apple, supra, and thus prevents multiple convictions?

[18] Although the matter is not free from difficulty, I do not think that there is. The **Kienapple** principle applies when the act that underlies the offence is sought to be used again to constitute the factual basis of a conviction for another offence: see **R. v. Krug**, [1985] 2 S.C.R. 255; 62 N.R. 263; 11 O.A.C. 187; 21 C.C.C.(3d) 193 at p. 198 (C.C.C.). In the present cases, once the Crown had proved that the accused had failed to stop when signalled to do so and had wilfully continued to avoid police while a police officer gave pursuit, it was entitled to a conviction under s. 189a(2) and to the imposition of the additional penalty under s. 189a(3). For a conviction under s. 189a(2) and the imposition of the additional penalty under s. 189a(3), it was unnecessary for the Crown to prove that the accused had driven carelessly or dangerously. However, in order for the Crown to obtain a conviction for careless driving or dangerous driving, it had to prove that the accused had done something beyond what was required to establish the offence under s. 189a: see **R. v. Krug**, supra, at p. 199 (C.C.C.), and **R. v. Logeman** (1978), 5 C.R.(3d) 219. The rule in **R. v. Kienapple**, supra, has accordingly no relevance for these cases.

[19] For these reasons and for the reasons given by Brooke, J.A., I would dispose of the appeals in the manner proposed by him.

Order accordingly.

Editor: Catherine M. Bowlen
pdj

NIELSEN et al. v. KAUFMANN

Ontario Court of Appeal
MacKinnon, A.C.J.O., Lacourcière and Morden, JJ.A.
February 7, 1986.

Summary:

The deceased died following a minor operation as a result of the negligence of the defendant, an anesthetist. The next of kin of the deceased appealed the quantum of damages awarded.

The Ontario Court of Appeal varied the damage awards accordingly.

Damage Awards - Topic 84

Injury and death - Fatal accidents - Mother and wife - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal assessed general damages for the surviving husband and two sons at $359,645.00 - See paragraph 57.

Damage Awards - Topic 86

Injury and death - Fatal accidents - Daughter - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal upheld an award of $10,000.00 awarded to the deceased's mother under the Family Law Reform Act - See paragraph 31.

Damage Awards - Topic 89

Injury and death - Fatal accidents - Siblings - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal upheld awards of $5000.00 and $11,000.00 to the deceased's brother and sister, respectively, under the Family Law Reform Act - See paragraph 31.

Damage Awards - Topic 97

Injury and death - Fatal accidents - Loss of guidance, care and companionship - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal increased the damage award to a 10 year old boy for loss of his mother's care, guid-

ance and companionship from $25,000.00 to $30,000.00 - See paragraph 33.

Damage Awards - Topic 98

Injury and death - Fatal accidents - Loss of housekeeping services - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal decreased the damage award to a husband for loss of his wife's housekeeping services from $84,117.75 to $50,000.00 - See paragraphs 15 to 21.

Damages - Topic 2119.1

Torts causing death - Method of assessment of value of the dependancy - Loss of deceased's future income - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal allotted the surviving spouse 60% of the deceased's future income and 4% to each of the surviving two children - See paragraphs 22 to 28.

Damages - Topic 2173

Torts causing death - Considerations which increase awards - Income tax - General - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal awarded a gross-up for income tax of 25% - The court held that the proper amount for gross-up will depend on the facts presented to the court - See paragraphs 35 to 56.

Damages - Topic 2377

Torts causing death - Particular damage claims - Loss of parent's guidance and support - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal held that the costs of a boarding school for the son of the deceased did not amount to compensation for loss of his mother's guidance, care and companionship - See paragraphs 7 to 14.

Damages - Topic 2378

Torts causing death - Particular damage claims - Loss of guidance, care and companionship - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal increased the damage award to a 10 year old boy for the loss of his mother's care, guidance and companionship from $25,000.00 to $30,000.00 - See paragraph 33.

Damages - Topic 2379

Torts causing death - Particular damage claims - Loss of housekeeping services - A 37 year old woman died following a minor operation because of the negligence of the anesthetist - The Ontario Court of Appeal held that the loss of future housekeeping services by a wife were compensable - See paragraphs 15 to 21.

Cases Noticed:

Andrews 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; 83 D.L.R.(3d) 452; 3 C.C.L.T. 235, dist. [para. 7].

Mason v. Peters (1982), 39 O.R.(2d) 27, ref'd to. [para. 15].

Franco v. Woolfe (1976), 12 O.R.(2d) 549, consd. [para. 16].

Lewis v. Todd et al., [1980] 2 S.C.R. 694; 34 N.R. 1, consd. [para. 45].

Cusack v. Brown (1984), 56 N.B.R.(2d) 221; 146 A.P.R. 221 (N.B.Q.B.), dist. [para. 51].

Statutes Noticed:

Family Law Reform Act, R.S.O. 1980, c. 152, ss. 4(5) [para. 19]; 60.

Fatal Accidents Act, R.S.O. 1970, c. 164 [para. 16].

Authors and Works Noticed:

Waddams, Law of Damages (1983), pp. 399-400 [para. 48]; 405 [para. 16].

Counsel:

D.W. Goudie, Q.C., and H. David, for the respondents;

Colin Campbell, Q.C., and J.J. Colangelo, for the appellant.

This appeal was heard on September 18 and 19, 1985, before MacKinnon, A.C.J.O., Lacourcière and Morden, JJ.A., of

the Ontario Court of Appeal. The decision of the court was delivered on February 7, 1986.

[1] By The Court: This appeal concerns the quantum of damages awarded to the next of kin of the late Dorothe Nielsen who died on December 24, 1979, a few days after a minor operation, as a result of the admitted negligence of the defendant anesthetist. (**Nielsen v. Kaufmann** (1984), 28 C.C.L.T. 54.)

[continued in right column]

[2] The deceased was survived by her husband, Ole Nielsen, 37 years old at the time, and two sons, Jeffery, age 12 and Ricky, age 6. She was also survived by her parents, a sister, Annette, and a brother, Michael. The action was tried at the end of January and the beginning of February 1984.

[3] Claims were made for the pecuniary and non-pecuniary loss resulting from Mrs. Nielsen's death under the **Family Law Reform Act**, R.S.O. 1980, c. 152, s. 60. The learned trial judge assessed the damages as follows:

.....

OLE NIELSEN (Husband)

Loss of support to age 65	$131,997.00
Loss of support after age 65	6,123.00
Loss of future housekeeping services	84,117.75
Loss of past housekeeping services and past loss of support	54,344.00
Out-of-pocket expenses	2,553.00
Family Law Reform Act, s. 60(2)(d)	40,000.00
Gross-up for tax less 25%	105,528.00
Less advance payment	- 10,000.00
TOTAL	$414,662.75

JEFFERY NIELSEN (Son)

Loss of future support	$ 727.00
Loss of past support	1,352.00
Family Law Reform Act, s. 60(2)(d)	20,000.00
TOTAL	$ 22,079.00

RICKY NIELSEN (Son)

Loss of future support	$ 2,938.00
Loss of past support	1,352.00
Family Law Reform Act, s. 60(2)(d)	$ 90,856.00
TOTAL	$ 95,146.00

ELLEN JONSSON (Mother)

As executrix of the Estate of Harold Jonsson who died subsequent to his daughter, but prior to trial	NIL
Personally (Family Law Reform Act, s. 60(2)(d))	$ 10,000.00

[table continued on next page]

MICHAEL JONSSON (Brother)

Family Law Reform Act, s. 60(2)(d)	$ 5,000.00

ANNETTE JONSSON (Sister)

Family Law Reform Act, s. 60(2)(d)	$ 11,000.00

.....

[4] Counsel for the appellant attacked the awards on a number of grounds. He submitted that:

(I) The trial judge erred in making an award based on hypothetical school expenses for Ricky Nielsen. This amounted to $65,856 of the $90,856 awarded under s. 60(2)(d) of the **Family Law Reform Act**;

(II) The assessment of the value of loss of household services is not a pecuniary loss as provided for in the **Family Law Reform Act**. Further, the assessment was excessive and involved a misapprehension of the evidence as well as a failure to recognize the contingencies;

(III) The future loss of support assessment made no allowance for contingencies and the dependency factor of 70% chosen by the trial judge was arbitrary and not appropriate for a two-wage earner family;

(IV) The awards under s. 60(2)(d) of the **Family Law Reform Act** were excessive and inconsistent with earlier awards. They were not fair, conventional or reasonable.

(V) The trial judge erred in awarding the sum of $105,528 as the gross-up for tax on the loss of future income. The calculation ignored the realities that by appropriate investment and certain other factors the income tax could be eliminated;

[5] Counsel for the appellant advised the court in opening that he was not pursuing the attack in his factum on the trial judge's determination of Dorothe Nielsen's life expectancy.

General Facts of the Family

[6] The trial judge thoroughly and sympathetically summarized the relevant backgrounds of the Nielsen and Jonsson families as follows:

"The late Dorothe Nielsen, formerly Jonsson, came to Canada in 1956 as a young girl with her family from Denmark. The family returned to Denmark briefly but settled again in Canada in 1965. Harold Jonsson, Mrs. Nielsen's father, was born in 1922. He worked as a plant manager until his retirement and died after the commencement of this action in 1983. His widow Ellen Jonsson was born in 1924 and lives in Mississauga. She is not in particularly good health. Dorothe's sister Annette, born in 1952, is single and lives in Mississauga. Her brother Michael, born in 1954, is married and has two daughters.

"Ole Nielsen came to Canada from Denmark with his family in 1957 when he was 15 years old. The Nielsen and Jonsson families, with their similar backgrounds, became close friends and Ole and Dorothe were married early in 1967.

"Dorothe suffered a serious illness in Denmark when she was about one and half years old. As a result she had right pulmonary artery obstruction, fibrous pericardial adhesions producing some degree of constrictive pericarditis, which in turn caused some enlargement of her liver with some fibrosis, and some atrial fibrilla-

tion. She appeared to have recovered well from her illness and showed few, if any, symptoms of heart disease. She participated in sports, including cross country skiing, jogging and canoeing. Dorothe was described as an extremely mature and intelligent person who was happy and outgoing.

"Dorothe and Ole saved their money and in 1975, Dorothe moved with her children to Campbellford where the family had bought a building lot. They wanted to live in the country since housing was cheaper there than in Toronto. They built a house on the lot with a great deal of her help. She moved in with the children before the installation of water and electricity. Some time later her husband gave up his job in Toronto and moved to Campbellford to be with the family. Dorothe was the family organizer and looked after the family money.

"Dorothe had the equivalent of Grade XII education and was an accomplished typist and book-keeper. She started to work in 1965 when she was still living at home with her parents and paid them rent. She stopped working shortly before Jeffery was born but went back to work about a year later and then took some time off again when Ricky was born. Shortly after she moved to Campbellford she started to work on a part-time/full-time basis for Carl Sherk, a chartered accountant, as a typist and book-keeper. She worked full time and overtime in the peak business periods and only part-time when required at other periods, a little over 1,000 hours in her last year. Dorothe enjoyed her work and was a good worker. The income that her work produced was very important to the family.

"Ole Nielsen had the equivalent of about a Grade VIII education in Denmark. He has always been in good health and started to work as soon as he arrived in Canada. Sometime after he moved to Campbellford he commenced working for Canadian National Railways as a carpenter, work which often took him away from home during the week leaving Dorothe to look after the household, including many tasks usually performed by a husband. The family went often to the Nielsen family cottage shared with a brother and sister but other than that could never afford to go away on a vacation.

"After Dorothe died, Ole got help from his sister and then from Annette Jonsson. He then made an arrangement with a woman, who was separated from her husband and had two children of her own, to move into the house to look after the housework and the children. This arrangement did not work out and this woman and her children left after about two years. Unfortunately Ole lost his job a little over a year ago in October of 1982 and, in spite of persistent efforts, has been unable to find work since. He received unemployment insurance payments for about a year and cashed in his pension. He has not gone on welfare but is just about out of funds. Dorothe left no estate since all they had was in their joint names. I have been advised that following the conclusion of the evidence an advance payment of $10,000.00 was made to Mr. Nielsen on behalf of the defendant.

"Jeffrey Nielsen is now 16 years old and in good health. He is in Grade XI in high school but is carrying subjects from lower grades. He did not do well in the five year course but is now doing better in a four year course. It is unlikely that he will be able to obtain a secondary school graduation certificate from Grade XII. He would like to be an automotive mechanic and will have the necessary academic requirements and aptitude for such a job.

"Ricky is now 10 years old. He is a very bright young boy. He is also in good health but he is under-achieving at school and, in the opinion of Mrs. Nancy Elgie, a highly qualified child psychologist, his very deprived and restrictive exposure to life experi-

ences is robbing him of opportunities of learning mastery skills and self confidence."

We turn now to the first issue raised by the appellant.

I. Portion of the **Family Law Reform Act** Award for Ricky Nielsen

[7] As part of his award, pursuant to s. 60(2)(d) of the **Family Law Reform Act**, the learned trial judge assessed Ricky's damages at $90,856. This included a sum of $25,000, for loss of guidance, care and companionship, which will be considered later in this judgment, and the sum of $65,856, which represented the present value of the cost of six years' schooling at a private school at $12,000 a year. For the latter award, the learned trial judge relied upon a passage from **Andrews 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; 83 D.L.R.(3d) 452; 3 C.C.L.T. 235, at pp. 241-242 (S.C.R.) in which the court dealt with the monetary award for the cost of future care for a severely injured young man. Mr. Justice Dickson stated that:

"Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, restitutio in integrum is not possible. Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim."

The trial judge then accepted the opinion of Mrs. Elgie, the psychologist who was called on behalf of the plaintiffs, that Ricky should be sent to boarding school "... in order to get his personality and self-concept more rounded and to have his academic achievement more in line with his intelligence." The learned trial judge added:

"It seems to me that young Ricky has been greatly deprived as a result of the death of his mother. I accept the opinion of Mrs. Elgie that a period in boarding school would help him and, to use the words of Mr. Justice Dickson, 'this would improve (his) mental health'. Spending his high school years in a boarding school will probably make all the difference to his future and it is a reasonable course to follow. Lakefield School is not far away and the costs would run about $12,000.00 a year for board, room, tuition, clothing and incidentals."

[8] In our opinion, it was an error to base an award of damages under s. 60 (2)(d) of the **Family Law Reform Act** on the restitutio in integrum concept applicable to the calculation of compensation for the pecuniary loss of an injured person. The passage quoted above from **Andrews** should not be taken out of context; there the court was dealing with a pecuniary claim for the cost of future care. It is clear that Ricky could not reasonably have expected that his mother would ever send him to the Lakefield school; in that respect, he did not suffer a pecuniary loss from her death. This is not determinative of Ricky's subs. (2)(d) claim because the court is bound to compensate him for a non-pecuniary loss under that subsection.

[9] Ricky, who was born August 6, 1973, was six at the time of his mother's death in December 1979, and half-way through grade one. He was ten at the time of the trial. There is no doubt that he misses his mother very much and that the deprivation of her guidance, care and companionship has had a greater effect on him than on his brother Jeffery, who was twelve at the time of his mother's death.

[10] Mrs. Elgie expressed the opinion that boarding school would help Ricky. In her report of January 16, 1984, she concluded:

"Ricky is under-achieving. He is a reasonably intelligent boy whose lack of language development is undermining performance in reading. More seriously, however, his very deprived and restricted exposure to life experiences is robbing him of opportunities for learning mastery skills and self confidence, as well as an understanding of others and of himself. His self focus is alarmingly low. He does not feel worthy of the good regard or interest of others and I would have to suggest this is most likely evidence of my previous warnings that this child would react to the loss of his mother more significantly than Jeff.

"If Ricky is not going to grow up to be totally devoid of coping skills and problem solving strategies he must have a better base of experience and stimulation. Also the fact that he has so little self regard could have implications both interpersonally, socially and vocationally. He will not be a competent, assertive person, he will be uncomfortable in interpersonal relationships and uncertain of his own abilities. I would like to see him go to summer camp, as well as have him involved in community activities such as cubs, scouts, sports etc., all of which have been unavailable to this child firstly because of his father's economic situation, originally after his mother's death because of father's arduous work hours, and more recently because of the family financial situation made worse when father was laid off. Ideally, I would like to see Ricky go away to school in an effort to get his personality and self concept more rounded and to have his academic achievement more in line with his quite good intelligence. However, even now his levels of academic achievement are lagging behind his grade placement and he might have genuine difficulty being accepted into a private school. Lakefield School is near Campbellford. They start at grade 5 and offer an excellent curriculum for the education and overall rounding of an individual's character and personality. Costs of this would probably run about $11,000 per year for board, room and tuition and another $1,000 for clothing and incidentals.

"It might be argued that had Ricky's mother lived, he might not have been a highly achieving, well adjusted young man anyway, but I think many of the facts would contradict this. When I saw Rick in October 1980, he was still an outgoing, spontaneous child. Granted, he had some weakness in language which probably is a result of the family's lack of English skills, but he was superior to almost 90% of his age mates in terms of non-verbal learning. Now we are seeing failure to develop self confidence and feelings of adequacy and gradual but predicted deterioration in his academic performance. Even his brother Jeff has a well formulated and realistic vocational ambition which is within his possibilities to achieve. Ricky presents as a poor, lost soul, who needs to be salvaged before it is too late." (Emphasis added.)

[11] At trial, Mrs. Elgie insisted that Ricky was deprived and described him as "presenting as a disadvantaged child." He had a restricted capacity to see "... various variables in a situation ..." because of very little input in terms of life experiences, information and knowledge. According to her, this deprivation was caused in part by the loss of his mother, but also by his father's limited education and lack of understanding of human emotion, and the loss of an aunt and grandfather in the fall of 1984. Based on all these factors, some of which are clearly unrelated to the death of Ricky's mother, Mrs. Elgie testified that, to reverse the situation:

"... I think that he should be at boarding school. I think he needs to be in a situation where he is surrounded by people who can give him the sort of input, the broad range that he needs, the experiences, the information, the knowledge so that we can salvage his good intelligence

and get some information into the computer before it is too late."

[12] While it is not our function to weigh the evidence and assess its credibility, we note that the psychological evidence called by the plaintiff is at variance with the psychological evidence tendered by the defence that Ricky was functioning well psychologically. Dr. Brooker, an Assistant Professor in the Department of Psychology at the University of Toronto, testified that Ricky is in the bright-normal range, has the capacity to achieve through the high school level, and that he is functioning well psychologically, although he misses his mother. There is no indication in the judgment that the learned trial judge gave any consideration to Dr. Brooker's evidence. The psychological evidence called on the plaintiffs' behalf is also inconsistent with the comments on Ricky's excellent progress made by Ricky's teachers in the school records which were filed.

[13] The portion of the award which reflected the present value of six years' schooling at a private school attempts to place Ricky in an ideal environment which the child could not have attained if his mother had lived. There is no evidence that Ricky was ever considered or that he would qualify for admission to the Lakefield school or to any other private school. Further, the award is really based on a speculative assumption of Mrs. Elgie that private schooling was required for the child's development, which she described as a guess in one portion of her evidence. The assumption is in turn based on perceived deprivations or disadvantages, which were accepted by the trial judge, apparently without giving any consideration or weight to the substantial body of independent evidence and opinion to the effect that Ricky was functioning well and invariably obtained positive report cards at school. The reasons for judgment contain no reference to it.

[14] In the absence of stated reasons for rejecting this evidence and preferring the opinion of Mrs. Elgie, this court is at liberty to draw its own inferences. But, even if it were bound by the trial court's adoption of Mrs. Elgie's opinion, it does not follow that the award providing for private schooling is appropriate to compensate Ricky for the loss of his mother's guidance, care and companionship. It is an undue and unwarranted extension of the principle that money can be used to improve the future mental health of an injured person. It is true that the **Family Law Reform Act** is a remedial statute which must be liberally construed. It cannot be extended, however, to include ideal and optimum schooling for a child who has already been generously compensated by an award of general damages for the loss of his mother's guidance, care and companionship. In our view in this case the award is significantly disproportionate to the loss suffered. The award of $65,856 for schooling will be struck out, subject to readjustment, in a later part of this judgment, of the general award of $25,000 under the **Family Law Reform Act**.

II. Damages for Loss of Household Services

[15] The damages assessed for Ole Nielsen included the sum of $84,117.75 for the loss of future housekeeping services added to the sum of $30,586 for the loss of past housekeeping services. This was based on the assumption that the late Dorothe Nielsen was an excellent housewife who performed many tasks normally done by a husband because her husband was often away on business. A money value was placed on this loss of "care" on the basis of the market price of housekeeping services. The loss under s. 60(2)(d) is not a pecuniary loss in the strict sense of the word: **Mason v. Peters** (1982), 39 O.R.(2d) 27. However, we recognize the pecuniary component relating to damages for loss of housekeeping services under s. 60(1) of the **Family Law Reform Act**.

[16] In valuing the loss of care, the learned trial judge relied, in part, on the evidence of Dr. Havrylyshyn, a pro-

fessor of economics at George Washington University in Washington, D.C. This witness estimated the market wages required to replace household duties. This court, in **Franco v. Woolfe** (1976), 12 O.R.(2d) 549, commented that similar evidence, given by the same witness, was irrelevant and unnecessary in assessing compensation for the loss of household services performed by the wife in a claim made by the husband under the **Fatal Accidents Act**, R.S.O. 1970, c. 164. We do not accept the distinction made by the learned trial judge that the use of the word "care" in s. 60(2)(d) of the **Family Law Reform Act** renders this evidence relevant or admissible. The value of lost housekeeping services under s. 60(1) must be determined by the court having regard to the services of a particular spouse. However, the testimony of economists, accountants and actuaries, which may be indispensable in calculating a pecuniary loss under s. 60(1), may also be helpful in determining the damages for loss of domestic services where the hiring of reasonable services on a commercial basis is made necessary by a wrongful death. See Waddams, **The Law of Damages**, (1983) at p. 405: "It is universally accepted that the cost of hiring reasonable services on a commercial basis to replace lost domestic services is an allowable claim."

[17] The award was based on $170 for a 40-hour week, including room and board or, $8,840 a year, subject to reduction by one-half once the youngest child reached 18 and a further reduction of 25% for future contingencies, including sickness, injury or remarriage. The appellant has submitted that, on the evidence, the weekly amount for a housekeeper should be as low as $132, less an allowance of $50 for room and board, for a net amount of $82 per week or, $4,264 per year. An examination of the evidence of the witness Walker appears to support this figure, but the end result should not be based on a slavish attachment to arithmetical calculations. In our view, the attempt in this case to strictly quantify an award for loss of care by actuarially calculating the cost to replace housekeeping services is misconceived.

[18] We accept the appellant's submission that it is inappropriate to give an award for a complete loss of those services when the claimants are being compensated for loss of future support on the basis that the deceased would have accepted full-time employment from February 1981. There is surely an element of double recovery in calculating the loss of full-time income and the cost of a housekeeper. It would have been difficult, if not impossible, for the deceased to look after her husband's needs and the needs of her two boys while maintaining a full-time job. This court is bound to interfere with an award which is based in part on an error in principle.

[19] For reasons already stated, we think that it is inappropriate to attempt a strict arithmetical calculation of a future cost which cannot be anticipated with any reasonable accuracy and which may never be incurred. The difficulty of assessing the loss does not relieve the court of its responsibility in that respect. In this assessment, the court is bound to take into consideration the assumption underlying s. 4(5) of the **Family Law Reform Act** that spouses have a joint responsibility for child care and household management. The responsibility of Ole Nielsen for this care and management survives the death of his wife. While he and the children have suffered the loss of the care which would have been provided by the deceased, Ole Nielsen's obligation to look after himself and his offspring continues and an award providing future housekeeping services should not completely relieve him of it.

[20] The calculation of an amount for a full-time housekeeper until the youngest child reaches the age of 18 also appears to overlook the fact that, in another part of the trial judgment, Ricky is provided with room and board at a private school for a period of six years. However, having cancelled the award for a private school education, we will not interfere with the assumption that the need for housekeep-

ing services will be greater until Ricky reaches the age of 18.

[21] In our view, having regard to the approach outlined above to calculating this loss, to the unpredictability of the need for and the cost of future housekeeping services, to the continuing responsibility of the plaintiff Ole Nielsen to assume a share of the household duties, and to the many contingencies which render this portion of the award incapable of mathematical or actuarial calculation, we think it is appropriate to award the sum of $50,000 (subject to gross-up) for future housekeeping services. We assess the sum of $10,000 for past housekeeping services. These sums will be added to the amount awarded for loss of care to Ole Nielsen pursuant to s. 60(2)(d) of the **Family Law Reform Act.**

III. Loss of Support Assessment and Dependency Factor

[22] Counsel for the appellant did not challenge the finding that the deceased would have worked full-time, but he submitted that the trial judge made no allowance for contingencies and that the dependency rate of 70% was based on a one-income family.

[23] It was argued that the trial judge should have reduced the damages for pecuniary loss by 25% for contingencies as he did the damages for housekeeping services. However, the trial judge pointed out in relation to the pecuniary loss that he had already dealt with the contingencies of early death and that Dr. Palmer's statistics included the incidence of sickness, accident and loss of employment opportunity. He concluded, after reciting the various contingencies, that "the positive contingencies balance the negative contingencies" and, therefore, he would not reduce the award for pecuniary loss for contingencies. We cannot say his reasoning was wrong on this point in this particular case.

[24] The trial judge opened his discussion of "dependency" by stating that conventional widsom is to take the net income and allot 70% to the surviving spouse and 4% to each child. He concluded that the deceased was a thrifty, intelligent manager of the household finances and spent little on herself and he allotted 70% to her spouse. This amounted to a total for past pecuniary loss of $23,758 for Mr. Nielsen and a total of $1,352 for each child as calculated by the trial judge.

[25] The fact that there are two "breadwinners" in the family skews the applicability of the "conventional" principle and figures somewhat. Those figures are based on a male breadwinner as the sole support of the family. The trial judge does not appear to have considered how the "conventional" figures might be affected when there is a two-wage earner family. It must be assumed that in such families some portion of the husband's income goes to the wife or vice versa. That portion remains with the survivor. The appellant's expert, Dr. Segal, was of the view that in a two-wage earner family the deceased would consume 30% of the total family income of husband and wife. The deceased would be partially dependent on the income that the surviving spouse is receiving and, therefore, there is an offset of that amount which the surviving spouse is no longer paying and for which "credit" should be given. Counsel for the appellant submits that in such families the appropriate dependency percentage should be 50% rather than 70%.

[26] Accepting the trial judge's view that the deceased was an intelligent and thrifty wife and mother, who was prepared to sacrifice her interests to those of her husband and children, some offset must still be allowed for the fact that no portion of Mr. Nielsen's income will now be going to support his wife. This was a family where there was obviously a pooling of resources and where the death of one partner would have an impact with some offsetting "credit". Taking the recited factors into account, we would allot 60% to Mr. Nielsen and 4% to each child.

[27] Using 60% instead of 70% affects Mr. Nielsen's recovery for past and future pecuniary loss as follows:

1980 60% of $4,236.00	$ 2,542.00
1981 60% of $8,446.00	5,068.00
1982 60% of $9,909.00	5,945.00
1983 60% of $10,438.00	6,263.00
1984 1/12th of 60% of $10,931.00	547.00
TOTAL:	$20,365.00

[28] The present values calculated as of February 1, 1984, on the basis of a net discount rate of 2½% and assumption of mortality produces the following figures:

Mr. Nielsen's loss of support of $6,559 per year during the period he and his wife could both have expected to live between February 1, 1984, and the date she would have attained 65:	$113,143.00
Mr. Nielsen's loss of support of $3,527 during the period he and his wife could both have expected to live after the date she would have attained 65:	$ 5,248.00

(IV) **Family Law Reform Act** Claims - s. 60(2)(d)

[29] Counsel for the appellant submitted that there should be "predictability" for awards for non-pecuniary loss under the **Family Law Reform Act**. In time there may be awards for the loss of care, guidance and companionship in the "average" family which will come to be recognized as "conventional". It is difficult now to see how such a family can be discovered or described.

[30] It is self-evidence, as has been said, that the amount of compensation in any given case "will depend on the facts and circumstance in evidence in the case": **Mason v. Peters**, supra, at p. 40. The existence of the relationship covered by the section only gives the right to make the claim. Although essentially non-pecuniary in character, there must be an actual loss of care, companionship and guidance. A brother of a deceased, for example, who lives in Vancouver and who has not seen the deceased, who lives in Toronto, for 20 years, although they exchange Christmas cards and a telephone call a year, would not, in our view, be entitled to any compensation. Undoubtedly, there would be grief and sorrow and a sense of loss but, under the circumstances recited, there would be no loss compensable under the section. This is not to minimize the importance of the section but, as we have stated, the mere fact of the relationship does not, of itself, establish the right to some compensation. Zuber, J.A., in **Hutcheson et al. v. Harcourt et al.** (June 30, 1983, unreported), pointed out that some parents provide a great deal of care, guidance and companionship and others very little and accordingly losses will vary.

[31] Although the awards to the deceased's mother, brother and sister in the instant case appear to be the maximum that the facts would warrant, we cannot say that they are so inordinately high as to call for our interference.

[32] With regard to Jeffery, who was 16 at the time of the trial, although he appears to be coping well, he has lost the care, companionship and guidance of an exemplary mother and the stronger parent in that regard. The $20,000 awarded is not excessive.

[33] As we have noted, Ricky, who was 10 at the time of trial, was awarded $25,000 and $65,856, which represented the present value of six years schooling at $12,000 a year. We have earlier determined that the award of $65,856 for schooling is not supportable. Having struck out that amount and having regard to Ricky's special needs and talents which would have greatly benefited from his mother's care, guidance and companionship, we find it appropriate to increase the assessment of the general award of his damages under the **Family Law Reform Act** from $25,000 to $30,000.

[34] As pointed out by the learned trial judge in awarding an amount for loss of housekeeping services, Mr. Nielsen has already, to some extent, been compensated for loss of care. However, as emphasized by the trial judge, he had to consider the individuals involved, in assessing the loss of care, guidance and companionship. Once again, having regard to his assessment of Mrs. Nielsen and the relationship between the parties, we cannot say he was wrong in assessing Mr. Nielsen's loss at $40,000 and we do not interfere with that award.

(V) The Gross-up for Income Tax

[35] The trial judge included in the award to Ole Nielsen the amount of $105,528 as compensation for the income tax which he will be obliged to pay on the income from that part of the award representing his future pecuniary loss, which was $222,237.75. This portion of an award is now commonly called the tax gross-up.

[36] In arriving at the amount of $105,528 the trial judge took certain basic considerations into account. He assumed that Mr. Nielsen would probably invest the greatest part of the lump sum award in income-producing securities. These would be long-term Government of Canada bonds. Further, he assumed that the personal income of Mr. Nielsen, apart from the income he would receive from the amount awarded, would be $18,000 per annum.

[37] These basic considerations, together with others based on assumptions respecting annual income, life expectancy, and the like, to which we shall refer, led to a calculation of an amount of $140,704 on future income of the fund of $222,237.75. The trial judge reduced this amount by 25% to arrive at the $105,528 amount. In explaining the reduction, he noted that all of the capital would be invested "at the highest rate of tax" and then said:

> "... I arbitrarily apply a contingency reduction of 25% to represent the reduction in the tax that may be affected by the investment of at least part of the sum in tax sheltered securities and by the possibility that the Government of Canada in times of inflation in the future may protect or exempt from tax certain other classes of securities, such as municipal debentures, as has been done in other countries. Had this action been settled and had a major part of this settlement been in the form of a structured settlement, the gross-up for tax could have been, to a considerable extent, avoided."

[38] The calculation of a tax gross-up is a complex and difficult process. It involves not only assumptions with respect to the nature of the investments in the fund (e.g., bonds or corporate shares) and the amount of the other income of the recipient of the income of the fund (both of these, as we have indicated, were set forth in the trial judge's reasons with respect to the present case) but also such matters as the present and future federal and provincial income tax rates, the range of taxable income to which the rates will apply, and the amount and applicability of exemptions and other deductions.

[39] In the present case the method followed by the trial judge was to make the two assumptions we have mentioned (i.e. the income would be from long-term government bonds and the other income of the recipient would be $18,-000 per annum) and then have the parties, with the aid of their experts, calculate the amount required to cover the income tax on the income from the fund which was eventually determined to be $222,237.15. This calculation does not appear in the trial judge's reasons but we were furnished with the correspondence relating to it. We set forth the steps taken.

[40] With respect to the income loss and housekeeping services, the following facts were furnished by the trial judge by letter to counsel for the

plaintiffs and for the defendant:

"INCOME LOSS:

Dependency rate 70% for husband plus 4% for each child until each child reaches the age of 18;

[Although it does not appear in this letter it does appear from the expert's response that he was also instructed to assume that the deceased would have commenced earning $205.00 a week ($10,660.00 per year) from full-time employment on February 20, 1981. This amount is set forth in the trial judge's reasons.]

life expectancy of the deceased reduced by 7.5 years;

the deceased would have taken on full time employment in the Spring of 1981 when the former full time employee left Mr. Sherk's employ (can you supply the exact date on which she left);

gross-up to be based on investment in long term government bonds (I will apply contingency factor) with Mr. Nielsen's income fixed as of the present date at $18,000.00 a year;

discount rate 2.5%.

HOUSEKEEPING SERVICES:

Present value of housekeeping services is $8,840.00 a year to include room and board;

value of these services from date of death to date to be calculated having regard to the contingency of death with the value of housekeeping services fixed at $8,840.00 as of today's date and reduced by C.P.I. over the period;

present value of housekeeping services at $8,840.00 a year as of today until youngest son is 18 and then half value for joint lives. (I will apply contingency factor.)"

[41] The actual calculations were done by one of the defendant's expert witnesses, Murray A. Segal, a practising actuary. Mr. Segal prepared a report which contained the following conclusions based on the information submitted to him:

"Present value on February 1, 1984, of

Mr. Nielsen's loss of support of $7,652 per year [which is 70% of the calculated net take home pay beginning in 1984] during period he and his wife could both have expected to live between February 1, 1984, and date she would have attained age 65	$131,997
Mr. Nielsen's loss of support of $4,115 per year [which is based on certain assumptions made by Mr. Segal respecting the deceased's post-retirement income in the form of Canada Pension Plan and Old Age Security payments] during period he and his wife could both have expected to live after date she would have attained age 65	6,123
Mr. Nielsen's loss of housekeeping services of $8,840 per year during period he and his wife could both have expected to live between February 1, 1984, and date youngest child attains age 18 (i.e. August 6, 1991)	58,671
Mr. Nielsen's loss of housekeeping services of $4,420 per year during period he and his wife could both have expected to live after August 6, 1991	53,486
Mr. Nielsen's total future loss before gross-up for income tax	250,277
Gross-up for income tax on basis requested by His Lordship	165,052
Mr. Nielsen's total future loss after gross-up for income tax	$415,329"

[42] The trial judge then applied a contingency factor of 25% to the loss of housekeeping services ($58,671 plus $53,486 minus $28,039) with the result that $84,118 was the final amount for the loss of housekeeping services. This amount added to the amount for loss of support ($131,997 and $6,123) led to the amount of $222,238.

[43] The trial judge also informed counsel that the amount of the gross-up should be reduced by 25%. The reasons for this deduction are set forth in his reasons which are quoted above. On the basis of these factors Mr. Segal reported as follows:

> "Based on the approach to this matter decided upon by His Lordship, we estimate that the 'conventional' amount of the gross-up needed to offset the effects of income tax on the investment income that Mr. Nielsen will derive from the above portion of the award would be $140,704 (i.e. about 63% of the net amount of $222,238), which should be reduced by 25% down to a net gross-up amount of $105,528."

[44] Notwithstanding the potential complexity of a determination of the proper amount for gross-up, the particular issue presented to us by the appellant is a relatively narrow one. The appellant submits that the trial judge erred in not reducing the gross-up by 50% rather than 25%.

[45] Before setting forth the appellant's contentions, it may be of value to note that there are two matters which are not in issue. First, it is not in issue that the plaintiff Ole Nielsen is entitled to a gross-up award. We are satisfied that a total award of the type we are considering would fall short of its purpose if it did not include an amount to cover the income tax on the income from the fund. If authority is needed on this point, it is furnished by **Lewis v. Todd et al.**, [1980] 2 S.C.R. 694; 34 N.R. 1 at 712-14 (S.C.R.) where, because of the particular state of the evidence before the Supreme Court of Canada, the gross-up element was recognized by disregarding the tax impact on the dependency. Secondly, the accuracy of the calculations leading to the amount of $140,704, which would include assumptions as to future tax rates, is not challenged. As we have said, this amount was contained in a joint submission of the parties to the trial judge and, in fact, was calculated by the appellant's actuary.

[46] What are raised as matters supporting the submission that the reduction from $140,704 should be 50%, rather than 25%, are the following:

> (a) It was an error to assume that the whole fund would be invested in long-term bonds. This assumption exposes the income, a part of which is not real but merely the effect of inflation, to the highest rates of tax. It should be contrasted with one involving the more favourable treatment accorded income from stocks, both dividend and in the form of capital gain, and further, with the even more favourable treatment accorded income that is "sheltered" in plans such as the recently repealed federal I.S.I.P. (Income Security Investment Plan).
>
> (b) We put this in the words contained in the appellant's written submission:
>
> > "That a choice exists to treat the award to be grossed up as the first income of the plaintiff for the purpose of computing a rate of taxation or, alternatively, as the last item of income and hence the highest marginal rate."
>
> (c) The award in question does not require the degree of protection that an award for future care would.

[47] We shall deal with the last two points first.

[48] With respect to (b), it is our view that the trial judge was right to

include the amount of Mr. Nielsen's own income ($18,000) in the calculation. There is no justification for ignoring Mr. Nielsen's probable actual tax rate which, of course, would be based on his total income. See Waddams, **The Law of Damages** (1983) at pp. 399-400.

[49] With respect to (c), while it is undoubtedly important to ensure that the necessary income from a fund earmarked for the cost of future care is not reduced by tax, we do not think that any significant distinction should be made with regard to income from funds notionly established to cover loss of income and of housekeeping services. The principle is the same in each case - to ensure, as reasonably as possible, that the award accomplishes its purpose.

[50] We think that there is more substance to the first point, (a), which is concerned with the investment composition of the proposed fund and other matters related to reducing the impact of taxation on the income from the fund. Several factors must be taken into account in assessing the ultimate effect of this point. We do not think that the trial judge was wrong to start with the assumption that this plaintiff would invest the greatest part of the award in safe, income-producing, securities. He noted that the plaintiff did not have much formal education and had no experience in managing large sums of money.

[51] The appellant urged us to adopt the approach in **Cusack v. Brown** (1984), 56 N.B.R.(2d) 221; 146 A.P.R. 221 (N.B. Q.B.), where the assumption was made that the fund would be divided equally between shares and bonds, but the facts of that case are not reasonably similar. The judge in **Cusack** observed that the plaintiff was "young and bright and engaged in self-advancement" and that "she would most probably opt for a mixed portfolio with some risk in common and quality preferred shares" (p. 228). Nonetheless, the trial judge in the present case, and rightly so, by no means placed exclusive reliance on the plaintiff's possible investment shortcomings. He did deduct 25% from the initial figure of $140,704 because of the possibility of investing in tax shelters and of future favourable legislative treatment of certain kinds of income. We have quoted his reasons in this respect.

[52] There is no doubt that an assumption based on total investment in long-term bonds substantially increases the amount of the gross-up and, in effect, substantially imposes the relevant future risks on the defendant. On the other hand, while an assumption based on an investment in stocks ameliorates the position of the defendant, at the same time it also imposes well-known investment risks on the plaintiff who, of course, is not the wrongdoer. A reasonable balance has to be found on the facts of any given case. In the present case the appellant has failed to persuade us that the trial judge, in exercising his judgment with respect to the reduction of the initial gross-up, committed any error which would justify our interference.

[53] The foregoing indicates that what is a proper amount for gross-up will depend largely on the facts presented to the court. The results in individual cases can, accordingly, vary widely. If a substantial degree of uniformity of treatment is considered desirable in these cases, then it appears to us that this is a matter for legislative intervention. The application of a precise statutory formula would, of course, be bound to involve certain arbitrary features. This, however, would be a policy matter appropriate for the legislature.

[54] Applying the trial judge's approach to gross-up to the total of the amounts which we have assessed for loss of future support ($113,143 and $5,248) and for loss of future housekeeping services ($50,000), which is $168,391, results in an amount of $71,967 ($95,-956 minus 25% of $95,956, which is $23,989).

[55] The learned trial judge assessed the past pecuniary loss at $23,758 for

Mr. Nielsen and $1,357 for each child and housekeeping services at $30,788. We, for our part, assessed the past pecuniary loss of Mr. Nielsen at $20,-365 and did not interfere with the minimal amounts fixed for the two boys. Similarly the trial judge assessed the loss of past housekeeping services at $30,788 which we have reduced to $10,-000.

[continued in right column]

[56] The trial judge reduced these figures by the factor of .3% of 1% since the deceased was subject to 2.10 times the average female population mortality rates. These calculations once again had a minimal effect on the final figures and we are of the view that we have taken these calculations into consideration in arriving at our final figures.

[57] In the result the damages as we have re-assessed them are:

OLE NIELSEN	
Loss of support to age 65	$113,143
Loss of support after age 65	5,248
Loss of future housekeeping services	50,000
Loss of past housekeeping services and past loss of support	30,365
Out-of-pocket expenses	2,553
Family Law Reform Act, s. 60(2)(d)	40,000
Gross-up for tax less 25%	71,967
Less advance payment	- 10,000
TOTAL	$303,276
JEFFERY NIELSEN (Son)	
Loss of future support	$ 727
Loss of past support	1,352
Family Law Reform Act, s. 60(2)(d)	20,000
TOTAL	$ 22,079
RICKY NIELSEN (Son)	
Loss of future support	$ 2,938
Loss of past support	1,352
Family Law Reform Act, s. 60(2)(d)	30,000
TOTAL	$ 34,290
ELLEN JONSSON (Mother)	
As executrix of the Estate of Harold Jonsson who died subsequent to his daughter, but prior to trial	NIL
Personally (Family Law Reform Act, s. 60(2)(d)	$ 10,000

[table continued on next page]

MICHAEL JONSSON (Brother)

Family Law Reform Act, s. 60(2)(d) $ 5,000

ANNETTE JONSSON (Sister)

Family Law Reform Act, s. 60(2)(d) $ 11,000

.....

[58] The appeal is allowed with costs, if demanded, and the damages are varied in accordance with this re-assessment.

Appeal allowed;
Order accordingly.

Editor: Catherine M. Bowlen
pdj

PANTRY v. PANTRY

Ontario Court of Appeal
MacKinnon, A.C.J.O., Houlden and Cory, JJ.A.
February 9, 1986.

Summary:

A wife petitioned for divorce and for an interim order under the Divorce Act for custody and maintenance of a child of the marriage. The wife was previously granted custody and maintenance under the Family Law Reform Act. A master of the court held that he had no jurisdiction to grant the interim order under the Divorce Act because of the existence of the order under the Family Law Reform Act. The wife appealed.

The Ontario Court of Appeal allowed the appeal. The court held that the master had jurisdiction to order interim custody and maintenance under the Divorce Act notwithstanding that custody and maintenance had been determined under the Family Law Reform Act.

For a related case involving the same parties see 12 O.A.C. 196.

Family Law - Topic 2052

Custody and access to children - Interim custody - Jurisdiction - A woman petitioned for divorce and applied under the Divorce Act for interim custody and maintenance of a child of the marriage - A master refused to grant the order because the wife already had a custody and maintenance order under the Family Law Reform Act - The wife appealed - The Ontario Court of Appeal allowed the appeal - The court held that the master had jurisdiction to order custody and maintenance under the Divorce Act notwithstanding that there was a custody and maintenance order in existence under the Family Law Reform Act.

Cases Noticed:

Simpson v. Simpson (1984), 39 R.F.L. (2d) 99, ref'd to. [para. 4].
Richards v. Richards, [1972] 2 O.R. 596, ref'd to. [para. 7].
Hughes v. Hughes, [1977] 1 W.W.R. 579, ref'd to. [para. 7].
Mudrinic v. Mudrinic (1978), 6 R.F.L. (2d) 326, affd 2 Fam.L.Rev. 128, ref'd to. [para. 7].

Statutes Noticed:

Courts of Justice Act, S.O. 1984, c. 11, s. 18(2) [para. 1].
Divorce Act, R.S.C. 1970, c. D-8, s. 10 [para. 1].
Family Law Reform Act, R.S.O. 1980, c. 152, s. 20 [paras. 5, 6].

Counsel:

Carl S. Zeliger, for the petitioner, appellant;
C. Perkins, for the Attorney General for Ontario, intervenant;
No one appearing for the respondent.

This appeal was heard on January 31, 1986, before MacKinnon, A.C.J.O., Houlden and Cory, JJ.A., of the Ontario Court of Appeal. On February 9, 1986, the following judgment of the court was delivered orally by Houlden, J.A.:

[1] Houlden, J.A. [orally]: This is an appeal from an order of Master Cork

POOLEY v. MISENER
(No. 26843)

Nova Scotia Supreme Court
Trial Division
Morrison, J.
October 20, 1980.

DAMAGE AWARDS - TOPIC 129
Personal injuries and death - Leg injuries - Tibia and fibula - Fracture - 26 year old unmarried woman, employed as a radio operator - Uneventful recovery with 32 weeks loss of work - Inability to indulge in sporting activities with resulting restriction in social life - The Nova Scotia Supreme Court, Trial Division, awarded $10,000 general damages for pain, suffering and loss of amenities of life plus $13,372.00 loss of income - See paragraphs 19 to 29.

INTEREST - TOPIC 5138
Damages - Torts - Negligence - Personal injuries - Loss of income - The Nova Scotia Supreme Court, Trial Division, awarded interest on damages for loss of income at 4.5% per annum, excluding amounts paid by the defendant in advance without prejudice and amounts received from her employer as sick benefits - See paragraphs 30 to 37.

INTEREST - TOPIC 5145
Interest as damages - Rate of interest applicable - The Nova Scotia Supreme Court, Trial Division, awarded interest on damages for loss of income at 4.5% per annum and on general damages for pain, suffering and loss of amenities of life at 9% per annum - See paragraphs 30 to 38.

INTEREST - TOPIC 5544
Interest as damages - Practice - Pleading - The Nova Scotia Supreme Court, Trial Division, held that a claim for interest, which the court may award on damages under s. 38 of the Judicature Act, S.N.S. 1972, c. 2, need not be pleaded - See paragraphs 31 to 32.

TORTS - TOPIC 376
Negligence - Motor vehicle - Standard of care of driver - Keeping proper lookout - The defendant driver on entering a main highway from a side street stopped to wait for a break in a long line of traffic in order to turn left to join the line - The defendant moved forward to cross the highway just as the plaintiff motorcyclist approached from the opposite direction and passed in front of him - The plaintiff was plainly visible for some distance, but the defendant failed to look to see her - The Nova Scotia Supreme Court, Trial Division, held the defendant driver negligent and wholly at fault for failing to keep a proper lookout - See paragraphs 1 to 18.

Summary:
This case arose out of the plaintiff female motorcyclist's claim against the defendant driver for damages arising out of a collision, which occurred when the defendant driver entered a through highway from a side street and struck the plaintiff, who was travelling on the highway.

The Nova Scotia Supreme Court, Trial Division, allowed the plaintiff's action and held the defendant driver negligent and wholly at fault.

CASES JUDICIALLY NOTICED:
Jefford v. Gee, [1970] 1 All E.R. 1202, appld. [paras. 31, 35].
Holley v. Ford Motor Company (1980), 41 N.S.R.(2d) 65; 76 A.P.R. 65, appld. [para. 32].

STATUTES JUDICIALLY NOTICED:
Judicature Act, S.N.S. 1972, c. 2, s. 38(9),(10),(11) [para. 30].
Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 110 [para. 14].

COUNSEL:
RONALD N. PUGSLEY, Q.C., for the plaintiff;
RAYMOND MORSE, for the defendant.

This case was heard on September 3, 1980, at Halifax, Nova Scotia, before MORRISON, J., of the Nova Scotia Supreme Court, Trial Division, who delivered the following judgment on October 20, 1980:

1 MORRISON, J.: This is an action for personal injuries suffered by reason of a collision between a motorcycle operated by the plaintiff and a motor vehicle operated by the defendant.

2 The collision occurred on October 20th, 1978, at approximately 7:30 a.m. on the main public highway known as the Herring Cove Road at Spryfield, in the City of Halifax. The collision

occurred at the junction of Mont Street, Spryfield, in the City of Halifax. The highway, at the scene of the accident, is approximately 22 feet in width. Mont Street is a side street which intersects the western side of the Herring Cove Road.

3 The plaintiff, Juanita Pooley, is a 26 year old unmarried lady. She is a graduate of Mount Allison University and is employed as a radio operator with the Department of Transport at Ketch Harbour, Nova Scotia.

4 The defendant is a young man, at the present time 19 years of age, and living in Alberta. As of October 20th, 1978, he was living in Harrietsfiled, Nova Scotia, and was employed in the City of Halifax. He, at all relevent times, was the owner of a 1975 Dodge Colt motor vehicle.

5 The plaintiff was operating her motorcycle at the relevant time in a southerly direction on the Herring Cove Road. She was driving from Halifax towards Ketch Harbour, her place of employment. The visibility was good. It was just about daylight and at that time in the morning when most vehicles did not require their headlights to be illuminated. Miss Pooley, however, did have the lights on her motorcycle. The traffic proceeding south was very light. There were no vehicles at all ahead of her within visible range. The traffic, however, in the opposite lane proceeding towards Halifax was very heavy and in fact was referred to as being "bumper to bumper".

6 The defendant was also proceeding to work in Halifax at the same time and he had stopped at the Tim Horton doughnut shop which is very close to the intersection of Mont Street and Herring Cove Road for coffee. He then left the Tim Horton shop, proceeded on to Mont Street and then drove easterly on Mont Street to the intersection of the Herring Cove Road. He there stopped his vehicle and looked both ways. He saw no vehicles approaching on the lane which would carry the traffic towards Herring Cove but on the lane towards Halifax he also testified traffic was very heavy and referred to it as being "bumper to bumper". He had to wait for an opening in order to enter that line of traffic because he would have to cross the two lanes of the highway in order to enter the line of traffic.

7 At this point the evidence becomes somewhat confusing. The defendant says that he proceeded onto the south bound lane to a point about half way across the lane and then

stopped waiting for a break in the solid line of traffic in the north bound lane. At this point he did not see any sign of the plaintiff's motorcycle approaching.

8 The plaintiff, in the meantime, who was proceeding in a southerly direction says that she saw the defendant's motor vehicle from approximately one-quarter mile away and the vehicle was stopped at that time and remained stopped at all times up to the time of the collision when it moved ahead. She testified that the defendant's motor vehicle was three to four feet out on her lane and was stopped there.

9 Roy Bowdridge, an independant witness, also testified. He is a fireman for the Halifax City Fire Department and on October 20th, 1978, was proceeding into Halifax to work on the Herring Cove Road. He said it was just starting to get light and the traffic in his lane proceeding towards Halifax was very heavy and cars were proceeding bumper to bumper. However, on the other lane, that is the south bound lane, there was very little traffic. Mr. Bowdridge recalled, as he approached the intersection of Mont Street with the Herring Cove Road, noticing a small car stopped at Mont Street at the intersection. In his opinion the car was just short of the edge of the Herring Cove Road. He referred to the plan, which was put into evidence as Exhibit 3, and according to that plan he thought that the car would be just short of the dotted line shown on the plan which the engineer had estimated was the western edge of Herring Cove Road. He said he was about 300 feet away and the car was stopped. He also noticed a motorcycle proceeding southerly on the south bound lane.

10 The motorcycle was proceeding at about twenty-five to thirty miles an hour and had its headlights on. Just as he reached a point opposite the intersection of Mont Street he said the car started to edge out on the Herring Cove Road. In the opinion of the witness the motorist had noticed a break in the traffic some distance behind the witness' motor vehicle and was inching out to try and enter that break. He said the driver of the car, presumably the defendant, was looking in a southerly direction towards the break in the traffic. As the motorcycle approached within a few feet of the car, the car hit the motorcycle broadside. He thought that the motorcycle was travelling at about the centre of the south bound lane and then veared slightly towards the centre line as if anticiapting the accident. In

his opinion there was no chance to avoid the collision on the part of the driver of the motorcycle. His motor vehicle was just about ten feet past the point of the impact when the collision occurred. The driver of the motorcycle, the plaintiff, was thrown to the eastern side of the Herring Cove Road. At the point of impact, in his opinion, the car operated by the defendant, was just a few feet short of the centre line of the Herring Cove Road. He also said there was no traffic ahead of the plaintiff's motorcycle on her side of the road and there was nothing unusual in the operation of the motorcycle.

11 It seems to me that the confusion on the part of the plaintiff and the defendant as to how far out the car had come when it was stopped was due to the fact the west boundary of Herring Cove Road was not clearly demarked. The total area is paved right into the Tim Horton doughnut shop and the intersection leading into Mont Street is also totally paved although Mont Street, itself, is not paved.

12 Mr. Bowdridge's evidence is rather significant, inasmuch as he has lived in the area for fifteen years and has commuted back and forth to Halifax during that period of time and is very familiar with the roadway. When I consider Mr. Bowdridge's evidence along with that of the plaintiff, I am forced to the conclusion that the defendant's motor vehicle was not out onto the south bound lane of the Herring Cove Road anymore than three to four feet as estimated by the plaintiff. I do not accept the defendant's evidence that he was half way across that lane.

13 In any event the defendant testified that he had not looked in a southerly direction after he had stopped the car in the first instance at the intersection of Mont Street on the Herring Cove Road. He said he was just about to look southerly and had released his foot on the brake and the car was going forward when he was turning his head to look southerly and the accident occurred. Miss Pooley said that although his car was three to four feet out on her lane, it was stopped all the time she had it in view. When she first saw the defendant's motor vehicle she slowed down, but then as she approached, noticed that the car was stopped and remained stopped and she had plenty of room to get through, she continued on and it was not until she was just about to pass the car that it came forward and collided with her.

14 Counsel for the defendant has pleaded Section 110 of the *Motor Vehicle Act*, Revised Statutes of Nova Scotia, 1967,

chapter 191 and which reads as follows:

> 110(1) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at approximately the same time the driver of the vehicle on the left shall yield to the driver on the right.
>
> (2) The driver of a vehicle who has stopped as required by law at the entrance to a through highway shall yield to other vehicles within the intersection or approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed, and other vehicles approaching the intersection on the through highway shall yield to the vehicle so proceeding or across the through highway.
>
> (3) The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver having so yielded and having given a signal when and as required by law may make the left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn.

15 It should be pointed out here that it is common ground that the defendant did have his left signal light on and flashing. The section referred to above governs the making of an entrance onto a through highway and making a left turn thereon. However, I do not think there is any authorization for a motor vehicle to proceed partially onto the highway and then stop expecting all traffic coming from the left or the right to stop while he is there. The defendant, in this case, could see that there was a solid line of traffic in the lane which he wished to enter and although he anticipated a break in the traffic, nevertheless, he partially entered the intersection a few feet and then stopped. It seems to me that he stopped realizing that he would have to wait until the break came in the traffic and realized that vehicles would have to pass in the meantime and he therefore left the lane open so that vehicles approaching from the left could pass in safety. This is consistent with the plaintiff's evidence that there was plenty of room for her to pass on the highway and the car was stopped. I cannot conlcude in these

circumstances that Section 110 of the *Motor Vehicle Act* applies.

16 I am satisfied from the defendant's own evidence that if he had not moved his car forward from a stationary position that the accident would not have occurred. I am also satisfied from the defendant's own evidence that he failed to look to the left before finally setting his car in motion by releasing the brake even though he had not touched the accelator. His action in taking his foot off the brake allowed the car to proceed forward and collide with the motorcycle. Up to this point he had not looked to his left immediately before taking his foot off the brake. If he had done so he would have seen the motorcycle approaching.

17 It seems to me that the defendant was negligent in failing to keep a proper look-out for approaching traffic. His vehicle was visible to the plaintiff from about a quarter mile away and if he had looked at any time while the motorcycle was proceeding on from that point he would have observed the motorcycle approaching and would not have allowed his car to move and consequently the accident would have been avoided.

18 I find that the collision between the two motor vehicles and the injury, loss and damage suffered by the plaintiff by the reason of such collision was caused by the negligence of the defendant in the operation of his motor vehicle in failing to keep a proper lookout. In my opinion the plaintiff exercised due care and caution. She was proceeding on a comparatively straight stretch of highway with her headlights illuminated and was proceeding at a reasonable rate of speed. She slowed her vehicle down and then when she saw that the defendant's car, (which was stationary on the highway), was stopped and was not moving she continued on her way and then suddenly without any immediate warning the car moved forward and struck her. I cannot find that the plaintiff was guilty of any negligence that contributed to the accident. I find that the defendant was 100% liable for the resulting accident and the injury, loss and damage suffered by the plaintiff.

19 The plaintiff is a young woman, 26 years of age and suffered a fracture of the tibia and the fibula of the right leg. She was thrown completely across the highway by the force of the collision and landed on her back on the east curb of the Herring Cove Road. She was in pain and was taken to the Victoria General Hospital by ambulance. She arrived at the hospital at 8 a.m. and her leg was set that night.

Doctor Erdogan said there was a closed reduction of the fractures and there was no operation. The leg was put in a long leg cast. She was in the hospital for four or five days and was then discharged walking out with the aid of crutches. The cast extended from her ankle up to the top of her leg.

20 The cast had to be replaced several times over the course of healing and the leg was slow in healing; however, in May of 1979 the cast was finally taken off and she returned to her employment on June 3, 1979.

21 On April 18, 1979, Dr. Erdogan testified that she was still wearing a long leg cast with a walking heel and indicated that Miss Pooley told him that because her right leg was in a cast she was unable to drive her car to work and while at work she was unable to manipulate herself around her desk. Dr. Erdogan also said that as of April 18, 1979, Miss Pooley denied having had any other injury other than to her right leg and in particular she denied having had any injury to her neck or back. In his report of September 10th, 1979, Dr. Erdogan said as follows:

> Clinically also, the fracture has united. She was practically asymptomatic. She said that she was fully active. I understand that she has returned to work. She has slight angulation at the fracture site, however, I believe that this is insignificant as far as long term prognosis is concerned. Therefore, I believe that the long term prognosis is good. As far as we could determine, she did not appear to have sustained any injury to her right ankle or right knee joint.

22 Dr. Erdogan examined Miss Pooley again on August 25th, 1980, and in his report made the following comments:

> Since then she has done quite well. When I saw her she complained only of occasional aching in her right knee especially at night. She said that she could sit for as long as 6 hours at her desk without discomfort. She describes her complaint as more of a nuisance than disabling. Her knee does not swell or give way. She does not have any complaints referrable to the fracture site itself. She is 6'2" tall and weighs 240 pounds.
>
> On examination today, the ranges of movements of both knees as well as both ankle joints were normal. She did not have any swelling of her right knee compared

with the left one. The circumference of her right thigh measured 2 centimetres less than the left thigh. The circumference of her right calf measured a centimetre less than the left one.

She is right handed. There was no enlargement of her right patella. She was minimally tender along the medial facet of the cartilage of the right patella. There was no appreciable lateral instability present. She did not have any other tenderness around the joint. She did not have collateral or cruciate ligament instability present. She has a small scar in the front of her right leg. One could feel a bony prominence along the shin of the tibia, however, this was not tender. Both legs measured the same. She did not have leg length discrepancy.

Miss Pooley said that when she runs more than a block she has soreness and weakness of her right leg though she did not complain of pain. I think clinically as well as radiologically as seen last year in August, the fracture has healed but I ordered repeat x-ray films of her right knee, tibia and fibula to be taken.

The discomfort she has in her right knee is caused by mild chondromalacia of the patella which I believe is secondary to the quadriceps atrophy she has developed following the injury. It is also possible that she might have injured the patella at the time of the accident.

23 It would appear that there is no positive assertion by the doctor that the discomfort in her right knee was caused from the injuries suffered at the accident. All that Dr. Erdogan indicates is that this is a possibility. The fractures themselves have healed quite well.

24 Miss Pooley who is a very athletic youny lady and was an accomplished basketball and volleyball player now testifies that she is unable to engage in these sports. She can walk comfortably but she cannot run. Similarly, she cannot play racketball which she had intended to take up. She was not sure that she would be able to engage in these sports in the future. She said that for the first one and one-half months after the accident it was very painful for her getting around. She had great difficulty with the cast and she had considerable discomfort for six or seven months after the accident, that is until the cast was finally removed. She

has given up motorcycle riding also which she had always considered to be a favourite sport of hers. She also developed a hobby in photography and she finds that the kneeling and squatting causes her considerable discomfort and she can no longer engage in her hobby in the way that she used to. She is, however, able to engage in social events such as dancing and so forth.

25 I am satisfied that this young woman suffered rather severe injuries which necessitated a cast being on her from October 20th, 1978 to May of 1979. The fractures have healed but it is clear that she is no longer able to indulge in sporting activities to the extent that she once did although it is probable that in time she may get back into her sporting activities.

26 Certain specific special damages were agreed upon in the amount of $350.00. In addition to this the plaintiff claims for lost wages for the period from October 20th, 1978 to June 3rd, 1979, a period of 32 weeks. She was indeed off work for this time and I find that she was justifiably off work due to the fact that she had the cast on her leg. Once the cast was removed in May of 1979 she returned to work on June 3rd, which indicates a desire on her part to resume employment. The evidence indicates that her base salary during the period she was convalescing and unable to work would be approximately $16,400.00. For a thirty-two week period then she would have lost $10,092.00 in base salary and in addition to this, however, she earned considerable overtime pay each year at her place of employemnt and she also lost whatever overtime pay she would have earned.

27 Naturally, it is impossible to calculate the amount of overtime accurately because one cannot be sure of those periods of time when overtime would be worked. From the evidence it is clear that she did earn overtime in 1977 of $5,330.22. The witness indicates that most overtime wages would be earned over the Christmas holidays and in the early summer. She did miss the Christmas period in 1978 but she was back to work on June 3, 1979, which would allow her to take advantage of any overtime in the early summer period. However, due to the fact that she was off work for a period of time she had to resume a training course which she had been taking and during this period of time was not able to earn any overtime. Considering all of these factors which I think balance one another out I would think it fair to say that she would have earned approximately $5,000.00 in

overtime wages in the year commencing October 20th, 1978. She was off work for thirty-two weeks of that year and she would have lost 32/53 of $5,000.00. Consequently, I make an approximation of the amount of overtime wages she would have lost in the amount of $3,280.00. I, therefore, allow the plaintiff in lost wages the sum of $13,372.00.

28 In addition to this the plaintiff was entitled to periodic wage increments which came automatically with service. She missed one of these increments due to her injuries and I fixed the lost in this respect at $325.00.

29 For general damages, taking into consideration the pain and suffering caused to the plaintiff, the loss of the amenities of life by not being able to engage in her favourite sports and her photographic hobby and some residual disability which should disappear with time I would allow the sum of $10,000.00 general damages.

30 The plaintiff has raised the question of interest on the award of damages under the provisions of Section 38 of the *Judicature Act*, Statutes of Nova Scotia, 1972, c. 2 2ith particular reference to the amendment made by c. 55 of the Statutes of Nova Scotia, 1980, adding clause 9 to Section 38. This Section reads as follows:

> (9) In any proceeding for the recovery of any debt or damages, the court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment.
>
> (10) Where a party pays money into court in satisfaction of a claim and another party becomes entitled to judgment for an amount equal to or less than that paid into court, the court shall award interest under clause (9) hereof only to the date of payment into court as if said date had been the date of judgment.
>
> (11) The court in its discretion may decline to award interest under clause (9) hereof or may reduce the rate of interest or the period for which it is awarded.
>
> (a) if interest is payable as of right by virtue of an agreement or otherwise by law;

> (b) if the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded;
>
> (c) if the claimant has been compensated in whole or in part by insurance or other payment prior to judgment; or
>
> (d) if the claimant has been responsible for undue delay in the litigation.

31 It seems to me that the above provisions would apply to the award in the present case. The court has some discretion on the payment and amount of interest and the length of time for which it is to be paid under the provisions of Section 38(11) above. The defendant has argued that the matter was not advanced in the pleadings and consequently should not be considered by this court however, I do not think that it is necessary that a claim for interest under this Section needs to be pleaded. It, in itself, is not a cause of action but as Lord Denning said in the case of *Jefford v. Gee*, [1970] 1 All E.R. 1202, at p. 1211:

> . . . It is no part of the debt or damages claimed, but something apart on its own. It is more like the award of costs than anything else. It is an added benefit awarded to a plaintiff when he wins the case.

32 I also refer to the case of *Holley v. Ford Motor Company* (1980), 41 N.S.R.(2d) 65; 76 A.P.R. 65, a decision of Chief Justice Cowan of this court, where interest was awarded under the provisions of this section even though the matter was not raised in the pleadings or, indeed, at the hearing.

33 However, counsel agreed that a certain amount of special damages was paid in advance by the defendant without prejudice and the claimant was compensated in part by a form of employee benefits she had with her employer. Consequently, I am satisfied that Section 38(11)(b) and Section 38(11)(c) should apply.

34 The total amount of monies paid in advance by the defendant is $4,311.20 and the plaintiff received from her employer sick leave benefits totalling $2,207.44. I shall take these sums into consideration in fixing the rate of interest and the period for which it may be awarded.

35 In the case of Jefford v. Gee, (supra), [1970] 1 All E.R. 1202, Denning, J. (dealing with the English Act) said as follows at p. 1212:

> Special damages. Interest should be awarded from the date of the accident to the date of trial at half the appropriate rate.
>
> Loss of future earnings. No interest should be allowed.
>
> Pain and suffering and loss of amenities. Interest should be awarded at the appropriate rate from the date of service of the writ to the date of trial.
>
> Appropriate rate. The appropriate rate should be the rate allowed by the court on the short term investment account, taken as an average over the period for which interest is awarded.

36 I find that the sum of $6,518.64 has been realized by the plaintiff by way of "without prejudice" payments made by the defendant and by way of sick benefits. In my opinion both these payments were meant to compensate for lost wages; consequently the total amount of special damages that I have awarded to wit, $14,047.00 will be reduced by the amount of $6,518.64 for the purpose of calculating interest. This would leave a balance of $7,528.36 special damages upon which interest may be awarded.

37 Bearing in mind the comments of Lord Denning in the *Jefford v. Gee* case, (supra) and the comments of Cowan, J., in the case of *Holley v. Ford Motor Company Limited*, (supra), I award interest to the plaintiff at the rate of 4 1/2 per cent per annum on the amount of $7,528.36 from October 20th, 1978 to the date of judgment.

38 With regard to the award of general damages in the amount of $10,000.00 I award interest at the rate of 9% on the said sum of $10,000.00 from the date of service of the originating notice until the date of judgment. I do not find anything on record in the file that indicates the date of service of the originating notice but the affidavit of service specifying the date of service should be on the original originating notice. It seems to me that this should be a matter of record and would not be subject to formal proof in the ordinary sense.

39 The plaintiff then will have judgment against the defendant for a total of $24,047.00 together with interest as I have outlined above. The plaintiff shall also have her costs of action, to be taxed.

Judgment for plaintiff.

Editor: David C.R. Olmstead
kjm

CANADIAN CASES ON THE LAW OF TORTS

RE ZDASIUK; ZDASIUK et al. v. LUCAS et al.

Indexed as: Zdasiuk Estate v. Lucas

Ontario Supreme Court [Court of Appeal],
Thorson, Cory and Tarnopolsky JJ.A.

Heard – January 8, 1987.
Judgment – January 21, 1987.

Damages – Fatal accident – Lost "guidance, care and companionship" of young woman, daughter and sister of respective plaintiffs – "Conventional" sums evidently awarded at trial – "Conventional" approach rejected and awards increased on appeal – Family Law Reform Act, R.S.O. 1980, c. 152, s. 60(2)(d).

A young woman of 25, mature, intelligent and a much-loved member of her family, was killed in an automobile accident caused by the negligence of the first defendant. At trial, the father, mother and brother of the deceased, claiming under s. 60(2)(*d*) of the Family Law Reform Act of Ontario for the loss of the dead woman's "guidance, care and companionship" were awarded $10,000, $12,000 and $5,000 respectively; the trial Judge expressing the view that while it was essential to maintain objectivity and eschew irrational emotiveness in making this sort of award,

the process was destined eventually to produce "conventional" awards. The plaintiffs appealed, seeking augmentation of the awards made to them.

Held – The appeal was allowed.

Consistency in awards under the Family Law Reform Act, s. 60, was no doubt a desideratum, but should not be sought by recourse to "conventional awards", without regard to the individual circumstances of the particular case, as had seemingly been done here.

The task of comparing losses in the case of family bereavement, especially where the principal element to be compensated is that of "companionship", is inevitably distasteful, but must be honestly faced. Prerequisite to such a claim was proof of a close family relationship, demonstrably in evidence in the case at Bar, which involved an unusually close family, likely to endure as such. The family's loss was an exceptional loss, and the awards made at trial erred in not reflecting this. The award to the father should be increased from $10,000 to $17,500; and that to the mother from $12,000 to $20,000, while the award to the brother should stand unaltered. Were it not for the anticipated marriage and migration to Utah, planned by the deceased prior to her death and inevitably predestined to diminish the companionship her family might have anticipated, the awards might properly have been set still higher.

Cases considered

Gervais v. Richard (1984), 48 O.R. (2d) 191, 30 C.C.L.T. 105, 28 M.V.R. 305, 12 D.L.R. (4th) 738 (Ont. H.C.) – distinguished.

Nielsen v. Kaufmann (1986), 54 O.R. (2d) 188, 36 C.C.L.T. 1, 26 D.L.R. (4th) 21, 13 O.A.C. 32 (Ont. C.A.) – applied.

Statutes considered

Family Law Reform Act, R.S.O. 1980, c. 152 [repealed and substituted by the Family Law Act, S.O. 1986, c. 4] – s. 60(2)(d)

Canadian Abridgment (2nd) Classification

Damages
V. 3. j. vii.

APPEAL by plaintiffs, as to quantum, from a judgment awarding damages to the family of a deceased accident victim for loss of guidance, care and companionship, under the Family Law Reform Act of Ontario.

Theodore B. Rotenberg, for appellants (plaintiffs).
B.A. Percival, Q.C., for respondent (defendant) Lucas.
Leslie A. Wright, for respondent (defendant) Winfield.

January 21, 1987. The judgment of the Court was delivered by

THORSON J.A.: – At issue in this appeal is the adequacy of certain awards made under s. 60(2)(*d*) of the Family Law Reform Act, R.S.O. 1980, c. 152 [repealed and substituted by the Family Law Act, S.O. 1986, c. 4], to the members of the family of Barbara Zdasiuk, who was 25 years old at the time of the tragic automobile accident which took her life.

The learned trial Judge in his reasons for judgment briefly summarized the background, the academic and career achievements and the future prospects and plans of this young woman, whom he described as a "loving daughter and sister, a mature and intelligent young lady who had a promising future ahead of her". He then observed that "it is difficult if not impossible and/or invidious to make comparisons between human losses" and added that "[F]or the survivors, the unexpected loss of a close family member may be perceived only as a monumental loss." He then went on to state:

> "For this reason I am of the opinion, as was this Court in *Wessell et al. v. Kinsmen Club of Sault Ste. Marie Ontario Inc.* (1982), 37 O.R. (2d) 481, that the quantum of damages to be awarded under s. 60 'must be realistic, having regard to all the evidence' (per Walsh J., at p. 499). I am in agreement and adopt the words of Mr. Justice Krever in *Gervais et al. v. Richard et al.* (1984), 48 O.R. (2d) 191, where he said, at p. 202, that 'the task of assessing damages under clause (*d*) of ss. (2) of s. 60 of the Family Law Reform Act must be undertaken objectively, unemotionally and, to the extent it is possible to do so, rationally.' Furthermore, I share in the view that such awards must eventually become conventional awards.
>
> I therefore assess the damages of Eugene Paul Zdasiuk at $10,000; those of Wanda Therese Zdasiuk at $12,000; and those of George Andrew Zdasiuk at $5,000."

The latter three named persons are, respectively, the father, the mother, and the only brother of the deceased.

It is no doubt desirable that there should be some degree of consistency in the awards that are made by our Courts under s. 60(2)(*d*) as compensation for the loss of "guidance, care and companionship" which a claimant might reasonably have been expected to receive from the person injured or killed if the injury or death had not occurred. It does not follow, however, that this consistency should be achieved by means of a "conventional award" that is arrived at without regard to the presence of circumstances which may make "unconventional" or

exceptional the particular case in which the award is being made. In my opinion, and regardless of what might reasonably be thought to be a "conventional award", this case cannot be described as conventional.

It is, I think, apparent from the quoted portion of his reasons for judgment that the awards made to the father and mother of Barbara Zdasiuk were intended by the learned trial Judge to be "conventional". They are in fact identical to the awards made by Krever J., as he then was, to the father and mother of the deceased in the *Gervais* case [*Gervais v. Richard* (1984), 48 O.R. (2d) 191, 30 C.C.L.T. 105, 28 M.V.R. 305, 12 D.L.R. (4th) 738 (Ont. H.C.)], with which decision the trial Judge had just previously in his reasons expressed himself to be in agreement. Immediately after this expression of his agreement, he then stated that he "therefore" assessed the damages in the indicated amounts.

The inference is compelling that having decided that the awards to be made in this case ought to be conventional, the learned trial Judge proceeded to make the awards to the father and mother of the deceased on that basis, without any analysis or further consideration of whether the particular facts and circumstances of the case warranted any departure from the amounts thereof which he took to be conventional. With deference, I am of the opinion that he erred in approaching the task before him in this manner, and that this error led to the making of awards in the case of the father and mother that were so low in amount as to warrant this Court's interference with them. With regard generally to awards of this kind, I would note this Court's recent observations in *Neilsen v. Kaufman* (1986), 54 O.R. (2d) 188 at 199-200, 36 C.C.L.T. 1 at 17, 26 D.L.R. (4th) 21, 13 O.A.C. 32:

> "In time there may be awards for the loss of care, guidance and companionship in the 'average' family which will come to be recognized as 'conventional'. It is difficult now to see how such a family can be discovered or described.
>
> It is self-evident, as has been said, that the amount of compensation in any given case will depend on the facts and circumstances in evidence in the case . . ."

The making of comparisons between human losses is indeed invidious. The measurement in money terms of the loss of such intangibles as guidance, care and companionship is always a difficult task, and it is even more so where the principal element of loss which the Court must seek to compensate is the loss of companionship. That is the situation that presents itself in this case. I would add that it probably goes without saying that in order for any claim to succeed based principally on the loss of companionship, there must first be found to have existed a close family relationship involving the claimant and the person injured or killed, which has been impaired to a significant extent by the latter's injury or brought to an end by his or her death. The existence of such a close relationship is, therefore, the beginning point in such a case, but it cannot at the same time be its ending insofar as the Court's task is concerned.

The picture that emerges very clearly from the record before us in the present case is that of an unusually close family, whose closeness was in large measure linked to the special place which Barbara occupied in the lives of her parents and her brother George.

There is no question that the social life of both these parents revolved around Barbara and her brother to an exceptional degree, heightened no doubt by the difficulties and hardships each parent had endured in their early lives in Poland and before their marriage in 1951, but due mainly to the warm, affectionate and companionable relationship that developed and matured between each of the members of this family as the children grew to be adults. In time both George and his sister came to share a keen interest in scientific fields, he in engineering science and she in bio-engineering, in which, after having obtained a Master of Science degree from the University of Utah, she intended to pursue her studies at the Ph.D. level. Quite shortly before her death in 1980, she had returned to Toronto to accept a research position and had become engaged to be married. The likelihood, however, was that she would have elected to return to Utah for the time required to obtain her Ph.D. degree.

I am persuaded by the evidence that the kind of companionship that existed between the members of this family was such that it would have continued and been maintained, notwithstanding the prospect of Barbara's marriage and the prospect of her physical absence from her parents for a period of several years. That in fact was the situation between Barbara and her brother, with whom she had maintained a very close relationship of mutual guidance and companionship by means of occasional visits but frequent telephone calls and letters, even though her brother had moved away to California some 5 years before her death. In summary, I am satisfied that for both her parents the loss of companionship suffered as a result of her death for which they are entitled to be compensated under s. 60(2)(*d*) of the Family Law Reform Act was an exceptional loss, and accordingly that the awards made by the trial Judge on the basis already indicated were, in their case, altogether inadequate.

For the reasons given, I would allow the appeal and vary

the judgment below as regards the awards to Eugene Paul Zdasiuk and Wanda Therese Zdasiuk. I would increase the award to the former from $10,000 to $17,500 and the award to the latter from $12,000 to $20,000. Were it not for the planned marriage of their daughter and her likely move to Utah for some period of years, factors which would inevitably have impaired at least to some extent the intimate kind of companionship that had previously been enjoyed by this family, I would have been inclined to increase these awards somewhat more.

The award made to George Andrew Zdasiuk should stand, since I do not think a case has been made that the award to him was so inordinately low as to warrant our intervention. The awards in each case of prejudgment interest from September 4, 1982, at the agreed upon rate of 11.8 per cent per annum will also stand.

Counsel for the parties did not address the Court on the question of costs, and accordingly the Court may be spoken to on this question if agreement thereon cannot be reached by counsel.

Appeal allowed and awards varied accordingly.

RE ABACUS CITIES LTD.; COLLINS BARROW LTD. v. BANK OF MONTREAL et al.*

Indexed as: Abacus Cities Ltd. (Trustee of) v. Bank of Montreal

Alberta Court of Queen's Bench,
McDonald J.

Judgment – October 24, 1987.

Res judicata – Estoppel by res judicata – Claims in fraud and conspiracy struck out accordingly, as subsumed in issues disposed of in earlier proceedings.

Negligence – Duty of care – Financial and legal advisers of bank urging appointment of receiver for plaintiff debtor company – No duty of care owed to company only to client – Policy precluding imposition of such duty.

The defendant bank caused a receiver to take over all the assets of AC Ltd. in purported exercise of powers reserved in debenture documents. The bank then obtained a default judgment in debt against the bankrupt company. Subsequently, the receiver was discharged from its duties by a consent order. The special trustee in bankruptcy of AC Ltd. then sued upon that company's behalf, alleging trespass, conversion and other tortious behaviour by the bank and others; saying that the bank had not given AC Ltd. a reasonable opportunity to make good any default, so that the receivership clause had not been legitimately triggered. The Alberta Court of Queen's Bench, applying the doctrine of estoppel by res judicata, declared that the proceedings confirming the appointment of the receiver, and declaring AC Ltd. in default, had entirely foreclosed this subsequent tort action, which must accordingly be struck out. That ruling was affirmed by the Alberta Court of Appeal.

A new joint trustee now brought action upon an amended statement of claim, against the bank and the other defendants. It was now alleged that there had been fraud by Z, president of the company, TR Ltd., which had been receiver for AC Ltd.; fraud which indeed had induced AC Ltd. to consent to the appointment of that company. There were also allegations of a conspiracy unlawfully to seize the business and assets of AC Ltd.; and of negligence on the part of TR Ltd. and other accountants and lawyers involved in the episode, who had supposedly given negligent advice to the bank, so inducing it to appoint the receiver for AC Ltd., and thereby, it was alleged, breaking a duty of care owed to AC Ltd. itself.

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*This case is currently under appeal.

the plaintiff is hesitant and reluctant to enter conversations. I accept his evidence that his enjoyment of life has been limited in his endeavours on the golf course and in conversation with friends. I am not satisfied, however, having heard the plaintiff as a witness, that his hoarseness is such that it should cause him undue embarrassment in gatherings. While his ability to communicate is restricted and while constant use of his voice may cause fatigue, I have concluded that the injury to the left vocal chord is partial in extent only. The injury to the hypoglossal nerve persists, but the initial embarrassment of drooling and inability to manage food in his mouth has now passed. The plaintiff has learned to control the management of food and no longer bites his tongue. Through his own efforts he has minimized the extent of the injury; however, it is permanent and will interfere with his enjoyment of life. Accordingly, I assess the plaintiff's general damages for pain, suffering, permanent disability and loss of amenities in the sum of $25,000. Absent the injury to the hypoglossal nerve, I would have assessed the plaintiff general damages at $20,000.

The parties agree that the net loss of income of the plaintiff up to the time of trial is $56,159.09 and that the future loss of pension to the plaintiff over a normal life expectancy is $25,000. As indicated above, the plaintiff voluntarily resigned. While his voice would fatigue during the course of a day, his employment was not in jeopardy. It appears, in addition to the difficulty he was having with his voice, he also suffered from glaucoma. He resigned on December 31, 1980. In a formal discussion with Mr. Bailey on October 10, 1980, he indicated his desire to resign at the year end. On the date of retirement the plaintiff was 60 years' old and had accumulated 20 years' employment. This enabled him to take early retirement under the Public Service Superannuation Plan of Ontario. In so resigning, he took a reduced pension. He was entitled to continue until age 65. I am not satisfied on the balance of probabilities that the plaintiff resigned as a result of the injury sustained to the vocal chord. While that might have been one factor which played a role in the resignation, I am satisfied that the fact he had attained the age of 60 with 20 years' service and was suffering to a certain extent from glaucoma, were also factors of equal weight in that decision. Furthermore, there is no evidence that he made any attempt to seek other employment. I would conclude on the balance of probabilities that the plaintiff left the employ of the Ministry of Community and Social Services by way of voluntary retirement. In result therefor, I would not have allowed the claim for loss of income and loss of pension benefits. I reserve the issue of costs until further submission by counsel.

Action dismissed.

REIDY et al v. McLEOD et al.

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

Judgment - July 23, 1984.

Damages - Damages in tort - Personal injury - Death - Claims under statutes other than Fatal Accidents Acts - Four young men killed in single-vehicle accident - Bereaved relatives of two victims claiming under s. 60 of Family Law Reform Act - Lost care, guidance and companionship final and indelible losses now compensable under s. 60 - Family Law Reform Act, R.S.O. 1980, c. 152, s. 60.

Four young men returning from an army cadet meeting were all killed when the car in which they were travelling went out of control on a gravel road, rolled over and smashed into a tree; the driver, whose estate was defendant in the present actions, was also killed. The defendant estate admitted liability in these proceedings, advanced largely under the Family Law Reform Act of Ontario. Two of the actions were settled before trial.

Held - Judgment for plaintiffs.

While it imposed upon Courts a task fraught with extreme difficulty, the reform effected by s. 60 of the Family Law Reform Act enacted in 1978 erased a shameful anomaly from the law. While it was clear that in no case should grief be treated as compensable, the elimination of that element in assessing damages for the lost companionship of a child was virtually impossible. These essentially non-pecuniary losses were to be quantified with regard to the distinct elements of lost guidance, care and companionship respectively, in the light of the available evidence as to the deceased person's position and role, when alive, in the family unit.

The deceased DR was 17 at his death, the youngest member of his family; he left behind him his mother and father, five siblings (aged from 26 to 31 years), and his grandmother. The family was a warm and caring one, and DR had been a good, dutiful and responsible son, who had shown an unusual aptitude for public service. The effect of his death on his parents had been devastating, even more so than upon his brothers and sisters.

The deceased JB, also 17 at his death, left behind him his mother, two brothers and two sisters. The bond between mother and son had been very close, as had been that between the dead boy and his younger brother, in particular.

No doubt s. 60 of the Family Law Reform Act was not designed to compensate for grief, the immediate and to some degree transient trauma of loss. But lost care, lost guidance and lost companionship were final and indelible losses, newly compensable in our law and requiring a fresh judicial approach. Damages under s. 60 should be awarded to the claimant relatives of the deceased DR in the total sum of $111,500, plus special damages; those due to the claimant relatives of JB under s. 60(2)(d), should be assessed in the total sum of $93,000; both awards to carry prejudgment interest and costs.

Cases considered

Mason v. Peters (1982), 39 O.R. (2d) 27, 22 C.C.L.T. 21, 139 D.L.R. (3d) 104 (C.A.). [Leave to appeal to the Supreme Court of Canada refused 46 N.R. 538 (S.C.C.).] - applied.

Thornborrow v. MacKinnon; Kane v. Murphy (1981), 32 O.R. (2d) 740, 16 C.C.L.T. 198, (sub nom. Re Schmidt; Thornborrow v. MacKinnon; Kane v. Murphy), 123 D.L.R. (3d) 124 (H.C.) - applied.

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 - considered.

Statutes considered

Family Law Reform Act, R.S.O. 1980, c. 152, s. 60.

Fatal Accidents Act, R.S.O. 1970, c. 164 [repealed and superseded by the Family Law Reform Act, S.O. 1978, c. 2, s. 79].

Judicature Act, R.S.O. 1980, c. 223, s. 36.

Lord Campbell's Act, 1846 (U.K.), c. 93.

Words and phrases considered

guidance, care and companionship

Canadian Abridgment (2nd) Classification

Damages V. 3. j. vii.

ACTIONS for damages for the loss of the guidance, care and companionship of deceased relatives, under the Family Law Reform Act, R.S.O. 1980, c. 152.

R. Ritchie, Q.C., for plaintiffs.
Norman Brown, Q.C., for defendants.

July 23, 1984. BOWLBY J.: - This action arises out of a single car motor vehicle accident which occurred on May 7, 1981. The auto was operated by Glenn Malcolm McLeod. Details of the accident were not provided with any particularity during trial nor was it necessary to the issues of fact to be decided that they be known. The following boys were passengers: David John Reidy, James Ronald Blakey, Timothy James Reid and James Johnston Reid. All were returning from an army cadet meeting. The car was traversing a gravel road in London Township when the operator lost control, skidded into a ditch, rolled over and smashed into a tree with the tragic consequence that five of the motor vehicle's occupants lost their lives.

The action, as originally framed, was brought pursuant to the provisions of the Family Law Reform Act, R.S.O. 1980, c. 152 and in particular, s. 60 of such statute by those persons claiming entitlement to damages arising from the deaths of David John Reidy, James Ronald Blakey, Timothy James Reid and James Johnston Reid.

The claims arising from the deaths of Timothy James Reid and James Johnston Reid were settled either before or during this trial and therefore need not be considered in this judgment.

Liability has been admitted by the defendant.

In my view, before dealing with the specifics of the damage awards to be made by those entitled to claim in this action following the deaths of David Reidy and James Blakey, and what I view to be the evidence supporting such awards, some general comments on how I view the impact that the Family Law Reform Act has had and will, hopefully in an expanding way, continue to have on this segment of our law, tortious compensation, would be in order.

For those of us who view the law from the Bench or Bar, there must be some comfort in the realization that, if a segment of our jurisprudence is wrong, unjust or both, then through the passage of time, albeit sometimes a very prolonged one, the situation will adjust itself.

In other words, whether the process is tortuously long or happily quick, the situation involving inequity is routed out. This corrective procedure occurs either through legislative process or by written judgment changing its interpretation of the law as it has stood.

A very real blight was removed from our approach to compensation by legislative process in the passage of the new Family Law Reform Act in 1978. As was said by Mr. Justice

Linden in the decision Thornborrow v. MacKinnon; Kane v. Murphy (1981), 32 O.R. (2d) 740, 16 C.C.L.T. 198 (sub nom. Re Schmidt; Thornborrow v. MacKinnon; Kane v. Murphy), 123 D.L.R. (3d) 124 (H.C.) (to which I will be referring frequently in these opening words of this judgment), "A stain on our law" was removed.

The Ontario Fatal Accidents Act, R.S.O. 1970, c. 164 [repealed and superseded by the Family Law Reform Act, S.O. 1978, c. 2, s. 79] had, since 1846, placed a person residing in this province in the legally indefensible position of where damages of a non-pecuniary nature could be sought against the tortfeasor who caused physical injury, but he who through his negligence caused death to a child, was only liable to pay the potential economic gain the child may have provided to his or her parents if such life had not been taken. Any lawyer who was advising his insurance client prior to 1978 as to a reserve that should be set up on a file to meet the circumstances of the taking of a child's life would, knowing the inequities written into the Fatal Accidents Act, simply multiply one or two hundred dollars by the age of the deceased infant and the total achieved would approximate the loss which could be proved. It was this state of our law which provoked Mr. Justice Linden to write [at p. 744 O.R.]:

> "It was said, in a kind of macabre jest that was a stain on our law, that it was better to kill a child than to injure one. This was a sickening situation, which embarrassed anyone who had anything to do with the law in this country. It was an affront to Canadians, who expect their law to be the embodiment of national and civilized thought. Such low damage awards were barbaric, and did not reflect the prevailing views of our society which recognizes that children have a special value that transcends the pecuniary benefits they may some day bestow on their parents."

This section of the Family Law Reform Act, which so redirected our approach to compensation, is to be found in s. 60, which reads as follows:

> "60.-(1) Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part II, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (2) The damages recoverable in a claim under subsection (1) may include,
>
> (a) actual out-of-pocket expenses reasonably incurred for the benefit of the injured person;
>
> (b) a reasonable allowance for travel expenses actually incurred in visiting the injured person during his treatment or recovery;
>
> (c) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the injured person, a reasonable allowance for loss of income or the value of his services; and
>
> (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."

Initially, there was some judicial speculation as to whether s. 60(2) had been intended to apply to fatal cases because of the existence of the words "injured person" in such section. The decision of this Court in Thornborrow v. MacKinnon, supra, and the decision of the Ontario Court of Appeal in Mason v. Peters (1982), 39 O.R. (2d) 27, 22 C.C.L.T. 21, 139 D.L.R. (3d) 104 [leave to appeal to the Supreme Court of Canada refused 46 N.R. 538 (S.C.C.)] puts this problem to rest. Mr. Justice Linden, again in the decision of Thornborrow v. MacKinnon, stated as follows [at p. 745]:

> "It would be an absurd interpretation of the statute to hold that there should be compensation for loss of guidance, care and companionship if someone were injured and spent a few weeks in the hopsital, but not if that person were killed and his relatives were deprived of his guidance, care and companionship forever. It would also be ludicrous if the effect of the Family Law Reform Act, 1978 was to allow for loss only of guidance and care in a fatal case (Vana v. Tosta et al., [1968] S.C.R. 71, 66 D.L.R. (2d) 97) but allow for guidance, care and companionship in an injury case. A smaller amount would then be given for death than for injury, and the inequity of the old law would survive. I am confident that a

rational Legislature could not and did not mean to accomplish such inconsistent results, notwithstanding the decision of Chitale et al. v. Sandford et al. (1980), 1 A.C.W.S. (2d) 309. I do not think that this language necessitates a construction such as this, for it would have the Legislature of Ontario marching backwards. Rather, the more sensible and consistent interpretation is that the Family Law Reform Act, 1978 was meant to reform the law and rationalize it. The aim was to modernize the law. Consequently, s-s. 2(d) applies in fatal injury cases as well as in non-fatal injury cases.

From now on, the damages awarded for injury to a child or for the loss of the life of a child include not only pecuniary losses, but also the non-pecuniary elements of guidance, care and companionship that parents and other relatives receive from a child."

The equating in monetary terms what the assessment should be for the loss of the "guidance, care and companionship" of a child is one which certainly abounds with difficulties but there is no other means by which our tort law can give compensation to a person who is suffering such loss. Unfortunately where the person has suffered the "ultimate [injury]," [Thornborrow v. MacKinnon] p. 744 [O.R.], that being the death of a child caused by the negligence of another, the only way that our tort law can compensate the claimant is through an award of monetary damages.

I have reviewed the decision of Mr. Justice McIntyre in the case of 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. The learned Justice, in that judgment, in trying to assess what was meant by "society and comfort" of a spouse said at p. 439 S.C.R., p. 391 D.L.R.:

"I am not prepared to accept such an approach. It is my view that, the Legislature having created the right of the wife to damage and having omitted any restriction on damage awards, the courts must endeavour to assess the damage 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.

It is my view that in the Thornborrow v. MacKinnon decision, Mr. Justice Linden expressed what should be the Court's interpretation of the word "companionship" in uniquely eloquent terms when he wrote [p. 748]:

"The companionship of a parent and child is a truly unique pleasure. The joy of sharing experiences with one's child is hard to surpass, whether it be sports, culture, conversation or play. There are not many activities more enjoyable for a parent than to participate with one's child in the celebration of birthdays, graduations, weddings, the births of grandchildren and all of the other landmark events in their lives. What greater joy is there than to be with one's child on religious holidays, such as Christmas or Easter or Chanukkah? What could be a greater pleasure than to accompany one's child to a movie, a circus or a hockey game? What can be more marvelous than to hear one's child laugh, to cuddle it before bed or to watch it play with a dog? To see the enthusiasm for life in one's children often helps to restore one's own faltering commitment to a better world. Yes, companionship with one's children is one of the most prized of human experiences. To lose that is one of life's greatest losses. It was to provide compensation for that loss of companionship that the Ontario Legislature inserted that language into the Family Law Reform Act, 1978. It was not meant to be treated as a trivial loss, for it is not."

I clearly realize that there is to be no compensation allowed, however, for grief or solatium. As has been alluded to in other decisions, the compensation to be awarded are the heads enumerated by the Family Law Reform Act and anything which would have been permitted under the common law. But although semantically to eliminate the presence of the consideration of grief while considering the just monetary award for the loss of the companionship of a child, one has to have the deceptive skill of a "Houdini" to honestly deny its presence. I am given much assistance as to the manner in which I should approach compensation in this case by the discussion of s. 60 of the Family Law Reform Act to be found in the judgment of our Court of Appeal in Mason v. Peters, supra, and in particular, the judgment of Mr. Justice Robins, who spoke for that Court.

Mr. Justice Robins wrote a clear and concise history of how Lord Campbell's Act, 1846 (U.K.), c. 93 translated itself into the Fatal Accidents Act in England and thence to Canada, fixing our law for so many years to which has been now judicially described as an affront to our national sense of justice. In reference to the word "companionship" as found in s. 60 of the Family Law Reform Act, Mr. Justice Robins wrote [at p. 33 O.R.]:

"The most significant loss suffered, apart from the sorrow, grief and anguish that always ensues from such deaths, is not potential economic gain, but deprivation of the society, comfort and protection which might reasonably be expected had the child lived - in short, the loss of the rewards of association which flow from the family relationship and are summarized in the word 'companionship'."

In his judgment, Mr. Justice Robins set out a number of authorities to be found in the United States which indicate the "growing recognition of the need to afford compensation for the loss of companionship notwithstanding its essentially non-pecuniary character".

It must be with great satisfaction that we, who feel that our law moves towards justice, even though at times slowly, will never be able to hear the aphorism "it is cheaper to kill than to injure."

In a penetrating and lucid description of the meaning of s. 60 of the Family Law Reform Act and its importance in impact on the law of compensation arising from death, Mr. Justice Robins wrote at pp. 37-8:

"Now, we have a general scheme of compensation covering family losses where injury, whether the injury is fatal or non-fatal, is caused by a third party to one of the family members. The right of action established by the Act evidences the Legislature's intention to accord greater recognition to the interest in family relations and provide greater protection against wrongful disturbance or destruction of that advantageous relationship. Consistent with that intent, s. 60(2) is aimed at repairing certain losses which may not fall within the pecuniary loss category and can properly be awarded only on a non-pecuniary basis. Guidance, care and companionship cannot ordinarily be equated in dollar value; the deprivation of these important elements of a family relationship is not generally capable of computation on a strictly monetary basis; and while it cannot be said that they can never constitute economic benefits (Vana v. Tosta et al., [1968] S.C.R. 71, 66 D.L.R. (2d) 97), the connection can seldom be traced from one to the other. Guidance, care and companionship, including as they do imponderable elements of loss, are essentially non-pecuniary in character.

In enacting s. 60(2), the Legislature intended to extend the measure of damages by permitting recovery for loss of guidance, care and companionship on a non-pecuniary basis. If this were not so, s. 60(2)(d) would be meaningless. Clearly, recovery may be had under s. 60(1) for losses of every kind and character suffered as a result of the death, subject to only one restriction - the losses must be pecuniary. If the same restriction were intended to apply to the damages for guidance, care and companionship authorized by cl. (d), the clause would serve no useful purpose, for if the losses were pecuniary, they would already be recoverable under s. 60(1). To confine compensation for lost guidance, care and companionship to pecuniary loss would be to treat cl. (d) as mere surplusage and without meaning or purpose of its own. To the contrary, that provision, in my view, was expressly designed to accommodate non-pecuniary awards for family losses of this nature, and, it follows, to reform the law by enlarging the measure of damages accordingly.

This represents an important step forward in cases involving the wrongful death of minor children. Pecuniary loss concepts have proven excessively restrictive in these cases and have produced awards wholly incommensurate with the true loss sustained by a child's death. By expanding the measure of damages to include non-pecuniary elements of loss, the Family Law Reform Act recognizes the child as an integral part of the family unit, not simply as a potential source of future service or monetary gain, and provides an effective basis for more realistic and just damages than those awarded under the Fatal Accidents Act for tortious violations of this family relationship."

In awarding damages for the loss of care, guidance and companionship of a child whose life has been taken due to the negligence of another, each word must be examined separately when considering what compensation is to be awarded and related to the facts as called at trial relevant to the position the child held in the family unit, both to his brothers and sisters, if any, and to his mother and father, if living.

The changes enacted by the legislators become hollow gestures made to rectify social inequities in our past law if we as Judges do not put flesh and meaning to their intentions. The words of s. 60 form the skeleton which, with imaginative pens, we as Judges must bedeck with a suitable and deserving raiment.

Each case must be scrupulously and carefully examined.

An award following the death of one child, when applying s. 60 of the Family Law Reform Act, might and perhaps will offer little guidance to a Court considering the death of a child in another. Families differ greatly in the closeness which exists between their members and the atmosphere of "love" generated by such unit.

Each word (care, guidance and companionship) must be examined separately to explore what the Legislature intended or how this most important enactment should be interpreted.

"Care" is a factor which must cause the Judge to project his mind to the future. Does the evidence satisfy him that the child who was killed would, in the years to come, bestow care upon his parents or his or her brother and sister, should such be needed? One should reflect on how many times we have heard the words of proud parents speaking of how one of their children has cared for them in times of stress, be it emotional or pecuniary.

The element of care is closely wedded to the element of guidance as when the child takes the hand of the elderly parent who so many times took his during his youth.

It is not just in oriental or other ethnic societies or environments that this ultimate repayment for love given can be seen; but, to an ever growing extent, in western culture as well. The "care and guidance" given to the elderly parent is hopefully to be less and less forfeited to the "old age home", but preserved in the atmosphere where it flourishes and is not stunted by loneliness. In my view, this fact was not lost sight of by the framers of the legislation.

The case of Mason v. Peters is not in my view to be used as the highest range of compensation involved in the translating of the word "care" into a damage award because its facts were so dramatically discernible (i.e., care involved in the attending to a mother who was tragically paralyzed). A son or daughter may provide a myriad of acts of assistance of greater and lesser degree, motivated by love of which the aged parent is the proud and thankful beneficiary. The Court should closely examine the facts of each case and determine would this child, now deceased, have been likely to provide this type of care and guidance and, having made this decision, then be resolute that it is reflected in its award. Before leaving this portion of my judgment, reflect on the number of times we have heard a parent or even a sibling ask of a member of his family, "Should I buy this home . . .", "The man wants to sell me such and such, would I be wise to buy . . .", "Would you help me with my gardening, or shopping, or getting ready for a short trip. . . ." The list is endless of the joy and benefit gained by the help made tenfold by the love which motivated it.

Perhaps the most readily understood loss which the Legislature has not made compensable is that of "companionship". A great observer of life's scene once penned:

> "No man is an iland intire of itselfe. Every man is a peece of the continent a part of the maine; if a Clod bee washed away by the sea, Europe is the lesse as well as if a promontorie were, as well as if a mannor of thy friends or thine owne were; any man's death diminishes me because I am involved in mankinde; and therefore never send to know for whom the bell tolls; it tolls for thee." [John Donne, Meditation XVII]

meaning that companionship is one of life's greatest needs and forces. It is this companionship which may lift our lives if it be rewarding, to the heights of beauty or can shatter it, if it be otherwise.

It is the "nexus" of the existence between two or more human beings, or which can give existence meaning, hope and indeed purpose. It is my judgment that it is in this context that the word finds its way into the Family Law Reform Act.

In short, the words "care, guidance and companionship" correct the arid wasteland of the verbiage to be found in the Fatal Accidents Act.

DAVID JOHN REIDY

David John Reidy was a member of a large and tightly knit family, its members being as follows:

(a) Patrick Reidy, father, age 59 years, born August 26, 1924;

(b) Shirley Reidy, mother, age 59 years, born January 21, 1925;

(c) Brian Patrick Reidy, brother, age 31 years, born June 6, 1953;

(d) Caroline Reidy, sister, age 30 years, born June 26, 1954;

(e) Wayne Douglas Reidy, brother, age 29 years, born May 26, 1955;

(f) Dianna Pennell, sister, age 28 years, born September 22, 1956;

(g) Joseph Phillip Reidy, brother, age 26 years, born April 1, 1958;

(h) Hazel Stinchcombe, grandmother, age 80 years, born June 9, 1904.

David Reidy was born on December 22, 1964 and was aged 17 years at the time of his death. His father has been employed as union officer with the Letter Carriers Union of Canada, working as a letter carrier prior to such appointment. During his early life, he had served in the army in the Second World War and in Korea. David was the youngest member of his family and when he was killed, he was the only child still living at the family home in London.

David's mother has worked through the major part of her marriage in a nursing home, taking a period of approximately six months off prior to and following the birth of each child, with the exception of David, following whose birth she did not resume employment for two years until she became re-employed at the "Dearness Home" for the elderly where her daughter Dianna also works.

It is most difficult for me to reflect in words which must carry with them a great deal of sterility when compared with the impact of the evidence that Mr. and Mrs. Reidy and the members of their family who testified at trial, had upon me. They are a warm, caring family, each attempting to give to the other the loyalty and love which cements this family unit.

There is no room for doubt in my mind that, prior to May 7, 1981, perhaps to some degree because he was the youngest and certainly to a major degree because of the unique qualities David possessed, his was a most important factor in the healthy, rewarding companionship shared by all.

David's ambition tended towards the military. He was attending H.B. Beal Secondary School when killed. His school records were filed as Ex. 7-A at trial. Although his ultimate ambition was to attend Royal Military College, counsel for the plaintiff agreed that this goal did not seem to be realistic and this fact is borne out by evidence of his academic achievement prior to his death. In the report of his secondary school progress, filed as Ex. 7-A in this action, the comments of his teacher, M.G. Pooley, following David's death should in my view be noted:

> "David left a memory in the minds and hearts of everyone he touched. He was the essence of all that is good at H.B. Beal."

David's interest in the military was no doubt fostered by the fact that his father had served for an extended period in the armed forces and also that his brother Joseph is a member of the Princess Patricia's Light Infantry. His brother was stationed at Winnipeg at the time of his death and then transferred back to London when the fact of David's death was learned.

In his evidence, Mr. Patrick Reidy gave a detailed and lengthy account of how particularly vital was the companionship of his son David to his wife and also to himself and other members of the family unit.

David had joined the army cadets in September 1977, becoming a "gold star" cadet in his last year. As a tribute to him, he was promoted to the rank of sergeant posthumously. He would attend cadet camps in the summer at Meaford and Ipperwash, continually writing or phoning home to his parents as to events in which he was taking part. Each year, Mr. Reidy and his wife would visit him at camp, sharing in part his excitement.

Mr. Reidy testified that David was the only child at home since August 1977. He would on a typical day, between 5 a.m. and 6 a.m., talk with him until he left for work at 6 a.m. David would then talk with his mother until she left at 7:15 a.m. David willingly did his chores around the home such as carrying laundry, putting dishes in the dishwasher, cleaning floors, helping his father with heavy jobs, cleaning his own room and setting the table for the evening meal. The Reidy home is surrounded by a large back yard which contains fruit trees and where vegetables are grown. David would do 75 per cent of the weeding, cut the lawn and trim the trees and shrubs.

Filed as Ex. 6 in this action are a certificate of achievement and an award of merit which were made to David Reidy with respect to his activities to maintain safety standards in regard to the school bus. Evidently, David would go with the school bus while it completed its route in transporting students and would make sure that the students entered the bus safely. He would then see that the students entered the school safely and helped in crossing various traffic arteries. This type of evidence is to my mind relevant when considering the exceptional degree of responsibility which David seemed to feel in regard to the welfare of others and would in my judgment be translated into a much greater degree in the companionship which he would give to his parents and brothers and sisters.

Mr. Reidy testified with pride which was wholly justified how David had been awarded by the Duke of Edinburgh the

"Silver Award" on the occasion of his visit to London in 1980 and an achievement award by the Lieutenant Governor of Ontario, the Honourable John Aird. Photographs of these two events are to be found in Ex. 14. The award itself and the standard of service to the community which must be attained before a boy may be honoured to receive it are to be found in Exs. 3 and 10. I was also impressed by the series of certificates which David had received due to his service with the army cadets and filed collectively as Ex. 5.

Again, I feel that all this type of evidence is relevant when determining what compensation is to be awarded for loss of the "care, guidance and companionship" caused by the death of a boy such as David Reidy who, in my judgment, was propelled by feelings of compassion for those he loved or felt responsible for at an exceptional level for one of his age.

David's brother, Wayne Reidy, became involved in the "drug culture", which ultimately led to criminal charges being laid against him and his serving a prison sentence. The whole family have been supportive of Wayne and share a hope in his rehabilitation. I was particularly impressed by David's letters written to his older brother at prison marked Exs. 1-A, B and C in these proceedings. They reflect a mature, loving attempt to communicate his feelings and desire to help Wayne by assuring him of not only his but also his family's love and support. To illustrate the depths of his response to his brother's problems, I have extracted a few portions from those letters:

> ". . . I hope they are keeping a good care of you Wayne."
>
> "Wayne I love you mom and Ada love you to and the kids . . ."
>
> ". . . I waiting at home for you my best buddy I am praying for you in my bed every night . . . P.S. Oh please do not leave me . . ."
>
> ". . . But do you love me yes you do and every buddy loves you . . . please be home for my sake . . ."

And to illustrate David's letters were not unappreciated, filed as Ex. 2-B is one of Wayne's replies, reading in part:

> "Hi Dave - how my buddy I liked the letter you wrote me. The people here ya there keeping good care of me. I love you Dave I always will so don't worry . . ."

All the children have been raised in the Catholic faith. On the evidence, it is clear that the home of Mr. and Mrs. Reidy has become the focal place for the family and grandchildren to gather on weekends and days when holidays are celebrated. Members of the family are in continuous communication by either physical presence or by telephone. Birthdays, baptisms, Holy Communion are celebrated together and memorial Mass is held for David each year. Each member of David's family has published in the local newspaper in prose or poetry a tribute to David's memory. Some of these expressions of affection are to be found in Exs. 15 and 16.

David's health prior to his death had been excellent. In fact, he had just passed a medical examination preliminary to his going to army cadet camp at Banff, Alberta, in the summer of 1981.

Mr. Reidy, when during his testimony he was asked to describe the effect of David's death on him and his family, verbalized it as "devastating". The effect on him and his wife of the loss of David's companionship was such that it threatened their marriage itself. Mr. Reidy has found solace in group therapy held with others who have suffered tragic personal loss. He described David's death in terms of "torn the centrefold out of his life". His son's memory is constantly with him, which fact is illustrated by his bringing fresh flowers to his grave twice each week.

David's death has had a particularly profound impact on his mother, Shirley Reidy. As I have said, following David's birth she remained at home with him for a period of two years before returning to work in the physio department of the Dearness Nursing Home. She loved him as the baby in the family and this love was reciprocated by David in a most meaningful and supportive way. David and she would talk each morning and in the evenings. He was extremely affectionate and would say that he "would never be too old to kiss you".

She, in trying to put words to her emotions following his being killed, said that she was possessed by a complete "emptiness" and "could not function". She has been unable to attend the group sessions with her husband, testifying that the beauty of her relationship with David was one which she could not share.

Her depression, in part, led to her being admitted to hospital on November 8, 1983. A medical brief, including the reports of Doctors Bhamjee and Corrigan, was filed at trial and marked as Ex. 19. A reading of the report of Doctor Tillman indicates a major cause of her troubles was not pathological but "unresolved grief over the loss of her youngest son". In passing, Doctor Shulman indicates the same inability to resolve his grief over David's death of Mr. Reidy. In his

report, dated October 26, 1983, Doctor Tillman writes as follows:

> "On pursuing her feelings associated with her dead son, it became evident to me that she is not able to relinquish her son emotionally. She states that at times she still talks to her son as she views his picture on the wall. She still finds herself on occasion aware that she is waiting for him to step in the door, so to speak, at home. She pointed out that her husband, in his way, is struggling too with the son's death. She supports this opinion in that he insists upon the son's clothing being left in his room and not allowing her to put it away. We learned from her that her husband attends a group therapy program at the University Hospital which seemingly is designed to enable an individual to deal with unresolved grief. The patient claims that she attended once, but is not interested in attending further. She was able to talk about her awareness of some underlying angry feelings directed towards God or towards family members of the other peers of her son, who were killed in the same automobile accident. She realizes that these feelings are out of proportion, but still do exist."

I was most impressed with the manner in which all members of the Reidy family testified. None attempted to overstate the loss they all feel but their testimony made it glaringly clear that the loss of David's companionship created a very real vacuum in the family unit.

Mrs. Reidy testified as to the bond between them which, if anything, strengthened as he grew. The others considered him the "baby" of the family and all showered love on him which he reciprocated. David admired his brother Joseph and it was this respect which led to his interest in the army cadets. Mrs. Reidy spoke of the feeling of emptiness she still carries with her and, although she realizes the impossibility of such thoughts, keeps expecting his return.

As I have stated, when he was alive David and his mother would talk each morning and evening. The effect of her evidence was that David was the one person in her life whom she could really communicate with and express love. She even stated that she looks upon death as a means "by which she might see him again. . . ."

Dianna testified that she would take him with her when he was very young. If he took the bus anywhere, she would meet him. She left home at 20. She would phone every night and talk to her parents and David. The small children still talk of Uncle David with great affection. Although her family

lives near the cemetery, she still cannot bring herself to visit his grave. She sought assistance from Janice Broker, a social worker, and sessions with her have helped her deal with her grief.

Caroline is 29 years of age. She has had a somewhat troubled past, having had a child from a common law relationship, and became in trouble with the law in 1983. She stated her family were shocked but supportive. She took care of David while her parents worked. David was like her own child. He was very affectionate and would demonstrate his warmth and feeling of love towards her. She continued to care for him between the ages of five and ten years. When she left home, David was nine or ten and she 18 years. David was very good with her daughter Kimberley, and he would talk to her about his experiences with the cadets. It was her testimony that David was particularly close to Dianna.

Caroline is in daily contact with her parents and the family gathers together frequently. Her daughter still treasures such items as pictures of David and a hand puppet he made for her. She stated in her evidence that his death was the hardest thing she has had to deal with in her life so far stating, "I hurt, God how I hurt." She tries to express her feelings in the "in memoriam" which she composes each year on the anniversary of his death.

Brian Reidy is employed as a letter carrier. He is the oldest of the Reidy family, being 30 years of age, and is married with a family. There was nine to ten years difference in age between him and David. Brian was quite a proficient ballplayer, and would take David to the games in which he was playing and helped David with hockey in the winter. He spoke of David in warm affectionate terms as to how he would help his mother and work around the house. David's death caused an emotional impact on the family unit which even led to a behaviour pattern change in him. He still goes to the cemetery every second week.

Joseph Reidy is 26 years of age, holds the rank of corporal in the Canadian army and is presently stationed in London. At the time of David's death, he was stationed in Winnipeg but transferred to London on compassionate grounds. He was six years older than his brother David, and they were not close until Joseph reached the age of twelve years. He would take him to sporting events. When Joseph was in the army cadets, he would often come home and find David polishing his buttons and cleaning his boots. In addition to his father, it would appear to have been Joseph who first stimulated David's interest in a military career. He testified how, when David was gone during the summer, he would write letters home three times per week. He testified as to the

shock and emptiness created by his death.

Wilf Brockman, who is a stockbroker employed by Merrill Lynch, testified as to David's involvement with the army cadets. Mr. Brockman is a senior training officer with the army cadets in London. He spoke of the London cadets as being more active than most he has seen throughout this province and in glowing terms in regard to David's participation. He described David as a very committed young boy, arriving to meetings or parades early and leaving late. He was very popular with his peers and instructors. These facts are, of course, witnessed by the awards and presentations with which he was honoured and to which I have earlier referred. His fellow cadets featured prominently at the funeral.

David's grandmother, Hazel Stinchcombe, also claims in this action. She is presently 80 years of age and, at the time of trial, was prevented by illness from attending. Although the evidence was slim in her regard, it would appear that David was very good to her and their relationship was quite close. I have no reason to conclude that she has not suffered a loss compensable by reason of s. 60 of the Family Law Reform Act.

JAMES RONALD BLAKEY

Elaine Eleanor Goldsack brings her action for damages resulting from the death of her son, James Blakey, on her own behalf and on behalf of her surviving children.

Mrs. Goldsack has been married twice. She is 53 years of age and has borne six children, five of whom survive. Her first marriage was to Ernest Blakey and took place in 1950. There were five children born as a result of this marriage, namely:

(a) Diane, born February 10, 1951;

(b) Charlene, born November 5, 1952;

(c) Randolph, born December 26, 1953;

(d) Karen Ann, born March 6, 1958;

(d) James Ronald, born September 18, 1964.

This marriage ended in divorce in 1967. She married Ernest Goldsack on September 26, 1967. One child has been born as a result of this marriage, a boy, Ernest Goldsack, born August 26, 1967. She has been separated from Ernest Goldsack

since 1979.

James was 17 years of age when he was killed.

Mrs. Goldsack attended school until Grade VIII. She has worked at various jobs throughout both marriages, but is presently unemployed and receives no support from Mr. Goldsack who left her and has been engaged in criminal pursuits. She lives on unemployment insurance and family allowance. Her age, educational background and present economic climate would seem to militate against her employment opportunities.

Mrs. Goldsack testified that she enjoyed a very close relationship with James. On hearing her testify, one gained the impression that he provided her with the companionship a mother would normally seek with her husband. She stated that, in addition, an exceptionally close bond grew between James and his step-brother Ernest, with James really attaining that of a father image.

Her second husband left home because of an involvement with drugs. At this time, only two boys remained at home, James and Ernest.

James would include Ernest in most of his activities. James' abiding interest was in the cadets and during the summer he would willingly contribute $20 per week to her household expenses. She would discuss problems with James and described his death as taking a piece from her heart which can only take so much.

There was evidence that Mrs. Goldsack had long chats with her son during which they exchanged news of their lives, offered and accepted advice and encouragement. Mrs. Goldsack went so far as to say that if she had an important decision to make, she would seek out James. There was also evidence that for some time before his death James stopped an allowance from his mother and found a job and began paying his mother $20 per week for room and board. James also spoke of leaving school for the balance of the year to help out his mother financially.

Following James' death, Ernest's grades dropped in school and he clearly showed the tragic effect that the loss of the companionship of James had upon him.

The particularly close relationship which existed between James and his mother was exhibited by the evidence that an invitation to the wedding of the sole survivor of the accident (Rise Appleton) so upset Mrs. Goldsack that she sought medical assistance.

Glen Brown, who is married to Mrs. Goldsack's daughter Diane, testified. When they met in 1967, James was three years of age and Ernie had just been born. He testified that they were a close-knit family. He and his wife lived at

Stratford but would return each week and for barbecues, dinners and so on. James had shown an interest in cadet training and telecommunications. His mother-in-law seemed to rely more heavily on James for moral support and as a confidant, particularly when her second marriage failed. He testified that James was warm, outgoing, that he and his mother sought each other out for advice and encouragement and he reiterated that some time before his death James, on his own initiative, stopped accepting any allowance from his mother and obtained odd jobs which would allow him to pay her some support.

Ernie had obviously felt the loss of his brother very acutely. They were the last remaining children at home. Ernie followed in James' footsteps by joining the cadets. After James was killed, Mrs. Goldsack tried to help Ernie by removing Jim's bed from the room, but Ernie asked that it be returned and he slept in it. He keeps all James' medals and trophies on display in his bedroom as if they represented a shrine to his brother's memory.

James' sister Karen testified that he would make her breakfast in bed, did the dishes and went shopping, seeming to want to be the man about the house after Mr. Goldsack left. She signed up for a school trip in James' class so they could be together. She would take James to wrestling matches and roller derbies and Ernie would "tag along".

James also received the Duke of Edinburgh award. He took great pride in his cadet activities. He was always adding to his library with books concerning the army. Filed as Ex. 21(a) and (b) are certificates which he earned as a cadet and as Ex. 20, a series of photos, one in particular showing his being presented with a "fitness award" by the Leiutenant Governor. Again, it should be underlined that the fact that James was in receipt of an award presented by the Duke of Edinburgh and by the Lieutenant Governor indicates to me that we are dealing with a boy whose unique abilities in regard to assisting those around him were recognized by those who observed him and received the highest recognition. It was these elements of James' character which he most certainly would carry into his family unit.

It would seem unnecessary to attempt to repeat in any further detail the evidence as received by this Court and given by family survivors of David Reidy and James Blakey. If this decision is reviewed by Appellate Courts, it is a loss to such tribunal that the impact of the depth of such sincere testimony is lost in the printed word.

Some authors, when dealing with s. 60 of the Family Law Reform Act, emphasize the fact that it was not intended to compensate for "grief", following the death of a loved one as

if this circumstance tends to reduce the monetary award which should be considered. It is my view that such is not the case. Nature, in its curative way, reduces the effects which grief imposes on a person following the death of a loved one; however, the loss of care one might have expected, the loss of guidance one might have expected, the end of any companionship one looked forward to, is finished and the loss in each of the three components is therefore permanent.

I hope it will not be viewed as "presumptuous" of me to make the following comments which, in my view, could affect our early approach to awards in this new area of tortious liability. This is simply that we Judges who will make the early decisions as to what monetary assessment compensates for what actual situation arising from the death of a child have been so suddenly plummetted into a whole area of dollar considerations contrary to those which directed our thinking through the dictates of the Fatal Accidents Act. Our initial assessment must not reflect the manacles placed upon us by the socially unworthy impediment to fair compensation existent in that statute. Then the road to adequate compensation for the "care, guidance and companionship" of those lost due to the tortious act of another will reach the ends envisioned by those who wrote the above words into s. 60(2)(d) of the Family Law Reform Act.

It is my view that some small award should be made to Mr. and Mrs. Reidy for pecuniary loss, flowing from financial assistance which might have been made by David in the future and assess this figure at $5,000. In regard to the loss suffered by Mr. and Mrs. Reidy and the Reidy children, I make the following assessments. The variance in such I hope I have been able to touch upon in this judgment, but which I feel are supported by the evidence in its totality.

Patrick Joseph Reidy	$35,000.00
Shirley Reidy	50,000.00
Brian Reidy	2,000.00
Caroline Reidy	5,000.00
Wayne Reidy	2,000.00
Dianna Reidy	10,000.00
Joseph Reidy	5,000.00
Hazel Stinchcombe	2,500.00

Expenses as agreed	4,963.46

The Reidy Family are to be entitled to prejudgment interest pursuant to the provisions of s. 36 of the Judicature Act, R.S.O. 1980, c. 223 and their costs of this action as if it had been initiated separately.

In assessing the pecuniary portion of the award to be made to Mrs. Goldsack, and remembering that James at a very early age was sensitive to his mother's financial plight, I would assess the financial assistance which she could reasonably have expected at $10,000.

At the risk of being repetitious in this action, it is my strong feeling that having regard to the testimony of the loss suffered by Mrs. Elaine Goldsack in regard to the care, guidance and companionship of her son, hers was the greatest. I would therefore assess to Mrs. Goldsack and her children, damages flowing from s. 60(2)(d) of the Family Law Reform Act as follows:

Elaine Goldsack	$65,000.00
Diane	3,500.00
Charlene	3,500.00
Randolf	2,500.00
Karen Ann	3,500.00
Ernest Goldsack	15,000.00

Having been agreed upon and paid, no claim was made for out-of-pocket expenses. Mrs. Goldsack and her children are to be entitled to prejudgment interest pursuant to the provisions of s. 36 of the Judicature Act.

The plaintiffs should have the costs of the action. The judgment in regards to Ernest Goldsack should be paid into court to be paid out in accordance with the rules.

Judgment for plaintiffs.

CASE COMMENT

Reidy v. McLeod, Gervais v. Richard, and Borland v. Muttersbach

John Irvine

The decisions of Bowlby J. in Reidy v. McLeod, ante, p. 183, and of Krever J. in Gervais v. Richard, ante, p. 105, strikingly illustrate the serious rift of judicial opinion in Ontario as to the principles which should govern the assessment of damages for "the loss of guidance, care and companionship" of a tortiously slain relative, under s. 60(2)(d) of the Family Law Reform Act of Ontario, R.S.O. 1980, c. 152.

> "60(1) Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part II, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (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."

I shall not presume to take sides in that dispute, but its importance is such as to require close attention. For the issue is by no means a parochial one, a peculiarity of Ontario's fatal accident law. The same debate is even now surfacing in Manitoba, where recent amendments to the Fatal Accidents Act, R.S.M. 1970, c. F50 (also C.C.S.M., c. F50) incorporate precisely the same concept in closely similar language [Section 4(4) [en. S.M. 1980, c. 5, s. 1; am. S.M. 1982, c. 51, s. 9]]:

all purposes to have been granted at the end of that period under Part 3 of the Act of 1947 without any condition or limitation. It might have been supposed that there was no object in bringing in these provisions, incorporating by reference the wide powers contained in s. 14 (1) of the Act of 1947, unless it was intended to bring all existing caravan sites (of both classes) within the system of control. The argument, however, for the applicant is that it was desirable to give the planning authority knowledge of the existing sites so that they could consider the desirability of these sites, and so that (i) they might regularise such caravan sites as appeared to be desirable, or (ii) eliminate undesirable sites, by the means provided under s. 26 of the Act of 1947, by a discontinuance notice, which of course involves compensation for the site owner under s. 27. The question is not at all easy, and the arguments for each side seem very well balanced, but on the whole it would appear that the court should come down on the side of the applicant, for this reason. It is a very difficult proposition to sustain that when there are well established methods of proceeding under the Act of 1947, which provide for compensation for a site owner whose rights in his property are injured, new provisions contained in the Act of 1960 provide for deprivation of the owner's rights in such way as to prevent him obtaining compensation for his loss.

Of course, the site owner's troubles may not be at an end. The Battle Rural District Council (who are both planning authority and licensing authority for the purposes of the two Acts) may have a second barrel to their gun which might be fatal to the applicant. We are only concerned with planning permission; but the authority, under s. 5 of the 1960 Act, as licensing authority, might impose a condition on the licence restricting the number of caravans to six, and the magistrates, if appealed to under s. 6, might think such a condition for this site not unduly burdensome. As regards condition 2, which imposed on the northern section a condition that no caravans should be stationed on the southern section, the objections to this condition were based on the view taken by the Court of Appeal in *Hall & Co., Ltd.* v. *Shoreham-by-Sea Urban District Council* (14). The imposing on an existing caravan site of conditions not affecting that site but a piece of adjoining land certainly seems to have little to commend it, though if it be the fact that the use of the southern section as a caravan site has not been established, it would appear that injury to the owner of the site cannot be great, even if indeed it exists at all. But in any case the learned judge in view of the way in which the case was presented to him found great difficulty in dealing with the matter and considered that it was not surprising that there were no effective findings of fact by the inspector as to the position of the southern section. In the result, if condition 1 is to be treated as ultra vires, probably condition 2 must go too, and, as the learned judge said, the position remains open.

The judge reached the right conclusion and the appeal must be dismissed.

The result of that appears to be that the permission is quashed and the matter goes back to the Minister for further consideration. In the circumstances, it does not seem necessary for me to consider the argument (presented as an alternative to the contention of ultra vires) that the inspector and the Minister had not acted on the proper basis.

A number of cases were mentioned in argument. They have been considered but have not been referred to because they appeared to depend largely on matters of fact special to those cases, and did not really deal with the points which have troubled us.

DAVIES, L.J.: I entirely agree, and do not wish to add anything.

SELLERS, L.J.: I also agree with the judgment of DANCKWERTS, L.J., upholding as it does the decision of SACHS, J. I think that the area of the existing caravan site, the north area hatched in black on the plan, was somewhat fortuitously fixed, for the applicant was claiming the whole field as a caravan site and

(14) Ante p. 1.

the position of the fence cutting off .78 of an acre at the northern end probably included more land than would have been allocated to the caravan site if no fence had been erected. Nevertheless the inspector and the Minister seem to have accepted that piece of land as a caravan site and, if so, there was room for expansion by adding additional caravans to a degree not involving development.

A lesser area of land, only adequate for six caravans, which might have been found as the caravan site, would have involved no deprivation of the applicant's existing rights, but on the site which he has been found to have had I think condition 1 curtailed his rights without compensation. It was therefore ultra vires.

Appeal dismissed. Leave granted to the Minister to appeal to House of Lords, on terms that orders for costs in favour of applicant in court below and Court of Appeal remain undisturbed and of payment of applicant's costs in House of Lords by respondents in any event.

Solicitors: *Solicitor, Ministry of Housing and Local Government; Sharpe, Pritchard & Co.*, agents for *Clerk to the Battle Rural District Council*; *Garber, Voules & Co.* (for the applicant).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

ROOKES *v.* BARNARD.

[HOUSE OF LORDS (Lord Reid, Lord Evershed, Lord Hodson, Lord Devlin* and Lord Pearce), July 1, 2, 3, 4, 8, 9, 10, 11, 15, 16, November 4, 5, 7, 11, 1963, January 21, 1964.]

Tort—Intimidation—Unlawful acts—Whether threat to break contract sufficient to constitute unlawful element in tort of intimidation.

Trade Union—Immunity—Members' immunity from civil action—Threat to strike in breach of contract with employers—Purpose of threat to secure dismissal of appellant—Whether authors of threats liable for tort of intimidation—Whether immunity conferred—Conspiracy, and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 3, as amended by Trade Disputes Act, 1906 (6 Edw. 7 c. 47), s. 1—Trade Disputes Act, 1906 (6 Edw. 7 c. 47), s. 3.

Damages—Exemplary damages—Principle—Categories in which award of exemplary damages given—Aggravated damages distinguished.

There is at common law a tort of intimidation by a threat to a person other than the plaintiff to do an unlawful act, made with the intention of damnifying the plaintiff, whereby loss accrues to him, and for the purposes of constituting the tort there is no distinction between a threat to do a tortious act to, and a threat to break a contract with, the person threatened (see p. 373, letter I, p. 374, letter D, p. 375, letter B, p. 384, letter F, p. 386, letter I, to p. 387, letter A, p. 395, letter E, p. 397, letter G, to p. 398, letter B, and p. 416, letter A, post).

Dicta of BOWEN, L.J., in *Mogul Steamship Co., Ltd.* v. *McGregor, Gow & Co.* ((1889), 23 Q.B.D. at p. 614), of LORD WATSON in *Allen* v. *Flood* ([1895-99] All E.R. Rep. at p. 69) and of LORD DUNEDIN in *Sorrell* v. *Smith* ([1925] All E.R. Rep. at p. 14) considered.

Cooper v. *Millea, McBride and Drohan* ([1938] I.R. 749) and *Riordan* v. *Butler* ([1940] I.R. 347) applied.

The appellant was employed by B.O.A.C. as a skilled draughtsman at London Airport and, until November, 1955, was a member of the Association of Engineering and Shipbuilding Draughtsmen (A.E.S.D.), a trade union, between which and B.O.A.C. an arrangement for one hundred per cent. union membership prevailed. In that month the appellant resigned his membership owing to a disagreement with the association. At all material times there

* LORD DEVLIN retired on Jan. 10, 1964.

was an agreement between B.O.A.C. and A.E.S.D. that there would be no strikes and that, in the event of a dispute, direct negotiations would take place and, if they failed, the matter would be referred to the Ministry of Labour. This agreement formed part of the contract of service of each member of A.E.S.D. with B.O.A.C. Until the appellant's resignation the membership of the London Airport Branch of A.E.S.D. was one hundred per cent. On Jan. 10, 1956, at a meeting of the airport branch of the union a resolution was passed that B.O.A.C. should be informed that all members would withdraw their labour if the appellant were not removed from the design office by 4 p.m. on Friday, Jan. 13, 1960. The three respondents spoke in favour of the resolution, two of them, B. and F., being fellow employees of the appellant and the third S., being a divisional organiser of the union, but not an employee of B.O.A.C. This resolution was presented to B.O.A.C. In consequence of it the appellant was first of all suspended from his employment and later given notice to terminate it. There was no breach of his contract of employment by B.O.A.C. It was common ground that up to the time of the appellant's dismissal a trade dispute existed concerning the appellant's employment by B.O.A.C. while not a member of the union, and that all acts of the respondents were in furtherance of the trade dispute. In an action* by the appellant against the three respondents† claiming damages against them for using unlawful means to induce B.O.A.C. to terminate his contract of service and for conspiracy to do so, the jury found (a) that there was a conspiracy to threaten strike action by members of A.E.S.D. to secure the appellant's withdrawal from the design office, (b) that all three respondents were parties to it, (c) that all three respondents made such a threat and (d) that such threats caused the suspension and the dismissal of the appellant. In his summing-up the trial judge crystallised his direction to the jury on damages as follows—"You have to consider, in relation to exemplary damages, whether this was a deliberately engineered unofficial 'wild cat' strike, forced by these three to use, at all costs, an illegal pressure, and whether on the other hand there was provocation, which could reasonably be regarded as provocation for that line of conduct." The jury awarded the plaintiff £7,500 damages.

Held: (i) the plaintiff was entitled to recover damages from the respondents, for he had established a good cause of action against them at common law for the tort of intimidation, and his right of action was not defeated either by s. 1‡ or by s. 3‡ of the Trade Disputes Act, 1906, for the following reasons—

(a) (as regards s. 1, which amended s. 3 of the Conspiracy, and Protection of Property Act, 1875) because the threat by a respondent, without combination with others, to break his contract of service if the appellant were not dismissed had the nature or quality of a tortious act, actionable as such, the tort being the tort of intimidation; and s. 1, though intended to give immunity from an action for conspiracy in respect of acts done in concert which would have been lawful if done by one individual alone, was not intended to give protection to the use of unlawful means, e.g., the tort of intimidation (see p. 401, letters E and F, p. 387, letters D to H, and p. 416, letter B, post; cf. p. 376, letter D, and p. 395, letter G, post).

(b) (as regards s. 3 of the Act of 1906) (LORD EVERSHED not dissenting) because, on the true construction of s. 3, the immunity that it provided was limited to conduct not tortious in other respects than that of inducement of breach of contract or interference with employment by lawful means (it being

* Reported [1961] 2 All E.R. 825.

† The defendant S., Mr. Silverthorne, died after the judgment at first instance but before the hearing of the appeal to the Court of Appeal. Throughout this report the term "respondents" is used to denote the three defendants and, where apt, the executrix of Mr. Silverthorne against whom the appeal was carried on in his place.

‡ Section 1 and s. 3 of the Trade Disputes Act, 1906, are set out at p. 375, letter C, post.

doubtful in 1906 whether such interference was actionable), but s. 3 did not protect the use of means otherwise tortious, as where there were threats or violence; therefore, s. 3 did not provide immunity where, as here, there were threats to break contracts and the tort of intimidation was established (see p. 378, letter H, p. 380, letter D, p. 389, letters D and E, p. 396, letter D, p. 405, letter E, and p. 416, letter I, to p. 417, letter A, post).

Dictum of LORD LOREBURN, L.C., in *Conway* v. *Wade* ([1908-10] All E.R. Rep. at p. 346) applied.

(ii) (a) English law recognised the awarding of exemplary damages, that is, damages whose object was to punish or deter and which were distinct from aggravated damages (whereby the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into account in assessing compensatory damages); and there were two categories of cases in which an award of exemplary damages could serve a useful purpose, viz., in the case of oppressive, arbitrary or unconstitutional action by the servants of the government, and in the case where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff (see p. 407, letters C and F, p. 408, letter F, p. 410, letters D, F and H, p. 380, letter H, p. 392, letter E, p. 396, letter F, and p. 417, letter H, post).

Dictum of WILLES, J., in *Bell* v. *Midland Ry. Co.* ((1861), 10 C.B.N.S. at p. 307) considered, *Owen and Smith* v. *Reo Motors (Britain), Ltd.* ([1934] All E.R. Rep. 734), and *Williams* v. *Settle* ([1960] 2 All E.R. 806) criticised. *Loudon* v. *Ryder* ([1953] 1 All E.R. 741) overruled (see p. 412, letter F, post).

(b) the present case was not a case for the award of exemplary damages, and, as the direction of the trial judge meant that the tort of intimidation was always punishable by such an award, there should be a new trial on the question of the amount of damages (see p. 380, letter I, and p. 414, letters A and B, post).

Per LORD DEVLIN: (i) the fact that the injury to the plaintiff has been aggravated by the malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied, is not justification for an award of exemplary damages; aggravated damages can do in this type of case what otherwise could be done by exemplary damages (see p. 412, letters C and H, post).

Dictum of LORD ATKIN in *Ley* v. *Hamilton* ((1935), 135 L.T. at p. 386) approved.

(ii) when considering the making of an award of exemplary damages, three matters should be borne in mind—(a) the plaintiff cannot recover exemplary damages unless he is the victim of punishable behaviour, (b) the power to award exemplary damages should be used with restraint, and (c) the means of the parties are material in the assessment of exemplary damages (see p. 411, letters C, D and E, post).

Decision of the Court of Appeal ([1962] 2 All E.R. 579) reversed on (i) above.

[As to the tort of intimidation, see 37 HALSBURY'S LAWS (3rd Edn.) 126, para. 219; as to the criminal offence of intimidation, see 38 HALSBURY'S LAWS (3rd Edn.) 68, 69, para. 78; and as to the elements of the tort of conspiracy and as to justification, see 37 HALSBURY'S LAWS (3rd Edn.) 128-131, paras. 222-224; and for cases on the subject of conspiracy, see 43 DIGEST 113-116, *1184-1198*; and for cases on illegality of means, see, ibid., 116, 117, *1199-1214*.

For immunity from civil action in respect of acts done in furtherance of a trade dispute, see 38 HALSBURY'S LAWS (3rd Edn.) 66, 67, paras. 76, 77, and as to the liability of union officials, see ibid., pp. 369, 370, para. 642.

As to exemplary damages, see 11 HALSBURY'S LAWS (3rd Edn.) 223-225, para. 391; and for cases on the subject, see 17 DIGEST (Repl.) 76, *11-13*, and on the aggravation of damages in tort, see ibid., 105, 106, *192-207*.

For s. 3 of the Conspiracy, and Protection of Property Act, 1875, see 5 HALSBURY'S STATUTES (2nd Edn.) 886.

For the Trade Disputes Act, 1906, s. 3, see 25 HALSBURY'S STATUTES (2nd Edn.) 1268.]

Cases referred to:

Allen v. *Flood*, [1895-99] All E.R. Rep. 52; [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 43 Digest 111, *1164*.

Bell v. *Midland Ry. Co.*, (1861), 10 C.B.N.S. 287; 30 L.J.C.P. 273; 4 L.T. 293; 142 E.R. 462; 17 Digest (Repl.) 105, *200*.

Benham v. *Gambling*, [1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. 49; 164 L.T. 290; 36 Digest (Repl.) 231, *1227*.

Benson v. *Frederick*, (1766), 3 Burr. 1845; 97 E.R. 1130.

Butterworth v. *Butterworth and Englefield*, [1920] P. 126; 89 L.J.P. 151; 122 L.T. 804; 17 Digest (Repl.) 76, *12*.

Connor v. *Kent*, *Gibson* v. *Lawson*, *Curran* v. *Treleaven*, [1891] 2 Q.B. 545; 61 L.J.M.C. 9; 65 L.T. 573; 55 J.P. 485; 14 Digest (Repl.) 122, *854*.

Conway v. *Wade*, [1908-10] All E.R. Rep. 344; [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 43 Digest 120, *1237*.

Cooper v. *Millea*, *McBride and Drohan*, [1938] I.R. 749.

Crofter Hand Woven Harris Tweed Co., Ltd. v. *Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.

Crouch v. *Great Northern Ry. Co.*, (1856), 11 Exch. 742; 25 L.J.Ex. 137; 26 L.T.O.S. 293; 156 E.R. 1031; 8 Digest (Repl.) 16, *79*.

Dumbell v. *Roberts*, [1944] 1 All E.R. 326; 113 L.J.K.B. 185; 170 L.T. 227; 108 J.P. 139; 14 Digest (Repl.) 204, *1690*.

Dunlop Pneumatic Tyre Co., Ltd. v. *Selfridge & Co., Ltd.*, [1914-15] All E.R. Rep. 333; [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 43 Digest 13, *73*.

Emblen v. *Myers*, (1860), 6 H. & N. 54; 30 L.J.Ex. 71; 2 L.T. 774; 158 E.R. 23; 17 Digest (Repl.) 105, *199*.

Finlay v. *Chirney*, (1888), 20 Q.B.D. 494; 57 L.J.Q.B. 247; 58 L.T. 664; 17 Digest (Repl.) 104, *185*.

Garret v. *Taylor*, (1620), Cro. Jac. 567; 79 E.R. 485; 34 Digest (Repl.) 211, *1485*.

Grey v. *Pearson*, (1857), 6 H.L. Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 10 E.R. 1216; 42 Digest 626, *277*.

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

Huntley v. *Thornton* [1957] 1 All E.R. 234; [1957] 1 W.L.R. 321; 3rd Digest Supp.

Leith v. *Pope*, (1779), 2 Wm. Bl. 1327; 96 E.R. 777; 14 Digest (Repl.) 128, *903*.

Ley v. *Hamilton*, (1935), 153 L.T. 384; 17 Digest (Repl.) 188, *838*.

Loudon v. *Ryder*, [1953] 1 All E.R. 741; [1953] 2 Q.B. 202; [1953] 2 W.L.R. 537; 17 Digest (Repl.) 76, *13*.

Lumley v. *Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 42 Digest 987, *169*.

Mackenzie v. *Iron Trades Employers' Insurance Assocn.*, 1910 S.C. 79; 34 Digest (Repl.) 236, **940*.

Merest v. *Harvey*, (1814), 5 Taunt. 442; 128 E.R. 761; 17 Digest (Repl.) 105, *203*.

Mogul Steamship Co. v. *McGregor*, *Gow & Co., Ltd.*, (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; *affd.* H.L., [1891-94] All E.R. Rep. 263; [1892] A.C. 25; 61 L.J.M.C. 295; 66 L.T. 1; 56 J.P. 101; 42 Digest 968, *6*.

National Coal Board v. *Galley*, [1958] 1 All E.R. 91; [1958] 1 W.L.R. 16; 33 Digest (Repl.) 878, *1206*.

Owen and Smith (*Trading as Nuagin Car Service*) v. *Reo Motors* (*Britain*), *Ltd.*, [1934] All E.R. Rep. 734; 151 L.T. 274; Digest Supp.

Quinn v. *Leathem*, [1900-03] All E.R. Rep. 1; [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 43 Digest 112, *1179*.

Riordan v. *Butler*, [1940] I.R. 347; 2nd Digest Supp.

Scruttons, Ltd. v. *Midland Silicones, Ltd.*, [1962] 1 All E.R. 1; [1962] A.C. 446; [1962] 2 W.L.R. 186; 3rd Digest Supp.

Sears v. *Lyons*, (1818), 2 Stark. 317; 2 Digest (Repl.) 302, *98*.

Sorrell v. *Smith*, [1925] All E.R. Rep. 1; [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 43 Digest 113, *1182*.

South Wales Miners' Federation v. *Glamorgan Coal Co., Ltd.*, [1904-07] All E.R. Rep. 211; [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 43 Digest 114, *1186*.

Sussex Peerage Case, (1844), 11 Cl. & Fin. 85; 3 L.T.O.S. 277; 8 E.R. 1034; 42 Digest 650, *569*.

Taff Vale Ry. Co. v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; 70 L.J.K.B. 905, n.; 83 L.T. 474; 43 Digest 92, *957*.

Tarleton v. *M'Gawley*, (1794), Peake 270; 170 E.R. 153; 43 Digest 9, *39*.

Tullidge v. *Wade*, (1769), 3 Wils. 18; 95 E.R. 909; 17 Digest (Repl.) 105, *196*.

Vacher & Sons, Ltd. v. *London Society of Compositors*, [1911-13] All E.R. Rep. 241; [1913] A.C. 107; 82 L.J.K.B. 232; 107 L.T. 722; 42 Digest 605, *54*.

Ware and de Freville, Ltd. v. *Motor Trade Association*, [1920] All E.R. Rep. 387; [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 43 Digest 124, *1264*.

White v. *Riley*, [1920] All E.R. Rep. 371; [1921] 1 Ch. 1; 89 L.J.Ch. 628; 124 L.T. 168; 43 Digest 122, *1242*.

Whitham v. *Kershaw*, (1886), 16 Q.B.D. 613; 54 L.T. 124; 31 Digest (Repl.) 399, *5285*.

Wilkes v. *Wood*, (1763), Lofft. 1; 98 E.R. 489; 17 Digest (Repl.) 105, *194*.

Williams v. *Currie*, (1845), 1 C.B. 841; 135 E.R. 774; 17 Digest (Repl.) 105, *204*.

Williams v. *Settle*, [1960] 2 All E.R. 806; [1960] 1 W.L.R. 1072; 3rd Digest Supp.

Appeal.

This was an appeal from a decision of the Court of Appeal (SELLERS, DONOVAN and PEARSON, L.JJ.), given on Apr. 17, 1962 (reported [1962] 2 All E.R. 579) which reversed a judgment of SACHS, J., sitting with a jury, given on May 19, 1961 (reported [1961] 2 All E.R. 825), by which it was adjudged that the appellant, Douglas Edwin Rookes should recover against the defendants Alfred James Barnard, Reginald John Silverthorne (since deceased) and Trevor John Fistal, the sum of £7,500 and costs to be taxed. The defendant Silverthorne died between the date of the judgment of SACHS, J., and the hearing of the appeal to the Court of Appeal. The action was continued against his executrix. The resolution of Jan. 10, 1956 (as to which see p. 372, letter I, post) was in fact delivered on that day by the respondent Fistal to the superintendent of the design office of B.O.A.C. at London Airport. The facts are summarised in the speech of LORD EVERSHED at p. 381, letters D to H, and p. 382, letters A to D, post.

S. C. Silkin, Q.C., and *A. de Piro* for the appellant.

Gerald Gardiner, Q.C., and *Colin Duncan* for the respondents.

The House took time for consideration.

Jan. 21. The following opinions were delivered.

LORD REID: My Lords, the appellant was employed for many years by B.O.A.C. as a skilled draughtsman in their drawing office at London Airport. He was a member of a trade union, the Association of Engineering and Shipbuilding Draughtsmen (A.E.S.D.) to which all who were employed in that drawing office belonged. He and another man, Unwin, became dissatisfied with the conduct of the union and resigned from it. The union were very anxious to preserve the position that no non-member should be employed in that office and they took

energetic steps to get these two men to rejoin. Unwin agreed to rejoin, but the appellant refused. As a result of steps taken by the union and its members, B.O.A.C. were induced first to suspend the appellant and then to terminate his employment after giving him due notice. The appellant has no remedy against B.O.A.C. They neither broke their contract with him nor committed any tort against him. In this action the appellant seeks a remedy against two members and an official of the union on the ground that they wrongfully induced B.O.A.C. to act as they did. The action was tried by SACHS, J. (1), with a jury, and the appellant was awarded £7,500 damages. The Court of Appeal (1) held that the respondents had not committed any tort, and the first question in this appeal is whether the respondents' actions were tortious. If that question is answered in the affirmative, a second question arises whether the respondents are absolved from liability by the provisions of the Trade Disputes Act, 1906: it is admitted that the respondents' acts were done in furtherance of a trade dispute.

Certain agreed questions (2) were put to the jury and their answers are not challenged. The questions are not entirely free from ambiguity and, in order to understand them, we can look at the summing-up of the learned judge. But we cannot go beyond the questions so explained and the jury's answers. The questions and answers are as follows:

1. Was there a conspiracy to threaten strike action by the members of A.E.S.D. against B.O.A.C. to secure the withdrawal of the [appellant] from the design office? A.—There was.
   If so,
   (a) was Barnard a party? A.—He was.
   (b) was Silverthorne a party? A.—He was.
   (c) was Fistal a party? A.—He was.
2. Was a threat to take strike action against B.O.A.C. to secure the withdrawal of the [appellant] from the design office made by
   (a) Barnard? A.—It was.
   (b) Silverthorne? A.—It was.
   (c) Fistal? A.—It was.
3. Did threats of strike action by members of A.E.S.D. cause
   (a) the suspension of the [appellant] from his work at B.O.A.C.? A.—They did.
   (b) the dismissal of the [appellant] from B.O.A.C.? A.—They did.
4. (a) What damages should be awarded to the [appellant] if the threats of strike action caused the [appellant's] dismissal? A.—£7,500.
   (b) What damages should be awarded to the [appellant] if the threats of strike action caused the [appellant's] suspension (but not his dismissal)? (Not answered).

Barnard was the chairman of the local branch of the union and Fistal was a shop steward. Silverthorne was an official of the union but not a member of it. There were negotiations with which I need not deal. The matter was brought to a head by a meeting of the members on Jan. 10, 1956, which resolved unanimously:

> "We, the members of the A.E.S.D., inform B.O.A.C. that if the Non-Unionist Mr. D. E. Rookes is not removed from the Design Office by 4 p.m., Friday, Jan. 13, 1956, a withdrawal of labour of all A.E.S.D. Membership will take place."

If the members had ceased work or come out on strike at that time they would have done so in breach of their contracts with B.O.A.C. An agreement had been made in 1949 between the employers' and employees' sides of the Draughtsmen's, Planners' and Tracers' Panel of the National Joint Council for Civil Air Transport which contained an undertaking that no lockout or strike would take place, and provided that any dispute should be dealt with as provided for in the constitution of the Joint Council. It is admitted that the provisions of that agreement had been made a term of all the contracts of employment of the men who took part in the meeting of Jan. 10, and that if they had withdrawn their labour on Jan. 13 they would have been in breach of their contracts with B.O.A.C. When this resolution was presented to B.O.A.C. they suspended the appellant and removed him from the design office, as the resolution required. There was considerable argument about the parts played by the three respondents, but we must take it from the jury's answers that the presentation of this resolution to B.O.A.C. was in pursuance of a conspiracy to which the three respondents were parties, that it was a threat of strike action, and that this threat caused B.O.A.C. first to suspend and then to dismiss the appellant. This was not a case of the respondents merely informing B.O.A.C. that the men would strike if their terms were not accepted; no questions were put to the jury suggesting any defence based on that ground.

This case, therefore, raises the question whether it is a tort to conspire to threaten an employer that his men will break their contracts with him unless he dismisses the plaintiff, with the result that he is thereby induced to dismiss the plaintiff and cause him loss. The magnitude of the sum awarded by the jury shows that the appellant had every prospect of retaining his employment with B.O.A.C., if the respondents and the other conspirators had not interfered: leaving the Trade Disputes Act, 1906, out of account, if B.O.A.C. had been induced to dismiss the appellant in breach of their contract with him then there is no doubt that the respondents would have committed a tort and would have been liable in damages (*Lumley* v. *Gye* (3)). Equally, there is no doubt that men are entitled to threaten to strike if that involves no breach of their contracts with their employer and they are not trying to induce their employer to break any contract with the plaintiff. The question in this case is whether it was unlawful for them to use a threat to break their contracts with their employer as a weapon to make him do something which he was legally entitled to do, but which they knew would cause loss to the appellant.

The first contention of the respondents is very far reaching. They say there is no such tort as intimidation. That would mean that, short of committing a crime, an individual could with impunity virtually compel a third person to do something damaging to the plaintiff, which he does not want to do but can lawfully do: the wrongdoer could use every kind of threat to commit violence, libel or any other tort, and the plaintiff would have no remedy. And a combination of individuals could do the same, at least if they acted solely to promote their own interests. It is true that there is no decision of this House which negatives that argument. But there are many speeches in this House and judgments of eminent judges where it is assumed that that is not the law and I have found none where there is any real support for this argument. Most of the relevant authorities have been collected by PEARSON, L.J. (4), and I see no need to add to them. It has often been stated that if people combine to do acts which they know will cause loss to the plaintiff, he can sue if either the object of their conspiracy is unlawful or they use unlawful means to achieve it. In my judgment, to cause such loss by threat to commit a tort against a third person if he does not comply with their demands is to use unlawful means to achieve their object.

That brings me to the second argument for the respondents which raises a more difficult question. They say that there is a distinction between threats to commit a tort and threats to break a contract. They point out that a person is quite entitled to threaten to do something which he has a legal right to do, and they

(1) [1961] 2 All E.R. 825; [1963] 1 Q.B. 623; on appeal [1962] 2 All E.R. 579; [1963] 1 Q.B. at p. 657.
(2) [1961] 2 All E.R. at p. 830.
(3) (1853), 2 E. & B. 216.
(4) [1962] 2 All E.R. at pp. 602-608; [1963] 1 Q.B. at pp. 686-696.

say that breach of contract is a private matter between the contracting parties. If the plaintiff cannot sue for loss to him which results from an actual breach of a contract to which he is not a party, why, they ask, should he be entitled to sue for loss which results from a threat to break a contract to which he is not a party? A somewhat similar argument failed in *Lumley* v. *Gye* (5). The defendant had induced a singer to break her contract with the plaintiff and he knew that this would cause loss to the plaintiff. The plaintiff had his action against the singer for breach of contract and he was held also to have a cause of action against the defendant for the tort of unjustifiably interfering so as to cause him loss. The fact that the direct cause of the loss was a breach of a contract to which the defendant was not a party did not matter. So, too, the plaintiff's action in the present case does not sound in contract: in fact there was no breach of contract because B.O.A.C. gave in.

The appellant in this case could not take a benefit from contracts to which he was not a party or from any breach of them. But his ground of action is quite different. The respondents here used a weapon in a way which they knew would cause him loss, and the question is whether they were entitled to use that weapon —a threat that they would cause loss to B.O.A.C., if B.O.A.C. did not do as they wished. That threat was to cause loss to B.O.A.C. by doing something which they had no right to do, breaking their contracts with B.O.A.C. I can see no difference in principle between a threat to break a contract and a threat to commit a tort. If a third party could not sue for damage caused to him by the former I can see no reason why he should be entitled to sue for damage caused to him by the latter. A person is no more entitled to sue in respect of loss which he suffers by reason of a tort committed against someone else, than he is entitled to sue in respect of loss which he suffers by reason of breach of a contract to which he is not a party. What he sues for in each case is loss caused to him by the use of an unlawful weapon against him—intimidation of another person by unlawful means. So long as the defendant only threatens to do what he has a legal right to do he is on safe ground. At least if there is no conspiracy he would not be liable to anyone for doing the act, whatever his motive might be, and it would be absurd to make him liable for threatening to do it but not for doing it. But I agree with LORD HERSCHELL (*Allen* v. *Flood* (6)) that there is a chasm between doing what you have a legal right to do and doing what you have no legal right to do, and there seems to me to be the same chasm between threatening to do what you have a legal right to do and threatening to do what you have no legal right to do. It must follow from *Allen* v. *Flood* (7) that to intimidate by threatening to do what you have a legal right to do is to intimidate by lawful means. But I see no good reason for extending that doctrine. Threatening a breach of contract may be a much more coercive weapon than threatening a tort, particularly when the threat is directed against a company or corporation, and, if there is no technical reason requiring a distinction between different kinds of threats, I can see no other ground for making any such distinction.

I have not set out any of the passages cited in argument because the precise point which we have to decide did not arise in any of the cases in which they occur, and it does not appear that any of the authors of these passages had this point in mind. Sometimes the language seems to point one way and sometimes another and it would, I think, be wrong in such circumstances to use a judge's language as authority for a proposition which he did not have in mind. The Court of Appeal in this case were unwilling to go beyond existing authorities. SELLERS, L.J., said (8):

> "Unless authority requires it, I would resist enlarging the tort of intimidation in the manner sought before and accepted by the judge,"

(5) (1853). 2 E. & B. 216.
(6) [1895-99] All E.R. Rep. 52 at p. 79; [1898] A.C. 1 at p. 121.
(7) [1895-99] All E.R. Rep. 52; [1898] A.C. 1.
(8) [1962] 2 All E.R. at p. 589; [1963] 1 Q.B. at p. 667.

and PEARSON, L.J., said (9):

> "Should this obscure, unfamiliar and peculiar cause of action, which has its roots in cases of physical violence and threats of violence, be extended to cover a case in which there is only a threat to break a contract?."

I am afraid I take a different view. Intimidation of any kind appears to me to be highly objectionable. The law was not slow to prevent it when violence and threats of violence were the most effective means. Now that subtler means are at least equally effective I see no reason why the law should have to turn a blind eye to them. We have to tolerate intimidation by means which have been held to be lawful, but there I would stop. Accordingly, I would hold that on the facts found by the jury the respondents' actions in this case were tortious.

It is now necessary to consider whether the respondents are absolved from liability by any of the provisions of the Trade Disputes Act, 1906. The sections on which the respondents rely are s. 1 and s. 3, which are as follows:

> "1. The following paragraph shall be added as a new paragraph after the first paragraph of s. 3 of the Conspiracy, and Protection of Property Act, 1875: An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

> "3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Before dealing with these sections I must say a word about what the law was, or was thought to be, in 1906. The older law bore very heavily on workmen who combined to seek concessions from employers, and Acts passed to amend it had been strictly construed. Matters were brought to a head by two decisions of this House, *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (10), and *Quinn* v. *Leathem* (11). These were followed by a royal commission over which LORD DUNEDIN presided. The main objects of the Act of 1906 are clear enough, to protect trade union funds and to exclude conspiracy from being an element in future cases. The former does not arise in the present case.

One of the difficulties facing Parliament was the uncertain state of the law with regard to liability for interfering with a person's trade or employment. It is exceedingly difficult to determine just what was decided in *Quinn* v. *Leathem* (11), and I neither need nor intend to embark on that vexed subject. But there were at least two theories about what the law really was. One was that an individual was free to take any steps that he chose so long as he used no means to achieve his end which were not unlawful for some reason other than that they interfered with some other person's trade or employment; and that a combination had the same freedom, provided that their conduct was not dictated by a desire or intention to injure the plaintiff. The other theory was that any action intended or known to be likely to interfere with the trade or employment of another person was unlawful unless it could be justified in some way. I might note that so late as 1908 SIR F. POLLOCK wrote in his LAW OF TORTS (8th Edn.) 325, 326:

> "The present writer confesses to great difficulty in understanding why in *Quinn* v. *Leathem* (11) before the House of Lords . . . it was necessary to say so much about conspiracy: for the cause of action was in effect ruining the plaintiff's business by coercing his customers not to deal with him which is well within a line of old authorities . . . . It is submitted that the

(9) [1962] 2 All E.R. at p. 608; [1963] 1 Q.B. at p. 695.
(10) [1901] A.C. 426.
(11) [1900-03] All E.R. Rep. 1; [1901] A.C. 495.

discussions would be materially simplified if it were understood that all damage wilfully done to one's neighbour is actionable unless it can be justified or excused."

So it is reasonable to suppose that the intention was to draft the Act of 1906 so that it would be equally effective whichever theory ultimately prevailed.

The only difficulty about s. 1 is to discover what is meant by "unless the act, if done without any such agreement or combination, would be actionable". In the present case, and I have no doubt in many others, the precise act complained of could not have been done without previous agreement. The act complained of in this case was presenting to B.O.A.C. a resolution of all the members of the union to which the respondents were parties. There was an argument that the section requires us to suppose that each respondent merely told B.O.A.C. that he would himself cease work if they did not get rid of the appellant. But that would have been an entirely different act and probably quite ineffective as a threat. The section cannot reasonably be held to mean that no action can be brought unless the precise act complained of could have been done by an individual without previous agreement or combination. In my view, the section requires us to find the nearest equivalent act which could have been so done and see whether it would be actionable. In the present case I think we must suppose that one of the respondents had said to B.O.A.C. "I am acting alone but I think I can, and I intend to, induce the men to break their contracts and strike if you do not get rid of Mr. Rookes". If the opinion which I have already expressed is right, that would have been actionable if B.O.A.C. had succumbed to that threat and got rid of the appellant in the way they did. So s. 1 does not help the respondents.

Section 3 deals with two classes of acts done by individuals, and, by virtue of s. 1, the immunity given by s. 3 to individuals must also extend to combinations or conspiracies. The classes of acts permitted (if done in contemplation or furtherance of a trade dispute) are, (1) inducing a breach of a contract of employment and, (2) interfering with a person's trade, business or employment or right to dispose of his capital or labour as he wills. The facts in this case fall within the second class: if B.O.A.C. had not safeguarded themselves by giving notice to the appellant, but had dismissed him summarily, the case would have come within the first class. In considering the proper construction of this section I think that it makes for clarity to take the first class first. The first class of acts are those within the principle in *Lumley* v. *Gye* (12), and there can be no doubt that if no more than mere persuasion is used to induce a breach of contract this section ousts the principle in *Lumley* v. *Gye* (12). But suppose that the defendant had to go further than mere persuasion and told deliberate lies or used intimidation to induce the breach of contract—is he then still protected by s. 3? Section 3 provides that the act complained of shall not be "actionable on the ground only" that it induces a breach of contract. That is a very difficult phrase to construe. An act which induces one party to a contract to break it is never actionable at the instance of the other party to the contract merely on that ground. In addition, the plaintiff must at least allege and prove that the defendant intended to cause him loss, or at least knew that his intervention would cause him loss, and that he has suffered loss. In this context it appears to me that "actionable on the ground only" can only have one or other of two meanings. It could mean: shall not be actionable if the plaintiff cannot succeed in his action without alleging and proving inducement of breach of contract. Or it could mean: shall not be actionable if the act done by the defendant is unlawful or actionable only because, or "on the ground" that, it induces the breach of contract. These two meanings lead to entirely different results. Whether the weapon used to induce the third party to break his contract with the plaintiff be mere persuasion or an extreme form of deceit, slander or intimidation, the plaintiff cannot succeed without

(12) (1853), 2 E. & B. 216.

proving that it caused or induced the breach of his contract. So if the first meaning be the right one this section gives a general immunity or licence however illegal the means used to induce the breach of contract. That was not and could not be denied by the respondents' counsel. But, on the other hand, if the second meaning is correct, then the immunity or licence applies only so long as the defendant has not used any unlawful means to induce the breach. If the defendant had used slander or intimidation, which are in themselves tortious, the plaintiff could sue on that ground, although he would still have to prove the damage resulting from his dismissal.

It was argued for the respondents that Parliament must have intended to extend immunity to all ordinary methods of inducing breach of contract used in strikes or other trade disputes, and that the use of methods such as these respondents used were commonplace. But it was not suggested that the use of deceit, slander or more extreme methods of intimidation were or are in general use, and it was hardly suggested that Parliament must be supposed to have intended to license them. And I cannot find any general indication of intention favourable to the respondents in other sections of the Act. Section 2 licenses picketing merely for the purpose of peacefully persuading, so there is no extensive licence there. Section 4 does give general immunity to trade unions, as distinct from their members, but there the language is very different—"an action against a trade union . . . in respect of any tortious act . . . shall not be entertained by any court". The protection of individual members is left to s. 3. So we are thrown back to the language of s. 3 itself without any very clear guidance either from the nature of the mischief which Parliament had to remedy by the Act or from other sections of the Act.

The only important authority is in the opinion of Lord Loreburn, L.C., in *Conway* v. *Wade* (13). I shall have to deal with this case at some length when I come to the second half of s. 3. He said (14):

> "It is clear that, if there be threats or violence, this section gives no protection . . . If the inducement be to break a contract without threat or violence, then this is no longer actionable."

Counsel had to argue that this was wrong, and he was quite entitled so to argue because the whole passage was obiter. But there was no dissent from this by any other member of the House, and, as Lord Loreburn was Lord Chancellor when the Act of 1906 was passed, he must have been well acquainted with its provisions. His speech has been quoted with approval in a number of later cases, but I do not set great store by that because the matter never seems to have been fully argued.

I would hold that what I have called the second meaning of this part of s. 3 is the right one—that it does not protect a person who induces a breach of contract by tortious means—both on the authority of Lord Loreburn and because it appears to me to be the better construction. The words "on the ground only" are clearly intended to limit the scope of the section, and if the first meaning for which the respondents contend were right, there would be hardly any limit to its scope. It would give immunity in almost every case of inducing a breach of contract that seems likely to arise in connexion with a strike or threatened strike. Section 4 makes it quite clear that there is complete immunity for the trade union itself, and I cannot believe that the very guarded language of s. 3 would have been used if it had been intended to give in addition almost complete immunity to all individuals acting in contemplation or furtherance of a trade dispute.

I have dealt at some length with the interpretation of the first part of s. 3, because I have come to think that it throws a great deal of light on the second part. The second part is much more difficult to construe. I must admit that on a

(13) [1908-10] All E.R. Rep. 344; [1909] A.C. 506.
(14) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.

consideration of the second part by itself I was inclined to think that it was applicable to the present case. If the second part of the section had to be construed in light of the law as we now know it to be and without reference to the first part, I would still be inclined to construe it in the way for which the respondents contend. But I do not think that it is proper to approach the problem in that way. In construing an Act of Parliament we are attempting to find the intention of Parliament. We must find that intention from the words which Parliament has used, but these words must be construed in the light of the facts known to Parliament when the Act was passed. One assumes that Parliament knows the law, but if the law is notoriously uncertain we must not attribute to Parliament prescience of what the law will ultimately be held to be. In 1906 the law with regard to lawful and unlawful interference with a person's trade, business or employment was quite uncertain. By 1925 LORD DUNEDIN was able to speak of one view as "the leading heresy" (*Sorrell* v. *Smith* (15)). But there were still some doubts. As VISCOUNT MAUGHAM pointed out in *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* (16), LORD DUNEDIN had taken a somewhat different view from that of the majority in *Sorrell* v. *Smith* (17). It often takes a long time to determine what is heresy and what is orthodoxy, and there can be no better witness about what was thought to be the law in 1906 than LORD LOREBURN who was Lord Chancellor when the Trade Disputes Act, 1906, was passed. He said in *Conway* v. *Wade* (18):

> "It is necessary to consider how the law stood before 1906 . . . it is material to see in what circumstances an individual could be sued for inducing someone not to employ or not to serve another . . . I think on that point the law stood as follows. If the inducement was accompanied by violence or threats (always remembering that a warning is one thing and a threat is another) there was a good ground of action. I next suppose there was no violence and no threat, and yet the inducement involved a breach of contract; then also it was established, after a long controversy beginning with *Lumley* v. *Gye* (19) in 1853 that an action could be maintained, unless at all events some sufficient justification could be made good. But suppose one person simply induced someone not to employ another or not to serve another, without violence or threat or breach of contract, would an action lie, and in what circumstances, in such a case? I believe there has not been either a conclusive or an exhaustive answer to that question. The further difficulty arises; What is a sufficient justification? Is it supplied by self-interest, or by trade competition, or by what other condition or motive? No answer in general terms has ever been given, and perhaps no answer can be given. A parallel difficulty arises where the inducement is by two or more persons acting together."

If that is a correct statement of the position in 1906—and I think it is—there were three classes of inducement which Parliament had to consider, (i) inducement accompanied by violence or threats (ii) inducement involving a breach of contract, and (iii) mere inducement alone. As regards (i) and (ii) the law was thought to be clear, as regards (iii) it was not. Section 3 is silent as to (i), so one might think that it leaves the existing liability unaltered. It deals with (ii) and (iii). I have stated my opinion as to how it deals with (ii); it confers immunity, provided that there is no further element of illegality, such as intimidation. The question is how it deals with (iii). Does it there go farther and confer immunity even where there is intimidation. The general plan of the section appears to be to treat (ii) and (iii) in precisely the same way, and it would

(15) [1925] All E.R. Rep. 1 at p. 9; [1925] A.C. 700 at p. 719.
(16) [1942] 1 All E.R. 142 at p. 150; [1942] A.C. 435 at p. 450.
(17) [1925] All E.R. Rep. 1; [1925] A.C. 700.
(18) [1908-10] All E.R. Rep. at p. 346; [1909] A.C. at p. 509.
(19) (1853), 2 E. & B. 216.

seem a strange result if the liability of the present defendants depended on the method which B.O.A.C. adopted in acceding to their demands that the appellant should be removed from the design office within a few days. If they had summarily dismissed him the case would have fallen under head (ii), and the defendants would have been liable. But can it be said that the fact that B.O.A.C. chose only to suspend him and then give him notice, which puts the case within head (iii), makes all the difference and saves the respondents from any liability to him? That may be the necessary result of the way in which the section is drafted, but it could hardly have been the intention of Parliament.

I must now return to what LORD LOREBURN said in *Conway* v. *Wade* (20). It is true that all this was obiter as regards s. 3, because it was held that there was no trade dispute. Until the case reached this House there were only two issues —whether the jury's findings could be supported, and what was meant by "in contemplation or furtherance of a trade dispute". Wade had "acted as mischief-maker in order to injure the plaintiff from unworthy motives" (per LORD LOREBURN (21)) by procuring his dismissal. He had threatened that he would call out the other men when he had neither the power nor the right to do that, and the employers gave way to this deceitful threat. It was argued for the first time in this House that, apart from the statute, Wade was guilty of no actionable wrong. This House had no difficulty in holding that he was, and they held, reversing the Court of Appeal, that he had not acted "in contemplation or furtherance of a trade dispute". So Conway won his appeal. LORD LOREBURN, after quoting s. 3, said (20):

> "Let me see how this alters the pre-existing law. It is clear that, if there be threats or violence, this section gives no protection in any case, for then there is some other ground of action besides the ground that 'it induces some other person to break a contract,' and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done 'in contemplation or furtherance of a trade dispute'. What is the meaning of these words I will consider presently. In this respect there is a change. If there be no threat or violence, and no breach of contract, and yet there is 'an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills' there again there is perhaps a change. It is not to be actionable, provided that it was done 'in contemplation or furtherance of a trade dispute'. So there is no longer any question in such cases, whether there was 'sufficient justification' or not. The condition contained in these words as to trade dispute is made sufficient."

LORD LOREBURN had no doubt that s. 3 afforded no protection if there were threats or violence. If a threat to break a contract amounts to unlawful intimidation, that covers the present case, for he draws no distinction between the two classes of acts covered by s. 3. His opinion was obiter and he may have been wrong, but LORD MACNAGHTEN (22) and LORD GORELL (23) concurred with him and I find no suggestion in other speeches to the contrary. It can be argued that the reason which he gave is wrong in part. The argument is that, although he may have been right in saying that where there are threats or violence, there is some other ground of action when the act complained of is inducing a breach of contract, he was wrong when the act complained of is mere interference with the plaintiff's trade, business or employment.

Parliament had, however, to provide for the possibility that mere interference, if no legal justification were proved, would be held to be a tort, and I think that

(20) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.
(21) [1908-10] All E.R. Rep. at p. 345; [1909] A.C. at p. 510.
(22) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 513.
(23) [1908-10] All E.R. Rep. at p. 350; [1909] A.C. at p. 520.

what Parliament did in enacting the second part of s. 3 was to put in a provision which would be necessary to achieve their object if the law should go one way, but unnecessary if it went the other way. So I would hold that s. 3 means that if mere interference is or can be a tort then there shall be no liability, where a trade dispute is involved, " on the ground only " of that interference. If that is right then the protection given by s. 3 is no wider in scope as regards acts within the second half than it is with regard to acts within the first half. Parliament might have enacted that the protection given by s. 3 should apply only so long as no illegal means, such as intimidation, were used to achieve the breach of contract or interference with trade, business or employment, or Parliament might have enacted that the protection should extend to all cases, no matter how illegal may have been the means employed. But to draw a distinction and to restrict protection of inducement of breach of contract to cases where no illegal means are employed, while extending protection of interference to all cases no matter how unlawful the means employed is something that I cannot think that Parliament could have intended and therefore is a construction of the section which I would accept only if its words are incapable of any other. In my judgment, it is clear that s. 3 does not protect inducement of breach of contract where that is brought about by intimidation or other illegal means and the section must be given a similar construction with regard to interference with trade business or employment. So, in my opinion, the section does not apply to this case because the interference here was brought about by unlawful intimidation. I would therefore allow this appeal.

That does not end the case, because the respondents maintain that, by reason of misdirection of the trial judge in the matter of damages, the jury's award of £7,500 cannot stand and there should be a new trial on the amount of damages. There is no doubt that the jury were directed that it was open to them to award punitive or exemplary damages, and indeed they might fairly assume from the summing-up as a whole that that would be their proper course if they did not accept the respondents' case on provocation. As they awarded a single sum we do not know now much they intended to award in respect of financial loss or how much they added on as punitive damages, but it is fairly obvious that they must have added a considerable sum. The respondents contend that there is nothing in the facts of this case to justify any award of punitive damages and that the trial judge ought to have directed the jury to that effect. It appears that at the trial counsel for the respondents did not take the point that exemplary damages could not be awarded in this case: he merely argued that for various reasons the jury should not award any. So the appellant now submits that it is too late to take the point now. In many cases it would be wrong to allow a new and belated point to be argued. But here there is no question of the point not being open on the pleadings and I have been unable to see that the appellant can have been in any way prejudiced in the presentation of his case by the point not having been taken. It is not a case in which it can be said that the course of examination and cross-examination of witnesses might have been different. This seems to me to be a pure point of law which we could properly admit in our discretion.

I have read and considered the opinion of my noble and learned friend LORD DEVLIN and I am in full agreement with his treatment of the subject of exemplary damages. I would therefore allow this appeal and order a new trial on the question of damages. In the whole circumstances I think that the costs of the previous trial ought to abide the result of the new trial and be dealt with by the trial judge, and that the appellant should now be awarded his costs in this House and in the Court of Appeal.

LORD EVERSHED: My Lords, as I begin to apply myself to the task of formulating my opinion in this important and difficult case, I have much in mind the observations of SCRUTTON, L.J., when delivering his judgment in the Court of

Appeal in the analogous case of *Ware and de Freville, Ltd.* v. *Motor Trade Assocn.* (24). That most learned judge then referred to the mass of authorities and dicta, many of them contradictory, contained in ten House of Lords cases and many cases in the Court of Appeal and (25) to the " able and conscientious attempts by judges of first instance to state the results of decisions by which they are bound, and by which they should be enlightened "; and he went on to state that the only tribunal which could bring order into chaos was your lordships' House. There have since been the two important decisions of the House in *Sorrell* v. *Smith* (26) and *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* (27); and so in the present case the attention of your lordships has been drawn to the important speeches in these two cases as well as to all the speeches and dicta in the earlier cases to which SCRUTTON, L.J., referred, and I cannot maintain any confident hope that in the present case order will have been so brought into chaos that, on some future occasion, it will not be found necessary to refer to the opinions now being expressed in addition to all those that have gone before. Such, indeed, is the importance of the questions now presented to your lordships and such is the difficulty which the history of the relevant law and the language of the Trade Disputes Act, 1906, have attached to their solution.

The essential facts of the present case may be shortly stated. The appellant before your lordships' House, the plaintiff in the present proceedings, having been for some years employed by British Overseas Airways Corporation (hereafter called B.O.A.C.) in the year 1955 quarrelled with the trade union known as the Association of Engineering and Shipbuilding Draughtsmen (hereafter called A.E.S.D.) to which he had belonged and of which indeed he had been an officer. In the result, he resigned from the union, and efforts made at the end of the year to make him rejoin were without effect. In the result, in the months of December, 1955, and January, 1956, the three defendants to the action—the respondent, Mr. Barnard, Mr. Silverthorne and the respondent Mr. Fistal—(of whom the second, Mr. Silverthorne, died since the proceedings commenced and has been replaced by his personal representative, the second respondent)—being all officials of the A.E.S.D. proceeded to make communications to B.O.A.C. to the effect that, unless the services of Mr. Rookes were determined by B.O.A.C. all their other employees in the same department, in number about seventy and all members of the A.E.S.D., would come out on strike—and possibly other servants of B.O.A.C. as well. I have so far deliberately used imprecise language; but the effect was that (as has been conceded throughout by the appellant) a " trade dispute " within the meaning of the Trade Disputes Act, 1906, had arisen. B.O.A.C. thereupon at first suspended the appellant and later, by appropriate notice, determined his contract of service. It is to be noted that there was no breach by B.O.A.C. of the appellant's service agreement.

If the matter rested only upon the facts as I have stated them, the answer to the appellant's claim would have been short and simple. As I have said there was no breach of the appellant's contract and it has long been recognised that strike action or threats of strike action (however those terms be interpreted—and I have in mind what fell from DONOVAN, L.J. (28), in his judgment in the Court of Appeal) in the case of a trade dispute do not involve any wrongful action on the part of the employees, whose service contracts are not regarded as being or intended to be thereby terminated. So much was stated by LORD WATSON in his speech in *Allen* v. *Flood* (29) and has, as I believe, been since consistently followed—see e.g. per LORD STERNDALE, M.R., in *White* v. *Riley* (30). Moreover,

(24) [1920] All E.R. Rep. 387; [1921] 3 K.B. 40.
(25) [1920] All E.R. Rep. at p. 397; [1921] 3 K.B. at p. 66.
(26) [1925] All E.R. Rep. 1; [1925] A.C. 700.
(27) [1942] 1 All E.R. 142; [1942] A.C. 435.
(28) [1962] 2 All E.R. at pp. 594-602; [1963] 1 Q.B. at pp. 675-685.
(29) [1895-99] All E.R. Rep. at p. 70; [1898] A.C. at p. 99.
(30) [1920] All E.R. Rep. 371 at p. 376; [1921] 1 Ch. 1 at p. 13.

such action on the part of the members of the A.E.S.D. would, to say the least, not be surprising since there was a recorded understanding between B.O.A.C. and the several unions, members of which were in the service of B.O.A.C., that if in any section of B.O.A.C.'s work one hundred per cent. membership of the relevant union was achieved, then B.O.A.C. would not employ in that section any non-union labour.

The circumstances of the present case are distinguished by one very important fact. On Apr. 1, 1949, an agreement in writing was made between the Employers' and Employees' sides of the Draughtsmen, Planners and Tracers Panel, cl. 4 of which provided that in the event of any relevant trade dispute, there should not be a strike or a lock-out but that the dispute should be resolved in the manner therein indicated. It has been conceded throughout these proceedings on the part of the defendants and respondents that the terms of this clause should be regarded as incorporated in and forming part of the contract of service with B.O.A.C. of every member of the A.E.S.D. It follows accordingly that strike action, or threats of strike action, by employees of B.O.A.C. who were members of the A.E.S.D. would constitute breaches or threats of breaches by them of their service contracts. So it is of the essence of the appellants' case that the acts of which he has complained constituted threats of wrongful acts, that is, of breaches of contract, aimed and directed at the appellant's employment, so as to cause, as they did, its determination; and that such acts were therefore actionable at the appellant's suit.

I was for myself somewhat troubled in the course of the argument by the question, what precisely were the " threats " on the part of the three respondents of which the appellant complained. The answer to the question is, however, as I conceive, to be found in the form of the second question put to the jury by SACHS, J. (31), and the jury's answer thereto—the form of such question having, as your lordships were informed, been agreed by the learned counsel appearing on both sides before the learned judge. The question was as follows: " Was a threat to take strike action against B.O.A.C. to secure the withdrawal of the [appellant] from the design office made by " each of the three respondents?—and the jury gave an affirmative answer in each case. I am satisfied that the form of the question and the answer given must be taken to have meant that each respondent threatened that strike action would in fact be taken by all the members of the A.E.S.D. unless the appellant's services were terminated. The threat, therefore, made by each respondent was not merely that he himself would go on strike (for the coercive effect of such a threat standing by itself would be negligible—and Mr. Silverthorne was not himself in fact in the service of B.O.A.C.); nor was it, on the one hand, mere information that a strike would or might occur or, on the other, a threat to procure such strike action. It was, as the words of the question implied, a threat that strike action on the part of all the A.E.S.D. men would in fact occur unless the plaintiff were withdrawn from the design office. And since all three respondents were officials of the union there can be no doubt that they could effectively so threaten and were understood by B.O.A.C. so effectively to threaten. It may, moreover, be added that on Jan. 10, 1956, a resolution to that effect had been passed by the union men and a written copy of the resolution was immediately afterwards handed by the third respondent to a representative of B.O.A.C.

Assuming, therefore, (1) that each respondent did so threaten and effectively threaten, (2) that, because of the special term deemed to be incorporated in each union man's service contract, the threat was of unlawful action on the part of all these men in the sense of constituting a threat to commit a breach of their service contracts and, (3) that the threats were directed at the appellant, being designed to cause an end of his employment with B.O.A.C.; can the appellant successfully sue the respondents for the damage he thereby suffered? This single problem has

(31) [1961] 2 All E.R. at p. 830; [1963] 1 Q.B. at p. 627.

inevitably been dissected into three separate questions, viz., (1) Is there a tort or wrong known to the English law as the tort of intimidation such that, although the party intimidated is not the party claiming to recover, the last mentioned party can sue the persons who did the intimidating on the ground that their object was to damnify him, as they did? (2) If so, are the wrongful acts which the person or persons threatened, by way of intimidation, to do confined to acts in themselves criminal or tortious, or do they extend to other so-called " wrongful " acts, including particularly breaches of contract? (3) If the tort of intimidation does so extend, then is the appellant's common law right of action defeated by the terms of either s. 1 or s. 3 of the Trade Disputes Act, 1906, seeing that, as is here conceded, the acts of intimidation of which the appellant complains were done in the course of furtherance of a trade dispute within the meaning of that Act?

On the first of these three questions which I have formulated all the members of the Court of Appeal (32) after a careful consideration of the many authorities and dicta on the subject, agreed with SACHS, J. (33), in giving to it an affirmative answer. My lords, it seems to me that in the year 1963 it is not sensible or possible to deny such a wrong, at any rate where the illegal acts threatened are criminal or tortious in character and where the threats are sufficiently substantial and coercive to cause real damage to the person against whom they are aimed and directed; and the person entitled to recover may be either the party intimidated or may be a third party where the intention and effect of the threat is to injure such third party. I do not in the circumstances propose for myself to go again through all the authorities. I am content to start with the citation (quoted by PEARSON, L.J. (34), in the Court of Appeal) from the well-known judgment of BOWEN, L.J., in the case of the *Mogul Steamship Co., Ltd.* v. *McGregor, Gow & Co., Ltd.* (35), and to add only citations from the speech of LORD WATSON in *Allen* v. *Flood* (36) and from the speech of LORD DUNEDIN in *Sorrell* v. *Smith* (37). In the *Mogul Steamship* case (38) BOWEN, L.J., said (39):

> " No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence . . . the impeding or threatening servants or workmen; the inducing persons under personal contracts to break their contracts; all are instances of such forbidden acts."

My citations from LORD WATSON are as follows (36):

> " There are, in my opinion, two grounds only on which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (40), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

Again later (41):

(32) [1962] 2 All E.R. 579; [1963] 1 Q.B. at p. 657.
(33) [1961] 2 All E.R. 825; [1963] 1 Q.B. 623.
(34) [1962] 2 All E.R. at p. 607; [1963] 1 Q.B. at p. 694.
(35) (1889), 23 Q.B.D. 598 at p. 614.
(36) [1895-99] All E.R. Rep. at p. 69; [1898] A.C. at p. 96.
(37) [1925] All E.R. Rep. at p. 14; [1925] A.C. at p. 730.
(38) (1889), 23 Q.B.D. 598. (39) (1889), 23 Q.B.D. at p. 614.
(40) (1853), 2 E. & B. 216.
(41) [1895-99] All E.R. Rep. at p. 69; [1898] A.C. at pp. 97, 98.

" Assuming that the Glengall Iron Co., in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. According to the decision of the majority in *Lumley* v. *Gye* (42) already referred to, a person who by illegal means, that is means which in themselves are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable. So long as the word 'means' is understood in its natural and proper sense that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him."

I turn finally to the speech of LORD DUNEDIN in *Sorrell* v. *Smith* (43). The noble lord first quoted (44) from a judgment which he had delivered in the Scottish case of *Mackenzie* v. *Iron Trades Employers' Insurance Assocn.* (45), and which he thereby affirmed. Then, after referring to numerous other cases, including that of *Ware and de Freville, Ltd.* v. *Motor Trade Assocn.* (46), he said (47):

" Expressing the matter in my own words, I would say that a threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established."

I shall have something to say hereafter about the use by LORD DUNEDIN of the phrase " i.e., a tortious action ". For the purpose of answering the first of the questions which I have posed, I think that the citations which I have made must now be accepted as correctly stating the law; and I add only my acknowledgment of the judgments and reasoning on this question of SELLERS (48), DONOVAN (49) and PEARSON (50), L.JJ., in the Court of Appeal, and particularly the analysis of the growth of the tort of intimidation stated in PEARSON, L.J.'s judgment (51), which I respectfully and gratefully adopt.

I therefore agree with the view expressed by the Court of Appeal that there has been established as a wrong and as part of the English law the tort of intimidation. I am willing to concede that the tort is one of relatively modern judicial creation (though PEARSON, L.J., in the course of his analysis (52) referred to some authorities of respectable antiquity) and that its full extent and scope have not (at least before the present case) been authoritatively determined and may well, indeed, even by your lordships' judgments in this case, still not have been finally stated. But that is, after all, in accordance with the well-known principles of our law, one of the characteristics of which is (as has been pointed out by many eminent legal scholars, including CARDOZO, C.J.), that its principles are never finally determined, but are and should be capable of expansion and development as changing circumstances require, the material subject matter being " tested and re-tested " in the law's laboratories, namely, the courts of justice (53).

(42) (1853), 2 E. & B. 216.
(43) [1925] All E.R. Rep. at pp. 7-15; [1925] A.C. at pp. 716-731.
(44) [1925] All E.R. Rep. at pp. 8, 9; [1925] A.C. at pp. 718, 719.
(45) 1910 S.C. 79. (46) [1920] All E.R. Rep. 387; [1921] 3 K.B. 40.
(47) [1925] All E.R. Rep. at p. 14; [1925] A.C. at p. 730.
(48) [1962] 2 All E.R. at p. 591; [1963] 1 Q.B. at p. 670.
(49) [1962] 2 All E.R. at p. 599; [1963] 1 Q.B. at p. 688.
(50) [1962] 2 All E.R. at p. 608; [1963] 1 Q.B. at p. 695.
(51) [1962] 2 All E.R. at p. 604; [1963] 1 Q.B. at p. 689.
(52) [1962] 2 All E.R. at pp. 602-608; [1963] 1 Q.B. at pp. 686-696.
(53) Nature of the Judicial Process (Yale University Press), p. 23.

Moreover, as observed by PROFESSOR HOLDSWORTH in his history of the LAW OF ENGLAND, vol. 8, pp. 392ff, the tort of conspiracy, as now understood, is also one of relatively modern exposition differing from the ancient tort of conspiracy (which as PROFESSOR HOLDSWORTH points out is in reality now equivalent to malicious prosecution) and has arisen out of the circumstances of modern industrial relations. So also, as I conceive, has the tort of intimidation. Counsel for the respondents forcibly argued, on an analysis of the various cases in which the alleged tort has arisen, that it was in truth originally and still is no more than an aspect of the law of tort of nuisance. According to counsel for the respondents, it was in truth invented by SIR JOHN SALMOND.

With all respect to counsel for the respondents' argument, it is now, as I have said, in my opinion too late to deny the reception of the tort of intimidation into the company of English wrongs. So far, I have agreed with the Court of Appeal; but I respectfully differ from the Court of Appeal in thinking that the wrong of intimidation must stop short so as to comprehend only threats of criminal or tortious acts, and thus to exclude threats of breaches of contract. I am aware that the only direct authorities for such an extension of the wrong are the two Irish cases of *Cooper* v. *Millea, McBride and Drohan* (54) before GAVAN DUFFY, J. and *Riordan* v. *Butler* (55), in which O'BYRNE, J. (56), followed GAVAN DUFFY, J. I am aware also that in the former case the learned judge erred in attributing a dictum in support of his view to LORD DUNEDIN in *Sorrell* v. *Smith* (57) and that in fact the noble lord in that case used the words which I have quoted (58) "... that action must be either per se a legal action or an illegal, i.e., a tortious action ". I cannot, however, think that by his use of the formula " id est " LORD DUNEDIN was intending to lay it down that only threats of tortious actions would constitute the wrong of intimidation. The attention of your lordships was also properly drawn to all the relevant dicta that have fallen from the judges since that of BOWEN, L.J., in the *Mogul Steamship* case (59) down to the present time, and I would concede that on the face of them these dicta may tend more to support the restriction of the tort than its extension so as to include threats of breach of contract—though they cannot be said in that respect to be uniform; see, for example, the use of the word " unlawful " by LORD LINDLEY in *South Wales Miners' Federation* v. *Glamorgan Coal Co. Ltd.* (60):

" To break a contract is an unlawful act; or, in the language of LORD WATSON in *Allen* v. *Flood* (61), 'A breach of contract is in itself a legal wrong'. ... a breach of contract would not be actionable if nothing legally wrong was involved in the breach."

To this last citation DONOVAN, L.J., referred in his judgment (62) in the present case. I venture, like LORD LINDLEY, to refer to LORD WATSON'S opinion in *Allen* v. *Flood* (63) where the noble lord cited and adopted the language of BOWEN, L.J., in the *Mogul Steamship* case (64) ". . . the term 'wrongful' imports in its term the infringement of some right ". But in none of the reported cases (except the Irish cases (65)) was the question with which your lordships are now concerned raised as relevant for decision, and the language in the many judgments to which your lordships have been referred was, as I conceive, intended to be but illustrative and was in any event on the present question obiter.

I feel therefore free to approach the question as a matter of principle; and so approaching it, I cannot for my part see any persuasive basis for drawing the line

(54) [1938] I.R. 749. (55) [1940] I.R. 347.
(56) [1940] I.R. at p. 353. (57) [1925] All E.R. Rep. 1; [1925] A.C. 700.
(58) [1925] All E.R. Rep. at p. 14; [1925] A.C. at p. 730.
(59) (1889), 23 Q.B.D. at pp. 611-620.
(60) [1904-07] All E.R. Rep. 211 at p. 218; [1905] A.C. 239 at p. 253.
(61) [1895-99] All E.R. Rep. at p. 69; [1898] A.C. at p. 96.
(62) [1962] 2 All E.R. at p. 598; [1963] 1 Q.B. at p. 679.
(63) [1895-99] All E.R. Rep. at p. 68; [1898] A.C. at p. 94.
(64) (1889), 23 Q.B.D. at p. 612.
(65) *Cooper* v. *Millea* [1938] I.R. 749 and *Riordan* v. *Butler* [1940] I.R. 347.

so as to exclude from the wrong of intimidation threats of breaches of contract. I cannot find in accordance with logic, reason or common sense anything between threats to do tortious or criminal acts, on the one hand, and threats to break contracts on the other, which amounts, in the simile used by LORD HERSCHELL in *Allen* v. *Flood* (66) to a chasm. It is no doubt true that in attempting to extract the principle from the present case there is some obscurity caused by the circumstances with which we are concerned, that is, first, by the actual nature of the alleged threats and, second, by the presence in the background of the Trade Disputes Act, 1906. I therefore consider other illustrations of threats to break contracts. Suppose the case of one who carries on on premises which he has leased from another a business or profession, and that the landlord, intent on damaging his tenant's business or profession, threatens to commit breaches of his covenant for quiet enjoyment; or suppose the case of one whose business depends upon the exploitation of a licence granted by a patentee and the patentee (let us say) out of spite for the licensee or dislike of his methods threatens him with breaches or revocation of the licence. I find, for my part, great difficulty in thinking that in such cases as I have mentioned there would be no cause of action based on intimidation whereas such a cause of action would arise if the landlord or the patentee threatened personal assault or other tortious act. Nor, for my part, can I regard as conclusive the argument which clearly appealed strongly to PEARSON, L.J. (67) that if threats of breaches of contract amounted to intimidation there would be an unnatural and anomalous distinction between threats to break a contract, on the one hand, and breaches of the contract, on the other. It is an undoubted, but established and perhaps peculiar, feature of the English law that only parties to a contract can sue for breaches of that contract, notwithstanding that some third party may be damnified by the breach and intentionally so damnified. Such, however, has long been the established rule in English law though (as some have thought) the restriction now should be somewhat relaxed. Let it, however, be supposed that A breaks his contract with B and that B, under the pressure of the breach of contract, dispenses with the services of C—dispenses, that is to say, without breaking his contract with C. If those are the only facts, then it is no doubt true that C cannot prefer any claim against A. But as a practical matter of fact what in truth in such a case happens? If (as we are to suppose) the object of A's breach of contract with B was to cause B to dispense with the services of C, then, B having done so, does A proceed to renew his contractual relations with B? And, if so, does he do so on the terms, well understood by B, that, if B should attempt again to re-engage C, A would once more break his contract? If such were the true facts, then it would appear to me not seriously in doubt that C could maintain a cause of action against A for continuing to threaten further breaches of his contract. It seems, therefore to me that the cases in which the employment of one party is interfered with by a breach of the contract with his employer by another but without any further threats expressed or implied must indeed be rare. Indeed, in practice I conceive a parallel would not be other than close with the case of one who, instead of breaking a contract with the employer, in fact assaulted him and as a result (intended by the assaulting party) the employer disposed of the services of his servant. As in the case of the broken contract, the inference would no doubt be that unless the employer permanently severed his relations with his servant the third party would assault the employer again: and so a cause of action would fairly arise from the implied intimidation rather than from the actual assault. But however that may be, for reasons which I have given, I cannot be persuaded that there is in the constitution of the tort of intimidation an essential difference between tortious or criminal acts, on the one hand, and unlawful acts consisting of breaches of contract, on the other, or threats of such breaches which make it

(66) [1895-99] All E.R. Rep. at p. 79; [1898] A.C. at p. 121.
(67) [1962] 2 All E.R. at p. 608; [1963] 1 Q.B. at p. 695.

necessary for us now to say that the tort of intimidation can never extend to cover threats of breaches of contract. So far, therefore, I agree with the learned judge, SACHS, J. (68) in my answer to the second question which I have previously formulated, and think that the appellant here had established a good cause of action at law, unless his rights are defeated by s. 1 or s. 3 of the Trade Disputes Act, 1906.

It becomes then necessary, as it was strictly unnecessary for the Court of Appeal, for the House to reach a conclusion on the third of the questions which I have formulated, namely, on the effect in the present case of s. 1 and s. 3 of the Trade Disputes Act, 1906. Section 1 reads as follows:

> "The following paragraph shall be added as a new paragraph after the first paragraph of s. 3 of the Conspiracy, and Protection of Property Act, 1875: An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

I believe that all your lordships are agreed that, in the circumstances of the present case, s. 1 cannot be successfully invoked by the respondents. I am also of that opinion although, as later appears, I am not sure that my concurrence with your lordships' conclusion on this point rests on a complete concurrence of reasoning. To my mind, the essential question may be thus stated: was the quality of the acts done by each of the respondents such that those acts (being, as it is conceded, done in furtherance of a trade dispute), would give to the appellant a cause of action if done by each respondent on his own, without collaboration with the other respondents? For reasons already given, I have concluded that a threat to do an act unlawful in the sense of constituting a breach of contract may qualify as falling within the tort of intimidation. No doubt if all that Mr. Barnard did (to take his case as an example) was to threaten B.O.A.C. to break his own contract of service unless B.O.A.C. gave notice to the appellant, its coercive effect would (as I have earlier indicated) be negligible, if indeed at all existent. But Mr. Barnard was an official of the union and his threat was (and clearly understood to be) that he in common with all his union colleagues would break their service contracts unless the appellant's services were determined. Although, therefore, the threat was not one to procure breaches of their service contracts by the other union men, nevertheless the threat, properly understood as it was intended to be understood in the light of the resolution of Jan. 10, 1956, had a real and substantial coercive force. As such, and apart from the combination with him of the other respondents, such threat itself constituted a cause of action on the appellant's part. It follows, therefore, in my opinion, that s. 1 of the Act provides no answer to the appellant's claim.

Section 3 however has caused far greater difficulty. Its language is as follows:

> "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Nothing in the present case turns on the first part of the section, since there was here no breach of the appellant's contract "procured" by the acts of the respondents. It is with the second part of the section that your lordships are concerned and it will, I hope, be useful to repeat the relevant words. They are:

> "An act done by a person in . . . furtherance of a trade dispute shall not be actionable on the ground only that . . . it is an interference with the . . . employment of some other person."

(68) [1961] 2 All E.R. at p. 832; [1963] 1 Q.B. at p. 634.

I believe that all your lordships have in the end reached the conclusion that on their true construction, and in light of the relevant law as it was understood at the date of the passing of the Trade Disputes Act, 1906, the words which I have repeated cannot protect the respondents in the present case. The problem, on its face, is simple enough: what is meant by the few—and the simple—words "An act . . . shall not be actionable on the ground only that . . ."? As I believe all your lordships are agreed, the answer to the problem is to be found by inquiring whether "the acts" complained of are, as such, wrongful only on the ground (in such a case as the present) that they constitute or result in an interference with some person's employment. If this be the correct nature of the inquiry, then the answer in this appeal is that the acts complained of are not wrongful only on the ground they they interfered with the appellant's employment; for they are also wrongful on the ground of constituting the tort of intimidation. The alternative analysis which has, I confess, appealed to me places perhaps greater emphasis on the word "actionable" so that the essential question posed by the statutory language is, whether the acts complained of are *actionable on the part of some particular person* on the ground only that they interfered with that person's employment. Applying such a test to the present case the question then is resolved thus: were the acts of the respondents actionable *at the suit of the appellant* on the ground (and only on the ground) that they interfered with his employment? And if that be the right question then, as I conceive, the answer must be in the affirmative since the appellant was not himself intimidated and the only ground on which he can complain of the respondents' acts is that they resulted (as they were intended to do) in an interference with his (the appellant's) employment with B.O.A.C.

Let me say at once that I do not at all differ from your lordships in thinking that the same principle of interpretation must be applied to the first part as to the second part of s. 3; for the essential formula—"shall not be actionable on the ground only that"—is equally applicable to both parts of the section. So if the test which has appealed to me is applied where the first part of the section is involved, that is, in a case where there has been a breach of the contract of service of someone in the appellant's position, it would follow that protection is equally given, where there exists a trade dispute, whether the acts which brought about the breach of contract were as regards the employer wrongful (e.g. constituted the tort of intimidation) or consisted merely of persuasion without any threat or any other unlawful act. It is, however, as I understand, the view of all your lordships that if the case supposed were one where the breach of contract of service were brought about by threats or other unlawful acts, then no protection would be afforded by the first part of the section.

My lords, I am indeed conscious of the fact that the view on the supposed case entertained by your lordships appears to have the support of no less an authority than that of LORD LOREBURN, who was Lord Chancellor at the time of the passing of the Trade Disputes Act, 1906. I have in mind the celebrated passage in his speech in *Conway* v. *Wade* (69):

> "It is clear that, if there be threats or violence, this section gives no protection, in any case, for then there is some other ground of action besides the ground that 'it induces some other person to break a contract', and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done 'in contemplation or furtherance of a trade dispute' . . . In this respect there is a change. If there be no threat or violence, and no breach of contract, and yet there is 'an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills', there again

(69) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.

> there is perhaps a change. It is not to be actionable, provided that it was done 'in contemplation or furtherance of a trade dispute'."

I shall, I hope, be excused from quoting further at length from LORD LOREBURN'S speech.

It is said indeed with force that the first part of the language which I have quoted shows that LORD LOREBURN'S view was that no protection would be given by the section where the wrong of intimidation done to an employer had the effect of inducing him to break his service contract. It is therefore said that (in LORD LOREBURN'S view) the first part of the section was only intended to give relief where the breach of contract was procured by persuasion unaccompanied by any wrongful acts—in other words, to give relief only in cases which were in the year 1906 thought to fall strictly within the scope and authority of *Lumley* v. *Gye* (70): though as regards the second part of the section, LORD LOREBURN was careful to express no concluded view. I must also add that in no subsequent case has there been any doubt or qualification expressed in regard to LORD LOREBURN'S statement of the effect of the first part of the section: though it is also true that the particular point which your lordships are now asked to resolve has never, in fact, come before the courts for decision.

Having regard to the unanimity of your lordships' view on this matter I have not thought it right formally to dissent. Nonetheless, I have not felt able to resolve the doubts which I have felt in favour of your lordships' views and in case the section should hereafter come before Parliament for review I have thought it right to express more fully the argument which has appealed to me in favour of the alternative view of the construction of s. 3, namely that the acts of the respondents of which the appellant complains are actionable *at his suit* because (and only because) they have constituted and resulted (as they were intended to do) in an interference with the appellant's employment by B.O.A.C. I do not forget that in construing the material language of s. 3 regard should properly be had to the state of the law as it should be taken to have been (and to have been understood by Parliament to be) in 1906. It is also no doubt true that in 1906 the "leading heresy" in LORD DUNEDIN'S language—see *Sorrell* v. *Smith* (71)—had not been exposed and dissipated, viz., that acts which were in themselves lawful might nonetheless be actionable if it were shown that they were "maliciously" directed against another person, i.e., were deliberately intended to damage such other person particularly in his employment; and it may indeed be that such heresy has been entertained until the present time. I here make the point, however, that the first part of the citation from LORD LOREBURN (72), may have been directed to the position of the person who (unlike the appellant in the present case) is himself intimidated and who may well therefore (like one who sues another for the tort of negligence) have a cause of action against the wrong-doer altogether distinct from the damage by way of loss of employment which he may suffer from the wrong.

I do not, however fail to appreciate the point that Parliament may, in enacting the second part of s. 3 of the Act of 1906, have intended to resolve the "heresy" above mentioned in favour of the trade union when the (lawful) acts complained of were done in furtherance of a trade dispute; though the result would be, in light of later judicial decisions, to make that part of the section (unlike its initial part) merely declaratory of the law and therefore, in effect, nugatory. But whatever may have been (or may be assumed to have been) the Parliamentary intention in 1906 the question before your lordships must be to construe, according to the ordinary sense of the language used, the terms of the enactment. So much has been forcibly and authoritatively stated by LORD MACNAGHTEN (and

(70) (1853), 2 E. & B. 216.
(71) [1925] All E.R. Rep. at p. 9; [1925] A.C. at p. 719.
(72) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.

the other noble lords) in the case of *Vacher & Sons, Ltd.* v. *London Society of Compositors* (73). LORD MACNAGHTEN said (74):

> "It is 'the universal rule', as LORD WENSLEYDALE observed in *Grey* v. *Pearson* (75), that in construing statutes, as well as in construing all other written instruments 'the grammatical and ordinary sense of the word is 'to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further'. Acts of Parliament are, of course, to be construed 'according to the intent of Parliament' which passes them. That is 'the only rule' said TINDAL, C.J., delivering the opinion of the judges who advised this House, in the *Sussex Peerage Case* (76). But his lordship was careful to add this note of warning: 'If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver'. Nowadays, when it is a rare thing to find a preamble in any public general statute, the field of inquiry is even narrower than it was in former times. In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shown either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed."

Applying then this test, the question persists, notwithstanding any heresy formerly entertained, what acts are actionable, at the suit of any person, "only on the ground" that they interfere with that person's employment? And if that test is applied to the present case the conclusion would be that the acts of which the appellant here complains are not otherwise, at his suit, actionable.

We are here concerned with acts, that is to say, "unlawful" threats constituting intimidation not of the appellant himself but of the appellant's employers aimed and intended to interfere with the appellant's employment. As I have more than once observed, the appellant was not himself intimidated; but if I am right in thinking that the "unlawful" acts complained of comprehend threats of breaches of contract as well as threats of tortious actions, then, according to the law as I think it has emerged, the appellant would undoubtedly have a good cause of action, unless the acts complained of had been done in furtherance of a trade dispute. It is however relevant, on this view of s. 3 of the Act of 1906, to consider also the case of the person who is directly intimidated. The attempt to extract the relevant principles from the present case is, as I have already intimated, to some extent bedevilled by the circumstances of the case, including the possible difficulty in properly stating the nature of the "threats" of the defendants and the admitted fact that whatever was done by the defendants was done in truth in furtherance of a trade dispute. I take, therefore, by way of example the simple case of one who intimidates another by threats of personal violence. I take the case of A, engaged in some profession or business. I assume that B, from motives of intense personal dislike of A, uses threats of personal violence to A of real coercive force intended (and effective) to interfere with A's business. If, as a result of B's threats, A is compelled to abandon his business or profession he will, according to the view of the Court of Appeal as well as of your lordships, have a cause of action against B and such cause of action will be founded on the tort of intimidation. If the only effect of the intimidation is to

(73) [1911-13] All E.R. Rep. 241; [1913] A.C. 107.
(74) [1911-13] All E.R. Rep. at p. 246; [1913] A.C. at pp. 117, 118.
(75) (1857), 6 H.L. Cas. 61 at p. 106. (76) (1844), 11 Cl. & Fin. 85 at p. 143.

"interfere" with A's business—if, that is to say, the only "damnum" suffered by A from B's injuria is damage to A's business—then the question remains whether, if the acts of intimidation were done in furtherance of a trade dispute, s. 3 of the Act of 1906 would provide a good defence to A's claim. On this question I express no view. But clearly the damage to A might not be so confined—he might well, as a consequence of B's intimidation, suffer in many ways including health, and, if he did, then, as I conceive, his cause of action against B would be founded on the tort of intimidation and would not be confined, by reference to the damage suffered, to interference with his business. I take by way of analogy the case where B, by careless driving of his motor car, seriously injures A. In such a case the damage suffered by A may comprehend the fact that, as a result of his injuries he is unable to continue to carry on his business or profession. Nonetheless his cause of action against B would be founded on B's negligence and plainly it could not fairly be said that the "only ground" on which, at A's suit, B's acts were actionable was that they interfered with A's business. Does not similar reasoning apply in the case where the person complaining of the tort of intimidation is the person himself intimidated? In a case therefore in which, pursuant to a trade dispute, threats were made—say by members or officials of a trade union—direct to one who was not a member of the union, it should follow that the person threatened could properly claim redress on the ground of intimidation since the damage suffered by him was not limited to and dependent on interference with his employment. That question, if and when it arises, will be decided on the particular facts of the case. Where, however, as in the present case, the complainant has not himself been intimidated, his cause of action must depend, and must depend exclusively, on his claim that the threats to a third party (namely, his employers) were made with the deliberate intent of affecting his own job. If they were, then (apart from s. 3 of this Act of 1906) he would have a cause of action; but if the threats were made in fact in furtherance of a trade dispute the result is, on the alternative view of construction which has appealed to me, that his cause of action, his right to complain, is necessarily and inevitably destroyed by what I take to be the plain meaning of the words of the section.

I should add here that I have been somewhat troubled by the words "... *is* an interference ..." in the section; since the acts complained of may fairly be said not themselves to be, but rather to have resulted in, such an interference. But the difficulty arises whichever view is taken of the construction of s. 3, and I have felt bound to conclude that the word "is" must in its context mean and comprehend the effect of the acts of which complaint is made. Were it otherwise, indeed, the section would be incompetent to cover the case of acts in themselves lawful but by their effect intended to damage the business or employment of the complainant. In other words, if by the use of the word "is" Parliament intended to confine the operation of the section to cases in which the "acts" in question of themselves operated as an interference with the business or employment of another, the section would, so far as I can see, have been inevitably without practical effect. I therefore have felt compelled to the view that by the word "is" Parliament meant and intended "is by its effect or intention".

I should add that, with all respect to the opposite view, it does not seem to me that any assistance one way or the other is to be derived from s. 4 of the Act of 1906, which in terms gives absolute immunity to trade unions themselves; for, on the alternative view of its effect which has appealed to me, s. 3 falls far short of giving a corresponding immunity to those whose acts procure a breach of some person's contract or interfere with his employment. Nor does it seem to me that the alternative view can be said to involve giving wholly unreasonable licence to persons doing wrongful acts in contemplation or furtherance of a trade dispute: for as I have endeavoured to illustrate, the person (i.e., in the ordinary case, the employer) is not deprived of the right to invoke the jurisdiction of the courts where he has been the victim of the wrongful acts except at any rate in a

case where his only ground for complaining of the wrongful acts—the only "damnum" suffered by him as their result—was that they interfered with his business. After all, on any view the only persons against whom proceedings could be taken by anybody in respect of acts done in contemplation or furtherance of a trade dispute would (except perhaps in very rare cases indeed) be individuals like the defendants in the present case whose ability to pay damages would be greatly limited. Moreover, in cases of the kind which I have in mind I hope and believe that the trade unions in our country are sufficiently responsible and influential to see that acts done by their members in the course of trade disputes are not wholly irresponsible.

I have, for the reasons earlier stated, attempted to set down fully the grounds which appear to me to support the alternative view of the construction of s. 3. I add only that, as I have felt, the vital word may be said to be "actionable" and not, for example, "wrongful" or "capable of giving rise to a cause of action". The use of the word "actionable" inevitably provokes the question "actionable on whose part?": and the alternative answer to the question involves only that there should be read into the section such words as "on the part of any person" which the use of the word "actionable" may be said inevitably to require. Nonetheless, having attempted to express my doubts and the reasons for them I do not on this matter formally dissent from your lordships.

There remains the final question fully argued on the resumed hearing of the appeal, namely, whether, assuming the appellant to be entitled to succeed in his action, he could claim what are called "exemplary damages". On this difficult question, falling now to be considered for the first time by your lordships' House, I have had the advantage of reading the opinion prepared by my noble and learned friend, LORD DEVLIN, who, at the end of it, dealt exhaustively with this subject. For the reasons which LORD DEVLIN gives, I agree entirely with his conclusion that awards of exemplary damages ought to be strictly limited to the two classes of case specified by him, neither of which comprehends the present case; and I share my noble friend's opinion that your lordships should now overrule the decision of the Court of Appeal in the case of *Loudon* v. *Ryder* (77).

In all the circumstances I agree that the House should now make an order in the form proposed by my noble and learned friend LORD REID.

LORD HODSON: My Lords, the appellant worked as a draughtsman for B.O.A.C. at London Airport where, from 1951, the union called the Association of Engineering and Shipbuilding Draughtsmen (A.E.S.D.) had an informal "one hundred per cent. membership" agreement with the employers. On Apr. 1, 1949, the employers' and the employees' sides entered into an agreement in writing, which provided by cl. 4 that no lock-out or strike should take place and that, if a dispute occurred, arbitration procedure should be followed. In 1955 the appellant, who had disapproved of the policy of the union, resigned his membership. The respondents Barnard and Fistal, branch chairman and local shop steward, and Silverthorne, who was a paid official of the union, advocated strike action if the appellant remained in his employment as a draughtsman. A resolution was passed and communicated to B.O.A.C. "that if the Non-Unionist Mr. D. E. Rookes is not removed . . . a withdrawal of labour of all A.E.S.D. Membership will take place". In face of this threat B.O.A.C. first suspended and later dismissed the appellant, after giving him due notice which expired on Mar. 16, 1956. The appellant brought his action on June 25, 1957, for damages for the injury which the respondents had caused him by threatening B.O.A.C. in the manner indicated, so that B.O.A.C. had been induced to terminate his services.

It was agreed by both sides that the terms of the 1949 agreement formed "so far as applicable part of the contract of employment" of A.E.S.D. members

(77) [1953] 1 All E.R. 741; [1953] 2 Q.B. 202.

at the London Airport office. It was also agreed that a trade dispute existed at all material times concerning the continuation of the appellant in the employment of B.O.A.C. while he was not a member of A.E.S.D., and that all the acts of the respondents were done in furtherance of that trade dispute. The jury found that there was a conspiracy to threaten strike action to secure the withdrawal of the appellant and that all three respondents were parties, that all three had threatened to take strike action directed to the same end, and that, their threats having caused the dismissal of the appellant, he should be awarded £7,500 damages. The learned judge held that the tort of intimidation had been committed by each defendant, that the threats to do unlawful acts, i.e., to break contracts of employment by departing from the terms of the 1949 agreement, resulted in reasonably foreseeable damages to the appellant.

The respondents have throughout maintained that the action is misconceived, in that there is no such tort as intimidation and, further, that if there is such a tort it does not extend to cover this case involving, as it does, no threat of violence or of any criminal or tortious act, but a mere threat to break a contract, that is, a breach of obligations undertaken by private treaty between two persons. Such a threat, it is said, ought not to give a remedy to an outsider. The Court of Appeal reversed the decision of the learned judge, holding that, although the tort of intimidation existed, it did not cover the case of a threat to break a contract. No doubt many of the old cases in which a plaintiff has been held entitled to recover damages from a defendant who has intimidated a third party can be explained on the ground of nuisance, or some other recognised tort, but some cannot, and I think that, of these *Garret* v. *Taylor* (78) and, more particularly, *Tarleton* v. *M'Gawley* (79) cannot be so explained, and I agree with your lordships that the existence of this tort is established by authority.

The main arguments of the respondents has been directed to persuade your lordships that this tort is of a restricted nature, having its roots in violence and threats of violence, and should not be extended to cover the case of workmen who threaten to break their contract with their employers if they, the employers, refuse to terminate the employment of an individual workman, as happened in this case. It cannot be disputed that the limited view of the tort which commended itself to the Court of Appeal (80) finds support in authority which does not appear to have contemplated that breach of contract was within the field of unlawful acts giving rise to the tort of intimidation. DONOVAN, L.J. (81), pertinently referred to the Criminal Law Amendment Act, 1871, which makes it an offence to use violence, threats, intimidation, molestation or obstruction with a view, among other things, to coercing an employer into ceasing to employ a workman. The threats and intimidation had to be acts such as would justify a justice of the peace in binding over the person so threatening or intimidating to keep the peace. This Act did not accordingly make it unlawful to threaten to strike. It was repealed in 1875 by the Conspiracy, and Protection of Property Act, 1875, and in 1891 it was decided, in two cases cited by the learned lord justice, that the word "intimidation" could not be construed more severely than as defined by the Act of 1871 (see *Connor* v. *Kent*, *Gibson* v. *Lawson*, *Curran* v. *Treleaven* (82)). Subject to specific exceptions, such as breaches of contracts of service by employees of municipal gas and water undertakings and breaches of contract involving danger to life, risk of serious bodily injury and destruction of or serious injury to valuable property, a threat to break a contract is no longer unlawful in the sense of being criminal.

In the past there has been much discussion in the conspiracy cases about the word "threat", but there is now no necessity to be careful to distinguish between a threat and a warning on the basis that one is a threat to do an illegal

(78) (1620), Cro. Jac. 567.
(79) (1794), Peake 270.
(80) [1962] 2 All E.R. 579; [1963] 1 Q.B. at p. 657.
(81) [1962] 2 All E.R. at p. 596; [1963] 1 Q.B. at p. 678.
(82) [1891] 2 Q.B. 545.

act and the other a warning to do something lawful. As LORD DUNEDIN put it in *Sorrell* v. *Smith* (83)

> "A threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal or an illegal, i.e., a tortious, action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established."

This language, while making clear that the word "threat" of itself is neutral, does nothing to support the contention of the appellant that breach of contract was the kind of unlawful act which could be envisaged by the tort of intimidation. Illegal is treated as equivalent to tortious by the use of the link "id est". In the *Crofter's* case (84), LORD WRIGHT said (85):

> "There is nothing unlawful in giving a warning or intimation that if the party addressed pursues a certain line of conduct, others may act in a manner which he will not like and which will be prejudicial to his interests, so long as nothing unlawful is threatened or done."

It is clear that the threat must be a threat to do something independently unlawful. Breach of contract is unlawful and SACHS, J., in rejecting the respondents' contention that this was outside the scope of intimidation, followed (86) the persuasive authority of two Irish cases, *Cooper* v. *Millea* (87) and *Riordan* v. *Butler* (88), in the earlier of which reliance was placed by GAVAN DUFFY, J., on the speech of LORD DUNEDIN in *Sorrell* v. *Smith* (89) which does not, however, support the proposition that a threat to strike in breach of contract is unlawful and constitutes unlawful means.

In *Huntley* v. *Thornton* (90), HARMAN, J., said, in relation to employees who threatened to strike:

> "If, however, their actions amounted to threats of illegal strike action—that is to say, action to withdraw labour in breach of contract—then those acts were tortious and illegal."

As SACHS, J., pointed out (91), this observation of HARMAN, J., was obiter.

The argument which seems to have carried the greatest weight in the Court of Appeal in this case is that which may be called the privity of contract argument. As PEARSON, L.J., put it (92), if the extension contended for by the appellant were made it would overturn or outflank the elementary principles of contract law. These, speaking broadly, exclude the jus tertii and restrict the rights and obligations of a contract to the parties thereto. See two decisions of your lordships' House, viz., *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (93) and *Scruttons, Ltd.* v. *Midland Silicones, Ltd.* (94). Various examples have been given showing the apparent absurdity of giving relief to someone in the position of the appellant when breach of contract is threatened and denying relief when the contract is in fact broken.

As my noble and learned friend, LORD DEVLIN, points out in the speech which I have had the privilege of reading, there is really no absurdity in the instances given. The vice of the respondents' action is the threat to break and not the breach itself, which would not have the adverse effect on the appellant

(83) [1925] All E.R. Rep. at p. 14; [1925] A.C. at p. 730.
(84) [1942] 1 All E.R. 142; [1942] A.C. 435.
(85) [1942] 1 All E.R. at p. 160; [1942] A.C. at p. 467.
(86) [1961] 2 All E.R. at p. 834; [1963] 1 Q.B. at p. 636.
(87) [1938] I.R. 749.
(88) [1940] I.R. 347.
(89) [1925] All E.R. Rep. at pp. 7-15; [1925] A.C. at pp. 716-731.
(90) [1957] 1 All E.R. 234 at p. 251.
(91) [1961] 2 All E.R. at p. 831; [1963] 1 Q.B. at p. 632.
(92) [1962] 2 All E.R. at p. 608; [1963] 1 Q.B. at p. 695.
(93) [1914-15] All E.R. Rep. 333; [1915] A.C. 847.
(94) [1962] 1 All E.R. 1; [1962] A.C. 446.

which was caused by the threat to break. Much of the argument which seeks to restrict the rights under a contract to the parties to it in a situation such as the present can be found in the powerful dissenting judgment of COLERIDGE, J., in *Lumley* v. *Gye* (95), but this judgment does not represent the law, and the view of the majority that a party injured by breach of contract has his remedy against one who has induced the breach is now part of our law—subject to any defence there may be by way of justification or under the Trade Disputes Act, 1906, to which I must refer later. I would therefore reject the privity of contract argument.

It would, I think, today be more anomalous to draw the line short of breach of contract than beyond it. In the old days the question of breach of contract by workmen simply did not arise for the reason that they did not have contracts of employment, as a rule, to break. Now the situation is different, and in this case the employees not only agreed to a fixed period of notice on either side for termination of the employment but also not to strike, which I take it means not to take part in any concerted withdrawal of labour, with or without notice.

It would be strange if threats of violence were sufficient and the more powerful weapon of a threat to strike were not, always provided that the threat is unlawful. The injury and suffering caused by strike action is very often widespread as well as devastating, and a threat to strike would be expected to be certainly no less serious than a threat of violence. That a breach of contract is unlawful in the sense that it involves the violation of a legal right there can be no doubt. LORD HERSCHELL in *Allen* v. *Flood* (96), emphasised this point in the passage where he expressed the opinion that there was a chasm between maliciously inducing a breach of contract and maliciously inducing a person not to enter into a contract. The one is unlawful and the other is lawful.

I do not think your lordships are laying down any new principle in including a threat to break a contract under the head of intimidation. It is no more than an application of the existing principle to a case which has not been before considered, and I would therefore accept the appellant's argument that the tort of intimidation would be available to him but for the effect of the Trade Disputes Act, 1906. Section 1 of the Act reads:

> "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

I agree with the learned judge that, once it is accepted that the threat to act in breach of the 1949 agreement constitutes intimidation and is actionable as a tort, if it is likely to harm the appellant and is followed by reasonably foreseeable damage, it is not open to the respondents to rely on this section by saying in effect that the damage cannot be attributed to any particular act of the respondents and therefore the act done is not actionable without the element of combination. Section 1 therefore provides no defence.

Section 3, however, is in a different category. It reads:

> "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

It is on the construction of this section that the most difficult question falls to be decided.

There is a material contrast between s. 3 and s. 4. The latter prevents actions of tort being instituted against trade unions in any circumstances, and may be said

(95) (1853), 2 E. & B. at pp. 246, 247.
(96) [1895-99] All E.R. Rep. at p. 79; [1898] A.C. at p. 121.

to place trade unions outside the law. The former is not so framed as to give "carte blanche" to those acting in contemplation or furtherance of a trade dispute. Actions are not forbidden to be entertained but certain acts done are not to be "actionable on the ground only that" etc. If the end result of both limbs of the section, inducement of some other person to break a contract on the one hand, interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wishes on the other hand, had alone to be taken into consideration, a result not unlike that reached by s. 4 would follow, for whatever the nature of the tort the ground of action would be either the "inducement" or the "interference". It would seem therefore at any rate very unlikely that in wording s. 3 in the way it did, in contrast to the general words conferring immunity to be found in s. 4, Parliament could have intended to go so far as to give protection to members of a trade union in every case where the consequences of the act, whether the act itself is lawful or unlawful, were that a breach of contract has been induced or that a person's employment had been interfered with.

Further support for what I may term the limited, as opposed to the licentious, scope of s. 3 is to be found in s. 2 of the Act, which licenses picketing but only for the purpose of peaceful persuasion. As my noble and learned friend, LORD REID, has pointed out, the general plan of s. 3 is to treat both limbs in the same way, and I will not detain your lordships by repeating in my own language the reasons which he gives, and with which I respectfully agree, for holding that on principle and authority s. 3 affords no protection if there are threats or violence and if, as your lordships all hold, the threat to break a contract amounts to unlawful intimidation. The dictum of LORD LOREBURN, L.C., in *Conway* v. *Wade* (97) has strong persuasive authority and has been accepted, I think rightly, in a number of cases to which your lordships have been referred down to the present time.

The intimidation is actionable, and the appellant is entitled to sue on that ground, not "on the ground only" that his employment has been interfered with. This last is the damage which he has suffered, it is not the only ground of his action. I would allow the appeal, but there must be a new trial on the question of damages for the reasons to be given by my noble and learned friend, LORD DEVLIN.

LORD DEVLIN: My Lords, on Mar. 16, 1956, the appellant's employment, which had lasted nine years with B.O.A.C., was lawfully determined by notice. The reason why it was terminated was because on Jan. 10, 1956, the members of the A.E.S.D., a trade union to which the appellant belonged and from which he had resigned, served notice on B.O.A.C.

> "that if the non-unionist, Mr. D. E. Rookes, is not removed from the design office by 4 p.m. Friday, Jan. 13, 1956, a withdrawal of labour of all A.E.S.D. membership will take place."

On Jan. 13, 1956, the appellant was suspended from his employment and the strike thereby averted; and thereafter notice terminating his employment altogether was given to him, as I have said. The three respondents were officials of the union and two of them were employed by B.O.A.C.

It is not disputed that the notice constituted a threat of breach of contract by the members of A.E.S.D. It is true that any individual employee could lawfully have terminated his contract by giving seven days' notice and if the matter is looked at in that way, the breach might not appear to be a very serious one. But that would be a technical way of looking at it. As DONOVAN, L.J., said in the Court of Appeal (98), the object of the notice was not to terminate the contract either before or after the expiry of seven days. The object was to break the contract by withholding labour but keeping the contract alive for as long as

(97) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.
(98) [1962] 2 All E.R. at p. 600; [1963] 1 Q.B. at p. 682.

the employers would tolerate the breach without exercising their right of rescission. In the second place, there was an agreement in force between A.E.S.D. and B.O.A.C. in which the former undertook that no strike of its members would ever take place; and it is admitted that that term formed part of the contract of service of each member with B.O.A.C. I agree with the submission made by counsel for the appellant that a strike means a concerted withdrawal of labour in furtherance of a trade dispute, whether or not the withdrawal is effected after proper notice has been given. It is common ground that the issue whether a non-unionist should continue to be employed creates a trade dispute.

It is not therefore denied that the service of the notice was an infringement of B.O.A.C.'s rights. But the question is whether the respondents thereby infringed any right of the appellant. Since all that the respondents did was admittedly done in the furtherance of a trade dispute, it is idle to inquire what possible causes of action there are available to the appellant at common law without inquiring at the same time to what extent they are curtailed by statute.

Conspiracy, which suggests itself at once as a possible cause of action, is covered by s. 1 of the Trade Disputes Act, 1906. There are, as is well known, two sorts of conspiracies, the *Quinn* v. *Leathem* (99) type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means. Section 1 of the Act contains the formula which negatives the first type as a cause of action where there is a trade dispute. In the latter type, which in my opinion is not affected by the section, the element of conspiracy is usually only of secondary importance, since the unlawful means are actionable by themselves. Section 3 provides a second barrier for the appellant to surmount. It grants immunity in respect of certain acts which include, it is said (I shall have later to examine carefully the language in which the immunity is granted), an inducement of "some other person to break a contract of employment" and "an interference with the trade business or employment of some other person".

The appellant's choice of remedies being restricted in this way, the only wrong which he asserts as having been committed by the respondents is the tort of intimidation. On this the respondents say, first that there is no such tort; secondly, that if there is, the respondents did not commit it; and thirdly, that if they did commit it, they are given immunity by s. 3, because the intimidation resulted in an interference with the employment of the appellant by B.O.A.C.

My lords, in my opinion there is a tort of intimidation of the nature described in ch. 18 of SALMOND ON THE LAW OF TORTS (13th Edn.), p. 697. The tort can take one of two forms which are set out in Salmond as follows:

> "(1) Intimidation of the plaintiff himself.
>
> "Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with the intention.
>
> "(2) Intimidation of other persons to the injury of the plaintiff.
>
> "In certain cases it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to the plaintiff: for example, the intimidation of the plaintiff's customers whereby they are compelled to withdraw their custom from him, or the intimidation of an employer whereby he is compelled to discharge his servant, the plaintiff. Intimidation of this sort is actionable, as we have said, in certain classes of cases; for it does not follow that, because a plaintiff's customers have a right to cease to deal with him if they please, other persons have a right as against the plaintiff to compel his customers to do so. There are at least two cases in

(99) [1900-03] All E.R. Rep. 1; [1901] A.C. 495.

which such intimidation may constitute a cause of action:—(i) When the intimidation consists in a threat to do or procure an illegal act; (ii) When the intimidation is the act, not of a single person, but of two or more persons acting together, in pursuance of a common intention."

As your lordships are all of opinion that there is a tort of intimidation and on this point approve the judgments in both courts below, I do not propose to offer any further authorities or reasons in support of my conclusion. I note that no issue on justification was raised at the time and there is no finding of fact on it. Your lordships have not to consider what part, if any, justification plays in the tort of intimidation.

Your lordships are here concerned with the sort of intimidation which SALMOND puts into the second category, and with the first of SALMOND'S two cases. The second case is, so SALMOND later observed, " one form of the tort of conspiracy " (100). That form is the *Quinn* v. *Leathem* (101) type, so that it is no use to the appellant here. He relies on " a threat to do or procure an illegal act ", namely, a breach of contract. Doubtless it would suit him better if he could rely on the procuring of a breach of contract, for that is a tort; but immunity from that is guaranteed in terms by s. 3. So he complains only of the threat to break the service contracts, and the breach would undoubtedly be an act actionable by B.O.A.C., though it is neither tortious nor criminal. He does not have to contend that in the tort of intimidation, as in the tort of conspiracy, there can be, if the object is injurious, an unlawful threat to use lawful means. I do not think that there can be. The line must be drawn according to the law. It cannot be said that to use a threat of any sort is per se unlawful; and I do not see how, except in relation to the nature of the act threatened, i.e., whether it is lawful or unlawful, one could satisfactorily distinguish between a lawful and an unlawful threat.

This conclusion, while not directly in point, assists me in my approach to the matter to be determined here. It is not, of course, disputed that if the act threatened is a crime, the threat is unlawful. But otherwise is it enough to say that the act threatened is actionable as a breach of contract or must it be actionable as a tort? My lords, I see no good ground for the latter limitation. I find the reasoning on this point of PROFESSOR HAMSON (102) (which SELLERS, L.J. (103), sets out in his judgment though he does not himself accept it) very persuasive. The essence of the offence is coercion. It cannot be said that every form of coercion is wrong. A dividing line must be drawn and the natural line runs between what is lawful and unlawful as against the party threatened. If the defendant threatens something that that party cannot legally resist, the plaintiff likewise cannot be allowed to resist the consequences; both must be put up with the coercion and its results. But if the intermediate party is threatened with an illegal injury, the plaintiff who suffers by the aversion of the act threatened can fairly claim that he is illegally injured.

Accordingly, I reach the conclusion that the respondents' second point fails and on the facts of this case the tort of intimidation was committed. I do not share the difficulties which the lords justices felt about the idea of admitting breach of contract into the tort of intimidation. Out of respect to them I must state what those difficulties are and how in my opinion they can be satisfactorily resolved. I think that in one form or another they all stem from the error that any cause of action by the third party, that is the appellant, must in some way be supplemental to or dependent on a cause of action by B.O.A.C. Thus, it is said to be anomalous that on the facts of this case the appellant should be able to sue the respondents when B.O.A.C. could not. The best way of answering that is to grant that B.O.A.C. would not be able to sue and to assert, as I shall seek to show, that there is nothing anomalous about it. But there was introduced into the

(100) (13th Edn.), p. 699. (101) [1900-03] All E.R. Rep. 1; [1901] A.C. 495.
(102) Cambridge Law Journal, November, 1961, p. 189 at pp. 191, 192.
(103) [1962] 2 All E.R. at p. 588; [1963] 1 Q.B. at p. 665.

argument a suggestion that B.O.A.C. could in fact have sued because although there was no actual breach of contract, one was threatened and therefore there was an anticipatory breach. Against that, it was said that B.O.A.C. could not have sued for an anticipatory breach unless they first elected to rescind, which they never did. I dare say that is right, but I do not think it matters at all whether B.O.A.C. could sue or not. The two causes of action—B.O.A.C.'s and the appellant's—are in law quite independent; and in fact they are virtually alternative because it is difficult to visualise (except in one case) a set of facts on which both could sue.

This last statement is best examined in relation to a threat of physical violence which would unquestionably constitute intimidation. If A threatens B with physical violence unless he harms C, B can either resist or comply. If he resists, B might obtain an injunction against A (as he could also in the case of a threatened breach of contract if the contract were of a kind that permitted that remedy); or if A carries out his threat, B can sue for assault and obtain damages. In neither case can C sue because he has suffered no harm. If B complies with the threat, B cannot sue for damages because ex hypothesi there has been no assault; and he is not likely to obtain an injunction against the execution of a threat which he has already taken other means to avoid. But C will be able to sue because through B's compliance he has been injured. There is no anomaly about this; and if one substitutes " breach of contract " for " physical violence ", the position is the same. The only case in which B and C are both likely to sue is if they both sue for the tort of intimidation in a case in which B has harmed himself by also harming C. Then it is said that to give C a cause of action offends against the rule that one man cannot sue on another's contract. I cannot understand this. In no circumstances does C sue on B's contract. The cause of action arises not because B's contract is broken but because it is not broken; it arises because of the action which B has taken to avert a breach.

Then it is asked how it can be that C can sue when there is a threat to break B's contract but cannot sue if it is broken without a threat. This means, it is argued, that if A threatens first, C has a cause of action; but if he strikes without threatening, C has no cause of action. I think that this also is fallacious. What is material to C's cause of action is the threat and B's submission to it. Whether the threat is executed or not is *in law* quite immaterial. *In fact* it is no doubt material because if it is executed (whether it be an assault or a breach of contract) it presumably means that B has not complied with it; and if B has not complied with it, C is not injured; and if C is not injured, he has no cause of action. Thus the reason why C can sue in one case and not in the other is because in one case he is injured and in the other he is not. The suggestion that it might pay A to strike without threatening negatives the hypothesis on which A is supposed to be acting. It must be proved that A's object is to injure C through the instrumentality of B. (That is why in the case of an " innocent " breach of contract, which was remarked on by SELLERS, L.J. (104), that is, one into which A was forced by circumstances beyond his control, there could never be the basis of an actionable threat.) If A hits B without telling him why, he can hardly hope to achieve his object. Of course A might think it more effective to hit B first and tell him why afterwards. But if then B injures C, it would not be because B had been hit but because he feared that he might be hit again. So if in the present case A.E.S.D. went on strike without threatening, they would not achieve their object unless they made it plain why they were doing so. If they did that and B.O.A.C. then got rid of the appellant, his cause of action would be just the same as if B.O.A.C. had been threatened first, because the cause of the injury to the appellant would have been A.E.S.D.'s threat, express or implied, to continue on strike until the appellant was got rid of.

Finally, it is said that if a threat of breach of contract constitutes intimidation,

(104) [1962] 2 All E.R. at p. 592; [1963] 1 Q.B. at p. 671.

one party to a contract could be sued for intimidation if he threatened reprisals. Suppose, for example, A has agreed to deliver goods to B in monthly instalments but has not made payment for the first a condition precedent to delivery of the second. If he threatens to withhold the second until payment has been made for the first, is he intimidating B? I doubt it. But the case introduces questions not in issue here—whether a threat in such circumstances would be justifiable and whether it is intimidation to try to force a man into doing what the law, if invoked, would compel him to do. I find therefore nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. The nature of the threat is immaterial, because, as PROFESSOR HAMSON points out (105), its nature is irrelevant to the plaintiff's cause of action. All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of — whether it is a physical club or an economic club, a tortious club or an otherwise illegal club. If an intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced.

I think therefore that at common law there is a tort of intimidation and that on the facts of this case each of the respondents has committed it, both individually (since the jury has found that each took an overt and active part) and in combination with others. I must add that I have obtained no assistance from the numerous dicta cited to show what constitutes " unlawful means " in the action of conspiracy. In some of the dicta the language suggests that the means must be criminal or tortious and in others that breach of contract would do; but in no case was the point in issue. Moreover, while a decision on that point might have been most illuminating, it is not the point that I have been considering. I have not been considering what amounts to unlawful means in the tort of conspiracy. I am not saying that a conspiracy to commit a breach of contract amounts to the tort of conspiracy; that point remains to be decided. I am saying that in the tort of intimidation a threat to break a contract would be a threat of an illegal act. It follows from that that a combination to intimidate by means of a threat of a breach of contract would be an unlawful conspiracy; but it does not necessarily follow that a combination to commit a breach of contract simpliciter would be an unlawful conspiracy.

I have now reached the respondents' third defence and must consider whether the Trade Disputes Act, 1906, provides them with a good defence. The respondents have advanced two separate statutory defences, the first based on s. 1 and the second on s. 3. The argument on s. 1 is that in order to find on the facts of this case sufficient proof of the tort of intimidation, it is necessary, so it is said, to bring in agreement or combination by the back door; and that is forbidden by s. 1. The argument is applied in particular and in general. In particular, it is applied in the case of Silverthorne, the respondent who is not an employee. He had therefore no contract to break; he cannot be sued (this is admittedly plain from s. 3) for procuring a breach by others; therefore the only cause of action against him is conspiracy or joint intimidation, involving either agreement or combination. In general, the argument is applied in the following way. To sustain the tort of intimidation, it must be shown that there was an operative threat. Damage is an essential part of the cause of action and it must be shown that the damage was caused by the threat. The threat of any single man to stop work would not have influenced B.O.A.C. It was the power of the combination that did that; and that makes proof of the combination (which s. 1 will not allow) an essential part of the appellant's cause of action against all three respondents. The first part of this argument, i.e. its application in particular to Silverthorne, in my opinion reads too much into s. 1. To establish a cause of action of any sort a plaintiff must show an injurious act. If the act that injures him is not by itself actionable, the plaintiff can succeed at common law only if he shows that it was " done in pursuance of an agreement or combination " to injure him. He is then

(105) Cambridge Law Journal, November, 1961, at pp. 191, 192.

setting up a *Quinn* v. *Leathem* (106) cause of action and if that is his position, s. 1 prevents him from suing. But if the injurious act is actionable without the allegation of conspiracy, that is, if it is by itself unlawful, s. 1 does not apply at all. It does not prevent the plaintiff from suing the doer of the act and the conspirators, if any, as well. Section 1 does not prevent actions of conspiracy altogether; it restricts them.

I turn now to the second part of the argument. It is true that the tort of intimidation cannot be committed unless the intimidator has, or is believed by the party threatened to have, the coercive power which is of the essence of the tort. It may be that the power belongs to someone else, who has placed it at the disposal of the intimidator and will himself do what the intimidator says: it is then the intimidator who is in control. Or it may be that an intimidator will employ an agent to convey the threat, and then such a person may be a tortfeasor as well. Or it may be that the coercive power is dispersed among many, no single man being strong enough by himself. All these three alternatives involve agreement or combination and then, however the act is done, it is done pursuant to an agreement or a combination. When the tort is committed by a single man, that man must be a man with enough coercive power to achieve his object. If the necessary coercive power is dispersed, there must be agreement or combination before it can be effectively used. If this is accepted, as I think it should be, as a correct analysis of the tort, the question becomes one of the true interpretation and effect of the language of s. 1. It turns on what exactly is meant by " actionable " and what is the test of actionability to be imposed. The section may mean that in the particular case to which it is being applied, the action will fail unless the plaintiff can prove that a single person has in fact committed the tort of intimidation. Or it may mean that the nature of the act must be such as to make it actionable, even if done without any agreement or combination. If the former view is right, then on the assumption of fact that, as is probable, B.O.A.C. would not have been coerced by any individual threat, this appeal must fail. If the latter is right, it is sufficient that intimidation is not of its nature a tort that cannot be committed by a single person and therefore it is of its nature actionable if done without agreement or combination. I have reached the conclusion that the second interpretation should be preferred. This is consistent with the view I have already expressed about this section, namely, that its object is to exclude *Quinn* v. *Leathem* (106) conspiracies in trade disputes. It is distinguishing between wrongs that can be committed singly and those that cannot.

The defence based on s. 3 also turns on the interpretation and effect of the section, the material words being " actionable on the ground only that ". There are two limbs in the section and I agree that " only " covers both. The second limb can for the purposes of this case be expressed shortly as an interference with employment. Thus the effect of the section can be stated as follows: an act is not to be actionable on the ground only (a) that it induces a breach of contract of employment, or (b) that it interferes with employment. The problem of interpretation to which this section gives rise is, I think, broadly similar to the problem created by s. 1. Is it dealing with the requisites of a cause of action in a given case or is it dealing with the nature of the tort which it is designed to exclude? I invite your lordships to consider this problem first in relation to the first limb of s. 3. What are the requisites for a cause of action for inducing a breach of contract? There must be, besides the act of inducement, knowledge by the defendant of the contract in question and of the fact that the act induced will be a breach of it; there must also be malice in the legal sense, that is, an intention to cause the breach and to injure the plaintiff thereby and an absence of justification; and there must be special damage, i.e. more than nominal damage, caused to the plaintiff by the breach. These three elements or requisites are the grounds on which an action for inducing a breach of contract must be based. If any one of them is missing, there is no cause of action.

(106) [1900-03] All E.R. Rep. 1; [1901] A.C. 495.

If then one treats the section as dealing with the requisites of a cause of action, one finds oneself in difficulties with the cardinal phrase "actionable on the ground only that". This speaks of a sole ground. The tort of inducing a breach of contract—and this is true of most torts—is not based on a single ground. An act of inducement is not by itself actionable. One man may induce another to take a certain course without the least idea that the other had pledged himself not to take it: that is not actionable at common law and needs no absolution from the statute. What are the ways around this difficulty? One way is to refuse to recognise it at all and to insist on the statute being taken literally. No one would suggest that in the present state of the common law mere inducement could be actionable. It might perhaps be suggested, not very convincingly, that at one time it was thought that it might be. At any rate it can be argued that on its literal construction this is what the statute clearly implies. From this it would follow that if one can add any other element to inducement, such as knowledge or intention or malice, the act is not brought only on the ground of inducement and therefore is not barred by the section. This would have the startling result that an action for inducing a breach of contract in a trade dispute could be brought notwithstanding the section. This is an approach to the section which would certainly suit the appellant in the present case. For then he could say that if the addition of an element such as knowledge, intention or malice excluded the operation of the section, so must the addition of an element of intimidation. But if the addition of intimidation to inducement excludes the operation of the first limb, it must follow that the addition of intimidation to interference excludes the operation of the second limb; and that is the result the appellant wants to achieve. I do not think the appellant can succeed as easily as that because I do not think that, *if the section is dealing with the requisites of a cause of action*, it can possibly be given a literal meaning.

What alternative is there,—still on the assumption that the section is dealing with the requisites of a cause of action? An alternative is to treat *the only ground* as meaning *an essential ground*. This reading means that if a plaintiff cannot establish a cause of action without setting up as part of it an act of inducement, the action is barred by the section. If this reading is applied to the second limb, it is fatal to the appellant here since an essential part of his cause of action is injury done to him by interference with his employment. If the section has to be interpreted on the assumption that it is dealing with the requisites of a cause of action, this reading of it is, I think, preferable to a literal reading. But undoubtedly it is straining the language to read the section as if for the words "on the ground only" there was substituted "if it is an essential ground". The two phrases are quite different in their import and would produce quite different results in their application to the first limb. Suppose that a defendant slandered a plaintiff so as to induce the plaintiff's employer by that means to dismiss him. It seems extremely unlikely that Parliament intended to authorise the use of foul means in the furtherance of a trade dispute. It is natural to think that the use of slander would enable the plaintiff to sue. But if the only ground means an essential ground the action would be prevented. For unless by chance there were some other and unintended item of special damage arising from the slander, it would in 1906 have been an essential ground of the plaintiff's claim that the words used by the defendant had caused or induced his dismissal.

In the light of these considerations and having found that the proper construction of s. 1 requires one to read it as dealing with the nature of the act and not with the requisites of a cause of action in a given case, it is natural to ask whether "actionable" should not be given the same sort of meaning in both sections; and whether s. 3 also should not be interpreted as dealing with the nature of the tort. On such a reading "the ground" is not used to define an ingredient in a tortious cause of action but to define the whole tort by reference to the essential ground by which the tort is usually described. Inducing a breach of contract is descriptive of a tort which comprises all the elements of

knowledge, malice, inducement and damage. If the means of inducement are honestly persuasive and nothing more, the inducer commits the tort of inducing a breach of contract and nothing more. But if the means are slanderous or deceitful, he may commit also the tort of defamation or of deceit. Then if an action is brought, it will not be only on the ground of inducing a breach of contract but also on the ground of slander or deceit, and the section will not prevent it. So if the means used are intimidatory, and since it is now clear that there is in law a tort of intimidation which is just as much separate from the tort of inducing a breach of contract as are slander and deceit, an action is not prevented by the section. This is the meaning that was clearly given to the section by LORD LOREBURN, L.C., in *Conway* v. *Wade* (107) and although the passage is obiter, it is entitled to great weight. He said:

> "It is clear that, if there be threats or violence, this section gives no protection in any case, for then there is some other ground of action besides the ground that 'it induces some other person to break a contract', and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, . . . In this respect there is a change."

I think that this is the way in which the section in its first limb deals with the tort of inducing a breach of contract. Standing alone the tort is insufficient where there is a trade dispute; but if the defendant has also committed the tort of intimidation, he can be sued. It does not matter that what was achieved by the intimidation was a breach of contract.

The same reasoning must, I think, be applied to the second limb, if it is assumed (as I shall start by assuming) that there is a tort of malicious interference with trade, business or employment. The section must be designed to deal with both torts in the same way. If, as a result of the respondents' action, B.O.A.C., instead of giving the appellant lawful notice had dismissed him summarily, it would follow that he could have sued the respondents for intimidation, though not for inducing a breach of contract, and it would be no answer to say that the damage was done by means of a breach of the contract of employment. As B.O.A.C. gave him lawful notice, it must follow that the appellant can sue for intimidation, though not for malicious interference; and likewise it is no answer to say that the damage was done by means of interference with his employment.

What is said to be fatal to this reasoning is that there is in law no such tort as the tort of malicious interference done by a single person. Parliament, it is argued, cannot have intended to take away by statute, a right of action that does not exist at common law. So the second limb, notwithstanding that there is no hint in the section of any different approach to it, cannot be construed in the same way as the first, and some other meaning must be found for it. What is suggested is, that since interference is not by itself actionable at common law, one must find some other element that, added to interference, makes it actionable at common law, and then one must give effect to the section by construing it as taking away that right of action. This other element is intimidation. One might comment that the other element might as well be said to be deceit or slander. For since your lordships have decided that intimidation is as much an independent tort as deceit or slander, there seems no reason for selecting it alone as the cause of action that is negatived. But perhaps because it is more closely connected with interference than deceit or slander is, it is the one that the argument in fact selects.

In order to weigh the merits of this argument, I do not think that it is necessary for the House to decide whether or not malicious interference by a single person with trade, business or employment is or is not a tort known to the law. But I must at least say what I mean by such a tort. I mean, putting it shortly, *Quinn*

(107) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.

v. *Leathem* (108) without the conspiracy. If one man, albeit by lawful means, interferes with another's right to earn his living or dispose of his labour as he wills and does so maliciously, that is, with intent to injure without justification, he is, if there is such a tort, liable in just the same way as he would undoubtedly be liable if he were acting in combination with others. The combination aggravates but is not essential. As I say, I do not think your lordships need decide this point. You are considering the construction of a statute passed in 1906 and endeavouring to interpret it in the light of what Parliament must be taken to have intended. If men were to be fully protected when they acted in furtherance of a trade dispute, they must be protected against what might well happen to them if they acted in a certain way as well as against what inevitably would happen to them. Your lordships do not therefore have to consider what the law is but what in 1906 Parliament might reasonably have thought it to be. Parliament, there can be no doubt at all, intended that *Quinn* v. *Leathem* (108) should not apply to trade disputes. If it was perfectly clear in 1906 that the decision in *Quinn* v. *Leathem* (108) depended on the element of conspiracy, s. 1 of the Act got rid of it. But if conspiracy was not essential to the decision, something more was necessary: and that something more is supplied by the second limb of s. 3. Moreover, the method chosen is that which one would expect Parliament in such circumstances to use. Statutes are not in this respect expressed conditionally. The draftsman cannot be expected to say by way of preface: "if it be held that interference is wrongful". He would assume for the purpose of the enactment that it was. If it was not, the enactment would be otiose but harmless; if it was, the enactment would achieve the object desired.

I am not at all sure that it can be said even now with certainty what *Quinn* v. *Leathem* (108) decided; but I am quite sure that in 1906 the matter was still in doubt. This can be shown by citations from three cases in this House, *Conway* v. *Wade* (109), *Sorrell* v. *Smith* (110), and *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* (111). In *Conway* v. *Wade*, LORD LOREBURN, L.C., speaking of the second limb of s. 3 and following on the passage which I have already cited from his speech, said (112):

> "If there be no threat or violence, and no breach of contract, and yet there is 'an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills,' there again there is perhaps a change. It is not to be actionable, provided that it was done 'in contemplation or furtherance of a trade dispute'."

The material words in this passage are "perhaps a change". LORD LOREBURN, L.C., is there saying that interference without threat or violence or breach of contract, might *perhaps* have been actionable at common law; and if so, the statute takes the right of action away.

In *Sorrell* v. *Smith* (110) three of your lordships treated the point as doubtful. VISCOUNT CAVE, L.C., with whom LORD ATKINSON concurred, said (113):

> "It does not necessarily follow that the existence of a combination is essential to the commission of the offence. There is some authority for the view that what is unlawful in two is not lawful in one."

LORD SUMNER said (114):

> "As to the part which combination or concerted action plays in an alleged tort of this kind, I think that this is not the occasion for expressing any decided opinion."

(108) [1900-03] All E.R. Rep. 1; [1901] A.C. 495.
(109) [1908-10] All E.R. Rep. 344; [1909] A.C. 506.
(110) [1925] All E.R. Rep. 1; [1925] A.C. 700.
(111) [1942] 1 All E.R. 142; [1942] A.C. 435.
(112) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.
(113) [1925] All E.R. Rep. at p. 6; [1925] A.C. at p. 713.
(114) [1925] All E.R. Rep. at p. 19; [1925] A.C. at p. 739.

He went on to indicate that there was a good deal to be said for thinking that combination in such a connexion was really only a particular form of intimidation. LORD DUNEDIN on the other hand, approving what ATKIN, L.J., had said in *Ware and de Freville* v. *Motor Trade Association* (115) was quite clear that a lawful act done by one did not become unlawful if done with intent to injure, whereas an otherwise lawful act done by two or more did become unlawful if done with that intent. He said (116) that conspiracy was "the very gist and essence of the decision" in *Quinn* v. *Leathem* (117); but, he said, the contrary view not only had been stated but also had gained many adherents—and indeed he described it as "the leading heresy" (118).

In the *Harris Tweed* case LORD PORTER said (119):

> "More difficulty is to be found in explaining *Quinn* v. *Leathem* (117). Why should a combination to injure be actionable, whilst action taken by a single person for that purpose, and for that purpose only, is permissible? In *Sorrell* v. *Smith* (120), LORD CAVE, L.C. (121), thought the point an open one and LORD SUMNER (122) considered it at least not free from doubt, but the view that a combination to do acts injurious to others is actionable, whereas the act of a single individual is not, is, I think, supported by the greater weight of authority."

I have therefore reached the conclusion that the true effect of s. 3 is that in a trade dispute it deprives the plaintiff of any cause of action he may have on the facts for inducing a breach of contract and any cause of action that he may have on the facts or in law for interference with his employment by lawful means; but that in neither case does it countenance the use of tortious means. So the plaintiff's cause of action in intimidation is not barred by the statute.

This leads to the conclusion that this appeal should succeed. But there is one argument, or at least one consideration, that remains to be noticed. It is that the strike weapon is now so generally sanctioned that it cannot really be regarded as an unlawful weapon of intimidation; and so there must be something wrong with a conclusion that treats it as such. This thought plainly influenced quite strongly the judgments in the Court of Appeal (123). To give effect to it means either that illegal means ought not to include a breach of contract; or that the statute ought to be construed as wide enough to give protection. The Court of Appeal tended, I think, to apply the argument to both points indiscriminately. I see the force of this consideration. But your lordships can, in my opinion, give effect to it only if you are prepared either to hobble the common law in all classes of disputes lest its range is too wide to suit industrial disputes or to give the statute a wider scope than it was ever intended to have.

As to the former alternative, I cannot doubt that the threat of a breach of contract can be a most intimidating thing. The present case provides as good an example of the force of such a threat as could be found. A great and powerful corporation submits to it at once, for it was threatened with the infliction of incalculable loss and of grave inconvenience to the public which it serves. The threat is made by men who are flagrantly violating a pledge not to strike, at least until constitutional means of resolving the dispute have been exhausted.

(115) [1920] All E.R. Rep. 387; [1921] 3 K.B. 40.
(116) [1925] All E.R. Rep. at p. 9; [1925] A.C. at p. 720.
(117) [1900-03] All E.R. Rep. 1; [1901] A.C. 495.
(118) [1925] All E.R. Rep. at p. 9; [1925] A.C. at p. 719.
(119) [1942] 1 All E.R. at p. 170; [1942] A.C. at p. 487.
(120) [1925] All E.R. Rep. 1; [1925] A.C. 700.
(121) [1925] All E.R. Rep. at p. 6; [1925] A.C. at pp. 713, 714.
(122) [1925] All E.R. Rep. at p. 20; [1925] A.C. at p. 740.
(123) [1962] 2 All E.R. at pp. 587, 600; [1963] 1 Q.B. at pp. 665, 683.

It is not just a technical illegality, a case in which a few days' longer notice might have made the difference. Because of the damage that would ensue from a strike, B.O.A.C., no doubt in return for corresponding benefits, secured the pledge not to strike; and it is that pledge that is being broken. Granted that there is a tort of intimidation, I think it would be quite wrong to cripple the common law so that it cannot give relief in these circumstances. I think it would be old-fashioned and unrealistic for the law to refuse relief in such a case and to grant it where there is a shake of a fist or a threat to publish a nasty and untrue story.

I said that I thought it would be wrong to cripple the common law in such a case, but that does not mean that I am necessarily criticising the policy of the Trade Disputes Act, 1906. It is easy now to see that Parliament in 1906 might have felt that the only way of giving labour an equality of bargaining power with capital was to give it special immunities which the common law did not permit. Even now, when the scales have been redressed, it is easy to see that Parliament might think that a strike, whether reprehensible or not, ought not to be made a ground for litigation and that industrial peace should be sought by other means. It may, therefore, as a matter of policy be right that a breach of contract should not be treated as an illegal means within the limited field of industrial disputes. But can your lordships get that out of the words of the Act? Section 3 gives immunity from action for procuring a breach of contract but not for the breach itself. In the Court of Appeal DONOVAN, L.J., said with great force (124):

> "If one may procure the breach of another's contract with impunity in a trade dispute, it is certainly odd if one cannot even threaten to break one's own."

The section could easily have read—"shall not be actionable on the ground only that it *is a breach of contract or* induces some other person" etc.; but it is not so written. It may be that, as counsel for the respondents suggests, Parliament thought it very unlikely that an employer would resort to action against workmen individually for breaches of contract and that he would get very little from it if he did: see on this point *National Coal Board* v. *Galley* (125). Or it may be that Parliament did not anticipate that a threat of breach of contract would be regarded as an intimidatory weapon. Whatever the reason, the immunity is not in the statute; the section clearly exempts the procurer or inducer and equally clearly does not exempt the breaker. It is not suggested that the House can remove the oddity by reading words into the Act that are not there.

So your lordships cannot construe the Act of 1906 to give protection in the case of a threat of a breach of contract unless you also make it wide enough to protect the threatener of physical violence. The Act of 1906 was no doubt intended to give immunity for all forms of peaceful persuasion, but I am sure—and LORD LOREBURN, L.C., in the passage I have cited from *Conway* v. *Wade* (126) says as much—that it was not intended to give protection from violent persuasion. I do not think it would be right so to construe it. It would mean that under the licence of a trade dispute one man could force another out of his job by threats of violence; and since such threats would not be actionable, I doubt if an aggrieved party could even get an injunction to restrain their constant repetition. The essence of the difficulty lies in the fact that in determining what constitutes the tort of intimidation your lordships have drawn the dividing line not between physical and economic coercion but between lawful and unlawful coercion. For the universal purposes of the common law, I am sure that that is the right, natural and logical line. For the purpose of the limited field of industrial disputes, which is controlled by statute and where much that is in principle unlawful is already tolerated, it may be that pragmatically and on grounds of policy the

(124) [1962] 2 All E.R. at p. 601; [1963] 1 Q.B. at p. 684.
(125) [1958] 1 All E.R. 91.
(126) [1908-10] All E.R. Rep. at p. 347; [1909] A.C. at p. 511.

line should be drawn between physical and economic pressure. But that is for Parliament to decide. What the House said in *Vacher & Sons, Ltd.* v. *London Society of Compositors* (127), especially per LORD MACNAGHTEN (128), is a very clear warning, if one be needed, against the interference of the courts in matters of policy in this branch of the law.

In my opinion, therefore, the appeal should succeed and the judgment of SACHS, J. (129) on liability should be restored. Counsel for the respondents has submitted that it ought not to be restored in its entirety. He asks for a new trial on damages on the ground that the learned judge misdirected the jury on this issue. The cardinal feature of the summing-up on this part of the case was a direction to the jury that they might (counsel for the respondents submits that it amounted almost to "must") award exemplary damages and your lordships have therefore listened to a very penetrating discussion about the nature of exemplary damages and the circumstances in which an award is appropriate. The Court of Appeal, having found for the respondents on liability, did not consider this issue, so your lordships must begin at the beginning. 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.

It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconvenience caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved. Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed.

There are also cases in the books where the awards given cannot be explained as compensatory, and I propose therefore to begin by examining the authorities in order to see how far and in what sort of cases the exemplary principle has been recognised. The history of exemplary damages is briefly and clearly stated by PROFESSOR STREET in his recent work on the law of damages (130). They originated just two hundred years ago in the cause célèbre of John Wilkes and the North Briton in which the legality of a general warrant was successfully challenged. Mr. Wilkes' house had been searched under a general warrant and the action of trespass which he brought as a result of it is reported in *Wilkes* v. *Wood* (131). SERJEANT GLYNN on his behalf asked (132) for "large and

(127) [1911-13] All E.R. Rep. 241; [1913] A.C. 107.
(128) [1911-13] All E.R. Rep. at p. 247; [1913] A.C. at p. 118.
(129) [1961] 2 All E.R. at p. 835; [1963] 1 Q.B. at p. 638.
(130) PRINCIPLES OF THE LAW OF DAMAGES by H. Street at p. 28.
(131) (1763), Lofft. 1. (132) (1763), Lofft. at p. 3.

exemplary damages", since trifling damages, he submitted, would put no stop at all to such proceedings. PRATT, C.J., in his direction to the jury said (133):

> "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

The jury awarded £1,000. It is worth noting that (134) the Chief Justice referred to "office precedents" which, he said, were not justification of a practice in itself illegal, though they might fairly be pleaded in mitigation of damages. This particular direction exemplifies very clearly his general direction, for a consideration of that sort could have no place in the assessment of compensation.

In *Huckle* v. *Money* (135) the plaintiff was a journeyman printer, who had been taken into custody in the course of the raid on the North Briton. The issue of liability having already been decided the only question was as to damages and the jury gave him £300. A new trial was asked for on the ground that this figure was "most outrageous". The plaintiff was employed at a weekly wage of one guinea; he had been in custody for only about six hours and had been used "very civilly by treating him with beefsteaks and beer". It seems improbable that his feelings of wounded pride and dignity would have needed much further assuagement; and indeed the Chief Justice said that the personal injury done to him was very small, so that if the jury had been confined by their oath to consider mere personal injury only, perhaps £20 would have been thought sufficient. But they had done right in giving exemplary damages. The award was upheld.

In *Benson* v. *Frederick* (136) the plaintiff a common soldier, obtained damages of £150 against his colonel who had ordered him to be flogged so as to vex a fellow officer. LORD MANSFIELD, C.J., said (137) that the damages "were very great, and beyond the proportion of what the man had suffered". But the sum awarded was upheld as damages in respect of an arbitrary and unjustifiable action and not more than the defendant was able to pay. These authorities clearly justified the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.

Some considerable time elapsed thereafter before the principle eo nomine was extended in other directions. Six cases, decided in the course of the next century, have been cited to your lordships but in none of them was there any clear ruling. They are *Tullidge* v. *Wade* (138), *Leith* v. *Pope* (139), *Merest* v. *Harvey* (140), *Sears* v. *Lyons* (141), *Williams* v. *Currie* (142) and *Emblen* v. *Myers* (143). They cover seduction, malicious prosecution and trespass. It is only in the first and last of these six cases that there is any express reference to the exemplary or punitive principle. In the first of them, the seduction case, WILMOT, L.C.J. (144) said that actions of this sort were brought for example's sake. In the last of them, WILDE, B. (145), at the trial directed the jury that they might find exemplary damages; and in the argument on the rule nisi a dictum of CHURCH, J. (146) in the Supreme Court of the United States was used in which he said:

> "There is no principle better established, and in practice more universal, than that vindictive damages or smart money may be and is awarded by the verdict of juries,"

but the verdict was upheld without recourse to the principle. The other four cases are cited because they show that the jury was permitted to consider matters

(133) (1763), Lofft. at p. 18.
(134) (1763), Lofft. at p. 19.
(135) (1763), 2 Wils. 205.
(136) (1766), 3 Burr. 1845.
(137) (1766), 3 Burr. at p. 1847.
(138) (1769), 3 Wils. 18.
(139) (1779), 2 Wm. Bl. 1327.
(140) (1814), 5 Taunt. 442.
(141) (1818), 2 Stark. 317.
(142) (1845), 1 C.B. 841.
(143) (1860), 6 H. & N. 54.
(144) (1769), 3 Wils. at p. 19.
(145) (1860), 6 H. & N. at p. 60.
(146) (1860), 6 H. & N. at p. 57.

which would not ordinarily be admissible in assessments of compensation; and in at least two of them, *Leith* v. *Pope* (147) and *Merest* v. *Harvey* (148), the sums awarded were so large as to suggest that they were intended to be punitive.

It is not until *Bell* v. *Midland Ry. Co.* (149), that there is a clear dictum. The plaintiff brought an action against the railway company for wrongful obstruction of access from the railway to his wharf. It does not appear that at the trial exemplary damages were asked for, and it appears (150) that ERLE, C.J., at the trial told the jury to confine the damages to pecuniary loss proved. The jury appears to have gone beyond that and awarded £1,000. In the argument on the rule nisi ERLE, C.J., said (151) that when the company's conduct was looked at, careless whether they were doing right or wrong, they prevented all access to the plaintiff's wharf for the purpose of extinguishing his trade and advancing their own profit. He was therefore entitled to ample compensation and £1,000 was very temperate. WILLES, J., said (152):

> "I must say, that, if ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. The defendants have committed a grievous wrong with a high hand and in plain violation of an Act of Parliament; and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves. If it were necessary to cite any authority for such a position, it will be found in the case of *Emblen* v. *Myers* (153) which I cite only for illustration."

In more recent times there are three obiter dicta of importance in the Court of Appeal in which the principle has been recognised, namely, BOWEN, L.J., in *Whitham* v. *Kershaw* (154) and in *Finlay* v. *Chirney* (155) and of SCOTT, L.J., in *Dumbell* v. *Roberts* (156). MCCARDIE, J., in *Butterworth* v. *Butterworth and Englefield* (157) also obiter, expounded the principle. There are three cases in the Court of Appeal in which the principle has been stated and applied.

In *Owen and Smith* (*Trading as Nuagin Car Service*) v. *Reo Motors* (*Britain*), *Ltd.* (158) the plaintiff, a motor dealer, had on his premises for display a chassis belonging to the defendants which they were at liberty to remove at any time except that it was specially provided that if the plaintiff had constructed a body on the vehicle he should be at liberty to dismantle it before removal. The defendants without notice to the plaintiff entered his garage, took the chassis and dismantled the body in the street, the process being observed by some members of the public including one of the plaintiff's creditors. It does not appear that any injury was done to the plaintiff's property but the Court of Appeal said it was a case for exemplary damages and awarded £100. *Loudon* v. *Ryder* (159) was a case of trespass and assault. The plaintiff was a young girl and the defendant broke into her flat and tried to turn her out. Her injuries were comparatively trivial but his behaviour was outrageous. The jury awarded her £1,500 damages for trespass, and £1,000 for assault; and £3,000 as exemplary damages, making £5,500 in all. This award was upheld in the Court of Appeal. In *Williams* v. *Settle* (160) the defendant was a professional photographer who had taken photographs of the plaintiff's wedding, the copyright being vested in the plaintiff. Two years later, when an event had occurred which caused the plaintiff to be exposed to publicity, the defendant sold the photographs to two national newspapers and their publication caused the plaintiff great distress. The county court judge awarded the plaintiff £1,000 damages for breach of copyright. This award was upheld in the Court of Appeal and in both courts it was described as one of exemplary damages. The Court of Appeal considered that

(147) (1779), 2 Wm. Bl. 1327.
(148) (1814) 5 Taunt. 442.
(149) (1861), 10 C.B.N.S. 287.
(150) (1861), 10 C.B.N.S. at p. 295.
(151) (1861), 10 C.B.N.S. at p. 304.
(152) (1861), 10 C.B.N.S. at p. 307.
(153) (1860), 6 H. & N. 54.
(154) (1886), 16 Q.B.D. 613 at p. 618.
(155) (1888), 20 Q.B.D. 494 at p. 504.
(156) [1944] 1 All E.R. 326 at p. 330.
(157) [1920] P. 126 at p. 136.
(158) [1934] All E.R. Rep. 734.
(159) [1953] 1 All E.R. 741; [1953] 2 Q.B. 202.
(160) [1960] 2 All E.R. 806.

exemplary damages could have been awarded at common law, but they relied also on the Copyright Act, 1956, s. 17 (3), which provides that the court may have regard to the flagrancy of the infringement and to any benefit shown to have accrued to the defendant by reason of the infringement and, if satisfied that effective relief would not otherwise be available to the plaintiff, may award such additional damages as it considers appropriate.

My lords, I express no view on whether the Copyright Act, 1956, authorises an award of exemplary, as distinct from aggravated damages. But there are certainly two other Acts of Parliament which mention exemplary damages by name. The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (2) (a), provides that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable shall not include any exemplary damages. The Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1953, s. 13 (2), provides that in any action for damages for conversion in respect of goods falling within the statute the court may take into account the defendant's conduct and award exemplary damages. 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; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.

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. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages.

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. I have quoted the dictum of ERLE, C.J., in *Bell* v. *Midland Ry. Co.* (161). MAULE, J., in *Williams* v. *Currie* (162), suggests the same thing; and so does MARTIN, B., in an obiter dictum in *Crouch* v. *Great Northern Ry. Co.* (163). It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will

(161) (1861), 10 C.B.N.S. at p. 304. (162) (1845), 1 C.B. at p. 848.
(163) (1856), 11 Exch. 742 at p. 759.

probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object,—perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

To these two categories, which are established as part of the common law, there must of course be added any category in which exemplary damages are expressly authorised by statute.

I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case (164), can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham* v. *Gambling* (165), and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.

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

I must now return to the authorities I have already reviewed and make quite plain what it is that I have not accepted from them. As I have said, damages that are at large can always be fixed as a round sum. Some juries have in the past been very liberal in their ideas of what a round sum should be and the courts

(164) (1763), Lofft. 1. (165) [1941] 1 All E.R. 7; [1941] A.C. 157.

which have always been very reluctant to interfere with awards of damages by a jury, have allowed very liberal awards to stand. *Williams* v. *Currie* (166), might on one view be regarded as a rather extreme example of this. It would not be right to take the language that judges have used on such occasions to justify their non-intervention and treat their words as a positive formulation of a type of case in which exemplary damages can be awarded. They have used numerous epithets—wilful, wanton, high-handed, oppressive, malicious, outrageous—but these sort of adjectives are used in the judgments by way of comment on the facts of a particular case. It would on any view be a mistake to suppose that any of them can be selected as definitive and a jury directed, for example, that it can award exemplary damages whenever it finds conduct that is wilful or wanton. When this has been said, there remains one class of case for which the authority is much more precise. It is the class of case in which the injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied. There is clear authority that this can justify exemplary damages, though (except in *Loudon* v. *Ryder* (167)) it is not clear whether they are to be regarded as in addition to, or in substitution for, the aggravated damages that could certainly be awarded.

It is not, I think, authority of great antiquity. The older group of six cases which I have cited, beginning with *Tullidge* v. *Wade* (168) discloses no statement of principle. In my opinion, all these cases can best be explained in principle as cases of aggravated damage, though I am not saying that in all the cases the sums awarded can be taken as an example of what compensatory damages ought to be. The direct authority for exemplary damages in this category of case lies in the three modern decisions of the Court of Appeal. I think that your lordships, if you agree with my conclusion, are bound to express your dissent from most of the reasoning in all of them. *Owen* v. *Reo* (169) and *Williams* v. *Settle* (170), even if the latter is considered apart from the Copyright Act, 1956, can be justified in the result as cases of aggravated damage; and indeed the sums awarded could, to my mind, more easily be justified on that ground than on the ground that they were exemplary. *Loudon* v. *Ryder* (167) ought, I think, to be completely overruled. The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case; and I can see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such.

This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength which it ought to have. Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law.

Finally on this point I think that the conclusion which I have expressed obtains strong support from the speech of LORD ATKIN in *Ley* v. *Hamilton* (171).

(166) (1845), 1 C.B. 841.
(167) [1953] 1 All E.R. 741; [1953] 2 Q.B. 202.
(168) (1769), 3 Wils. 18.
(169) [1934] All E.R. Rep. 734.
(170) [1960] 2 All E.R. 806.
(171) (1935), 153 L.T. 384.

Speaking of damages for defamation, LORD ATKIN said that they were not arrived at (172)

> "by determining the 'real' damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times. The 'punitive' element is not something which is or can be added to some known factor which is non-punitive."

I do not think that LORD ATKIN means that a sum awarded as punishment can be arrived at in just the same way as a sum awarded as compensation. Clearly they are different and, as the authorities which I have cited on means and mitigation show, must be arrived at in different ways. LORD ATKIN puts "punitive" in inverted commas. "So-called punitive" is what I think that he means; and read in that way the passage is strong authority for the view that insult offered and pain given are matters for compensation and not for punishment.

I turn at last to the summing-up in this case (173). In the light of the general principles which I have endeavoured to state, I think that it is plain that the summing-up can be extensively criticised. This is not the fault of the learned judge. It does not appear that any argument was addressed to him about the principles on which exemplary damages ought to be awarded and anyway he would have felt himself bound by authorities which do not tie your lordships. It may be that the judge who presided at the trial of *Loudon* v. *Ryder* (174) can be exculpated on the same ground. In this House the submissions have been so far ranging that, I think, your lordships might well have refused to have listened to them. But there were also submissions about points of detail which the respondents were undoubtedly entitled to make. If they succeeded, the House could give effect to them only by ordering a new trial on the issue of damages. In that event the House would have had to have given some guidance to the judge at the new trial as to the principles on which he should direct the jury. Your lordships therefore thought it wise to open up the whole matter for argument and to deal by means of an appropriate order as to costs with the appellant's complaints that the respondents' submissions of law before the House were far wider than anything that was addressed to the learned judge. I may observe that the House is dealing only with points of law. Your lordships have not had to consider the evidence. The question is simply whether or not on the facts so far as they emerge from the summing-up the learned judge misdirected the jury in law.

The basis of the summing-up was a direction that any deliberate illegality might be punished by exemplary damages. Here the respondents had deliberately and knowingly broken their contracts with B.O.A.C. The case against them was that they had sought to achieve their ends by a wildcat strike—a flagrant use of illegal force. Their answer was that they were provoked into this by the conduct of the appellant in endangering their closed shop understanding with B.O.A.C. It is unnecessary to quote numerous extracts from the summing-up. The direction to the jury is crystallised in one passage at the end of it as follows:

> "There it is. You have to consider, in relation to exemplary damages, whether this was a deliberately engineered unofficial 'wild-cat' strike, forced by these three to use, at all costs, an illegal pressure, and whether

(172) (1935), 153 L.T. at p. 386.
(173) [1961] 2 All E.R. at pp. 827-835; [1963] 1 Q.B. at pp. 631-638.
(174) [1953] 1 All E.R. 741; [1953] 2 Q.B. 202.

on the other hand there was provocation, which could be reasonably regarded as provocation for that line of conduct."

My Lords, it must be plain from what I have said already that I regard this direction as far too wide. If it does not mean that exemplary damages can be given for every act of deliberate illegality, it certainly means that the tort of intimidation is always punishable in that way. Counsel for the respondents has submitted that it was virtually a direction to the jury that, the tort of intimidation having been proved, the jury was bound to give exemplary damages, unless they thought that the appellant by his provocative conduct had brought it all on himself. I think that this criticism is substantially justified. There is nothing to bring the case within either of the two categories that I have mentioned. In my opinion, the facts disclosed in the summing-up do not show any case for exemplary damages. It may be said by those who have no sympathy with their actions that the respondents and their supporters acted oppressively but, for the reasons which I have given, this is not the sort of oppression that comes within the first category.

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

In short, I think it might very well be that if your lordships had had the whole of the evidence in front of you, you would have been able to declare that on a new trial the judge should direct the jury to give no more than that rounded figure which I have already described. I have said as much as this because I feel that saying it may help the parties at the end of these protracted proceedings to agree on a figure of damage. But I have not intended to say anything that would in any way prejudge the character of the directions about aggravated damages which the judge on a new trial, if there has to be one, thinks it right to give when he has all the material before him.

I agree with the order proposed by the noble lord on the Woolsack.

LORD PEARCE: My Lords, I agree with your lordships and with the courts below that the tort of intimidation has been shown to exist both on principle and on the authorities which are fully set out in the judgment of PEARSON, L.J. (175). There would be a strange gap in the common law if it provided no such remedy. The more difficult problem is whether the threat of a mere breach of contract can suffice to support that tort. LORD DUNEDIN in *Sorrell* v. *Smith* (176) resolved certain disharmonies of the famous trio of cases as follows:

(175) [1962] 2 All E.R. at pp. 602-608; [1963] 1 Q.B. at pp. 680-696.
(176) [1925] All E.R. Rep. at p. 9; [1925] A.C. at p. 718.

> "In the first place, everyone has the right to conduct his own business upon his own lines, and as suits him best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul* case (177). Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen* v. *Flood* (178). Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual. I think that is the result of *Quinn* v. *Leathem* (179)."

The question whether "means that are illegal in themselves" include threats of breach of contract is not directly covered by authority except in the two Irish cases, *Cooper* v. *Millea* (180) and *Riordan* v. *Butler* (181), which held that a threatened breach of contract constituted illegal means. In your lordships' House there have been dicta which each side has called in aid, but there has been no dictum which was, I think, intending to give an answer to this particular question.

In *Allen* v. *Flood* (182) LORD HERSCHELL pointed out that there was a "chasm" between cases where the act induced was a breach of contract and cases where that act was the not entering into a contract. If a breach of contract must be classified as either lawful or unlawful in this context, it lies less uneasily in the latter class than in the former. As between the parties a breach of contract is an unlawful act and creates a legal wrong; a party has no right to break his contract even if he offers to pay damages, unless, of course, the contract so provides (see per LORD LINDLEY in *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.* (183) and LORD WATSON in *Allen* v. *Flood* (184)). Somewhere one must draw the line between pressure or coercion that may be permitted and that which may not. It is logical for the law to say that, while a man may threaten to use all the means to which he is strictly entitled by law in order to encompass another's injury deliberately, yet he shall not threaten to use any means to which he is not so entitled. It is less logical to say that in order to injure another he may with impunity use all means to which he is strictly entitled and may with impunity also threaten to break a contract which he is not by law entitled to do, but that he shall not threaten to commit any tort. Moreover, to draw the line at that point, namely between contract and tort, seems to me inconsistent with the principle that underlies *Lumley* v. *Gye* (185).

Businesses are run on the basis of contracts. The threat by an important supplier to withhold the supplies under a long term contract on which a manufacturer relies might be tantamount to a threat of ruin and compel him to accede to the supplier's demands. It would seem strange if the law should disregard intimidation by such potent contractual weapons, while taking cognisance of intimidation by less potent tortious weapons. Nor do I think that the principle of *Dunlop* v. *Selfridge* (186) leads to such a conclusion. To sue in respect of a contract to which the plaintiff is not a party is very different from suing for injury deliberately caused to the plaintiff by improper pressure and abuse of such a contract. In estimating whether pressure by a threat is permissible or not it is the relationship between the threatened and the threatener which has

(177) (1889), 23 Q.B.D. 598. (178) [1895-99] All E.R. Rep. 52; [1898] A.C. 1.
(179) [1900-03] All E.R. Rep. 1; [1901] A.C. 495. (180) [1938] I.R. 749.
(181) [1940] I.R. 347. (182) [1895-99] All E.R. Rep. at p. 79; [1898] A.C. at p. 121.
(183) [1904-07] All E.R. Rep. at p. 218; [1905] A.C. at p. 253.
(184) [1895-99] All E.R. Rep. at p. 69; [1898] A.C. at p. 96.
(185) (1853), 2 E. & B. 216. (186) [1914-15] All E.R. Rep. 333; [1915] A.C. 847.

to be considered although it is the plaintiff who will suffer by the wrong if the threats are effective. In my opinion, therefore, a threat to break a contract may, like a threat to commit a tort, be the foundation for an action of intimidation.

In the case of trade disputes, s. 1 of the Trade Disputes Act, 1906, was intended to give immunity to concerted action which, though it used means which would be lawful if done by an individual might yet be held to be conspiracy within the principles of *Quinn* v. *Leathem* (187). The present case, however, was not founded on *Quinn* v. *Leathem* (187), and I agree with your lordships that if, on other grounds, the appellant can succeed in this case, s. 1 gives no protection to the respondents. Does s. 3 protect the respondents? Certain intentions of the Act of 1906 as a whole with regard to acts done in contemplation or furtherance of a trade dispute are clear. To the trade unions themselvss it gave, by s. 4, total immunity from actions in tort. To the members it gave only a partial protection. No general immunity in tort was given to them; nor were they protected from breaches of their own contracts. One cannot start with any assumption that they were or were not intended to be protected from tortious abuse of their own contracts.

Partial protection in the area covered by *Quinn* v. *Leathem* (187) was provided by s. 1; and s. 3 was clearly intended to give partial protection in a different area. Unfortunately the limits of the protection in s. 3 are far from clear. Did it intend to protect all tortious acts that might result in inducement of breach of a contract of employment or interference with employment, or did it intend to protect only the tort of inducing a breach of contract of employment and the tort (on the assumption that it existed) of interfering with employment? According to the respondents it intended the former, and protects all tortious conduct of whatever kind, provided that it needs special damage to support it and that the only special damage arising is damage by an induced breach of contract of employment or by interference with trade, business or employment. It may be said that since interference with employment is not as such actionable, the latter half of the section would be pointless unless it protected tortious acts which resulted in such interference. But that argument must go to the length of holding that the section intended to frank all tortious conduct, however grave, provided that it caused no actionable damage other than interference with employment. It would be surprising if Parliament so intended, and if it did so intend, it would be strange that the intention is not more clearly expressed. Moreover, such a reading would make the word "only" otiose, whereas the impression is created by the section that the word "only" is intended to have some definite limiting effect.

At first sight, there is compelling force in the respondents' argument that Parliament cannot have intended the second limb to be merely declaratory that interference with employment (which is not a tort) shall not be actionable. But at the date when the Act was passed the law was in some confusion. It was thought by some well informed opinion that there was a tort of mere unjustifiable interference with trade. This appears from the Report of the Royal Commission which preceded the Act. On this view of the law (which was subsequently shown to be wrong) it would be reasonable for Parliament to enact the second limb of s. 3 for the purpose of ensuring that no conduct should be unlawful on the ground only that it interfered with trade—meaning that it was protected if it was tortious for that reason and for no other reason. The section would then have the effect of limiting the protection to conduct which was not tortious in any other respect save that it induced a breach of contract or interfered with employment. LORD LOREBURN, who was the Lord Chancellor at the time of the passing of the Act, thought that this was the intention of the Act. His dicta in *Conway* v. *Wade* (188) which my noble and learned friend, LORD REID, has cited, are, in my opinion, consistent with any other view. The textbook writers and the two Irish

(187) [1900-03] All E.R. Rep. 1; [1901] A.C. 495.
(188) [1908-10] All E.R. Rep. at p. 346; [1909] A.C. at p. 510.

cases (189) have taken a similar view of the section's meaning. The reading for which the respondents contend would be an extension of the meaning which has hitherto been given to the section.

A strong argument (to which DONOVAN, L.J. (190), in his forceful judgment subscribed) is urged on the respondents' behalf to the effect that threats of lawful action (i.e. by giving notice) as opposed to threats of unlawful action (i.e. by stopping work in breach of contract) are inconvenient and unsuited to modern industrial disputes, since neither side wishes the contracts to be determined and the termination of contracts would give rise to confusion in respect of superannuation schemes and other matters. I see the force of this, as a matter of convenience, but I feel some doubt how far it is a useful argument on what Parliament intended in 1906 under the then existing conditions. It is further contended by the respondents that to limit the protection of s. 3 to the torts specifically referred to in the section, namely, the tort of inducing a breach of contract and the tort (as it was then thought) of interference with trade or employment would be to drive a coach and four through the protection afforded to trade unionists by the Act. The appellant retorts that the opposite construction would, by licensing all forms of tort, contrary to the views of the Act expressed by LORD LOREBURN, L.C. (191) and textbook writers alike, drive a coach and four through the protection of the common law which the Act intended to retain for the community. I do not find such an argument helpful. The Act was intending to give a partial protection, holding a balance between conflicting interests, and the question before us is where Parliament intended the boundary of protection to run.

One cannot read the words of the section literally as defining the components of a cause of action since in that case the protection against an action "on the ground only that it induces some other person to break a contract of employment" is meaningless. For no action could ever lie on that "ground only"; it would need the addition of knowledge and damage. I see the attractions of paraphrasing the section as referring to the substantial essential requirements of an action. One might, for instance, so read a section that said that no spoken words should be actionable on the ground only that they referred to a man in the way of his trade. True, the additional grounds of publication and defamation would be needed, but one might well argue that the statute assumed their existence. This would, however, be a very loose and unsatisfactory method of expression in a statute where one would expect precision in drafting the dividing line between what may or may not be done with impunity, and I find myself unable to accept it.

I have felt considerable difficulty in this case, but having had the advantage of reading the opinions of my noble and learned friends, LORD REID and LORD DEVLIN, I agree with their observations on the construction of the section. I would allow the appeal.

On the point raised as to damages I agree with the opinion of my noble and learned friend LORD DEVLIN.

Appeal allowed. New trial ordered on question of damages.

Solicitors: *Lewis Silkin & Partners* (for the appellant); *W. H. Thompson* (for the respondents).

[*Reported by* C. G. LEONARD, ESQ., *Barrister-at-Law.*]

(189) *Cooper* v. *Millea*, [1938] I.R. 749; *Riordan* v. *Butler*, [1940] I.R. 347.
(190) [1962] 2 All E.R. at p. 600; [1963] 1 Q.B. at p. 682.
(191) [1908-10] All E.R. Rep. at p. 346; [1909] A.C. at p. 510.

THORNTON et al. v. BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 57 (PRINCE GEORGE) et al.

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

Damages — Personal injuries — Quadriplegia — Principles to be applied in assessment of damages.

As a result of the respondents' negligence, the appellant, 15½ years old, although remaining mentally alert, was rendered irreparably a quadriplegic. The British Columbia Court of Appeal substantially reduced the amount of general damages awarded to the appellant by the trial Judge. On appeal to the Supreme Court of Canada in respect of its assessment of damages, *held*, the appeal should be allowed.

The Court of Appeal should not have considered the ability to pay as a factor in determining pecuniary loss nor should it have awarded damages on a basis that would require the appellant to live in an auxiliary hospital inappropriate for a person of his age, intelligence and ability to move around. No reduction should have been made for purely speculative contingencies. However, damages for pain and suffering, loss of amenities and shortened expectation of life should be limited to $100,000.

[*Andrews et al. v. Grand & Toy Alberta Ltd. et al.*, *ante* p. 452; revg 64 D.L.R. (3d) 663, [1976] 2 W.W.R. 385; varg 54 D.L.R. (3d) 85, [1974] 5 W.W.R. 675, folld; *Karas et al. v. Rowlett*, [1944] 1 D.L.R. 241, [1944] S.C.R. 1, refd to]

APPEAL by the plaintiffs from a judgment of the British Columbia Court of Appeal, 73 D.L.R. (3d) 35, [1976] 2 W.W.R. 240, varying a judgment of Andrews, J., 57 D.L.R. (3d) 438, [1975] 3 W.W.R. 622, in favour of the plaintiffs in an action for damages for personal injuries.

R. Cummings and *D. Andrews*, for appellants.
C. C. I. Merritt, Q.C., and *R. B. Wallace*, for respondents.

The judgment of the Court was delivered by

DICKSON J.:—The issues raised in this appeal are essentially those raised in *Andrews et al. v. Grand & Toy Alberta Ltd. et al.* [*ante* p. 452]. Reasons for judgment in *Andrews* are being delivered contemporaneously with those in the present appeal. In *Andrews* I have sought to enunciate the principles applicable to the assessment of damages for serious personal injuries. The application of those principles led me to conclude that the Alberta Supreme Court, Appellate Division, had erred in *Andrews*. For the same reasons I believe that the Court of Appeal of British Columbia erred in the present case.

This appeal concerns an action for damages for severe injuries sustained by Gary Thornton (the appellant) while in attendance at Kelly Road Secondary School in Prince George, British Columbia. As in *Andrews*, the major issue is as to the capitalized cost of annual care which the appellant must be able to meet over his life expectancy. The trial Judge (57 D.L.R. (3d) 438, [1975] 3 W.W.R. 622) awarded $1,122,571. The Court of Appeal (73 D.L.R. (3d) 35, [1976] 5 W.W.R. 240), without any evidential support, reduced this sum to $210,000. The effect of the judgment in the Court of Appeal was to reverse findings of fact, and to cast aside unanimous and cogent evidence emanating from eminent medical authorities, which the trial Judge accepted, as to the standard of care that should be accorded a physically incapacitated but mentally alert youthful quadriplegic.

The accident occurred as a result of the negligence of the school authorities of the City of Prince George in failing to exercise due care during physical education classes. While the appellant was attempting a somersault, he sustained a serious flexion injury to his neck with comminuted fracture of the fourth cervical vertebrae. The injury caused total or partial paralysis to each of his four limbs. Prior to the injury the appellant was 6'3" in height and described in evidence as being the epitome of the all-round athlete. At the date of trial he was 18 years of age, physically disabled, unemployable, and wholly dependent upon male orderly assistance for his day-to-day needs, yet with mental faculties wholly intact.

An orthopaedic specialist, Dr. F. Ducharme, testified that the orthopaedic problems to which the appellant might be subject would be minimized with optimal care and, given that care, he could reasonably expect an almost normal life expectancy. Lacking that care, his life expectancy would be seriously reduced. This opinion was shared by Dr. Ayers, a specialist in neurosurgery and by Dr. Ezzedin, a specialist in rehabilitation and physical medicine. The appellant was described by Dr. Gauk, a specialist in nervous diseases of children, as exemplary in his behaviour and in his studies, well-motivated, generally cheerful and a useful person in teaching other handicapped people the secrets of motivation. Dr. Moncton, a specialist in neurosurgery and the only medical witness called by the defence, agreed generally with the other medical opinion save that he considered that the appellant was unlikely to reach normal life expectancy due to his susceptibility to pulmonary and urinary infection. Dr. Gingras, Executive Director of the Rehabilitation Institute of Montreal, former president of the International Federation of Physical Medicine and consultant to the United Nations on the rehabilitation of paraplegics and quadriplegics, stated that the life span of a spinal cord injury patient was now, or would shortly be, that of a normal person, subject to one proviso — that constant optimal care was provided. The term "optimal care" was used from time to time throughout the evidence. It might suggest, to some, the ultimate in care and expense, indeed, a sybaritic life, but it is clear from the medical evidence that the term merely connotes an ongoing practical level of orderly care in a home environment. Auxiliary hospitals, on the other hand, are minimum care facilities.

The following extracts from the evidence of Dr. Ayers make that clear:

> THE COURT: If this boy were to be, say, in an extended care hospital would you feel that he would get what you would refer to as optimum care even though it was a hospital?
>
> THE WITNESS: No, because most so-called extended care or auxiliary hospitals are minimum care facilities. The care would not be totally directed towards him.
>
> . . . . .
>
> THE WITNESS: Well, optimum care, in my opinion, is just reasonable care. It has to be done. These are things that have to be done. The environment for this person must be oriented to him, people that look after him must know him and be aware of the problems.

Dr. Gingras was strongly opposed to placing youthful quadriplegics in auxiliary hospitals where they might be forgotten, lonesome, without recreation or proper treatment and with no will to live. Dr. Gingras considered that an apartment or private home environment was a necessary feature of optimal care, on both psychological and mental health grounds. Neither an auxiliary hospital nor drop-in orderly service would be suitable, in his opinion, for the physical and mental health of a young quadriplegic. Institutionalization would be the last resort for such a patient. Out of 600 quadriplegic patients Dr. Gingras has treated, only 125 are in auxiliary hospitals. The remaining 475 are in a home environment.

The trial judge, Andrews, J., was furnished with detailed costs figures (ex. 37) from which it appeared that the monthly cost of the type of care which the medical witnesses deemed essential would amount to $4,305. In addition, initial equipment outlay expenses totalled $12,000; a home, if one were purchased, would cost $45,000 to $52,000; an Econo-van, specially equipped for quadriplegic use, would cost $8,500; a total of $65,000 in round figures.

After reviewing all the medical evidence the trial Judge reached the following conclusions:

1. Gary Thornton has a good chance of living a normal life expectancy, but his "good chance" is contingent upon the existence of optimal care.
2. Optimal care demands the level of expenditure as set out in ex. 37.

Upon the evidence no other conclusion was open to him. The defendants did not manage to refute the plaintiff's claim that the only adequate compensation for his injuries was care in a home environment. Neither did they establish that proper care in the home could be provided at less expense than that set out in ex. 37.

The Judge assessed damages under the heads and in the amounts set forth below.

Head 1: Special Damages

Counsel agreed on the amount of $42,128.87 as special damages.

Head 2: Cost of future basic care needs

The rates set out in ex. 37 were not disputed by defence counsel though the principle of home care therein set out was contested. The submissions of the respondents were rejected by the trial Judge in these words [at p. 461 D.L.R., p. 647 W.W.R.]:

> In light of the evidence before me, I feel that I must assess the cost of care according to the means of care as set out in ex. 37 since that means of care is, to my understanding, the type of care needed by young Gary Thornton to give him his "good chance" of living a normal life expectancy. To allow him less would, given the medical evidence before me, effectively result in curtailing his life span to less than his rightful measure.

The Judge at trial accepted the actuarial evidence that a young man of the age of the appellant would have a life expectancy of 54 years to which a reduction of five years was applied, giving a life expectancy of 49 years. The Judge used the exhausting fund principle, ignored inflation entirely and used a 4% capitalization rate based on an historic rate of investment return. No allowance was made for contingencies. The Judge was of the view that the appellant would require care for the rest of his days and there were no further adverse or beneficial contingencies which could arise. Including the sum of $65,500 for the special equipment, to which I have referred, the Judge arrived at a total of $1,188,071.80 under Head 2.

Head 3: Loss of the ability to earn future income

Counsel had agreed that loss of income should be based on an assumed possible base income of $850 per month. To avoid duplication, the Judge, accepting expert evidence, deducted 52% representing the ordinary living costs which the appellant would have had to meet, had he not been injured, for such matters as food, clothing, shelter and the like. He assumed a normal retirement age of 65 years and calculated the present value under Head 3 to be $103,858.26. He declined to make any allowance for contingencies, saying that he had no way of knowing whether the appellant would meet adverse conditions in his life such as alcoholism, unemployment, drug addiction, insanity. Equally, he could not know whether the appellant would have received promotions and salary increases. In fine, the beneficial and the adverse contingencies cancelled out.

Head 4: Non-economic related head of damage

Under this head is included compensation for physical and mental pain and suffering, loss of amenities and enjoyment of life, loss of expectation of life. The sum of $200,000 was assessed in this category.

Conclusion

In the penultimate paragraph of his reasons for judgment the trial Judge said [at pp. 463-4 D.L.R., pp. 649-50 W.W.R.]:

> I have rarely referred to case law in assessing damages here, although I have read and re-read all the Canadian, English and American authorities referred to me by counsel in argument. That is because I feel that the principles regarding contingencies, tax considerations, duplication, inflation, and the mathematical method of calculating a fund have been well established in British Columbia. I have both outlined and followed them and express no concern that at first blush this award is much higher than any other personal injury award given in British Columbia, or possibly Canada. As I view the matter, the underlying principle is, and has been, that the plaintiff should be put back into the position both in terms of finances and health that he would have been had he not been injured, in accordance with the principles which I have stated above. He should not, and indeed cannot, be awarded perfect compensation. One should be fair to each side. I have been careful on the one side, as Mr. Merritt, Q.C., so aptly put it in argument not to "soak the wrongdoer"; but on the other side, I have endeavoured to use the wrongdoer's money to provide Gary with the dignity, comfort and length of life to which we all in this society feel so rightly entitled. The principles have not changed, and that is fortunate for they make good sense. It is the medical evidence that has changed and warrants the large award assessed in this case in the amount of $1,534,058.93.

The observation that the large award was warranted by reason of change in medical evidence, not change in legal principle, is worthy of note. It recognizes the revolution in rehabilitative and physical medicine of recent years. The current enlightened concept is to dignify and accept the gravely injured person as a continuing, useful member of the human race, to whom every assistance should be afforded with a view to his re-integration in society. Formerly, the gravely handicapped were relegated to institutions where they could look forward to little other than an early demise. They die, according to Dr. Ezzedin, because "there is nothing to help them to live".

The defendants appealed.

The leading judgment in the Court of Appeal was delivered by Mr. Justice Taggart.

I. *Cost of future care*

In his prefatory remarks, the learned Justice of Appeal defined the issue as being whether the constant care and attention required by the appellant should be given to him in a home of his own without any sharing of the substantial costs involved by other persons having similar injuries which require a similar level of care. The Judge referred to the medical evidence and the two basic considerations which, that evidence disclosed, must be met in caring for a person in the position of the appellant: (i) attention to his physical needs — such as turning every two hours, transfer of the appellant from bed to wheelchair to specially designed vehicle and back again; (ii) personal — care such as washing, dressing, bowel

and urinary tract attention, and other personal needs. As Mr. Justice Taggart observed, the medical evidence indicated that an auxiliary hospital was the kind of institution in which the appellant would be placed if it were not possible for him to establish a home of his own. This kind of institution was recognized by the Court as unsuitable for young people in the condition of the appellant. The reasons therefor: (i) the age and senility of most of the patients is not conducive to the mental well-being of a young person like the appellant, whose mental ability is in the bright normal to superior range; (ii) it is possible for the appellant with the assistance of orderlies to leave the institution to attend the theatre and sporting events, or to visit friends. As a result the appellant, notwithstanding his severe injuries, would still be much more mobile than the others around him. From the point of view of the institution, an additional burden would be placed upon the hospital staff with comings and goings inconsistent with ordinary hospital routine.

Reference was made in the Court of Appeal, and in this Court, to the possibility of the appellant and two or three others in a similar situation pooling their resources and establishing a group home, reducing thereby the monthly cost of future care required by the appellant. Although the Court of Appeal speculated on this possibility, it conceded that the "evidence is silent as to the likelihood of this occurring". With great respect, I can see little purpose in an appellate Court conjuring up, of its own accord, possibilities which have not been mooted at trial, particularly when those possibilities find no support in the evidence either as to practicability or as to cost. In an adversary system it is the parties themselves, and not the court, who must come forward with claims for mitigation and with credible evidence to support those claims: see *Karas et al. v. Rowlett*, [1944] 1 D.L.R. 241, [1944] S.C.R. 1.

Mr. Justice Taggart made this trenchant finding [at p. 42 D.L.R., p. 247 W.W.R.]: "I have no doubt that the increase in life expectancy would be enhanced if the ideal level of care proposed for the respondent is available." He added: "The question is, however, whether that ideal level of care with its attendant cost is one which should be imposed upon the appellants." There, starkly, is the issue. Thornton will live longer if he receives the care which the doctors recommend. Is the cost too much for the respondents to bear? Ability to pay is advanced as the reason for denying the appellant the care which the medical experts say he needs. As I stated in the *Andrews* case, it is an error of law to regard the ability of the defendant to pay as a relevant consideration in the assessment of pecuniary damages. The correct principle is proper compensation for the injuries suffered by the victim. The exact amount in any particular case must be determined from the evidence presented by the parties at trial. Fairness to the defendant is achieved not by a re-

duction for ability to pay, or by an arbitrary slashing of the award, but by assuring that the plaintiff's claims are legitimate and justifiable.

Mr. Justice Taggart referred to the monthly cost set out in ex. 37, $4,305, and to the evidence which suggested that if the appellant were cared for in an auxiliary hospital in Edmonton the monthly cost would probably not exceed $1,200. He quoted at length from the judgment of McGillivray, C.J.A., in *Andrews v. Grand & Toy Alberta Ltd.*, and concluded that $1,500 would be "a generous and reasonable" figure. My opinion of the reasoning adopted by the Alberta Appellate Division in *Andrews* has been made clear in my reasons for judgment in that case.

In the present case the trial Judge, in avoiding duplication, deducted from the amount to be awarded for loss of future income, the amounts which the appellant would have expended for future needs had he not been injured. The Court of Appeal made that deduction from the cost of future care. The Court said that such a reduction had been made in reaching the amount of $1,500. It is obvious that the effect of awarding $1,500 per month for cost of future care would be to commit the appellant to institutional care.

Each case must proceed on its own evidence, but in this case, as in *Andrews*, on all the evidence such institutional care would be entirely unsuitable for a young mobile quadriplegic with unimpaired mental faculties. In my opinion, the Court of Appeal erred in principle in failing to give effect to the evidence as to the standard of care required, and as found by the trial Judge.

The Court of Appeal of British Columbia then entered upon a discussion of the appropriate interest rate, inflation, and cost increase to be considered when determining the capitalization rate. The Court rejected the discount factor of 4% accepted by the trial Judge, being of the view that a 4% rate was drawn from economic conditions which were unlikely to be experienced in the foreseeable future. It also considered that an equally erroneous approach was the utilization of an unrealistically high level of interest which would result in no allowance being made to protect the capital fund against future cost increases and other effects of inflation. With respect, I agree with both of these observations. The Court of Appeal then selected a discount factor of between 7½% and 9%. It did not, unfortunately, relate this choice to the evidence presented at trial. This evidence was similar to that presented in *Andrews*. In fact, the same actuary, Mr. R. W. Grindley, appeared as an expert witness for the plaintiff in both cases. In this case, as in *Andrews*, he stated that the use of present rates of return together with an allowance for inflation constituted an alternative method of calculation to the use of a "pure rate of interest" (*i.e.*, which might exist in a hypothetical stable economic state), with no allowance for

inflation. He also acknowledged that it was possible to obtain long-term high quality investments, such as corporate bonds with a 20-year maturity, with rates of return in excess of 10%. Another expert witness, Mr. D. R. Badir, introduced into evidence the fact that the Economic Council of Canada have gone on record as suggesting that over the next 40-year period the average rate of inflation will be in the neighbourhood of 3½% to 4%. In my opinion, this evidence affords sufficient basis for the choice of 7% as an appropriate discount rate. It does not, however, support a range of 7½% to 9%. I would therefore adopt a discount rate of 7%.

The Court of Appeal considered that some allowance should be made for contingencies. Among those mentioned was the possibility that in the future the State would provide for the care of quadriplegics in their own quarters in institutions designed for them and at no cost to the patients. No evidence supports that speculation. The other contingency noted was the possibility that the appellant would be cared for either in an auxiliary hospital, or in a general hospital, at times when the provision of adequate medical care rendered it necessary to enter such an institution. If the award made by the Court of Appeal had been such as to make home care possible, then I would understand an argument that some contingency reduction should be applied in recognition of the possibility that the injured person might from time to time enter a general hospital for special treatment. How, though, does one justify a reduction in an award on the contingency that a plaintiff will enter an institution, or a general hospital, when the award itself is so low that the plaintiff is effectively committed to auxiliary hospital care in the first place?

In reducing the award for future care to $210,000, the Court of Appeal took the view that the trial Judge had made three errors in principle, namely:

(i) he had chosen an unrealistic and unreasonably high standard of care to determine the monthly cost of future care;
(ii) he had chosen an inordinately low rate of interest to compute the present value of the capital sum required for this purpose;
(iii) he had failed to make adequate allowance for contingencies.

In my opinion, the Court of Appeal erred in law in the approach it took toward the standard of care. According to the medical evidence, the very length of life of the youthful quadriplegic is directly proportional to the nature of the care provided. With home care, the injured person can be expected to live a normal, or almost normal, life span. With institutional care, it can be expected that he will not live a normal life span. It is difficult, indeed impossible, to fashion a yardstick by which to measure "reasonableness" of cost in relation to years of life. It is sufficient, I think, for the pur-

poses of the present case, to say that before denying a quadriplegic home care on the ground of "unreasonable" cost something more is needed than the mere statement that the cost is unreasonable. There should be evidence which would lead any right-thinking person to say: "That would be a squandering of money — no person in his right mind would make any such expenditure." Alternatively, there should be evidence that proper care can be provided in the appropriate environment at a firm figure, less than that sought to be recovered by the plaintiff.

In the case at hand a number of expert witnesses, all highly qualified, representing various disciplines, appeared before the Court and advocated a particular type of care. In general terms, they would be aware of the cost of that care. Is it to be supposed that, as responsible people, they would recommend a particular standard of care if they thought that standard wildly extravagant or foolish? If there be a body of opinion holding that view then the burden was on the respondents to make that opinion known during trial. The defence did not call any evidence to rebut either the standard of care, or the cost of care evidence tendered on behalf of the appellant. I think the award of the trial Judge for cost of future care should stand. His judgment, if I may say so, shows thoughtful and anxious consideration of every aspect of this difficult case.

The Court of Appeal denied the appellant the capital sum for his own home and Econo-van motor vehicle, but allowed him $12,000 for medical supplies and equipment which would not be required if, as the Court of Appeal in effect held, he should be institutionalized.

The respondents did not adduce any evidence to refute the reasonableness of the costs put forward by the appellant as to each item under ex. 37, inclusive of initial costs for the home and the Econo-van motor vehicle. The trial Judge noted that the present value of the rental of an apartment would have been $117,342 for the life expectancy of the appellant, compared to the capital sum of $45,000 which he allowed as the cost of a home. The cost of the items mentioned naturally follows the adoption of home care as the standard of care. If auxiliary hospital care were to be the standard, then of course those items would be redundant. I would reinstate, as part of the award, the cost of the home and of the motor vehicle denied by the Court of Appeal.

With regard to contingencies, in view of the fact that home care is to be the standard, I think it must be recognized that the duration of such care may be affected by such contingencies as difficulty in staffing a self-contained establishment or the need to enter hospital for special treatment. I think that some contingency allowance is proper and I would be prepared to accept an allowance of 20%.

II. *Future income loss*

The following table shows the differences between the Judge at trial and the Court of Appeal in the computation of the award for loss of prospective income.

	At Trial	On Appeal
	$	$
Assumed monthly gross base income	850	850
Deduction for basic necessities of food, clothing and shelter	443	
	407	850
Anticipated working life-span	46 years	43 years
Discount rate	4%	7½/9½%
Contingency deduction		10%
Award	$103,858.26	$120,000

For the reasons which I stated in *Andrews v. Grand & Toy Alberta Ltd.*, I am of the opinion it is preferable that the deduction for basic necessities should be made in computing the award for loss of future income rather than in respect of future care. This approach reflects the fact that the costs of necessities may be different when in an infirm state than when in a state of health. A difference would also arise if there is a difference in the contingency factor. I would agree with the trial Judge in deducting $443 for basic necessities. For the reasons stated earlier, however, I would apply a discount rate of 7%.

The question of a contingency allowance presents some difficulty. The trial Judge, as I have said, declined to make any allowance for contingencies. He considered that he had no way of knowing whether the appellant might meet adverse conditions in his life, giving rise to a reduction in prospective future earnings, or whether he might receive promotions and salary increases which would have the effect of inflating the projected figures. The Court of Appeal applied a 10% contingency deduction. 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. I do not think the Court of Appeal can be said to have erred in applying a 10% allowance.

The selection by the Court of Appeal of a 43-year working span was based on the actuarial evidence. The appellant concurs in the change made by the Court of Appeal in this regard. In the result, I would accept the trial Judge's figures except for a variation of the working span from 46 to 43 years.

In concluding his review of the award for pecuniary loss, Mr. Justice Taggart gave expression to certain misgivings which, with respect, I share [at pp. 50-1 D.L.R., pp. 257-8 W.W.R.]:

> The once and for all award may still be the most appropriate approach to compensation for that head of damages with which I have yet to deal, that is to say, pain and suffering, loss of amenities and loss of expectation of life. But I fear it is far from appropriate with respect to the pecuniary heads of damage. It results in the respondent receiving in respect of those heads of damage very large sums of money. If the approach I have taken is correct and if the respondent survives for the full term anticipated by the actuary and if there are no unforeseen contingencies then there will be sufficient funds to compensate him for the cost of his future care and for his loss of future income. On the other hand, if he survives longer than anticipated by the actuarial evidence or if unforeseen contingencies arise then unquestionably there will be a shortfall in the compensation available. If, however, the respondent fails to survive for the anticipated life span then there may well be substantial funds remaining unexpended which will go to the beneficiaries of the respondent's estate. They may well be entitled to the unexpended portion of the amount awarded in respect of loss of future income but one can hardly say that they are entitled to the unexpended portion of the amount awarded for the cost of future care. No matter how one's judgment is hedged about with allowances for contingencies some of which may be adverse and some favourable to the injured person, I feel a sense of inadequacy in doing real justice between the tortfeasor and the compensation claimant.

III *Pain and suffering, loss of amenities, loss of expectation of life*

It will be recalled that, under this heading, the trial Judge assessed the sum of $200,000. The Court of Appeal was of the opinion that the amount awarded by the trial Judge, though generous, was not so inordinately high as to constitute a wholly erroneous award. The Court considered that there was little to distinguish the condition of the appellant in this case from that of the appellant in the *Andrews* case. The Court of Appeal made no reduction under this head in the sum of $200,000.

The award under non-economic related heads of damage should be a Canadian conventional award, adjusted to meet the specific circumstances of the individual case. I am in agreement with the Court of Appeal that the pain and suffering, loss of amenities, loss of enjoyment of life and loss of expectation of life experienced by Thornton are essentially similar to that experienced by Andrews. Both were active young men with an abundance of life's pleasures before them. Both are now quadriplegics, although both are mentally unimpaired and both are mobile when provided with proper assistance. For the reasons expressed by me in *Andrews* I would reduce the award for non-pecuniary loss to $100,000.

The Court of Appeal totalled the amount awarded under each head of damage, $542,000, added $58,000, in part for the impact of taxation on income likely to be earned through investment of the amount awarded, and arrived at a total of $600,000 for general damages. The amount added to compensate for the impact of taxation appears to have been made with respect to income from both the award for loss of future earnings, as well as that for future care. For the reasons outlined in *Andrews*, I do not believe that any allowance need be made in respect of taxation. In no event should an allowance be made in respect of the impact of taxation upon the award for loss of prospective earnings.

The British Columbia Court of Appeal held the appellant to be entitled to his special damages of $42,128 and to the sum of $7,500 to be held in trust for his mother to compensate her for the services of a nursing character which she had rendered to him.

I would allow the appeal and assess damages in the manner undermentioned:

General Damages		
A. *Pecuniary Loss*		
I *Cost of Future Care*		
(a) Initial Capital Outlay for:		
Home		$ 45,000
Econo-van Motor Vehicle		8,500
Home Care Equipment		12,000
(b) Capitalized annual cost of future care (monthly amount of $4,305; life expectancy 49 years; contingencies 20%; capitalization rate 7%)		586,989
II *Loss of Future Earnings* ($407 per month; work-span 43 years; contingencies 10%; capitalization rate 7%)		61,254
B. *Non-Pecuniary Loss* Compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life		100,000
Total General Damages		$813,743
	Rounded off at —	$810,000

To arrive at the total damage award, the special damages of $49,628, which includes $7,500 to be held in trust for the appellant's mother, must be added to give a final figure of $859,628.

I would allow the appellant costs in this Court and in the Courts below.

Appeal allowed; judgment varied.

THE QUEEN IN RIGHT OF CANADA v. THE QUEEN IN RIGHT OF PRINCE EDWARD ISLAND

Federal Court of Appeal, Jackett, C.J., Pratte and Le Dain, JJ.
December 5, 1977.

Crown — Liability — Breach of statutory duty — Failure by Government of Canada to operate ferry — Whether liable for consequent damage suffered by Province.

As a result of a nation-wide strike in the Canadian National Railway system, the Government of Canada failed to operate a ferry service to Prince Edward Island for over 10 days in the summer of 1973. The Province brought an action under s. 19 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), for damages for breach of statutory duty alleging a breach by the Government of Canada of a duty imposed on the Government of Canada by the Order in Council of June 26, 1873 (R.S.C. 1970, App. II, No. 12, p. 291), which, pursuant to s. 146 of the *British North America Act, 1867*, admitted the Colony of Prince Edward Island into the Dominion of Canada on July 1, 1873. The trial Judge found that the Government of Canada was in breach of its statutory duty to provide a continuous ferry service, but held that no action lay for damages caused to the Province by the breach. On appeal to the Federal Court of Appeal by the federal Government and cross-appeal by the Province, *held* (Pratte, J., dissenting), the appeal should be dismissed and the cross-appeal should be allowed.

Per Jackett, C.J.: The trial Judge's conclusion that the Government of Canada was in breach of its statutory duty to provide a continuous ferry service was correct. In any event, his conclusion was a conclusion of fact, was open to him on the evidence and could not be said to be clearly wrong. The appeal should, therefore, be dismissed. As for the cross-appeal, the Prince Edward Island Terms of Union created a legal duty in favour of that Province in respect of a ferry service. The "obligor", while it was described as the "Dominion Government", was the newly created political entity called "Canada" and the obligee was the Province. Neither the obligor nor obligee was an entity having status as a person in any British or international Court of law. Nevertheless, the United Kingdom Parliament, by imposing duties on one in favour of another, made them parties to statutory rights or duties, no matter how unorthodox it may be to create legal rights without legal remedies. The result of conferring such statutory rights on the Province, in the absence of any other sanction, was to confer a right on it to be compensated in respect of damages arising from breach thereof; but the only remedy, at the time that the right was created was that which was available where there was no legal regime for settling disputes — namely (leaving aside force or other illegal acts), negotiation and invoking the intervention of third parties (*e.g.* in 1867 and 1873, Her Majesty's United Kingdom Government). However, the lack of legal machinery at that time to determine disputes does not detract from the existence at that time of a right to have the statutory duty carried out or to be compensated for breach of that duty. When there is a statutory right to have something done with no express sanction for breach, there is, *prima facie*, an implied right to be compensated for a breach of such right. The trial Judge was wrong when he concluded, in effect, that the breach of the Terms of Union did not give rise to a right to compensation for damages suffered as a result. The effect of the enactment of the original forerunner of s. 19 of the *Federal Court Act* was to convert a legal (statutory) right of a "province" without a legal remedy into a legal right with a remedy.

Per Le Dain, J.: The efficiency of the service is to be judged with regard to its operation. Whether a particular stoppage or interruption of the service is such that the service cannot for that period of time be considered to be an efficient one within the meaning of the Terms of Union is a question of fact — a matter of degree. The trial Judge held that in all the circumstances the ferry service was wholly inadequate to meet the requirements for transportation during the period of the strike and as such had ceased to be an efficient service for that period. There is no basis for interfering with that finding of fact and the appeal should be dismissed. As far as the cross-appeal is concerned, the question is whether the Court should ascribe to the Order in Council an intention that the Province is entitled to be compensated for damages resulting from a breach of this legal obligation or duty by the Government of Canada. There could not, of course, have been any question at the time of the Order in Council of an intention that a breach of the duty should give rise to an action for damages since there was no forum in which an action could have been brought by the Province against Canada. What is to be looked for is an intention to create a legal right to compensation, however it is to be enforced, rather than a right of action as such. It is clearly the intention of s. 19 of the *Federal Court Act* that rights and obligations that would otherwise be unenforceable for lack of a forum are now to be recognized as enforceable. The right or liability may be thought of as an inchoate or imperfect one which is perfected by the creation of a forum in which it may be enforced. The Order in Council arose out of and gave effect to an agreement between Canada and Prince Edward Island. It clearly evidences an intention to create legal rights and obligations as between the two. It contains several provisions creating financial liability. The obligation with respect to the ferry service is also imposed in the context of financial liability. It is clear that the establishment and maintenance of the ferry service was an essential condition of the Union — a practical necessity. It was a matter of governmental responsibility, and the purpose of the obligation was to establish which of the two Governments was to be responsible financially and otherwise for providing the service. It must have been intended that in the measure that Canada failed to perform this obligation the Province would have a right to be compensated for any expense or loss directly caused to it by such failure.

Per Pratte, J., dissenting in part: The appeal and the cross-appeal should be dismissed. The Order in Council of June 26, 1873, imposed on the Dominion Government the legal duty to establish and maintain an efficient ferry service between the mainland and Prince Edward Island. While the Order in Council of June 26, 1873, was adopted following an agreement between Canada and Prince Edward Island, it did not describe the duty imposed on the Dominion Government relating to the ferry service as a duty *towards* the new Province or its Government. It is, therefore, possible to conceive of that duty as one towards the public at large. In that perspective, in case of a breach, the right to be compensated should not be limited to the Government of the Province; it should, in all logic, be granted to all persons suffering damage as a result of the breach. This would be unacceptable. One cannot ascribe to a constitutional document of the nature of the Order in Council the intention of imposing on the Dominion Government, in addition to the public duty to establish and maintain the ferry service, the obligation to compensate all those who might suffer damage as a consequence of a failure in the performance of that obligation. If, on the other hand, the duty in respect of the ferry service be conceived of as an obligation towards the Province, the question is whether it was the intention of the Order in Council that the Dominion Government, in case of breach, be liable to the Province for the damage suffered as a consequence of the breach. The answer must remain negative for two reasons. First, when the duty relating to the ferry was imposed on the Dominion Government, it was not a duty enforceable through

McAulay v. London Tpt. Executive, [1957] 2 Lloyd's Rep. 500 (C.A.) - considered.
McCann v. Cape (1980), 28 A.R. 175 (Q.B.) - distinguished.
McCarthy v. MacPherson (1977), 14 Nfld. & P.E.I.R. 294, 33 A.P.R. 294 (P.E.I. C.A.) - distinguished.
McGrath v. Excelsior Life Ins. Co. (1973), 6 Nfld. & P.E.I.R. 204 (Nfld. T.D.) - distinguished.
Marcroft v. Scruttons Ltd., [1954] 1 Lloyd's Rep. 395 (C.A.) - considered.
Masny v. Carter-Halls-Aldinger Co., [1929] 3 W.W.R. 741 (Sask. K.B.) - considered.
Morgan v. T. Wallis Ltd., [1974] 1 Lloyd's Rep. 165 - referred to.
Savage v. T. Wallis Ltd., [1966] 1 Lloyd's Rep. 357 (C.A.) - distinguished.
Schultz v. Leeside Devs. Ltd., [1978] 5 W.W.R. 620, 6 C.C.L.T. 248, 90 D.L.R. (3d) 98 (B.C. C.A.) [Leave to appeal to the Supreme Court of Canada dismissed, 25 N.R. 609n.] - referred to.
Steele v. Robert George & Co. (1937) Ltd., [1942] A.C. 497, [1942] 1 All E.R. 447 (H.L.) - applied.
Taylor v. Addems, [1932] 1 W.W.R. 505 (Sask. C.A.) - distinguished.

Canadian Abridgment (2nd) Classification
Damages VI.

ACTION for damages for personal injuries sustained in a motor-vehicle accident.

J.M. Scurfield, for plaintiff.
K. McCulloch, for defendants.

(Suit No. 2061/81)

October 29, 1984. WILSON J.: - While walking through the pedestrian crosswalk at a downtown Winnipeg street intersection Mrs. Yphantides was struck by defendants' automobile and, tossed in the air, fell violently to the pavement. This was on August 17, 1979, and she has not worked since. Liability is admitted, so that I am concerned with damages only. Specials are agreed, leaving compensation for future loss of wages and general damages for the injury itself.

A native of Greece, plaintiff came to Canada in 1975. She was then aged 21, and educated to what would correspond with Grade VI here. She knew no English and is still not completely at home in that language, which she cannot read.

She married her present husband in October 1975 and they have two children, one of them born before the accident and a second child born since, on August 11, 1982.

She had no work experience in Greece and entered the garment industry shortly after coming here, interrupting this when her first child was born, and since then, [worked] regularly with Peerless Garments Ltd. Her salary at the time of the accident as a sewing machine operator was $136 weekly gross, her T4-1978 showing net wages of $5,350 in round figures. Her rate of pay was then $3.25 per hour; in 1979 it had increased to $3.40. And of course, it would have varied though the following years as, for example, $4.50 hourly for 1983; and see Ex. 3.

On a straight mathematical projection, discounted at 3 per cent but with no deduction for contingencies or expense of any kind, and assuming her to be incapable of working through the concerned period, her future wage loss as from the end of 1982, calculated for retirement at ages 40, 50, or 65, would be respectively $93,990, $149,518, and $204,430: Exs. 5 and 6. And of course, she claims loss of wages accordingly.

Her husband, a few years older than herself, emigrated from Greece in July 1969, since when he has had fairly regular employment in a series of occupations, none of them requiring any particular training or experience. When I saw him he was working in a furniture shop at an hourly rate of $6.10, about $1,200 a month gross. Not enough to support a wife and two children, he said, for which the family looked to their combined incomes, to supplement which the plaintiff for a time had a second job, as an office cleaner.

Working at the Peerless factory from 7 a.m. to 3 p.m. she started her second job two hours later, 5 p.m., and worked a four-hour shift cleaning offices in the employ of Oxford Building Cleaning Company. And she worked this split shift, 12 hours in all, five days each week.

From Ex. 2, Oxford's letter, she worked there for six months, January 15 to July 13, 1979; her hourly wage of $2.95 giving her a gross income through that period of $1,522.61. Oxford's wages have since risen to $4.45 per hour, and plaintiff asks for an additional award for loss of income on that account, Ex. 6, and again for retirement at ages 40, 50 and 65, shows assumed wage losses of $46,128, $73,380, or $100,328. This, of course, additional to the figures mentioned above for loss of wages presumably to be earned with Peerless.

Plaintiff described her ambition to work steadily, the children to be looked after by day-care or nursery services as available, so that with her husband's income they would buy a home of their own and achieve independence. Her husband said not too much about that, and his brother, the witness

Constantine Yphantides, understood their dream was to make as much money as they could, and then return to Greece.

Most couples, I should think, forecast a future for themselves when, after a life of shared responsibilities, they hope to reach a stage where what they have gained on the way will allow an afterglow of some comfort, perhaps even complete financial independence. And, to their great credit, many newcomers to Canada manage to see those dreams come true. But, it is not always so.

Plaintiff left Oxford Cleaning, she said, in order to look for something better. She was not fired, and felt she could return whenever she wanted. Ex. 2 does not say as much, and nobody was called from Oxford on that point.

She and her husband outlined their plan to work as a team, cleaning offices after their regular daytime employment, with an expected extra income of $160 weekly each, gross. The husband described his own efforts on that account, whereby he was offered a contract to clean offices in two locations, separated by ten miles or so. Indeed he started this program in January 1980 but quit the next month, because it was too much. Had the plaintiff been available, he believed, they could have handled it easily.

Starting at 10 p.m., they would be finished by 1 a.m., with the children looked after by the landlady, whom I did not hear. On cross-examination he admitted that, after trying to do it all himself, working from 10 p.m. to 5 a.m., he persuaded three other men to help but, for whatever reason, this night work was abandoned within two months.

Apart from speculating about the significance of quitting one manual job at 1 a.m. and within six hours beginning another eight-hour shift, over a sewing machine, I do not think that I could charge defendants with the cost of the second job, given the speculative nature of the evidence in its favour, none of it corroborated. The balance of probabilities is not in favour of that additional award, and wage loss will be calculated on the basis of plaintiff's employment as a sewing machine operator.

On August 17, 1979 Mrs. Yphantides was 25 or 26 years old, and in good health. She was happily married with one child, three or four years old. She had a steady job and meant to keep on working indefinitely, a situation which, assuming the job was still there, would of course depend not only on her own state of health and readiness to work, but upon her continued freedom from other responsibilities in conflict with that daily routine. Given her level of preparedness it is unlikely she would have found employment significantly different from what she was doing at the time. All of that academic in her view, which is that because of her injuries she is now and forever will be unfit for work of any sort. And so, what is the extent of disability?

After a fruitless wait for medical assistance at the scene plaintiff was taken home following her accident, where shortly afterwards an ambulance arrived and she was removed to hospital. Examination there disclosed no bone injury and she was returned home. Her family doctor saw her on August 23rd, by which time bruises had developed. His examination was the same, and she was advised to rest at home; and see Dr. Henderson's report, Document "K" of Ex. 1 (1/K).

She was no better when her doctor saw her again a month later, so that he referred her to Dr. Gibeault, an orthopaedic specialist. Dr. Gibeault's first examination of his patient, October 3, 1979, suggested the discomfort and restriction of movements she described were traceable to a disc protrusion. Seen a fortnight later, she was invited to submit to a myelogram investigation to confirm and fix the location of the suspected protrusion with a view to correction by surgery. She declined, and the prescription of bed-rest and analgesics continued, Ex. 1/J. Seen again November 14th, December 5th, December 28th, and January 30th (now 1980) she went on physiotherapy for a time, discontinued because it seemed to worsen her back pain, Ex. 1/I.

In March Dr. Gibeault suggested dissolution of the offending protrusion by Disease injection, as an alternative to the surgery proposed earlier. That too was refused, wherefor the doctor could only "persist with other forms of treatment in spite of the fact that she does not seem to be benefiting from them"; ie., bed-rest and analegisics, "conservative" treatment, Ex. 1/H. At that time too, because she meant to visit her family in Greece, she was given a lumbosacral support - a belt.

While in Greece she kept in touch with a local doctor and continued at rest. On her return she resumed her appointments with Dr. Gibeault and when he left the city she was referred to Dr. Huebert, also a specialist, who first saw her in mid-October 1980. Two weeks earlier, September 29, 1980, she had agreed to a computed tomographic examination of the spine - "CAT scan" - which indicated a left L5-S1 intervertebral disc-space lesion, Ex. 1/G.

Dr. Huebert discussed with her the prospects for recovery but, as she continued to decline surgery, she was asked to sleep on a firm bed, apply heat to the affected area, and avoid lifting. On December 22nd she was still in pain, limping, freedom of movement was further decreased, but she still declined any operative procedure. By that time Dr. Huebert was satisfied that her difficulties were caused by the disc protrusion on the left side, incurable except by surgery.

Dr. Huebert's reports of June 24th and November 19th in 1981 and January 17th and September 8th of 1983 were essentially to the same effect, namely continuing disability caused by a disk protrusion believed to be at the L5-S1 level, with conservative treatment; i.e., rest and avoidance of strain. Of the alternative correction of plaintiff's condition by surgery, recommended by himself and Dr. Gibeault but refused, Dr. Huebert's report of November 19, 1981, supra, Ex. 1/E contains the following:

> "5. Surgical intervention in acute disc protrusion is beneficial in a high percentage of patients, that is well above fifty percent. This, therefore, would make it probable that she would have been helped by surgical intervention. This would decrease the backache, decrease the pain down the leg, and improve her overall mobility through this. It is quite possible, however, that there might be some residual aches and pains in the back, and this lady regardless of having surgery or not surgery would have an increased chance of developing degenerative changes in the disc space and in the facets of that area. She would probably have to be careful with heavy lifting, twisting and turning for the rest of her life even with a successful operation.
>
> 6. Do myelograms, disease injections, or medical intervention expose the patient to any damage or pain? There is some pain often connected with myelograms. There is the pain of insertion of the needle, and sometimes the pain of irritation of nerve roots. There is also sometimes a post myelogram headache. Any medical or surgical treatment has possible complications. This would include allergic reactions to medicines or side reactions of the various medicines. Surgical intervention of course is associated with some pain, since to achieve the operative intervention various tissues have to be cut through, and this leads to some post-operative pain. There is of course an anesthetic risk with any operation, which, however, small in healthy people, still is present. In a relatively healthy individual such as Mrs. Yphantides this risk is of course very low, but it is present."

With that doctor's report of January 17, 1983 (Ex. 1/D) the notion of surgery is abandoned, because:

> "By now the disc protrusion has been present so long that the tissues will likely be adherent, so the surgery would be much more difficult, and the anticipated benefit would be much less. The nerve root has been pushed upon by the presumed protruding disc material for such a length of time, that even if the pressure were relieved now, anticipated improvement would be minimal."

That report, too, mentions a complaint of neck pain which the plaintiff told me had bothered her right the way through, but of which there was no mention to her doctor until the summer of 1982. Dr. Huebert described it as an "unrelated condition" and in his report of September 8th, Ex. 1/B, he says - and I think this could only come from the plaintiff - "It should be noted that during the course of events the patient was involved in another accident which has given her neck pain." In her visits to Dr. Huebert in August, September and October of 1982, seemingly the neck pain was her chief concern. The question of another accident was not pursued at trial.

The latest in that series of four reports, September 8, 1983, refers to diminishing range of lumbar spine movements, pain with any hip movement, numbness in the left calf and three toes of that foot, a "different" feeling in the left leg, and decreased sensation in the sole of the left foot, all of which seemingly is explained as a radiation of the effects of the left-sided disc protrusion. The accumulated symptoms noted, from the closing sentence of the September report, are such as "would significantly limit her capacity to do any type of physical work".

Nor is that all. Seemingly at the suggestion of her brother-in-law Constantine Yphantides, from October 1982 she has been regularly seen by Dr. Varsamis, a psychiatrist, whose report of February 8, 1983, Ex. 1/C, summarizes the verbal account of her state told to me by the plaintiff and her husband. Dr. Varsamis said:

> "She presented with symptoms of anxiety and depression. She felt low, sad and cried frequently. She also complained of irritability and intolerance to noise. . . . 'I get mad at my husband and children for no reason - afterwards I feel guilty'. She had difficulty making decisions, could not concentrate and complained of being forgetful, 'I cannot read a book, I read a page and then I forget what I've read and have to start at the beginning again.'
>
> In addition she has had insomnia and many somatic symptoms, e.g. lack of energy and a variety of pains and aches. She described headaches, palpitations and tightness in the chest. She thought that she had heart disease and

saw a cardiologist Dr. Narvas who found her heart functions to be normal. She subsequently saw another internist at the Winnipeg Clinic for chest discomfort and urinary tract infection. She has also been seeing Dr. Huebert for low back problems.

The above symptoms are typical of patients suffering from a major depression.

In addition she suffers from a number of phobias - she is afraid to go out alone and in particular of crossing streets unaccompanied."

As I saw her, she is in a pitiable state. She moved with difficulty, with a constant head shake. She now fears for the continuance of her marriage because of her failure "as a wife", of which I remind myself that in August 1982, three years after the accident, she had her second child.

Looking after the two children and doing the housework calls for more than the usual assistance of a husband. Their life at home I would think is not cheerful; Constantine Yphantides remarked about his own ennui in listening to her "groaning and moaning" whenever he visits.

And of course, defendants say, all of this could have been avoided had she accepted her doctors' advice and undergone the surgery they recommend.

The general principle that a plaintiff must take whatever steps are reasonably open to him to mitigate his loss extends to the acceptance of medical advice. The Court will not decide for the plaintiff whether or not he will undergo an operation or otherwise submit to any particular medical attention or regimen; but should it appear the plaintiff has wilfully refused treatment which in all the circumstances seemed reasonable the defendant ought not to be charged with the dollar consequence of that refusal. And see Seaton J.A. in Schultz v. Leeside Devs., [1978[5 W.W.R. 620 at 632, 6 C.C.L.T. 248, 90 D.L.R. (3d) 98 (B.C. C.A.) [Leave to appeal to the Supreme Court of Canada dismissed, 25 N.R. 609n.], and MacPherson J. in Hayden v. Klavs, [1975] W.W.D. 78 (Sask. Q.B.).

Upon his review of the English cases cited to him in Bateman v. Middlesex (1911), 24 O.L.R. 84, affirmed 25 O.L.R. 137 (Div. Ct.) [varied on other grounds (1912), 27 O.L.R. 122, 6 D.L.R. 533 (C.A.)], Riddell J. said, p. 87:

> "The principle to be deduced from these is, if a patient refuse [sic] 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."

Singleton L.J. in Marcroft v. Scruttons Ltd., [1954] 1 Lloyd's Rep. 395 (C.A.) put it this way, p. 399:

> "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."

It must appear that the prospects for the success of what is proposed must be clearly put to the plaintiff, per Jenkins L.J. in McAuley v. London Tpt. Executive, [1957] 2 Lloyd's Rep. 500 at 505 (C.A.); but the fact he is an "uneducated, ignorant man", or even that he was in such a state of anxiety neurosis as to be unable to make a decision, will not save the day for the plaintiff and saddle the defendant with an area of damages which could reasonably have been avoided; Denning L.J. in Marcroft, supra, p. 401.

There was no challenge to the explanations offered by her doctors to the plaintiff before me, nor anything to suggest that she did not understand what was being said to her. Her reason for refusing to undergo the treatment counselled appears with her examination for discovery, Ex. 8, QQ. 140-141:

> "140 Q Can you tell me why it is that even though Dr. Gibeault suggested surgery and Dr. Hubert [sic] suggested surgery that you chose not to have surgery?
>
> A Sure, I took the decision not to have an operation because there was no guarantee, I am very young and if the surgery was going to leave me in a worse position what am I going to do, I know I can't live that way but

afterwards if I get worse so what is that, that would have been worse for me.

141 Q What sort of gurantee did you expect before you would consider surgery?

A If I was ensured that I would have been better."

I should think it would be difficult to exact such a guarantee, turning as it must on the many uncertainties which surround any operative procedure and the course of recovery following that intervention. Particularly so, in this day, when the threat of litigation imperils every comment offered by the doctor in question in the course of his exchanges with the patient.

In answer to her counsel's inquiry about the nature and probable success of the operation in question, Dr. Huebert replied, on March 8, 1984, Ex. 1/A:

"On assessment of Mrs. Yphantides, the last examination being March 6, 1984, it appears to me that she still has some pain in her back, despite the fact that I think there is some psychogenic overlay to aggravate the symptoms, it appears to me that she has a real disability. As such she would not be able to resume employment which would involve lifting, twisting, turning or sitting for a long time in one position.

In trying to assess what could have happened and what did happen one should consider the possible benefits and complications of surgery and Discase injections.

Numbers vary depending on the specific investigation which is being quoted, but it is commonly believed that approximately eighty percent of people with disc protrusion who are treated with Discase show improvement. It should be pointed out however that the patients chosen for Discase injection are selected and are selected with the probable benefit in mind before being submitted to this procedure.

Of these eighty percent which have improved some would be virtually symptomless, but a substantial number would still have some aches and pains, and some limitation of activity. Of the twenty percent which did not improve a substantial number would be the same as they were prior to the Discase injection, a small number might become worse. A very small number might have more serious complications which can sometimes occur after Discase injections. The more serious complications would be possible paralysis due to leaking of the material into the spinal canal. It is also possible to have allergic reactions to the material, which can be all the way from a minor irritation all the way to anaphylactic shock, which can cause death.

The efficacy of disc surgery is also considered to be in the neighbourhood of eighty percent improvement. Again of this eighty percent perhaps half would be virtually symptomless for at least five to ten years, but also a substantial number would have some aches and pains, with improvement, but not a totally normal back. Roughly twenty percent would not show improvement, a few of which may be somewhat worse. In a very small percentage there may be additional complications such as tearing of the dural sac, cutting spinal nerves. There is also always the risk of a general anesthesia, which while a small percentage, can include many complications, even as far as death.

It must also be pointed out that with conservative treatment, even of an acute disc protrusion, a substantial number of patients can recover, and obtain reasonably good function. In my opinion the percentage which would recover with conservative treatment would likely be somewhat lower than with operative intervention, but it must also be stated that a substantial percentage of patients with this condition would recover reasonable function of the back. By reasonable number I would estimate perhaps fifty percent would recover with reasonable function of the spine, leaving the other fifty percent with some continuing discomfort, and a smaller percentage with severe symptoms which can persist for a longer period of time. It must also be stated that within even the orthopaedic profession there are some differences of opinion as to which are the most efficacious methods of treating disc protrusions, and there are some surgeons who are very reluctant to operate, and would consider conservative treatment, that is rest, medicines, physiotherapy, as the advisable treatment in almost any circumstance."

For the majority in Ippolito v. Janiak (1981), 34 O.R. (2d) 151, 18 C.C.L.T. 39, at 65, 126 D.L.R. (3d) 623 (C.A.), Blair J.A. said:

> "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 at 158, [1971] 3 All E.R. 285, per MacKenna J. 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."

and continuing, p. 69:

> "The failure to mitigage 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 per cent risk that he would be unable to return to his employment.

Save in cases not relevant here, as for example the treatment of infants or others incapable of deciding, the Court will not direct the application of a supposed medical remedy. But in the instant case it is open to the Court to fix damages at an amount which presumes the application of a remedy in fact refused by the claimant, where such refusal is not supported by acceptable medical opinion. Of this last, I have earlier noted that no objection was taken to any of the reports and conclusions penned by the doctors who were consulted by the plaintiff.

McAuley, supra, p. 505, adopted in Ippolito v. Janiak, p. 61:

> " . . . what is the effect, if any, on the quantum of damages in 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."

Those opinions, I think it fair to say, were at one in recommending - until it was too late to be of any use - relief by way of direct surgery or Disease injection and, given the aftermath of plaintiff's rejection of that advice, in the view that her condition today is significantly worse than it would have been had she submitted to the surgery proposed.

Beyond question, the onus is upon the defendant to show that the refusal of the plaintiff to accept the medical advice proffered was unreasonable; and see Browne J. in Morgan v. T. Wallis Ltd., [1974] 1 Lloyd's Rep. 165 at 170. But this is not a case where the opinions were so divided as to make the patient reluctant to opt for the view preferred by the defendant, McGrath v. Exelsior Life Ins. Co. (1973), 6 Nfld. & P.E.I.R. 203 (Nfld. T.D.); or where there was at best a 50/50 chance for success, McCarthy v. MacPherson (1977), 14 Nfld. & P.E.I.R. 294, 33 A.P.R. 294 (P.E.I. C.A.); or where despite the opinions of others perhaps better qualified the patient prefers the differing advice of "his own" doctor, McCann v. Cape (1980), 28 A.R. 175 (Q.B.), Savage v. T. Wallis Ltd., [1966] 1 Lloyd's Rep. 357 (C.A.); or where the remedy proposed could perhaps make some improvement but entails risks which outweigh the chance for the better, Taylor v. Addems, [1932] 1 W.W.R. 505 (Sask. C.A.). In all of those circumstances, the plaintiff was not seen as unreasonable in refusing to undergo the surgery put to him.

The refusal as a mere whim of the patient will not do; neither - as earlier noted - will a state of anxiety neurosis, or the fact that the patient was "ignorant, uneducated". Fear will not do, Morgan, supra, p. 170; nor "wanton and reckless obstinancy", Masny v. Carter-Halls-Aldinger Co., [1929] 3 W.W.R. 741 at 744 (Sask. K.B.). My own opinion, supra, that a plaintiff may not expect from the doctor an absolute assurance, a 100 per cent chance of success, is supported by Browne J. in Morgan and by the Ontario Court of Appeal in Ippolito v. Janiak, supra.

Crucial to the question whether the plaintiff should have followed the medical advice in question must be of course the nature of that advice, and in particular whether in the surgery

proposed a reasonable patient would appreciate a significant betterment from what his lot would be without that procedure.

For Dr. Huebert, the efficacy of Discase injection or disc surgery is in the neighbourhood of 80 per cent, albeit with some remaining limitation of movement. Given that percentage I see no reason to suppose that the plaintiff here should be numbered among the 20 per cent of cases which do not respond. Given that likelihood for improvement of her state of recovery from the accident, I think her refusal to follow the advice in question was unreasonable.

Because of the likelihood of some persisting disability despite the proposed surgery, however, to discount her claim by 80 per cent would be too much; "the effects of the accident still remain", Lord Wright in Steele v. Robert George & Co. (1937) Ltd., [1942] A.C. 497 at 499 [1942] 1 All E.R. 447 (H.L.); and from Ippolito,

> "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 . . ." [Blair J.A., p. 58 C.C.L.T.]

Arbitrary as it may seem, I believe 50 per cent would be a more realistic figure, and one fair in all the circumstances to both parties.

Mrs. Yphantides was injured on August 17, 1979 and by November 1, Ex. 1/J, Dr. Gibeault expected she would be back at work in two or three months. His later opinion, March 5, 1980, confirmed his suspicion that her pain and disability was due to disc protrusion and he recommended a Discase injection, which she refused. Within three weeks she was well enough to travel to Greece, Ex. 1/H.

Dr. Gibeault saw her when she returned, and when he left the city Dr. Huebert took over. His opinion was the same, namely a disc protrusion which he thought could be corrected by surgery, advice which she rejected in the fall of 1980, Ex. 1/G. Her condition steadily deteriorated to the state she presented in Court.

Assuming the more radical cure proposed by her doctors, she could, I think, be reasonably viewed as fit to return to work by the spring of 1981 at the latest, so that her claim for wages would be allowed from August 17, 1979 to April 30, 1981, calculated at her then rate of pay, without deduction. Wages from that time to the end of 1982 are allowed at the rate she would have earned, but reduced by the 50 per cent factor settled above. As to future wages, Exs. 5 and 6, Mrs. Yphantides should, I think, be treated as sincere in her protestations of meaning to work for as long as she could, a willingness to stand behind her husband (or for herself) in garnering what fruits she could, not unusual in newcomers to this province of her unsophisticated background and itch for material advancement, so that I start with the actuary's figure for retirement at age 65.

But that naked mathematical projection takes no account of the ups and downs she is bound to meet in so long a time, some 35 years, so that for those contingencies the actuary's figure of $204,430 will be reduced by 25 per cent. Arbitrary again, but not, I think, out of reason, and the factor adopted in Ippolito. The dollar result will be further reduced by the 50 per cent adjustment developed above. In fixing her general damages at $35,000, as I do, I have taken account of the extent to which her condition would not have been as it is but for her own rigidity. That award therefore is not subject to the adjustments prescribed on wage account.

Plaintiff will have her costs. In view of the nature of the evidence I do not see this as a case for surcharge by way of interest before judgment.

Order accordingly.