ROYAL COMMISSION ON COMPENSATION

FOR DONALD MARSHALL, JR.

L I T E R A T U R E

SUBMITTED BY

COUNSEL FOR THE COMMISSION

I N D E X

1. Linden, Canadian Tort Law (1977)

2. Compensation for Wrongful Imprisonment, A Report by JUSTICE (1982)

3. Sullivan, Three Methods of Tort Compensation (1982), 3 Advocates Quarterly 256.

4. Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death (1987).

5. Brown, Law of Defmation (1987).

6. McGregor on Damages (1988)

7. Short, Matters of Interest (1988) 9 Advocates Quarterly 105

8. Todd, Structured Settlements and Structured Judgements: Do They Work and Do We Want Them?, (1989) 12 Dalhousie Law Journal 445

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F. Punitive Damages

Defendants found liable for intentional torts may be ordered to pay punitive or exemplary damages in addition to the special and general damages payable in ordinary tort cases.[176] Such damages, which have also been described as "vindictive", "penal", "aggravated" and "retributory", are awarded in cases of high-handed, malicious, or contemptuous conduct, in order to punish the defendant for the wrong and to make an example of him in order to deter others from committing such torts.[177] They are not normally available for mere negligence.[178] Mr. Justice Schroeder has explained the scope of the punitive damage principle in these words:

> "Generally, . . . such damages may be awarded in actions of tort such as assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution and false imprisonment. If, in addition to committing the wrongful act, the defendant's conduct is 'high-handed, malicious, conduct showing a contempt of the plaintiff's rights, or disregarding every principle which actuates the conduct of a gentleman' (to quote a few examples taken from the authorities) his conduct is an element to be considered as a circumstance of aggravation which may, depending upon its extent or degree, justify an award to the injured plaintiff in addition to the actual pecuniary loss which he has sustained. I do not think that it can be stated with any precision what may be classed as aggravating circumstances but malice, wantonness, insult and persistent repetition have always been regarded as elements which might be taken into account."[179]

His Lordship concluded by categorizing the defendant's conduct as "outrageous and scandalous", calling for "an expression of the Court's strong aversion" to his "evil" motive and "callous disregard" of the plaintiff's rights.

Punitive damages have been awarded in most types of intentional torts such as battery,[180] assault and unlawful arrest,[181] trespass to land,[182]

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[176] See Fridman, "Punitive Damages in Tort" (1970), 48 Can. Bar Rev. 373; Atrens, "Intentional Interference with the Person" in *Studies in Canadian Tort Law* (1968); Morris, "Punitive Damages in Tort Cases" (1931), 44 Harv. L. Rev. 1173.

[177] See McRuer C.J.H.C., at trial in *Denison v. Fawcett*, [1957] O.W.N. 393, aff'd., [1958] O.R. 312 (C.A.), a deceit and conspiracy case; another rationale given was the difficulty of fixing actual compensation in defamation cases, for example.

[178] *Kaytor v. Lion's Driving Range Ltd.*, (1962), 35 D.L.R. (2d) 426 (B.C.).

[179] *Denison v. Fawcett, op.cit. supra*, O.R. at p.312.

[180] *Karpow v. Shave*, [1975] 2 W.W.R. 159 (Alta.), (*per* D. C. McDonald J.), spectator attacking hockey player.

[181] *Basil v. Spratt* (1918), 44 O.L.R. 155 (C.A.); *Eagle Motors (1958) Ltd., v. Makaoff* (1970), 17 D.L.R. (3d) 222, (B.C.C.A.), false imprisonment.

[182] *Pollard v. Gibson* (1924), 55 O.L.R. 424 (C.A.); *Pafford v. Cavotti* (1928), 63 O.L.R. 171 (C.A.); *Patterson v. De Smit*, [1949] O.W.N. 338 (C.A.); *Carr-Harris v. Schacter and*

trespass to goods,[183] trespass to a ship,[184] defamation,[185] conversion,[186] and fraud.[187]

No punitive damages will be permitted, however, where the defendant has already been punished in the criminal courts for the same conduct.[188] In *Loomis v. Rohan*, a plaintiff was shot four times by the defendant and rendered a paraplegic, but no punitive damages were allowed because the defendant had been sent to prison for his conduct.[189] Similarly, where a five-year-old child was brutally raped, no punitive damages were permitted because the defendant had already been jailed for the offence.[190] Another factor which precludes the award of punitive damages is provocation by the plaintiff.[191] Such cases clearly demonstrate that there is a punitive element in awarding extra exemplary damages in these tort cases which supplements the criminal law, but that where the criminal process has been utilized, tort law withdraws, except to the extent of ordinary compensation.

In England, the availability of punitive damages has been severely limited. In *Rookes v. Barnard*,[192] the House of Lords expressed the view that tort law ought to be primarily aimed at compensation and not at punishment. It restricted awards of exemplary damages to two situations (in addition to express statutory authorization, of course): (1) where there was oppressive, arbitrary or unconstitutional action by servants of governments; (2) where the defendant's conduct was calculated by him to make a profit which may exceed the compensation payable to the plaintiff. "Aggravated" damages, as distinct from "exemplary" damages, were said to remain available, although the distinction between them was not fully explained.

Rookes v. Barnard was not received with enthusiasm. The courts in Canada, Australia, and New Zealand refused to follow it, but the English courts submitted, that is at least, until *Broome v. Cassell & Co. Ltd.*[193] In that case, although the facts were actually within the second exception of *Rookes v. Barnard*, Lord Denning sought to overthrow that decision and urged that it no longer be followed. When the case was appealed, the House of Lords affirmed the result on the basis of the sec-

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Seaton, [1956] O.R. 944; *Starkman v. Delhi Court Ltd.*, [1961] O.R. 467 (C.A.); *Cash & Carry Cleaners v. Delmas* (1973), 44 D.L.R. (3d) 315 (N.B.); *Townsview Properties Ltd., v. Sun Construction Equipment Co. Ltd.*, (1974), 7 O.R. (2d) 666 (C.A.).

[183] *Owen and Smith (Trading as Nuagin Car Service) v. Reo Motors (Britain) Ltd.*, [1934] All E.R. 734 (C.A.).

[184] *Fleming v. Spracklin* (1921), 50 O.L.R. 289 (C.A.); *Mackay v. Canada Steamship Lines Ltd.*, (1926), 29 O.W.N. 334.

[185] *Ross v. Lamport*, [1957] O.R. 402 (C.A.); *Gillett v. Nissen Volkswagen Ltd.*, (1975), 58 D.L.R. (3d) 104 (Alta.).

[186] *Grenn v. Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9 (Ont. C.A.).

[187] *McKenzie v. Bank of Montreal* (1975), 7 O.R. (2d) 521.

[188] *Amos v. Vawter* (1969), 6 D.L.R. (3d) 234 (B.C.); *Natonson v. Lexier*, [1939] 3 W.W.R. 289 (Sask.).

[189] *Loomis v. Rohan* (1974), 46 D.L.R. (3d) 423 (B.C.).

[190] *Radovskis v. Tomm* (1957), 9 D.L.R. (2d) 751 (Man.).

[191] *Check v. Andrews Hotel Co. Ltd.*, (1974), 56 D.L.R. (3d) 364 (Man.C.A.), (Matas J.A.).

[192] [1964] A.C. 1129.

[193] [1971] 2 All E.R. 187.

ond exemption, but used the occasion to reaffirm *Rookes v. Barnard* and to criticize the Court of Appeal "with studied moderation" for its course of conduct in defying them.[194]

In the main, Canadian courts have refused to follow *Rookes v. Barnard*, and have clung to the earlier Canadian authorities.[195] One recent example of the current attitude of Canadian judges is *S. v. Mundy*,[196] where the defendant indecently assaulted and beat the plaintiff severely. No criminal charges were laid, but the plaintiff sued for assault. Cudney,Co.Ct.J. awarded $1,500 exemplary damages. His Honour indicated that our courts had not differentiated between "aggravated" and "exemplary" damages, the words being used interchangeably. He suggested that "exemplary" or "punitive" damages may be awarded where there is a "wanton or intentional act" and when it "is necessary to teach the wrongdoer that tort does not pay." These damages are "preventive or deterrent in character and are over and above compensation". His Honour felt that the defendant's conduct was "outrageous", and "deserving of punishment to deter him and others from attempting the same thing in future."[197] There is, however, some Canadian authority, following *Rookes v. Barnard*, to the effect that exemplary damages, but not punitive damages, could be awarded for a shooting.[198]

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[194] See *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027; for a fine article on this topic, see Catzman, "Exemplary Damages: The Decline, Fall and Resurrection of *Rookes v. Barnard*", in *Special Lectures of the Law Society of Upper Canada* on *New Developments in the Law of Torts* (1973).

[195] See *McElroy v. Cowper-Smith*, [1967] S.C.R. 425; *Paragon Properties Ltd. v. Magna Envestments* (1972), 24 D.L.R. (3d) 156 (Alta.C.A.); *Weiss Forwarding v. Omnus* (1975), 5 N.R. 511.

[196] [1970] 1 O.R. 764.

[197] *Ibid.*, at p.771. See also *dictum* in *Turnbull v. Calgary Power Ltd.*, (1974), 51 D.L.R. (3d) 562 (Alta.C.A.).

[198] *Banks v. Campbell* (1974), 45 D.L.R. (3d) 603 (N.S.) (*per* Cowan C.J.T.D.N.S.).

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A REPORT BY JUSTICE

Compensation for Wrongful Imprisonment

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A REPORT BY JUSTICE

Compensation for Wrongful Imprisonment

CHAIRMAN OF COMMITTEE
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This report has been endorsed and approved
for publication by the Council of JUSTICE.

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INTRODUCTION

1 One of the conditions of an ordered democratic society is that every citizen should submit himself to the laws of the land in which he lives and to the jurisdiction of those who are authorized to administer and enforce them. Thus, in England and Wales, if he is suspected of having committed a criminal offence, he may be arrested and detained in a police station, charged, brought in front of a magistrate and, if the offence is serious, tried in the Crown Court. If he is found guilty and has exhausted any right of appeal he may exercise then he has to accept the penalty and the consequences which flow from it be they imprisonment, or fine, or loss of reputation, property and livelihood.

2 All those who participate in the administration of criminal law at various levels, including juries, are acting on behalf of society as a whole. As they are human, it is inevitable that mistakes will be made. There are inherent dangers of error and injustice in the accusatorial system of trial and the problem which this committee has been asked to consider is the extent to which the state should accept responsibility for the consequences of such errors and injustices.

3 This country has been slow to provide a remedy in damages in the field of administrative law, but if there is an area in which an effective remedy should be provided it is where the operation of the criminal law has resulted in unjustified loss of liberty.

4 This void in our provision of remedies appears even more remarkable when we consider that the injury suffered through errors in the administration of the criminal law can be far more serious than one suffered by maladministration on the part of a civil authority since it may include:–

(a) loss of liberty and the harshness and indignities of prison life;

(b) loss of livelihood and property;

(c) break-up of the family and loss of children;

(d) loss of reputation.

Any period of imprisonment, however short, can bring about all these consequences.

5 It has further to be noted with regret that, so far as we have been able to ascertain, the United Kingdom is the only member country of the Council of Europe with no statutory scheme for compensating those who unjustly suffer loss through the malfunctioning of the criminal law. This is despite the fact that Article (6) of the U N International Covenant on Civil and Political Rights, which entered into force on 23 March 1976 and was ratified by the United Kingdom on 27 May 1976, establishes the following right:–

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Furthermore, the United Kingdom was the last member country of the Council of Europe to adopt a scheme for rehabilitation of offenders, after a campaign led by JUSTICE, and is still the only such country which has no statutory provision for the independent investigation and remedying of prisoners' grievances.

6. The original terms of reference given to our committee were 'compensation for wrongful imprisonment arising out of a miscarriage of justice', but it soon became apparent that these were too restrictive, and that there are other situations in which a citizen can suffer serious injustice at the hands of the criminal law with very little prospect of obtaining compensation. The reason for this is that there is no statutory right to compensation. The only available source is an *ex gratia* payment by the Home Office in cases where:–

(a) a free pardon has been granted under the Royal prerogative;

(b) the Court of Appeal has quashed a conviction on a reference from the Home Office;

and in a few other exceptional circumstances.

7 This inadequate provision does not cover cases in which;–

(a) a conviction carrying a sentence of imprisonment is quashed on appeal from a Crown Court or a magistrates' court;

(b) a person is committed in custody for trial and the jury finds him not guilty, or he is discharged by the judge, or the prosecution offers no evidence;

(c) a person is detained or remanded in custody and is discharged or acquitted when he appears in the magistrates' court;

(d) a person is detained for questioning and released without being charged.

Although an aggrieved person can bring civil action for wrongful arrest or malicious prosecution such actions are fraught with technical difficulties and are rare in practice.

8 A statutory scheme to cover all these situations might not be regarded as practicable. We have, therefore, not attempted to formulate recommendations in respect of (c) and (d) above, taking the view that these could be the subject of study by another committee.

9 In a special section of our report we have summarized the statutory provisions for compensation in other countries. In drawing attention to them we think it fair to point out that their problems are simpler than ours, particularly if factual innocence or unjustified prosecution is to be taken as the criterion for awarding compensation. Inquisitorial systems with independent public prosecutors mean that fewer unjustified charges are brought and the facts of a case are more fully explored than in our accusatorial system where there is no independent scrutiny and appraisal of evidence before a case comes to trial. Furthermore, an acquittal at trial or the quashing of a conviction on appeal does not necessarily betoken innocence, or indicate the extent to which a person may have contributed to his misfortune.

EXISTING PROVISIONS

10 As we have indicated in the introduction to this report, there is no statutory provision for the payment of compensation even in the clearest cases of wrongful imprisonment and even if they have been brought about by negligence or malpractice on the part of the prosecution. The Home Office does, however, make *ex gratia* payments without question in those cases where the Home Secretary has granted a free pardon under the Royal prerogative or the Court of Appeal has quashed a conviction following a reference by the Home Secretary.

11 The justification for this would appear to be that in such cases factual innocence is presumed to have been established. The Home Secretary is in a difficult position constitutionally, since questions of guilt or innocence are supposed to be decided by the Courts and not by the executive. The Home Secretary therefore will not grant a free pardon unless the petitioner can produce unassailable proof of innocence which overcomes all the evidence on which he was convicted including, perhaps, a disputed admission. A plea of guilty, even if made under improper pressure, can provide an insuperable barrier to a pardon although in such cases the Court of Appeal can treat the plea of guilty as a nullity and order a retrial. If the Home Secretary is in doubt about the probative value of new evidence he will refer it to the Court of Appeal to resolve any doubt. He is more likely to adopt this course when an appeal has already been dismissed. The Home Secretary does not want to appear to overrule the Court of Appeal – as would have been the impression created in the Luton murder case had he granted Cooper and McMahon a free pardon after three unsuccessful references to the Court of Appeal.

12 C.H. Rolph's book, *The Queen's Pardon*, cites a number of the better known cases. The most famous of these is that of Adolf Beck who, in 1905, was a victim of mistaken identity. Beck served seven years in prison before, after sixteen unsuccessful attempts to get his case re-opened, the

identity of the real criminal was discovered. Beck was awarded an *ex gratia* payment of £4,000.

13 Other cases cited by C.H. Rolph include:–

(a) In 1928, Oscar Slater, who had been imprisoned for eighteen and a half years for a murder he did not commit, was awarded £6,000 'compassionate allowance'.

(b) In 1955, Emery, Thompson and Powers, who had been wrongly imprisoned for two years for assaulting a police officer, were awarded sums between £300 and £400.

(c) In 1965, the three Cross brothers, who had spent eight months in prison for robbery, were awarded sums between £800 and £1,000. They had been identified by a woman who said that she recognised them in a dimly lit street from a second floor window. A watch they were alleged to have stolen was later found in the possession of another gang.

(d) In 1974, Laszlo Virag, who had been wrongly identified and imprisoned for five years, was awarded £17,500.

(e) In 1977, Patrick Meehan was pardoned by the Secretary of State for Scotland after serving six years for a murder committed by another man, whose confession was disclosed only after his death. Meehan, whose case was the subject of a book by Ludovic Kennedy, was awarded only £7,500, presumably because of his 'way of life'.

14 We would also mention four recent cases in which JUSTICE was actively involved in securing the quashing of the convictions:–

(a) In 1974, Luke Dougherty was found guilty of stealing some curtains from the British Home Stores in Sunderland, having been identified in highly unsatisfactory circumstances by two shop assistants. At the time of the theft he was on a coach outing to Whitley Bay with 24 other persons, but only two of these witnesses were called at his trial. The Court of Appeal condoned some serious

irregularities in the identification procedures and, with the consent of Dougherty's counsel, said it could not take notice of twelve witness statements which JUSTICE had sent to the Registrar. Fifteen affidavits were later prepared and sent to the Home Secretary who, after a police investigation, referred the case back to the Court of Appeal. The conviction was duly quashed and Dougherty, who had served eight months before being released on bail, was awarded £2,000.

(b) In 1977, Tom Naughton served three years of a ten year sentence for armed robbery. His alibi that he had been arranging to buy a car at a garage many miles away was disbelieved. A mechanic, who had left the garage shortly afterwards, was eventually traced and recognised Naughton and his friend who had called at the garage with him. The Court of Appeal quashed the conviction on a reference by the Home Secretary and Naughton was awarded £10,000.

(c) Donald Benjamin was convicted in 1976 of raping a young woman whom he found baby-sitting in the flat of his girl friend, and sentenced to 12 years imprisonment. His defence was that she had willingly consented and that she had accused him of rape only because she was frightened of what her boy friend, who had convictions for violence, might do to her. She had confessed this to two friends who were sisters and who offered to give evidence. The younger sister, however, was threatened by the boy friend and refused to say anything when she went into the witness box. JUSTICE obtained statements from her and her mother. The Home Office ordered a police investigation which resulted in the case being referred to the Court of Appeal, which ordered a re-trial at which Benjamin was acquitted. He was awarded £9,000 compensation.

(d) Albert Taylor was released in 1979 after serving 5 years of a life sentence for the murder of his fiancée's younger sister. A police investigation brought to light some further important medical

evidence and a strengthening of Taylor's alibi. This had partly depended on his assertion that about the time of the murder he had been at Peterborough Station and had heard the station clock click on the half-hour. The prosecution had produced evidence to show that it did not click, but the Chief Superintendent who conducted the investigation discovered that a fault in the mechanism had developed between the time of the murder and the trial.

A recommendation by the Chief Superintendent that the new evidence warranted a review of the conviction came to light only as the result of an enquiry by Taylor's welfare officer. This enabled his solicitors and JUSTICE to co-operate in the drafting of a petition to the Home Secretary, who referred the case back to the Court of Appeal. Taylor's conviction was quashed and he was awarded £21,000.

(e) More recently, John Preece, who had been convicted of murder on the subsequently discredited evidence of the Home Office forensic scientist, Dr Clift, has been awarded £70,000.

15 It appears from the above that, when one of the two conditions stated in paragraph 6 above is satisfied, the decision to grant compensation is automatic. The amount to be paid used to be decided by the Official Referee but more recently has been decided by the Chairman of the Criminal Injuries Compensation Board. The procedure for determining the amount of compensation payable is set out in Appendix C.

16 The 'exceptional circumstances', other than those described above, in which the Home Secretary may agree to pay compensation have never been publicly disclosed and lie entirely within his discretion. We can only assume that they include convictions quashed on appeal in which it can be shown that the applicant has suffered wrongful imprisonment through some gross irregularity or malpractice on the part of the prosecution. We shall discuss in a later chapter the general problem of convictions quashed on appeal, but we should like to cite two cases in which JUSTICE has

been involved and which disclose a serious and inexplicable inconsistency of policy.

17 In July, 1976, Roy Binns was found guilty of setting fire to a hospital Portakabin and sentenced to 19 months imprisonment. The evidence against him was a statement by a co-accused and an alleged admission which he hotly disputed. An unidentified finger-print had been found at the scene of the crime and this was not disclosed to the defence. Binns lodged a complaint and an investigation by a Chief Superintendent of Police resulted in a confession by the co-accused that he had given false evidence, the identification of the finger-print as that of a man called Alexandre and his subsequent confession to the crime. There could have been no clearer proof of Binns' innocence, and in December 1976 he was visited by the Chief Superintendent and told that he would be released in the New Year.

The Chief Superintendent reported to the Chief Constable recommending a free pardon and, because the investigation was prompted by a complaint and involved Alexandre, the Chief Constable sent the papers to the Director of Public Prosecutions as well as to the Home Office, where 'an official at junior management level' (as the Parliamentary Commissioner later established) accepted the advice of a legal assistant in the office of the Director of Public Prosecutions to take no action. Binns' solicitors were informed of this in May 1977. Binns was released on parole shortly afterwards. His solicitors applied for leave to appeal out of time on the basis of the Chief Superintendent's findings and the Court of Appeal quashed the conviction with the full agreement of the prosecution. His solicitors applied for compensation and were informed, in a brief letter, that the law made no provision for payment of compensation to persons whose convictions were quashed on appeal and that Binns' case did not justify an *ex gratia* payment.

Strong representations were later made to the Minister of State by Binns' M P with the backing of JUSTICE and, somewhat exceptionally, by the prosecuting solicitor in the case, but to no avail. The Minister would not even agree to consider paying compensation for the period between the Chief Superintendent's recommendation reaching the Home Office and Binns' release.

18 The case of James Stevens followed the same pattern but was treated in a very different way. Stevens was convicted of robbery with violence in March 1976 and sentenced to 5 years imprisonment. He had been taken in for questioning and then released on bail. Two weeks later he was arrested and charged on the strength of an oral admission and unsigned written statement he was alleged to have made before his release on bail. Three men had taken part in the robbery and the two victims both said that two of the robbers had called the third man (allegedly Stevens) by a name which he never used. The victims were at no time asked to identify him.

Stevens likewise complained to the police about the alleged admission, and the investigation resulted in a Chief Superintendent reporting to the Home Office, via the Chief Constable, his firm opinion that Stevens was innocent. Stevens was made aware of this. His solicitor applied for a free pardon or a reference to the Court of Appeal but, despite representations by his M P , the Home Office said it could not act on an opinion, even of a senior police officer. JUSTICE was consulted and advised and assisted with an application for leave to appeal out of time. The prosecution was less helpful than it had been in the case of Binns. It refused to disclose the statements taken in the course of the investigation and opposed the appeal, but Stevens' solicitors obtained permission to interview the two victims, who both stated categorically that he was not one of the robbers. In May 1977, the Court allowed the appeal, virtually without argument, on the main ground that, if Stevens' alleged admission to a robbery with violence had been genuine, he would not have been freed on police bail, and that the trial judge had failed to put this point to the jury. He had then served over three years of his sentence.

The Home Office agreed to pay him compensation without argument, but the arbitrator reduced the amount asked for to £8,500 on the ground that Stevens had been out of work at the time of his arrest. In the light of this case it is very difficult indeed to understand or justify the refusal of compensation in the case of Binns.

19 A similar inconsistency was shown in the treatment of Tony Burke whose conviction for murder was quashed in

1980 in the course of an ordinary appeal. Burke was a part-time club bouncer who was charged with murder after trying to prevent a guest from being beaten up. Witnesses who had not been called at the trial testified that he had been trying to break up the fight. He had spent 18 months in custody and was offered £7,000.

20 As an alternative to granting a pardon or referring a case to the Court of Appeal the Home Secretary, through the Parole Board, may release a prisoner before he has served his full sentence because he accepts that there were serious doubts as to his guilt. This is an obscure area of his jurisdiction, because such releases are rarely publicized. The most recent known cases are those of George Davies, and of Michael McMahon and David Cooper, whose convictions for the murder of a Luton sub-postmaster had been upheld by the Court of Appeal on four occasions. There is no doubt that these releases were brought about by public pressure of various kinds and it is reasonable to infer that there are many other prisoners about whose guilt there are substantial doubts but who have had to serve their sentences because no voices were raised on their behalf. In the absence of public pressure Home Office officials appear to be reluctant to interfere with convictions and the Home Office will never admit that they might have been obtained by police malpractice.

21 To the best of our knowledge no compensation is payable or has been paid in cases of premature release and this can be a source of real injustice. In a case in which JUSTICE was involved in its early days, four Pakistanis were convicted of the murder of a fellow countryman in an inter-family affray. He was knocked to the ground and killed by a blow to the head from a man who took the next plane to India and was never charged. The four convicted men had all been taking part in or watching the fight but two of them, who spoke no English, maintained that they had taken no part in it, and strongly protested their innocence. At the request of the Governor of Wormwood Scrubs, the Secretary of JUSTICE, with the help of a Pakistani barrister who spoke Urdu, undertook a long investigation and it was eventually discovered that the evidence of a vital witness had been mistranslated.

22 There are two Urdu words which sound the same, but have different meanings. One is 'to stand by' and the other is 'to strike'. Both at the magistrates' court and the trial the witness had said that when the victim was on the ground the two men were standing by, but at the trial this was interpreted as 'they struck him'. The Minister of State was pressed to recommend a free pardon. He refused to do so, but eventually agreed to sanction early releases. By this time the two men had been wrongfully imprisoned for seven years through no fault of their own, but they were not given a penny compensation.

23 In October 1978, Tracy Hercules was convicted of malicious wounding occasioning grievous bodily harm and sentenced to life imprisonment. He maintained that the wounding, which had caused the victim permanent injury, had been inflicted by another coloured man who had run off and had not been traced. There were serious irregularities in the evidence of identification and JUSTICE organised an appeal. The Court upheld the conviction but reduced the sentence to seven years. Information as to the identity and possible whereabouts of the real culprit was later obtained through an enquiry agent and passed to the police. Some months later Hercules was suddenly released on parole after he had served less than half of his sentence. No explanation was given and there was no basis for claiming compensation.

24 The clearest statement of the position taken by the Home Office in cases where the Home Secretary has not intervened is set out in a letter from the Minister of State dated 17 March 1978:–

> The law makes no provision for... payments to persons acquitted in the ordinary process of law, whether at trial or an appeal. If someone thinks he has grounds for compensation his legal remedy is to pursue the matter in the civil courts, by way of a claim for damages. In exceptional circumstances, however, the Home Secretary may authorise an *ex gratia* payment from public funds, but this will not normally be done unless the circumstances are compelling and there has been default by a public authority.

25 Here again there is no guidance as to what circumstances

the Home Secretary would regard as compelling or what he would regard as a default by a public authority. The adjudication is made by a Home Office official. No reasons are given for a refusal. There is no case law to guide the applicant's legal advisers. A claim for damages in civil courts is fraught with obstacles and difficulties without access to all the documents and records available to the Home Office.

26 The general position we have described, which covers only Home Office cases, is unsatisfactory in every respect:—

(a) If the prisoner petitions the Home Secretary claiming that he was wrongly convicted and a police investigation is ordered, it is a matter of chance or influence at what level the claim will be decided. In the case of Roy Binns, it was decided at junior management level that no action should be taken on the Chief Superintendent's recommendation. On the other hand, representations by an M P or by JUSTICE normally receive the personal attention of the Minister of State.

(b) Much depends on the zeal and objectivity of the investigating officer and the recommendation he makes.

(c) When the Home Office has been satisfied that there may have been a miscarriage of justice and that some action is called for, then further hazards await the petitioner in that either he may be granted a pardon, or his case may be referred to the Court of Appeal with no certainty that his conviction will be quashed, or he may be released before he has served his full sentence without compensation and, what is worse, without any indication of whether he is judged innocent or guilty.

27 Although it is not strictly a concern of this Committee we think it relevant to point out that, in its report *Home Office Reviews of Criminal Convictions*, JUSTICE recommended that petitions for free pardons based on new evidence should not be assessed by Home Office officials but by a member of a panel of experienced criminal lawyers with power to direct the investigation and make recommendations.

CONVICTIONS QUASHED ON APPEAL

28 As we have already indicated, the problem of compensation in cases other than those in which innocence has been established is a difficult one. The accusatorial system does not set out to establish innocence but to prove to the satisfaction of a properly directed jury that the defendant has committed the crime of which he had been accused. The primary role of the Court of Appeal is to determine whether the jury was properly directed as to the law and fairly directed as to the facts. Appeals can be based and allowed on material irregularities or points of law or misdirections of fact, or on a mixture of these ingredients.

29 The Court has a general power to quash a conviction on the grounds that in all circumstances the verdict of the jury was unsafe or unsatisfactory and a further power to quash a conviction after hearing new evidence and coming to the conclusion that, if the jury had heard it, it would have reached a different verdict.

30. All this means that it is very difficult to deduce from a judgment of the Court of Appeal whether a successful appellant is factually guilty or innocent of the crime of which he was convicted, or who was to blame if he was wrongly convicted. Judges sitting in that Court are prone to mute their criticisms of their fellow judges. More important, they are reluctant to comment on police malpractice even if it is one of the reasons for allowing the appeal.

31 It would therefore be unfair to base awards of compensation solely on the published judgment of the Court of Appeal. The quashing of a conviction on a material irregularity, or a misdirection in law too serious to justify invoking the proviso,would require the payment of compensation to a man who was clearly guilty. On the other hand the quashing of a conviction on a point of law could conceal the deliberate framing of an innocent man.

32 Foreign jurisdictions which grant compensation to persons whose convictions are quashed on appeal operate the

inquisitorial system which is concerned to ensure that all the facts of an offence and the part played by the accused are all brought before the Court. In effect, these jurisdictions require proof of innocence before payment of compensation, a not uncommon formula being: 'provided no suspicion remains'.

33 It would clearly be impracticable to ask the Court of Appeal to provide two judgments – one for public consumption and one for a factual assessment of guilt or innocence and the extent to which the appellant was the author of his own misfortune. We therefore think that the latter task should be entrusted to a specially appointed tribunal. It should be open to any successful appellant to apply to the tribunal for compensation to be determined and assessed in accordance with the guidelines set out in paragraph 46 in this report.

34 A difficulty we foresee is that in many successful appeals to the Court of Appeal the appellant is represented by counsel only. The trial solicitor, who probably knows most about the facts of the case and the totality of evidence available, may well have fallen out of the picture and it will be necessary for him, or another solicitor of the appellant's choice, to be given legal aid for the purpose of presenting a claim for compensation, and if necessary to pursue an appeal against the decision of the single member of the proposed tribunal.

ACQUITTALS AT TRIAL

35 Although for practical reasons we make no general recommendations relating to acquittals at trial we nevertheless think it right to call public attention to the serious hardships and injustices which can be suffered by innocent persons who are remanded in custody for varying periods of time and are subsequently acquitted when they come up for trial.

36 Such acquittals can arise from a number of different causes including the following: –

(i) the prosecution may offer no evidence because new evidence pointing to the accused's innocence has come to light or the available evidence has been re-examined and considered too weak to justify a trial;

(ii) the prosecution may decide not to proceed because one of its vital witnesses is no longer available;

(iii) the trial judge may of his own volition, or on a submission by the defence, direct the jury to acquit on the grounds of insufficient evidence;

(iv) the judge may stop the trial and direct the jury to acquit because one or more of the prosecution witnesses have been clearly shown to be giving false evidence;

(v) for a variety of reasons the jury may find the accused not guilty.

37 Frequently in respect of (i) (iii) and (iv) above, the accused person has suffered wrongful imprisonment through some error, or default, or excess of zeal on the part of authority. Unless, therefore, he has brought suspicion on himself by his own conduct he should be entitled to a statutory remedy; for during the period of his remand in custody he may well have lost his job, his home and his family. In theory he can bring a civil action for wrongful arrest and detention but this is a difficult and usually unrewarding exercise and the action will be vigorously contested by

authority. If, therefore, there is to be a statutory scheme for compensation, we would recommend bringing such cases within its scope, as is the case in West Germany, Sweden, Holland and other jurisdictions. This might bring about the exercise of greater care in the framing and pressing of charges.

38 We would like to be able to recommend that acquittals by a jury should automatically be brought within the scope of any scheme, but because of the nature of our trial system we regard the obstacles as formidable. An acquittal by a jury does not necessarily betoken innocence or indicate that the prosecution should not have been brought. A jury may be prejudiced or influenced by considerations other than the evidence produced or not fully informed of all the facts of the case.

39 Any tribunal would thus be presented with an enormous task if it had to assess compensation in the thousands of acquittals after remand in custody which occur every year. To overcome this difficulty we suggest that in meritorious cases the trial judge should be able to certify, on application by counsel, that a successful defendant should have a claim for compensation considered by the compensation tribunal, and that, if the judge declines or no application is made at the trial, the tribunal should be able to consider an application supported by counsel's written opinion.

40 We are fully aware that our proposals relating to convictions quashed on appeal and to acquittals at trial will entail a formal recognition of the potential difference between a verdict of not guilty and factual innocence, corresponding to the Scottish verdicts of not guilty and not proven. At present anyone who is acquitted at a trial or has his conviction quashed by the Court of Appeal is entitled to claim for all purposes that his innocence has been established. Anyone who publicly suggests that he was lucky to escape conviction may lay himself open to an action for defamation. Our proposals may therefore cause concern on the grounds that they will undermine respect for the verdict of a jury.

41 Our answer to this is threefold. First, trial judges already have the power to cast doubts on the justice of an acquittal by a refusal to award costs or an order to make a contribution to legal aid costs. Secondly, we propose that all applications

for compensation should be dealt with in private and the adjudications published anonymously unless the applicants desire otherwise. Thirdly, to be credible and acceptable any scheme of awarding compensation must be based on the factual realities of a situation rather than on legal fictions.

OUR PROPOSALS

42 For reasons which will have become apparent, we recommend that it should no longer rest with the Home Secretary to decide who is or who is not entitled to receive compensation. To summarize them briefly: –

- (a) the making of the decisions and the considerations which prompt them are shrouded in secrecy:
- (b) the reports on which they are based are not made available to the claimant or his legal adviser;
- (c) they may involve an assessment of the extent to which the prosecution or the police or the administration of the court is responsible for the wrong conviction and it is neither right nor fair that this should be entrusted to the Minister who is so heavily involved in the administration of criminal justice and the conduct of the police.

43 We also take the view that the question of eligibility for compensation should not be decided by the appellate courts as they are concerned with narrower issues than those which may be relevant to the issue of compensation.

44 We therefore recommend that all claims for compensation should be made to and decided by an independent tribunal whose nature and powers we describe in succeeding paragraphs. A claimant who has been granted a free pardon, or whose conviction has been quashed by the Court of Appeal on a reference by the Home Secretary, should have an automatic entitlement, as in effect he does at present. An ordinary appellant whose conviction is quashed by the Court of Appeal should have an unrestricted right to apply for compensation, and a person acquitted at trial a conditional right as suggested in paragraph 39 above.

45 We further think that a convicted prisoner who has had part of his sentence remitted by the Home Secretary on the grounds of serious doubts about the rightness of his conviction, or who, with the consent of the Home Secretary, is given early parole for the same reason, should be entitled to apply for compensation, and that the tribunal should have the power to call for all the papers in the case. It can be

fairly argued that, if the new evidence or the result of a police investigation is capable of raising doubts which induce the Home Secretary to use his executive powers, a jury in possession of the new material might not have convicted in the first place.

IMPRISONMENT COMPENSATION BOARD

46 We propose that the tribunal should be called the Imprisonment Compensation Board and function on lines similar to those of the Criminal Injuries Compensation Board. It should draw up and publish guidelines setting out the circumstances on which compensation may be withheld or reduced and the heads under which it may be claimed. The guidelines we suggest below are in the main those in use by the C I C B. They are not intended as a code, as it is clearly desirable that the Board should be flexible in its approach to individual cases:–

(a) After the Board has accepted a claim as falling within its jurisdiction and being worthy of consideration it may refuse or reduce compensation if it considers that:–

  (i) a conviction has been quashed on grounds that the Board regard as being a mere technicality;

  (ii) it would be inappropriate in view of the imprisoned person's conduct in respect of the matters which led to the criminal proceedings;

  (iii) the applicant has failed to give reasonable assistance to the Board in its efforts to assess compensation.

(b) In respect of paragraphs a (i) and a (ii) above the Board will normally only consider evidence which was advanced at the trial or at the hearing of the appeal, except that it may consider and take into account matters which have come to light in the course of a subsequent investigation.

(c) Where the applicant's claim is accepted as coming within the provision of the scheme the Board will grant compensation for:–

  (i) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;

(ii) loss of earnings by the imprisoned person or any dependant person where such loss is a direct consequence of the imprisonment;

(iii) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependant person;

(iv) pain suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependants.

The Board will reduce any award by the amount of any other compensation or damages already received by the claimant.

(d) Compensation will not be paid if the assessment is less than £250.

(e) A person compensated by the Board will be required to undertake that any damages, settlement or compensation he may subsequently receive in respect of his wrongful imprisonment will be repaid to the Board up to the amount awarded by the Board.

ADMINISTRATION

47 (a) The Compensation Scheme will be administered by the Imprisonment Compensation Board, assisted by appropriate staff. Appointments to the Board will be made by the Lord Chancellor and in Scotland by the Lord President of the Court of Session. The Chairman and members of the Board, who will be legally qualified, will be appointed to serve for five years in the first instance, and their appointments will be renewable for such periods as the Secretary of State considers appropriate.

(b) The Board will be financially supported through a grant-in-aid out of which payments for compensation awarded in accordance with the principles set out below will be made. Their net expenditure will fall on the votes of the Home Office and the Scottish Home and Health Department.

(c) The Board will be entirely responsible for deciding what compensation should be paid in individual

cases and its decisions will not be subject to ministerial review or appeal save to the High Court by way of judicial review. The general working of the scheme will, however, be kept under the review by the Government and the Board will submit annually to the Home Secretary and the Secretary of State for Scotland a full report on the operation of the Scheme together with its accounts. The report and accounts will be open to debate in Parliament.

PROCEDURE FOR DETERMINING APPLICATION

48 (a) The initial decision of the amount of any compensation awarded will be taken by one member of the Board. Where an award is made the applicant will be given a breakdown of the assessment of compensation except where the Board consider this inappropriate. Where an award is refused or reduced reasons for the decision will be given. If the applicant is not satisfied with the decision he will be entitled to a hearing before three members of the Board other than the member who made the initial decision.

(b) Procedure at hearings will be informal and hearings will generally be in private. The Board will have discretion to permit observers, such as representatives of the press, radio and television, to attend hearings provided that written undertakings are given that the anonymity of the applicant and other parties will not in any way be infringed without the consent of all parties to the proceedings. The Board will have power to publish information about its decisions in individual cases: this power will be limited only by the need to preserve the anonymity of applicants and other parties.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1 There are no statutory provisions in the United Kingdom for the payment of compensation to persons who have been wrongfully imprisoned, such as are required under Article 14(6) of the U N International Covenant on Civil and Political Rights or are in force in other member countries of the Council of Europe (paragraph 5).

2 It is neither right nor appropriate that decisions to grant compensation should rest with the Home Secretary if only because he is so heavily involved in the administration of criminal justice and the conduct of the police (paragraph 42).

3 In the light of the above we recommend that all claims for compensation should be determined, in respect of both eligibility and quantum, by an independent tribunal to be called the Imprisonment Compensation Board. The Board would be similarly constituted and operate on broadly the same principles as the Criminal Injuries Compensation Board (paragraph 46).

4 Persons who have been granted a free pardon under the prerogative of mercy or whose convictions have been quashed by the Court of Appeal on a reference by the Home Secretary would have an automatic entitlement to compensation as they effectively have under existing provisions for *ex gratia* payments (paragraph 44).

5 Persons whose convictions have been quashed on appeal should be automatically entitled to apply for compensation, but the Board would be entitled to refuse or reduce compensation if it considered that the conviction had been quashed on a mere technicality, or that it would be inappropriate in view of the claimant's conduct in respect of the matters which led to the criminal proceedings (paragraph 46 (i)).

6 In respect of the above, the Board would be entitled to take into account matters which had come to light in the course of a subsequent investigation. (paragraph 46(2).

7 Persons committed for trial in custody and subsequently found not guilty or discharged for any of the reasons indicated in paragraph 36 should be entitled to apply for compensation if the trial judge grants a certificate or if counsel provides a written opinion in support of the application (paragraph 39).

8 A convicted person who has had part of his sentence remitted by the Home Secretary because of serious doubts about the rightness of his conviction should be entitled to apply to the Board for compensation and the Board should have power to call for all the papers in the case (paragraph 45).

9 In assessing quantum, the Board should award compensation under the headings in paragraph 46(3).

10 Legal aid should be available to claimants for the presentation of claims and for appeals against refusals by a single member of the Board (paragraph 34).

SCHEMES FOR COMPENSATION IN OTHER COUNTRIES

Many jurisdictions operate schemes to compensate people who have suffered as a result of the faulty functioning of the system of criminal justice. These schemes differ widely as to the scope of compensation available and in the way in which such compensation is assessed.

Some jurisdictions award compensation only for imprisonment following an erroneous conviction. These include Italy, Portugal, Spain, Mexico, Brazil, California, North Dakota, Wisconsin and the United States in its federal jurisdiction. Other jurisdictions go further and also compensate for detention in custody pending final disposal of the case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Holland, Belgium, Hungary and some of the Swiss Cantons. The detailed provisions of some of the schemes operating are set out below:

WEST GERMANY

As a result of federal legislation which came into force on 8 March, 1971, compensation is available from the State Treasury in three situations in which an individual may have been inappropriately dealt with by the system of criminal justice –

(a) Where a person has received a sentence which is subsequently quashed or reduced on appeal.

(b) Where a person has suffered damage by being detained in custody pending trial or being kept in custody as a result of some other prosecution measure, and he is acquitted or the proceedings against him are discontinued.

(c) Where the pre-trial criminal process is discontinued at the discretion of the Court or the State Attorney's Office.

In each of these three situations the accused person has a right to compensation but only insofar as it is equitable for him to receive it in the circumstances of the case. Compensation is denied where the accused person has by some action of his own caused the prosecution either deliberately or through gross neglect. Compensation may also be refused if the accused has kept silent about mitigating circumstances or has made a confession which has subsequently proved to be false, or if the proceedings were discontinued because of the accused's unfitness to plead or because of some technicality.

Compensation is available for both pecuniary and non-pecuniary loss

and is assessed by the court of trial either at the conclusion of the proceedings or at some later date; there is no limit to the amount of compensation that can be awarded. Any person who is maintained by the accused person also has a claim for compensation. There is a full right of appeal from the decision on compensation.

In 1974, the last year for which figures are available to us, 1300 people received compensation and the total paid out was 2½ million deutschmarks (about £0.6m). German lawyers who have been in touch with members of JUSTICE have expressed the opinion that their legislation is clear in its provisions and satisfactory in its operation.

SWEDEN

In Sweden, as a result of a law that came into operation on 1 July, 1974, a person who has been detained in custody pending trial can claim compensation from the government if:

(a) he has been found not guilty at his trial; or

(b) the charges against him are withdrawn at the trial; or

(c) the preliminary investigations are concluded without legal proceedings being instituted.

A person who has served a prison sentence is also entitled to compensation from the government if his conviction is quashed on appeal without a new trial being ordered or if a reduced sentence is imposed.

A person has no right to compensation if he has caused the situation which led to his being taken into custody, or if he has destroyed evidence, or in some other way made investigation of the crime he is accused of committing more difficult.

Compensation covers both pecuniary loss and non-pecuniary loss and there is no limit to the amount of compensation that can be paid. Any amount of compensation that a claimant has the right to claim from some other source is deducted from the amount of compensation otherwise payable. If the claim exceeds 100,000 kroner (about £10,000), then compensation is decided by the government instead of the Attorney General.

In 1975 approximately 160 people were acquitted after being detained in custody, and a further 72 had their convictions quashed on appeal. Of these 232 persons, 55 received awards of compensation totalling 120,243 kroner (about £12,024) – up to June 1980 the Attorney General had received 580 petitions requesting compensation. The number of petitions rose each year, except 1977, when the same number was received as in the previous year. The number of cases rose from 11 cases in 1974, to 117 cases in 1979 and in the first five months of 1980 there were 105 cases. The total amount of compensation paid

out up to the end of 1979 was 1,300,000 Swedish kroner (about £130,000).

Under the Swedish legislation, compensation may be paid for expenses, loss of earnings from employment, interference with business activities, or the suffering caused. Compensation payments will cover losses caused by loss of liberty which can be verified by the person concerned. Relatively small sums are paid for compensation for suffering. The 'tariff' operating in mid-1980 seems to have been about 1,600 kroner (about £160) for each month's loss of liberty. It is considered that if the loss of liberty has led to great publicity or arisen from charges of gross or outrageous crime, the rate of compensation will be greater. On the other hand, an 'old lag' might get less than the usual rate of compensation.

It should be noted that payment is only made for loss of liberty and does not compensate a person for being mistakenly suspected of a crime nor is compensation payable for mental or physical illness arising from circumstances of this kind.

FRANCE

By a law passed in 1970 compensation may be awarded to persons detained in custody pending trial and to those recognised as innocent after being convicted. In the case of detention pending trial the person charged does not have to prove his innocence. The accused person may indeed have escaped conviction by being given the benefit of the doubt. However he must show that detention in custody has resulted in 'obviously abnormal damage of particular severity'. This qualification greatly restricts the number of people to whom compensation is paid; for example in 1973 54,000 people were detained in custody pending trial, and of these 1,037 were acquitted. However only about four acquitted persons per year receive compensation.

If compensation is granted it is not limited to financial loss but covers all non-pecuniary loss suffered by the accused as well. There is no limit on the amount of compensation that can be awarded. The average sum awarded is about 56,000 francs (about £560) per person. In respect of persons who claim to have been wrongfully convicted the conditions are so restrictive that out of approximately sixty applications a year, only one or two are successful.

Compensation for detention pending trial is assessed by a special commission of three judges, whereas compensation for a wrongful conviction is awarded by a court other than the one which tried the convicted person. The court dealing with compensation must be of equal status to the trial court.

Compensation may be claimed not only by the person who has been

wrongly convicted, but also by his spouse, relatives or descendants. If the applicant so requests, the decree declaring his innocence will be displayed in the place where he lived, and advertised in newspapers chosen by the court. Legal aid is available to pursue a claim for compensation.

HOLLAND

Compensation can be granted to persons detained in custody who are ultimately acquitted, and for persons whose sentence is annulled after it has been fully or partly served. Compensation is available where a case is disposed of without any punishment having been imposed.

Compensation is available for both pecuniary and non-pecuniary loss and there is no limit to the amount of compensation that can be awarded. Compensation is available for arrest by the police as well as for actual detention in custody. An application for compensation must be made within three months of the close of the case. The applicant has a right to be heard and to have legal representation. So far as possible, the court dealing with the claim for compensation will have the same composition as the trial court. There is a full right of appeal against all decisions on compensation.

Compensation is awarded where the court is of the opinion that, taking all the circumstances into account, it is fair and reasonable to make an award. The applicant is not required to prove his innocence, but he will not automatically get compensation in every case covered by the criteria set out above.

A claim for compensation may be made by the dependants of the person innocently detained as an alternative to a claim by the person directly concerned. If the claimant dies after having submitted an application or lodged an appeal, compensation is paid to his heirs.

COUNTRIES OUTSIDE EUROPE

The countries mentioned above all follow the inquisitorial system. The difference in procedures in the accusatorial system makes it more difficult for Commonwealth countries to overcome the problem of compensation for wrongful imprisonment. Nevertheless the problem is being studied and the information we have received from Australia is of some interest, though as yet no satisfactory statutory scheme has been devised.

SOUTH AUSTRALIA

The Criminal Law and Penal Methods Reform Committee of South Australia has recommended that compensation should be paid to persons who are acquitted after having been detained in custody

pending trial. The Committee recommends that compensation should be assessed by the judge after acquittal if he considers that on the balance of probabilities the defendant is innocent and has suffered loss amounting to hardships. Information is not yet available as to whether this aspect will be implemented.

WESTERN AUSTRALIA

The Law Reform Commission of Western Australia embarked some two years ago on a long-term study of the problem, and collated a great deal of information about provisions in other countries. It very generously made this information available to us and we have drawn on it extensively in this chapter of our report. The Commission then circulated a discussion document to leaders of opinion in the legal profession, the churches, the police and the social services, and it has very helpfully sent us copies of some of the replies it received: these are summarized in Appendix 3. Unfortunately, the Commission's study had to be adjourned in favour of other more pressing matters, and it is not likely to report for some while. We have, however, been told that it is likely to recommend that compensation should be granted only in cases where there are substantial indications of innocence.

OTHER AUSTRALIAN STATES

There are no formal compensation provisions in other Australian States, and *ex gratia* payments were rare in the twenty years prior to 1970. No *ex gratia* payments were made in Tasmania or it is believed in Victoria, Queensland or Western Australia. In New South Wales, there has only been the case of McDermott, who in the 1940's served some years of a life sentence for murder until a Royal Commission found the evidence against him to be unsatisfactory. He was released and given an *ex gratia* payment of £1,000.

SUMMARY OF RESPONSES TO WESTERN AUSTRALIA LAW REFORM COMMISSIONS QUESTIONNAIRE. *COMPENSATION FOR PERSONS DETAINED IN CUSTODY.*

In November 1976 the Western Australian Law Reform Commission published a working paper, concerning *Compensation for persons detained in custody who are ultimately acquitted or pardoned.* A questionnaire was sent to a number of interested individuals, institutions and pressure groups, including lawyers, the police, the probation service, the church and the Social Action Lobby. The system of justice in Western Australia is akin to our own in being based on common law and the adversarial system. Their responses to certain questions have been summarised by this Committee and are set out below:–

(a) All were in favour of a scheme for compensation being implemented whether persons were ultimately acquitted at trial or on appeal or by way of pardon. A typical comment was:– For the balance to be maintained between rights of individuals and society's expectation of having the law enforced effectively, an effective system of compensation must exist.

(b) The majority favoured compensation under specified heads of damage, but the representative of the probation service thought full tort damages should be given.

(c) The majority felt other benefits (such as unemployment benefits) should be taken into account when calculating the quantum of the award; but the Social Action Lobby did not feel even this should be brought into the reckoning.

(d) A majority were against any limit to the amount of any award, but a solicitor and one of the police responses were in favour of some maximum limit.

(e) A majority were in favour of allowing categories of persons in addition to the acquitted claimant, to claim. One of the police to respond disagreed. A typical comment was:– It is essential that those financially dependant should be able to claim. It would be unwise to deny the right to claim for situations may arise where it is equitable and in accordance with natural justice that they should be able to do so. Similarly a majority felt representatives of a deceased claimant should be able to claim on behalf of the estate.

(f) A majority were against claimants being required to establish their innocence. The police and the solicitor thought this

should be a precondition. A typical comment was:– Such a person should not be placed in the position of re-establishing his innocence in order to obtain compensation as this leads to multiplicity of trials and may lead to (seemingly) inconsistent results. To grant compensation is not to imply malicious prosecution (for which there is a remedy in tort).

(g) A majority were in favour of some bars to compensation (but not one of the police responding) such as where a claimant had contributed to his own misfortune; but in general these should not be absolute bars but a factor in assessing compensation.

(h) On the tribunal to decide the claim, the responses were evenly split between an independent tribunal, the trial judge, and other judges or courts.

(i) In general it was felt that an improvement in the procedures for granting bail would alleviate the problems of compensation for pre-trial detentions.

HOME OFFICE LETTER TO CLAIMANTS

EXPLANATORY NOTE

EX GRATIA *PAYMENTS TO PERSONS WRONGLY CONVICTED OR CHARGED:*

PROCEDURE FOR ASSESSING THE AMOUNT OF THE PAYMENT

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

2 Subject to Treasury approval, the amount of the payment to be made is at the direction of the Home Secretary, but it is his practice before deciding this to seek the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made in the meantime.

3 The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that an *ex gratia* payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a memorandum is prepared by the Home Office. This will include a full statement of the facts of the case, and any available information on the claimant's circumstances and antecedents, and may call attention to any special features in the case which might be considered relevant to the amount to be paid; any comments or representations received from, or on behalf of, the claimant will be incorporated in, or annexed to, this memorandum. A copy of the completed memorandum will then be sent to the claimant or his solicitor for any further comments he may wish to make. These will be submitted, with the memorandum, for the opinion of the assessor. The assessor may wish to interview the claimant or his solicitor to assist him in preparing his assessment and will be prepared to interview them if they wish. As stated in paragraph 2 above, the final decision as to the amount to be paid is a matter entirely for the Home Secretary.

4 In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and/or loss of liberty, and any or all the

following factors may thus be relevant according to circumstances:–

Pecuniary loss
Loss of earnings as a result of the charge or conviction.
Loss of future earning capacity.
Legal costs incurred.
Additional expense incurred in consequence of detention, including expenses incurred by the family.

Non-pecuniary loss
Damage to character or reputation.
Hardship, including mental suffering, injury to feelings and inconvenience.

The assessment will not take account of any injury a claimant may have suffered which does not arise from the conviction (eg as a result of an assault by a member of the public at the scene of the crime or by a fellow prisoner in prison) or of loss of earnings arising from such injury. If claims in respect of such injuries are contemplated, or have already been made to other awarding bodies (such as the courts or the Criminal Injuries Compensation Board), details should be given and included in the memorandum referred to in paragraph 3.

When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation. In submitting his observations a solicitor should state, as well as any other expenses incurred by the claimant, what his own costs are, to enable them to be included in the assessment.

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

6 Since the payment to be offered is entirely *ex gratia*, and at his discretion, the Home Secretary is not bound to accept the assessor's recommendation, but it is normal for him to do so. The claimant is equally not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections.

3

THREE METHODS OF TORT COMPENSATION: LUMP-SUM AWARDS, REVIEWABLE PERIODIC PAYMENTS, AND STRUCTURED SETTLEMENTS

*Joseph Sullivan**

A. Introduction

Sophisticated concepts and rules have been a part of all discussions on tort liability. However, only in recent years have as much precision and attention been focused on damages. There are two main topics to which one can refer in an article on damages. Most legal writing centres on the first — the assessment of damages. This is the calculation that estimates how much a particular injury is worth. Secondly, there is the issue relating to the form of payment in which this calculated amount should be made. This article addresses the second issue.

There are three methods or systems that can be used. One arrangement is our present lump-sum payment system which has undergone some recent changes. An alternative to this system is a scheme whereby an injured plaintiff is compensated with monthly payments much like workmen's compensation. This method is unique in that it provides for periodic review of the quantum of the payments. In addition, there is a compromise between these two: structured settlements. These settlements provide for regularly timed payments without any periodic review. The aim here is to introduce and define structured settlements and give examples of their use. One can particularly appreciate the attraction of structured settlements if a review of the problems associated with lump-sum awards is undertaken.

B. General Objectives of Assessement of Damages

Since the Supreme Court of Canada's 1978 trilogy of cases, the principles of damages assessment have received much attention

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and criticism. It is beneficial to review the aims of assessment of damages. These are simply stated: compensation is, of course, the chief goal. In addition equity, and predictability in like cases should be considered.[1] Equity includes the idea that damages should be fair, yet not punitive; predictability is a goal of almost all legal rules. These aims are very general and not helpful in actually assessing damages in our lump-sum system. The Supreme Court of Canada has clarified the exact principles to be applied in fatal and non-fatal cases in a comprehensive series of judgments released in 1978: *Andrews v. Grand & Toy Alberta Ltd.*;[2] *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*;[3] *Arnold v. Teno*;[4] and *Keizer v. Hanna*.[5] Contained in these judgments are some very controversial principles.

C. Method Number One: Lump-Sum Award

Two of the most controversial relate to post-assessment discounts. Once a court has assessed how much a particular injury is worth, the court is invited to discount a sum for future interest capitalization and for future contingencies.

1. Discount Rule

Probably the strongest criticism of the trilogy was the use of a seven per cent discount rate applied to the lump-sum award.[6] The commentators generally agree that the Supreme Court was plainly wrong in its use of the seven per cent figure.[7] Discounts are applied to lump-sum awards at the time of trial because it is felt that a plaintiff will invest his money when he receives it. The interest (investment income) he earns on the money would amount to over-compensation. When calculating long-term financial planning, one must also consider inflation. Some of the benefits accruing to the plaintiff because of future interest will be offset by

[1] See W. H. Charles, "Justice in Personal Injury Awards" in *Studies in Canadian Tort Law*, L. Klar, ed. (Toronto, Butterworths, 1977), p. 37.

[2] (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, 3 C.C.L.T. 225.

[3] (1978), 83 D.L.R. (3d) 480, [1978] 2 S.C.R. 267, 3 C.C.L.T. 257.

[4] (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272.

[5] (1978), 82 D.L.R. (3d) 449, [1978] 2 S.C.R. 342, 3 C.C.L.T. 316.

[6] S. A. Rea, Jr., "Inflation, Taxation and Damage Assessment", 58 Can. Bar Rev. 280 (1980), hereafter "Rea"; M. Brantt and A. Pratt, "Tragedy in the Supreme Court of Canada: New Developments in the Assessments of Damages for Personal Injuries", 37 U. of Tor. Fac. of L. Rev. 1 (1979), hereafter "Brantt and Pratt".

[7] Rea, *ibid.*, at p. 282; Brantt and Pratt, *ibid.*, at p. 24.

future inflation. Courts juggle these two estimates by deducting the erosion of inflation from the benefits of interest capitalization. This is satisfactory but the criticism stems from the use of the seven per cent figure. The reasoning of the Supreme Court was that prevailing long-term interest rates are in excess of ten per cent (which was determined by judicial notice) and that long-term inflation would run at three and a half per cent.[8] The court concluded that the difference between these figures was seven per cent and this was the discount employed. In this regard, Samuel A. Rea, Jr. gives a detailed criticism of the Supreme Court in his article "Inflation, Taxation and Damage Assessment".[9] The thesis of his work concerning inflation and damages is that when computing a discount rate one must use consistent interest and inflation rates. However, in the trilogy, the Supreme Court used predictions of *long-term* inflation rates and *prevailing* interest rates. Rea states, "it is crucial that the forecast rate of inflation ... be the same rate of inflation which is implicit in the interest rate",[10] and later: "The confusion over expected rates of inflation can be ignored altogether if the courts use a real rate of discount which reflects historical experience. A two to three per cent figure would be appropriate".[11] Logically, Rea's advice to the courts is that the "real" difference between inflation and interest is always about two or three per cent. Irwin Lipnowski writes a similar critique of the trilogy in "Economist's Approach To Assessing Compensation for Accident Victims".[12] He notes: "By any standard, the Supreme Court's assumption of a *real* rate of interest of 7% exceeds the historical (and current) rate by as much as 5%."[13]

The Ontario Legislature has attempted to rectify the problem by empowering the Rules Committee to prescribe the rate of interest to be used as a discount rate in s. 114(10)(*ba*) of *The Judicature Act*.[14] The Rules Committee has fixed the discount rate of interest at two and a half per cent in Rule 267a.[15] It is submitted that the fixation of a discount rate is part of the subtantive law as it

[8] *Andrews*, *supra*, footnote 2 at p. 471 D.L.R., p. 255 S.C.R., p. 246 C.C.L.T.

[9] *Supra*, footnote 6.

[10] *Supra*, footnote 6 at pp. 283-4.

[11] *Supra*, footnote 6 at p. 285.

[12] I. F. Lipnowski, "Economist's Approach to Assessing Compensation For Accident Victims", 9 Man. L.J. 319 (1979).

[13] *Ibid.*, at p. 331.

[14] R.S.O. 1980, c. 223.

[15] R.R.O. 1980, Reg. 540.

relates to damages and not merely a matter of procedure. It follows that the Legislature has "empowered" the Rules Committee to alter substantive law by allowing that body to fix this rate. *Quaere*, whether Rule 267a is *ultra vires* the Rules Committee and that this subject is properly within the exclusive jurisdiction of the Legislature. An example of a case where a Rule was struck down as *ultra vires* is *Circosta v. Lilly*.[16]

In concluding the discussion on discount rates it is noted that the use of the seven per cent figure has been recognized as faulty by commentators, the Ontario Legislature and even the Supreme Court itself. In *Lewis v. Todd*,[17] Mr. Justice Dickson emphatically pointed out that the seven per cent figure was not a matter of law. It is respectfully submitted that the figure used is a matter of law; however, that the use of a seven per cent figure is a matter of bad law.

2. Contingency Deduction

Another area that traditionally receives much criticism in relation to damage assessment is the use of a "contingency deduction". This deduction is made from prospective earnings because of the chance that the plaintiff's earnings would be reduced by "unemployment, illness, accidents and business depression".[18] Courts receive criticism in this area because some feel that too often the twenty per cent contingency figure is used as virtually standard practice.[19] On the contrary, the necessity for a deduction must be proven in each and every case. For example, an established professional should clearly get less deducted by way of contingencies than a less successful man, going from job to job; justifiably, a law for the rich and a law for the poor. There is an explanation for the unduly high contingency deductions: courts are overly enthusiastic when they deduct and discount awards, and generally want to keep awards low. Although there may be weak theoretical underpinnings, the courts are reflecting a social value by suppressing the amounts of these awards. We are astounded when we read of the notoriously high awards granted in the United

[16] [1967] 1 O.R. 398, 61 D.L.R. (2d) 12 (C.A.)

[17] (1980), 115 D.L.R. (3d) 257 at p. 268, [1980] 2 S.C.R. 694 at p. 709, 14 C.C.L.T. 294 at p. 309.

[18] *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at p. 470, [1978] 2 S.C.R. 229 at p. 253, 3 C.C.L.T. 225 at p. 244

[19] Braniff and Pratt, *supra*, footnote 6 at p. 21

States. The deductions and discounts simply reflect our desire in Canada to keep insurance premiums within reason and our justice system at a level we perceive as moderate. In *Lan v. Wu*,[20] Bouck J. of the British Columbia Supreme Court "refused to deduct anything for contingencies" saying that "there is hardly a shred of acceptable evidence which indicates life will get worse in the years to come. If anything, it should get better".[21] Predictably, the decision was reversed on appeal and a 20 per cent contingency deduction was employed by the British Columbia Court of Appeal.[22]

D. Method Number Two: Reviewable Periodic Payment Schemes

1. Introduction

The alternative to using a once-and-for-all lump-sum award system is the reviewable periodic payment scheme. Note that the latter is not a structured settlement. As we shall see later, structured settlements are not reviewable once made. The traditional view was enunciated in the House of Lords in *British Transport Commission v. Gourley*.[23] Lord Reid states:[24]

> The loss which he [the victim] has suffered between the date of the accident and the date of the trial may be certain, but this prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial, but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss.

Dickson J., in *Andrews*,[25] considered the problem:

> The lump-sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment.

The court[26] goes on to recognize the "negative recommendation of the British Law Commission (Law Com. 56 — *Report on Personal Injury Litigation — Assessment of Damages*) [of a reviewable

[20] [1979] 2 W.W.R. 122, 7 C.C.L.T. 314 (B.C.S.C.).
[21] *Ibid.*, at pp. 132-3 W.W.R., p. 331 C.C.L.T.; see also C. A. Wright and A. M. Linden, *Canadian Tort Law, Cases and Materials*, 7th ed. (Toronto, Butterworths, 1980).
[22] [1981] 1 W.W.R. 64, 14 C.C.L.T. 282 (B.C.C.A.).
[23] [1956] A.C. 185, [1955] 3 All E.R. 796 (H.L.).
[24] *Ibid.*, at p. 212 A.C.
[25] *Supra*, footnote 18 at p. 458 D.L.R., p. 236 S.C.R.
[26] *Supra*.

periodic scheme] following strong opposition from insurance interests and the plaintiffs' bar." It is of interest to note that both sides of the bar were opposed to a reviewable system. It compels one to conclude that barristers are content with the risk of litigation. Dickson J. calls on the Legislature to enact some type of reviewable periodic payment scheme, realizing that such an innovation is beyond the scope of the court's jurisdiction.

Lump sums will inevitably produce either a shortfall or a windfall. An excellent example is the case of an injured party who has a 25 per cent chance of developing epilepsy within five years. In assessing damages, a court would add further to the award; if the plaintiff develops epilepsy he is undercompensated; if he does not, he is overcompensated. Indeed, such a system seems totally inadequate as a means of compensating accident victims; however, the alternative, the reviewable periodic scheme, presents its own obstacles. Most of these are practical in nature.

A committee was formed in Ontario to study the "desirability and feasibility of instituting a scheme in Ontario for the periodic payments of judgments and for the variation of judgments".[27] The chairman of the committee was Mr. Justice R. E. Holland of the Ontario High Court. The Committee received submissions from the insurance industry, legal practitioners, law professors and government officials. In a very readable report, the committee outlined arguments for and against reviewable periodic payments as compensation for tort damages. Highlights of the major arguments now follow.

2. Arguments for a Reviewable Periodic Payment Scheme

Reliability of assessment is the first and foremost argument in favour of this system. In the above "epilepsy example", the trial court would not grant any money based on the chance that the disease would occur, but if it did develop, compensation would be forthcoming. This idea is seen more frequently in our present "non-reviewable system". Settlements can be negotiated which will guarantee payment of expenses caused by a medical condition, usually within a fixed number of years. Such a settlement term would be akin to an insurance policy on the plaintiff where the defendant pays the money if the risk (epilepsy) is realized. The

[27] *Report of the Committee on Tort Compensation*, August, 1980, p. 1

Report also notes that "social security" programmes (*e.g.*, welfare, workmen's compensation) use periodic payments.

The present lump-sum system is fraught with delays because of its very nature. The plaintiff is forced to delay as he must gather evidence regarding the long-term effects of his injury and to be sure that his injury is settled. The present method could also delay the plaintiff's rehabilitation, deprive him of compensation soon after the accident (when he may need it most) and unduly pressure him into settling early. There is no suggestion in the Report as to how these problems would be solved under the proposed system. Presumably, the amounts of the payments would still have to be litigated with all of the accompanying evidence as to losses past and future. Malingering by the plaintiff would still be a potential problem in such cases. The Report observes that "compensation neurosis" is avoided because the plaintiff knows he will always get fair compensation and his "future support does not depend on a single proceeding".

Taxation problems are created in a lump-sum payment scheme because the income generated on a sum when invested is treated as income from property and is taxable. Periodic payments would most likely be tax free. The Committee received an income tax opinion from Revenue Canada to this effect.

This Report goes on to remark that a periodic payment scheme avoids much of the guesswork generally associated with damage assessment. For instance, the courts could avoid the distasteful task of guessing whether or not the injured plaintiff will remarry. Under the proposed scheme, the payments would vary as the circumstances vary.

There is only a slight emphasis on the problem of early dissipation of awards. This, of course, would be sidestepped under any periodic payment system, as it would provide much better security for a plaintiff. In addition, if the periodic payments were indexed to inflation, then adverse economic conditions could not usurp the award. It is submitted that both of these points are major advantages of the system, and will be raised again later.

3. Arguments Against a Reviewable Periodic Scheme

As one might imagine from a report with a large input from the insurance industry, there are a multitude of arguments cited against such schemes. The major complaint is the lack of finality

associated with the periodic payment system. With this criticism, the Committee is referring to the administrative burden of reviewing such awards, and the Report dwells on this point at length. The Committee points out viable solutions; for example, proposed legislation could establish minimum threshold changes in the plaintiff's condition that would allow a review; this may occur where the plaintiff demonstrates a "substantial change". The Report criticizes this since it would necessitate litigation to have judicial rulings on the exact meaning of "substantial change". With respect, it is submitted that this is a weak argument as an attack on a periodic payment scheme. The benefits of a periodic payment scheme far outweigh the costs of a few test cases. Major reforms in legislation will always bring test cases, but this alone should not deter legislators from enacting needed changes. For example, *The Family Law Reform Act*,[28] makes family property division much fairer on marriage breakdown as it recognizes, *inter alia*, the housewife's contribution to the household. The Ontario Legislature did not avoid this important advancement simply because every new word in the Act may be tested by the courts. Legislators should never let this consideration guide their progress, otherwise we may be forever haunted by ghosts of the common law.

The Report notes another aspect of the criticism of lack of finality. It points to the added costs to the system of such reviews. In economic terms, it is hardly worth implementing this scheme if it costs more to administer than would be saved. In observing this, the Report does not weigh the two. Without such a comparison, it is difficult to see how the Committee could seriously consider "review costs"; this is a strike against reviewable awards. Under the proposed system we could lessen these costs; instead of fixing a time for review in a statute, the legislation could simply leave it open to the court to fix when it would be prepared to review a judgment. If there is a good chance that crippling arthritis will set in within five years for example, a review could be allowed every year for five years, or perhaps review only if such arthritis strikes. The possibilities are endless, but they do avoid the chance that plaintiffs will be continually running back for more.

Related to lack of finality is the insurers' inability to close their books or estimate their liabilities. The insurers argue that they

[28] R.S.O. 1980, c. 152, Part I.

need to know reasonably well what their liabilities are so that they may accurately calculate their premiums. The Committee's response is that insurers are in the business of weighing risks and they should be able to "accurately guess" their future liability; this conclusively puts to rest one of the major arguments made by insurers and the defence bar. Even if insurers insist that a reviewable scheme will raise premiums because they would be exposed to higher risks, then perhaps this would be acceptable. At least the insurance-buying public would be "better insured". There could be a public forum to see if society is prepared to pay more for such a system. The Report indicates that insurers' fears of open-ended liability are largely unfounded and that these fears are not a strike against the reviewable system. In addition to the insurer's lack of finality, the Report notes the possibility that the insured would not be encouraged to rehabilitate himself under the periodic scheme. As a result, the defendant "payor" would be encouraged to "snoop" into the plaintiff's private life to check abuses. The Committee concludes that these latter problems are not "insuperable obstacles". A reviewable scheme could work out a plan to check abuses, but no plan could ever hope to eliminate all of them. One must remember that there is a wide potential for abuse under the present system as well. It is impossible to estimate how much money goes to compensate malingering plaintiffs. Under a reviewable scheme, there is a better chance that the malingerer will be found out; indeed, a reviewable scheme may even save money in this regard.

Another interesting aspect presents itself which concerns the conceptual nature of a damage award. Mr. Justice Holland's Report contends that a disabling injury causes the plaintiff to lose a capital asset. I submit, however, that these disabling injuries represent ongoing losses, and are better redressed by ongoing compensation rather than a lump-sum award. This point will be raised again later in a discussion of structured settlements. A very serious flaw in a reviewable periodic payment scheme is the fact that defendants have fixed policy limits, and periodic payments would eat away at these limits very quickly. In the United States, the draft *Periodic Payments of Judgments Act*[29] provides that an insured is only liable up to his policy limits. This problem will also

[29] National Conference of Commissioners on Uniform State Laws, *Draft Model Periodic Payments of Judgments Act*, 1980.

be raised later. Under the reviewable periodic system, in cases where policy limits are a problem, it may be possible for the court to order that the insurance company invest a sum of money equal to the policy limits. The interest thereby earned would be put toward the future payments, and could offset some of the liability facing an insured person because of the policy limits problem. As we shall see, this is precisely how a structured settlement is funded.

The Committee reports that a mandatory periodic scheme denies the plaintiff a lump sum if he wants it. It goes on to point out that under the present system, one who wants his award to be paid out periodically could opt for a structured settlement. The conclusion is that the present system gives the claimant his choice. Respectfully, I disagree. The present system does deny the plaintiff the reviewability advantage of the proposed method and reviewability is the major advantage of the proposed scheme, not the "periodic" aspect.

The present arrangement denies the claimant his preferred reviewable award as much as the reviewable payment scheme denies another claimant his preferred lump sum. The entire issue could be avoided by allowing a plaintiff to take a lump-sum award if he could show a good reason. It may even be possible to give the plaintiff his choice. These are the major findings of the Committee On Tort Compensation.

In its conclusion, the Committee resolved that under the present framework such a reviewable periodic payment scheme would not be feasible. However, if there is consent to review, the Committee would be in favour of the reviewable scheme. After reading the report, one is drawn to the conclusion that reviewable periodic payments are still by far the best way to compensate tort victims, even though practical difficulties seem numerous. In assessing the feasibility of a reviewable periodic scheme, one must draw a balance sheet to weigh the opposing financial and social interests. Before implementing this system, we would have to see if the new method would save money paid out in awards. More accurate damage awards may indeed cost less than the amounts now paid out. If the system would cause more to be paid out, then we would have to ask ourselves if the extra cost (by way of insurance premiums) would be worth the accuracy achieved. Other more tangible costs that must be weighed are the litigation costs of reviewing judgments and the possible costs caused by

abuses. The Committee has made a helpful though cursory contribution to the debate, but it has failed to make a detailed cost-benefit analysis which is very necessary in deciding this important question. Many of the arguments against the scheme can be effectively addressed; therefore, the forum is best left open. Perhaps it is necessary to review the situation more carefully by way of a proposed statute. Such a statute has been proposed in the United States and has been drafted and redrafted many times in response to input from the bar and the insurance industry. This seems the only effective way of discussing the topic. The Committee On Tort Compensation merely discussed the idea of a periodic payment system which leaves us only with general comments and nothing concrete.

John Fleming has addressed this issue in an article[30] where he reviewed many of the same points covered by the Committee On Tort Compensation. A novel point raised by Fleming, however, is the alleged paternalism of all types of periodic payment systems (reviewable and non-reviewable). They lock the claimant into a set budget and life-style and do not allow the plaintiff to invest a lump sum the way he would prefer. A reviewable system may be altered only if needs change; it is unlikely alteration would be permitted if desires change. This is another factor in the debate, and is due for consideration.

E. Method Number Three: Structured Settlements

1. Introduction

A structured settlement is a new method by which personal injury actions are settled. The typical damage suit has three components: (i) medical and other expenses *past and future*; (ii) loss of wages *past and future*; and (iii) pain and suffering *past and future*. A conventional lump-sum award would calculate with relative specificity the *past* losses and would estimate the *future* losses, then add the two, and arrive at a lump sum. A structured settlement, on the other hand, divides these types of losses into past and future and would pay for the *past* expenses at the time of settlement; the *future* losses are then assessed and compensated by purchasing an annuity for the injured party. The annuity pays the plaintiff a sum monthly (or at another specified interval). The *past*

[30] John Fleming, "Damages: Capital or Rent?", 19 U. of Tor. L.J. 295 (1969).

losses which are compensated for are known as the "up front" money (and includes the lawyer's fees). The "up front" money may also include funds to purchase special equipment the claimant will need (*e.g.*, special house, ramps, vans).[31] A structured settlement may be tailored to the exact needs of each individual plaintiff. If one adds up all of the monthly payments from a structured settlement, he would see that this total far exceeds the amount the plaintiff would have received by way of a lump sum (see Appendix). The reason for this is that the insurance company is investing the original sum during the life of an annuity and therefore has more with which to pay out because of interest accumulation. The question thus arises: why cannot the plaintiff just take the money and invest it himself? There are many answers (as we shall see), but the main reason is that Revenue Canada will tax the interest that a plaintiff makes on his lump sum, but will *not* tax interest an insurance company makes on money that is destined for a plaintiff by way of a structure; nor is the plaintiff taxed when he receives these "previously invested" sums. More will be said about the tax situation later, as it is absolutely critical to the success of structured settlements.

2. Variations

Structured settlements are non-reviewable, and cannot be altered once made. This leads to the fair criticism that they are inflexible. However, there are many variations possible on the basic model, which reduce much of the apparent inflexibility. There are several almost standard modifications. For example, almost all structures include indexing, which is a monthly accelerator attached to the payments to help offset inflation. Most structures have a "guaranteed period". Let us suppose our structure provides for monthly payments for the rest of the plaintiff's life, it would seem unfair if the plaintiff were to die shortly after the structure began. To resolve this, most structures have a guaranteed period: if the plaintiff dies before the period has passed, then the balance of the payments would be made to a named beneficiary. As has been noted, the payments could be made on a monthly, quarterly, semi-annually or even yearly basis.

[31] See Dr. L. J. Grossman and J. E. Morton, "Structured Settlements—A New Approach", in a paper delivered at the ALTA Annual Convention in Houston, August, 1979.

This type of settlement can be made in both fatal and non-fatal accident cases.

Many further variations are also possible, and I will mention several major ones. Suppose at the time of settlement it is known that the plaintiff *may* need a spinal fusion operation within five years which will cost the plaintiff a considerable sum of money personally. Within the structure we can include a type of insurance policy which provides that if the plaintiff requires the surgery, then the insurance company will pay the related expenses. Another feature is illustrated in the case where a plaintiff is injured, but can still work for, say, five years; then it is likely arthritis will cripple him and he will be unable to continue to work. Under a structured settlement we can give him nominal monthly payments for five years, then substantially increase them thereafter. If he has children who may want to go to university in year 15 of the structure, then we can cause a little extra "nest egg" to be paid for that purpose in year 15. The problem with these variations is that we must guess as to how much the plaintiff will need and when. It is submitted, however, that if we take each case as it comes, interview each individual plaintiff and assess his needs, we can provide him with a much more secure future than a lump-sum award could provide. Another variation is seen in the case where we would provide for the purchase of special equipment for the plaintiff (out of the "up front" money) and the equipment has a life expectancy of ten years (*e.g.*, a specially equipped van). We can then provide for a special lump sum to be paid out in year ten of the structure. If the van needs replacement after seven years, then the plaintiff could get a loan to buy one and use the structure as collateral. The outstanding sum could then be paid in year ten.

Another variation could occur if the plaintiff is planning to live with his mother for about ten years and then to go out on his own, but will always require someone to care for him. We can suppress the payments for the first ten years of his structure, and then substantially increase them. Suppose, however, that this plaintiff's mother were to die after five years, and he were left alone for five years until his payments were to increase. To solve this problem, we can write a life insurance policy on the life of his mother into the structure and if the mother dies the plaintiff would receive a large sum of money (*e.g.*, $250,000) to pay for his added expenses until his monthly payments increased in year ten.

Structured settlements have been in use in the United States for the past ten years and are now more prevalent here. The Americans often seem to precede Canadians in settlement devices. They also widened their discovery rules before we did. One might suppose that because of their normal cost rule (*i.e.*, costs are paid by each side regardless of the outcome) and their notoriously high verdicts, that they demonstrate a keener interest in settlement. Now, however, we have the high-dollar verdicts in Canada and defendant insurers are looking for better and cheaper ways to settle.

3. The Annuity

The annuity portion of a structured settlement must be owned by the insurer and must be non-commutable and non-assignable. This provides protection for the plaintiff so that the source of his payments will not be compromised at a future date. We will see later that the plaintiff must have no control over the structure if the tax position is to be maintained. The periodic payments are usually also indexed at a fixed level (generally between two per cent and eight per cent). In times of high inflation, indexing is a vital part of any structure, and it must be sufficient to justly compensate the particular plaintiff. The problem is that many of these structures span 20 to 50 years, and inflationary trends are impossible to predict. Counsel must satisfy himself that the index rate is high enough to avoid a shortfall for his client. Three other factors must be kept in mind as well. The first point, a critical one, is that the payments be tax free. Therefore an indexing of four per cent or five per cent of tax free funds is equivalent to a ten per cent or eleven per cent indexing of taxable income. Of course, this depends on the marginal rate of the individual.[32] Secondly, one must concede that there is a remote possibility that inflation will continue at the high levels it has now reached and if one assumes inflation will drop, then these index rates are more than adequate. A third matter to keep in mind is a practical one: if we go to trial and are seeking a lump-sum award, it will be very difficult (if not impossible) to get a trial judge to compensate our plaintiff on the assumption that inflation will run at thirteen per cent for the next 50 years. It is submitted that we are better off with a structure because most trial judges will not make such assumptions for the simple reason that the awards would become absolutely astronom-

[32] See B. H. Wheatley, "Structured Settlements" (1980), *Independent Adjuster* 10.

ical. Again, our courts reflect our social values by keeping our dollar verdicts low. One need only look at the rates used in the Supreme Court of Canada trilogy.[33] Structured settlement specialists point out that we could index at almost any level, but this would simply cost more. If we were to index at a higher level, then either the monthly payments would become less, or the number of years guaranteed by the structure would become less. One must always keep in mind that there is only so much money, and it can be allocated in any way, but that, of course, means that somewhere else there will be a shortfall.

Let us now review the tax position of structured settlements and the advantages and disadvantages of them.

4. The Tax Position

The favourable tax treatment is the most important aspect of structured settlements. Let us consider it first.

Lump-sum awards for personal injury are received tax free by a plaintiff. Interpretation Bulletin IT-365[34] outlines Revenue Canada's position. Paragraph 5 states that special and general damages will be received tax free except for "accrued loss of earnings to date of award or settlement". Income made on such awards (such as bank interest) will be taxable. There is a possible deduction from income available to all taxpayers for medical expenses. Section 110(1)(*c*) allows for a deduction for medical expenses to the extent that they exceed three per cent of the taxpayer's net income.[35] However, the "three per cent rule" is a major barrier to most taxpayers.[36] There is a series of other minor deductions in s. 110 for an injured plaintiff.

Minors receive some extra relief under the *Income Tax Act* for income earned on a personal injury award. Section 81(1)(g.1), (g.2) and (g.3) excludes from taxable income that which is earned from the award (*e.g.*, bank interest) until the minor reaches 21 years of age. In this type of situation, the award is paid into court and it earns interest while it is there; this interest is not taxable. When the minor turns 18 years of age, he may remove the money from court by Rule 737(3),[37] and if he does, the tax-free status of

[33] For example, see *Andrews*, *supra*, footnote 2.

[34] Revenue Canada, March 21, 1977.

[35] *Income Tax Act*, S.C. 1970-71-72, c. 63 as amended.

[36] W. Grover, and F. Iacobucci, *Materials on Canadian Income Tax*, 4th ed. (Toronto, Richard DeBoo Ltd., 1980).

[37] R.R.O. 1980, Reg. 540.

the interest is lost. The minor must leave the money paid into court if he wants the interest to be tax free between his 18th and 21st birthdays.

The normal tax treatment of annuities is of interest when discussing structured settlements. Grover and Iacobucci[38] have succinctly summarized it:

> Under the present statutory scheme, an entire annuity receipt is added to taxable income [s. 56(1)(*d*)][39] but the taxpayer is then permitted to deduct the "capital element of each annuity payment" under para. 60(*a*). Therefore, if one exchanges $10,000 for a legal right to receive $1,000 per year for 12 years [for a total of $12,000] then there will be tax liability of $2,000 as income from property.

The Minister of National Revenue has made it clear that if one receives such an annuity in exchange for compensation for personal injury, then no tax liability is to be incurred.[40] Therefore, the plaintiff may collect the monthly payments tax free from the insurer's annuity. The insurer must own the annuity and the plaintiff must have no control over it[41] in order to maintain the tax-free status. The government should be concerned about maintaining the structured settlement procedure as it provides much security for an injured party and thereby substantially reduces the risk of dissipation of an award, which may make the plaintiff a public charge. It should be noted that although this tax position is firm, it is not etched in stone! If a structured settlement is designed in such a way that Revenue Canada feels it is a tax dodge, then it may tax the income portion of the annuity payments as outlined above. For example, suppose a 35-year old doctor is injured and is entitled to a $15,000 lump sum. Because this places him in a higher tax bracket, he decides to structure it with a long deferral period; this structure would provide for annuity payments to commence when he turns 65 years of age (*i.e.*, 30 years from now), after the $15,000 has earned substantial interest. Such an obvious dodge may make Revenue Canada tax the payments when they come. Structured settlements with long deferral periods are suspicious when they cease to be compensation for personal injury, but merely a long-term investment plan. One may

[38] *Supra*, *footnote* 36 at p. 230.

[39] *Income Tax Act*, *supra*, footnote 35.

[40] See Law Society of Upper Canada Seminar Materials for January 24, 1981, prepared by Frederick Luchak, Q.C., at p. 7.

[41] Letter to Price, Waterhouse & Co., June 2, 1980, from Revenue Canada. Found in Appendix C of the *Report of the Committee on Tort Compensation*.

be able to avoid this by providing a nominal yearly payment for 30 years and then step up the payments when this plaintiff turns 65 years of age. This area is still problematical. Such structures would probably be deemed taxable on an *ad hoc* basis. It is unlikely that Revenue Canada would tax all structures because of a few abuses. *Pawnee Petroleums Ltd. v. M.N.R.*[42] is an example of a case where a "once and for all" settlement was reached (in a corporate litigation context) and the damages were held to be income and not a capital receipt.

5. Advantages

Structured settlements provide monthly payments over many years "a little at a time". Therefore, there is no chance that the entire award will be squandered or dissipated all at once. Next to the favourable tax treatment, this fact is probably the most popular advantage of structured settlements. Lump sums are meant to compensate the plaintiff for losses that will accrue over a lifetime; they are not prizes that injured plaintiffs win to make them feel better. Unfortunately, many times, large verdicts are quickly dissipated by plaintiffs. It is said that many well-meaning (and not well-meaning) friends and relatives descend upon a successful plaintiff and ask for loans, or invite the plaintiff to invest it in various ventures. Derek A. Cave recognizes this problem in his article[43] where he notes that:

> ... one sobering insurance industry survey has ascertained that the life span of large cash payments to injured parties or widows is as follows: within two months of settlement, 2.5 out of 10 have nothing left; within one year of settlement, 5 out of 10 have nothing left; within two years of settlement, 7 out of 10 have nothing left; within five years of settlement, 9 out of 10 have nothing left.

There is no documentation of the source of these statistics, but they at least attempt to represent the problem. The recipient of a monthly sum may squander each payment, but, he is much more secure over the long term than with the lump sum. It is less likely that each payment would be squandered if there are many unpaid bills outstanding. A solicitor obviously cannot force his client to take a structured settlement but the solicitor should be aware of the wide social values involved in his advice; he should relate these to the client. If a plaintiff squanders the money which is to be used

[42] [1972] C.T.C. 2303, 72 D.T.C. 1273 (T.R.B.).
[43] "Structured Settlements: An Alternative Resolution", 37 The Advocate 331 (1979).

for his care, then he will probably have to depend on some form of social assistance and will probably receive less competent care than if he had saved his money; he most likely would be institutionalized. In *Arnold v. Teno*,[44] the Supreme Court of Canada awarded the plaintiff a "management fee". This is a good idea since it recognizes the inherent difficulties in handling such a large sum of money.

It is interesting to note that insurance companies were the first to initiate structured settlements. Suspicious plaintiffs may wonder why, and the simple reason is that it costs insurers less. Grossman and Norton address this point by stating that if an insurance company can calculate that the rate of return on its funds is higher than the discount rate likely to be applied by the court, then it is better off to structure. "Businesses generally have a higher rate of return on their funds than do individuals."[45] When one includes this with the fact that there is much uncertainty about the trial process (from both the defendant and the plaintiff point of view) the attraction to a structure becomes clear. One can never say with certainty that a structured settlement saves the insurer money because no one can be certain what a trial verdict may be, but numerical examples demonstrate savings to the insurer (see Appendix).

Structured settlements can provide a very attractive alternative in cases where there is a "policy limits" problem. In the recent case of *Mesic v. McConnell* (infant structured settlement approved by Holland J. on November 25, 1980)[46] the infant plaintiff was struck by a motor vehicle and sustained very serious injuries, *inter alia*, paraplegia and some mental impairment. She is capable of completing her education but will experience various medical problems associated with paraplegia. It is always very difficult to estimate the damages a court would assess, but it is probable that they would have been well in excess of the $500,000 policy limits. An equivalent structured settlement was acceptable to the plaintiff which cost $425,000 (well below $500,000). Another complicating factor is liability. The defence maintained that the plaintiff ran out in front of the insured's car; she was seven years old when injured. Therefore, the defence was faced with a

[44] (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287.
[45] Grossman and Norton, *supra*, footnote 31 at p. 116.
[46] Unreported, Supreme Court of Ontario No. 12488/77.

possible "all or nothing" verdict at trial; that is, if the court found that she was of sufficient intelligence to be liable, the defence may have had the action dismissed.[47]
Even if the action had not been dismissed, damages may have been reduced by contributory negligence. In a case such as this, the insurer's counsel must be very careful; if the defence refuses a reasonable settlement offer (and take the risk that the trial verdict would save money for the insurance company), then the policy limits of the defendant might be extended in a subsequent action to cover a verdict that goes over policy limits.

There is a "policy limits issue" now pending in Ontario in another case. At trial the action was dismissed, but on appeal a different finding of liability was reached and judgment was entered in excess of policy limits. In a subsequent action, the insured is suing the insurance company for the amount he is bound to pay in excess of limits, resting the case on two grounds: bad faith in the settlement process *and* negligence. The insurance company has joined the original solicitor for the insurance company as third party in the action. This could present a nuance in the law. The California Supreme Court extended policy limits in such an action. In addition to awarding the insured the $91,000 which she was bound to pay the plaintiff (in excess of limits), that court also awarded $25,000 for the mental suffering of the insured caused by the anguish of owing the plaintiff $91,000.[48]

It is clear that a structured settlement such as in the *Mesic* case can avoid many of these problems. The insured is saved from the risk of having judgment in excess of policy limits. Moreover the insurance company has avoided the risk of having policy limits extended in a subsequent action by acting reasonably and prudently under the circumstances.

6. Disadvantages

In addition to the advantages, there are some disadvantages of structured settlements. One must remember that many of these are problems that face damage assessment in general. A strong criticism of these structures is that they are paternalistic. Lawyers, judges and insurance agents dictate the style and type of life an

[47] See *Gargotch v. Cohen*, [1940] 4 D.L.R. 810, [1940] O.W.N. 479 (H.C.J.), *McEllistrum v. Etches* (1956), 6 D.L.R. (2d) 1, [1956] S.C.R. 787.
[48] See *Crisci v. Security Insurance Co.*, 426 P. 2d 173 (Cal. S.C., 1967).

injured party will live because of the fact that a structure sets his monthly income, maybe even for the rest of his life. The injured party must consent to the settlement, but none the less, the settlements do indicate a spirit which says, "we know what's best for you". Fleming[49] raised the paternalism issue when discussing the reviewable periodic schemes. Structures can be made very flexible to adapt to a particular plaintiff's needs, but cannot be altered. For example, the settlement may provide for additional sums to be paid when a plaintiff needs a large amount of money (perhaps when he reaches 25 years of age, he may need immediate money to buy a major asset like a house or sailboat). This is helpful, but we can only surmise when, during the course of his lifetime, he will need more funds than merely his monthly payments. A lump-sum award would provide more flexibility, as the plaintiff could allocate his money more freely during his lifetime. The element of inflexibility becomes more predominant when we are structuring for an infant, as the conjecture becomes more arbitrary. There is, however, a conventional way to avoid some of this rigidity. If we have a person locked into a straight 30-year structure which provides only for monthly payments, and at year ten he wants to buy a house, then he would probably be able to get a loan from the bank and use the structure payments as collateral. The payments could not be *directed* to the bank, but they could be given to the bank when the plaintiff receives them.

Often the Official Guardian is consulted on an application for approval of an infant action. The Official Guardian would naturally be concerned about rigid, inflexible structures, but should also be wary of parents who may descend upon a lump sum. On the other hand, there is an immediate need for money that many families will have because of the injury. Any type of award system must satisfy these needs and the Official Guardian's supervision is necessary. A structure will have to meet particularly high standards with infants for another reason: income made on a lump-sum award to an infant remains tax free until the infant reaches 18 years of age (or 21 years of age if he leaves it in court). Hence an infant plaintiff already has a tax advantage under the existing system. Therefore, if we plan to disadvantage the infant by locking him into a structure, then we must be able to show further tangible benefits of that structure. Two of these benefits

[49] *Supra*, footnote 30.

are that the tax advantage remains after age 21, and that immediate dissipation and squandering are avoided. Squandering may be a greater problem with a person who is young and has not realized a sense of the future.

Brian Wheatley[50] points out the case of an eight-year-old minor who takes a structure in lieu of $60,000 lump sum; this provides him with a yearly income of $16,000 for the rest of his life. With a normal life expectancy the plaintiff can expect to receive $1,000,000 tax free.

A solicitor sometimes has difficulty selling the idea of a long-term structure to a plaintiff because the latter has doubts whether or not the annuity company will be "good" for the money in 20 or 30 years. Many of these unsure plaintiffs were persons who lost everything or who have seen their country's banking and financial institutions crumble in a World War or in an invasion. These fears are understandable even today. For instance, we now see that Chrysler Corporation and Ford Motor Company are on the brink of bankruptcy — it is a fact, however, that refusal of a structured settlement is always the prerogative of the plaintiff.

Structured settlements are paid out over many years, and thus there is no need to discount the award to present value. The guesswork that has been soundly criticized by the commentators is avoided. We should note, however, that structured settlements also involve a lot of guesswork relating to the future needs of a plaintiff and to the future trends of inflation. It seems preferable to have the plaintiff decide himself how much weight is to be put on these factors. For example, if the plaintiff is very concerned that inflation will run at ten per cent for the next 50 years, then he can arrange to have an appropriate indexing rate. He will realize that this may mean the number of years *guaranteed* by the structure will be less, or that the monthly payments will begin at a lower value, but this is *his* decision and he can do the guessing instead of a court.

7. Calculation of Structured Settlements

When one looks at the example in the Appendix, the obvious question arises: how do we calculate the monthly payments? If we were to use a specialist in the field, we could send him all of the data and tell him what we need. He would then come up with a

[50] *Supra*, footnote 32.

plan (with all of the variations that we desire), then would investigate to see which insurance company could provide us with the best terms for an annuity. Each added variation will add somewhat to the cost of the annuity. The specialist will have a fixed sum of money the insurer is willing to spend. He then will design the structure pursuant to the needs outlined by the plaintiff. The difference between four and seven per cent indexing will affect the amount of the monthly payments. The longer the guaranteed period, the less will remain for monthly payments. Since there is a fixed amount of money available (*i.e.*, the cost of the annuity), the cost of any one item is bound to affect the amount left over for other items.

8. Negotiating Structured Settlements

As has been already noted, the insurance company usually saves a little by structuring judgments. Suppose we have a case that would probably attract a trial lump-sum verdict of $300,000 but both sides want to structure. If the insurer calculates that he can provide Plan "A" for $180,000, then there is a lot of room for negotiation. The various additional features will cost the insurer more, but will still save money by avoiding a trial. The plaintiff, on the other hand, will be bargaining for more out of the plan by way of additional features, but he may not want to go to trial either; therefore, he cannot insist too strongly. From the plaintiff's point of view, it is essential that he know how much the structure is costing the insurer so that he can bargain more effectively. In the United States, some insurers take the position that the cost of the structure to the insurance company is none of the plaintiff's business[51] and that the plaintiff need only be concerned about the adequacy of the plan. It is refreshing to report that in Canada there seems to be a freer flow of information regarding the cost of the structure.[52] Even if the defendant insurer refuses to disclose the cost of the structure, a plaintiff counsel would only have to consult his own actuary, who could tell the plaintiff the cost. This is simply one element of the negotiation process.

Another area of interest in negotiating structured settlements deals with the type of annuity company used to provide the struc-

[51] See Carl Wymore, "Annuities to Settle Cases", Insurance Counsel Journal, July, 1979, p. 367 at p. 368.

[52] *Supra*, footnote 41 at p. 13.

ture. If the injured party has an abnormal life expectancy because of the accident, then this will affect the cost of the annuity because most provide for payment until the plaintiff dies. Where the plaintiff's life expectancy has been shortened by 15 years, the annuity company can agree to have more money paid out monthly because it is expected that the injured party will die earlier. Not all annuity companies will consider this shortened life expectancy. Therefore, if we have a 30-year-old quadriplegic whose pre-accident life expectancy was 40 years, but is now only 20 years, it is clear that an annuity company which does not take into account the "abnormal life expectancy" will be counting on paying out much more than the company which considers the shortened life. For the same cost the annuity company that considers abnormal life spans will be able to pay out more dollars per month because its calculations show that the plaintiff will die in 20 rather than 40 years. If solicitors fail to go to the proper annuity company, they may indeed be liable for negligence for failing to use reasonable care in the choice.

Negotiating a structured settlement may become difficult when one side becomes adamant about one or two terms. Suppose the insurer realizes how badly a plaintiff wants a structure (because of tax saving) and uses this as a lever to cheapen the structure by only offering a very low indexing rate. One could also imagine the situation where the plaintiff is being unreasonable because the insurer wants the structure to save money by avoiding a trial. It would be advantageous if a trial court had the power to order a structured settlement. This would not be the same as the recommendation of the Committee on Tort Compensation, since court-ordered structured settlement would be non-reviewable. California has such a statute: s. 667.7 of the California *Code of Civil Procedure*[53] provides that:

> . . . a superior court *shall*, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump sum payment if the award equals or exceeds $50,000.00 in future damages.

The section goes on to make requirements for security of debt. Interestingly enough, this section only applies "against a provider of health care services". The National Conference of Commissioners of Uniform State Laws has drafted the *Periodic Payments of Judgments Act*[54] which would allow American courts to enter a structured judgment. Such legislation in Ontario would be beneficial to both insurers and plaintiffs. It should contain a stipulation that the judgment would be non-reviewable (unless on consent) and that the requesting party should choose the annuity company. This would avoid the problem of having the court choose which company should provide the structure. The judgment would parallel the approval that courts now make of infant structured settlements, and therefore there would be no undue burden on the judiciary.

9. Situations Adaptable To Structuring

Some types of personal injury actions are more adaptable to structuring than others. Low damage cases are not really worth structuring because there is not much tax advantage. The income earned on a small lump-sum award would not be very high, and therefore would not attract much tax. A long deferral of the annuity may run into tax problems. Frederick Luchak has outlined several cases particularly appropriate for structuring.[55] Two of these are the cases where the income earned on the lump sum will place the plaintiffs in higher tax brackets. The lump sums need not be very sizable to do this to some plaintiffs who are hovering slightly below a higher bracket. Another instance occurs when the plaintiff has "long term and serious identifiable needs" in which case the structured settlement's monthly payments ameliorate his ongoing loss. The fourth case occurs where deferral is advantageous to an infant "to create a large sum to produce tax free income after the age of majority". Finally, Mr. Luchak describes the case where a lump sum would go beyond the policy limits of the defendant's insurance contract, in which case a structure may be implemented for a cost within the policy limits of the defendant. It is also pointed out that if the plaintiff is unsophisticated and unable to properly invest large sums of money, then the problems of dissipation are avoided with a structure.

F. Conclusion

In this article we have referred to three types of tort compensation: (i) the lump-sum award; (ii) the reviewable periodic payment scheme; and (iii) the structured settlement. The first scheme is modified (albeit drastically) to become the structured settlement, whereas the reviewable scheme is very much set apart from the

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53 California *Code of Civil Procedure*, 1980, as amended.

54 *Supra*, footnote 29.

55 [illegible]

rest. The implementation of a reviewable payment system will require careful consideration by most segments of society, for many of the issues to be decided are social in nature. The Committee On Tort Compensation has effectively opened the forum; now it is time for Law Reform Commissions, members of the academic community, the bar and the insurance industry to continue the discussion.

Structured settlements illustrate how well the system really can work when it is faced with an inadequate compensation system. One often hears that structured settlements are not perfect for every case; this is true, but it is submitted that with careful review, we can select cases that are ideal for structuring: ideal from the viewpoint of plaintiffs, insurers, insured, and perhaps more importantly, society.

APPENDIX

This is an example of a structured settlement for an injured man, 49 years old, who has a 22-year life expectancy. Most of his loss results from an impaired earning capacity. This example is taken from the Law Society of Upper Canada's January 24, 1981, materials on structured settlements. It was drafted by McKellar Structured Settlements Inc.; the Law Society materials were prepared by Frederick Luchak, Q.C.

The structure is guaranteed for 22 years and "thereafter so long as he remains alive". The cost of the settlement is $250,000. Up-front money was paid in the order of $63,500.

Index Rate: 3.0%

Year	*Monthly*	*Yearly*	*Cumulative*
1	$1,955.01	$23,460.12	$ 23,460.12
2	2,013.66	24,163.92	47,624.04
3	2,074.07	24,888.84	72,512.88
4	2,136.29	25,635.48	98,148.36
5	2,200.38	26,404.56	124,552.92
10	2,550.84	30,610.08	268,943.64
15	2,959.13	35,485.56	436,332.48
20	3,428.13	41,137.56	630,382.20
22	3,636.90	43,642.80	716,396.64
25	3,974.14	47,689.68	855,339.12
30	4,607.11	55,285.32	1,116,125.40
35	5,340.90	64,090.80	1,418,448.00

At the seminar on January 24, 1981, it was estimated that a lump sum of $300,000 to $350,000 would be required to produce the same benefit as this structure.

PRACTICE AND PROCEDURE BEFORE THE ONTARIO ENVIRONMENTAL APPEAL BOARD

Grace Patterson *

The Environmental Appeal Board is an important tribunal whose responsibilities frequently touch upon the rights of the Ontario public to a healthy and safe natural environment.

This article discusses the statutes under which this tribunal is empowered to hear specific matters, appeals from the Environmental Assessment Board, jurisdiction, how the Environmental Appeal Board is constituted, procedure, appeals from the Environmental Appeal Board, and further participation where a project is approved but conditions imposed on the approval allow the opposing parties to remain involved.

I. Appeals to the Environmental Appeal Board

Although the Environmental Appeal Board is created and given its powers under Part XI of the *Environmental Protection Act*[1] ("EPA"), it is empowered to hear appeals under the *Ontario Water Resources Act*[2] ("OWRA") and the *Pesticides Act*.[3] This article deals with the Environmental Appeal Board's powers under each of these Acts separately.

1. The Environmental Protection Act

Among the various powers given to the Ministry of the Environment ("MOE") under the EPA are the issuance of certificates of approval, control orders, stop orders, repair and clean-up orders, and equipment orders. The levels of decision-making applicable to each one are explained in relation to the particular type of permit or order.

(a) *Certificates of approval*

A certificate of approval is required before anyone can operate a potential source of pollution. If the Director of approvals refuses to issue a certificate of approval or issues one on terms and condi-

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[1] R.S.O. 1980, c. 141.
[2] R.S.O. 1980, c. 361.
[3] R.S.O. 1980, c. 376.

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REPORT

ON

COMPENSATION FOR PERSONAL INJURIES AND DEATH

ONTARIO LAW REFORM COMMISSION

Ministry of the Attorney General

1987

CHAPTER 3

DAMAGES FOR NON-PECUNIARY LOSS

1. INTRODUCTION

In this chapter, the Commission will consider the nature and role of compensation for non-pecuniary loss suffered by an injured person. Although the view of what constitutes non-pecuniary loss has changed somewhat over the years,[1] the modern tendency is to describe such loss as involving three distinct elements: pain and suffering; loss of amenities (sometimes called loss of enjoyment of life); and loss of (or shortened) expectation of life.

It is obvious that not all forms of non-pecuniary loss are necessarily present in every personal injury case. Where two or more are present, however, the Supreme Court of Canada, in a series of cases commonly referred to as the "trilogy",[2] has held that it is proper and necessary to assess a single global sum to cover all non-pecuniary loss. As we shall see, this view reflects the essential similarity of purpose, as well as the basic imprecision, at least in monetary terms, of the three heads of damage.

Until recently, damages for pain and suffering, including mental distress, could be recovered only by a plaintiff who had also suffered a personal injury as a result of negligence or a nominate intentional tort. Mental distress alone could not form the basis for a separate award or an independent action. Emotional distress sufficiently serious to cause "objective and substantially harmful physical or psychopathological consequences"[3] can now provide the basis for a separate claim, although in such circumstances it is possible to label the harm a "personal injury" and it is likely that the plaintiff will have suffered pecuniary loss as well. However, the law in this

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[1] The concepts of pecuniary and non-pecuniary loss did not, in fact, appear until the 19th century, by which time there was a distinct law of torts. See Cherniak and Sanderson, "Tort Compensation—Personal Injury and Death Damages", in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada 1981[:] New Developments in the Law of Remedies* (1981) 197, at 202.

[2] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to [1978] 2 S.C.R.); *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609; and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480 (subsequent reference is to [1978] 2 S.C.R.).

[3] Fleming, *The Law of Torts* (6th ed., 1983), at 146.

injury victim. The Commission will discuss whether there should be any change in the law that now permits the estate to recover damages in respect of the deceased's pain and suffering and, apparently, loss of amenities, although not loss of expectation of life.

The final related matter pertains to damages for emotional distress. The Commission will consider whether damages for such distress, standing alone, should be recoverable, and, if so, whether the right to recover them should be enshrined in legislation.

2. THE NOTION OF NON-PECUNIARY LOSS

The essential idea of a pecuniary loss is relatively straightforward. An injury or death may generate a variety of expenses and reduce or eliminate a number of opportunities and expectations having a clear pecuniary component. While the calculation of the dollar value of these losses may not always be simple to perform—because, in the case of permanent injury or death, the lump sum damage award involves predictions or educated guesses as to the future—it is not difficult to think of these as losses.

The notion of a non-pecuniary loss is more difficult. Certainly there is a sense of loss experienced by someone who, because of some physical impairment, can no longer enjoy life to the same extent as before the injury, or who suffers continuing discomfort or disability, or who now has a shorter lifespan. And while there may be no physical pain, emotional distress, or frustration experienced by an unconscious victim, there is still the loss of the ability to enjoy life, as well as, in many cases, the loss of expectation of life. But, whereas an objective pecuniary value can be determined, or at least approximated, where a person, for example, requires medical care or can no longer earn income because of a disability,[11] one cannot, except arbitrarily, attach a dollar value to non-pecuniary loss. Thus, we are here considering a "loss" of a different order.

It is not, of course, essential, in order to justify an award of damages or to decide on the appropriate amount of compensation, to continue to refer to these conditions as losses. One may well choose other labels. But the issues canvassed in this chapter clearly transcend the matter of characterization. Rather, they deal with the central questions of policy respecting awards of damages for non-pecuniary loss—for example, whether they should continue to play a role in a future compensation regime and, if so, the principles on which they should be calculated. In order to be able to make these determinations, it is necessary first to consider the purpose of such awards.

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[11] But see United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as "Pearson Report"), Vol. 1, para. 360, at 85, where it is said that "[a]lthough in theory all expenses resulting from injury are recoverable as pecuniary loss, in practice some of them may well be unquantifiable...".

area is evolving at a relatively rapid pace. The English Court of Appeal, for example, has allowed damages for emotional distress in breach of contract cases,[4] and Ontario courts seem prepared to follow suit.[5]

In Ontario, there may also be an award of damages for non-pecuniary loss arising from the interference with relational interests where such loss flows from the injury or death of an individual. This type of award is provided for in section 61(2)(e) of the *Family Law Act, 1986*,[6] which states that the damages recoverable include "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred". While it was at one time asserted that damage of this kind was pecuniary in nature, it now appears to be generally accepted that such a classification was something of a fiction. Those entitled to make a claim under the Act are the spouse, children, grandchildren, parents, grandparents, brothers, and sisters of the person injured or killed. Other jurisdictions have statutes that limit recovery to cases of wrongful death and include a less extensive family group, omitting brothers and sisters. Most also limit recovery to pecuniary loss.[7]

In our examination of damages for non-pecuniary loss, the Commission will consider whether such damages should continue to be awarded to a living plaintiff and, if so, whether there should be any change in the law—more particularly, the $100,000 limit—set forth by the Supreme Court of Canada in the trilogy, that is, *Andrews v. Grand & Toy Alberta Ltd.*,[8] *Arnold v. Teno*,[9] and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*.[10] Given our endorsement of awards of damages for non-pecuniary loss, we shall examine several further matters that arise in connection with such awards. The first matter concerns whether, and, if so, the degree to which, guidance should be given by the trial judge to the jury in respect of the quantum of damages awardable, and whether counsel should be entitled to speak to this issue. In this context, we shall also consider the review of jury and court awards by appellate courts.

The second matter arising in connection with awards for non-pecuniary loss concerns the survival of actions in favour of the estate of a deceased

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[4] *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233, [1972] 3 W.L.R. 954 (C.A.), and *Heywood v. Wellers*, [1976] Q.B. 446, [1976] 2 W.L.R. 101 (C.A.).

[5] *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711, 114 D.L.R. (3d) 378 (H.C.J.). See, also, *Brown v. Waterloo Regional Board of Police Commissioners* (1983), 43 O.R. (3d) 113, 150 D.L.R. (3d) 729 (C.A.).

[6] S.O. 1986, c. 4.

[7] For a discussion of third party claims, including claims for loss of guidance, care, and companionship, under the *Family Law Act, 1986*, see *supra*, ch. 2.

[8] *Supra*, note 2.

[9] *Supra*, note 2.

[10] *Supra*, note 2.

injury victim. The Commission will discuss whether there should be any change in the law that now permits the estate to recover damages in respect of the deceased's pain and suffering and, apparently, loss of amenities, although not loss of expectation of life.

The final related matter pertains to damages for emotional distress. The Commission will consider whether damages for such distress, standing alone, should be recoverable, and, if so, whether the right to recover them should be enshrined in legislation.

2. THE NOTION OF NON-PECUNIARY LOSS

The essential idea of a pecuniary loss is relatively straightforward. An injury or death may generate a variety of expenses and reduce or eliminate a number of opportunities and expectations having a clear pecuniary component. While the calculation of the dollar value of these losses may not always be simple to perform—because, in the case of permanent injury or death, the lump sum damage award involves predictions or educated guesses as to the future—it is not difficult to think of these as losses.

The notion of a non-pecuniary loss is more difficult. Certainly there is a sense of loss experienced by someone who, because of some physical impairment, can no longer enjoy life to the same extent as before the injury, or who suffers continuing discomfort or disability, or who now has a shorter lifespan. And while there may be no physical pain, emotional distress, or frustration experienced by an unconscious victim, there is still the loss of the ability to enjoy life, as well as, in many cases, the loss of expectation of life. But, whereas an objective pecuniary value can be determined, or at least approximated, where a person, for example, requires medical care or can no longer earn income because of a disability,[11] one cannot, except arbitrarily, attach a dollar value to non-pecuniary loss. Thus, we are here considering a "loss" of a different order.

It is not, of course, essential, in order to justify an award of damages or to decide on the appropriate amount of compensation, to continue to refer to these conditions as losses. One may well choose other labels. But the issues canvassed in this chapter clearly transcend the matter of characterization. Rather, they deal with the central questions of policy respecting awards of damages for non-pecuniary loss—for example, whether they should continue to play a role in a future compensation regime and, if so, the principles on which they should be calculated. In order to be able to make these determinations, it is necessary first to consider the purpose of such awards.

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[11] But see United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as "Pearson Report"), Vol. 1, para. 360, at 85, where it is said that "[a]lthough in theory all expenses resulting from injury are recoverable as pecuniary loss, in practice some of them may well be unquantifiable...".

3. THE PURPOSE OF DAMAGES FOR NON-PECUNIARY LOSS

(a) INTRODUCTION

Before examining briefly the three heads of damage for non-pecuniary loss, a general comment relating to awards of damages for such loss ought to be made. The Supreme Court of Canada's approval in the trilogy of a global award for non-pecuniary loss involved a recognition of the essential similarity of purpose of the three heads of damage and that a separate assessment would suggest a capacity for precision that would simply be misleading. In *Andrews v. Grand & Toy Alberta Ltd.*, Mr. Justice Dickson, delivering the reasons for judgment of the unanimous Court, asserted:[12]

> It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses.

(b) PAIN AND SUFFERING

The use of the two words "pain" and "suffering" usually denotes two conditions: physical discomfort and mental or emotional distress. As in the case of the other heads of non-pecuniary loss, an award of damages under this head can be expected to do nothing more than to provide solace. It cannot function in the fashion of an analgesic to deaden the pain or as a tranquillizer to lighten the distress. It cannot replace the physical comfort or emotional tranquillity that may be considered to have been "lost". But it may have an important consoling effect nonetheless, in that it signifies a recognition by the law of the unhappy consequences that a personal injury has brought upon its victim. An award may also help to alleviate some pain and suffering or distract the injured party by permitting him to purchase material or other comforts that he may otherwise lack.

Few seem to question the propriety of an award for this purpose,[13] although it seems to be agreed that, if the injury victim is unconscious and, therefore, unaware of his condition, there should be no award for pain or suffering.[14] It has also been suggested "that giving damages for physical pain

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[12] *Supra*, note 2, at 264.

[13] Although, as will be noted *infra*, this ch., sec. 6, some no-fault proposals would omit all non-pecuniary heads of compensation.

[14] No such damages were awarded in *The Queen in right of Ontario v. Jennings*, [1966] S.C.R. 532, 57 D.L.R. (2d) 644. See, also, *Lim v. Camden and Islington Area Health*

that is wholly past, not continuing and not expected to recur, is simply an anomaly, for there can be no solace for past pain".[15] But unlike the unconscious injury victim, the victim whose pain is a thing of the past is nevertheless aware of having had that experience; arguably, therefore, it is still possible for the law to signify to the injury victim, by an award of damages, its recognition of the fact that he has had an unpleasant experience, the memory of which may well continue.[16]

Where pain and suffering are permanent or long term, it is normally because the injury is disabling to some degree. Thus, there is also likely to be a loss of amenities, that is, a loss of the capacity to do certain things or to enjoy doing them. There may not necessarily be a shortened expectation of life. However, as we have noted, the Supreme Court has established that a global sum should be assessed, thereby recognizing, among other things, the similarity of the three heads.[17]

(c) Loss of Amenities and Shortened Expectation of Life

The independent claim for loss of expectation of life was first explicitly recognized by the courts in *Rose v. Ford*.[18] The loss was seen as something in the nature of a loss of a property interest. As Lord Wright stated:[19]

> [A] man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given.

Authority, [1980] A.C. 174, [1979] 3 W.L.R. 44 (H.L.) (subsequent reference is to [1980] A.C.), and Pearson Report, *supra*, note 11, para. 394, at 91. Concerning the distinction between pain and suffering, on the one hand, and the other two heads of damage, on the other, with respect to the question whether an award should be made to an unconscious plaintiff, see text accompanying notes 22-25, 35-36, and 101-04, *infra*.

15 *Skelton v. Collins* (1966), 39 A.L.J.R. 480 (H.C.), at 496, *per* Windeyer J.

16 For pain that is past, damage awards tend to be moderate, although in minor injury cases—which represent the majority of cases—pain and suffering is often the biggest single head of damages. An examination of Stonehouse *et al.* (eds.), *Goldsmith's Damages for Personal Injury and Death in Canada* (Digest Service) discloses that, for minor injuries, non-pecuniary damages can go as high as $10,000, but that the usual range is from $500 to $3,500. A not untypical case described injuries that required no treatment other than ice packs and analgesics, cleared up completely and brought an award of $1,500 in non-pecuniary damages. See, also, Cheng, *Report on Modified No-Fault Automobile Insurance Plan in Ontario* (February 25, 1986), in State Farm Insurance Companies, *Submission To: The Ontario Law Reform Commission Project on Compensation for Personal Injury and Death* (May 31, 1986), Appendix A. "Nuisance" and "minor injury" cases accounted for 72% of claims, "non-economic loss" for 86% of damages paid in "nuisance" cases and 76% in "minor injury" cases (Exhibit 2A to Appendix A).

17 *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2, at 264.

18 [1937] A.C. 826, [1937] 3 All E.R. 359 (H.L.) (subsequent reference is to [1937] 3 All E.R.).

19 *Ibid.*, at 371-72.

In *Benham v. Gambling*,[20] the House of Lords stated that damages should be assessed on the basis of "an *objective* estimate of what kind of future on earth the victim might have enjoyed...". A reasonable and moderate figure should be awarded.[21]

As we have said, loss of the amenities of life refers to the loss of the ability to engage in normal activities and, therefore, the loss of the ability to enjoy life to its fullest. Loss of the amenities of life, together with shortened expectation of life, have frequently been distinguished from pain and suffering on the basis that the last mentioned head of damage is said to be subjective, whereas the first two are said to be objective. This means, presumably, that pain and suffering depend upon an awareness of these conditions on the part of the victim, while loss of amenities and shortened expectation of life can be said to exist notwithstanding the victim's lack of awareness. Thus, in *H. West & Son Ltd. v. Shephard*,[22] a majority of the House of Lords declined to award damages for pain and suffering to an unconscious plaintiff, but did award damages for loss of amenities and shortened expectation of life.

This case was followed by the Supreme Court of Canada in *The Queen in right of Ontario v. Jennings*,[23] but without any analysis of the issues. However, the minority in the House of Lords in *H. West & Son Ltd. v. Shephard* and the majority of the High Court of Australia in *Skelton v. Collins*[24] believed that the damages awarded under the three different heads served roughly the same purpose—solace—and that that purpose would not be advanced by an award to an unconscious plaintiff.[25]

(d) CONCLUSION

Professor Anthony Ogus[26] has outlined three approaches to the assessment of damages for lost amenities:[27] the conceptual approach, which treats

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[20] [1941] A.C. 157, at 167, [1941] 1 All E.R. 7 (H.L.) (emphasis added).

[21] See, also, *Bechthold v. Osbaldeston*, [1953] 2 S.C.R. 177, 4 D.L.R. 783, and *Northland Greyhound Lines Inc. v. Bryce*, [1956] S.C.R. 408, 3 D.L.R. (2d) 81.

[22] [1964] A.C. 326, [1963] 2 W.L.R. 1359 (H.L.). This case followed *Wise v. Kaye*, [1962] 1 Q.B. 638, [1962] 2 W.L.R. 96 (C.A.).

[23] *Supra*, note 14.

[24] *Supra*, note 15.

[25] In the words of Mr. Justice Windeyer of the High Court, damages for non-pecuniary loss are "solace for a condition created" rather than "payment for something taken away" (*ibid*., at 495). See, also, Pearson Report, *supra*, note 11, paras. 393-95, at 91-92.

[26] Ogus, "Damages for Lost Amenities: For a Foot, a Feeling or a Function" (1972), 35 Mod. L. Rev. 1.

[27] Professor Margaret Somerville suggests that the three different methods could be applied to pain and suffering as well: see Somerville, "Pain and Suffering at Interfaces of Medicine and Law" (1986), 36 U. Toronto L.J. 286, at 291-92.

faculties as personal assets, each having an objective "value"; the personal approach, which attempts to evaluate the past, present, and future loss of pleasure and happiness of each injured person; and the functional approach, which awards such a sum as might be used to provide the injured individual with reasonable solace.[28]

In the trilogy, the Supreme Court of Canada considered these three methods of assessment and purported to choose the functional approach. In *Andrews*, Mr. Justice Dickson stated:[29]

> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

At the same time, however, the Court brought an element of subjectivity into the calculation. Notwithstanding that such awards are arbitrary or conventional and that assessability, uniformity, and predictability are important, the Court was of the view that they must have some regard for the individual situation of the victim:[30]

> For example, the loss of a finger would be a greater loss of amenities for an amateur pianist than for a person not engaged in such an activity. Greater compensation would be required to provide things and activities which would function to make up for this loss.

Thus, the view of the Supreme Court of Canada may be summed up in the following propositions. There should be recognition by the law, through an award of damages, that the injury victim has suffered distress and a sense of loss. There is, however, no conclusive test of the appropriate amount of damages to compensate the victim. The award, which must be arbitrary, should be substantial, but limited and, in a sense, conventional. The amount of the award was set by the Supreme Court of Canada at $100,000, in 1978 dollars,[31] in cases involving two quadraplegic plaintiffs and one brain damaged plaintiff, and was described by the Court as a "rough upper limit" for non-pecuniary loss generally.

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[28] Professor Somerville argues that different approaches could be taken to the award of damages for non-pecuniary loss. For example, a subjective approach could be taken to the award of damages for pain and suffering, while an objective approach could be taken to loss of amenities. See *ibid.*, at 291.

[29] *Supra*, note 2, at 262.

[30] *Ibid.*, at 263.

[31] This figure is now just under $200,000. See, for example, *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273, 39 C.C.L.T. 20 (S.C.), where an award for non-pecuniary damages of

In the subsequent case of *Lindal v. Lindal*,[32] in which the Supreme Court of Canada took the opportunity to "continue the exposition" of the principles sketched in the trilogy,[33] the Court rejected what has been called the comparative approach to determining damages for non-pecuniary loss. It was of the view that the amount recovered does not depend on the seriousness of the injury or the extent of the plaintiff's "lost assets"; accordingly, courts should not measure the difference in value between the losses caused by different injuries, so that a person injured only half as seriously would receive only half as much.[34] However, while a sliding scale for awards was rejected, the Court did countenance some degree of flexibility in the awards given to different plaintiffs; consequently, some sort of comparison between victims was, it seems, necessarily contemplated.

On the question whether damages should be awarded for lost amenities to someone who is not aware of the loss, the Supreme Court's decision in *Andrews v. Grand & Toy Alberta Ltd.* may be seen to imply that they should not, although the point is not made explicit and there is no reference to *The Queen in right of Ontario v. Jennings*. If the objective of the damage award is the provision of reasonable solace for misfortune—that is, physical arrangements that can make life more endurable—then that objective cannot be met. Money will not, to use Dickson J.'s words, "serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way".[35] However, as we have seen, conflicting approaches have been taken in England and Australia, and distinctions have been drawn between pain and suffering, on the one hand, and loss of amenities, on the other.[36]

4. SURVIVAL OF ACTIONS

As we have seen,[37] at common law, tort actions did not survive the death of the injured person in favour of his estate.[38] However, all Canadian

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$188,842 was made; *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382, 38 C.C.L.T. 1 (S.C.), where there was an award for non-pecuniary damages of $181,783; and *Mitchell v. U-Haul Co. of Can. Ltd.* (1986), 47 Alta. L.R. (2d) 193 (Q.B.), where an award was made for non-pecuniary damages of $181,000.

[32] *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263 (subsequent references are to [1981] 2 S.C.R.).

[33] *Ibid.*, at 630.

[34] *Ibid.*, at 641-43. See, also, *Richards v. B & B Moving & Storage Ltd.*, unreported (June 27, 1978, Ont. C.A.).

[35] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2, at 262.

[36] See text accompanying notes 13-14 and 22-25, *supra*.

[37] *Supra*, ch. 2, sec. 2(b)(i).

[38] For a discussion of survival actions, see Waddams, *The Law of Damages* (1983), ch. 12; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), ch. 8; and Luntz, *Assessment of Damages for Personal Injury and Death* (2d ed., 1983), ch. 9, sec. 1.

of American states have now enacted dollar limits with respect to such damages.[118]

In California, for example, the Medical Injury Compensation Reform Act[119] provides that non-economic damages, to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other intangible damages, should be limited to $250,000 in personal injury accidents against health care providers. While the California limit is greater than the current value of the $100,000 upper limit set in the Supreme Court of Canada's trilogy, it is also fair to say that California is identified as one of the areas in the United States where jury awards have tended to be most generous. Hence, in a sense, the California limit established by statute represents an even more dramatic policy decision than that represented in Canada by the trilogy, which merely adopted as a "rough upper limit" an amount that had been among the highest awarded in personal injury cases prior to the decisions of the lower courts in *Thornton*, *Andrews*, and *Arnold*.[120]

6. ARGUMENTS AGAINST THE APPROACH IN THE TRILOGY

There is, of course, no demonstrably correct approach to the awarding of damages for non-pecuniary loss. It is, as Canadian, English, and other courts have repeatedly pointed out, an undertaking for which there is no objective measure.[121] The process can, however, be informed by a coherent policy so that the decision will not be arbitrary in the particular case; that is, it need not be contingent solely upon the unfettered discretion of a judge or a jury.

In this section, we shall examine briefly the contention that the present law, represented by the trilogy in the Supreme Court of Canada, is deficient and therefore ought to be reformed.[122] We leave to the next section the narrower questions of the respective roles of the judge and jury, survival of actions, and the award of damages for emotional distress alone.

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[118] See Council of State Governments, *Backgrounder* (December, 1985), which lists 32 states with such legislation.

[119] Cal. Civ. Code § 3333.2.

[120] But see, for example, *Jackson v. Millar*, [1972] 2 O.R. 197 (H.C.J.), where $150,000 was awarded for non-pecuniary loss. This award was left untouched in the Court of Appeal ([1973] 1 O.R. 399) and the Supreme Court of Canada ([1976] 1 S.C.R. 225).

[121] It has been said that, in the trilogy, the "monetary evaluation of non-pecuniary losses was held to be more a philosophical and policy exercise than a legal or logical one": Cherniak and Sanderson, *supra*, note 1, at 212.

[122] See, generally, B.C. Report, *supra*, note 52, esp. at 16-17. For a response to that Report, see Waddams, "Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention?" (1985), 63 Can. B. Rev. 734.

With respect to the recommendation in the B.C. Report to "abolish" the rough upper limit established in the trilogy, Waddams notes the "unresolved conflict" in the

In some cases, criticism of the present law has led to the conclusion that no award should be made for non-pecuniary loss. Two arguments can be raised in favour of such a policy. The first is that because many injury victims now go uncompensated for their pecuniary losses, it would be preferable to direct the money to meeting that shortcoming of the system rather than add it to the compensation of those whose pecuniary awards are adequate.

The other argument raised for abolishing damages for non-pecuniary loss is that such damages constitute a barrier to rehabilitation. It is said that the injury victim's belief that damages for non-pecuniary losses will be reduced by successful efforts on his part to overcome his injury can be subversive of rehabilitation.[123]

With respect to the first argument, it bears emphasizing that the abolition of the right to damages for non-pecuniary loss under the present tort system would not, in itself, serve to redirect the money to any other particular purpose. Redirection—in order to provide full compensation for pecuniary losses, where this is thought to be lacking, or for any other reason—would occur only where it is expressly mandated by a different type of compensatory regime. For example, the denial of damages for non-pecuniary loss tends to be associated with schemes of universal no-fault compensation, either for victims of a particular type of accident or for injury victims generally. In this connection, reference may be made to the Commission's *Report on Motor Vehicle Accident Compensation*,[124] in which we proposed a no-fault compensation scheme in respect of motor vehicle accidents. In that Report, it was recommended that "no compensation should be paid for non-pecuniary losses suffered as a result of a motor vehicle accident".[125] Workers' compensation schemes frequently exclude the possibility of such damages under certain circumstances. By providing compensation for all accident victims in respect of their pecuniary loss, they concentrate resources on the cost of care.

The second argument—concerning the allegedly negative effect of an award of damages for non-pecuniary loss on the rehabilitative efforts of injured persons—is, it appears, a factor in the abolition or limitation of such damages in many of the schemes described above. However, to the extent that the argument carries any weight, it does so only in respect of the period

Report between the desire to impose a known limit, or "reference" point, on damages for non-pecuniary loss and the desire to give a "largely unfettered power in trial courts" to award such damages (*ibid.*, at 740).

[123] Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (1973) (hereinafter referred to as "O.L.R.C. Report"), ch. VI. In the B.C. Report, *supra*, note 52, at 18, it was said that one argument allegedly favourable to an upper limit on non-pecuniary damages was that, without it—that is, if damages were "at large"—there would be "an incentive for personal injury victims to dwell on their misfortunes".

[124] O.L.R.C. Report, *supra*, note 123.

[125] *Ibid.*, at 107.

of time between the injury and the judgment. Once the quantum has been fixed by the court, any malingering by the plaintiff would serve no purpose and, accordingly, any disincentive to rehabilitation would be removed.

Finally, it should be noted that the two arguments considered above may, in fact, be used to advance a cause other than that of completely abolishing awards of damages for non-pecuniary loss. Assuming their validity, at least under some circumstances, it may be said that both of these arguments could be made by those who favour a conventional, limited award, like that endorsed in the trilogy, rather than no award at all.

Criticism of existing law also comes from those who favour a policy of higher awards, sometimes with no upper limit. Several arguments have been advanced in favour of higher awards. One argument that had been raised in the past is that a fixed limit involves the prospect of erosion by inflation.[126] But arguments based purely on the adverse effects of this factor can be easily countered. The courts are now prepared to take inflation into account in applying the upper limit imposed by the trilogy. In *Fenn v. City of Peterborough*,[127] the Ontario Court of Appeal justified an award of $125,000 for non-pecuniary damages on the ground that there had been an erosion in the value of money since the upper limit was established. The case went to the Supreme Court of Canada, which upheld the award, without commenting on the Court of Appeal's reasoning.[128] In *Lindal v. Lindal*,[129] although the Supreme Court of Canada upheld the decision of the British Columbia Court of Appeal to reduce a trial judgment from $135,000 for non-pecuniary damages to $100,000, it also stated:[130]

> Account may be taken of inflation in awarding damages and it is not suggested that the figure of $100,000 should not vary in response to economic conditions, in particular, the debasement of purchasing power as a result of inflation.

It has also been argued that, with an upper limit of $100,000, the amounts available for less serious injuries quickly diminish; but, again, the courts seem to have rejected the notion that there is a sliding scale, with the person injured only half as seriously receiving only half as much.[131] In *Lindal v. Lindal*, the Court explained:[132]

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[126] Cherniak and Sanderson, *supra*, note 1, at 220 *et seq*.

[127] (1979), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (C.A.).

[128] *Sub nom. Consumers' Gas Co. v. City of Peterborough*, [1981] 2 S.C.R. 613, 129 D.L.R. (3d) 507.

[129] *Supra*, note 32.

[130] *Ibid*., at 643.

[131] *Ibid*.

[132] *Ibid*., at 637.

> [T]he amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the 'need for solace will not necessarily correlate with the seriousness of the injury' (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a 'tariff'. An award will vary in each case 'to meet the specific circumstances of the individual case' (*Thornton* at p. 284 of S.C.R.).

A further argument in favour of higher awards for non-pecuniary loss is that greater deterrence would thereby be achieved. While that proposition is no doubt true, the important issue from an economic perspective is obtaining the correct level of deterrence. Whether one is thinking in terms of deterring individuals from rash behaviour or deterring people generally from engaging in a particular activity, the economic argument is that the appropriate degree of deterrence is achieved by requiring that potential wrongdoers face the full social cost of their activities. Accordingly, on this analysis, the appropriate amount of damages from a deterrence standpoint is the social cost of the losses occasioned by the wrongful activity. But this principle does not readily dictate the appropriate amount of damages because the inquiry returns to the question, "What is the appropriate evaluation of the loss?". Unless it can be shown that the Supreme Court's approach does not amount to an adequate assessment of the injured person's losses, the economic conception of deterrence requires no greater award than that endorsed in the trilogy.

Some have argued, in effect, that damages for non-pecuniary loss should be sufficiently high—that is, beyond the Supreme Court of Canada's "rough upper limit"—to compensate the injured person for pecuniary losses not specifically dealt with or foreseen at trial.[133] The Commission cannot, however, see why the courts, or the Legislature, should do indirectly what

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[133] See Pearson Report, *supra*, note 11, para. 360, at 85. See, also, B.C. Report, *supra*, note 52, at 14-16. After appearing to make this type of argument, the B.C. Report stated (*ibid.*, at 15):

> We do not mean to suggest that damages for non-pecuniary loss should be considered as compensation for other heads of loss for which inadequate or no damages are awarded. We merely doubt whether it is safe to assert that adequate compensation on other heads of loss is sufficient reason to assess non-pecuniary losses moderately.

But then the B.C. Report made these comments (*ibid.*, at 16):

> Because of the uncertainty inherent in accurately estimating pecuniary loss, an award for non-pecuniary loss often provides a sum which safeguards the plaintiff from a financial shortfall arising because the assumptions made were wrong. Placing a ceiling on damages for non-pecuniary loss may seriously impair a function performed by those damages as an element of the whole process of adequately compensating the plaintiff.

they might do directly. If it is thought to be essential to expand the heads of damage for pecuniary loss in order to compensate the victim more fully, this ought to be done expressly. Damages to provide solace for such intangible "losses" as pain and suffering, loss of amenities, or loss of expectation of life should not be used as a means of rectifying any basic deficiency in the law relating to awards of damages for pecuniary loss.

Finally, it is said that the policy adopted by the Supreme Court of Canada in the trilogy simply results in inadequate compensation for injured persons with respect to non-pecuniary loss. In other words, it is an argument in favour of greater generosity—basically, more solace—to the victims of injury.

As we have said already, since all agree that there is no truly objective measure of the loss suffered, the determination concerning what constitutes appropriate compensation is a policy decision based on a number of considerations. The Supreme Court, in the trilogy, clearly directed its attention to whether the amount it was awarding was enough to compensate the injured party adequately for non-pecuniary loss. One may disagree,[134] but one cannot prove the Court wrong.[135]

In the trilogy, the Supreme Court of Canada partly justified its policy of restraint on the basis of what it considered to be the likely adverse effect on liability insurance premiums of unlimited and unpredictable awards. The Law Reform Commission of British Columbia was highly critical of the Supreme Court's reasoning with respect to the impact of insurance. The British Columbia Commission was of the opinion that the Court's assessment of the matter was superficial, resting partially on what it said was misleading—and, it appears, ultimately withdrawn—publicity, sponsored by the insurance industry in the United States, claiming that high damage awards would lead to prohibitively high insurance premiums. Indeed, it would appear that the Court's statements on the effect of damage awards on insurance premiums were not based on any empirical evidence; nor was the issue even argued before the Court.

See, also, *ibid.*, at 12: "[W]e have doubts whether damages for non-pecuniary loss serve any one narrow purpose. Confining the level of those damages overlooks a number of other kinds of loss for which a plaintiff usually receives no compensation".

[134] The B.C. Report, *ibid.*, at 21, stated:

> It [the limit imposed in the trilogy] has ... probably led to undercompensating personal injury victims generally.... The only conclusion that can be reached with absolute certainty is that the current 'limit' is far too low.

[135] In the B.C. Report, the dissenting Commissioner stated as follows (Memorandum of Dissent by Anthony F. Sheppard, *ibid.*, at 33):

> Critics of the rule have not shown and indeed cannot show convincingly that the limit is unfair because non-pecuniary losses cannot be objectively quantified and because $100,000 adjusted for inflation and with court order interest is a substantial sum of money.

The British Columbia Commission stated that damages for non-pecuniary loss generally represent a small portion of the total damage award, that awards are not as high as one would believe simply by reading newspaper accounts, and that American awards are, and will likely remain, higher than British Columbia awards because the cost of medical care is much greater in the United States.[136] The Commission conducted a study "to predict the impact on motor vehicle insurance premiums of higher awards for non-pecuniary loss",[137] and drew the conclusion that "concerns over the costs of insurance with respect to compensating for non-pecuniary loss were overstated by the Supreme Court of Canada".[138] It said that increases in premiums, while not nominal, would not be prohibitive.

We are of the view that the question whether the abolition of the trilogy's "rough upper limit" would result in dramatically increased liability insurance premiums cannot be answered conclusively without further empirical data. Arguments have been marshalled on either side; yet, since most evidence is anecdotal, answers are generally speculative and, we believe, will remain so for some time.[139]

The British Columbia Commission raised a further argument against the approach taken by the Supreme Court of Canada in the trilogy. The argument was that, in settling a "rough upper limit" for damages for non-pecuniary loss, the Supreme Court was usurping the role of the Legislature. While, for example, the Commission was willing to countenance the Court "[defining] the role to be played by damages for non-pecuniary loss", the

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[136] *Ibid.*, at 13.

[137] *Ibid.*, at 30.

[138] *Ibid.*

[139] However, it has been argued that "the cost of high awards is ultimately borne by large sections of the public through liability insurance premiums, and that unpredictability of awards as well as their large size increases the cost of insurance": Waddams, *supra*, note 122, at 736. The Ontario Task Force on Insurance also referred, *inter alia*, to the effect of large damage awards on liability insurance premiums (Ontario, *Final Report of the Ontario Task Force on Insurance* (1986), at 38):

> There is no doubt that the current insurance crunch is dominated by a crisis in liability insurance. As noted above, the causes of this crisis are difficult to discern but relate primarily to the extreme uncertainty associated with 'long-tail' risks. The insurer's exposure may extend for many years beyond the time when the insured occurrence took place, and systemic socio - legal and economic changes are constantly shifting the parameters of liability and quantum of damage. This uncertainty has made it impossible for insurers to price the various types of risks and has led directly to the severe problems in availability, adequacy and affordability of liability insurance coverage.

The Task Force indicated that the problem was not serious in all areas of liability-generating activity. The problem seemed most pressing for product manufacturers, municipalities, tavern owners, hotels, hospitals, volunteer groups, contractors, truckers, bus operators, and newspapers. The Task Force called for responses broader than the mere limitation of damages for non-pecuniary losses. But its conclusions do support such a limitation.

Commission was of the view that the Court "was not in the best position to determine whether to impose an arbitrary limit on damages for non-pecuniary loss".[140]

We cannot agree. We believe that it is the proper function of appellate courts to control damage awards. An appellate court, and particularly a court of last resort, must ensure that such awards are fair and consistent, that is, that they are fair as between plaintiffs similarly injured and as between defendants, as well as between the parties in individual cases. It does not appear to us that the objectives of fairness and consistency can be achieved unless there is some sort of scale for comparing one case with another. Any such scale must have an upper end, more or less clearly defined. In our opinion, it is not beyond the proper jurisdiction of an appellate court to indicate, for the guidance of trial courts, where that upper end lies.

7. CONCLUSIONS

(a) THE APPROACH IN THE TRILOGY

The Commission has come to the conclusion that, in a compensation regime based on the idea that a "wrongdoer" should pay for the injury done to another person, it is not appropriate to abolish awards of damages for non-pecuniary loss. We are unaware of any significant public sentiment in favour of abolishing the award of damages under this head.[141] While some surveys have suggested that people might be prepared to give up such compensation in favour of a system that provided compensation for all pecuniary losses on a no-fault basis,[142] this option does not come within the terms of reference of this Report. However, it bears emphasizing that even the no-fault accident compensation regime in New Zealand permits awards for non-pecuniary loss, although of a very modest amount.

Our endorsement of awards of damages for non-pecuniary loss applies equally to past, as well as present, pain and suffering. For some, the notion of "solace", the purpose advanced by the Supreme Court of Canada in the trilogy as the basis of damages for non-pecuniary loss, involves the spending of the award in order to furnish some form of comfort only for anticipated on-going pain and suffering. We believe, however, that the need for solace is not inconsistent with the memory and experience of past pain and suffering, and that it is the *receipt* of the award that furnishes that solace.[143]

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[140] B.C. Report, *supra*, note 52, at 16.

[141] In this connection, see Pearson Report, *supra*, note 11, para. 361, at 86.

[142] O.L.R.C. Report, *supra*, note 123, at 79.

[143] See Cooper-Stephenson and Saunders, *supra*, note 38, at 353-54, and Waddams, *supra*, note 38, para. 393, at 226-27.

In our view, once the decision has been made to retain awards of damages for non-pecuniary loss, the realistic choice is between accepting the general approach laid down by the Supreme Court of Canada in the trilogy, which embraces the idea of moderation in awards and a rough upper limit or, alternatively, recommending more liberal or indulgent awards, perhaps with no upper limit. At this level, the Commission has no trouble endorsing the approach enunciated by the Supreme Court of Canada. It is probably fair to say that no system fully accepts an approach that would involve no upper limit. Even in American jurisdictions, where awards that would be regarded as astronomical in Canadian terms have been permitted, it is nevertheless accepted that an appellate court has the authority to limit or reduce amounts assessed by juries. The importance of recognizing a sense of loss and attempting to provide solace must be balanced against the social burdens of indulgent awards, as well as the impossibility of equating distress with money.

Having said this, the question for the Commission ultimately comes down to what the upper limit should be. The argument for a higher, but still moderate, limit, consistent with the approach adopted by the Supreme Court of Canada, involves several strands, for example, that it would permit more flexibility and give greater scope for assessing adequate awards in less serious cases. In the end, however, the argument seems to be founded on the subjective belief that $100,000, adjusted for inflation but otherwise forming the limit except in very exceptional circumstances, is simply not enough and that the "laddering" effect this has on awards for less serious, but still severe, injuries results in inadequate awards for these injuries.

As we have indicated, in its 1984 Report the Law Reform Commission of British Columbia recommended that "[t]he rough upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada in the 'trilogy' [should] be abolished".[144] In its place, the Commission proposed a "fair upper reference point",[145] represented by the 1975 trial award of $200,000 in *Thornton*. The difference between the British Columbia Commission's "reference point" and the Supreme Court of Canada's "rough upper limit" is not altogether clear.[146] Both attempt to keep damages from escalating in an uncontrolled fashion and to provide consistency and certainty in awards for various kinds of injuries. Fundamentally, then, the distinction would appear to be simply that the reference point imposes the limit at a higher dollar figure.

By way of summary, the Commission believes that the goals of consistency, predictability, and fairness—as between one award and another, and as between awards in one province and awards in another—necessitate the retention of some sort of limit. Since money cannot alleviate pain and

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[144] *Supra*, note 52, at 31 (emphasis deleted).

[145] *Ibid*., at 26.

[146] See Waddams, *supra*, note 122, at 735-36.

suffering or return to the injured person the lost years or lost amenities of life, and given the social burdens of indulgent awards, a reasonable, moderate award is required. In order to advance the goals referred to above, appellate review of lower court awards is essential. So long as some flexibility is assured, in order to deal with very exceptional cases demanding higher awards,[147] and so long as there is an adjustment for inflation in the level of awards, we believe that injured persons are adequately protected by the existing law respecting damages for non-pecuniary loss. If such persons are not properly compensated in respect of pecuniary losses, the remedy clearly lies in reform of that facet of the law. Indeed, it is an essential goal of our recommendations to ensure full recovery for such losses. Accordingly, the Commission recommends that there should be no change in the present law and practice, as enunciated by the Supreme Court of Canada in the trilogy, respecting awards of damages for non-pecuniary loss.[148]

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[147] After a review of the jurisprudence, Waddams concludes that "though in principle the limit might be exceeded on grounds of seriousness of injury, it will in practice be difficult to establish such a case" (*supra*, note 38, para. 381, at 219). See, generally, *ibid*., paras. 379-81, at 217-19.

[148] Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation:

> As Chairman of the Ontario Law Reform Commission, I was a signatory of its 1973 *Report on Motor Vehicle Accident Compensation*. The Commission at that time, apart from the Chairman, comprised three legal practitioners, one of whom specialized as counsel in these particular areas of litigation, and the fourth was the distinguished former Chief Justice of the High Court of Ontario whose judicial career necessarily involved in this area an intimate knowledge of the law and a broad experience in its decision making. The Report of the Commission was unanimous, including the recommendation that "no compensation should be paid for non-pecuniary losses suffered as a result of a motor vehicle accident."
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> Nothing that I have read or heard since then has persuaded me that our decision at that date was wrong and it is therefore with regret that I must dissent from the recommendation of my colleagues in the current Report with respect to the award of non-pecuniary damages. It goes without saying that if there is to be compensation for non-pecuniary loss I would support the view that an upper limit, adjusted from time to time for inflation, be fixed by legislation. The figure of $100,000 was determined in the *Andrews* case by the Supreme Court of Canada to be a proper award and my colleagues have recommended that the practice of our courts on this point since that case be confirmed. It is clear, of course, that the fixing of the figure at $100,000, subject to adjustment for inflation, is no less arbitrary and no more logical than any other figure.
>
> It was said in the *Andrews* case that there is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. It must also be said that as a philosophical matter it is highly doubtful whether money can buy back happiness or palliate pain, and even assuming that it can, when does one establish where an infusion of dollars begins to be palliative and at what point in future dosage does one run into the law of diminishing returns? It is a given, of course, that everything that can reasonably be provided in terms of present and future care ought to be provided and certainly one should not skimp on the one with an expectation that the slack will be taken up on the other.
>
> It has been said in our current Report that some surveys have suggested that the people might be prepared to give up damages for non-pecuniary losses as a *quid*