrence; in the case of aggravated damages, it is to compensate the plaintiff who has sustained an aggravated hurt as a result of such conduct or punitive damages when the court is satisfied it ought to exercise its discretion to penalize and deter. In the case of the former, there is no discretion as the court must compensate a plaintiff injured by such conduct.

Accepting that *Rookes* v. *Barnard* has established the terminology from which a clear concept of these damages has been established, one ought to bear in mind the purpose of the award of punitive damages as attributed to them by Lord Devlin in the *Rookes* case when making the argument that the court ought to exercise its discretion in favour of making such award.

Clearly, in the case of intentional torts, punitive damages are proper. More recently they are available for action sounding in negligence. It is uncertain whether breach of contract will attract such an award. It may well be in the context of certain kinds of insurance cases, i.e., no-fault benefits or first party or third party bad faith claims, that the courts may uphold an award of punitive damages for statutory breach of contract, but there may be a requirement to support such cause of action by some tort theory. Of course, aggravated damages are always available whether intentional tort, negligence or contract.

Finally, the limitations on the availability of these awards in certain situations not found with respect to the award of damages generally must be carefully considered.



The foregoing review of the current law of punitive damages evidences a serious intention by our courts to accept the role of punitive damages as a part of the civil law function to control and regulate the conduct of the members of society. This is but a manifestation of the proposition that we live in a society governed by the rule of law where illegal conduct will be punished. These damages can be substantial. The deterrent effect of this body of law may turn out to be far-reaching. The future development of this body of law represents a challenge for the judiciary counsel, and the academic community.