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all others, including the company, and that if the gas company were not compelled to reconnect the gas supply it would somehow be placing itself in a secured position in priority to the bank and all other creditors.

In *Ostrander v. Niagara Helicopters Ltd. et al.* (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5, Stark, J., points out that a receiver, not Court appointed, is called the agent of the company but is, in fact, the agent for the mortgagee or other creditor in possession. In practice, however, the debenture in such cases, as here, provides expressly that the receiver shall be deemed to be the agent of the company. Obviously, this is done for the purpose of making it apparent to third parties that the receiver has authority to deal with and manage the affairs of the company. That being so, it is not surprising that the defendant in the present case should look to the receiver for payment of its account and refuse to enter upon a new contract unless it is paid. This was the result in two English cases dealing with similar situations under very similar legislation, namely: *Re Smith*, [1893] 1 Q.B. 323; and *Paterson v. Gas Light & Coke Co.*, [1896] 2 Ch. 476.

In *Canada Trust Co. et al. v. Consumers' Gas Co.*, unreported but heard by Keith, J., on September 22, 1977 [reported *ante*, p. 449], a situation identical to the one before me was considered, the difference being that the receiver had made a new contract with the gas company following which the company took it upon itself to interrupt the supply until the arrears of the former account were paid. Keith, J., distinguishes the two English cases just cited stating that the difference was "... the establishment of a new supplier and customer relationship ..." and went on to say that a strong *prima facie* case had been made for a mandatory injunction.

That distinction is not found in the present case where no new contract has been made and, in fact, the defendant refuses to make one until the arrears are paid. In these circumstances it is by no means apparent that the plaintiff/applicant would probably succeed at trial and, in my view, no case for an interim mandatory injunction has been made.

The application will be dismissed but the costs will be for determination by the trial Judge.

Application dismissed.

ANDREWS et al. v. GRAND & TOY ALBERTA LTD. et al

Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré, JJ. January 19, 1978.

Damages — Personal injuries — Severe physical disability — Principles to be applied in assessment of general damages.

The subject of general damages for personal injury is an area of the law which needs legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal, and the disparity resulting from lack of provision for victims who cannot establish fault is disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump-sum system and a once-and-for-all award. The lump-sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, and income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, the law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs. Until such time as the Legislature acts, however, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.

The method of assessing general damages in separate amounts is a sound one. It is the only way in which any meaningful review of the award is possible on appeal and the only way of affording reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, thus assuring them that each of the various heads of damage going to make up the claim has been given thoughtful consideration.

With respect to pecuniary loss, in a case of total or near-total disability the paramount issue is whether the future care of the victim should be in an institutional or a home-care environment. The principle that compensation should be full for pecuniary loss is well established. In theory, a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. There is no duty to mitigate, in the sense of being forced to accept less than the real loss. There is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate and fair to both parties. Compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. Where the evidence favours a home environment, reasonableness relates to what is to be provided in that home environment. The victim need not languish in an institution which on all the evidence is inappropriate for him. The only argument against home care is that the social cost is too high. In these days the cost is distributed through society through insurance premiums. The area of future care is not one in which the argument of the social burden of the expense should be controlling, particularly in a case where the consequences of acceding to it would be to fail in large measure to compensate the victim for his loss. Greater weight might be given to this consideration where the choice is not so stark as between home care and an auxiliary hospital. Minimizing the social burden of expense may be a factor influencing a choice between acceptable alternatives. It should never compel the choice of the unacceptable.

A plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accomodation would have been paid for out of earnings. They are no additional type of expense occasioned by the accident. When calculating the damage award the proper method of proceeding is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings, *i.e.*, the award is on the basis of net earnings and not gross earnings. To determine accurately the

needs and costs in respect of future care, basic living expenses should be included. The costs of necessaries when in an infirm state may well be different from those in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. The project cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.

As to loss of earnings it is the loss of capacity to earn for which compensation must be made. A capital asset has been lost. It is the capacity which existed prior to the accident that must be valued.

In establishing the figures for pecuniary loss the proper approach is to use present rates of return on long-term investments and to make some allowance for the effects of future inflation. No deduction should be made for tax which might have been attracted had income been earned over the working life of the plaintiff. Similarly, no consideration should be taken of the amount by which the income from the award will be reduced by payment of taxes on the interest, dividends, or capital gain.

The impact of taxation upon the income from the capital sum for future care is mitigated by the existence of provisions for the deduction of medical expenses in the *Income Tax Act*, R.S.C. 1952, c. 148, as amended by 1970-71-72, c. 63. The exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with the political winds. As a result, no allowance should be made to adjust the amount for future care in light of the reduction through taxation. The calculations should provide for a self-extinguishing sum. To allow a residual capital amount would be to over-compensate the injured person by creating an estate for him.

The problem with non-pecuniary loss is qualitatively different from that of pecuniary loss. 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. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care; this is the reason that the paramount concern of the Courts when awarding damages for personal injuries should be to ensure that there will be adequate future care. If the principle of the paramountcy of care is accepted there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary loss. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is within this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest. It is also the area where there is the clearest justification for moderation.

The proper approach to non-pecuniary loss is a functional one which, rather than attempting to set a value on lost happiness, attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune". "Solace" in this sense means physical arrangements which can make his life more endurable rather than sympathy. This approach provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering and loss of expectation of life. Money is awarded because it will 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. From this 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 inju-

ries 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 co-ordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

However one may view such awards in a theoretical perspective, the amounts are still largely arbitrary or conventional. This does not mean that the Courts should not have regard to the individual situation of the victim. On the contrary, they must do so to determine what has been lost. 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. But there should be guidelines for the translation into monetary terms of what has been lost. There must be an exchange rate, albeit conventional. The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will serve to make up for this loss, but variation should not be made merely for the Province in which he happens to live.

It is customary to set only one figure for all non-pecuniary losses, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a solid 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. Save in exceptional circumstances, $100,000 should be regarded as the upper limit of non-pecuniary loss in the case of a young adult quadriplegic.

[*The Queen v. Jennings* (1966), 57 D.L.R. (2d) 644, [1966] S.C.R. 532; affg 50 D.L.R. (2d) 385, [1965] O.R. 285, *sub nom. Jennings v. Cronsberry et al.*, folld; *Fletcher v. Autocar Transporters, Ltd.*, [1968] 1 All E.R. 726; *Warren et al. v. King*, [1963] 3 All E.R. 521, apld; *Bisson v. District of Powell River* (1967), 66 D.L.R. (2d) 226, 62 W.W.R. 707; affd 68 D.L.R. (2d) 765*n*, [1968] S.C.R. v, 64 W.W.R. 750; *Schroth et al. v. Innes et al.* (1976), 71 D.L.R. (3d) 647, [1976] 4 W.W.R. 225, overd; *Oliver et al. v. Ashman*, [1962] 2 Q.B. 210; *McCann v. Sheppard*, [1973] 1 W.L.R. 540; *Mallett v. McMonagle*, [1970] A.C. 166, disaprvd; *Cunningham v. Harrison et al.*, [1973] 3 All E.R. 463; *Jackson v. Millar* (1975), 59 D.L.R. (3d) 246, [1976] 1 S.C.R. 225, distd; *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.* (1975), 57 D.L.R. (3d) 438, [1975] 3 W.W.R. 622; vard 73 D.L.R. (3d) 35, [1976] 5 W.W.R. 240; revd *post*, p. 480; *Teno et al. v. Arnold et al.* (1974), 55 D.L.R. (3d) 57, 7 O.R. (2d) 276; vard 67 D.L.R. (3d) 9, 11 O.R. (2d) 585; affd *post*, p. 609; *Nance v. B.C. Electric R. Co.*, [1951] 3 D.L.R. 705, [1951] A.C. 601, 2 W.W.R.(N.S.) 665, 67 C.R.T.C. 340, [1951] 2 All E.R. 448; *Admiralty Com'rs v. S.S. "Susquehanna"*, [1926] A.C. 655; *Admiralty Com'rs v. S.S. "Valeria"*, [1922] 2 A.C. 242; *H. West & Son Ltd. v. Shephard*, [1964] A.C. 326; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; *The Queen v. Jennings* (1966), 57 D.L.R. (2d) 644, [1966] S.C.R. 532; affg 50 D.L.R. (2d) 385, [1965] O.R. 285, *sub nom. Jennings v. Cronsberry et al.*; *Skelton v. Collins* (1966), 39 A.L.J.R. 480; *McKay et al. v. Board of Govan School Unit No. 29 of Saskatchewan* (1968), 68 D.L.R. (2d) 519, [1968] S.C.R. 589, 64 W.W.R. 301; *Bresatz v. Przibilla* (1962), 108 C.L.R. 541; *Reference re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452, [1976] 2 S.C.R. 373, 9 N.R. 541; *Keizer v. Hanna et al.* (1978), 82 D.L.R. (3d) 449; *Ward v. James*, [1965] 1 All E.R. 563; *Hamel et al. v. Prather et al.* (1976), 66 D.L.R. (3d) 109, [1976] 2 W.W.R. 742, refd to]

APPEAL by the plaintiffs from a judgment of the Alberta Supreme Court, Appellate Division, 64 D.L.R. (3d) 663, [1976] 2 W.W.R. 385, varying a judgment of Kirby, J., 54 D.L.R. (3d) 85, [1974] 5 W.W.R. 675, in favour of the plaintiffs in an action for damages for personal injuries.

D. K. Laidlaw, Q.C., *R. Cummings* and *D. Andrews*, for appellants.
John A. Weir and *B. J. Larbalestier*, for respondents.

The judgment of the Court was delivered by

DICKSON, J.:—This is a negligence action for personal injury involving a young man rendered a quadriplegic in a traffic accident for which the respondent Anderson and his employer, Grand & Toy Alberta Ltd., have been found partially liable. Leave to appeal to this Court was granted on the question whether the Appellate Division of the Supreme Court of Alberta erred in law in the assessment of damages. At trial Mr. Justice Kirby awarded $1,022,477.48 [54 D.L.R. (3d) 85, [1974] 5 W.W.R. 675]; the Appellate Division reduced that sum to $516,544.48 [64 D.L.R. (3d) 663, [1976] 2 W.W.R. 385].

The amount awarded in each Court under each of the several heads of damages is set out below:

Pecuniary Loss	Trial	Appellate Division
(a) Cost of Future Care		
— special equipment	$ 14,200	$ 14,200
— monthly amount	4,135	1,000
— contingencies	20%	30%
— capitalization rate	5%	5%
— life expectancy	45 years	45 years
	$735,594	$164,200
(b) Loss of Prospective Earnings		
— level of earnings	$ 830	$ 1,200
— basic deduction to avoid duplication between the award for future care and that part of the lost earnings that would have been spent on living expenses	440	—
Net	$ 390	$ 1,200
— contingencies	20%	20%
— work span	30.81	30.81
— capitalization rate	5%	5%
Total	$ 59,539	$175,000
Non-Pecuniary Loss		
— Pain and Suffering — Loss of Amenities — Loss of Expectation of Life	$150,000	$100,000
Special Damages	$ 77,344	$ 77,344

Liability is not an issue. The trial Judge found that the fault was entirely that of the respondents. The Appellate Division (McDermid, J.A., dissenting on this issue) found the appellant James Andrews 25% contributorily negligent. Those findings do not arise for discussion in this appeal. Nor does the question of special damages.

This Court is called upon to establish the correct principles of law applicable in assessing damages in cases such as this where a young person has suffered wholly incapacitating injuries and faces a lifetime of dependency on others. The question of "million dollar" awards has not arisen in Canada until recently, but within the past several years four such cases have been before the Courts, namely: (i) the case at bar; (ii) *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.* (1975), 57 D.L.R. (3d) 438, [1975] 3 W.W.R. 622 (B.C. S.C.); varied 73 D.L.R. (3d) 35, [1976] 5 W.W.R. 240 (B.C. C.A.), at present under appeal to this Court [*post* p. 480], in which the award at trial was $1,534,058, reduced on appeal to $649,628; (iii) *Teno et al. v. Arnold et al.* (1974), 55 D.L.R. (3d) 57, 7 O.R. (2d) 276 (Ont. H.C.J.); reversed in part 67 D.L.R. (3d) 9, 11 O.R. (2d) 585 (Ont. C.A.), also under appeal to this Court [*post* p. 609], in which the award for general damages at trial was $950,000, reduced on appeal to $875,000; (iv) *McLeod v. Hodgins* (unreported), in which Mr. Justice Robins, of the Ontario High Court, awarded at trial an amount of $1,041,197, of which $1,000,000 were general damages.

Let me say in introduction what has been said many times before, that no appellate Court is justified in substituting a figure of its own for that awarded at trial simply because it would have awarded a different figure if it had tried the case at first instance. It must be satisfied that a wrong principle of law was applied, or that the overall amount is a wholly erroneous estimate of the damage *Nance v. B.C. Electric R. Co.*, [1951] 3 D.L.R. 705, [1951] A.C. 601, 2 W.W.R.(N.S.) 665.

The method of assessing general damages in separate amounts, as has been done in this case, in my opinion, is a sound one. It is the

only way in which any meaningful review of the award is possible on appeal and the only way of affording reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby that each of the various heads of damage going to make up the claim has been given thoughtful consideration.

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump-sum system and a once-and-for-all award.

The lump-sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs. In making this comment I am not unaware of the negative recommendation of the British Law Commission (Law Com. 56 — *Report on Personal Injury Litigation — Assessment of Damages*) following strong opposition from insurance interests and the plaintiffs' bar.

The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid, and a sharper tool than the "multiplier-multiplicand" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump-sum awards, however, we are tied also to actuarial calculations as the best available means of determining amount.

In spite of these severe difficulties with the present law of personal injury compensation, the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature, rather than the Courts. Until such time as the Legislature acts, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.

I proceed now to a brief recital of the injuries sustained by the appellant James Andrews in the present case. He suffered a fracture with dislocation of the cervical spine between the fifth and sixth cervical vertebrae, causing functional transection of the spinal cord, but leaving some continuity; compound fracture of the left tibia and left humerus; fracture of the left patella. The left radial nerve was damaged. The lesion of the spinal cord left Andrews with paralysis involving most of the upper limbs, spine and lower limbs. He has lost the use of his legs, his trunk, essentially his left arm and most of his right arm. To add to the misery, he does not have normal bladder, bowel and sex functions. He suffers from spasticity in both upper and lower limbs. He has difficulty turning in bed and must be re-positioned every two hours. He needs regular physiotherapy and should have someone in close association with him at all times, such as a trained male orderly. The only functioning muscles of respiration are those of the diaphragm and shoulders. There is much more in the evidence but it need not be recited. Andrews is severely, if not totally disabled. Dr. Weir, a specialist in neurosurgery, said of Andrews' condition that "there is no hope of functional improvement". For the rest of his life he will be dependent on others for dressing, personal hygiene, feeding and, indeed, for his very survival. But, of utmost importance, he is not a vegetable or a piece of cordwood. He is a man of above average intelligence and his mind is unimpaired. He can see, hear and speak as before. He has partial use of his right arm and hand. With the aid of a wheelchair he is mobile. With a specially-designed van he can go out in the evening to visit friends, or to the movies, or to a pub. He is taking driving lessons and proving to be an apt pupil. He wants to live as other human beings live. Since May 31, 1974, he has resided in his own apartment with private attendant care. The medical long-term care required is not at a sophisticated level but rather at a practical care level.

Andrews was 21 years of age and unmarried on the date of the accident. On that date he was an apprentice carman employed by the Canadian National Railways in the City of Edmonton.

I turn now to consider assessment of the damages to which Andrews is entitled.

1. PECUNIARY LOSS

(a) *Future care*

(i) *Standard of care.* While there are several subsidiary issues to be decided in this case, there is one paramount issue: in a case of total or near-total disability should the future care of the victim be in an institutional or a home-care environment? The trial judge

chose home care. The Appellate Division agreed that home care would be better but denied it to him. Chief Justice McGillivray who delivered the judgment of the Court on this issue said [at p. 698]:

> All the evidence called supports the proposition that psychologically and emotionally Andrews would be better in a home of his own, where he would be lord of the manor, as it were.

Some evidence even indicated the medical superiority of a home environment.

The trial Judge found that it would take $4,135 per month to provide care for Andrews in a home environment. The Appellate Division considered that this standard of care was unreasonably and unrealistically high. Without giving any reason for selecting the particular figure chosen, the Appellate Division substituted $1,000 per month. Obviously, here is the heart of the controversy. On other matters there was substantial agreement between the lower Courts.

In my opinion, the Court of Appeal erred in law in the approach it took. After the statement quoted above, that Andrews would be better psychologically and emotionally in a home of his own, Chief Justice McGillivray referred to some of the evidence supporting that proposition. He quoted the following passage from the evidence of Dr. Weir [at p. 698]:

> "Well, I think that the greatest problem they have and the greatest burden of their affliction is the fact that they are all depressed because not only have they lost the potential for many normal and enjoyable human activities. In fact up until the present they pretty well have been converted into lifelong inhabitants of a hospital institution and an institution is an institution, it is virtually a life sentence and has been to this date. I would say that if you really, you know, if you wanted to give him the optimal potential it would be in a home environment in which he had some, in which he had the control of it to the same extent that the rest of us have control over our own homes and dwelling places. I don't really think that any hospital or medical institution has the potential to give someone that same feeling that they are in fact the lords and masters of their own castle."

The Chief Justice noted that Andrews had said he would not live in an institution and the following excerpts from the evidence were quoted [at p. 699]:

> "Q. Tell us, Jim, would you be prepared to live in an auxiliary hospital.
>
> "A. Never.
>
> "Q. Would you elaborate on that?
>
> "A. Well there is just no way that I would go into an auxiliary hospital that is — I don't know, I think that is one step into a grave, that is all it is, too many old folks that have nothing to do but reminisce, you know, I don't know, but just from what I have heard of auxiliary hospitals.
>
> "Q. Well how about other disabled people, do you have any difficulty getting along with them, would you be prepared to live with them, say if they were even younger?
>
> "A. My age?
>
> "Q. Yes.
>
> "A. With my same disability?
>
> "Q. Yes, if you were in some place with people that have disabled problems?
>
> "A. No, because it is the same thing, people get into a state of depression and they throw it on the group, like even now in the hospital like the way it is now there is a group of younger people and, you know, even friction can be created amongst us because of one person's bad day kind of thing, and I wouldn't want to live with other disabled persons, not at all."

I am hesitant to enter upon a detailed analysis of the reasons advanced by the Appellate Division for its decision, but in view of the importance of the matters raised in this litigation, not only for the appellant Andrews but for others in a similar plight, I do not think any other course is open.

Following the passage from the evidence of Andrews which I have quoted, Chief Justice McGillivray said:

> In having a home of his own, it is stated that Andrews needs at least 20 hours a day care. He has to be turned at night every two hours, he has to have constant attention, and it is on this footing that two orderlies and a housekeeper and the cost of operating a three-bedroom home are advanced as being reasonable costs. Now, while the proposition that to the extent that money can do it, a plaintiff should be put into the position he would have been in, but for the accident, this does not mean that the plaintiff does not have to be reasonable and mitigate damage.

With respect, I agree that a plaintiff must be reasonable in making a claim. I do not believe that the doctrine of mitigation of damages, which might be applicable, for example, in an action for conversion of goods, has any place in a personal injury claim. In assessing damages in claims arising out of personal injuries, the ordinary common law principles apply. The basic principle was stated by Viscount Dunedin in *Admiralty Com'rs v. S.S. "Susquehanna"*, [1926] A.C. 655 at p. 661 (cited with approval in *H. West & Son Ltd. v. Shephard*, [1964] A.C. 326 at p. 345), in these words:

> ... the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act ...

The principle was phrased differently by Lord Dunedin in the earlier case of *Admiralty Com'rs v. S.S. "Valeria"*, [1922] 2 A.C. 242 at p. 248, but to the same effect:

> ... in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him.

The principle that compensation should be full for pecuniary loss is well-established: see *McGregor on Damages*, 13th ed. (1972), pp. 738-9, para 1097:

> The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. This is today a clear principle of law.

To the same effect, Kemp & Kemp, *Quantum of Damages*, 3rd ed.(1967), vol. 1, p. 4: "The person suffering the damage is entitled to full compensation for the financial loss suffered." This broad principle was propounded by Lord Blackburn at an early date in *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 at p. 39, in these words:

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

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

Contrary to the view expressed in the Appellate Division of Alberta, there is no duty to mitigate, in the sense of being forced to accept less than real loss. There is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate, and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. But, in a case like the present, where both Courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment. It does not mean that Andrews must languish in an institution which on all evidence is inappropriate for him.

The reasons for judgment of the Appellate Division embodied three observations which are worthy of brief comment. The first [at p. 699]:

> ... it is the choice of the respondent to live in a home of his own, and from the point of view of advancing a claim for damages, it is a most salutary choice, because it is vastly the most expensive.

I am not entirely certain as to what is meant by this observation. If the import is that the appellant claimed a home life for the sole purpose of inflating his claim, then I think the implication is both unfair and unsupported by evidence. There is no doubt upon the medical and other evidence that a home environment would be sa-

lutary to the health of the appellant and productive of good effects. It cannot be unreasonable for a person to want to live in a home of his own.

The next observation [at pp. 699-700]:

> Secondly, it should be observed that in many cases, particularly in Alberta, where damages have been awarded, the persons injured were going to live with their families. Here, the evidence (in spite of the fact that the respondent's mother advanced a claim for $237 which represented a towing charge for the motor-cycle and parking, taxis and bus fare expended on visits to her son in the hospital for approximately a nine-month period prior to the issue of the statement of claim) is that the respondent and his mother were not close before the accident, and matters proceeded on the footing that the mother's natural love and affection should have no part in Andrews' future. Again, this situation is the most expensive from the point of view of the respondent.

The evidence showed that the mother of the appellant James Andrews was living alone, in a second-floor apartment and that relations between Andrews and his mother were strained at times. This should have no bearing in minimizing Andrews' damages. Even if his mother had been able to look after Andrews in her own home, there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis. The second observation is irrelevant.

The third observation was in these words:

> Thirdly, it should be observed that the learned trial Judge has referred with approval to the English authorities which held that full compensation for pecuniary loss must be given. It does not, however, follow that every conceivable expense which a plaintiff may conjure up is a pecuniary loss. On the evidence, then, should this Court consider that Andrews should live in a home of his own for the next 45 years at the expense of the appellant?

I agree that a plaintiff cannot "conjure up" "every conceivable expense". I do not think that a request for home care falls under that rubric.

Each of the three observations seems to look at the matter solely from the point of view of the respondents and the expense to them. An award must be fair to both parties but the ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable.

The Appellate Division relied upon *Cunningham v. Harrison et al.*, [1973] 3 All E.R. 463. In that case, as a result of an accident, the plaintiff was permanently paralyzed in his body and all four limbs. The trial Judge found that the plaintiff was a self-opinionated person who should, if possible, live in some dwelling of his own where he would be looked after by a housekeeper and the persons who did

the nursing. The Court of Appeal held that the plaintiff's entitlement to reasonable expenses for nursing and accommodation appropriate to a normal person should not be increased by reason of his exceptional personality. The Court of Appeal in reducing the award from £72,616 to £59,316, took into account three factors: (i) the difficulty of obtaining a housekeeper and nurses; (ii) that ground floor flats specially designed for handicapped persons were being built in the borough; (iii) that the plaintiff might accept the aid of statutory and voluntary organizations at much less cost. None of these factors is significant in the present case. Although it reduced the award, the Court nevertheless affirmed that the award included provision for a housekeeper and nursing services and also for extra accommodation. The case does not stand for the proposition that though home care is better, it will not be provided because the cost is excessive. In the present case, the Appellate Division asked [at pp. 700-7]:

> If Andrews does have a home of his own, however, should he not so locate that orderly services from existing hospitals could be available to him at night and in the daytime for his hygienic and getting-up periods? Is it to be assumed that in a Province such as Alberta, orderly services could not be given outside the four walls of an institution if the subject of the service is a nearby resident?

The respondents did not raise the possibility about which the Court speculated. There was no evidence as to the feasibility of such a proposal, no evidence as to the availability or cost of outpatient care.

With respect to Andrews' disinclination to live in an institution, the Court commented:

> He might equally say that he would not live in Alberta, as he did not wish to face old friends, or for any other reasons, and that he wished to live in Switzerland or the Bahamas.

Andrews is not asking for a life in Europe or in the Carribean. He asks that he be permitted to continue to live in Alberta and to see his old friends, but in his own home or apartment, not in an institution.

The Court then expressed the view that the standard accepted by the trial Judge was the equivalent of supplying a private hospital. The phrase "private hospital" is both pejorative and misleading. It suggests an extravagant standard of care. The standard sought by the appellant is simply practical nursing in the home. The amount Andrews is seeking is, without question, very substantial, but essentially it means providing two orderlies and a housekeeper. The amount is large because the victim is young and because life is long. He has 45 years ahead. That is a long time.

In reducing the monthly amount to $1,000, the Appellate Division purported to apply a "final test" which was expressed in terms of the expenses that reasonably-minded people would incur,

assuming sufficient means to bear such expense. It seems to me difficult to conceive of any reasonably-minded person of ample means who would not be ready to incur the expense of home care, rather than institutional care, for himself or for someone in the condition of Andrews for whom he was responsible. No other conclusion is open upon the evidence adduced in this case. If the test enunciated by the Appellate Division is simply a plea for moderation then, of course, no one would question it. If the test was intended to suggest that reasonably-minded people would refuse to bear the expense of home care, there is simply no evidence to support that conclusion.

The Appellate Division, seeking to give some meaning to the test, said that it should be open to consider "standards of society as a whole as they presently exist". As instances of such standards the Court selected the daily allowances provided under the *Workmen's Compensation Act* 1973 (Alta.), c. 87, s. 56, and the federal *Pension Act*, R.S.C. 1970, c. P-7, s. 28 [rep. & sub. R.S.C. 1970, c. 22, (2nd Supp.), s. 14(1)]. The standard of care expected in our society in physical injury cases is an elusive concept. What a Legislature sees fit to provide in the cases of veterans and in the cases of injured workers and the elderly is only of marginal assistance. The standard to be applied to Andrews is not merely "provision", but "compensation", *i.e.*, what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care. If there were severe mental impairment, or in the case of an immobile quadriplegic, the results might well be different; but, where the victim is mobile and still in full control of his mental faculties, as Andrews is,it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better.

Other points raised by the Appellate Division in support of its reversal of the trial Judge, may be briefly noted [at p. 704]: (i) "It seems to me probable that there will be, at Government expense, people employed to look after quadriplegics. In the United States, there are now a few institutions which have special apartments as part of the hospital setting, where patients can receive attention and, at the same time, have privacy." There is no evidence that the Government of Alberta at present has any plans to provide special care or institutions for quadriplegics. Any such possibility is speculation. (ii) ". . . will the respondent, in fact, operate a home of his own?" The Court expressed the fear that Andrews would take the award, then go into an auxiliary hospital and have the public pay. It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it.

That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes. Financial advice is readily available. He has the flexibility to plan his life and to plan for contingencies. The preference of our law to date has been to leave this flexibility in the plaintiff's hands: see Fleming, "Damages: Capital or Rent?", 19 U. of Toronto L.J. 295 (1969). Save for infants and the mentally incompetent, the Courts have no power to control the expenditure of the award. There is nothing to show that the dangers the Appellate Division envisaged have any basis in fact.

In its conclusion, the Appellate Division held that the damages awarded by the trial judge were "unreasonably and unrealistically high" and an award which would result in the appellant receiving approximately $1,000 a month for cost of care would be entirely adequate and would constitute a generous award. The Appellate Division further reduced the award by 30% for potential contingencies. Why $1,000? The main issue at trial was the choice between home care and institutional care. There is no question but that Andrews could be taken care of in an auxiliary hospital, but both Courts below concluded that home care was the appropriate standard. The trial Judge made an award reflecting the cost of home care. The Appellate Division made an award related to neither home care nor institutional care. The effect is to compel a youthful quadriplegic to live the rest of his life in an auxiliary hospital. In my opinion, the Appellate Division failed to show that the trial Judge applied any wrong principle of law or that the overall amount awarded by him was a wholly erroneous estimate of the damage. With great respect, the irrelevant considerations which the Appellate Division took into account were errors in law.

Is it reasonable for Andrews to ask for $4,135 per month for home care? Part of the difficulty of this case is that 24-hour orderly care was not directly challenged. Counsel never really engaged in consideration of whether, assuming home care, such care could be provided at lesser expense. Counsel wants the Court, rather, to choose between home care and auxiliary hospital care. There are unanimous findings below that home care is better. Although home care is expensive, auxiliary hospital care is so utterly unattractive and so utterly in conflict with the principle of proper compensation that this Court is offered no middle ground.

The basic argument, indeed the only argument, against home care is that the social cost is too high. In these days the cost is distributed through insurance premiums. In this respect, I would adopt what was said by Salmon, L.J., in *Fletcher v. Autocar & Transporters, Ltd.*, [1968] 1 All E.R. 726 at 750, where he stated:

> Today, however, virtually all defendants in accident cases are insured. This

> certainly does not mean compensation should be extravagant, but there is no reason why it should not be realistic. . . . It might result in some moderate increase in premium rates, which none would relish, but of which no-one, in my view, could justly complain. It would be monstrous to keep down premiums by depressing damages below their proper level, i.e., a level which ordinary men would regard as fair—unprejudiced by its impact on their own pockets.

I do not think the area of future care is one in which the argument of the social burden of the expense should be controlling, particularly in a case like the present, where the consequences of acceding to it would be to fail in large measure to compensate the victim for his loss. Greater weight might be given to this consideration where the choice with respect to future care is not so stark as between home care and an auxiliary hospital. Minimizing the social burden of expense may be a factor influencing a choice between acceptable alternatives. It should never compel the choice of the unacceptable.

(ii) *Life expectancy.* At trial, figures were introduced which showed that the life expectancy of 23-year-old persons in general is 50 years. As Chief Justice McGillivray said in the Appellate Division, it would be more useful to use statistics on the expectation of life of quadriplegics. A statistical average is helpful only if the appropriate group is used. At trial, Dr. Weir and Dr. Gingras testified that possibly five years less than normal would be a reasonable expectation of life for a quadriplegic. The Appellate Division accepted this figure. On the evidence I am willing to accept it.

(iii) *Contingencies of life.* The trial Judge did, however, allow a 20% discount for "contingencies and hazards of life". The Appellate Division allowed a further 10% discount. It characterized the trial Judge's discount as being for "life expectancy" or "duration of life", and said that this ignored the contingency of "duration of expense", *i.e.*, that despite any wishes to the contrary, Andrews in the years to come may be obliged to spend a great deal of time in hospital for medical reasons or because of the difficulty of obtaining help. With respect, the Appellate Division appears to have misunderstood what the trial Judge did. The figure of 20% as a discount for contingencies was arrived at first under the heading of "Prospective Loss of Earnings" and then simply transferred to the calculation of "Costs of Future Care". It was not an allowance for a decreased life expectancy, for this had already been taken into account by reducing the normal 50-year expectancy to 45 years. The "contingencies and hazards of life" in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings, such as unemployment, accident, illness. They are not merely to be added to the latter so as to achieve a cumulative result. Thus, so far as the action taken by the Appellate Division is concerned, in

my opinion, it was an error to increase by an extra 10% the contingency allowance of the trial Judge.

This whole question of contingencies is fraught with difficulty, for it is in large measure pure speculation. It is a small element of the illogical practice of awarding lump-sum payments for expenses and losses projected to continue over long periods of time. To vary an award by the value of the chance that certain contingencies may occur is to assure either over-compensation or under-compensation, depending on whether or not the event occurs. In light of the considerations I have mentioned, I think it would be reasonable to allow a discount for contingencies in the amount of 20%, in accordance with the decision of the trial Judge.

(iv) *Duplication with compensation for loss of future earnings.* It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.

When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings, *i.e.*, the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse, *i.e.*, to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

The trial judge took the first approach, reducing loss of future earnings by 53%. The Appellate Division took the second. In my opinion, the approach of the trial Judge is to be preferred. This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included. The costs of necessaries when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings. For the acceptability of this method of proceeding

see the judgment of this Court in *The Queen v. Jennings* (1966), 57 D.L.R. (2d) 644 at pp. 651-2, [1966] S.C.R. 532 at pp. 540-1; affirming 50 D.L.R. (2d) 385 at p. 418, [1965] O.R. 285, *sub nom. Jennings v. Crousberry et al.*, and also *Bisson v. District of Powell river* (1967), 66 D.L.R. (2d) 226 at pp. 239-40, 62 W.W.R. 707 at pp. 720-1.

(v) *Cost of special equipment.* In addition to his anticipated monthly expenses, Andrews requires an initial capital amount for special equipment. Both Courts below held that $14,200 was an appropriate figure for the cost of this equipment. In my opinion, this assessment is correct in principle, and I would therefore accept it.

(b) *Prospective loss of earnings*

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity of which compensation must be made: *The Queen v. Jennings, supra.* A capital asset has been lost: what was its value?

(i) *Level of earnings.* The trial Judge fixed the projected level of earnings of Andrews at $830 per month, which would have been his earnings on January 1, 1973. The Appellate Division raised this to $1,200 per month, a figure between his present salary and the maximum for his type of work of $1,750 per month. Without doubt the value of Andrews' earning capacity over his working life is higher than his earnings at the time of the accident. Although I am inclined to view even that figure as somewhat conservative, I would affirm the holding of the Appellate Division that $1,200 per month represents a reasonable estimate of Andrews' future average level of earnings.

(ii) *Length of working life.* Counsel for the appellants objected to the use of 55 rather than 65 as the projected retirement age for Andrews. It is agreed that he could retire on full pension at 55 if he stayed with his present employer, Canadian National Railways. I think it is reasonable to assume that he would, in fact, retire as soon as it was open for him to do so on full pension.

One must then turn to the mortality tables to determine the working life expectancy for the appellant over the period between the ages of 23 and 55. The controversial question immediately arises whether the capitalization of future earning capacity should be based on the expected working life span prior to the accident, or the shortened life expectancy. Does one give credit for the "lost years"? When viewed as the loss of a capital asset consisting of income-earning capacity rather than a loss of income, the answer is apparent: it must be the loss of that capacity which existed prior to the accident. This is the figure which best fulfils the principle of

compensating the plaintiff for what he has lost: see *Mayne and McGregor on Damages*, 12th ed. (1961), p. 659; Kemp & Kemp, *Quantum of Damages*, 3rd ed., vol. 1 (Supp.), c. 3, p. 28; *Skelton v. Collins* (1966), 39 A.L.J.R. 480. In the instant case, the trial Judge refused to follow the *Oliver et al. v. Ashman*, [1962] 2 Q.B. 210, approach, the manifest injustice of which is demonstrated in the much-criticized case of *McCann v. Sheppard*, [1973] 1 W.L.R. 540, and in this I think the judge was right. I would accept his decision that Andrews had a working life expectancy of 30.81 years.

(iii) *Contingencies*. It is a general practice to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents and business depression. In the *Bisson* case, which also concerned a young quadriplegic, an allowance of 20% was made. There is much support for the view that such a discount for contingencies should be made: see, *e.g.*, *Warren et al. v. King*, [1963] 3 All E.R. 521; *McKay et al. v. Board of Govan School Unit No. 29 of Saskatchewan* (1968), 68 D.L.R. (2d) 519, [1968] S.C.R. 589, 64 W.W.R. 301. There are, however, a number of qualifications which should be made. First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse, as the above list would appear to indicate. As is said in *Bresatz v. Przibilla* (1962), 108 C.L.R. 541, in the Australian High Court, at p. 544: "Why count the possible buffets and ignore the rewards of fortune?" Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small: see J. H. Prevett, "Actuarial Assessment of Damages: The Thalidomide Case — I", 35 Mod. L. Rev. 140 at p. 150 (1972).

In reducing Andrews' award by 20% Mr. Justice Kirby gives no reasons. The Appellate Division also applied a 20% reduction. It seems to me that actuarial evidence could be of great help here. Contingencies are susceptible to more exact calculation than is usually apparent in the cases; see Traversi, "Actuaries and the Courts", 29 Aust. Law. Jo. 557 (1956). In my view, some degree of specificity, supported by evidence, ought to be forthcoming at trial.

The figure used to take account of contingencies is obviously an arbitrary one. The figure of 20% which was used in the lower Courts (and in many other cases), although not entirely satisfactory, should, I think, be accepted.

(iv) *Duplication of the cost of future basic maintenance*. As discussed, since basic needs such as food, shelter, and clothing have

been included in the cost of future care, a deduction must be made from the award for prospective earnings to avoid duplication. The injured person would have incurred expenses of this nature even if he had not suffered the injury. At trial evidence was given that the cost of basics for a person in the position of Andrews prior to the accident would be approximately 53% of income. I would accept this figure and reduce his anticipated future monthly earnings accordingly to a figure of $564.

(c) *Considerations relevant to both heads of pecuniary loss*

(i) *Capitalization rate: allowance for inflation and the rate of return on investments*. What rate of return should the Court assume the appellant will be able to obtain on his investment of the award? How should the Court recognize future inflation? Together these considerations will determine the discount rate to use in actuarially calculating the lump sum award.

The approach at trial was to take as a rate of return the rental value of money which might exist during periods of economic stability, and consequently to ignore inflation. This approach is widely referred to as the Lord Diplock approach, as he lent it his support in *Mallett v. McMonagle*, [1970] A.C. 166. Although this method of proceeding has found favour in several jurisdictions in this country and elsewhere, it has an air of unreality. Stable, non-inflationary economic conditions do not exist at present, nor did they exist in the recent past, nor are they to be expected in the foreseeable future. In my opinion, it would be better to proceed from what known factors are available rather than to ignore economic reality. Analytically, the alternate approach to assuming a stable economy is to use existing interest rates and then make an allowance for the long-term expected rate of inflation. At trial the expert actuary, Mr. Grindley, testified as follows:

> Yes, as I mentioned yesterday, I was comfortable with that assumption 5% interest because it produces the same result as for example 8% interest and 3% inflation.
>
> . . . . . .
>
> I would be happy to use either of the following two packages of assumption, either an 8% interest rate combined with provision for amounts which would increase 3% in every year in the future or a 5% interest rate and level amount, level amounts, that is no allowance for inflation.

One thing is abundantly clear: present interest rates should not be used with no allowance for future inflation. To do so would be patently unfair to the plaintiff. It is not, however, the level of inflation in the short term for which allowance must be made, but that predicted over the long term. It is this expectation which is built into present interest rates for long-term investments. It is also this level of inflation which may at present be predicted to operate over the lifetime of the plaintiff to increase the cost of care

for him at the level accepted by the Court, and to erode the value of the sum provided for lost earning capacity.

In *Bisson v. District of Powell River*, *supra*, the British Columbia Court of Appeal held that there had been a misdirection, or non-direction amounting to misdirection, in the trial Judge's charge to the jury with respect to quantum of damages for the plaintiff's personal injuries. Bull, J.A., listed several instances of misdirection, including failure to instruct the jury that although they might give some thought to possibilities of future inflation, it was wrong to include any built-in inflation factors in the actuarial calculations with respect to the sums for future care and loss of prospective earnings. An appeal to this Court was dismissed (68 D.L.R. (2d) 765*n*, [1968] S.C.R. (v), (1968), 64 W.W.R. 768), Cartwright, C.J.C., giving short oral reasons as follows:

> We are all of opinion that the Court of Appeal [66 D.L.R. (2d) 226, 62 W.W.R. 707] were right in holding that they were justified in setting aside the assessment of damages made by the jury. In such circumstances they had jurisdiction under Rule 36 of the British Columbia Court of Appeal Rules to reduce the damages instead of ordering a new trial. We find ourselves unable to say that in fixing the amount of damages the Court of Appeal erred in principle or that the figure at which they arrived was such as to represent a wholly erroneous estimate.

In my opinion, this cannot be taken as an express endorsement by this Court of the method of calculation expressed by Bull, J.A. When discussing this issue, Bull, J.A., stated that the correct procedure was to use a capitalization rate of 5% or 6%, since there was evidence that 6% was a normal and available rate of return on first-class securities, and not to build in any inflation rate at all. With respect, I cannot understand how thought is to be given to the possibility of inflation in calculating the award if no inflation factor is to be built into the calculation of the award. In his judgment, Bull, J.A., further states, at p. 242 D.L.R., p. 723 W.W.R.:

> If inflationary trends appear, it may well be that the use to which the money is put, whatever it may be, will itself increase its own amount as part of an inflationary process. It is well known that interest rates, or the "wages" of money, rise in times of inflation.

One might offer two comments: First, the words "If inflationary trends appear" reflect economic conditions in 1967 when serious inflation was only on the horizon. During the past ten years, inflation has become one of the most serious Canadian problems. This Court, in *Reference re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452, [1976] 2 S.C.R. 373, 9 N.R. 541, recognized the *Anti Inflation Act*, 1974-75 (Can.), c. 75, as a measure necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole. Second, the passage immediately above-quoted accepts the proposition that interest rates or the "wages" of money rise in times of inflation. This rise is attributable, at least in part, to

the erosion of the dollar. Accepting the highly unlikely proposition that the appellant will be able to invest for the balance of his lifetime at current high rates the capital sum awarded to him, this investment will provide him with a constant number of dollars each year, but the services which those dollars will provide will become more costly by the year. If current high interest rates abate with a reduction of inflationary pressures and return, say, to the 1967 rates of 5% or 6%, it is obvious that reinvestment from time to time in later years of the equities or fixed income securities comprising the capital sum will be at rates which fall far short of those at present available. Then, even the number of dollars the appellant gets will be less than *even the present cost of care*. With respect, the economic analysis in *Bisson* proceeds on the erroneous basis that the cost of services decreases as the rate of inflation decreases. On the contrary, a decrease in the rate of inflation merely results in a lower rate of increase in the cost of these services.

In *Schroth et al. v. Innes et al.* (1976), 71 D.L.R. (3d) 647, [1976] 4 W.W.R. 225, Bull, J.A., delivering the judgment of the Court, repeated his views on this matter. Again, the relevance of inflation was recognized in principle but was excluded from the calculation of the award. At p. 657 D.L.R., p. 236 W.W.R., Bull, J.A., states, "... it is today's money to which the respondent Shiels is entitled in damages". With respect, we are not concerned only with today's money. The real concern is in determining what that money will provide in the way of services over the next 45 years.

Bull, J.A., voiced his disapproval of any recognition for inflation, whether by building in an inflation factor while using current rates of return, or by using a hypothetical "stable state". The learned Judge attempted to refute the conclusion that inflation should be included. He said, at pp. 659-60 D.L.R., p. 239 W.W.R.:

> With the greatest deference, I do not agree with the basic premises of those conclusions. To me what was really said was that current interest rates, much higher than those prevailing in the old days of the so-called "stable economy", exist only because of an existing inflated economy and of current fear of future inflation; and hence should not be used unless future inflation estimates or factors are fed into the computer also. That may well be so in England but I am not prepared to accede to that proposition with respect to this country. I think it general knowledge that interest rates in Canada for many years have reached higher levels because of the desire and need to attract new capital from abroad to create and service our expanding industrial and commercial economy. But I content myself with saying that I am satisfied that the current high rates of interest (which have been with us for years with only modest variations up and down) reflect today the present value of already inflated money in exactly the same way as do current high wages and prices generally. They live together, and the use of a high level of wages as one side of the coin and a low level of interest for the other is, in my respectful view, wrong.

In my opinion, this analysis is manifestly in error. Fear of future inflation is not confined to England. It is such as to have consti-

tuted a national emergency in this country. The current high rates of interest do not merely reflect the present value of already inflated money. They reflect the present expectation of *future* inflation. This is not the only factor which determines the existing interest rate, but it is without doubt one of the major factors. In my opinion, recognition of this fact must be made in the calculations of a damage award.

The approach which I would adopt, therefore, is to use present rates of return on long-term investments and to make some allowance for the effects of future inflation. Once this approach is adopted, the result, in my opinion, is different from the 5% discount figure accepted by the trial Judge. While there was much debate at trial over a difference of a half to one percentage point, I think it is clear from the evidence that high quality long-term investments were available at time of trial at rates of return in excess of 10%. On the other hand, evidence was specifically introduced that the former head of the Economic Council of Canada, Dr. Deutsch, had recently forecast a rate of inflation of 3½% over the long-term future. These figures must all be viewed flexibly. In my opinion, they indicate that the appropriate discount rate is approximately 7%. I would adopt that figure. It appears to me to be the correct result of the approach I have adopted, *i.e.*, having regard to present investment market conditions and making an appropriate allowance for future inflation. I would, accordingly, vary to 7% the discount rate to be used in calculating the present value of the awards for future care and loss of earnings in this case. The result in future cases will depend upon the evidence adduced in those cases.

(ii) *Allowance for tax.* In *The Queen v. Jennings, supra*, this Court held that an award for prospective income should be calculated with no deduction for tax which might have been attracted had it been earned over the working life of the plaintiff. This results from the fact that it is earning capacity and not lost earnings which is the subject of compensation. For the same reason, no consideration should be taken of the amount by which the income from the award will be reduced by payment of taxes on the interest, dividends, or capital gain. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.

In contrast with the situation in personal injury cases, awards under the *Fatal Accident Act*, R.S.A. 1970, c. 138, should reflect tax considerations, since they are to compensate dependants for the loss of support payments made by the deceased. These support payments could only come out of take-home pay, and the payments from the award will only be received net of taxes: see the contemporaneous decision of this Court in *Keizer v. Hanna et al.* (1978), 82 D.L.R. (3d) 449.

The impact of taxation upon the income from the capital sum for future care is mitigated by the existence of s. 110(1)(*c*)(iv.1) [enacted 1973-74, c. 14, s. 35] of the *Income Tax Act*, R.S.C. 1952, c. 148 (as amended by 1970-71-72, c. 63), in respect of the deduction of medical expenses, which provides that medical expenses in excess of 3% of the taxpayer's income includes "remuneration for one full-time attendant upon an individual who was a taxpayer ... in a self-contained domestic establishment in which the cared for person lived". This exemption, I should think, permits a deduction for the payment of one full-time attendant for seven days a week, regardless of whether this attendance is provided by several attendants working over 24-hour periods, or one person working 24-hour shifts seven days a week.

The exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with the political winds. What concerns us here is whether some allowance must be made to adjust the amount assessed for future care in light of the reduction from taxation. No such allowance was made by the Courts below. Elaborate calculations were provided by the appellant to give an illusion of accuracy to this aspect of the wholly speculative projection of future costs. Because of the provision made in the *Income Tax Act* and because of the position taken in the Alberta Courts, I would make no allowance for that item. The Legislature might well consider a more generous income tax treatment of cases where a fund is established by judicial decision and the sole purpose of the fund is to provide treatment or care of an accident victim.

One subsidiary point should be affirmed with respect to the determination of the present value of the cost of future care. The calculations should provide for a self-extinguishing sum. To allow a residual capital amount would be to over-compensate the injured person by creating an estate for him. This point was accepted by the lower Courts and not challenged by the parties.

2. NON-PECUNIARY LOSSES

Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. 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. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No

money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the Courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

It is also the area where there is the clearest justification for moderation. As one English commentator has suggested, there are three theoretical approaches to the problem of non-pecuniary loss (A. J. Ogus, "Damages for Lost Amenities: For a Foot, a Feeling or a Function?", 35 Mod. L. Rev. 1 (1972)). The first, the "conceptual" approach, treats each faculty as a proprietary asset with an objective value, independent of the individual's own use or enjoyment of it. This was the ancient "bot", or tariff system, which prevailed in the days of King Alfred, when a thumb was worth 30 shillings. Our law has long since thought such a solution unsubtle. The second, the "personal" approach, values the injury in terms of the loss of human happiness by the particular victim. The third, or "functional" approach, accepts the personal premise of the second, but rather than attempting to set a value on lost happiness, it attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune". "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will 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. As Windeyer, J., said in *Skelton v. Collins*, *supra*, at p. 495:

> ... he is, I do not doubt, entitled to compensation for what he suffers. Money may be compensation for him if having it can give him pleasure or satisfaction ... But the money is not then a recompense for a loss of something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.

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.

However one may view such awards in a theoretical perspective, the amounts are still largely arbitrary or conventional. As Lord Denning, M.R., said in *Ward v. James*, [1965] 1 All E.R. 563, there is a great need in this area for assessability, uniformity and predictability. In my opinion, this does not mean that the courts should not have regard to the individual situation of the victim. On the contrary, they must do so to determine what has been lost. 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. But there should be guidelines for the translation into monetary terms of what has been lost. There must be an exchange rate, albeit conventional. In *Warren v. King*, *supra*, at p. 528 the following dictum of Harman, L.J., appears, which I would adopt, in respect of the assessment of non-pecuniary loss for a living plaintiff:

> It seems to me that the first element in assessing such compensation is not to add up items as loss of pleasures, of earnings, of marriage prospects, of children and so on, but to consider the matter from the other side, what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances.

Cases like the present enable the Court to establish a rough upper parameter on these awards. It is difficult to conceive of a person of his age losing more than Andrews has lost. Of course, the figures must be viewed flexibly in future cases in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic conditions.

The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss, but variation should not be made merely for the Province in which he happens to live.

There has been a significant increase in the size of awards under this head in recent years. As Moir, J.A., of the Appellate Division of the Alberta Supreme Court, has warned: "To my mind, damages under the head of loss of amenities will go up and up until they are stabilized by the Supreme Court of Canada": *Hamel et al. v. Prather et al.* (1976), 66 D.L.R. (3d) 109 at p. 127, [1976] 2 W.W.R. 742 at p. 748. In my opinion, this time has come.

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.

There is an extensive review of authorities in the Court of Appeal judgment in this case as well as in the *Thornton* and *Teno* cases, *supra*, to which I have referred. I need not review these past authorities. What is important is the general picture. It is clear that until very recently damages for non-pecuniary losses, even from very serious injuries such as quadriplegia, were substantially below $100,000. Recently, though, the figures have increased markedly. In *Jackson v. Millar et al.* (1975), 59 D.L.R. (3d) 246, [1976] 1 S.C.R. 225, this Court affirmed a figure of $150,000 for non-pecuniary loss in an Ontario case of a paraplegic. However, this was done essentially on the principle of non-interference with awards allowed by provincial Courts of Appeal. The need for a general assessment with respect to damages for non-pecuniary loss, which is now apparent, was not as evident at that time. Even in Ontario, prior to these recent cases, general damages allocable for non-pecuniary loss, such as pain and suffering and loss of amenities, were well below $100,000.

In the present case, $150,000 was awarded at trial, but this amount was reduced to $100,000 by the Appellate Division. In *Thornton* and *Teno* $200,000 was awarded in each case, unchanged in the provincial Courts of Appeal.

I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of $100,000. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.

TOTAL AWARD

This is largely a matter of arithmetic. Of course, in addition, it is

customary for the Court to make an overall assessment of the total sum. This, however, seems to me to be a hangover from the days of global sums for all general damages. It is more appropriate to make an overall assessment of the total under each head of future care, prospective earnings, and non-pecuniary loss, in each case in light of general considerations such as the awards of other Courts in similar cases and an assessment of the reasonableness of the award.

In the result I would assess general damages for the appellant Andrews as follows:

1. PECUNIARY LOSS	
(a) *Cost of future care*	
— special equipment	$ 14,200
— amount for monthly payments (monthly amount $4,135; life expectancy 45 years; contingencies 20%; capitalization rate 7%)	557,232
(b) *Prospective loss of earnings* (monthly amount $564; work span 30.81 years; contingencies 20%; capitalization rate 7%)	69,981
2. NON-PECUNIARY LOSS	
— compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life	100,000
Total General Damages	$741,413
Rounded off at	$740,000

To arrive at the total damage award, the special damages of $77,344 must be added to give a final figure of $817,344.

The appellant Andrews will have judgment for 75% of that amount, that is, $613,008.

The appellants should have their costs in this Court and in the trial Court. The respondents should have their costs in the Court of Appeal as they achieved substantial success in that Court in respect of the finding of contributory negligence on the part of Andrews.

Appeal allowed; judgment varied.

2

Section 23(1) reads:

> 23(1) Every lien for which a claim is registered ceases to exist on the expiration of ninety days after the work has been completed or the materials have been placed or furnished, or after the expiry of the period of credit, where such period is mentioned in the registered claim for lien, unless in the meantime an action is commenced to realize the claim or in which a subsisting claim may be realized, and a certificate is registered as provided by section 22.

It is admitted that no action has been brought within the period stipulated for bringing such an action in s. 23(1) and, of course, that no certificate of action has been registered.

The appellant referred the Court to s. 25(3) of the *Mechanics' Lien Act*, which reads:

> 25(3) Notwithstanding sections 22 and 23, where an order to vacate the registration of a lien is made under clause *a* or *b* of subsection 2, the lien does not cease to exist for the reason that no certificate of action is registered.

It is quite true that the order of Judge Maedel did direct under s. 25(2)(*b*) of the *Mechanics' Lien Act*, that the claim for lien, which had been registered, was to be vacated and so the appellant does fall within and should receive the benefits of s. 25(3) of the *Mechanics' Lien Act*. However, s. 25(3) only relieves the appellant from the obligation of registering a certificate of action. It does not relieve the appellant from the necessity of bringing an action within the time prescribed in s. 23(1).

Accordingly, it is our view that since the appellant has not brought an action within the time stipulated for in the *Mechanics' Lien Act*, he has lost all right to maintain a mechanics' lien action and his right to a lien, if any, has ceased to exist quite apart from the order made by His Honour Judge Maedel. So far as the point raised in the appeal is concerned, we express no view in that regard, feeling that it is unnecessary to do so in this case.

For the reasons given, the appeal is dismissed with costs.

Appeal dismissed.

ARNOLD et al. v. TENO et al.

Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz, and de Grandpré, JJ. January 19, 1978.

Negligence — Duty of care — Children buying ice-cream from truck — Obligation of owner and driver to children.

Negligence — Standard of care — Mother allowing young children to cross street to buy ice-cream — Whether mother used reasonable care in circumstances.

The infant plaintiff, just over four-and-a-half years old, having bought ice-cream from an ice-cream truck parked at the curb, dashed into the street and was struck by a passing car. The trial Judge held the driver and owner of the car and the driver and owner of the truck liable in negligence to the plaintiffs. In addition, he dismissed defendants' claim against plaintiff mother for contribution or indemnity. An appeal by the defendants to the Court of Appeal was allowed in part. The defendants' appeal against liability was dismissed. However, defendants' claim against the mother for contribution was allowed, and the damages awarded to the infant plaintiff were reduced. The driver and the owner of the ice-cream truck appealed to the Supreme Court of Canada both as to their liability and the quantum of damages. The driver and the owner of the car appealed only against the quantum of damages resisting the appeal of the other defendants as to liability. The mother appealed the granting of contribution against her. *Held*, the appeal of the driver and owner of the ice-cream truck as to liability should be dismissed. The appeals as to the quantum of damages should be allowed and the damages awarded to the plaintiffs should be reduced. The mother's appeal should be allowed and the defendants' claim against her for contribution should be dismissed. All four defendants should be liable for the full amount of the damages. As between the driver and owner of the car and the driver and owner of the ice-cream truck there should be contribution of 50%.

The driver of the ice-cream truck was untrained. He was an 18- or 19-year-old student who had been working for about six weeks after reading a manual said to be inapplicable at least in part to the vehicle which he operated and who had had a part of a day's instruction by a supervisor. The supervisor seemed mostly concerned not with safety but with efficient merchandising. After serving the infant plaintiff, the driver then turned to serve her brother. At that time the car was some distance behind the truck. Had the driver of the truck looked through the large glass windows at the rear of his truck, he could not have failed to see that the two children, and particularly the little girl whom he had just served, would be in imminent danger of being struck when they returned to their home on the other side of the street. His failure to take the slightest precaution of looking through his rear window in order to protect his little customers was enough to attach liability to him. The failure to warn them or either one of them before they started to return across the boulevard of the danger which could arise from other cars was also negligence. In fact, permitting the children to cross the street at all in order to purchase might well be considered negligence. The owner of the ice-cream truck was vicariously liable for the driver's negligence.

The liability of the mother to contribute must be considered in the light of the accepted standard of care by parents generally in the community. She was a mother of four young children and was speaking to her husband on the telephone at the time. She was interrupted by the two youngest crying for money to buy ice-cream from a vehicle designed to attract if not to entice young children. The children had been used to buying confections from the same kind of dealer, if not the same dealer, previously. The children had both received very strong instructions as to how they should behave in reference to crossing the street and, in fact, had crossed the

street for that very purpose on other occasions. The mother specifically reminded the children on this very occasion to "watch out for cars". It could not be said that the mother, who permitted her children to cross that quiet residential street to buy wares from the ice-cream truck as they and the other children in the neighbourhood had been accustomed to do, was contributorily negligent. This conclusion does not put a higher standard of care on the defendants than on the mother. The standard of care put on the mother is properly the standard of mothers in the immediate community on the approach of this ice-cream truck which was designed to attract even children of tender years. The mothers were entitled to rely on the vendor of the ice-cream to exercise some care toward the children attracted by the vehicle.

Per Spence, J., Laskin, C.J.C., Judson and Dickson, JJ., concurring: The owner of the ice-cream truck caused it to be designed for the purpose of selling ice-cream products on the streets. The design of the vehicle, its appearance, and the appearance of the products dispensed were clearly calculated to attract small children to purchase the wares dispensed from the vehicle. The driver of the vehicle was instructed that he should dispense those wares from the vehicle. While the owner is entitled to carry on its business, it must carry it on with ordinary regard for the safety of others inevitably, and therefore foreseeably, involved in the operation of that business. As soon as the owner put the ice-cream truck in operation on the streets it put itself in such a relationship with its children patrons that it became the "neighbour" of those children and was required to take reasonable care to avoid acts or omissions which he could reasonably foresee would likely to injure them. When the company attracted the patronage of children of pre-school age with little ability to comprehend danger and none to read, failing to take proper steps to see that these children were not subjected to the danger of traffic accidents was to fail to do what anyone with the slightest common sense would have done. If the owner of the ice-cream truck could not carry on its business profitably and safely without a second attendant in the truck then the company should not have been carrying on the business in that fashion.

Per Pigeon, J., Martland, Ritchie and Beetz, JJ., concurring: The owner of the ice-cream truck was not negligent in the manner in which it carried on its business. The law does not impose a duty to take all possible safety precautions. While a two-man operation would have been safer, it would also have been economically unfeasible. The general opinion among municipal authorities clearly was that the one-man operation was unreasonable. The parents of the children also so considered it by giving their children money to buy ice-cream from the vending truck rather than objecting to the operation. The parents acted reasonably. They were entitled to expect that the truck operator would not fail to watch for oncoming traffic and to warn the children against imprudently crossing the street in front of the truck. The parents were also entitled to expect that automobile drivers would not pass such trucks without taking the special precautions called for. What the parents considered reasonably safe should not be considered a "folly" on the part of the ice-cream vending company.

Per de Grandpré, J., dissenting in part: The mother was negligent. If an ice-cream merchant is responsible to his young customers because his employee failed to take the reasonable care owed to a child who had become his "neighbour", the mother, in the circumstances of this case, could not be in a better position. The duty of care resting on a parent is a parmount one and does not come to an end because a third party comes into the picture and is found to have been negligent for having allowed the child to cross the street and for having failed to warn that child of an approaching car. The mother, who had just given to her two young children the money to buy ice-cream and who knew that the truck was on the other side of the boulevard, could not be said to be under a lesser duty than that resting on the merchant's employee.

[*Robins v. National Trust Co., Ltd.*, [1927] 2 D.L.R. 97, [1927] A.C. 515, [1927] 1 W.W.R. 692, apld; *Bressington v. Com'r of Railways* (1947), 75 C.L.R. 339, distd; *Godfrey et al. v. Gadbois et al.*, [1949] 4 D.L.R. 844, [1949] O.W.N. 635; *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; *Home Office v. Dorset Yacht Co. Ltd.*, [1970] A.C. 1004; *Jordon House Ltd. v. Menow and Housberger* (1973), 38 D.L.R. (3d) 105, [1974] S.C.R. 239; *Gambino et al. v. DiLeo et al.* (1970), 17 D.L.R. (3d) 167, [1971] 2 O.R. 131; *Beckerson and Beckerson v. Dougherty*, [1953] 2 D.L.R. 498, [1953] O.R. 303; *Pedlar v. Toronto Power Co.* (1913), 15 D.L.R. 684, 29 O.L.R. 527; *Cowle and Cowle v. Filion* (1956), 6 D.L.R. (2d) 258, [1956] O.W.N. 881; *McCallion v. Dodd et al.*, [1966] N.Z.L.R. 710; *T. Eaton Co. Ltd. of Montreal v. Moore*, [1951] 2 D.L.R. 529, [1951] S.C.R. 470; *Cavanagh v. Ulster Weaving Co. Ltd.*, [1960] A.C. 145, refd to]

Damages — Personal injuries — Severe physical and mental disability — Very young child — Assessment of general damages.

[*Andrews et al. v. Grand & Toy Alberta Ltd. et al.* (1974), 54 D.L.R. (3d) 85, [1974] 5 W.W.R. 675; vard 64 D.L.R. (3d) 663, [1976] 2 W.W.R. 385; revd *ante*, p. 452; *The Queen v. Jennings* (1966), 57 D.L.R. (2d) 644, [1966] S.C.R. 532, folld; *British Transport Com'n v. Gourley*, [1956] A.C. 185; *Mallett v. McMonagle*, [1970] A.C. 166, disaprvd; *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.* (1975), 57 D.L.R. (3d) 438, [1975] 3 W.W.R. 622; vard 73 D.L.R. (3d) 35, [1976] 5 W.W.R. 240; revd *ante*, p. 480; *Taylor v. O'Connor*, [1971] A.C. 115; *Taylor v. Bristol Omnibus Co. Ltd.*, [1975] 2 All E.R. 1107; *Warren et al. v. King*, [1963] 3 All E.R. 521, refd to]

APPEALS by the defendants and CROSS-APPEAL by plaintiff mother as to contribution awarded against her from a judgment of the Ontario Court of Appeal, 67 D.L.R. (3d) 9, 11 O.R. (2d) 585, varying a judgment of Keith, J., 55 D.L.R. (3d) 57, 7 O.R. (2d) 276, in favour of the plaintiffs in an action for damages for personal injuries.

Appeal re damages:

Brendan O'Brien, Q.C., for appellants, J.B. Jackson Ltd. and Stuart Galloway.

R. E. Barnes, Q.C., and *J. A. Bear*, for appellants, Wallace Arnold and Brian Arnold.

Earl A. Cherniak, Q.C., *Martin H. Wunder*, Q.C., and *M. A. Sanderson*, for respondent, Diane Marie Teno.

Appeal as to liability:

Brendan O'Brien, Q.C., for appellants, J.B. Jackson Ltd. and Stuart Galloway.

B. A. Percival, Q.C., and *M. S. Kaczkowski*, for appellants, Yvonne Teno et al.

Earl A. Cherniak, Q.C., *Martin H. Wunder*, Q.C., and *M.A. Sanderson*, for respondent, Diane Marie Teno.

R. E. Barnes, Q.C., and *J. A. Bear*, for respondents, Wallace Arnold and Brian Arnold.

LASKIN, C.J.C., concurs with SPENCE, J.

MARTLAND, J., concurs with PIGEON, J.

JUDSON, J., concurs with SPENCE, J.

RITCHIE, J., concurs with PIGEON, J.

SPENCE J.:—These are my reasons for judgment in these appeals. Taken together, these three appeals are grouped as one of a series of four cases in which this Court was concerned with the quantum of damages to be awarded for very serious personal injuries. In two, *Andrews et al. v. Grand & Toy Alberta Ltd. et al.* (1974), 54 D.L.R. (3d) 85, [1974] 5 W.W.R. 675 (Alta. S.C.T.D.); varied 64 D.L.R. (3d) 663, [1976] 2 W.W.R. 385 (App. Div.), and *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.* (1975), 57 D.L.R. (3d) 438, [1975] 3 W.W.R. 622 (B.C. S.C.); varied 73 D.L.R. (3d) 35, [1976] 5 W.W.R. 240 (B.C. C.A.), the plaintiffs were young men who became quadriplegic as a result of their injuries, although their mental capacities were unaffected, while in the present appeal the plaintiff's mobility was very seriously lessened although technically she was not paralyzed and she suffered a very considerable degree of mental impairment. The fourth appeal was in a claim under the *Fatal Accidents Act*, R.S.O. 1970, c. 164. In all four, however, very similar problems arose and the Court has determined to pronounce its judgments on all four at the same time. The very serious problems in the assessment of damages have been engaging the attention of the members of the Court for some months. We have received much assistance from each other. I am most grateful for the opportunity to peruse and consider the reasons of my brother Dickson in *Andrews* [*ante* p. 452] and in *Thornton* [*ante* p. 480] and I have adopted much of his reasoning herein.

I turn now to the three appeals considered in these reasons. They are three appeals all taken with leave of this Court. The action was originally taken by Diane Marie Teno, an infant, by her next friend Orville Teno, and the said Orville Teno and Yvonne Teno against four defendants: J. B. Jackson Limited, Stuart Galloway, Wallace Arnold and Brian Arnold.

By their statement of defence, the defendants J. B. Jackson Limited and Stuart Galloway claimed contribution from the plaintiffs Orville Teno and Yvonne Teno and the defendants Wallace Arnold and Brian Arnold took a like course in the statement of defence filed on their behalf.

Keith, J., in very detailed and most carefully considered reasons for judgment [55 D.L.R. (3d) 57, 7 O.R. (2d) 276], gave judgment against the four defendants apportioning the negligence between them in the following percentages:

1/3 against the defendants Brian Arnold and Wallace Arnold,

1/3 against the defendants J. B. Jackson Limited and Stuart Galloway, and

1/3 against the defendant J. B. Jackson Limited.

Keith, J., refused to order any contribution to be made by the plaintiffs Orville Teno and Yvonne Teno. The Court of Appeal varied the apportionment of negligence as follows:

Brian Arnold and Wallace Arnold	25%
J. B. Jackson Limited	25%
Stuart Galloway	25%
Yvonne Teno	25%

I should add that Thomas J. Lipton Limited had been named originally as a party defendant but the plaintiffs discontinued against that party at trial and the action was dismissed as against it. I shall refer later to the quantum of damages.

The circumstances giving rise to the action are somewhat complicated. Rather than set them out in detail, I shall refer to the judgment of the Court of Appeal for Ontario, now reported as *Teno et al. v. Arnold et al.*, (1976), 67 D.L.R. (3d) 9, 11 O.R. (2d) 585. Zuber, J.A., giving judgment for the Court, at pp. 11-4 D.L.R., pp. 587-90 O.R., set those facts out and, except where I shall be required to refer further to facts or evidence, I adopt them for the purpose of these reasons.

In their appeal to this Court, the defendants J. B. Jackson Limited and Stuart Galloway appealed both against the judgment of the Court of Appeal as to their liability and as to the quantum of damages assessed by the Court of Appeal for Ontario. The defendants Brian Arnold and Wallace Arnold, on the other hand, appealed only against the quantum of damages awarded by the Court of Appeal for Ontario and resisted the appeal of J. B. Jackson Limited and Stuart Galloway as to the issue of their liability. The original plaintiffs Diane Teno and Orville Teno and Yvonne Teno, as respondents, resisted the appeals both as to liability and quantum of damages and the original plaintiff Yvonne Teno appeals from that portion of the judgment of the Court of Appeal granting contribution against her to the extent of 25%.

I

AS TO LIABILITY

As I have said, Keith, J., at trial found liability against all defendants. As to the defendant Brian Arnold, the driver of the vehicle which struck the infant Diane Teno, Keith, J., cited the provisions of s. 106(1) of the *Highway Traffic Act*, R.S.O. 1960, c. 172, which was in effect at the date of the accident and which now appears as R.S.O. 1970, c. 202, s. 133(1). It reads:

> 133(1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle is upon the owner or driver.

After a detailed examination of the evidence, Keith, J., expressed his conclusion as follows [at p. 68]:

> He has failed to satisfy me that he was concentrating as he ought to, on the potential traffic situation in front of him as he overtook and passed the ice-cream truck. Had he been driving at a proper speed he could and ought to have seen the child in time to have avoided striking her.
>
> In the result Brian Arnold must be held liable-to the plaintiffs for any damages suffered by them.

Keith, J., of course, held Wallace Arnold liable as the owner of the vehicle under the provisions of the then s. 105(1) of the *Highway Traffic Act*, now s. 132(1).

The judgment, in so far as the liability of those two defendants, was confirmed in the Court of Appeal. As I have said, they did not contest the said judgment as to liability in this Court.

Keith, J., commenced his consideration of the liability of the defendants J.B. Jackson Limited and Stuart Galloway by again referring to the provisions of the onus s. 133(1) which I have quoted above and after examining *Godfrey et al. v. Gadbois et al.*, [1949] 4 D.L.R. 844, [1949] O.W.N. 635, came to the conclusion that the onus section applied to those defendants.

Much argument in both the Court of Appeal and in this Court was directed toward the correctness of that decision. I am of the opinion that the question is quite academic as there is no doubt that the findings of fact made by Keith, J., and by the Court of Appeal, with which findings, as I shall show, I am in agreement, make it unnecessary to consider any question of the application of the onus.

I adopt the view of Lord Dunedin in *Robins v. National Trust Co., Ltd.*, [1927] 2 D.L.R. 97 at p. 101, [1927] A.C. 515 at p. 520, [1927] 1 W.W.R. 692:

> But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

The approach taken by both Keith, J., at trial and by the Court of Appeal was that the renowned speech by Lord Atkin in *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 at pp. 580-81, set out the duty which lay upon J.B. Jackson Limited and the driver of the ice cream truck Stuart Galloway. Although those words have been oft-cited, I repeat them:

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender*, 11 Q.B.D. 503, 509, as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould*, [1893] 1 Q.B. 491, 497, 504. Lord Esher says: "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith L.J.: "The decision of *Heaven v. Pender*, 11 Q.B.D. 503, 509, was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

Counsel for the appellants Jackson and Galloway submits that to find his clients liable represented a drastic and unreasonable change in the law in that that company and its servant Galloway were carrying on a legal and an ordinary business and that the negligence charged against them in the lower Courts was the negligence of omission submitting that a defendant should not be found guilty because of an omission in the conduct of his business unless it was shown that either the thing which was not done was commonly done by other persons in like circumstances or that it was a thing which was so obviously wanted that it would be folly for anyone to neglect to do it. In the circumstances of this case, the defendant J.B. Jackson Limited caused to be designed for it a particular form of vehicle for the purpose of selling ice cream products on the streets. The design of the vehicle, its appearance, and the appearance of the products dispensed were all carefully calculated to attract small children to purchase the wares dispensed from the vehicle. The driver of the vehicle was instructed that he should dispense those wares from the vehicle. Printed in red letters along the left-hand side of the vehicle were the words: "WAIT ON CURB----I'LL COME TO YOU".

Evidence was given by John R. Jackson, who, at the time of the accident giving rise to this action, had been president of J.B. Jackson Limited, that a manual had been issued to operators which in-

cluded most specifically directions to require the operator to carry out that course and never permit children to cross the street to the ice-cream truck, but, he continued, that manual had application particularly to a smaller and differently designed truck and it was not practicable from a business economics standpoint to adopt such a course in the business operation carried out by the truck used at the time of the accident. Galloway gave evidence that upon reading the manual and looking at the truck, he also concluded that such a course was not practicable and that he was informed by a supervisor on his instruction, which took only part of one day, that certain portions of the manual were inapplicable.

The operators, such as Galloway, were given no specific instructions as to the handling of young children.

A slight consideration had been given to the suggestion, made by municipal authorities in another city, that the truck should be manned by a second person so that some care could be given to small children who were its constant patrons but it was not adopted on the ground of economic infeasibility.

In dealing with the liability of J. B. Jackson Limited, Keith, J., said [at p. 76]:

> In all these circumstances, I have no doubt that the defendant J. B. Jackson Limited quite apart from any vicarious liability, owed a duty of care to customers too young to be held responsible for their actions and that they were in breach of such duty on the occasion of the accident in question. If, as it may well have been, uneconomic to employ a second person to travel with the truck and be responsible for the safety of young children customers, then it was at the very least their duty to instruct their driver-salesman to discharge this responsibility. If even this could not be done economically, then they should not have had their trucks on the streets.

Zuber, J.A., in giving judgment for the Court of Appeal for Ontario upon the same topic after quoting as I have from *Donoghue v. Stevenson, supra*, and then referring to *Home Office v. Dorset Yacht Co. Ltd.*, [1970] A.C. 1004, and *Jordon House Ltd. v. Menow and Honsberger* (1973), 38 D.L.R. (3d) 105, [1974] S.C.R. 239, continued [at pp. 16-7 D.L.R., pp. 592-3 O.R.]:

> In considering how these principles may be applied to this case, some further comment with respect to factual matters is required. The defendant Jackson and its employee, Galloway, were in the business of selling ice-cream largely to children. To accomplish this end, children were deliberately drawn into the street by the use of an attractive truck and ringing bells. The defendants were aware that many of the children so attracted were obliged to cross and recross the roadway and also that many of the children were too young to take proper care for their own safety. The evidence amply demonstrates (if indeed it is necessary) that the defendants knew of the danger inherent of this type of enterprise.
>
> When Galloway and Jackson induced the Teno children into the street, they assumed a duty to take reasonable care of them. It is perhaps ironic that while others concerned with the safety of children do what they can to dissuade children from running into the street, the purpose of the defendants was to accomplish the opposite. The children induced into the street by the defendants, to use Lord Atkin's expression, become the neighbours of the defendants.

I am of the opinion that such conclusions by the learned trial Judge and by the Court of Appeal for Ontario were perfectly proper applications of the salutary principle so clearly put by Lord Atkin in *Donoghue v. Stevenson, supra*, and I arrived at a conclusion exactly in accordance with them. As to the objection that these defendants were carrying on a legal and ordinary business, certainly they are entitled to carry on that business but they must carry it on with ordinary regard for the safety of others inevitably, and therefore foreseeably, involved in the defendants' operation of the business. I am of the opinion that so soon as these defendants put that ice cream truck in operation on the streets of Windsor in the fashion which has been described above, then they put themselves in such a relationship with their child patrons that they became the neighbours of those children and in the words of Lord Atkin, "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

To the objection that what is charged against these defendants is an omission and not a commission and that liability in negligence can only be found in the case of an omission when it is a failure to do what others carrying on a like business ordinarily do or when it is so obviously needed that it would be folly for anyone to fail to so act, my answer is that the latter category exactly fits the actions of the defendant J. B. Jackson Limited. It was inevitable that when the company attracted the patronage of young children, on the evidence found to be so young that they were of pre-school age with little ability to comprehend danger and none to read, then to fail to take proper steps to see that these children were not subjected to the gravest danger of traffic accidents was only to fail to do what anyone with the slightest common sense would have done. I agree with the comments made by both the learned trial Judge and Zuber, J.A., that if the defendant Jackson could not carry on its business profitably and safely without a second attendant in the truck then the company should not have been carrying on the business in that fashion.

Counsel for the appellant cited, *inter alia*, *Bressington v. Com'r of Railways* (1947), 75 C.L.R. 339, for the proposition that unless it is shown that it is practicable to provide against a danger it cannot be shown that it is reasonable to do so. The facts in that case are so startlingly different that one must be most careful in drawing any general principle therefrom. They were as follows. A busy railway shunting yard was open only to members of the shunting crew. There the railway cars could move at any time without any warning when shunted by a locomotive from the other end of a line of

cars. Two men, without watching, walked a few feet behind a stationary railway car. An impact at the other end of the line of cars drove the last one forward to hit them. It was argued that the accident might have been avoided if there had been placed at the end of each line of railway cars an employee to warn his fellow employees when one of the railway cars might be moved. The mere recital of the facts show how little application they have to a case where, by ringing bells and flashing lights on a truck adorned by cartoons, to attract attention, most desirable confections were sold to very young children.

It is true that the ease with which protection may be afforded is a strong argument that to provide such protection is only reasonable, but surely that principle would not apply to protect those who, for commercial purposes, engage in a business which is intended to and does attract very young children into an area of extreme danger. I would, therefore, confirm the finding of negligence against J. B. Jackson Limited.

Both the trial Court and the Court of Appeal for Ontario found that, in addition to the negligence of J. B. Jackson Limited, its driver Stuart Galloway was also negligent in the course of his employment for which negligence his employer is, of course, responsible in law.

As I have said before, Galloway was extremely untrained. He was an 18- or 19-year-old student (both ages are mentioned in the reasons) who had been working for about six weeks after reading a manual said to be inapplicable at least in part to the vehicle which he operated and who had a part of a day's instruction by a supervisor. That supervisor seemed mostly concerned, not with safety, but with efficient merchandising. As Galloway drove south on Academy Dr., he observed to his left on a lawn at the east side of the street two young children who turned out to be the victim and her brother aged, respectively, four and one-half years and six years plus a month. It was quite evident to Galloway that these children had been attracted by the ice-cream truck with its bells and lights and were coming to purchase. Galloway stopped his truck on the west side of Academy Dr. against the west curb so that these children had to cross, firstly, the two northbound lanes then the boulevard and then the two southbound lanes to get to the right-hand side of his truck where the service window was open awaiting them.

Galloway observed in his rear-view mirror, while still seated at the steering-wheel, a vehicle approaching from the north so that that vehicle would pass to the left side of his then stopped truck, and he spoke to these two children warning them to stop. The two children stood on the easterly curb of the southbound lanes, that is, at the west side of the boulevard until that car had passed then crossed the southbound lanes and came to his service window.

In the report of the judgment for the Court of Appeal for Ontario to which I have referred above, it is recited how Galloway first served the little girl, Diane Teno, the plaintiff, and then turned to her brother. On Brian Arnold's evidence, at the moment when Galloway took the latter child's order and turned to bend down into the freezer and take out the wares which the child had ordered he, Brian Arnold, was proceeding southward on Academy Dr. between his friend's house and the rear of the truck. That distance, on the evidence, was about 350 to 400 feet. Brian Arnold travelled between a minimum of 15 m.p.h. and a maximum of 25 m.p.h. and, on his evidence, as he approached the rear of the truck he was travelling about 20 m.p.h. so that the latter might be taken as his average speed. At that average speed, it would take him between 11 and 12 seconds to cover this distance from his friend's house to the ice-cream truck. During that whole distance, he would have been plainly visible to Galloway if Galloway had chosen to give the slightest glance through the large glass windows in the rear of his truck. Had he done so, he could not have failed to see that the two children, and particularly the little girl whom he had just served, would be in imminent danger of being struck when they returned to go home on the other side of the street, as it was inevitable that they would do.

Had Galloway not committed any other act of negligence, I would have found that the failure to take the slightest precaution of looking through his rear window in order to protect his little customers would have been enough to attach liability to him. There were, of course, other acts of negligence. Having first realized that these children might be injured by the first southbound automobile, to fail to warn them or either one of them before they started to return across the boulevard of the danger which could arise from other cars was negligence. I am of the opinion that, in fact, the permitting of the children to cross the street at all in order to purchase might well be considered negligent. That danger had been realized and, in the manual which it was said applied to the earlier vehicle, the operators were warned not to permit children to cross the street, and that warning was repeated for children old enough to read with a sign on the left side of the truck to which I have already referred.

With respect, I agree with the view of Keith, J., when he said [at p. 76]:

> In my judgment, Galloway, in serving his employer as he did, was himself negligent and his negligence becomes the further responsibility of his employer.

II

AS TO THE LIABILITY OF YVONNE TENO TO CONTRIBUTE

I turn next to consider the position of Yvonne Teno as appellant. As I have said, both the defendants Wallace Arnold and Brian Arnold and the defendants J. B. Jackson Limited and Stuart Galloway claimed contribution from both the adult plaintiffs Orville Teno and Yvonne Teno. At trial, after consideration of the issue, Keith, J., concluded [at p. 78]:

> The parents of these children did not depart from the generally accepted standard of care.
>
> In any event the negligence that caused injury to Diane Teno was the combined negligence of Brian Arnold, Stuart Galloway and J. B. Jackson Limited, and the claim for indemnity against Orville Teno and Yvonne Teno fails.

Zuber, J.A., for the Court of Appeal, in his reasons, said [at p. 19 D.L.R., p. 595 O.R.]:

> The next issue in this case is whether or not there was any negligence on the part of Yvonne Teno.

The notice of appeal to the Court of Appeal on behalf of Wallace Arnold and Brian Arnold simply alleged that the learned trial Judge erred in finding that the conduct of Yvonne Teno did not contribute to the injuries and amount to negligence but the solicitor for the defendants J. B. Jackson Limited and Stuart Galloway, in their notice of appeal to the Court of Appeal, alleged that the learned trial Judge erred in finding the injuries of the plaintiff had not been caused by or contributed to by the negligence of the *plaintiffs* Yvonne Teno and Orville Teno. It would appear that in their argument of the appeal, the appellants desisted from claiming any contribution by Orville Teno, the father of the infant plaintiff. Zuber, J.A., found that negligence of the mother Yvonne Teno had contributed to the injuries to her daughter, saying [at p. 20 D.L.R., p. 596 O.R.]: "The conduct of Yvonne Teno falls short of the standard to be expected from a reasonably prudent mother under the circumstances."

In the report of the judgment of the Court of Appeal for Ontario, the actual circumstances leading to the time when the infant plaintiff and her brother left their home and approached the ice-cream truck are carefully detailed and I need not repeat them.

A few additional facts were adduced in evidence which might well be stated.

Academy Dr. is a residential street ending one and a half blocks to the south of the site of the accident at a private girls' secondary school. There were no sidewalks on either side of Academy Dr. During the summer, when the school is not in operation, this street might be considered to have a reduced volume of traffic. About 25 young children reside in the block where the accident occurred.

The infant plaintiff, Diane Teno, was a normal, active child of four and a half years of age and left the home accompanied by her brother six years and one month old. Evidence given by the parents was that both children had received repeated instructions from the parents as to the proper method of crossing streets, and the infant plaintiff had been instructed to never cross streets unattended. She had frequently crossed this very Academy Dr. but accompanied by her brother or older sister or by a baby-sitter and had crossed Academy Dr. before in company with this very same brother to purchase ice-cream from ice-cream vending trucks. At the time of this accident, the infant plaintiff and her sister and brothers were playing in the front yard of the house immediately next door to their home when they heard the sound of the bells announcing the approach of the ice-cream truck. Their mother, the appellant Yvonne Teno, had been engaged in her housework and answered a telephone call from her husband who was at work in Detroit. That call was, therefore, a long distance call although the tariff would have been small for such a short distance. Upon the children requesting money to purchase from the ice-cream vendor, Yvonne Teno gave the money to both of them and admonished them "watch out for cars". The children left the house and very shortly thereafter, while she was still speaking to her husband on the telephone, Yvonne Teno heard the "thump" of the accident.

Galloway testified that it was not unusual to observe pre-school age children approaching the ice-cream vending truck alone or in small groups or with their parents. On this evidence, Keith, J., considered the claim for contribution on the basis that there was no doctrine of identification in Ontario such as has been applied in various States in the United States of America and that therefore it was possible for a parent to have been found in breach of a duty of care to a child and liable for that child's damages, citing *Gambino et al. v. DiLeo et al.* (1970), 17 D.L.R. (3d) 167, [1971] 2 O.R. 131. That was a judgment of Osler, J., at trial. The case does not seem to have gone to appeal. That was another case of children being injured when leaving an ice-cream vending truck. There, however, the infant plaintiffs, by their father as next friend, had sued only the owner-driver of the automobile which struck them and not the operator of the ice cream truck. The father had been sitting on the front steps of his home immediately across the road from where the ice-cream truck had stopped in front of a small park. Upon the two infants desiring to purchase ice-cream, he accompanied the two of them across the street having to pass between a row of parked cars on his own side of the street before reaching the truck. He then left the children and returned to resume his position on the front steps and the reading of his paper.

Osler, J., said at p. 170 D.L.R., p. 134 O.R.:

> Under all these circumstances I find that the failure of Mr. Gambino either to keep his children constantly in view so that he could be ready to assist them, or to remain on the same side of the road as the children in order to guard them from the possibility of crossing on their own, constitutes negligence, for which he must bear responsibility.

He assessed a 25% contribution upon the father.

Another decision by a trial Court Judge in Ontario is also of some interest, that is Anger, J.'s judgment in *Beckerson and Beckerson v. Dougherty*, [1953] 2 D.L.R. 498, [1953] O.R. 303. There a boy four and one-third years old was struck by the defendant's automobile on Barton St. in the City of Hamilton, when the child was several hundred yards away from his home which was on a different street. The father gave evidence as to a general plan of supervision whereby one of the mothers in the area was supposed to look after the group of children but could not give any evidence as to any actual supervision at the time of the accident and testimony of the motorist was that he saw no evidence of such supervision. Anger, J., relying on *Pedlar v. Toronto Power Co.* (1913), 15 D.L.R. 684, 29 O.L.R. 527, came to the conclusion that a parent's contributory negligence in failing to take proper care of an infant child could affect the parent's own right to recovery for out-of-pocket expenses in the subsequent care of the injured child. In the result, Anger, J., gave judgment for the infant plaintiff for $1,500 and for the adult plaintiff for only 70% of the out-of-pocket expenses incurred by such adult plaintiff. There does not seem to be any discussion in the case as to any liability of the parent to contribute to the defendant any percentage of the amount awarded against the defendant in favour of the infant plaintiff.

In the present case, the learned trial Judge allowed out-of-pocket expenses of $7,979.62 and another sum of $7,500 to the male adult plaintiff Orville Teno. It was directed that the amount of $7,500 be held in trust for the female plaintiff, the mother, Yvonne Teno, as a *quantum meruit* for her care of the infant plaintiff up to the date of the trial. On appeal, there was no contest as to that portion of the judgment and despite the contribution of 25% awarded to the defendants against the adult plaintiff Yvonne Teno, there was no direction of any reduction because of the 25% contribution.

In *Cowle and Cowle v. Filion* (1956), 6 D.L.R. (2d) 258, [1956] O.W.N. 881, Miller, Co. Ct. J., considered an action by an infant plaintiff and by the infant plaintiff's father against a motorist based on the injuries to the child and found that the motorist had not discharged the onus in the Ontario statute to which I have previously referred and then continued to consider the claim by the defendant that the adult plaintiff should be found guilty of negligence. He said at pp. 265-6 D.L.R., pp. 884-5 O.W.N.:

> The parents of this child did not intentionally permit him to play on the

> street. He had been told not to go on the street. On the day in question they sent him out to play at the rear of their apartment, where he was accustomed to ride his tricycle on the walk and to play in the sand-boxes provided for that purpose in the play-area. The play-area was surrounded by a fence but there were openings at each end for which no gates were provided. His mother looked out the window from time to time to see that he was all right. He had on some occasions wandered away and she had had to go after him but he had not gone on the street before, to the knowledge of his parents. The street was not "a main thoroughfare" but a residential street and the fact that at the time of the accident there was no other traffic would indicate that it was not a busy street. According to the father's evidence the child had been out of the house for 15 or 20 minutes at the time of the accident, but when he left the area behind his home does not appear. As I have said, it was a residential area for members of the army and it was estimated that there were 200 or 300 children resident in the settlement. There were 40 or 50 children playing around the vicinity of the plaintiff's home at the time in question. There was no suggestion in cross-examination or otherwise that the parents of the infant plaintiff took any fewer precautions than those taken by all the other parents in the area. If anything was said, at the time the injured child was brought into the house, as to the mother being at fault I am satisfied that neither parent said anything to indicate that the child had been knowingly permitted on the street.
>
> In *Ware's Taxi Ltd. v. Gilliham*, [1949], 3 D.L.R. 721, S.C.R. 637, although there was disagreement as to the effect of the evidence in the case, all of the members of the Court apparently agreed that the conduct of other parents, or of parents generally, might be taken as one test of the reasonableness or sufficiency of the actual care in the particular case.
>
> In my opinion the adult plaintiff and his wife did not fail to act as reasonable and prudent parents and the adult plaintiff is not liable for indemnity or contribution with respect to the damages payable by the defendant to the infant plaintiff. Neither do I think that the expenses incurred by the adult plaintiff by reason of his child's injuries were, in whole or in part, the result of any want of reasonable care on his part.

McCallion v. Dodd et al., [1966] N.Z.L.R. 710, is a decision of the Supreme Court of New Zealand on appeal from Gresson, J. In that case, the father and mother and two boys, the younger of which was four years of age, were walking along a rural highway after dark on the side of the road which would cause overtaking traffic to come from behind them. The driver of an overtaking automobile failed to observe the four and struck them killing the mother and badly injuring the four-year-old boy. The defendant issued a third party notice against the father alleging his negligence in failing to take care of the infant and the trial Judge gave effect to that third party notice allowing a contribution by the father in favour of the defendant. In the Court of Appeal, the right to such a contribution was confirmed. North, P., said at p. 721:

> A stranger would render himself liable in negligence only if he had on a particular occasion assumed or accepted the care and charge of the child. It seems to me, however, that parents are in a somewhat different position, and at all times while present are under a legal duty to exercise reasonable care to protect their child from foreseeable dangers. I do not consider that a parent *while present* is ever able to shed responsibility for the child's safety though on the

> facts it may appear that he was not negligent by reason of his preoccupation with other things. It has been accepted that a person who, as a parent, has control of a child is responsible for negligence in the exercise of that control if injury results to another.

(The italics are my own.)

There are some other cases but I deduce therefrom a confirmation of the principle referred to by both the trial Judge and the Court of Appeal that the liability of the parent to contribute, himself, be considered in view of the accepted standard of care by parents generally in the community.

Keith, J., found that the appellant Yvonne Teno had acted in accordance with that standard. Zuber, J.A., in giving judgment for the Court of Appeal for Ontario, was strongly of the view that she had not, saying "the conduct of Yvonne Teno falls short of the standard to be expected from a reasonably prudent mother under the circumstances". With respect, I am of the opinion that the learned trial Judge came to the correct conclusion. Here was a mother of four young children who was speaking to her husband on the telephone and was interrupted by the two youngest crying for money to buy ice-cream confections to be supplied by the defendant J. B. Jackson Limited from a vehicle designed to attract if not entice young children. The children had been used to buying confections from the same kind of dealer, if not the same dealer, previously. The children had both received very strong instructions as to how they should behave in reference to crossing the street and, in fact, had crossed the street for that very purpose on other occasions. The mother specifically reminded the children on this very occasion to "watch out for cars". I do not think it can be said that that mother, who permitted her children to cross that quiet residential street to buy wares from the ice-cream truck as the same children and the other children in the neighbourhood had been accustomed to doing, can be found to be contributorily negligent. I approach this conclusion in the light of all the circumstances as to the attraction to young children by the defendant J. B. Jackson Limited's method of carrying on its business and in the light of the defendant Brian Arnold's failure to observe any ordinary precaution in driving down a street where 25 children resided in the same block and where this infant child attractor, the ice-cream truck, was present.

It was the emphatic submission of counsel on behalf of J. B. Jackson Limited and Stuart Galloway that to refuse contribution against Yvonne Teno would be to put a higher standard of care of this infant upon these two defendants than on her own mother. In my opinion, the circumstances to which I have referred above refute that submission. The standard of care put on the mother is, I think, properly the standard of care of mothers in the immediate

community on the approach of this ice-cream truck which was designed to attract and actively operate so that even children of tender years were enticed to purchase its wares. Yvonne Teno and the other mothers were entitled to rely on the vendor of the ice-cream from such a vehicle to exercise some care toward the children which it attracted. I, therefore, am of the opinion that the appeal of Yvonne Teno should be allowed and that no contribution should be assessed against her.

III

APPORTIONMENT OF LIABILITY

This brings me to the apportionment of the liability of the four defendants against whom liability has been found. Of course, the defendants Wallace Arnold and Brian Arnold should bear the same proportion. For the reasons outlined at trial, in the Court of Appeal and in these reasons, I have found that there was negligence on the part of both the defendant J. B. Jackson Limited and the defendant Stuart Galloway. There were separate acts of negligence of these two defendants, the corporate defendant by the driving of its vehicle and its method of operation, the driver Galloway by his acts of commission and omission. However, the effect of those various acts of negligence is so interwoven that it is not realistic to separate them and I have determined, after some consideration and not without some reluctance, that a just division would be to lump the contribution of Wallace Arnold, the owner, and Brian Arnold, the driver, on one side, and that of J. B. Jackson Limited and its employee Galloway on the other. In my view, the negligent driving of Brian Arnold was a major contributory cause of the accident and the negligent operation of the business of Jackson and the negligent conduct of its driver Galloway taken together was a like major contributory cause. I would, therefore, hold that, of course, all four are liable to the plaintiffs for the full amount of their damages but as between themselves Wallace Arnold and Brian Arnold should contribute 50% to their co-defendants and Jackson and Galloway should likewise contribute 50% to those first named defendants.

IV

THE QUANTUM OF DAMAGES

There remains for consideration the question of the quantum of damages. The problem of quantum of damages in serious personal injury cases is a most difficult one and has been considered by this Court in not only the present appeal but, as I have said, in two other appeals argued just prior to the argument in the present appeal, namely, *Andrews v. Grand & Toy Alberta Ltd., supra*, and *Thornton v. Board of School Trustees of School District No. 57, supra*. In all three cases, the plaintiffs suffered extremely serious

personal injuries. There are, however, very considerable differences in the three appeals. In the first place, the plaintiff in the present appeal was, at the time of her injuries, a four-and a half-year-old little girl. In *Andrews v. Grand & Toy Alberta Ltd.*, the plaintiff was, at the time of the accident, a young man 21 years of age gainfully employed. In *Thornton v. Board of School Trustees of School District No. 57*, the plaintiff was, at the time of the accident, a 15-year-old boy. Therefore, in *Andrews* the Court had a good basis for a consideration of the important topic in the fixing of the quantum of damages, that is, the loss of income, and even in *Thornton*, with a youth of Gary Thornton's age, the Court had much more solid ground upon which to proceed. On the other hand, as I have said, the plaintiff in the present appeal was a four and a half-year-old girl at the time of the accident. Secondly, the injuries in both the *Andrews* and *Thornton* cases resulted in a condition of quadriplegia with no impairment of mental faculties. The injuries to the present plaintiff, as I shall show hereafter, were very different consisting chiefly of injuries to the brain with resultant physical disabilities and with a very considerable mental impairment. There are other differences between the three appeals but the above recital is sufficient to demonstrate that no general formulation can be used to reach a common result.

A similarity of verdicts may well be considered desirable and of some assistance in the settlement of future cases prior to judicial consideration of them or in the assessment of the damages allowed upon such consideration but it must be realized that that goal of similarity is one quite impossible to attain and that each case of assessment of damages for personal injuries must be determined in the consideration of the individual circumstances, the personality of the plaintiff, and many other particular aspects of each case.

I turn, therefore, to the question of the assessment of the damages which should be allowed to this plaintiff Diane Teno for the injuries which she sustained in the accident on July 1, 1969.

After a very careful analysis of the evidence and consideration of the arguments as to quantum advanced by counsel, the learned trial Judge allowed damages as follows: Orville Teno — $14,979.62 — made up of out-of-pocket expenses paid for the care of the infant Diane Teno to the date of the trial — $7,479.62 — and a sum of $7,500 which he was to hold in trust for Yvonne Teno as a *quantum meruit* for the care and service which she had to supply to her daughter Diane Teno up to the date of the trial. None of these sums were disturbed in the Court of Appeal for Ontario and they were not the subject of any submission in this Court.

The learned trial Judge then allowed the sum of $950,000 as the damages of the infant plaintiff Diane Teno. Of that sum $200,000 was awarded to the infant plaintiff for what the learned trial

Judge described as "non-pecuniary damages" and which covered an award for pain and suffering, permanent disability, loss of amenities of life and loss of life expectancy. Zuber, J.A., in giving reasons for judgment of the Court of Appeal, said [at pp. 23-4 D.L.R., pp. 599-600 O.R.]:

> This amount was challenged on the simple ground that it was too generous. I am unable to accept that argument. In my opinion, this assessment is reasonable and reflects no error.
>
> Since the argument in this case, Mr. O'Brien has supplied us with a copy of a judgment of the Appellate Division of the Supreme Court of Alberta in *Andrews v. Grand & Toy Alberta Ltd.* (December 8, 1975, as yet unreported) ... In that case the Alberta Court reduced the non-pecuniary general damages awarded to a quadriplegic from $150,000 to $100,000 and in so doing accepted the concept that a totally disabled plaintiff should be compensated for pain and suffering, loss of amenities of life and loss of life expectancy, by the award of an arbitrary conventional sum. With this concept, I am in respectful but complete disagreement.

Reference will be made to this topic hereafter.

Keith, J., allowed the sum of $750,000 for pecuniary damages, that is, the cost of the care which had to be given to the infant plaintiff for the rest of her natural life and also her loss of future income. He said [at p. 93]:

> With respect to the latter assessment I have deliberately refrained from carrying out a mathematical exercise of the kind that Kirby, J., did because I do not think the figures that he used in arriving at what was required monthly for the purposes indicated are susceptible of precise calculation even at present and must inevitably become inapplicable with the passage of time. If that is so, any result obtained by the use of such figures must be open to attack.

Zuber, J.A., commented:

> In arriving at the $750,000 for pecuniary general damages, the learned trial Judge referred to the various factors upon which it was based but refrained from any mathematical computation. While in the end result, a global figure must be arrived at and while this figure is not capable of precise or scientific ascertainment, it is nevertheless desirable in cases of large assessments that some basic calculations be done to more specifically explain the total and to act as a check or guide respecting the ultimate figure.

With respect, I am in agreement with the view of Zuber, J.A. I am, however, of the view that a careful reading of the reasons of Keith, J., shows that he did fix certain quantums and certain percentages and that his global result of $750,000 may well be taken as a rough calculation and totalling based thereon. The calculation was made very carefully by Zuber, J.A., in his reasons for judgment for the Court of Appeal and it is my intention to concern myself with that calculation and comment thereon.

Zuber, J.A., commenced his consideration of the details of the quantum of the damages by quoting the report made by Dr. John S. Prichard on October 20, 1970. Dr. Prichard had been for 25 years a physician on the staff of the Toronto Hospital for Sick Children and for many years the chief senior physician and professor of pe-

diatrics at the University of Toronto. His pre-eminence in his profession was accepted by all and there can be no better analysis of the plaintiff's injuries and of her condition than Dr. Prichard's report. I quote, therefore, the said report and a subsequent addendum thereto made after examinations on July 3, 1973, and April 9, 1974 [at pp. 21-2 D.L.R., p. 597-8 O.R.]:

"On examination, she is an attractive looking little girl who seemed very happy and content. Her speech was very slow, slurred and difficult to understand, although she seemed able to make proper sentences and express herself reasonably well. She was able to recognize simple objects and name them correctly. On attempting to walk she had a very spastic gait with the left leg more involved than the right. She had an obvious severe action tremor of her right hand, whereas she did not use her left hand at all. On formal examination of the central nervous system the following state of affairs existed. Her sense of smell was normal. Her visual acuity appeared to be normal and her visual fields were full. Her optic discs were normal. Her pupils reacted briskly to light and accommodation. Her external occular movements were full and there was no nystagmus. Her face moved symmetrically. Her hearing was normal. Her palate moved freely in the mid-line. Her tongue movements were very slow and stiff. She had a severe spastic paralysis of her left hand and arm. She was able to voluntarily open her hand only partially. She had fairly free movement of the shoulder. Sensation in the left hand appeared to be intact. The tendon reflexes were greatly increased. The right hand and arm had a gross action tremor that made it impossible for her to grasp my finger when held up in front of her. There was no tremor at rest. The tone was slightly increased but the reflexes were within normal limits. Sensation appeared to be normal. The abdominal reflexes were slow and diminished on the left. She had a severe spastic paralysis of her left leg but was able to lift the leg off the bed by herself. She was unable to move her ankles or toes. She had some spastic weakness of her right leg and a moderate action tremor of the right leg. The reflexes in the legs were not increased but both plantor responses were extensor. Her heart, lungs and abdomen were normal.

"This child had a very severe head injury which has left severe sequelae, which can be enumerated under the following headings.

"1. She has a severe left hemiparesis involving the arm and the leg about equally. It is unlikely that this will improve very much. This means that she will probably never have any useful movement of her left hand.

"2. She has some slight spastic weakness of the right side but a very severe action tremor, probably from involvement of her extrapyramidal system. This now makes the right hand almost useless in anything but the most coarse activity. It is probable that this will improve considerably over the next two or three years.

"3. Because of her severe motor involvement, she is now unable to walk. With continuing physiotherapy I think it is likely that she will walk by herself eventually but her gait will always be unsteady and precarious.

"4. The motor involvement also affects her speech which is now difficult to understand. This will improve although she will always speak slowly and probably indistinctly.

"5. The possibility of post-traumatic epilepsy exists. The fact that she has been 15 months without a seizure is very encouraging and the chance of this occurring is less than 10%.

"6. The severe brain injury has affected her intellectual capacity. I found this difficult to evaluate but thought she was probably behaving at about a borderline level. I had her seen by Dr. Netley, head of our Department of Psychology and am attaching his report. You will see that he estimates her IQ within the dull normal range.

"Putting all these disabilities together means that we have a child with reasonable intellectual potential but without the physical ability to make much use of it. She is going to need a special educational program and her subsequent ability to earn a living is going to be very limited. She is going to need continuing physiotherapy for years.

"It is only 15 months since the accident and children have a remarkable capacity for recovering more than one expects. I think she should be reassessed in about a year or 18 months."

Dr. Prichard examined Diane again on July 3, 1973, and on April 9, 1974, and reported as follows [at pp. 22-3 D.L.R., pp. 598-9 O.R.]:

"I think it is most unlikely that this young lady will ever be able to live by herself. Her physical disabilities are tremendous. I do not think she will be able to go to a store to buy supplies, prepare her own food or cook for herself, wash, look after or mend her clothes, or indeed dress herself, or perform most of the tasks we take for granted when people live independently. This means that whilst she will probably not need permanent nursing care, she will need permanent help in the form of somebody living with her all the time. I think she will require this for all her life.

"I have just finished seeing this little lady and her parents. It is disappointing to see how little she has improved during the last year.

"The parents have the following remarks to make about her present performance:

"1) She still has no functional use of her right hand. She cannot use it to steady anything. She likes to keep it quiet by sitting on it.

"2) Her left hand is very clumsy. She is unable to dress herself, feed herself, perform simple toilet needs, or drink from a cup. She can drink from a straw or training cup.

"3) She is able to walk by herself but does so slowly and clumsily. She cannot run.

"4) Her speech is very difficult to understand. It is slow and laborious.

"5) She is going to school and is in Grade 1. She is able to read at about the mid Grade 1 level, according to her parents.

"6) She seems to be a happy little girl. She has some school friends and gets on well with them.

"7) Her general health is good.

"On examination, she is a cheerful, attractive looking, severely disabled small girl. Formal examination of her central nervous system is essentially unchanged from my previous report.

"1) Her speech is slow and spastic. Her tongue movements are limited and very slow.

"2) She has a gross action tremor of her right arm. She was unable to reach for and grasp an object because of this. She has some action tremor of her right leg but it is much less severe.

"3) She has a moderately severe left hemiparesis involving the arm and leg. She is unable to use a pincer grip with her left hand. She can grasp a pencil in her palm and scribble with it.

"My comments of my report of the 4th July 1973, still apply. It is becoming more apparent that she has some intellectual impairment in addition to her tremendous physical disabilities. She was seen by Dr. Netley this morning and you will be having a report from him.

> "This accident has produced one of the most disabled children I have ever seen."

Zuber, J.A., added a very significant paragraph reciting Dr. Prichard's evidence at trial that the infant plaintiff was now aware of her situation and that as time went on her disabilities would become more obvious to her. The last words of Dr. Prichard's report may be stressed. I repeat them: " 'This accident has produced one of the most disabled children I have ever seen.' "

As I have pointed out above, that statement was made by a great specialist with 25 years' experience in the Toronto Hospital for Sick Children where he must have dealt personally with some thousands of cases of children's injuries.

With this introduction, I turn to my view of what amounts should be allowed for the various types of damages which the infant plaintiff has suffered. It is my intention to consider these under the following headings:

Firstly, special damages;

Secondly, allowance for future care;

Thirdly, loss of future income, and

Fourthly, non-pecuniary damage.

It should be stressed that in such a case as the present, and indeed in the other personal damage actions to which I have referred above, the prime purpose of the Court is to assure that the terribly injured plaintiff should be adequately cared for during the rest of her life. That end having been attained, other elements of damage are of lesser importance.

Therefore, firstly, to deal with the provision for future care: As will be seen from Dr. Prichard's report which I have quoted *in extenso*, the infant plaintiff requires for the rest of her natural life full-time care. As pointed out in the Courts below, that full-time care, from the time she left hospital up to the date of the trial, was being provided by her mother, Yvonne Teno, at tremendous personal sacrifice. It was very evidently the view of the learned trial Judge that it was physically impossible for that situation to continue. Therefore, he examined the evidence and accepted the calculations made by various witnesses that to provide such care until the infant reached 19 years of age by a single attendant on duty 24 hours a day for five days a week living in the family home and supplemented by attendants working three eight-hour shifts per day on the remaining two days of the week would involve an expenditure of about $21,000 per year. Zuber, J.A., cited that finding and accepted it and added [at p. 26 D.L.R., p. 602 O.R.]:

> On the basis of all the evidence submitted, it would be reasonable to estimate that when Diane becomes an adult and establishes her own home, full-time care will cost approximately $27,000 per year.

I stress that it is not my intention to question the arithmetical calculations made in the Courts below or to enter into discussion as to whether one attendant or two attendants are necessary or the length of work shifts but to devote myself to the issue of principle and I have no difficulty in accepting the judgment of the learned trial Judge, confirmed in the Court of Appeal, that to give to the infant plaintiff the care which her condition requires and will continue to require for the rest of her natural life will, until she reaches the age of 19 years, cost about $21,000 per year and thereafter about $27,000 per year. I point out that those calculations do not envisage any such elaborate and costly care as was considered by the Courts below in either the *Andrews* or *Thornton* cases but simply, until the infant plaintiff becomes 19 years of age, a full-time female attendant of some maturity and nursing skills supplemented on week-ends by nursing attendants and, after the infant plaintiff becomes 19 years of age, a housekeeper in addition to the female attendant. It should also be noted that such calculations for cost of care make no provision for the ordinary costs of living such as food, clothing and shelter but are for special care alone.

In both *Andrews* and *Thornton*, the evidence and the reasons for judgment in the Courts below were much concerned with the debate as to whether proper future care should be supplied in an institutional surrounding or in something resembling as close as possible a home environment. My brother Dickson, in his reasons, has dealt extensively with that issue and has come to the conclusion that the evidence clearly demonstrates that the only adequate provision for the plaintiffs' continuing existence was in a home environment.

In the present appeal, the only evidence as to the proper standard of care was given on behalf of the plaintiff and the plaintiff's chief witness was Edward Rapelle, a rehabilitation councillor with Lyndhurst Lodge. Lyndhurst Lodge is a rehabilitation institute in the City of Toronto which has a unique reputation for its superlative work in rehabilitation of seriously injured persons and those who have suffered from such catastrophies as massive strokes. It is, however, strictly a rehabilitation institution and it does not make provision for those who have to have continuing care for the rest of their lives. After the institution has done its best for the rehabilitation of such persons, they must leave it and find their continuing care in other places.

It was the opinion of both Mr. Rapelle and the other witnesses who gave evidence for the plaintiff that in the Province of Ontario there was simply no satisfactory institution and that all the unsatisfactory aspects of such places as chronic care hospitals and nursing homes which were the subject of the evidence and of the judgments in both *Andrews* and *Thornton* were also present and most influential in the Province of Ontario.

Mr. Rapelle was also of the opinion that Canada had gone farther than the United States in its proper care for seriously disabled persons. The institutions mentioned in the City of Toronto were well known and it was quite evident the learned trial Judge, from his own personal knowledge, needed little other evidence to convince him of their unsatisfactory character.

Counsel for the defendants, here appellants, J. B. Jackson Limited and Stuart Galloway, in cross-examination of Mr. Rapelle, attempted to build up an ideal organization consisting of what he described as "something in the nature of a club or something like this could be evolved within the confines of the establishment, there were occupational therapy facilities and physiotherapy, the usual swimming pool sort of thing?" Mr. Rapelle did agree that such an organization, I avoid the word "institution", would be a desirable device for providing future care for such persons as the infant plaintiff. He said, however, that he and others had attempted to evolve such an organization but that the cost was so prohibitive that it could not be done without Government subsidy, and so far there had been no provision of such subsidy.

On all of the evidence, the learned trial Judge came to the conclusion, with which I agree, that the infant plaintiff could only receive the proper care to which she is entitled under the regime advanced by the plaintiff's witnesses, that is, in her own apartment with the attendants which her care requires.

I have already emphasized that the provision of such an appropriate standard of care must be the prime purpose in the awarding of damages in these personal injury cases. I, therefore, adopt the view of the learned trial Judge, as confirmed in the Court of Appeal, that damages will have to provide for the care of the infant plaintiff in the sums to which I have referred, to wit, $21,000 per year until she reaches the age of 19 years, and $27,000 per year thereafter.

Therefore, I am of the view that this problem must be resolved by finding what amount of damages should be directed by the judgment in order to assure the infant plaintiff the provision of those sums of money annually for the rest of her natural life. It will be seen that this brings up at once the question of the discount rate which should be applied to find that present sum and this involves the consideration of income tax, of present day investment rates, and of future inflation.

I shall refer first to income tax. In *The Queen v. Jennings* (1966), 57 D.L.R. (3d) 644, [1966] S.C.R. 532, this Court adopted the view expressed by Judson, J., that we should reject the principle in *British Transport Com'n v. Gourley*, [1956] A.C. 185, and that there should be no deduction from damages which were assessed for loss of future income by reason of any income tax that that in-

come might have attracted had the plaintiff not been injured and the income continued. We are, however, here concerned with income tax which may be assessed on income which will be payable to the infant plaintiff accruing from the investment of the award for damages. In so far as that award concerns non-pecuniary damages, then like any other asset of the infant plaintiff it will earn an income and that income will be subject to income tax. The amount which I am awarding as a fund from which shall be paid the amounts necessary for future care will, of course, have to be invested and that fund will generate an income and that income will be subject to tax.

As Zuber, J.A., pointed out in his reasons given for the Court of Appeal for Ontario, the amount of that tax is, by the present provisions of the *Income Tax Act*, R.S.C. 1952, c. 148 (as amended by 1970-71-72, c. 63), subject to certain deductions. Section 23(2) of the 1973-74 (Can.), c. 14, now appears as s. 81(1)(*g*)(i), and exempts from the income of the taxpayer for a taxation year the income from any property acquired by the taxpayer pursuant to an action for damages in respect of any physical or mental injury to the taxpayer which income was received before the taxpayer attained the age of 21 years. Therefore, there will be no income tax impact upon this fund for the first 16-odd years of the infant plaintiff's life. Secondly, s. 110(1)(*c*)(iv.1) provides that medical expenses in excess of 3% of the taxpayer's income includes "remuneration for one full-time attendant upon an infant who was a taxpayer ... in a self-contained domestic establishment in which the cared-for person lived".

I am in agreement with Zuber, J.A., when he interprets this exemption as providing for the deduction for the payment of one full-time attendant for seven days a week regardless of whether this attendance is provided by several attendants working over 24-hour periods or one person working 24-hour shifts seven days a week. These two deductions reduce the problem of income tax on the income from the portion of the award devoted to the care of the infant plaintiff to a great deal less significant proportion.

As Zuber, J.A., pointed out, the tax burden is extremely difficult to forecast. Moreover, it would seem that income tax authorities may well review the situation where a Court awarded a sum of money as damages so that that sum may be used in fixed annual amounts to provide necessary future care for the injured person and determine that the 3% deduction to which I have just referred is, under such circumstances, inadequate. In view of this uncertainty and of the fact that future rates of income tax, certainly those applicable in particular circumstances, are only matters of speculation, I am of the opinion that this would not justify in assessing an amount to cover that possible income tax and for the purpose of these reasons I omit any such allowance.

Turning next to the problems of inflation materially increasing the cost of care in the future and the present very high levels of investment rates upon income, we see the problem graphically illustrated in the evidence given at trial by the actuary. For instance, the present value of $1,000 per year for 66.9 years if calculated at the rate of 4.5% was $21,563 and the present value at 6½% was $15,685. So, the present value at 11% would be about $9,100. The choice of the discount rate is, therefore, all important and the problem of the correct rate to choose is one which has been under constant debate in the courts in late years. Both Courts below referred to the statement of Lord Diplock in *Mallett v. McMonagle*, [1970] A.C. 166, where the learned Law Lord said at p. 176:

> In my view, the only practicable course for courts to adopt in assessing damages awarded under the Fatal Accidents Act is to leave out of account the risk of further inflation, on the one hand, and the high interest rates which reflect the fear of it and capital appreciation of property and equities which are the consequence of it, on the other hand. In estimating the amount of the annual dependency in the future, had the deceased not been killed, money should be treated as retaining its value at the date of the judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4 per cent. to 5 per cent. should be adopted.

In the very subsequent year, in *Taylor v. O'Connor*, [1971] A.C. 115, that statement was criticized. Although the actual case is only mentioned in the judgment of Viscount Dilhorne, it would seem that the learned Law Lords did regard the practice of choosing a rate of 4% to 5% as being out of accord with reality. Viscount Dilhorne, quoting the last sentence of the statement of Lord Diplock which I have quoted above, commented [at p. 138]:

> I see no reason for that and, with the greatest respect, it seems to me that requires the calculation to be made on an unreal and hypothetical basis.

It would seem that Viscount Dilhorne, in fact, used a percentage of about 10% although it is most difficult, in considering the judgments of Viscount Dilhorne and the other Law Lords, to find an actual percentage as the Law Lords used the multiplier multiplicand method and that arithmetic is so inaccurate that it is difficult to understand the exact result. On the other hand, it would appear that Lord Pearson in some of his calculations adopted a percentage of about 5%. He said at p. 143:

> I think protection against inflation is to be sought by investment policy, and the lump sum of damages should be assessed on the basis that it will be invested with the aim of obtaining some capital appreciation to offset the probable rise in the cost of living.

Yet his various calculations would seem to take into account the possibility of inflation.

Kemp & Kemp on the Quantum of Damages, 4th ed., vol. 1, p. 45, notes:

> Moreover, this [the Diplock approach] is likely to continue to be the law. For the Law Commission accepts that the most practical way of making allowance for inflation is to adopt what we term in this chapter "the Diplock approach".

Of course, it must be understood that both *Mallett v. McMonagle* and *Taylor v. O'Connor* were fatal accident cases and not cases where it was absolutely necessary that the plaintiff continue to receive each year a sum sufficient for her care.

Zuber, J.A., in his reasons for judgment for the Court of Appeal for Ontario, said [at p. 25 D.L.R., p. 601 O.R.]:

> In my respectful view there is much to be said for Lord Diplock's approach. It is at the very least a practicable and reasonably satisfactory solution to a difficult problem. The critical speeches in *Taylor v. O'Connor* provide little by way of an alternative solution.

It would appear that it is necessary to evolve some method of determining the appropriate discount to be applied in finding the present value of the annual amounts which will be necessary for providing the plaintiff with adequate care.

I have come to the conclusion that perhaps as a compromise I would adopt neither the Diplock approach nor the use of the present day very high rates of return on investment. I am in agreement with the comment that the Diplock approach starts with an unrealistic base. I am also in agreement with the view that the use of the present very high interest rates without provision for future inflation is equally unrealistic and might cause, in the present case, a very serious shortfall in the amounts which will be available for the future care of the infant plaintiff. We may take judicial notice of the pronouncement made by Dr. Deutch of the Economic Council of Canada that we may expect inflation at the rate of 3½% over the long-term future, and it is the long-term future we must consider in awarding damages for the future care of the infant plaintiff. If we assume present day investment rates at about 10½% and then deduct from that rate 3½% to cushion against future inflation, we would arrive at a discount rate of 7%. I would adopt that figure as being the best compromise to, at the same time, recognize the present very high rates of investment income and the probability of future inflation. I shall hereafter apply that 7% rate.

The last topic with which I must deal is that mentioned for the first time in the reasons in the Court of Appeal for Ontario although I am sure that Keith, J., has it in mind when fixing the global award. Even if the infant plaintiff were adult and not disabled, she would need professional assistance in the management of such a large sum of money as is being awarded to her in this case. Although the management of that sum, until she is an adult, will be in the efficient hands of the Official Guardian for the Province of Ontario, she will have the whole burden of management so soon as she becomes an adult and at that time she will have to retain the

services of skilled financial advisers. It is appropriate to allow an amount to cover the annual fee which will be entailed. It was Zuber, J.A.'s calculation that the award should be increased by an amount of $35,000 to provide a fund for the payment of such management fee and I am ready to accept that disposition.

I turn next to the consideration of an award to cover the income which the infant plaintiff would have earned had she grown to womanhood and joined the work force. This amount was not separately assessed or considered by the learned trial Judge although he did emphasize in discussing the global award that it would have to be made to cover the plaintiff's own living costs even apart from the award to cover the special care with which I have already dealt as "she had been deprived of an opportunity to provide for herself".

Zuber, J.A., in his reasons for the Court of Appeal for Ontario, assigned the sum of $115,000 to cover this loss of future income. His reasons for doing so are set out in one paragraph which I quote [at p. 26 D.L.R., p. 602 O.R.]:

> Diane Teno is entitled to be compensated for the loss of future income she would have earned but for this accident. Inherent in this statement, there is the obvious difficulty of selecting the income she would have earned. In view of Diane's age, obviously no evidence could be tendered as to what in fact her potential earnings might have been. It was disclosed in evidence that Diane's mother, Yvonne, was a teacher, earning in excess of $10,000. In the absence of any other guide, the trial Judge rightly used this as some indication of Diane's potential. It would not be unreasonable to assume that she would begin earning money at age 19 and continue to a retirement age of 65. The capital sum required as of the date of trial, to produce that income, between those ages, using a 5% interest rate, is $115,500. It is now settled law that in arriving at an award to compensate for future loss of income, the effect of income tax is not to be considered: *The Queen v. Jennings*, [1966] S.C.R. 532, 57 D.L.R. (2nd) 644.

The allowance of an amount for loss of future income in the present case is extremely difficult. The plaintiff at the time of her injury was a four and a half-year-old child. There can be no evidence whatsoever which will assist us in determining whether she ever would have become a member of the work force or whether she would have grown up in her own home and then married. There can be no evidence upon which we may assess whether she would have had a successful business future or have been a failure. Since the Court is bound not to act on mere speculation, I do not see how this Court could approve the course taken by Zuber, J.A., which simply amounted to assuming, as he quite frankly said, "in the absence of any other guide", that the infant plaintiff would follow the course of her mother who was a primary school teacher with an income of $10,000 per year. On the other hand, I do not think we can assume that a bright little girl would not grow up to earn her living and would be a public charge, and we are not entitled to free the defendants, who have been found guilty of negli-

gence, from the payment of some sum which would be a present value of the future income which I think we must assume the infant plaintiff would earn. It must be remembered that the allowance for future care provides only for the cost of attendants and that like everyone else the infant plaintiff has to eat, clothe herself and shelter herself.

If there is no allowance for the loss of future income, then the fund from which her ordinary living costs would be supplied would have to come from the amount awarded for non-pecuniary damages and there can be no excuse for depriving the infant plaintiff of an allowance for those non-pecuniary damages fixed in a fashion which I shall discuss hereafter by requiring her to use those non-pecuniary damages to live on. The problem has caused concern in many other cases. Lord Denning, M.R., in *Taylor v. Bristol Omnibus Co. Ltd.*, [1975] 2 All E.R. 1107 (C.A.), dealt with a claim for loss of future income by a boy three and a half years old at the time of the accident. At pp. 1112-3, he said:

> 3. *Loss of future earnings*
>
> The judge assumed that Paul would start earning at the age of 19. He took the yardstick of his father's position. He took an average figure of £2,000 a year and used a multiplier of 16. This making £32,000. Less one-half for present payment: making £16,000.
>
> Counsel for the defendants urged us to adopt a new attitude in regard to babies who are injured. He suggested that the loss of future earnings was so speculative that, instead of trying to calculate it, we should award a conventional sum of say £7,500. He suggested that we might follow the advice given by Lord Devlin in *H West & Son Ltd v Shephard*, [1963] 2 All ER 625 at 638, [1964] AC 326 at 357, that is: (i) give him such a sum as will ensure that for the rest of his life, this boy will not, within reason, want for anything that money can buy; (ii) give him, too, compensation for pain and suffering and loss of amenities; (iii) but do not, in addition, give him a large sum for loss of future earnings. At his very young age these are speculative in the extreme. Who can say what a baby will do with his life? He may be in charge of a business and make much money. He may get into a mediocre groove and just pay his way. Or he may be an utter failure. It is even more speculative with a baby girl. She may marry and bring up a large family, but earn nothing herself. Or, she may be a career woman, earning high wages. The loss of future earnings for a baby is so speculative that I am much tempted to accept the suggestion of counsel for the defendants.

In *Kemp & Kemp on the Quantum of Damages*, 4th ed., vol. 1, p. 135, in a paragraph entitled "Where the plaintiff is a child or youth and has not commenced on any career, and so there is no figure for net annual loss at the date of the trial", it is stated that in that class of case the court is really reduced to pure guesswork.

Lord Denning, in the statement of *Taylor* which I have quoted, cites the argument of counsel that there should be awarded "a conventional sum of say £7,500".

As I have said, I think we must make an award of some sum but we have no guidance whatsoever in the fixation of that sum. It

would seem to me that we are entitled to say that the infant plaintiff would not have become a public charge. To award an annual loss of income of the sum of $5,000 is to make an award of an amount which, in the present economic state, is merely on the poverty level, yet, I cannot justify an award based on an amount of $10,000 as did Zuber, J.A. I think that we would be doing justice to both plaintiff and defendants, and I find it equitable, to determine that the infant plaintiff would, at least, have earned $7,500 per year for her business life.

As I have already pointed out, this Court in *The Queen v. Jennings, supra,* found that there should be no deduction for income tax from the amount allowed by loss of future income.

I am of the view that annual amounts should only be calculated from the time the infant plaintiff would have reached 20 years of age until she would have reached the normal retirement age in industry today of 65 years. Moreover, when we assume that the plaintiff would have been a wage earner, we must also consider that all wage earners are faced with possibilities of failure through illness short of death, financial disasters, personality defects, and other causes. I, therefore, believe that we should allow a 20% contingency deduction from the $7,500 to make a net annual loss of income of $6,000 and then calculate the present value of payments of $6,000 commencing at the time the infant plaintiff would have attained the age of 20 years and continue until she would have reached 65 years. That present value, in my view, should be calculated at the same discount rate of 7% as the present value of the amount provided for future care for the reasons which I have discussed above. This calculation appears hereafter in my summary.

There remains the assessment of the quantum of non-pecuniary damages. These damages are spoken of as "compensation" for pain and suffering, loss of amenities of life, loss of expectation of life — a grant of largely subjective considerations the very naming of which indicates the impossibility of precise assessments. I have recited above in very complete detail the evidence and report of a pre-eminent medical specialist. I repeat his conclusion: "This accident has produced one of the most disabled children I have ever seen." The learned trial Judge in his global award of $950,000 assigned $200,000 as non-pecuniary damages. The Court of Appeal, despite vigorous attacks on that amount by counsel for all defendants confirmed that amount. The same counsel launched the same attack in this Court.

The real dificulty is that an award of non-pecuniary damages cannot be "compensation". There is simply no equation between paralyzed limbs and/or injured brain and dollars. The award is not repairative: there can be no restoration of the lost function. There can be no doubt that awards for non-pecuniary damages in the immediate past have been increasing apace. In the case of many verdicts in the United States, it may well be said that they have been soaring. The reasons probably are many. Firstly, I have pointed out the impossibility of accurate assessment. Then there must be many cases of what really are expressions of deep sympathy for the terribly injured plaintiff and a mistaken feeling that his or her sore loss of the amenities of life may be assuaged by the feeling of satisfaction from a pocket-full of money. There might even be some element of punishment for the wrongdoer or, the most irrelevant of considerations, a measuring of the depth of the defendant's purse. Certainly, such awards, which one may well characterize as exorbitant, fail to accord with the requirement of reasonableness, a proper gauge for all damages.

I repeat my view expressed earlier that in these cases of very serious personal injuries the prime purpose in fixing an award of damages is the provision of adequate reasonable care for the plaintiff for the rest of the plaintiff's life. This I have attempted above by providing a fund from which may be drawn annually the necessary sum for care and attention and by an award for loss of future income from which she may supply the ordinary necessities of life. These two amounts I reach without regard for any social impact of the admittedly, and necessarily, large award. Indeed, the social burden may only be borne by a proper and reasonable assessment of the amounts. Under the present common law system of liability for fault, there can be no excuse for foisting on the public the burden of caring for the plaintiff or supplying her with the necessities of life. However, that accomplished, and I hope I have accomplished it, one may and should have regard for the social impact of very large and, as I have said, non-compensatory awards for non-pecuniary damages. The very real and serious social burden of these exorbitant awards has been illustrated graphically in the United States in cases concerning medical malpractice. We have a right to fear a situation where none but the very wealthy could own or drive automobiles because none but the very wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards.

One solution might be that discussed in some English cases, *i.e.*, to confine the non-pecuniary damages to "an arbitrary conventional sum". This solution I seek to avoid. Rather, I adopt the course taken by my brother Dickson in *Andrews*, that is, to fix the non-pecuniary damages by reference to a rational basis for them. If, as did my brother Dickson, one realizes that it is impossible to compensate for the losses of the various elements involved in non-pecuniary damages and that it is reasonable, none the less, to make an award then gauge that award by attempting to set up a fund from which the plaintiff may draw, not to compensate for those

losses, but, to provide some substitute for those amenities. As Harman, L.J., put it so well in *Warren et al. v. King*, [1963] 3 All E.R. 521 at p. 528, "... what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances?"

I am in respectful agreement with Dickson, J., that there should be uniformity, always allowing flexibility to meet each differing individual case, in awards for non-pecuniary damages. Perhaps one should say there must be upper limits with awards lower in some cases and some higher in exceptional cases. Dickson, J., has found $100,000 as being the upper limit in both *Andrews* and *Thornton*. As I have pointed out, those were both cases of young men turned by the accidents into quadriplegics but whose mental faculties were unimpaired and who, by use of wheelchairs and appropriate automotive vehicles, will be able to get about amongst their fellow men.

The infant plaintiff Diane Teno, although not completely paralyzed, is so disabled that her very limited ability to walk is accomplished in such an awkward fashion as to cause her continual embarrassment. Her left arm is very clumsy, her right is useless because of spastic weakness, her speech is impaired and nearly unintelligible and her mental impairment has reduced her to the "dull normal range". I am of the opinion that such a condition justifies a very generous award to permit the infant plaintiff to find some way by which her life may be made a little more tolerable. Moreover, the infant plaintiff in the present appeal has a life expectancy of 66.9 years while Andrews has a life expectancy of only 45 years and Thornton only 49 years. Therefore, despite the fact that the infant plaintiff, unlike Andrews and Thornton, will not need the frequent actual treatment required by the latter such as turning in bed every two hours, the other circumstances to which I have referred justify the allowance of the same sum of $100,000 to her under this heading of non-pecuniary damages.

The result of these reasons, I would summarize as follows:

Firstly, the respondent Orville Teno is entitled to retain his judgment against all the defendants for special damages fixed at $14,979.62 of which sum he is to hold $7,500 in trust for his wife Yvonne Teno.

Secondly, the respondent Diane Teno is entitled to the following sums:

(1) *For future care*:
To provide a fund of $21,000 per annum for 57 years, calculated at discount rate of 7% $294,387
To provide an additional sum of $6,000 per annum commencing in 1984 (when she attains the age of 19 years) and continuing for the balance of her life .... $ 54,735
(This sum will have generated a fund of $82,708 by 1984.)

(2) *Loss of future income*: .... $ 54,272
Fixed at $6,000 per year for 45 years commencing in 1984 when this sum at a discount rate of 7% will have accumulated a fund of $82,008

Thirdly, non-pecuniary damages $100,000
Fourthly, management fee .... $ 35,000
TOTAL damages of Diane Teno $538,394
rounded out at $540,000.

The judgments in the amounts aforesaid should be payable in full by all four of the defendants, Wallace Arnold and Brian Arnold, J. B. Jackson Limited and Stuart Galloway, but as between themselves Wallace Arnold and Brian Arnold taken together should contribute 50% to their co-defendants J. B. Jackson Limited and Stuart Galloway and vice-versa.

The costs at trial should remain unchanged. Although the global award made by the learned trial Judge was much reduced upon appeal, no costs were awarded against the plaintiff Diane Teno by the Court of Appeal for Ontario. Despite the further reduction of the global award in this Court, I am of the opinion that the matters involved in its determination were questions of policy upon which there had been little guidance in previous decisions of this Court and that it would be proper to refrain from making any order as to costs in this Court against the appellant Diane Teno.

The appellant Yvonne Teno is entitled to her costs against all defendants upon the third party issue in which contribution was claimed against her.

PIGEON, J.:—I have had the advantage of reading the reasons of Spence, J. I am in agreement with him on all but one point.

Specifically, I agree that all defendants should be held liable and that, as between them, there should be an even division between Wallace Arnold and Brian Arnold on one hand, and J. B. Jackson Limited and Stuart Galloway on the other. I also agree to restore the conclusion of the trial Judge that there should be no contribution by Yvonne Teno. The evidence fully supported the conclusion of Keith, J., [55 D.L.R. (3d) 57 at p. 78, 7 O.R. (2d) 276]: "The parents of these children did not depart from the generally accepted standard of care."

In my view, the same should be said of defendant J. B. Jackson Limited, the ice-cream vending company whose truck was in the charge of the defendant Stuart Galloway. Although I see no reason to interfere with the concurrent findings of negligence against the latter, I am unable to accept the finding that J. B. Jackson Limited is liable for the accident, not only by reason of Galloway's negligence but also by reason of the way in which its vending business was conducted. Here is how this finding was expressed by Zuber, J.A. [67 D.L.R. (3d) 9 at pp. 17-8, 11 O.R. (2d) 585]:

> If there is any validity in the argument of the defendants, that it was impossible for one man in Galloway's position to do any more, it succeeds only in impaling these defendants on the other horn of a dilemma. If a single attendant can not adequately care for the children attracted into the street, then he creates an unreasonable risk by first attracting them. A pied piper cannot plead his inability to take care of his followers when it was he who played the flute.
>
> I agree with the result arrived at by Mr. Justice Keith in finding responsibility on the part of Jackson and Galloway. I agree as well with his further characterization on the position of the defendant Jackson. Not only is Jackson vicariously responsible for the particular failings of Galloway, but Jackson itself was negligent in the manner in which it carried on business. Without taking any adequate precautions for their safety, it attracted children into the roadway with the consequent forseeable and unreasonable danger to them.

A good deal of evidence was led by the plaintiffs in this case concerning ice-cream vending to young children from trucks in the streets. In Windsor, in 1969, when the accident occurred, this was not a new operation, it was an established business operating under a permit as in a great many other cities in Ontario and elsewhere in North America as well as overseas. In a few places, the operation was banned and a traffic expert gave evidence of a report he had made in support of such a by-law which was promoted by dealers in ice-cream selling it in stores. In 1962, Jackson vainly tried to have the ban lifted by the Township of Etobicoke. No such ban was in effect in Windsor or in most cities and towns in Ontario. In some places, consideration had been given to the possibility of requiring a second person on each truck. It was appreciated that under present economic circumstances this would be the equivalent of banning the operation and no action was taken. The witness Amer had been by-law enforcement officer for the Township of North York where there was a restrictive by-law. He said that he had seen *on one occasion* an ice-cream vending operation carried on by one man in the truck and another on the sidewalk.

The trial Judge said in particular [at pp. 75-6]:

> J. R. Jackson who was for many years vice-president and general manager of the defendant J. B. Jackson Limited was called as a witness for the plaintiff. In direct examination he stated that their drivers were given no specific instructions about handling young children coming from the opposite side of the street, or indeed from any place, but conceded that common sense requires you to keep them off the street. When asked why special precautions were not taken, such as requiring the driver to leave the truck and escort little ones to safety or by providing a second person on the truck for just such purposes (as was considered necessary in *Culkin v. McFie & Sons, Ltd., supra* [[1939] 3 All E.R. 613]), his honest but damning answer was that the exigencies of business, *i.e.*, to make a profit, overrode safety factors.

The actual answer of the witness was:

> Q. Was there any consideration of having two men on the truck, one to serve and one to assist pedestrians?
>
> A. One of the municipal suburbs of Toronto suggested we do that. We did not consider this because we would have, there just is not the margin, there is not enough profit in the operation to pay two men. As a matter of fact we experimented with a young lad but I think they contributed more to general breakdown of morale than anything else. Like school boys, that was not working.

In my view the trial Judge's comment was not justified. The law does not impose a duty to take all possible safety precautions. As Rinfret, C.J.C., said in *T. Eaton Co. Ltd. of Montreal v. Moore*, [1951] 2 D.L.R. 529 at p. 533, [1951] S.C.R. 470 at p. 475: "The law does not require more of any man than that he should have acted in a reasonable way."

On this aspect of the case, the question is whether a one-man operation was reasonable. It cannot be denied that a two-man operation would have been safer, but it would also have been economically impossible. The general opinion, among municipal authorities clearly was that the one-man operation was reasonable. The parents of the children as well so considered it by giving their children money to buy ice-cream from the vending truck rather than objecting to the operation. I agree that the parents acted reasonably. They were entitled to expect that the truck operator ("the piper") would not fail to watch for oncoming traffic and to warn the children against imprudently crossing the street in front of the truck. The parents were also entitled to expect that automobile drivers would not pass such trucks without taking the special precautions called for. I cannot agree that what the parents considered reasonably safe, should be considered a "folly" on the part of the ice-cream vending company. In *Cavanagh v. Ulster Weaving Co. Ltd.*, [1960] A.C. 145, Viscount Simonds said at (p. 158):

> It would, I think, be unfortunate if an employer who has adopted a practice, system or set-up, call it what you will, which has been widely used without complaint, could not rely on it as at least a prima facie defence to an action for negligence ...

Lord Tucker with whom Lord Jenkins agreed said (at pp. 161-2):

> I would, however, desire to express my agreement with what was said by my noble and learned friend, Lord Cohen, in *Morris's* case ([1956] A.C. 552) where, after reviewing what had been said on this subject in *Paris v. Stepney Borough Council* ([1951] A.C. 367, 382, [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42), and considering the language used by Parker L.J. in the case under consideration ([1954] 2 Lloyd's Rep. 507, 518), he said ([1956] A.C. 552, 579): "I think that the effect of their Lordships' observations is that when the court finds a clearly established practice 'in like circumstances' the practice weighs heavily in the

scale on the side of the defendant, and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one." And later he equates the word "folly" as used by Lord Dunedin and Lord Normand to "unreasonable or imprudent," thereby emphasising that Lord Dunedin could not have been intending to extend the employer's common law liability beyond that which had been laid down in *Smith v. Charles Baker & Sons* ([1891] A.C. 325; 7 T.L.R. 679) and many subsequent cases in this House. To give the word "folly" any other meaning would necessarily have this result.

Lord Somerwell of Harrow added at p. 167:

In my view it would be unfortunate if courts had to consider what amounted to folly.

DICKSON, J., concurs with SPENCE, J.

BEETZ, J., concurs with PIGEON, J.

DE GRANDPRÉ, J. (dissenting in part):—The facts giving rise to this litigation are not in dispute. They have given rise to a condemnation against the owner and the driver (the Arnolds) of the motor-car that struck young Diane Marie Teno and there is no appeal before us on the point.

On the issue of the liability of the ice-cream merchant (Jackson) and of his employee (Galloway), I would have been inclined to decide that there was no negligence on their part. Because of the concurrent findings in the Courts below, I have reluctantly come to the conclusion that their conduct cannot be considered blameless. However, I share the views of my brother Pigeon that the liability of Jackson is vicarious only.

With respect, I do not agree with my brethren that the mother has committed no negligence. If an ice-cream merchant is responsible to his young customer because his employee failed to take the reasonable care owed to a child who had become his "neighbour", the mother, in the circumstances of this case, cannot be said to be in a better position. The duty of care resting on a parent is a paramount one and does not come to an end because a third party comes into the picture and is found to have been negligent for having allowed the child to cross the street and for having failed to warn that child of an approaching car. The mother, who had just given to her two young children (six and four and one-half years old respectively) the money to buy ice-cream and who knew that the truck was on the other side of the boulevard, cannot be said to be under a lesser duty than that resting on the merchant's employee.

I agree with Zuber, J.A., that (67 D.L.R. (3d) 9 at p. 20, 11 O.R. (2d) 585 at p. 596):

The conduct of Yvonne Teno falls short of the standard to be expected from a reasonably prudent mother under the circumstances.

and I adopt all his reasons in support of that conclusion.

In the result, I would hold that the consequences of the accident must be borne equally in the proportion of one-third by the Arnolds, by Jackson and Galloway and by Yvonne Teno.

Appeals dismissed; cross-appeal allowed; judgment varied.

PROTESTANT SCHOOL BOARD OF GREATER MONTREAL et al. v. MINISTER OF EDUCATION OF QUEBEC et al.; ATTORNEY-GENERAL OF CANADA, Third Party

Quebec Superior Court, Montreal District, Deschenes, C.J.S.C. *April 6, 1976.*

Constitutional law — Validity of legislation — Legislation dealing with language of instruction in schools — Whether violating constitutional guarantees given by British North America Act, 1867, s. 93(1) — Official Language Act, 1974 (Que.), c. 6.

The *Official Language Act*, 1974 (Que.), c. 6, in so far as it deals with the language of instruction in schools, does not violate the constitutional guarantees with respect to denominational schools given by s. 93(1) of the *British North America Act, 1867*. Section 93 says nothing about language. As a result, the restrictions imposed by s. 93(1) on the exclusive power of the Province in matters of education apply to the denominational aspect of schools, but not to the language in which they function. As to the choice of the language of education, the Legislature is supreme.

[*Ottawa Separate School Trustees v. Mackell* (1916), 32 D.L.R. 1, [1917] A.C. 62; *Hirsch et al. v. Protestant Bd. School Com'rs of Montreal et al.*, [1928] 1 D.L.R. 1041, [1928] A.C. 200, 48 Que. K.B. 115 [varg [1926] 2 D.L.R. 8, [1926] S.C.R. 246]; varg 31 Rev. de Jur. 440; *Board of Trustees of Roman Catholic Separate Schools of Belleville v. Grainger et al.* (1878), 25 Gr. 570; *Ottawa Separate School Trustees v. City of Ottawa* (1916), 32 D.L.R. 10, [1917] A.C. 76; *Ottawa Separate School Trustees v. Quebec Bank and A.-G. Ont.* (1919), 50 D.L.R. 189, [1920] A.C. 230; *Tiny Separate School Trustees v. The King*, [1928] 3 D.L.R. 753, [1928] A.C. 363, [1928] 2 W.W.R. 641 [affg [1927] 4 D.L.R. 857, [1927] S.C.R. 637]; affg [1927] 1 D.L.R. 913, 60 O.L.R. 15; *Board of Education for Moose Jaw School District No. 1 of Saskatchewan et al. v. A.-G. Sask. et al.* (1975), 57 D.L.R. (3d) 315, [1975] 6 W.W.R. 133; *L'Association des Proprietaires des Jardins Tache Inc. et al. v. Les Enterprises Dasken Inc. et al.* (1971), 26 D.L.R. (3d) 79, [1974] S.C.R. 2; *Thorson v. A.-G. Can. et al. (No. 2)* (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225; *Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632, [1976] 2 S.C.R. 265, 32 C.R.N.S. 376, 12 N.S.R. (2d) 85, 5 N.R. 43; *Perusse et al. v. School Com'rs of St-Leonard de Port Maurice* (1969), 11 D.L.R. (3d) 81, [1970] Que. C.A. 324; *Regina Public School v. Gratton Separate School and City of Regina* (1914), 18 D.L.R. 571, 7 W.W.R. 7, 7 S.L.R. 451; *Reference re Adoption Act, etc.*, [1938] 3 D.L.R. 497, [1938] S.C.R. 398, 71 C.C.C. 110; *Brophy et al. v. A.-G. Man.*, [1895] A.C. 202; *City of Winnipeg v. Barrett*, [1892] A.C. 445; *Perron v. School Trustees of Rouyn and A.-G. Que.* (1955), 1 D.L.R. (2d) 414, [1955] Que. Q.B. 841; *Chabot v. School Com'rs of Lamorandiere and A.-G. Que.* (1957), 12 D.L.R. (2d) 796, [1957] Que. Q.B. 707; *McDonald v. Lancaster Separate School Trustees* (1915), 24 D.L.R. 868, 8 O.W.N. 598; *McDonald v. Lancaster Separate School Trustees* (1916), 29 D.L.R. 731, 9 O.W.N. 444; *Nissan Automobile Co. (Canada) Ltd. et al. v. Pelletier et al.* (1976), 77 D.L.R. (3d) 646; *McKay v. The Queen* (1965), 53 D.L.R. (2d) 532, [1965] S.C.R. 798; *Gold Seal Ltd. v. Dominion Express Co. and A.-G. Alta.* (1921), 62 D.L.R. 62, 62 S.C.R. 424, [1921] 3 W.W.R. 710; *Morgan et al. v. A.-G. P.E.I. et al.* (1975), 55 D.L.R. (3d) 527, [1976] 2 S.C.R. 349, 7 Nfld. & P.E.I.R. 537, 5 N.R. 455, refd to]

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can be effectively restored and that in the result is the effect of the order of the learned trial judge.

The learned trial judge allowed interest on the judgment at 12% per annum from August 1, 1982, to the date of judgment. It was submitted by the appellant that the Crown was not liable for prejudgment interest in the absence of a contractual or statutory provision stipulating that interest was payable. In view of the conclusion which I have reached, that the contract was void, Municipal Spraying is entitled to restitution. Restitution in this case depends on the loss including interest on the money which the respondent was required to pay by the terms of the contract. The right to restitution on this basis is not dependent on the right to prejudgment interest although in the result the amount may be the same. The amount assessed in this case was reasonable and I would not disturb it.

In the result I would dismiss the appeal with costs to the respondent to be taxed.

Appeal dismissed.

BORLAND et al. v. MUTTERSBACH et al. and four other actions

Ontario Court of Appeal, MacKinnon A.C.J.O., Dubin, Lacourcière, Blair and Thorson JJ.A. December 23, 1985.

Insurance — Automobile insurance — Underinsured motorist endorsement — Seven persons falling within definition of "insured" — Limit of liability applying to total liability under endorsement.

By an underinsured motorist endorsement, an insurer agreed to indemnify "an insured person who sustains bodily injury or death by accident arising out of the use or operation of an automobile for the amount such person is legally entitled to recover from . . . the owner or operator of an automobile who is insured under a motor vehicle liability policy . . .". It was further provided that payment under this paragraph was "excess to recovery from the sources referred to in that paragraph . . . but shall not exceed the difference between the aggregate recovery from such sources and the legal liability limits referred to in Clause 3". Clause 3 stated: "The amount payable hereunder, regardless of the number of persons injured or killed, shall not exceed the amount stated as the legal liability limit [under the liability section of the policy]." "Insured person" was defined to include the named insured, and, if residing in the same dwelling, his or her spouse and any dependent relative of either while an occupant of the described automobile or who was struck by an automobile. An explanatory introductory paragraph at the beginning of the endorsement included a single example, in which an insured person recovered his full loss under the endorsement. An accident occurred caused by the fault of one M, in which one person was killed and seven were injured, all seven falling within the definition of "insured persons". M was insured for $300,000. The liability limit in the policy containing the underinsured motorist endorsement was $1,000,000.

Several of the plaintiffs suffered damage in excess of $300,000, and one suffered damage in excess of $1,000,000. All recovered judgment against M for their loss. The trial judge held that each plaintiff was an "insured person" under the policy, and each was entitled to recover, subject to a separate limit of $1,000,000 (minus the amount recovered from M) for each. On appeal to the Ontario Court of Appeal, **held**, allowing the appeal on this point, the words of cl. 3 according to their natural meaning meant that the amount payable under the endorsement, no matter how many persons were injured or killed, was not to exceed the figure referred to.

Judgments and orders — Interest — Prejudgment — Rate — Personal injuries — Damages for non-pecuniary loss — Interest awarded at full rate.

Judgments and orders — Interest — Prejudgment — Rate — Interest rates dropping after commencement of action — Average rate awarded.

Judgments and orders — Interest — Prejudgment — Rate — Discretion to depart from statutory rate — Defendant's insurer withholding payment until shortly before trial — Factor properly to be taken into account in exercising discretion — Judicature Act, R.S.O. 1980, c. 223, s. 36.

Cases referred to

Wigle et al. v. Allstate Ins. Co. of Canada (1984), 49 O.R. (2d) 101, 14 D.L.R. (4th) 404, [1985] I.L.R. para. 1-1863, 10 C.C.L.T. 1, 30 M.V.R. 167; leave to appeal to S.C.C. refused D.L.R. *loc. cit.*, 59 N.R. 73; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.*, [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, [1980] I.L.R. para. 1-1176, 32 N.R. 488; *Spencer v. Rosati et al.* (1985), 50 O.R. (2d) 661, 1 C.P.C. (2d) 301; *Andrews et al. v. Grand & Toy Alberta Ltd. et al.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 8 A.R. 182, 19 N.R. 50; *Arnold et al. v. Teno et al.*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 3 C.C.L.T. 272, 19 N.R. 1; *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257, 19 N.R. 552; *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263, [1982] 1 W.W.R. 433, 19 C.C.L.T. 1, 34 B.C.L.R. 273, 39 N.R. 361; *Graham et al. v. Persyko* (1984), 30 C.C.L.T. 85; *Wotherspoon et al. v. Canadian Pacific Ltd. et al.; Pope et al. v. Canadian Pacific Ltd. et al.* (1979), 22 O.R. (2d) 385, 92 D.L.R. (3d) 545; vard 35 O.R. (2d) 449, 129 D.L.R. (3d) 1; leave to appeal to S.C.C. granted 37 O.R. (2d) 73*n*, 44 N.R. 83*n*; *Eagil Trust Co. Ltd. v. Pigott-Brown et al.*, [1985] 3 All E.R. 119

Statutes referred to

Judicature Act, R.S.O. 1980, c. 223, s. 36(3), (4), (6) (since repealed by s. 187 of, and replaced by *Courts of Justice Act*, 1984 (Ont.), c. 11, s. 138)

APPEAL and CROSS-APPEALS from a judgment of Barr J., 49 O.R. (2d) 165, 15 D.L.R. (4th) 486, [1985] I.L.R. para. 1-1815, in actions for damages arising out of an automobile accident.

W. L. N. Somerville, Q.C., and *T. P. D. Bates*, for Royal Insurance Company of Canada, appellant.

Earl A. Cherniak, Q.C., and *Jerome R. Morse*, for respondents, appellants in cross-appeal.

Norman C. Brown, Q.C., and *J. P. Schlemmer*, for Zurich Insurance Company, respondent in cross-appeal.

W. T. McGrenere, Q.C., for Allstate Insurance Company of Canada, respondent in cross-appeal.

BY THE COURT:—The principal issue in these appeals involves the interpretation to be given to an insurance policy endorsement, namely, S.E.F. No. 42 underinsured motorist endorsement ("S.E.F. No. 42"), which, while in existence for a short time, is no longer in use.

The plaintiffs were all occupants of a 1971 G.M.C. self-propelled motor home owned by Tye Farm Equipment Limited, rented by the plaintiff, Edward Borland, and driven by his son, the plaintiff, Scott Borland. They were injured in a collision with a motor vehicle owned and operated by Harry Richard Muttersbach ("Muttersbach"). Muttersbach was killed in the accident, as was the husband of another plaintiff, Judith Ann Barchuk. The plaintiffs sued Eleanor Ann Muttersbach as executrix of Muttersbach's estate. Muttersbach was held liable for the accident and judgment was given in favour of the plaintiffs. Damages were assessed (exclusive of prejudgment interest) as follows:

Edward Borland	$326,777.00
Joan Borland	$326,741.00
Scott Borland	$303,604.00
Sean Borland	$306,337.00
Shelley Borland	$1,281,153.00
Stacey Borland	$78,258.00
and Judith Barchuk	$534,385.00
(whose husband was killed in the accident)	$3,157,255.00

The Muttersbach vehicle was insured by Zurich Insurance Company ("Zurich") under a policy with Section A, third party liability limits of $300,000 ("Zurich Policy No. 1"). Edward Borland (who rented the Tye Farm Equipment motor home) was the owner of a 1953 Chrysler and 1966 Volkswagen, both of which were insured by Zurich under a policy with Section A, third party liability limits of $500,000 ("Zurich Policy No. 2"). Scott Borland, the driver of the motor home, was the owner of a 1978 Honda which was insured by Zurich under a policy with Section A, third party liability limits of $500,000 ("Zurich Policy No. 3"). The plaintiff, Sean Borland, a passenger in the motor home, was the owner of a 1969 G.M.C. which was insured by Allstate Insurance Company of Canada ("Allstate") under a policy with Section A, third party liability limits of $500,000 ("Allstate Policy"). The insurance policies held by Edward, Scott and Sean Borland on their own motor vehicles were all endorsed with S.E.F. No. 42.

The appellant, Royal Insurance Company of Canada ("Royal") was the liability insurer of the Tye Farm Equipment Limited vehicle under a policy with Section A, third party liability limits of $1,000,000. It was agreed that the Royal policy had also been endorsed with S.E.F. No. 42.

The judgment under appeal

The appellant, Royal, on the trial judge's interpretation of S.E.F. No. 42, was ordered to pay the several plaintiffs that sum of money which represented the difference between each plaintiff's *pro rata* share of the proceeds from the Muttersbach policy (Zurich Policy No. 1 — $300,000) and the amount of each of their judgments against the estate of Muttersbach, up to a limit of $1,000,000 per plaintiff or a total of $3,226,602 (inclusive of prejudgment interest). The appellant was also ordered to pay the party-and-party costs of the plaintiffs, with a direction that the costs include an allowance for two senior and one junior counsel fee for the time each counsel was actually present at trial. The decision of the trial judge can be found at 49 O.R. (2d) 165, 15 D.L.R. (4th) 486, [1985] I.L.R. para. 1-1851.

The main part of the appellant's appeal involved an attack on the trial judge's interpretation of S.E.F. No. 42. Two subsidiary issues were raised in relation to the award of prejudgment interest. Counsel for the appellant argued that the trial judge erred in awarding interest on the pecuniary loss prior to trial at one-half the prime rate for the month preceding the issue of the writ, rather than at one-half the average prime rates between the month preceding the issue of the writ and the judgment month. Counsel also submitted that the plaintiff, Shelley Borland, had been doubly compensated when the trial judge awarded prejudgment interest on the award of $170,000 for non-pecuniary general damages, in light of the fact that the $170,000 took into account inflation (with its interest component) from the time of the accident to the date of trial.

Leave to appeal the award of costs was given by the trial judge and counsel submitted to this Court that there was no precedent for such an award. We did not require counsel for the respondents to reply on this issue and we shall deal with the matter later in these reasons.

In the event that the appellant, Royal, was successful in its appeal, the respondents cross-appealed, relying on the S.E.F. No. 42 coverages in Zurich Policies No. 2 and No. 3 and the Allstate Policy where they fall within the definition of "insured person".

The respondent, Shelley Borland, also appealed regardless of the success of the Royal appeal. Her position is that, in any event, she is entitled to judgment against Royal for $1,000,000, without credit being given for the money recovered by her under Zurich Policy No. 1 (the Muttersbach policy).

We turn now to the first and what we have described as the main part of the appeal.

The interpretation of S.E.F. No. 42

There are certain general observations that may be made about S.E.F. No. 42 about which there seems to be no disagreement.

The first is that while the endorsement was still being offered, it provided to those subscribing to it an insurance coverage additional to that provided by the standard automobile insurance policy issued in Ontario. This optional additional coverage could only be offered, and could only be subscribed to, in the form set forth in S.E.F. No. 42. This was the form in which it was approved by the Superintendent of Insurance, whose approval was necessary before it could be marketed in Ontario by those insurers choosing to offer the coverage it provided. No deviations from the form were permitted either at the instance of insurers offering it or at the request of particular subscribers.

S.E.F. No. 42 itself contained an insuring agreement which was separate from the standard automobile policy to which the endorsement was added. It was, however, treated as forming part of the policy, and indeed, to give full meaning and effect to the endorsement, it is necessary to refer to some of the provisions of the policy such as the Section A, third party liability limit.

S.E.F. No. 42 has two main components, the first being a "Brief Explanation of Endorsement" which seeks to explain in relatively simple and straightforward language what coverage is offered. The brief explanation gives an example of the operation of S.E.F. No. 42 and refers the reader to the second main component, namely, the endorsement wording. For convenience the full text is set out as follows:

S.E.F. No. 42
Underinsured Motorist Endorsement

Brief Explanation of Endorsement

By this endorsement your Insurer provides additional benefits to you and other insured persons who have a claim against another motorist and injuries or death if the other motorist has insufficient insurance to pay the claim. The limit of this coverage is the difference between the liability insurance limit of your policy and that carried by the motorist at fault. For example, if your policy shows a liability limit of $500,000 and

you obtained a judgment of $300,000 against the "at fault" motorist — but he was insured for only $100,000 — you would be able to claim the difference of $200,000 from your Insurer. The coverage also applies if the "at fault" motorist is not insured.

Priority of payment is given to you and your family over other occupants of the automobile.

For complete details, refer to the endorsement wording hereunder.

Insuring Agreement — Provided a premium is stated for this Endorsement in item 4 of the application and subject to the provisions hereof it is understood and agreed that the Insurer shall indemnify an insured person who sustains bodily injury or death by accident arising out of the use or operation of an automobile for the amount such person is legally entitled to recover from

Underinsured Motorist Excess Cover — (a) the owner or operator of an automobile who is insured under a motor vehicle liability policy or who has provided a bond, cash deposit or other financial guarantee as required by law in lieu of such a policy; and

Uninsured Motorist Excess Cover — (b) the owner or operator of an uninsured automobile as defined in Subsection 3 of Section B of the policy to which this endorsement is attached.

Limit Under Paragraph (a) — 1. Payment under paragraph (a) of the insuring agreement above is excess to recovery from the sources referred to in that paragraph and to recovery of any first loss insurance referred to in Clause 8 but shall not exceed the difference between the aggregate recovery from such sources and the legal liability limits referred to in Clause 3.

Limit Under Paragraph (b) — 2. Payment under paragraph (b) of the insuring agreement above is excess to

(i) any amount payable by an unsatisfied judgment or similar fund;

(ii) any such amount which would have been payable by such fund had this endorsement not been in effect;

(iii) any amount payable under the uninsured motorist cover of a motor vehicle liability policy, and shall not exceed the difference between recovery under sub-clauses (i), (ii) and (iii) and the legal liability limits referred to in Clause 3.

Limit(s) — 3. The amount payable hereunder, regardless of the number of persons injured or killed, shall not exceed the amount stated as the legal liability limit applicable to the item covering the automobile in Section A of the policy.

Determination of Legal Liability — 4. The determination of legal liability and amount of damages shall be in accordance with Subsection 3 of Section B of the policy to which this endorsement is attached.

Limitation — 5. Every action or proceeding against the Insurer for

Period recovery under this endorsement shall be commenced within one year from the date when the cause of action hereunder arose.

Family Priority of Claims 6. The settlement of the claim of an insured person as defined in paragraphs (a) and (b) of Clause 9 shall have priority over the claim of any other insured person.

Where Insured Has Vehicles Separately Insured 7. Subject to Clauses 1 and 2, where the named insured has automobiles separately insured under two or more automobile liability policies, the Insurer under the policy to which this endorsement is attached shall pay the proportion only that its limit of liability hereunder bears to the total of all applicable limits under all of the policies involved.

Primary and Excess Insurance 8. Where an insured person is entitled to payment under Underinsured Motorist insurance under more than one policy, such insurance on the vehicle in which the insured person is an occupant is first loss insurance and such insurance under any other policy is excess.

Definition of Insured Person 9. In this endorsement "insured person" means:

(a) the named insured and, if residing in the same dwelling premises as the named insured, his or her spouse and any dependent relative of either, while
- (i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the General Provisions, Definitions and Exclusions of the policy;
- (ii) an occupant of any other automobile but excluding the person who owns such other automobile or leases it for a period in excess of 30 days; or
- (iii) not an occupant of an automobile and is struck by an automobile;

(b) if the named insured is a corporation, unincorporated association or partnership, any employee or partner of the named insured for whose regular use the described automobile is furnished, and his or her spouse and any dependent relative of either residing in the same dwelling premises as such employee or partner, in the circumstances referred to in subparagraphs (i), (ii) and (iii) of paragraph (a);

(c) any other person while an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the General Provisions, Definitions and Exclusions of the policy.

If more than one automobile is insured under this policy, this endorsement shall apply only to the automobile(s) against which S.E.F. No. 42 is designated in the schedule of automobiles forming part of this policy.

Except as otherwise provided in this endorsement, all limits, terms, conditions, provisions, definitions and exclusions of the policy shall have full force and effect.

This endorsement attaches to and forms part of the policy and shall be effective from 12:01 a.m. Standard Time of the effective date of the policy or renewal thereof, or, if added to the policy during the policy period, from 12:01 a.m. Standard Time of the effective date of the endorsement specifying the addition of this coverage.

In approaching the interpretation of S.E.F. No. 42 as added to the Royal policy, the trial judge correctly concluded that each of the plaintiffs in the two actions against the Muttersbach estate and Royal, being an occupant of the motor home described in the Royal policy, was an "insured person" within the meaning of cl. 9(c) of the endorsement. As he saw it, the first question then to be addressed was (at p. 172 O.R., p. 494 D.L.R.):

> . . . whether there is one "insured person" consisting of a group of claimants or whether each person falling within the definition of "insured person" is vested with rights he or she can enforce, individually, against the insurer.

Having decided that the latter interpretation was the correct one, he then turned to the various provisions of the endorsement. After a lengthy analysis of each of them, he concluded that the endorsement spoke to each insured person, separately and individually, with the result that each could claim the full benefit of the coverage it offered, without reference to others who might also be entitled to assert claims under it arising out of the same accident.

We shall return to this conclusion later. For the present, it is sufficient to note that the trial judge rejected the argument of counsel for Royal that the endorsement's provisions included a "cap" on the insurer's liability which limited that liability, however many persons might be entitled to assert claims under it, to an aggregate sum no greater than $1,000,000, the third party liability limit specified in Section A of the policy.

With respect, we are of the opinion that in asking himself as the first question "whether there is one 'insured person' consisting of a group of claimants", the trial judge erred in approaching the matter as if the answer to that question was determinative of the issue. The opening sentence of the "Brief Explanation" indicates that benefits are provided "to you [the named insured] *and other insured persons* who have a claim against another motorist . . ." (emphasis added). In the insuring agreement proper, the operative statement is that "the Insurer shall indemnify *an insured person* . . . for the amount *such person* is legally entitled to recover . . ." (emphasis added). In our view, these provisions make it clear that each insured person having a claim arising out of the same accident has rights which can be enforced separately

and individually. As is explained below, however, the measure of those rights varies from one claimant to another depending on the relevant facts.

In our opinion this "claimant by claimant" manner of reading the insuring agreement must also be applied to the interpretation of cl. 1. Clause 1 begins with the words "payment under paragraph (a) of the insuring agreement" (the applicable paragraph in this case, since the recovery in question here is from the owner or operator of the Muttersbach vehicle, which was insured under Zurich Policy No. 1). The reference to "[p]ayment under paragraph (a)" thus takes the reader directly back to the insuring agreement, which, as already noted, deals with the indemnification that "an insured person" may claim from the insurer. This compels the conclusion that the immediately following words in cl. 1 "is excess to recovery from the sources referred to in [para. (a)]" refers to the amount which *that particular* insured person ("such person") is entitled to recover from the owner or operator of the at fault insured vehicle.

Counsel for the appellant urged upon us that the "recovery" spoken of in cl. 1 must mean the total amount recovered or recoverable by all claimants from the owner or operator of the at fault insured vehicle (in this case, the $300,000 payable under Zurich Policy No. 1). He noted that the clause speaks of recovery from the "sources" referred to in para. (a), which he submitted reinforced the implication that when more than one claimant is entitled to recovery from such a source, an aggregating of the individual recoveries is what was intended in cl. 1. The result in this case would be that in calculating the net amount available under the Royal policy for distribution to individual claimants, the full $300,000 recoverable under Zurich Policy No. 1 would be subtracted from whatever is determined to be the limit of Royal's liability to all claimants under S.E.F. No. 42. Since this limit, counsel for the appellant submitted, is $1,000,000, the net amount available for distribution to all claimants would be $700,000.

With respect, we do not think that any such edifice can be built on so modest a foundation. There is, in our opinion, no particular subtlety surrounding the use of the plural word "sources", nor is there anything in para. (a) of the insuring agreement which compels the conclusion that an aggregating of the individual recoveries of each of the claimants is intended by cl. 1. The interpretation of cl. 1 contended for by counsel for the appellant appears to give no weight or significance to the opening words of that clause, "Payment under paragraph (a) of the insuring agreement", which, as already observed, takes the reader directly back to what is said in the insuring agreement, in language which in our opinion is clear and unambiguous.

There remains only to be considered in cl. 1 that part of the clause which follows the words "is excess to recovery from the sources referred to in [para. (a)]", that is to say, the words "and to recovery of any first loss insurance referred to in Clause 8 but shall not exceed the difference between the aggregate recovery from such sources and the legal liability limits referred to in Clause 3".

In our opinion, the effect of this clause, when read in its entirety and in the context of each insured person under S.E.F. No. 42, is to require the insurer to indemnify such person for the amount he or she "is legally entitled to recover" from the at fault insured owner or operator (in this case, the amount of the judgment obtained by that person against the Muttersbach estate) less:

(a) whatever can be recovered by him or her from the insurance had by the at fault owner or operator, and

(b) whatever can be recovered by him or her from any first loss insurance referred to in cl. 8.

The amount remaining is then the insurer's obligation to that person, except to the extent, if any, that that amount exceeds any limit on that obligation imposed by the operation of cl. 3.

The trial judge concluded, and we agree, that cl. 8 has no application in the context of the Royal policy. That clause becomes relevant only when it is necessary to determine which of two or more policies providing S.E.F. No. 42 coverage must respond first. Here, each insured person was an occupant of the vehicle insured by Royal, and there can be no question therefore that the Royal policy must respond first.

On this point, counsel for the appellants by cross-appeal argued, with reference only to Shelley Borland, that Shelley should be entitled to recover from Royal the full amount of her judgment up to the third party liability limit of $1,000,000. He submitted that cl. 8 makes it clear that the Royal policy is entirely first loss insurance, thus it must respond to Shelley's claim first. This, he contended, means that cl. 1 should be held to have no application in her case (since otherwise cl. 1 would be saying, absurdly, that the Royal policy is excess to itself). The result would be that any recovery by Shelley under Zurich Policy No. 1 should be ignored when calculating her right of recovery under the Royal policy.

To the extent that we think we understand this argument, we do not agree. Clause 8 cannot be invoked to yield such a result for the simple reason that, on the facts of this case, the clause is irrelevant in the context of determining liability under the Royal policy. Clause 8 can only be applied where it appears in, and is being read in the context of, another policy (Zurich Policy No. 2, for example) which also provides underinsured motorist coverage but on a vehicle other than that in which the claimant was an occupant at the time of the accident triggering the claim. Read in the context of Zurich Policy No. 2, of course, cl. 8 makes it clear that the Royal policy is to be treated as first loss insurance, to which Zurich Policy No. 2 is "excess".

This brings us to what we see as the pivotal issue in the main appeal, which is the interpretation of cl. 3 of S.E.F. No. 42, which, once again, reads:

> 3. *The amount payable hereunder, regardless of the number of persons injured or killed*, shall not exceed the amount stated as the legal liability limit applicable to the item covering the automobile in Section A of the policy.

(Emphasis added.)

The trial judge, at pp. 176-7 O.R., p. 498 D.L.R., after noting that the relevant limit in the Royal policy was $1,000,000, put the positions of the parties in these words:

> Defence counsel urges that the clause is addressed to an entity, namely, that group of persons who fall within the definition of "insured person" and should be construed as if it read: "The *total* amount payable hereunder *to all insured persons*, regardless of the number of persons injured or killed, shall not exceed . . .".
>
> Plaintiffs' counsel urges that each insured person is entitled to read the endorsement as being addressed to him or her and that the clause should be construed as if it read: "The amount payable hereunder *to an insured person who suffers bodily injury or death*, regardless of the number of persons injured or killed, shall not exceed . . .".
>
> Defence counsel submits that the words "regardless of the number of persons injured or killed" show that one over-all limit of $1,000,000 for all claims is intended. Plaintiffs' counsel submits that an insured person, such as Shelley Borland, reading this, will understand that *her* limit is $1,000,000, regardless of the number of people injured or killed. The side note is "Limit(s)". Why thus, if not to indicate one limit for one claimant and "limits" for more than one claimant?
>
> In my view, the words of cl. 3 are capable of either interpretation. Consequently the rest of the endorsement must be examined to see if the uncertainty is resolved by the other provisions of the endorsement.

(Original emphasis.)

With great respect to the trial judge, we are not persuaded that "the words of cl. 3 are capable of either interpretation". To adopt

the interpretation urged on him by plaintiffs' counsel at trial is, in our opinion, to give to the words of that clause a meaning at odds with their normal and natural meaning, and one which they cannot reasonably bear.

The introductory words of cl. 3, "The amount payable hereunder", are not parallel to the opening words of cl. 1, "Payment under paragraph (a) of the insuring agreement". The latter words, as already noted, speak to what "an insured person" may look to by way of indemnification under the terms of the endorsement. By contrast, the introductory words of cl. 3 neither expressly nor by implication compel any reference back to an individual insured person. On the contrary, they are concerned with what is "payable hereunder" (*i.e.*, payable under the endorsement) regardless of how many persons are injured or killed. However many such persons there may be, "the amount" payable under the endorsement is not to exceed "the amount stated as the legal liability limit applicable to the item covering the automobile in Section A".

The trial judge in his reasons looked to, and took support from, the side-note "Limit(s)" which appears in the margin opposite the text of cl. 3. Clearly, however, it is the endorsement wording itself which must govern; there, only one liability "limit" is mentioned. Whatever the significance of the side-note, it cannot be used to render ambiguous that which is otherwise unambiguous in the governing text.

As we have seen, the trial judge was prepared to accept that cl. 3 was capable of being interpreted as though the introductory words read "the amount payable hereunder *to an insured person who suffers bodily injury or death*". On this premise, he was prepared to read the next following phrase "regardless of the number of persons injured or killed" as simply underscoring the point that the amount payable to an *individual* insured person was to be payable to him or her regardless of how many persons may have been injured or killed. Put another way, he was prepared to view the phrase beginning with "regardless" as words of comfort or assurance extended by the insurer, that no individual claimant would be denied full indemnification up to the Schedule A limit simply because there might be other such claimants seeking similar indemnification.

On this reading of cl. 3, however, the phrase beginning with "regardless" would for all practical purposes be surplusage, since its only function would be to indicate the circumstances which would *not* limit any individual claimant's recovery. We cannot

accept that that is its function. Far from being surplusage, we think the phrase takes effect to limit "the amount payable hereunder" regardless of how many persons there may be who have been injured or killed and in respect of whom, accordingly, claims may be asserted to share in that amount. With respect, to interpret cl. 3 in the way in which the trial judge was prepared to read it requires the importation into the clause of words which are simply not there. Reading it as we think it should be read, no such importation is necessary in order to make its meaning plain.

As seen in the concluding paragraph quoted above from the trial judge's reasons, he considered that he ought to look at other provisions of the endorsement "to see if the uncertainty" was resolved by them. In the course of this exercise, it became necessary to address himself to cl. 6 of the endorsement, which, once again, reads:

> 6. The settlement of the claim of an insured person as defined in paragraphs (a) and (b) of Clause 9 shall have priority over the claim of any other insured person.

The trial judge first noted that cl. 6 had no application on the facts of this case, since none of the plaintiffs was a "relative" of the corporate insured owner of the vehicle in which they were occupants. Even so, he stated, it could be looked at "to see whether it eliminates the ambiguity of cl. 3" (p. 178 O.R., p. 499 D.L.R.). He rejected the argument of defence counsel that cl. 6 was incompatible with the interpretation of cl. 3 urged by the plaintiffs. The trial judge found the clause to be not clear, and he said that it "would never occur" to an insured person reading it that the words of cl. 6 might limit his or her right to indemnification in circumstances where both relatives and non-relatives of a named insured were asserting claims. He also remarked, at p. 178 O.R., p. 499 D.L.R.:

> To say that "settlement" of certain claims shall have priority means, literally, that these claims shall be processed and paid first. It does not say that the claim of any other insured person may not be paid at all because there is one total for all claims and family claims may exhaust this total.

If cl. 6 means only that the claims of the named insured and his or her relatives are to be processed and paid first, then surely it is essentially meaningless, since on the trial judge's reading of the endorsement each claimant is entitled to be paid up to the full amount of the policy's Section A liability limit sooner or later in any case. If, on the other hand, as we have concluded, each claimant is entitled only to his or her *pro rata* share of that amount except that "family claims" are to be given priority over those of other claimants, then it becomes apparent that family claims may indeed exhaust the total. In our view, the purpose of cl. 6 is to make it clear that if the total amount available for the satisfaction of claims made under the endorsement is insufficient to satisfy all such claims in full, the claims of insured family members are to be paid first, up to each such family member's *pro rata* share of the total and the claims of other insured persons are to be paid thereafter, up to each such persons' *pro rata* share of whatever amount, if any, remains. This, we note, is consistent with the statement made in the "Brief Explanation", that "Priority of payment is given to you and your family over other occupants of the automobile".

To summarize our conclusions to this point, whatever the provisions of S.E.F. No. 42 may be thought to lack in drafting precision, we do not find them to contain the ambiguities which the trial judge considered would justify the alternative interpretation to which he held they were open. That being so, the question of any possible application in this case of the *contra proferentem* doctrine does not arise and need not be considered. By the same token, the doctrine of "reasonable expectations" of the "reasonable insured" invoked by the learned trial judge in conjunction with the *contra proferentem* rule as expounded by this Court in *Wigle et al. v. Allstate Ins. Co. of Canada* (1984), 49 O.R. (2d) 101 at pp. 116-8, 14 D.L.R. (4th) 404 at pp. 419-21, [1985] I.L.R. para. 1-1863, cannot apply in these circumstances.

In the result, what we have described as the main part of the appeal must be decided in the appellant's favour. However, we do not agree that the net amount available under the Royal policy for distribution to the plaintiffs is the amount remaining after subtracting from the $1,000,000 limit in Section A of the Royal policy the total recovery ($300,000) of all plaintiffs under Zurich Policy No. 1. In our opinion, each such plaintiff is entitled to be paid by Royal that sum of money which represents the difference or shortfall between that plaintiff's *pro rata* share of the proceeds from Zurich Policy No. 1, and the amount of that plaintiff's judgment against the Muttersbach estate up to his or her *pro rata* share of $1,000,000, being the limit of Royal's liability as stated in Section A of its policy.

Admissibility of evidence as to the rate structure for S.E.F. No. 42

In support of its interpretation of S.E.F. No. 42, the appellant, Royal Insurance, sought to adduce at trial underwriting and

actuarial evidence dealing with the premium rate structure applicable to the endorsement. The learned trial judge ruled that such evidence was inadmissible. He did not base his ruling on the parol evidence rule because of his opinion that the endorsement was ambiguous and that the admission of extrinsic evidence might therefore be permissible to assist in its interpretation. He held, however, that even if the evidence showed that the insurer had made an improvident agreement, this evidence would nevertheless be of no assistance in construing the endorsement. We agree that this evidence was irrelevant in this case for this reason and that it was properly rejected by the learned trial judge.

Like the learned trial judge, we do not consider that a *dictum* pronounced by Estey J. in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.*, [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, [1980] I.L.R. para. 1-1176, has any application to the facts of this case. By way of *obiter* in the *Consolidated-Bathurst* case, Estey J. said at p. 903 S.C.R., p. 60 D.L.R.:

> Similarly, to interpret corrosion as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract. *It may well be argued by insurers that the premium will reflect such a narrowed coverage. There is no evidence that such is the case here.*

(Emphasis added.)

There may be cases where premiums for specific risks are fixed at a low level with the intent of providing only narrow coverage. The fact that a premium is low in relation to the risk is in itself of no assistance in construing the ambit of coverage provided by an insurance policy. In order to affect the result, it must also be shown that the insured knew that the premium was modest and that the risk was limited. This might conceivably occur where it could be shown, as perhaps it might have been in the *Consolidated-Bathurst* case, that the insurer and the insured actually bargained about the terms of a policy and the applicable premiums. This cannot be said to have occurred in this case where the terms of a policy and its endorsements are contained in standard forms and it is quite unrealistic to assume that the insured was in a position to balance precisely the elements of risk, coverage and premium. Indeed, in this case, it was conceded by counsel for Royal that the respondents were unaware that the policy on the motor home was covered by S.E.F. No. 42.

In making these observations on the dictum of Estey J. in the *Consolidated-Bathurst* case, we do not wish to be understood as suggesting that arguments based on the level of premium can be advanced in all cases in aid of an insurer's restricted interpretation of coverage provided by a policy. It is only in the most exceptional cases that these arguments might be relevant. They do not and cannot apply in the usual run of cases where policies in standard form are sold to the public as protection against the ordinary hazards of life in modern society at rates which are determined by risk, demand, marketing strategies, competition and other factors. Indeed, in this case, counsel for the appellant stated that an S.E.F. No. 42 endorsement had been included in at least some of the policies without any added premium because S.E.F. No. 42 had been first brought into force in the year 1981 after the policies had been issued.

Prejudgment interest

The appellant objects to the awards of prejudgment interest only on special damages to the date of trial and on the non-pecuniary general damages of Shelley Borland. Both awards were made by the learned trial judge under the power conferred on him by s. 36(6) of the *Judicature Act*, R.S.O. 1980, c. 223. That subsection permits the judge to vary the rate of interest and the period for which it is payable, "where he considers it to be just to do so in all the circumstances", from the rate prescribed in s. 36(3) for general or non-pecuniary damages and in s. 36(4) for special damages.

(a) *Special damages prior to trial*

Special damages for pecuniary loss prior to trial were awarded to several respondents, and included under this head were damages for loss of business awarded to the respondents, Edward Borland and Joan Borland. In fixing prejudgment interest on these damages at 10.62%, Barr J. said, at p. 186 O.R., p. 507 D.L.R.:

> Counsel are agreed that, rather than using the formula set out in s. 36(4), I should follow the common practice of awarding interest on these damages at one-half the rate otherwise applicable. There is no reason, on the facts of this case, for my otherwise varying the rate provided by s. 36. The prime rate for the month preceding the issue of the writ was 21.25%. Interest will therefore be calculated at the rate of 10.62% on these damages . . .

Section 36(4) provides that prejudgment interest on special damages shall be calculated at the prime rate for the month preceding the giving of written notice of the claim, on the special damages as calculated at six-month intervals as they accrue to the date of judgment. Counsel for the appellant asserted that the usual practice was to award prejudgment interest on special

damages prior to trial at one-half of the average of the prime rates for the period from one month before the commencement of the proceedings to the month of judgment. Had this practice been followed in this case, the rate would have been only 7.299% being one-half of the average prime rate of 14.598%. The appellant contends that the learned trial judge erred in principle in failing to give reasons for not following the usual practice.

In this case it is not necessary to decide whether the trial judge was obligated to express precise reasons for exercising his discretion either to depart from the statutory formula or to fix a higher rate than that proposed by the appellant because his reasons for doing so are readily apparent from his judgment relating to general damages. He awarded prejudgment interest at the prime rate of 21.25% on the first $300,000 of non-pecuniary damages which was to be paid by the appellant, Zurich Insurance, and at the rate of 15% on non-pecuniary damages in excess of $300,000 under Zurich Policy No. 1. He said that it must have been apparent at an early stage that damages in this case would far exceed the limits of liability of that policy and that it would reasonably have been expected that the company would have made some or all of its coverage available to the victims of the accident to replace income and to provide facilities and services to assist in their recovery. Instead of following this course, Zurich paid the entire amount of $300,000 to Royal and both insurers enjoyed the advantages of retaining the insurance moneys on hand. It was not until 32 months after the accident and only a short time before trial that a payment of $50,000 was made to the victims. The learned trial judge described the conduct of the insurers as "remarkably callous".

It seems to us that this is a sufficient reason for not exercising his discretion in favour of the insurers in departing from the statutory rate. It is also consistent with this Court's interpretation of the policy of the legislation providing for the payment of prejudgment interest as being "intended to provide an incentive for early settlements or payments": *Spencer v. Rosati et al.* (1985), 50 O.R. (2d) 661 at p. 665, 1 C.P.C. (2d) 301, *per* Morden J.A.

(b) *Non-pecuniary damages of Shelley Borland*

Shelley Borland was totally disabled by her severe injuries. She was awarded non-pecuniary damages of $170,000 in addition to pecuniary damages of $1,068,853, largely for loss of future income and cost of future care. There is no doubt that, because of her

total disability, she was entitled to this award which is the upper limit of non-pecuniary damages established by the Supreme Court of Canada. The figure for non-pecuniary losses was initially fixed in 1978 at $100,000 by the famous trilogy of cases: *Andrews et al. v. Grand & Toy Alberta Ltd. et al.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577; *Arnold et al. v. Teno et al.*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 3 C.C.L.T. 272, and *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607. In *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263, [1982] 1 W.W.R. 433, it was established that the figure of $100,000 could be increased to take account of inflation. The award of $170,000 in 1984 in this case reflects the influence of inflation since 1978. It is for this reason that payment of prejudgment interest thereon is objected to by the insurers.

They contend that the award of prejudgment interest in the sum of $170,000 compels a double payment because the rate of interest reflects or includes the rate of inflation prevailing over the relevant period. They rely on the decision of R. E. Holland J. in *Graham et al. v. Persyko* (1984), 30 C.C.L.T. 85, where, at p. 103, he reduced the rate of prejudgment interest to 2½% for the following reasons:

> It is clear, however, that my assessment carries an element of inflation with it. It is above the old upper limit. In these circumstances the award of $125,000 will bear interest at only 2-½ per cent from February 23, 1981 to the date of judgment.

Barr J. gave careful consideration to this argument in his judgment. He rejected it for the following reasons [at pp. 187-8 O.R., pp. 508-9 D.L.R.]:

> 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.

There was evidence to support the trial judge's decision on these issues and there is no evidence which would establish that he erred in reaching his decision. There is, therefore, no reason for this Court to interfere with his decision as to the award of prejudgment interest on the non-pecuniary damages payable to Shelley Borland.

The learned trial judge also rejected the argument of defence counsel that "non-pecuniary damages in a case of serious personal injuries are designed to provide solace in the future and to that extent are damages for future pecuniary loss" (p. 188 O.R., p. 509 D.L.R.). A similar argument was rejected by this Court in *Spencer v. Rosati*, *supra*, which was reported after his judgment. In that case it was argued that prejudgment interest was inappropriate on at least a portion of the non-pecuniary damages because the victim would endure part of the pain and suffering after they were fixed. The reasons for rejecting this argument were stated by Morden J.A. at pp. 665-6 as follows:

> ... we think that this introduces an unnecessary complexity into the determination of interest which is at odds with the terms of the legislation. Even if part of a judgment for non-pecuniary loss is notionally to cover the future our law requires a single, once and for all, payment to be made now. We see no warrant for extending judicially the policy set forth in s. 36(5)(*d*) respecting future pecuniary loss.

In the result, Barr J. did depart from the prime rate of 21.25% as the basis for the determination of prejudgment interest on non-pecuniary damages in excess of $300,000. He fixed the rate at 15%, which is slightly more than the average of the prime rates from the giving of notice to the date of judgment. His reasons for doing so are found at p. 189 O.R., p. 510 D.L.R.:

> From the giving of notice to the date of judgment prime rates have varied from a high of 22.75% to a low of 11%. Where there is such an extreme range I think, generally speaking, the proper course is to average the rate. The average rate is slightly over 14%. However, the plaintiffs have had to borrow fairly substantial amounts of money due to the accident and people under those circumstances have to pay substantially more than prime rates. Taking this into account I fix the rate payable on the balance of the non-pecuniary damage after the first $300,000 at 15%. Interest is payable on all non-pecuniary damages, past pecuniary damages and damages awarded under s. 60(2) of the *Family Law Reform Act* [R.S.O. 1980, c. 152].

No grounds have been advanced for questioning the exercise of the trial judge's discretion in establishing this rate and this branch of the appeal must fail.

Costs

The appellant objected to the award of costs for two senior and one junior counsel for the time each was actually present at trial. While acknowledging that the award of costs at trial is solely within the discretion of the trial judge, counsel for the appellants maintained that it had been the universal practice in all prior actions to provide one senior and one junior counsel fee only. He noted that this practice has been followed in extremely complex cases where the successful party had been represented by more than one senior counsel along with one junior counsel at trial and on the appeal and no order for additional costs was made: see *Wotherspoon et al. v. Canadian Pacific Ltd. et al.; Pope et al. v. Canadian Pacific Ltd. et al.* (1979), 22 O.R. (2d) 385, 92 D.L.R. (3d) 545 (H.C.); varied 35 O.R. (2d) 449, 129 D.L.R. (3d) 1 (C.A.).

We did not call upon the respondents to reply to this argument. It was carefully considered by the learned trial judge who rejected it, at pp. 189-90 O.R., p. 511 D.L.R., for the following reasons:

> I should note that this is, by far, the most complex action I have ever encountered. Although it was a personal injury action it involved a wide range of subjects. There were ten claims requiring proof. The injuries ranged through fractures that healed properly, fractures with infection, fractures requiring microsurgery, injuries requiring plastic surgery, disabling ligamentous injury, paraplegia, traumatic neurosis and death. There were 55 witnesses including experts in the fields of neurology, orthopaedics, urology, gynaecology, microsurgery, internal medicine, psychology, social work, econometrics, actuarial science, industrial accounting and business loss appraisal.
>
> While there were times during the trial when only two counsel were present for the plaintiffs, I accept the submission of senior counsel for the plaintiffs that it would have been impossible for one senior and one junior counsel to master, organize and present this large volume of evidence on so many different topics. Because there was a good deal of overlapping where evidence being led on one issue was relevant to other issues I am satisfied that there were no times when counsel were unnecessarily present.

The reasons for the trial judge's decision are clear from this passage which completely answers any suggestion that he did not act judicially in exercising his discretion in his award of costs: see *Eagil Trust Co. Ltd. v. Pigott-Brown et al.*, [1985] 3 All E.R. 119 at p. 122 (C.A.). A trial judge in awarding costs is not limited in the exercise of his discretion by an arbitrary rule that at the most

the costs of only one senior and one junior counsel are allowable at trial. The complexity of the case and the extent of preparation required provide ample reason for his award. In addition, it should be noted that the case on behalf of numerous plaintiffs was carried on by one firm of solicitors. Had the plaintiffs been separately represented, each would have been entitled to the costs of counsel at trial.

We would not interfere with the trial judge's award of costs for two senior and one junior counsel.

Appeal of Shelley Borland

In her appeal, which was advanced irrespective of the outcome of the Royal appeal, the plaintiff Shelley Elizabeth Borland asks that the judgment below be varied to grant her judgment against Royal for $1,000,000 without credit being given for the money she recovered under Zurich Policy No. 1. For reasons we have already expressed, this appeal fails.

The contingent cross-appeals

It now becomes necessary to deal with what have been described as the contingent cross-appeals. There are three such cross-appeals. All of them are contingent in the sense that each cross-appeal is advanced only in the event that the main appeal of Royal is allowed entirely or in part.

That appeal having been substantially successful, and the cross-appellants' recovery against Royal having been substantially reduced to a *pro rata* share of $1,000,000, the result is a shortfall which the cross-appellants now seek to recoup from the "excess" insurers, namely, Zurich (pursuant to Policies No. 2 and No. 3) and Allstate (pursuant to the Allstate Policy). All of these policies, as noted above, contained an S.E.F. No. 42 endorsement which provided that the insurer would indemnify the insured for the amount the insured was legally entitled to recover from an underinsured motorist up to a specified limit, provided always that any amounts recovered from the first loss source (the underinsured motorist's insurer) and proceeds from "first loss insurance" as defined in cl. 8, were to be deducted from the amount the insurer was required to pay. First loss insurance was defined in cl. 8 as underinsured motorist insurance on the vehicle in which the insured is an occupant, in this case, the insurance provided by the S.E.F. No. 42 of the Royal policy. The argument originally advanced by Zurich's counsel, that these plaintiffs were not entitled to stack the liability limits of Zurich Policy No. 3 on top of the recovery under the Royal policy endorsement, has been

abandoned and it is conceded that the shortfall could be recovered, having regard to the priorities set out in cl. 8. This was always the position of counsel for Allstate.

I. *Cross-appeal of Scott Borland*

In the first cross-appeal, the plaintiff, Scott Borland, asks that if Royal is successful in whole or in part in its appeal, the judgment be varied to provide that he recover from Zurich. Scott Borland came within the definition of insured person under the Royal endorsement but he was not a dependent relative of his father, Edward Borland, and, therefore, was not an insured person under Zurich Policy No. 2. He was, however, the only plaintiff insured under Zurich Policy No. 3, which had a limit on its third party liability coverage of $500,000 and contained S.E.F. No. 42. His total award, exclusive of prejudgment interest, is $303,604.

He is entitled to indemnity under Zurich Policy No. 3 for any shortfall after his recovery from the first loss source, *i.e.*, Zurich Policy No. 1, and from his *pro rata* share of $1,000,000, the total liability of Royal. However the amount payable pursuant to Zurich Policy No. 3 shall not exceed the limit on third party liability provided therein.

The cross-appeal will be allowed and Scott Borland is entitled to receive full recovery of his damages, as his entire shortfall will be made good by Zurich Policy No. 3. This interpretation does not involve "stacking".

II. *Cross-appeal of Edward, Joan, Shelley and Stacey Borland*

In the second cross-appeal, the plaintiffs, Edward, Joan, Shelley and Stacey Borland, ask that in the event their assessed damages are not fully covered by Zurich Policy No. 1 and the Royal policy, the judgment be varied to provide that they be entitled to recover under Zurich Policy No. 2 any shortfall up to its limit of $500,000. (The only plaintiff in the group whose total damages, exclusive of prejudgment interest, exceeds $500,000 is Shelley). In other words, these plaintiffs submit that once they have recovered from the first loss source and under the Royal endorsement, and have credited such recovery against their respective judgments, they can recover under Zurich Policy No. 2 up to its liability limit or their assessed amount of damages in the main action, whichever is less. This interpretation of Zurich's obligation to pay under Policy No. 2 does not depend upon the principle of "stacking".

For reasons which we have already expressed, we agree with the submissions of these cross-appellants and would allow their cross-appeal, and they shall share, *pro rata*, in the $500,000 payable under Zurich Policy No. 2.

III. *Cross-appeal of Sean Borland*

In the third cross-appeal, the plaintiff, Sean Borland, whose judgment against the Muttersbach estate, exclusive of prejudgment interest was for $306,337, claims to be entitled to recover against Allstate. Sean was not a dependent relative and was, therefore, not an insured person for S.E.F. No. 42 coverage under Zurich Policy No. 2. But he was the named insured under the Allstate policy which contained S.E.F. No. 42 with a legal liability limit of $500,000. As an occupant of the motor home, he also came within the definition of an insured person for the purpose of S.E.F. No. 42 coverage under the Royal policy endorsement.

It is conceded by Allstate, and we agree, that once the appeal of Royal Insurance is allowed in part, the judgment below should be varied to provide that Sean Borland recover against Allstate the difference between his judgment in the main action and what he recovers from the first loss source (Zurich Policy No. 1) plus his *pro rata* share of the proceeds of the Royal policy.

This cross-appeal will also be allowed and using this method to calculate his recovery, this plaintiff would be fully compensated for his damages.

Conclusion

In the result, the appeal of Shelley Borland will be dismissed; the appeal of Royal Insurance Company of Canada will be allowed as will the contingent cross-appeals, and the judgment below set aside and varied to give effect to these reasons. If the parties are unable to adjust the amounts in accordance with these reasons, the Court may be spoken to.

Success being divided, there will be no costs of the appeals. The costs awarded below will stand.

Appeal allowed; cross-appeal allowed in part.

SASKATOON GALLERY & CONSERVATORY CORP. v. DEAKIN FINE ART TRANSPORT LTD.

Ontario High Court of Justice, Craig J. December 13, 1985.

Road transport — Carriage of goods — Liability — Regulation restricting carrier's liability unless higher value declared on face of bill of lading — Higher value written on bill, but not in space provided for "declared valuation" — Carrier not entitled to benefit of regulation — Public Commercial Vehicles Act, R.S.O. 1980, c. 407 — O. Reg. 943/79, Sch. 1, s. 10.

By O. Reg. 943/79 under the *Public Commercial Vehicles Act*, R.S.O. 1980, c. 407, a carrier's liability is limited to $4.41 per kilogram unless a higher value is declared on the face of the bill of lading by the consignor. In arranging for the shipment of certain paintings, T, the shipper's representative, wrote on the face of the bill of lading, in the box headed "description of goods and special marks" the words "value — 42,950.00". A space marked "declared valuation" was left blank. The carrier's driver then asked whether T wished to purchase insurance through the carrier, but T replied that she did not want insurance but had been instructed to insert the value as a "formality". The paintings were damaged in transit, and the shipper brought an action for the full loss.

Held, the value was "declared on the face of the bill of lading" within the meaning of the regulation and, consequently, the carrier was liable for the loss.

Cases referred to

Cunningham v. Great Southern Life Ins. Co., 66 S.W. 2d 765; *Corcoran v. Ehrlick Transport Ltd. et al.* (1984), 46 O.R. (2d) 225, 12 D.L.R. (4th) 134, 27 M.V.R. 197

Statutes referred to

Public Commercial Vehicles Act, R.S.O. 1980, c. 407, ss. 27 (am. 1981, c. 71, s. 10), 37(1), paras. 16, 18

Rules and regulations referred to

O. Reg. 943/79, ss. 2(1)(*h*), (*l*), (*o*), 5, Sch. I, arts. 1, 10, 18 — see now R.R.O. 1980, Reg. 829, Schedule.

ACTION for damage to goods.

J. W. Strype, for plaintiff.
Robert J. Clayton, for defendant.

CRAIG J.:—This is an action for damages occasioned to 68 pieces of art (Suzy Lake's pictures) while being transported by the defendant's truck pursuant to two bills of lading; the parties agreed that the plaintiff sustained damages of $13,646.

The parties further agree that the relationship between the parties is governed by the *Public Commercial Vehicles Act*, R.S.O. 1980, c. 407 (the Act), and O. Reg. 943/79 (the Regulation). The defendant is a Class "D" carrier, and in the circumstances of this case liability for damages was limited to $1.50 per pound (now more correctly $4.41 per kilogram) "unless a higher value is declared on the face of the bills of lading by the consignor". The defendant admits liability for damages; the issue in this case is whether, in the circumstances to be outlined, the plaintiff (the consignor) declared such higher value and is not bound to a maximum recovery of $4.41 per kilogram.

The relevant sections of the Act and Regulation are as follows:

4

general sense nothing less than a rehearing of his case and a review of the decision. See per Lord Radcliffe in *Fox v General Medical Council*[8].

(2) Notwithstanding the generality of the above language, the actual exercise of the jurisdiction is severely limited by the circumstances in which it can be invoked. The appeal is not by way of re-hearing in the sense that the witnesses are heard afresh or the evidence gone over again (see per Lord Radcliffe[6]). This, amongst other things, means that there is a heavy burden on an appellant who wishes to displace a verdict on the grounds that the evidence alone makes the decision unsatisfactory.

(3) Beyond a bare statement of its findings of fact, the disciplinary committee does not in general give reasons for its decision as in the case of a trial in the High Court by judge alone from which an appeal by way of rehearing lies to the Court of Appeal (see per Lord Radcliffe[9]). It follows from this that the only circumstances in which an appellate court can reverse a view of the facts taken by the disciplinary committee would be a case where, on examination, it would appear that the committee had misread the evidence to such an extent that they were not entitled to make a finding in the state of the evidence presented before them.

(4) The legal assessor who assists the committee at its hearing is not a judge, and his advice to the committee is not a summing up, and no analogy with a criminal appeal against a conviction before a judge and jury can properly be drawn. The legal assessor simply advises the committee in camera on points of law and reports his advice in open court after he has given it. The committee under its president are masters both of law and of the facts and what might amount to misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the committee's decision. Where a criticism is made of the legal adviser's account of his advice the question is whether it can fairly be thought to have been of sufficient significance to the result to invalidate the decision. See *Fox v General Medical Council*[10] and per Lord Guest in *Sivarajah v General Medical Council*[11].

In the result, although the jurisdiction conferred by the statute is unlimited, the circumstances in which it is exercised in accordance with the rules approved by Parliament are such as to make it difficult for an appellant to displace a finding or order of the committee unless it can be shown that something was clearly wrong either (i) in the conduct of the trial or (ii) in the legal principles applied or (iii) unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread. Or, of course, an appellant can rely cumulatively or in the alternative on any combination of the three. In the present case, for instance, counsel for the appellant relied on criticisms of the assessor's advice to supplement what he alleged was the weakness of the evidence against the appellant.

It is against this background and within this legal framework that the present appeal falls to be considered. [His Lordship then considered the grounds of appeal and concluded:] The result must be that the appeal fails, being basically an appeal against the findings of a committee on the matter of fact on which there was ample evidence to entitle them to come to the conclusion they did. In the result their Lordships have humbly advised Her Majesty that the appeal be dismisssed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Hempsons* (for the appellant); *Waterhouse & Co* (for the General Medical Council).

S A Hatteea Esq Barrister.

8 [1960] 3 All ER at 226, [1960] 1 WLR at 1020
9 [1960] 3 All ER at 227, 229, [1960] 1 WLR at 1021, 1023
10 [1960] 3 All ER 225, [1960] 1 WLR 1017
11 [1964] 1 All ER at 507, [1964] 1 WLR at 116, 117

Cassell & Co Ltd v Broome and another

HOUSE OF LORDS
LORD HAILSHAM OF ST MARYLEBONE LC, LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD WILBERFORCE, LORD DIPLOCK AND LORD KILBRANDON
26th, 29th, 30th NOVEMBER, 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, 10th, 13th, 15th, 16th, 17th 20th DECEMBER 1971, 23rd FEBRUARY 1972

Libel – Damages – Exemplary or punitive damages – Principles on which exemplary damages awarded – Whether appropriate cases for award restricted to categories laid down in Rookes v Barnard[a].

Libel – Damages – Exemplary or punitive damages – Categories in Rookes v Barnard[a] *– Calculation that profit would exceed compensation payable to the injured person – Necessity to show knowledge that what was done was against law and decision to persist with it because prospects of material advantage outweighed prospects of material loss – Unnecessary to show defendant had made arithmetical calculation that profit would exceed loss.*

Libel – Damages – Exemplary or punitive damages – Categories in Rookes v Barnard[a] *– Direction to jury – Direction that exemplary damages to be awarded 'if, but only if' proposed compensatory damages insufficient to punish defendant – Direction to jury that exemplary damages to be additional to compensatory damages – Whether sufficient.*

Libel – Damages – Exemplary or punitive damages – Joint defendants – Award of single sum – Degrees of blameworthiness – One defendant more blameworthy than other – No necessity to split damages between defendants according to blameworthiness – Sum to be that appropriate for least blameworthy.

Damages – Exemplary damages – Oppressive, arbitrary or unconstitutional conduct by servants of the government – Servants of the government – Class extending to local government officials, police and others exercising governmental functions.

Damages – Exemplary damages – Deceit – Whether exemplary damages can be awarded.

Pleading – Damages – Exemplary damages – No need to plead.

Judgment – Judicial decision as authority – Decision of House of Lords – Decision per incuriam – Whether Court of Appeal bound to follow decision.

A wrote a book entitled 'The Destruction of Convoy PQ17'. The book was about one of the great naval disasters of the second world war in which a large number of merchant vessels in convoy PQ17 were destroyed and many lives lost. B was the officer commanding the naval ships escorting the convoy at the time of the disaster. The book placed the blame for the disaster on B, and contained grave imputations on his conduct. In writing the book A knew fully what he was doing and persisted with it in spite of repeated warnings from the most authoritative sources that the relevant passages in the book were defamatory of B. A's view was that it was possible to say 'some pretty near the knuckle things about' B and others involved in the episode 'but if one says it in a clever enough way, they cannot take action'. Nevertheless A's thesis was stated sufficiently plainly for an experienced publisher to understand perfectly well its meaning. A's original publishers, W K Ltd, refused to publish the book on the ground that it was 'a continuous witch hunt of B'. They had been advised that 'the book reeks of defamation'. A then offered the book to C Ltd who

a [1964] 1 All ER 367

agreed to publish it. C Ltd were warned by W K Ltd that they had rejected the book on the ground that it was libellous. B himself also warned C Ltd on several occasions that if they published the book without substantial modification they must expect an action for libel from him. Nevertheless C Ltd went ahead and published a hardback edition of the book with a dust jacket, the advertisement on which in terms indicated that C Ltd were well aware of the full implication of the passages complained of and were prepared to sell the book on the basis of this sensational interpretation of the naval disaster. B issued a writ for libel against C Ltd and A and included in his reamended statement of claim the following plea: '[B] will assert that the defendants and each of them calculated that the money to be made out of the said book containing the passages complained of would probably exceed the damages at risk (if any) and that [B] is consequently entitled to exemplary damages'. In his summing-up the judge directed the jury that having considered whether B was entitled to compensatory damages they were to go on and ask whether B had proved that he was entitled to exemplary damages and to ask, 'What additional sum should be awarded him by way of exemplary damages?' The judge asked them to underline the word 'additional' because he wanted to know 'how much more do you award over and above the compensatory damage'. He also directed the jury that they should award a single sum by way of exemplary damages and stated that, if they were to ask whether they should award a larger sum against one of the defendants if they thought him more blameworthy, the answer to that question was No. He further explained that a single sum was to be awarded against both defendants. The jury, having found that the words complained of were defamatory and untrue, awarded B damages of £40,000 against both defendants, assessing the compensatory damages at £15,000 and the exemplary damages at £25,000. A and C Ltd appealed against the award of damages contending inter alia that the judge's direction on the question of exemplary damages failed to comply with the requirements laid down by the House of Lords in *Rookes v Barnard*[b]. The Court of Appeal[c] dismissed the appeal, holding that the decision of the House in *Rookes v Barnard*[b] was not good law since it had been arrived at per incuriam and without argument on the point by counsel. The court further held that in any event the judge's direction complied with the requirements of *Rookes v Barnard*[b]. C Ltd appealed on the question of exemplary damages to the House of Lords.

Held – (i) (Viscount Dilhorne and Lord Wilberforce dissenting) The decision of the House in *Rookes v Barnard*[b] had correctly formulated the principles of law governing the circumstances in which exemplary damages, i e damages by way of punishment of the defendant in excess of those necessary to compensate the plaintiff for the injury done to him, might be awarded to a plaintiff in the case of certain torts; the principles enunciated in that decision were applicable to defamation cases; the decision could not be said to have been made per incuriam since it had been arrived at after a full consideration of the authorities and the House was not bound to limit its conclusions within any formulation which counsel had thought fit to formulate (see p 807 f, p 823 c, p 827 d to g, p 833 j, p 835 j to p 836 a, p 841 g and h, p 842 h, p 846 f, p 847 c, p 870 f and g, p 872 c, p 873 d and e, p 875 a and b and p 877 f, post).

Rookes v Barnard [1964] 1 All ER 367 followed.

McCarey v Associated Newspapers Ltd [1964] 3 All ER 947, *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, *Fielding v Variety Incorporated* [1967] 2 All ER 497 and *Mafo v Adams* [1969] 3 All ER 1404 approved.

E Hulton & Co v Jones [1908-10] All ER Rep 29 and *Ley v Hamilton* (1935) 153 LT 384 distinguished.

Uren v John Fairfax & Sons Pty Ltd (1967) 117 CLR 118 and *Australian Consolidated Press Ltd v Uren* [1967] 3 All ER 523 considered.

b [1964] 1 All ER 367
c [1971] 2 All ER 187

(ii) (Viscount Dilhorne, Lord Wilberforce and Lord Diplock dissenting) On the basis of the principles formulated in *Rookes v Barnard*[d] the jury's award of £25,000 exemplary damages against the defendants should be upheld for the following reasons—

(a) there was ample evidence to leave to the jury on which they could find that the case fell within the second category of cases laid down in *Rookes v Barnard*[d] in which it was permissible to award exemplary damages, i e that the defendants' conduct had been calculated to make a profit for them which might well exceed the compensation payable to B as damages; to bring a case within the second category it was necessary to show (1) knowledge that what was proposed to be done was against the law or a reckless disregard whether what was proposed to be done was illegal or legal, and (2) a decision to carry on doing it because the prospects of material advantage outweighed the prospects of material loss; it was not necessary that the defendant should have made an arithmetical calculation that the plaintiff's damages if he sued to judgment would be smaller than the defendant's profit (see p 812 a and b, p 813 d and g to j, p 830 g and h, p 831 a to d, p 839 b and c, p 843 e to h and p 875 to p 876 c and e, post);

(b) although not as clear as it might have been, the judge's direction was adequate to convey to the jury that they should make an award of exemplary damages 'if, but only if' they were satisfied that the sum they had in mind to award as compensation was inadequate to punish the defendants for their conduct; the emphasis placed by the judge on the word 'additional' in explaining to the jury that an award of exemplary damages would be additional to any compensatory damages was sufficient, taken in the context of the summing-up as a whole, to convey to the jury the necessary requirements for an award of exemplary damages (see p 816 a to e, p 839 h, p 844 g and h, p 845 c and e and p 877 h, post);

(c) when a plaintiff elected to sue more than one defendant in the same action in respect of the same publication only one sum could be awarded against the defendants by way of exemplary damages; in such circumstances the sum awarded could not be higher than the lowest sum for which any of the defendants could be held liable; the judge's direction was sufficient to make clear to the jury that, if different sums by way of exemplary damages were appropriate for each of the two defendants, they were to award the lower against both (see p 817 c to f, p 818 e and f, p 840 d to g, p 845 f, and p 877 h, post);

(d) since the jury was the only legal and constitutional tribunal for deciding on the award of damages in libel cases an appellate court should only interfere with an award where it was so manifestly too large that no reasonable jury, properly directed, could possibly have come to it; although the award of exemplary damages was exceptionally high it was impossible to say that no jury of reasonable men could have reached that sum (see p 819 a to d, p 820 f, p 841 b, p 845 f and h, p 846 b and p 878 b, post).

Per Lord Hailsham of St Marylebone LC, Lord Reid, Lord Wilberforce, Lord Diplock and Lord Kilbrandon. Decisions of the House of Lords are binding on the Court of Appeal and it is not open to that court to advise judges to ignore decisions of the House on the ground that they were decided per incuriam or are unworkable (see p 809 d to g, p 835 h, p 859 h, p 874 f and p 878 f, post. Furthermore (per Lord Hailsham of St Marylebone LC and Lord Diplock) although it is open to an appellate court to decline to follow one of its own previous decisions on the ground that it was decided per incuriam, the Court of Appeal is not entitled to disregard a decision of the House of Lords, nor is a judge of the High Court entitled to disregard a decision of the Court of Appeal, on that ground (see p 809 h and p 874 h, post).

Per Lord Hailsham of St Marylebone LC, Lord Reid, Lord Diplock and Lord Kilbrandon. The first category of cases in which exemplary damages may be awarded, ie cases of oppressive, arbitrary or unconstitutional action by servants of the

d [1964] 1 All ER 367

government, should not be limited to servants of the government in the strict sense of the word but should be extended to others, such as local government officials or the police, who may be described as exercising governmental functions (see p 829 j to p 830 a, p 838 f, p 873 h and p 877 d, post).

Per Lord Hailsham of St Marylebone LC and Lord Diplock. The decision in *Rookes v Barnard*[c] did not have the effect of extending the power to award exemplary damages to torts, such as deceit or negligence, where exemplary damages could not previously have been awarded (see p 828 g and h and p 874 f, post); dictum of Lord Widgery LJ in *Mafo v Adams* [1969] 3 All ER at 1410 disapproved.

Per Lord Hailsham of St Marylebone LC. The jury should normally be asked to award a single sum whether as solatium, ie full compensation to the plaintiff, or as exemplary damages. If, in order to avoid a second trial, they are asked a second question, they should be asked, in the event of their awarding exemplary damages, what smaller sum they would have awarded if they had confined themselves to solatium (see p 833 h, post).

Per Lord Hailsham of St Marylebone LC. In accordance with current practice exemplary damages need not be pleaded (see p 834 h, post).

Decision of the Court of Appeal sub nom *Broome v Cassell & Co Ltd* [1971] 2 All ER 187 affirmed on different grounds.

Notes

For the award of exemplary damages, see 11 Halsbury's Laws (3rd Edn) 223-225, para 391, and for cases on the subject, see 17 Digest (Repl) 76, *11-13*.

For appeals in relation to excessive damages in actions for libel, see 24 Halsbury's Laws (3rd Edn) 121, para 225, and for damages against joint tortfeasors, see ibid 115, para 213, and for cases on these subjects, see 17 Digest (Repl) 180-189, *752-859*, 175-177, *691-717*.

Cases referred to in opinions

Addie (R) & Sons (Collieries) Ltd v Dumbreck [1929] AC 358, [1929] All ER Rep 1, 98 LJPC 119, 140 LT 650; *rvsg* sub nom *Dumbreck v Robert Addie & Sons (Collieries) Ltd* 1928 SC 547, 36 Digest (Repl) 120, *604*.

Addis v Gramophone Co Ltd [1909] AC 488, [1908-10] All ER Rep 1, 78 LJKB 1122, 101 LT 466, 17 Digest (Repl) 74, *1*.

Ashby v White (1703) 2 Ld Raym 938, Holt KB 524, 6 Mod Rep 45, 1 Salk 19; *rvsd on other grounds* (1704) 1 Bro Parl Cas 62, 17 Digest (Repl) 79, *22*.

A-G for New South Wales v Perpetual Trustee Co Ltd [1955] 1 All ER 846, [1955] AC 457, [1955] 2 WLR 707, 119 JP 312, Digest (Cont Vol A) 978, **372a*.

Australian Consolidated Press Ltd v Uren [1967] 3 All ER 523, [1969] AC 590, [1967] 3 WLR 1338, Digest (Cont Vol C) 285, *13b*.

Bell v Midland Ry Co (1861) 10 CBNS 287, 30 LJCP 273, 4 LT 293, 17 Digest (Repl) 105, *200*.

Benham v Gambling [1941] 1 All ER 7, [1941] AC 157, 110 LJKB 49, 164 LT 290, 36 Digest (Repl) 231, *1227*.

Bocock v Enfield Rolling Mills Ltd [1954] 3 All ER 94, [1954] 1 WLR 1303, [1954] 2 Lloyd's Rep 103, Digest (Cont Vol A) 471, *763a*.

Broadway Approvals Ltd v Odhams Press Ltd [1965] 2 All ER 523, [1965] 1 WLR 805, Digest (Cont Vol B) 493, *1910a*.

Bulli Coal Mining Co v Osborne [1899] AC 351, [1895-99] All ER Rep 506, 68 LJPC 49, 80 LT 430, 33 Digest (Repl) 788, *618*.

Chapman v Ellesmere (Lord) [1932] 2 KB 431, [1932] All ER Rep 221, 101 LJKB 376, 146 LT 538, 17 Digest (Repl) 175, *698*.

Clark v Newsam (1847) 1 Exch 131, 16 LJEx 296, 9 LTOS 199, 11 JP 840, 17 Digest (Repl) 176, *704*.

c [1964] 1 All ER 367

Crouch v Great Northern Ry Co (1856) 11 Exch 742, 25 LJEx 137, 26 LTOS 293, 8 Digest (Repl) 16, *79*.

Dawson v M'Clelland [1899] 2 IR 486, 50 Digest (Repl) 445, *1431*.

Dougherty v Chandler (1946) 46 SR (NSW) 370.

Egger v Viscount Chelmsford (or Davies) [1964] 3 All ER 406, [1965] 1 QB 248, [1964] 3 WLR 714, Digest (Cont Vol B) 493, *1998a*.

English and Scottish Co-op Properties Mortgage and Investment Society Ltd v Odhams Press Ltd [1940] 1 All ER 1, [1940] 1 KB 440, 109 LJKB 273, 162 LT 82, 32 Digest (Repl) 88, *1103*.

Fay v Parker (1873) 53 NH 342.

Fielding v Variety Incorporated [1967] 2 All ER 497, [1967] 2 QB 841, [1967] 3 WLR 415, Digest (Cont Vol C) 632, *2127b*.

Forsdike v Stone (1868) LR 3 CP 607, 37 LJCP 301, 18 LT 722, 17 Digest (Repl) 193, *902*.

Greenlands Ltd v Wilmshurst and London Association for Protection of Trade [1913] 3 KB 507, 83 LJKB 1, 109 LT 487; *rvsd* HL sub nom *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, [1916-17] All ER Rep 452, 17 Digest (Repl) 175, *697*.

Heydon's Case (1612) 11 Co Rep 5a, 77 ER 1150, 17 Digest (Repl) 175, *692*.

Hill v Goodchild (1771) 5 Burr 2790, 98 ER 465, 17 Digest (Repl) 175, *691*.

Huckle v Money (1763) 2 Wils 205, 95 ER 768, 17 Digest (Repl) 188, *832*.

Hulton (E) & Co v Jones [1910] AC 20, [1908-10] All ER Rep 29, 79 LJKB 198, 101 LT 831, 32 Digest (Repl) 18, *84*.

James v Baird 1916 SC 510.

Jones v Secretary of State for Social Services, Hudson v Secretary of State for Social Services p 145 ante, [1972] 2 WLR 210.

Leith v Pope (1779) 2 Wm Bl 1327, 96 ER 277, 17 Digest (Repl) 188, *836*.

Lewis v Daily Telegraph Ltd, Same v Associated Newspapers Ltd [1963] 2 All ER 151, [1964] AC 234, [1963] 2 WLR 1063; *affg* [1962] 2 All ER 698, [1963] 1 QB 340, [1962] 3 WLR 50, 32 Digest (Repl) 85, *1073*.

Ley v Hamilton (1935) 153 LT 384; *rvsg* (1934) 151 LT 360, 17 Digest (Repl) 188, *838*.

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 42 LT 334, 44 JP 392, 17 Digest (Repl) 80, *30*.

Loudon v Ryder [1953] 1 All ER 741, [1953] 2 QB 202, [1953] 2 WLR 537, 17 Digest (Repl) 76, *13*.

McCarey v Associated Newspapers Ltd [1964] 3 All ER 947, [1965] 2 QB 86, [1965] 2 WLR 45, Digest (Cont Vol B) 492, *1769a*.

M'Grath v Bourne (1876) IR 10 CL 160, 17 Digest (Repl) 184, **652*.

Mafo v Adams [1969] 3 All ER 1404, [1970] 1 QB 548, [1970] 2 WLR 72, Digest (Cont Vol C) 706, *583a*.

Manson v Associated Newspapers Ltd [1965] 2 All ER 954, [1965] 1 WLR 1038, Digest (Cont Vol B) 494, *2121a*.

Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd [1935] AC 346, [1935] All ER Rep 22, 104 LJKB 403, 153 LT 153, 51 Digest (Repl) 863, *4134*.

Mediana, (Owners) v Comet (Owners etc), The Mediana [1900] AC 113, [1900-3] All ER Rep 126, 69 LJP 35, 82 LT 95, 9 Asp MLC 41, 17 Digest (Repl) 76, *10*.

Merest v Harvey (1814) 5 Taunt 442, [1814-23] All ER Rep 454, 1 Marsh 139, 128 ER 761, 17 Digest (Repl) 105, *203*.

Minister of Social Security v Amalgamated Engineering Union [1967] 1 All ER 210, [1967] AC 725, [1967] 2 WLR 516, Digest (Cont Vol C) 704, *4585a*.

Morey v Woodfield [1963] 3 All ER 533n, [1964] 1 WLR 16n, Digest (Cont Vol A) 1190, *1051b*.

Praed v Graham (1889) 24 QBD 53, 59 LJQB 230, 38 WR 103, 17 Digest (Repl) 101, *160*.

Rookes v Barnard [1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269, Digest (Cont Vol B) 217, *13a*.

Scott v Musial [1959] 3 All ER 193, [1959] 2 QB 429, [1959] 3 WLR 437, Digest (Cont Vol A) 404, *165b*.
Sears v Lyons (1818) 2 Stark 317, 2 Digest (Repl) 302, *98*.
Smith v Streatfeild [1913] 3 KB 764, [1911-13] All ER Rep 362, 82 LJKB 1237, 109 LT 173, 17 Digest (Repl) 176, *706*.
Smith's Newspapers Ltd v Becker (1932) 47 CLR 279, 6 ALJ 195, [1933] ALR 196, 33 Digest (Repl) 541, **192*.
Uren v John Fairfax & Sons Pty Ltd (1967) 117 CLR 118, [1967] ALR 25, Digest (Cont Vol C) 285, **6d*.
Ward v James [1965] 1 All ER 568, [1966] 1 QB 289, [1965] 2 WLR 461, [1965] 1 Lloyd's Rep 145, Digest (Cont Vol B) 219, *783a*.
Wilkes v Wood (1763) Lofft 1, 98 ER 489, 17 Digest (Repl) 105, *194*.
Williams v Currie (1845) 1 CB 841, 135 ER 774, 17 Digest (Repl) 105, *204*.
Williams v Settle [1960] 2 All ER 806, [1960] 1 WLR 1072, Digest (Cont Vol A) 313, *685a*.
Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293, [1944] KB 718, 113 LJKB 513, 171 LT 113; *affd* HL [1946] 1 All ER 98, [1946] AC 163, 115 LJKB 63, 174 LT 39, Digest (Cont Vol A) 967, *698a*.
Youssoupoff v Metro-Goldwyn-Meyer Pictures Ltd (1934) 50 TLR 581, 32 Digest (Repl) 11, *26*.

Appeal

This was an appeal by Cassell & Co Ltd against an order of the Court of Appeal (Lord Denning MR, Salmon and Phillimore LJJ) dated 4th March 1971 and reported [1971] 2 All ER 187 dismissing an appeal by the appellants against so much of the verdict and judgment for the first respondent, John Egerton Broome ('Captain Broome'), before Lawton J and a jury on 17th February 1970, as awarded Captain Broome £25,000 by way of exemplary damages for libel, in addition to an award of £15,000 by way of compensatory damages, against the appellants and second respondent, David Irving ('Mr Irving'), the publishers and author respectively of a book entitled 'The Destruction of Convoy PQ17' in which the libels were contained. The facts are set out in the opinion of Lord Hailsham of St Marylebone LC.

R J Parker QC and *Robert Alexander* for the appellants.
David Hirst QC and *A J Bateson* for Captain Broome.
Mr Irving did not appeal and was not represented.

Their Lordships took time for consideration.

23rd February. The following opinions were delivered.

LORD HAILSHAM OF ST MARYLEBONE LC.

NATURE OF THE PROCEEDINGS

My Lords, this appeal arises out of two consolidated actions for libel on the publication of a book. The first action was in respect of the 60 proof copies of the book, the second in respect of the principal or hardback edition of the book. We were told that there are separate proceedings still pending in respect of a paperback edition, published under licence by separate publishers. This paperback edition was mentioned at all stages in the proceedings as being potentially relevant to the question of damages. The House is not otherwise concerned with it.

The plaintiff in the action (the first respondent to this appeal) is a retired captain in the Royal Navy of unblemished reputation, who, at the time of the matters referred to in the book, held the rank of commander, and occupied the responsible position of officer commanding the escorts in the ill-fated convoy PQ17. He held active command throughout the war, and ended his wartime naval career with his present rank of captain in command of the battleship Ramillies. The subject-matter of the book, and its title, was 'The Destruction of Convoy PQ17' which, as is well known, was one of the great naval disasters of the war, in which all but 11 out of over 35 merchant vessels were sunk on their way to the Soviet Union and about 153 merchant seamen killed by enemy action and a vast quantity of war material lost. The

defendants in the action were respectively the author of the book, David Irving, who is the second respondent in the appeal, and was not represented before us, and the publishers of the book, Cassell & Co Ltd, who are the appellants.

THE RESULT OF THE TRIAL

The trial of the action took, we were told, 17 days before Lawton J and a jury. In the result, on 17th February 1970, the jury found a verdict for the plaintiff and awarded against both defendants (1) the sum of £1,000 in respect of publication of the proof copies of the book, counsel for the plaintiff having waived any claim to exemplary damages on the proof copies, (2) £14,000 described as 'compensatory damages' in respect of the hardback edition, and, (3) in respect of the hardback edition a further sum of £25,000, described as 'by way of exemplary damages'. Judgment was entered for the sum of £40,000 against both defendants. The present appeal relates solely to the above sum awarded 'by way of exemplary damages' of £25,000.

So far as relevant to this appeal, the entire proceedings before Lawton J were conducted by all the counsel concerned and summed up by the judge to the jury on the basis of the remarks of Lord Devlin in *Rookes v Barnard*[1] and of the direction following Lord Devlin's remarks by Widgery J in *Manson v Associated Newspapers Ltd*[2]. This was not surprising since all the other members of the House of Lords had expressly concurred in Lord Devlin's opinion on this point, although without adding reasons of their own, and the opinion in *Rookes v Barnard*[3] which was strictly an intimidation case, although obviously intended to apply generally, had been expressly applied to defamation proceedings by the Court of Appeal in *McCarey v Associated Newspapers Ltd*[4] by Willmer, Pearson and Diplock LJJ; in *Broadway Approvals Ltd v Odhams Press Ltd*[5] by Sellers, Davies and Russell LJJ; in *Fielding v Variety Incorporated*[6], by Lord Denning MR, Harman and Salmon LJJ; and in *Mafo v Adams*[7], a case of deceit and other causes of action, the principles enunciated in *Rookes v Barnard*[3] were accepted as applicable where the evidence justified it by Sachs, Widgery LJJ and Plowman J.

Except for two important passages and one minor passage of which complaint is made, and to which I will come later, Lawton J's direction to the jury was unexceptionable as an exposition of the law as it has been declared in the House of Lords by an unanimous House in *Rookes v Barnard*[3] and applied by the Master of the Rolls, ten Lords Justices and one puisne judge in the above cases in the Court of Appeal and as it had been expounded by Widgery J in his direction to the jury in *Manson v Associated Newspapers Ltd*[2].

THE APPEAL TO THE COURT OF APPEAL[8]

At the end of the 17 day trial the costs of the proceedings which, as between party and party, followed the event, must have already been enormous. Both defendants accepted the verdict on liability. The defendant Irving appealed on all the damages awarded. The present appellants appealed on the award of £25,000 'by way of exemplary damages'. The appeal lasted nine days before the Court of Appeal[8] (Lord Denning MR, and Salmon and Phillimore LJJ) and judgment was given on 4th March 1971 dismissing both appeals with costs, which must by this time, with the costs of the trial, even on a party and party basis, have greatly exceeded the amount of the award. Before the appellate committee of this House the appeal

1 [1964] 1 All ER 367 at 407, 408, [1964] AC 1129 at 1220-1223
2 [1965] 2 All ER 954, [1965] 1 WLR 1038
3 [1964] 1 All ER 367, [1964] AC 1129
4 [1964] 3 All ER 947, [1965] 2 QB 86
5 [1965] 2 All ER 523, [1965] 1 WLR 805
6 [1967] 2 All ER 497 [1967] 2 QB 841
7 [1969] 3 All ER 1404, [1970] 1 QB 548
8 [1971] 2 All ER 187, [1971] 2 WLR 853

lasted 13 working days, thus again greatly increasing the sum at stake, although by this time the defendant Irving had given up the struggle.

JUDGMENT OF THE COURT OF APPEAL[9]

The Court of Appeal[9] took a somewhat unusual course. On the view which they formed of the matter, which, as will appear, I have come to share although with greater hesitation than they expressed, they were for dismissing the appeal on the grounds that the criticisms of the direction by Lawton J failed, and that the mere size of the award was not one which, on accepted principles, could be attacked. If they had stopped there, it is possible, and perhaps likely, that the proceedings would have come to an end. It is doubtful if leave to appeal to this House would have been given, and if it had not, the two remaining parties would have been spared the costs of the 13 days' hearing in your Lordships' House. Even if leave to appeal had been given in the above circumstances a great deal of the time occupied before us would have been saved.

The Court of Appeal[9], however, did not stop at dismissing the appeal on these grounds. Whether or not they were encouraged by the zeal of plaintiff's counsel, they put in the forefront of their judgments the view that *Rookes v Barnard*[10] was wrongly decided by the House of Lords and was not binding even on the Court of Appeal. It was, so they said, arrived at per incuriam and without argument from counsel. It ignored, they claimed, two previous decision, in the House of Lords, *Ley v Hamilton*[11] and *E Hulton & Co v Jones*[12], which had approved awards of punitive or exemplary damages on lines inconsistent with Lord Devlin's opinion in *Rookes v Barnard*[10]. They felt themselves fortified in this view with the somewhat cool reception in the Commonwealth of *Rookes v Barnard*[10], particularly in the Australian Supreme Court decision in *Uren v John Fairfax & Sons Pty Ltd*[13] which had been affirmed, so far as regards Australian law, by the Judicial Committee of the Privy Council in the associated case of *Australian Consolidated Press Ltd v Uren*[14]. Neither Lord Denning MR nor Salmon LJ seem to have been in any way inhibited or embarrassed by the fact that each had been party to at least one of the decisions of the Court of Appeal applying *Rookes v Barnard*[10] without question. Not content with all this, all three members of the Court of Appeal went further still and, besides declaring *Rookes v Barnard*[10] to have been decided per incuriam and ultra vires, proceeded to say that it was 'unworkable', and, in the meantime, therefore, 'judges should direct juries in accordance with the law as it was understood before *Rookes v Barnard*[10]' which the court considered, to use the phrase of Lord Denning MR, as 'settled'.

As sent to us by the Court of Appeal[9], therefore, the appeal before us raised several questions of wide ranging importance. Quite apart from the merits of the respective litigants, these questions include the status of judgments and the relevance of precedent in this House, the circumstances when, if at all, decisions of this House may be questioned by the Court of Appeal, and judges of first instance directed by the Court of Appeal to disregard them. There is also the whole question of exemplary damages as canvassed in *Rookes v Barnard*[10] and subsequent decisions. What began as a simple proceeding between a plaintiff and two defendants has assumed, at the expense of two of the litigants, the dimensions of a constitutional question and a general enquiry into one aspect (and perhaps more than one aspect) of the law of damages.

THE COURSE TAKEN BY THE COURT OF APPEAL[9]

In view of their importance it is unavoidable that before entering into the merits

9 [1971] 2 All ER 187, [1971] 2 WLR 853
10 [1964] 1 All ER 367, [1964] AC 1129
11 (1935) 153 LT 384
12 [1910] AC 20, [1908-10] All ER Rep 20
13 (1967) 117 CLR 118
14 [1967] 3 All ER 523, [1969] AC 590

of the appeal I should discuss in a few paragraphs both the propriety and the desirability of the course taken by the Court of Appeal[15]. I desire to do so briefly and with studied moderation.

From the point of view of the litigants it is obvious, I would have thought, that, on the view taken by the Court of Appeal[15], the course taken was unnecessary. Private litigants have been put to immense expense, of which most must be borne by the loser, discussing broad issues of law unnecessary for the disposal of their dispute. If the Court of Appeal[15] felt, as they were well entitled to do, that in the light of the Australian and other Commonwealth decisions *Rookes v Barnard*[16] ought to be looked at again by the House of Lords, either generally or under the practice declaration of 1966[17] they were perfectly at liberty to say so. More, they could have suggested that so soon as a case at first instance arose in which the ratio decidendi of *Rookes v Barnard*[16] was unavoidably involved, the parties concerned might wish to make use of the so-called 'leap-frogging' procedure now available to them under the Administration of Justice Act 1969, and thus avoid one stage in our three-tier system of appeals. But to impose on these litigants, to whom the question was, on the court's view, unnecessary, the inevitable burden of further costs after all they had been through up to date was not, in my view, defensible.

Moreover, it is necessary to say something of the direction to judges of first instance to ignore *Rookes v Barnard*[16] as 'unworkable'. As will be seen when I come to examine *Rookes v Barnard*[16] in the latter part of this opinion, I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v Barnard*[16] as decided 'per incuriam' or 'unworkable' they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

The fact is, and I hope it will never be necessary to say so again, that, 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. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd*[18] offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said[17]:

> 'Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

15 [1971] 2 All ER 187, [1971] 2 WLR 853
16 [1964] 1 All ER 367, [1964] AC 1129
17 See *Note* [1966] 3 All ER 77, [1966] 1 WLR 1234
18 [1944] 2 All ER 293, [1944] KB 718

> Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.'

It is also apparent from the recent case of *Jones v Secretary of State for Social Services*[19], where the decision in *Minister of Social Security v Amalgamated Engineering Union*[20] came up for review under the 1966 declaration[1], that the House will act sparingly and cautiously in the use made of the freedom assumed by this declaration. In addition, the last sentence of the declaration[1] as quoted above clearly affirms the continued adherence of this House to the doctrine of precedent as it has been hitherto applied to and in the Court of Appeal.

THE MERITS OF THE APPEAL

It is now possible to turn to the merits of the case so far as these were canvassed before us on the assumption of the continued authority of the *Rookes v Barnard*[2] decision. Before us the appellants made three contentions: (i) that there was no evidence to be left to the jury that the conditions were fulfilled to bring the case within one of the three 'categories' of case listed by Lord Devlin in *Rookes v Barnard*[3] as being appropriate for an award of punitive damages, and in particular the second, which was admittedly the only relevant category; (ii) that, even on the assumption that the first contention was wrong, Lawton J had misdirected the jury in at least two important matters; (iii) that in any event the award of £25,000 was excessive, and could not be sustained. In order to understand these contentions it is necessary to say something about the facts.

THE FACTS ON WHICH THE BOOK WAS FOUNDED

The fate of the PQ 17 convoy is one of the most publicised, as well as one of the most tragic, naval operations of the second world war. The evidence showed that it had been written about many times, notably by Captain Roskill, RN, the official naval historian, and by the late Mr Godfrey Winn, whose book was said to have sold half a million copies. It is unnecessary to recapitulate the facts here. They are graphically described in the judgment of Lord Denning MR[4].

It is sufficient to say that the primary cause of the disaster flowed from an order to the convoy to scatter, which made the ships in it an easy prey to the aircraft and submarines by which they were attacked. This order to scatter was issued by the Admiralty in Whitehall and was due to a faulty appreciation by the Naval Staff, in particular, as is now known, by the then First Sea Lord himself, that the German battleship Tirpitz was at sea, and to a decision, also by the then First Sea Lord, to take the responsibility for the order on himself rather than leave the decision to the discretion of the naval officers on the spot. The naval officers on the spot, including Admiral Hamilton in command of the cruiser squadron, and Captain Broome, had no option but to obey, and the convoy was thus left to fan out on individual courses covering a vast area of sea.

So far there can be no controversy. But the two naval officers, rightly considering that the order to scatter must denote the approach of a superior hostile surface force

19 Page 145 ante, [1972] 2 WLR 210
20 [1967] 1 All ER 210, [1967] AC 725
1 See *Note* [1966] 3 All ER 77, [1966] 1 WLR 1234
2 [1964] 1 All ER 367, [1964] AC 1129
3 [1964] 1 All ER at 410, 411, [1964] AC at 1226, 1227
4 [1971] 2 All ER 187, [1971] 2 WLR 853

sailed west in company. Admiral Hamilton was acting under precise orders from the Admiralty. Captain Broome was not. Captain Broome had proposed and Admiral Hamilton accepted that he should put himself under command of the Admiral commanding the cruisers. That this decision was courageous there can be no doubt. What has been subsequently disputed was whether it was as wise as it was certainly brave. Some have thought that it was no more than the inevitable reaction of gallant and experienced naval officers to the threat of surface action. Others have thought that its effect was to remove from the area of the convoy the only naval elements, which might have countered the U boat and air attacks, and thus to contribute to the extent of the convoy's losses. Which of these two views be correct it is not appropriate here to discuss. But what is relevant to the present appeal is that those who criticised the decision had previously fastened the responsibility on Admiral Hamilton. It was one of the distinctive features of Mr Irving's book (which it may have shared with a German work with whose author he had collaborated) that it attempted to place responsibility for the withdrawal of the destroyers entirely or mainly on the shoulders of Captain Broome. This was a difficult thesis to sustain since Captain Broome was the junior officer of the two, and had only 'proposed' the course which both forces ultimately pursued. It also involved the propositions, both disputable, that the decision was wrong in the light of the information then available, and that the absence of the destroyers made a significant difference to the loss of life and material.

From the start Captain Broome contended that the passages in the book relating to himself which it is not necessary to set out at length were defamatory. In his statement of claim he said that they meant and were intended and understood to mean:

> '. . . that [Captain Broome] was disobedient, careless, incompetent, indifferent to the fate of the merchants ships and/or by virtue thereof had wrongly withdrawn his destroyer force from the convoy and/or taken it closer to the German airfields than he had been ordered to and had thereby been largely responsible for or contributed extensively to the loss of the aforesaid ships and the effective destruction of more than two-thirds of the Convoy P.Q.17.'

In addition, at the trial it was contended that the ordinary and natural meaning of one of the relevant passages was that Captain Broome was a coward and for this reason 'needed no second bidding' to desert the convoy. The defendants both disputed that the book bore any of these meanings, but contended that without them the passages in the book were true. It is evident from their verdict and from the magnitude of the award of damages that the jury rejected the contentions of the defence, although how far and to what extent must be to some extent a matter of speculation.

THE MATERIAL BEFORE THE JURY

From the commencement of the trial it was contended for Captain Broome that notwithstanding the limitations of *Rookes v Barnard*[5], he was entitled to 'exemplary' or 'punitive' damages. The trial judge[6] ruled (although on this point he was subsequently overruled by the Court of Appeal[7]) that, if so, he was bound to include a plea to this effect in his statement of claim, and the pleading consequently introduced into the statement of claim by way of reamendment affords a convenient summary of the way the case was then put. The pleader wrote:

> 'The plaintiff will assert that the defendants and each of them calculated that the money to be made out of the said book containing the passages complained of would probably exceed the damages at risk (if any) and that the plaintiff is consequently entitled to recover exemplary damages.'

5 [1964] 1 All ER 367, [1964] AC 1129
6 [1971] 1 All ER 262
7 [1971] 2 All ER 187, [1971] 2 WLR 853

He then went on to give particulars. If established, the plea clearly puts the case within the second of the three exceptional categories listed by Lord Devlin in *Rookes v Barnard*[8]. The question for the judge was whether there was evidence to leave to the jury on which they could find that the case was indeed to be placed in this category. If there was such evidence, and if the jury were not misdirected, inclusion within the second category would have entitled (although not compelled) them to make some award on this account.

The appellants contended before the Court of Appeal[9] and before us that there was no such evidence. In my opinion, this contention wholly fails. To convince us, they would in practice have to establish that there was no evidence on which a properly directed jury could find that at the time of publication they were fully aware the words bore and were intended and understood to bear the meanings, attached to them, in the statement of claim, since, if at the time of publication the words were known to bear these meanings, they were false to the knowledge of the appellants and published with that knowledge for profit. In my view, the meanings, or most of them, are sufficiently obvious from a casual reading of the book, and the inadequate attempts by the author or the publishers to provide an alternative meaning or an escape route by which they could argue the alternative before a jury by small modifications or carefully phrased ambiguities, are less an indication of innocence or naiveté than a clear-sighted appreciation of the danger that they faced. Mr Irving was not represented before us, but his case was strenuously advanced before the Court of Appeal[9], and in another context (to be discussed later) we had to consider his case when counsel for the appellants expressly accepted as accurate Lord Denning MR's colourful account of his behaviour. It is abundantly plain from this account that Mr Irving at least knew, and carefully planned, what he was doing, that he went on with it in spite of repeated warnings from the most authoritative sources, that he conceived the book 'as a book with a difference as all men [that is including Captain Broome] were shown to be cowards', and that he prided himself on being able to say—

> 'some pretty near the knuckle things about these people [he was directly referring to Captain Broome's threat of proceedings] but if one says it in a clever enough way, they cannot take action'.

The rules of evidence preclude us from taking these admissions of his state of mind as evidence against the appellants. But, in my opinion, the 'near the knuckle things' said about Captain Broome in the course of this book, including the allegation that he was a coward, were said sufficiently plainly for an experienced publisher to know perfectly well what their meaning was and the fact that they were said 'in a clever enough way' should have told them plainly that they were said with deliberate intent to convey the meanings without incurring heavy damages.

But the case against the appellants does not stop at the obvious meanings to be attached to the passages in the book. Even if, which I could not easily accept, they did not understand the drift of the book at a first reading, they acquired the right to publish and they went on actually to publish in circumstances from which the jury were clearly entitled to infer that they went ahead with the most cold-blooded and clear-sighted appreciation of what they were doing.

The appellants were not the first publishers selected by Mr Irving. His original publishers were William Kimber Ltd, who ultimately refused to publish the book on the ground that the book was 'a continuous witch hunt of Captain Broome' having been advised by Captain Roskill, who gave evidence for Captain Broome, and perhaps by others, that 'the book reeks of defamation'. In the absence of evidence by either defendant at the trial, it is impossible to say how much of this was known to the

8 [1964] 1 All ER 367 at 410, 411, [1964] AC 1129 at 1226, 1227
9 [1971] 2 All ER 187, [1971] 2 WLR 853

appellants. But it is certain that Mr William Kimber warned the appellants in unmistakable terms that his house had rejected the book precisely on the grounds that it was libellous, amongst others of Captain Broome. The undisputed response of the appellants was either flippant or cynical. Moreover, Captain Broome himself had warned them on several occasions that, if they published the book, as they did, in substantially the form in which he had seen it, they must expect an action for libel from himself. That they took these threats seriously can be seen from their reaction to the latest of them which followed the issue of the proof copies. On receipt of this, the appellants placed a stop on the book in the following terms:

> 'Will you please note that absolutely and positively not one single copy, on any pretext whatsoever, is to be removed from the House without reference to me.'

In attempts to sell the serial rights their efforts were 'shot down' by three national Sunday newspapers presumably on the same grounds.

What the full explanation of their subsequent publication may have been will never be known, since the appellants did not elect to give evidence. But, in the absence of any explanation, the jury were perfectly entitled to infer that they had calmly calculated that the risks attendant on publication did not outweigh the chances of profit. What is certain is that, insofar as they were aware that the passages complained of could be reasonably understood to bear the meanings attached to them by Captain Broome, including the allegation of cowardice, they published them knowing them in this sense to be false, since no effort was made at any stage to suggest that there was any material on which a reasonable publisher could base the belief that the passages complained of, if they bore these meanings, were true. In his judgment in the Court of Appeal[10] Lord Denning MR lists other features of the case against the appellants on which the jury were entitled to base inferences. With most of these, except the reference to the paperback edition, which, contrary to what he says (perhaps per incuriam), was not published by the appellants but under licence by another publisher, I find myself in agreement. In particular, I concur in what was said in the Court of Appeal[10] about the dust cover of the book, which, making every allowance for the popular style in such productions, and putting the most favourable interpretation on every phrase in it, seems, to my mind, in the absence of explanation, to indicate that the appellants were well aware of the full implication of the passages complained of and were prepared to sell the book on this sensational interpretation. In such circumstances to argue that there was no evidence from which the jury could infer that—

> 'the appellants had calculated that the money to be made out of the book containing the passages complained of would probably exceed the damages at risk (if any)'

was, to my mind a somewhat forlorn hope, and nothing which counsel for the appellants said in the course of his strenuous and ably conducted argument has convinced me to the contrary. I will refer to the passage from Lord Devlin's speech in *Rookes v Barnard*[11] relating to the categories later for its proper interpretation, but I cannot see how, on any view, if these facts were proved to the satisfaction of a jury, properly directed, they are not sufficient to enable the jury to base inferences bringing the publication within the second category.

THE DIRECTION ON THE RELATION BETWEEN THE TWO AWARDS

There was much more substance in, and I find much greater difficulty in deciding on, the appellants' second contention, which was based, not on Lord Devlin's three

10 [1971] 2 All ER 187, [1971] 2 WLR 853
11 [1964] 1 All ER 367 at 410, 411, [1964] AC 1128 at 1226, 1227

listed categories, but on his exposition of the general conditions under which exemplary damages may be awarded after the conclusion of the three 'considerations' listed in the report[12], which, he says, ought always to be borne in mind. At this point, Lord Devlin said[13]:

> 'Thus a case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified. But the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. 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 (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.* [The italics are mine.] If a verdict given on such direction has to be reviewed on appeal, the appellate court will first consider whether the award can be justified as compensation, and, if it can, there is nothing further to be said. If it cannot, the court must consider whether or not the punishment is in all the circumstances excessive. There may be cases in which it is difficult for a judge to say whether or not he ought to leave to the jury a claim for exemplary damages. In such circumstances and in order to save the possible expense of a new trial, I see no objection to his inviting the jury to say what sum they would fix as compensation and what additional sum, if any, they would award if they were entitled to give exemplary damages. That is the course which he would have to take in a claim to which the Law Reform (Miscellaneous Provisions) Act, 1934, applied.'

In my opinion, this passage contains a most valuable and important contribution to the law of exemplary damages which, prior to *Rookes v Barnard*[14], had not, so far as I am aware, been adequately stressed in any previous case, and which, in my view, would retain, and possibly even increase, its value even if the categories in *Rookes v Barnard*[14] were to be wholly rejected.

In essence the doctrine is that the award of a punitive element in damages, if it is ever permissible, must also remain discretionary, and, in order to give effect to the second of the three 'considerations'[15], the judge should always warn a jury that they need not award anything, and must not do so unless they are satisfied that a purely compensatory award (in a sense which I will explain) is inadequate. It follows that whatever they do award should only be a sum which has taken into account the award of damages already notionally allowed as compensation, including, where appropriate, the 'aggravated' element required by a defendant's bad conduct, and should never exceed the amount by which the required penalty (if that is the right word) exceeds the required compensation. I shall revert to this feature of *Rookes v Barnard*[14] later. But what is said in substance by the appellants in this case is that the summing-up failed to give effect to this important and, in my view, vital principle.

The learned judge directed the jury over two days and much that he said was irrelevant to the question of exemplary damages. Of what was relevant to exemplary damages, most was a direction to the jury about the second category and the evidence in the case relevant to it. This reflected the balance of argument by counsel during the case and it appears from a remark in the judgment of Phillimore LJ in the Court of Appeal[16] that, in some sense at least, both counsel agreed that, dependent on the view which the jury took of the facts, Lawton J should leave the question of exemplary

12 [1964] 1 All ER at 411, [1964] AC at 1227, 1228
13 [1964] 1 All ER at 411, [1964] AC at 1228
14 [1964] 1 All ER 367, [1964] AC 1129
15 [1964] 1 All ER at 411, [1964] AC at 1227
16 [1971] 2 All ER at 214, [1971] 2 WLR at 887

damages to the jury. But there were two passages in the summing-up relevant to the present issue. The first was a passage on the first day of the summing-up when the judge, having directed the jury that punitive damages were in the nature of a fine, went on to give two examples from the criminal law carrying the moral that the punishment must neither be excessive nor inadequate to the gravity of the offence and said:

> 'If you are going to punish a man to show him that libel does not pay, provided, of course, it comes within Mr. Justice Widgery's definition [he was referring to *Manson v Associated Newspapers Ltd*[17]], what you do must be reasonable in all the circumstances, bearing in mind that it is a penalty.'

The second, and more important, of the passages was on the second day of the summing-up when, after leaving an agreed list of questions to the jury, the learned judge said:

> '. . . as you will see, the issue of damages has been divided into two questions. The first one is No. 3, "What compensatory damages do you award the plaintiff?" You will remember that compensatory damages are compensation for some-thing, they are not given to you. When you come to consider that question you must remember that this is a joint publication by [the appellants] and Mr. Irving. You do not award two different sums. You award one sum and you will leave the lawyers to work out what it means, but it is one sum. Do you all follow that? Then having decided what are the proper additional compensatory damages then you will go on and consider the fourth question, namely, "Has [Captain Broome] proved that he is entitled to exemplary damages?". It is for him to prove that he is entitled to it, not for the defendants to prove that he is not. This question has got to be divided up into a number of subsidiary questions and the reason for this is problems of law which arise, but you do not have to concern yourselves with those. That is my responsibility. There are two defendants and, as I have been at pains to point out to you during my summing-up, the case against each defendant on the issue of punitive damages is different, so you will have to consider the case against each defendant separately. I suggest you start with Mr. Irving and then go on to [the appellants]. In respect of each of them you will ask yourselves this question: "Has [Captain Broome] proved his entitle-ment against that defendant?". If the answer is Yes then you will have to go on and assess how much punitive damages should be awarded. If the answer is No he will get no punitive damages. At least that will be your finding. What the law is is another matter, but that will be your finding. Having carried out that operation in relation to Mr. Irving you should carry out exactly a similar opera-tion in relation to [the appellants]. Remember all the time that letters written by Mr. Irving or to Mr. Irving, other than by [the appellants], are not evidence against [the appellants]. I cannot stress that too much. You will have to ask yourselves: "Has he proved that he is entitled to punitive damages against [the appellants]?". If the answer is No that is that. If the answer is Yes you will have to assess the damages. I have put all that into an omnibus lawyers' series of questions. I could have put it all into one question, but I came to the conclusion that it would probably be better for you. I will read paragraph 4 again. "Has [Captain Broome] proved that he is entitled to exemplary damages? If Yes, has he proved his entitlement against one or both of the defendants? If one only, against which one?". Then you see the last question under this heading, "What additional sum should be awarded him by way of exemplary damages?". Would you be good enough to underline the word "additional", because I want to know, and learned counsel want to know, if you do decide to award punitive damages, how much more do you award over and above the compensatory damage.'

17 [1965] 2 All ER 954, [1965] 1 WLR 1038

What was said against this passage on behalf of the appellants was that this summing-up was defective in that it did not make it absolutely plain to the jury that before making *any* punitive award against the defendants they must first take into account and assess the punitive effect of any compensatory award (including any element of 'aggravated' damage) and only award such amount (if any) by which the appropriate penalty exceeded such award.

I am bound to say that I have found the greatest difficulty in accepting the summing-up on this point as adequate, and my difficulties were increased by two passages in the final speech of counsel for Captain Broome which, as counsel for the appellants persuasively argued, seemed to indicate that the respective awards of compensatory and punitive damages were entirely separate assessments and that one should not be balanced against the other. Insofar as counsel said this, and he appears to have done so, he was, in my opinion, entirely wrong. In the end, however, I have come to the conclusion that the judge's direction was just adequate to convey the impression intended in the passage of Lord Devlin's speech[18] which had been accurately read to the jury by counsel for Mr Irving and that the jury were not in fact misled. In coming to this conclusion I have been impressed, as was the Court of Appeal[19], by the stress the judge laid on the word 'additional' in the passage cited, by the fact that the form of the questions left to the jury (which did not include as it should have done, the words 'if any' in that relating to punitive damages) was agreed by counsel and by the fact that the line of the judge's summing-up was entirely in accord with the case for the appellants as it was put to the jury on their behalf, and that everyone seems to have assumed that the result of the jury's answers was that which in fact obtained. I desire, however, to say that the direction on this point, if sufficient, as I am constrained to say it was, was only barely sufficient, and that I trust that in future cases of this kind trial judges will stress the matter a good deal more clearly and with greater emphasis than was done here. In the present case I do not think that the judge can be blamed for putting the matter compendiously in a form which seems to have misled no one, which accorded with the way and with the emphasis with which it had been put to the jury on behalf of the appellants, and which, according to Phillimore LJ's observation[20] refered to above had, in some sense, been agreed.

A SINGLE AWARD OR TWO?

Less meritorious, in my view, was the second criticism of the direction put before us. This was in effect that the judge did not correctly direct the jury as to the principles on which a joint award of exemplary damages can be made against two or more defendants guilty of the joint publication of a libel in respect of which their relevant guilt may be different, and their means of different amplitude. With high regard for the judgments of Lord Denning MR and of Salmon LJ, I differ from both in what they said on this aspect of the matter, both as to the effect of the judge's summing-up and to what it ought to be in such cases. Lord Denning MR said[1]:

> 'There is, of course, a difficulty. How is a jury to assess the *one* figure against two defendants? *Are they to fix it at a high sum which they think the more blameworthy ought to pay or a low sum for the least blameworthy? That must be left to the jury. They may, if they choose, fix a figure in between. The judge can, I think, tell them that they can fix it as against the more blameworthy, expecting him to pay it; and leave the least blameworthy (if he is called on to pay) to recover contribution. In this case the judge left it to them without any specific direction. That was, I think, quite legitimate; and is no ground for disturbing the verdict.*' [The italics are mine.]

Lord Denning MR then added:

18 [1964] 1 All ER at 411, [1964] AC at 1228
19 [1971] 2 All ER 187, [1971] 2 WLR 853
20 [1971] 2 All ER at 214, [1971] 2 WLR at 887. See footnote 16, p 814, ante
1 [1971] 2 All ER at 201, [1971] 2 WLR at 873

> 'In any case, however, I think [the appellants] are not at liberty to take this point. They did not ask judge or jury to split the damages. The judge told counsel the question he was going to put to the jury; and asked for their comments. That was the time for counsel to ask for the exemplary damages to be split. Not having asked, it is too late to ask in this court.'

Salmon LJ appears to have thought that the award should reflect the amount due by the most guilty of the tortfeasors and he said[2]:

> '. . . it is well settled that where there are several defendants who have all committed a joint tort, there can be only one award of one sum of damages against all of them: *Greenlands Ltd v Wilmshurst*[3]. *It may bear hardly on one or more of the defendants. The moral may be that you must be as careful in choosing your companions in tort as you are in choosing your companions when you go out shooting.*' [The italics are again mine.]

With respect to both judgments which, as will be seen, are arguably not quite consistent with one another, I think the effect of the law is exactly the opposite and that awards of punitive damages in respect of joint publications should reflect only the lowest figure for which any of them can be held liable. This seems to me to flow inexorably both from the principle that only one sum may be awarded in a single proceeding for a joint tort, and from the authorities which were cited to us by counsel for the appellants in detail in the course of his argument. Counsel referred us to *Heydon's case*[4], *Clark v Newsam*[5], *Hill v Goodchild*[6], *Dawson v M'Clelland*[7], *Greenlands Ltd v Wilmshurst*[8], *Smith v Streatfeild*[9], *Chapman v Lord Ellesmere*[10] per Slesser LJ, *Dougherty v Chandler*[11], *Egger v Viscount Chelmsford*[12] and to the current edition of Gatley[13] 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 of 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 were 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. Defendants, of course, have their ordinary contractual or statutory remedies for contribution or indemnity so far as they may be applicable to the facts of a particular case. But these may be inapplicable to exemplary damages.

Having established this principle, counsel for the appellants went on to argue that the judge had misdirected the jury, seeking to encourage us in this belief by the submission that, if he had persuaded at least two members of the Court of Appeal

2 [1971] 2 All ER at 210, [1971] 2 WLR at 882
3 [1913] 3 KB 507
4 (1612) 11 Co Rep 5a
5 (1847) 1 Exch 131
6 (1771) 5 Burr 2790
7 [1899] 2 IR 486
8 [1913] 3 KB 507, especially at 521
9 [1913] 3 KB 764 at 769, [1911-13] All ER Rep 362 at 364
10 [1932] 2 KB 431 at 471, [1932] All ER Rep 221 at 237
11 (1946) 46 SR (NSW) 370
12 [1964] 3 All ER 406 at 411, [1965] 1 QB 248 at 262
13 Libel and Slander, 6th Edn, para 1390

to defend it on one of two possibly inconsistent and erroneous bases, the learned judge might well have succeeded in making the jury accept one of them as the ground of their award.

The passage in the summing-up on which the appellants relied for this purpose was as follows. It occurs immediately after the passage already quoted in which the judge directs the jury to regard the exemplary damages as a sum additional to the compensatory award. Lawton J went on:

> 'You may be saying to yourselves: if we do take the view that both these defendants should pay something by way of punitive damages, should we take into consideration the relative culpability of each one? Again, and I merely say this by way of illustration, and certainly not by way of guidance to you, say, for example you took the view that Mr. Irving was more to blame than [the appellants], or to be fair, you took the view that [the appellants] being an experienced firm of publishers were more to blame than this young man, Mr. Irving, *should you make [the appellants] pay a larger sum by way of punitive damages than Mr. Irving? The answer to that is No.* [The italics are mine.] Whatever damages, if any, you decide should be awarded by way of punitive damages must be the same sum in respect of both Mr. Irving and [the appellants], if you find them both liable to pay punitive damages. Have I made that clear?'

This direction is in many ways defective as a piece of clear English prose. In particular, it contains an ambiguity, later cured by an exchange in the presence of the jury between counsel and the bench as to whether the jury is to award a single sum against both defendants or two sums, each against one of the defendants. But, on the crucial point whether this sum, when awarded, should represent the higher or the lower figure for which the jury found either guilty, I myself find no difficulty in thinking that the jury would have been clear that they were to award the lower. I would hope that on other occasions this would be made even plainer, but I find it difficult to criticise an experienced judge for not being absolutely crystal clear on this point at the end of a two day direction over a wide range of different topics following a 17 day trial. I would not disturb the verdict on these grounds.

I also consider that, having agreed to the form of the questions left to the jury, it was not really open to the appellants to contend, on appeal, that the awards should be split. In any case I am fortified in my view of the matter by the fact that I find the same difficulty as did the Court of Appeal[14] in differentiating in any way between the moral culpability of the two defendants. Mr Irving may have been the author of the defamatory matter. But the appellants published it, on the jury's finding, with their eyes open as to what it contained. It may be that Mr Irving had fewer means, and, if the jury were looking on the exemplary damages from the point of view of deterring him, they could have awarded a smaller sum. But there seems to have been no evidence concerning the means of either party, and I do not see how at this late date we can properly be invited to speculate. The enterprise was essentially a joint one, and if the appellants had not all the information available to Mr Irving, they had enough to make sure that they knew exactly what they were doing. It is difficult to know on what principle the jury could have differentiated between the two defendants.

WAS THE AWARD EXCESSIVE?

The final point taken for the appellants was that the award of £25,000 exemplary damages or, as it was equally properly and possibly better put, the total award of £40,000 (which included the exemplary element) was so far excessive of what 12 reasonable men could have awarded that it ought to be set aside and a new trial ordered. I cannot disguise from myself that I found this an extremely difficult point in the case, and have only decided that the verdict should not be disturbed with great

14 [1971] 2 All ER 187, [1971] 2 WLR 853

hesitation because I am very conscious of the fact that I would certainly have awarded far less myself, and possibly, to use a yardstick which some judges have adopted as a rule of thumb, less than half the £25,000.

A number of factors lead me, however, to the belief that the verdict should not be disturbed. The first, and paramount, consideration in my mind is that the jury is, where either party desires it, the only legal and constitutional tribunal for deciding libel cases, including the award of damages. I do not think the judiciary at any level should substitute itself for a jury, unless the award is so manifestly too large, as were the verdicts in *Lewis v Daily Telegraph Ltd*[15], or manifestly too small, as in *English and Scottish Co-op Properties Mortgage and Investment Society Ltd v Odhams Press Ltd*[16], that no sensible jury properly directed could have reached the conclusion. I do not think much depends on the exact formula used to describe the test to be applied, whether the traditional language 'so large [or small] as that twelve sensible men could not reasonably have given them' (per Lord Esher MR in *Praed v Graham*[17]) or that of Palles CB in *M'Grath v Bourne*[18] cited by Lord Wright in *Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd*[19], that 'no reasonable proportion existed between it and the circumstances of the case'. The point is that the law makes the jury and not the judiciary the constitutional tribunal, and if Parliament had wished the roles to be reversed in any way, Parliament would have said so at the time of the Administration of Justice (Miscellaneous Provisions) Act 1933, since s 6 of that Act expressly excepts defamation actions (otherwise than in a limited class of case) from the general change which it then authorised.

In addition to the above cases counsel for Captain Broome cited *Youssoupoff v Metro-Goldwyn-Meyer Pictures Ltd*[20], *Bocock v Enfield Rolling Mills Ltd*[1], *Scott v Musial*[2], *Morey v Woodfield*[3], *McCarey v Associated Newspapers Ltd*[4] and *Broadway Approvals Ltd v Odhams Press Ltd*[5]. I do not see anything in the above cases which alters the principle involved, nor am I aware of anything in the nature of exemplary damages to alter it in this limited class of case. It may very well be that, on the whole, judges, and the legal profession in general, would be less generous than juries in the award of damages for defamation. But I know of no principle of reason which would entitle judges, whether of appeal or at first instance, to consider that their own sense of the proprieties is more reasonable than that of a jury, or which would entitle them to arrogate to themselves a constitutional status in this matter which Parliament has deliberately withheld from them, for aught we know, on the very ground that juries can be expected to be more generous on such matters than judges. I speak with the greater conviction because my own view is that the legal profession is right to be cautious in such matters and juries are wrong if they can be said to be more generous. But that is not the law and I do not think that judges who hold my view are any more entitled to change the law on this topic than they have been in the past.

Counsel very rightly drew our attention to observations of Lord Devlin in *Rookes v Barnard*[6] when he said:

> 'I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with

15 [1963] 2 All ER 151, [1964] AC 234
16 [1940] 1 All ER 1, [1940] 1 KB 440
17 (1889) 24 QBD 53 at 55
18 (1876) IR 10 CL 160 at 164
19 [1935] AC 346 at 378, [1935] All ER Rep 22 at 37
20 (1934) 50 TLR 581 at 583, 584
1 [1954] 3 All ER 94, [1954] 1 WLR 1303
2 [1959] 3 All ER 193 at 194, [1959] 2 QB 429 at 436
3 [1963] 3 All ER 533n, [1964] 1 WLR 16n
4 [1964] 2 All ER 947, [1965] 2 QB 86
5 [1965] 2 All ER at 536, 537, [1965] 1 WLR at 818, 820
6 [1964] 1 All ER at 411, [1964] AC at 1227

> restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham* v. *Gambling*[7], and place some arbitrary limit on awards of damages that are made by way of punishment.'

I regard *Benham v Gambling*[7] as setting an absolutely necessary but wholly arbitrary rule to solve an absolutely insoluble problem, and I do not think it could readily be extended to exemplary damages for libel simply on the ground that judges do not agree with juries on quantum. I do not think the first sentence in Lord Devlin's observation means more than that the House will use its legitimate powers to interfere with awards by juries with particular regard to the need for preserving liberty, which he was concerned to express, and, if it means that the House was conferring on itself greater powers than it previously possessed, I would have regarded it as an usurpation of the function of the legislature as a whole. We were also referred to the observations of the Court of Appeal in *Ward v James*[8]. If the passage quoted there means more than that court, in exercising its undoubted right to interfere with unreasonable verdicts, will have more regard than heretofore to the general level of damages in cases of a similar nature, and particularly personal injury cases, it may need further consideration.

The second reason which leads me to decline to interfere with the jury's verdict in this case is the peculiar gravity of the facts of this case. I share with Phillimore LJ the view that the jury must have found that[9]—

> 'these were grave libels perpetrated quite deliberately and without regard to their truth by a young man and a firm of publishers interested solely in whether they would gain by the publication of this book. They did not care what distress they caused.'

It is true, and I have been constrained to say, that I would have treated this heinous offence against public decency with far less severity than did the jury in this case. But, at the end of the hearing, I found myself as unable to say as were the three eminent judges in the Court of Appeal[10] that no 12 reasonable jurors could have come to a different conclusion from myself. These matters are very highly subjective, and I do not feel myself entitled to substitute my own subjective sense of proportion for that of the constitutional tribunal appointed by law to determine such matters.

I should add, lest I be thought to have overlooked the point that, to avoid the expense and anxieties of a new trial counsel on both sides agreed to leave to us, in case the appeal should succeed, the assessment of any sum to be awarded. I doubt myself how satisfactory this would have been but, quite obviously, before we embarked on such a task we should have to be first satisfied that the original verdict could not stand, and to this preliminary issue the agreement between counsel is necessarily irrelevant.

THE DECISION IN ROOKES V BARNARD[11]

These considerations really conclude the result of this appeal. It must, in my view, be dismissed. But, lest other litigants be put to expense and uncertainty comparable to that which the parties to this case have, in my view, unnecessarily suffered, it is now unavoidable that I should deal at length with the wider issues in the law of damages on which the Court of Appeal[10] founded the greater part of its judgment. Before I do so I ought to remark that, although counsel for the appellants took the point that the trial judge should have withdrawn the question of the paperback edition from the jury, I regard the way in which he left it to them as so favourable to the appellants as not to justify a new trial on that ground alone.

The judgment of the Court of Appeal[10] was based on the simple proposition that

7 [1941] 1 All ER 7, [1941] AC 157
8 [1965] 1 All ER 568 at 575, [1966] 1 QB 289 at 301
9 [1971] 2 All ER at 215, [1971] 2 WLR at 887
10 [1971] 2 All ER 187, [1971] 2 WLR 853
11 [1964] 1 All ER 367, [1964] AC 1129

the decision in *Rookes v Barnard*[12] so far as it affected punitive or exemplary damages was made per incuriam and without prior argument by counsel and that judges should in future ignore it as unworkable, and that, in directing juries, judges of first instance should return to the status quo ante *Rookes v Barnard*[12] as if that case had never been decided at all. I have already said, and will not repeat, what I think about the propriety of the Court of Appeal[13] in doing this at all, and the appropriateness, in view of the consequences to the parties, of their doing it in this case. I now proceed to consider how far their opinions are correct.

I make no complaint of their view that *Rookes v Barnard*[12] clearly needs reconsideration by this House, if only because of the reception it has received in Australia, Canada and New Zealand. 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*[14] and anything one can do in this case to bring the various strands of thought in different Commonwealth countries together ought to be done. Moreover, as I shall show, many of Lord Devlin's statements[15] have been misunderstood, particularly by his critics, and the view of the House may well have suffered to some extent from the fact that its reasons were given in a single speech. Whatever the advantages of a judgment of an undivided court delivered by a single voice, the result may be an unduly fundamentalist approach to the actual language employed. Phrases which were clearly only illustrative or descriptive can be treated in isolation from their context, as being definitive or exhaustive. I am convinced that this has happened here and that to some extent at least, the purpose and nature of Lord Devlin's exposition has been misunderstood.

THE LAW BEFORE ROOKES V BARNARD[12]

Whatever else may be said, the Court of Appeal's judgment[13] is based on one assumption which is plainly incorrect. This assumption is, to quote its most characteristic expression on the lips of Lord Denning MR[16]: 'Prior to *Rookes v Barnard*[12], the law as to exemplary damages was settled.' In point of fact, it was nothing of the kind. Lord Denning MR went on immediately to quote from Mayne and MacGregor on Damages the following passage[17]:

> 'Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so when his conduct is wanton, as when it discloses fraud, malice, violence, cruelty, insolence, or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights . . . Such damages are recognised to be recoverable in appropriate cases in defamation . . .'

If Lord Denning MR had gone on to quote from a subsequent passage[18] of the same edition he would have read the following passage, inconsistent with his construction of the foregoing, under the heading 'A Double Rationale' which should, I hope, have disabused him of the idea that the law of punitive damages was in fact settled prior to *Rookes v Barnard*[12]. The passage is as follows[18]:

> '3. A DOUBLE RATIONALE
>
> 'Through all these various cases, however, runs another thread, giving a very different explanation of the position. *For indeed it cannot be said that English law has committed itself finally and fully to exemplary damages, and many of the above*

12 [1964] 1 All ER 367, [1964] AC 1129
13 [1971] 2 All ER 187, [1971] 2 WLR 853
14 [1967] 3 All ER 523, [1969] AC 590
15 In *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129
16 [1971] 2 All ER at 197, [1971] 2 WLR at 868
17 12th Edn (1961), paras 207, 208
18 Para 212

cases point to the rationale not of punishment of the defendant but of extra compensation for the plaintiff for the injury 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.' [The italics are mine.]

Indeed, in the well-known American textbook on the law of damages by the late Professor Charles T McCormick, published in 1935 by the West Publishing Co of Minnesota, occurs the following passage to the same effect[19]:

> 'In England, where exemplary damages had 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 that the doctrine, thus definitely isolated, has been attacked and criticised.'

More characteristic than either of these passages and more illustrative of the confusion which reigned before *Rookes v Barnard*[20] is the paragraph on the subject in Lord Simonds's edition of Halsbury's Laws of England[1]:

> '*Exemplary damages.* Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrong-doer. Such damages are said to be "at large", and, further, have been called exemplary, vindictive, penal, punitive, aggravated, or retributory.'

This passage clearly shows the extraordinary confusion of terminology reflecting differences in thinking and principle which existed up to 1964. Apart from anything else, 'aggravated' damages, classed as compensatory by Mayne and MacGregor, and by Professor McCormick, are assimilated to exemplary or punitive damages as such, as is the phrase damages 'at large'—an expression so indefinite in its connotation that counsel for the appellants in argument felt able to include within it (as this passage suggests inappropriately) even the general damages for pain and suffering in a personal injuries case. Clearly, before *Rookes v Barnard*[20], the thinking and the terminology alike called aloud for further investigation and exposition, and, since in such cases it is the classic function of this House to make such reviews, I cannot accept the simpliste doctrine of the Court of Appeal[2] either that there was no need to make it, or that the only thing to restore clarity is to go back to the state of the law as it was in 1963. In passing, I may say that I do not attach so much importance as did the Court of Appeal[2] to the circumstances that the two categories mentioned by Lord Devlin had never been discussed in argument by counsel. The cases and textbooks on exemplary damages had been exhaustively read, and when this House undertakes a careful review of the law it is not to be described as acting per incuriam or ultra vires if it identifies and expounds principles not previously apparent to the counsel who addressed it or to the judges and textbook writers whose divergent or confusing expressions led to the necessity for the investigation. Of course, in a sense, it would be easy enough to direct a jury under the old law if one simply said to them that any conduct of which they chose on rational grounds to disapprove would give rise to an award of exemplary damages and that any sum they chose to think appropriate as the penalty would be acceptable. But no one in recent years has ever

19 Page 278
20 [1964] 1 All ER 367, [1964] AC 1129
1 11 Halsbury's Laws (3rd Edn) 223, para 391
2 [1971] 2 All ER 187, [1971] 2 WLR 853

thought this, although it is noteworthy that as recently as 1891 the author of Sedgwick's 'A Treatise on the Measure of Damages' was writing[3]:

> 'Until comparatively recent times juries were as arbitrary judges of the amount of damages as of the facts . . . Even as late as the time of Lord Mansfield it was possible for counsel to state the law to be that "The Court cannot measure the ground on which the jury find damages that may be thought large: *they may find upon facts within their own knowledge*" . . . *The doctrine of exemplary damages is thus seen to have orginated in a survival in this limited class of cases of the old arbitrary power of the jury.*' [The italics are mine.]

Clearly modern juries must be given adequate professional guidance and the object of Lord Devlin's opinion in *Rookes v Barnard*[4] was to enable them to have it. Speaking for myself, and whatever view I formed of the categories, I would find it impossible to return to the chaos which is euphemistically referred to by Phillimore LJ[5] as 'the law as it was before *Rookes v Barnard*[4]'.

Before I examine the actual decision in *Rookes v Barnard*[4] I would now propose to make two sets of observations of a general character. The first relates to the context in which damages must be awarded, the second to the terminology to be used in particular classes of case.

THE SUBJECTIVE ELEMENT IN DAMAGES

Of all the various remedies available at common law, damages are the remedy of most general application at the present day, and they remain the prime remedy in actions for breach of contract and tort. They have been defined as 'the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract'. They must normally be expressed in a single sum to take account of all the factors applicable to each cause of action and must of course be, expressed in English currency[6].

In almost all actions for breach of contract, and in many actions for tort, the principle of restitutio in integrum is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be estimated by relation to some material loss. It is true that where loss includes a pre-estimate of future losses, or an estimate of past losses which cannot in the nature of things be exactly computed, some subjective element must enter in. But the estimate is in things commensurable with one another, and convertible at least in principle to the English currency in which all sums of damages must ultimately be expressed.

In many torts, however, the subjective element is more difficult. The pain and suffering endured, and the future loss of amenity, in a personal injuries case are not in the nature of things convertible into legal tender. The difficulties arising in the paraplegic cases, or, before *Benham v Gambling*[7], in estimating the damages for loss of expectation of life in a person who died instantaneously, are only examples of the intrinsically impossible task set judges or juries in such matters. Clearly the £50,000 award upheld in *Morey v Woodfield*[8] could never compensate the victim of such an accident. Nor, so far as I can judge, is there any purely rational test by which a judge can calculate what sum, greater or smaller, is appropriate. What is surprising is not that there is difference of opinion about such matters, but that in most cases professional opinion gravitates so closely to a conventional scale. Nevertheless, in all actions in which damages, purely compensatory in character, are awarded for suffering, from

3 8th Edn, pp 502 et seq
4 [1964] 1 All ER 367, [1964] AC 1129
5 [1971] 2 All ER at 214, [1971] 2 WLR at 887
6 Mayne and McGregor on Damages, 12th Edn, para 1
7 [1941] 1 All ER 7, [1941] AC 157
8 [1963] 3 All ER 533n, [1964] 1 WLR 16n

the purely pecuniary point of view the plaintiff may be better off. The principle of restitutio in integrum, which compels the use of money as its sole instrument for restoring the status quo, necessarily involves a factor larger than any pecuniary loss.

In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such 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. As Windeyer J well said in *Uren v John Fairfax & Sons Pty Ltd*[9]:

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

This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being 'at large'. In a sense, too, these damages are of their nature punitive or exemplary in the loose sense in which the terms were used before 1964, because they inflict an added burden on the defendant proportionate to his conduct, just as they can be reduced if the defendant has behaved well—as for instance by a handsome apology—or the plaintiff badly, as for instance by provoking the defendant, or defaming him in return. In all such cases it must be appropriate to say with Lord Esher MR in *Praed v Graham*[10]:

> '... in actions of libel ... the jury in assessing damages are entitled to look at the whole conduct of the defendant [I would personally add "and of the plaintiff"] from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial.'

It is this too which explains the almost indiscriminate use of 'at large', 'aggravated' 'exemplary', and 'punitive' before *Rookes v Barnard*[11]. To quote again from Professor McCormick's work, it was originally only in America that the distinction between 'aggravated' damages (which take into account the defendant's bad conduct for compensating the plaintiff's injured feelings) and 'punitive' or 'exemplary' damage was really drawn. My own view is that 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*[11] 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.

9 (1967) 117 CLR 118 at 150
10 (1889) 24 QBD at 55
11 [1964] 1 All ER 367, [1964] AC 1129

The next point to notice is that it has always been a principle in English law that the award of damages when awarded must be a single lump sum in respect of each separate cause of action. Of course, where part of the damage can be precisely calculated, it is possible to isolate part of it in the same cause of action. It is also possible and desirable to isolate different sums of damages receivable in respect of different torts, as was done here in respect of the proof copies. But I must say I view with some distrust the arbitrary subdivision of different elements of general damages for the same tort, as was done in *Loudon v Ryder*[12], and even, subject to what I say later, what was expressly approved by Lord Devlin in *Rookes v Barnard*[13] for the laudable purpose of avoiding a new trial. In cases where the award of general damages contains a subjective element, I do not believe it is desirable or even possible simply to add separate sums together for different parts of the subjective element, especially where, as was done by agreement in this case, the subjective element relates under different heads to the same factor, in this case the bad conduct of the defendant. I would think with Lord Atkin in *Ley v Hamilton*[14]:

> 'The "punitive" element is not something which is *or can* [the italics are mine] be added to some known factor which is non-punitive',

or in the words of Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*[15]:

> 'The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of *inextricable* considerations.' [The italics again are mine.]

In other words the whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition. When exemplary damages are involved, and even though, in theory at least, it may be possible to winnow out the purely punitive element, the dangers of double counting by a jury or a judge are so great that, even to avoid a new trial, I would have thought the dangers usually outweighed the advantages. Indeed, although it must be wholly illegitimate to speculate in such a matter, the thought crossed my mind more than once during the hearing that it may even have happened in this case.

TERMINOLOGY

This brings me to the question of terminology. It has been more than once pointed out the language of damages is more than usually confused. For instance, the term 'special damage' is used in more than one sense to denominate actual past losses precisely calculated (as in a personal injuries action), or 'material damage actually suffered' as in describing the factor necessary to give rise to the cause of action in cases, including cases of slander, actionable only on proof of 'special damage'. If it is not too deeply embedded in our legal language, I would like to see 'special damage' dropped as a term of art in its latter sense and some phrase like 'material loss' substituted. But a similar ambiguity occurs in actions of defamation, the expressions 'at large', 'punitive', 'aggravated', 'retributory', 'vindictive' and 'exemplary' having been used in, as I have pointed out, inextricable confusion.

In my view it is desirable to drop the use of the phrase 'vindictive' damages altogether, despite its use by the county court judge in *Williams v Settle*[16]. Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding 'aggravated' damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a

12 [1953] 1 All ER 741, [1953] 2 QB 202
13 [1964] 1 All ER at 411, [1964] AC at 1228
14 (1935) 153 LT 384 at 386
15 (1967) 117 CLR at 150
16 [1960] 2 All ER 806, [1960] 1 WLR 1072

generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and as the result of the conduct exciting the indignation demands a more generous solatium. Likewise the use of 'retributory' is objectionable because it is ambiguous. It 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.

As between 'punitive' or 'exemplary', one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer 'exemplary', not because 'punitive' is necessarily inaccurate, but 'exemplary' better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that 'tort does not pay' by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.

The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants' counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in *Rookes v Barnard*[17], when he defines the phrase as meaning all cases where 'the award is not limited to the pecuniary loss that can be specifically proved'. But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.

Finally, it is worth pointing out, although I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatising 'compensatory', 'punitive', 'exemplary' or 'aggravated' damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken into account in assessing a single sum. They are not separate heads to be added mathematically to one another.

ANALYSIS OF ROOKES V BARNARD[18]

This being said, it is necessary to analyse the decision in *Rookes v Barnard*[18], a case, it must be remembered, of intimidation and not libel. The only actual decision on damages must be looked for in the passage where Lord Devlin says[19]:

> 'I doubt whether the facts disclosed in the summing-up show even a case for aggravated damages; a different impression may be obtained when the facts are fully displayed on a new trial. At present there seems to be no evidence that the respondents were motivated by malevolence or spite against the appellant. They wronged him, not primarily to hurt him, but so as to achieve their own ends. If that had not been their dominating motive, then what they did would not have been done in furtherance of a trade dispute and the whole case has been fought on the basis that it was. It is said that they persisted in believing that their closed shop position was endangered by the appellant's conduct, even when their official leaders told them that it was not. Be it so; pig-headedness will not do. Again, in so far as disclosed in the summing-up, there was no evidence of offensive conduct or of arrogance or insolence. It was, I think, suggested that some impolite observations were made about the appellant, but that is not enough; in a dispute of this sort feelings run high and more than hard words are needed for aggravated damages. Counsel for the appellant relied strongly on the flagrant breach of contract with B.O.A.C. and the respondents' open disregard of their pledges and their lack of consideration. But this was not conduct

17 [1964] 1 All ER at 407, [1964] AC at 1221
18 [1964] 1 All ER 367, [1964] AC 1129
19 [1964] 1 All ER at 414, [1964] AC at 1232

> that affected the appellant. He was no more distressed or humiliated by it than any of B.O.A.C.'s passengers whose convenience, it might be said, and interests were brushed aside by the respondents in their determination to secure their object.'

Although, as will be seen, I prefer much of what Lord Devlin said on the subject of exemplary damages to what has been said by his subsequent critics, and propose to follow it, the decision in *Rookes v Barnard*[20] must be viewed in the light of these conclusions. It is not verbally inspired. But it is a careful and valuable decision not lightly to be set aside.

The passages which have given rise to criticism and discussion[21] can be divided conveniently into the following parts. The first part consists in exposition of the authorities and principles[22] where Lord Devlin begins to draw his conclusions. These conclusions, which form the second portion of his opinion, include the three 'alleged categories'[1], the three 'considerations'[2] and finally[3] the commentary and exposition of the consequences of what he has said and these occupy the rest of the passage under discussion.

WAS THE DECISION PER INCURIAM?

Now, I think I must protest at the outset at the theory that Lord Devlin (or those members of the House who agreed with him) was speaking 'per incuriam'. I have already dealt with the argument that his conclusions did not follow the actual submissions of counsel on either side. Lord Devlin was, of course, perfectly well aware that, in drawing these conclusions from the authorities, he was making new law in the sense in which new law is always made when an important new precedent is established. Thus, he said[4]:

> 'I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.'

But a judge is always entitled to do this when the exact limits, rationale, and the extent of a principle is being discussed, and when those limits, rationale, and extent have never been authoritatively defined.

Nor can it be said fairly that he had ignored *Ley v Hamilton*[5]. In fact he quoted from it at length and treated it, making allowance for the confusion in the legal terminology at the time to which I have already drawn attention, as a case of 'aggravated' damages. I think he was right in so doing; although I also think Salmon LJ was almost certainly right in thinking[6] that the inverted commas in which Lord Atkin[7] puts 'punitive' are not a guide to its meaning. The word is in inverted commas for the same reason that 'real' in the earlier passage is in inverted commas. They are quotation marks and Lord Atkin[7] was quoting the actual words in the judgment of Maugham LJ[8] which he was criticising.

20 [1964] 1 All ER 367, [1964] AC 1129
21 [1964] 1 All ER at 407-413, [1964] AC at 1220-1231
22 [1964] 1 All ER at 407-409, [1964] AC at 1220-1225
1 [1964] 1 All ER at 409-411, [1964] AC at 11225-1227
2 [1964] 1 All ER at 411, 412, [1964] AC at 1227-1230
3 [1964] 1 All ER at 412, 413, [1964] AC at 1230, 1231
4 [1964] 1 All ER at 410, [1964] AC at 1226
5 (1935) 153 LT 384
6 [1971] 2 All ER at 207, [1971] 2 WLR at 879
7 In *Ley v Hamilton* (1835) 153 LT at 386
8 In *Ley v Hamilton* in the Court of Appeal (1934) 151 LT 360 at 374

It is a fairer criticism of Lord Devlin to say that he did not mention *E Hulton & Co v Jones*[9]. Both counsel for the plaintiff in argument in that case and Lord Loreburn LC, in his speech[10] which may have been ex tempore, reflect a view of the law of damages for libel apparently at variance with the law as Lord Devlin has now declared it to be. But, as I shall show, the difference is more apparent than real. It is difficult to square either counsel for the plaintiff's argument or the passage of Lord Loreburn LC's speech with the explicit admission made in the Court of Appeal and repeated in the facts stated[11], that the use of the name 'Artemus Jones' by the editor and author was innocent, and it is on this basis that the case is normally cited as an authority. Judging the use made of the case in the Court of Appeal by their own criteria of Lord Devlin, the case is certainly not a binding authority on the law of exemplary damages. It was never argued as such, although the observations of Lord Loreburn LC can be fairly used as testimony, and even as persuasive authority, for the state of legal thinking at the time. In law, however, if Lord Devlin be right, the law of exemplary damages was still evolving, and *Hulton v Jones*[9] made no pretence at altering or defining it, nor did either counsel in the case argue the case in terms which raised the question in its present form.

DID ROOKES V BARNARD[12] EXTEND EXEMPLARY DAMAGES TO FRESH TORTS?

Having rejected the theory that Lord Devlin's speech can be pushed aside as having been delivered per incuriam, I hope I may now equally dispose of another misconception. I do not think that he was under the impression either that he had completely rationalised the law of exemplary damages, nor by listing the 'categories' was he intending, I would think, to add to the number of torts for which exemplary damages can be awarded. Thus I disagree with the dictum of Widgery LJ in *Mafo v Adams*[13] (which, for this purpose, can be treated as an action for deceit) when he said:

> 'As I understand LORD DEVLIN's speech, the circumstances in which exemplary damages may be obtained have been drastically reduced, but the range of offences in respect of which they may be granted has been increased, and I see no reason since *Rookes* v. *Barnard*[12] why, when considering a claim for exemplary damages, one should regard the nature of the tort as excluding the claim.'

This would be a perfectly logical inference if Lord Devlin imagined that he was substituting a completely rational code by enumerating the categories and stating the considerations. It is true, of course, that actions for deceit could well come within the purview of the second category. But I can see no reason for thinking that Lord Devlin intended to extend the category to deceit, and counsel on both sides before us were constrained to say that, although it may be paradoxical, they were unable to find a single case where either exemplary or aggravated damages had been awarded for deceit, despite the fact that contumelious, outrageous, oppressive, or dishonest conduct on the part of the defendant is almost inherently associated with it. The explanation may lie in the close connection that the action has always had with breach of contract (see the discussion in Mayne and MacGregor[14]).

WHERE SOLATIUM IS ENOUGH

The true explanation of *Rookes v Barnard*[12] is to be found in the fact that, where damages for loss of reputation are concerned, or where a simple outrage to the individual or to property is concerned, aggravated damages in the sense I have explained can, and should in every case lying outside the categories, take care of the

9 [1910] AC 20, [1908-10] All ER Rep 29
10 [1910] AC at 24, [1908-10] All ER Rep at 47
11 [1910] AC at 20
12 [1964] 1 All ER 367, [1964] AC 1129
13 [1969] 3 All ER at 1410, [1970] 1 QB at 558
14 Chapter 41, especially at para 968

exemplary element, and the jury should neither be encouraged not allowed to look beyond as generous a solatium as is required for the injuria simply in order to give effect to feelings of indignation. It is not that the exemplary element is excluded in such cases. It is precisely because in the nature of things it is, and should be, included in every such case that the jury should neither be encouraged nor allowed to look for it outside the solatium and then to add to the sum awarded another sum by way of penalty additional to the solatium. To do so would be to inflict a double penalty for the same offence.

The surprising thing about *Rookes v Barnard*[15] is not that Lord Devlin restricted the award of exemplary damages viewed as an addition to or substitution for damages by way of solatium to the three so-called categories, but that he allowed the three so-called categories to exist by way of exception to the general rule. That he did this is due at least in part to the fact that he felt himself bound by authority to do so, but partly also because he thought that there were cases where, over and above the figure awarded for loss of reputation, for injured feelings, for outraged morality, and to enable a plaintiff to protect himself against future calumny or outrage of a similar kind, an additional sum was needed to vindicate the strength of the law and act as a supplement to its strictly penal provisions[16].

IS ROOKES V BARNARD[15] UNWORKABLE?

I confess I am quite unable to see why such a view of the matter is 'unworkable'. As I have already pointed out, it has been worked in fact for nearly eight years. On the contrary, by insisting on a single sum being awarded for outrageous behaviour in nearly every case of tort, and allowing the jury full vent to their legitimate feelings within the proportions set by the injury involved, it seems to me that judge and jury are set an inherently less difficult task than if they were told first to take into account the aggravating factors, and then to impose an additional 'fine' for the size of which they have neither the qualifications, nor any measure by which they can limit their discretion, particularly since neither counsel nor the judge can mention particular figures which can have any relevance to the actual case. The difficulty consists, not in working the system of aggravated and purely compensatory damages, where they apply, as they do in almost every case of contumelious conduct under Lord Devlin's opinion, but in working a system of punitive damages alongside the system of aggravated and compensatory damage. This difficulty exists whether Lord Devlin's limitation to the categories be right or wrong and, if it were wrong, would exist in every case, and not only in a small minority of cases. The difficulty resides in the fact that the thinking underlying the two systems is as incompatible as oil and vinegar, the one based on what the plaintiff ought to receive, the other based on what 12 reasonable, but otherwise uninstructed, men and women think the defendant ought to pay.

THE MEANING OF THE CATEGORIES

As regards the meaning of the particular categories, I have come to the conclusion that what Lord Devlin said was never intended to be treated as if his words were verbally inspired, and much of the criticism of them which has succeeded reports of the case has been based on interpretations which are false to the whole context and unduly literal even when taken in isolation from it.

The only category exhaustively discussed before us was the second, since the first could obviously have no application to the instant case. But I desire to say of the first that I would be surprised if it included only servants of the government in the strict sense of the word. It would, in my view, obviously apply to the police, despite *A-G for New South Wales v Perpetual Trustee Co Ltd*[17], and almost as certainly to local

15 [1964] 1 All ER 367, [1964] AC 1129
16 Cf what Lord Devlin says [1964] 1 All ER at 410, 412, [1964] AC at 1226, 1230
17 [1955] 1 All ER 846, [1955] AC 457

and other officials exercising improperly rights of search or arrest without warrant, and it may be that in the future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority. What it will not include is the simple bully, not because the bully ought not to be punished in damages, for he manifestly ought, but because an adequate award of compensatory damages by way of solatium will necessarily have punished him. I am not prepared to say without further consideration that a private individual misusing legal powers of private prosecution or arrest as in *Leith v Pope*[18], where the defendant had the plaintiff arrested and tried on a capital charge, might not at some future date be assimilated into the first category. I am not prepared to make an exhaustive list of the emanations of government which might or might not be included. But I see no reason to extend it beyond this field, to simple outrage, malice or contumelious behaviour. In such cases a properly directed jury will not find it necessary to differentiate between what the plaintiff ought to receive and the defendant ought to pay, since the former will always include the latter to the extent necessary to vindicate the strength of the law.

When one comes to the second category we reach a field which was more exhaustively discussed in the case before us. It soon became apparent that a broad rather than a narrow interpretation of Lord Devlin's words was absolutely essential, and that attempts to narrow the second category by a quotation out of context of one sentence from the passage wherein it is defined simply will not do. Lord Devlin founded his second category on a sequence of cases beginning with *Bell v Midland Ry Co*[19], and on the judgment of Maule J in *Williams v Currie*[20] and the dictum of Martin B in *Crouch v Great Northern Ry Co*[1]. None of these were examples of precise calculation of the balance sheet type. Then he said[2]:

> 'It [i e the motive of making a profit] is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. *This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object,—perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.*' [The italics are mine.]

Even a casual reading of the above passage shows that the sentence:

> 'Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity'

is not intended to be exhaustive but illustrative, and is not intended to be limited to the kind of mathematical calculations to be found on a balance sheet. The sentence must be read in its context. The context occurs immediately after the sentence ending: 'one man should not be allowed to sell another man's reputation for profit', where the word 'calculation' does not occur. The context also includes the final sentence: 'Exemplary damages can properly be awarded whenever it is necessary to teach a

18 (1779) 2 Wm Bl 1327
19 (1861) 10 CBNS 287
20 (1845) 1 CB 841 at 848
1 (1856) 11 Exch 742 at 759
2 [1964] 1 All ER at 410, 411, [1964] AC at 1227

wrongdoer that tort does not pay.' The whole passage must be read sensibly as a whole, together with the authorities on which it is based.

It is true, of course, as was well pointed out by Widgery J in *Manson v Associated Newspapers Ltd*[3], that the mere fact that a tort, and particularly a libel, is committed in the course of a business carried on for profit is not sufficient to bring a case within the second category. Nearly all newspapers, and most books, are published for profit. What is necessary in addition is (i) 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, and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss. It is not necessary that the defendant calculates that the plaintiff's damages if he sues to judgment will be smaller than the defendant's profit. This is simply one example of the principle. The defendant may calculate that the plaintiff will not sue at all because he has not the money (I suppose the plaintiff in a contested libel action like the present must be prepared nowadays to put at least £30,000 at some risk), or because he may be physically or otherwise intimidated. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty.

At this stage one must examine some of the counter-arguments which found favour in the Court of Appeal[4]. How, it may be asked, about the late Mr Rachman, who is alleged to have used hired bullies to intimidate statutory tenants by violence or threats of violence into giving vacant possession of their residences and so placing a valuable asset in the hands of the landlord? My answer must be that if this is not a cynical calculation of profit and cold-blooded disregard of a plaintiff's rights, I do not know what is. It is also argued that the second category does not take care of the case of a man who pursues a potential plaintiff to ruin out of sheer hatred and malice. The answer is that it does not do so because this is already taken care of in the full compensation or solatium for the injuria involved in which the jury can give full rein to their feeling of legitimate indignation without going outside the bounds of compensatory damages in the sense in which I have explained the phrase, that is, damages of sufficient size to enable the plaintiff to point to the size of the award to indicate the baselessness of the false charge, and damages for the outrage inflicted in exact proportion as it was unprovoked, unatoned for, or malicious. I would have thought the second category was ample to cover any form of injury committed within the scope of those torts for which aggravated and exemplary damages may be awarded where the motive was material advantage. *Mafo v Adams*[5] is not really an authority to the contrary, although I would have thought that the damages there awarded for inconvenience, breach of covenant, and loss of a regulated tenancy were perhaps at present day values too small for the wrong committed. What was at issue in *Mafo v Adams*[5] was the award of exemplary damages in an action for deceit (see from Sachs LJ[6]) and this, in the event, was never decided. What was decided in that case was that the plaintiff had not discharged the onus of proof that the defendant's motives were such as to bring the case within the second category. This is clear from the fact that both Sachs and Widgery LJJ based their judgments on a passage from the decision of the county court judge, where he said: 'The defendant's reasons for his actions are obscure' (see per Sachs LJ[7], and per Widgery LJ[8]). I am far from saying that insofar as it could have been shown that the defendant was actuated by hope of gain, and if the action had been one of trespass, exemplary damages could not have been awarded under the second category, and even though

3 [1965] 2 All ER at 960, [1965] 1 WLR at 1045
4 [1971] 2 All 187, [1971] 2 WLR 853
5 [1969] 3 All ER 1404, [1970] 1 QB 548
6 [1969] 3 All ER at 1407, [1970] 1 QB at 555
7 [1969] 3 All ER at 1408, [1970] 1 QB at 556
8 [1969] 3 All ER at 1411, [1970] 1 QB at 559

in the absence of authority I am of opinion that exemplary damages cannot be awarded in an action for deceit, I cannot claim that that matter has been finally determined.

The main criticisms of Lord Devlin's speech are thus shown to have been unfounded. That he went beyond the existing law he had no doubt, and nor have I. But, as I have shown, he was entitled to do so. It may very well be that, in deciding in favour of the two exceptional categories, he was making an unnecessary concession to tradition. But he made the concession after a careful analysis of the authorities and, speaking for myself, and given the cautious approach indicated in Lord Gardiner LC's practice declaration[9], and by a majority of this House in *Jones v Secretary of State for Social Services*[10], I do not think there is any reason for disturbing them. I regard the Australian cases, and in particular *Uren v John Fairfax & Sons Pty Ltd*[11], as deciding no more than that on the particular facts of that case the award of exemplary damages was not acceptable. Insofar as they claim to establish that exemplary damages can be awarded for any contumelious disregard of the plaintiff's rights I may not, of course, comment so far as regards the law of Australia, but, so far as regards the law of England, I would say that an adequate award of compensatory damages in such a case must of necessity include, and perhaps more than include, any punitive or exemplary element. The proposition, as a proposition, would have been perfectly acceptable so long as the looser terminology prevalent before *Rookes v Barnard*[12] was in use. So far as regards the more strict terminology now to be employed, the proposition is not to be treated as acceptable in the English courts.

Before turning to the so-called 'considerations' I desire to say a word concerning the decision in *Williams v Settle*[13] and *Loudon v Ryder*[14], on which Lord Devlin also commented. *Williams v Settle*[13] was a case under s 17 (3) of the Copyright Act 1956. I agree with Lord Devlin that it is for consideration in the light of subsequent cases whether that section, which does not use the phrase 'exemplary damages', does in fact give a right to damages which are exemplary in the narrower sense used since *Rookes v Barnard*[12]. If it does, the case should be regarded as a second category case, since the defendant's motive was profit. If it does not, and if it is to be regarded as still authoritative, *Williams v Settle*[13] can only be regarded as an extreme example of aggravated damages, although the language of the county court judge was so strong as to lead me to think that I would not myself have been prepared to make so large an award

Loudon v Ryder[14] is the earliest instance which I have been able to find where a split award was made of exemplary and compensatory damages for the same tort, and the split was made in circumstances which are not altogether plain from the report, after an award of a lump sum had been announced. What would have happened if Devlin J had summed up to the jury in favour of a generous award of aggravated damages on the lines of his later speech in *Rookes v Barnard*[12] is, of course, a question which no one can possibly answer. The answer might well have been, substituting 'trespass' for 'defamation', what Windeyer J said in *Uren v John Fairfax & Sons Pty Ltd*[15]:

> 'Telling the jury in a defamation action that compensation is to be measured having regard to aggravating circumstances the result of the defendant's conduct might not result in a verdict different from that which they would return if they were told that because of that conduct they could give damages by way of example.'

9 See *Note* [1966] 3 All ER 77, [1966] 1 WLR 1234
10 Page 145 ante, [1972] 2 WLR 210
11 (1967) 117 CLR 118
12 [1964] 1 All ER 367, [1964] AC 1129
13 [1960] 2 All ER 806, [1960] 1 WLR 1072
14 [1953] 1 All ER 741, [1953] 2 QB 202
15 (1967) 117 CLR at 152

What is certain is that the summing-up by Devlin J in that case could not, as Lord Devlin himself surmised, now survive the analysis by Lord Devlin in *Rookes v Barnard*[16] of the theoretical basis of exemplary damages in the sense in which the term should now be employed.

THE 'CONSIDERATIONS'

I turn now to Lord Devlin's three 'considerations'. It is worth pointing out that neither the Court of Appeal[17] nor any of the counsel who appeared before us attacked these as such. Nor, so far as I am aware, have these been attacked in the cases in which Commonwealth judges have felt constrained to criticise *Rookes v Barnard*[16]. This alone would be a good reason against a simple return to the status quo ante proposed by the Court of Appeal[17], because the first and second 'considerations' coupled with the passage from which I have already quoted[18] are themselves, and quite independently of the 'categories', an important, and I think original, contribution to the law on exemplary damages. Whilst, as I have indicated, I cannot myself follow what Lord Devlin says on the second category so far as regards the right of appellate courts to interfere with jury awards on principles different from the traditional, nor, I think, with the proposal that *Benham v Gambling*[19] offers a precedent for arbitrary limits imposed by the judiciary in defamation cases, I regard it as extremely important that, for the future, judges should make sure in their direction to juries that the jury is fully aware of the danger of an excessive award. A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury's consideration. Even if it is not withdrawn from the jury, the judge's task is not complete. He should remind 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*[20], the use of the word 'fine' in connection with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that, in making such an award they are putting money into a plaintiff's pocket, and not contributing to the rates, or to the revenue of central government.

If this be correct, the agreed list of questions submitted to the jury in the present case is not the ideal procedure for ensuring that the jury keep their verdict within bounds. They should normally be asked to award a single sum whether as solatium or as exemplary damages. If, in order to avoid a second trial, they are asked a second question, they should be asked, in the event of their awarding exemplary damages, what smaller sum they would have awarded if they had confined themselves to solatium in the sense explained.

It follows from what I have said that I am not prepared to follow the Court of Appeal[17] in its criticisms of *Rookes v Barnard*[16], which I regard as having imposed valuable limits on the doctrine of exemplary damages as they had hitherto been understood in English law and clarified important questions which had previously

16 [1964] 1 All ER 367, [1964] AC 1129
17 [1971] 2 All ER 187, [1971] 2 WLR 853
18 [1964] 1 All ER at 400, [1964] 1 AC at 1225
19 [1941] 1 All ER 7, [1941] AC 157
20 (1935) 153 LT 384 at 386

been undiscussed or left confused. From one point of view, there is much to be said for the interpretation put on Lord Devlin's speech by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*[1] immediately before the passage I have just quoted:

> 'What the House of Lords has now done is, as I read what was said, to produce a more distinct terminology. Limiting the scope of terms that often were not distinguished in application makes possible an apparently firm distinction between aggravated compensatory damages and exemplary or punitive damages.'

But it is not to be inferred from this that the ruling in *Rookes v Barnard*[2] is a pure question of semantics. It may well be true that in most individual cases the precise terminology in which the question is asked of the jury may not make much difference to the amount of the award. Both Windeyer J in the passage just cited and Lord Devlin[3] were evidently of this view. But the following positive advantages can be gained from adhering to the rules he laid down, if properly interpreted: (1) The danger of double counting, of adding a pure 'fine' to what has already been awarded as solatium, without regarding the deterrent or punitive effect of the latter, has been eliminated, or at least reduced to a minimum. (2) In all cases where the categories do not apply, the jury must be told to confine the punitive or deterrent element in their thinking within the limits of a fair solatium. In other words, to borrow the language, though not the sentiments, expressed in *Forsdike v Stone*[4] the jury must be told to consider *only* what the plaintiff should receive after giving full allowance to the need to re-establish his reputation and for the outrage inflicted on him, and *not* what the defendant should pay independently of this consideration. (3) In cases where the categories do apply, juries can be given directions a little more informative and regulatory than was the case up to and including the new analysis.

Rookes v Barnard[2] has not perhaps proved quite the definitive statement of the law which was hoped when it was decided. This is often the case. I remember with suitably mixed feelings of filial piety and inherited caution, that in his judgment in *R Addie & Sons (Collieries) Ltd v Dumbreck*[5] my father believed he was putting a final end to doubts about the limits of occupiers' liability to trespassers, licensees, and invitees. But the way forward lies through a considered precedent and not backwards from it. I would hope very much that, in the light of observations made on *Rookes v Barnard*[2] in this case, Commonwealth courts might see fit to modify some of their criticisms of it. I do not know how far it can be of value in the United States of America where it seems to me that the decisions of the Supreme Court have been influenced greatly by the terms of the First Amendment to the Constitution, and by the unsatisfactory rules prevalent in American courts as to the recovery of costs. However that may be, we cannot depart from *Rookes v Barnard*[2] here. It was decided neither per incuriam nor ultra vires this House; we could only depart from it by tearing up the doctrine of precedent, and this was not the object of this House in assuming the powers adopted by the practice declaration of 1966[6].

Lest I should have been thought to have forgotten it, I would observe that the Court of Appeal[7] overruled the decision of Lawton J[8] that a claim for exemplary damages should be pleaded. I am content to accept their view on the basis of the present practice. But in the light of the decision of this House in the instant case I propose to refer to the Rule Committee the question whether in the light of *Rookes v Barnard*[2] and the present decision the present practice should not be altered.

1 (1967) 117 CLR at 152
2 [1964] 1 All ER 367, [1964] AC 1129
3 [1964] 1 All ER at 412, [1964] AC at 1230
4 (1868) LR 3 CP 607 at 611
5 [1929] AC 358, [1929] All ER Rep 1
6 See *Note* [1966] 3 All ER 77, [1966] 1 WLR 1234
7 [1971] 2 All ER 187, [1971] 2 WLR 853
8 [1971] 1 All ER 262

There is much to be said for the view that a defendant against whom a claim of this kind is made ought not to be taken by surprise.

My Lords, it follows from what I have said in my opinion this appeal should be dismissed and that costs should follow the event.

LORD REID. My Lords, the appellants published a book 'The Destruction of Convoy PQ17' which according to their advertisement on the dust jacket was the result of five intensive years of meticulous research by the author. It contained many statements about the conduct of Captain Broome who was the naval officer in command of the convoy. He sued the appellants and the author for damages for libel. After a trial which lasted for some 17 days a number of questions were left to the jury. They found that the words complained of were defamatory of Captain Broome, and were not true in substance and in fact. They were asked what compensatory damages they awarded, and they awarded £15,000. Then they were asked 'Has the plaintiff proved that he is entitled to exemplary damages?' Their answer was Yes against both defendants. Next they were asked 'What additional sum should be awarded him by way of exemplary damages?' Their answer was £25,000. So judgment was entered against both defendants for £40,000.

Others of your Lordships have dealt in detail with these statements and I do not think it necessary to say more than that in my opinion the jury were well entitled to find that they conveyed imputations of the utmost gravity against the character and conduct of Captain Broome as a naval officer. Indeed the appellants do not now seek to disturb the award of £15,000 as 'compensatory damages'. Their contention before your Lordships is twofold: first that the jury were not entitled to award any exemplary damages and secondly that the amount awarded under this head was much too great. As no objection was taken at the time to the form of the question there cannot now be any objection to the jury having been asked in this case to consider separately compensatory and exemplary damages.

The whole matter of exemplary damages was dealt with in this House in *Rookes v Barnard*[9] in a speech by Lord Devlin with which all who sat with him, including myself, concurred. The Court of Appeal[10] dealing with the present case held that if they applied the law as laid down in *Rookes v Barnard*[9] the appellants' appeal must fail and the jury's verdict must stand. They could have stopped there, but they chose to go on and attack the decision of this House as bad law. They were quite entitled to state their views and reasons for reaching that conclusion but very unfortunately Lord Denning MR, apparently with the concurrence of his two colleagues, went on to say[11]:

> 'This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by *Rookes v Barnard*[9] are so great that the judges should direct the juries in accordance with the law as it was understood before *Rookes v Barnard*[9]. Any attempt to follow *Rookes v Barnard*[9] is bound to lead to confusion.'

It seems to me obvious that the Court of Appeal[10] failed to understand Lord Devlin's speech, but whether they did or not I would have expected them to know that they had no power to give any such direction and to realise the impossible position in which they were seeking to put those judges in advising or directing them to disregard a decision of this House. That aberration of the Court of Appeal has made it necessary to re-examine the whole subject and incidentally has greatly increased the expense to which the parties to this case have been put.

The very full argument which we have had in this case has not caused me to

9 [1964] 1 All ER 367, [1964] AC 1129
10 [1971] 2 All ER 187, [1971] 2 WLR 853
11 [1971] 2 All ER at 201, 202, [1971] 2 WLR at 873

change the views which I held when *Rookes v Barnard*[12] was decided or to disagree with any of Lord Devlin's main conclusions. But it has convinced me that I and my colleagues made a mistake in simply concurring with Lord Devlin's speech. With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law. My main reason is that experience has shown that those who have to apply the decision to other cases and still more those who wish to criticise it seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament. They do not seem to realise that it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive. When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it.

I am bound to say that, in reading the various criticisms of Lord Devlin's speech to which we have been referred, I have been very surprised at the failure of its critics to realise that it was intended to state principles and not to lay down rules. But I suppose that those of us who merely concurred with him ought to have foreseen that this might happen and to have taken steps to prevent it. So I shall try to repair my omission by stating now in a different way the principles which I, and I believe also Lord Devlin, had in mind. I do not think that he would have disagreed with any important part of what I am now about to say.

Damages for any tort are or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered. Where the injury is material and has been ascertained it is generally possible to assess damages with some precision. But that is not so where he has been caused mental distress or when his reputation has been attacked—where to use the traditional phrase he has been held up to hatred, ridicule or contempt. Not only is it impossible to ascertain how far other people's minds have been affected, it is almost impossible to equate the damage to a sum of money. Any one person trying to fix a sum as compensation will probably find in his mind a wide bracket within which any sum could be regarded by him as not unreasonable—and different people will come to different conclusions. So in the end there will probably be a wide gap between the sum which on an objective view could be regarded as the least and the sum which could be regarded as the most to which the plaintiff is entitled as compensation.

It has long been recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation.

Frequently in cases before *Rookes v Barnard*[12] when damages were increased in that way but were still within the limit of what could properly be regarded as compensation to the plaintiff, it was said that punitive, vindictive or exemplary damages were being awarded. As a mere matter of language that was true enough. The defendant was being punished or an example was being made of him by making him pay more than he would have had to pay if his conduct had not been outrageous. But the damages although called punitive were still truly compensatory; the plaintiff was not being given more than his due.

On the other hand when we came to examine the old cases we found a number which could not be explained in that way. The sums awarded as damages were more—sometimes much more—than could on any view be justified as compensatory, and courts, perhaps without fully realising what they were doing, appeared to have

12 [1964] 1 All ER 367, [1964] AC 1129

permitted damages to be measured not by what the plaintiff was fairly entitled to receive but by what the defendant ought to be made to pay as punishment for his outrageous conduct. That meant that the plaintiff, by being given more than on any view could be justified as compensation, was being given a pure and undeserved windfall at the expense of the defendant, and that insofar as the defendant was being required to pay more than could possibly be regarded as compensation he was being subjected to pure punishment.

I thought and still think that that is highly anomalous. It is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties. Some objection has been taken to the use of the word 'fine' to denote the amount by which punitive or exemplary damages exceed anything justly due to the plaintiff. In my view the word 'fine' is an entirely accurate description of that part of any award which goes beyond anything justly due to the plaintiff and is purely punitive.

Those of us who sat in *Rookes v Barnard*[13] thought that the loose and confused use of words like 'punitive' and 'exemplary' and the failure to recognise the difference between damages which are compensatory and damages which go beyond that and are purely punitive had led to serious abuses, so we took what we thought was the best course open to us to limit those abuses. Theoretically we might have held that as purely punitive damages had never been sanctioned by any decision of this House (as to which I shall say more later) there was no right under English law to award them. But that would have been going beyond the proper function of this House. There are many well established doctrines of the law which have not been the subject of any decision by this House. We thought we had to recognise that it had become an established custom in certain classes of case to permit awards of damages which could not be justified as compensatory, and that that must remain the law. But we thought and I still think it well within the province of this House to say that that undesirable anomaly should not be permitted in any class of case where its use was not covered by authority. In order to determine the classes of case in which this anomaly had become established it was of little use to look merely at the words which had been used by the judges because, as I have said, words like 'punitive' and 'exemplary' were often used with regard to damages which were truly compensatory. We had to take a broad view of the whole circumstances.

I must now deal with those parts of Lord Devlin's speech which have given rise to difficulties. He set out two categories of cases which in our opinion comprised all or virtually all the reported cases in which it was clear that the court had approved of an award of a larger sum of damages than could be justified as compensatory. Critics appear to have thought that he was inventing something new. That was not my understanding. We were confronted with an undesirable anomaly. We could not abolish it. We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow any extension.

It will be seen that I do not agree with Lord Devlin's view that in certain classes of case exemplary damages serve a useful purpose in vindicating the strength of the law. That view did not form an essential step in his argument. Concurrence with the speech of a colleague does not mean acceptance of every word which he has said. If it did there would be far fewer concurrences than there are. So I did not regard disagreement on this side issue as preventing me from giving my concurrence.

I think that the objections to allowing juries to go beyond compensatory damages are overwhelming. To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like—terms far too vague to be admitted to any criminal

13 [1964] 1 All ER 367, [1964] AC 1129

code worthy of the name. There is no limit to the punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced by emotion; it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind. And there is no effective appeal against sentence. All that a reviewing court can do is to quash the jury's decision if it thinks the punishment awarded is more than any 12 reasonable men could award. The court cannot substitute its own award. The punishment must then be decided by another jury and if they too award heavy punishment the court is virtually powerless. It is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them? The right to give punitive damages in certain cases is so firmly embedded in our law that only Parliament can remove it. But I must say that I am surprised by the enthusiasm of Lord Devlin's critics in supporting this form of palm tree justice.

Lord Devlin's first category is set out in the passage where he said[14]:

> 'The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category,—I say this with particular reference to the facts of this case,—to oppressive action by private corporations or individuals.'

This distinction has been attacked on two grounds: first, that it only includes Crown servants and excludes others like the police who exercise governmental functions but are not Crown servants and, secondly, that it is illogical since both the harm to the plaintiff and the blameworthiness of the defendant may be at least equally great where the offender is a powerful private individual, With regard to the first I think that the context shows that the category was never intended to be limited to Crown servants. The contrast is between 'the government' and private individuals Local government is as much government as national government, and the police and many other persons are exercising governmental functions. It was unnecessary in *Rookes v Barnard*[15] to define the exact limits of the category. I should certainly read it as extending to all those who by common law or statute are exercising functions of a governmental character.

The second criticism is I think misconceived. I freely admit that the distinction is illogical. The real reason for the distinction was, in my view, that the cases showed that it was firmly established with regard to servants of 'the government' that damages could be awarded against them beyond any sum justified as compensation, whereas there was no case except one that was overruled where damages had been awarded against a private bully or oppressor to an amount that could not fairly be regarded as compensatory, giving to that word the meaning which I have already discussed. I thought that this House was therefore free to say that no more than that was to be awarded in future.

We are particularly concerned in the present case with the second category. With the benefit of hindsight I think I can say without disrespect to Lord Devlin that it is not happily phrased. But I think the meaning is clear enough. An ill disposed person could not infrequently deliberately commit a tort in contumelious disregard of another's rights in order to obtain an advantage which would outweigh any compensatory damages likely to be obtained by his victim. Such a case is within this category. But then it is said, suppose he commits the tort not for gain but simply out of malice why should he not also be punished. Again I freely admit there is no logical reason. The reason for excluding such a case from the category is simply that firmly established authority required us to accept this category however little we might like it, but did not require us to go farther. If logic is to be preferred to the desirability of cutting down the scope for punitive damages to the greatest extent

14 [1964] 1 All ER at 410, [1964] AC at 1226

15 [1964] 1 All ER 367, [1964] AC 1129

that will not conflict with established authority then this category must be widened. But as I have already said I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority. On that basis I support this category.

In my opinion, the conduct of both defendants in this case was such that the jury were clearly entitled, if properly directed, to hold that it brought them within the second category. Again, I do not intend to cover ground already covered by my noble and learned friends. So I say no more than that the jury were fully entitled to hold that the appellants knew when they committed this tort that passages in this book were highly defamatory of Captain Broome and could not be justified as true and that it could properly be inferred that they thought that it would pay them to publish the book and risk the consequences of any action Captain Broome might take. It matters not whether they thought that they could escape with moderate damages or that the enormous expense involved in fighting an action of this kind would prevent Captain Broome from pressing his claim.

It was argued that to allow punitive damages in this case would hamper other publishers or limit their freedom to conduct their business because it can always be inferred that publishers publish any book because they expect a profit from it. But punitive damages could not be given unless it was proved that they knew that passages in the book were libellous and could not be justified or at least deliberately shut their eyes to the truth. I would hope that no publisher would publish in such circumstances. There is no question of curtailing the freedom of a reputable publisher.

The next passage in Lord Devlin's speech which has caused some difficulty is what has been called the 'if, but only if' paragraph[16]. I see no difficulty in it but again I shall set out the substance of it in my own words. The difference between compensatory and punitive damages is that in assessing the former the jury or other tribunal must consider how much the plaintiff ought to receive whereas in assessing the latter they must consider how much the defendant ought to pay. It can only cause confusion if they consider both questions at the same time. The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punitive damages. But if they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment.

It was argued that the jury were not properly directed by the trial judge on this matter. I agree with your Lordships that that argument must fail. A judge's direction to a jury is not to be considered in vacuo. It must be read in light of all the circumstances as they then existed and I cannot believe that the jury were left in any doubt as to how they must deal with this matter.

Next there are questions arising from the fact there were two defendants. When dealing with compensatory damages the law is quite clear. There was one tort of which both defendants were guilty. So one sum is fixed as compensation and judgment is given for that sum against both defendants leaving it to the plaintiff to sue whichever he chooses and then leaving it to the defendant who has paid to recover a

16 [1964] 1 All ER at 411, [1964] AC at 1228

contribution if he can from the other. But when we come to punitive damages the position is different. Although the tort was committed by both only one may have been guilty of the outrageous conduct or if two or more are so guilty they may be guilty in different degrees or owing to one being rich and another poor punishment proper for the former may be too heavy for the latter.

Unless we are to abandon all pretence of justice, means must be found to prevent more being recovered by way of punitive damages from the least guilty then he ought to pay. We cannot rely on his being able to recover some contribution from the other. Suppose printer, author and publisher of a libel are all sued. The printer will probably be guiltless of any outrageous conduct but the others may deserve punishment beyond compensatory damages. If there has to be one judgment against all three then it would be very wrong to allow any element of punitive damages at all to be included because very likely the printer would have to pay the whole and the others might not be worth suing for a contribution. The only logical way to deal with the matter would be first to have a judgment against all the defendants for the compensatory damages and then to have a separate judgment against each of the defendants for such additional sum as he should pay as punitive damages. I would agree that that is impracticable. The fact that it is impracticable to do full justice appears to me to afford another illustration of how anomalous and indefensible is the whole doctrine of punitive damages. But as I have said before we must accept it and make the best we can of it.

So, in my opinion, the jury should be directed that, when they come to consider what if any addition is to be made to the compensatory damages by way of punitive damages, they must consider each defendant separately. If one any of the defendants does not deserve punishment or if the compensatory damages are in themselves sufficient punishment for any one of the defendants, then they must not make any addition to the compensatory damages. If each of the defendants deserves more punishment than is involved in payment of the compensatory damages then they must determine which deserves the least punishment and only add to the compensatory damages such additional sum as that defendant ought to pay by way of punishment. I do not pretend that that achieves full justice but it is the best we can do without separate awards against each defendant.

It was argued that here again there was misdirection of the jury because all that was not made plain to them. But again I agree with your Lordships that in the whole circumstances we ought not to hold the direction of the learned trial judge to be inadequate. Again the jury can have been in no doubt as to what was required of them.

There remains what is perhaps the most difficult question in this case—whether the additional award of £25,000 as punitive damages is so excessive that we can interfere. I think it was much too large, but that is not the test. I would like to be able to hold that the court has more control over an award of punitive damages than it has over an award of compensatory damages. As regards the latter it is quite clear that a court can only interfere if satisfied that no 12 reasonable men could have awarded so large a sum and the reason for that is plain. The court has no power to substitute its own assessment for the verdict of a jury. If it interferes it can only send the matter back to another jury. So before it can interfere it must be well satisfied that no other jury would award so large a sum. I do not see how this House could arrogate to itself any wider power with regard to punitive damages. We could not deprive the plaintiff of his right to a new trial so we must adhere to the established test. Any diminution or abolition of the functions of a jury in libel cases can only come from Parliament. If this case brings nearer the day when Parliament does take action I for one shall not be sorry.

Whether or not we can interfere with this award is a matter which is not capable of much elaboration. In considering how far 12 reasonable men might go, acting as jurors commonly do act, one has to bear in mind how little guidance the court is entitled to give them. All that they can be told is that they must not award a sum

which is unreasonable. In answer to questions whether anything more definite could properly be said neither counsel in this case was able to make any suggestion and I have none to offer. The evidence in this case is such that the jury could take an extremely unfavourable view of the conduct of both defendants. I do not say that they ought to have done so, but they were entitled to do so. And they must have done so. I find it impossible to say that no jury of reasonable men, inexperienced but doing their best with virtually no guidance, could reach the sum of £25,000. Or, to put it in another way, I would feel no confidence that if the matter were submitted to another jury they must reach a substantially different result. So with considerable regret I must hold that it would be contrary to our existing law and practice if this House refused to uphold this verdict.

It is true that in this case the parties agreed that if the verdict for £25,000 were quashed they would leave it to this House to substitute another figure. But that agreement cannot justify us in doing otherwise than we would have done if the parties had stood on their legal rights. The obvious reason for that agreement was a common desire to avoid the enormous expense of a new trial. This is not the first occasion on which I have felt bound to express my concern about the undue prolixity and expense of libel actions. I would not blame any individuals. It may arise from the conduct of a trial before a jury being more expensive than a trial before a judge. If so that is an additional argument for taking these cases away from juries. Or it may be that it suits wealthy publishers of newspapers, books and periodicals that the cost of fighting a libel action is so great that none but a person with large financial backing can sue them effectively.' Whatever be the reason the costs of this case have already reached a figure which many laymen would call scandalous. I think that those in a position to take effective action might take note.

Finally, I must say something about a strange misconception which appears in the judgments of the Court of Appeal[17] in this case. Somehow they reached the conclusion that the decision of this House in *Rookes v Barnard*[18] was made per incuriam, was ultra vires, and had produced an unworkable position. It must be noted that in at least three earlier cases the Court of Appeal were able without difficulty or question to apply that decision (*McCarey v Associated Newspapers Ltd*[19], *Broadway Approvals Ltd v Odhams Press Ltd*[20] and *Fielding v Variety Incorporated*[1]). What has caused their change of mind does not appear but I must deal with their new view. As regards the present position being unworkable, of course many difficulties remain in this branch of the law, but these difficulties are an inheritance from the confusion of the past. I have dealt fairly fully with the proper interpretation of *Rookes v Barnard*[18] and it appears to me that that decision removes many old difficulties and creates few, if any, new ones.

I need not deal separately with the novel idea that a decision of this House can be ultra vires because that charge appears to be consequential on the charge that this House acted per incuriam in reaching its decision. It is perfectly legitimate to think and say that we were wrong but how anyone could say we acted per incuriam in face of the passage[2] in which reference is made to *Ley v Hamilton*[3] I fail to understand.

This charge is really based on what appears to me to be a misreading by the Court of Appeal of two decisions of this House, *E Hulton & Co v Jones*[4] and *Ley v Hamilton*[3]. *Hulton's case*[4] has always been regarded as the leading authority for the proposition that a defamatory description intended to apply to a fictional person may in fact be a libel on a real person and therefore a subject for damages. I see nothing in the speeches in this House to indicate that punitive damages in the modern sense were being considered. It was said that there was an element of recklessness in the failure of the defendants to realise that there was a real Artemus Jones and that this justified

17 [1971] 2 All ER 187, [1971] 2 WLR 853
18 [1964] 1 All ER 367, [1964] AC 1129
19 [1964] 3 All ER 947, [1965] 2 QB 86
20 [1965] 2 All ER 523, [1965] 1 WLR 805
1 [1967] 2 All ER 497, [1967] 2 QB 841
2 [1964] 1 All ER at 412, 413, [1964] AC at 1230
3 (1935) 153 LT 384
4 [1910] AC 20, [1908-10] All ER Rep 29

a rather high sum of damages but I see nothing to indicate any view that the damages went beyond anything that could be justified as compensation and could only be justified as being punitive in the modern sense.

Ley v Hamilton[5] requires rather fuller consideration. But again I see nothing to indicate that this House held that the damages went beyond compensation or that there had been outrageous conduct justifying a punitive award which went beyond compensation. The majority in the Court of Appeal certainly held that the £5,000 damages awarded was punitive in the modern sense. They held that the real damage was trifling and the rest punishment. Greer LJ said[6] that if Mr Hamilton had been prosecuted for criminal libel it was inconceivable that he would have been fined £5,000. Maugham LJ said[7] that the damages could not be described as a fair and reasonable compensation but were in the nature of a fine. In this House only Lord Atkin delivered a speech. I read it as intended to show that elements properly included in compensatory damages were far wider than the majority in the Court of Appeal had thought and that the whole of this £5,000 was in fact justified as being compensatory. He said[8]:

> 'The fact is that the criticism with great respect seems based upon an incorrect view of the assessment of damages for defamation. They are not arrived at as the Lord Justice seems to assume by determining the "real" damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times. The "punitive" element is not something which is or can be added to some known factor which is non-punitive. In particular it appears to present no analogy to punishment by fine for the criminal offence of publishing a defamatory libel.'

By saying that compensation for insult or the pain of a false accusation cannot be weighed at all closely and that there was nothing here analogous to punishment by fine, he was to my mind making it as clear as words can make it that the whole of this £5,000 was truly compensatory in character. So I think that Lord Devlin was perfectly right in saying that there is no decision of this House which recognises punitive damages in the modern sense of something which goes beyond compensation. Where the Court of Appeal[9] went wrong was in failing to realise that in the older cases damages were frequently referred to as exemplary or punitive although they were in reality compensatory.

On the whole matter I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, at the trial of this action questions arose whether, if the plaintiff, Captain Broome, succeeded, he was entitled to recover exemplary damages in addition to compensatory damages. The law relating to exemplary damages was considered in your Lordships' House in 1964 and was laid down in the decision in *Rookes v Barnard*[10]. That decision bound the learned judge. It bound the Court of Appeal[9]. It continues to be binding authority in all courts unless and until it appears to your Lordships to be right to depart from it.

In presiding at the trial the learned judge set himself loyally and faithfully to follow the binding authority of the decision. His directions to the jury followed the approach laid down in the decision though it is contended that in regard to one or two matters there was faulty exposition which was sufficiently serious to vitiate

5 (1935) 153 LT 384
6 (1934) 151 LT 360 at 369
7 (1934) 151 LT at 374
8 (1935) 153 LT at 386
9 [1971] 2 All ER 187, [1971] 2 WLR 853
10 [1964] 1 All ER 367, [1964] AC 1129

the award made by the jury of exemplary damages. These matters call for separate consideration. If the contentions concerning them do not succeed, there remains an issue whether the award of the jury was excessive and should be set aside. If it is held that there was nothing amiss at the trial and that the law as laid down in your Lordships' House[11] was properly applied by the learned judge it would be an unhappy conclusion if it were now held that the trial had in fact been conducted on wrong or at least on unnecessary lines but that this had only been so because the law which had to be followed had been wrongly laid down. If that were the conclusion it is by no means certain that it would be possible to avoid ordering a new trial which would then be conducted on the basis of the law as newly laid down. But a result so lamentable (and for the parties so calamitous) must be contemplated as at least a possibility if it is decided that the law was wrongly declared in 1964 and must now be changed or changed back again.

Before considering this aspect of the matter further I must express my view in regard to the main contentions which are raised by the appellants. They for their part do not in any way question the validity of *Rookes v Barnard*[12]. Their appeal relates only to the award of exemplary damages. The jury found that the words complained of in the hardback edition were defamatory of Captain Broome and that the words were not true in substance or in fact. They found similarly in regard to the proof copies. They awarded compensatory sums respectively of £14,000 and £1,000. No challenge as to such results is made. No criticism is advanced in regard to the very careful summing-up of the learned judge dealing with the facts and with the issues as to liability. No suggestion is made that the awards of compensation can be attacked as being excessive or unreasonable.

The learned judge left three questions to the jury on the issue of exemplary damages. First they were asked whether Captain Broome had proved that he was entitled to exemplary damages. Here the learned judge was carefully following *Rookes v Barnard*[12]. There may be exemplary damages if a defendant has formed and been guided by the view that though he may have to pay some damages or compensation because of what he intends to do yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him. He is prepared to hurt somebody because he thinks that he may well gain by so doing even allowing for the risk that he may be made to pay damages. As the learned judge put it in reference to defamation there may be exemplary damages in cases where someone wilfully or knowingly or recklessly peddles untruths for profit. There must be evidence fit to be left to the jury but if there is then it is for the jury to decide whether there is entitlement to exemplary damages on the basis to which I have referred.

It was contended on behalf of the appellants that there was no evidence fit to be left to the jury in this case on this issue. In my view this contention wholly fails. There was ample evidence. It was painstakingly recounted in the summing-up of the learned judge. It is helpfully referred to and summarised in the judgment of Lord Denning MR[13]. It is reviewed in the speech of Lord Hailsham LC which I have had the advantage of reading in advance.

Similar considerations apply to the question which was put to the jury and which they answered by saying that entitlement to exemplary damages was proved against both defendants. It is in regard to the next question and answer that the greatest

11 In *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129
12 [1964] 1 All ER 367, [1964] AC 1129
13 [1971] 2 All ER 187, [1971] 2 WLR 853

doubts and difficulties in my view arise. Being asked, what additional sum should be awarded him by way of exemplary damages? the answer of the jury was £25,000. So there were three awards: one being (for the hardback edition) the compensatory figure of £14,000; another being the exemplary damages figure of £25,000. For the total of £40,000 judgment was entered.

I must confess that for my part I should greatly regret it if the practice became general of having a separate award of exemplary damages in this manner (I will return to this question later). But the learned judge was only following the guidance specifically given in *Rookes v Barnard*[14]. There it was said[15] that the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. But it was said that there may be cases in which it is difficult for a judge to say whether he ought or ought not to leave a claim for exemplary damages to the jury. I can quite see that in such a case it will be easier for an appellate court (where an issue is raised whether there was evidence which could justify an award of exemplary damages) if there are two awards. The award of exemplary damages could be set aside without the necessity for a new trial if the appellate court considered that the evidence was not such as to have been fit for the consideration of the jury so as to entitle them to award exemplary damages. For this reason it was stated in *Rookes v Barnard*[14] that if a judge is in doubt whether he ought to leave a claim for exemplary damages to a jury then he could invite them to say 'what sum they would fix as compensation and what additional sum, if any, they would award if they were entitle to give exemplary damages'. It was this course that the learned judge followed in the present case. But if this course is followed the words 'if any' become of importance. They were not included in the question which was put to the jury.

There are three very important issues which arise. (1) Did the learned judge give an adequate direction to the jury to ensure that they understood that they should only award an 'additional' sum if they were satisfied that the amount they were awarding as compensatory damage was in itself not enough to punish the defendants? (2) Did the learned judge give an adequate direction to meet the situation where (as in this case) there are two defendants? and (3) In any event is the sum of £40,000 excessive as an award of exemplary damages and a figure which no reasonable jury could award—with the result that although the purely compensatory part £15,000 is not challenged the award of an additional £25,000 must be set aside? (1) The relevant sentences in the summing-up have been referred to in the speech of Lord Hailsham LC and I need not set them out. I would have been happier if the direction on this point (which came towards the end of what I venture to think was a masterly review of the case) had been ampler and more explicit than it was. But the learned judge did emphasise the word 'additional'. He asked the jury to underline it. He said that they should underline it because both the court and counsel would want to know 'if you do decide to award punitive damages, how much more do you award over and above the compensatory damage'. Even so it would have been better to have made it abundantly clear that the punitive element is not to be considered in isolation: an enforced obligation to pay a large sum by way of compensation has itself a punitive impact. So a jury ought fully to understand that only if a sum awarded as compensation is inadequate as a punishment should any larger sum be awarded.

Much earlier in his summing-up the learned judge had dealt with this matter in an introductory way. He told the jury that they were being asked—

> 'not only to give Captain Broome compensatory damages, that is, a reasonable sum for the injury to his reputation and the exacerbation of his feelings: but in addition to fine [the appellants] and Mr. Irving for having done what they have done. The money which you decide—if you do decide—to award by way of punitive damages will not go into the National Exchequer. It will have to go into Captain Broome's pocket.'

14 [1964] 1 All ER 367, [1964] AC 1129

15 [1964] 1 All ER at 411, [1964] AC at 1228

Here again there was an omission to emphasise that an award of compensation must always and inevitably be a part of the 'fine' in cases where the imposition of a 'fine' is warranted.

Although a study of the shorthand note of what was said has led me to the view that there should have been amplification in the way to which I have referred, the important question now is whether it should be held that the jury were misled with the result that their award cannot stand. The emphasis placed on the word 'additional' could not have been lost sight of by the jury. Additional to what? Quite clearly, additional to the amount of compensation awarded. The jury were asked 'how much more' they would award. The 'more' was to be 'over and above' the compensation. It surely must have been clear to the jury that any 'more' that they decided on or any 'additional' sum would have to be paid by those against whom they awarded it on top of the sum that they were first awarding. Here was a jury that listened to the case over a period of 17 days. They deliberated for nearly five hours. They awarded a sum of £25,000 to be 'additional' to their award of £15,000. They knew that the total was £40,000. Thereafter they heard both counsel agree that there should be a single judgment for that amount. No suggestion was made (or I think could possibly have been made) that the £25,000 included the £15,000. I would find it difficult to accept that at the stage in their deliberations when they were considering whether the present appellants and Mr Irving should be punished by being made to pay money they should at that stage have left out of account one part of the money that they themselves were awarding. If having decided that it was a case for punishment the jury were considering the monetary sum which, as such punishment, should be paid the point would surely have been raised by one member if not by all members of the jury: are we not punishing them enough by saying that they must pay £15,000? They could have recorded that as their view had they entertained it. I am not prepared to assume that something which at that stage must really have beeen quite obvious was overlooked by the jury.

(2) There is nothing in regard to this question which I could usefully add to what Lord Hailsham LC has said in reviewing the authorities and in formulating his conclusion. I express my concurrence.

(3) The approach which should be followed by an appellate court in considering whether an award of damages made by a jury should be assailed on the ground that the sum awarded is excessive has been clearly defined in authoritative decisions. They are referred to in the speech of Lord Hailsham LC. I am bound to say that the figure of £40,000 appears to me to be a high figure. Certainly it must be a very unusual case in which on a correct application of the law as laid down in *Rookes v Barnard*[16] the amount which defendants must pay should so greatly exceed the amount which is reasonably to be received by the plaintiff by way of compensation. It is this disparity between the £40,000 and the £15,000 that has caused disquiet as to whether the jury may have been caused or allowed to be under a misunderstanding. But if the conclusion is reached that the jury knew what they were about and chose their figures advisedly then I do not think that I ought to conclude that their 'additional' figure of £25,000 was so high that no reasonable jury could award it. To translate injury to and attack on reputation into monetary terms is at all times a difficult exercise. But it was the same jury that fixed the 'additional' figure of £25,000 that also—without being impeached for so doing—fixed the compensatory figure of £15,000. If they did not go wide when fixing the latter why should it be determined that they went wide in fixing the former. The conclusion which I think can be drawn is that the jury took a very serious view of the conduct and attitude of the defendants. If, after hearing all the relevant features of the case probed and examined over a period of 17 days and hearing the evidence of such of the parties as decided to call or give evidence, the jury did take a very serious view there was evidence which entitled them to do so. They may have regarded the conduct and attitude of each of the

16 [1964] 1 All ER 367, [1964] AC 1129

defendants with equally sharp disfavour. If it was their considered collective view that the defamation was grave and that publication was deliberately undertaken by those who had regard for their own advantage but none for the honour and renown of one whom they traduced then the jury were warranted in deciding that such conduct should be heavily penalised. Whatever might have been my personal assessment had I been on the jury I have not been persuaded that it must be decided that the penalty imposed was beyond the limit to which a reasonable jury could go. Nor can it be said with any assurance that an estimation of a figure by a learned judge would necessarily have superior validity. A learned judge has experience and knowledge of other cases but in a matter so elusive as fixing in monetary terms a reflection of feelings of disapproval there is no norm. It may be difficult to give guidance but a judge should be able to express to a jury the same guidance as he would give to himself.

For the reasons which I have given I consider that the appeal should be dismissed. As I have indicated, the appellants in no way sought to impugn the decisions in *Rookes v Barnard*[17]. Such ardour in criticism as may have been evinced in the Court of Appeal[18] by counsel for Captain Broome became tempered and modified by the reflection that an assault on *Rookes v Barnard*[17] was not essential for his success in this appeal and that the overturning of *Rookes v Barnard*[17] might at least possibly involve the jettisoning of all the proceedings to date and a complete new trial on a fresh basis. But as so much was said about *Rookes v Barnard*[17] and because in the printed case of the respondent, Captain Broome, the first reason set out was that your Lordships' House should depart from its decision in *Rookes v Barnard*[17] (insofar as that decision altered the law on exemplary damages generally or at least in defamation cases) I must record my opinion.

In *Rookes v Barnard*[17] one submission that was made was that exemplary damages could not be awarded in that case. Other submissions led to a somewhat general consideration of the law relating to exemplary damages. The report of the arguments[19] shows that certain authorities and certain textbooks were referred to and were examined. There were citations of some 30 cases. In the result the House examined and reviewed the law and came to certain conclusions. The House was not bound to limit those conclusions within any formulation which counsel had thought fit to formulate.

It would be idle to deny that a very considerable pruning operation was decided on. It may be that there are some who would not have pruned so much and so drastically. It may be that there are some who would have pruned more severely. What was done was done in the hope of removing from the law 'a source of confusion between aggravated and exemplary damages'. It may be that there are some who feel that though the previous law (built up, as the common law is, as a result of particular decisions given in particular sets of circumstances) was in very many respects imprecise and even illogical yet it was somehow found in practice to work and to be no serious cause of confusion. It may be that there are some who consider that manifest variations and divergencies in terminology did not reflect any really fundamental differences of approach: that for example when in *The Mediana (Owners) v Comet (Owners)*[20] Lord Halsbury LC made a reference, although only a passing and incidental one, to punitive damages:

> 'I put aside cases of trespass where a high-handed procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages'

17 [1964] 1 All ER 367, [1964] AC 1129
18 [1971] 2 All ER 187, [1971] 2 WLR 853
19 [1964] AC at 1158-1164
20 [1900] AC 113 at 118, [1900-3] All ER Rep 126 at 129

he had much the same conception in mind as had Lord Atkinson when in *Addis v Gramophone Co Ltd*[21], he made an incidental reference to circumstances of malice, fraud, defamation or violence which would sustain an action of tort in which a person might no doubt 'recover exemplary damages, or what is sometimes styled vindictive damages' or as had Lord Loreburn LC when he said in *Hulton v Jones*[1]:

> 'In the second place the jury were entitled to say this kind of article is to be condemned. There is no tribunal more fitted to decide in regard to publications, especially publications in the newspaper Press, whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the licence is not fairly used and that the tone and style of the libel is reprehensible and ought to be checked, it is for the jury to say so . . .'

But even if some of the thoughts above referred to are in fact entertained, do they give warrant for re-opening now the debate that led to the decision in *Rookes v Barnard*[2]. I do not think so. I do not think that the power that was referred to in the statement of 26th July 1966[3] was intended to encourage a tendency periodically to chop and change the law. In branches of the law where clarification becomes necessary there may well be decisions which as a matter of policy are not universally welcome or where some may think that some variant of the decision one way or the other would have been more acceptable. But this does not mean that decisions of this House should readily be reviewed whenever a case presents itself which is covered by a decision. There must be something much more.

In his book on damages[4] Professor Street poses the question whether awards of exemplary damages are ever justified. He outlines seven arguments against them and with mathematical impartiality seven arguments in their favour concluding that one cannot say whether or nor exemplary damages are desirable. Whatever general views may be entertained or whatever inclination there may be in different personal views I see no advantage in refusing at this juncture to recognise that a deliberate pronouncement was made in *Rookes v Barnard*[2].

Although I consider that no reason has been shown for denying to that pronouncement the authority of a decision of this House it is not inconsistent with this approach to express the hope that a necessity for a separate and isolated assessment of exemplary damages will be rare. In the search for authority only one case was found prior to *Rookes v Barnard*[2] in which there was such a result. That was *Loudon v Ryder*[5] now overruled. The present case is I think the first one subsequent to *Rookes v Barnard*[2] in which such a separate award has actually been made.

In the older cases the 'vindictive' or 'exemplary' or 'punitive' aspect merely became one element in a composite whole. Thus the law as it was in 1877 was summarised in Mr Mayne's Treatise on Damages[6]. He pointed to the difference between damages in cases of contract (where they were only a compensation) and in cases of tort. In the latter 'if there were no circumstances of aggravation they 'are generally the same'. But where he said:

> '. . . the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, they operate as a punishment, for the benefit of the community, and as a restraint to the transgressor.'

In the various cases cited[7] one amount only of damages was assessed. For a later general summary of the law (as it was in 1895) reference may be made to Sir Frederick

21 [1909] AC 488 at 496, [1908-10] All ER Rep 1 at 5
1 [1910] AC 20 at 25, [1908-10] All ER Rep 29 at 47
2 [1964] 1 All ER 367, [1964] AC 1129
3 See *Note* [1966] 3 All ER 77, [1966] 1 WLR 1234
4 Principles of the Law of Damages, 1962, at pp 34-36
5 [1953] 1 All ER 741, [1953] 2 QB 202
6 3rd Edn, p 37
7 See pp 36, 37, 514, 515, 516

Pollock's book on torts[8]. He refers to cases where there is great injury without the possibility of measuring compensation by any numerical rule. In such cases he said:

> '... juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called exemplary or vindictive.'

He went on to explain that—

> 'the kind of wrongs to which they are applicable are those which, besides the violation of a right or the actual damage, import insult or outrage.'

The cases cited, to which I need not refer in detail, again appear to me to be cases in which only one figure of damages was assessed.

When juries came to award damages in such cases of tort they did therefore give and indeed were 'encouraged' to give a sum which marked displeasure or indignation or which was to serve as a deterrent or as an example or which vindicated the law or which was a way of punishing the defendant. But juries were not invited to isolate such element as was purely punitive. I do not expect that they did in practice. In some cases their displeasure or indignation would operate as a kind of topping-up process. But if the process by which they had arrived at a figure could have been analysed (which normally it could not have been) while it would probably have been found that there had been nothing in the nature of a mathematical addition of separate sums yet it would have been recognised that some (wholly unascertainable) part of the whole must have been purely punitive. Stated otherwise such (unascertained) part was a fine. Logical analysis forces the conclusion therefore that in the result there would in a civil action have been punishment for conduct not particularised in any criminal code and that such punishment had taken the form of a fine not receivable by the state but as a sort of bonus by a private individual who would apart from it be solaced for the wrong done to him. There may be much to be said for making it permissible in a criminal court to order in certain cases that a convicted person should pay compensation. There is much to be said against a system under which a fine becomes payable in a civil court without any of the safeguards which protect those charged with crimes. If therefore the working of the law before *Rookes v Barnard*[9] is exposed to a relentless logical examination it has to be conceded that some features of it were not in principle acceptable. Yet it may be that no serious injustice resulted. And indeed as we have been told the life of the law often lies not in logic but in experience. It would however be an unfortunate and bizarre result if a wholly laudable attempt to rationalise the law had brought it about that the element which it was most sought to suppress was so brought into sharp relief that it attained a significance never before exhibited.

I would regard the present case as exceptional in the sense that the jury must have considered that the conduct of the defendants merited very special condemnation. In other than an exceptional case where exemplary damages are to be awarded I would hope that a jury would be unlikely to award a total sum which exceeded its purely compensatory component element to an extent in any way comparable to that which is revealed in the present case.

I would dismiss the appeal.

VISCOUNT DILHORNE. My Lords, the main issues to be determined in this appeal are (1) whether what was said by my noble and learned friend Lord Devlin in *Rookes v Barnard*[9] with regard to exemplary damages, and with which all the other members of the House then sitting agreed, correctly states the law; (2) if it does, whether Lawton J erred in leaving the question of exemplary damages to the

8 The Law of Torts, 4th Edn, p 174

9 [1964] 1 All ER 367, [1964] AC 1129

jury; (3) having left it to them, whether he misdirected them with regard thereto; and (4) whether the sum of £40,000 awarded by them, of which £25,000 was exemplary damages, was so excessive that that verdict cannot be allowed to stand. I propose to consider the first of these questions last. Although *Rookes v Barnard*[10] was not concerned with damages for libel, I consider the other questions on the assumption that what was said in that case is not to be regarded as obiter in relation to libel cases and is to be regarded as binding on all inferior courts.

Lord Devlin expressed the view[11] that there were only three categories of cases in which exemplary damages could be awarded, namely:—(1) where there had been oppressive, arbitrary or unconstitutional action by servants of the government; (2) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; and (3) where exemplary damages are expressly authorised by statute.

The appellants contended that this case did not come within the second category. They called no evidence at the trial and the question whether it should have been left to the jury to consider exemplary damages, depends on whether there was evidence given or adduced on behalf of the plaintiff on which the jury were entitled to infer and conclude that the defendant's conduct was of that character.

I do not think that Lord Devlin ever envisaged that, to bring a case within the second category, the plaintiff would have to show that there had been something in the nature of a mathematical calculation by the defendant, an assessment of the profit likely to ensue from the publication of defamatory matter and an estimation of the risk of being sued and the damages likely to be awarded if an action was brought. If a plaintiff had to prove that, it would be seldom that he would be in a position to do so. Newspapers and books are usually published for profit and that fact does not by itself make the publisher liable to pay exemplary damages. I think that Widgery J was right when he said in *Manson v Associated Newspapers Ltd*[12]:

> '... it is perfectly clear, from those authorities [*McCarey v Associated Newspapers Ltd*[13] and *Broadway Approvals Ltd v Odhams Press Ltd*[14]], that in a case in which a newspaper quite deliberately publishes a statement which it either knows to be false or which it publishes recklessly, careless whether it be true or false, and on the calculated basis that any damages likely to be paid as a result of litigation will be less than the profit which the publication of that matter will give, then LORD DEVLIN's conditions are satisfied and exemplary damages are permissible.'

He went on to say that he proposed to tell the jury that they could consider exemplary damages—

> 'if, having considered what material there is before them, they are driven to the inference that this was an article published by the defendants when conscious of the fact that it had no solid foundation and with the cynical and calculated intention to use it for what it was worth, on the footing that it would produce more profit than any possible penalty in damages was likely to be.'

I think too that Lawton J put the matter correctly when he said in the course of his summing-up:

> 'A man is liable to pay damages on a punitive basis if he wilfully and knowingly, or recklessly peddles untruths for profit.'

In my opinion, there was ample evidence on which the jury was entitled to come to the conclusion that the case came within the second category. On 9th December

10 [1964] 1 All ER 367, [1964] AC 1129

11 [1964] 1 All ER at 410, 411, [1964] AC at 1226, 1227

12 [1965] 2 All ER 954 at 957, [1965] 1 WLR 1038 at 1040, 1041

13 [1964] 3 All ER 947, [1965] 2 QB 86

14 [1965] 2 All ER 523, [1965] 1 WLR 805

1966 Mr Irving, the author, sent the manuscript of the book to the appellants with a letter in which he said that Captain Broome had threatened legal action if the manuscript was published, and on 23rd December he sent them a long letter in which he quoted an extract from a letter he had received from Kimbers, the publishers to whom he had first submitted the manuscript. That extract stated:—

> '. . . if the book goes to a legal man as it is, he could only tell you that half is libellous. We could not possibly publish the book as it is . . .'.

The manuscript submitted to the appellants was identical with that which Kimbers had seen. Perusal of it by any intelligent publisher must, even without the advantage of having the views of another publisher, have led to the conclusion that it contained many very grave and serious libels on Captain Broome and the jury were fully entitled to conclude that the appellants realised this.

Mr Kimber gave evidence that about 8th March 1967 he had telephoned Mr Parker, a director of the appellants and told him that they had had one or two threats of libel actions if they published the book; to which Mr Parker's response was 'In that case we will tighten up the indemnity clause in Mr Irving's agreement'. On 27th December 1967 Captain Broome wrote to the appellants saying that the manuscript was 'unquestionably libellous'. They replied saying that in the light of his comments 'drastic revisions' had been made. In fact, as the appellants must have known, the revisions that were made did not materially affect the passages defamatory of Captain Broome. On 16th February 1968 the business director of the appellants circulated a memorandum in the following terms, to all concerned:

> 'It is anticipated that early copies of THE DESTRUCTION OF CONVOY P.Q 17 will start coming into the House on March 5th. Will you please note that absolutely and positively not one single copy, on any pretext whatsoever, is to be removed from the House without reference to me. Mr. Mitchell: Would you please notify the printer that this book is to be treated on a maximum security basis and ensure that not one single copy slips through their net.'

Shortly thereafter the appellants circulated proof copies of the book. Why they did so after the circulation of this memorandum is not known for no evidence was given for them. In the absence of any explanation the jury were, in my view, entitled to draw the inference that they had decided to publish the book, despite Captain Broome's threats of action, knowing that passages in the book were libellous of Captain Broome and not caring whether those passages were true or false and on the footing that it was worth their while to run the risk of an action being brought by him and of his obtaining damages in order to make a profit on the book.

On 5th March 1968 Captain Broome issued a writ for libel. On 29th April 1968 his statement of claim was delivered. The appellants then knew, if they were in any doubt before, of what passages he was complaining. On 14th June 1968 they delivered their defence. They pleaded that the words complained of were true in substance and in fact in their natural and ordinary meaning. They did not seek to justify the meaning which the statement of claim alleged the words complained of bore, inter alia, that Captain Broome had been disobedient, careless, incompetent, indifferent to the fate of the merchant ships and had been largely responsible for or contributed extensively to the loss of two-thirds of the ships of the convoy. Despite the issue of this writ, the appellants went on and published a hardback edition of the book. That led to another writ being issued by Captain Broome. Again in their defence to this statement of claim the appellants pleaded that the words complained of were in their natural and ordinary meaning true in substance and in fact but did not seek to justify the meanings which in the statement of claim it was alleged they bore. The jury by their verdict rejected the plea of justification and must have accepted that the passages complained of bore the meanings alleged by Captain Broome.

I do not propose to set out what those passages were. Suffice it to say that they

clearly alleged that Captain Broome had been disobedient, careless, incompetent, indifferent to the fate of the merchant ships, that he had wrongly withdrawn his destroyer force from the convoy, that he had taken it closer to the German airfields than he had been ordered to do and that he had been responsible for the loss of two-thirds of the ships in the convoy. He was in fact accused of cowardice. That the appellants did not appreciate that the passages complained of could be understood to have these meanings, is hard to accept. Yet after publication of the proof copies, after receipt of the writ and the statement of claim in respect of that publication, and when they knew the meanings which it was alleged the passages bore, they went on and published the hardback edition, and at the trial persisted in their plea of justification. In these circumstances if Lawton J had ruled at the end of the plaintiff's case, as he was asked to do, that there was no evidence from which the jury could infer that the case came within the second category, he would in my opinion have erred. I therefore reject this contention of the appellants.

After specifying the three categories of cases in which in his view exemplary damages might be awarded, Lord Devlin in *Rookes v Barnard*[15] said that there were three considerations which must always be borne in mind and then went on to say:

> '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 (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.'

Complaint is made that Lawton J gave no such direction to the jury. With the agreement of counsel, he asked them to answer seven questions. The first was whether, in respect of the hardback edition the words complained of were defamatory of the plaintiff; the second, were they true in substance and in fact. Their answer to the first question was, Yes and to the second, No. The third question was, 'What compensatory damages do you award the Plaintiff?' Their answer was £14,000. Then in answer to the fourth and fifth questions they said that he was entitled to exemplary damages against both defendants. The sixth question was 'What additional sum should be awarded him by way of exemplary damages?' Their answer was £25,000.

After the questions had been handed to the jury in the course of the summing-up, Lawton J told them that, after considering what were the compensatory damages if they found for the plaintiff, they should go on to consider whether he was entitled to exemplary damages. As to that, he told them to consider the case against each defendant separately, saying:

> 'In respect of each of them you will ask yourselves this question: "Has the plaintiff proved his entitlement against that defendant?". If the answer is Yes, then you will have to go on and assess how much punitive damages should be awarded.'

In the next paragraph of his summing-up, he repeated this, saying:

> 'You will have to ask yourselves: "Has he proved that he is entitled to punitive damages against [the appellants]?" If the answer is No, that is that. If the answer is Yes, you will have to assess the damages.'

Then he asked the jury to underline the word 'additional' in the sixth question as he and learned counsel wanted to know:

> '. . . if you do decide to award punitive damages, how much more do you award over and above the compensatory damage.'

15 [1964] 1 All ER at 411, [1964] AC at 1228

The jury were thus clearly told that if they found that the plaintiff was entitled to punitive damages, they must then assess what punitive damages should be awarded. They were never told that in considering whether any sum should be so awarded, they must have regard to the sum they awarded for compensatory damages, and if, and only if, that sum was inadequate to punish the defendants, should they add to it by awarding a sum for exemplary damages.

The failure to give such a direction, I regret that I cannot but regard as a most serious omission. It is one of the most important features of Lord Devlin's speech that a direction on the lines he stated should be given. It was not, and instead the jury were told twice that, if they held that Captain Broome was entitled to exemplary damages, they must assess them. The jury's verdict shows that they thought that £15,000 compensatory damages was insufficient, but if they had been told that they must, in assessing exemplary damages, take into account the sum awarded in compensation, it is possible that they would have awarded not £25,000, but only £10,000 as exemplary damages, that is to say, that they would have deducted from the £25,000 the £15,000 compensatory damages.

I regret having to come to this conclusion but I see no escape from it. After a trial lasting 17 days and lengthy hearings in the Court of Appeal[16] and in this House, one feels some reluctance to say that the jury's verdict should not stand. If all the counsel engaged in the case had told the jury that a sum should only be awarded for exemplary damages if the amount of the compensatory damages was insufficient punishment, then it might be possible to say that despite the omission in the summing-up, the jury can have been in no doubt as to what they were required to do. Unfortunately all counsel did not tell them that. One counsel told the jury in his final address that they must consider exemplary damages quite separately from compensatory damages. He told them, 'they are completely unconnected with each other and in no sense does the one head fall to be balanced against the other' and, 'the two sums are so different that there is no propriety in any sense in balancing them up'. He thus indicated that account should not be taken of the amount of compensatory damages when deciding what, if any, sum should be awarded for exemplary damages. Counsel for the present appellants did not refer to the matter but counsel for Mr Irving in his final address read to the jury the 'if, but only if' passage of Lord Devlin's speech.

As the case was presented to the jury, I can see no ground for the conclusion that they must, despite the omission in the summing-up, have been aware that they had to take into account the compensatory damages when deciding, if they held that there was entitlement to exemplary damages, what sum, if any, should be awarded on that account. On the contrary, the passages I have cited from the summing-up show that they were told that, if they found entitlement, they must then assess an amount for exemplary damages. I have regretfully come to the conclusion that in consequence of this omission, the verdict should not be upheld.

Another criticism made of the summing-up was that the jury were not told on what basis they should assess the exemplary damages if they found that the plaintiff was entitled to them from both defendants and if, in their opinion, the degree of guilt of the defendants differed. In the Court of Appeal[16] there was considerable divergence of view as to the proper direction to be given on this. While there is ample authority for the proposition that against joint tortfeasors there can only be one verdict and one judgment for a joint tort, there is not a great deal of authority on this question. Such as there is points to the conclusion that the plaintiff can only recover the amount which all the defendants should pay and that the amount to be awarded should not be increased to a sum thought adequate to punish the most guilty defendant (see *Dawson v M'Clelland*, per Andrews J[17], per Boyd J[18] and

16 [1971] 2 All ER 187, [1964] 2 WLR 853
17 [1899] 2 IR 486 at 490
18 [1899] 2 IR at 493

per FitzGibbon LJ[19]; *Smith v Streatfeild*[20] per Bankes J, and Gatley on Libel and Slander[1]). If that were not the case an innocent party or a less guilty party might have to pay a sum far in excess of that which he ought to pay. The result of this conclusion appears to be that if three defendants are sued for writing, printing and publishing a libel, if the publisher and author are held liable to pay exemplary damages and the printer is not, the plaintiff will not be awarded exemplary damages and the publisher and author will avoid liability for such damages.

The summing-up contained this passage:

> '... say, for example, you took the view that Mr. Irving was more to blame than [the appellants], or to be fair, you took the view that [the appellants], being an experienced firm of publishers were more to blame than this young man, Mr. Irving, should you make [the appellants] pay a larger sum by way of punitive damages than Mr. Irving? The answer to that is No. Whatever damages, if any, you decide should be awarded by way of punitive damages must be the same sum in respect of both Mr. Irving and [the appellants], if you find them both liable to pay punitive damages.'

Later in response to an intervention by counsel, he made it clear that this did not mean awarding one sum against each defendant but one sum against both.

While it can be said that the direction on this might have been more clearly expressed, I think it suffices for this passage did indicate to the jury that they should award a sum which was appropriate to the less guilty of the two. It may, of course, be the case that the jury did not find that one was more guilty than the other.

I now turn to the question whether the damages awarded were so excessive that the verdict cannot be allowed to stand. In *Rookes v Barnard*[2] Lord Devlin recognised that where there was entitlement to exemplary damages, that did not necessarily mean that there must be two awards though he expressed the view that where there was doubt about entitlement to such damages, to avoid the risk of a new trial, it might be convenient to have separate awards. One consequence of there being two awards, one for compensatory damages and one for exemplary, is that the jury's verdict is more open to attack. If £15,000 was sufficient to compensate the plaintiff for the injury inflicted on him, what justification can there be for an award of a further £25,000 as exemplary damages?

Lawton J very clearly told the jury that they were being asked to fine the appellants and Mr Irving for what they had done. He told them that they were 'really in the position of a judge or magistrate trying a criminal case' and that punitive damages 'must be reasonable in all the circumstances'.

An appellate court should only interfere with a jury's verdict as to damages if it is such as to show that the jury has failed to perform its duty (*Mechanical and General Inventions Co Ltd v Austin and the Austin Motor Co Ltd*[3] per Lord Wright, *Bocock v Enfield Rolling Mills Ltd*[4], *Scott v Musial*[5] and *Lewis v Daily Telegraph Ltd*[6]). To be set aside, the verdict must be out of all proportion to the facts. The award of £25,000 for exemplary damages, as a fine and despite the direction given by Lawton J to which I have referred, in addition to the award of £15,000 compensatory damages is, in my opinion, out of all proportion to the facts and suffices to show that they failed to perform their duty. Their award was, in my view, far in excess of the most that 12 reasonable men could be expected to give. If they had appreciated that they

19 [1899] 2 IR at 499
20 [1913] 3 KB 764 at 769, [1911-13] All ER Rep 362 at 364
1 6th Edn, p 1389
2 [1964] 1 All ER at 411, [1964] AC at 1228
3 [1935] AC 346 at 375, [1935] All ER Rep 22 at 35
4 [1954] 3 All ER 94, [1954] 1 WLR 1303
5 [1959] 3 All ER 193, [1959] 2 QB 429
6 [1962] 2 All ER 698, [1963] 1 QB 340, *affd* [1963] 2 All ER 151, [1964] AC 234

had to take into account the compensatory damages, then as I have said perhaps they might have awarded an additional £10,000 as exemplary damages. I would myself have assessed a considerably lower figure. Perhaps, one does not know, they may have thought that the judge had power to set off one against the other. However that may be, I think that the highest figure that could have been awarded by a jury performing its duty for exemplary damages would have been £10,000 in which case judgment would have been given not for £40,000 but for £25,000. On this ground, too, in my opinion the verdict cannot stand.

In turn now to the first question. Does *Rookes v Barnard*[7] correctly state the law with regard to exemplary damages? The Court of Appeal[8] held that it did not. It was said that it was a decision given per incuriam. The Court of Appeal[8] refused to allow it and judges were told to direct juries in accordance with the law as understood before that case.

Decisions of this House are binding on all inferior courts and must be followed by them. There are, I think, two grounds on which the Court of Appeal can justifiably refuse to follow what has been said in this House. The first is that what was said was obiter. While it might be argued that the observations made with regard to exemplary damages insofar as they related to libel actions were obiter as no question with regard to them arose in *Rookes v Barnard*[7] where the question was, could such damages be given for intimidation? the Court of Appeal[8] did not base their action on this ground. The second is where there are two clearly inconsistent decisions of this House, and the Court of Appeal has then to choose which to follow. In the Court of Appeal[8] it was asserted that what was said in *Rookes v Barnard*[7] was in conflict with two previous decisions of this House, *Hulton v Jones*[9] and *Ley v Hamilton*[10] but, as I read the judgments, the Court of Appeal[8] did not proceed on this ground.

To say that a decision of this House was given per incuriam is, to say the least, unusual and could be taken, although I cannot believe it was so intended, as of a somewhat offensive character. While I regret the use of this expression, I doubt if it was intended to mean more than that the questions involved deserved more consideration in relation, among other things, to libel actions. If that is what was meant, it is, I must confess, a view with which I have considerable sympathy.

As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the law is, not what we think it should be. If it is clearly established that in certain circumstances there is a right to exemplary damages, this House should not, when sitting judicially, and indeed, in my view, cannot properly abolish or restrict that right. This, indeed, was recognised by Lord Devlin when he said[11] that it was was not open to this House to 'arrive at a determination that refused altogether to recognise the exemplary principle'. If the power to award such damages is to be abolished or restricted, that is the task of the legislature.

One criticism that can be made of Lord Devlin's speech is that while recognising that a refusal altogether to recognise the exemplary principle was not possible, he nevertheless restricted the power to award such damages so that they ceased to be obtainable in cases where prior to *Rookes v Barnard*[7] they might have been given.

I agree with Lord Denning MR that the pre-*Rookes v Barnard*[7] law was well

7 [1964] 1 All ER 367, [1964] AC 1129
8 [1971] 2 All ER 187, [1971] 2 WLR 853
9 [1910] AC 20, [1908-10] All ER Rep 29
10 (1935) 153 LT 384
11 [1964] 1 All ER at 410, [1964] AC at 1226

stated in Mayne and McGregor on Damages[12]—where it is said that such damages can only be given—

> 'where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights.'

A similar statement is to be found in Mayne on Damages[13]. I do not think that this statement of the law is to be questioned because in a later passage[14] in the current edition it is stated:

> '... it cannot be said that English law has committed itself finally and fully to exemplary damages [a view which conflicts with the opinion of Lord Devlin to which I have referred], and many of the ... cases point to the rationale not of punishment of the defendant but of extra compensation for the plaintiff for the injury 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.'

This passage did not appear in the earlier editions. I am not concerned with the rationale but with what was recognised to be the law before *Rookes v Barnard*[15]. And I am reinforced in my view by the fact that what was said in the earlier passage[16] appears to accord with Australian law. In this field there does not appear to have been any difference between Australian and English law prior to *Rookes v Barnard*[15]. In *Uren v John Fairfax & Sons Pty Ltd*[17] the High Court of Australia refused to follow *Rookes v Barnard*[15] and held that exemplary damages might be awarded if it appears that the defendant's conduct in committing the wrong exhibited a contumelious disregard of the plaintiff's rights, McTiernan J saying that the law of exemplary damages was 'compendiously stated' in the passage I have cited from Mayne and McGregor.

Lord Devlin's first category 'oppressive, arbitrary or unconstitutional action by servants of the government', a category which he said he would not extend to oppressive action by private corporations or individuals, was subjected to serious criticism by Taylor J in *Uren v Fairfax*[17]. He pointed out that in none of the three old cases on which this category was apparently based, did the decisions turn on the fact that the defendants had acted for the government. Surely it is conduct, not status, that should determine liability. Power to award exemplary damages may be an anomaly, but I doubt whether it is beneficial to the law to seek to reduce the area of that anomaly at the price of creating other anomalies and illogicalities. Surely it is anomalous if a person guilty of oppressive conduct should only be liable to exemplary damages if a servant of the government. In these days there are others than the government who can be guilty of oppressive conduct. Why should they be treated differently? I can find nothing in the three cases to indicate that if the conduct complained of had been by persons other than servants of the government, liability to exemplary damages would have been excluded.

Just as the definition of this category might be said to have been obiter to the decision in *Rookes v Barnard*[15], so might consideration of it be regarded in this case. Nevertheless as *Rookes v Barnard*[15] has to be considered in this appeal in consequence of the action taken by the Court of Appeal[18], I feel I should express my opinion

12 12th Edn (1961), para 207
13 11th Edn (1946), p 41
14 12th Edn, para 212
15 [1964] 1 All ER 367, [1964] AC 1129
16 12th Edn, para 207
17 (1967) 117 CLR 118
18 [1971] 2 All ER 187, [1971] 2 WLR 853

which is that this narrow definition does not appear to me to be justified by the authorities on which it was based.

It may also be contended that Lord Devlin's second category is also too narrowly drawn for why should conduct lead to exemplary damages if inspired by the profit motive or some material interest, and similar conduct due to other motives not do so. But the substantial criticism that can be made is that by his categorisation, the previously existing and recognised power to award exemplary damages is restricted. Lord Devlin indeed appreciated the novelty of what he was doing when he said[19] that acceptance of his views 'would impose limits not hitherto expressed on such awards'. I do not think that this should have or could properly be done. It should have been left to the legislature.

This conclusion does not, however, mean that the jury's verdict as to liability must be interfered with. It was urged that the appellants' decision to call no evidence was based on the assumption that *Rookes v Barnard*[20] applied—and that the issue was, did the case come within the second category. While it may be that Captain Broome would have presented his case differently but for what was said in *Rookes v Barnard*[20] the defendants had to meet the case presented whether or not *Rookes v Barnard*[20] applied, and it was in relation to that case that they decided to call no evidence. As the case presented would prior to *Rookes v Barnard*[20], if established, have justified the award of exemplary damages, I cannot accept that the defendants might have reached a different decision about calling evidence on the case as presented if *Rookes v Barnard*[20] had not been followed.

I now turn to the passage in Lord Devlin's speech dealing with the assessment of damages, a passage which, save in the respect to which I have referred, was closely followed by Lawton J in his summing-up. I think that Salmon LJ correctly summarised the pre-*Rookes v Barnard*[20] practice when he said[1]:

> 'Judges used to direct juries in libel actions that, if they found in favour of the plaintiff, they should award him a sum which would make it plain to the world that there was no truth in the libel and which, as far as money could do so, would compensate him for the distress, humiliation and annoyance which the libel had caused him. They were also told in appropriate cases that they could take the whole of the defendant's conduct into account down to the moment they returned their verdict, and that if they came to the conclusion that he had behaved outrageously they might, as a deterrent, reflect their disapproval of the defendant's conduct in the amount of the damages which they awarded. At the same time they were always warned to be fair and reasonable and not to allow themselves to be inflamed against the defendant but to decide dispassionately what in all the circumstances would be a reasonable sum to award.'

The summing-up in *Loudon v Ryder*[2] which was approved by the Court of Appeal[3], also recognised that outrageous conduct was a ground for exemplary damages. That appears to be the first case in which a jury was asked to award separate sums for exemplary and for compensatory damages and in which it was suggested that the amount awarded for exemplary damages was to be regarded as the imposition of a fine.

In *Ley v Hamilton*[4] the Court of Appeal by a majority (Greer and Maugham LJJ, Scrutton LJ dissenting) allowed an appeal from a jury's verdict awarding £5,000 damages for libel, one ground for the decision being that the damages awarded were excessive, Maugham LJ saying that the sum could not be described 'as a fair and reasonable compensation for the damages which the plaintiff had suffered, that the verdict could only be justified on the view that the jury were exercising the right to give vindictive or punitive damages, and that—

> 'when the damages in question are really not compensation for an injury sustained by the plaintiff but in the nature of a fine inflicted on the defendant'

the Court of Appeal would be compelled to interfere. In this House[5] Maugham LJ's approach was rejected by Lord Atkin in a speech with which Lords Tomlin, Thankerton, Macmillan and Wright agreed. Part of the relevant passages of Lord Atkin's speech were cited by Lord Devlin[6] but two sentences which I italicise and which I regard as important were omitted. The full passage is as follows[7]:

> '*The fact is that the criticism* [Maugham LJ's] *with great respect seems based upon an incorrect view of the assessment of damages for defamation.* They are not arrived at as the Lord Justice seems to assume by determining the "real" damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times. The "punitive" element is not something which is or can be added to some known factor which is non-punitive. *In particular it appears to present no analogy to punishment by fine for the criminal offence of publishing a defamatory libel.*'

Maugham LJ did not in his judgment refer to 'real' damage. I think it is clear that by 'real' damage Lord Atkin meant the damage which the plaintiff had suffered.

Yet is not the very process condemned in *Ley v Hamilton*[5] that which it was said in *Rookes v Barnard*[9] should be followed and that which, pursuant to *Rookes v Barnard*[9], was followed in this case? Lord Atkin said that for the reasons he gave 'real' damage, i e compensatory damage, could not be ascertained and established. Under *Rookes v Barnard*[9] a jury is to be directed that that which Lord Atkin said could not be done, is to be done and 'compensatory' damages assessed first. The punitive element is not something that can be added. Yet in *Rookes v Barnard*[9] it is said that it should be added if, but only if, the compensatory damages are insufficient. Lord Atkin said that there was no analogy to punishment by a fine for a criminal libel, yet following *Rookes v Barnard*[9], juries are to be told that punitive damages amount to a fine. I must confess my inability to reconcile the views of this House as expressed in *Ley v Hamilton*[5] with those expressed in *Rookes v Barnard*[9].

Before *Rookes v Barnard*[9] the words 'aggravated', 'punitive', 'exemplary' and 'retributory' were used indiscriminately to indicate that the damages awarded might be enhanced and might contain a punitive element. By *Rookes v Barnard*[9] precise meanings were attached to the words 'aggravated' and 'exemplary'. Lord Devlin recognised[10] that the jury could take into account the motives and conduct of the defendant where they aggravate the injury to the plaintiff.

> 'There may be [he said] 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.'

So where the injury is aggravated, an addition can be made to the compensatory damages.

19 [1964] 1 All ER at 410, [1964] AC at 1226
20 [1964] 1 All ER 367, [1964] AC 1129
1 [1971] 2 All ER at 205, [1971] 2 WLR at 876, 877
2 [1953] 1 All ER 741, [1953] 2 QB 202
3 [1971] 2 All ER 187, [1971] 2 WLR 853
4 (1934) 151 LT 360

5 (1935) 153 LT 384
6 [1964] 1 All ER at 413, [1964] AC at 1230
7 (1935) 153 LT at 386
8 (1934) 151 LT 360
9 [1964] 1 All ER 367, [1964] AC 1129
10 [1964] 1 All ER at 407, [1964] AC at 1221

While in some cases it may be evident that malice or misconduct has added to the injury, there may be other cases where, although it is clear that there has been malice and misconduct, it cannot be said that the injury inflicted is any greater than it would have been if there had been no malice or misconduct. In such cases it would seem from *Rookes v Barnard*[11] that the compensatory damages should not be increased. Nor, in such cases would it seem that exemplary damages as there defined could always be awarded for they are only to be awarded if the sum given in compensation is 'inadequate to punish for outrageous conduct, to mark the jury's disapproval of such conduct, and to deter a repetition'. The existence of malice may not make the defendant's conduct outrageous, and yet it is, I think, established beyond all doubt that before *Rookes v Barnard*[11] a jury was always entitled to award larger damages than they otherwise would have given if satisfied that the libel was actuated by malice.

All the members of the Court of Appeal[12] thought that the *Rookes v Barnard*[11] approach was wrong and in conflict with the views expressed in this House in *Ley v Hamilton*[13]. I can find no escape from that conclusion and if the choice now lies between following one or the other of those decisions, I would myself choose to follow the simpler and more flexible approach in *Ley v Hamilton*[13]. The Court of Appeal[12] also thought that there was a conflict with the decision of this House in *Hulton v Jones*[14]. While there are some passages in the report of that case which afford some ground for that contention, I do not think that they suffice to establish that that is so with any degree of certainty.

While, if the views I have expressed prevailed, it would not be necessary to disturb the jury's verdict as to liability, I cannot regard a direction to assess damages in accordance with *Rookes v Barnard*[11] as a proper direction in accordance with the pre-*Rookes v Barnard*[11] practice and as complying with *Ley v Hamilton*[13]. So if my view were to prevail, the verdict given in this case could not be sustained and there would, if there had not been agreement by counsel that this House should in that event assess the damages, have to be a new trial limited to the assesssment of damages. As my view does not prevail, it is not necessary to express an opinion on what that sum should be if this House had to assess it.

For the reasons I have stated, I would allow the appeal.

LORD WILBERFORCE. My Lords, this case must be accounted, as in many respects an unhappy one. After a trial of 17 days before a judge and jury, in which the defendants called no evidence, the plaintiff, Captain Broome, was awarded against author and publishers jointly £40,000 damages in respect of libels contained in the book 'The Destruction of Convoy PQ17'. This total sum was awarded by the jury as to £15,000 as 'compensatory' damages and as to £25,000 as 'punitive' damages. Captain Broome was awarded his costs of the trial.

An appeal was taken to the Court of Appeal[12] by both defendants. The substantial points for argument were two: (1) whether the summing-up was defective as regards the circumstances in which punitive damages may be given in addition to compensatory damages, (2) whether the damages awarded were excessive. There was also a question whether a separate award should have been made against each defendant. Since the passages in the book principally complained of reflected on the conduct of officers of the Royal Navy, in combat conditions, there was an obvious danger that the jury may have become inflamed. This made it particularly necessary that there should be a dispassionate and cool review of the sums awarded and of the summing-up in the Court of Appeal[12].

11 [1964] 1 All ER 367, [1964] AC 1129
12 [1971] 2 All ER 187, [1971] 2 WLR 853
13 (1935) 153 LT 384
14 [1910] AC 20, [1908-10] All ER Rep 29

If matters had taken their proper and normal course these matters should have been disposed of within a few days—by dismissal of the appeal or by an order for a new trial, and no question of appeal to this House would have arisen. This did not happen. The trial had been conducted properly, and inevitably on the basis that the law to be applied as regards any claim for punitive damages was that stated by this House in *Rookes v Barnard*[15]. The learned judge considered that he was bound by what was said in this House, as he clearly was. But in the Court of Appeal[16] argument was admitted to the effect that *Rookes v Barnard*[15], on punitive damages, was wrong and should not be followed: the Court of Appeal[16] so decided, and three judgments, separate exercises in forceful advocacy, were delivered giving their reasons.

The course permitted and taken was doubly surprising. First, there was nothing new about *Rookes v Barnard*[15]. It was decided in 1964; it had been followed and applied in England by the Court of Appeal itself three times since then in, amongst others, libel cases without difficulty or protest by any of the Lords Justices involved. Secondly, it was, on the view of the facts which the Court of Appeal[16] took, unnecessary for the decision of the appeal to decide whether *Rookes v Barnard*[15] on punitive damages was right or wrong. The Court of Appeal[16], having held that it was wrong, still dismissed the appeal, and in an alternative passage held that the same result followed if it was right.

The consequences for the present litigants have been heavy. An appeal has been brought here and argued for 13 days Counsel for the appellants were forced into the necessity of arguing at length that *Rookes v Barnard*[15] is right, and this argument was answered on Captain Broome's side. A mountain of costs has piled up and it is as well that the size of this should be understood; it is open on the record. As shown by the order of the Court of Appeal, the plaintiff's costs at the trial have been taxed at £22,000. His costs as assessed in the Court of Appeal are £7,000. His costs in this House must exceed this figure. The taxed costs of the defendants are unlikely to be less; there will be further solicitor and own client costs on either side. It may not be unfair to put the aggregate bill, which an unsuccessful party may have to bear, at more than £60,000. It would be entirely unfair to suggest that the whole, or even half this sum, is due to the course taken in the Court of Appeal[16]—the greater part flows from the inherent nature of our system. But it is necessary to say that in a legal system so extravagant and punitive as to costs as ours is in civil cases, and particularly libel actions, the addition of further burdens, and here they were certainly considerable, carries the result further into an unacceptable area of injustice. England has not the equivalent of the New South Wales Suitors Fund Act 1951, nor of the Victoria Appeal Costs Fund Act 1964, so when the machinery creaks it is the private litigants who pay. I have felt deep concern about this throughout the hearing.

My Lords, observations have already been made on other constitutional aspects of the Court of Appeal's[16] judgments. I concur entirely with what has been said, and the fact that for reasons of space I abstain from using my own words does not mean that my concurrence is any the less wholehearted.

I proceed to the principal task we have, which is to decide the present appeal. Before examining the summing-up, on which the jury's verdict was based, it is necessary to establish the law. This involves some re-examination of those parts of the decision in *Rookes v Barnard*[15] which relate to punitive damages. I shall consider *Rookes v Barnard*[15] under three heads. First, as to the analysis it contains of damages in tort cases; secondly, as to defamation actions in relation to Lord Devlin's second category—both of these being directly relevant to the present case; thirdly, and briefly, as to the first and second categories, their inclusions and exclusions.

I deal first with that portion of the judgment which analyses damages in tort

15 [1964] 1 All ER 367, [1964] AC 1129
16 [1971] 2 All ER 187, [1971] 2 WLR 853

cases into 'compensatory' damages, a subhead of which is said to be 'aggravated' damages and punitive damages, because I think that this has been largely misunderstood—a misunderstanding which has fatally entered into the present case. The judgment points out that in the reported English authorities, over some 200 years, there is no clear terminology used; aggravated, exemplary, punitive, vindictive, retributory being adjectives which have been used, singly or in combination, without distinction or difference. Then it is suggested that in future there should be a clear and conscious distinction between compensatory/aggravated and punitive (or exemplary) damages, the former reflecting what the plaintiff has suffered materially or in wounded feelings, the latter the jury's (or judge's) views of the defendant's conduct. The statement of categories, in which alone punitive damages may be given, follows from this.

This analysis is powerful and illuminating and undoubtedly represents a valuable contribution to English judicial thought on the subject[17] but it has its dangers in practical application, as the present case only too well shows. English law does not work in an analytical fashion; it has simply entrusted the fixing of damages to juries on the basis of sensible, untheoretical directions by the judge with the residual check of appeals in the case of exorbitant verdicts. That is why the terminology used is empirical and not scientific. And there is more than merely practical justification for this attitude. For particularly over the range of torts for which punitive damages may be given (trespass to person or property, false imprisonment and defamation, being the commonest) there is much to be said before one can safely assert that the true or basic principle of the law of damages in tort is compensation, or, if it is, what the compensation is for (if one says that a plaintiff is given compensation *because* he has been injured one is really denying the word its true meaning) or, if there is compensation, whether there is not in all cases, or at least in some, of which defamation may be an example, also a delictual element which contemplates some penalty for the defendant. It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely that the criminal law, rather than the civil law is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories; it may have been wiser than it knew.

This is not the place to argue out the general case for or against punitive damages in English law. The existence of the principle has its convinced opponents, particularly, I understand, in Scotland. The arguments against it—that it is an 'anomaly', that it brings a criminal element into the civil law without adequate safeguards, that it leads to excessive awards, an unmerited windfall for the plaintiff; these and others are by now well known; they, and the counter-arguments are well summed up in Professor Street's Principles of the Law of Damages[18]. Perhaps the opponents have, marginally, the best of it in logic but logic in excess has never been the vice of English law and I am impressed, as I think was Lord Devlin, with the fact that the principle has shown and *continues to show*, its vitality not only in England but in Australia, Canada and New Zealand, as well (though there are special considerations there) as in the United States of America. This is shown not only by reported cases, of which Canadian provinces, Australian states and New Zealand provide a number of modern examples[19], but in the daily unreported practice of the courts. Its place in the

17 Cf in the United States *Fay v Parker* (1873) 53 NH 342-347 per Foster J; and as to textbook discussion Mayne and McGregor on Damages, 12th Edn (1961), Street, Principles of the Law of Damages (1962)

18 See pp 34-36

19 See as to Canada (1970) 48 Can BR 373

law has been endorsed by many eminent judges in terms which clearly recognise the punitive element. The principle of punitive damages has been recognised by the High Court of Australia on five occasions, by the Supreme Court of Canada and by the Supreme Court of the United States of America.

To my mind the strongest argument against it is that English law already contains a heavy, indeed exorbitant, punitive element in its costs system; contrast the United States where it is the absence of this (advocate's costs not being normally recoverable) which is invoked as a justification for punitive damages. One or other must clearly be reformed, and it is Parliament alone that can do it.

I take the discussion one step further, because the point is very relevant here. In Lord Devlin's opinion the distinction is made between aggravated damages and punitive damages; it is said that many of the authorities are really cases of aggravated damages although other words are used, that apart from the exceptional cases included in the three categories, aggravated damages are the appropriate and sufficient remedy. Although I doubt very much whether all the cases can be explained in this way—to do so seems to attribute a high degree of confusion of thought or inaccuracy of expression to judges of eminence—there is attraction in the distinction. It has the advantage, to some minds, of reducing the area of 'punitive' damages, and of bringing the remedy nearer to 'compensation'.

But closer examination causes one to doubt whether the separation, otherwise than in analysis, of compensatory from punitive damages does not involve some real danger in practice. As Windeyer J said in *Uren's* case[20]:

> 'What the House of Lords has now done is . . . to produce a more distinct terminology. Limiting the scope of terms that often were not distinguished in application makes possible an *apparently firm distinction* between aggravated compensatory damages and exemplary or punitive damages. How far the different labels denote concepts really different in effect may be debatable. I suspect that in seeking to preserve the distinction we shall sometimes find ourselves dealing more in words than ideas.'

(Cf Salmond on Torts[1] which maintains the old 'confusion'). The distinction does not in my belief greatly correspond to what happens in reality. Take a common case: a man is assaulted, or his land is trespassed upon, with accompanying circumstances of insolence or contumely. He decides to bring an action for damages, he need not further specify the claim. Is he suing for compensation, for injury to his feelings, to teach his opponent a lesson, to vindicate his rights, or 'the strength of the law', or for a mixture of these things? Most men would not ask themselves such questions, many men could not answer them. If they could answer them, they might give different answers. The reaction to a libel may be anything from 'how outrageous' to 'he has delivered himself into my hands'. The fact is that the plaintiff sues for damages, inviting the court to take all the facts into consideration, and, if he wins, he may ascribe his victory to all or any of the ingredients.

As, again, Windeyer J has said[2], the amount of the verdict is the product of a mixture of inextricable considerations. Sedgwick[3] said:

> 'Where either of these elements [sc malice, oppression etc] mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages, in other words, it *blends together* the interests of society and of the aggrieved individual and gives

20 (1967) 117 CLR at 152

1 (1969) 15th Edn

2 (1967) 117 CLR at 150

3 Measure of Damages, 3rd Edn (1858)

> damages not only to recompense the sufferer but to punish the offender. This rule . . . seems settled in England and in general jurisprudence of [U.S.A.].'

Lord Atkin said just this in *Ley v Hamilton*[4] in a passage (cited in other opinions, vide that of Viscount Dilhorne) which, if any in modern times, is clear and authoritative. Dixon J endorsed the principle—see citation below[5]—as did the key passage in Halsbury's Laws of England[6] cited by Lord Hailsham LC. To segregate the punitive element is to split the indivisible and to invite the stock criticism (vide Street[7]) that civil courts have no business to impose fines.

This is of critical importance in practice. If the separation of damages into compensatory/aggravated and punitive is carried through into the instruction to the jury, there is the greatest possible risk of excessive awards, through counting twice what is but a different facet of the same bad conduct. Lord Devlin himself clearly understood this; the careful passage[8] containing the 'if but only if' prescription, provided his antidote—an effective one if judges can administer it in a timely and effective way.

My Lords, I think there was much merit in what I understand was the older system, before *Rookes v Barnard*[9]. I agree with the Court of Appeal[10] that in substance, although not perhaps philosophically or linguistically, this was clear and as explained above I doubt if there was any confusion as to what the jury should do. It was to direct the jury in general terms to give a single sum taking the various elements, or such of them as might exist in the case, into account including the wounded feelings of the plaintiff and the conduct of the defendant, but warning them not to double count and to be moderate. A formula on these lines commended itself to Dixon J in 1932. What amount of damages, he asked[5]—

> 'is enough to serve *at once* as a solatium, vindication and compensation to him and a requital to the wrongdoer . . .'.

An earlier example is the direction of Abbott J in *Sears v Lyons*[11]: as evidence that modern practice corresponds I could not desire more than the passage, based on considerable experience, in the judgment of Salmon LJ in this case[12] cited in full by Viscount Dilhorne and which I need not repeat. If judges were to act in this way, and direct substantially as Salmon LJ describes, I would see no basis for ascribing to them any error in law. If, on the other hand, use were to be made of the aggravated-punitive distinction, I would think that it is even more necessary that the jury should be directed to give a single sum (Lord Devlin's exception to avoid a new trial is entirely laudable, but, I respectfully think, risky). The direction to give a single sum should mean (the necessity to say this illustrates again the dangers of the terminology) not merely producing a single figure by way of verdict, but arriving in their discussion at a single sum. It would be wrong, and a novelty in the law, that they should, in the jury room, find separately the various elements—pure compensation, aggravated compensation and penalty and add them up to a total. In no previous cited case, except in *Loudon v Ryder*[13] (overruled by Lord Devlin himself), was this done; it was directly discountenanced by Lord Atkin in *Ley v Hamilton*[14].

4 (1935) 153 LT 384
5 *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 300
6 11 Halsbury's Laws (3rd Edn) 223, para 391
7 Principles of the Law of Damages (1962), pp 34, 35
8 [1964] 1 All ER at 414, [1964] AC at 1232
9 [1964] 1 All ER 367, [1964] AC 1129
10 [1971] 2 All ER 187, [1971] 2 WLR 853
11 (1818) 2 Stark 317
12 [1971] 2 All ER at 205, [1971] 2 WLR at 876, 877
13 [1953] 1 All ER 741, [1953] 2 QB 202
14 (1935) 153 LT 384 at 386

I regret that this rather lengthy analysis has been necessary before I deal with the present appeal, but in my view it is fundamental to a consideration of the summing-up.

The full account of the trial which has been given in previous opinions enables me to summarise. The critical stages were these: (1) the jury were told that there were two aspects of damages, compensatory and punitive. They were asked first to consider compensatory damages. They had read to them a passage from the judgment of Pearson LJ in *McCarey v Associated Newspapers Ltd*[15] in which it was said in clear terms that if there had been any high-handed, oppressive or contumelious behaviour which increased the mental pain and suffering caused by the defamation, this might be taken into account. (2) The judge then pointed out that Captain Broome had suffered no actual pecuniary loss; that he had not been shunned by his comrades; that the trial had been conducted without exacerbation; but that what was said in the book might be very wounding to his feelings. (3) The learned judge then dealt with punitive damages by reference to the second category in *Rookes v Barnard*[16], cited the words of Widgery J in *Manson v Associated Newspapers Ltd*[17], and said:

> '. . . you are being asked here not only to give Captain Broome compensatory damages, that is, a reasonable sum for the injury to his reputation and the exacerbation of his feelings; but *in addition to fine [the appellants] and Mr. Irving* for having done what they have done . . . you are really in the position of a Judge or a Magistrate trying a criminal case; *you have got, so to speak, to fine the Defendant.*' [Emphasis supplied.]

and he gives examples of reasonable and unreasonable fines. Later he gives lengthy directions relevant to the second category (was there a calculation of profit etc) and on the next day returns finally to damages. (4) The final direction as to damages consisted of the statement of questions for the jury and explanation of them. The first question (no 3) is 'What compensatory damages to you award the plaintiff?' The summing-up continues:

> 'Then having decided what are the proper additional [sic] compensatory damages you will go on and consider the fourth question, namely, "Has the plaintiff proved that he is entitled to exemplary damages?" [and directs the jury to consider this in relation separately to each defendant. Lastly there is this passage:] Then you see the last question under this heading, "What additional sum should be awarded him by way of exemplary damages?". Would you be good enough to underline the word "additional", because I want to know, and learned counsel want to know, if you do decide to award punitive damages, how much more do you award over and above the compensatory damage.'

The result of this was an award of £15,000 compensatory damages and £25,000 as an additional sum for exemplary damages.

My Lords, I regret to have reached the conclusion that this verdict ought not to stand. Apart from the reasons given by my noble and learned friend, Lord Diplock, with which I respectfully agree, I think for myself that the separation of the element of compensatory damages from that of punitive damages, brought about through the interpretation placed on the second category and the application of it, involving, as it did, the need to fix compensation (plus aggravation) first, see if the case came within the category, and then fix a separate punitive sum, is fundamentally wrong. It has brought about precisely the result which was to be feared from breaking down the indivisible whole, namely, of fixing a compensation figure swollen by aggravation and then adding a fine on top—a fine in this case exceeding greatly the

15 [1964] 3 All ER 947 at 957, 958, [1965] 2 QB 86 at 104, 105
16 [1964] 1 All ER 367, [1964] AC 1129
17 [1965] 2 All ER 954 at 958, [1965] 1 WLR 1038 at 1043

aggravated compensation. If the matter rested on the figures alone, I should find the greatest difficulty in supporting, even with all the inhibitions properly felt against substituting a judicial opinion for that of the jury, so large a punitive element, particularly in a case such as this where the libel was considered to be (I say nothing as to my own opinion) of a most wounding character, so that the 'compensatory' damages must necessarily include a large 'punitive' element. But when it is seen how the jury were directed to calculate, and the direction was certainly clear and certainly and visibly acted on, their figures become impossible to accept.

In argument the issue was put in the form whether the judge's direction complied with Lord Devlin's 'if, but only if' advice[18]. I think that it certainly did not. The dangers of separating the compartments (compensatory damages and punitive damages) in so watertight a way are so great, as I have tried to explain, indeed, in my opinion, so wrong in principle that I doubt very much whether any instructions, in a difficult case, could avoid them. That is why I think that any interpretation placed on *Rookes v Barnard*[19] which requires this separation, or authorises it, and the introduction of the profit gateway which almost compels it, ought to be discarded. But however that may be, the directions given fall far short of what was necessary—I say this without any criticism of the learned judge who was merely following *Rookes v Barnard*[19] as previously applied by the Court of Appeal. When all is said the warning to the jury against the danger was contained in the word 'additional' in question 4. I think this was not enough, for they had been told that they could inflict a fine.

For these reasons, without committing myself to any particular figure if we were called on to substitute one, I agree with the conclusion of my noble and learned friend, Lord Diplock, as to the necessity for a new trial on the question of punitive damages.

I must add one other point. This is the question of a joint award of damages against two wrongdoers, publisher and author. There is no doubt that the existing law is ill adapted to deal fairly with a case where 'guilt' of joint defendants is unequal. But it is clear enough what the law is; it is stated by Lord Hailsham LC in terms which I need not repeat. In the Court of Appeal[20] Lord Denning MR said that the jury were free to decide whether to fix punitive damages at the highest figure, the lowest figure, or at a figure between the two and I fear that the jury may well have proceeded on this somewhat libertarian view of the law. One may escape from the conclusion that this vitiates the verdict by assuming that the two defendants were equally 'guilty', but I am not prepared to make this assumption or to ascribe a view to that effect to the jury. I think that the jury must have been, at best, confused, at worst misled by the direction, and I cannot accept that acquiescence by counsel validates the defect.

I must now deal as briefly as I can with other aspects of the judgment in *Rookes v Barnard*[19]. I deal first with its effect on the law of damages for defamation.

I am far from convinced that Lord Devlin ever intended to alter the law as to damages for defamation or intended to limit punitive damages in defamation actions to cases where a 'profit motive' is shown. (I use this compendiously for the formula in his second category.) I summarise the reasons: (a) Defamation is normally thought of as par excellence the tort when punitive damages may be claimed. It was so presented in argument by counsel for Captain Broome (arguing against punitive damages) and he was an acknowledged expert in the subject. Every practitioner and every judge would take this view. (b) Lord Devlin's passage where he sets up his second category does not refer to any defamation case, but to three other miscellaneous cases which he illuminatingly bases on the profit motive. He makes merely an incidental reference to libel where he says the profit motive is always a *factor*, not, it should be observed, a *condition*. (c) It is difficult to believe that Lord Devlin was

18 [1964] 1 All ER at 411, [1964] AC at 1228
19 [1964] 1 All ER 367, [1964] AC 1129
20 [1971] 2 All ER 187, [1971] 2 WLR 853

intending to limit the scope of punitive damages in defamation actions so as to exclude highly malicious or irresponsible libels. At least if he intended to do so at a time when the media of communication are more powerful than they have ever been and certainly not motivated only by a desire to make money, and since elsewhere the judgment shows him conscious of the need to sanction the irresponsible, malicious or oppressive use of power, I would have expected some reasons to be given.

If we cannot interpret his judgment as leaving libel outside category 2 as a separate case, well known to everyone, in which punitive damages may be given in familiar circumstances and as stating category 2 as a qualification for other cases, hitherto not explained or rationalised, then since the disposal of defamation actions was there dealt with briefly, I would say incidentally, and obiter, I consider that in this case where we are directly concerned with such an action we should disagree with it.

This would leave the law as I understand it to be in Australia and Canada, countries where, in this respect, there is not known to me to be any such difference in 'social conditions' as to call for the recognition, by this House, judicially, of a divergent law. If changes are to be made, they should be made, after proper investigation, by Parliament.

I would add, with reference to this point, that the present case well illustrates the irrationality of the supposed new principle. For if the profit motive is essential for the recovery of punitive damages, one would expect the damages given to bear some relation to the supposed profit and/or to the means of the offender; the idea (if there is any logic in the requirement) must be to take the profit out of wrongdoing. Yet there was not, and in many such cases cannot be, any real consideration of the likely profit or of the offender's means. There was no evidence what these might be and the jury were given no guidance. How, then, could the punitive £25,000 be other than an arbitrary guess? If one replies that it represents the jury's view of the defendants' conduct (as it probably did) what purpose is served by introducing the profit motive gateway?

Finally, as to other torts as to which, before *Rookes v Barnard*[1], punitive damages could be given but on which some restriction is evidently intended to be placed by the judgment. That this House, as a matter of law, or of legal policy, was entitled to restrict the scope of punitive damages I have, with all respect to the Court of Appeal[2], no doubt and, whatever my own reservations as to the wisdom of the policy, I should feel myself obliged to accept a new statement of principle if it were clear, consistent and workable and intelligibly related to the main stream of authority. That it was not entirely clear, appears well enough from the opinions in the present case; and I cannot entirely blame the Court of Appeal[2] for attempting to escape from it, just as one may sympathise with a customer when he finds his new suit almost at once requiring alteration, or patching, for putting it aside and reaching for his old tweeds. There is not perhaps much difficulty about category 1; it is well based on the cases and on a principle stated in 1703—'if *public officers* will infringe men's rights, they ought to pay greater damages than other men to deter and hinder others from the like offences' (*Ashby v White*[3] per Holt CJ). Excessive and insolent use of power is certainly something against which citizens require as much protection today; a wide interpretation of 'government' which I understand your Lordships to endorse would correspond with Holt CJ's 'public officers' and would partly correspond with modern needs. There would remain, even on the most liberal interpretation, a number of difficulties and inconsistencies as pointed out by Taylor J in *Uren's* case[4].

I have more difficulty with the commonplace types of trespass or assault accompanied by insult or contumely, which, even more than 'first category' cases touch

1 [1964] 1 All ER 367, [1964] AC 1129
2 [1971] 2 All ER 187, [1971] 2 WLR 853
3 (1703) 2 Ld Raym 938 at 956
4 (1967) 117 CLR 118

the life of ordinary men and occupy the county courts. Although Lord Devlin studiously refrains from overruling earlier cases (other than *Loudon v Ryder*[5]) which undoubtedly proceeded on, or contained, a punitive element, his opinion has been understood as laying down that in future such cases cannot, unless the 'profit motive' is present, be treated as cases for punitive damages but only as cases for aggravated damages. The phrase used has been 'aggravated damages can do the work of punitive damages'.

I understand that a majority of your Lordships, for possibly differing reasons, are satisfied with this so it will remain the law in this country. But, if only in fairness to the Court of Appeal[6] with whose approach to this matter I agree, I must state very briefly why I feel some difficulty.

I am far from clear how juries, or judges, are intended to act in the future. Are they to take it that the law has been changed, so that (absent a profit motive) only 'compensatory' damages can be given, plus an element for 'aggravation' if that is proved? I fear that there will be difficulty in seeing how far earlier cases, or Commonwealth cases, are now authority and that there will be much argument whether a particular case was one of 'aggravated' or 'punitive' damages or of both. Alternatively, if 'aggravated damages' are 'to do the work of punitive damages' and if it is to be supposed that juries, or judges, will continue giving damages much as before, then nothing has been gained by changing the label and we are indulging in make belief and encouraging fictional pleading. The whole point is well brought out by Pearson LJ in *McCarey v Associated Newspapers Ltd*[7]: 'if the compensatory principles is accepted, punitive damages must not be allowed to creep back into the assessment in some other guise'. I must confess to sympathy with the Court of Appeal's[6] preference for the older system and with the objections to the new stated by Taylor J in *Uren's* case[8], the weight of which clearly impressed the Privy Council. Their validity has been endorsed by cases post-*Rookes v Barnard*[9] in Australia, Canada and New Zealand. I share their doubt whether we have yet arrived at a viable substitute. But I note with satisfaction and agreement the opinion expressed by the noble and learned Lord on the Woolsack that the relevant passage in Lord Devlin's judgment, which he cites, should be read sensibly as a whole together with the authorities on which it is based. This may provide a sound basis for redevelopment of the law.

My Lords, on all other points not expressly dealt with in this opinion I wish to express my concurrence with that of Lord Hailsham LC. I regret to differ from him in thinking that the appeal should be allowed on the grounds which I have stated.

LORD DIPLOCK. My Lords, the trial of this action proceeded, correctly, on the basis that as respects the measure of the damages which the jury might award, the judge was bound to direct them in accordance with the law as laid down by this House in Lord Devlin's speech in *Rookes v Barnard*[9].

I agree with all your Lordships that there was material on which the jury were entitled to find that the conduct of each of the defendants brought the case within Lord Devlin's second category of cases in which exemplary or, as I would have preferred to call them, punitive damages may be awarded. The jury did so find by special verdicts. That part of the judge's summing-up in which he directed them as to the matters for their consideration in arriving at their findings on this issue as respects each of the defendants cannot be faulted.

It was, however, also incumbent on the judge to instruct the jury as to the measure of the damages which they might award if they reached the conclusion that the case as against each of the defendants was one in which they were not precluded from

5 [1953] 1 All ER 741, [1953] 2 QB 202
6 [1971] 2 All ER 187, [1971] 2 WLR 853
7 [1965] 2 QB at 105, cf [1964] 3 All ER at 957
8 (1967) 117 CLR 118
9 [1964] 1 All ER 367, [1964] AC 1129

awarding punitive damages. On this aspect of the case there were two principles of law which should have been stated clearly to the jury. Neither was self-evident. The first was that, even if the jury found that the case came within Lord Devlin's second category and that the defendants' conduct merited punishment, it did not necessarily follow that they must award as damages to Captain Broome a greater sum than was sufficient to compensate him for all the harm and humiliation that he had suffered as a consequence of the defendants' tortious acts. They should take into account as part of the punishment inflicted on the defendants any sum (in the result £15,000) which they were minded to award to Captain Broome as compensatory damages; and only if they thought that sum to be inadequate in itself to constitute sufficient punishment were they to award such additional sum as would, when added to the compensatory damages, amount to an appropriate penalty for the defendants' improper conduct. The second was that if the jury thought that the conduct of one of the joint defendants deserved to be penalised by a lesser sum than the conduct of the other, the most that the jury were entitled to award against the defendants was that lesser sum, if it were to exceed the amount which they were minded to award as compensatory damages.

I have the misfortune to differ from the majority of your Lordships in that I find it impossible to discover in the language of the summing-up any clear statement of either of these principles. At best I think that when the jury retired they must have been confused as to how the punitive damages, if any, were to be assessed. At worst I think that they may well have thought that they were to arrive at a sum which they thought was an appropriate penalty for the defendants' conduct and to add it to any sum awarded as compensatory damages.

My Lords, I do not think that on this vital question of the assessment of exemplary damages the jury were adequately directed. I am fortified in this view by my conviction that, if properly directed, no reasonable jury could possibly have reached the conclusion that the appropriate penalty to inflict on the less culpable of the defendants was £40,000 for publishing a libel of which the victim was in their view adequately recompensed at £15,000 for all the harm and humiliation that it had caused to him.

A penalty of £40,000 is, I believe, very much larger than any of your Lordships would have thought it appropriate to inflict on the defendants. I doubt if any of your Lordships would have hesitated to interfere with it if it had been awarded by a judge sitting alone. He would have been vulnerable because he would have given his reasons. Shibboleths apart, there survive today two valid reasons why an appellate court should be more reluctant to disturb an assessment of damages by a jury than an assessment by a judge. The first is applicable to all kinds of actions. It is that a judge articulates his findings on the evidence and his reasoning, whereas a jury state the result of their findings and their reasoning but otherwise are dumb. In considering whether an award of damages by a jury is excessive an appellate court cannot do other than assume that the jury made every finding of fact and drew every inference that was open to it on the evidence as favourably as possible to the plaintiff and as adversely as possible to the defendant. In the instant case, however, this handicap to an appellate's court ability to do justice is palliated by the facts; that there was no conflict of evidence for them to resolve—for the defendants called none, and that the jury were given a partial gift of speech By their special verdict this House has been told that they considered that the plaintiff would be fully compensated by £15,000. The second reason for reluctance to interfere with a jury's award of damages applies particularly to actions for defamation. It is that, unless the parties otherwise agree, the consequence of setting aside the jury's verdict must be a new trial before another jury. This involves the parties, through no fault of their own, in greatly increased costs which, particularly in libel actions, are, to the discredit of our legal system, out of all proportion even to the large compensatory damages awarded in the instant case. For my part, I should not be deflected from setting aside a jury's verdict as unreasonable by the fear, sometimes expressed by appellate judges, that another

unreasonable jury might make a similar unreasonable award of damages on the new trial. So far as I know this has never happened yet. But the consideration of the costs involved is one which it would be unrealistic and unjust to ignore. In the instant case, however, the parties agreed that this House should assess the damages in the event of the jury's verdict being set aside. No more costs would be incurred if the appeal were allowed than if it were dismissed—although the incidence of them on the parties might be different.

It may be said, and not implausibly, that there is nothing in the training or experience of a judge which makes him fitter than a jury to determine the pecuniary compensation which a plaintiff should receive for a reputation that is damaged or feelings that are hurt. And there may be safety in numbers. But it runs counter to the basis of our criminal law, in which the jury determine guilt and the judge determines the appropriate punishment, to treat the jury as better qualified than a judge to assess the pecuniary penalty which a defendant ought to pay for conduct which merits punishment. On an appeal from the jury's award of £40,000 which I know to be compensatory to the extent of £15,000 only, I should approach it in the same way as I should approach a fine of £40,000 imposed by a judge in a criminal prosecution. Even if I thought the jury had been given an adequate direction by the judge, I would have set the award aside and substituted an award of £20,000.

I have thought it right to express my own minority opinion as to what the result of this appeal should be. It is that with which the parties are primarily concerned—and it is they who are paying for it. It is, however, inherent in our legal system that owing to the manner in which the Court of Appeal[10] dealt with the instant case, the unsuccessful party is also paying for the ruling of this House on two questions of law of much more general importance. The first is as to the effect of the decision in *Rookes v Barnard*[11] on the assessment of damages for defamation and whether that decision ought to be followed. The second is as to the propriety of the manner in which the Court of Appeal[10], as an intermediate appellate court, dealt with the decision of this House in *Rookes v Barnard*[11]. To these two topics I now turn.

In *Rookes v Barnard*[11] the plaintiff's claim was for damages for the tort of intimidation. At the trial the judge had summed up to the jury in terms which left it open to them to award exemplary damages. There was a cross-appeal against the amount of damages, on which this House heard separate and lengthy argument. It was necessary as a matter of decision of the cross-appeal for this House to determine whether the facts in *Rookes v Barnard*[11] brought it within a category of cases in which exemplary damages were recoverable at common law. This House determined that they did not and ordered a new trial. There were two different processes of reasoning by which it would have been possible to reach this conclusion of law. One, which was not adopted by this House, was to hold that the particular tort of intimidation was one in which the common law did not permit of exemplary damages. The other, which was adopted by this House, was to state the categories of cases in which alone exemplary damages might be awarded at common law and to determine whether the facts in *Rookes v Barnard*[11] brought it within one of these categories.

Lord Devlin's speech on the cross-appeal in *Rookes v Barnard*[11], in which all the five members who heard the appeal explicitly concurred, was a deliberate attempt by this House to do two things: (a) as a matter of legal exposition, to formulate the rationale of the assessment of damages for torts in which damages are 'at large'; (b) as a matter of legal policy, to restrict the categories of cases in which damages can be awarded against a defendant in order to punish him, to those in which this method of inflicting punishment still serves some rational social purpose today. Lord Devlin's speech, however, does not follow the simple arrangement of exposition followed by choice of policy. He starts by formulating three heads of damages. The purpose of two of them is to compensate the plaintiff; that of the third is to

10 [1971] 2 All ER 187, [1971] 2 WLR 853

11 [1964] 1 All ER 367, [1964] AC 1129

punish the defendant. This formulation is followed by an analysis of the previous authorities. These authorities lead to the policy decision to accept two categories of cases in which exemplary damages may be recovered and, proleptically, to reject other categories of cases in which it had previously been thought that damages might be awarded in order to punish the defendant. He then reverts to exposition of some considerations which follow from the purpose served by exemplary damages and which should be borne in mind when awards of exemplary damages are made. Finally he reverts to an analysis of the previous authorities for the purpose of completing the policy decision by overruling those which were authority for the award of exemplary damages where the injury to the plaintiff had been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it was accompanied. It is, however, convenient for the purposes of the instant appeal to deal with exposition and with policy separately.

The three heads under which damages are recoverable for those torts for which damages are 'at large' are classified under the following heads. (1) Compensation for the harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value on physical hurt, as in assault; on curtailment of liberty, as in false imprisonment or malicious prosecution; on injury to reputation, as in defamation, false imprisonment and malicious prosecution; on inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. This Lord Devlin calls 'aggravated damages'. (3) Punishment of the defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls 'exemplary damages'. I should have preferred the alternative expression 'punitive damages' to emphasise the fact that their object is not to compensate the plaintiff but to punish the defendant and to deter him, and perhaps others, from committing similar torts. To avoid confusion I have, however, accepted the lead of Lord Hailsham LC in adhering to Lord Devlin's adjective 'exemplary'.

It may seem remarkable that there had not previously been any judicial analysis, even as elementary as this, of the constituent elements of the compound 'damages at large'. But it has to be remembered that at common law the assessment of damages was the exclusive function of a jury, and, despite growing exceptions from the mid-nineteenth century onwards, nearly all actions for torts in which damages were at large were tried by jury until after 1933. The assessment of damages was an arcanum of the jury box into which judges hesitated to peer; and it does not appear to have been their practice to give any direction to the jury as to how they should arrive at the amount of damages they should award, beyond some general exhortation to do their best in a matter which was peculiarly within their sphere.

What is disclosed by an examination of previous judgments since the 18th century, given on applications for a new trial on the grounds that the award of a jury was too large or too small, is a confusion of language and consequently of thought as to what were the constituent elements in an award of damages at large. In particular there is a complete failure to distinguish between aggravated and exemplary damages in cases where the malice of the defendant or the manner in which he did the wrongful act had both increased the injury to the plaintiff's feelings and aroused the indignation of the jury themselves.

In addition to the cases specifically referred to by Lord Devlin in *Rookes v Barnard*[12] your Lordships have been referred to many others in the course of the argument in the instant appeal. They serve but to confirm the confused state of the law on this subject before 1964.

The tort of defamation, to which Lord Devlin made only a passing reference in

12 [1964] 1 All ER 367, [1964] AC 1129

Rookes v Barnard[13], has special characteristics which may make it difficult to allocate compensatory damages between head (1) and head (2). The harm caused to the plaintiff by the publication of a libel on him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the damages under head (1) itself even in cases in which there are no grounds for 'aggravated damages' under head (2). Again the harm done by the publication, for which damages are recoverable under head (1) does not come to an end when the publication is made. As Lord Atkin said in *Ley v Hamilton*[14], 'It is impossible to track the scandal, to know what quarters the poison may reach'. So long as its withdrawal is not communicated to all those whom it has reached it may continue to spread. I venture to think that this is the rationale of the undoubted rule that persistence by the defendant in a plea of justification or a repetition of the original libel by him at the trial can increase the damages. By doing so he prolongs the period in which the damage from the original publication continues to spread and by giving to it further publicity at the trial, as in *Ley v Hamilton*[15], extends the quarters that the poison reaches. The defendant's conduct between the date of publication and the conclusion of the trial may thus increase the damages under head (1). In this sense it may be said to 'aggravate' the damages recoverable as, conversely, the publication of an apology may 'mitigate' them. But this is not 'aggravated damages' in the sense that that expression was used by Lord Devlin in head (2). On the other hand, the defendant's conduct after the publication may also afford cogent evidence of his malice in the original publication of the libel and thus evidence on which 'aggravated damages' may be awarded under head (2) in addition to damages under head (1). But although considerations such as these may blur the edges of the boundary between compensatory damages under head (1) and compensatory damages under head (2) in the case of defamation, they do not affect the clear distinction between the concept of compensatory damages and the concept of exemplary damages under head (3).

My Lords, the major clarification of legal reasoning to be found in the expository part of Lord Devlin's speech in *Rookes v Barnard*[13] was the recognition, first, that the award of a single sum of money as damages for tort, while it must always perform the function of giving to the plaintiff what he deserves to receive to compensate him fully for the harm done to him by the defendant, may in appropriate cases also perform the quite different function of fining the defendant what he deserves to pay by way of punishment; and, secondly, that even in those appropriate cases, it is only if what the defendant deserves to pay as punishment exceeds what the plaintiff deserves to receive as compensation, that the plaintiff can be also awarded the amount of the excess. This is a windfall which he receives because the case happens to be one in which exemplary damages may be awarded.

It is not necessary to dwell on the three considerations which Lord Devlin referred to as arising from the nature and function of punitive damages. The first consideration qualifies the categories of cases in which exemplary damages may be awarded. The plaintiff must himself have been the victim of the conduct of the defendant which merits punishment; he can only profit from the windfall if the wind was blowing his way. The second consideration is relevant to the attitude of an appellate court to a jury's assessment of exemplary damages. I have already taken it into account in forming my conclusion that the jury's award of £40,000 ought to be set aside. The third conclusion relates to the relevance of the defendant's means to any assessment of punitive damages in excess of the amount required to compensate

13 [1964] 1 All ER 367, [1964] AC 1129
14 (1935) 153 LT 384 at 386
15 (1935) 153 LT 384

the plaintiff. These three considerations are followed by the crucial exposition of the way in which a jury should be directed in a case in which it is open to them to award punitive damages. I have already dealt with this in the first criticism which I have made of the summing-up at the trial in the instant case.

It should perhaps be pointed out that Lord Devlin did not suggest that in a case which clearly came within a category which justified an award of exemplary damages the jury should be invited to make separate awards in respect of the compensatory and the punitive element, although no doubt a judge sitting alone should do so. It was only in cases where it might be doubtful whether exemplary damages were permissible that he suggested that special verdicts splitting the total award might serve a useful purpose in avoiding the necessity of a new trial in the event of appeal.

It has not been contended that those parts of Lord Devlin's speech which expounded the rationale of the award and the assessment of exemplary damages in those cases in which they could be recovered did not serve a useful purpose which lay well within the functions of this House in its judicial capacity. It brought some order out of chaos, some light and reason into what was previously a dark and emotive branch of the common law. What has been criticised is the decision of legal policy to restrict the categories of cases in which exemplary damages may be awarded.

If the common law stood still while mankind moved on, your Lordships might still be awarding bot and wer to litigants whose kinsmen thought the feud to be outmoded—though you could not have done so to the plaintiff in the instant appeal, because defamation would never have become a cause of action. The common law would not have survived in any of those countries which have adopted it, if it did not reflect the changing norms of the particular society of which it is the basic legal system. It has survived because the common law subsumes a power in judges to adapt its rules to the changing needs of contemporary society—to discard those which have outlived their usefulness, to develop new rules to meet new situations. As the supreme appellate tribunal of England, your Lordships have the duty, when occasion offers, to supervise the exercise of this power by English courts. Other supreme appellate tribunals exercise a similar function in other countries which have inherited the English common law at various times in the past. Despite the unifying effect of that inheritance on the concept of man's legal duty to his neighbour, it does not follow that the development of the social norms in each of the inheritor countries has been identical or will become so. I do not think that your Lordships should be deflected from your function of developing the common law of England and discarding judge-made rules which have outlived their purpose and are contrary to contemporary concepts of penal justice in England, by the consideration that other courts in other countries do not yet regard an identical development as appropriate to the particular society in which they perform a corresponding function. The fact that the courts of Australia, of New Zealand and of several of the common law provinces of Canada have failed to adopt the same policy decision on exemplary damages as this House did for England in *Rookes v Barnard*[16] affords a cogent reason for re-examining it; but not for rejecting it if, as I think to be the case, re-examination confirms that the decision was a step in the right direction—although it may not have gone as far as could be justified.

The award of damages as the remedy for all civil wrongs was in England the creature of the common law. It is a field of law in which there has been but little intervention by Parliament. It is judge-made law par excellence. Its original purpose in cases of trespass was to discourage private revenge in a primitive society inadequately policed, at least as much as it was to compensate the victim for the material harm occasioned to him. Even as late as 1814 Heath J felt able to say[17]:

> 'It goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages.'

16 [1964] 1 All ER 367, [1964] AC 1129
17 *Merest v Harvey* (1814) 5 Taunt 442 at 444, [1814-23] All ER Rep 454 at 455

No one would today suggest this as a justification for rewarding the victim of a tort for refraining from unlawful vengeance on the wrongdoer. Conversely, the punishment of wrongdoers today is regarded as the function of the state to be exercised subject to safeguards for the accused assured to him by the procedure of the criminal law and with the appropriate punishment assessed by a dispassionate judge and not by a jury roused to indignation by partisan advocacy. One of the most significant and humane developments in English law over the past century and a half has been the increasing protection accorded to the accused under our system of criminal justice. As my noble and learned friend Lord Reid has pointed out no similar protection is available to a defendant as a party to a civil action.

So the survival into the latter half of the 20th century of the power of a jury in a civil trial to impose a penalty on a defendant simply to punish him had become an anomaly which it lay within the power of this House in its judicial capacity to restrict or to remove; though it would have been anticipating by two years the recent change in the practice of this House if to have done so would have involved over-ruling one of its own previous decisions.

Lord Devlin's analysis of previous decisions disclosed three kinds of cases in which the courts had recognised the right of a jury to award damages by way of punishment of the defendant in excess of what was sufficient to compensate the plaintiff for all the harm occasioned to him. The categorisation was new. Its purpose has, I think, been misunderstood. No one suggests that judges, when approving awards of exemplary damages in particular cases in the past consciously differentiated between one kind of case in which exemplary damages could be awarded and another. They dealt with them all as falling within a single nebulous class of cases in which the defendant's conduct was such as to merit punishment. The purpose of Lord Devlin's division of them into three categories was in order to distinguish between factual situations in which there was some special reason still relevant in modern social conditions for retaining the power to award exemplary damages, and factual situations in which no such special reason still survived.

With this end in view Lord Devlin extracted from the single nebulous class which appeared to be all that had been consciously recognised as justifying an award of exemplary damages at common law, two categories of cases in which this House decided that there were special reasons why the power to award exemplary damages should be retained. These two (apart from cases where exemplary damages are authorised by statute) are generally referred to as 'the categories'. But there is also to be found in the previous cases a third category, consisting of the remainder of the single nebulous class in which this House decided that the anomalous practice of awarding exemplary damages in civil proceedings ought to be discontinued.

The first category comprised cases of abuse of an official position of authority. This would seem to be analogous to the civil law concept of détournement de pouvoir, with the limitation that it must involve the commission of an act which would be tortious if done by a private individual. The cases cited are 200 years old. It would not appear that the actual conduct of the defendant himself need justify an award of aggravated damages. In *Huckle v Money*[17] the defendant appears to have treated the plaintiff with courtesy and consideration. The servant was the whipping-boy for the political head of the government. Nor need he have known that his act was wrongful. Mr Money, a mere subordinate official, can hardly have been expected to know that general warrants issued by the Secretary of State were illegal. In *Wilkes v Wood*[18], however, it was said that a belief that the act impugned was lawful could be pleaded in mitigation of damages.

The second category was of cases where an act known to be tortious was committed in the belief that the material advantages to be gained by doing so would outweigh any compensatory damages which the defendant would be likely to have to pay to the plaintiff. This would seem to be analogous to the civil law concept of enrichesse-

17 (1763) 2 Wils 205

18 (1763) Lofft 1

ment indue subject to a similar limitation that the act resulting in enrichment must be tortious. The cases cited by Lord Devlin do not include underground trespass to minerals, which provide the classic examples in the 19th century of this category of tort. There is high authority both in this House (*Livingstone v Rawyards Coal Co*[19]) and in the Privy Council (*Bulli Coal Mining Co v Osborne*[20]) that in the case of wilful clandestine trespass to minerals the damages may be assessed at the market value of the minerals without deduction for the cost of working—an award which would exceed both the loss to the plaintiff and the profit to the defendant from his wrongful act. The excess is punishment.

The third—and rejected—category is numerically by far the largest. It consists of cases in which the manner in which the tort has been committed has attracted a whole gamut of dyslogistic judicial epithets such as wilful, wanton, high-handed, oppressive, malicious, outrageous; particularly those where the defendant's manner of doing the tortious act has been characterised by arrogance or insolence or, in the preferred Australian phrase, a contumelious disregard of the plaintiff's rights. These are nearly all cases in which 'aggravated damages' by way of compensation apart from punishment can be awarded and much of the previous confusion about exemplary damages stems from this.

Apart from this confusion or perhaps because of it, I do not doubt that it was the general understanding of English judges and of those who practised in the English courts that exemplary damages by way of punishment of the defendant as well as aggravated damages by way of compensation of the plaintiff could be awarded in cases which fall within the third category. Lord Devlin's speech in *Rookes v Barnard*[1] explicitly acknowledges this. It was an understanding which he himself had shared. He had given effect to it in his own summing-up in *Loudon v Ryder*[2].

The decision of legal policy which this House made in *Rookes v Barnard*[1] was to retain the first two categories and to discard the third as obsolete.

In describing the two categories retained I have deliberately departed from the ipsissima verba of Lord Devlin's description of them. His statement of the categories was not intended as a definition to be construed as if it were enacted law. They were retained because this House considered that there were circumstances in which a power to award exemplary damages still served a useful social purpose and the descriptive words must be understood in the light of the social purpose which they were designed to serve.

My Lords, had I been party to the decision in *Rookes v Barnard*[1] I doubt if I should have considered it still necessary to retain the first category. The common law weapons to curb abuse of power by the executive had not been forged by the mid-eighteenth century. In view of the developments, particularly in the last 20 years, in adapting the old remedies by prerogative writ and declaratory action to check unlawful abuse of power by the executive, the award of exemplary damages in civil actions for tort against individual government servants seems a blunt instrument to use for this purpose today. But if it to be retained—a question which cannot arise in the instant appeal—the reasoning which supports its retention would not confine it to torts committed by servants of central government alone. It would embrace all persons purporting to exercise powers of government, central or local, conferred on them by statute or at common law by virtue of the official status or employment which they held.

I have no similar doubts about the retention of the second category. It too may be a blunt instrument to prevent unjust enrichment by unlawful acts. But to restrict the damages recoverable to the actual gain made by the defendant if it exceeded the loss caused to the plaintiff, would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him or, if he did, might fail in the hazards of litigation. It

19 (1880) 5 App Cas 25

20 [1899] AC 351, [1895-99] All ER Rep 506

1 [1964] 1 All ER 367, [1964] AC 1129

2 [1953] 1 All ER 741, [1953] 2 QB 202

is only if there is a prospect that the damages may exceed the defendant's gain that the social purpose of this category is achieved—to teach a wrongdoer that tort does not pay.

To bring a case within this category it must be proved that the defendant, at the time that he committed the tortious act, knew that it was unlawful or suspecting it to be unlawful deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty. While, of course, it is not necessary to prove that the defendant made an arithmetical calculation of the pecuniary profit he would make from the tortious act and of the compensatory damages and costs to which he would render himself liable, with appropriate discount for the chances that he might get away with it without being sued or might settle the action for some lower figure, it must be a reasonable inference from the evidence that he did direct his mind to the material advantages to be gained by committing the tort and came to the conclusion that they were worth the risk of having to compensate the plaintiff if he should bring an action.

I see no reason for restoring to English law the anomaly of awarding exemplary damages in the third category of cases. If malice with which a wrongful act is done or insolence or arrogance with which it is accompanied renders it more distressing to the plaintiff, his injured feelings can still be soothed by aggravated damages which are compensatory. I share the scepticism expressed by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*[3] whether what was in the defendant's mind at the time he committed the tort really increases the injury to the plaintiff's feelings. I think too that an evanescent sense of grievance at the defendant's conduct is often grossly overvalued in comparison with a lifelong deprivation due to physical injuries caused by negligence. But my own equable temperament may be idiosyncratic and the law of 'aggravated damages' does not call for closer examination in the instant appeal.

Finally on this aspect of the case I would express my agreement with the view that *Rookes v Barnard*[4] was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit. Its express purpose was to restrict, not to expand, the anomaly of exemplary damages.

My Lords, there is little that I should wish to add to what Lord Hailsham LC and Lord Reid have already said about the way the instant case was treated in the Court of Appeal[5]. It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in the Court of Appeal I sometimes thought the House of Lords was wrong in overruling me. Even since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.

The Court of Appeal[5] found themselves able to disregard the decision of this House in *Rookes v Barnard*[4] by applying to it the label per incuriam. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal. Even if the jurisdiction of the Court of Appeal had been co-ordinate with the jurisdiction of this House and not inferior to it the label per incuriam would have been misused. The reasons for applying it were said to be: first, that Lord Devlin had overlooked two previous decisions of this House in *Hulton v Jones*[6] and *Ley v Hamilton*[7]; secondly, that the 'two categories' selected as those in which the power to award exemplary damages should be retained had not been previously suggested by counsel in the course of their arguments.

3 (1967) 117 CLR 118 at 151, 152
4 [1964] 1 All ER 367, [1964] AC 1129
5 [1971] 2 All ER 187, [1971] 2 WLR 853
6 [1910] AC 20, [1908-10] All ER Rep 29
7 (1935) 153 LT 384

I find the suggestion that *Hulton v Jones*[8], the leading case on innocent defamation, is to be regarded as an authority for an award of exemplary damages, quite unacceptable. *Ley v Hamilton*[9] was discussed at some length in Lord Devlin's speech. I myself agree with his interpretation of Lord Atkin's speech. The Court of Appeal[10] did not and in this they now have the powerful support of my noble and learned friend, Viscount Dilhorne. But however wrong they may have thought Lord Devlin was, they cannot have thought that he had overlooked *Ley v Hamilton*[9].

The second reason I find equally unconvincing. On matters of law no court is restricted in its decision to following the submissions made to it by counsel for one or other of the parties. After listening to a lengthy argument which embraced a full examination of a large and representative selection of the relevant previous authorities this House was fully entitled to come to a conclusion of law and legal policy different from that which any individual counsel had propounded.

With regard to the amount of exemplary (and also aggravated) damages which may be awarded where the plaintiff elects to sue defendants jointly for a single tort, I agree with Lord Hailsham LC that the Court of Appeal[10] got it wrong. Where I differ from him is in thinking that the trial judge got it right. I am fortified in this view by the fact that Lord Denning MR understood the summing-up as leaving to the jury a choice whether to award a sum appropriate as a punishment of the more blameworthy of the defendants or the less blameworthy or something in between the two sums. Salmon LJ appears to have taken the same view. Both thought that this was a correct statement of the law. In this I think that they were mistaken as to the law, but right as to what the jury would have understood the summing-up to mean.

On the wider aspects of the course adopted by the Court of Appeal[10] it is best that I should content myself with expressing my concurrence with all that Lord Hailsham LC has said.

LORD KILBRANDON. My Lords, there are several reasons which induce me to be as brief as I can. First, the case in its important general aspects is concerned with doctrines, and to some extent with procedures, with which I am not familiar. Secondly, those general aspects have been examined in great detail and in an authoritative manner by your Lordships who have preceded me. Thirdly, since it is unlikely that any contribution of mine would be regarded as of value in clarifying the law of England, I may at least wind up the consideration of a disastrous case with economy, the lack of which, especially in this class of litigation, is, as others of your Lordships have observed, a notoriously discreditable feature of our jurisprudence. In short, having had the advantage of reading the speeches prepared by my noble and learned friends, Lord Hailsham LC, Lord Reid and Lord Morris of Borth-y-Gest, I agree with them.

It is conceded by the appellants that they libelled Captain Broome and they do not attack as excessive the sum awarded by the jury as compensation for the damage they did to his feelings and his reputation. It is also conceded that, if there was evidence on which a properly directed jury could find that the appellants had calculated that they might make a profit from publication which might exceed the compensation payable to the plaintiff, then, since 'one man should not be allowed to sell another man's reputation for profit', and since it may 'be necessary to teach a wrongdoer that tort does not pay', the jury were entitled to award punitive damages, on the authority of *Rookes v Barnard*[11]. The first question, and one which from first to last occupied a very great deal of time in your Lordships' House, was whether there was such evidence.

I have no doubt on this point at all, and I do not rehearse the evidence. The jury had before them the state of the appellants' knowledge before publication—that

8 [1910] AC 20, [1908-10] All ER Rep 29
9 (1935) 153 LT 384
10 [1971] 2 All ER 187, [1971] 2 WLR 853
11 [1964] 1 All ER 367, [1964] AC 1129

Captain Broome had warned them that he regarded certain passages as libellous, that professional naval opinion was to the same effect, and, above all, that another reputable publisher had refused to handle the book because of its defamatory character. The appellants' attitude is demonstrated by their written references to libel actions as affording 'first class publicity', and to 'tightening up the indemnity clause'. No doubt there was an element of the jocular in these remarks, but they do show that the appellants were going ahead with their eyes open as to consequences, and they must have thought it would be worth their while.

Counsel for the appellants pointed out, and I for one agree, that since all commercial publication is undertaken for profit, one must be watchful against holding the profit motive to be sufficient to justify punitive damages: to do so would be seriously to hamper what must be regarded, at least since the European Convention was ratified, as a constitutional right to free speech. I can see that it could be in the public interest that publication should not be stopped merely because the publisher knows that his material is defamatory; it may well be in the public interest that matter injurious to others be disseminated. But if it were suggested that this freedom should also be enjoyed when the publisher either knows that, or does not care whether, his material is libellous—which means not only defamatory but also untrue—it would seem that the scale is being weighted too heavily against the protection of individuals from attacks by media of communication.

The conduct of the appellants, accordingly, is in my view brought within the principle of the rule laid down in *Rookes v Barnard*[12] to which I have just referred. If a publisher knows, or has reason to believe, that the act of publication will subject him to compensatory damages, it must be that, since he is actuated by the profit-motive, he is confident that by that publication he will not be the loser. Some deterrent, over and above compensatory damages, may in these circumstances be called for.

This leads me to the little I have to say on the doctrine of punitive damages. I do not propose to discuss its merits or demerits, because I agree with Lord Devlin, not only that it forms part of the law of England, but also that its abolition would not be within the judicial functions of this House. I will, however, add that I am not convinced that any statutory example of the recognition of the doctrine is to be found. By the Law Reform (Miscellaneous Provisions) Act 1934, s 1 (2) (*a*), it is provided that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of that estate shall not include any exemplary damages. In the previous subsection provision has also been made, per contra, for causes of action subsisting *against* the estates of deceased persons. Since punitive damages are punitive or deterrent against the author of them, it would have been understandable if the statute had refused to allow them against a dead man. But, instead, they have been disallowed when they are claimed in respect of an injury to a dead man. This leads me to suppose that by the phrase 'exemplary damages' Parliament was here referring to what are usually called 'aggravated' damages; the estate of a dead man must pay them in order to indemnify the living, but the estate of a dead man, whose feelings post mortem have become irrelevant, does not receive them.

In the same sense I would interpret s 13 (2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, which provides for the award, in certain circumstances, of 'exemplary damages'. Section 13 (2) applies, by virtue of s 13 (6), to Scotland, and since I can hardly believe that this Act introduced for the first time, as it were by a side-wind, the doctrine of punitive damages into the law of Scotland, I conclude again that 'exemplary' really means 'aggravated'. Aggravated damages, in the English sense, are available to pursuers in defamation cases in Scotland, subject to this qualification, that the conduct of counsel (cf *Greenlands Ltd v Wilmshurst*[13]) is not accepted as an aggravation unless that conduct has been on the express

12 [1964] 1 All ER 367, [1964] AC 1129

13 [1913] 3 KB 507

instructions, or with the privity, of counsel's client—see *James v Baird*[14]. Finally, Lord Devlin[15] doubted whether s 17 (3) of the Copyright Act 1956, authorised an award of exemplary damages; in my opinion it did not.

I do not suppose that anyone now sitting down to draft a civil code would include an article providing for punitive damages. But the doctrine exists, and in my respectful opinion the rationale of it is explained, by illustrations as apt as one could find, in the speech of Lord Devlin. The doctrine proceeds on the footing, whether sound or not, that in some torts, and in some circumstances, there is an element of public interest to be protected. The only way in which that can be done may be by awarding to a plaintiff a sum of damages which he does not deserve, being in excess of any loss or injury he has suffered; that sum includes an element calculated to deter the defendant, and other like-minded persons, from committing similar offences. One example, which is Lord Devlin's second category, I have already noticed—the publisher who does not mind paying compensatory, even aggravated damages for libel, because he will still have a profit after paying them. It is not in the public interest, especially as the publishing agencies become more and more monolithic, that such conduct should go unchecked, and no remedial measures other than punitive damages seem to be open. A second example—Lord Devlin's first category—is in the sphere of public authority. While, as some of your Lordships have pointed out, the illustration may have been too narrowly drawn, the rationale is clear, and is the same. An example might be, an outrageous excess of official authority without any aggravating circumstances (cf *Huckle v Money*[16]) resulting in the wrongful imprisonment of a person of bad character. False imprisonment is primarily actionable as an injury to reputation. If the plaintiff has none to lose, the amount of his compensatory damages may be inadequate to deter, in the public interest, flagrant injustices of this character.

The exclusion of the 'common bully' category, and the consequent overruling of *Loudon v Ryder*[17] are entirely consistent with this principle. Very large compensatory damages, which should be an adequate deterrent, are proper in such cases, and in most of them the criminal law can also take care of the public interest.

I accordingly accept that *Rookes v Barnard*[18], as it has now been expounded by my noble and learned friend, Lord Reid, correctly states the law of England. It cannot be said, and it does not purport, to state the law of Scotland; it may be that in other parts of the Commonwealth also it is not, for what may be very different reasons, acceptable. Nevertheless it appears to me to give content to the doctrine of punitive damages, and to set proper limits on it.

The trial having been correctly and inevitably conducted on the basis of *Rookes v Barnard*[18] as then understood, the question now arises whether the learned judge gave the jury adequate and accurate directions in law on that basis. First, did he fail to make it clear to the jury that, if they had made an award of compensatory damages, any additional award by way of punitive damages could be made 'if, but only if' the amount of the compensatory damages did not itself constitute a sufficient deterrent? The second objection was that the learned judge gave an inadequate direction as to the course to be followed by the jury should they find punitive damages due, but a different degree of culpability in the two defendants. I think it is sufficient for me to say that I agree with those of your Lordships who are of opinion that the directions, in both matters, were adequate.

The aspect of the case which has given me the greatest difficulty is the question whether the total amount of the damages awarded is so excessive that the verdict cannot stand. That it is excessive I do not doubt, but that is not a sufficient reason for the award to be set aside. The assessment of damages in such cases as this is not, in our law, a judicial function. Insofar as compensatory damages are concerned, it

14 1916 SC 510

15 [1964] 1 All ER at 410, [1964] AC at 1225

16 (1763) 2 Wils 205

17 [1953] 1 All ER 741, [1953] 2 QB 202

18 [1964] 1 All ER 367, [1964] AC 1129

may well be right that that should be so. If he were called on to estimate the sum appropriate to repair the injured feelings and damaged reputation of a citizen who had been defamed, a judge would be making not a legal, but something more like a social, assessment; there is no reason to suppose that his estimate would more probably be correct than would that made collectively by any 12 sensible men and women. So when one looks at a jury's award in such a case one has to ask, whether it could have been made by sensible people acting reasonably, or whether it must have been arrived at capriciously, unconscionably, or irrationally. On that test, I think the present award must stand. Moreover, it is not unprecedented. For example, in a case in which the libel was in some ways less wounding than the present—*Youssoupoff v Metro-Goldwyn-Meyer*[19]—an award, adjusted for the change in money values, of well over twice as large as this was upheld by experienced judges.

The same test, as the law now stands, must be applied to a jury's award of punitive damages. Whether this should be so is another matter; it is arguable that the assessment of punishment is not properly a jury's function, and ought more readily to be challengeable on appeal to a judicial authority. It is obvious that, as counsel for the appellants forcibly pointed out, a defendant against whom punitive damages is sought stands to a great extent stripped of the constitutional safeguards which would be his right were he arraigned before a criminal court. One of those safeguards is a calm judicial determination of the penalty appropriate to his offence. Perhaps, if the doctrine of punitive damages is to be retained, it ought to be made a condition precedent of their being asked for that the plaintiff forego his right to have the case tried by a jury; it is not likely that a defendant would wish to stand on his own right in that respect.

So, although I would myself have assessed the damages at a much smaller sum, I cannot say that the award, on the principles under which we now operate, ought not to stand, or that, were a new trial to be ordered, the result would, in my confident opinion, be substantially different.

Finally, I do not consider it necessary for me to say anything on the issue of the relations between this House and the Court of Appeal, except that I entirely agree with what has fallen from Lord Hailsham LC on this topic.

I would, accordingly, dismiss this appeal.

Appeal dismissed.

Solicitors: *Herbert Smith & Co* (for the appellants); *Theodore Goddard & Co* (for Captain Broome).

S A Hatteea Esq Barrister.

Dingle v Turner and others

HOUSE OF LORDS

VISCOUNT DILHORNE, LORD MACDERMOTT, LORD HODSON, LORD SIMON OF GLAISDALE AND LORD CROSS OF CHELSEA

17th, 18th, 19th, 22nd, 23rd NOVEMBER 1971, 16th FEBRUARY 1972

Charity – Relief of poverty – Poor employees – Trust to provide pensions to poor employees of a company – Whether valid charitable trust.

Charity – Public benefit – Requirement of public benefit – Section of the public – Determination whether potential beneficiaries constitute a section of the public – Relevance.

The testator died on 10th January 1950. By cl 8 (*e*) of his will he directed his trustees to invest a specified sum on trust 'to apply the income thereof in paying pensions to poor employees of [D Ltd]...' At the testator's death D Ltd employed over 600

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persons and there was a substantial number of ex-employees. Since then the business had expanded and D Ltd had 705 full-time and 189 part-time employees and was paying pensions to 89 ex-employees. In proceedings to determine whether the trust declared by cl 8 (*e*) was valid it was contended by those interested on intestacy if the trust failed, that a trust ought not to be regarded as charitable if the benefits were confined to the employees of a given individual or company, the validity of trusts for 'poor relations' constituting an anomalous exception to the general rule.

Held – The trust constituted a valid charitable trust. It was a natural development of the 'poor relations' decisions to hold as charitable trusts for 'poor employees' of an individual or company or 'poor members' of a club or society; to draw a distinction between different kinds of 'poverty' trusts would be illogical. In the field of trusts for relief of poverty the dividing line between a charitable and a private trust depended on whether, as a matter of construction, the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular poor persons, the relief of poverty amongst them being the motive of the gift (see p 880 h and j, p 881 b d and e, p 883 e and p 888 f to h, post).

Re Gosling (1900) 48 WR 300, *Gibson v South American Stores (Gath & Chaves) Ltd* [1949] 2 All ER 985, and *Re Scarisbrick* [1951] 1 All ER 822 applied.

Re Compton [1945] 1 All ER 198, *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER 31 and *Davies v Perpetual Trustee Co (Ltd)* [1959] 2 All ER 128 distinguished.

Per Lord MacDermott, Lord Simon of Glaisdale and Lord Cross of Chelsea. In determining for the purposes of the law of charity whether a trust other than for the relief of poverty is for the public benefit, the question whether or not the potential beneficiaries of the trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust (see p 881 b and e and p 889 f and g, post).

Per Viscount Dilhorne, Lord MacDermott and Lord Hodson. The fiscal privileges of a legal charity are not directly relevant to the determination whether a given trust or purpose is charitable (see p 880 j and p 881 c and d, post).

Notes

For the relief of the poor being a charitable purpose, see 4 Halsbury's Laws (3rd Edn) 213-218, paras 492-495, and for cases on the subject, see 8 Digest (Repl) 316-319, *13-48*.

Cases referred to in opinions

A-G v Northumberland (Duke) (1877) 7 Ch D 745, 47 LJCh 569, *varied* (1878) 38 LT 245, 8 Digest (Repl) 410, *1020*.

A-G v Price (1810) 17 Ves 371, [1803-13] All ER Rep 467, 34 ER 143, 8 Digest (Repl) 316, *19*.

Buck, Re, Bruty v Mackey [1896] 2 Ch 727, [1895-99] All ER Rep 366, 65 LJCh 881, 75 LT 312, 60 JP 775, 8 Digest (Repl) 356, *348*.

Compton, Re, Powell v Compton [1945] 1 All ER 198, [1945] Ch 123, 114 LJCh 99, 172 LT 158, 8 Digest (Repl) 330, *123*.

Cox (decd), Re, Baker v National Trust Co Ltd, Public Trustee for Ontario (Province) v National Trust Co Ltd [1955] 2 All ER 550, [1955] AC 627, [1955] 3 WLR 42, *affg* [1951] OR 205, Digest (Cont Vol A) 91, *3a*.

Davies v Perpetual Trustee Co (Ltd) [1959] 2 All ER 128, [1959] AC 439, [1959] 2 WLR 673, Digest (Cont Vol A) 88, *6a*.

Drummond, Re, Ashworth v Drummond [1914] 2 Ch 90, [1914-15] All ER Rep 223, 83 LJCh 817, 111 LT 156, 8 Digest (Repl) 320, *52*.

Gibson v South American Stores (Gath & Chaves) Ltd [1949] 2 All ER 985, [1950] Ch 177, 8 Digest (Repl) 320, *51*.

Gosling, Re, Gosling v Smith (1900) 48 WR 300, 16 TLR 152, 8 Digest (Repl) 320, *49*.

5

COMEAU v. MARSMAN and COMEAU ESTATE (Third Party);
STATES v. COMEAU ESTATE and MARSMAN
(S.H. No. 25508)
(S.H. No. 25508)

Nova Scotia Supreme Court, Trial Division
Hallett, J.
July 15, 1981.

Summary;

A widow and two children applied for an assessment of damages following the death of the husband-father in a motor vehicle collision. The passenger of the defendant driver also applied for an assessment of damages. The Nova Scotia Supreme Court, Trial Division, assessed the damages.

DAMAGE AWARDS - TOPIC 81

Injury and death - Fatal accidents - Father and husband, aged 36, leaving surviving his wife, aged 33, and two children, aged 10 and 12 - The deceased welder contributed $8,371.76 a year to his family - The Nova Scotia Supreme Court, Trial Division, awarded $152,000.00 general damages to be apportioned 80% to the wife and 10% to each child - See paragraph 52.

DAMAGE AWARDS - TOPIC 150

Injury and death - Multiple injuries - 23 year old male - Compound fractured tibia, fractured ribs, compound fractures of 3 metacarpals, lacerated forehead, concussion, collapsed lung - Surgery on hand and lung reinflated - Disabled 8 to 9 months - Scars on face, leg and hand - Minor cosmetic deformity of hand but no serious functional impairment - Possibility of arthritis at fracture sites - The Nova Scotia Supreme Court, Trial Division, assessed $10,000.00 general damages - See paragraphs 53 to 61.

DAMAGES - TOPIC 2113

Torts causing death - Method of assessment of value of the dependency - Lump sum - Upward adjustment for future income tax - The Nova Scotia Supreme Court, Trial Division, discussed "grossing up the award" to compensate for income tax payable and allowed an increase in the award to a widow and children - See paragraphs 37 and 38.

DAMAGES - TOPIC 2116

Torts causing death - Method of assessment of value of the dependency - Lump sum - Present value of deferred payments - Discount rate - The Nova Scotia Supreme Court, Trial Division, stated that the discount rate established in Civil

Procedure Rule 31.15 is not the only rate that can be applied, but that the appropriate rate depends on the facts of each case - The court adopted the 2 1/2% rate established by the Rule because the deceased's pay increases were approximately the same as increases in the consumer price index - See paragraphs 17 to 25.

DAMAGES - TOPIC 2117

Torts causing death - Method of assessment of value of the dependency - Lump sum - Contingencies - A widow entered a relationship with a man who stayed at her home most of the time - The man was employed full-time - The widow testified she had no plans to remarry and that the man did not support her family - The Nova Scotia Supreme Court, Trial Division, stated that the burden is on the defendant to prove the contingency - The court reduced the widow's award holding that she was likely to remarry or live common law with the man and gain a pecuniary advantage - See paragraphs 29 to 33.

DAMAGES - TOPIC 2135

Torts causing death - Deductions from lump sum pecuniary loss of pecuniary advantages resulting - Pension or insurance proceeds - The Nova Scotia Supreme Court, Trial Division, stated that because of s. 4(2) of the Fatal Injuries Act life insurance proceeds and pensions are not to be deducted from the general damage award - See paragraph 42.

DAMAGES - TOPIC 2138

Torts causing death - Deductions from lump sum pecuniary loss of pecuniary advantages resulting - Deductions for interest of deceased in family home - The Nova Scotia Supreme Court, Trial Division, declined to reduce an award for general damages as a result of a widow acquiring her husband's joint interest in the matrimonial home - See paragraph 42.

INTEREST - TOPIC 5139

Interest as damages - Torts - Negligence - Wrongful death - The Nova Scotia Supreme Court, Trial Division, awarded interest on the part of an award of general damages which related to the period from the date of death to the date of judgment - The court awarded an interest rate of 1/2 what would normally be ordered, because the full sum was not applicable from the time of death but accumulated from then - The court also ordered 16% interest on the full award from the date of judgment to the date of payment but not as interest on the award, rather as part of the award - See paragraphs 46 to 52.

CASES NOTICED:

Keizer v. Hanna and Buch, [1978] 2 S.C.R. 342; 19 N.R. 209, appld. [para. 5].
Lewis v. Todd et al. (1981), 34 N.R. 1; 115 D.L.R.(3d) 257, appld. [para. 16].
Buckley v. John Allen & Ford (Oxford) Ltd. [1967] 1 All E.R. 539, consd. [pra. 31].
Ball v. Kraft (1967), 60 D.L.R.(2d) 35, ref'd to. [para. 33].
Spurr v. Naugler (1975), 11 N.S.R.(2d) 637; 5 A.P.R. 637, appld. [para. 42].
Cookson v. Knowles, [1978] 2 All E.R. 604, appld. [para. 47].
Fenn v. City of Peterborough (1980), 25 O.R.(2d) 399, ref'd to. [para. 49].

STATUTES NOTICED:

Civil Procedure Rules (N.S.) Rule 31.15 [para. 20].
Fatal Injuries Act, R.S.N.S. 1967, c. 100, s. 4 [para. 3].
Judicature Act, S.N.S. 1980, c. 2, ss. 38 [para. 46]; 42 (fa) [para. 19].

AUTHORS AND WORKS NOTICED:

McGraw Hill, Handbook of Modern Accounting [para. 26].

COUNSEL

D.R. CHIPMAN, Q.C., and D. CARVER, for the plaintiff;
J.M. DAVISON, Q.C., R.G. BELLIVEAU, and L. SCARAVELLI, for the defendant;
J.W. JORDAN, for the plaintiff.

This case was heard on April 28, 1981, at Halifax, Nova Scotia, by HALLETT, J., of the Nova Scotia Supreme Court, Trial Division.

On July 15, 1981, HALLETT, J., delivered the following judgment:

1 HALLETT, J.: This is an assessment of damages arising out of a motor vehicle collision. The liability issue was tried before me on January 5, 6, 7 and 8, 1981. I found the defendant, Marsman, liable for the damages suffered by the family of the late Mr. Comeau, who was killed in the accident and also liable for the damages suffered by the plaintiff, States, a passenger in the Marsman motor vehicle.

2 I shall first assess the damages suffered by the Comeau family.

3 Section 4 of the *Fatal Injuries Act*, R.S.N.S. 1967, c. 100, established certain rules for the assessment of damages:

> 4 (1) Every action brought under this Act shall be for the benefit of the wife, husband, parent, or child of such deceased person; and the jury may give such damages as they think proportioned to the injury resulting from such death to the persons respectively for whose benefit such action was brought; and the amount so recovered, after deducting the costs not recovered (if any) from the defendant, shall be divided among such persons, in such shares as the jury by their verdict find and direct.
>
> (2) In assessing the damage in any action there shall not be taken into account any sum paid or payable on the death of the deceased, whether by way of pension or proceeds of insurance, or any future premiums payable under any contract of assurance or insurance.
>
> (3) In an action brought under this Act where funeral expenses have been incurred by the parties for whose benefit the action is brought damages may be awarded for reasonable necessary expenses of the burial of the deceased, including transportation and things supplied and services rendered in connection therewith.

4 The principle to be applied in any assessment of damages arising out of a tort is well known. The injured party must be compensated, insofar as money can, for the wrongful act.

5 The test for the assessment of damages in a fatal injuries case was stated by Dickson, J., of the Supreme Court of Canada in *Keizer v. Hanna and Buch*, [1978] 2 S.C.R. 342; 19 N.R. 209; the surviving spouse is entitled to an award of such an amount as will ensure her the comforts and station in life which she would have enjoyed but for the untimely death of her husband. In fatal injuries cases, practicality requires the court to consider and, to a great extent, rely upon actuarial evidence in reaching a conclusion as to what is reasonable compensation to the family.

6 Mr. Comeau was born on July 4, 1943, and was thirty-six years of age at the time of his death on September 17, 1979. Mrs. Comeau was born on August 26, 1946. The parties were married on October 3, 1964. There were two children of the

marriage; their dates of birth were January 10, 1967, and October 13, 1969. Both children are now dependent on Mrs. Comeau. Both Mr. and Mrs. Comeau were in good health on September 17, 1979.

7 Mr. Comeau was employed as a Shop Foreman with Aberdeen Paving Limited and worked, for the most part, out of the shop at the company's premises in Bedford, Halifax County, although he lived in Meteghan, Digby County. He commuted between Meteghan and Bedford in order to attend his work place. His normal practice was to get up early on Monday morning and drive into Bedford, returning to Meteghan on Friday afternoon or early evening. From time to time, he did work in the field, so to speak, particularly working out of the Yarmouth office, but his main duties were as Shop Foreman at the company's premises at Bedford. He was a valued employee of the company and had progressed fairly rapidly to Shop Foreman from an apprentice welder when he joined the company in 1976. It is unlikely that he would have progressed to a more senior position with the company as the company does not have any employees who are trained as welders in a more responsible position than Shop Foreman. I am satisfied from the evidence of Mrs. Comeau that it was her husband's intention to continue working with Aberdeen Paving Limited. The Comeaus were happily married.

8 The key evidence adduced on behalf of Mrs. Comeau as to the sum that should be awarded for damages was given by Mr. Brian L. Burnell, an Actuary who has testified before the court on a number of occasions. His report was prepared on October 6, 1980. It was prepared on the assumption that Mrs. Comeau was working and earning $7,500.00 per year at the time of her husband's death. However, the evidence at the trial showed that Mrs. Comeau had stopped work prior to her husband's death. This erroneous assumption by Mr. Burnell required him to revise his calculations at trial.

9 The joint life expectancy of Mr. and Mrs. Comeau immediately prior to the accident was 33.18 years, based on the Mortality Tables in respect of the total population of male and female residents in Nova Scotia as developed by Statistics Canada during the years 1975 to 1977 inclusive. Mr. Burnell's calculation of the present value of the amount of Mr. Comeau's future income that would have been available to his family had he not been killed was made on the assumption that Mr. Comeau would have retired at age sixty-five if he survived until then; that is a reasonable basis for the actuarial calculations required in this case. Mr. Burnell calculated that

there would be a 67.02% probability that Mr. Comeau would survive to age sixty-five and his wife would still be alive at that time. He calculated that the actual expected number of years of joint survival up to Mr. Comeau's attainment of age sixty-five is 25.74 years. His evidence as to life expectancy and expected number of years of joint survival to Mr. Comeau's attainment of age sixty-five was not challenged and I accept his opinion in this respect.

10 Mr. Sterling George, a Vice-President of Aberdeen Paving Limited, testified to the raises that had been received by Mr. Comeau since he joined the company in 1976. Mr. Comeau's income for 1979, had he completed the full year, was projected by Mr. Burnell at $19,786.80. The evidence supports this projection as he had earned $14,015.70 for the period January 1, 1979, to September 15, 1979, his last working day before being killed. At the time of his death, he was earning $6.00 per hour. In 1977 he had received an increase in pay equivalent to 12.5% over 1976; in 1978 an increase of 11% over the year 1977; and in 1979 an increase of 9% over 1978. I would infer from the evidence that he could have expected to receive increases approximately equivalent to increases in the cost of living index as indicated by the raise he received in 1979. I also find that it is unlikely he would have moved to a higher plateau in the company despite Mr. George's view that he had a possibility of upward mobility. There are no positions with the company open to welders that would appear to be more remunerative than that held by Mr. Comeau at the time of his death. I have not overlooked the fact that he had continued to upgrade himself in various occupations since achieving a Grade X education, but he was satisfied with his job. He had attained the top welder's position of Shop Foreman and it is a reasonable inference that he would have continued at this level with the company.

11 In determining the portion of Mr. Comeau's earnings that would have been available for maintenance of his family had he lived, a deduction must be made for income tax that would have been payable by him on his salary of $19,786.80 and also a deduction for that part of his earnings that would have been required for his own personal living expenses. I accept Mr. Burnell's calculations that in 1979 Mr. Comeau would have paid income tax, Canada Pension Plan contributions and Unemployment Insurance Commission contributions of $4,915.04, equivalent to 24.84% of his salary. I am unable to accept Mr. Burnell's figure of 20% as being the portion of his earnings used for his personal expenses. This calculation by Mr. Burnell was

made on information submitted to him. It became clear as the trial progressed that Mr. Comeau's personal living expenses were substantially more than the $3,957.36 that had been used by Mr. Burnell in the calculations contained in his initial report. Specifically, I am satisfied that Mr. Comeau's expenditures for food were in excess of the figures used by Mr. Burnell, but the major difference relates to Mr. Comeau's use of his automobile. Most weeks he drove his 1979 Cougar to and from his place of employment. He did not receive a car allowance from his company other than when he was on company assignment. Although this happened from time to time, the majority of times when he commuted between Meteghan and Bedford was in his own car at his own expense. In arriving at his figure of $3,957.36 for personal living expenses, Mr. Burnell used an annual expense figure for the automobile of approximately $2,000.00. The distance between Bedford and Meteghan is about 152 to 160 miles, which would mean driving in excess of 300 miles a week; that is, something in the order of 15,000.00 miles a year. Mr. Burnell's calculation of the automobile expense of $2,000.00 was low. Using a figure of between .25¢ and .30¢ a mile, the expense with respect to the use of the automobile would be approximately $4,000.00 or, calculated on the basis of an automobile worth $10,000.00 depreciated at 20% per annum, for an annual automobile replacement expense of $2,000.00 plus another $2,000.00 for gas, oil, maintenance, tires, *etc.*, which is reasonable considering the mileage travelled by Mr. Comeau, you arrive at a figure of $4,000.00, even making an allowance for the fact that from time to time he was using a company vehicle.

12 In addition to his car expense of approximately $4,000. per year, he would have had personal expenses for food, clothing, cigarettes, liquor, miscellaneous items, including entertainment, participation in sports in which he was interested and personal items of another $2,500.00, for a total of $6,500.00.

13 I therefore calculate that the net amount that would have been available to the Comeau family in 1979, had he lived, after deduction of Mr. Comeau's personal expenses, taxes, *etc.*, could have been as follows:

Gross earnings		$19,786.80
Less:		
Personal expenses	$6,500.00	
Tax, C.P.P. and U.I.C., 24.84%	4,915.04	11,415.04
Net available for family		$ 8,371.76

14 This amount for personal expenses is high, but it is high because Mr. Comeau had such extraordinarily high transportation expenses in connection with going to and from his work.

15 Having determined the annual benefit that the comeau family would have received from Mr. Comeau, based on 1979 income and expenses, the second step is to determine what sum should be awarded as damages that, if invested, will replace the annual benefit to the widow and children for the balance of Mr. Comeau's working life expectancy, with some reduction for contingencies, with the fund extinguishing itself in the process (*Keizer v. Hanna and Buch*, [1978] 2 S.C.R. 342; 19 N.R. 209).

16 In determining what is the appropriate sum to award to achieve this result, a number of factors must be considered. First, whether there is any reason not to apply the current Mortality Tables to which I have referred in determining the actual expected number of years of joint survival up to Mr. Comeau's attaining the age of sixty-five, which I am assuming would be his normal retirement date in the absence of any evidence to the contrary. There is nothing inherently dangerous in Mr. Comeau's work as was the case in connection with the policeman who was killed in *Lewis v. Todd et al.* (1981), 34 N.R. 1; 115 D.L.R.(3d) 257. There is no reason to assume that he was in any danger of an early death from his occupation. There is no evidence that either he or his wife were in ill health. The only factor that might be considered is that Mr. Comeau spent a considerable time on the road, but so do a lot of other people, and deaths on the highway would be reflected in the standard Mortality Tables.

17 A second and very important consideration in determining the amount of the award is the selection of the so-called discount rate. As was stated by the Supreme Court of Canada in *Lewis v. Todd*, the determination of the appropriate discount rate is normally a factual issue which will turn on the evidence advanced in individual cases. It is fair to say there is some confusion surrounding the use of the discount rate in arriving at an appropriate award and it might be helpful to quote from Mr. Justice Dickson's judgment in *Lewis v. Todd* in which he explains the purpose of the discount rate.

> It would be useful to recall precisely the function which the 'discount rate' is intended to serve. In the case of a fatal accident the court is endeavouring to

compensate the dependents of the deceased for loss of a future stream of income which the dependents might have expected to receive but for the death of the deceased. As it is not open to a court, in the absence of enabling legislation, to order periodic payments adjusted to future needs, the dependents receive immediately a capital sum roughly approximating the present value of the income they would have received had the deceased survived. They are able to invest this capital sum and earn interest thereon. A proportion of the interest received may be offset by the effect of inflation. To the extent that the interest payments exceed the rate of inflation, there is conferred on the dependents, through payment today of a stream of future income, a benefit which can be expressed as the 'real rate of return.' There would clearly be enrichment of the plaintiff at the expense of the defendant if the court did not take this benefit into account in making an award. Accordingly, the court applies a so-called 'discount factor' *i.e.* the real rate of return which the plaintiff can expect to receive on the damage award. This is what the court was suggesting in *Andrews* when it was stated 'the approach which I would adopt, therefore, is to use present rates of return on long-term investments and to make some allowance for the effects of future inflation.' (p. 258)

It has been suggested at various times that there is no need for a court to hear evidence on expected rates of interest and inflation as the relationship between these two factors and thus the real rate of return, is constant. (see generally Gibson, *Repairing the Law of Damages* (1978), 8 Man. L.J., 637, 651; Braniff and Pratt, *Tragedy in the Supreme Court of Canada: New Developments in the Assessment of Damages for Personal injuries* (1979), 37 U.T. Fac. L. Rev. 1, 26). Such an approach has been termed the 'Lord Diplock approach' or 'modified Lord Diplock approach', following *Mallett v. McMonagle*, [1970] A.C. 166.

I know of no authority by which this court, if so minded, could legislate a fixed discount rate, applicable for all cases. Even if such authority were present, I would be loathe to exercise it in the present case. At trial, the plaintiff called one economist and one actuary to give evidence on future trends in inflation and interest rates. It would be irresponsible for this court to make an immutable pronouncement on a complex issue on the basis of such limited evidence. The findings made herein should, in justice, only bind the parties to the present litigation.

The principle remains that, absent legislation (see *The Judicature Amendment Act*, 1979, (Ont.) c. 65, s. 6(5)) which directs the manner of calculating discount rate (*e.g.* by setting a figure or by pegging the interest rate to return on specific investment vehicles and inflation to a particular index), the discount rate will vary according to the expert testimony led at trial.

This does not mean that there will never be any uniformity in the selection of discount rate. As litigants in these cases produce more thorough and rigorous economic data and as the judiciary becomes more familiar with this data, a certain uniformity will no doubt emerge.

18 In short, to the extent that the rate of interest earned on the award exceeds the rate of inflation, there is conferred on the dependents a benefit which would clearly be an enrichment of the plaintiff at the expense of the defendant if the court did not take that interest benefit into account. Thus, the award of a present capital sum to compensate the family for loss of the stream of future income must be discounted by the real rate of return on investments. As stated by Mr. Justice Dickson in *Lewis v. Todd*, in the absence of legislation, the discount rate will vary from case to case depending on the expert evidence adduced. We now have legislation in Nova Scotia.

19 On June 5, 1980, the Nova Scotia Legislature amended the *Judicature Act*, S.N.S. 1980, c. 2, by adding to Section 42 subsection (fa). The section now reads:

> 42 The Judges of the court or a majority of them may make rules of court for carrying this Act into effect and in particular,
>
> . . . . . .
>
> (fa) respecting the rate of interest to be used in determining the capitalized value of an award in respect of future damages;

20 Following the enactment of this enabling legislation,

the judges of the Supreme Court of Nova Scotia amended the *Civil Procedure Rules* by adding Rule 31.15 to become effective on the proclamation of the amending Act. Rule 31.15 reads as follows:

> The rate of interest to be used in determining the capitalized value of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is two and one half (2 1/2) per centum per annum.

21 The amendment was proclaimed on November 13, 1980. Mr. Burnell's report had been prepared on October 6, 1980, in which he stated that a discount rate of 1% would be appropriate considering the real rate of return on federal government bonds over the last ten years. The lower the real rate of anticipated return on the award, the greater the capital sum that is required to provide the family with a stream of payments to which they would likely have been the recipient had Mr. Comeau not met his untimely death. Apart from not accepting Mr. Burnell's opinion, based on evidence of actuaries I have heard in other cases, the rate at which awards are to be discounted to reflect what is the real rate of return has been fixed by the court and therefore governs, until changed, this aspect of the calculations in reaching an award.

22 In fixing the discount rate at 2 1/2%, the court is only gving effect to the difference between the anticipated rate of interest on investments and inflation rates that can be measured by the consumer price index so as to reflect the percentage by which, in the court's opinion, based on the evidence that was available to the judges at the time the Rule was made, the anticipated real rate of return on investments exceeded the anticipated inflation rate.

23 As can be seen by the words used in *Civil Procedure Rule* 31.15, the judges did not intend that the only discount rate that could be appropriate in any particular case would be 2 1/2%. The fixing of the discount rate at 2 1/2% is intended to reflect only the difference between interest rates and the rate of inflation. In any given case, there could be factors that would indicate that this discount rate would be inappropriate. I am thinking of a situation where the deceased had a record of increases in the years immediately preceding his death which would show that his annual income increases were substantially in excess of the annual increase in the consumer price index so that he could have expected to earn and thus benefit his family by a percentage substantially greater than the percentage increase in the consumer price index. Under such circumstances, a discount rate less than 2 1/2% would seem to be appropriate to reflect in a practical way the probability that his income would have outpaced inflation. The method used by the courts of calculating the present value of the stream of future payments is based on the deceased's annual income as of the date of death as a constant factor moving in lock step with inflation. Such is not necessarily the case. An alternative method to adjusting the discount rate would be to make an upward adjustment of the award to reflect such a contingency.

24 In this case, Mr. Comeau's increases, expressed as a percentage of his previous years' wages, were decreasing and his increase in his final year of employment approximately matched the increases in the consumer price index. I therefore cannot see any justification for using a discount rate other than the 2 1/2% rate which reflects only the anticipated difference by which interest rates will exceed the percentage increases in inflation rates based on historical records.

25 I find on the facts of this case that a reasonable discount rate to apply is 2 1/2%.

26 In this case, as has become the practice, the actuary called on behalf of the plaintiff submitted to the court calculations showing the sum required to be invested to provide the lost income benefits to the family for the appropriate number of years, using various discount rates. In the absence of such calculation, reference can be made to McGraw & Hill's *Handbook of Modern Accounting* which contains tables showing the present value of a dollar discounted at various rates.

27 The present value of the lost benefits can be calculated by multiplying the discounted value of a dollar for the number of years the benefits were expected to be received by the annual lost benefit to arrive at the capital sum required to replace these lost benefits.

28 In this case, I accept Mr. Burnell's calculations that the present capitalized sum needed to provide for future annual net payments of $8,371.36 required for the support of Mrs. Comeau and family, based on a discount rate of 2 1/2% for the joint lifetime of Mr. and Mrs. Comeau, but ceasing in any event not later than Mr. Comeau's sixty-fifth birthday,

would be $159,994.00.

29 Having determined the capitalized value of the future net payments that would have been available to the Comeau family to the date of Mr. Comeau's sixty-fifth birthday had he not been killed, it is necessary to consider to what extent this sum should be reduced to recognize the contingencies of life that may reasonably be foreseen. The court is not justified in imposing an automatic contingency deduction nor should it do so automatically.

30 It is clear from the decisions of the Supreme Court of Canada in *Lewis v. Todd* and *Keizer v. Hanna and Buch* that it is appropriate for the court to consider contingencies in arriving at the damage award. What is not clear is what contingencies should be considered. Certainly, there is a wide discretion in the trial judge to consider any evidence which takes the deceased's situation outside the average. I refer to the statement in *Lewis v. Todd* at p. 19 that:

> A trial Judge should consider whether there is *any* evidence which takes the deceased's situation outside the 'average'; whether there are any features of which no account was taken in the acuarial tables, either because the factor is entirely personal to the individual or, because the 'average' is not adapted for the category or class to which the person belongs, *e.g.* police officers.

31 There is really nothing in this case that takes the deceased outside the average insofar as life expectancy is concerned that would not be reflected in the Mortality Tables. What is not so clear is the extent to which the court should consider certain other factors, including the possibility of remarriage of the widow, the possibility of the widow's death before the expiry of the joint expectancy period, the possibility of the deceased retiring before the expiry of the joint expectancy period and the possibility that the deceased may have become unable to earn income due to sickness or otherwise. These were some matters referred to by the trial judge in *Keizer v. Hanna and Buch* and seem to have received implied approval as proper considerations when the case went before the Court of Appeal and the Supreme Court of Canada. In *Keizer v. Hanna and Buch*, the Supreme Court of Canada made the following statement with respect to the possibility of a widow remarrying. The court stated at p. 349:

> On the question of prospects of remarriage, the

> judge adopted the apt comments of Phillimore J. in *Buckley v. John Allen & Ford (Oxford) Ltd.*, [1967] 1 All E.R. 539, including the statement that judges should act on evidence rather than guesswork and, there being no evidence of any existing interest or attachment, concluded: 'I therefore accord no material significance to this prospect by way of deduction.' He does not say that he is according no weight to the contingency.

32 The possibility of remarriage is a contingency to be considered in this case as in all cases. In *Buckley v. Allen*, counsel for the defendant had not cross-examined the widow on this issue and the trial judge declined to make a deduction based on his guess as to her prospects of remarriage.

33 Approximately one year following the death of her husband, Mrs. Comeau commenced a relationship with a Mr. Wayne Comeau. He is gainfully employed as a millwright with E.M. Comeau & Sons. He stays overnight at Mrs. Comeau's residence on a regular basis and for periods of several weeks at a time. Mrs. Comeau recently gave up her job which had been paying her $7,500.00 a year. She testified that she gave up this job because she was having difficulty with her son due to the fact that her son did not have the parental influence of a father and he was getting into some difficulties. She testified that she has no plans to remarry and that Mr. Comeau does not support her or the family. It was argued on behalf of the defendant that a very strong inference should be drawn that she will be marrying or at least taking up a relationship with Mr. Comeau once this case is resolved. On behalf of Mrs. Comeau, it has been argued that one cannot assume in this day and age that she will remarry or that the person she marries or strikes up a relationship with will necessarily support Mrs. Comeau or the children. There is some merit in the latter argument. The burden of proof is on the defendant to show that Mrs. Comeau will likely receive a pecuniary advantage by remarriage or if she commences a common law relationship. (*Ball v. Kraft* (1967), 60 D.L.R.(2d) 35.) The defendant, Marsman, has discharged that burden. It is not guesswork but reasonably foreseeable that Mrs. Comeau will either marry or take up a common law relationship with Mr. Wayne Comeau and that he will make a financial contribution to the support of the Comeau family. I will deduct $20,000.00 from the award for this contingency.

34 Although the deceased Mr. Comeau was in good health, there was no guarantee that his good health would have contin-

ued; serious illness can strike the most healthy without warning. Such a contingency could have affected the late Mr. Comeau's employment and, as a consequence, the benefits his family would have continued to receive had he not been killed. Similarly, serious illness or death could be in the future for Mrs. Comeau. One cannot escape from the contingencies of life which are very real and which often have a serious effect on the benefits a family enjoys from the breadwinner.

35 On the other hand, it is possible that Mr. Comeau may have advanced beyond the level of work he then had, or he may have continued to work after age sixty-five, or he may have found better employment in the area where he lived and could conceivably have made a greater financial contribution to the well being of his family because the travel expenses would have been eliminated.

36 The possibilities of bad fortune seem no greater than those of good fortune. I do not feel there should be any further adjustment for contingencies in this case, upward or downward. To make such an adjustment would be simply guesswork and guesswork has not received judicial approval, at least with respect to the possibility of benefits arising out of remarriage, and I can see no reason why guesswork should play a part in the assessment of the other contingencies, unless there is evidence pointing to a real possibility of the contingency becoming a reality.

37 Since Mrs. Comeau and her family benefited from the late Mr. Comeau by an annual amount on which income tax had already been paid by him, it is necessary to increase the award by an amount sufficient to pay the income tax that will be levied on the annual payments so as to provide her with after-tax income equal to the lost benefit. This concept of compensation known as "grossing up the award" was approved in *Keizer v. Hanna and Buch*. In *Lewis v. Todd*, the Supreme Court of Canada reaffirmed the necessity of the court in assessing damages arising out of a fatal accident to consider both the impact of income tax on the deceased's income during his lifetime for the purpose of calculating the benefit the family received from him during his lifetime and, secondly, to consider the impact of income tax on the annual benefit the family will receive from the award. In short, for the purpose of determining the benefit the family received during the life of the deceased, income tax payable by him on his earnings must be deducted. For the purpose of determining the capitalized value of the annual benefit the family would have received had he lived, the capitalized value must be grossed up by an amount sufficient to

cover the impact of annual income tax on the interest earned on the award by the surviving spouse and family.

38 I accept Mr. Burnell's evidence that the award will have to be grossed up from $159,994.00 to $171,882.00 to provide a fund sufficient to net the Comeau family $8,371.76 annually after payment of income tax. These calculations are made on the basis that Mrs. Comeau was not working at the time of her husband's death and is not now working. I accept Mr. Burnell's evidence that the taxable portion of the annual payments she will receive from the award would be approximately 70% of the annual payment and that income tax payable by her would be approximately 7.4%.

39 In summary, based on a projected income for Mr. Comeau of $19,786.80, personal expenses of $6,500.00, income tax, etc. expense of $4,915.04, the Comeau family would have derived in 1979 a net benefit of $8,371.76. By the application of a 2 1/2% discount rate, with a deduction of $20,000.00 for contingencies, and grossing up the award to cover the income tax liability that Mrs. Comeau will have, I calculate the capitalized value of future payments required for the support of Mrs. Comeau and her family to compensate them for the loss of the stream of income caused by his death for which the defendant, Marsman, was responsible, at $152,000.00.

40 I have considered whether the award should be increased to provide for a fund to pay for the future cost of administering the fund as suggested by Mr. Burnell. His calculation shows the fund would have to be increased by $13,613.00 to cover a standard administration fee over the life of the annuity payments. First, there is no evidence that Mrs. Comeau plans to employ the services of an investment counsellor. Second, I am inclined to think that any cost incurred on an annual basis for the administration of funds through an investment broker should be offset by increased income over and above what Mrs. Comeau might earn if she simply invested the funds herself in deposit certificates or debentures. There is no justification for including a capitalized sum to look after future annual administrative charges.

41 Considering the ages of the children who are dependent on Mrs. Comeau and the fact that Mrs. Comeau is a relatively young widow who will have a life long dependency on the damage award, it would seem to me that the award of $152,000.00 should be divided 80% to the widow and 10% to each of the children.

42 There should not be any deduction from the award for pecuniary advantages derived by Mrs. Comeau from the death of her husband as the pecuniary benefits she received were: (1) life insurance proceeds and pensions which are not to be deducted by reason of Section 4(2) of the *Fatal Injuries Act*; (2) the acquisition of her husband's joint interest in the matrimonial home. As she already had the enjoyment of the home, she derived no benefit from her husband's death, except the acceleration of the falling into possession of the survivorship interest arising as an incidence of joint tenancy. In *Spurr v. Naugler* (1975), 11 N.S.R.(2d) 637; 5 A.P.R. 637, at p. 649, Chief Justice Cowan did not make a deduction for the acquisition by the widow of her deceased husband's interest in the matrimonial home owned in joint tenancy on the ground that she already had the enjoyment of the home. This rationale for not deducting anything from the award has been accepted in many cases.

43 As stated in *Keizer v. Hanna and Buch* at p. 342, the assessment of damages in these cases must be an "exercise of business judgment" and as stated in *Lewis v. Todd* at p. 14, the award is not simply an "exercise in mathematics" based on expert evidence. As stated by Mr. Justice Dickson in the latter case, if the figures produced lead to an award which, in the trial judge's view, is inordinately high, he has a duty to adjust the figures downward; if too low, a duty to adjust them upward.

44 The assessment of damages in a fatal injury case is anything but the precise science that the mathematics involved seems to portray. Assessing all the facts in this case, I have concluded an award of $152,000.00, reflecting an adjustment for contingencies, will give Mrs. Comeau and her children reparation for the wrongful act of the defendant, Marsman, which caused the death of Mr. Comeau in that such an amount shall ensure to her and the children the comforts and station in life they would have enjoyed had Mr. Comeau not been killed as a result of Mr. Marsman's negligence. There is no need to adjust the award upward or downward - it is reasonable.

45 Special damages have been proved, being the reasonable funeral costs of $1,573.00. Mrs. Comeau shall also recover these.

46 Mrs. Comeau claims pre-judgment interest. Section 38(9), (10) and (11) of the *Judicature Act*, as amended, provides as follows:

38 In every proceeding commenced in the court, law and equity shall be administered therein, according to the following provisions:

. . . . .

(9) In any proceeding for the recovery of any debt or damages, the court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal.

(10) Where a party pays money into court in satisfaction of a claim and another party becomes entitled to judgment for an amount equal to or less than that paid into court, the court shall award interest under clause (9) hereof only to the date of payment into court as if said date had been the date of judgment.

(11) The court in its discretion may decline to award interest under clause (9) hereof or may reduce the rate of interest or the period for which it is awarded

(a) if interest is payable as of right by virtue of an agreement or otherwise by law;

(b) if the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded;

(c) if the claimant has been responsible for undue delay in the litigation.

47 The provisions of Section 38(11) of the *Judicature Act* gives the court a discretion to decline to award interest or reduce the rate or the period where the claimant has not been deprived of the use of the money. Should the interest apply to the full amount of the award in this case or only a portion of it? This question has been canvassed in fatal injury cases in England culminating in the decision of *Cookson v. Knowles* [1978] 2 All E.R. 604. That case held that interest should only be awarded on that part of the award that relates to the period from the date of the death of the deceased to the date of judgment; in this case, September 17, 1979, to July 16, 1981 (I assume the order will be taken out on that date). I calculate that portion of the award at $14,161.00, being the

total of the amount of the benefit she would have received for that eighteen month period (based on an annual benefit of $8,371.76) of $12,588.00 and the funeral expenses of $1,573. There shall be no interest on the balance of the award as the loss has not yet been incurred because the capitalized sum is intended to provide a fund to replace the annual benefit that the family would have received had Mr. Comeau not been killed; the family has not been deprived of the use of these future payments.

48 In *Cookson v. Knowles*, the House of Lords has suggested that the *rate* of interest should be half the rate that the court would otherwise order as the full sum applicable to the period in question was not due from the date of the accident but simply continued to accumulate over the period from the date of the accident to the date of judgment. This is a rough but logical approach. Interest rates for guaranteed investment certificates maturing in a year during the period September, 1979, to July, 1981, would average about 14%, half of which is 7%. Therefore, I allow pre-judgment interest on the sum of $12,588.00 at the rate of 7% from September 17, 1979, to July 17, 1981. If the order is not taken out by July 17, 1981, the interest calculation will have to be revised upward as Section 38(9) of the *Judicature Act* requires that the pre-judgment interest be calculated to the date of judgment, being the date the order is signed. In addition, I will allow pre-judgment interest on $1,573.00 at 14% per annum from September 17, 1979, to the date of judgment.

49 There is one other practical consideration that relates to the question of interest on the award. A delay in payment is not to be encouraged. In *Lewis v. Todd*, interest was awarded as part of the award from the date of judgment until payment. The Supreme Court of Canada followed the case of *Fenn v. The City of Peterborough* (1980), 25 O.R.(2d) 399.

50 In *Lewis v. Todd*, the Supreme Court of Canada stated at p. 21:

> In *Fenn v. The City of Peterborough* (1980), 25 O.R.(2d) 399, the Ontario Court of Appeal accepted the argument that if the payment of the required capital sum is delayed the calculations made by the trial judge are no longer valid. The court pointed out that this could have been guarded against if the trial judge had ordered that the capital sum awarded should bear interest at 10% per annum (the anticipated investment rate in *Fenn*) from the date of judgment at trial to the date of payment - not as interest on the sum awarded but as part of the sum awarded. Thereby the requisite capital fund, when eventually paid, would be sufficient to achieve what was intended. In *Fenn*, the Ontario Court of Appeal made such an award. I think this court should make an award of the same nature in the present case, that is to say 8.25% from the date of judgment at trial to date of payment of the judgment - not as interest but as part of the award.

51 I will therefore order that the award include interest at the rate of 16% from the date of judgment to the date of payment of the judgment, not as interest on the sum awarded but as part of the award. I have chosen a rate of 16% because that is, at the present time, a reasonable, but conservative, rate of return on short term certificates.

52 In summary, Mrs. Comeau shall have judgment for:

(1) General damages - $152,000.00, apportioned 80% to Mrs. Comeau and 10% to each child;

(2) Special damages for funeral expenses of $1,573.00;

(3) Pre-judgment interest on $12,588.00 at 7% and on $1,573.00 at 14% from September 17, 1979, to the date of judgment;

(4) An additional amount equal to interest at 16% on the total sums provided for in paragraphs (1), (2) and (3) above from the date of judgment to payment; and

(5) Costs to be taxed.

53 I will now assess the damages suffered by Mr. States as the result of the gross negligence of Mr. Marsman, the driver of the car in which Mr. States was a passenger at the time of the accident.

54 Mr. States has put forward a claim for loss of wages as a shucker of scallops at Digby for 109 days during the period September 17, 1979, to June 23, 1980, for a total claim for loss of wages of $10,900.00. The approximate remuneration paid to scallop shuckers is $20.00 to $25.00 a bucket; Mr. States shucked from five to six buckets a day. The accident took place on September 17, 1979. Mr. States had been unem-

ployed for a number of years prior to taking up scallop shucking on or about August 10, 1979. As a result of the accident, he was unable to work for approximately a year. Mr. States has had a rather lengthy life of crime and as he spent most of the period 1971 to 1978 in jail, he could not remember when he last had a job. He worked about one month shucking scallops and has not been employed since the accident. Mr. States had no documentary proof of any sort that he was paid the sums he said he received for shucking scallops. He was paid by cheque but there was no evidence from his employer stating what he earned during the period. Mr. States testified that he did not pay any income tax or file a tax return for the year 1979 so there is no help there. He said that in the month or more he worked, he earned $3,900.00. This would necessitate his having worked every day of the week. The scallop season in the Digby area apparently opens in April and closes in October (there were no specific dates given in evidence). It is a reasonable inference that at the most Mr. States could have worked until the end of October had he not been injured in the accident. Conceivably, he could then have begun work again sometime in April of 1980. He was fit to do any sort of work by June 23, 1980, as by that time his hand and leg which had been broken in the accident had completely healed, although up to that time he would not have been able to work had he chosen to do so or had work been available. I do not accept Mr. States' evidence that he earned $3,900.00 in the month or so he worked prior to the accident. I do not accept his evidence that he would have had employment on a scallop boat going to sea later on the day of the accident had the accident not taken place. I do not accept his evidence that had he not been injured he would have been in Digby in the spring of 1980 to work either on the boats at sea or on the boats when they returned to Digby Harbour with a catch of scallops. Untruthfulness radiated from Mr. States' demeanour on the witness stand. I am not prepared to make any award with respect to his claim for lost wages as I do not accept his evidence that he would have been employed after September 17, 1979.

55 As to his claim for personal injuries, Mr. States suffered rather serious injuries as a result of the automobile accident. His evidence that he continues to suffer from these injuries is contradicted by the medical testimony. He was treated by Dr. A. MacD. Lawley, a surgeon and Chief of Staff at the Digby General Hospital. He had a compound fracture of the left tibia, fractured ribs, compound fractures of the 1st, 2nd and 3rd metacarpals (left hand), a lacerated forehead and a concussion. He was hospitalized from September 17 to

September 30, 1979. A fractured rib had penetrated the lung; the lung was reinflated as this was the most serious and urgent problem. The fractured tibia was reduced and the leg placed in a full length cast. The fractured hand was put in a padded splint as there was too much swelling. On September 18, 1979, the chest tube became plugged and a new one had to be inserted. On September 28, 1979, the fractured hand was operated on and a K wire and banjo splint inserted. The most serious of the fractures to the hand was the fracture of the thumb. Dr. Lawley estimated that the leg cast should have been left on for six to eight months and the cast on the arm and the wire and splint on the hand removed after six to eight weeks. Mr. States left the Digby area and returned to Toronto. On January 24, 1980, he consulted Dr. S.M.T. Tooke requesting that he remove the casts. Dr. Tooke's report is dated April 14, 1981, and states that his examination revealed that the left tibia fracture healed without deformity and the fractures of the metacarpals of the left hand healed but with a deformity. He felt there was a minimal functional impairment of the hand and he prescribed Mr. States to resume activity as tolerated and that surgery would not likely improve the function of his hand. This was the situation as of June 23, 1980. His prognosis was simply that the symptoms in his hand might persist another year to two years, but that he would not have any serious functional impairment, but would have a permanent cosmetic deformity. The symptom in the hand was some aching in the morning.

56 Dr. Lawley next saw Mr. States on April 14, 1981. He testified that he had the fracture sites x-rayed and both fractures were solidly united although the fracture sites could possibly lead to arthritis. Mr. States has some scarring on the face, leg and hand. There is some swelling in the hand but the hand has good strength; further surgery is not required other than for cosmetic purposes. In cross-examination, Dr. Lawley acknowledged that Mr. States enjoyed a complete recovery.

57 There was a period from the date of the accident, September 17, 1979, until June 23, 1980, that Mr. States was unable to work. However, the medical testimony is very clear that after June 23, 1980, he could work. At the trial of the liability issue in this case in January of 1981, Mr. States testified that he could not stand on his leg for any length of time and that he had no strength in his hand. This evidence was later contradicted by the medical testimony.

58 Mr. States testified on the assessment of damages in April of 1981 that he was sensitive and embarrassed about the scarring on his forehead and hand. I had an opportunity to observe the scars on his forehead and they are not particularly noticeable nor do they present any serious disfigurement. Similarly, his hand has a slight swelling in it which, according to the medical testimony, could be corrected by cosmetic surgery although an operation is not recommended as the hand functions satisfactorily. Again, on this point Mr. States' testimony at the trial was contradicted by the medical evidence as to the effect of the injury he sustained to his hand. I accept the medical testimony over that of Mr. States'.

59 Mr. States was twenty-three years of age at the time of the accident. I am satisfied there is a real possibility of arthritis at the sites of the fractures. Although Mr. States received serious injuries to his leg, hand and wrist, and had a collapsed lung which could have been serious, there were no complications and all injuries healed satisfactorily. However, Mr. States was disabled for a period of eight to nine months. I do not accept his evidence that he cannot work because he cannot stand on his leg for more than twenty minutes at a time. The medical evidence does not support this assertion. Mr. States had to undergo two operations and subsequent follow-up treatment and physiotherapy. He endured pain and suffering associated with his injuries. He had a loss of amenities in that he could not play basketball and other sports which he enjoyed for a period of time after the accident. He says his ankle still gives out; the medical evidence does not support this. The medical evidence indicates he can now play, but he is concerned about some scarring on his legs although these scars were not displayed to me. If the leg scars are less noticeable, and one might infer they are since they were not displayed to the court, than those on his forehead, the scarring would not be significant. I find Mr. States has no permanent disability except to the extent of the scarring and a minor cosmetic deformity of the hand and the possibility of arthritis in the future at the sites of the fractures. I will assess general damages at $10,000.00 and special damages in the amount of $50.00 to reimburse him for expenses incurred in attending the doctor for checkups following his discharge from hospital.

60 Mr. States shall have interest on the award at 14% from September 17, 1979, to the date of judgment.

61 Mr. States shall have his costs to be taxed against the

defendant, Marsman.

Order accordingly.

Editor: Mary S. Stewart
mdc

AMHERST CREDIT UNION LTD. v. QUEBEC ASSURANCE CO., CASUALTY CO. OF CANADA, FEDERATION INS. CO. OF CANADA and COBEQUID INS. & REALTY LTD.
(S.AM. No. 0528)

Nova Scotia Supreme Court, Trial Division
MacIntosh, J.
July 14, 1981.

Summary:

A mortgagee, designated as a loss payee under a fire insurance policy, brought an action against the insurers to recover the deficiency after realizing on the mortgage security. The Nova Scotia Supreme Court, Trial Division, dismissed the mortgagee's action, because the insured made a material misrepresentation, which rendered the policy void ab initio.

INSURANCE - TOPIC 1428

The insurance contract - Termination by insurer - Waiver of grounds for termination - An insured misrepresented the property owner under a fire policy - On August 15, the insurer discovered the true owner and knowing he was a bad risk, instructed the agent to cancel the policy - The insured would not surrender the policy so on October 6 the insurer cancelled it - The building burned - The Nova Scotia Supreme Court, Trial Division, held that the delay in cancellation from August 15 to October 6 after discovering the true property owner did not constitute affirmation of the policy or waiver of the insured's misrepresentation - See paragraph 52.

INSURANCE - TOPIC 2446

Applicant's duty of disclosure - Materiality - Material matters - The Nova Scotia Supreme Court, Trial Division, stated that the identification of persons behind a limited company and knowledge that persons involved in a property have had a number of fire insurance claims in the recent past are both material facts which should be communicated

6

Domenic Cirella, Plaintiff,

and

Her Majesty the Queen, Defendant.

Federal Court — Trial Division (Thurlow, ACJ), December 7, 1977 (Court No T-4130-76), on appeal from a decision of the Tax Review Board, reported [1976] CTC 2292.

Income tax—Federal—Income Tax Act, RSC 1952, c 148 (am SC 1970-71-72, c 63)—3, 5(1), 9(1)—Damages awarded for loss of income.

In 1972 the plaintiff received $34,400 as damages for personal injuries sustained in an automobile accident which happened in 1968. The judgment award included special damages of $14,500 for loss of income from the date of the accident until the end of 1971. At the time of the accident the plaintiff had been employed as a welder but he could not continue the employment because of his injuries. In 1972 he was operating a light welding business for himself. The Minister of National Revenue included the $14,500 in assessing the plaintiff's income for 1972.

HELD:

The amount was neither income from the plaintiff's business nor salary or wages from employment. The damages were not of an income character and the description of the amount in the judgment as being for loss of income merely indicated the method by which the total award was calculated. Appeal allowed.

[For an Editorial Note to this case, see p 3801.]

M Mazza for the plaintiff.

N Helfield for the defendant.

Cases referred to:

The Queen v Jennings, [1966] SCR 532;

London and Thames Haven Oil Wharves, Ltd v Attwooll, [1967] 2 All ER 124;

Raja's Commercial College v Gian Singh & Co Ltd, [1977] AC 312;

The Queen v Atkins, [1976] CTC 497, 76 DTC 6258;

Curran v MNR, [1959] SCR 850; [1959] CTC 416; 59 DTC 1247;

Graham v Baker, 106 CLR 340;

Groves v United Pacific Transport Pty Ltd, [1965] Qd R 62;

Glenboig Union Fireclay Co, Ltd v IRC, 12 TC 427.

The Associate Chief Justice:—The issue in this appeal is whether the plaintiff is liable for income tax in respect of an amount of $14,500, being part of a total amount of $34,400 awarded him by a judgment of the Supreme Court of Ontario in 1972 for damages for personal injuries sustained by him in a motor vehicle accident in 1968. The reasons for judgment indicate that the particular amount of $14,500 was awarded as special damages in respect of the plaintiff's loss of income for the period from the time of the injury to the end of 1971.

The plaintiff is a welder. At the time of the injury he was employed as such by a company known as "Indofab" and earning $108 per week. He went back to his employer after his recovery but, because of the permanent disability arising from his injuries, he was unable to do the heavy work involved in his job. Since then he has carried on a light welding business of his own. The precise date when the business was started is not clear, the evidence of the plaintiff being that it was in 1970 or 1971.

In reassessing the plaintiff for the 1972 taxation year, the Minister included the $14,500 in the plaintiff's income and his action in so doing was upheld by the Tax Review Board.

In support of the assessment, the defendant in the defence cited sections 3 and 9 of the *Income Tax Act*. The same statutory provisions had been cited by the Minister in his notification under subsection 165(2). But as the evidence indicated that, prior to the injury, the plaintiff had been an employee of Indofab rather than engaged in carrying on his own business, counsel for the Crown also referred to and relied on subsection 5(1).

Section 3 of the Act requires that there be brought into the computation of the income of a taxpayer for a taxation year:

> the aggregate of amounts each of which is the taxpayer's income for the year ... from a source inside or outside Canada, including, without restricting the generality of the foregoing, his income for the year from each office, employment, business and property ...

Under subsection 5(1),

> 5. (1) Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by him in the year.

Under subsection 9(1),

> 9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.

No case was cited, and I am not aware of any, in which the particular problem raised by this appeal, viz, the liability of a taxpayer for income tax in Canada in respect of special damages awarded for loss of income over a particular period of time resulting from the impairment of his earning capacity by personal injuries, has been decided. I was told by counsel for the plaintiff—without protest by counsel for the defendant—that such amounts have not heretofore been assessed. But whether that is so or not, the point was left open by the majority of the Supreme Court in *The Queen* v *Jennings et al*, [1966] SCR 532. There, in the course of discussing the application in this country of the decision of the House of Lords in *British Transport Commission* v *Gourley*, Judson, J said at page 544:

> For what it is worth, my opinion is that an award of damages for impairment of earning capacity would not be taxable under the Canadian *Income Tax Act*. To the extent that an award includes an identifiable sum for loss of earnings up to the date of judgment the result might well be different. But I know of no decisions where these issues have been dealt with and until this has been done in proceedings in which the Minister of National Revenue is a party, any expression of opinion must be insecure. Such litigation would have to go through the Board of Tax Appeals or direct to the Exchequer Court with a final appeal, in appropriate cases, to this Court. As matters stand at present this ground alone is perhaps sufficient for the rejection of the principle in *Gourley*.

The substance of the argument put forward by counsel for the defendant, as I understood it, was that the amount here in question was not damages for the loss of anything of a capital nature but was for loss of income for a particular period of time, that as such it replaced or compensated the plaintiff for income he would have earned and thus it should be brought into his income for tax purposes. He relied in particular on *London and Thames Haven Oil Wharves, Ltd* v *Attwooll*, [1967] 2 All ER 124, where an amount recovered for loss of use of a jetty for 380 days during repair following a collision by a ship with it was held to have been properly assessed as income, and *Raja's Commercial College* v *Gian Singh & Co Ltd*, [1977] AC 312, where damages recovered for loss of the opportunity to earn a higher rent during a period in which tenants, who had been given notice to quit, overheld were considered to be assessable as income of the landlord.

I do not think the principle of these cases bears on the present situation. They were concerned with elements to be brought into account in computing the profits of businesses or properties where there had been a decrease or shortfall in the revenue, in the first case by damage done to an income-producing asset of the business and in the second by a tortious overholding of an income-producing property. In each case, the loss had been compensated for by the damages awarded. Here, there was no property in respect of which any loss arose and for any part of the period involved in the calculation of the damages here in question in which it might be concluded that the plaintiff was carrying on his newly-commenced business it cannot, in my view, be affirmed that there was any loss or shortfall of revenue of that business attributable to the tort for which he was compensated since the injuries had been incurred long before the business was commenced. I should add that I also doubt that the plaintiff could properly be regarded as an asset of his own business so as to treat damages recovered for personal injuries occasioned to him as filling a hole or shortfall of the revenue of the business resulting from his injury. In my view, therefore, the amount in question is not assessable in whole or in part as income of the plaintiff's business.

Nor do I think the amount can be regarded as income from employment. It was not salary or wages or a gratuity or other remuneration of employment, and it was not paid or received as such.* It was not earned by working for or serving anyone. And it was not paid or received to induce the plaintiff to work for or serve anyone.†

* Compare *The Queen* v *Atkins*, [1976] CTC 497; 76 DTC 6258.

† Compare *Curran* v *MNR*, [1959] SCR 850; [1959] CTC 416; 59 DTC 1247.

Moreover, in defining income from employment, the statute is very precise as to what is to be included, but nowhere does it specify that such an amount is to be included as such income.

There remains the question whether the amount is otherwise of an income nature so that it ought to be regarded as income from a source of income within the meaning of section 3. The wording of the judgment describes the amount in terms suggestive of income and calculates it in part on the basis of prospective income that, but for the injury, might have been earned. But the nature of the amount, as I see it, is determined not by that but by the nature of the award itself. What a court awards in personal injury cases is damages to compensate the injured person for the wrong done him. One of the elements frequently involved in such awards is the impairment of the earning capacity of the injured person resulting from his injuries and, in such cases, it is usual to assess the damages in respect thereof in two parts: one consisting of the loss up to the time of the judgment, which can generally be calculated with some approach to accuracy because the relevant events have already occurred; and the other, the loss for the future which can never be better than an informed and reasonable estimate. In both instances, however, they are for the same injury, the same impairment of earning power. There is but one tort and one impairment and, in my opinion, the damages therefor are all of the same nature.

The point is put thus in the 13th edition of *McGregor on Damages* at page 296:

> The only feature which is not actually decided by *Gourley's* case is whether these particular damages would themselves be liable to tax, for it was agreed that they would not be. Earl Jowitt alone gave his opinion on the correctness of this, saying that he thought that it was rightly agreed. And indeed it would seem that there is no "source" from which the amount given as damages can be said to come as income, for it represents not so much loss of earnings as the loss of future earning capacity, which is a capital value. Further, no distinction was taken in *Gourley's* case between the special damages for loss of earnings up to the time of judgment and the general damages for loss of future earning capacity. This is correct, and it would be fallacious to regard the special damages as taxable on the ground that they are loss of income and the general damages as not taxable on the ground that they are loss of a capital asset. For both are of the same nature, and it is only the accident of the time when the action is heard that will put a particular sum into the one category or the other. If the general damages for loss of future earning capacity are to be regarded as not taxable, then the same should be said in respect of the special damages, which in this case only represent a portion of the general damages for loss of earning capacity in a crystallised form. And indeed the plaintiff has not specifically earned, by working for them, the sums of damages awarded as special.

To the same effect is the reasoning of the High Court of Australia in *Graham* v *Baker* (1961-62), 106 CLR 340. The Court (Dixon, CJ and Kitto and Taylor, JJ) said at page 346:

> So far the matter has been discussed as if the right of a plaintiff whose earning capacity has been diminished by the defendant's negligence is concerned with two separate matters, ie loss of wages up to the time of trial and an estimated future loss because of his diminished earning capacity. It is, we think, necessary to point out that this is not so. A plaintiff's right of action is complete at the time when his injuries are sustained and if it were possible in the ordinary course of things to obtain an assessment of his damages immediately it would be necessary to make an assessment of the probable economic loss which would result from his injuries. But for at least two obvious reasons it has been found convenient to assess an injured plaintiff's loss by reference to the actual loss of wages which occurs up to the time of trial and which can be more or less precisely ascertained and then, having regard to the plaintiff's proved condition at the time of trial, to attempt some assessment of his future loss.

This view was followed by Gibbs, J in *Groves* v *United Pacific Transport Pty Ltd et al*, [1965] Qd R 62 at 65:

> Although it is usual and convenient in an action for damages for personal injuries to say that an amount is awarded for loss of wages or other earnings, the damages are really awarded for the impairment of the plaintiff's earning capacity that has resulted from his injuries. This is so even if an amount is separately quantified and described as special damages for loss of earnings up to the time of trial. Damages for personal injuries are not rightly described as damages for loss of income.

Adopting, as I do, this view of the nature of the right of the plaintiff to the damages in question and having regard as well to the fact that they were in no sense earned or gained in the pursuit of any calling or trade or from property but arose from the injury done him, I am of the opinion that these damages are not of an income character and that the description of them in the judgment as damages for loss of income and the reasoning applicable thereto do not characterize the amount awarded as income but merely indicate the method by which a portion of the total award, which is of a capital rather than an income nature, was calculated. See *The Glenboig Union Fireclay Co, Ltd* v *Commissioners of Inland Revenue* (1922), 12 TC 427, and *The Queen* v *Atkins* (*supra*).

The appeal will be allowed with costs and the reassessment will be referred back to the Minister for reassessment accordingly.

Heskel S Abed, Appellant,

and

Minister of National Revenue, Respondent.

Federal Court—Trial Division (Walsh, J), December 16, 1977 (Court No T-1739-71), on appeal from a decision of the Tax Appeal Board, reported [1971] Tax ABC 106.

Income tax—Federal—Income Tax Act, RSC 1952, c 148—2(1), (2), 3, 4, 31(1), 85B(1)(b), (d), (2), 139(1)(e), (7) [see 2(1), (3), 9(1), 115(1), 12(1)(b), 20(1)(n), 248(1), 253 of present Act]—Canada-US Tax Convention—Articles I, III, VIII, XI—Protocol—3(b), (d), (e), (f)—Residence—Real estate transactions in Canada by non-resident—Whether carrying on business in Canada—Whether Canada-US Convention applicable where no US enterprise involved—Whether reserve allowable when not originally claimed but allowed by the Minister.