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FENN et al. v. CITY OF PETERBOROUGH et al.; PETERBOROUGH UTILITIES COMMISSION et al., Third Parties

Ontario Court of Appeal, MacKinnon, A.C.J.O., Jessup, Arnup, Zuber and Morden, JJ.A. May 8, 1979.

Limitation of actions — Defendant negligently undermining gas main — Main fracturing five months later and escaping gas causing explosion which killed some people and injured others — Writ issued less than six months after explosion — Statute providing that action must be brought within "six months next after the act committed" — Whether action barred — Public Utilities Act, R.S.O. 1970, c. 390, s. 32.

In early August, defendant utilities commission was replacing water service lines in a residential neighbourhood. The excavation work exposed a gas main. A fracture occurred in the gas main in early January because of stresses placed upon the main as a result of lack of support or blocking and inadequate and improper back-filling during and following the excavation. Gas escaped from the main and an explosion occurred destroying a house, killing some of its occupants and injuring others. An action was commenced less than six months later. The commission raised as a defence s. 32 of the *Public Utilities Act*, R.S.O. 1970, c. 390, which provides that: "No action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed . . .". The trial Judge held that the action was not barred. On appeal by the commission to the Ontario Court of Appeal, *held*, the appeal should be dismissed.

The trial Judge was correct in holding that the six months did not begin to run until the date of the explosion. The basic purpose of a statutory limitation provision is to prevent the bringing of stale claims. In the case of claims against persons acting pursuant to statutory authority, the traditional legislative approach has been to provide for a much shorter period of time than for similar claims against defendants not so acting. However, it would be absurd to attribute to the Legislature an intention, in the public interest or otherwise, to bar claims which not only are not stale but which could never have been brought before the running of the stipulated time. Having regard to the provision's basic purpose, the words "the act committed" in s. 32 of the *Public Utilities Act*, should be interpreted to mean "the cause of action arose". "The act committed" is a compendious term referring to an act that, because of its consequences, has legal significance.

[*Davies v. Traders Finance Corp.*, [1959] O.W.N. 99, 18 D.L.R. (2d) 48, [1956-60] I.L.R. 1065*n*, distd; *Berardinelli v. Ontario Housing Corp. et al.*, [1979] 1 S.C.R. 275, 90 D.L.R. (3d) 481, 8 C.P.C. 100; *Carey v. Metropolitan Borough of Bermondsey* (1903), 67 J.P. 447; *Huyton & Roby Gas Co. v. Liverpool Corp.*, [1926] 1 K.B. 146; *Roberts v. Read et al.* (1812), 16 East. 215, 104 E.R. 1070; *Gillon v. Boddington* (1824), Ry. & Mood. 161, 171 E.R. 979; *Nicklin et al. v. Williams* (1854), 10 Ex. 259, 156 E.R. 440; *Whitehouse v. Fellowes* (1861), 10 C.B. (N.S.) 765, 142 E.R. 654; *Turley v. Daw* (1906), 94 L.T. 216; *Freeborn v. Leeming*, [1926] 1 K.B. 160; *Watson v. Fram Reinforced Concrete Co. (Scotland), Ltd. and Winget, Ltd.*, [1960] S.C. (H.L.) 92, refd to]

Municipal law — Plaintiff injured as result of negligence of public utilities commission or its servants — Whether commission statutory agent of municipality for which it was created — Whether both commission and municipality liable to plaintiff — Whether municipality entitled to be indemnified by commission.

Principal and agent — Plaintiff injured as result of negligence of public utilities commission or its servants — Whether commission statutory agent of municipality for which it was created — Whether both commission and municipality liable to plaintiff — Whether municipality entitled to be indemnified by commission.

A public utilities commission is the statutory agent of the municipality for which it was created. Where injury is sustained or damage suffered because of the negligence of the commission or its servants, both the municipality and the commission may be sued by the injured party on the basis of the common law principles applicable to principal and agent. However, as between the municipality and the commission, the municipality is entitled to be indemnified by the commission on the basis of the common law right of a principal, who is found vicariously liable to a plaintiff by reason of the negligence of his agent, to be indemnified by the agent.

[*Campbell Flour Mills Co. Ltd. v. City of Peterborough* (1925), 57 O.L.R. 458, [1925] 4 D.L.R. 23; *Ridgway v. City of Toronto* (1878), 28 U.C.C.P. 579; *Young v. Town of Gravenhurst* (1910), 22 O.L.R. 291; affirmed 24 O.L.R. 467; *Scott v. Hydro-Electric Com'n of City of Hamilton* (1914), 7 O.W.N. 385; *Stevens-Willson v. City of Chatham et al.*, [1933] O.R. 305, [1933] 2 D.L.R. 407, disaprvd; *MacDougall, Sons & Co. et al. v. Water Com'rs of City of Windsor* (1901), 31 S.C.R. 326; affirming 27 O.A.R. 566; *Gibbs et al. v. Trustees of Liverpool Docks* (1856), 1 H. & N. 439, 156 E.R. 1273; revd 3 H. & N. 164, 157 E.R. 429; affd L.R. 1 H.L. 93, *sub nom. Mersey Docks & Harbour Board Trustees v. Gibbs et al.*; *Humphreys v. City of London*, [1935] O.R. 91, [1935] 1 D.L.R. 300; affd [1935] O.R. 295, [1935] 3 D.L.R. 39; *Collins v. Hydro-Electric Com'n of Renfrew*, [1948] O.R. 29; *MacKinder and MacKinder v. City of London et al.*, [1953] O.R. 52, [1953] 1 D.L.R. 452; *G.N.J. Properties Ltd. v. Barriesim Developments Ltd., City of Barrie Public Utilities Com'n, Third Party*, [1973] 3 O.R. 614; *Jones v. Manchester Corp. et al.*, [1952] 2 Q.B. 852; *T.T.C. v. Metro. Toronto*, [1960] O.R. 487; *Re City of Berlin and County Judge of County of Waterloo* (1914), 33 O.L.R. 73, 22 D.L.R. 296; *Re Gillis; Township of Tisdale v. County of York*, [1950] O.W.N. 21; *Re Wright*, [1938] O.R. 117, [1938] 2 D.L.R. 52, 69 C.C.C. 397; *McFee v. Joss* (1925), 56 O.L.R. 578, [1925] 2 D.L.R. 1059; *Custom Ceilings Inc. v. S.W. Fleming & Co. Ltd. et al.*, [1970] 3 O.R. 17, 12 D.L.R. (3d) 209; *Lister v. Romford Ice & Cold Storage Co. Ltd.*, [1957] A.C. 555; *Ryan v. Fildes et al.*, [1938] 3 All E.R. 517; *Morris v. Ford Motor Co. Ltd.*, [1973] Q.B. 792, refd to]

Damages — Personal injuries — Limit on awards of non-pecuniary general damages for pain and suffering and loss of amenities of life — Plaintiff suffering devastating and totally disabling injury — Cases in Supreme Court of Canada not establishing an absolute limit of $100,000 — Higher award justified because of erosion of value of money since Supreme Court of Canada cases and because of fact that this plaintiff suffered more pain than plaintiffs in those cases — Award of $125,000 appropriate for non-pecuniary general damages.

[*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, 19 N.R. 50; *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, 19 N.R. 552; *Arnold et al. v. Teno et al.*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 19 N.R. 1; *Lindal v. Lindal*, [1978] 4 W.W.R. 592, refd to]

APPEAL by the defendant utilities commission and gas company,

from a judgment of R. E. Holland, J., 14 O.R. (2d) 137, 73 D.L.R. (3d) 177, in favour of the plaintiffs in an action for damages for personal injuries and wrongful death; CROSS-APPEAL by the plaintiffs in respect of damages and the dismissal of their action against the defendant city; APPEAL by the gas company from the dismissal of its third party action against the commission and the city, and by the city from the dismissal of its third party action against the gas company and the commission.

John J. Fitzpatrick, Q.C., and *Harvey Poss*, for appellant, Peterborough Utilities Commission.

Ian W. Outerbridge, Q.C., and *Warren H. O. Mueller*, for appellant, Consumers' Gas Company.

David A. L. Britnell, Q.C., *Gordon H. T. Farquharson*, Q.C., and *Paul D. Blanchard*, for respondent, City of Peterborough.

Eric R. Murray, Q.C., *Barry G. A. MacDougall* and *William E. Pepall*, for plaintiffs, respondents and cross-appellants.

W. Graham Dutton, Q.C., for Ontario Hospital Insurance Plan.

BY THE COURT:—On January 8, 1973, disaster stalked the household and entered the home of the respondents, Gerard and Sandra Fenn, with tragic and lasting consequences. At 12 o'clock noon of that day a natural gas explosion, followed by a fire, totally demolished their rented home at 521 Bolivar St. in the City of Peterborough, horribly injuring and mutilating Sandra Fenn and killing their three young children. It is accepted that this terrible event occurred through no fault or act of the Fenns.

The learned trial Judge gave judgment, after a 33-day trial, for, *inter alia*, damages of $719,074.43 in favour of Sandra Fenn against the appellant Consumers' Gas Company (Consumers) and the appellant Peterborough Utilities Commission (the Commission). He apportioned the liability at 75% to the Commission and 25% to Consumers and directed the usual contribution and indemnity each from the other. He dismissed the action as against the respondent City of Peterborough (the City) as well as the third party proceedings brought by Consumers against the Commission and the City and the third party proceedings by the City against Consumers and the Commission.

Consumers and the Commission appealed, both arguing that the negligence of the other was the sole cause of the explosion and, in any event, that its proportion of negligence which contributed to the damage should be no more than 10%. Consumers also argued on various grounds that, if it should be held liable to any degree for the damages, it should be indemnified by either or both the

Commission and the City in the third party proceedings. The Commission further argued that, as a matter of law, it was insulated from any finding of negligence in that the liability was that of the City. The Commission's final argument on liability, supported by the City, was that the action fails against it because of the effect of the limitation period found in s. 32 of the *Public Utilities Act*, R.S.O. 1970, c. 390.

Consumers and the Commission also appealed the quantum of damages awarded and Sandra Fenn cross-appealed on the issue of damages. Finally, counsel for the plaintiffs argued that the City should be liable to his clients on the basis of the applicability to the facts of this case of the principle enunciated in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, affirming L.R. 1 Ex. 265.

The facts

The trial Judge carefully and comprehensively reviewed the evidence and made his findings of fact on that review. It is necessary for us to repeat some of those facts, less comprehensively, in order that our conclusions on various issues, some of which were not argued before the trial Judge, may be understood in their factual context. We do say, at the outset, that we agree completely with the trial Judge's findings of fact, his determination of liability and his apportionment of negligence based on those findings and determination. There was ample credible evidence to support those findings.

Bolivar St., on which the Fenns lived, runs east and west. Number 521 was on the south side of the street, being a two-storey, semi-detached brick residence with a basement. Its companion was No. 519, the more easterly of the two houses. Between the front lawn of the two houses and the roadway, was a sidewalk and a boulevard. Underneath the boulevard was an eight-inch steel gas main which did not service the house and a four-inch wrought iron gas main from which two service lines extended, one being a capped line ending in the wall of No. 519 and one servicing the water heater in No. 521. On the north side of Bolivar St. was a trunk water main with a service connection running south to the boulevard in front of No. 521 with a connection into No. 519.

The mid point of the eight-inch gas main, which was located close to the curb, to the mid point of the four-inch gas main was a distance of 3.5 ft. The top of the eight-inch main was 4.2 ft. from the surface and the top of the four-inch main was 3.5 ft. from the surface. The water service pipes varied slightly in their distance from the surface but were approximately six feet below the sur-

face. The finding of fact by the trial Judge was that it was a fracture in the four-inch wrought iron gas main which caused a leak of natural gas. The gas was trapped below the surface by the frozen ground, percolating through the soil following the path of least resistance and entering the basements of Nos. 519 and 521, where it was probably ignited by the pilot light of the natural gas-fired hot-water heater in the basement of No. 521. The trial Judge held it was the combined negligence of the Commission and Consumers which led to the fracture and the resulting explosion, and, as already stated, apportioned the fault 75% to the Commission and 25% to Consumers.

The wrought iron gas main was laid in 1909 and operated by the City and the Commission for almost 50 years as part of a propane-air plant. It apparently was not much used in later years and in 1958 and 1959 the plant, piping and all physical assets, were sold to Consumers by the City. Transferred to Consumers as part of the sale were 227,450 ft. of wrought iron pipe which included, of course, the four-inch main running along Bolivar St. It was established that the fracture in the wrought iron pipe occurred through the threads where two lengths of pipe were joined by a threaded coupling. The trial Judge described the fracture as follows [14 O.R. (2d) 137 at pp. 141-2, 73 D.L.R. (3d) 177 at pp. 181-2]:

> The fracture occurred through the threads at the east edge of the coupling. The minimum thickness of the pipe at the fracture surface occurred at 40° counter-clockwise and was .043 ins. The maximum thickness was at 90° counter-clockwise and was .216 ins. A considerable amount of corrosion product was found over approximately 40° of the bottom surface of the pipe. The threads under this corrosion product had deteriorated. Relatively little corrosion had occurred at the thin section of the fracture face. The fracture had followed the route of a single thread over the top 120° in a brittle manner, leaving a granular flat surface on both sides of the fracture. Over approximately the next 65° on each side, the fracture was considerably rougher and included a step of one thread towards the west on both sides. The remaining approximately 110° followed the route on an individual thread down on both sides. At approximately 20° counter-clockwise from the bottom these two parts were connected by two sharp steps across the intervening thread. It is apparent that the main fractured in an almost completely brittle manner. It appears that the fracture initiated either near the top of the pipe or at the thinnest point in the pipe 40° counter-clockwise from the top. It appears probable that the fracture occurred without any measurable time between initiation and complete fracture.

The threaded portion where the fracture occurred was not overlapped and protected by the partner pipe.

Although little corrosion had occurred at the thin section where the fracture had occurred, there was a considerable amount of corrosion on the bottom surface of the pipe, and the threads under

the corrosion had deteriorated. The pipe was oval shaped or asymmetric so that, the theory was, the thread cutter, which itself was round, would cut more deeply into certain portions of the pipe when cutting the thread. As noted, the trial Judge found that "the main fractured in an almost completely brittle manner".

The evidence was that the pipe as it lay in the ground was at a temperature of about 40° Fahrenheit and would be in what was termed a "brittle mode". This means that in cold weather the wrought iron pipe was particularly susceptible to fracture, and with the application of moderate force a brittle fracture would follow. It was accepted that stresses were sharply increased and concentrated at the roots of the notches made by the threading of the pipes. In addition, there is a propensity for fracture at grooved areas, called "notch sensitivity", that is unexplained by simple stress concentration. This concentration of stress at the root of the notch makes it even more sensitive to fracture when it is brittle in cold weather. This particular susceptibility of wrought iron pipe to fracture under the circumstances recited required that great care be taken when working around it and necessitated an adequate system being set up to protect against this susceptibility.

In the summer of 1972 a tenant at 519 Bolivar St. complained about a water leak. The Commission decided to excavate and replace the water service lines leading to Nos. 519 and 521. Prior to any excavation work being done, the Commission notified Consumers that work was to be done in the area. Consumers sent out Kenneth Davis, an employee for some 14 years, who marked out the location of the gas mains using paint and stakes. This was a regular and routine part of his job. He met George Cheel, a senior foreman of the Commission and with the Commission some 30 years, at the site where the locations of the four-inch and eight-inch gas mains were staked out. The stake-out report, a printed form, completed by Davis, contained this:

> WARNING
>
> The Contractor must not work outside the area mentioned in part "C" without a further stake-out by the Company.
>
> If excavation is necessary over or near underground gas plant, extreme caution must be observed especially where mechanical equipment is used. The actual location of the gas plant must be determined in advance by exposing it by hand.

There is no notation on the form that if pipe (or "gas plant", to use the terminology of the report) were exposed Consumers was to be notified immediately. The trial Judge noted that it was obvious from the evidence that Consumers knew excavations were to be

carried out in the area of the old wrought iron main, although at the commencement of the work no one, either from the Commission or Consumers, had any real idea as to the extent of the excavations that would be required. We agree with the trial Judge's view that any excavation in the area of the wrought iron pipe should have been of concern to Consumers.

A four-man crew from the Commission commenced work on August 3, 1972. They first made an excavation through the asphalt surface at the north side of Bolivar and cut the old water service off at the main. They then moved to the south of the sidewalk at the property line of Nos. 519 and 521 to disconnect the old service pipe. A further excavation was then made north of the sidewalk, along its edge, in the boulevard from the area of the service to No. 521, in an easterly direction along the line of the water pipe, to the area where the pipe to No. 519 ran south. This excavation was approximately 12 ft. long and extended down some six feet to the water pipe. The south edge of this trench was at the north edge of the sidewalk. A backhoe was used to assist with the digging and with its two-foot bucket the width of the bottom of the trench was at least two feet. It was at this stage of the operation that the Commission's employees had to make a further excavation that had not been anticipated. In attempting to pull the old water pipe, followed by the new copper pipe replacement, under the roadway and through the excavation on the north side of the street the old pipe broke or stuck. It then became necessary to excavate in the boulevard between the eight-inch steel gas main and the four-inch wrought iron main. It should be noted that during these excavations there was no inspection by Consumers.

In this final excavation the backhoe was once again used to assist in the digging. The excavation was approximately five feet from east to west and at least two feet wide at the bottom, which was some six feet down. The backfilling of this excavation was done with the backhoe and blade and there was little or no compacting done in the course of completing the backfilling.

The distance between the four-inch and eight-inch main was only three feet. The trial Judge found, as he well could on the evidence and the reasonable inferences from that evidence, that, as a result of this last excavation, the four-inch gas main was partially exposed for a distance of five feet or so, and "at best, was supported, or appeared to be supported, by a wedge of soil" [p. 140 O.R., p. 180 D.L.R.]. Counsel for the Commission argued strenuously that there was no evidence to support this conclusion of the trial Judge and that the opinion of the expert who gave evidence

for Consumers was based on different hypotheses which the evidence did not support. In our view there was ample evidence to support the trial Judge's finding that the support for the four-inch main had been interfered with to such an extent that it was a contributing cause to the fracture which led to the escape of gas on January 8, 1973. It was noted by the trial Judge that in the course of the digging of this last trench the backhoe bucket had struck the eight-inch main but such striking, and the exposure of the four-inch main, were not reported to Consumers.

Some time prior to 1973 a co-ordinating committee had been set up by the City's engineering department in co-operation with certain other companies and utilities including Consumers and the Commission. This committee met fairly regularly to discuss matters of common concern and "regulations" were issued by the co-ordinating committee from time to time. A meeting of the committee was held on June 1, 1972, and the chairman of the committee (who was employed in the City's engineering department) "was requested to review the present regulations in regard to road cuts and make any necessary revisions, and present to the Committee at a future meeting". On June 9, 1972, "regulations" with respect to "cuts" in street allowances were circulated. A note to the regulations reads, in part, as follows:

> Normally no one will be given permission to cut into any portion of a City street allowance except the Peterborough Utilities Commission . . . the Consumers' Gas Company . . . These regulations are meant to apply to the above-mentioned agencies.

Included in the regulations was the requirement for a permit before any cut was made into a roadway or sidewalk. No permit was required where the cut only affected grass areas or private driveways or sidewalks. The regulations required that in trench restoration, the trench would be backfilled with material similar to the original material so that the frost effect on the compacted trench would be the same as on the ground around it. Further, the backfill was to be compacted in layers not exceeding six inches in depth. These directions were not followed by the Commission employees in backfilling either the five-foot or the twelve-foot trench.

Findings of negligence

1. *The Commission*

The trial Judge, having recited these and other facts, came to the conclusion, as already noted, that the Commission was 75% at fault for the explosion and Consumers 25% at fault. His reasons, based on his findings of fact, for holding the Commission liable were as follows [at pp. 145-6 O.R., pp. 185-6 D.L.R.]:

> It is common knowledge that gas is dangerous and when mixed with air in certain proportions and ignited it will burn or explode. It is to be expected, therefore, that gas distribution and transmission systems and gas-operated equipment will be treated with the greatest of care. There is a high risk and this produces a correspondingly high duty. This high duty of care rested in this case not only on the Gas Co. but also on the Commission. The officers and employees of the Commission, particularly William Powell, the general manager, who has been with the Commission 26 years, and George Cheel, the senior foreman, who had been with the Commission 30 years, had operated or assisted in the operation of this very system when it was used for the distribution of manufactured gas prior to its sale to the Gas Co. in 1959. Through their own experience they should have realized that the system was old and subject to leaks. With hindsight it is easy to set too high a standard. However, in my view, the senior officers of the Commission had an obligation to ensure that if digging was to be performed in the area of a gas main the following steps would be taken:
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> (1) A full description of the proposed work would be given to the Gas Co. with the request that the Gas Co. stake out the gas mains;
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> (2) If any change in the proposed work occurred requiring any further excavation in the proximity of a gas main, then the Gas Co. should be immediately advised of the change;
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> (3) Digging in the vicinity of gas mains should be done very carefully and if necessary by hand;
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> (4) Any gas mains uncovered should be immediately reported to the Gas Co.;
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> (5) The Gas Co. should be given the opportunity of making a decision on the support of any exposed mains and backfilling. That is, the Gas Co. should have the opportunity of doing the support work or requiring the Commission to do the work and also should be given the opportunity of either doing the backfilling itself or supervising backfilling by the Commission;
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> (6) Any backfilling performed by the servants of the Commission should be done with great care and with proper and adequate compaction.
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> These precautions were not taken and the senior officers of the Commission were negligent in this regard. I am also of the view that the servants of the Commission in this case were negligent in that:
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> (1) Although it was the original intention of the Commission to replace the defective water line without disturbing the gas main, it should have been clear that by the time the excavating work was finished the four-inch gas main had been exposed and was not adequately supported. In spite of this the exposure of the main and lack of support was not reported to the Gas Co.
>
> (2) No effort was made to properly backfill around the gas main and to make sure that the backfill was properly and adequately compacted so as to provide adequate support for the main.

Counsel for the Commission argued that the negligence found against his client did not, in law, contribute to the damage because once work was done around the old wrought iron gas main, no matter how carefully done, it was then susceptible to fracture to

the knowledge of Consumers which had not set up an adequate system to protect against this susceptibility. The trial Judge did advert to the failure of Consumers to maintain any inspection or supervision of the work when it was immediately adjacent to its pipes and held it negligent in that failure. However, as he also pointed out, the fact of the matter is that the main had been in the ground for 64 years without fracture and then fractured following the excavation work. This goes beyond coincidence and "natural" causes. Further, we agree entirely with his characterization of the conduct of the servants of the Commission as "reckless", not only in the way they backfilled around the gas main, but in carrying out their excavation work around it. There was, in this entire operation, on the part of the servants of the Commission, as said by the trial Judge, "a callous disregard for the safety of others". The Commission was negligent *qua* the plaintiffs and Consumers.

2. *Consumers*

In turning to the liability of Consumers one must have regard, as did the trial Judge, to the statement of Lord Wright, in *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd. et al.*, [1936] A.C. 108 at pp. 118-9, [1935] 4 D.L.R. 737 at pp. 741-2, [1935] 3 W.W.R. 446:

> That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are prima facie within the principle of *Rylands v. Fletcher*, L.R. 3 H.L. 330, affirming *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265: that is to say, that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the rule of strict liability if the gas escapes: the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Rylands v. Fletcher*, L.R. 3 H.L. 330, requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the City (that is in the sub-soil) in exercise of a franchise to do so. . . . [T]he rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers. . . . [T]he rule has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party, as in *Box v. Jubb*, 4 Ex. D. 76, which was approved by the Judicial Committee in *Richards v. Lothian*, [1913] A.C. 263; and not to any negligence of the defendants.

Counsel for Consumers argued before the trial Judge and again before us that his client was not guilty of any negligence and that

the whole cause of the explosion was the negligence of the Commission's workmen, who exposed the four-inch gas main and struck the eight-inch steel main but reported neither to their foreman. If it had been reported to the foreman and then to Consumers, Consumers, he argued, would have dealt with the matter in some appropriate way and there would have been no explosion. His argument, in detail, went to support the finding of negligence made by the learned trial Judge against the Commission and with this portion of his argument we have no difficulty in agreeing.

However, in assessing the negligence and the liability of Consumers, without any finding of strict liability on the basis of *Rylands v. Fletcher*, the trial Judge noted Lord Wright's description of the responsibility of a corporation in carrying inflammable gas as "tremendous" and went on to say [at p. 147 O.R., p. 187 D.L.R.]:

> I must bear this tremendous responsibility in mind. We are dealing with an old main that was fragile and delicate and entitled to be treated with care and respect. Some 25% of the Peterborough system consisted of old cast iron or wrought iron mains. It was these mains that produced leaks. The only way of checking the condition of the mains was through leak surveys and by visually examining the mains when exposed. The mains were subject to corrosion and corrosion had been a problem in Peterborough. Professor Sawers was called as an expert witness on behalf of the Gas Co. and said that as soon as you excavate anything under the level of the main you affect its support and the closer you get and the deeper you go, the greater the loss of support. Roderick Long, an engineer with the Gas Co. for many years, and who was general superintendent of operations in 1972, was even more specific and testified that any parallel excavation closer than six feet to a gas main three feet below the level of the line would be of concern. It was his view that in excavating you should stay at least two feet out from the main for every foot you go below the level of the main. It is perfectly obvious that an escape of gas from a fractured main can result in an explosion and fire with the attendant loss of life, injury and damage to property. The officers and employees of the Gas Co. should have had in mind at all times the danger inherent in excavating in the proximity of this old wrought iron main and should have borne in mind at all times the tremendous responsibility that rested upon them to do everything reasonable within their power to ensure that there be no escape of gas as a result of any act or neglect on their part or as a result of any act or neglect on the part of third parties. A main of this age required the greatest care and consideration. The alternative was to remove wrought iron mains from the system completely or to line them with plastic.

He then pointed out that Lord Wright in *Northwestern Utilities* (at p. 127 A.C., p. 749 D.L.R.) had discussed the standard of care imposed on a company like Consumers and had stated:

> If they did know [of the City Works] they should have been on their guard: they might have ascertained what work was being done and carefully investigated the position, or they might have examined the pipes likely to be affected so as to satisfy themselves that the bed on which they lay was not being disturbed. Their duty to the respondents was at the lowest to be on the watch and to be vigilant:

The trial Judge went on to hold [at pp. 148-9 O.R., pp. 188-9 D.L.R.]:

> The officers and employees of the Gas Co. were negligent.
>
> In the first place the senior officers of the Gas Co. should have made clear, in some institutional way, the extreme danger of excavating in the proximity of wrought iron gas mains. Some system should have been in effect to clearly inform all Gas Co. field men of the danger and, through them, other companies or utilities engaged in excavating anywhere in the area of gas mains. The failure to do this undermines any justification the Gas Co. might have in relying on other utilities to inform them of any exposure of their gas mains. Roderick Long, general superintendent of the Gas Co., knew that any parallel [excavation] closer than six feet to a gas main three feet below the level of the line would be of concern and this sort of knowledge should have been passed on to the field men. The Gas Co. could not very well rely on warnings from some other utility if the employees of that other utility did not themselves fully realize the danger.
>
> In the second place, in the circumstances that existed, I am of the opinion that a Gas Co. employee should have inspected the site of the excavation on a regular basis and arrangements should have been made so that an inspection could be carried out before any backfilling occurred. If this had been done it is probable that the exposed main would have been properly supported and the backfill properly compacted.

Counsel for Consumers argued that the trial Judge's statement, *supra*, that the knowledge of Consumers should have been passed on to the field men was not a finding of negligence and was not a cause contributing to the explosion. Further, while acknowledging that a duty of care was owed to the plaintiffs, counsel for Consumers submitted that there was no such duty owed by Consumers to the Commission. His position was that the Commission knew as much about the extreme danger in working close to this ancient pipe as did Consumers and there was no duty on Consumers to protect the Commission from its own negligence. However, there was evidence, much of which was recited to us and some of which was referred to by the trial Judge, from which he could properly draw the inference that Consumers, and Consumers alone, were aware of the various factors that made this wrought iron pipe much more susceptible to fracture than steel pipe and of the extreme danger involved in excavating near such pipe and interfering with its support. The Commission was not shown to have this particular knowledge and it is clear, as found by the trial Judge, that the employees of the Commission did not fully realize the danger in excavating near the wrought iron pipes. Consumers should have made known to those excavating the great danger at-

tendant upon such work in the circumstances recited, and have been present as a matter of routine. There was, of course, another benefit or security which Consumers could realize on such occasions by being present: the opportunity to inspect, visually, the pipe for potential danger areas.

To restate the matter: Consumers had a duty to warn the Commission of the great danger involved in excavating near the wrought iron pipe and an obligation when such excavation work was proceeding "to be on the watch and to be vigilant". Such a duty goes well beyond the "system" which Consumers argued it already had of "snifters" driving up and down the street from time to time, participation in the co-ordinating committee and the practice of "staking-out" the location of gas mains. If the Commission had been given notice of the extreme danger it would thereby have had the opportunity of exercising the necessary great care and of involving Consumers in ensuring that all necessary protective measures were taken. We agree with the trial Judge that the failure to warn and to supervise was a contributing cause of and to the explosion.

It was the combined negligence of both the Commission and Consumers which led to the disastrous explosion. The division of liability was made by the trial Judge on his assessment of their degrees of fault which contributed to the explosion based on his knowledge and understanding of the evidence. As stated at the beginning, we agree with the trial Judge that, on the facts, the Commission's negligence which contributed to the explosion and the ensuing damage was considerably greater than that of Consumers. As was noted by Dickson, J., in his dissenting reasons for judgment in *Taylor v. Asody*, [1975] 2 S.C.R. 414 at p. 423, 49 D.L.R. (3d) 724 at p. 728, 3 N.R. 381, an appellate Court is not free to substitute its apportionment of fault for that made by the trial Judge "unless there has been palpable and demonstrable error in appreciation of the legal principles to be applied or misapprehension of the facts by the trial Judge". The other members of the Supreme Court were in agreement with this statement of principle. We can see no error in the trial Judge's appreciation of the legal principles which he had to apply in determining liability and the apportionment of fault, and there was no misapprehension by him of the relevant facts, even though there might be some minor errors in his recital of the facts not relevant to the final determinations he made. Accordingly, we would not interfere with his apportionment of fault.

Consumers argued that, in any event, it was entitled to be indemnified by the Commission for the 25% of the damages it was ordered to pay the plaintiffs. It based its argument on various grounds but it was all predicated on the submission that it owed no duty of care to the Commission. The grounds advanced which, counsel submitted, supported Consumers' right to be totally indemnified by the Commission were:

(a) The Commission had interfered with its common law right to support (of the wrought iron pipe);
(b) the Commission had interfered with its statutory right to support;
(c) Consumers had a claim in contract or *quasi*-contract against the Commission based on the fact that both the Commission and Consumers were members of the co-ordinating committee and had agreed to abide by the regulations and understandings of that committee. This constituted a contract *inter se* and the failure of the Commission to restore the boulevard in accordance with the applicable regulation was a breach of that contract;
(d) Consumers was entitled to recover from the Commission on the basis of a rather ill-defined claim in "equity and good conscience";
(e) Consumers was entitled to be indemnified by the City in that the City, in allowing its servant or agent, the Commission, to remove or interfere with the pipe's support, had "derogated from its grant".

We shall deal later with the relationship between the City and the Commission but the same answer must be given to all these submissions whether Consumers' claim for indemnity is made against the Commission or against the City.

As we have agreed with the trial Judge in his finding that Consumers owed a duty of care, not only to the plaintiffs but also to the Commission, we know of no authority which allows a party to be indemnified for its own negligence in the absence of a contractual right thereto and we were referred to none.

The authorities to which we were referred were not similar to the instant case in that in none of the cases cited was there found to be negligence by the one claiming indemnity towards the one from whom indemnity was claimed. Further, in most of the cases cited, there were contractual warranties between the parties and damages were being claimed for breach of such warranties. The evidence here does not establish that, by the mere fact of being members of an informal committee, the parties had contractual ob-

ligations one to the other. If one is to be protected against and indemnified for one's own negligence there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms. In our view there is nothing in the relationship between the parties arising out of their membership in the co-ordinating committee which would support a claim for indemnity for loss occasioned by the claimant's own negligence: *Canada Steamship Lines Ltd. v. The King*, [1952] A.C. 192, [1952] 2 D.L.R. 786, 5 W.W.R. (N.S.) 609; *Smith et al. v. South Wales Switchgear Ltd.*, [1978] 1 All E.R. 18. The bar to recovery of indemnity by Consumers is its negligence to the plaintiffs, independent of anyone else's negligence, and it cannot recover indemnity from the Commission beyond the 75% allowed by the *Negligence Act*, R.S.O. 1970, c. 296.

The defence of the Commission and the City based on s. 32 of the Public Utilities Act

The Commission and the City relied upon the limitation provision contained in s. 32 of the *Public Utilities Act* as a bar to this action. The section reads:

> 32. No action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed, or in case there is a continuation of damage, within one year after the original cause of action arose.

This action was commenced on July 6, 1973, and the submission of the defendants, relying on s. 32, was, quite simply, that "the act committed" was the excavation and backfilling in August of 1972, and, therefore, the limitation period expired in February of 1973. The defendants relied on what was said by this Court in *Davies v. Traders Finance Corp.*, [1959] O.W.N. 99 at p. 100, 18 D.L.R. (2d) 48 at p. 54, [1956-60] I.L.R. 1065*n*, with respect to the similar terms of s. 11 of the *Public Authorities Protection Act*, R.S.O. 1950, c. 303, which read:

> 11. No action, prosecution or other proceedinq shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

It may be noted now that the language of this provision remained unchanged until its amendment by 1976 (Ont.), c. 19, s. 1, which amendment will be referred to later in these reasons.

One of the claims asserted in *Davies* was for damages for breach

of warranty of title against a Sheriff who had, under an execution against a conditional sale purchaser of a motor vehicle, sold the vehicle to the plaintiff. It was held that the purchase was subject to the riqhts of the conditional sale vendor. The Sheriff's sale was on May 3, 1956, but the conditional sale vendor did not seize the vehicle from the plaintiff until February 27, 1957. The action was commenced on August 26, 1957.

Morden, J.A., for the Court, said at p. 54 of 18 D.L.R.(2d):

> Under s. 11 of the *Public Authorities Protection Act*, the time runs from the date of the act, neglect or default complained of. If the act or default was a breach of warranty, it occurred on May 3, 1956, and the time began running then: *Tremaine v. Canada Sand Lime Pressed Brick Co.* (1921), 21 O.W.N. 110; (1922), 22 O.W.N. 12. Incidentally the plaintiff suffered no damages until the seizure which was made long after the time had run. His cause of action did not accrue until the seizure. This leads to the startling result pointed out by Scrutton, L.J. in *Huyton & Roby Gas Co. v. Liverpool Corp.*, [1926] 1 K.B. 146 at p. 155: "that you may lose a cause of an action before you have got it." It is interesting to note that English statute law, which was until 1939 in the same terms as the Ontario Act, was amended in that year to provide that the limitation period begins running "from the date on which the cause of action accrued": 1939 (Imp.), c. 21, s. 21(1). This unfair result is no longer possible in England but it is in this Province.

In the case before us the trial Judge referred to *Davies* in the following passage [at p. 153 O.R., p. 193 D.L.R.]:

> To hold that s. 32 of the Act bars the action would have the effect, had the explosion occurred a month or so later, of barring a cause of action before it even accrued. This unfair result is said to be still possible in Ontario: *Davies v. Traders Finance Corp.*, [1959] O.W.N. 99 at p. 100, 18 D.L.R. (2d) 48 at p. 54, [1956-60] I.L.R. 1065*n*.

He held that the six-month period provided for in s. 32 did not commence to run until the date of the explosion for two reasons:

1. Because the "fraud" of the Commission prevented the time running until discovery of the facts. He quoted from judgments of Lord Denning, M.R., in *Eddis et al. v. Chichester Constable et al.*, [1969] 2 All E.R. 912 at p. 915, and in *King v. Victor Parsons & Co. (a firm)*, [1973] 1 All E.R. 206 at p. 209.
2. Because the Commission was negligent in failing to backfill properly and thereby provide adequate support for the gas main, which lack of support continued to the explosion. Reference was made to passages in the judgments of Bankes, L.J., and Scrutton, L.J., in *Huyton & Roby Gas Co. v. Liverpool Corp.*, [1926] 1 K.B. 146 at pp. 152 and 155 respectively, a case concerned with the application of s. 1(*a*) of the *Public Authorities Protection Act*, 1893 (U.K.), c. 61.

In our view the trial Judge was correct in holding that the six months did not begin to run until the date of the explosion. We base our conclusion on reasoning different from that of the trial Judge but which is more direct, in our respectful view, having regard to the issues to be resolved. We should mention that, having regard to what was said in *Davies v. Traders Finance Corp. Ltd.*, *supra*, the reasoning we propose to follow may not have appeared to the trial Judge to have been open to him.

Before embarking on these reasons we shall deal with some preliminary matters. It is not disputed that the Commission, if the requisite facts are shown, is entitled to the benefit of s. 32 of the *Public Utilities Act*. Mention is made of this because s. 32 appears in Part III of the Act which begins with s. 26, which provides:

> 26. This Part applies to all municipal corporations owning or operating public utilities.

A reading of the plain opening language of s. 32 itself, which refers to "any person", and of other sections in Part III, makes it reasonably clear that the Part's sections are not exclusively confined to the rights and duties of municipal corporations. However, if for the reason mentioned above, or any similar reason, the Commission were not entitled to argue the applicability of s. 32, then it clearly could argue the applicability of s. 11 of the *Public Authorities Protection Act*, R.S.O. 1970, c. 374, which it has pleaded and which, as indicated, uses similar language to that in s. 32. If the 1976 amendment to this provision were applicable to this action (the amendment applies "in respect of causes of action arising before or after this Act comes into force" (April 14, 1976): 1976 (Ont.), c. 19, s. 2), then there could be no possible defence available to the Commission based on a limitation provision.

Further, we accept that the Commission, in carrying out its activities in front of Nos. 519 and 521 Bolivar St. in August of 1972, was acting in pursuance of the *Public Utilities Act*, even though the Act contains no express provisions relating to excavating and backfilling. Such work is obviously directly incidental to the operation of the waterworks system. Reference should be made to s. 4(3) which requires ". . . land, not being the property of the [municipal] corporation, [to] be restored to [its] original condition without unnecessary delay". The inapplicability of this provision, because the pipe was in City property, should not be read as excluding an implicit duty to excavate and backfill with due care.

Also, we see no need to enter into a detailed analysis of the meaning of the word "act" from the vantage point of the distinction between a positive act and an omission, because the conduct

of the Commission which gave rise to the claim against it would seem to be a combination of excavation and backfilling, whether the backfilling be described as bad backfilling or failure to backfill adequately. In any event, it would seem to be generally accepted that "anything done" or "act" would include failures to act or omissions: see, *e.g.*, *Wilson v. Mayor and Corp. of Halifax* (1868), L.R. 3 Ex. 114 at pp. 119-20, and *Watson v. Fram Reinforced Concrete Co. (Scotland), Ltd. and Winget, Ltd.*, [1960] S.C. (H.L.) 92 at pp. 111 and 115. The fact that another section in the Act (s. 52), which is of later origin, uses more extended language, "act, default, neglect, or omission", does not persuade us otherwise.

The basic purpose of a statutory limitation provision is to prevent the bringing of stale claims. This purpose may be accomplished by providing that the kind of legal claim in question must be brought, if at all, within a specified period of time. In the case of claims against persons acting pursuant to statutory authority, the traditional legislative approach has been to provide for a much shorter period of time than for similar claims against defendants not so acting. For example, the six-month period provided for in s. 11 of the *Public Authorities Protection Act*, and in the provision we are considering, may be contrasted with the six-year period provided for in s. 45(1)(*g*) of the *Limitations Act*, R.S.O. 1970, c. 246, with respect to general negligence claims. However, it may reasonably be thought to be absurd to attribute to the Legislature an intention, in the public interest or otherwise, to bar claims which not only are not stale but which could never have been brought before the running of the stipulated time.

The approach recently enunciated by Estey, J., for the Supreme Court of Canada in *Berardinelli v. Ontario Housing Corp. et al.*, [1979] 1 S.C.R. 275, 90 D.L.R. (3d) 481, 8 C.P.C. 100, to the interpretation of s. 11 of the *Public Authorities Protection Act* is clearly relevant to s. 32 of the *Public Utilities Act* (at p. 280 S.C.R., p. 492 D.L.R.):

> Section 11, being a restrictive provision wherein the rights of action of the citizen are necessarily circumscribed by its terms, attracts a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated.

With these approaches in mind it is reasonable to interpret "the act committed" in s. 32 of the *Public Utilities Act* as having the same meaning as the "anything done in pursuance of this Act" (in the first clause of the section) for which an "action [may] be

brought". Surely, the "anything" must embrace that minimum combination of facts which must exist to enable the action to be brought and the word "act" should also receive such an interpretation.

This approach is consistent with the meaning of the second part of s. 32 which provides for a one-year limitation period where there is a continuation of damage, *i.e.*, a continuation of the act which causes the damage (*Carey v. Metropolitan Borough of Bermondsey* (1903), 67 J.P. 447) "after the original cause of action arose". With respect to a claim for damages for negligence, with which we are now concerned, the original cause of action could not arise until the plaintiff had suffered some damage as a result of the defendant's act. It is unreasonably inconsistent to construe the section as not requiring, in the context of a negligence action, any infliction of damage on the plaintiff to start the time running for a "once-and-for-all" act or omission but to require it for an action based on a continuing cause of action where, indeed, the limitation period is longer.

In our view, having regard to its basic purpose, the legislation is capable of the interpretation we have placed on it, in effect, construing "the act committed" as "the cause of action arose", and it should receive this interpretation. It is not unreasonable to think that the various Legislatures (and we shall be turning to similar provisions shortly) which have used this, or almost identical language, have intended by "the act committed" to use somewhat compendious terms to refer to an act having legal significance to the plaintiff — but only after the act has, because of its consequences, such significance.

It may be that the original draftsman of the language of s. 32 considered, wrongly, that with respect to actions for damages, the defendant's conduct and the infliction of damages, which together give rise to the cause of action (where such damages are a necessary element) will always be concurrent; or, to express the point differently, that the breach of duty causing the damages would be a very short-lived temporal event, the event including the infliction of the damages. The use of the expression "act committed", with such an assumption in mind, is understandable. If there should be a time lag between the defendant's conduct and its infliction of the plaintiff's injuries or damages there is no "act", *i.e.*, breach of duty, until the wrongful infliction of damage and, in our view, it does no violence to either the language or the undoubted policy of the provision to read it this way.

Admittedly, the language is capable of the more restrictive interpretation which would confine "act" solely to the conduct of the defendant, isolated from its legally significant consequences. This approach was apparently adopted in *Davies v. Traders Finance Corp. Ltd.*, *supra*, and was mentioned in *Huyton & Roby Gas Co. v. Liverpool Corp.*, *supra*, and other cases. Nonetheless, if regard is had to previous judicial decisions, it can be seen that the great preponderance of them supports the interpretation which we prefer.

First, it should be noted that there is nothing new or unique in the language of s. 32. In Ontario this particular provision traces its lineage back to the *Municipal Water-works Act*, 1882 (Ont.), c. 25, s. 24, which read:

> 24. If any action or suit be brought against any person or persons for anything done in pursuance of this Act, the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuation of damages, then within one year after the original cause of such action arising.

An earlier local statute, "An Act for the construction of Water Works for the Town of Peterborough", 1874 (Ont.), c. 78, s. 31, read:

> 31. If any action or suit be brought against any person or persons for anything done in pursuance of this Act, the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuation of damages, then within one year after the original cause of such action arising.

Reference may also be made to "An Act to Protect Justices of the Peace in Upper Canada from Vexatious Actions", 1853 (U.C.) c. 180, s. 7, which read:

> 7. And be it enacted, That no Action shall be brought against any Justice of the Peace for any thing done by him in the execution of his Office, unless the same be commenced within Six Calendar Months next after the act complained of shall have been committed.

This, undoubtedly, was based on identical English legislation enacted in 1848, the *Justices Protection Act* (U.K.), c. 44, s. 8.

A great many English statutes, beginning in the 18th century, contained limitation provisions relating to actions "for anything done in pursuance of this Act" and provided that the action "shall be commenced within six calendar months after the fact committed, and not afterwards": see, for example, the Schedule to the *Public Authorities Protection Act*, 1893 (U.K.), c. 61; Darby & Bosanquet, *A Practical Treatise on the Statutes of Limitations in England and Ireland*, 2nd ed. (1893), with Supplement (1899), pp. 577-89, and Chartres, *The Public Authorities Protection Act, 1893* (1912), pp. 142-82. Such legislation may reasonably be regarded,

as indicated, as the model copied by identical or similar legislation in Ontario.

One of the earliest English cases was *Roberts v. Read et al.* (1812), 16 East. 215, 104 E.R. 1070. There, surveyors of highways, in the execution of their office, undermined a wall adjoining a highway. The wall fell in more than three months afterwards. An action on the case was commenced within three months of this event. The applicable statute was the *Highway Act*, 1773 (U.K.), c. 78, which in s. 82 provided that:

> 82. . . . if any Action or Suit shall be commenced against any Person or Persons for any Thing done or acted in pursuance of this Act; then, and in every such Case, such Action or Suit shall be commenced or prosecuted within Three Calendar Months after the Fact committed, and not afterwards . . .

The reasons refer to s. 81 but the correct section appears to be s. 82.

The defendants contended that the "thing done or acted" was the undermining of the wall and not the falling of the wall, which was a mere consequence of such wrongful act. The whole of the judgment of Lord Ellenborough, C.J., for the Court, is as follows, at p. 217:

> It is sufficient that the action was brought within three months after the wall fell, for that is the gravamen: the consequential damage is the cause of action in this case. If this had been trespass, the action must have been brought within three months after the act of trespass complained of; but being an action on the case for the consequential damage, it could not have been brought till the specific wrong had been suffered; and that only happened within three months before the action was brought.

This judgment was followed 12 years later in *Gillon v. Boddington* (1824), Ry. & Mood. 161, 171 E.R. 979, which was an action against the London Dock Company which, two years before the commencement of the action, had undermined the wall of the plaintiff's wharf. The wall subsequently fell down. The action was commenced within six months of this event. The *London Dock Act*, 1880 (U.K.), c. 47, in s. 151 provided that no action should be commenced against any person for anything done pursuant to that Act after six calendar months next after the fact committed. To the defendant's argument based on this provision, Abbott, L.C.J., said at p. 164:

> I am of opinion that the case of *Roberts v. Read* is an answer in point of authority to the objection which has been taken upon the Act of Parliament, and I cannot forbear saying, that I have great pleasure in finding such a decision in the books; for it appears to me to be one in which the wisdom of the common law has been interposed to prevent the injustice which might arise from too literal an adherence to the words of an Act of Parliament.

In a subsequent case, *Nicklin et al. v. Williams* (1854), 10 Ex. 259 at p. 268, 156 E.R. 440, with reference to the statutes requiring that the action be brought within a certain time "from the fact committed", Parke, B., said: "Those statutes mean, no doubt, the limitation to run from *the act*, that is, the cause of action." [Emphasis added.]

In *Whitehouse v. Fellowes* (1861), 10 C.B. (N.S.) 765, 142 E.R. 654, identical language appeared in the relevant statutory limitation provision: "within three months after the fact committed". There were several issues in the case relating to the application of the provision but it represents, at the least, a further clear affirmation of the principle that "fact committed", where damage is a required element of the cause of action in question, includes the occurrence of such damage.

The *Public Authorities Protection Act*, 1893 (U.K.), c. 61, repealed public general statutory provisions of the kind referred to in the foregoing cases, and substituted therefor, in s. 1(*a*), a general and somewhat more elaborate provision requiring that the action be commenced "within six months next after the act, neglect, or default complained of".

With reference to the earlier statutes there seems to have been little doubt in the cases or treatises that "fact [or act]" committed meant the accrual of a complete cause of action. Chartres, *The Public Authorities Protection Act, 1893* (1912), at pp. 142-3, states the law as follows:

> By "the act complained of" is, of course, denoted an act such as is capable of being complained of in a Court of law, that is, an act such as gives rise to a cause of action. Now, it may be that an act causing damage is in itself the legitimate exercise of a right, and that the damage which has resulted from it constitutes the sole ground of complaint. In such a case the damage, and not the act from which it flows, is "the act complained of," and the period of limitation will run not from the date of the act causing the damage, but from the date at which the damage itself was sustained. And as the infliction of the damage, not the causal act, is "the act complained of," it follows that in such cases every recurrence or repetition of damage at successive intervals will give rise to a fresh "act complained of," and will afford a fresh starting-point for a new limitation period.

Darby and Bosanquet, *op. cit.*, sum up the earlier law as follows, at p. 589:

> It will be noticed that in many of the public Acts referred to above the time runs not from the accrual of the cause of action, but from the "time of the act or fact committed," and it is believed that this was the most usual expression in local and personal Acts, and hence, questions have frequently arisen whether time begins to run from the time of the committal of the act which causes the damage, or from the time when the damage happened. It is clear

> from the case of *Whitehouse v. Fellowes* 10 C.B.N.S. 765, in which most of the former cases on the subject were referred to, that for this purpose the words "from the act or fact committed," must be treated as substantially the same as "from the accrual of the cause of action, and that, if the cause of action, as laid, is the happening of the damage and not the mere doing of the act which causes the damage, the principle laid down in *Bonomi v. Backhouse* in the Exchequer Chamber 28 L.J.Q.B. 378, which was subsequently confirmed by the House of Lords 9 H.L. 503, and followed by the House of Lords in the *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127, will apply, and time will run, not from the doing of the act, but from the happening of the damage.

Halsbury's Laws of England, 2nd ed., vol. 8 (1936), p. 771, para. 1063, stated:

> In many of the statutes which fix a special period of limitation, such period commences from the act or fact committed; these words mean substantially the same as "from the accrual of the cause of action". Thus if the cause of action, as laid, is the happening of the damage and not the mere doing of the act which causes the damage, time will run not from the doing of the act, but from the happening of the damage.

It may have been thought that because of the well-settled state of judicial interpretation of the language we are considering there would be no issue respecting the quite similar language in the *Public Authorities Protection Act, 1893*. However, in *Turley v. Daw* (1906), 94 L.T. 216, Bray, J., at p. 218, expressed the view that "act, neglect or default" did not mean cause of action, as did Salter, J., in *Freeborn v. Leeming*, [1926] 1 K.B. 160 at pp. 165-6 and, apparently, Atkin, L.J., in *Huyton & Roby Gas Co. v. Liverpool Corp.*, [1926] 1 K.B. 146 at pp. 156-7. In *Huyton & Roby*, Scrutton, L.J., left the point open. At p. 155 he said:

> It is not necessary to decide in the present case what is the result where no damage occurs till six months has elapsed from the act, and damage is a necessary part of the cause of action. If time runs from the act this leads to the startling result that you may lose a cause of an action before you have got it. Possibly this remarkable result might be avoided by holding that the words "neglect complained of," "default complained of," involve something which can be legally complained of, and therefore the time runs from the accruing of the cause of action, though not from the latest development of the damage; but it is not necessary so to decide in the present case.

This was a case turning on later language in the section: ". . . in case of a continuance of injury or damage, within six months next after the ceasing thereof".

As far as more recent legislation is concerned, s. 1(*a*) of the *Public Authorities Protection Act, 1893*, except in so far as it relates to criminal proceedings, was replaced by s. 21 of the *Limitation Act*, 1939 (U.K.), c. 21, which used the language "one year from the date on which the cause of action accrued". In Ontario, by 1976 (Ont.), c. 19, s. 1(1), s. 11 of the *Public Authorities Protection Act* was amended in the same way — by substituting "cause of action arose" for "act, neglect or default complained of". Of course, this amendment, which seems to have been a somewhat delayed response to what was said in *Davies v. Traders Finance Corp. Ltd.*, *supra*, and which, probably by inadvertence, was not made with respect to s. 32 of the *Public Utilities Act*, should not be construed as a declaration that the previous state of the law was different: the *Interpretation Act*, R.S.O. 1970, c. 225, s. 17.

With respect to *Davies* we would observe that, notwithstanding what was said therein, it was not a case where the cause of action was defeated by the statute before it arose. The claim was for breach of warranty of title and the cause of action arose on the sale by the Sheriff, and not on the subsequent seizure, even though the plaintiff may not have been aware of it at the time. This latter feature raises problems of a different order.

To return to the United Kingdom jurisprudence, very useful reference may be made to the majority reasons for judgment of the House of Lords in *Watson v. Fram Reinforced Concrete Co. (Scotland), Ltd. and Winget, Ltd.*, [1960] S.C. (H.L.) 92, where the relevant part of the limitation period under consideration read ". . . before the expiration of three years from the date of the act, neglect or default giving rise to the action". The pursuer was injured in August of 1956 while working, for his employer, with a cement mixer which had been manufactured by the second defender and supplied by it to the employer in July of 1955. The injuries were alleged to have been caused by a defect in the manufacture of the mixer. The second defender was joined in the action in March of 1959. It pleaded the limitation period mentioned above, submitting that there could be no act, neglect, or default on its part after the machine had been sold and delivered to the pursuer's employers.

The House of Lords, by a majority, held that the three-year period ran from the date the cause of action accrued, that is, when the workman was injured, and that, accordingly, the action was not time-barred. We would refer, in particular, to the judgments of Lord Keith of Avonholm at pp. 112-3, and of Lord Denning at pp. 115-9. It may be that the words "giving rise to the action" provide additional support for the decision reached but there is still much in the reasons given to support the conclusion which we have arrived at with respect to s. 32 of the *Public Utilities Act*.

Having regard to the foregoing, it is our conclusion that when this action was commenced on July 6, 1973, it was commenced in time.

The position of the Public Utilities Commission as statutory agent of the City

The trial Judge rejected the submission of the Commission that it "was a mere statutory agent for the City and that as such the City and not the Commission is liable for the negligence of the Commission and its employees" [p. 150 O.R., p. 190 D.L.R.]. He relied upon the decision of the Ontario Appellate Division in *Campbell Flour Mills Co. Ltd. v. City of Peterborough* (1925), 57 O.L.R. 458, [1925] 4 D.L.R. 23, from which he quoted extensively, and concluded that so far as this particular commission was concerned, it did not appear that it was the statutory agent of the City, under the relevant legislation.

He then went on to hold that the common law doctrine of *respondeat superior* did not impose liability on the City for the negligence of the Commission. He found that the Commission was an independent authority and there was not the control vested in the City that would impose vicarious liability on the City as master or principal for the acts of its servant or agent. He therefore dismissed the action against the City with costs, but gave the plaintiffs the right to recover those costs against the Commission and Consumers. The third party proceedings by the City against the Commission were dismissed without costs.

In this Court the Commission, as already noted, raised the point that even if it were negligent, the liability would be that of the City and not of the Commission. No one in this Court asserted that the City was liable for the negligence of the Commission on the common law basis of *respondeat superior*, and no more need be said about it.

However, counsel for the Commission has urged upon us, as he did at trial, that a long line of authority in Ontario has established that where a public utilities commission has been negligent in carrying out its activities, only the municipal corporation and not the public utilities commission is liable to the injured party. The City submitted that the Commission's position was wrong in law, that if it was supported by authority, the cases were wrongly decided, but that in any event, if the Commission's position was correct as a general proposition, it had no application in Peterborough. Support for the last point was to be found, the City submitted, in the *Campbell Flour Mills* case, *supra*, which was correctly decided, was binding on this Court, and had properly been followed by the trial Judge.

Alternatively, the City submitted that if it was vicariously liable

for the negligence of the Commission, acting as the City's "statutory agent", the City had a right of complete indemnity from the Commission. The City was without fault of its own, and the ultimate responsibility should rest upon the actual wrongdoer, the Commission.

Counsel for Consumers stated that it was in his interest to have a finding of liability against both the City and the Commission, since he had a claim for indemnity against the City, but had one argument in support of the claim against the City that was not available against the Commission. Counsel for the plaintiffs had no submissions to make on the question of "statutory agency", saying he was not concerned with whether it was the City or the Commission who was liable for the Commission's negligence.

The earliest Ontario public utility statutes dealt with the supply of water, and were applied for by individual municipalities. They "seem to have been drafted by different persons" employed by the municipality in question: see *MacDougall, Sons & Co. et al. v. Water Com'rs of City of Windsor* (1901), 31 S.C.R. 326 at p. 329. The first such statute appears to be that of Toronto, passed in 1872 (c. 79), simultaneously with that of Ottawa (c. 80). In 1874 came the first Peterborough statute (c. 78), passed simultaneously with that of Windsor (c. 79): see *MacDougall*, *supra*, at pp. 331-2 (that case involved the Windsor statute).

The Peterborough Act contained in s. 1 the same words as the Toronto Act: "by and through the agency of commissioners". Section 2 of the Act provided that: "The commissioners and their successors shall be a body corporate, under the name of 'The Water Commissioners for the Town of Peterborough . . .' ". However, s. 38 provided that the Act "shall not have any force or effect until the council of the corporation of the Town of Peterborough shall pass a by-law authorizing the construction of the said water works". It is an historical fact that no such by-law was ever passed. Hence the Act never became operative.

The Toronto statute was the subject of consideration in *Ridgway v. City of Toronto* (1878), 28 U.C.C.P. 579. Section 1 of that statute enacted that the city "by and through the agency of commissioners" should have power to purchase, construct and manage waterworks. The commissioners and their successors were created a body corporate under the name of "The Water Works Commission for the City of Toronto". The case involved a man who, while shovelling snow off the sidewalk in front of his house, suddenly had one foot sink into the ground a few inches off the sidewalk, owing to the negligent construction of a drain to

carry water away from an old reservoir, not in use. The work was done by the water commissioners. Although described as "the defendants", the city appears to have been the sole defendant. It was held liable. The case is of interest here primarily because of the following passage in the reasons of Hagarty, C.J., at p. 584:

> 2. The whole of the operations of the water commission were, in the words of the statute, the acts of the city corporation through their agency. They were merely the means through and by which the city erected the water works.

In 1882 the first general Act in this field was passed: the *Municipal Water-works Act, 1882*, c. 25 (earlier referred to). Section 38 of that Act provided, in part:

> 38. The council of the city, town, or village may itself, or by its officers, exercise and enjoy the powers, rights, authorities and immunities hereby conferred upon the corporation of such municipality, or such council may, either before the commencement of the works, or at any time while they are in course of construction, or after their completion, by by-law, assented to by the electors of the municipality, provide for the election of commissioners for such purpose:
>
> (2) Upon the election of commissioners, all the powers, rights, authorities or immunities which, under this Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, and the council thenceforth during the continuance of the board of commissioners shall have no authority in respect of such works;
>
> . . . . .
>
> (4) Nothing herein contained shall be construed to divest the council of its authority with reference to the providing of moneys required in respect of such works, and the treasurer of the municipality shall, upon the written certificate of the said commissioners, pay out any moneys so provided.

The words in earlier private Acts, "by and through the agency of commissioners", do not appear in this Act, nor does it constitute the commissioners a body corporate. The Act was carried forward, without significant amendment, into R.S.O. 1887, c. 192, and became R.S.O. 1897, c. 235 (in which s. 38 became s. 40).

In 1899 the Court of Appeal decided *McDougall* [*sic*] *v. Windsor Water Com'rs*, 27 O.A.R. 566, already referred to. The action was in contract. The city was not sued. The water commissioners pleaded that under the statute incorporating them, they were merely agents for the City of Windsor for the purpose of managing the city's system of waterworks and that the city should be a party to the action. There were other defences raised. Osler, J.A., after quoting at length from the Act incorporating the commissioners (1874, c. 79), said at pp. 576-7:

> The general provisions of this Act are of a somewhat similar character to those of other Acts passed about the same period for a like purpose. In some of these, *e.g.* the Toronto Act, 35 Vict. ch. 79 (O.), and the Peterborough Act, 37 Vict. ch. 78 (O.), the status of the commissioners as agents of the municipal corporation is more expressly declared by enacting that the municipal corporation "by and through the agency of commissioners," who are created a corporation, shall have and may exercise the powers subsequently conferred upon the commissioners and their successors.
>
> The Ottawa Act, 35 Vict. ch. 80 (O.), which says nothing about agency, seems to place the commissioners in that respect in a more independent situation, although they can rent or purchase property for the purposes of their works only with the assent of the city.
>
> I think the commissioners are to be regarded, as were those appointed under the Toronto Act, as the statutory agents of the corporation for many purposes: *Ridgway v. Toronto* (1878), 28 C.P. 579; *Bailey v. Mayor of New York* (1842), 3 Hill (N.Y.) 531. They evidently have a large discretion as to the system to be adopted, the method of managing the works, and the contracts into which they will enter for purposes of carrying them out. These contracts are intended to be entered into by them in their own corporate name, and the Act does not in terms require any prior assent thereto on the part of the city. And it seems also clear that in relation to such contracts they may sue and be sued in their own corporate name. Nevertheless inasmuch as they have no funds or property of their own which they can apply for the purposes of such a contract as that in question, they are wholly dependent therefor upon money raised or to be raised by the paramount authority, the city, for such purposes, under the borrowing powers of the latter. The city is the principal, the commissioners, the agent.

Osler, J.A., concluded that the contract sued upon was *ultra vires* the commissioners. Moss, J.A., likewise held that while the commissioners undoubtedly had the power to contract and be contracted with, their powers were subject to certain limitations as to the mode of raising or procuring the funds for purposes going beyond "incidental maintenance", and that the contract in question was beyond their powers. He did not discuss agency, in terms.

The case was taken to the Supreme Court of Canada; the appeal of the plaintiffs was dismissed: 31 S.C.R. 326. Gwynne, J., for the Court, said at p. 329, with reference to the judgments of the Court of Appeal, that he entirely concurred in their construction of the statute that corporations incorporated as water commissioners "act as agents of, and not as paramount to, the municipal corporation of the city". The history of such statutes is traced at pp. 329-32. At p. 337 Gwynne, J., said:

> The water commissioners corporation are not by the Act made paramount to the city corporation, nor have they any power to compel the municipal council to pass a by-law, the principle of which they may utterly disapprove of as wasteful, extravagant, ineffectual for the purpose contemplated or of an experimental character, or the principle of which had been disapproved of and rejected by the ratepayers, or for the purpose of experimenting upon suggestions of the commissioners. The statute does not place the council of the mu-

> nicipality in subjection to the water commissioners of the city in any such manner. I am of opinion also that the city corporation were a necessary party if not the sole necessary party to be made defendants in the present action, for if the instrument sued upon constituted a valid contract under the provisions of the Act of 1874 the question really at issue was. Were the city corporation bound by the act of their agents, the water commissioners corporation? To an action raising such an issue the city corporation was the necessary party.

It is important to recall the context in which this statement was made. Two of the three water commissioners, including the mayor of Windsor, determined to build a filter plant, although they knew the City Council had approved a settlement of certain litigation with the Town of Walkerville which involved the city moving its intake pipe beyond or above the point of discharge of the Walkerville sewage, which action would make a filter plant unnecessary. The city refused to consent to be made a party to the action of the contractor who was building the filter plant; the ratepayers had voted against a by-law to raise the money for the plant.

At p. 334 Gwynne, J., made the suggestion that the municipal corporation should not only be a defendant but perhaps the *sole* defendant:

> Then the sec. 45 of 37 Vict. ch. 79 declares, as it appears to me, in clear terms, that in the exercise of the powers vested by the Act in the water commissioners incorporation, that body acts only as agents of, and as subordinate to, or concurrently with the municipal corporation in the matter of water-works, for the whole cost of the construction and maintenance of which, as the property of the municipal corporation, they alone are liable, and therefore, as it seems to me, they should be made defendants, *if not sole defendants*, in every action brought to recover any sum of money made payable in respect of every valid contract for such purposes entered into by their agents the water commissioners incorporation.

(Emphasis added.) Riddell, K.C., was counsel for the plaintiff throughout. Ten years later, as a trial Judge, he was to give judgment in what became the leading case on the position of public utility commissions vis à vis the municipality to which they supplied a utility.

That case is *Young v. Town of Gravenhurst* (1910), 22 O.L.R. 291, affirmed with a minor variation as to damages 24 O.L.R. 467. With the rapid increase in the use of electricity, municipal corporations had been authorized in 1883 to establish local hydro-electric power commissions: see the *Municipal Light and Heat Act*, 1883 (Ont.), c. 21, later R.S.O. 1897, c. 234. The Town of Gravenhurst had constituted a board of commissioners in 1904 to manage the distribution of both electric power and water. This action was brought by a young boy and his mother against the town,

as sole defendant, as a result of injuries received by him through the negligent "leak" of electric power, which found its way to a light socket in the plaintiffs' home. The defendant contended that the action did not lie against the town at all; if anyone was liable, it was the commissioners.

Riddell, J., reviewed the relevant portions of what, for convenience, may be called "the water-works Act" and the "hydro-electric power Act", and said, at p. 295:

> The whole effect of sec. 40 of [the water-works Act] is to permit the council, instead of acting for the "corporation," *i.e.*, the "body corporate" themselves, to deliver this agency to officers appointed by the council or to Commissioners. The Commissioners then become the body which acts for the corporation —and so "statutory agents."

(The phrase "statutory agents", first used by Osler, J.A., in *McDougall*, is here adopted by Riddell, J., and appears frequently in later cases. It appears to have no more special meaning than "agents by virtue of statute".)

Riddell, J., referred to the *McDougall* case and to *Ridgway v. City of Toronto*, *supra*, saying of the latter (at pp. 295-6):

> It is true that the word "agency" appears in the statute, but it is not used in the technical sense, and adds nothing to the meaning—the Act might have read "through Commissioners," and then it would have meant precisely the same thing.

At p. 296, Riddell, J., referred to *Gibbs et al. v. Trustees of Liverpool Docks* (1856), 1 H. & N. 439, 156 E.R. 1273; reversed 3 H. & N. 164, 157 E.R. 429; appeal dismissed *sub nom. Mersey Docks & Harbour Board Trustees v. Gibbs et al.* (1866), L.R. 1 H.L. 93, which had laid down that "in every case the liability of a body created by statute must be determined upon a true interpretation of that statute". He then said:

> In all the many cases in which this case is mentioned, I do not find that any one has ever again made the suggestion that a statutory commissioner is not merely an agent.

He concluded (at p. 297) that "it is the corporation of the town which is the principal, and the Board of Commissioners but the agent".

On appeal it was again contended for the town that the board of commissioners alone was liable. The argument was rejected. Moss, C.J.O., said at 24 O.L.R., p. 472:

> The Board of Commissioners, when constituted and elected, is a body which assumes not the ownership but the management and conduct of the works, very much in the same way as, but for the by-law, the council would, in the exercise by it of the powers of the corporation as provided by sec. 5 of the Municipal Act, 1903.

> The law on this point seems to be well settled so far as this Province is concerned; and it does not support the defendants' contention.

Garrow, J.A., held that Riddell, J., had "quite properly" overruled the objection that the board of commissioners was the proper body to be sued; he paraphrased the judgment below as "holding that the Board was merely a statutory agent to carry out for the defendants objects which the Legislature had placed under the defendants' management and control" (p. 476).

In *Scott v. Hydro-Electric Com'n of City of Hamilton* (1914), 7 O.W.N. 385, an action in negligence, brought against the commission alone, the jury disagreed on negligence, but Kelly, J., dismissed the action, following *Young v. Town of Gravenhurst*, *supra*, and holding that the Act constituting the Hamilton commission (the *Public Utilities Act*, 1913, c. 41) "does not give them a position higher or more independent than that of agent for the municipal corporation" (p. 386).

The *Public Utilities Act* of 1913 consolidated the *Municipal Water-works Act*, and the *Municipal Light and Heat Act* and incorporated certain provisions of several related Acts. Under ss. 34(2) and 36(1) of the new Act, all public utility commissions established under the two general Acts mentioned were created corporate bodies. Previously, the particular Acts creating commissions in certain cities sometimes made the commission a body corporate, and sometimes did not. As we shall note later, the Peterborough Commission had become a body corporate in 1907, and would have been one much earlier if the 1872 legislation had been implemented by a municipal by-law.

The *Public Utilities Act* of 1913 has of course continued down to the present time; the section creating a public utility commission a body corporate is s. 42(1) of the present Act.

Leaving aside the Peterborough legislation and the *Campbell Flour Mills* case which considered it, Ontario Courts have consistently followed *Young v. Town of Gravenhurst*, *supra*. In 1932 Rose, C.J.H.C., tried the action of *Stevens-Willson v. City of Chatham et al.*, [1933] O.R. 305, [1933] 2 D.L.R. 407. (His judgment is there reported along with that of the Court of Appeal.) There the plaintiff's factory was damaged by a fire caused by a short circuit of high-voltage electric power wires. The city's firemen were alleged to have been negligent in not putting water on the fire because they thought it was unsafe in view of the fire's electrical origin. Employees of the hydro-electric branch of the commission were alleged to have been negligent in being too slow in turning off the power. Rose, C.J.H.C., said of the commission, at p. 308 O.R., p. 409 D.L.R.:

> Then as to the Public Utilities Commission. There has been argument as to the legal position of the Commission, as to whether under the statute (R.S.O. 1927, ch. 249, sec. 33 and the following sections) and under the by-law and agreement put in as exhibits 3 and 4, the Commission is merely an agent of the municipality, and whether for an act of an employee of the Commission—an employee controlled, it is true, by the Commission—the Commission is responsible, or whether the action must be against the municipality. The matter is dealt with in *Young v. Town of Gravenhurst* (1910), 22 O.L.R. 291, and 24 O.L.R. 467, and in *Scott v. Hydro-Electric Commission of the City of Hamilton*, of which there is a note, but not a full report in (1914), 7 O.W.N. 385. It looks rather as if any action based upon negligence of persons employed by the Commission ought to be an action against the municipality and not against the Commission; but that point need not be decided if the view that I am about to state is correct.

In the end the Chief Justice found no negligence on anyone's part.

On appeal, counsel for the commission is noted as having relied in argument on the *Young* and *Scott* cases as justifying dismissal of the action against it. Riddell, J.A., said at p. 313 O.R., p. 413 D.L.R., that it was "admitted" on the hearing, on the authority of *Young*, that there was no cause of action against the commission. Fisher, J.A. (dissenting on the merits), said at p. 315 O.R., p. 414 D.L.R., that on the argument, plaintiffs' counsel "abandoned" the appeal against the commission; Davis, J.A., at p. 324 O.R., p. 424 D.L.R., also said that counsel "abandoned" the appeal against the commission "recognizing, on the authority of such cases as *Young v. Town of Gravenhurst* (1910), 22 O.L.R. 291; 24 O.L.R. 467, that there was no cause of action against the Commission, it being merely a statutory agent of the Municipality". The only mention of the *Campbell Flour Mills* case was by counsel for the city, who is noted as having referred to it in support of the proposition that the city was not bound to maintain a fire department or provide it with equipment.

The plaintiffs appealed to the Supreme Court of Canada, [1934] S.C.R. 353, [1934] 3 D.L.R. 1, but only against the city. On the point now under consideration by us, Duff, C.J.C., said at p. 363 S.C.R., p. 6 D.L.R.:

> Two other questions were considered in the Court of Appeal. First, the question whether the Commission is answerable in legal proceedings for the negligence of its servants, in such a situation as that presented here, where negligence is established. It may be that—by reason of the pertinent decisions and the re-enactment, more than once, of the pertinent legislation after the decisions were pronounced, and the acceptance of the decisions as expressing the effect of the legislation, and, consequently, as giving an authoritative guidance in the conduct of municipal affairs—it may be that, for these reasons, these decisions are not now open to review. I express no opinion on that, or on the effect of the legislation. Neither do I discuss the question whether, by force of the legislation, the Corporation is responsible for the col-

> lateral negligence of the servants of the Commission in the execution of the duties of the Commission under the by-law and the statutes. On these questions it is better, I think, to say nothing, until a case arises in which a decision on one or more of them is necessary.

Rinfret, J., even "assuming" that the city was liable for the negligence of the servants of the commission, declined to interfere with the concurrent findings of the Courts below. Lamont, J., expressed himself thus, at p. 364 S.C.R., p. 7 D.L.R.:

> The learned trial judge held that the course pursued by the officials and servants of the Utilities Commission was a reasonable one and was justified under the circumstances. He, therefore, absolved the Commission from any blame in connection with the burning of the appellants' mills. This finding was affirmed by the majority of the Court of Appeal, and I am not prepared to differ from it. As the Utilities Commission was not guilty of any negligence contributing to the appellants' loss, it is unnecessary to determine whether or not the Commission was the statutory agent of the municipality; and that question I wish to leave open for future consideration.

Crocket, J. (dissenting), said at p. 366 S.C.R., pp. 8-9 D.L.R.:

> During the hearing of the plaintiffs' appeal from the trial judgment their counsel, acting upon the suggestion of the court that the Public Utilities Commission was the statutory agent of the City Corporation on the principle affirmed in *Young v. Town of Gravenhurst* and other cases and was therefore an unnecessary party to the action, abandoned their appeal against that corporation, though maintaining that the City of Chatham was liable for the negligence, if any, of the Utilities Commission. The Appeal Court accordingly considered the appeal upon that assumption and dismissed it on a division of opinion, Riddell and Davis, JJ.A., supporting the judgment of the learned trial judge, while Fisher, J.A., dissented.

Notwithstanding the abandonment in the lower Court of the case against the commission, Crocket, J., discussed the matter of "statutory agency", saying at pp. 368-9 S.C.R., pp. 10-1 D.L.R.:

> By their abandonment of their appeal against the Commission the plaintiffs have staked their whole case, in so far as it concerns the negligence which they charge against the Commission or its servants, upon the assumption that the Commission, though a separate corporation, is the agent of the municipality for the management of its light and power system, and that the present respondent, the City of Chatham, is therefore quite as fully responsible for any negligence on the part of the Commission or its servants as it is for the negligence of any other department of the civic government.
>
> This at once raises the question as to whether the Commission is in fact the statutory agent of the respondent in the sense that its negligence is the negligence of the respondent and, if so, whether it is now open to the plaintiff to impeach the finding of the learned trial judge that the Commission was guilty of no negligence in the circumstances.
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> . . . . .
>
> The intention of the court and of the parties plainly was that the plaintiffs' case, in so far as it was based upon charges of negligence on the part of the Commission, should be dealt with in the same way as if it had been charged against the municipality as being responsible for the negligence of its statutory agent.
>
> Considering this branch of the case from this standpoint, the first question which naturally arises is as to whether the Commission is in fact the statutory agent of the respondent for the management of its light and power plant. As to this we think the Court of Appeal were right in holding that it was. All three of the Appeal Judges concurred in this view, though differing upon the question of negligence. It was argued by the learned counsel for the respondent that *Young v. Town of Gravenhurst*, on which the Appeal Court's decision was based, was not correctly decided. We think it was and that there is no substantial difference between the provisions of R.S.O., 1897, caps. 234 and 235, upon which that case was decided, and the provisions of the *Public Utilities Act*, R.S.O. 1914, cap. 204, in pursuance of which the Public Utilities Commission of the Corporation of the City of Chatham was constituted.

At p. 374 S.C.R., p. 16 D.L.R., Crocket, J., observed:

> I am glad therefore, convinced, as I am, that the judgment of the Appeal Court ought not to be affirmed on the question of the negligence of the Commission, that a careful comparison of the statutory provisions under which the Public Utilities Commission of the City of Chatham was constituted with those upon which *Young v. Town of Gravenhurst* was decided, has firmly assured me that the Appeal Court was fully justified in holding that the Commission is the statutory agent of the respondent municipality and that any negligence, of which it may be guilty, is properly chargeable against the municipality as its principal. The principle affirmed in *Young v. Gravenhurst* has indeed been so consistently followed by the courts of Ontario in so many other cases that it may well be said to be the established law of that province.

Less than two years later, Kerwin, J., then an Ontario trial Judge, decided *Humphreys v. City of London*, [1935] O.R. 91, [1935] 1 D.L.R. 300; affirmed O.R. *loc. cit.*, p. 295, [1935] 3 D.L.R. 39. There the plaintiff's husband had been killed while working in a park owned by the City of London. By the statute 1912, c. 107, the management and control of all public parks in London had been given to the water commissioners for the City of London. The city relied upon this as relieving it from liability.

The only way counsel for the city sought to distinguish *Young v. Gravenhurst* and *Stevens-Willson*, *supra*, was to say that in *Young v. Gravenhurst* the commissioners were not a body corporate, and only became such under the *Public Utilities Act* of 1913. Kerwin, J., pointed out that *Stevens-Willson* was decided years after the change (although the point had not been there taken), and while noting that Duff, C.J.C., had left the point open in the Supreme Court, he (Kerwin, J.) could not find that any change had been made in the law, merely because the Commission had now been created a corporation. "The Commission is still the statutory agent of the municipality" (p. 95 O.R., p. 304 D.L.R.). The judgment was affirmed [1935] O.R. 295, [1935] 3 D.L.R. 39, but the point involving the commission was not taken on appeal.

Collins v. Hydro-Electric Com'n of Renfrew, [1948] O.R. 29, was a case involving a contract for the sale of lands. The defence was that a necessary consent from the Hydro-Electric Power Commission of Ontario had not been obtained. The town was not a party to the action (or the contract).

Robertson, C.J.O., said at p. 32:

> I agree with the judgment of Mr. Justice Hogg disposing of this appeal. In my opinion the appellant has misconceived the relation of the respondent to the municipal corporation. The respondent is a mere agent of the municipal corporation, exercising whatever powers it has for and on behalf of the municipality. I am aware that in some of the legislation passed in recent years the relationship has become somewhat confused, and it seems to have been considered that a hydro-electric commission established in a municipality had some independent status other than that of the agent and trustee of the municipality. In my opinion the true relationship is still the same as it was when *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467, was decided.

Hogg, J.A., with whom Fisher, J.A., agreed, did not discuss the question of the relationship of the town to the Renfrew commission.

MacKinder and MacKinder v. City of London et al., [1953] O.R. 52, [1953] 1 D.L.R. 452, was again a case involving a park owned by the City of London, but this time both the city and the Public Utilities Commission were sued, following an accident in the park. Judson, J., at trial, followed the *Humphreys* case, holding the commission was the statutory agent of the city; the city was the occupier of the park through its agent. Judgment was given against the city. The action against the commission was dismissed, although the negligence was that of two of its employees.

The city appealed, and solely as a precautionary measure, the plaintiffs cross-appealed against the dismissal of the action against the commission. The Court of Appeal agreed with the trial Judge that the commission was in law the statutory agent of the city, and that any occupancy of the agent would be in law the occupancy of the city (p. 61 O.R., p. 454 D.L.R.).

The latest case to which we were referred is the judgment of Pennell, J., in *G.N.J. Properties Ltd. v. Barriesim Developments Ltd.; City of Barrie Public Utilities Com'n, Third Party*, [1973] 3 O.R. 614. The plaintiff was the purchaser of land from the defendant. The defendant had entered into a prior subdivision agreement with the City of Barrie. The plaintiff was charged $1,800 by the Public Utilities Commission of Barrie for the installation of underground hydro services, and sued to recover that amount from the defendant, who sought to claim over against the commission in third party proceedings. An appeal from an unsuccessful motion to strike out the third party claim came before Pennell, J. After referring to the submission that the appellant commission was the statutory agent of the City of Barrie and in consequence of that fact there was no cause of action against the commission, Pennell, J., said at p. 616:

> Now several high authorities have held that any action based upon the negligence of persons employed by a public utilities commission in the Province of Ontario ought to be an action against the municipality and not against the commission. Of course, the present case involves an alleged breach of contract, but the cases which I have selected for mention have a peculiar value in relation to the matter now under consideration.

He then discussed the *Young* and the *Stevens-Willson* cases, reproduced the portion of the judgment of Crocket, J., in the latter case, already quoted herein, and held there was no cause of action against the commission; the City of Barrie was the principal and the commission "merely the agent".

This line of cases, which began over a century ago, has been regarded in this Province as establishing these propositions:

(1) A public utilities commission is the statutory agent of the municipality for which it was created.
(2) Where a public utilities commission enters into a contract relating to some aspect of its operations, only the municipal corporation and not the commission may be sued on the contract.
(3) Where injury is sustained or damage suffered because of the negligence of the commission or its servants, only the municipality and not the commission may be sued by the injured party.

Reference to Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (1971), para. 259.5 at p. 1439, and to 17 *C.E.D.* (Ont. 2nd), p. 495, para. 24, indicates that these propositions represent the generally held view. The Supreme Court of Canada in *Stevens-Willson v. City of Chatham et al.*, *supra*, expressly left open the third proposition, in the passage already quoted above from the judgment of Duff, C.J.C., and in the light of what Lamont, J., said, *supra*, the first proposition is probably also open in that Court.

However, so far as this Court is concerned, the first proposition has been firmly adhered to in every case in which the subject has arisen. Even though it developed in an age when the nature and size of public utility operations bore no relationship to the complex operations of many of today's commissions, the proposition is so firmly embedded in the law of Ontario, and has been followed so consistently in the Court of Appeal, that we see no reason to depart from it.

The second proposition flows logically from the first. If a contract is made with an entity known to be acting as agent for a known principal, only the principal and not the agent can be sued on the contract. On this basis, there is no reason to question the actual results in *McDougall v. Windsor Water Com'rs*; *Collins v. Hydro-Electric Com'n of Renfrew*, or *G.N.J. Properties Ltd. v. Barriesim Developments*, all of which were contract cases.

It is the third proposition, relating to cases of negligence of a commission, that gives us serious difficulty. Of the cases falling into this group, the judgment of Kerwin, J., at trial in *Humphreys v. City of London* is not binding on this Court; the Court of Appeal did not deal with the point. The other "London park" case (*MacKinder and MacKinder v. City of London*) was treated as a case of occupier's liability, and the crucial issue was: who was in occupation? At trial and on appeal the City of London was held to be in occupation, through its agent, the public utilities commission; the city had turned over to the commission the occupation and management of the park. The park was not a public utility, a fact which doubtless strengthened the argument that the commission was not performing a function independent of the city but was its designated agent.

This leaves for consideration four of the cases already discussed: *Ridgway v. Toronto*; *Young v. Town of Gravenhurst*; *Scott v. Hydro-Electric Com'n of City of Hamilton*, and the *Stevens-Willson* case. Of these, the *Scott* case is not binding on us. In none of the four cases does the argument appear to have been made that at common law, a plaintiff injured by the negligence of an agent acting in the course of his duties can sue the principal or the agent or both. We accept the holding of these cases that the municipality can be successfully sued for the negligence of its "statutory agent", the public utilities commission, but we are not prepared to perpetuate the alleged corollary, that *only* the municipality can be held liable. Because the common law principle that both the principal and his negligent agent can be sued does not appear to have been considered, we regard these four judgments, so far as they hold that *only* the principal, the municipality, can be held liable, as having been delivered *per incuriam*.

The common law principle that both the negligent agent and his principal are liable is discussed in 25 Hals., 3rd ed., p. 546, para. 1030; *Bowstead on Agency*, 13th ed. (1968), p. 305, and *Jones v. Manchester Corp. et al.*, [1952] 2 Q.B. 852 at pp. 868-71. Until the U.K. legislation of 1935 (the *Law Reform (Married Women and Tortfeasors) Act*, 1935 (U.K.), c. 30), the principal and his agent

were regarded in the United Kingdom as joint tortfeasors in some circumstances; that Act permitted contribution between joint tortfeasors. We will revert to this aspect later in these reasons.

Mr. Britnell, for the City of Peterborough, submitted that the law applicable to Peterborough and its public utilities commission is different from the law applicable in other municipalities, because of what has been termed "the peculiar legislation relating to Peterborough".

The submission is founded upon *Campbell Flour Mills Co. Ltd. v. City of Peterborough* (1925), 57 O.L.R. 458, [1925] 4 D.L.R. 23, a unanimous judgment of the Appellate Division, comprising the five Judges of the First Divisional Court. The argument is not reported save for a listing of the statutes and cases referred to. The statutes mentioned include the *Municipal Act*, R.S.O. 1914, c. 192, s. 248; the *Public Utilities Act*, R.S.O. 1914, c. 204, ss. 26-45; the *Power Commission Act*, R.S.O. 1914, c. 39, ss. 18-24; "An Act respecting the City of Peterborough", 1907, c. 82, ss. 1, 2 and 6, and two references respecting public inquiries. The cases include *Young v. Town of Gravenhurst*, *supra*, and *Scott v. Hydro-Electric Com'n of City of Hamilton*, *supra*, and several cases on public inquiries.

The case involved the power of the Council of the City of Peterborough to initiate an inquiry before the County Court Judge under s. 248 of the *Municipal Act* into the hydro bills rendered to the plaintiff by the Public Utilities Commission of Peterborough for the period March, 1919 to December, 1921. An alderman who was himself a miller had raised the matter before the Municipal Council and had successfully pressed for a judicial inquiry.

This action was then launched claiming an injunction to restrain the city and the Judge from proceeding with the inquiry. The commission was also a defendant. Middleton, J.A., sitting as a High Court Judge, granted the injunction.

Section 248 of the *Municipal Act* authorized a municipal council to request the Judge to "investigate any matter relating to a supposed malfeasance or breach of trust . . . or to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business". The argument for the plaintiff, put simply, was that the City of Peterborough had handed over to the Public Utilities Commission the matter of the distribution of hydro-electric power in Peterborough, including the billing, and that this subject had ceased to be part of the city's public business. The Appellate Division agreed with this submission and dismissed the appeal.

Hodgins, J.A., for the Court, put what may be termed the broad basis for its decision in these words (pp. 465-6 O.L.R., pp. 28-9 D.L.R.):

> It is urged that, as the Corporation of Peterborough is by statute entitled to any surplus resulting from the operations of the business managed and controlled by the Water Commissioners of Peterborough, it follows naturally that the business must be that of the corporation and so within the section, but it is difficult to regard that fact as an exact test in this matter, for two reasons. It ignores the object of setting up an authority, different from the council, which, under the statute, represents the people of the municipality, which authority is elected by and is responsible to the same constituency, to deal with this particular enterprise. It must be clear to every one that the Legislature has from time to time vested in independently elected or appointed bodies various parts of what was originally the business of the municipality, and has specially favoured in that respect the segregation of what are called public utilities. In particular the management and control of electrical energy has generally been placed in the hands of local commissions on account of its technical character. And this has been done to establish contact between these bodies and the Ontario Power Commission, so that the production and distribution of power may be kept up to a proper and scientific standard, a thing hardly possible if they were managed as only one of many municipal activities. But another reason is that the argument is manifestly too wide in its scope, for nothing in which the inhabitants of the municipality can be said to be pecuniarily or indirectly interested or concerned as affecting their good or welfare could then be excluded. It would lead to unexpected results if the passing of a resolution by the council should be taken to authorise an inquiry merely because the council therein asserted that its interests were involved.

It is when Hodgins, J.A., analyzed the statutes involved, and drew certain conclusions from that analysis that problems emerged and remain. He begins (at p. 467 O.L.R., p. 30 D.L.R.) by quoting s. 40(2) of the *Municipal Waterworks Act*, R.S.O. 1897, c. 235 (the italics are his):

> "Upon the election of commissioners, all the powers, rights, authorities, or immunities which, under this Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, *and the council thenceforth during the continuance of the Board of Commissioners shall have no authority in respect of such works.*"

Reference is next made to the 1906 statute, "An Act to provide for the Transmission of Electrical Power to Municipalities, 1906, c. 15, whereby the Hydro-Electric Power Commission of Ontario ("H.E.P.C.") was constituted, and municipalities were empowered to contract with it for a supply of electrical power for themselves and the inhabitants of the municipality.

Next is mentioned the 1907 Act, c. 82, "An Act respecting the City of Peterborough," upon which counsel for the city laid great stress in the argument before us. Hodgins, J.A., noted that by this Act the city obtained power to purchase the plant and business of the Peterborough Light and Power Company, subject to the approval of the agreement by H.E.P.C., and to develop and sell electric energy or to receive, rent or lease it, subject to such conditions as to rates, etc., as H.E.P.C. prescribed. He noted that the Water Commissioners of Peterborough were constituted a body corporate by s. 6 of this Act, that the management, control and operation of "the business" was vested in them, and "they were thenceforth *to have vested in them all the rights, powers, authorities, immunities and duties conferred upon a municipal council entering into a contract with* [H.E.P.C.] *under 6 Edw. VII, ch.* 15" (p. 468 O.L.R., p. 31 D.L.R., emphasis by Hodgins, J.A.).

Hodgins, J.A., referred to s. 3 of the 1907 Act making rates charged subject to regulations of H.E.P.C. and giving H.E.P.C. power to examine the books of the water commissioners and examine their rates. He referred to a contract entered into in 1913 between the city and H.E.P.C. for the exclusive supply of power by H.E.P.C. to the city for 30 years. This agreement, he noted, was confirmed by the *Power Commission Act*, 1913, c. 12, s. 5 (along with a considerable number of similar agreements).

The next portion of his judgment must be quoted in full (commencing at p. 468 O.L.R., p. 31 D.L.R.):

> By (1914) 4 Geo. V. ch. 87, an Act respecting the City of Peterborough, which recites the statute of 1907, the Peterborough Water Commissioners are declared to be a Public Utilities Commission under R.S.O. 1914, ch. 204, and are to continue, as the statute states, "to be a body corporate, and *all special or general authority, powers and duties conferred or imposed by any Act now in force upon the Peterborough Water Commissioners or conferred or imposed by the Public Utilities Act on a Public Utilities Commission and the commissioners thereof are hereby conferred and imposed upon the Peterborough Utilities Commission and the commissioners thereof* and the provisions of any Act now in force affecting the Peterborough Water Commissioners, together with the provisions of the Public Utilities Act in so far as they are applicable to and not inconsistent with any such Act, shall apply to the said Peterborough Utilities Commission and the commissioners thereof."
>
> The authority, powers, and duties conferred on a Public Utilities Commission by the Public Utilities Act, R.S.O. 1914, ch. 204, are those of control and management, and, when a contract is made by the corporation with the Hydro-Electric Power Commission, a Public Utilities Commission is required to be established for that purpose. Section 35 provides that after the establishment of such a commission its powers, rights, etc., shall be exercised by the commission and not by the council. By this statute authority was given to take over the Peterborough Light and Power Company.
>
> It was argued that secs. 8, 9, and 10 of the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, enlarged the meaning of the words "part of its

public business." These sections make the "inhabitants" a body corporate, under the name of "The Corporation of the City of Peterborough," and provide that the powers of a municipal corporation shall be exercised by its council. But these sections in no way, in my opinion, derogate from the devolution upon the Water Commissioners of Peterborough of the authority to manage and direct the business entrusted to them as a statutory corporation by the statute of 1907, and a Public Utilities Commission, under the statute R.S.O. 1914, ch. 204. These were formerly conferred upon the municipal council, whose authority was by the statute of 1897 and by that of 1914 excluded while the Board of Commissioners continued.

To hold otherwise would be to beg the question, because, while the Corporation of the City of Peterborough represents the inhabitants, it does so only so far as the Legislature consents to the business of those inhabitants being so represented, and not where they are, as to the supply and distribution of electrical energy, represented directly, by force of special legislation, by the Public Utilities Commission. There is no power, save that of the Legislature, to divert from the Water Commission of Peterborough the power and authority given to it by the legislation I have outlined. It is for this reason that I do not think *Young v. Town of Gravenhurst*, 24 O.L.R. 467, is in point. Under the peculiar legislation relating to Peterborough, which I have set out, the Water Commission are not merely the servants and agents of the Corporation, as was the case there. They are constituted an independent authority, and, while they exist, the Corporation of Peterborough is debarred from exercising the powers, etc., entrusted to them.

The conclusion to which I feel bound to arrive is that the matter sought to be investigated under the council's resolution is no "part of its public business," but is solely that of the Water Commission of Peterborough as a Public Utilities Commission.

In that view the injunction was properly granted and the appeal must be dismissed with costs.

With the greatest respect, we are unable to agree with the suggested distinction between *Young v. Town of Gravenhurst*, *supra*, and the *Campbell Flour Mills* case. Statutory provisions stating that upon the creation of water commissioners (incorporated or unincorporated) for a municipality, or of a public utilities commission, all of the powers of management and control of the utility in question should thereafter be in the commissioners or commission, and not in the council of the municipality, had been not unusual since 1872. Reference may be made to the first Toronto Act, 1871-72, c. 79, s. 25, and the Ottawa Act, 1871-72, c. 80, s. 25, each of which provided that the commissioners "shall have the full, entire and exclusive possession, control and management of the said lands and water works and all things appertaining thereto"; and to the Windsor Act, 1874, c. 79, s. 1 of which prescribed that the waterworks already constructed or to be constructed "shall be placed under the management of commissioners, and their successors . . . who shall have power to design, construct, build, purchase, improve, alter, hold, and generally maintain, manage and conduct water works, and all buildings, matters, machinery and appliances therewith connected or necessary thereto, in the Town of Windsor . . .". Section 45 of the Windsor Act gave the Town of Windsor the option of itself operating the water works; it read:

45. Notwithstanding the provisions of this Act, authorizing the working, management and extension of the water works of the said Town of Windsor through the agency of commissioners, if the Corporation of the town of Windsor shall desire to retain the working and management in its own hands, then all the powers, rights, authorities, duties and liabilities by this Act given to, granted and vested in the said commissioners shall be vested in the said Corporation, and the said Corporation shall be vested with all the powers, privileges and immunities necessary for carrying into effect the intentions and objects of this Act.

The *Municipal Waterworks Act*, R.S.O. 1897, c. 235, s. 40(2), quoted by Hodgins, J.A., *supra*, was of general application. So was the H.E.P.C. Act, 1906, c. 15. While Hodgins, J.A., does not mention the Act, the *Municipal Light and Heat Act* of 1883 was likewise of general application. As already indicated, that statute became merged in the first *Public Utilities Act* of 1913. In the following year the Peterborough Water Commissioners were declared a public utilities commission, by a special Act, referred to by Hodgins, J.A. Hodgins, J.A., italicized the words of the 1914 special Act which preserved in the Peterborough Public Utilities Commission all special statutory powers and duties conferred on the Peterborough water commissioners "by any Act now in force".

There *were* no special powers or duties in prior statutes which made peculiar to Peterborough the basic characteristics of water commissioners or public utility commissions, which were that the land and works were owned by the municipality, the management, control and maintenance, and the collection of rates, was the function of the commission, and surplus revenue was to be turned back to the municipality.

The Peterborough P.U.C. is deemed to be a commission established under Part III of the *Public Utilities Act*, R.S.O. 1970, c. 390, by virtue of s. 39 of that Act. It is at least arguable that as such, the P.U.C.'s existence may be terminated, with the assent of the electors, under s. 45 of the Act, in the same way as any commission established by by-law.

In our respectful view, in so far as *Campbell Flour Mills* may be said to hold that the legal relationship between the City and the P.U.C. is different in Peterborough from the situation in other municipalities, the decision is either *obiter* or wrong.

With the actual decision we have no quarrel. The H.E.P.C. Act,

coupled with s. 3 of the 1907 Peterborough Act, gave H.E.P.C. express power to examine the books and the rates of the commissioners. In this sense, the examination of rates charged to a particular user of power had been given by statute to H.E.P.C., and such rates were not to be examined elsewhere under the guise of investigating "the business of the city".

If *Campbell Flour Mills Co. Ltd. v. City of Peterborough*, *supra*, on that part of its holding that "it's different in Peterborough" was wrongly decided, should we follow it anyway, as we have decided to do with the first proposition established by the "statutory agency" cases? In connection with *Campbell Flour Mills*, the situation differs factually in that it is not simply part of a long line of consistent cases. Until the instant case, it appears to have been cited only once on the question of the relationship of a public utility to the municipality. That single instance was in *T.T.C. v. Metro. Toronto*, [1960] O.R. 487, where the T.T.C. sought to enjoin the Metropolitan Corporation from carrying out an inquiry by a County Court Judge of certain expenditures of the T.T.C. Counsel for the T.T.C. relied on *Campbell Flour Mills* and *Re City of Berlin and County Judge of County of Waterloo* (1914), 33 O.L.R. 73, 22 D.L.R. 296. Thompson, J., pointed out that in 1927 the Legislature had amended s. 248 of the *Municipal Act* to include within the ambit of inquiry the activities of local boards and commissions, and observed (at p. 492) that since the amendment of 1927 the *Campbell Flour Mills* case and another case relied on had little or no application. Obviously, on that view of the law, Thompson, J., had no occasion to consider the correctness of *Campbell Flour Mills*, even if it had been open to him to do so. He said, at p. 492:

> In the *Berlin* case the inquiry sought was with respect to matters under the administrative jurisdiction of a police commission. It was there held that the inquiry required was not within the scope of the section as it related to matters solely within the paramount, statutory, jurisdiction of the police commission, an independent statutory body, and not to matters within the jurisdiction of the municipal council. It was said, in effect, that although the term good government of the municipality embraced a very wide ambit, some limitation must be placed upon it and that it was limited to matters within the jurisdiction of the council.
>
> Likewise, in the *Peterborough* case, and for similar reasons, it was held that such an inquiry did not lie with respect to matters within the statutory jurisdiction of a public utility commission.
>
> The decisions in these cases proceed upon the basis that the powers of government relating to the questions involved were the powers of the particular board or commission concerned and not of the municipality, and that such questions, as matters of business, public or otherwise, related exclusively to the business of such independent body and not to the business of the council.

> In my view, since the amendment of 1927, already referred to, these cases have little or no application; and it would appear that it was enacted to overcome their effect.

Thus we are not dealing with a case which has been relied on and followed in other cases, on the question of statutory agency between the City and the Commission, nor one on the faith of which citizens have "ordered their affairs". We therefore propose not to follow it.

While this Court will generally follow one of its own decisions in a civil case, the Court has occasionally departed from this longstanding practice. In *Re Gillis; Township of Tisdale v. County of York*, [1950] O.W.N. 21, the Court of Appeal on November 16, 1949, gave judgment in which, *inter alia*, the Court expressed its views upon s. 10 of the *Children's Protection Act*, R.S.O. 1937, c. 312. After the reasons for judgment had been handed out, counsel for one of the parties drew to the attention of the Court its decision in *Re Wright*, [1938] O.R. 117, [1938] 2 D.L.R. 52, 69 C.C.C. 397. Robertson, C.J.O., in additional reasons given on December 12, 1949, said at p. 23:

> While we had not that case before us in considering our judgment, the provisions of s. 10 of The Children's Protection Act have been frequently considered by members of this Court, and with every respect to the opinion expressed in *Re Wright*, we are not able to read the provisions of subs. 4 of s. 10 as they were interpreted in that case. In our opinion the time referred to in the first line of subs. 4 is the time of residence of the child in subs. 2, and of the mother in subs. 3, and has no relation to the period of five years referred to in the latter part of subs. 3. Added to this, the concluding clause of subs. 4, in our opinion, supports this view. We, therefore, deem it unnecessary either to change our judgment or to call for further argument.

In our view, the *ratio* of the *Campbell Flour Mills* case should be confined strictly to the point actually decided, namely, that the City of Peterborough had no power to initiate a judicial inquiry into the rates for hydro-electric power charged to a particular customer of the Peterborough Public Utilities Commission. It should not be regarded as authority for the proposition that while public utilities commissions elsewhere are statutory agents for the municipality which they serve, and if the commission is negligent, both the municipality and the commission are liable, in Peterborough the commission operates independently of the city and is not its statutory agent.

The trial Judge should, therefore, have held that the City was vicariously liable for the negligence of the Commission, and the Commission was also liable to the plaintiff. As between the City and the Commission on the one hand and Consumers on the other,

the City and the Commission are responsible for 75% of the judgment and costs of the plaintiffs and Consumers for 25% with contribution and indemnity between them on that basis, subject to the City's separate rights to indemnity, which we now discuss.

The City's claims for indemnity

The City has asserted, in third party proceedings, that if it is found liable to the plaintiffs, it is entitled to be indemnified by Consumers, and on different grounds, by the Commission. The City did not formally cross-appeal the dismissal of its third party claim against the Commission and Consumers but the issue was clearly raised in its statement and full argument was heard without objection. We are, accordingly, prepared to grant leave to the City to file such a notice of cross-appeal *nunc pro tunc*. The City's claim against Consumers is based on the following provision of the franchise agreement between the City and Consumers:

> 3. The Company [Consumers] shall at all times wholly indemnify the City from and against all loss, damage and injury and expense to which the City may be put by reason of any damage or injury to persons or property caused by the construction, repair, maintenance or operation by the Company of its works in the said City as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the Company in connection with the construction, repair, maintenance or operation by the Company of any of its works in the City unless the cause of such loss, costs, damage, injury or expense can be traced elsewhere.

The proper interpretation of cl. 3, in the context of the whole agreement, is that it is intended to indemnify the City against loss occasioned by acts of Consumers or of those for whom Consumers may be responsible in law.

Furthermore, this clause does not state in clear and unambiguous language that Consumers is to indemnify the City against the results of the City's own negligence or of negligence for which it is responsible in law. Without such clear language, an indemnity clause ought not to be construed as conferring a right of indemnity for loss occasioned by one's own negligence (the principle is stated early in these reasons, along with two cases supporting it: *Canada Steamship Lines Ltd. v. The King*, [1952] A.C. 192, [1952] 2 D.L.R. 786, 5 W.W.R. (N.S.) 609, and *Smith et al. v. South Wales Switchgear Ltd.*, [1978] 1 All E.R. 18). We think the same rule applies to negligence of another for the results of which one is in law responsible.

The City's appeal as to its claim for indemnity against Consumers in the third party proceedings instituted by the City is, therefore, dismissed.

The City's claim against the Commission, made in the same third party proceedings, rests on the common law right of a principal who is found vicariously liable to a plaintiff by reason of the negligence of his agent in the performance of his authorized duties to be indemnified by the agent. It is not a right which has been pursued frequently, but its existence is clear. It is an exception to the common law rule that there could be no contribution between joint tortfeasors. The principal asserting the right must himself have been without fault in the occurrence which caused the damage. No one in this case has alleged any positive fault on the part of the City. Its liability is purely vicarious. Hence all the necessary ingredients of a good claim for indemnity are present.

The underlying principle is not confined to cases of agency; it has been applied even where there are no contractual relations at all between the wrongdoer and a person who is vicariously liable for the damages occasioned by the wrongful act. Thus, in *McFee v. Joss* (1925), 56 O.L.R. 578, [1925] 2 D.L.R. 1059, McFee, the owner of a motor vehicle, had been held liable under the *Highway Traffic Act* to a person injured by the negligence of Robert Joss, to whom McFee had rented a car for use by Robert Joss in his father's business. McFee sued Robert Joss and his father for indemnity for the damages and costs assessed against him, plus his own costs of his unsuccessful defence. Ferguson, J.A., for the Court said, at p. 584 O.L.R., p. 1064 D.L.R.:

> ... as I read the cases, an implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tort-feasors in such a sense as to prevent recovery; that is, where the act done is not clearly illegal in itself. The right of indemnity is based upon the principle that every one is responsible for his own negligence, and if another is, by a judgment of a court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer. I am also of opinion that such right of indemnity exists independently of the statute [the *Highway Traffic Act*], and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular duty not to be negligent.

The case was considered and its principle adopted by Morand, J., in *Custom Ceilings Inc. v. S.W. Fleming & Co. Ltd. et al.*, [1970] 3 O.R. 17, 12 D.L.R. (3d) 209.

In *Lister v. Romford Ice & Cold Storage Co. Ltd.*, [1957] A.C. 555, the House of Lords unanimously held that a servant owes a duty to his master to carry out his work with reasonable care, and if damages are recovered against the master by a person injured by the servant's negligence, the master can recover from the serv-

ant the damages and costs the master has been obliged to pay. The cause of action was characterized as breach of an implied term of the contract between the master and the servant. (The House divided three to two on the question whether there was a duty on the master fo effect insurance protecting his servant (a lorry driver) and whether, if there was, this afforded the servant a defence to the master's action, which was, in fact, brought by the master's insurers.)

The author of *Powell, The Law of Agency*, 2nd ed. (1961), states at p. 322, that "as a result of the decision in [the *Lister* case] an agent would seem to be liable to indemnify his principal against damages and costs which the principal has had to pay to a third party by reason of a tort committed by the agent against that third party".

Most of the English cases have arisen in situations where the master was seeking contribution from his servant whose negligence had rendered the master vicariously liable. In *Ryan v. Fildes et al.*, [1938] 3 All E.R. 517, Tucker, J., in discussing the argument that the *Law Reform (Married Women and Tortfeasors) Act, 1935* provided for contribution but not indemnity among joint tortfeasors, noted (at p. 525) that it was immaterial that the master "might have had" a right of indemnity at common law. In *Jones v. Manchester Corp. et al.*, [1952] 2 Q.B. 852, Singleton, L.J., at p. 865, quoted with apparent approval this passage from *Salmond on the Law of Torts*, 10th ed. (1945), p. 78:

> "It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity."

Denning, L.J., while acknowledging that the existence of the right "has often been assumed to be the law" (p. 868), was clearly sceptical of the existence of such a right, apart from express contract, and said that he knew of no case in which it had actually been decided. As appears from his judgment in *Morris v. Ford Motor Co. Ltd.*, [1973] Q.B. 792, his main concern was that an insured employer might sue (and recover from) an uninsured employee.

The existence of the right was made clear in the *Lister* case, *supra*, and Salmond in the 15th edition (1969), at p. 648, treats the matter as settled. See also Atiyah, *Vicarious Liability in the Law of Torts* (1967), c. 38; *Morris v. Ford Motor Co. Ltd.*, *supra*; *Davenport v. Com'r for Railways et al.* (1953), 53 S.R. (N.S.W.) 552, *per* Owen, J., at pp. 556-7 and Herron, J., at pp. 559-60; Winfield and Jolowicz on *Tort*, 10th ed. (1975), at pp. 532-4; Fridman, *The Law of Agency*, 3rd ed. (1971), at p. 250; *Finnegan v. Riley*, [1939] 4 D.L.R. 434 (Ont. C.A.), and Prosser, *Handbook of the Law of Torts*, 4th ed. (1971), at p. 311.

We therefore hold that the City is entitled to judgment against the Commission in the third party proceedings for the amount the City is required to pay to the plaintiffs by way of damages and costs, together with the City's costs of its defence in the main action (see *McFee v. Joss*, *supra*, at p. 586 O.L.R., p. 1066 D.L.R.), and its costs of the third party proceedings. The City is also entitled to recover against the Commission that portion of its costs of the appeal in the third party proceedings as if the successful portion of its appeal had taken one-half day. This allocation of its costs will reflect adequately the fact that the City failed in its attempts to overcome the line of cases on statutory agency and to persuade us that the law in Peterborough was different from that applicable elsewhere.

Liability of the City based on Rylands v. Fletcher

As mentioned earlier, the plaintiffs sought to have liability imposed upon the City based on the principle of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, affirming L.R. 1 Ex. 265. The plaintiffs did not serve a notice of cross-appeal on this issue. We think that such a notice should have been served for the matter to be properly before us. The City was before the Court as a respondent with respect to the issue of its liability to the plaintiffs on the Commission's appeal and counsel for the City was prepared to argue the issue on the merits. We, accordingly, heard such argument from both sides as though the requisite notice had been served.

Without repeating all the details of the factual background, the essential facts are that the pipe at the point of fracture was on City property within the limits of the street allowance and it was owned by Consumers, having, as already stated, been sold to it by the City as part of an underground system in 1959. It was in that year that the City granted to Consumers the franchise to supply natural gas.

The oft-quoted statement of the principle in question is that of Blackburn, J., at p. 279 of (1866), L.R. 1 Ex. 265:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

It may be noted at the outset that the facts of the present case,

as far as the City is concerned, do not come within a literal application of this language. The City did not (a) bring the gas into its land (b) for its purposes. However, the plaintiffs' argument is, essentially, that the City is liable because it *permitted* Consumers to bring the gas onto its lands. On the issue raised several cases and textual statements were cited to us or otherwise came to our attention. Those apparently helpful to the plaintiffs are: *Humphries v. Cousins* (1877), 2 C.P.D. 239; *Aikman v. Geo Mills & Co. Ltd. et al.*, [1934] O.R. 597; *Aldridge and O'Brien v. Van Patter et al.*, [1952] O.R. 595, [1952] 4 D.L.R. 93, and *Winfield and Jolowicz on Tort*, 10th ed. (1975), at p. 375. Those favouring the City are: *Whitmores (Edenbridge), Ltd. v. Stanford*, [1909] 1 Ch. 427 at p. 438; *St. Anne's Well Brewery Co. v. Roberts et al.* (1928), 140 L.T. 1 at pp. 5, 6 and 9; 28 Hals., 3rd ed., p. 158, para. 222, and *Charlesworth on Negligence*, 5th ed. (1971), at pp. 279-81. In our view, none of the foregoing compels a particular result on the facts of this case.

For a combination of reasons we think that it is not appropriate that the *Rylands v. Fletcher* principle be applicable to the City. The gas distribution enterprise was entirely that of Consumers, with all of its attendant benefits and risks. Consumers had the ownership not only of the gas but also, together with the control and care thereof, of the pipe from which the gas could escape. In light of these considerations we do not think that the mere fact that the City has permitted Consumers to assume ownership of a chattel on its lands, for the purposes of Consumers, should entail strict liability on the part of the City. Cases in which an owner leases land for a hazardous purpose, or for a purpose that inevitably has to amount to a nuisance, may be distinguished on the ground that in such cases it can be said that the owner, in a sense, shares in the use of the land for such purpose.

Related to the foregoing is the fact that the City is acting pursuant to statutory powers in granting the franchise. As far as the current legislation is concerned reference may be made to the *Municipal Act*, R.S.O. 1970, c. 284, s. 354(1), para. 102, and various provisions in the *Municipal Franchises Act*, R.S.O. 1970, c. 289. In the latter statute particular reference may be made to the powers of the Ontario Energy Board respecting the right to supply gas in municipalities (s. 8) and to approve gas franchise bylaws (s. 9). It must be assumed that all of such powers are conferred to be exercised in the public interest. Thus it cannot be said that the Consumers pipe runs through City land merely because the City has permitted it to do so and that the public interest has

not been taken into account in the granting of the right to Consumers to supply gas in the City. These considerations should be taken into account in considering the appropriateness of the City being strictly liable for damages resulting from the activities of Consumers.

In the result, then, we see no merit in this particular claim advanced by the plaintiffs.

Damages

We turn now to the important issue of damages. As a result of the explosion and the fire which followed, Sandra Fenn, who was then 24 years of age, was horribly injured. Her children were killed; Candice Fenn, a sister-in-law, was injured; Gerard Fenn, Sandra's husband, returned home to find his house destroyed, his children dead and his wife being loaded into an ambulance, and as a result he suffered severe nervous shock. The learned trial Judge in his reasons for judgment described the injuries to Sandra Fenn and the effect of the explosion on Gerard Fenn. It is unnecessary to review again the injuries, the treatment and the result of the injuries in the same detail. It will be sufficient for the purposes of this appeal simply to quote and adopt a portion of the trial Judge's reasons as follows [14 O.R. (2d) 137 at pp. 158-60, 73 D.L.R. (3d) 177 at pp. 198-200]:

> Following the explosion Mrs. Fenn was pinned to the floor by rubble. Her baby Gregory had been in her arms and was beside her. She was conscious until her rescue. She watched the fire spread. Her legs were consumed by fire and her body and hands terribly burned. She heard her children crying. When she was rescued the burns to her legs were so severe that her feet fell off. When admitted to hospital she was in a tremendous amount of pain, in deep shock and crying out about her children. What was left of her legs below the knees was badly burned and charred and consisted of little more than bits of completely burned flesh clinging to exposed bones. Her entire back was deeply burned and charred. Her upper thighs and buttocks were deeply burned, and also her upper arms and fingers. The little fingers were completely charred and mummified. She was taken to the operating-room where both ler legs were amputated just above the knee. Her burns were cleaned up and dressed, she was placed face down on a Stryker frame and transferred to the intensive care unit. Further surgery was performed on January 15th, when both fifth fingers were amputated and further surgery was performed on both hands. Mrs. Fenn was subjected to a number of further operations and skin grafts and on March 8, 1973, obstruction of an airway was caused as a result of a malfunctioning intravenous infusion. This necessitated an emergency tracheotomy.
>
> I do not think it is necessary to describe in detail the treatment that Sandra Fenn received. She suffered excruciating pain for several months. She became very depressed and on one occasion, more than a year following the accident, attempted suicide. She is still easily depressed. She suffers from continuing nightmares. She is permanently incapacitated.

Mrs. Fenn's present condition was described by Dr. Hoyle Campbell, a well recognized plastic surgeon, who was called as a witness at trial. Her whole back has been grafted, together with her right arm and elbow. She still has an unstable scar on her right elbow. The right medial aspect of her right wrist and the flexor surface of the right palm and wrist have been grafted but there is contracture present which will be permanent unless further work is done. There is a fusion of the proximal intraphalangeal joints of the third and the fifth digits on the right hand and the fifth has been transposed to the fourth position. This hand does work and she can grasp with it, although inefficiently. The thumb is drawn by the contracture into the palm and while some extension is possible, the extensor mechanism is working at a considerable disadvantage. The posterior aspect of the left arm has been grafted and there is some scar drag, particularly noticed when she trys to flex her elbow fully. There is gross scarring in the dorsum of the wrist, with loss of the fourth digit at the proximal joint. The legs have been amputated through the lower thighs and healing is complete although there is extensive scarring on the posterior aspect of the stumps, extending up the posterior thighs which pull it very taut when she flexes her hips, almost to the point of tearing. She has undergone so many operations and so much pain that the thought of further reconstructive surgery is abhorrent to her.

Following Mrs. Fenn's release from hospital in the autumn of 1972, she moved into an apartment with her husband. It was impossible for either of them to adjust to the changed circumstances. Mr. Fenn was terribly depressed and eventually attempted suicide with the result that he was admitted to hospital. No one was left to care for Mrs. Fenn and she was also admitted to hospital. After counselling, it was agreed that it would be in the best interests of both Mr. and Mrs. Fenn if they separated. They have lived separate and apart ever since.

. . . . .

Attempts have been made in the past to mobilize Mrs. Fenn on artificial limbs. These attempts have failed.

Damages for the injury to Sandra Fenn were assessed at $712,417.56. Damages under the *Fatal Accidents Act*, R.S.O. 1970, c. 164 (repealed by s. 79 of the *Family Law Reform Act*, 1978 (Ont.), c. 2), for the deaths of the three Fenn children were assessed at $5,000. Damages were also assessed for the claim of Gerard Fenn and Candice Fenn, but these amounts are not relevant to this appeal.

The assessments were made by a trial Judge of great experience in cases of personal injury and the appeals as originally launched did not involve the issue of damages. However, following judgments of the Supreme Court of Canada in *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, *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, and *Arnold et al. v. Teno et al.*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 19 N.R. 1, the defendants applied for and received leave to enlarge

their appeals to include appeals against the assessment of damages for Sandra Fenn. These appeals in turn led to a cross-appeal by Sandra Fenn respecting her damages and the assessment under the *Fatal Accidents Act* for the death of her children.

Sandra Fenn's damages were assessed as follows:

1.	General damages including future loss of income	$250,000.00
2.	Cost of the purchase of a specially equipped vehicle	9,000.00
3.	Out-of-pocket expenses excluding that portion apportioned to OHIP	15,026.95
4.	Present value of future economic loss	351,354.63
5.	Cost of past insured services apportioned to OHIP	37,035.98
6.	Estimated future cost of insured services apportioned in favour of OHIP	50,000.00
		$712,417.56

Items 2, 3 and 5 are not in dispute.

(a) *Non-pecuniary general damages*

The figure of $250,000 is stated to include amounts for pain and suffering and the loss of amenities of life as well as an amount for loss of future income. It is now necessary to separate these two heads of damage and identify an amount for pain and suffering and loss of the amenities of life, *i.e.*, the non-pecuniary damages.

Stated bluntly, the position of the appellants is that the trilogy of cases decided by the Supreme Court of Canada has established a limit of $100,000 for non-pecuniary damages. In those cases the plaintiffs suffered devastating and totally disabling injuries; the non-pecuniary damages in each case were fixed or confirmed at $100,000. In *Andrews*, Dickson, J., said at p. 263 S.C.R., p. 477 D.L.R.:

> 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 the changing economic conditions.

In *Teno*, Spence, J., said at p. 334 S.C.R., p. 640 D.L.R.:

> 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.

In our opinion, these cases do not establish an absolute limit for non-pecuniary damages. The figure of $100,000 is put forward as a rough level of non-pecuniary general damages which is reached by those plaintiffs whose lives are left in total ruin but who are made economically whole by the assessment of pecuniary damages.

In *Lindal v. Lindal*, [1978] 4 W.W.R. 592, Fulton, J., addressed himself to the question whether $100,000 constituted an absolute limit for non-pecuniary general damages and concluded, at p. 602:

> The door is thus open to make a higher award and, as I say, the problem which has been of real concern to me is whether there are facts here which move this case through that door.

There can be little doubt that Sandra Fenn's crushing and totally disabling injuries move her to at least the $100,000 plateau. The question is whether or not this amount should be increased.

In this case there are two factors which justify an award somewhat higher than $100,000. Firstly, the trial in this case (the point in time as of which damages are to be assessed) took place approximately a year and a half after the latest of the trials in the trilogy of cases decided by the Supreme Court. It is apparent that during that time there has been an appreciable erosion in the value of money. Secondly, it appears that Sandra Fenn has suffered substantially more pain than any of the plaintiffs in *Teno*, *Andrews* and *Thornton*. We do not in any way wish to minimize the suffering of the plaintiffs in any of those three cases. Assuredly, any of these plaintiffs suffers terribly with the dawn of each new day which renews the recognition of cold reality. However, unlike the other plaintiffs, Sandra Fenn suffered excruciating, prolonged, raw physical pain which requires an increase in her assessment of damages. Taking into account these two additional factors, an appropriate figure for general damages would be $125,000.

(b) *The discount rate*

Before dealing with the balance of the assessment of damages, it is necessary to direct our attention to the problem of the appropriate discount rate. Substantial parts of the plaintiff's claim involve the provision of periodic payments for care and maintenance, etc. Critical to the actuarial calculation of a fund sufficient to such a task is the selection of a discount rate. In earlier times, this was a relatively simple operation which involved only the proper estimate of the interest rate which would prevail over the life of the fund. Now, however, the discount rate must take into account not only the interest rate but also the eroding effect of inflation. In *Teno*, *Andrews* and *Thornton*, these factors were considered and a discount rate of 7% was selected by the Supreme Court of Canada. In this case the trial Judge accepted a discount rate of 3%.

It cannot be said that the 7% discount rate is a matter of law for, as Dickson, J., said in *Andrews*, at p. 259 S.C.R., p. 474 D.L.R., "[t]he result in future cases will depend upon the evidence adduced in those cases." (See also *Sheppard et al. v. Wells et al.*, Ontario Court of Appeal, unreported, released June 21, 1978 [summarized [1978] 2 A.C.W.S. 323], and *Richards v. B and B Moving & Storage Ltd. et al.*, Ontario Court of Appeal, unreported, released September 8, 1978 [summarized [1978] 3 A.C.W.S. 113].)

However, it was argued that *Teno*, *Thornton* and *Andrews* as a matter of law provided a formula for the ascertainment of a discount rate and this is accomplished by subtracting the long-term inflation rate from present interest rates. In support of this proposition the appellants quoted from Dickson, J., in the *Andrews* case, at p. 255 S.C.R., p. 471 D.L.R.:

> 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.

In our view, it is apparent from the context from which these remarks are taken that Dickson, J., was speaking of present interest rates for long-term investments. It is further implicit in this analysis that when one speaks of long-term investments and long-term inflation rates one is speaking of the same long-term and that the long-term so far as possible should correspond to the projected life of the fund which is the subject of the calculation. However, it is not necessary for a Court to struggle unduly with these economic concepts when, as in this case, it is given the ample assistance of expert witnesses. In this case, the uncontradicted evidence, accepted by the trial Judge, was that the long-term probable differential between investment return and inflation was not greater than 3% and this figure should be used as the discount rate.

On the other hand, counsel for the plaintiff urged that the discount rate should be lower than 3% and based his argument on the proposition that at least some of the funds that the plaintiff would be required to expend for her care and maintenance would be subject to income tax and the discount rate should be decreased in order to ensure that these funds would be tax paid in her hands. In

our view, the question of the tax burden is far too complex and too personal to each plaintiff to be accommodated by a simple reduction of the discount rate.

The plaintiff further argued that in future she will be compelled to expend funds on wages for persons to assist her and that the evidence in this case demonstrates that because of increased productivity, wages will rise at a rate faster than the ordinary inflation rate. This argument fails, however, for want of a sufficient evidentiary base. The evidence in this case is of a general character and is not sufficient to warrant the conclusion that the services that the plaintiff will require will increase in cost at a rate beyond the inflation rate. We adopt the 3% discount rate which was selected by the trial Judge and which was fully supported by the evidence.

(c) *Cost of future care*

The trial Judge accepted a figure of $15,861 as the yearly cost of future care which included household help, nursing care, wheelchairs, home modification, transportation and the like. He estimated that this expense would continue for the next 32 years until Sandra Fenn attained the age of 60 years (she was 28 at the date of trial). He then estimated that the cost of her care would escalate to $18,861 for the next five years until she attained the age of 65. These figures were not challenged. The cost of future care was attacked simply on the basis that the trial Judge had used an incorrect discount rate in calculating the present cost of these future expenses. Accepting as we do that the trial Judge used the correct discount rate, we are in agreement with his assessment of the cost of future care at $351,354.63. In addition to this cost of future care, it was estimated that the Ontario Hospital Insurance Plan would incur future costs for medical treatment as well as costs of Sandra Fenn's permanent care beyond age 65. Utilizing the same discount rate of 3% the trial Judge calculated that the future cost to OHIP would be $50,000 and we are in agreement with him.

(d) *Basic costs of living: lost earning capacity*

It is now appropriate to return to an issue which the learned trial Judge doubtless had in mind when he allowed an unspecified amount for loss of income within the assessment of general damages at $250,000. The amounts assessed under the prior heading of future care include nothing for the basic cost of living, *i.e.*, food and shelter, etc., until Sandra Fenn reaches 65 years of age, at which point the cost of institutional care is provided.

Prior to the explosion, Sandra Fenn was not employed in the sense that she earned a wage from an outside source. She was, however, employed, and one might say gainfully, in the care of her family and the management of her household. This household, funded by the earnings of Gerard Fenn, provided Sandra Fenn with a modest but comfortable living. The explosion destroyed not only the Fenn house but the household as well. The marriage was unable to withstand the tragedy heaped upon it and without the fault of either Gerard or Sandra Fenn, crumbled. The plaintiff Sandra Fenn is now left without support or any realistic likelihood of ever being supported by her husband. Her injuries have rendered her utterly incapable of supporting herself.

It appears that this issue can be approached in either one of two ways and each leads to substantially the same result. The funds necessary to provide for the basic living costs can be classed simply as part of the cost of future care made necessary as a result of the explosion. Dickson, J., in *Andrews*, having spoken of moderation in the assessment of non-pecuniary damages, included this significant sentence at p. 261 S.C.R., p. 476 D.L.R.:

> 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.

The loss of basic living expenses is a pecuniary loss. The appellants who seek moderation in non-pecuniary damages in accord with the principles enunciated in *Andrews*, *Teno* and *Thornton*, must surely yield to the counterbalancing principle of full compensation for pecuniary losses.

On the other hand, the matter might be approached as an assessment of damages for the lost earning capacity of Sandra Fenn. Support for this approach is found in the words of Spence, J., in *Teno*, who said at p. 328 S.C.R., p. 636 D.L.R.:

> 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".

And at pp. 329-30 S.C.R., p. 637 D.L.R.:

> 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 remaining problem is the selection of an amount. There is no helpful employment history of Sandra Fenn to be used as a guide. We select the figure of $6,000 per year as a reasonable estimate of her earning capacity, a figure barely above the poverty level and a figure which is consistent with the approach used by Spence, J., in *Teno.* Further, the sum of $6,000 a year is a reasonable, if somewhat arbitrary, estimate of her basic living expenses. Thus this sum, it seems to us, can be justified on either basis. Using the actuarial evidence supplied, the provision of this sum from the date of trial until Sandra Fenn reaches age 65, using a 3% discount rate, would cost $154,105. Age 65 is significant as the customary end of one's working life expectancy and in this case the age at which the trial Judge estimated Sandra Fenn would require institutional care. Thus, the termination date will be the same whether this annual sum is classed as the cost of basic living expenses or as lost earning capacity.

(e) *Income tax*

In his reasons for judgment the trial Judge spoke of the income tax burden that would fall upon the plaintiff and the necessity of providing the cost of future care as a tax paid sum in the plaintiff's hands. It does not appear in his assessment, however, that any specific allowance was made to cover the tax burden. The appellants took the position that the Supreme Court of Canada in *Teno, Thornton* and *Andrews* established a rule of law that the extra amount of money required to pay tax to ensure the cost of future care will be tax paid in the plaintiff's hands is not an allowable claim. We do not agree that those cases stand for that proposition. It is true that in none of those cases was a claim for amounts sufficient to meet tax liability allowed, but it appears that the claims failed for want of adequate proof. In *Andrews* (p. 260 S.C.R., p. 475 D.L.R.) and *Teno* (p. 325 S.C.R., p. 633 D.L.R.) reference was made to the possibility that the tax laws might be amended to afford more generous treatment to accident victims. Thus far, there has been no legislative response.

It is important, however, to keep the tax question within its proper limits. The defendants are not obliged to provide a sum to pay the taxes that will be incurred on the interest income on the general damage award. We are concerned simply with the amount for future care. However, it must be recognized that other amounts which generate income will propel a plaintiff into a position where the tax rate applicable on the amounts in question will be higher. However, as was pointed out in both *Andrews* and

Teno, the existence of s. 110(1)(*c*)(iv.1) of the *Income Tax Act* diminishes the problem. The tax problem is further complicated by the fact that the funds paid to a plaintiff such as Sandra Fenn out of a self-exhausting fund are part capital and part income and it is only the income portion which is subject to tax. In this case there was evidence given as to the tax burden that would fall upon the plaintiff but this evidence is not sufficient to enable us to make any specific assessment because this evidence fails to take into account the fact that the funds payable to Sandra Fenn are mixed capital and income and further the tax calculations mixed inextricably the tax liability on the income from her general damage award and the cost of future care. Thus, despite the commonly recognized fact of the inevitability of death and taxes, the evidence in this case falls short of enabling us to make a specific assessment under this head.

(f) *Management fee*

In her cross-appeal, the plaintiff Sandra Fenn asked that the assessment of damages be increased by the award of a management fee to enable her to seek professional assistance in the handling of the funds awarded to her. It is inherent in the award that the fund must be managed in such a way as to produce income which will exceed the inflation rate by 3%. The management of a large self-exhausting fund which must endure over a very long term and achieve its objects is a task which requires professional assistance. Sandra Fenn is a person of modest capacity who would have found the management of such a fund difficult under the best of circumstances; the facts of this case make it abundantly clear that the explosion has seriously diminished her capacity. In *Teno* a sum of $35,000 was allowed to provide a self-exhausting fund out of which management fees could be paid over the life of the principal award. It has been pointed out that Diane Teno was a much younger plaintiff and that the fund in this case will not endure for quite so long a period. In all of the circumstances, we are of the opinion that the sum of $25,000 under this head would be appropriate.

(g) *The contingencies*

It was lastly argued by the appellants that the sums awarded to the plaintiff under the various heads of damage should be reduced by some percentage to reflect the contingencies, *i.e.*, the possibilities, that she might not require all of the care estimated, or she might require institutional care (less expensive than home care) earlier; that if the $6,000 a year is characterized as lost income

that it would be affected by the possibility of layoffs or illnesses, etc. In speaking of contingencies, Dickson, J., said in *Thornton*, at p. 283 S.C.R., p. 489 D.L.R.:

> The imposition of a contingency deduction is not mandatory, although it is sometimes treated almost as if it were to be imposed in every case as a matter of law. The deduction, if any, will depend upon the facts of the case, including the age and nature of employment of the plaintiff. Most forms of employment, however, are exposed to the possibility of layoff, illness, accidents and the like.

And in *Andrews*, at pp. 249-50 S.C.R., p. 468 D.L.R.:

> 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 this case, the trial Judge in his calculations for future institutional care has already reduced Sandra Fenn's statistical life expectancy of 78 to 70 and on the facts of the case we are satisfied that he was not in error in so doing. This reduction in life expectancy reflects itself in the diminished costs of institutional care beyond age 65. The appellants, however, argued that there should be a substantial reduction in whatever sum is allowed for either lost income or the basic cost of living. It would appear that none of the other sums awarded realistically lend themselves to the concept of reduction premised on the contingencies. However, one may appropriately ask why the concept of contingencies has almost always been interpreted as a factor which should *diminish* a damage award. Surely there are contingent factors which may lead to the *enlargement* of damages. In this case there exists the spectre of tax liability which will to some extent diminish the funds which Sandra Fenn will receive for the cost of future care.

As mentioned earlier, the evidence falls short of demonstrating exactly what that tax liability will be but the fact of some tax liability has not been dispelled and it would seem reasonable that this tax liability is a contingency which should be weighed in favour of the plaintiff. In *Oliver et al. v. Ashman et al.*, [1961] 3 All E.R. 323 at p. 340, Pearson, L.J., said:

> Where a plaintiff has been rendered helpless by his injuries, which have been caused by the defendants' negligence, the sum awarded as compensation should be sufficient to ensure that he will be properly looked after by others in any situation which can reasonably be foreseen, so that even rather improbable contingencies will be covered.

In cases such as this where a plaintiff has been totally disabled

and Courts are faced with the task of providing sums to ensure proper care for a lifetime, one should not be quick to reduce those sums under a ritualistic theory of contingencies. In this case, it is not difficult to foresee that in countless ways Sandra Fenn will be put to extra expense to accomplish the ordinary small tasks and to partake of the small pleasures in life and this contingency should as well be weighed in the balance. In the result we are not persuaded that there should be any percentage reduction of the figures already arrived at under the theory of contingencies. Those possibilities which may tend to increase the financial burden on Sandra Fenn are at least the equal to those possibilities which may tend to diminish the sums awarded.

(h) *Summary of damages*

In summary, Sandra Fenn's damages should be assessed as follows:

1.	Non-pecuniary damages for loss of the amenities of life, pain and suffering	$125,000.00
2.	Cost of the purchase of a specially equipped vehicle	9,000.00
3.	Out-of-pocket expenses excluding that portion apportioned to OHIP	15,026.95
4.	Present value of future care	351,354.63
5.	Cost of past insured services apportioned to OHIP	37,035.98
6.	Estimated future cost of insured services apportioned in favour of OHIP	50,000.00
7.	Present cost of future basic living allowance or lost earning capacity	154,105.00
9.	Management fee	25,000.00
	TOTAL:	$766,522.56

(i) *Damages under the Fatal Accidents Act*

As a result of the explosion the three Fenn children, Dean age four and a half, Virginia two and a half, and Gregory four months, were killed. In his reasons for judgment the trial Judge awarded the sum of $5,000 for the death of all three children and described the amount as "so small and so insignificant compared to the death of these three children". However, as he rightly observed, the calculations of these damages must be based upon a reasonable expectation of pecuniary benefit. The plaintiffs by way of cross-appeal ask that this assessment be substantially increased. We are, however, not persuaded that in selecting this largely conventional sum the trial Judge was in error, and we would not interfere with the award in this connection.

Interest

Pursuant to leave granted by the order of Houlden, J.A., on December 21, 1977, the plaintiffs cross-appeal for an order that the judgment in appeal be varied to provide for interest on the judgment at a rate of 10% per annum, or such rate as this Court deems just, from the date of judgment to the date of payment. The plaintiffs in their application to Houlden, J.A., had sought to remove the stay of execution and the matter of a stay was adjourned to the Court hearing the appeal.

While this cross-appeal was brought on behalf of all of the plaintiffs, we propose to give effect to it only with respect to the plaintiff Sandra Fenn.

The first branch of the argument on behalf of the plaintiff Sandra Fenn was based upon what was said to be delay on the part of the defendants in perfecting the appeal. This delay is said to have occurred prior to the actual ordering of the entire transcript; discussions were then going on, on a rather spasmodic basis, on the subject of whether part of the transcript could be omitted for the purposes of the appeal. The plaintiff was not involved in any controversy with the defendants on that matter.

While undoubtedly there were delays in the perfecting of the appeal, particularly with respect to the making of a decision as to what evidence was required, there was another considerable delay later, occasioned by the application brought by the plaintiffs for leave to appeal to the Supreme Court of Canada from the order granting the defendants leave to broaden their grounds of appeal to this Court so as to attack the award of damages by the trial Judge. In all the circumstances, we do not think this is a case in which delay should be a factor in our decision whether to make a special order regarding interest.

Once judgment in an action has been "given", which in this case means when the reasons for judgment were released on October 7, 1976, the judgment bears interest from the time of "giving the judgment": the *Judicature Act*, R.S.O. 1970, c. 228, s. 40. The rate is 5%: Rule 548 and Form 115 [am. O. Reg. 307/72, s. 12].

The amended s. 38 of the *Judicature Act*, permitting the allowance of interest at the prime rate in the circumstances specified in the amended section, applies only to judgments delivered after the section came into force on November 25, 1977: see 1977 (Ont.), c. 51, s. 3(2). Although s. 39 of the *Judicature Act* was repealed on the same date, it was in force when the trial judgment was delivered, but it was not suggested in argument that s. 39 had any relevance to the facts of this case.

The plaintiff's further submission was that the calculation of the sum needed to produce the required annual amount to look after the plaintiff was made and given in evidence in July, 1976. It assumed that the requisite capital payment would be made at once. It assumed also the obvious mathematical fact that if the fund were invested at once at an average return of 10% per annum, the encroachments on the fund in the initial years would have a much greater content of interest than of capital. Later the capital portion of each payment would eventually exceed the interest portion, and towards the end of the plaintiff's lifetime, the payments to her would be mostly all capital. The annual payments out of the fund will have to be increased year by year because of the impact of inflation. The payment in 1979 will have to be greater than the $15,000 estimated for the year commencing in 1976.

It is now two and a half years since the evidence was given. The fund has not yet been set up. The interest that should have accumulated in that period has not been received. Hence the fund will be exhausted sooner than the judgment contemplates. In Mr. Murray's colourful phrase, "Mr. Walker's evidence becomes a myth if the fund doesn't get set up until 1979." The defendants who are ultimately found liable will have had the benefit of this money since October, 1976, at a cost to them of 5% per annum if the submissions of the defendants are accepted.

Mr. Mueller's submissions on interest on the award may be summarized as follows:

(1) The specific provisions of the *Judicature Act* and Rule 548 relating to interest should be resorted to, and not the general powers of the Court of Appeal conferred on it by s. 30 of the Act. If s. 40 and Rule 548 do not fix the rate at 5%, s. 3 of the *Interest Act*, R.S.C. 1970, c. I-18, fixes the rate at 5%.

(2) The power of the trial Judge to award interest at a rate other than 5% was (before 1977) confined to interest up to the date of giving of judgment; thereafter, only 5% interest was payable: *Sidan Investments Ltd. v. W.B. Sullivan Construction Ltd.* (1974), 3 O.R. (2d) 121 at p. 131, 44 D.L.R. (3d) 641 at p. 651; *Babineau v. MacDonald* (1974), 9 N.B.R. (2d) 382 at p. 389.

(3) The powers of the Court of Appeal are to pronounce the judgment the trial Judge should have pronounced. Those powers are as set out in point (2).

The recent judgment of the House of Lords in *Pickett v. British Rail Engineering Ltd.*, [1978] 3 W.L.R. 955, has some bearing, by analogy only, to Mr. Murray's point that the defendants found liable have had the use of the money, at the statutory rate of 5% since the date of the trial judgment. In *Pickett* the trial Judge had allowed interest from the date of the writ to the date of judgment, as the English Rule permitted him to do. The Court of Appeal increased the damages from £7,500 to £10,000 but disallowed the interest "on the theory that as damages are now normally subject to increase to take account of inflation, there is no occasion to award interest as well" (the quoted words are those of Lord Wilberforce at p. 963). The House of Lords restored the provision for interest. Lord Wilberforce, *id. cit.*, said: "Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other." Lord Edmund-Davies, after quoting (and finding fallacious) the reasoning of Lord Denning, M.R., in *Cookson v. Knowles*, [1977] Q.B. 913 at p. 921, which the Court of Appeal in *Pickett* had followed, also emphasized at pp. 975-6 the aspect of the defendant having the use of the money, and therefore not being prejudiced by being required to pay interest on it.

In the present case the governing provisions respecting interest, as such, on a judgment are s. 40 of the *Judicature Act* and Rule 548 (and Form 115). The prescribed rate is 5% (unless there is a written contract making interest payable at a higher rate, after judgment, in which case the judgment may so provide). We agree with the judgment of Lerner, J., in *Sidan Investments Ltd. v. W.B. Sullivan Construction Ltd.*, *supra*. However, we think it is clear that with respect to the cost of future care the evidence on behalf of the plaintiff was designed to prove what capital sum, *paid at once*, would be required to make available to the plaintiff the necessary amount per annum for the rest of her life, presuming a rate of 10% per annum on the amount of capital from time to time in the plaintiff's hands. We accept the argument that if payment of the required capital sum is delayed for two and a half years, the calculations made by the trial Judge are no longer valid. The plaintiff will run out of money while she still needs care.

This could have been guarded against if the trial Judge had ordered that the capital sum awarded for future care should bear interest at 10% per annum from the date of his judgment to the date of payment — not as interest on the sum awarded but as part of the sum awarded. Thereby the requisite capital sum, when eventually paid, would be sufficient to provide for the plaintiff's care for life. The trial Judge was not asked to do so, and could not have foreseen the delay in payment that has in fact occurred (and may become greater if there is a further appeal).

We can make such an award now, and in the circumstances, justice requires that we do so. The judgment should be amended to provide that the sum of $351,354.63 awarded for present value of future care shall bear interest at 10% per annum from October 7, 1976, to the date of payment.

The same principle applies to the award of $154,105 as the present cost of future basic living allowance or lost earning capacity. We have selected a figure of $6,000 per year as a reasonable estimate of the plaintiff's earning capacity, and have said that the same figure is a reasonable estimate of her basic living expenses. In arriving at the present value of the capital amount required to produce $6,000 per annum, we have again used an investment return of 10%, minus the inflation rate of 7%, to produce a discount factor of 3%. Hence, the award of $154,105 should bear interest at the rate of 10% per annum from the date of the judgment (October 7, 1976), to the date of payment.

In each case the allowance of 10% interest is in lieu of the 5% provided for by Rule 548 and Form 115.

As to the award of $50,000 for the future cost to OHIP of insured services, while undoubtedly there is some discount element involved, OHIP did not cross-appeal, and when its counsel addressed us in support of the $50,000 award, he did not suggest that any special consideration of the interest on it should be given. That part of the award will, therefore, bear interest at the usual rate of 5% from the date of judgment.

The plaintiff has received $135,000 from the defendants, or some of them, and Mr. Murray told us he was not claiming interest on that amount. We do not know whether the payment was specified by the defendants to be made in respect of some particular head of

damage. We propose to treat it as paid in respect of heads of damage other than future economic loss and future basic living allowance or lost earning capacity. We are not allowing interest on those other heads of damage at a rate higher than 5%. The parties can work out the arithmetic, based on the dates of payment and in the light of these reasons.

Summary of our conclusions and the disposition of costs

The appeals of Consumers and the Commission with regard to liability and damages are dismissed with costs (with one set of counsel fees) payable to the plaintiffs. These costs are to be paid equally by these appellants. The plaintiffs are, however, to have judgment with costs against the City as well as the Commission, on the basis of the City's vicarious liability. Contribution and indemnity as between the City and the Commission on the one hand and Consumers on the other will take place on the basis that the City and the Commission were 75% at fault and Consumers 25% at fault. The City is to have judgment against the Commission in the third party proceedings for the amount the City is required to pay to the plaintiffs by way of damages and costs together with the City's costs of its defence in the main action and its costs of the third party proceedings. The City is also to recover the costs of the appeal in the third party proceedings as of one-half day's proceedings. The appeals with relation to the damages awarded to OHIP are dismissed without costs.

The cross-appeal of the plaintiffs seeking to impose liability on the City under *Rylands v. Fletcher* is dismissed but under the circumstances without costs.

The cross-appeal of the plaintiffs with regard to the damages awarded to the plaintiff Sandra Fenn is allowed with costs and the damages increased to $773,179.43, being the sum of the $766,522.56 already itemized, plus $2,500 (one-half of the award of $5,000 under the *Fatal Accidents Act*) plus $4,156.87 (one-half of the agreed joint out-of-pocket expenses of Gerard Fenn and Sandra Fenn of $8,313.75). These costs, which, as between Consumers and the Commission are to be paid equally, include the costs of the motion before Houlden, J.A., on December 21, 1977. The plaintiff is to have interest at 10% on the sum of $505,459.63 from October 7, 1976, to the day of payment. This allowance of 10%, as stated, is in lieu of the 5% provided by Rule 548. The cross-appeal of the plaintiffs with regard to damages under the *Fatal Accidents Act*, which took very little time, is dismissed without costs.

The costs in the interlocutory proceedings before this Court on

June 6, 1978, were finally dealt with at that time, and nothing more need be said about them.

Appeals by defendants, Peterborough Utilities Commission and Consumers' Gas Company dismissed; cross-appeal by plaintiffs allowed; appeal by Consumers' Gas Company from dismissal of its third party action dismissed; appeal by City of Peterborough from dismissal of its third party action dismissed as against Consumers' Gas Company and allowed as against Peterborough Utilities Commission.

DUCHARME v. CITY OF WINNIPEG

Manitoba Court of Appeal, Hall, Matas and O'Sullivan, JJ.A. June 18, 1979.

Municipal law — By-laws —Street closing — Whether by-law required for temporary closure of street — Meaning of "closing" — City of Winnipeg Act, 1971 (Man.), c. 105, s. 495(5).

The City of Winnipeg proposed to repair one of its main thoroughfares. Capital estimates were approved and a starting date set by the city construction division. Traffic was to be diverted for six or seven weeks from that part of the street which passed the plaintiff's restaurant.

On appeal from an order denying the plaintiff's motion to enjoin the defendant city from commencing the repairs, *held*, O'Sullivan, J.A., dissenting, the appeal should be dismissed. The *City of Winnipeg Act*, 1971 (Man.), c. 105, imposed a statutory duty on the city to repair its streets and empowered the city to delegate duties and powers to commissioners or city employees. Section 495(5) to the Act empowered the city to pass by-laws to, *inter alia*, close a street. The plaintiff's contention that the city's actions were improper without such a by-law should be rejected. "Closing" as used in s. 495(5) of the Act meant permanent closing, and not a temporary diversion of traffic for the reconstruction of a street.

Per O'Sullivan, J.A., dissenting: The issue is not concluded by a finding that a temporary diversion is not a "closing" within the Act. The major reconstruction contemplated goes beyond the kind of repair which can be done by the city without a by-law or Order in Council under s. 496(5) of the Act. It is not the function of the Court to grant a licence to anyone, whether citizen or public authority, to violate the law. Accordingly, the city should be enjoined from proceeding until a by-law is passed or an Order in Council is given.

[*Re Christmas and City of Edmonton* (1970), 14 D.L.R. (3d) 228, 75 W.W.R. 453; *Re Land Titles Act*, [1954] 1 D.L.R. 253, 10 W.W.R. (N.S.) 407 *sub nom. Re Edmonton (City) By-law No. 1546*, folld; *Canadian Westinghouse Co. Ltd. v. Hamilton*, [1948] 2 D.L.R. 571, [1948] O.R. 144; *Lambair Ltd. v. Aero Trades (Western) Ltd.* (1978), 87 D.L.R. (3d) 500, [1978] 4 W.W.R. 397; *Hubbard et al. v. Vosper et al.*, [1972] 1 All E.R. 1023; *Taylor v. Gage* (1913), 16 D.L.R. 686, 30 O.L.R. 75; *Croft v. Town Council of Peterborough* (1853), 5 U.C.C.P. 35, 141, consd]

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The out-of-pocket expenses and loss of income will bear interest at 14.92 per cent from February 23, 1981 in accordance with s. 36(4) of the Judicature Act. The awards under the Family Law Reform Act will bear interest at 14.92 per cent from February 23, 1981.

The plaintiffs are therefore entitled to judgment for the amounts set out below, together with interest as indicated.

MARC GRAHAM:	
Family Law Reform Act	$20,000.00
MICHAEL GRAHAM:	
Family Law Reform Act	$20,000.00
THOMAS GRAHAM:	
General damages	125,000.00
Out-of-Pocket expenses	15,428.79
Loss of income to date	110,000.00
Future costs	54,578.54
Future loss of income	412,590.00
TOTAL	$717,597.33
JUDITH GRAHAM:	
Family Law Reform Act	$10,000.00
Household and Nursing help including transportation	15,683.00
TOTAL	$25,683.00

The amounts awarded to Marc and Michael will be paid into court until age 18, subject to further order of this Court.

The plaintiffs are also entitled to their costs.

Judgment for the plaintiff.

GERVAIS v. RICHARD

Ontario Supreme Court [High Court of Justice], Krever J.

Judgment - September 17, 1984.

Negligence - Fatal accident - Death of 16-year-old girl - Bereaved relatives claiming under Family Law Reform Act, R.S.O. 1980, s. 60 - Principles applicable to assessment of lost "guidance, care and companionship" generally considered.

Liability of owner of car for driver's negligence - Car taken by stealth - Not driven with consent - Owner not liable.

Contributory negligence - Failure to wear seat-belt - Accepting ride from inebriated driver - Self-induced intoxication - Contributory negligence set at 35 per cent.

Damages in tort - Personal injury - Death - Claims under statutes other than Fatal Accidents Acts - Death of 16-year-old girl - Bereaved relatives claiming under s. 60 of Family Law Reform Act, R.S.O. 1980, c. 152 - Principles applicable to assessing lost guidance, care and companionship.

Motor vehicles - Liability of owner - Consent to possession - General - Parent's car taken by stealth - Car not driven with consent - Parent owner not liable.

Motor vehicles - Passengers - Passenger's contributory negligence - Acceptance of risk - Death of 16-year-old girl passenger - Self-induced intoxication - Girl accepting ride from inebriated driver and failing to wear seat-belt - Contributory negligence set at 35 per cent.

The second defendant, 16 years old and a learner driver with a restricted license, deviously acquired a copy of his mother's car keys, and late one night, while his parents were asleep, took the car and drove to his girl-friend's home. Arriving there already intoxicated, he continued drinking with the five teenagers he found "partying" there, before driving four of them to the lake. On the return journey, due to his reckless and excessively fast driving, the car went out of control. In the resulting single-vehicle accident, his girl-friend,

aged 16 like himself, was fatally injured. She too had been intoxicated and, like her companions on the fatal trip, had failed to use the seat-belts provided.

Apart from the deceased's father's claim for special damages, the present action comprised claims by various relatives of the dead girl, claiming, under s. 60(2)(d) of the Family Law Reform Act (Ontario), damages for the loss of guidance, care and companionship reasonably to be expected of her, had she not been killed. The claimants were the father, mother, three sisters and two brothers of the dead girl.

Some measure of contributory negligence, attributable to the deceased, was conceded by the plaintiffs.

Held - Judgment for the plaintiff.

Upon all the evidence, it was impossible to conclude that the defendant driver's father, owner of the car, had consented to his possession of it.

While the plea of volenti was without merit upon the facts in issue, the measure of contributory negligence attributable to the deceased was set at 35 per cent. The girl knew of the driver's impairment, and even if her appreciation of the danger was impaired by her own indulgence in alcohol, her self-inflicted impairment itself bespoke a lack of due care for her own safety. Moreover, in a situation fraught with obvious danger, her failure to wear her seat-belt - a failure which evidently contributed to her death - compounded her contributory negligence.

The father's special damages, claimed in the sum of $4,039.22, were not disputed. The quantification of the intangible losses embraced by s. 60(2)(d) provided a more difficult task, given that human life is perceived in law as beyond price and hence beyond quantification. The assessment of damages under s. 60(2)(d) must thus be undertaken objectively, unemotionally and as rationally as the nature of the exercise admitted. As with claims for consortium or for non-pecuniary general damages in personal injury cases, awards in the present context, being intractable to purely rational analysis, must ultimately become conventional in nature. Upon the evidence, the mother's loss was marginally greater than the father's here; and that of the younger brothers and sisters greater than that of the older ones, who had left home. The mother was awarded $12,000 under the Act, the father $10,000, and the brothers' and sisters' sums ranging from $1,500 to

$6,000; minus 35 per cent for contributory negligence in each instance. Judgment with costs was accordingly entered against the infant defendant, with prejudgment interest.

Cases considered
Andrews v. Grand & Toy Alta. Ltd., [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 8 A.R. 182, 83 D.L.R. (3d) 452, 19 N.R. 50 - applied.
Deakins v. Aarsen, [1970] S.C.R. 609, 17 D.L.R. (3d) 494 - distinguished.
Reidy v. McLeod (1984), 30 C.C.L.T. 183 - not followed.
Woelk v. Halvorson, [1980] 2 S.C.R. 430 [1981] 1 W.W.R. 289, 14 C.C.L.T. 181, 24 A.R. 620, 114 D.L.R. (3d) 385, 33 N.R. 232 - applied.

Statutes considered
Family Law Reform Act, R.S.O. 1980, c. 152, s. 60.
Highway Traffic Act, R.S.O. 1980, c. 198, s. 166(1).
Judicature Act, R.S.O. 1980, c. 223, s. 36.

Canadian Abridgment (2nd) Classification
Damages V. 3. j. v.
Motor Vehicles IX. 3. a.; VII. 4. b.

ACTION for damages for the lost guidance, care and companionship of a deceased relative, under the Family Law Reform Act, R.S.O. 1980, c. 152.

R. Heyd, for plaintiffs.
O. Smith, Q.C., for defendant, Robert Richard.
J. Huot, for defendant, Raymond Richard.

September 17, 1984. KREVER J. (orally): - This is an action for damages suffered by the surviving members of the family of Doris Gervais who, at the age of 16, was killed in a tragic single-vehicle accident in the City of Timmins in the early morning hours of July 19, 1980. She was one of four young passengers in a 1976 Chrysler Cordoba which was being driven by the defendant Raymond Richard and was owned by his father, the defendant Robert Richard.

The action is brought under the provisions of s. 60 of the Family Law Reform Act, R.S.O. 1980, c. 152, by Doris Gervais' mother, father, three sisters and two brothers. Apart from the special damages incurred by the plaintiff Robert Gervais, the father of Doris, the claims asserted fall under para. (d) of subs. 2 of s. 60 of the Act, being only for damages for the loss of guidance, care and companionship that the plaintiffs

might reasonably have expected to receive from Doris had her death not occurred.

The issues in controversy at the trial were the degree to which Doris Gervais should be found contributorily negligent, for contributory negligence on her part was properly conceded; the liability of the defendant Robert Richard for his son, the defendant, Raymond Richard's negligence, or the issue of consent; and, finally, the assessment of damages.

The trial began as a jury trial. At the conclusion of the examination-in-chief of the first witness, Constable Victor Last, on an application made by Mr. Smith on behalf of the defendant Robert Richard, an order was made on the consent of all parties dispensing with the participation of the jury. Thereafter the trial proceeded as a non-jury trial.

That the accident and the resulting death were caused by the negligence of the defendant Raymond Richard was, as the facts dictated, admitted. Nevertheless, it is necessary to give a description of the events leading up to the accident to make the discussion of the controversial issues intelligible. The defendant Raymond Richard, who is now 20 years old, was, at the date of the accident, 16. In July, 1980, he was, and for some time, about a year, had been, the boyfriend of the plaintiff Denise Gervais who, in July, 1980, was 14 years old. He was not an experienced driver and, in fact, had, only approximately two or three months earlier, acquired a beginner's or learner's driver's licence, a permit to operate a motor vehicle only when accompanied by a driver possessing a permanent or unrestricted driver's licence. He had, it seems, on or shortly before July 17, 1980, told the plaintiff Denise Gervais that he might take her and others to Bigwater Lake on Friday, July 18, 1980. During the day on July 18 the defendant Raymond Richard had gone with his cousin's husband, 20-year-old Roger Bolduc, in the latter's Mustang to Highway Beach to visit Mr. Bolduc's uncle who was camping there. Between the hours of one and five in the afternoon Raymond drank three or four beers, which I understood to mean 12-ounce bottles of beer. In the evening of July 18, before leaving Highway Beach to return home at 11 or 11:30 p.m., he drank another two or three beers.

When he arrived home at midnight or 12:30 a.m., he learned that, in his absence, he had received a telephone call from one of the Gervais girls. He returned the call and spoke to either Doris or Denise Gervais - more likely Denise - and was reminded of his offer to drive Denise and the others to Bigwater Lake. "Feeling no pain", to use his language, or in a somewhat intoxicated condition, as I find, he drove to the Gervais home in his father's Chrysler Cordoba and entered the home where he found a group of young persons "partying" or, more precisely, drinking rye whisky. They were the plaintiff Sue Gervais, then 19; the deceased Doris Gervais, then 16; the plaintiff Denise Gervais, then 14; Vivian Villeneuve, a friend of the plaintiff Sue Gervais; and Paul or "Beaver" Guinard, a friend it seems, of the plaintiff Sue Gervais. Sue Gervais and Paul Guinard had been there all evening and had started drinking around 8 o'clock, each consuming, according to Sue's testimony, about eight drinks containing about one ounce of rye each. Doris and Vivian had arrived shortly after 10 p.m. and from that time to midnight had three drinks of rye. Fourteen-year-old Denise arrived home at around 11:40 p.m. and had a drink of rye. The Gervais parents, the plaintiffs Robert and Theresa Gervais, with their youngest children, the plaintiffs Robert and Carol Ann Gervais, were then at their summer cottage property. The Gervais children who were at home were interested in continuing their partying and, thinking there might be an opportunity to do so at Bigwater Lake, telephoned the defendant Raymond Richard with that purpose in mind.

On his arrival at the Gervais home, the defendant Raymond Richard immediately had a large drink containing four ounces of rye which he consumed in a matter of seconds in a "chug-a-lugging" manner, as it was described in the evidence. He then became sick to his stomach and vomited in the kitchen, the room in which the drinking party was taking place. With the help of Denise, Raymond cleaned himself off and the trip to Bigwater Lake was underway in the Chrysler Cordoba. Raymond Richard drove. Sitting next to him in the front seat were Denise Gervais and next to her in the right front passenger seat sat Doris Gervais. The plaintiff Sue Gervais and her friend Vivian Villeneuve occupied the back seat. Paul Guinard did not accompany the group to Bigwater Lake.

Apart from the defendant Raymond Richard who, as I have said, possessed only a temporary learner's driving licence entitling him to operate a motor vehicle only when accompanied by a licensed driver - apart from Raymond, I say - there was no licensed driver in the car. For intended use on arrival at their destination, the girls brought along a bottle of rye which was mixed with Pepsi-Cola. According to the evidence, the drive to Bigwater Lake was uneventful. Upon arrival, the occupants of the car went down to the beach where, it seems, they found no one they knew and decided there was no point in staying. Yet, I find, they must have remained at the lake for about an hour. It is likely, though the evidence on the point is in conflict, that at least a little more drinking occurred at the lake. The defendant Raymond Richard, whose memory of the events after leaving the Gervais home is understandably faulty, left the beach first and returned to the car to lie down on the front seat. Eventually two of

the girls, Denise Gervais and Vivian Villeneuve, became concerned and went to the car to see what condition Raymond was in. He told them he was fine. In due course, the other girls returned to the car and the fatal trip began.

The occupants sat in the same seats they had occupied on the drive to the lake. Although, I find, the car was equipped with seat belts in proper working order, those in the front seat for the driver and right-hand passenger being of the shoulder-harness and lap-belt variety, no one in the car used the available seat belts. More particularly, the deceased Doris Gervais who, it will be recalled, was seated next to the right-hand front door and who, therefore, had available to her a properly working shoulder-harness and lap-seat belt, failed to use either of them.

Unlike the drive to Bigwater Lake from the Gervais home, the return trip was, of course, not uneventful. It took a longer, inexplicable route and was characterized by erratic and probably excessively fast driving on the part of the defendant Raymond Richard who was, I am certain, still "feeling good". Although it is not clear from the evidence whether the comment was made on the Texas Gulf Highway or on Dalton Road, the location of the accident, I am satisfied that Raymond's driving was the subject of a statement by the plaintiff Sue Gervais that Raymond was driving too fast and that he had the lives of the occupants of the car in his hands.

Near the end of the tortuous ride Raymond entered Dalton Road and remained on it until he reached the scene of the accident. Dalton Road runs in an east-west direction and, as one drives in a westerly direction, turns sharply at an almost 90° angle to the south where, very near the end of the curve, it ceased to be a paved road and became an unlit gravel road. The defendant Raymond Richard, whose driving took the car from one side of Dalton Road to the other, and who, I find, was deliberately so driving, completely lost control of the car moments after it negotiated the sharp curve to the left and entered the gravel portion of the road. The deceased Doris Gervais was thrown from the car and the car rolled over from side to side three or four times, during the course of which part of the car struck Doris Gervais as she was lying on the road, fracturing her skull and causing severe brain damage. The car came to rest on its side in the position shown in the photographs which are Exs. 5, 6, 7 and 8. The cause of death, as certified in the pathologist's report which, by agreement of counsel, was admitted in evidence as Ex. 16, and as testified to by Dr. R.J. Hutchison, the coroner who investigated the accident at the scene, was, "laceration of brain and mid-brain resulting from severe skull fracture caused by M.V.A." As part of the investigation of the fatal accident, specimens of the deceased girl's blood and urine were analyzed, revealing that the blood specimen contained 83 mg per cent ethyl alcohol and that the urine contained 125 mg per cent ethyl alcohol. A note in the report of the Centre of Forensic Sciences, which is part of Ex. 16, says, "The ethyl alcohol concentration of the urine sample indicates that the blood alcohol concentration was 96 mg per cent sometime prior to death." This means, according to Dr. Hutchison's evidence, as I understood it, that at some time before Doris Gervais died her blood alchol level showed 96 mg of alcohol in 100 ml of blood. Although the certificate of analysis of the Centre of Forensic Sciences, dated July 31, 1980, and admitted in evidence by consent as Ex. 11, certified that a sample of blood taken from Raymond Richard and analyzed on July 21, 1980, contained 44 mg of alcohol in 100 ml of blood, it is my understanding - and counsel have confirmed that understanding - that on the basis of the analysis of blood samples taken from the defendant Raymond Richard at 7 a.m., July 19, 1980, at the time of the accident, which must have occurred at approximately 2:30 a.m. on July 19, his blood alcohol level was 98 mg of alcohol per 100 ml of blood.

The first issue in controversy I shall deal with is whether, at the time of the accident, the Chrysler Cordoba was in the possession of the defendant Raymond Richard, the operator, with the consent of the defendant Robert Richard, his father and the owner of the vehicle.

Section 166(1) of the Highway Traffic Act, R.S.O. 1980, c. 198, reads as follows:

> "The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner."

Although it is agreed that no express consent had been given by the defendant Robert Richard to the defendant Raymond Richard to have the car on the occasion of the accident, it is submitted on behalf of the plaintiffs that the circumstances of the case give rise to, or support the finding of, the existence of implied consent. On the other hand, while accepting the burden of proving the absence of consent by Robert Richard as owner, it is argued on his behalf that there was not only no express consent, there was an express prohibition by Robert Richard and his wife Florida Richard, to the extent that her conduct can be imputed to her husband Robert, against

Raymond's possession of the car at any time when not accompanied by a licensed driver.

The Chrysler Cordoba was one of two cars owned by the defendant Robert Richard. For the purpose of transportation to and from his place of employment, he normally used the second and older car, a 1965 Plymouth Fury. The Chrysler Cordoba was more frequently used by his wife Florida and was kept in the driveway adjacent to their home. It was in this car that Raymond's mother was teaching him to drive and permitting him to have driving experience. There were two sets of keys for the Chrysler. One set, when not in use, was kept in the defendant Robert Richard's pants pocket and the other, again when not in use, was kept in Mrs. Richard's purse. It was the evidence of Mr. and Mrs. Richard that Mr. Richard's standing instructions to both Mrs. Richard and their son Raymond were that Raymond was never to have or drive the car, after he had obtained his beginner's licence, unless a licensed driver was with him in the car. For her part, Mrs. Richard testified that Raymond was permitted to drive the car only when he was accompanied by a licensed driver she knew was licensed and only if Raymond first asked her permission. Except on a few occasions, probably as few as two, the only licensed driver in whose company Raymond was driving to gain experience was his mother. The only times Raymond had access to his mother's keys which, as I have said, when not in use were in his mother's purse, was when he was driving the car with permission of his mother. If, on an occasion when he was with his mother, the drive was interrupted by a stopover, for example, a shopping trip, Raymond was, as one might reasonably expect, allowed to retain the keys in his possession until the return trip began. It was on one of these occasions, not long before the date of the accident, that, according to Raymond's testimony, while his mother had left him with the keys when she went off to pay a bill and was gone for as long as 20 minutes, Raymond went to Tom's Lock Shop and had a copy of the ignition key made. His parents did not know he had done so and that he was in possession of a key to the Chrysler. It was this key that Raymond used when, late at night on July 18, 1980, when his parents had retired for the night and, in fact, were asleep, he took the Chrysler which was parked in the driveway and drove to the Gervais home in his "happy" state and thence with the passengers I have identified to Bigwater Lake.

I confess that I would have had difficulty accepting Raymond's evidence if I had not heard the testimony of his parents and, particularly, that of his mother. Mrs. Richard was, I am satisfied, a straightforward, truthful witness whose evidence, as in the case of her husband and, I may add, her son, the defendant Raymond Richard, successfully withstood the test of a determined cross-examination by Mr. Heyd. I accept Mrs. Richard's statement that, sometime after the accident, her keys to the then demolished Chrysler Cordoba were still in her purse. There seems to me to be no basis for rejecting the defendant Raymond's explanation of the way in which he obtained possession of the key to the Chrysler. Nor can I hold that there was any justification for the defendant Robert Richard and his wife to take any more effective steps than they did take to prevent the keys to the car from being used by Raymond otherwise than under the conditions which had been imposed on him. His flagrant disobedience was not something which they should reasonably have foreseen. I specifically reject as a reason why they should have taken more effective steps than advanced in argument, that is, that the defendant Robert Richard, when Raymond was not yet 16 years old, had occasion to berate him for coming home too late at night.

Much effort was made during the trial to prove that there were two or three occasions before the accident when the defendant Raymond Richard was observed driving a Chrysler Cordoba while he was alone, that is, without any licensed driver accompanying him. In my opinion, even if that were so and without any evidence that his parents were aware that it was so, it is of little help on the critical question in this case and that is whether on the night and morning of July 18 to July 19, 1980, the defendant Raymond Richard was in possession of the car with the implied consent of the defendant Robert Richard. However, because of the possibility that others may take a different view of the relevance and probative value of the assertions of those witnesses who said they had seen Raymond on such occasions, I say that I am not satisfied with the accuracy of their evidence. I make the express finding that the witness Joanne Leduc was an unreliable witness. Even such a simple concept of the time of day was difficult for her. Her explanation of how it came about that she had relevant evidence for this case seemed to me to be implausible. I believe the other witnesses who testified that they had seen Raymond driving without a licensed driver with him are simply mistaken. But, as I have said, even if they are not I am unable to draw the inference that therefore on the occasion of the accident Raymond was in possession of the car with his father's consent.

In argument, with respect to the issue of consent, Mr. Heyd relied on the decision of the Supreme Court of Canada in Deakins v. Aarsen, [1970] S.C.R. 609, 17 D.L.R. (3d) 494. In that case a mother, the owner of the car in question, permitted her 19-year-old son to use her car whenever he

wanted it for his own purposes. The trial Judge, supported by Mr. Justice Ritchie who spoke for a unanimous Supreme Court of Canada, discounted the evidence of the mother that she had prohibited the son from letting anyone else drive the car. The mother knew the son was irresponsible and frequently intoxicated. It was found as a fact that although registered in the mother's name, the car was, for all practical purposes, the son's and that the mother exercised no control over who was to drive it. At the time of the accident in that case the car was being driven by the son's girlfriend who was well known to the mother. The girlfriend had only a beginner's permit and had left the restaurant, where she and the son were, to drive a girlfriend somewhere. The accident ensued. It was found that the mother had given her tacit approval at all times to the car being driven by anyone to whom the son entrusted it. The Court's reason for holding that the mother was liable for the negligence of the girlfriend is summed up in the following short paragraphs at pp. 496-497 [D.L.R.]:

> "There is no evidence that Robert gave his express consent to Lois taking the car on the evening in question, but he was very intimate with the girl and his carefree attitude in leaving the keys where they were, taken together with the fact that he had instructed her in how to drive the car and knew that she had driven it on her own on at least one previous occasion, in my opinion clearly justifies the learned trial Judge in finding that there was an implied consent on the part of Robert and through him on the part of his mother, for the girl to drive.
>
> The learned trial Judge made a careful analysis of the facts and it is apparent that the Court of Appeal concurred in his finding that Ellen Deakins had not satisfied the onus of proving that the Meteor was in the possession of Lois without her consent at the time of the accident."

Perhaps I should add, because of the reference in that passage I have just quoted to the location of the keys, where the phrase is used, "his carefree attitude in leaving the keys," that according to my recollection, the keys were left in some very obvious place - I think an ashtray in the car.

It is clear from my recitation of the facts of that case that they are so distinguishable from the facts of this case that the decision of the Supreme Court of Canada cannot govern the outcome of this case. In this case, there was, indeed, a prohibition and, moreover, a prohibition against the

son himself - he was not to use the car except in the presence of a licensed driver and, even then, only when permission was expressly sought for the specific occasion. Furthermore, reasonable steps were taken to prevent the son from having access to the keys. It is, I confess, with a heavy heart that I conclude that the defendant Robert Richard has successfully discharged the burden on him of showing, on a balance of probability, that at the time of the accident his car was not in the possession of the defendant Raymond Richard with his, that is, the defendant Robert Richard's consent. It follows that the action must be dismissed as against the defendant Robert Richard.

I turn now to the issue of contributory negligence on the part of the deceased girl Doris Gervais. In passing, I point out that the defence of non fit injuria was pleaded by the defendant Raymond Richard. It was, however, not pursued in argument. The evidence does not support a finding of a bargain between Doris and Raymond by which Doris waived or gave up her right of action for negligence or expressly or impliedly, in advance, released him from any liability in respect of any act of negligence he might commit. But that there was contributory negligence on the part of Doris Gervais is clear. Subsection 3 of s. 60 of the Family Law Reform Act provides as follows:

> "In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed."

The contributory negligence of Doris Gervais consisted of permitting herself to become Raymond's passenger in the first place and then, having done so, of failing to use her seat belt. In both of these respects she failed to take reasonable care for her own safety and protection. Doris Gervais knew that Raymond Richard was an inexperienced driver and, in fact, knew that he was an unlicensed driver. She must have known that he was intoxicated. She saw him in a state in which, to use his words again, he was "feeling no pain," saw him consume - and consume in a reckless manner - an inordinately large drink of rye, saw him vomit from having drunk to excess and saw his need to lie down in the car at Bigwater Lake. Even if she knew - and as to this I make no finding - that Raymond was an experienced drinker, she knew that he was only 16 years of age. She knew also that the purpose of the drive was to find an opportunity to continue the drinking party. If her own consumption of alcohol impaired her judgment by making her unable to see the danger she was exposing herself

to by driving with Raymond, that self-inflicted impairment, particularly on the part of a 16-year-old girl, was also carelessness. Added to that lack of care for her own safety was, of course, her failure to use her seat belt. She was sitting next to the front door in the passenger's seat, knew all of those matters about the driver I have just enumerated and heard a complaint about his manner of driving, or at least about the speed at which he was driving. To fail to use an available seat belt may well be a failure to take care in any circumstances. Such a failure in the circumstances of this case was surely foolhardy, if not reckless. At the very least, it can be said that it was not the act of a reasonable person, even a reasonable 16-year-old person, or even a reasonable 16-year-old person whose judgment was clouded by the consumption of alcohol. That the failure to secure herself from being thrown from the car by using the seat belt contributed to her death is, on the evidence in this case, an unavoidable conclusion.

Apportionment in negligence cases is always a difficult matter. I have concluded that it is reasonable that the apportionment of negligence on the part of Doris Gervais be fixed at 35 per cent. If a breakdown of that figure is necessary - and in my own view it is not - it would be as follows:

15 per cent for participating in the ill-advised and ill-fated escapade, and

20 per cent for failure to use the seatbelt.

The plaintiffs, then, are entitled to judgment against the defendant Raymond Richard for 65 per cent of their assessed damages and is to that difficult task of assessment that I finally turn. The special damages suffered by the plaintiff Robert Gervais, Doris's father, in the sum of $4,039.52 are not disputed by the defendant Raymond Richard. This sum is made up as follows:

Tombstone	$ 400.00
Funeral Expenses	$2,300.00
Loss of income	$1,339.52
TOTAL	$4,039.52

To measure the loss of guidance, care and companionship that survivors of one whose death has been caused by the

negligence of another might reasonably have expected had death not occurred is no easy task. It is to measure what is immeasurable, to calculate what is incalculable. The provisions of s. 60 of the Family Law Reform Act, as they have been interpreted by the Courts, however, require that an award of money for those intangible, irreplaceable losses be made. Subsection (2) of s. 60 of the Act, that is to say, that part of it that is relevant to this case, reads as follows:

> "(2) The damages recoverable in a claim under subsection (1) may include,
>
> . . .
>
> (d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred."

The relevant provision, as I have pointed out, is para. (d). The statute, on the other hand, has not altered the position that our law has always taken that human life is priceless. That, to me, means that no amount of money can compensate for the loss suffered by survivors of one who has been the subject of a wrongful death. It is for that reason that I am unable to follow the approach taken in the recent decision of this Court, referred to in argument, in Reidy v. McLeod, Ont. H.C., July 23, 1984 (unreported) [now reported infra, p. 183]. With great respect for those who take a different view, I believe that the task of assessing damages under para. (d) of subs. (2) of s. 60 of the Family Law Reform Act must be undertaken objectively, unemotionally and, to the extent that it is possible to do so, rationally. An award must be made. I adopt and adapt the words of Mr. Justice McIntyre in a somewhat different context in which damages for loss of consortium were in issue, in Woelk v. Halvorson, [1980] 2 S.C.R. 430 at p. 439, [1981] 1 W.W.R. 289, 14 C.C.L.T. 181, 24 A.R. 620, 33 N.R. 232 and 114 D.L.R. (3d) 385 at p. 391:

> "In my opinion, it is not open to the Court to treat the new cause of action as trivial and deserving of only token awards. It is not open to the Courts to consider that the Legislature of Alberta, in passing s. 35, intended to preserve the old jurisprudence, which had gone far to eliminate the right and render damage awards insignificant. I am not prepared to accept such an approach. It is my view that, the Legislature having created the right of the wife to damages and having

> omitted any restriction on damage awards, the Courts must endeavour to assess the damages realistically, according to the evidence in each case. The Legislature did not intend, in my view, to perpetuate an action leading only to insignificant recovery, nor can it be said that it regarded the remedy as anomalous."

In my view, guidance can be found, in assessing the losses with which I am concerned, in the language of Mr. Justice Dickson in Andrews v. Grand & Toy Alta. Ltd., [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 8 A.R. 182, 83 D.L.R. (3d) 452, 19 N.R. 50, in his discussion of the non-pecuniary losses suffered by a quadraplegic as a result of a traffic accident. At p. 261 (S.C.R.), p. 476 (D.L.R.) he said:

> "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."

And at p. 262 (S.C.R.) and at p. 477 (D.L.R.) he continued:

> "However one may view such awards in a theoretical perspective, the amounts are still largely arbitrary or conventional."

In my view, awards for loss of guidance, care and companionship under subs. (2), s. 60 of the Family Law Reform Act must eventually become conventional awards. Finally, and certainly tritely, I say that each case must be decided on its own facts.

The Gervais family was a close family. Immediately before Doris's death there were six children ranging in age from 20 to 11 as follows:

Rick	20
Sue	19
Doris	16
Denise	14
Robert	12
Carol Ann	11

Rick and Sue were no longer living at home. Rick had moved to Edmonton in March, 1980, to look for work and has not returned except for some visits in the Christmas season. Sue had left home in April, 1980, with her own child who was born in December, 1979. At the time of her death, Doris had just completed grade eleven. When not at school or at her part-time job she spent much of her time in the company of her

family, all of whom enjoyed the usual winter and summer outdoor activities such as swimming, fishing, skating and snowmobiling. They engaged in family projects. Like the other children, she performed the usual family chores. She often helped the youngest two children with their homework and took them shopping and to the movies. She and Denise exchanged intimacies and they had common friends. Doris's relationship with her brothers and sisters, though close, was, it is fair to say from the evidence, no closer than the relationship each child had with the others. As between mother and father, Doris, of course, was in the company of her mother more often and for longer periods. Though comparisons are perhaps invidious, they are impossible to avoid in cases of this kind. In my judgment, the loss to the plaintiff Theresa Gervais, Doris's mother, is greater than that to the plaintiff Robert Gervais, her father. Similarly, the loss to Denise is greater than that to Rick and Sue, both of whom had left home. Finally, guidance as well as companionship was involved in the loss to the two youngest children and their loss, in my view, is greater than that to Denise.

My assessment, then, of the compensation to be awarded to the plaintiffs for the loss of Doris's guidance, care and companionship is as follows:

Robert Gervais	$10,000.00
Theresa Gervais	12,000.00
Rick Gervais	1,500.00
Sue Gervais	3,000.00
Denise Gervais	4,500.00
Robert Gervais, Jr.	6,000.00
Carol Ann Gervais	6,000.00

To the assessment of the loss to Doris's father, Robert Gervais, must be added the special damages of $4,039.52, making a total assessment for him of $14,039.52. The total assessment for all plaintiffs is, therefore, $47,039.52. To each of the constituent assessments must be applied the apportionment which I mentioned earlier. Because of Doris's contributory negligence of 35 per cent, the plaintiffs are entitled to judgment for only 65 per cent of their respective assessments. For convenience, I set out the amounts to which each plaintiff is entitled to judgment against the defendant Raymond Richard:

Robert Gervais	$ 9,125.69
Theresa Gervais	7,800.00
Rick Gervais	975.00
Sue Gervais	1,950.00
Denise Gervais	2,925.00

Robert Gervais, Jr.	3,900.00
Carol Ann Gervais	3,900.00
TOTAL	$30,575.69

The amounts awarded to Robert Gervais, Jr., and Carol Ann Gervais are to be paid into Court to their credit, to remain there until they reach the age of 18 or until further order.

(Argument re costs and pre-judgment interest.)

I think this endorsement covers everything that I said should be covered but I'll read it now so there will be no problem in taking out the formal judgment.

"September 17, 1984

For oral reasons delivered in court, action dismissed with costs as against the defendant Robert Richard. The plaintiffs will have judgment against the defendant Raymond Richard as follows:

Robert Gervais	$ 9,125.69
Theresa Gervais	7,800.00
Rick Gervais	975.00
Sue Gervais	1,950.00
Denise Gervais	2,925.00
Robert Gervais, Jr.	3,900.00
Carol Ann Gervais	3,900.00

The amounts awarded to Robert Gervais, Jr., and Carol Ann Gervais are to be paid into court, to remain there until they attain the age of eighteen years or until further order. The plaintiffs are entitled to the costs of the action against the defendant Raymond Richard and to add to those costs the costs they're required to pay to the defendant Robert Richard. Plaintiffs are also entitled to pre-judgment interest under the provisions of Section 36 of the Judicature Act from November 16, 1981."

Judgment for plaintiffs
against defendant Raymond Richard

SHKWARCHUK et al. v. HANSEN et al.

Saskatchewan Court of Queen's Bench
[Yorkton Judicial Centre],
MacLeod J.

Judgment - July 13, 1984.

Negligence - Motor vehicle accident - Personal injuries - Damages.

Contributory negligence - "Seat-belt defence" - In absence of mandatory seat-belt legislation, failure to wear seat-belt not contributory negligence.

Damages - Loss of consortium - Consortium distinguished from servitium - Right to action for loss of consortium discriminatory as action available only to husband and not to wife at common law - Preferable to declare action abolished than to extend equivalent right of action to wife for loss of husband's consortium - Canadian Charter of Rights and Freedoms, s. 15(1).

The first defendant's vehicle having become overheated one dark night, he stopped on the paved shoulder of an S-bend of the highway. Shortly, his cousin, the second defendant, chanced by, and stopped on the paved shoulder directly in front of the stricken vehicle, but facing oncoming traffic, with his headlights on. The effect was to create a beam of light confusing to oncoming traffic on this difficult double bend, while effectively rendering the first vehicle invisible. The male plaintiff, driving with his family, was bemused by the light and ran into the back of the first vehicle. The male plaintiff, his wife and daughter, were injured. The wife had not been wearing her safety belt. All sued for damages for their injuries, the husband's action including a claim for loss of consortium.

Held - Judgment for the plaintiffs. The accident was caused entirely by the negligence of the defendants, and by agreement they should share liability equally.

Where no legislation imposed any duty to wear a seat-belt, it was not contributory negligence to fail to do so. Moreover, the defendants had failed to show that Mrs. S's injuries were in any way exacerbated by her failure to wear her seat-belt.

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other hand, the driver of a loaded gasoline tanker-truck is likely to have a quite different expectation. Surely he knows or ought reasonably to expect that if as a result of his negligence an accident occurs, and as a result his cargo is spilled or his vehicle strikes some highway structure such as the wall or supporting columns of an overpass, there will be a potential for very great damage not only to users of the highway but to the highway property itself. At least in the latter case the words of my colleague, "if the question were put to him, he would say he owed no duty to the Crown because the use he was making of the highway was the use it was anticipated motorists would make of it", seem to me to be properly directed not so much to what his expectations about the consequences of his negligence may be, but more to what the ordinary driver in this province has come to understand and expect is in fact his legal liability for negligence when he is availing himself of the use of the highway.

Rather than allowing the appeal on what seems to me to be the somewhat doubtful ground that the appellant owed no duty of care to the Crown and thus cannot be held liable to it in negligence, I prefer to allow it on the basis that in this province the Legislature has simply not seen fit to confer a right of recovery by the Crown in respect of damage negligently caused to highway property by motorists. For this purpose, I am prepared to assume that the law on the subject of the compensability of economic losses is not free from doubt as it applies to the facts of this case and thus that the outcome of this appeal need not turn on the argument.

Counsel for the appellants puts the argument that since the Crown's duty to maintain and keep the highways in good repair is imposed on it by statute, the statute must be looked to for any right of recovery by the Crown against the motorist, and such a right is not conferred. Related to this is the argument that no such right is conferred "because the Legislature intended the discharge of the Crown's duty to be financed from general revenues and not from lawsuits against the motoring public".

My colleague in her reasons accepts that counsel makes a persuasive case based on these arguments. It is unnecessary to repeat or summarize here her comments about these arguments, since I am in agreement with her that they are persuasive. Her only expressed reservation is that when an action is brought by the Crown as the owner of property which has been damaged, rather than as a statutory entity which is obliged to incur economic loss by virtue of a statutory duty, there may be no need to look for the Crown's right of recovery in the express terms of the statute, since as a property owner the Crown may be said to have all the rights of a private property owner unless those rights have been removed by statute. If this were so however, there would presumably then be a duty of

care which would be recognized as owing to the Crown by the appellant driver in this case. In any event, the Crown in my opinion cannot be compared to a private property owner in relation to its ownership of the highways, and for the reasons given by my colleague in her comments on the subject of the duty of care and in her comments relating to the fourth and fifth arguments of counsel for the appellant, I do not think that any distinction that might be supposed to exist based on the Crown's "alternative status" as an owner of damaged property, can or ought to prevail to render the appellant liable to the Crown in the circumstances of this case. If indeed the Legislature intended that there should be a right of recovery by the Crown of damages occasioned in circumstances such as these, it ought to say so in clear and unmistakable terms, as has been done in the corresponding legislation of other provinces. This it has not done, and once again I do not think it is up to this Court to remedy the deficiency if in fact there is any deficiency.

For these reasons I must with regret disagree with the conclusion reached by my colleague Brooke concerning the disposition of this appeal. The appeal should be allowed but without costs either in this Court or below.

Appeal allowed.

[COURT OF APPEAL]

Ippolito v. Janiak et al.

MACKINNON A.C.J.O., BLAIR AND GOODMAN JJ.A.

15TH SEPTEMBER 1981.

Damages — Tort — Personal injuries — Mitigation — Principles of assessment when plaintiff unreasonably refuses to undergo corrective surgery.

Tort — Damages — Personal injuries — Mitigation — Principles of assessment when plaintiff unreasonably refuses to undergo corrective surgery.

The plaintiff suffered serious back injuries when struck from behind in a motor vehicle accident. Liability was admitted and the trial proceeded on the assessment of damages. The trial Judge held that the plaintiff had unreasonably refused to undergo corrective surgery, which had a possible failure rate of 25 to 30%. He further held that the plaintiff was not entitled to any damages in respect of loss consequent upon this refusal. The plaintiff appealed.

Held (MacKinnon A.C.J.O. dissenting), the appeal should be allowed.

Where a plaintiff unreasonably refuses to undergo corrective survery, damages should be assessed as they would be if the plaintiff had agreed to the operation, but sued before it was performed. The trial Judge erred in refusing to award damages for pain, suffering, loss of amenities, or lost earnings consequent upon the plaintiff's

unreasonable refusal to undergo surgery. In this case, there was a 30% risk that the plaintiff would have been unable to return to his employment had the operation been performed. The plaintiff is entitled to have loss of future earnings damages calculated on the basis that he has lost 30% of his future income. That amount, discounted at an agreed 3%, is subject to a contingency deduction of 25% for normal contingencies of life, and the possibility that surgery would have been required to correct an injury sustained in an earlier accident. The damages otherwise payable should then be reduced by one-third to take into account the likelihood of the plaintiff securing less remunerative employment.

Per MacKinnon A.C.J.O., dissenting: the prospect of unsuccessful surgery is relevant to the issue of whether the plaintiff unreasonably refused the surgery; not to the assessment of damages. Having accepted the finding of the trial Judge that the appellant had unreasonably refused medical or surgical treatment, the assessment of damages must proceed on that basis. The 25-30% possibility of failure of the operation was a factor in determining whether the refusal was reasonable. However, once the finding is made that, if the appellant had submitted to the operation he would, on the balance of probabilities, have been able to resume his employment, no room is left for resurrecting the contingency of failure of the operation as an item of damages. It is inconsistent to hold that on the balance of probabilities the operation would have been successful, but nevertheless award damages on the basis that there was a possibility of failure. The trial Judge awarded general damages on the assumption that the plaintiff had undergone a successful operation, and these should not be altered. However, it seems incongruous that the majority would not take into account the possibility of unsuccessful surgery in assessing general damages.

Per Blair J.A. (Goodman J.A., concurring): where a tortious act causes personal injury, there is a foreseeable possibility, as in this case, that the effects of the injury may never be completely overcome by surgery or other medical treatment. The "all or nothing" approach in the United Kingdom workmen's compensation cases is not consistent with the general rule of mitigation of damages. The failure to mitigate does not bar the remedy; it only goes to the amount of damages recoverable. The failure to minimize damages merely precludes recovery of that part of the appellant's damages which the Court finds could reasonably have been avoided. The appellant's damages should have been assessed as they would have been if he had agreed to surgery with the 30% risk that he would be unable to return to his employment.

[*Schrump et al. v. Koot et al.* (1977), 18 O.R. (2d) 337, 82 D.L.R. (3d) 553, 4 C.C.L.T. 74, apld; *McAuley v. London Transport Executive*, [1957] 2 Lloyds Rep. 500; *Morgan v. T. Wallace Ltd.*, [1974] 1 Lloyds Rep. 165; *Curliss v. Village of Bolton*, [1939] O.R. 201, [1939] 1 D.L.R. 772, consd; *Craig v. Garfit-Mottram*, (1977), 17 A.C.T.R. 17, distd; *Plenty v. Argus*, [1975] W.A.R. 155; *Newell v. Lucas*, [1964-65] N.S.W.R. 1597, folld; *Steele v. Robert George & Co. (1937). Ltd.*, [1942] A.C. 497, revg [1941] N.I. 133; *Donnelly v. Wm. Baird & Co. Ltd.* (1908), 45 S.L.R. 394; *Warncken v. R. Moreland & Sons*, [1909] 1 K.B. 184; *Marshall v. Orient Steam Navigation Co. Ltd.*, [1910] 1 K.B. 79; *Marcroft v. Scruttons Ltd.*, [1954] 1 Lloyds Rep. 395; *Masny v. Curtis-Halls-Aldinger Co. Ltd.*, [1929] 3 W.W.R. 741, not folld; *Murray v. H. Baigent & Sons Ltd.*, [1938] N.Z.L.R. 405; *Hamilton v. Tuck Bros. Ltd.*, [1940] N.Z.L.R. 895; *Marsh v. Bowlin*, [1947] N.Z.L.R. 218; *Shaw, Savill, Albion Co. Ltd. v. Jones*, [1947] N.Z.L.R. 226; *Bateman v. County of Middlesex* (1911), 24 O.L.R. 84; *Murphy v. MacAdam* (1965), 51 M.P.R. 267; *McGrath v. Excelsior Life Ins. Co.* (1973), 6 Nfld. & P.E.I.R. 203; *McCarthy v. MacPherson's Estate* (1978), 14 Nfld. & P.E.I.R. 294; *Eley v. Bedford*, [1972] 1 Q.B. 155; *Payne v. Hillcrest Rent-a-Car Ltd. et al.* (1979), 21 Nfld. & P.E.I.R. 520; *Hayden v. Klaus et al.*, [1975] W.W.D. 78; *Polidori v. Staker* (1973), 6 S.A.S.R. 273; *Matters v. Baker et al.*, [1951] S.A.S.R. 91; *Glavonjic v. Foster*, [1979] V.R. 537, refd to]

APPEAL from trial Judge's assessment of damages in a personal injury negligence action.

William Morris, Q.C., and *Janet Smith*, for appellant.
Brendan O'Brien, Q.C., for respondent.

MACKINNON A.C.J.O. (dissenting):—The appellant, then aged 40, was seriously injured on March 31, 1976, when the motor vehicle he was driving was struck in the rear while stopped at a railway crossing. The defendant Janiak (respondent) admitted liability and the trial proceeded on the assessment of damages.

As a result of the accident, the appellant sustained a disc protrusion of the cervical spine and a tear in the left biceps tendon sheath. Dr. Richter, the orthopaedic surgeon treating the appellant, recommended surgery for the cervical spine being an excision of the disc with a spinal fusion. After a recuperation period of some four months, there would be the probability of surgery being required for the tear in the biceps tendon sheath which would entail a further four months for recovery. Dr. Richter was of the opinion that there was a 70-75% chance of a successful result in the operation on the spine and that the appellant would thereafter be able to resume his employment as a crane operator. This opinion was confirmed by Dr. Martin, the orthopaedic specialist retained by the respondent.

Dr. Martin was also of the opinion, which was not contradicted, that, as a result of an earlier accident and the degenerative disc changes revealed in earlier X-rays, there was at least a 50% chance that the appellant would have had symptoms leading to the recommended surgery even if there had been no accident in 1976. Dr. Agro, the appellant's family physician, also recommended to the appellant that he undergo the surgery.

It should be noted that where the figure of 10% was given as the possibility of a poor result for the spinal operation, the possibility of paraplegia or death did not make up that 10%. Although the doctors were reluctant to give any figures, the mortality figure given by Dr. Martin was one-tenth of one percent and the possible figure for quadriplegia was "somewhere around 1%". They obviously did not feel that these remote possibilities should be given any real weight or consideration in recommending surgery.

The appellant had a great fear of the surgical procedures and he wished to be assured that there was a 100% chance of success before he would consent to an operation. Since the surgeons were unable to give such a guarantee, which would be the case in any operation, however simple, the appellant refused to undergo the recommended surgery and as a result was unable to continue his employment up to

the date of trial. The appellant called as a witness Dr. Eldon Tunks, a psychiatrist and the director of the Pain Clinic at the Chedoke-McMaster Medical Centre. He was of the view that, because of the appellant's tension, no significant improvement would occur as a result of any surgery. As pointed out by counsel for the respondent, Dr. Tunks had apparently suggested to the appellant various non-surgical methods of treatment. The appellant said he would consult with his family physician, Dr. Agro, and no evidence was heard whether the appellant had indeed consulted with Dr. Agro and had accepted or undertaken any of the suggested methods of treatment. A safe assumption is that he did not consult Dr. Agro and certainly he had not undertaken any of Dr. Tunk's suggested treatments up to the date of trial.

The learned trial Judge carefully considered the evidence of the medical experts including that of Dr. Tunks and, as was his province, he accepted the evidence of the two orthopaedic specialists supported by the recommendation of the appellant's family physician. The trial Judge concluded on all the evidence that the respondent had satisfied the onus of establishing that the appellant had unreasonably refused to avail himself of the requisite surgical treatment and that he was not entitled to any damages in respect of any pain, suffering, loss of amenities or earnings consequent upon such unreasonable refusal. Thus he awarded the appellant special damages of $33,000 for loss of income from the date of the accident until March 31, 1978, the date by which the trial Judge found the appellant would have been able to return to work had he submitted to surgery, and general damages of $25,000.

We did not require submission from counsel for the respondent on the question whether the appellant had, under the circumstances, unreasonably refused the recommended surgical treatment. As stated by each member of the House of Lords in *Steele v. Robert George & Co. (1937), Ltd.*, [1942] A.C. 497 at pp. 501, 502, 503, 504, 508, whether a plaintiff has unreasonably refused medical treatment is a pure question of fact, and in the case at bar, we were all of the view that there was evidence to support the trial Judge's conclusion on this point.

On the question of damages, counsel for the appellant submitted that the $25,000 awarded by the trial Judge as general damages should be increased to $35,000. However, this argument was not pressed and I see no error in the amount awarded which was to compensate the appellant for the future pain and suffering and the loss or impairment of some amenities of life which he would have continued to suffer even if he had successfully undergone surgery on his spine.

No issue was taken with the proposition that the refusal to

undergo the operation was a relevant factor in the assessment of damages. The only issue on which we required submissions from counsel for the respondent was whether, in his calculation of damages for loss of future income, the trial Judge had erred in failing to take into account the 25% chance of the operation failing, so that the appellant would be unable to resume his former employment. Counsel for the appellant submitted that the damages for future income loss should have been calculated on this basis. The net yearly figure of 25% of the appellant's estimated annual income ($23,401) is approximately $5,850 which, for his working life expectancy at the agreed discount figure of 3%, produces approximately $85,700. Allowing 25% for contingencies, the claim for loss of future income is approximately $64,000.

In support of his position, counsel for the appellant relied on a passage from *Schrump et al. v. Koot et al.* (1977), 18 O.R. (2d) 337, 82 D.L.R. (3d) 553, 4 C.C.L.T. 74. In that case this Court was concerned with whether the trial Judge had erred in failing to direct the jury to disregard the "possibility" of future surgery, the argument being that the medical evidence only indicated a "possibility" and not a "probability" of surgery. The Court dealt with the issue in these words at p. 340:

> Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.

In my view, this passage does not address itself to the issue in the instant appeal. *Schrump v. Koot* dealt with the risk or likelihood of future developments attributable to the injuries suffered. The question here is how should the Court assess the future when it has held that the injured party has unreasonably refused all surgical treatment which, on the balance of probabilities, would have made that party economically whole.

Mr. Justice Blair has analyzed the problem with his usual force and clarity in his extensive reasons but I regret that I am unable to agree with his conclusions. It was not suggested or argued before us that there could not be concurrent or "multiple" causes of damage and I do not see that as an issue in this case. Whether Courts in the past have sought to avoid a finding of unreasonableness in cases such as this is really *nihil ad rem*, although such a conclusion is not flattering to the Courts concerned and must be highly conjectural.

Happily it can be said there are very few cases of "unreasonable" plaintiffs so the matter may not be of great general interest, although the principles involved, it seems to me, are.

In *Morgan v. T. Wallis Ltd.*, [1974] 1 Lloyd's Rep. 165 at p. 169, Mr. Justice Browne, in dealing with a problem similar to the one which faced the trial Judge in the instant case quoted from Lord Justice Romer's reasons in *Marcroft v. Scruttons, Ltd.*, [1954] 1 Lloyd's Rep. 395 as follows:

> "In my view it is clear that when one is considering this problem one has not got to be satisfied that the treatment or operation would certainly have been successful. Like everything else in civil litigations, the standard is the balance of probabilities."

(I have quoted from Browne J.'s reasons as I was unable to find that statement in my copy of the Lloyd's Report of the *Marcroft* decision. It is apparent that Browne J. had a more complete report of that decision before him than was available to me.)

In my view, once it has been established that on the balance of probabilities the operation, unreasonably refused, would have been successful, it does not require an elaborate examination of accepted principles to determine what is essentially a question of fact and proof and to reach a conclusion consistent with precedent and principle. Each case must be decided on its own facts and, in the instant case, the trial Judge found as a fact that the appellant acted unreasonably in refusing to have the recommended operation and that finding has been unanimously affirmed. It is clear that the respondent has established that, on the balance of probabilities (75%-25%), the operation would have enabled the appellant to return to his former work and thus there would have been a complete or 100% recovery so far as the appellant's loss of future income is concerned. That finding of fact having been made, the prospect of a 25% chance of future income loss disappears from the equation and should not be re-introduced when assessing damages. This is the reasoning that lies behind the English authorities on the subject, to which I shall refer shortly, which, as my brother Blair points out, have gone beyond being limited in their application to Workmen's Compensation cases. By allowing the appellant to recover 25% (30%) of his alleged economic loss, the majority effectively bypass or ignore the trial Judge's initial finding of fact as to unreasonableness.

The cases cited by my brother Blair, namely, *McAuley v. London Transport Executive*, [1957] 2 Lloyd's Rep. 500; *Morgan v. T. Wallis Ltd.*, *supra*, and the Australian cases, in my view support the position I take rather than otherwise. The Courts there speak of assessing the damages on the basis that the plaintiff had undergone the operation and "secured the degree of recovery to be expected from it". The degree of recovery to be expected from the operation

in the instant case when related to the economic loss as determined by the balance of probabilities was 100%. In *McAuley v. London Transport Executive*, the Court of Appeal (Jenkins, Sellers and Pearce L.JJ.) unanimously affirmed the conclusion of Pearson J. at trial that "if the continuance of an injury is due to the plaintiff's unreasonable refusal to have an operation, the continuing effects are not chargeable against the defendants. They are not due to the initial cause but due to the intervening cause of the unreasonable refusal." (p. 503) In *Morgan v. T. Wallis Ltd.* Browne J., having found as a fact that the plaintiff was unreasonable in refusing a laminectomy which, on the balance of probabilities, would have allowed him to resume his pre-accident work, refused to make any award for future loss of earnings.

Unlike the majority, I do not view the earlier authorities in this field as instances of "punishing" plaintiffs by barring legitimate claims for damages which could be established if they had agreed to surgery. Rather, the evidence establishes on a factual basis that the claims for such damages could not be proven on the balance of probabilities which, as Romer L.J. pointed out, is the standard in civil litigation, due to the voluntary acts of the plaintiffs concerned, just as in the instant case. This is not a case of punishing the appellant for his unreasonable conduct. Equally, it should not be a case of punishing the respondent for the unreasonable conduct of the appellant.

Furthermore, the appellant would not have been required to experience great delay in awaiting the results of his operation to determine the extent of his recovery, nor indeed are plaintiffs generally so required. The argument to the contrary does not accord with experience. The accident occurred on March 31, 1976, the operation was rejected in June or July 1977, and the trial was in 1979. Normally any required operation takes place almost immediately after the accident. The most commonly provided and accepted reason for adjourning trials is that a firm medical prognosis is not available until a further period of time has elapsed. Indeed, experienced trial counsel do not set their cases down for trial before they have in hand as firm a medical prognosis as possible. Both sides require such evidence and these are not cases of denying compensation to plaintiffs indefinitely but cases of having the best evidence available so that a proper disposition may be made in the interest of all parties. It is at that stage that a prognosis is made by the experts and weighed by the Court, quite a different situation from the facts of the instant appeal.

As noted by Mr. Justice Blair, counsel referred us to a number of Canadian and English authorities. In England the problem has been dealt with most frequently in connection with the *Workmen's Com-*

pensation Act. The issue in those cases was whether the workman had unreasonably refused medical or surgical treatment and whether his continuing incapacity was therefore not a consequence of the accident but a consequence of his unreasonableness thus dis-entitling himself to any further payment under the *Workmen's Compensation Act*: *Tutton v. Owners of Steamship Majestic*, [1909] 2 K.B. 54; *Warncken v. R. Moreland & Son, Limited*, [1909] 1 K.B. 184 at p. 189; *Steele v. Robert George & Co. (1937), Ltd.*, *supra*; *Richardson v. Redpath, Brown & Co. Ltd.*, [1944] A.C. 62.

In this province the earlier English authorities were analysed by Riddell J. in *Bateman v. County of Middlesex* (1911), 24 O.L.R. 84. In that case the plaintiff had been injured as a result of the defendant's negligence. The accident had caused the plaintiff a number of injuries; the most serious of which was a prolapsed kidney. After citing a number of English authorities, the learned Judge said this at p. 87:

> The principle to be deduced from these is, that, if a patient refuse to submit to an operation which it is reasonable that he should submit to, the continuance of the malady or injury which such operation would cure is due to his refusal and not to the original cause. Whether such refusal is reasonable or not is a question to be decided upon all the circumstances of the case. If the medical attendant of the injured man be competent, and no attack be made upon his honesty, the *Tutton* case is authority for saying that it is not unreasonable to refuse to submit to an operation against the advice of the attendant. And that is this case.

The majority reasons suggest that Riddell J.'s statement of principle is inconsistent with the conclusion reached by Hogg J. (a Judge of concurrent jurisdiction) in *Curliss v. Village of Bolton*, [1939] O.R. 201, [1939] 1 D.L.R. 772. There the plaintiff fractured her femur by stepping into a depression or hole which the defendant municipality had allowed to remain in the centre of the sidewalk. A short time after the accident, as is the usual situation as I have sought to point out, she had an operation to reduce the fracture and a few weeks later, a second operation was performed to insert a pin in order to facilitate the union of the bone. On discharge from the hospital she was instructed to walk only with the aid of crutches but a month later she discarded her crutches without her doctor's knowledge and relied on a cane for support diminishing the chances of the fracture uniting. A third operation was required as a result of the pin loosening which the trial Judge held was due to her use of the cane rather than crutches. On the evidence, the trial Judge concluded that there was normal recovery in 75% of such cases and that accordingly her damages relating to the period after the third operation would be reduced by 75%. I find it difficult to analogize the instant case with *Curliss v. Village of Bolton*. The analogy would be more apt if Mrs. Curliss had refused to use *either* crutches or cane or, more importantly, if she had unreasonably refused any

operation at all and had claimed for economic loss for her disability. I do not view Mr. Justice Hogg's decision as being inconsistent with the statement of principle, quoted above, by Mr. Justice Riddell in *Bateman*, and that statement has stood unchallenged by any higher authority in this province for 70 years.

Whether a plaintiff in a personal injury action is entitled to future loss of wages, it having been held as a fact that he unreasonably refused medical treatment, was canvassed by the English Court of Appeal in *Marcroft v. Scruttons, Ltd.*, *supra*. In that case the plaintiff suffered some slight physical injury which resulted in severe anxiety neurosis and depression. The plaintiff's own doctors advised him to undergo treatment at a mental hospital, which treatment they believed would likely produce substantial recovery. The appellant refused the treatment.

After reviewing the evidence at length, Singleton L.J. said at pp. 399-400:

> I do not wish to say anything that would hurt the feelings of a plaintiff in a case of this kind, but I believe it to be the duty of this Court to say that if a man is recommended by his own medical advisers and by others to undergo a course of treatment, he ought to undergo it; if he is advised that it gives him a reasonable chance of recovery, and if the treatment is reasonable, he ought to undergo it; if he will not, and does not, he must see that it is a little hard upon the defendants if they are to be asked to pay damages in respect of a period extending afterwards. If the general opinion is that that treatment would cure him, or, at least, render him in a much better state in every way, then he ought to undergo the treatment.

Lord Justice Denning dealt with the issue as follows at p. 401:

> The difficulty is, however, that the man refused to accept medical treatment. The doctors were of the opinion that he ought to receive electrical shock treatment, and that if he did so he had a very good chance of recovery, but the man refused to follow the advice of all the doctors. Viewing the matter objectively, he was quite unreasonable in refusing to follow their advice; but viewing the matter subjectively, the man's attitude was quite understandable. He was an uneducated, ignorant man who did not realize that a mental hospital nowadays is very different from what it was 30 or 40 years ago; and, moreover, owing to his anxiety neurosis, he was not in a fit state to make reasonable decisions. The difficult question in the case is whether we are to admit this subjective condition of his as a reason for refusing medical treatment. I think not. We should do great harm if we allowed him to go on receiving compensation for the rest of his life because of his refusal to accept medical treatment.

Lord Justice Romer agreed with the other two members of the Court in these words at p. 401:

> But although I can well understand the viewpoint that obviously affected the plaintiff, I have come to the conclusion that it would not be right to say that the defendants, who are asked to pay damages, should pay damages when it was, in all probability, possible at an early stage to improve the plaintiff's physical condition.

In my opinion that approach is not a new or startling departure from the ordinary standard of proof required of a plaintiff in a civil litigation action and is applicable here. In summary, having accepted the finding of the trial Judge that the appellant had unreasonably refused medical or surgical treatment, the assessment of damages must proceed on that basis. The 25-30% possibility of failure of the operation was a factor in determining whether the refusal was reasonable. However, once the finding is made that, if the appellant had submitted to the operation he would, on the balance of probabilities, have been able to resume his employment, no room is left for resurrecting the contingency of failure of the operation as an item of damages. It is inconsistent to hold that on the balance of probabilities the operation would have been successful, but nevertheless award damages on the basis that there was a possibility of failure. The appellant has failed to establish his right to claim for economic loss on the findings of fact made against him. Furthermore, if the Court is called upon, under the circumstances, to deal with percentages, an award of 25% (30%) of the calculated lost future wages also ignores Dr. Martin's opinion that there was a 50% possibility of the operation being required even if there had been no accident.

It was not argued before us that this is a "thin skull" or "eggshell personality" case. There was no suggestion that the appellant's refusal to have the operation was due to a physical or psychological disability pre-existing the accident or that he was acting under the pressure of a mental disorder which prevented him from exercising a free choice. On the contrary, he knew the purpose and effect of his act. Having decided not to undergo the operation, which decision was held to be an unreasonable one, the disability from which he continues to suffer (so far as his inability to return to his former employment is concerned) flows from that decision and cannot be held to be the natural and probable result of the original negligence. Thus he cannot recover damages for it. To call his decision a failure to discharge his duty to mitigate does not alter the results which, of necessity, flow from that failure.

Lacourcière J.A. pointed out in *Cotic v. Gray* (1981), 33 O.R. (2d) 356, that "the test of foreseeability is to determine what the reasonable man would do in the particular circumstances". A defendant is not called upon to foresee the actions of an unreasonable man and if it is to be otherwise one wonders what becomes of contributory negligence, *volenti non fit injuria* and *novus actus interveniens*, all, one would think, as equally foreseeable as the actions of an unreasonable plaintiff.

Singleton L.J. in *Marcroft v. Scruttons, Ltd., supra*, made the following comment which is applicable here (p. 400):

> If he [the trial Judge] made up his mind as to what the plaintiff ought to have done, and as to what his position in all probability would have been if he had adopted the advice which he was given, I cannot see that it is any part of the duty of this Court to interfere with that finding, which was based upon the evidence given before the Judge. If that is the right view to take, the assessment of the out-of-pocket loss of the plaintiff cannot be challenged.

I equally think that this Court should not interfere with the findings of fact made by the learned trial Judge in the instant case.

There is one further matter that concerns me on which the record is somewhat confused. Dr. Richter, whose evidence was accepted by the trial Judge, recommended two steps in the surgery — first, surgery for the cervical spine, and, after recuperation from the spinal fusion, probable surgery for the tear in the biceps tendon sheath. In his opinion a four-month recovery period was necessary after each operation.

The trial Judge awarded loss of income to March 31, 1978, by which time the trial Judge felt the appellant would have recovered from his second operation. It is true that Dr. Richter in his evidence at trial stated that he had again advised the appellant on June 30, 1977, to have the operation on his spine and had at that time indicated the probabilities of a satisfactory result. However, in his cross-examination, it became apparent that he had not discussed surgery of the shoulder (the tear in the biceps tendon sheath) with the appellant until October 11, 1977. Accordingly, I think it appropriate, allowing time for the appellant to consider the prospects of a second operation at the same time as he is considering undergoing the first operation, and for the necessary hospital arrangements to be made, to start the total recovery time of eight months from November 1st, rather than from August 1, 1977. If my time calculations are correct the appellant would have recovered from his second operation by the end of June, 1978, three months beyond the time allowed by the trial Judge. This would mean a three-month loss of income which rounds to $4,250 and I would vary the judgment below accordingly.

I would not interfere with the award of general damages for the same reasons that I would not award any damages for economic loss. As already noted, the award of general damages made allowance for the continuing pain and suffering and loss of some amenities even if a successful operation had taken place. This award was accepted by all members of the Court. It seems to me somewhat incongruous that the Court should now award 25% (or 30%) of the alleged economic loss on the basis of a 25% (30%) possibility of an unsatisfactory result of the operation, but not do so with regard to the award of general damages.

I would, accordingly, dismiss the appeal, subject to the amount

fixed for loss of income being varied from $33,000 to $37,250. After deducting the no-fault benefits of $10,010 received by the appellant this would leave the special damages at $27,240. In this difficult case, although the appellant, in my opinion, has lost the major portion of his appeal, he did have some modest success and the ends of justice would be served by dismissing the appeal, subject to the modification noted, without costs.

BLAIR J.A.:—This case is concerned with the effect on the award of damages of the unreasonable refusal of an accident victim to submit to surgical treatment of his injury. Mr. Justice Callaghan held the appellant's continuing incapacity to work resulted from his unreasonable refusal of the operation and that because he had failed to mitigate his loss he could only claim damages up to the time when he would have recovered from the surgery.

The judgment of Chief Justice MacKinnon carefully sets out the facts but I am, with respect, unable to agree with his conclusions. It is beyond dispute that the appellant's refusal of surgery was unreasonable and that, as determined by the learned trial Judge, such surgery offered only "a 70 percent chance of recovery to a degree that will allow the [appellant] to return to his former employment". The possible results of the operation were described in greater detail in the medical evidence of Dr. Richter which was accepted by the learned trial Judge. There was a 30% possibility of an excellent result where there would be no continuing limitation of activities or pain; a 30 to 35% possibility of a good result where there would be some continuing pain but no limitation of activities; a 30% possibility of a fair result where there would be both continuing pain and some limitation of activities; and an up to 10% possibility of a poor result where there would be significant pain and total disability. Such total disability included the possibility of paralysis or death from the operation on the appellant's neck.

The judgment at trial is based upon a legal doctrine which evolved from judicial interpretation of the *Workmen's Compensation Acts* if the United Kingdom. Viscount Simon explained the doctrine in a leading case relied on by the learned trial Judge, *Steele v. Robert George & Co. (1937), Ltd.*, [1942] A.C. 497 at p. 499:

> My Lords, the Workmen's Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end or be reduced if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity "results from the injury" within the meaning of s. 9 of the Act of 1925, after the time when the rejected remedy might be confidently expected to bring about a cure.

The peculiarity of the doctrine was commented upon by Lord Wright in the same case at p. 503:

> The rule as to the effect of an unreasonable refusal by a workman to undergo an operation, which has been approved by the two decisions of this House which I have quoted, was a piece of judicial legislation adopted by the Court of Appeal as long ago as 1903, but it has not been disavowed or qualified by the legislature in the subsequent revisions or re-enactments of the Act. It must be taken to have commended itself to the general sense of the community, but it is not easy to understand or apply. *It is rather a penalty provision than anything else. I find it not very logical to say that the workman's refusal breaks the chain of causality between the accident and the incapacity. On the contrary, effects of the accident still remain. The operation, furthermore, may not be successful even if it is not refused.*

(Emphasis added.)

The operation of the rule is explained by Judge Ruegg in his text, *Workmen's Compensation*, 9th ed., p. 148:

> If a workman unreasonably refuses to submit to an operation or to undergo treatment, and the employer can show that such operation or treatment will, in all probability, end or diminish the incapacity for work, the workman is not entitled to compensation whilst he so refuses, as in such case the continuing incapacity is attributable to his unreasonable conduct and not to the accident.

This general rule has been applied in numerous workmen's compensation cases in England, Ireland and Scotland: see *Donnelly v. William Baird & Co. Ltd.* (1908), 45 S.L.R. 394; *Warncken v. R. Moreland & Sons, Ltd.*, [1909] 1 K.B. 184; *Marshall v. Orient Steam Navigation Co. Ltd.*, [1910] 1 K.B. 79. In England the rule also applies in ordinary personal injury cases: *Marcroft v. Scruttons, Ltd.*, [1954] 1 Lloyds Rep. 395.

A review of the *Workmen's Compensation Act* cases makes it obvious that the initial concern of the United Kingdom Judges was to prevent malingering and impose what was considered to be a salutary discipline upon injured workmen. In their interpretation of these statutes the United Kingdom Courts appear to have been guided by their views on industrial and social policy rather than the ordinary rules applicable to damage assessment. Failure to accept medical treatment resulted in the forfeiture of any claim for damages thereafter rather than the mere reduction of claimable damages which would be more in accord with generally accepted principles. As Lord Wright stated in the *Steele* case, *supra*, the rule is "a piece of judicial legislation" tantamount to "a penalty provision".

In the *Donnelly* case Lord McLaren stated the policy underlying the rule at p. 396:

> In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief

> from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident, is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power.

If a workman refused to abide by the condition which the Judges implied in the statute he did so, as Lord MacDonald, the Lord Justice-Clerk stated in the same case at p. 395-96, "under penalty . . . of forfeiture of his right to a weekly payment". Later in the same passage at p. 396 he drew back from the choice of the blunt word "forfeiture" which he considered "an unfortunate one to use" and stated that a "better form" would be to say that after unreasonable refusal of surgery a workman "is precluded from further insisting on his claim for weekly payments".

The Courts also sternly disapproved of workmen who lacked, in the words of Lord MacDonald in *Donnelly*, the "manly character" to undergo an operation for their own good. The theme of the workman who unreasonably refuses surgery as an unworthy victim runs through almost all the cases and is strongly stated by Andrews C.J. in the Court of Appeal of Northern Ireland in the *Steele* case ([1941] N.I. 133 at p. 136), in a passage adopted by Viscount Simon, at pp. 490-500:

> "If he [the workman] refuses to submit to an operation from defect of moral courage or because he is content to put up with the disablement and is willing to live on a pittance under the Workmen's Compensation Act he is not entitled to compensation."

Quite recently Lord Denning in *Marcroft v. Scuttons, Ltd., supra*, stated that "weaklings" who unreasonably refused surgery should not be indulged by the law.

The socio-economic policy expressed in the early cases has remained, in my opinion, the dominant reason for the rule. Later it was joined by another rationale which avoided the use of indelicate words such as "forfeiture" and "penalty" and superficially appeared more in accord with traditional principles governing damage assessment. This explanation was that the chain of causation was broken by the unreasonable refusal of surgery which became thereafter the cause of the continuing incapacity: see *Warncken v. R. Moreland & Sons Ltd., supra*. Some cases described the unreasonable refusal as a *novus actus interveniens* which reinforced the rationalization that the chain of causation had been broken. At the turn of the century this explanation unquestionably had great appeal because of what Fleming, *The Law of Torts*, 5th ed. at p. 252 describes as the "inveterate predilection of the Common Law mind for assigning occurrences to a single responsible cause". The comment by Fleming at p. 253 on the philosophical and economic basis of contributory negligence applies equally to the doctrine at issue in this case:

> Like voluntary assumption of risk and the common employment rule, [contributory negligence] it subsidized the growth of industrial and business enterprise by lightening the burden of compensation losses for accidents inevitably associated with a rapidly expanding economy and the faster and greater volume of transport. These economic developments were accompanied by an individualistic philosophy which stipulated a high degree of self-reliance: The law, barely required to aid those who could not protect themselves, could well be indifferent to people who could help themselves but failed to do so. Besides, did the rule not serve the cause of accident prevention by encouraging utmost circumspection on everyone's part? If to the modern mind the sanction of withholding all redress seems rather disproportionate and punitive, it must be rememberd that "nineteenth century morality was a severe thing. It demanded absolutes. Either a defendant was responsbile or he was not. Compromises were not to be endured."

The concept of causation, which was developed to explain the doctrine acquired authority through judicial repetition but never had any factual foundation. As Lord Wright commented in the *Steele* case, *supra*, at p. 503, it is "not very logical to say that the workman's refusal breaks the chain of causality between the accident and the incapacity. On the contrary, the effects of the accident still remain". It is factually inaccurate to assert that the unreasonable refusal becomes the sole cause of the continuing incapacity except where it might be proved that there was no possibility of any continuing incapacity after such operation as occurred in the Australian case of *Craig v. Garfit-Mottram* (1977), 17 A.C.T.R. 12.

In this century the theoretical basis of tortious liability has been greatly altered. Multiple causes of damage are now recognized. The original tortious act becomes a continuum which may be joined or affected by other forces before the final damage for which the tortfeasor is responsible can be ascertained. The final damages may be affected by many events including contributory negligence, a subsequent accident or medical intervention. Apportionment and other techniques are employed by the Courts to assign liability to proper parties and, in appropriate cases, to reduce the liability of the first tortfeasor.

The legal limit on the liability of the primary wrongdoer is set by the doctrine of remoteness which embraces all damage which could be reasonably foreseen to flow from the tortious act. The doctrine of remoteness presents no difficulty in this case because it is obvious that, after a serious injury, the possibility of continuing incapacity, pain and loss of amenities will remain even after medical treatment or surgery. The doctrine on which the judgment at trial is based must, therefore, be regarded as being incompatible with the modern law of tort and cannot be justified on the basis of any principle of causation.

The English judicial rule of forfeiture was incorporated into the statutes of New Zealand but, as I will explain later, has not been adopted by statute or judicial decision in other common law jurisdic-

tions. It appears in the New Zealand *Workers' Compensation Act, 1908*, s. 16 and subsequent revisions. This section reads as follows:

> No compensation shall be payable in respect of the death or incapacity of a worker if his death is caused, or if and so far as his incapacity is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment the risk of which is, in the opinion of the Court, inconsiderable in view of the seriousness of the injury or disease.

The history of this statutory rule is explained in *Murray v. H. Baigent and Sons Ltd.*, [1938] N.Z.L.R. 405, where O'Regan J. said at p. 409:

> They [the English cases] show, further that whether compensation is to be continued, suspended, diminished, or ended depends entirely on the facts of each particular case, but that if the Court finds that the cause of the continued incapacity is not the original injury but the unreasonable conduct of the injured man, then his refusal is treated as *novus actus interveniens* . . . This section [*Workers' Compensation Act*, 1922, c. 39, s. 16] . . . is really declaratory of the law as explained by the cases decided under the English Act, and it indicates the serious risk that an injured man incurs of losing his right to compensation altogether.

See also *Hamilton v. Tuck Brothers, Ltd.*, [1940] N.Z.L.R. 895; *Marsh v. Bowlin*, [1947] N.Z.L.R. 218; *Shaw, Savill, Albion Co. Ltd. v. Jones*, [1947] N.Z.L.R. 226.

There appears to be increasing recognition by the United Kingdom Courts that the application of this doctrine presents difficulties. In the leading case of *Steele, supra*, Viscount Simon said at p. 500:

> The principle is, therefore, established, though I may observe that cases might arise in which there would be some difficulty in working out the quantitative result of applying it. For example, if the proposed operation can at best only work a partial cure, it does not appear to be an easy matter to fix what the reduced figure of compensation should be. And a converse case may be imagined. Supposing that a workman who is partially incapacitated undergoes an operation which is recommended as likely to cure him, but the operation fails and reduces him to total incapacity — is the compensation due from the employer thereby increased?
>
> In the present appeal, however, we are not troubled with these conundrums.

In later cases the English Courts have attempted to deal with these problems. In *McAuley v. London Transport Executive*, [1957] 2 Lloyd's Rep. 500, an injured person was advised to have an operation to repair a severed nerve in his arm where the prospect was of a 90% chance of restoring fine movement. The trial Judge held that his refusal to have the operation was unreasonable and terminated his claim for loss of wages at the point he would have been able to return to work had he had the operation. However, in his calculations of general damages, he took into account the residual disability which might have remained had the plaintiff undergone surgery.

His judgment was upheld by the Court of Appeal where Jenkins L.J. said at p. 505:

> what is the effect, if any, on the *quantum* of damages of the plaintiff's conduct in relation to the advice he received from these two medical men? It is not in dispute that, inasmuch as in a case of this sort it is the duty of the injured party to mitigate damages, it is his duty to act on any medical advice he receives to the effect that this or that treatment will give this or that prospect of success. If he receives medical advice to the effect that an operation will have a 90 per cent chance of success, and is strongly recommended to undergo the operation and does not do so, then the result must be, I think, that he has acted unreasonably, and that *the damages ought to be assessed as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it.*

(Emphasis added.)

This approach was carried further in *Morgan v. T. Wallis Ltd.*, [1974] 1 Lloyd's Rep. 165. In that case the evidence was that the chance of a successful operation was 90% "at the highest". Browne J. held that the plaintiff's refusal to have the remedial operation was unreasonable and gave practical effect to the dictum of Jenkins L.J. in the *McAuley* case quoted above when he stated at p. 173:

> Although I have held that the plaintiff ought to have had the operation, say, nine months ago, I do not think it would be right to assume that even if he had had the operation and it had been substantially successful he would not still have had some discomfort and some disability in the future, and I am making an increase of the damages on this account.

In both the *McAuley* and *Morgan* cases the assessment of general damages was increased to recognize the comparatively small possibility of a 10% continuing disability but no increase on this account was made for loss of future earnings. In the light of these recent decisions, it may be questioned whether the English Courts would now refuse to recognize the far greater impact on loss of future earnings as well as general damages of a 30% possibility of continuing disability. The "conundrums" referred to by Viscount Simon have apparently not yet been presented to the English courts.

Without mentioning the *McAuley* or *Morgan* decisions, Callaghan J. assessed general damages in this case on a similar basis. His calculation recognized the possibility of continuing pain and suffering even if the appellant had submitted to surgery. As a result the Court was not persuaded by the appellant's argument that the learned trial Judge had erred in assessing general damages and did not call upon the respondent to reply.

There is no Canadian case binding on this Court which has held that, if surgery is unreasonably refused in circumstances like the present, no claim for damages can be made for any incapacity remaining after such refusal. The United Kingdom doctrine was referred to seventy years ago by this Court in *Bateman v. County*

of Middlesex (1911), 24 O.L.R. 84, but was not applied to prevent recovery because there it was held that the victim of an accident had reasonably refused surgery. The extraordinary case of *Masny v. Carter-Halls-Aldinger Co. Ltd.*, [1929] 3 W.W.R. 741, a trial decision of the Saskatchewan Court of King's Bench, appears to be the only reported Canadian case where the doctrine was applied. There has been obvious reluctance to apply it and a disposition to seek a reasonable explanation for refusal of surgery: see *Murphy v. MacAdam* (1965), 51 M.P.R. 267 (N.S.S.C.), *McGrath v. Excelsior Life Ins. Co.* (1973), 6 Nfld. & P.E.I.R. 203 (Nfld. S.C.), *McCarthy v. MacPherson's Estate* (1978), 14 Nfld. & P.E.I.R. 294 (P.E.I.C.A.).

The consideration of whether the old United Kingdom rule should now be adopted by this Court must begin by ascertaining how damages would have been assessed if the appellant had agreed to an operation which had not yet been performed. It is then necessary to determine whether and to what extent the appellant who unreasonably refused the operation would have his damages assessed differently.

The appellant was injured by the admittedly negligent conduct of the respondent. If he had not refused to have the operation, his damages would have been assessed on the basis of the degree of recovery anticipated from the operation. He would not have had to await the outcome of the operation before bringing his action. If this was not the law, plaintiffs, who suffer grievous injuries requiring prolonged surgical and medical treatment, could be denied compensation indefinitely. In *McGregor on Damages*, 14th ed. (1980), the following is stated at para. 293:

> The rule is that damages for loss resulting from a single cause of action will include compensation not only for damage accruing between the time the cause of action arose and the time the action was commenced, but also for the future or prospective damage reasonably anticipated as the result of the defendant's wrong, whether such future damage is certain or contingent. Perhaps the commonest illustration of the rule is an action for personal injuries where every day damages are awarded which take into account prospective pain and suffering, prospective loss of amenities of life, prospective medical expenses and prospective loss of earnings.

The problem of assessing damages in this case, had an operation been agreed to but not performed, would be no greater than that faced by Judges and juries daily in assessing the damages payable for the anticipated residual effect of injuries after surgery where they might be complicated by pre-existing medical conditions. In such an event the chain of causation would not be considered broken if an operation was performed. In assessing damages the remaining effect of the accident would be taken into account along with the possible results of the operation. In *Schrump et al. v. Koot et al.*

(1978), 18 O.R. (2d) 337, 82 D.L.R. (3d) 553, 4 C.C.L.T. 74, the question was whether a jury in assessing damages should consider medical evidence of the possibility of future surgery. This Court held that it mattered not whether the likelihood of surgery was described as a "possibility" or a "probability" and that it must be taken into account if the possibility was substantial and not speculative. Lacourcière J.A. said at p. 340:

> Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.

In this case the learned trial Judge found that "Surgical fusion offers a 70% chance of recovery to a degree that will allow [the appellant] to return to his former employment" (p. 26). There is thus a 30% chance that he would not be able to return to his former employment. In my view, this possibility that the operation will not be completely successful is too substantial to be disregarded in assessing damages.

The injured person, who is willing to submit to surgery is not confronted with an "all or nothing" result in the assessment of his damages. In these cases the finding that, on the balance of probabilities, there is a reasonable likelihood that surgery will overcome the incapacity and enable the victim to return to work goes to the issue of the reasonableness of the refusal and not the assessment of damages. Examples are legion of cases where damages have been awarded on the basis that there is a 30% or much less possibility of recovery from an injury with or without an operation. Our decision in *Schrump et al. v. Koot et al.* illustrates that a victim willing to submit to surgery will not be arbitrarily deprived of all damages because full recovery might be expected on a balance of probabilities. Lacourcière J.A. stated the governing principle at pp. 339-40:

> In this area of the law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage *will* occur, but only that there is a reasonable chance of such loss or damage occurring.

Had the appellant in this case agreed to the operation and sued before it was performed, there is no doubt that his damages would have taken into account the 30% possibility of failure.

The remaining questions are why should the result be different because the appellant refused the operation and whether the appellant should be denied any right to damages, as the learned trial Judge held, because he failed to mitigate his loss. Every plaintiff has a duty to minimize losses from personal injury by surgery or other medical treatment. The general rule of mitigation of damage applicable to both breach of contract and tort is that the aggrieved party must take all reasonable steps to mitigate the loss and cannot claim for avoidable loss: see *McGregor on Damages*, *supra*, paras. 213 to 241. In the case of contract, damages for breach are reduced by the amount of loss that should have been avoided if the plaintiff had taken reasonable steps to mitigate. In tort a similar rule applies to property damage: *McGregor*, para. 224.

It is trite law that "a plaintiff must always do what is reasonable to mitigate his loss": *Eley v. Bedford*, [1972] 1 Q.B. 155, *per* MacKenna J. at p. 158. If a plaintiff does not do what is reasonable to mitigate the loss, the result is that the claim for damages is diminished to the extent that it could have been mitigated if reasonable steps had been taken. The Courts will not award damages for avoidable loss. Failure to mitigate, however, does not mean that the total claim of the plaintiff is barred or has disappeared. It is merely reduced in cases of contract and tortious damage to property to the loss the plaintiff would have suffered if he had acted reasonably. There is no reason in principle why the same rule should not apply in personal injury cases.

In the analogous situation where the injured person refuses medical treatment or fails to follow medical advice (in contrast to unreasonably refusing to submit to surgery) the Courts have consistently reduced the damage award by an amount by which the plaintiff could have mitigated his damage but have not barred all right to compensation after such refusal or failure. In *Curliss v. Village of Bolton*, [1939] O.R. 201, [1939] 1 D.L.R. 772, the plaintiff was advised to wear crutches but instead chose a walking cane thereby aggravating her injuries. Hogg J. reduced the damage award for the plaintiff's failure to mitigate. He said at p. 207:

> Upon careful consideration of the whole of the medical testimony, I cannot reach the conclusion that all of the subsequent expenses incurred can be held to have resulted from the act of the plaintiff in giving up, when she did, the use of crutches, but I think it reasonable to hold that as under usual circumstances there is normal recovery in seventy-five per cent of like cases, the amount of damages relating to the period subsequent to April 1938 must be reduced by seventy-five per cent, on account of her own act. Because of this act on the part of the plaintiff, she placed herself in the class where normal recovery does not take place.

Other examples are provided by *Payne v. Hillcrest Rent-a-Car Ltd. et al.* (1979), 21 Nfld. & P.E.I.R. 520 (Nfld. S.C.), where the plaintiff's damages were reduced for failure to follow his physician's advice to lose weight; *Hayden v. Klaus et al.*, [1975] W.W.D. 78 (Sask. Q.B.), where the plaintiff's refusal to submit to reasonable medical treatment or surgery to alleviate her condition was held to result in the defendant's not being required to compensate her more than if the injuries had been treated properly. The recommendation of surgery is a form of medical advice and I see no reason why the principles of damage assessment in the case of a refusal to follow medical advice should be different from the case of an unreasonable refusal to undergo surgery.

The Australian Courts have adopted this principle of mitigation and hold that where a plaintiff unreasonably refuses to undergo surgery damages are assessed as they would have been if the plaintiff had in fact submitted to surgery and secured the expected degree of recovery. In *Plenty v. Argus*, [1975] W.A.R. 155, Burt J., speaking for the full Court of the Supreme Court of Western Australia, and adopting the language of Jenkins L.J. in *McAuley v. London Transport Executive*, quoted above, explained the rule at p. 158 as follows:

> In all the personal injury negligence cases so far reported, it appears to have been established on the balance of probabilities both that the plaintiff had acted unreasonably and that had the operation been carried out, the incapacity would have been removed or reduced to a certain degree. In such cases the onus is discharged on either view and with the result that damages are assessed "as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it."

The Australian approach to mitigation is illustrated by *Newell v. Lucas*, [1964-65] N.S.W.R. 1597, where the Full Court of the Supreme Court of New South Wales dealt with a factual situation very similar to that in this case. The plaintiff had suffered a back injury which had aggravated the effects of a previous one. He had refused an operation, which was estimated to have a 70% chance of success. The jury made a generous award of damages on the apparent basis that he was incapable of resuming his former employment which was more remunerative than work he was able to do after the second accident. The Full Court directed a new trial on the issue of damages. It held that the jury's award was out of all proportion to the sum required to give him reasonable compensation for the harm caused by the accident because it failed to take into proper account the effects of the previous injury which the medical evidence established as a certainty (not a possibility as in the present case) would have had incapacitating results in the future. In addition, it held that the plaintiff's refusal to have the operation was unreasonable and that the jury should have assessed damages "not on the basis that the operation would be a failure" but rather on the basis of "some compensation for the chance of failure": *per* Walsh J. at

p. 1604. Asprey J. added that because of the plaintiff's failure to mitigate damages by refusing the operation, the jury should discount heavily such damages as might be awarded under the heading of loss of future earning capacity. This reasoning was adopted by the Supreme Court of South Australia in *Polidori v. Staker* (1973), 6 S.A.S.R. 273. See also *Matters v. Baker et al.*, [1951] S.A.S.R. 91; *Glavonjic v. Foster*, [1979] V.R. 537.

The same principle underlies the American doctrine of mitigation of damages or, as it is more commonly referred to, the doctrine of avoidable consequences: see "Damages" 25 *Corpus Juris Secundum*, para. 33; "Damages" 22 *American Jurisprudence 2d* paras. 38-42; Shipley, "Duty of Injured Person to Submit to Surgery to Minimize Tort Damages", 62 A.L.R. 3d paras. 2-5.

The American doctrine provides that an injured plaintiff may not recover for those consequences of the defendant's act which the plaintiff could have avoided by the exercise of reasonable care and diligence. This rule is commonly applied in personal injury actions to preclude recovery for the pain and incapacity which could have been avoided if the plaintiff had acted reasonably in seeking medical or surgical attention. The only effect of an unreasonable failure to submit to surgery is that the plaintiff may not recover damages for the consequences of the defendant's act which could have been avoided by surgery. In 22 *American Jurisprudence 2d* the following passage appears at para. 42, pp. 68-9: "Refusal to submit to an operation will not prevent a recovery for consequences which could not, under the circumstances, have been avoided by the operation."

In his annotation "Duty to Minimize Tort Damages by Surgery", *supra*, Shipley states at subpara. 2[a], p. 13:

> It needs to be emphasized that the injured party is in no way compelled to go to surgery — the only consequence of the failure to do so is to relieve the defendant of liability for those consequences which surgery would have averted.

It is incongruous, if not offensive, to assert as is often done in the United Kingdom cases that a person is not compelled to undergo surgery but nevertheless to punish him if he refuses by barring a legitimate claim for damages which could be established if he had agreed to have surgery. A person may not by his unreasonable refusal of surgery enhance his claim for damages but this is far different from saying that such refusal is the cause of the damages which could have been claimed if the surgery had not been refused.

Where a tortious act causes personal injury, there is a foreseeable possibility, as in this case, that the effects of the injury may never be completely overcome by surgery or other medical treatment. The "all or nothing" approach in the United Kingdom workmen's compensation cases is not consistent with the general rule of mitigation of damages. The failure to mitigate does not bar the remedy; it only goes to the amount of damages recoverable. The failure to minimize damages merely precludes recovery of that part of the appellant's damages which the Court finds could reasonably have been avoided. The appellant's damages should have been assessed as they would have been if he had agreed to surgery with the 30% risk that he would be unable to return to his employment.

In my view, this Court is in a position to reassess damages and it is not necessary to direct a new trial and prolong this litigation for that purpose. There is no dispute about the economic or actuarial evidence. Conflicts in the medical evidence of Dr. Richter, called by the plaintiff, and Dr. Martin, called by the defendant, were resolved by the learned trial Judge who stated "insofar as differences exist in the opinions of Drs. Richter and Martin, I accept the evidence of Dr. Richter as he has treated the plaintiff extensively since May 22, 1976 to date and has examined him on numerous occasions".

The learned trial Judge assessed special damages for loss of earnings at $33,000 and general damages of $25,000 from which he deducted no fault benefits of $10,010, making a net award of $47,990. I agree with Chief Justice MacKinnon that the damages for loss of earnings up to the point where the appellant could reasonably have been expected to recover from surgery should be increased from $33,000 to $37,250.

The submission of the appellant's counsel provides a good starting point for the calculation of damages for loss of future earnings which the appellant would have suffered after the operation because of the 30% possibility of incapacity to resume this previous employment. The annual earnings of the appellant, including overtime, were $23,400 and 30% of that sum is $7,020. The capital sum of $102,821 is required to produce an annual income of $7,020 for the appellant's working life established by the actuarial evidence discounted at an agreed rate of 3%. The appellant's counsel acknowledged that the full 30% could not be claimed as damages and proposed a reduction of approximately 25% to $75,000 for unspecified contingencies. In my opinion, this deduction is insufficient and it is necessary to undertake a more precise estimate of the contingencies and other factors which would reduce the appellant's loss of future earnings.

I consider that an initial deduction of 25% for contingencies is appropriate in this case. It would cover the normal contingencies of life and the added possibility that an operation might have been required to correct the pre-existing injury to the appellant's neck resulting from the earlier accident. Even though Dr. Richter regarded Dr. Martin's estimate of 50% possibility that this operation would be required as "very high", it cannot be disregarded and would reasonably be included in a 25% contingency allowance. This would reduce the sum of $102,821 to $77,116.

At the time of the accident the appellant was employed in the realtively well-paid position of a crane operator. Even if he could not resume this former employment after an operation, the possibilities of earnings from alternative employment must be taken into account. Dr. Richter's evidence, summarized at the beginning of this judgment, was that there was as high as a 10% possibility of a poor result from the operation which would totally disable the appellant. He considered there was a 30% possibility of a fair result which would result in pain and some limitation of activity. Thus within the 30% possibility of incapacity of the appellant to resume his former employment established by the learned trial Judge, there is an amalgam of the fair and poor results described by Dr. Richter and the possibilities range from total disability through part-time to light employment for the appellant. Dr. Richter stated that "he would be doing light work or part-time work, he would be taking medication for pain, visiting his doctor, taking physiotherapy treatments from time to time, possibly using a collar and having a significant amount of difficulty". At a later stage in his testimony, he added the possibility that he could do "no work at all". The possibility of retraining for non-manual work can be excluded because of the appellant's age, education and lack of familiarity with the English language. Taking into account the various possibilities of total disability, ability to perform part-time work or less remunerative light work, it seems reasonable to reduce the damages otherwise payable to the appellant by one-third from $77,116 to $51,411.

In summary, damages for loss of earnings would be increased to $88,661 and after deduction of no-fault benefits of $10,010 would amount to $78,651. General damages would remain at $25,000 and the total would be $103,651.

I would therefore allow the appeal with costs and direct that para. 1 of the judgment below be varied by increasing the award of damages from $47,990 to $103,651.

GOODMAN J.A. concurs with BLAIR J.A.

Appeal allowed.

[COURT OF APPEAL]

Leading Investments Ltd. v. New Forest Investments Ltd. et al.; H. W. Liebig & Co. Ltd. v. Leading Investments Ltd.

BROOKE, WILSON AND MORDEN JJ.A. 5TH OCTOBER 1981.

Contracts — Interpretation — Court to look for and be guided by the reasonable expectations of the parties as long as compatible with their written contract.

Agency — Commission — Real estate agent — Agent's right to commission depends on his finding a purchaser, ready, willing and able to complete the sale.

The appellant agreed to employ the respondent as his agent to sell land. The appellant gave the respondent an exclusive listing. The respondent, the agent, presented an offer from the defendant to the appellant, the vendor. The vendor accepted this offer. The defendant was unable to complete. The vendor brought an action against the defendant, seeking specific performance and damages, and against the agent for payment to it of the deposit paid by the defendant. The agent counterclaimed for its commission. The action against the defendant was settled, and the trial only concerned the vendor and agent. The listing agreements signed by the vendor were on the standard form of the Ontario Real Estate Board and provided that a commission would be paid by the vendor "on any sale . . . effected . . . ." The agreement of purchase and sale contained the standard wording of the Real Estate Board forms and provided that the commission was payable to the agent for its "having procured" the offer. The agent argued that the commission had been earned. The trial Judge allowed the agent's claim, holding that the terms of the agreement of purchase and sale governed. The vendor appealed.

Held, the appeal should be allowed. The governing document was the listing agreement: the agreement of purchase and sale did not vary the rights of the parties as they were set by the listing agreement. The effect of that agreement was that the agent was only entitled to its commission when a buyer who was ready, willing and able to complete was found by the agent. Even though the vendor was experienced in real estate transactions, it would be unreasonable to expect that it would agree to pay the agent anything unless it produced a purchaser who was ready, willing and able to complete. The Court should look for and be guided by the reasonable expectations of the parties so long as it is compatible with their written contract.

[*Dennis Reed, Ltd. v. Goody and another*, [1950] 2 K.B. 277, [1950] 1 All E.R. 919, consd; *Gladstone v. Catena et al.*, [1948] O.R. 182, [1948] 2 D.L.R. 483; *Loveridge v. Cooper*, [1959] O.W.N. 81, 18 D.L.R. (2d) 337; *Eades & Fenton v. Kukk*, [1972] 2 O.R. 802, 26 D.L.R. (3d) 681; *C & S Realties of Ottawa Ltd. v. McCutcheon* (1978), 19 O.R. (2d) 247, 84 D.L.R. (3d) 584, folld; *Ramm v. Cooper*, [1955] O.W.N. 525, refd to]

APPEAL from a judgment allowing the claim of a real estate agent to a commission.

Allan Sternberg, for appellant Leading Investments Ltd.
E. A. Jupp, Q.C., for respondent H. W. Liebig & Co. Ltd.

The judgment of the Court was delivered by

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vertical line about an inch long; it required four stitches. The fourth was immediately below the left nostril on the upper lip and is about half an inch long; it required two stitches. There is some pigmentation, that is to say, discolouration due to impregnated dirt, in the third and fourth scars. Plastic surgery is advisable and will be helpful in ameliorating the appearance of the scars. Counsel agreed that the cost would be $100. The plaintiff's lips were swollen and numb following the accident. There was injury to the under surface of his upper lip. The plaintiff hurt both his wrists but not seriously and the pain did not continue for long.

The scarring is not unsightly in any shocking sense. It is scarcely noticable on a casual glance but is noticeable on a more careful scrutiny. The four chipped teeth are somewhat sensitive to heat and cold.

I include in the general damages $100 for future surgery, $210 for a crown, and I take into account the serious risk that further dental work will be required.

Taking all these factors into account, I am of the opinion that the plaintiff will be fairly and adequately compensated by an award of damages of $1,500 and I assess general damages at this amount. Special damages were agreed at $90.59. The plaintiff is entitled to costs to be taxed.

A number of cases and issues came to my attention after viva voce argument. I requested further submission and now thank counsel for their written arguments on those cases and issues.

Judgment for plaintiff.

JOSEPH BRANT MEMORIAL HOSPITAL and MALETTE v. KOZIOL et al. and JEFFRIES

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

Heard—February 23 and 24, 1977.
Judgment—May 17, 1977.

Medical malpractice — Function of appellate court—Rule in Cook v. Lewis, [1951] S.C.R. 830, [1952] 1 D.L.R. 1.

This was an appeal from the judgment of the Court of Appeal for Ontario dismissing the appeal of the present appellants.

The late W.K. was involved in a motor vehicle accident with the respondent Jeffries. The accident was caused solely by the negligence of

Jeffries. The injuries suffered by W.K. required surgical treatment and this operation was performed at the Joseph Brant Memorial Hospital. The morning after the operation, W.K. died. An action was brought by the widow of W.K. against the doctor who treated W.K., the hospital and several nurses who had the management of the care of the patient, as well as against the motorist Jeffries. At trial, it was held that the hospital, the nurses, and the motorist were liable. On appeal to the Ontario Court of Appeal, the appeals of the hospital and Nurse Malette were dismissed, based on the principle of *Cook v. Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1. It was held that it was due to the negligence of Nurse Malette that the cause of W.K.'s death could not be determined and therefore that the onus was on her and her employer to exculpate themselves. The appeal of the remaining nurses was maintained.

Held on appeal—The Court of Appeal was in error in applying the case of *Cook v. Lewis* to the facts of this case. The issue in the case at bar was whether or not Nurse Malette was negligent and whether this negligence resulted in the death of W.K. The Court of Appeal refused to accept the trial court's finding on this issue. It was however not the function of the appellate court to reconsider evidence and come to a different conclusion than the trial court unless it could be shown that the evidence reasonably could not have resulted in justifying the conclusion. The appeal of the hospital and Nurse Malette was accordingly dismissed, the judgment of the trial judge being adopted with respect to their liability.

Annotation

This is the final chapter of some interesting litigation.

The late William Kolesar was involved in a motor vehicle accident and taken to hospital. He was operated on and placed in a Stryker frame —a contraption onto which a patient is strapped in a supine position which prevents the patient from moving and disturbing a bone graft. As was pointed out by Spence J., the use of this frame presents some problems to the nurses in that the frame must be rotated and care must be taken to prevent the patient from regurgitating. The morning after the operation the patient died.

Haines J. was the trial court judge. He heard the case without a jury and came to the conclusion that the patient died from regurgitating gastric juices. He found the hospital and nurses negligent in having failed to properly supervise the patient's care.

On appeal, Jessup J.A. was very critical of the trial judge's handling of the case. He suggested that the hearing of the action was arranged by the trial judge in order to ensure that he could preside at the hearing. He questioned the manner in which the evidence was presented. Jessup J.A. also concluded that he could not accept the trial judge's conclusions that a preponderance of the evidence supported the thesis that the cause of the patient's death was regurgitation and that as far as the Court of Appeal was concerned the cause of death was a "mystery". The Court of Appeal accordingly allowed the appeals of all but one of the nurses. However, Jessup J.A. relied on the case of *Cook v. Lewis*, supra, to find one of the nurses and the hospital liable in negligence.

The case of *Cook v. Lewis* is a curious decision. The plaintiff in that case was shot by one of two hunters. It could not be determined which one. The shooting was a "trespass" and it was (and still is) the law that in an action for trespass the plaintiff must merely prove that there was a trespass, it then being up to the defendant to prove that the trespass was neither intentionally nor negligently committed. This pro-

cedural advantage of a trespass action did not help the plaintiff in *Cook v. Lewis* however because he still could not establish which of the two defendants actually committed the trespass. The Supreme Court then formulated a rule, which has subsequently come to be known as the "rule in *Cook v. Lewis*". The ingredients of the rule seem to be as follows: When a person has been injured by one of two persons, in circumstances where both persons have acted carelessly, and the effect of the carelessness has been to make it impossible for the plaintiff to show which one of the two's negligence actually caused the injuries, both defendants should be found liable unless they can exculpate themselves.

Jessup J.A.'s interpretation of the rule was somewhat different. He held that, since the nurse's negligence was the cause of there being no way to determine the probable cause of the patient's death, it should be up to the nurse and her employer to prove a cause of death unrelated to their negligence. The decision was important because it applied *Cook v. Lewis*, which in itself is rather infrequently done, and because it indicated that the rule has scope for future actions.

The Supreme Court of Canada has now, by this decision, closed the case and taken us back to square one. The court, per Spence J., reversed the Court of Appeal's rejection of Haines J.'s findings. The court reaffirmed a well-known principle that appellate courts should not interfere with trial courts' findings of fact and conclusions unless they are unreasonable. More importantly, the Supreme Court has re-explained what it said in *Cook v. Lewis* and has made it clear that Jessup J.A.'s application of that case to the facts of this case was not appropriate. Before you can shift the burden of disproof to a defendant you must establish negligence on the part of that defendant and you must also establish that the negligence has caused the injury. The rule in *Cook v. Lewis* and the evidentiary principle of res ipsa loquitur may assist the plaintiff in this task in very particular and limited circumstances. In order to avail himself of the rule of res ipsa loquitur the plaintiff must be able to show that the defendant had sole management and control of the thing or situation which inflicted the damage and also that the evidence or common experience indicates that the accident's occurrence does not happen in the absence of negligence. As Professor Jacobs has pointed out in her annotation to the case of *Hobson v. Munkley* (1976), 1 C.C.L.T. 163 (Ont.), res ipsa loquitur can be used only where the facts fit: "A definition of res ipsa loquitur should not be suspended over the facts with an intention of pressing it onto them." The rule in *Cook v. Lewis* applies only where the plaintiff has been able to establish that both defendants were negligent, that it was the negligence of one which caused the injuries, and that it was due to their negligence that the exact cause of the injuries cannot be established. As the Supreme Court pointed out in the case at bar, it is inappropriate to attempt to borrow the rule and use it in a different set of circumstances.

The appeal was dismissed in the final result. The hospital and nurse were still held liable. The case had proceeded through three courts and each time the hospital and nurse lost. The reasons of the courts were different however and in the process some interesting law was learned.

Lewis Klar

Case judicially considered

Cook v. Lewis, [1951] S.C.R. 830, [1952] 1 D.L.R. 1 — considered.

APPEAL from judgment of the Court of Appeal for Ontario (sub nom. *Kolesar v. Jeffries*), 12 O.R. (2d) 142, 68 D.L.R. (3d) 198, dismissing on the principle established in the case of *Cook v. Lewis*, an appeal from the judgment of Haines J., 9 O.R. (2d) 41, 59 D.L.R. (3d) 367.

J. J. Fitzpatrick, Q.C., and *H. Poss*, for appellants.
E. J. Orzel, Q.C, and *N. L. Baker*, for respondents Koziol.
W. S. Wigle, Q.C., and *M. T. J. McGoey*, for respondent Jeffries.

17th May 1977. The judgment of the court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on 15th January 1976 [sub. nom. *Kolesar v. Jeffries*, 12 O.R. (2d) 142, 68 D.L.R. (3d) 198]. By that judgment, the Court of Appeal for Ontario dismissed the appeal of the present appellants, the Joseph Brant Memorial Hospital and Nurse G. Malette, from the judgment of Haines J. pronounced on 21st January 1975 [9 O.R. (2d) 41, 59 D.L.R. (3d) 367], but allowed the appeal from that latter judgment in so far as it gave judgment against four other defendants and third parties, Nurse E. Tilman, Nurse D. Stroop, Nurse Janet Stannix and Nurse Margaret Bragger.

The judgment of the Court of Appeal for Ontario confirmed the dismissal of the action as against the defendant Dr. Shri K. Bhalla and made variations as to the costs payable by the various parties.

The appeal to this court was taken only against the plaintiff Julie Kolesar, administratrix of the estate of William Kolesar, deceased, and Terrance L. Jeffries.

The plaintiff Julie Kolesar died prior to the hearing of the appeal in this court and by a suggestion filed on 10th February 1977 Katherine Koziol and Joseph Koziol were made parties respondent to the appeal.

Some considerable reference to the circumstances involved in this appeal is necessary.

On 2nd January 1969, the late William Kolesar, while driving his motor vehicle, became involved in a collision with an automobile owned and driven by the defendant Terrance L. Jeffries, and as a result thereof Kolesar sustained serious injuries. It was admitted throughout the litigation that the collision was due solely to the negligence of Jeffries. Those injuries required, very much later, surgical treatment and on 30th December 1969 the late William Kolesar underwent surgical treatment by the defendant Dr. Bhalla. This operation was for

the correction of a condition described as traumatic spondylolysis and the operation may be colloquially described as a spinal fusion. The operation was completed at about 12:10 p.m. on 30th December 1969. After the operation and while the patient was still unconscious, he was placed in a Stryker frame. The patient was removed to the surgical ward. He was visited at 3:30 p.m. by his surgeon, Dr. Bhalla, who gave orders for his care appropriate to a patient so confined in a Stryker frame.

From 6:00 to 8:00 p.m., the late William Kolesar was visited by his then wife, the late Julie Kolesar, who in her evidence described her husband as being very pale, in a lot of pain in his head, neck and back and complaining of a heavy feeling in his stomach. At 5:00 o'clock the next morning, 31st December 1969, Kolesar was found either dead or so close to death that he died immediately thereafter despite the attempts of a Dr. Michael Watts to resuscitate him. This litigation resulted.

The trial only commenced on 7th November 1974, almost five years later, and during that time there had been a great deal of examination for discovery carried on by all parties. When the action was called for trial in Hamilton, Haines J. was presiding at an assize for the trial of actions with a jury. A jury notice had been served in this action but had been stricken out. The case had, however, remained on the list for trial of actions with a jury. The conduct of Haines J. in what was alleged to be a forcing of the parties on to trial was made subject to serious complaint in the appeal, and Jessup J.A., giving the judgment for the Court of Appeal, said [p. 143]:

"A ground of complaint if not of appeal is the way in which the learned trial Judge became seized of the case."

After the judgment in the Court of Appeal, the appellants to this court applied for leave to re-argue the appeal on a fresh point, i.e., that the bias and unjudicial conduct of the trial judge were such as to have deprived the appellants of their right to a fair trial. By reasons for judgment delivered on 27th February 1976, the Court of Appeal for Ontario dismissed that application but gave leave for amendment of the notices of appeal "so that the appellants may, if they were so advised, apply to the Supreme Court of Canada for leave to also argue that issue if an application to the court were taken".

This court, on 5th April 1976, granted leave to the present appellants to appeal and notice of appeal was filed dated 22nd April 1976.

At the opening of the appeal in this case the appellants presented a notice of motion, dated 17th February 1977, for leave to file a supplementary factum dealing with the following ground of appeal:

"That there was an appearance of bias on the part of the learned trial judge which deprived the appellants of their right to a fair trial."

After counsel for the appellants had addressed the court upon such application and after discussion with members of the court, counsel withdrew such application and in these reasons it is not my intention to deal any further with that so-called ground of appeal.

The action by the present respondent Kolesar as against the appellants was based on an allegation that Kolesar came to his death due to aspiration which was caused by a failure to give him proper care and attention between the time of his removal unconscious from the operating room, encased in a Stryker frame, and the time of his death some 17 hours later. There had been no admission by the present appellants that such aspiration had been the cause of death, but in the long series of examinations for discovery there had been no suggestion of any other possible cause of death.

At the opening of the trial before Haines J., counsel for both appellants made their position very clear that there had been no admission of such cause of death, but it was equally clear that at that time they had no information which would lead them to suggest any other cause of death.

I quote the statement made by counsel for the appellant hospital and agreed to by his co-counsel [p. 147]:

"I can advise Your Lordship and my friend Mr. Wigle [counsel for the defendant Jeffries] that as of this time we have no evidence to indicate that the cause of death was other than as a result of aspirating gastric fluid."

Jessup J.A., in his reasons for judgment, said [p. 148]:

". . . but in any event it is painfully evident from the cross-examination of the plaintiff's witnesses that neither was fully aware of another theory of death, if aware at all, until at least the close of the plaintiff's case."

The plaintiff's counsel proceeded to prove his case by adducing the evidence of a surgeon, Dr. Hudecki, and two nursing experts, and other medical evidence as to the care which must be exercised in the treatment of a patient confined in a Stryker frame, and also the evidence of the pathologist who

performed an autopsy on the late William Kolesar and of another expert pathologist.

The Stryker frame resembles a narrow bed with apparatus that enables the bed to be turned over 180 degrees on its longitudinal axis so that the supine patient is then lying face downwards on the frame. He is strapped into the frame so that he remains in a fixed position permitting healing to proceed. This frame must be rotated as required at intervals directed by the surgeon. The use of the frame presents some problems to those who have management of the patient's care. Chief amongst those problems would appear to be the grave risk of regurgitation contributed to by many factors which need not be outlined in detail. For this reason, great care must be taken not to give the patient too much fluid and particularly not to allow the contents of his stomach to rise to the point where he might regurgitate. Such regurgitation may be either suddenly massive or minimal over a period of time and may result in a flow into the esophagus, from there into the pharynx and then into the lungs.

Haines J. considered particularly the evidence of Nurse Kathleen Stewart and Nurse Patricia O'Connor and accepted their evidence as to the proper treatment which should have been accorded to the late William Kolesar, summarizing as follows [pp. 46-48]:

"1. Kolesar should have been roused at 12 p.m. midnight and made to deep breathe and cough every 15 minutes at least during the night so that fluids would not collect in his throat and lungs. [This evidence related to the note timed at 10 p.m. that Kolesar had not voided and had been twice sedated.]

"2. Physiotherapy in the form of movement of the arms should have been given at the same time.

"3. The large quantity of fluids ought not to have been given to him orally, and on learning of the fluids which had been given prior to midnight together with the constant flow of intravenous fluids, the nurses should have realized the patient's body systems were overloaded with fluid. He should have been watched carefully because of the danger of regurgitation, his stomach palpated and catheterized . . .

"4. Blood pressure, respiration, pulse and temperature should have been taken and recorded at regular intervals.

"5. The failure to chart and make nurses notes between 10 p.m. on December 30th and 5 a.m. on December 31st is a definite breach of basic record-keeping in the management of the case. The hospital is an accredited hospital under the Canadian Council on Hospital Accreditation. I do not think I can better emphasize the need of prompt and accurate record-keeping than by quoting from ex. 31 at p. 69: . . .

"On a ward with a great many patients the medical record becomes the common source of information and direction for patient care. If kept properly it indicates on a regular basis the changes in the patient's condition and alerts staff to developing dangers. And it is perhaps trite to say that if the hospital enforced regular entries during each nursing shift, a nurse could not make the entry until she had first performed the service required of her. In Kolesar's case the absence of entries permits of the inference that nothing was charted because nothing was done.

"6. A post-operative patient is usually very disturbed, sleeps only from hour to hour. If Kolesar, pale, slept peacefully all night, that in itself was a danger signal. He should have been aroused hourly, compelled to deep breathe and cough, and if fluid in the throat or tubes was present a suction device should have been brought in.

"7. Merely looking at the patient, even if regularly, is not sufficient."

Adopting that standard of care, Haines J. then turned to consider the evidence given by a large number of persons as to the care which the late William Kolesar actually did receive. That evidence was given in large part by three witnesses; the first of these was John Mayes who, on that night, had been a patient in the bed adjoining that of the late William Kolesar; the second was Mrs. I. M. Stevens, a nursing assistant. In his reasons for judgment, Haines J. rejected the evidence given by these two witnesses and gave reasons for such rejection. In the Court of Appeal, Jessup J.A. said [p. 151]:

"The learned trial Judge considered in detail the demeanour and evidence of Mayes and Nursing Assistant Stevens and found their evidence incredible for reasons which do not permit our interference in his findings."

The third person who gave the chief evidence as to that care was Nurse Malette. Nurse Malette gave evidence in very considerable detail but that evidence certainly was not confirmed by any notation in the hospital record, and Haines J. found most unsatisfactory the practice which had been followed of not making those notes on the charts contemporaneously with the performance of the service or the making of the observation but later in a joint conference at 5:00 a.m. so that the notes

represented the memory of the different persons who had been attending the patient during that night. Such a record made in the early morning hours by Nurse Malette was filed as Ex. 29. Haines J., in his reasons, stated [p. 48]:

"One is always suspicious of records made after the event, and if any credence is to be attached to ex. 29, it shows that at all times the patient was quite pale, very pale, and was allowed to sleep soundly to his death."

Haines J. came to his conclusion, after examining all of the evidence in very considerable detail and after having presided at the trial which took 18 days, in the following words [p. 50]:

"On all the evidence I accept the theory advanced by the plaintiff and the defendant Jeffries that the cause of death was the regurgitation of gastric juices occurring from one to three hours before death. I accept the evidence of Drs. Stanley Hudecki and Frederick Jaffe and I find that the deceased died slowly over a period of hours. In his weakened state following the surgery, together with the cumulative effect of the drugs and the accompanying anoxia, together with being strapped in a supine position on the Stryker frame, he was limited in his struggles and efforts to call for help. I have not the slightest doubt that had he been given adequate nursing care his condition would not have occurred, or would have been detected timely. The plaintiff has established that her husband's death was caused by the acts of negligence set out in her statement of claims, paras. 14(c), (d), (e), (f) and (g). The defendant Jeffries adopts the plaintiff's allegations of negligence and in addition I find he has established those pleaded in para. 9 of his statement of defence as (b), (c), (e) and (f)."

Before expressing his conclusion in favour of the plaintiff in those words, Haines J. had dealt with the evidence adduced by the defence in attempting to show that aspiration had not been the cause of death, and stated [p. 44]:

"The defendants called a great many expert witnesses, many of whom had been retained for the trial. Doubtless their opinions were intended to be helpful, but in the light of the preponderance of evidence supporting the plaintiff's theory, I find the theories propounded by the defence that death may have been caused by heart failure, or may have been caused by some liver condition, or may have been caused by something else, as being postulates unsupported by the weight of evidence."

On this basis, Haines J. gave judgment as follows: *Firstly*, as against the defendant Jeffries alone, based upon the action

for damages for injuries resulting from the accident, for $11,679.09. This judgment was not appealed to the Court of Appeal for Ontario or to this court. *Secondly*, he dismissed the action against the defendant Dr. Bhalla, and that judgment also was not interfered with in the Court of Appeal and not considered in this court. *Thirdly*, he gave judgment against all the defendants except Dr. Bhalla but including Jeffries in the sum of $101,901.58, the quantum of that judgment having been agreed between the parties, and no discussion as to such quantum took place in this court. It was this judgment which was the subject of the appeal to the Court of Appeal for Ontario and to this court. The judgment provided that the defendant Jeffries was entitled to be reimbursed by all other defendants and third parties except Dr. Bhalla to the extent of any portion of the $101,901.58 and costs that he should pay to the plaintiff.

Reasons for judgment for the Court of Appeal for Ontario were delivered by Jessup J.A. I summarize those reasons and shall deal with them in detail hereafter. Firstly, the appeals of Nurses Tilman, Stroop, Stannix and Bragger were allowed with costs, and there has been no appeal from that disposition. Secondly, Jessup J.A. was of the opinion that he was unable to accept the learned trial judge's conclusion that a preponderance of evidence supported a finding of death resulting from aspiration, or that the balance of probabilities was that such was the cause of death. Concluding, on the other hand, that the cause of death was a mystery, Jessup J.A. then determined that the maxim res ipsa loquitur could not be applied because to do so required the establishment of the cause of death and that with reasonable care that cause of death would have been avoided, while in this case the cause of death had not been established.

Jessup J.A. then proceeded to apply the judgment of Rand J. in *Cook v. Lewis*, a decision of this court reported in [1951] S.C.R. 830, [1952] 1 D.L.R. 1. I am unable to find any assistance in the judgment of this court upon that appeal. In the first place, the judgment of Rand J. was not the judgment of this court as he spoke only for himself, and the judgment for the majority, composed of Cartwright J., as he then was, Estey and Fauteux JJ., was given by Cartwright J., and that judgment, I think, is summarized at p. 842 in these words:

"I do not think it necessary to decide whether all that was said in *Summers v. Tice* (1948), 5 A.L.R. (2d) 91, should be accepted as stating the law of British Columbia, but I am of opinion, for the reasons given in that case, that if under the

circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defendants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect, in view of their answer to question 3."

In that case, three men had gone on a bird hunting expedition in British Columbia and had agreed that they were to share the bag. Two of the men fired their shotguns simultaneously. Both alleged that they had fired in another direction, but the plaintiff, not a member of their party and hidden by a bush, was struck by pellets and as a result lost an eye. Both of the two men who fired their shotguns were sued. The jury, in answer to questions, found that the plaintiff had been shot by one or other of the defendants but that the plaintiff's injuries were not caused by the negligence of either defendant, and they expressed themselves as unable to decide which one of the two defendants had fired the pellets which struck the plaintiff. The jury's answer denying negligence was found by the Court of Appeal for British Columbia to be perverse, and that finding was accepted by this court. The judgment of the Court of Appeal for British Columbia was that there should be a new trial, and that judgment was confirmed in this court.

Jessup J.A. quoted the headnote which purported to summarize the reasons given by Rand J. Even if that had been the judgment of the court, it is surely inapplicable in the present circumstances on the basis of Jessup J.A.'s finding because by that finding guilt has not been "brought down" to one or the other of the two persons. Upon Jessup J.A.'s finding, the cause of death was a mystery and therefore it is impossible to say that there was guilt or negligence, that is, guilt or negligence which caused the death. There must be not only negligence but negligence causing the injury before there can be recovery. We are not here faced with two persons who were negligent and with an inability to find whether the negligence of one or the other caused the death. We are here faced with the simple question of whether there was negligence by Nurse Malette, for which negligence the hospital was responsible in law, and whether that negligence resulted in the late William Kolesar's regurgitation. Nor is *Mann v. Balaban*, [1970] S.C.R. 74, 8 D.L.R. (3d) 548, cited by the respondent, helpful. That was a case of assault

while the present case is one based on an allegation of negligence by the omission to take care.

Haines J., in the excerpt from his judgment which I have quoted above, accepted the theory advanced by the plaintiff and the defendant Jeffries that the cause of death was such regurgitation and that had the late William Kolesar been given adequate nursing care such a condition would not have occurred. That was a finding that the negligence of the defendants caused the death of Kolesar. It was this finding which Jessup J.A. for the Court of Appeal refused to accept.

Jessup J.A. was of the opinion that Haines J., in coming to his judgment after trial, had refused to put any dependence on the evidence given by Mayes, Nursing Assistant Stevens or Nurse Malette, and that therefore [p. 153] "Between 12 p.m. and 5 a.m. we know nothing of the deceased's vital signs or sounds or whether or not he was struggling for life." With respect, I am of the opinion that this is not a correct view of the learned trial judge's consideration of the evidence of the third person I have named, i.e., Nurse Malette. It is perfectly true that Haines J. refused to rely on the notes made by Nurse Malette which purported to show frequent attendances upon the late William Kolesar during the early hours of 31st December and even purported on occasion to give notations as to observation of his vital signs, but he did accept the record for one very important fact when he said that if any credence was to be attached to the hospital record made by Nurse Malette it was that at all times the patient was quiet, very pale and was allowed to sleep soundly all night. It is this very conduct, admitted by Nurse Malette in the record, which establishes her negligence and the hospital's responsibility. It was that conduct which was absolutely contra the course of treatment advised by the medical witnesses and particularly by the two nursing experts, Nurse Stewart and Nurse O'Connor. The learned trial judge heard those witnesses. It was for him to judge their credibility and the weight which should be given to their testimony. He did so and made a specific finding saying [p. 46]: "I accept their evidence which may be summarized in respect to this case as follows:" and then for the next three pages he set out the summary of the evidence as to proper treatment.

I am, therefore, of the opinion that Haines J. did have evidence before him which he could accept as to the conduct of Nurse Malette and therefore the responsibility of the hospital. Not only did the learned trial judge have this evidence but he had the evidence of the pathologist, Dr. Fowler, and of the

expert pathological specialist, Dr. Jaffe. In fact, Jessup J.A. even quoted Dr. Fowler's evidence in the following question and answer [p. 155]:

"Q: In any event, your opinion now is that he died of aspiration some one or two hours before his death?

"A: No, my opinion is the patient died of aspiration of gastric juice and I don't know exactly when the aspiration occurred and I cannot really give you an accurate time. I can say less than 2 hours. I would say less than 2 hours, but that I can't."

Jessup J.A. stated later in his reasons [p. 158]: "Drs. Fowler and Jaffe gave aspiration as the cause of death based solely on the pathology or some part of it."

It would seem that Jessup J.A. started out with the premise that the learned trial judge had no clinical information as to the period between midnight and 5:00 a.m., and then proceeded to examine the evidence of not only the two pathologists, Drs. Fowler and Jaffe, to whom I have referred, but a host of other doctors to come to the conclusion that the plaintiff had not established, upon a balance of probabilities, that the cause of death was aspiration resulting from regurgitation. In doing so, Jessup J.A. referred to the evidence given by a total of 15 doctors as well as by other witnesses. All of those doctors and all of those witnesses gave evidence and were subject to a very careful cross-examination before Haines J. at trial. I agree with the statement made in the factum of the respondent Julie Kolesar that "it is a well known principle that appellate tribunals should not disturb findings of fact made by a trial judge if there was credible evidence before him upon which he could reasonably base his conclusion". Haines J. heard that evidence, judged it to be credible and accepted it as a basis for his conclusion. I am strongly of the view that it is not the function of an appellate court to reconsider that evidence whether it be upon facts or a matter of professional opinion and come to a different conclusion, unless it could be shown that evidence reasonably could not result in justifying the conclusion made by the trial judge. This is particularly true in the circumstances of the present case where, as Jessup J.A. pointed out, up to the end of the plaintiff's evidence the defence had no suggestion of any other cause of death other than the aspiration relied upon by the plaintiff.

Death had taken place more than five years prior to the trial. During that time, expert solicitors had been engaged on both sides and voluminous examination for discovery had been proceeded with. Although it is true that the defence had not

admitted that the cause of death was aspiration, it would seem that both the defence and the plaintiff were proceeding on the basis that aspiration was the cause of death and were solely concerned with whether that aspiration resulted from a failure to properly care for the patient. It seems then nothing less than startling that, after all that time and after the counsel for the plaintiff had put in his evidence over many days, the defence should turn up with a bevy of experts none of whom could have had any contact with even the records in the case until the very last minute and who could only suggest possible alternative causes of death as varied as cardiac arrest, stroke or sudden and previously undetected fatal liver disease. It is, in my view, a rather natural conclusion for the trial judge to have rejected this kind of testimony, which he rightly termed "postulates unsupported by the weight of the evidence", and to have preferred to accept the evidence of the pathologist who performed the autopsy together with other witnesses who had seen the patient alive.

For these reasons, I would dismiss the appeal by adopting the judgment of the learned trial judge with respect to the appellants' liability. As to the other matters, such as the variation of costs, dealt with by the Court of Appeal for Ontario, I think such matters are properly within the jurisdiction of that court and I would not interfere with them.

The respondents are entitled to their costs in this court.

Appeal dismissed.

LEPP v. HOPP

Alberta Supreme Court, Brennan J.

Judgment—April 26, 1977.

Medical malpractice — Negligence — Assault — Failure to inform patient that operation being performed by surgeon for first time — Whether consent an informed consent freely given.

The plaintiff was suffering from a "slipped disc". He was referred to the defendant, an orthopaedic surgeon. The defendant performed two myelograms and determined that surgery was necessary.

The plaintiff signed a formal consent to the operation and the prescribed operation was performed.

The plaintiff's condition did not improve normally and he was referred by the defendant to a neurologist. Examinations demonstrated the necessity of a further operation and this was performed by a neurosurgeon.

The plaintiff suffered permanent damage as a result of his condition. He alleged that the defendant was negligent at the time he operated

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Kibale. Indeed, someone other than him might have believed testimony that he dismissed. Unfortunately, that is not enough to justify our intervention because it is obvious that he cannot be accused of having reached his decision in a perverse or capricious manner, or without regard for the evidence.

[11] The application will therefore be dismissed.

Application dismissed.

Editor: Debra F. MacCausland
gas

effet, un autre que lui aurait pu ajouter foi à des témoignages qu'il a écartés. Cela, malheureusement, ne suffit pas à justifier notre intervention. Car, il est évident qu'on ne peut lui reprocher d'avoir décidé de façon absurde, arbitraire ou sans tenir compte de la preuve.

[11] La demande sera donc rejetée.

Requête rejetée.

Arrêtiste: Debra F. MacCausland
gas

HER MAJESTY THE QUEEN (appellant/defendant) v. CHARLES LAWRENCE LeBAR (respondent/plaintiff)
(A-44-87)

INDEXED AS: LeBAR v. CANADA

Federal Court of Appeal
Urie, Mahoney, MacGuigan, JJ.
October 27, 1988.

Summary:

LeBar was serving sentences for robbery and escaping lawful custody. During his incarceration the Federal Court of Appeal issued a declaratory decision in R. v. MacIntyre, 44 N.R. 361, wherein the court expressed a method of calculating the term of imprisonment to be served by escapers before their release. LeBar alleged that the R. v. MacIntyre decision applied to him, making his release date August 10, 1982. The correctional authorities held him until September 22, 1982. LeBar commenced an action for a declaration that the R. v. MacIntyre decision applied to him and for damages for unlawful imprisonment.

The Federal Court of Canada, Trial Division, in a decision reported in 8 F.T.R. 250, allowed LeBar's action. The court declared that LeBar was entitled to have his term of imprisonment calculated in accordance with the Federal Court of Appeal's decision in R. v. MacIntyre. The court awarded LeBar \$430 general damages and \$10,000 exemplary damages. The Crown appealed the award of exemplary damages. LeBar appealed both damage awards.

The Federal Court of Appeal dismissed both appeals.

Constitutional Law - Topic 114

Definitions - Rule of law - The Federal Court of Appeal stated that the necessity for the government and its officials to obey the law is the fundamental aspect of the principle of the rule of law - The rule of law must in all events mean "the law is supreme" and that officials of the government have no option to disobey it - See paragraph 11.

Courts - Topic 8

Precedents - Court of Appeal - Weight - Declaratory judgments - The Crown obtained a declaratory judgment in the Federal Court of Appeal respecting a prisoner's release date - The Federal Court of Appeal held that the declaratory judgment become a binding precedent and was binding on the Crown in a similar case involving a different prisoner - See paragraph 9.

Criminal Law - Topic 5662.2
Punishments (sentence) - Imprisonment - Term of - Effect of declaratory judgments re other prisoners in similar circumstances - LeBar was serving time for robbery and escaping custody - The Federal Court of Appeal issued a declaratory judgment (R. v. MacIntyre), which set out how to calculate the term of imprisonment for escapers - LeBar argued that the decision applied to him, making his release date August 10, 1982 - The correctional authorities held him until September 22, 1982 - He sued for damages - The Crown argued that R. v. MacIntyre, being a declaratory judgment, did not apply to LeBar - The Federal Court of Appeal affirmed that the Crown was bound by R. v. MacIntyre.

Damage Awards - Topic 630
Torts affecting the person - False or unlawful imprisonment - Correctional authorities improperly detained a prisoner (LeBar) for 43 days after his release date - LeBar sued for damages for unlawful imprisonment - The Federal Court of Appeal affirmed an award of $10 per day general damages ($430) to LeBar for his wrongful imprisonment - The court also affirmed an award of $10,000 exemplary damages for the correctional authorities' legally unjustifiable conduct - See paragraphs 17 to 27.

Damages - Topic 1297
Exemplary or punitive damages - Conditions precedent - The Federal Court of Appeal held that malice or bad faith was not a requirement for the awarding of exemplary damages against the Crown - The only requirement was oppressive, arbitrary or unconstitutional action by the servants of the government - See paragraphs 17 to 19.

Damages - Topic 1303
Exemplary or punitive damages - False or unlawful imprisonment - LeBar was serving time for robbery and escaping custody - The Federal Court of Appeal issued a decision setting out how to calculate the term of imprisonment to be served by escapers (R. v. MacIntyre) - LeBar argued that R. v. MacIntyre applied to him and that his release date should be August 10, 1982 - The correctional authorities disagreed and held him until September 22, 1982 - LeBar sued for damages for unlawful imprisonment - The Federal Court of Appeal affirmed that the R. v. MacIntyre decision applied to LeBar and awarded him $10,000 exemplary damages (plus general damages), for the legally unjustifiable conduct of the correctional authorities in holding him 43 days past his proper release date.

Damages - Topic 2441
Torts affecting the person - False or unlawful imprisonment - General - [See **Damage Awards - Topic 630** above].

Estoppel - Topic 386
Estoppel by record - Res judicata as a bar to subsequent proceedings - Issues decided in prior proceedings - The Crown obtained a declaratory judgment in the Federal Court of Appeal respecting a prisoner's release date - The Federal Court of Appeal affirmed that the issue determined by the declaration became res judicata between the parties and a binding precedent - Accordingly, the court affirmed that the judgment was binding on the Crown in a similar case involving a different prisoner - See paragraphs 6 to 9.

Practice - Topic 5656
Judgments and orders - Declaratory judgments - Scope and content - Whether binding - [See **Courts - Topic 8** above].

Practice - Topic 5656
Judgments and orders - Declaratory judgments - Scope and content - Whether binding - [See **Criminal Law - Topic 5662.2** above].

Cases Noticed:
R. v. MacIntyre, [1983] 1 F.C. 603; 44 N.R. 361, appld. [para. 4].
Letter Carrier's Union of Canada v. Canada Post Corporation (1986), 8 F.T.R. 93, refd to. [para. 7].
Emms v. Minister of Indian Affairs and Northern Development and Public

Service Commission, [1979] 2 S.C.R. 1148; 29 N.R. 156, refd to. [para. 8].
Emms v. Minister of Indian Affairs and Northern Development and Public Service Commission, [1978] 2 F.C. 174; 17 N.R. 14, refd to. [para. 8].
Ouimet v. Canada, [1979] 1 F.C. 55; 21 N.R. 247, refd to. [para. 8].
Dyson v. Attorney General, [1911] 1 K.B. 410 (C.A.), refd to. [para. 9].
Manitoba Language Rights Reference, [1985] 1 S.C.R. 721; 59 N.R. 321; 35 Man. R.(2d) 83, refd to. [para. 11].
British Columbia Government Employees' Union v. British Columbia (Attorney General) (1988), 87 N.R. 241, refd to. [para. 11].
Gould v. Attorney General of Canada et al., [1984] 1 F.C. 1119 (F.C. T.D.); [1984] 1 F.C. 1133; 54 N.R. 232 (F.C.A.), affd. (1984), 53 N.R. 394; 13 D.L.R.(4th) 491 (S.C.C.), refd to. [para. 12].
R. v. Sowa (1979), 1 Sask. R. 162; 50 C.C.C.(2d) 513, refd to. [para. 15].
Rookes v. Barnard, [1964] 1 All E.R. 367, refd to. [para. 18].
Broom v. Cassell & Co., [1972] A.C. 1027, refd to. [para. 19].
Andrews et al. v. Grand & Toy (Alberta) Ltd., [1978] 2 S.C.R. 229; 19 N.R. 50; 8 A.R. 182; [1978] 1 W.W.R. 557; 3 C.C.L.T. 225; 83 D.L.R.(3d) 452, refd to. [para. 24].
Teno et al. v. Arnold et al., [1978] 2 S.C.R. 287; 19 N.R. 1; 3 C.C.L.T. 372; 83 D.L.R.(3d) 609, refd to. [para. 24].
Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al., [1978] 2 S.C.R. 267; 19 N.R. 552; [1978] 1 W.W.R. 607; 3 C.C.L.T. 257; 83 D.L. R.(3d) 480, refd to. [para. 24].
Lindal v. Lindal, [1981] 2 S.C.R. 629; 39 N.R. 361; [1982] 1 W.W.R. 433; 129 D.L.R.(3d) 263, refd to. [para. 24].

Statutes Noticed:
Criminal Code, R.S.C. 1970, c. C-34, s. 137 [para. 5].
Canadian Charter of Rights and Freedoms, 1982, preamble [para. 11].

Authors and Works Noticed:
Wade, H.W.R., Administrative Law (5th Ed.), p. 523 [para. 6].
de Smith, Judicial Review of Administrative Action (4th Ed. 1980), by J.M. Evans, p. 475 [para. 9].
Dicey, A.V., Introduction to the Study of the Law of the Constitution (10th Ed. 1959), by E.C.S. Wade, pp. 193, 202-203 [para. 11].

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These appeals were heard before Urie, Mahoney and MacGuigan, JJ., of the Federal Court of Appeal, at Ottawa, Ontario, on October 12, 1988. The decision of the Court of Appeal was delivered by MacGuigan, J., on October 27, 1988.

[1] MacGuigan, J.: This is an appeal and cross-appeal from the judgment of Muldoon, J., rendered on January 12, 1987, wherein he declared that the respondent was entitled to have been released from prison on August 10, 1982, and not September 21, 1982, when he was in fact released.

[2] Muldoon, J., awarded general damages in the amount of $430 and exemplary damages in the amount of $10,000. In this court, the appellant contested neither the finding of liability nor the award of general damages, and appealed only with respect to the award of exemplary damages. In his cross-appeal, the respondent contested both the award of general damages and that of exemplary damages.

[3] During the summer of 1982, the respondent was completing a term of imprisonment with an expected release date of October 22, 1982. The salient events were tabulated as follows by the trial judge (Appeal Book, pp. 17-18):

"July 19 - Federal Court of Appeal released its unanimous decision in **MacIntyre v. The Queen**, [1983] 1 F.C. 603;

August 10 - Plaintiff's correct date for release according to the law's interpretation which was expressed and decided in **MacIntyre**;

August 13 - The Correctional Service of Canada, through notification of the sentence administrator at Collins Bay Penitentiary (all servants of the defendant) were notified that the **MacIntyre** decision affected the plaintiff's duration of his term and that his solicitor opined that the plaintiff ought to be released forthwith;

September 14 - Statement of claim and notice of motion for interim injunction filed, the latter returnable on September 23;

September 22 - The plaintiff was released from incarceration:
- Defendant's solicitor confirms consent to the plaintiff's withdrawal of the above-mentioned motion, without costs."

[4] On these facts, the trial judge held as follows (Appeal Book, p. 31):

"The Court's record reveals that the **MacIntyre** judgment was in fact signed on July 19, 1982. The defendant's servants were notified of its effect in regard to the plaintiff by his solicitor on August 13, 1982. He was not released until September 22, 1982. The defendant's solicitor knows the law. The clear inference of that unexplained prodigious delay is negligence and wilful or wanton disregard of the plaintiff's right to liberty. This court so finds. Pondering the possibility of seeking leave to appeal further to the Supreme Court of Canada does not excuse the unlawful imprisonment. Accordingly, this Court finds that the plaintiff was, and remains, entitled to have the term of his imprisonment calculated in accordance with the judgment in **MacIntyre v. The Queen**, signed and released by the Federal Court of Appeal on July 19, 1982, and now reported in [1983] 1 F.C. 603. The Crown's servants were obliged to apply it to the plaintiff. They refused or neglected to do so. Accordingly, the defendant is liable to the plaintiff in damages for having kept him involuntarily and unnecessarily imprisoned in Collins Bay penitentiary during the 43 days from and including August 11, 1982, through September 22, 1982."

[5] As a result of this unlawful imprisonment, the learned trial judge awarded exemplary damages of $10,000, which he justified as follows (Appeal Book pp. 43-44):

"To ignore the Court's decision rendered the previous July 19 until September 22, 1982, was to evade the duty which it lawfully imposed for a period of 65 days. To ignore the solicitor's notification of the effect of the Court's decision from August 13 to September 22 was to purport to repudiate both the decision and the duty it imposed for a period of 40 days. That is high-handed and arbitrary detention of the plaintiff. The Court's interpretation of the pertinent law, as already noted, became operative and authoritative upon its judgment having been rendered.

"Exemplary damages are those which are also called 'punitive', 'aggravated', 'retributory' and according to Linden [**Canadian Tort Law**, 3rd Ed. 1982, p. 51] even 'vindictive' and 'penal'. Such a varied, but single-minded and strong nomenclature certainly conveys the judicial intention to denounce the defendant's misconduct. Although keeping the plaintiff unlawfully for 43 days after his 20 years of imprisonment, excepting periods of his being unlawfully at large, could hardly inflict any additional humiliation or loss of reputation upon him, it did constitute oppressive, arbitrary and fundamentally unconstitutional conduct by

servants of the defendant. In this country where liberty is a constitutionally, albeit conditionally, protected individual right and societal value, it is not tolerable to treat even this plaintiff's self-cheapened liberty, or anyone else's precious liberty, with insouciant disregard.

"In all the circumstances here, however, there is one pejorative quality of the defendant's servants' misconduct which was not proved on the part of anyone in particular and which cannot be inferred, and that is malice. Their negligence and their oppressive and wilful or wanton disregard of the plaintiff's right to be released were amply abusive to support the award of exemplary damages. Despite reasonably timely notification, they persisted in deliberately detaining him in prison until the day before his motion for a mandatory injunction was returnable in this Court in September, 1982. Unjustified by any explanation, their misconduct is legally unjustifiable.

"Here in the matter of exemplary damages, the taxpayers again will have to pay but now a more substantial assessment for the misconduct of the defendant's servants. This task of assessment is not an exact science. The assessment of exemplary damages must be an adequate disapproval of those servants' reprehensible misconduct in ignoring the law whose authoritative interpretation was clearly signalled to them, and in oppressively, abusively and deliberately disregarding the plaintiff's right to regain his conditional liberty amd liberation from unlawful imprisonment. In light of the jurisprudence, which, unfortunately for the assessor of damages, does not present any exactly, or even nearly, similar situation, the Court awards the plaintiff the sum of $10,000 exemplary damages."

The effect of the **MacIntyre** decision, supra, was to vary the interpretation accorded s. 137 of the **Criminal Code** as to the calculation of sentences in situations where a prisoner has committed an offence while unlawfully at large.

[6] The appellant's fundamental contention, in oral argument, was that exemplary damages could not be awarded since the **MacIntyre** decision was merely declaratory and that a declaration does not render a matter res judicata where there is not an exact mutuality of parties. In support of this argument, the appellant cited H.W.R Wade, **Administrative Law** (5th Ed.), p. 523, to the following effect:

> "A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court. By enabling a party to discover what his legal position is, it opens the way to the use of other remedies for giving effect to it, if that should be necessary."

[7] The appellant also relied on the words of Addy, J., in **Letter Carrier's Union of Canada v. Canada Post Corporation**, (1986) 8 F.T.R. 93, at p. 94, who, in citing the above passage from Wade, commented that no declaratory judgment or order "is capable of sustaining, without more, any execution process nor a fortiori any contempt of court remedy".

[8] The appellant also drew the court's attention to **Emms v. The Queen et al.**, [1979] 2 S.C.R. 1148; 29 N.R. 156. In **Emms**, this court had held, at [1978] 2 F.C. 174; 17 N.R. 14, that the appellant government employee was properly released from employment during an extension of the normal probation period, but subsequently in **Ouimet v. The Queen**, [1979] 1 F.C. 55; 21 N.R. 247, this court had held that the regulation allowing management to extend the normal probationary period was ultra vires. **Ouimet** was not appealed but **Emms** was. Pigeon, J., for the concurring minority on the Supreme Court, raised the same issue as in the

case at bar without deciding it, at pp. 1160-1162:

> "I know of no case in which the doctrine of res judicata has yet been applied to a judicial determination of the validity of an administrative regulation. But the principles governing res judicata are not statutory, they are 'judge-made law' like the rule of evidence dealt with in **Ares v. Venner** [[1970] S.C.R. 608] and are to be developed by the courts in accordance with the needs of the time.
>
> "The judgment at trial in **Ouimet** indicates how serious it would be to treat a declaration of invalidity as binding only towards the plaintiff in the case in which it was issued. ...
>
> "Thus it will be seen that if a formal declaration of invalidity of an administrative regulation is not considered effective towards all those who are subject thereto, it may mean that all other persons concerned with the application of the regulation, including subordinate administrative agencies, have to keep on giving effect to what has been declared a nullity. It is obviously for the purpose of avoiding this undesirable consequence that, in municipal law, the quashing of a by-law is held to be effective 'in rem'.
>
> "Should it be possible for an administrative agency to allow a declaration of invalidity to stand in a given case while ignoring it towards other parties, on the chance that in another case it might succeed in having it overruled by a higher court, if not by a different judge? Should the situation be viewed in the same way as in the case of declarations of invalidity of statutes which seem to have always been considered only as precedents?
>
> "After anxious consideration, I find it unnecessary to express an opinion on this difficult question because, assuming the respondent is entitled to ask that the judgment in **Ouimet** be overruled, I find no reason to do so. No argument was submitted to support the validity of s. 30(2) of the **Public Service Employment Regulations** which had not been considered and dealt with by the trial judge and the Federal Court of Appeal and no error was shown in the decisions rendered thereupon."

Martland, J., for the majority decided the case without reference to the issue. In the result, this case is not an authority either way.

[9] Declaratory relief, as we now know it, first appeared in the case law only in **Dyson v. Attorney General**, [1911] 1 K.B. 410 (Eng. C.A.). A declaration differs from other judicial orders in that it declares what the law is without pronouncing any sanction against the defendant, but the issue which is determined by a declaration clearly becomes res judicata between the parties and the judgment a binding precedent. The rationale for declaratury awards is expressed as follows by de Smith, **Judicial Review of Administrative Action** (4th Ed.), by J.M. Evans, 1980, at p. 475:

> "[I]t is sometimes neither necessary nor desirable for a legal dispute to be settled by the threat of coercion. If one has a dispute with a friend and a ruling by a court of law on the relevant legal issues is required, it is incongruous for one to be obliged to ask the court to award sanctions against him. And no matter what may be the personal relationship of the parties, litigation in which sanctions are sought is apt to generate an acerbity which is contrary to the interests of the parties and of the community. Again, it is often unseemly to proceed on the implied assumption that the defendant will fail to observe the law as declared by the court unless contingent sanctions exist. Especially is this true where the defendant is a body invested with public responsibilities. Moreover, there may be serious practical difficulties in the way of securing

judicial enforcement of a coercive order against the organs of the State.[1] There are also cases where the award of coercive relief would be unfair to the defendant but where the validity of the plaintiff's claim against him warrants formal judicial recognition. In all these classes of cases it is highly advantageous for the courts to have power to make binding declarations of the rights and duties of the parties, without the necessity of decreeing any consequential relief.

....

[1] Orders made by the European Court (the Court of the Communities) against member-States are almost exclusively declaratory."

[10] The force of this analysis, it seems to me, is that a declaration is a peculiarly apt instrument in dealing with bodies "invested with public responsibilities" because it can be assumed that they will, without coercion, comply with the law as stated by the courts. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory proceedings vis-a-vis the Government. Any power to enforce such a judgment against the Government would be a superfluity.

[11] In my opinion, the necessity for the Government and its officials to obey the law is the fundamental aspect of the principle of the rule of law, which is now enshrined in our Constitution by the preamble to the **Canadian Charter of Rights and Freedoms**. This aspect was noted by A.V. Dicey, **Introduction to the Study of the Law of the Constitution** (10 Ed.), E.C.S. Wade, 1959, pp. 193, 202-203, and was authoritatively established by the Supreme Court in its per curiam decision in **Re Manitoba Language Rights**, [1985] 1 S.C.R. 721, at p. 748; 59 N.R. 321; 35 Man. R.(2d) 83:

"The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power."

In its recent decision in **British Columbia Government Employees' Union v. The Attorney General for the Province of British Columbia et al.**, decided October 20, 1988, at p. 12, Dickson, C.J.C., writing for the majority declared that "rule of law is the very foundation of the **Charter.**" [See (1988), 87 N.R. 241].

Elusive as it is as a concept, the rule of law must in all events mean "the law is supreme" and that officials of the Government have no option to disobey it. It would be unthinkable, under the rule of law, to assume that a process of enforcement is required to ensure that the Government and its officials will faithfully discharge their obligations under the law. That the Government must and will obey the law is a first principle of our Constitution.

[12] The consequence of this principle for declaratory proceedings has, it seems to me, already been implicitly established by this court in the **Gould** case: **Gould v. Attorney General of Canada et al.**, [1984] 1 F.C. 1119 (F.C.T.C., Reed, J.); **Attorney General of Canada et al. v. Gould**, [1984] 1 F.C. 1133; 54 N.R. 232, affd. (1984), 53 N.R. 394; 13 D.L.R.(4th) 491 (S.C.C.).

[13] That case involved a motion for an interlocutory injunction (in an action for declaratory relief) requiring the Chief Electoral Officer and the Solicitor General to enable the applicant penitentiary inmate to exercise his right to vote in the 1984 federal election, despite s. 14(4)(e) of the **Canada Elections Act**. In assessing the balance of convenience with respect to an interlocutory injunction, the trial judge said (at p. 1127):

"It seems clear that the balance of

convenience is all in the applicant's favour in this case. His claim relates only to his right to vote. He is not claiming on behalf of all inmates. ...

"I recogmize that had the claim been on behalf of a great many inmates the balance of convenience might have tipped in the other direction because it would simply be impossible to set up the machinery before September 4 for providing all inmates (or a large number) with the right to vote."

Mahoney, J., for the majority in this court wrote as follows (pp. 1139-1140):

"To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(e) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada."

The Chief Justice of Canada, in dismissing the appeal to the Supreme Court, commented that "we generally share the views expressed by Mr. Justice Mahoney".

[14] It seems to me that we must similarly say that to treat the **MacIntyre** case as affecting only the rights of the inmate in that case is to ignore reality - and indeed the wording of the court's holding in that case, which answered in a universal proposition a general question as to the meaning of s. 24.2 of the **Penitentiary Act**. The question was put this way (at p. 609):

"7. The question for adjudication proposed by and concurred in by both parties is as follows:

Does the term in Section 24.2 of the **Penitentiary Act**, namely 'The sentence he was then serving', mean a 'Sentence consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment (to which he was subject) commenced and ending on the expiration of the last to expire of such term of imprisonment', pursuant to Section 14(1) of the **Parole Act**?

"8. If the Court shall be of opinion in the positive, a declaratory order is to be made that the Applicant is entitled to earned remission up to one-third of the aggregate calculated on that basis.

"9. If the Court shall be of opinion in a negative, then the Applicant is not entitled to earn any earned remission after December 1st, 1979, and his release date is to be calculated accordingly."

To that question, the court's stated answer was as follows (at p. 624):

"I am accordingly of the opinion that the appeal should be allowed, the order appealed from should be set aside and the question posed in paragraph 7 of the special case should be answered in the positive. There should also be a declaration, in accordance with paragraph 8 of the special case, that the appellant is entitled to statutory and earned remission up to one-third of the aggregate calculated on the basis that 'the sentence he is then serving' in section 24.2 of the **Penitentiary Act** means, in the case of the appellant, a 'sentence consisting of a term of imprisonment commencing on the earliest day on which any of the sentences of imprisonment to which the appellant was subject commenced, i.e. July 6, 1971, and ending on the expiration of the last to expire of such terms of imprisonment, pursuant to subsection 14(1) of the **Parole Act**'."

Government officials could not have been in any doubt as to the generality of the court's pronouncement.

[15] The appellant argued before this court that Government officials must nevertheless have been in a quandary because of the apparent conflict of the **MacIntyre** decision with that of the Saskatchewan Court of Appeal in **Re Sowa and the Queen** (1979), 1 Sask. R. 162;

50 C.C.C.(2d) 513. Thurlow, C.J., concurring in **MacIntyre**, expressly distinguished **Sowa** (at p. 605). The respondent argued that the majority implicitly did so as well.

[16] But accepting, **arguendo**, that the two cases were in conflict and that officials were caught in a genuine dilemma as to what to do with respect to inmates in the Prince Albert Penitentiary in Saskatchewan, the proper course of action for the appellant, as the trial judge pointed out, would have been to seek to have the judgment in **MacIntyre** postdated pursuant to rule 338(2) or to seek leave to appeal to the Supreme Court along with a stay of the **MacIntyre** judgment. Even if in the minds of its officials it has good reason to pause and consider, it is not enough for the Government to remain outwardly mute and disobedient in the face of a declaratory judgment, because such an apparent failure to obey the law is a ready occasion of scandal for the public. The Government must be seen to be obedient to the law. If it has some reason for uncertainty, it owes it to the principle of the rule of law to reveal its position publicly, through a legal challenge to its apparent duty as declared by the courts. In my view, the rule of law can mean no less. I therefore reject the appellant's contention that she had no obligation to follow the declaratory judgment in **MacIntyre**.

The other issue on the appeal is that of the exemplary damages in themselves.

[17] The appellant argued that, since the purpose of an award of exemplary damages is deterrence rather than compensation, such damages are awarded only to punish a tortfeaser for high-handed, malicious or arbitrary conduct, conduct that is sufficiently outrageous as to warrant the condemnation of the court, and never where the defendant acted in good faith. The trial judge made no finding of malice. It was, he said, "not proved on the part of anyone in particular and ... cannot be inferred".

[18] The leading authority, **Rookes v. Barnard**, [1964] 1 All E.R. 367, dealt with the question of exemplary damages for the tort of intimidation on the part of a trade union. Lord Devlin stated the issue thus (at p. 407):

> "Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England."

After reviewing the authorities, he concluded (at pp. 410-411):

> "These authorities convince me of two things. First, that your lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are. ...
>
> "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. Where one man is more powerful than

another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. ...

"Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ... 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."

[19] Lord Devlin here recognized that "outrageous" or "oppressive" conduct on the part of the Government is quite different from similar conduct by powerful corporations or individuals, and that it is much more serious, "for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service". In a subsequent case, **Broom v. Cassell & Co.**, [1972] A.C. 1027, Lord Diplock alone doubted that it is still necessary to retain this category relating to government action. There is no mention that the conduct must be malicious or in bad faith. Lord Devlin's category is "oppressive, arbitrary or unconstitutional action by the servants of the government". This was the very standard applied by the learned trial judge in the case at bar. He referred to the "oppressive and wilful or wanton disregard of the plaintiff's right to be released", and to the persistence "in deliberately detaining him in prison until the day before his motion for a mandatory injunction was returnable to this court".

[20] The appellant argued that the trial judge drew a wrong inference from the failure to act, given the conflicting Saskatchewan decision and the fact that the date on which the respondent was released was still well within the time prescribed by law within which leave to appeal could have been sought against the MacIntyre decision.

[21] But in my view, this argument could succeed only if malice were required to found exemplary damages. If, as seems clear to me, malice is not necessary for the existence of "oppressive, arbitrary or unconstitutional action by the servants of the government", the appellant's argument serves only to strengthen the trial judge's finding that the conduct of the Government was wilful and deliberate. As I have already said in dealing with an earlier argument, apparently persistent failure by the Government to obey a clear judicial decision is not consonant with the principle of the rule of law.

[22] I would therefore dismiss the appeal with costs.

[23] In his cross-appeal, the respondent sought an increase in general damages from $10 a day to $500 a day and in exemplary damages from $10,000 to $50,000.

[24] The learned trial judge reviewed the law, including all of the authorities cited before this court by the respondent, and also the respondent's long life of criminal activity, beginning with a first incarceration in 1942 and culminating in a conviction for breaking and entering in March 1983, after the events herein, to which the

trial judge attributed the delay in the hearing of this trial until the fall of 1986. On general damages, he concluded (Appeal Book, pp. 40-41):

"The above recitation indicates why the damages awarded in the cases cited for the plaintiff are greater than he can expect to recover here. Upon becoming sui juris, if one does not exercise that restraint which nourishes personal liberty but continually victimizes others by means of criminal depredations, one is responsible for the devaluation of one's own liberty. Such a person cannot reasonably require the people and government of Canada to pay him a princely price for the liberty which he himself has constantly undervalued and squandered. The plaintiff is a virtually life-long tax consumer who seeks to impose the price of his 43 days of loss of his cheap liberty on the taxpayers of Canada. Indeed, if all monetary values were counterpoised as sums, it is almost certain that the plaintiff would owe the people of Canada, whom he cheated and robbed, more for food and lodging, social burden and criminal misconduct than he could ever pay. In that regard, it may be wondered why the defendant did not assert a set-off herein.

"How, then, is the plaintiff to be compensated for his self-devalued, squandered liberty? His behavioural record and his subsequent misconduct indicate the probability that, left at large to his own devices on August 10, 1982, the plaintiff could well have incurred negative gain during the following 43 days. Yet, he would (but for how long?) have been able to draw the sweet air of liberty and, arguably, might have been able to find legitimate employment. That counts for something, but in the plaintiff's particular case, not much. In 1982 he was being paid a wage of $35 per week in Collins Bay. If that were his measure of fixed compensation - $5 per day - his damages would be assessed at $215 for the 43 days. But even to the Norman LeBars of this world loss of liberty is worth more than that. Doubling that sum to $10, and realizing that if he had been so paid over the last 20 years, 1962 to 1982, when he was incarcerated (generously overlooking his periods of being unlawfully at large, when self-help was his necessity), it is evident that he could have emerged from prison in 1982 with ($10 x 365 days x 20) $73,000, plus interest if he had frugally saved it all. The taxpayers of Canada cannot reasonably be expected to pay more than $10 per day in general damages for the liberty which Mr. LeBar himself has so apparently despised both before and after August 10, 1982. The Court therefore awards the plaintiff $430 in general damages for his unlawful imprisonment between midnight of August 10, 1982, and whatever time he was released on September 22, 1982."

In my opinion, the respondent has not succeeded in establishing any reviewable error in this award. Indeed, the Supreme Court of Canada adopted a functional approach for general damages in its trilogy of judgments of January 19, 1978: **Andrews et al. v. Grand & Toy (Alberta) Ltd.**, [1978] 2 S.C.R. 229; 19 N.R. 50; 8 A.R. 182; [1978] 1 W.W.R. 557; 3 C.C.L.T. 225; 83 D.L.R.(3d) 452; **Arnold et al. v. Teno et al.**, [1978] 2 S.C.R. 287; 19 N.R. 1; 3 C.C.L.T. 372; 83 D.L.R.(3d) 609; **Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.**, [1978] 2 S.C.R. 267; 19 N.R. 552; [1978] 1 W.W.R. 607; 3 C.C.L.T. 257; 83 D.L.R.(3d) 480. Subsequently, in **Lindal v. Lindal**, [1981] 2 S.C.R. 629, at p. 637; 39 N.R. 361; [1982] 1 W.W.R. 433; 129 D.L.R.(3d) 263, at p. 270, the court emphasized that "an appreciation of the individual's loss is the key" (per Dickson, J.). This was the approach of the trial judge.

[25] In awarding the respondent the sum of $10,000 for exemplary damages, the learned trial judge noted that "the jurisprudence, ... unfortunately for

the assessor of damages, does not present any exactly, or even nearly, similar situation". His analysis of the factual evidence was as follows (Appeal Book p. 42):

> "Counsel for the defendant pleaded in argument that there was at the relevant time no computer whereby the defendant's servants could immediately identify the '20 or so' prison inmates (transcript: pp. 73 & 74) out of a total inmate population of '13,000 people incarcerated in some seven provinces' (transcript: p. 89) who were in the same plight as the plaintiff's. As counsel rightly noted, there is no evidence before the Court about the necessity of effecting a manual search of inmate records, but even so, one may in law ask, 'so, what?'. Complex as the legislative provisions are, the judgment in the **MacIntyre** case did not further complicate computation of terms of imprisonment. The statutory provisions remain as complex as before.
>
> "It must be remembered that, through his solicitor and counsel the plaintiff attempted appropriately to mitigate damages by reasonably timely notification of the defendant's proper servants, and even the minister, to the effect that he ought to be released on the basis of a proper method of calculation declared by the Federal Court of Appeal. If the prison authorities had set a sentence administrator immediately to the task of computimg and verifying the plaintiff's release date, and if he had thereupon been released, the Court would not now be considering exemplary damages. No one would begrudge the defendant's officials taking several hours, even a day, after notification, to calculate the plaintiff's correct date of release."

Again, the respondent has failed to demonstrate any error. The sum of $10,000 is far from negligible and I believe large enough to qualify as a deterrent against future conduct of this kind, especially since the financial consequences will in all likelihood be visited upon the budget of the particular Government agency at fault.

[26] I would therefore dismiss the cross-appeal. Since the respondent was successful on the appeal, and since a minimum of the parties' effort was directed to the cross-appeal, I would not award costs on the cross-appeal.

Appeal dismissed.

Editor: Debra F. MacCausland
gas

SYNDICAT DES EMPLOYES DE PRODUCTION DU QUEBEC ET DE L'ACADIE (applicant) v. COMMISSION CANADIENNE DES DROITS DE LA PERSONNE (tribunal-respondent) and LA SOCIETE RADIO-CANADA (mis-en-cause)
(A-634-85)

INDEXED AS: SYNDICAT DES EMPLOYES DE PRODUCTION DU QUEBEC ET DE L'ACADIE v. COMMISSION CANADIENNE DES DROITS DE LA PERSONNE et al.

Federal Court of Appeal
Marceau, Hugessen and Lacombe, JJ.
November 7, 1986.

Summary:

A union filed a complaint against the C.B.C. alleging discrimination within the meaning of ss. 4 and 11 of the Canadian Human Rights Act in that the C.B.C. maintained different wages between men and women performing work of equal value. An investigator was appointed under the Canadian Human Rights Act, who rejected the complaint. The union was allowed to file submissions with the Canadian Human Rights Commission. The Commission dismissed the complaint as being unsubstantiated pursuant to s. 36(3)(b) of the Act. The union applied to quash the Commission's decision under s. 28 of the Federal Court Act.

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Location	*Facility of Service*
Battle Harbour, Nfld.	Navigation Aids
Bonavista, Nfld.	Navigation Aids
Gander, Nfld.	Area Control Centre
	Navigation Aids
Goose Bay, Nfld.	Navigation Aids
St. Anthony, Nfld.	Navigation Aids
St. John's, Nfld.	Navigation Aids
Sept-Iles, P.Q.	Navigation Aids
Stephenville, Nfld.	Navigation Aids

. . . . .

Computation and Payment of Fees

24. Where a fee calculated according to these Regulations is not a multiple of five cents, the fee payable shall be reduced or increased to the nearest multiple of five cents.

25. All fees are due and payable when incurred except for the annual parking fee which is payable in advance.

There were some changes in the Regulations in C.R.C. 1978, c. 5, but they remain substantially in the same terms as before.

Obviously, the provision in s. 25 aforementioned that "all fees are due and payable when incurred" cannot avail to make the fees payable unless authority to that end is found in the regulation-making power conferred by s. 5 of the *Aeronautics Act*. Do then the words in s. 5 authorizing the "prescribing" of charges connote not only fixing the quantum of charges but also the imposition and consequent liability to pay them? Mahoney J., after reference to dictionary meanings of the term "prescribe", concluded that s. 5 gave authority not only to fix the charges, but also to impose a legal obligation to pay them. I find no reason to differ from him on this issue and would, accordingly, reject the submission that s. 5 is deficient in its formulation to lay an obligation of payment upon the appellants.

The factum of the respondent included the submission that the charges were, in any event, payable as a matter of contract or *quasi*-contract because the services in question here were requested by the appellants and supplied at their request. The submission was not, however, pushed and Mahoney J. noted a possible issue of his jurisdiction if it were. The appellants did not take any jurisdictional point and the respondent joined issue only on the scope of s. 5.

In the result, I would dismiss the appeals with costs and affirm

the judgment for the respondent on its counterclaim.

Appeals dismissed.

LINDAL v. LINDAL

Supreme Court of Canada, Martland, Ritchie, Dickson, Estey and McIntyre JJ. December 17, 1981.

Damages — Personal injuries — Non-pecuniary losses — Supreme Court of Canada establishing $100,000 as upper limit for awards for non-pecuniary losses — Whether, and in what circumstances, awards more than $100,000 may be given.

The plaintiff was severely injured in a car accident as a result of the defendant's negligence. In the plaintiff's action against the defendant for damages for personal injuries the trial Judge awarded the plaintiff $135,000 damages for pain and suffering and loss of amenities. On appeal by the defendant, the Court of Appeal reduced this award to $100,000. The plaintiff appealed to the Supreme Court of Canada. *Held*, the plaintiff's appeal should be dismissed.

Principles to guide trial Courts in the assessment of damages in personal injury cases have been broadly outlined by the Supreme Court of Canada in three judgments delivered in early 1978, sometimes referred to as the "trilogy". The issue here is under what circumstances should a trial Judge exceed the rough upper limit of $100,000 for non-pecuniary loss established by the Court in the trilogy? In the trilogy, the Court reaffirmed the basic principle that the purpose of awarding damages for personal injury is compensation not punishment. The goal is to put the plaintiff in the position he would have been in had the injury not been suffered. Anything having a money value which the plaintiff has lost should be made good by the defendant. Lost earnings and expensive medical or nursing attention are costs which are "losses" to the plaintiff, in the sense that they are expenses that he would not have had to incur but for the accident. The amount of the award under these heads of damages should not be influenced by the depth of the defendant's pocket or by sympathy for the position of either party. Nor should arguments over the social costs of the award be controlling at this point. Different considerations are paramount in the matter of damages for non-pecuniary loss. The principle *restitutio in integrum* can find only limited application in the matter of non-pecuniary losses. In the trilogy, the Court adopted a "functional" approach to the problem of non-pecuniary loss, 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. Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the $100,000 maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key.

Although the social costs of an award cannot be controlling when assessing damages for loss of income and the cost of future care, the social impact of an award must be considered in calculating the damages for non-pecuniary loss. There are a number of reasons for this. First, the claim of a severely injured plaintiff for

damages for non-pecuniary loss is virtually limitless. This is particularly so if one adopts the functional approach and award damages according to the use that can be made of the money. A second factor is that the plaintiff has already been fully compensated for his loss of future earnings. Had he not been injured, a certain portion of these earnings would have been available for amenities. Therefore, even before damages under the head of non-pecuniary loss are awarded, the plaintiff has certain funds at his disposal that can be used to provide a substitute for lost amenities. This consideration indicates that a moderate award for non-pecuniary damages is justified. A third factor is that damages for non-pecuniary loss are not really "compensatory". The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfil this function, should be moderate. Thus, the Court reaffirms a rough upper limit of $100,000 for non-pecuniary loss in cases of severe personal injury, as providing a measure of uniformity and predictability in this difficult area. However, inflation and the erosion in the value of money since the trilogy of cases was decided by the Court must be considered. As stated in one of the three cases, the figures must be viewed flexibly in recognition of, *inter alia*, "changing economic conditions". The amount of $100,000 should be subject to increase upon proof of, or agreement as to, the effect of inflation on the value of money since the decisions in the trilogy. In addition, in one of the cases the Court spoke of exceeding the limit of $100,000 in "exceptional circumstances". The variety of possible fact situations is limitless, and it would be unwise to foreclose the possibility of ever exceeding the guide-line of $100,000, but the circumstances in which it should be exceeded will be rare indeed.

[*Andrews et al. v. Grand & Toy Alberta Ltd. et al.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50; *Arnold et al. v. Teno et al.* (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287, 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), 83 D.L.R. (3d) 480, [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257, 19 N.R. 552; *Lewis v. Todd et al.* (1980), 115 D.L.R. (3d) 257, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 34 N.R. 1, folld]

APPEAL by the plaintiff from a judgment of the British Columbia Court of Appeal, 115 D.L.R. (3d) 745, 25 B.C.L.R. 381, [1982] 1 W.W.R. 419, allowing the defendant's appeal in part from a judgment of Fulton J., (1) [1978] 4 W.W.R. 592, 5 C.C.L.T. 244, (2) 90 D.L.R. (2d) 668, [1978] 6 W.W.R. 349, 7 C.C.L.T. 30, by reducing the award for non-pecuniary damages from $135,000 to $100,000, in an action for damages for personal injuries.

Brian A. Crane, Q.C., and *Russell V. Stanton*, for appellant.
R. Bruce Harvey, for respondent.

The judgment of the Court was delivered by

DICKSON J.:—This is another tragic personal injury case. Liability is no longer in issue. The only question on appeal is whether the Court of Appeal of British Columbia erred in reducing from $135,000 to $100,000 the award for pain and suffering and loss of amenities of life.

This Court, in recent years, has sought to fashion a body of rational and cohesive principles to guide trial Courts in the assessment of damages in personal injury cases. The broad outline of these principles was sketched in three judgments delivered on January 19, 1978, sometimes referred to as the "trilogy": *Andrews et al. v. Grand & Toy Alberta Ltd. et al.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577; *Arnold et al. v. Teno et al.* (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272; *Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.* (1978), 83 D.L.R. (3d) 480, [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607. The outline was further clarified and refined in *Lewis v. Todd et al.* (judgment delivered October 28, 1980, reported at 115 D.L.R. (3d) 257, [1980] 2 S.C.R. 694, 34 N.R. 1). The present case affords an opportunity to continue the exposition. The issue here is narrow: under what circumstances should a trial Judge exceed the rough upper limit of $100,000 for non-pecuniary loss established by the Court in the trilogy?

I

The appellant, Brian Lindal, claimed against his brother, the respondent Kenneth Lindal, for damages sustained by the appellant as a result of the negligence of the respondent in the operation of a motor vehicle on May 18, 1975, at River Rd. in the Municipality of Delta, Province of British Columbia. The respondent lost control of the motor vehicle, in which the appellant was a passenger, and collided with a telephone pole resulting in severe physical and other injuries to the appellant. He was comatose for a period of almost three months. He suffered extensive damage to brain and brain stem resulting in severe dysarthria (speech impairment) due to loss of control of the muscles of the lips, tongue and palate. He suffered also from ataxic (irregularity of function) and spastic (sudden convulsive movement) double hemiplegia (loss of control of the muscles of the arms and hands and legs). In addition to the physical disability flowing from the loss of brain function there is appreciable personal and emotional disorder. The appellant lacks the capacity to reconcile himself mentally to his condition. He is emotionally labile, irritable, erratic and given to fits of depression. As at the date of trial, the appellant did not have any pain as a result of his injuries.

In assessing damages the trial Judge, Fulton J., in reasons reported in [1978] 4 W.W.R. 592, 5 C.C.L.T. 244, carefully

reviewed the decisions I have mentioned. He considered the appellant was not as severely paralyzed as either Andrews or Thornton, but in the end result was less mobile than they, for they apparently were able to move about freely in wheelchairs and one of them, Andrews, was able to drive a specially equipped van whereas here the appellant was limited to extremely slow, unsteady and difficult walking. More importantly, the appellant had suffered loss of brain function with resultant speech impairment and other consequences, whereas both Andrews and Thornton were left with mental functions unimpaired. In the *Teno* case, the infant plaintiff had also suffered severe brain injury but in *Teno* there did not appear to have been the personality disorders and constant frustration shown by Brian Lindal as a result of inability to make the mental adjustment.

Mr. Justice Fulton noted that this Court, in the trilogy, had established a normal upper limit of $100,000 for damages for non-pecuniary loss. However, in Fulton J.'s opinion, the door had been left open for a higher award in an "exceptional case". The trial Judge referred [[1978] 4 W.W.R. at p. 602] to the following passage from the judgment in *Andrews*, *supra*, at p. 478 D.L.R., p. 265 S.C.R., in support of this proposition:

> I would adopt as to 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

The Judge felt that "exceptional circumstances" were present in the case of Brian Lindal. Brian Lindal, because of his damaged brain, has no chance of adjusting and leading a useful life; this possibility was open to the plaintiffs in *Andrews* and *Thornton* where there was no loss of brain function.

The Judge concluded that in *Andrews* this Court had fixed the normal upper limit of an award under the head of non-pecuniary damages in very severe personal injury cases, but that this was "not an absolute ceiling fixed and for all time". The following passage from *Andrews*, *supra*, at p. 477 D.L.R., p. 263 S.C.R., was quoted [at p. 602]:

> "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 Judge found what he referred to as "compelling reasons" for fixing a higher sum. He considered that the consequences of Brian Lindal's injuries — lack of mobility, lack of ability to

communicate, personality disorders — were substantially more serious than in the *Andrews* and *Thornton* cases. Two additional facts were relied on — (i) evidence of extreme depression and suicidal tendencies and (ii) the taking of a drug called dantrium, which had undesirable side effects, to relieve the effects of spasticity in the muscles. Damages for non-pecuniary loss were fixed at $135,000.

II

The sole issue on the appeal to the Court of Appeal of British Columbia was whether the trial Judge had erred in awarding a sum in excess of $100,000 for non-pecuniary loss. The Court of Appeal, speaking through Taggart J.A., could not accept the conclusion that Brian Lindal was less mobile than Thornton and Andrews; Thornton and Andrews were, in the opinion of the Court, immeasurably worse off than Lindal. The impairment of Lindal's mental faculties was a most serious disability, one not suffered by Andrews and Thornton, but, when one had regard to the injuries sustained by the child in *Teno*, not so serious as to warrant an award in excess of $100,000. The following passage sums up the views of the Court [115 D.L.R. (3d) 745 at p. 753, 25 B.C.L.R. 381, [1982] 1 W.W.R. 419]:

> It will never be possible to make a precise comparison between persons who suffer non-pecuniary losses as a result of personal injuries. Their personalities will differ as will the circumstances obtaining both before and after the accident giving rise to their injuries. The effect of their injuries on them even though those injuries be similar will also vary because of their differing abilities to adjust to the altered circumstances in which they find themselves. I think it is because there is no possibility of making a precise comparison that Dickson J. in *Andrews* and *Thornton* and Spence J. in *Teno* used general language in fixing the rough upper limit of $100,000 as the amount to be awarded for non-pecuniary losses. I think that also led them to say that it should be only in exceptional cases that that limit should be exceeded. In my view this is not an exceptional case but rather one in which the limit fixed by Dickson J. in *Thornton* and *Andrews* and by Spence J. in *Teno* should prevail.

The Court allowed the appeal and reduced the amount awarded for non-pecuniary damages from $135,000 to $100,000.

Counsel for Brian Lindal advanced without success an alternative argument, in an attempt to sustain the higher award. He submitted that changes in economic conditions, that is to say, inflation, between the date of judgment at trial in April, 1978, and date of judgment on appeal in October, 1980, militated in favour of increasing the award from $100,000 to $135,000. The Court declined to hear this submission on the ground that it would have been necessary for counsel to refer to statistical and other

materials not introduced in evidence at trial and there had been no application before the Court to introduce new evidence.

The Court added [p. 754]:

> We sit as a Court of review and not for the purpose of retrying a case. If we were to take account of the factors suggested by counsel for the respondent it seems to me we would be following the latter course. That is not to say that where evidence of an economic nature is adduced at trial which supports a conclusion that the case is one where an award in excess of the $100,000 level fixed in *Andrews, Thornton* and *Teno* should be made we cannot have regard for that evidence. I say simply that the material to which counsel for the respondent wished to refer was not before the trial Judge and forms no part of the record which is before us. For those reasons we declined to hear counsel for the respondent on this aspect of his argument.

III

In the trilogy, this Court reaffirmed the basic principle that the purpose of awarding damages for personal injury is compensation not punishment. The goal is to put the plaintiff in the position he would have been in had the injury not been suffered. The principle of compensation ensures a measure of fairness to both parties (*Andrews, supra*, at p. 463 D.L.R., p. 243-4 S.C.R.):

> 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.

A number of secondary principles flow from the basic precept of compensation. The first is that anything having a money value which the plaintiff has lost should be made good by the defendant. If the plaintiff is unable to work, then the defendant should compensate him for his lost earnings. If the plaintiff has to pay for expensive medical or nursing attention, then this cost should be borne by the defendant. These costs are "losses" to the plaintiff, in the sense that they are expenses which he would not have had to incur but for the accident. The amount of the award under these heads of damages should not be influenced by the depth of the defendant's pocket or by sympathy for the position of either party. Nor should arguments over the social costs of the award be controlling at this point. The first and controlling principle is that the victim must be compensated for his loss.

Different considerations are paramount in the matter of damages for non-pecuniary loss. The principle *restitutio in integrum* can find only limited application in the matter of non-pecuniary losses. A lost limb or a lost mind are not assets that can be valued in monetary terms. Money cannot repair brain damage or obliterate anguish and suffering. As the Court put it in *Andrews* at p. 475 D.L.R., p. 261 S.C.R.:

> 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.

Pain and suffering and loss of amenities are intangibles. They are not possessions that have an objective, ascertainable value. Professor Kahn-Freund in his brilliant essay "Expectation of Happiness", 5 Mod. L.R. 81 (1941), cites the example of the Stoic philosopher Poseidonios, who, when tormented by pain, is reported to have exclaimed [at p. 86] "Pain, thou shalt not defeat me. I shall never admit that thou art an evil." How, Professor Kahn-Freund asks, could we award damages for pain and suffering to this philosopher who welcomed his misery as a test of his own power to resist it? Is the stoic entitled to less compensation than the weak-willed person who recoils at the slightest suggestion of pain or unhappiness? These examples only reinforce the conclusion that it is fruitless to attempt to put a dollar value on the loss of a faculty in the way that we put a dollar value on the loss of a piece of property.

These problems were identified and discussed by the Court in the trilogy. In *Andrews*, three theoretical approaches to the problem of non-pecuniary loss were canvassed. The first two approaches, the "conceptual", which treats each faculty as a proprietary asset with an objective value, and the "personal", which would measure loss in terms of human happiness of the particular individual, both seek, in varying ways, to place a dollar value on human faculties and human happiness. The Court adopted the third approach, the "functional", 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. Money is awarded, not because lost faculties have a dollar value, but because money can be used to substitute other enjoyments and pleasures for those that have been lost. The matter is discussed in *Andrews* in these terms at pp. 476-7 D.L.R., p. 262 S.C.R.:

> ... 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* [(1966), 39 A.L.J.R. 480] 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 compensation.

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case": *Thornton*, *supra*, at p. 490 D.L.R., p. 284 S.C.R.

Mr. Justice Spence, in *Arnold v. Teno*, *supra*, at pp. 639-40 D.L.R., pp. 333-4 S.C.R., approached the matter of non-pecuniary loss on the same footing:

> 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?"

The following comments on the functional approach are found in a recent article by Professor Beverly M. McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injury", 59 Can. Bar Rev. 1 (1981), at pp. 11-2 and 48:

> The essential point is that the plaintiff must demonstrate a reasonable or fair function which the money claimed will serve. As these examples illustrate, what is a reasonable or fair function may involve reference to the restitutionary concept of what the plaintiff would have enjoyed or have been able to provide for his dependants had he not been injured. This reflects the fact that the functional approach to damages is not in conflict with the ideal of *restitutio in integrum*, but rather provides a basis for calculating the closest practical equivalent to the goal of restoring the plaintiff to his original position. Viewed thus, the functional approach shows promise of providing the comprehensive and just rationale for the calculation of damages for personal injuries which has heretofore been wanting.
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> . . . . .
>
> The attractions of a functional approach to the assessment of non-pecuniary damages are considerable. It provides a much needed rationale for such damages. It solves the problem inherent in the traditional compensation model of what the compensation is for. And it is in conformity with the conclusion of Lord Pearson's Commission:
>
> > "We think the approach should be to confine* non-pecuniary damages only where they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost."
>
> [* Should read "award".]

The functional approach in the assessment of damages for non-pecuniary loss was adopted by the Pearson Commission in England (Royal Commission on Civil Liability and Compensation for Personal Injury, (1978) Cmnd. 7054-I). The commissioners stated that the main aim of any system for the award of pecuniary damages should be to make good the loss. Non-pecuniary damages should be awarded only when they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost (vol. 1, para. 397). This led the commissioners to recommend that a permanently unconscious plaintiff should not receive any damages for non-pecuniary loss since the money award could serve no useful purpose (vol. 1, para. 398).

I have already indicated that the social costs of the award cannot be controlling when assessing damages for loss of income and the cost of future care. The plaintiff must be provided with a fund of money which will provide him with adequate, reasonable care for the rest of his life. The social impact of the award must be considered, however, in calculating the damages for non-pecuniary loss. There are a number of reasons for this. First, the claim of a severely injured plaintiff for damages for non-pecuniary loss is virtually limitless. This is particularly so if we adopt the functional approach and award damages according to the use which can be made of the money. There are an infinite number of uses which could be suggested in order to improve the lot of the crippled plaintiff. Moreover, it is difficult to determine the reasonableness of any of these claims. There are no accurate measures available to guide decision in this area.

A second factor that must be considered is that we have already fully compensated the plaintiff for his loss of future earnings. Had he not been injured, a certain portion of these earnings would

have been available for amenities. Logically, therefore, even before we award damages under the head of non-pecuniary loss, the plaintiff has certain funds at his disposal which can be used to provide a substitute for lost amenities. This consideration indicates that a moderate award for non-pecuniary damages is justified.

A third factor is that damages for non-pecuniary loss are not really "compensatory". The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfil this function, should be moderate.

The social impact and possible effect, in practical terms, of very large awards for non-pecuniary loss was considered by Mr. Justice Spence in the *Teno* case, *supra*, at p. 639 D.L.R., p. 333 S.C.R.:

> 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.

This Court, while recognizing that limits are by their very nature arbitrary and conventional, endorsed the concept of an upper limit for awards of non-pecuniary loss in personal injury cases. The Court felt this to be desirable for the reasons outlined above and in the *Andrews* judgment, *supra*, from which I quote the following at p. 476 D.L.R., p. 261 S.C.R.:

> 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 the greatest.
>
> It is also the area where there is the clearest justification for moderation.

I would here reaffirm, for all the reasons outlined above, a rough upper limit of $100,000 for non-pecuniary loss in cases of severe personal injury, as providing a measure of uniformity and predictability in this difficult area. None of us, however, is unaware of, or unaffected by, the inflationary trend and the erosion in the value of money since the trilogy of cases was

decided by this Court. The value of money has been steadily declining. It seems only reasonable therefore to reaffirm the statement in *Andrews*, at p. 477 D.L.R., p. 263 S.C.R., that the figures must be viewed flexibly in recognition of, *inter alia*, "changing economic conditions". Such amount of $100,000 should be subject to increase upon proof of, or agreement as to, the effect of inflation on the value of money since the decisions of this Court in *Andrews*, *Teno* and *Thornton*. A Court may take judicial notice of the fact than an inflationary trend exists, but I should not think that the precise monthly or yearly inflation rate is normally a fact of which such notice may be taken.

IV

Mr. Justice Fulton made no reference to functional considerations in making his award of $135,000 for Brian Lindal's non-pecuniary loss. He referred to those passages in *Andrews* which discuss the need for "flexibility" in the assessment of non-pecuniary damages. He concentrated on demonstrating that the plaintiff Lindal was in a worse position than the plaintiffs in *Andrews* and *Thornton*, in concluding that $35,000 was a "reasonable and proper measure" of the difference between Lindal and Andrews and Thornton.

With great respect, in the case at bar, Mr. Justice Fulton appears to have misapprehended fundamentally the significance of the award of a conventional sum of $100,000 for non-pecuniary loss made by this Court to the three plaintiffs in the trilogy. He seems to have assumed that the figure of $100,000 was a measure of the "lost assets" of the plaintiffs in those cases. The issue was seen as one of quantifying and comparing the losses sustained. Once this premise is accepted, the question then becomes whether the plaintiff Lindal has lost more "assets" than did the plaintiffs in the earlier cases. If the answer to this question is in the affirmative, then it naturally follows that Brian Lindal deserves an award of over $100,000 under the head of non-pecuniary loss. The excess will represent the difference in value between what Lindal has lost and what the plaintiffs Andrews and Thornton have lost.

The difficulty with this approach is with the initial premise. The award of $100,000 for non-pecuniary loss in the trilogy was not in any sense a valuation of the assets which had been lost by Andrews, Thornton and Teno. As has been emphasized, these assets do not have a money value, and thus an objective valuation is impossible. The award of $100,000 was made, as earlier indicated, in order to provide more general physical arrangements

above and beyond those directly relating to the injuries in order to make life more endurable. This is reflected in the fact that an identical sum was awarded to each of the three plaintiffs in those cases, even though their injuries were quite different. James Andrews, for example, suffered a lesion of the spinal cord which paralyzed most of his upper limbs, spine and lower limbs. He no longer had normal bladder, bowel and sex functions. Andrews was severely, if not totally, disabled. By way of contrast, Diane Teno had suffered a severe brain injury. Her speech was affected and she had a severe spastic paralysis on her left hand and arm. She was able to walk by herself but she did so clumsily.

No one would suggest that the injuries suffered by these two individuals were precisely identical. The Court recognized that their situations were in many ways quite different. Notwithstanding these differences, the Court awarded the same sum for non-pecuniary loss. Equally, the fact that Brian Lindal's injuries are different from and arguably more severe than those of James Andrews does not justify an award of more than $100,000 in this case.

It is true that the Court in *Andrews* spoke of exceeding the limit of $100,000 in "exceptional circumstances". The variety of possible fact situations is limitless, and it would be unwise to foreclose the possibility of ever exceeding the guide-line of $100,000. But, if the purpose of the guide-line is properly understood, it will be seen that the circumstances in which it should be exceeded will be rare indeed. We award non-pecuniary damages because the money can be used to make the victim's life more bearable. The limit of $100,000 was not selected because the plaintiff could only make use of $100,000 and no more. Quite the opposite. It was selected because without it, there would be no limit to the various uses to which a plaintiff could put a fund of money. The defendant, and ultimately, society at large, would be in the position of satisfying extravagant claims by severely injured plaintiffs.

It is apparent, therefore, that there was no justification for exceeding the limit of $100,000 in the case of Brian Lindal. While his injuries were different from those of the plaintiffs in the trilogy, this alone does not justify exceeding the upper limit.

V

The plaintiff argued in the Court of Appeal and in this Court that, even assuming that the trial Judge erroneously exceeded the limit of $100,000, changes in economic circumstances since judgment was given in April, 1978, justified an award of $135,000.

Account may be taken of inflation in awarding damages and it is not suggested that the figure of $100,000 should not vary in response to economic conditions, in particular, the debasement of purchasing power as a result of inflation.

In the present case, inflation is not a significant factor. The trial judgment was delivered in April, 1978, some four months after the judgments in the trilogy and it is conceded there was no measurable increase in inflation during this brief period. I do not think in the circumstances that the award of the trial Judge can be supported on the basis of inflation.

In the result, in my view, the disposition of the Court of Appeal was correct. The appropriate level of damages for non-pecuniary loss in this case is $100,000.

VI

I would dismiss the appeal with costs. In response to the request and agreement of counsel, I would also order that the damages awarded by the trial Judge for loss of future income be increased by adding interest set out in the British Columbia *Court Order Interest Act*, R.S.B.C. 1979, c. 76, less 5%, calculated from the date of the trial judgment until payment.

Appeal dismissed.

GLOUCESTER PROPERTIES LTD. et al. v. THE QUEEN IN RIGHT OF BRITISH COLUMBIA et al.

British Columbia Court of Appeal, Nemetz C.J.B.C., Carrothers and Hinkson JJ.A. October 23, 1981.

Evidence — Privilege — Crown privilege — Cabinet minutes and discussions — Whether absolute privilege attaches — Crown Proceeding Act, R.S.B.C. 1979, c. 86, s. 9.

Practice — Discovery — Privilege — Crown privilege — Action attacking validity of Order in Council — Statutory requirement for committee recommendation prior to Order in Council being made — Plaintiff asking Minister on discovery for details of recommendation — Whether claim of Crown privilege on basis of Cabinet discussions to be upheld — Crown Proceeding Act, R.S.B.C. 1979, c. 86, s. 9.

An assertion of privilege by the Crown with respect to Cabinet minutes and discussions does not attract an absolute privilege. A claim of privilege will prevail only when it is necessary in the public interest. Accordingly, in an action attacking the validity of an Order in Council which by statute required a committee decision as a condition precedent, a Cabinet Minister can be required on discovery to disclose Cabinet discussion, especially where the interest in non-disclosure is not elaborated and is put on the basis of a bare claim to absolute privilege.

13

may be awarded for reasonable necessary expenses of the burial of the deceased, including transportation and things supplied and services rendered in connection therewith."

[3] The test for the assessment of damages in a fatal injury case was set out by 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. This in effect is an amount that will compensate her for the loss of the benefit she would have derived from her husband's income had he not been killed.

[4] I assess damages under the **Fatal Injuries Act** as follows:

(1) Loss Of Future Support

[5] To the widow, Mrs. Morrell-Curry, the sum of $60,000.00 to compensate her for the pecuniary loss she suffered by reason of losing the benefit of a portion of her husband's income. At the time of the accident, Glenn Curry was unemployed. I find that it was reasonable and probable, considering his training, experience, age, job opportunities and character, that he would have obtained employment by January 1, 1988, in a position in which he would earn approximately $18,000.00 a year commencing January 1, 1989. The best case scenarios for his employment prospects put forward by the plaintiff were not realistic. On the other hand, the poor prospects suggested by the defendant for Mr. Curry, while supported by his "track record" to the date of his death, failed to account for the fact that he was a good worker who presented himself well and did not take into account that his periods of unemployment were explained by the fact that he had been in a motorcycle accident in June, 1984, and that his wife wanted him to quit the job he held at Doncaster Medical in March of 1987. In my opinion, he would have risen to employment levels above that of his last job but not to the heights the plaintiff's counsel suggested.

[6] As is usual in these cases, both sides called actuaries to give expert testimony. Mr. Paul G. Conrad was called by the defendant. He is an actuary employed with William M. Mercer Limited. I accept Mr. Conrad's method of calculating Mrs. Morrell-Curry's loss of financial support as a result of the death of her husband. The method is described in his report at pp. 4 and 5 as follows:

"Mr. Curry's Personal Expenses

"Many families do not maintain detailed records of family expenditures, particularly with respect to individual family members. Thus, in determining what proportion of the Curry's family income was used for Mr. Curry's personal expenses, we have made use of broad statistics relating to the total population.

"In using average family expenditure statistics to assess the distribution of family income, we have first determined that the average family consisting of two adults spends about 34.3% of their net income on shelter, household operations, and household furniture and equipment. This figure is derived from the Statistics Canada publication, **Family Expenditure in Canada 1982**.

"After accounting for shelter, household operations, and household furniture and equipment, 65.7% of net family income remains for the personal use of family members. In the absence of information to the contrary, we have assumed that each of Mr. & Mrs. Curry would have used 50% of the 'personal use' funds, or 32.85% of net family income.

"Therefore, Mrs. Curry's loss of financial support would total 67.15% (i.e. 34.3 + 32.85) of net family income, less her own after tax income. Alternatively, and perhaps more clearly this can be expressed as Mr. Curry's net income less his personal expenses of 32.85% of total net family income."

[7] I reject the evidence of the actuary called on behalf of the plaintiff as it was based on an unrealistic allocation of the household and living expenses as between Mr. and Mrs. Curry, thus resulting in a larger amount of Mr. Curry's income that would have been available for the support of Mrs. Curry had he lived. I reject the approach that 60% or 70% of the net employment income of Mr. Curry would be used for the support of Mrs. Morrell-Curry considering Mr. Curry's low income level. That is not at all realistic. If the Ontario Court of Appeal can be said to have approved a dependency percentage in the 60% or 70% range in **Nielsen et al. v. Kaufmann** (1986), 13 O.A.C. 32 (C.A.), I can only say that I disagree with their views; I prefer the methodology commonly used by Mr. Conrad and other actuaries to determine the degree

[continued on right column]

to which the surviving family members were dependent on the income of the deceased. In a family dependent on one breadwinner, it is reasonable that 60% to 70% of his income would be used for the benefit of the family, possibly more. However, in this case, the family consisted of only the spouses. Both Mr. and Mrs. Curry earned income and Mrs. Morrell-Curry's income was significantly greater than that of her husband.

[8] In doing his calculations, Mr. Conrad used an annual income figure for 1989 for Mr. Curry of $14,400.00 (based on his actual earnings from his last employment) in reaching his conclusion that Mrs. Morrell-Curry's loss of support was $1,597.00 a year. At p. 6 of his report, he applied the above formula in making the following calculations:

"We derive below the net family income as at January 1, 1989 of $30,926."

	Mr. Curry	**Mrs. Curry**	**Total**
Gross Income	$14,400	$25,000	$39,400
Income Tax	2,117	4,874	6,991
CPP	246	468	714
UI	281	488	769
Subtotal	$ 2,644	$ 5,830	$ 8,474
Net Income	$11,756	$19,170	$30,926

Thus, the annual loss of support to Mrs. Curry is as follows:

67.15% of Net Family Income,

less Mrs. Curry's own Net Income.

(67.15% x 30,926) - 19,170 = $1,597

[9] I have estimated that his income as of January 1, 1989, which is the date both actuaries used for the purpose of making calculations of the loss of dependency, would have been in the $18,000.00 range. Mr. Conrad's assumptions with respect to Mrs. Morrell-Curry's income levels were reasonable.

[10] Using a figure of $18,000.00 as Mr. Curry's probable income for the year 1989, this would increase the family income to $43,000.00, an increase of about 9%. I have made a rough estimate that the cost of income tax, C.P.P. and U.I. would increase by a similar percentage, resulting in a cost of these items increasing to $9,237.00, producing a net income to the family (based on Mr. Curry earning $18,000.00 in 1989) of $33,763.00. Applying the formula used by Mr. Conrad (I accept his evidence that the formula is generally used by actuaries), I have determined that based on an $18,000.00 gross income for Mr. Curry for 1989, the loss of support suffered by Mrs. Morrell-Curry is 67% of $33,800.00 (rounded) less her net income of $19,170.00, for a loss of support for the year 1989 projected to be $3,476.-00. The budgets presented in evidence showing the allocation of funds by the Currys supported the assumptions made by Mr. Conrad; in fact, the budgets indicated less of the deceased's income would be available for support than the statistical approach used by Mr. Conrad.

[11] I have rounded the loss of support off at $3,500.00 for the year 1989, being the probable loss of support based on the probable income level of Mr. Curry for the year 1989 had he lived.

[12] I do not agree that the award should include an amount for administration fee and I am not prepared to include such a sum for the reasons that I stated in paragraph 40 in **Comeau v. Marsman et al.** (1981), 47 N.S.R.(2d) 550; 90 A.P.R. 550.

[13] I consider the appropriate discount rate to be 2½% as fixed by **Civil Procedure Rules**, notwithstanding the fact there is presently a gap between the inflation rate and the rate of return on prudent investments that would possibly warrant an increase in the discount rate.

[14] I have considered the evidence submitted with respect to the **Statistics Canada** figures on the probabilities of mortality, divorce and remarriage and the facts of this case. I have concluded that the likelihood of divorce had Mr. Curry lived and the likelihood of remarriage for Mrs. Morrell-Curry is somewhat below what the statistical figures would indicate. I have also considered the possibility of Mr. Curry having been disabled had he lived and the evidence on this subject. I feel that the likelihood of his becoming disabled would not be higher than the 3% norm referred to by the plaintiff's actuary. I have concluded that the award should be discounted by 35% for these contingencies. I have not made a reduction for the contingency of periods of unemployment for Mr. Curry as these are offset to a considerable extent by the Unemployment Insurance benefits he would receive and, in periods of unemployment, the unemployed person generally cuts back on discretionary spending; thus there is not likely much of a reduction in family support.

[15] I find that Mr. Curry would probably have worked to age sixty-five. He was in good health and he and his wife would likely have needed the income as she would probably be retired by the time he became sixty as she was nine years older than Mr. Curry. I accept Mr. Conrad's evidence that as of July 1, 1989, using a 2½% discount factor, a sum of $77,550.00 would be necessary to replace $3,500.00 of annual income.

[16] Discounted at 35% for contingencies results in a sum which I have rounded to $50,400.00. To this sum must be added the necessary gross-up to look after the increased income tax that would be payable by Mrs. Morrell-Curry by reason of the income earned on the award. I accept Mr. Conrad's evidence that the grossed-up figure to replace the $3,500.00 income lost would be $61,828.00.

[17] As the calculation that Mrs. Morrell-Curry lost the annual benefit of $3,500.00 income by reason of Mr. Curry's death was slightly on the generous side, I shall round the award off at $60,000.00. As stated by the Supreme Court of Canada in **Keizer v. Hanna and Buch**, an assessment of damages must be an exercise of business judgment; it is not an exercise in mathematics although the Courts are dependent on actuarial evidence in making calculations. In my opinion, considering the facts of this case, $60,000.00 for loss of the benefit of future support is reasonable compensation to Mrs. Morrell-Curry.

(ii) Past Loss Of Support

[18] This should be calculated on the following basis:

(1) Between July 5, 1987, and December 31, 1987, Mr. Curry would probably have been on Unemployment Insurance. I calculate Mrs. Morrell-Curry's loss of support for this period at $1,000.00.

(2) Between January 1, 1988, and December 31, 1988, it is probable that he would have earned something in the order of $17,000. I calculate her loss of support for this period at $2,500.00.

(3) Between the period January 1, 1988, to June 30, 1989, he would probably have earned the sum of $8,700.00. I calculate her loss of support for this period at $1,600.00.

[19] These are rough calculations based on a loss of support of $3,500.00 annually on an income of $18,000.00 per annum for Mr. Curry. The total claim for loss of past support is rounded to $5,000.00.

[20] I am not allowing anything on the plaintiff's claim for loss of services of her husband, Glenn. She put forward a claim of something in the order of $20,000.00 on the basis that he was able to cut the grass, shovel snow, do some repairs around their trailer and do minor repairs to their vehicle. It was argued that she would now have to pay for such services. Subsequent to her husband's death, Mrs. Morrell-Curry sold the trailer in which they lived for the basic reason that she wished to move into the City as she did not like the drive from Lower Sackville to her place of work in Halifax and her best friend lives in Halifax. She is now living in an apartment in Halifax and therefore does not have any need for services of a handyman and I am not allowing this claim. The facts of this case are very different from the facts in **Atkinson v. Whiting** (1987), 79 N.S.R.(2d) 189; 196 A.P.R. 189, in which case I awarded $20,000.00 to a sixty-six year old man who was very dependent on the services of his wife.

(iii) Damages For Loss Of Guidance, Care And Companionship

[21] Section 4(1A)(d) of the **Fatal Injuries Act** provides:

> "(1A) In subsection (1), 'damages' means pecuniary and nonpecuniary damages and, without restricting the generality of this definition, includes
>
> . . . . .
>
> (d) an amount to compensate for the loss of guidance, care and companionship that a person for whose benefit the action is brought might reasonably have expected to receive from the deceased if the death had not occurred."

[22] This is commonly known as a claim for loss of guidance, care and companionship. The Courts have made it very clear that this award is not to compensate a person for grief suffered when a family member dies in circumstances that give rise to a claim under the **Fatal Injuries Act**. Grief is not compensable with any amount of money.

them. In cases under the **Fatal Injuries Act**, realistic awards are made as compensation for the loss of financial support of the deceased. However, the grief suffered by the survivor is not compensable. There must be an actual loss of guidance, care and companionship. The award should be such as to provide reasonable compensation for that actual loss. As in the cases of serious disability decided by the Supreme Court of Canada such as **Teno v. Arnold**, the compensation for loss of guidance, care and companionship should have some degree of uniformity although I am not suggesting a maximum. However, as noted by the Ontario Court of Appeal, the award to Mr. Nielsen of $40,000.00 was at the high end of the scale as were the awards to her mother, brothers and sisters; the surviving family members in that case were very dependent on Mrs. Nielsen. In most cases, it is impossible to make an accurate assessment of damages under this head. The primary compensation for the surviving spouse is the award to replace the benefit of the lost income as in the cases of total disability.

[27] Mrs. Morrell-Curry is thirty-five years of age. She was nine years older than her husband. They had been married for eleven months and were, from all the evidence, a happy couple and spent most of their time together. Mrs. Morrell-Curry was established in a career and really not dependent on her late husband's guidance. The evidence discloses that Glenn Curry had a good relationship with his parents. However, he lived in the Halifax area and they lived at the Strait of Canso. He would visit them on a somewhat regular basis. Both parents have suffered a great deal of grief as a result of the death of their only son but it is not for grief that compensation is awarded under the above provisions of the **Fatal Injuries Act**.

[28] I assess damages for actual loss of guidance, care and companionship as follows:

[29] To the widow, Mrs. Morrell-Curry, $10,000.00.

[30] To the deceased's mother, Mrs. Alice Curry, $2,500.00.

[31] To the deceased's father, Donald Curry, $2,500.00.

(iv) Nervous Shock

[32] The plaintiff, Mrs. Morrell-Curry, claimed damages for so-called nervous shock. This award is not for grief as that is incalculable and uncompensable despite the fact that the death of a loving husband is a great burden for the surviving spouse to bear. There must be some identifiable illness that the surviving spouse is suffering from as a result of the accident. This claim is supported by a report of Rosemarie Sampson, Ph.D., a psychologist who tested Mrs. Morrell-Curry on January 24 & 25, 1989. In her report, she states that Mrs. Morrell-Curry is "exhibiting many of the features of Post Traumatic Stress Disorder." She states at p. 3 of the report:

"The interpersonal consequences of PTSD are substantial: problems with intimacy and socialbleness and they are often paranoid and hostile in their relationships. Addiction behavior and depression are common accompaniments.

"Rosemary will need a period of psychotherapy to deal with her problems. She needs to regain a sense of control over her emotions and redirect her attention away from negative affect."

[33] Her summary states as follows:

"In summary Rosemary is a young woman who is experiencing a pathological grief reaction which comprises a special instance of PTSD. She experienced the death of her husband in a very intense way because of the circumstances surrounding the death. Anyone would experience sadness, distress, rage, or some alternating combination of these emotions. This is not pathological. Only when these emotions become associated with high anxiety and/or depression does pathology develop. Such is the case with Rosemary. Usually support moderates grief and our culture provides rituals to insure that social support is available at the time of death. Such support was not adequate for her to overcome her grief."

[34] The evidence supports the opinion that Mrs. Morrell-Curry is suffering from this recognized disorder. She is having a problem in being sociable with old friends. She appears to be hostile in her relationships with her co-workers. She has developed some addictive behaviour in that she has become an aerobics fanatic and she is depressed. I did form the impression from listening to the evidence of Mrs. Morrell-Curry that she probably does need psychotherapy as suggested by Dr. Sampson in her report. It is now almost two years since the accident and she seems preoccupied in feeling sorry for herself. I am satisfied that Mrs. Morrell-Curry is suffering from a form of illness as a result of the death of her husband. She was a passenger in the car at the time of his death and this would have been a contributing cause of the development of the traits of post traumatic stress disorder which are evident. These are injuries which were reasonably foreseeable by the defendant. I will award her the sum of $2,000.00 to compensate her for this illness which has resulted from the defendant's negligence. Counsel for the plaintiff had urged me to make an award in the $8,000.00 range based on the decision of this Court in **Frank v. Cox** (1988), 84 N.S.R.(2d) 370; 213 A.P.R. 370. However, in that case, the effect of witnessing her husband's death had a very serious effect on the plaintiff while Mrs. Morrell-Curry has been able to continue working and carry out her normal activities. She has not been under doctor's care as was Mrs. Frank.

(v) Expenses

[35] The parties have agreed that the recoverable expenses for funeral, etc., are in the amount of $6,550.28.

[36] The parties have agreed that there shall be deducted from the award to the plaintiff the sum of $11,337.00, representing Section B payments that have been made by the insurer of the Curry vehicle. These deductions are made by reason of the provisions of ss. 100D and 100J(2) of the **Insurance Act**, R.S.N.S. 1967, c. 148 as amended. There are no other amounts deductible from the award as the benefits she received as a result of her husband's death either fall within the ambit of s. 4(2) of the **Fatal Injuries Act** or the principle developed in **Spurr v. Naugler** (1975), 11 N.S.R.(2d) 637; 5 A.P.R. 637, respecting her husband's interest in the matrimonial home.

[37] Prejudgment interest shall be included in the judgment at the rate of 10% per annum compounded annually from the date the cause of action arose to the date of judgment (**Clarke v. Milford** (1987), 38 D.L.R.(4th) 139; 78 N.S.R.(3d) 337; 193 A.P.R. 337). However, there will be no interest on the award of $60,000.00 for loss of future support and the interest on the award of $5,000.00 for past support shall be at the rate of 5% for the reasons set out in **Comeau v. Marsman** in paragraphs 47 and 48.

[38] In summary, the damage awards are as follows:

[See summary on following page]

(i) For Mrs. Morrell-Curry's loss of the benefit of future support	60,000.00
(ii) For Mrs. Morrell-Curry's loss of support to July 1, 1988	5,000.00
(iii) For loss of guidance, care and companionship,	
Mrs. Morrell-Curry	10,000.00
Mrs. Alice Curry (mother)	2,500.00
Mr. Donald Curry (father)	2,500.00
(iv) For Mrs. Morrell-Curry for post traumatic stress disorder	2,000.00
(v) For funeral expenses, etc.	6,550.28
Total damage award	$88,550.28

[39] There must be deducted from this the sum of $11,337.00; no portion of this shall be deducted from the awards to the deceased's parents. The plaintiff shall have judgment for $77,213.28 with prejudgment interest as computed

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in accordance with the directions in the penultimate paragraph plus costs to be taxed.

Judgment for plaintiff.

Editor: Steven C. McMinniman
sal

Darlene May Veniot (applicant) v. David Harvey Veniot (respondent) (H83-430)

Indexed As: Veniot v. Veniot

Nova Scotia Family Court
Roscoe, J.F.C.
June 28, 1989.

Summary:
Parents divorced in 1985. The mother had custody of their then two year old son. In 1989 the mother applied under Civil Procedure Rule 57.30 and s. 17 of the Divorce Act to terminate the father's access because he allegedly sexually abused the child.

The Nova Scotia Family Court allowed the application and denied access. The court held that the mother proved on a balance of probabilities that the father sexually abused the child.

Family Law - Topic 2004
Custody - Access - Grounds for refusal - Restriction or variation of access - Sexual abuse - The Nova Scotia Family Court terminated a father's access to his now six year old son, where the mother proved on a balance of probabilities that the father sexually abused the child - The court referred to seven factors to consider in determining whether a child's sexual abuse complaints were reliable.

Cases Noticed:
H.(P.) v. H. (1985), 72 N.S.R.(2d) 104; 173 A.P.R. 104 (T.D.), refd to. [para. 54].

D.R.H. et al. v. Superintendent of Family and Child Services et al. (1984), 41 R.F.L.(2d) 337, refd to. [para. 55].

Statutes Noticed:
Civil Procedure Rules (N.S.), rule 57.30.
Divorce Act, S.C. 1986, c. 4, s. 17.

Authors and Works Noticed:
Blush, Gordon, J., and Karol L. Ross, Sexual Allegations in Divorce: The SAID Syndrome (1987), 25 Conciliation Courts Rev. [para. 16].

Counsel:
Mark Knox, for the applicant;
Andrew Pavey, for the respondent.

This application was heard before Roscoe, J.F.C., of the Nova Scotia Family Court, who delivered the following judgment on June 28, 1989.

Introduction

[1] Roscoe, J.F.C.: This is an application to vary the access provisions of a Decree Nisi. The application is made by Darlene Veniot and is dated January 10, 1989. The application is made pursuant to Civil Procedure Rule 57.30 and the **Divorce Act**, s. 17.

[2] The applicant, Darlene Veniot, is seeking an order denying access by the respondent, David Harvey Veniot, to their son James Dean William Veniot who was born on April 3, 1983. The basis of the application is that Mrs. Veniot believes that her former husband has sexually abused their son.

[3] At the first hearing of this matter on February 15, 1989 the parties entered into an interim consent order with respect to access. That order provided that Mr. Veniot have supervised access to the child each Saturday from noon until 7:00 p.m. The access was to be supervised by Pastor Brian Larratt and Mrs. Barbara Larratt in their home.

Background

[4] Mr. and Mrs. Veniot were married on October 16, 1982. During their brief marriage they experienced many difficulties mainly as a result of the abuse of alcohol and nonprescription drugs by Mr. Veniot. After several brief separations they finally separated in July 1984. Minutes of Settlement were entered into on March 22, 1985 and a Decree Nisi was issued on the same date. That order provided that Mr. Veniot have access to the child, Jamie, who at that time was almost two years old at reasonable times, including two days every second week and including overnight, to be arranged on twenty-four hours' notice to Mrs. Veniot. The order also provided for Christmas and summer access.

[5] After the Christmas visit with Mr. Veniot in 1988 Jamie reported to his mother that his father had touched him inappropriately and Mrs. Veniot reported the incident to the police. As a result of the report, an interview of the child by the Child Abuse Team at the Izaak Walton Killam Hospital in Halifax took place. The members of that team were satisfied that Mr. Veniot had sexually abused his son and as a result this application to deny access was made by Mrs. Veniot. Mr. Veniot has consistently denied that he has abused his son.

Evidence Of Witnesses Called On Behalf Of Mrs. Veniot

Darlene Veniot

[6] In her direct evidence Mrs. Veniot described with some detail the difficulties she experienced with Mr. Veniot during their marriage. She indicated that they had many problems with money and that Mr. Veniot abused alcohol and nonprescription drugs. She indicated that they argued frequently and that he was occasionally physically violent with her. They were divorced on the grounds of his mental cruelty.