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Apart from the statutory considerations, a court is not likely to look kindly upon an argument that newspapers be treated differently from other defendants in order to avoid the chilling effect that a damage award might have on freedom of the press. As Deschenes C.J.S.C. said in *Snyder v. Montreal Gazette*,[409] "those who would imprudently risk, by a stroke of the pen, to destroy the reputation of such dedicated men ought to be prepared to pay the high price that such a misdeed deserves".[410] On the other hand, the mere fact that the defendant does not establish lack of actual malice and gross negligence in order to satisfy the statutory requirement, does not preclude the court from otherwise considering an apology in mitigation of damages under the usual common law view.[411]

6. Punitive Damages

A jury or judge is free to give to the plaintiff what is essentially a windfall and to make an award of damages over and above that which would ordinarily compensate the plaintiff for the wrong that was done.[412] Such an award has been variously referred to as retributory,[413] exemplary,[414] vindictive,[415] punitive,[416] or "smart money",[417] although the term "punitive" seems to be most commonly used in Canada.[418] It has been described by one American judge as a "hybrid between

409 (1978), 87 D.L.R. (3d) 5 at 19 (Que. S.C.), modified in part as to damages (1983), 5 D.L.R. (4th) 206 (C.A.).

410 "[I]t has been argued that a large damage award would have a chilling effect on . . . the media in acting as watchdog, and that would be against the public interest. No legitimate public interest can be hurt by discouraging the media from abusing its freedom and power": per Esson J. in *Vogel v. C.B.C.* (1982), 3 W.W.R. 97 at 181 (B.C.S.C.). Unfortunately, few Canadian judges have attempted to explore in depth the policy implications in such an assertion.

411 *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 at 120-121 (H.C.).

412 *Ibid.*

413 *Allan v. Bushnell T.V. Co.*, [1969] 2 O.R. 6 (C.A.).

414 *McElroy v. Cowper-Smith*, [1967] S.C.R. 425; *Stieb v. The Vernon News*, [1947] 4 D.L.R. 397 (B.C.S.C.); *O'Neal v. Pulp, Paper & Woodwkrs. of Can.*, [1975] 4 W.W.R. 92 (B.C.S.C.); *Booth v. B.C. T.V. Broadcasting System* (1982), 139 D.L.R. (3d) 88 (B.C.C.A.); *Gillett v. Nissen Volkswagen Ltd.*, [1975] 3 W.W.R. 520 (Alta. S.C.); *Knott v. Telegram Printing Co.*, [1917] 3 W.W.R. 335 (S.C.C.); *Imperadeiro v. Imperadeiro* (1977), 76 D.L.R. (3d) 765 (B.C.S.C.).

415 *Knott v. Telegram Printing Co.*, [1917] 1 W.W.R. 974 (Man. C.A.), affirmed (1917), 55 S.C.R. 631; *Levi v. Reed* (1881), 6 S.C.R. 482; *Stirton v. Gummer* (1899), 31 O.R. 227 (C.A.).

416 *McElroy v. Cowper-Smith*, [1967] S.C.R. 425; *O'Neal v. Pulp, Paper & Woodwkrs. of Can.*, [1975] 4 W.W.R. 92 (B.C.S.C.); *Stieb v. The Vernon News*, [1947] 4 D.L.R. 397 (B.C.S.C.); *Knott v. Telegram Printing Co.*, [1917] 3 W.W.R. 335 (S.C.C.); *Ross v. Lamport*, [1957] O.R. 402 (C.A.); *Allan v. Bushnell T.V. Co.*, [1969] 2 O.R. 6 (C.A.); *Gillett v. Nissen Volkswagen Ltd.*, [1975] 3 W.W.R. 520 (Alta. S.C.); *Morgenstern v. Oakville Record Star*, [1962] O.R. 638 (H.C.); *Platt v. Time Int. of Can. Ltd.*, [1964] 2 O.R. 21, affirmed without reasons [1965] 1 O.R. 510 (C.A.); *Stirton v. Gummer* (1899), 31 O.R. 227 (C.A.).

417 *Wilson v. Walt*, 138 Kan. 205, 25 P. 2d 343 (1933); *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920).

418 Traditionally, common law courts have distinguished between aggravated damages, which compensate a plaintiff for an affront to his feelings, and punitive damages, which punish a defendant for his reprehensible conduct. Davies L.J. in *Broadway Approvals Ltd. v. Odhams Press Ltd.*, [1965] 1 W.L.R. 805 at 822 (C.A.) identified the essential differences: "If the libel outraged the plaintiffs, that would be a proper matter for consideration in awarding compensatory damages. But if the libel outraged the jury . . . that would not be a proper matter for them to take into account:

a display of ethical indignation and the imposition of a criminal fine."[419] Its purpose is to permit the court to express its outrage or indignation at, or disapproval of, the conduct of the defendant,[420] punish him for it,[421] or serve to deter the defendant and others from a repetition of the same or similar conduct.[422] The Faulks Committee has recommended that awards of punitive damages be abolished,[423] and in England they are narrowly confined.[424]

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for to give effect to that would be not to compensate but to punish." Some Canadian courts have suggested that the distinction between the two has disappeared, and lump them together in one award for punitive damages: see *S v. Mundy*, [1970] 1 O.R. 764 (Co. Ct.). However, see the recent decision of *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 (H.C.), where the court awarded aggravated damages in the sum of $25,000.

419 Per Garrison J. in *Haines v. Schultz*, 50 N.J. L. 481, 14 A. 488 at 489 (1888).

420 *Stieb v. The Vernon News*, [1947] 4 D.L.R. 397 (B.C.S.C.). "Punitive or exemplary damages in a libel case are awarded in condemnation of the conduct of the defendant": per Macfarlane J., *id.*, at 399. See also *Knott v. Telegram Printing Co.*, [1917] 1 W.W.R. 974 (Man. C.A.), affirmed (1917), 55 S.C.R. 631; *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 (H.C.); *Johnson v. Jolliffe* (1981), 26 B.C.L.R. 176 (S.C.); *Vogel v. C.B.C.*, [1982] 3 W.W.R. 97 (B.C.S.C.).

421 *Knott v. Telegram Printing Co.*, [1917] 1 W.W.R. 974 (Man. C.A.); *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 (H.C.); *Allan v. Bushnell T.V. Co.*, [1969] 2 O.R. 6 (Ont. C.A.).

422 *Johnson v. Jolliffe* (1981), 26 B.C.L.R. 176 (S.C.); *Vogel v. C.B.C.*, [1982] 3 W.W.R. 97 at 185 (B.C.S.C.); *Gillett v. Nissen Volkswagen Ltd.*, [1975] 3 W.W.R. 520 (Alta. S.C.); *Knott v. Telegram Printing Co.*, [1917] 1 W.W.R. 974 (Man. C.A.). In *Roberge v. Tribune Publishers Ltd.* (1977), 20 N.B.R. (2d) 381 (S.C.), the court awarded punitive damages at twice the amount approved in settlement of a previous libel in order to deter the defendant from repeating his conduct a third time. In *Uren v. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118 at 147 (Aust. H.C.), Menzies J. argued that such awards would not have a chilling effect on free speech. He said: "In Australia, no one could say that, if the vigorous assertion and application of this rule were to curb the malice and arrogance of some defamatory publications, it would not serve a useful purpose in vindicating the strength of that part of the law which protects people's reputation, and would afford that protection without encroaching in any way upon the liberty of the Press. A vigilant concern with freedom of speech is in no way inconsistent with the recognition that malicious and callous disregard for a man's reputation deserves discouragement". For a general survey of the law, see G.H.L. Fridman, "Punitive Damages in Tort" (1970), 48 Can. Bar Rev. 373. See also L.F.S. Robinson, "Exemplary Damages for Defamation" (1929), 3 Aust. L.J. 250, 292.

423 See Summary of Recommendations, para. 384 (c). The report quotes extensively from the judgment of Lord Reid in *Cassell & Co. v. Broome*, [1972] A.C. 1027 at 1087 (H.L.), noted in (1972), 30 C.L.J. 232, who felt that an award for punitive damages contravened those principles that had evolved for the protection of offenders. He noted that the offences meriting such an award are not defined, that the punishment was unlimited and inflicted not by a judge but by a jury which may be swayed by emotion, and that there is no effective appeal from the penalty. Pearson L.J. in *McCarey v. Assoc. Newspapers Ltd. (No. 2)*, [1965] 2 Q.B. 86 at 105 (C.A.) said that the "object of the award of damages in tort nowadays is not to punish the wrongdoer, but to compensate the person to whom the wrong has been done" and that the court should not permit "punitive . . . damages to creep back into the assessment in some other guise". More recently, Stephenson L.J. observed that it was "unfortunate" that Parliament had not given effect to the Faulks Committee's recommendation that punitive damages be abolished: *Riches v. News Group Newspapers Ltd.*, [1986] 1 Q.B. 256 at 269 (C.A.).

424 Presently in England punitive damages in actions for libel and slander are limited to oppressive, arbitrary or unconstitutional actions on the part of the government, or where a defendant's actions are marked by conduct designed to make a profit under circumstances where it may exceed the damages for the defamation: see *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.). Punitive damages were deemed appropriate in the latter instances because "one man should not be allowed to sell another man's reputation for profit": per Lord Devlin, *id.*, at 1227. On the other hand, the mere fact that a newspaper sells information for a profit does not automatically bring it within the

Where punitive damages are awarded, they are limited to exceptional cases,[425]

exception. As Widgery J. said in *Manson v. Assoc. Newspapers Ltd.*, [1965] 1 W.L.R. 1038 at 1040-1041, noted in [1965] C.L.J. 206; (1965), 28 Mod. L. Rev. 361; (1965), 81 L.Q.R. 321: "[T]he mere fact that a newspaper is run for profit and that everything published in the newspaper is published, in a sense, with a view to profit, does not automatically bring newspaper defendants into the category of those who may have to pay exemplary damages on the footing that what they have done has been done with a view to profit. A newspaper which reports news in an ordinary run of the mill way and happens to make a mistake in its report is not to be mulcted in exemplary damages merely because what it does is done with a view to profit. On the other hand it is perfectly clear . . . that in a case in which a newspaper quite deliberately publishes a statement which it either knows to be false or which it publishes recklessly, careless whether it be true or false, and on the calculated basis that any damages likely to be paid as a result of litigation will be less than the profit which the publication of that matter will give, then . . . exemplary damages are permissible". In *Riches v. News Group Newspapers Ltd.*, [1986] 1 Q.B. 256 (C.A.), the court held that there was sufficient evidence to support a finding that the defendant newspaper published an article knowing it was defamatory, and calculated to secure an economic advantage greater than any damages likely to be awarded. However, it held that the £250,000 exemplary damages awarded to the ten plaintiffs were excessive, and ordered a new trial. Stephenson L.J. approved the following excerpt from *Duncan and Neill on Defamation* (2d ed. 1983) para. 18.27, at p. 136 as a correct statement of English law: "(a) Exemplary damages can only be awarded if the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss. 'What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty.' (b) The mere fact that a libel is committed in the course of a business carried on for profit, for example the business of a newspaper publisher, is not by itself sufficient to justify an award of exemplary damages. (c) If the case is one where exemplary damages *can* be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purpose of compensating the plaintiff but also for the purpose of punishing the defendant. It is only if the sum proposed by way of compensatory damages (which may include an element of aggravated damages) is insufficient that the court or jury should add to it enough 'to bring it up to a sum sufficient as punishment'. (d) The sum awarded as damages should be a single sum which will include, where appropriate, any elements of aggravated or exemplary damages. (e) The plaintiff can only recover exemplary damages if he is the victim of the punishable behaviour. (f) A jury should be warned of the danger of an excessive award. (g) The means of the parties, though irrelevant to the issue of compensatory damages, can be taken into account in awarding exemplary damages. (h) Where a number of persons are sued the question of exemplary damages has to be considered by reference to the least guilty of the defendants": *id.*, at 269-270. Diplock L.J. has offered an explanation for the policy underlying the *Rookes v. Barnard* exceptions. He said: "There is, first, the historical and anomalous exception of abuse of power by servants of government, with its echoes of eighteenth-century struggles against oligarchic and arbitrary rule. There is the second exception flowing from the principle that the law is mocked if it enables a man to make a profit from his own wrong-doing. This is not punishment; it is merely preventing the defendant from obtaining a reward for his wrong-doing": *McCarey v. Assoc. Newspapers Ltd. (No. 2)*, [1965] 2 Q.B. 86 at 107 (C.A.), noted in [1965] C.L.J. 206; (1965), 81 L.Q.R. 321. These restrictions have been mostly ignored in Canada. In fact, in Ontario a judge was admonished by an appellate court for suggesting to a jury that in recent times the tendency has been to depart from awarding punitive damages. According to Kelly J.A., such was not the law in the province of Ontario: *Gouzenko v. Lefolii*, [1967] 2 O.R. 262 (C.A.), affirmed and varied on other grounds [1969] S.C.R. 3.

425 In *Paletta v. Lethbridge Herald Co. (No. 2)* (1976), 4 Alta. L.R. 97 at 106 (S.C.), O'Bryne J. instructed the jury on the circumstances when punitive damages might be awarded: "These damages should not be awarded except in cases where a defendant has been high-handed and vindictive or consciously contemptuous of the plaintiff's rights and he has published a libel knowing that it

when they are clearly warranted[426] and the defendant's actions "merit the

would damage the plaintiff, or where there was a callous disregard for the plaintiff and his rights." In Quebec punitive damages are not permitted, although in the recent case of *Snyder v. Montreal Gazette Ltd.* (1978), 87 D.L.R. (3d) 5 (Que. S.C.), a jury awarded the plaintiff $135,000 for "financial and moral damages" in a libel action. However, this award was later reduced to $13,500: (1983), 5 D.L.R. (4th) 206 (C.A.). In Australia, the assessment of punitive damages was an established practice before the decision in *Rookes v. Barnard*, and, as a result, the Privy Council in *Australian Consol. Press Ltd. v. Uren*, [1969] 1 A.C. 590 (P.C.) felt it appropriate to recognize this "well-settled judicial approach". However, New South Wales does not permit an award of exemplary damages in actions for defamation: Defamation Act, 1974, s. 35(3)(a). New Zealand, like Canada, permits punitive damages: *C.W. Wah Jang and Co. v. West*, [1933] N.Z.L.R. 235 (S.C.); *Fogg v. McKnight*, [1968] N.Z.L.R. 330 (S.C.). The use of punitive damages against newspapers is discussed and approved in R.A. Hayes, "Newspaper Libel — The Deterrent and Vindicatory Effect of General Damages Awards" (1967), 5 U.Q.L.J. 370. The author concludes: "Exemplary damages may be justified, in that they serve a useful social purpose, providing a deterrent from conscious wrongdoing, where the criminal prosecution is inappropriate": *id.*, at 391. In the United States, the award of punitive damages has been greatly restricted in defamation cases involving publishers or broadcasters. Such awards may be made only where "actual malice" has been shown, that is, where there is "a showing of knowledge of falsity or reckless disregard for the truth", and where the plaintiff has suffered actual injury: *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974). Otherwise, said the court, juries would be invited "to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact": *id.*, at 349, per Powell J. The reasoning of *Gertz* is based upon the constitutional concern expressed by the court for the chilling effect that punitive damages might have on the legitimate exercise of First Amendment rights. However, the particular case involved a media defendant, and there is still an unanswered issue as to whether the court intended to extend its reasoning to non-media defendants. Lower courts have divided on the issue. Some courts have refused to apply the constitutional test to private litigants: see e.g. *Rowe v. Metz*, 195 Colo. 424, 579 P. 2d 83 (1978); *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 228 N.W. 2d 737 (1975); *Adams v. State Farm Mut. Auto. Ins. Co.*, 283 Or. 45, 581 P. 2d 507 (1978). Other courts have applied the constitutional standard to all defendants: see *Millsaps v. Bankers Life Co.*, 35 Ill. App. 3d 735, 342 N.E. 2d 329 (1976); *Nelson v. Cail*, 120 Ariz. 64, 583 P. 2d 1384 (1978). It would appear, however, that a majority of the justices on the United States Supreme Court would extend the constitutional protection to non-media defendants, at least if the matter involved a topic of public concern: see Chapter 27. Some American states do not permit an award of punitive damages at all: see e.g. *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W. 2d 472 (1975); *Munson v. Gaylord Broadcasting Co.*, 491 So. 2d 780 (La. App. 1986). In Canada, punitive damages have been allowed in the following cases of defamation: *O'Neal v. Pulp, Paper & Woodwkrs. of Can.*, [1975] 4 W.W.R. 92 (B.C.S.C.) ($1,000); *Thompson v. NL Broadcasting Ltd.* (1976), 1 C.C.L.T. 278 (B.C.S.C.) ($2,500); *Imperadeiro v. Imperadeiro* (1977), 76 D.L.R. (3d) 765 (B.C.S.C.); *Kolewaski v. Island Properties Ltd.* (1983), 56 N.S.R. (2d) 475 (S.C.); *Gillett v. Nissen Volkswagen Ltd.*, [1975] 3 W.W.R. 520 (Alta. S.C.); *Quinn v. Beales*, [1923] 3 W.W.R. 561 (Alta. S.C.), reversed on other grounds (1924), 20 Alta. L.R. 620 (C.A.); *Knott v. Telegram Printing Co.*, [1917] 1 W.W.R. 974, affirmed (1917), 55 S.C.R. 631; *Roberge v. Tribune Publishers Ltd.* (1977), 20 N.B.R. (2d) 381 (S.C.); *Morgenstern v. Oakville Record Star*, [1962] O.R. 638 (H.C.); *Booth v. B.C. T.V. Broadcasting System* (1982), 139 D.L.R. (3d) 88 (B.C.C.A.); *Good v. North Delta-Surrey Sentinel*, [1985] 1 W.W.R. 166 (B.C.S.C.); *Mitchell v. Clement* (1919), 14 Alta. L.R. 248 (C.A.); *Platt v. Time Int. of Can. Ltd.*, [1964] 2 O.R. 21, affirmed without reasons [1965] 1 O.R. 510 (C.A.); *Levi v. Reed* (1881), 6 S.C.R. 482; *McCain Foods Ltd. v. Agricultural Publishing Co.* (1978), 22 N.B.R. (2d) 30 (Q.B.); *Johnson v. Jolliffe* (1981), 26 B.C.L.R. 176 (S.C.); *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 (H.C.); *Vogel v. C.B.C.*, [1982] 3 W.W.R. 97 (B.C.S.C.); *Hubert v. DeCamillis* (1963), 44 W.W.R. 1 (B.C.S.C.) (alternative basis for award). On the other hand, although specifically requested to do so, courts have refused such an award in *Pulp and Paper Wkrs. of Can. v. Int. Brotherhood of Pulp, Sulphite and Paper Mill Wkrs.*, [1973] 4 W.W.R. 160 (B.C.S.C.); *Lawson v. Burns*, [1975] 1 W.W.R. 171 (B.C.S.C.); *Bennett v. Stupich* (1981), 30 B.C.L.R. 57 (S.C.); *Stieb v. The Vernon News*, [1947] 4 D.L.R. 397 (B.C.S.C.); *Siepierski v. F.W. Woolworth Co.* (1979),

condemnation of the court".[427] Even then they may not be available where the crown has pursued a successful criminal libel prosecution involving the same conduct.[428] There must be evidence of what the court has variously described as "a deliberate act consciously directed" against the plaintiff's reputation,[429] or malicious conduct,[430] or "'conscious, contumelious and calculated wrongdoing'",[431] or behaviour that can be characterized as "gross",[432] reckless,[433] outrageous,[434] reprehensible and irresponsible,[435] or "high-handed, insolent, vindictive or consciously contemptuous" of the plaintiff's rights.[436] However, "'if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, . . . no vindicative damages should be given.'"[437]

The evidence necessary to establish such conduct is essentially the same as that which would enhance an award of ordinary damages. Certainly if there is evidence that the defendant consciously set out to "get" the plaintiff, an award of punitive damages will be appropriate.[438] A court will take into consideration the character of the plaintiff,[439] the prominence or importance of the defendant

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427 Per Esson J. in *Vogel v. C.B.C.*, [1982] 3 W.W.R. 97 at 185 (B.C.S.C.).

428 The general rule in Canada is that punitive damages will not be awarded "where the defendant has already been punished in the criminal courts for the same conduct": Linden, *Canadian Tort Law* (3d ed. 1982), at p. 53. See also *Radovskis v. Tomm* (1957), 9 D.L.R. (2d) 751 (Man. Q.B.); *Loomis v. Rohan*, [1974] 2 W.W.R. 599 (B.C.S.C.). However, the fact that a plaintiff has received a punitive award in a civil case will not bar the Crown from proceeding with a criminal prosecution involving the same publication: *Menard v. R.*, [1934] 1 D.L.R. 155 (Que. C.A.).

429 Per Quigley J. in *Gillett v. Nissen Volkswagen Ltd.*, [1975] 3 W.W.R. 520 at 536 (Alta. S.C.). See also *Platt v. Time Int. of Can. Ltd.*, [1964] 2 O.R. 21, affirmed without reasons [1965] 1 O.R. 510 (C.A.). While most Canadian courts refer to some deliberate or intentional wrongdoing, there is a trend in the direction of permitting recovery for less serious forms of misconduct: see e.g. *Robitaille v. Vancouver Hockey Club Ltd.* (1979), 19 B.C.L.R. 158, affirmed (1980), 26 B.C.L.R. 1 (C.A.).

430 *Hubert v. DeCamillis* (1963), 44 W.W.R. 1 (B.C.S.C.); *Roberge v. Tribune Publishers Ltd.* (1977), 20 N.B.R. (2d) 381 (S.C.); *Stieb v. The Vernon News*, [1947] 4 D.L.R. 397 (B.C.S.C.); *Allan v. Bushnell T.V. Co.*, [1969] 2 O.R. 6 (C.A.).

431 *Barltrop v. C.B.C.* (1978), 25 N.S.R. (2d) 637 at 664 (C.A.), per MacKeigan C.J., citing *Australian Consol. Press Ltd. v. Uren*, [1967] A.L.R. 54 (Aust. H.C.).

432 *Mitchell v. Clement* (1919), 14 Alta. L.R. 248 (C.A.).

433 *Fraser v. Sykes*, [1971] 1 W.W.R. 246, affirmed [1971] 3 W.W.R. 161, (Alta. C.A.), which was affirmed [1974] S.C.R. 526; *Platt v. Time Int. of Can. Ltd.*, [1964] 2 O.R. 21, affirmed without reasons [1965] 1 O.R. 510 (C.A.).

434 *Johnson v. Jolliffe* (1981), 26 B.C.L.R. 176 (S.C.).

435 *Ibid.*

436 Per Schroeder J.A. in *Allan v. Bushnell T.V. Co.*, [1969] 2 O.R. 6 at 17-18 (C.A.). See also *Goodman v. Kidd*, [1986] N.W.T.R. 94 (S.C.). Accord: Taylor J. in *Uren v. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118 at 129 (Aust. H.C.).

437 Per Rose J. in *Stirton v. Gummer* (1899), 31 O.R. 227 at 234 (C.A.), quoting from *Odgers on Libel and Slander* (3d ed.) at pp. 301, 302. Where punitive damages are sought against an employer for the actions of his or her employees, some American courts require a finding that management "authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant": per Kaye J. in *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y. 2d 369, 494 N.E. 2d 70 at 74 (1986).

438 *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 (H.C.). In this case the evidence showed that a reporter said of the plaintiff, "I've got that fucking Munro", and another reporter referred to him in a memorandum as that "sleeze Munro".

439 "Defamation of a professional man is a very serious matter and ordinarily would be visited with an award of substantial damages, including punitive or exemplary damages if the circumstances so warrant": per Hall J. in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425 at 426. In this case the

in the community,[440] the fact that he or she abused a position of public trust[441] or knew at the time of the publication that the statement was untrue,[442] and that the defendant selected a vehicle for publication that would give the defamatory remarks the widest possible circulation.[443]

The nature of the defamatory remark is also extremely important. Language which is disproportionately abusive or insulting to the plaintiff may exacerbate the wrong. Thus, the imputation of unchastity to a woman, such as the remark, "Mrs. Mitchell wanted me to take $30 out in trade at $1 at a time", was visited with a punitive award.[444] In *Imperadeiro v. Imperadeiro*,[445] the court found an accusation by a husband that his estranged wife tried to poison him sufficiently outrageous to warrant the assessment of exemplary damages. In *Crosskill v. The "Morning Herald" Printing and Publishing Co.*,[446] in justifying the punitive damages, the court found "exceedingly offensive" the charge against the plaintiff that he was "a willing and active participator in an office which, for eleven years, was a sink of iniquity wherein public robbery ran riot and where political villainy of almost every species was concocted and perpetrated", that he lacked "fidelity and honesty" and that he should be placed on "the same list with the chief baker whom Pharaoh hung". In *Knott v. Telegram Printing Co.*,[447] an article charging the plaintiff with extortion and using corrupt influence in the issuance of liquor licences warranted an award of exemplary damages because Perdue J.A. found it "would be difficult to find a case in which all the elements which tend to aggravate the damages more completely co-exist".[448] Perhaps the most blatant example of defamation in Canada, where punitive damages were awarded, was in the remarks made by one doctor about a colleague which accused the latter, among other things, of murder, madness, extortion, medical ignorance and malpractice without any evidence of provocation on the plaintiff's part. The defendant capped this

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the court felt an award of punitive damages was inappropriate since no one was likely to believe the defendant.

440 *Ross v. Lamport*, [1957] O.R. 402 (C.A.). The court was of the opinion that the fact that the defendant was the mayor of the city and a member of the police commission would add greater weight and credibility to his accusation.

441 *Ross v. Lamport, ibid.*

442 *Hubert v. DeCamillis* (1963), 44 W.W.R. 1 (B.C.S.C.); *Ross v. Lamport, ibid.*

443 *Ibid.*

444 *Mitchell v. Clement* (1919), 14 Alta. L.R. 248 (C.A.).

445 (1977), 76 D.L.R. (3d) 765 (B.C.S.C.). The accusation had the effect of excluding the plaintiffs from the Portuguese community and alienating the female plaintiff from her family.

446 (1883), 16 N.S.R. 200 at 214 (C.A.).

447 [1917] 1 W.W.R. 974 (Man. C.A.).

448 *Ibid.*, at 985. The following passage identifies the factors considered by Perdue J.A.: "The plaintiff was at the time of the publication of the article and had been for a considerable time, a merchant doing business in Winnipeg where the defendant's newspaper was published and had a very wide circulation. The article, in effect, charged him with conspiring with another person to wrongfully extort money . . . It was false and malicious. Its vindictive character was evidenced by the epithets applied to the plaintiff. Opportunity to retract was given to the defendants and refused by them. When the plaintiff brought the action the defendants set up justification and averred the truth of the statements contained in the article, and kept this defence upon the files of the Court up to the very commencement of the trial. Then that defence was withdrawn and no attempt was made to justify or excuse the publication": *id.* Anglin J. specifically concurred in this judgment on appeal: [1917] 3 W.W.R. 335 at 341 (S.C.C.).

performance by repeating the same remarks in court without offering any evidence in corroboration.[449]

The court will also take into consideration any repetition of the defamatory publication on the defendant's part,[450] his or her failure or refusal to offer an appropriate apology or retraction,[451] and the persistence in a plea of justification,[452] particularly where the defendant knows the statement is untrue.[453] Even the failure of the defendant to appear and defend the action may be seen as "arrogance" and "nonchalance" meriting a punitive award.[454]

There is no clear rule governing the amounts that may be awarded as punitive damages in Canada. The awards have ranged from $400[455] to $5000,[456] although there are cases of substantial awards where the punitive damages were not separated from the compensatory award.[457]

In some American jurisdictions, evidence of the wealth or reputed wealth of the defendant is admissible for the purpose of quantifying the punitive damages,[458] although that is more likely to be true in those states that perceive punitive damages as a basis for deterring or punishing the defendant than in those that assess punitive damages to fully compensate the plaintiff for the injury suffered.[459] Some courts

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449 *Levi v. Reed* (1881), 6 S.C.R. 482. The trial judge awarded a modest $1,000 damages which was reduced by the Quebec Court of Queen's bench to $500 but reinstated by the Supreme Court of Canada. Ritchie C.J. said that "in the whole course of my judicial experience I . . . [never] . . . knew of a man who has been so persistently pursued by such slanderous, scandalous and malicious statements": *id.*, at 489.

450 *Roberge v. Tribune Publishers Ltd.* (1977), 20 N.B.R. (2d) 381 (S.C.); *Morgenstern v. Oakville Record Star*, [1962] O.R. 638 (H.C.).

451 *Hubert v. DeCamillis* (1963), 44 W.W.R. 1 (B.C.S.C.); *McCain Foods Ltd. v. Agricultural Publishing Co.* (1978), 22 N.B.R. (2d) 30 (Q.B.); *Ross v. Lamport*, [1957] O.R. 402 (C.A.); *Morgenstern v. Oakville Record Star, supra*.

452 *Morgenstern v. Oakville Record Star, supra*.

453 *Hubert v. DeCamillis* (1963), 44 W.W.R. 1 (B.C.S.C.); *Ross v. Lamport*, [1957] O.R. 402 (C.A.). Generally, it is the character and behaviour of the defendant that is weighed by a court in determining an award of punitive damages, and not the defamatory statement's impact on the reputation of the plaintiff. Therefore, the decision of the Supreme Court of Canada in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425, allowing an appeal against an award of punitive damages on the ground that persons would not likely be affected by defamatory comments coming from an unstable person, must be considered an anomaly.

454 *McCain Foods Ltd. v. Agricultural Publishing Co.* (1978), 22 N.B.R. (2d) 30 at 39 (Q.B.).

455 *Quinn v. Beales*, [1923] 3 W.W.R. 561 (Alta. S.C.), reversed on other grounds (1924), 20 Alta. L.R. 620 (C.A.). See also *Mitchell v. Clement* (1919), 14 Alta. L.R. 248 ($500) and *Booth v. B.C. T.V. Broadcasting System* (1982), 139 D.L.R. (3d) 88 (B.C.C.A.) ($500).

456 *Good v. North Delta-Surrey Sentinel*, [1985] 1 W.W.R. 166 (B.C.S.C.). See also *Imperadeiro v. Imperadeiro* (1977), 76 D.L.R. (3d) 765 (B.C.S.C.) ($2500); *Johnson v. Jolliffe* (1981), 26 B.C.L.R. 176 (S.C.); *Thompson v. NL Broadcasting Ltd.* (1976), 1 C.C.L.T. 278 (B.C.S.C.).

457 *Knott v. Telegram Printing Co.*, [1917] 1 W.W.R. 974 (Man. C.A.), affirmed (1917), 55 S.C.R. 631 ($11,500); *Platt v. Time Int. of Can. Ltd.*, [1964] 2 O.R. 21, affirmed without reasons [1965] 1 O.R. 510 (C.A.) ($35,000). And see *Farrell v. C.B.C.* (1983), 44 Nfld. & P.E.I.R. 182 (Nfld. S.C.), where the court did not award exemplary damages because he felt that the compensatory award he gave ($80,000) would serve the same purpose.

458 *Wollman v. Graff*, 287 N.W. 2d 104 (S.D. 1980); *Snodgrass v. Headco Industs. Inc.*, 640 S.W. 2d 147 (Mo. App. 1982); *Peisner v. Detroit Free Press*, 68 Mich. App. 360, 242 N.W. 2d 775 (1976); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E. 2d 636 (1969); *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975).

459 *Peisner v. Detroit Free Press*, 68 Mich. App. 360, 242 N.W. 2d 775 (1976). As Holbrook P.J. said:

have considered the net worth of the defendant the best index for this purpose,[460] while others have also admitted specific proof relating to income, cash flow, expenses, anticipated income, anticipated diminutions of income and anticipated casualties.[461]

In joint publications, there is authority in the language of one case for the proposition that the award of punitive damages against the defendants should not reflect a figure greater than that for which punitive damages could be assessed against any one of them.[462] However, a British Columbia Court recently held that such damages could be separately assessed in different amounts against each of the defendants.[463] This latter approach has the support of most American jurisdictions, where the view is held that "punitive damages, in order to be fair and effective, must relate to the degree of culpability exhibited by a particular defendant and to that party's ability to pay."[464]

Where there are multiple plaintiffs, the jury should be instructed to compute the amount of compensatory damages to be awarded to each plaintiff and then add to the total compensatory damages a sum for punitive damages. The latter sum should then be divided equally among the plaintiffs.[464a]

7. Nominal Damages

Nominal damages are appropriate under circumstances where special damages have not been proven, and the judge or jury is desirous of vindicating the plaintiff's reputation.[465] Such damages are particularly appropriate where the plaintiff's

"Since punitive damages are not intended to punish the defendants for their actions, evidence of the Free Press' financial situation is immaterial": *id.*, at 780.

460 *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 334 N.E. 2d 79 (1975).

461 *I.U.O.E., Loc. 675 v. Lassitter*, 295 So. 2d 634 (Fla. App. 1974), reversed on other grounds, 314 So. 2d 761 (Fla. 1975).

462 Lord Hailsham in *Cassell & Co. v. Broome*, [1972] A.C. 1027 at 1063 (H.L.) said "awards of punitive damages in respect of joint publications should reflect only the lowest figure for which any of them can be held liable. . . . I think that the inescapable conclusion to be drawn from these authorities is that only one sum can be awarded by way of exemplary damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication, and that this sum must represent the highest *common* factor, that is, the *lowest* sum for which any of the defendants can be held liable on this score." This also appears to be the view of the Ontario Court of Appeal in *Gay Co. v. Trick* (1926), 60 O.L.R. 8 (C.A.), where Smith J.A. said: "Where one of the joint wrongdoers has so acted as to justify exemplary damages and the other has not, the malicious motive of one cannot be made the ground of exemplary damages against the other, and if such damages are desired by the plaintiff he must sue separately the one from whom he claims such exemplary damages. If he joins both in one action, the innocence of the one defendant will to this extent protect the other": *id.*, at 13.

463 *Vogel v. C.B.C.*, [1982] 3 W.W.R. 97 (B.C.S.C.). The British Columbia Law Reform Commission has drafted a proposed provision which would ensure that the judge assessed punitive damages separately against several defendants according to their culpability: *Report on Defamation* (1985) at p. 64.

464 Per Digges J. in *Embrey v. Holly*, 293 Md. 128, 442 A. 2d 966 at 973 (1982).

464a *Riches v. News Group Newspapers Ltd.*, [1986] 1 Q.B. 256 (C.A.). In this case the jury assessed £25,000 punitive damages and then multiplied that amount by the number of plaintiffs, giving a total of £250,000 punitive damages. The court ordered a new trial.

465 *Warren v. Green* (1958), 25 W.W.R. 563 (Alta. S.C.) ($100); *Bennett v. Sun Publishing Co.*, [1972]

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CHAPTER 11

EXEMPLARY DAMAGES

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1. THE GENERAL BAN ON EXEMPLARY DAMAGES

406 THE primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages, even retributory damages,[1] and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like. Whether a modern legal system should recognise exemplary damages at all has been much debated, but it is thought that, all in all, the case for dispensing with them is made out. The central argument against them is that they are anomalous in the civil sphere, confusing the civil and criminal functions of the law[2]; in particular, it is anomalous that money exacted from a defendant by way of punishment should come as a windfall to a plaintiff rather than go to the state. On the other side, a major justification of exemplary damages is that their existence provides a suitable means for the punishment of minor criminal acts which are in practice ignored by police too caught up in the pursuit of serious crime.[3]

407 In the 1760s exemplary damages first made their appearance on the English legal scene. The earliest cases arose in the *cause célèbre* of John Wilkes and the *North Briton*. In the government's effort to stop the *North Briton* from being published, a variety of individuals suffered interference at the hands of public officials, and in two tort actions of 1763 based upon such interference, *Huckle* v. *Money*[4] and *Wilkes* v. *Wood*,[5] awards of exemplary damages were made. By the end of the

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[1] As by Byles J. in *Bell* v. *Midland Ry.* (1861) 10 C.B.(N.S.) 287, 308. In *Broome* v. *Cassell & Co.* [1972] A.C. 1027 Lord Hailsham L.C. thought it desirable to abandon the use of "vindictive" and "retributory" and, as between "exemplary" and "punitive," preferred the former (*ibid.* 1073C–F); Lord Diplock (*ibid.* 1124H–1125A) would have preferred "punitive," but accepted the Lord Chancellor's lead in adhering to Lord Devlin's "exemplary" in *Rookes* v. *Barnard* [1964] A.C. 1129. For these two leading cases, see § 408, *infra*.

[2] See the cogent remarks of Lord Reid in *Broome* v. *Cassell & Co.* [1972] A.C. 1027, 1087C–F, where he pointed out that "to allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders."

[3] The arguments pro and con are fully listed in Street, *Principles of the Law of Damages* (1962), pp. 34–36.

[4] (1763) 2 Wils.K.B. 205.

[5] (1763) Lofft 1. The plaintiff was John Wilkes himself.

decade further awards had appeared in other contexts,[6] and thereafter exemplary damages became a familiar feature of tort—though never contract—law, being awarded not only in cases of assault, false imprisonment, defamation, seduction and malicious prosecution but also in cases of trespass to land and, eventually, trespass to goods.[7]

408 In the 1960s the situation totally changed. In *Rookes* v. *Barnard*[8] the House of Lords took the opportunity to review the whole doctrine and held that, except in a few exceptional cases which are dealt with later,[9] it is no longer permissible to award exemplary damages against a defendant, however outrageous his conduct. That their lordships recognised the exemplary principle as out of place in the law of damages is clear from the fact that they stated that their task was to consider, in the absence of any decision of the House approving an award of exemplary damages, whether it was open to them "to remove an anomaly from the law of England."[10] There was, however, an attempt by the Court of Appeal in *Broome* v. *Cassell & Co.*[11] to question the decision, but on the appeal in that case their lordships put paid to any such questionings.[12] The House was, in the words of the Lord Chancellor, "not prepared to follow the Court of Appeal in its criticisms of *Rookes* v. *Barnard*, which . . . imposed valuable limits on the doctrine of exemplary damages as they had hitherto been understood in English law and clarified important questions which had previously been undiscussed or left confused."[13] "We cannot," he added, "depart from *Rookes* v. *Barnard* here. It was decided neither *per incuriam* nor *ultra vires* this House."[14]

409 The result is that two centuries of authorities have become suspect. Yet the new thinking does not have such a drastic effect upon the existing case law as would at first sight appear. For as Lord Devlin, who spoke for all their lordships on the issue of exemplary damages, pointed out in *Rookes* v. *Barnard*,[15] there is a double rationale behind such awards. "When one examines the cases in which large damages have been awarded for conduct of this sort," he said, "it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed."[16] The House considered that practically all the so-called exemplary damages cases could, and should, be explained as cases of aggravated damage—that is, as cases of extra compensation to the plain-

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[6] *Benson* v. *Frederick* (1766) 3 Burr. 1845 (assault); *Tullidge* v. *Wade* (1769) 3 Wils.K.B. 18 (seduction).

[7] The cases are all set out and discussed in the 12th ed. of this work at §§ 208–211.

[8] [1964] A.C. 1129.

[9] See §§ 411–423, *infra*.

[10] [1964] A.C. 1129, 1221.

[11] [1971] 2 Q.B. 354 (C.A.).

[12] [1972] A.C. 1027.

[13] *Ibid.* 1082E.

[14] *Ibid.* 1083D. Out of a full House of seven, only two, Viscount Dilhorne and Lord Wilberforce, favoured the pre-*Rookes* position.

[15] [1964] A.C. 1129. Confirming the view advanced in the 12th ed. of this work at §§ 212–214.

[16] *Ibid.* 1221.

tiff for the injury to his feelings and dignity[17]—and indeed it was the availability of this alternative explanation of the cases which allowed the House to place a general ban upon exemplary damages while remaining within the framework of precedent. Lord Devlin hoped that the decision of the House would

> "remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength which it ought to have. Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes."[18]

Accordingly, the House did not find it necessary to overrule the earlier authorities *en masse*. Indeed, only one case, *Loudon* v. *Ryder*,[19] was expressly overruled; the great majority fall now to be explained as awards on account of aggravated damage.[20]

410 Lord Devlin expressed the view in *Rookes* v. *Barnard*[21] that exemplary damages were a peculiarity of English law. It is more exact to regard them as a peculiarity of the common law, not accepted by other legal systems. For the English lead of the 1760s was in fact taken up both throughout the Commonwealth and in the United States of America, while the English *volte face* of the 1960s has not been largely followed by other jurisdictions within the common law family.[22] Indeed, in Australia a clear rejection emerged when, in a libel action, the High Court refused to adopt the new English approach.[23] This refusal, moreover, was upheld on appeal by the Judicial Committee of the Privy Council,[24] basing its decision on two factors: that Australia, unlike England before *Rookes*, had already fully accepted the exemplary principle, with all its implications, where damages for libel were concerned; and that it was a matter for Australia, in an area of domestic rather than international

[17] *Cf.* in particular Lord Atkin's statement in *Ley* v. *Hamilton* (1935) 153 L.T. 384, 386 (H.L.) that damages for defamation "are not arrived at . . . by determining the 'real' damage, and adding to that sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained that the damages are at large. It is impossible to track the scandal, to know the quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation."

[18] [1964] A.C. 1129, 1230.

[19] [1953] 2 Q.B. 202 (C.A.).

[20] *e.g. Owen and Smith* v. *Reo Motors* (1934) 151 L..T. 274 (C.A.) and *Williams* v. *Settle* [1960] 1 W.L.R. 1072 (C.A.), which are so justified at [1964] A.C. 1129, 1229. But awards in cases falling within the permitted exceptions to the general ban on exemplary damages (§§ 411–423, *infra*.;) may still be upheld on their original basis.

[21] [1964] A.C. 1129, 1221.

[22] For case and textbook references to other jurisdictions, both within and without the common law, see the 13th edition of this work at § 305. Since the new English approach is now settled, it is thought that continued reference to the position elsewhere is no longer needed.

[23] *Uren* v. *John Fairfax & Sons Pty.* [1967] Argus L.R. 25; (1966) 40 A.L.J.R. 124; *Australian Consolidated Press* v. *Uren* [1967] Argus L.R. 54; (1966) 40 A.L.J.R. 142.

[24] *Australian Consolidated Press* v. *Uren* [1969] 1 A.C. 590 (P.C.).

significance where the need for uniformity within the Commonwealth is less, to decide whether to change her settled judicial policy on this issue in the law of libel.[25] However in *Broome* v. *Cassell & Co.*[26] Lord Hailsham L.C. said that he viewed with dismay the doctrine that the common law should differ in different parts of the Commonwealth, and expressed the hope that, in the light of their lordships' observations on *Rookes*, Commonwealth courts might modify their criticism of it.[27]

2. EXCEPTIONAL CASES IN WHICH EXEMPLARY DAMAGES MAY BE AWARDED

411 While laying down that, as a general rule, exemplary damages should no longer be awarded, their lordships in *Rookes* considered that they "could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle,"[28] and there remain three categories of cases in which awards of exemplary damages continue to be legitimate, though not mandatory as whether to make an award is in the court's discretion.[29] Two of the categories are established as part of the common law; to these there is to be added the category of exemplary damages expressly authorised by statute. However, though there is now appearing to be some scope for the first of the common law categories, only the second is likely to prove of any great practical importance; indeed it may even possess an interesting potential for growth. It is therefore considered last.

(1) *Express authorisation by statute*

412 The statutory category can be briefly dealt with. In the past, it has been known for statutes expressly to empower the courts to award exemplary damages in respect of particular wrongs where this is justified by the conduct of the defendant. Clearly, the House of Lords in *Rookes* had no option but to accept these dictates of statute, and therefore no question of rationalising the incidence of exemplary damages in this category arose. Nevertheless, statutory provisions of this nature were already extremely few and far between before *Rookes* and, understandably now that exemplary damages have been generally prohibited, none has appeared since. Lord Devlin gave by way of illustration only one[30] and that came from a statute of a somewhat esoteric nature, the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, giving by Part I protection to servicemen against remedies involving interference with

[25] *Ibid.* 637, 641, 642, 644.
[26] [1972] A.C. 1027.
[27] *Ibid.* 1067H and 1083C.
[28] [1964] A.C. 1129, 1226.
[29] See *Holden* v. *Chief Constable of Lancashire* [1987] Q.B. 380, 388D and 389B (C.A.).
[30] [1964] A.C. 1129, 1225. *Cf.* the seventeenth- and eighteenth-century statutes cited at § 1042, n. 70, § 1375, n. 26, and § 1379, n. 48, *infra*, allowing a double or treble recovery.

goods, such as execution, distress and the like, and providing by section 13(2) that in any action for damages for conversion in respect of such goods the court may take into account the defendant's conduct and award exemplary damages. In *Broome* Lord Kilbrandon interpreted "exemplary" in section 13(2) as meaning "aggravated," basing this interpretation upon the fact that the subsection applies, by section 13(6), to Scotland where exemplary damages are not recognised.[31] Indeed he expressed himself as "not convinced that any statutory example of the recognition of the doctrine is to be found,"[32] and appears to have taken the view that with the confusion of terminology before *Rookes*, all references to exemplary damages in pre-*Rookes* statutes should be treated as referring to aggravated damages, putting forward the ingenious suggestion that, to make sense of the provision in the survival of actions legislation of 1934 prohibiting "exemplary" damages in actions by, but not against, the estate[33] "exemplary" must be read as "aggravated."[34]

413 Certainly, where there is a statute which makes no express reference to exemplary damages but is so phrased as to permit an authorisation to award exemplary damages to be inferred, such an inference is now not likely to be drawn. This situation arises with the Copyright Act 1956, which by section 17(3) gives the court power, in assessing damages for an infringement of copyright, to award such "additional damages" as the court may consider appropriate in the light of the flagrancy of the infringement and any benefit accruing to the defendant by reason of it. This provision had been held in *Williams* v. *Settle*[35] to permit an award of exemplary damages, but Lord Devlin reserved his opinion in *Rookes* v. *Barnard*[36] as to whether the Act "authorises an award of exemplary, as distinct from aggravated, damages." Yet the answer to this question would appear to be implicit in Lord Devlin's own speech: since he was careful to phrase this category in terms of exemplary damages which are *expressly* authorised by statute,[37] the provision of the Copyright Act must fall outside its ambit. In *Broome*, while Lord Kilbrandon expressed himself as satisfied that section 17(3) did not authorise exemplary damages,[38] Lord Hailsham L.C. said that even if it did—and he considered the point an open one—*Williams* v. *Settle*[35] should be regarded as a case falling within the second common law category as the defendant's motive was profit.[39]

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[31] [1972] A.C. 1027, 1133G.
[32] *Ibid.* 1133D.
[33] See §§ 717 and 722, *infra*.
[34] *Ibid.* 1133E–F.
[35] [1960] 1 W.L.R. 1072 (C.A.).
[36] [1964] A.C. 1129, 1225.
[37] *Ibid.* 1227.
[38] [1972] A.C. 1027, 1134A.
[39] *Ibid.* 1080G–H; and see also *Nichols Advanced Vehicle Systems* v. *Rees, Oliver* [1979] R.P.C. 127 at § 1716, *infra*.

(2) *First common law category: oppressive conduct by government servants*

414 The first of the two common law categories comprises cases in which, in Lord Devlin's words in *Rookes*, there has been "oppressive, arbitrary or unconstitutional action by the servants of the government;"[40] in *Broome* their Lordships were agreed that "government servants" was to be widely interpreted so as to include the police and local and other officials.[41] This category is based primarily on the eighteenth-century cases which introduced the general doctrine of exemplary damages.[42] While the general justification advanced by the House in *Rookes* for retaining such cases within the exemplary damages net is that here "an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal,"[43] more important is the particular justification which is put by way of a contrast between public servants on the one hand and private corporations and individuals on the other. With the latter,

> " . . . where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."[44]

Accordingly, the facts of *Rookes* itself, which concerned trade unions and trade disputes, fell outside this category.[45]

415 It may be a matter for speculation how far the House, in selecting this category, was really impressed by the difference in the context of damages between the public and private sectors and how far it was motivated by the need to retain some scope for exemplary damages in order not to appear to be acting too cavalierly with the doctrine of precedent[46]; in such a search, what better authorities to leave standing than those in which exemplary damages had originated? In *Broome*[47] Lord

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[40] [1964] A.C. 1129, 1226.

[41] See especially [1972] A.C. 1027, 1077H–1078B, 1087H–1088B and 1130B, *per* Lords Hailsham, Reid and Diplock respectively.

[42] See § 407, *supra*.

[43] [1964] A.C. 1129, 1226.

[44] *Ibid*. 1226.

[45] Lord Hailsham L.C. in *Broome* v. *Cassell & Co.* [1972] A.C. 1027, 1078B expressed himself as "not prepared to say without further consideration that a private individual misusing legal powers of private prosecution or arrest . . . might not at some future date be assimilated into the first category"; but, given the motivation of imposing limits on exemplary damages, it is thought that such a development is unlikely.

[46] See text accompanying § 411, n. 28, *supra*.

[47] [1972] A.C. 1027, 1129H–1130A.

Diplock doubted whether today it was still necessary to retain this category but in any event it seems unlikely that in practice there will be many cases which will fall within it. The tort books and the court lists are hardly full of cases of actions arising out of oppressive conduct of public servants. It is probably true to say that the first three cases of the opening salvo in the campaign for exemplary damages[48] are the only decisions of the past two centuries which survive, after *Rookes*, by virtue of falling within this category, while *Holden* v. *Chief Constable of Lancashire*[49] is a so far isolated latterday illustration.[50] In that case it was accepted that a wrongful arrest by a police officer fell within the category and that, accordingly, whether or not to award exemplary damages should have been left to the jury; the court was not prepared to accept that every act of a police officer without authority brought the category into play[51] though it was of the view that, if an act did so because of unconstitutionality, there was no need also to show arbitrary and oppressive behaviour since there were in this first common law category in effect three sub-categories.[52]

(3) *Second common law category: conduct calculated to result in profit*

416 The second of the two common law categories comprises cases in which, again in Lord Devlin's words in *Rookes*, "the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff."[53] As with the first common law category, the general justification advanced was that here exemplary damages could serve a useful purpose in vindicating the law's strength,[54] but, once again, it is the particular justification which is the more important. "Where a defendant," said Lord Devlin,

> " . . . with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which he either

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[48] *Huckle* v. *Money* (1763) 2 Wils.K.B. 205; *Wilkes* v. *Woods* (1763) Lofft 1; *Benson* v. *Frederick* (1766) 3 Burr. 1845.

[49] [1987] Q.B. 380 (C.A.).

[50] See too *A.-G. of St. Christopher, Nevis and Anguilla* v. *Reynolds* [1980] A.C. 637, especially at 662F–G, where the propriety of an exemplary award was not in dispute, and *Columbia Picture Industries* v. *Robinson* [1987] Ch. 38, especially at 87 D–F, where there was no claim for exemplary damages but Scott J. was disposed to think that solicitors executing, oppressively and excessively, an Anton Piller order as officers of the court fell within this category.

[51] [1987] Q.B. 380, 387H–388B (C.A.).

[52] *Ibid.* 388C–D.

[53] [1964] A.C. 1129, 1226.

[54] See text preceding § 414 n. 43, *supra*.

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As a practical matter, it must be conceded that vesting jurisdiction in the Federal Court over Charter matters raised in proceedings which were otherwise properly before that court would avoid the need to apply to a provincial superior court for a Charter remedy. Vesting such jurisdiction exclusively in the Federal Court would eliminate the potential for forum shopping.

The goals of avoiding inconsistency and forum shopping would not be met by the third alternative which is to vest concurrent jurisdiction over Charter issues in both the provincial superior courts and the Federal Court.

The conclusion which is suggested in light of this analysis of the potential approaches to be taken regarding jurisdiction over Charter issues is that the creation of the Charter and the emergence of the issue of jurisdiction over it has created a need to re-evaluate the need for and scope of the jurisdiction of the Federal Court system as a whole. Prior to the existence of the Charter, it was relatively clear in what court one could bring a challenge to federal legislation or administrative action either on a constitutional issue in the division of powers sense or on the basis that the administrative action in question was not supportable under the empowering legislation. Furthermore, the interpretation given to the *Jabour* case in the *Waddell* and *Williams* cases, assuming that the latter two cases will find favour with the judiciary instead of the *Chicken Marketing* case, has raised the potential problems of inconsistency and forum shopping in cases not involving the Charter. Section 28(4) of the *Federal Court Act*, as applied in *Northern Telecom*, might have the same effect in division of powers cases. Thus, even aside from the new problems raised by the creation of the Charter, the difficulties discussed above suggest that statutory reform is required to clarify the jurisdiction of the Federal Court and to minimize or eliminate the potential problems of inconsistent decisions and forum shopping. Whether that statutory reform should entail a reduction of the jurisdiction or an elimination of the Federal Court system is an issue which is beyond the scope of this article. However, a reconsideration of the role of the Federal Court is appropriate in light of the jurisdictional difficulties which are addressed in the cases discussed above, particularly in light of the need for consistent application of and rational access to the principles and protections afforded by the Charter. The creation of the Charter warrants a re-examination of the respective jurisdictions of the various courts which are or might be required to interpret and apply it.

MATTERS OF INTEREST

*Donald E. Short**

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* Of Campbell, Godfrey & Lewtas. This article is a revision of a paper delivered by the author at the Annual Institute of the Canadian Bar Association (Ontario).

Introduction

Many of the younger members of the Ontario Bar find it surprising to learn that up until 1977, the only usual situation in which interest could be awarded in addition to damages was in the situation of a monetary debt or "sum certain". Statutory amendments made in Ontario that year permitted recovery in most other situations. Perhaps, because any interest award was regarded as better than none, there has been a tendency by plaintiffs to claim only the statutory rate provided for by the applicable statute without considering available alternatives. While each province has its own particular statutory provisions, it is hoped that although this article will focus on Ontario it will nevertheless serve the purpose of encouraging counsel across the country to be more imaginative in asserting and defending interest claims to better serve the interests of their clients.

Effective November 25, 1977, the *Judicature Act*, R.S.O. 1970, c. 228, was amended by S.O. 1977, c. 51, s. 3, to eventually become s. 36 of the *Judicature Act*, R.S.O. 1980, c. 223. Appendix A reproduces that section together with the present statutory provisions of the *Courts of Justice Act*, S.O. 1984, c. 11.

In particular, subsecs. (5)(*f*) and (6) of s. 36 preserved the court's discretion to disallow interest or to award it at a rate other than that provided by the section.

For example, in *Sipco Oil Ltd. v. D'Amore Construction (Windsor) Ltd.* (1981), 21 C.P.C. 313 (Ont. Master), Master MacRae held that it would be inappropriate to award interest only at the lower rate which was in force at the time the action was commenced and awarded interest at a higher rate because to do otherwise would have made it profitable for the debtor to have withheld payment.

The case of *McCann v. B & M Renovating* (1983), 34 C.P.C. 188 (Ont. H.C.J.), is another useful precedent with respect to the inclination to award the average of the interest rates during the accumulation of the claim. Where the prime rate varied between 12% and 20%, the court decided that the appropriate rate to award was 16%.

In a 1986 decision, *Chatham Motors Ltd. v. Fidelity & Casualty Ins. Co. of New York; Putnam, Third Party* (1986), 53 O.R. (2d) 581, 7 C.P.C. (2d) 251 (H.C.J.), White J. allowed the plaintiff prejudgment interest on equitable principles for the period prior to November 25, 1977. The court held that the defendant insurers had been withholding payment of just debts owing to the plaintiff and that, as a consequence, the plaintiff was entitled to prejudgment interest for the full period from the accident including that period prior to the legislative change notwithstanding the difficulty faced by the insurers in calculating the appropriate amount of the claim.

In the course of preparing this article, I had occasion to refer to two excellent publications which may be of assistance in this area. The first is an article by Dianne Saxe entitled "Judicial Discretion in the Calculation of Prejudgment Interest", 6 Adv. Q. 433 (1985-86). The second is a speech delivered by Bernard Gluckstein to the Law Society's Personal Injury Damages Program held on May 24, 1986. His paper deals particularly with problems related to prejudgment interest in cases involving a claim for bodily injury.

1. The Present Rules

When the Rules of Civil Procedure were brought into effect in 1985, there were some minor modifications with respect to the manner in which the interest rate was to be established. Instead of looking to the *prime* rate, which presented difficulties because the Bank of Canada Review was not published until some time after the prime rates were set, the *bank* rate was inserted as that rate was able to be established immediately. In order to provide more certainty for the practising bar and to avoid the necessity of calling evidence, s. 137(2) of the *Courts of Justice Act, 1984* further provides that the Registrar shall establish and publish forthwith after the first day of the last month of each quarter the applicable rate for all actions commenced during the next quarter. The applicable rates established to date are:

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
1988	10%			
1987	10%	9%	10%	11%
1986	11%	13%	10%	10%
1985	12%	13%	11%	11%

2. When Does the Prejudgment Interest Period End?

It is useful to note that the term "date of the order" is used

throughout the interest sections in order to make it clear that the relevant date for the end of the prejudgment interest period and the commencement of the postjudgment interest period is the date the order is made even though it may not be entered or enforceable on that date or even though the order may be varied on appeal. The definition also provides that the relevant date for determining interest rates in the event of a reference is the date that the report on the reference is confirmed since it is not until that date that the exact amount owing will become known. These provisions appear to provide a legislated solution to the problems which were confronted by the Court of Appeal in 1981 in *Canada Square Corp. Ltd. v. Versafood Services Ltd.* (1981), 130 D.L.R. (3d) 205, 34 O.R. (2d) 250, where an adjournment of the trial was obtained on the condition that prejudgment interest would not continue to run and a reference was ordered at trial which did not conclude until long after the trial.

The result of this provision is that counsel ought to avoid any situations where prejudgment interest is suspended as a condition of an adjournment since in the event of a reference there may be a substantial loss of interest.

3. Interest on Non-Pecuniary Damages — From the Trilogy to Borland

Consideration of interest on portions of a prejudgment claim in cases involving catastrophic injuries requires a brief review of the so-called trilogy cases: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* (1978), 83 D.L.R. (3d) 480, [1978] 2 S.C.R. 267; and *Arnold v. Teno* (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287. These cases set the upper limit on awards for non-pecuniary general damages at $100,000 in 1978. Since that time the courts have been prepared to acknowledge a progressive increase in the current equivalent of the buying power of $100,000 in 1978. In its brief to the Ontario Task Force on Insurance, the Advocates' Society noted that in February of 1986 that amount would be $184,000, and, applying a 4% inflationary factor for the past year the maximum amount a person can be awarded for pain and suffering and loss of amenities of life is now approximately $191,000.

The issue which arose and was considered in the case of *Borland v. Muttersbach* (1984), 15 D.L.R. (4th) 486, 49 O.R. (2d) 165 (H.C.J.), reversed on another point 23 D.L.R. (4th) 664, 53 O.R. (2d) 129 (C.A.), was whether or not such a lump sum constituted a part of the judgment that represented pecuniary loss arising after the date of the judgment and was thus not subject to a further award in the form of prejudgment interest on that amount.

Defence counsel at trial and on the appeal argued that the then $170,000 non-pecuniary damages amount included an element of double counting of interest and inflation. A five-member Court of Appeal ruled as follows with respect to these submissions (at pp. 681-2 D.L.R., p. 146 O.R.):

> They rely on the decision of R.E. Holland J. in *Graham et al. v. Persyko* (1984), 30 C.C.L.T. 85, where, at p. 103, he reduced the rate of prejudgment interest to 2½% for the following reasons:
>
> > "It is clear, however, that my assessment carried an element of inflation with it. It is above the old upper limit. In these circumstances the award of $125,000 will bear interest at only 2-½% per cent from February 23, 1981 to the date of judgment."
>
> Barr J. gave careful consideration to this argument in his judgment. He rejected it for the following reasons [at pp. 187-8 O.R., pp. 508-9 D.L.R.]:
>
> > "The award of $170,000 will purchase no more goods and services than $100,000 in 1978. The plaintiff receiving $170,000 in 1984 is receiving the same compensation as the plaintiff receiving $100,000 in 1978 although expressed in different dollars. Whatever the award, the statute gives the plaintiff the *prima facie* right to receive prejudgment interest on it at the prime rate prevailing in the month before it was issued. A defendant who is prepared to forgo investment income may reduce or extinguish the plaintiff's claim for prejudgment interest by making an advance payment or payments. An insurer who wishes to invest the money at current high rates should not profit by having the benefit of such rates while being required only to pay a nominal rate of interest to the plaintiff. In my view, this would discourage advance payments, thereby adding to the distress of the victims and would be contrary to the policy reflected by s. 36.
> >
> > "I am troubled too by the practical application of the *Graham* case. The context suggests that the trial judge there had in mind inflation occurring since the Trilogy. If inflation continues the upper limit, and presumably awards, will double in a matter of years if awards are adjusted for inflation. A case tried ten years hence will have an upper limit (assuming inflation at 7% per annum continuing) of $350,000, an increase of $250,000, an amount which will undoubtedly exceed the prejudgment interest accumulated after the statutory rate. To follow the *Graham* case would result in a refusal of prejudgment interest and, in effect, the abolition of prejudgment interest on non-pecuniary damages in such cases.
> >
> > "I conclude that the fact of inflation is not a proper ground to deprive

> the plaintiffs of their *prima facie* right to receive prejudgment interest at a prime rate."
>
> There was evidence to support the trial judge's decision on these issues and there is no evidence which would establish that he erred in reaching this decision. There is, therefore, no reason for this Court to interfere with his decision as to the award of prejudgment interest on the non-pecuniary damages payable to Shelley Borland.

In his trial decision in this case, Mr. Justice Barr also held as follows (at p. 509 D.L.R., p. 188 O.R.):

> In answer to defence counsel's point that non-pecuniary damages in a case of serious personal injuries are designed to provide solace in the future and to that extent are damages for future pecuniary loss, there are several answers. The first is that the plaintiffs' rights to damages accrue at the date of the injury and include a right to general damages. Although the amount of such damages may be difficult to ascertain, the insurer does set aside a reserve. If the insurer retains it rather than make advance payments he will receive the income from the fund but he does so at the risk of paying prejudgment interest.

The Court of Appeal commented on this finding as follows (at p. 682 D.L.R., p. 147 O.R.):

> A similar argument was rejected by this Court in *Spencer v. Rosati*, *supra*, which was reported after his judgment. In that case it was argued that prejudgment interest was inappropriate on at least a portion of the non-pecuniary damages because the victim would endure part of the pain and suffering after they were fixed. The reasons for rejecting this argument were stated by Morden J.A. at pp. 665-6 as follows:
>
> "... we think that this introduces an unnecessary complexity into the determination of interest which is at odds with the terms of the legislation. Even if part of a judgment for non-pecuniary loss is notionally to cover the future our law requires a single, once and for all, payment to be made now. We see no warrant for extending judicially the policy set forth in s. 36(5)(*d*) respecting future pecuniary loss."

This would appear to settle the law in Ontario and establish that interest is awardable on payments of this nature from the date notice of the claim is served.

4. Interim Payments

The *Borland* case also dealt with the attitude of some of the insurers who failed to make interim payments which Barr J. described as "remarkably callous". As a result he refused to reduce the interest rate from the 21.25% which was in force in the month preceding the commencement of the action.

Conversely, in *Bettencourt v. State Farm Mutual Auto Ins. Co.* (1985), 13 C.C.L.I. 139, [1985] I.L.R. ¶1-1941 (Ont. S.C.), Flinn

D.C.J. held that where the full amount of the plaintiff's claim was paid by the defendant prior to trial, the plaintiff was not entitled to prejudgment interest under s. 36(3) of the *Judicature Act* since the plaintiff was not "a person entitled to a judgment for the payment of money" since all such money had been paid.

Section 224 of the Insurance Act, R.S.O. 1980, c. 218, deals with advance payments by an insurer in the case of motor-vehicle liability claims. Subsection 3 of that section provides as follows with respect to interim payments:

> 224(3) Where the person commences an action, the court shall adjudicate upon the matter first without reference to the payment but in giving judgment the payment shall be taken into account and the person shall only be entitled to judgment for the net amount, if any.

In *Baboi v. Gregory* (1986), 56 O.R. (2d) 175, 9 C.P.C. (2d) 230 (Dist. Ct.), the advance payment exceeded the amount recovered at trial. Costello D.C.J. held that the plaintiff was entitled to prejudgment interest from the date of the accident to the date of the advance payment. He ordered that the advance payment be taken into account and the plaintiff paid any net amount remaining.

The Divisional Court recently had occasion to consider whether or not interest ought to be allowed in favour of insurers making advance payments in *Ciceri v. Wyatt* (1986), 21 C.C.L.I. 1, [1986] I.L.R. ¶1-2122. Mr. Justice Barr noted that the *Judicature Act* permitted plaintiffs to claim prejudgment interest but made no allowance for interest accruing on advance payments in the plaintiff's hands. He continued (at p. 3 C.C.L.I., p. 8209 I.L.R.):

> However, s. 224 of the Insurance Act, under which the defendant made interim payments, contains no corresponding provision. It makes no provision for interest on interim payments. Possibly this is through legislative oversight or possibly the Legislature did not consider it just to allow the defendant to receive interest on money accruing to the plaintiff for his damages. In any event, as the law now stands the defendant who makes advance payments loses the investment income he would otherwise earn on the money but also reduces or extinguishes the plaintiff's entitlement to prejudgment interest. The legislation does not give him the additional benefit of interest on the amount prepaid.
>
> Mr. Bark feels that this is unfair to defendants. If so, it is because of statutory provisions which apply. Failing statutory amendment this Court has no jurisdiction to make such an award.

5. Examples of the Exercise of the Court's Discretion

Section 140 of the *Courts of Justice Act, 1984* provides that the

court may, where it considers it just to do so, having regard to changes in market interest rates, the circumstances of the case, the conduct of the proceeding or any other relevant consideration either disallow interest or allow interest at a rate higher or lower than that provided for in ss. 138 and 139 for any period in respect of the whole or any part of the amount on which interest is payable. This discretion allows a fair degree of latitude to the court. I believe that counsel should be more aware of the potential for additional recovery as a result of this judicial discretion. For example, if the court can be convinced to award interest compounded semi-annually rather than simple interest, the gain to the plaintiff, assuming a 10% rate of interest, will be an additional $4,000 for every $100,000 awarded.

A. Rate Averaging

The courts seem to have accepted that taking a reasonable average of the interest rates in effect from the time the cause of action arose is the easiest way to deal with widely fluctuating interest rates. Several cases have applied this approach. A recent example is the decision of Rosenberg J. in *Haverkate v. Toronto Harbour Com'rs* (1986), 30 D.L.R. (4th) 125 at p. 134, 55 O.R. (2d) 712 at p. 721 (H.C.J.). In that case, his Lordship found that the rate of interest had fluctuated from a low of 8.25% in January of 1978 to a high of 22.75% in August of 1981 and, under all of the circumstances, thought that it was appropriate to allow an average rate of 12% per annum.

In *French v. Zuzic; Pafco Ins. Co. Ltd., Third Party*, a decision of Montgomery J., summarized at (1984), 25 A.C.W.S. (2d) 453 (Ont. H.C.J.), the court did not award the average rate but rather allowed interest at the higher rate that existed when the writ was issued. However, in that case the trial was prolonged by the conduct of the defence in what appeared to have been tactics of obstruction.

The disadvantage of this approach is that it does not permit certainty as to the ultimate interest liability of the defendant. Thus, it may be prudent for a defendant in times of high interest rates to delay settling the claim in hopes that rates will go down and result in a lower rate of interest being payable at some future date.

Another type of rate averaging is applied where the pecuniary losses suffered by a plaintiff are not all incurred at once. Rather than doing a separate calculation on each item a practice has developed of allowing one-half the applicable interest rate on the total claim. Mr. Justice Barr in *Borland* accepted this practice; however, he applied one-half the rate in force when the writ was issued rather than one-half the average rate and this was not disturbed on appeal.

B. Total Denial

In appropriate circumstances, the court can deny the plaintiff recovery of any interest. In *Savioli & Morgan Co. Ltd. v. Vroom Construction Ltd.* (1975), 63 D.L.R. (3d) 274 at p. 278, 10 O.R. (2d) 381 at p. 385 (H.C.J.), Lerner J. held that:

> The wide disparity between the amounts claimed and counterclaimed required detailed examination by way of evidence in order to determine the amount, if any, owing by either party on the many items in dispute. It would have been unreasonable to attempt to conclude, without a trial the amounts that these items would constitute in dollars. ... I cannot find that the amount claimed was improperly withheld.

While this case was determined prior to the amendment of the *Judicature Act*, R.S.O. 1970, c. 228 to provide for the payment of interest, it is not unique. While the Court of Appeal has recently overruled *Vroom* in *Arthur J. Fish Ltd. v. Moore* (1985), 23 D.L.R. (4th) 424, 53 O.R. (2d) 65, the court retains the jurisdiction to deny interest in appropriate circumstances.

In 1979 in *Bank of Montreal v. Inco Ltd.* (1979), 99 D.L.R. (3d) 142, 24 O.R. (2d) 710 (S.C.), interest was not awarded against the defendant who had paid the amount claimed into court by way of interpleader. Thus, this case stands for the proposition that the court is able to exercise a discretion to disallow interest even where it would otherwise be payable under the Act if the court considers it just to do so in all the circumstances. However, the Ontario Court of Appeal in *Landry v. Cameron* (1981), 20 C.P.C. 204, [1981] I.L.R. ¶1-1338, held that there is a *prima facie* right to prejudgment interest which may be disallowed only by exercise of discretion based upon the particular facts.

C. Partial Denial

In appropriate circumstances the court can decide that interest ought not to be payable for the entire period of the plaintiff's claim. In *Canada Square Corp. Ltd. v. Versafood Services Ltd.*, *supra*, the court held that where the plaintiff sought an

adjournment when the defendant was ready to proceed to trial the plaintiff was denied interest from the date of the adjournment to the date the master's report on the reference was finally settled.

In the decision of the Supreme Court of Canada in 1979 in *Baud Corp., N.V. v. Brook (No. 2)* (1979), 97 D.L.R. (3d) 300, [1979] 3 W.W.R. 93, Estey J. considered the *Supreme Court Act*, R.S.C. 1970, c. S-19 provisions dealing with interest. Section 52 of that Act provided as follows:

> 52. Unless otherwise ordered by the Court, a judgment of the Court bears interest at the rate and from the date applicable to the judgment in the same matter of the court of original jurisdiction or at the rate and from the date that would have been applicable to that judgment if it had included a money award [rep. and sub. 1974-75-76, c. 18, s. 7].

In his reasons for judgment Estey J. noted that difficulties flowed by reason of the failure of the appellant, Baud, to prosecute its appeal assiduously. His Lordship noted that whatever contribution the defendant might have made to the lengthy delays encountered in the 18 years when the proceedings were before the courts, the plaintiff had the paramount right of control over the proceedings and their conduct in the courts. Mr. Justice Estey went on to point out that as it turned out the procrastination by the plaintiff during some periods in the course of the litigation in fact increased its ultimate recovery. As a consequence the court held that, even though the quantum of the plaintiff's recovery was increased on appeal, it was appropriate for the Supreme Court of Canada to exercise its discretion under s. 52 and award the plaintiff interest only on that portion of its ultimate recovery which was originally awarded by the trial judge.

D. Commencement Date

The court also has a discretion as to the date upon which the accrual of interest will commence. The normal rule under s. 138(1) is that in the case of a liquidated claim interest runs from the date the cause of action arose and in the case of an unliquidated claim from the date the person entitled gave notice in writing of his claim to the person liable therefor. In its brief to the Slater Committee, the Canadian Bar Association recommended an amendment to the *Courts of Justice Act, 1984* to provide that in any actions involving bodily injury, prejudgment interest with respect to nonpecuniary losses should not commence until the plaintiff has disclosed to the defendant or his insurer the extent and nature of the injury sustained. The alternative proposed was that such interest not commence until the plaintiff has agreed to make himself or herself available for a medical examination on reasonable notice at the defendant's expense.

In *Erco Industries Ltd. v. Allendale Mutual Ins. Co. (No. 2)* (1984), 48 O.R. (2d) 17, 46 C.P.C. 100 (H.C.J.), the defendant's payment into court exceeded the principal amount of the judgment and the defendant was awarded costs. Mr. Justice Rosenberg held that postjudgment interest was not payable until the defendant could determine the net amount payable after taxation of the defendant's costs.

On a similar basis, the court in *McWhinnie v. Scott* (1985), 5 C.P.C. (2d) 245 (Ont. Dist. Ct.), delayed the commencement of postjudgment interest and denied the plaintiff prejudgment interest from the date originally fixed for trial after the plaintiff sought and obtained an adjournment from that date.

E. Offers to Settle

Rule 49 deals with offers to settle. The rule does not make clear the manner in which prejudgment interest is to be addressed in determining the sufficiency of an offer to settle. Consider the case of *Rushton v. Lake Ontario Steel Co. Ltd.* (1980), 112 D.L.R. (3d) 144, 29 O.R. (2d) 68 (H.C.J.), a decision of Steele J. in which His Lordship held that, in determining the sufficiency of a payment into court, the prejudgment interest should be calculated up to the date of the payment into court. Thus, it is certainly advisable to provide in the offer to settle for the manner in which future interest from the date of the offer to settle will be treated.

F. Appellate Jurisdiction to Vary

In *Pavlovic v. Nikolic* (1986), 15 O.A.C. 135, the court considered s. 37(2) of the *Judicature Act*, which gave jurisdiction to "the Judge" to disallow or vary the rate of postjudgment interest. The Divisional Court held that a trial judge was the only judge with any jurisdiction to vary the amount of postjudgment interest. Section 140 of the *Courts of Justice Act, 1984* uses the term, "the Court", and it would now seem that any level of court has the jurisdiction to vary prejudgment or postjudgment interest.

6. Unusual Claims

There are numerous circumstances in which it is reasonable to ask the court to award a different rate of interest from that normally provided by the *Courts of Justice Act, 1984*.

A. Compound Interest

The normal rule is to provide for simple interest on the total principal amount of the judgment awarded. However, the Court of Appeal in *Brock v. Cole* (1983), 142 D.L.R. (3d) 461, 40 O.R. (2d) 97, held that compound interest could be awarded pursuant to the court's discretion under what was then s. 36(5)(*f*) of the *Judicature Act* which permitted interest to be awarded where interest is payable by a right other than under that section. This provision was carried forward into the *Courts of Justice Act, 1984* in s. 138(3)(*f*). In effect, the Court of Appeal held that the entitlement under cl. (*f*) overrode the restriction in cl. (*b*) preventing the award on interest accruing under the section.

The court also held that the courts of equity had long possessed jurisdiction to award compound interest in certain cases. Once the conditions giving rise to the court's equitable jurisdiction to order compound interest had been met, it could probably be said that the plaintiff had a right to interest of the kind described in cl. (*f*), *i.e.*, an extra-statutory right.

Mr. Justice Thorson writing for the court quoted Lord Denning M.R. in the decision of *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849 (C.A.), at p. 856, in which His Lordship set out his undertaking of the principles involved as follows (at p. 467 D.L.R., p. 103 O.R.):

> "... in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money — years later — is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest ... But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it ... Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, ie compound interest."

Mr. Justice Thorson went on to note that on the record before the Court of Appeal the evidence was not clear as to what use was

in fact made of the money advanced to the defendants during the period between the making of the mortgage advance and the time when the judgment was paid. Nevertheless, the court was prepared in that case to make certain "presumptions" including that the plaintiff was seeking secure investments which would yield a good return on the money available to him for his retirement. It was also to be presumed that he would have sought to reinvest the money advanced to the defendants along with any interest earned thereon on similarly favourable terms had he not been deprived of its use by the actions of the defendants. The court went on to hold that it is a reasonable assumption that the moneys received by the defendants would have been employed in a way that could be expected to have earned for them compound interest as is the usual case with dealings involving mortgages of varying terms. As a consequence the court held that the plaintiff would not be adequately compensated by an award of simple interest and awarded interest compounded on an annual basis. I see no reason why evidence could not be led which could expand the entitlement to compound interest to a semi-annual basis which is probably more common than annual compounding.

I would also refer the reader to the comments of the Court of Appeal in *Wotherspoon v. Canadian Pacific Ltd.* (1982), 129 D.L.R. (3d) 1, 35 O.R. (2d) 449, affirmed 39 D.L.R. (4th) 169, 76 N.R. 241 *sub nom. Eaton Retirement Annuity Plan v. Canadian Pacific Ltd.* (S.C.C.). At p. 50 D.L.R., p. 495 O.R. of those reasons the court dealt with the question of interest and the question of whether or not compound interest is appropriate. In holding that it was not appropriate in that case the court held: "The case is far different from the 'unwarranted withholding of a just debt' cases, and from the express trust situations where there was a duty to invest." These dicta would certainly seem to indicate that in those situations compound interest can be claimed and ought to be awarded.

In *Public Trustee v. Mortimer* (1985), 16 D.L.R. (4th) 404, 49 O.R. (2d) 741 (H.C.J.), a lawyer's former partners were held liable for his fraud as an executor. The court awarded simple interest after considering s. 36(5)(*f*). With respect, I would suggest the court could have awarded compound interest outside the Act based upon the common law entitlement.

B. Pecuniary Loss Assessed as at Date of Trial

Any part of a pecuniary loss assessed as of the date of trial should not attract prejudgment interest. Basically the current replacement cost fully compensates the plaintiff. For examples of such cases see *Pavlakis v. 359068 Ontario Ltd.* summarized (1985), 29 A.C.W.S. (2d) 347 (Ont. H.C.J.), *per* J. Holland J.; *Halifax Developments Ltd. v. Parks Projects Ltd.* summarized (1984), 28 A.C.W.S. (2d) 517 (N.S.C.A.), and *Kemp v. Lee* (1984), 58 B.C.L.R. 219, 41 R.P.R. 20 (C.A.).

C. No Contractual Entitlement to Interest

The House of Lords denied prejudgment interest for a period in which no interest was payable under the original contract in the decision of *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. Ltd.*, [1975] 2 All E.R. 173.

D. Alternate Funding Costs

Prior to the statutory amendments in Ontario, the Supreme Court of Canada decision in *Prince Albert Pulp Co. Ltd. v. The Foundation Co. of Canada Ltd.* (1976), 68 D.L.R. (3d) 283, [1977] 1 S.C.R. 200, approved a rate of interest equivalent to the borrowing rates of the claimant. The Ontario Court of Appeal in 1979 approved this method of awarding interest in *Nor-Min Supplies Ltd. v. C.N.R. Co.* (1979), 106 D.L.R. (3d) 325, 27 O.R. (2d) 390. Since the *Courts of Justice Act, 1984* does not exclude alternate methods of interest calculation and in fact contemplates them, there is no reason not to claim interest on the most advantageous basis. More recently, Ontario courts have awarded a higher rate of interest to compensate a plaintiff forced to borrow money at a rate of interest higher than the rules would otherwise provide because of the defendant's actions: *Heeney v. Best* (1979), 108 D.L.R. (3d) 366, 28 O.R. (2d) 71 (C.A.); *Borland v. Muttersbach* (1984), 15 D.L.R. (4th) 486, 49 O.R. (2d) 165 (H.C.J.), reversed on another point 23 D.L.R. (4th) 664, 53 O.R. (2d) 129 (C.A.).

E. Foreign Currency

In appropriate circumstances, the English Queen's Bench decision in *Miliangos v. George Frank (Textiles) Ltd. (No. 2)*, [1976] 3 All E.R. 599, should be considered. In that case by a contract governed by Swiss law the plaintiff, a Swiss national, agreed to sell to an English company certain goods. The English company failed to pay for the goods and eventually a judgment was obtained for the amount due in the form of a sum of money expressed in Swiss francs. The court held that the plaintiff should be treated *mutatis mutandis* as if he had been awarded judgment in sterling and was therefore entitled to simple interest on the judgment sum at a rate at which a person could have reasonably borrowed Swiss francs in Switzerland. It is probable that such a borrowing rate would have been substantially less than that in the United Kingdom. The court held that where judgment is given in the currency of a foreign country and interest is awarded by way of damages the rate at which a person could reasonably borrow money in that country is a matter for expert evidence.

I invite the reader to consider the applicability of this case when framing claims involving s. 131 of the *Courts of Justice Act, 1984* dealing with claims in a foreign currency.

F. Construction Lien Claims

In a 1984 decision, *Longview Forming Ltd. v. Valentine Developments Ltd.* (1984), 6 C.L.R. 213, 42 C.P.C. 37 (Ont. Master), Master Donkin awarded interest at a rate higher than the average prime rate but less than the prime rate in force in the month prior to the commencement of the plaintiff's action.

Among the factors enumerated by the master in justifying awarding a rate higher than the average rate was the fact that the plaintiff could not choose his time to commence the action but was limited to a period of 90 days from the time the last work was performed. The court also considered the fact that the plaintiff was restricted, by reason of the provisions of the *Mechanics' Lien Act*, R.S.O. 1980, c. 261, s. 49(2), to costs of 25% of the amount due on the lien. Master Donkin also considered the actions of the defendant in not making a partial payment to the plaintiff out of moneys recovered by the defendant prior to trial. Harry Radomski, in his comment on this case annexed to the C.L.R. headnote, posed the rhetorical question as to whether or not the words "just . . . in all the circumstances" deal only with those circumstances in relation to the appropriate compensation for the loss of use of money or whether those words encompass all the circumstances of a particular case and in effect permit the awarding of punitive damages in an indirect way.

This case must be contrasted with *Arthur J. Fish Ltd. v. Moore*

(1985), 23 D.L.R. (4th) 424, 53 O.R. (2d) 65, in which the Court of Appeal held in 1985 that the general rule is that a person entitled to a money judgment is entitled to prejudgment interest subject to the court's discretion. Mere difficulty in determining the amount of recovery is not a valid ground for exercising the discretion.

G. Wrongful Dismissal Claims

Damages for wrongful dismissal have been established by the Court of Appeal in *Chang v. Simplex Textiles Ltd.* (1985), 6 C.C.E.L. 247, to be payable as at the date of termination. As a consequence, interest runs on the full amount from the date the plaintiff would have received payment had there been no breach by the defendant even though notice of the plaintiff's claim was not given in writing until some eight months after the termination took place. The Court of Appeal noted that, while the plaintiff's claim is not a liquidated claim, there is, nevertheless, a logical basis for awarding interest from the date of termination and the court has been prepared to do so in a number of cases which are listed by Morden J.A. at p. 252 of the judgment.

In *Rushton v. Lake Ontario Steel Co. Ltd. supra*, Steele J. took a different approach and awarded interest on a month-by-month diminishing balance basis.

H. Arbitration Awards

In *Re Hope and Co-Operators Ins. Ass'n* (1986), 24 D.L.R. (4th) 78, 53 O.R. (2d) 208, the Divisional Court held that an arbitrator was entitled to award interest and costs as it would be anomalous for the legal rights of a party to vary substantially according to whether or not he submitted to arbitration.

7. Miscellaneous Matters of Interest

A. Interest and the Prime Rate

It will be seen from the definitions of prejudgment and postjudgment interest under the *Courts of Justice Act, 1984* that they end up being between 1% and 2% above the bank rate as established by the Bank of Canada. The rate thus established approximates the prime rate charged by the chartered banks to commercial lenders. While the prime rate is a simple and well-known rate of interest, one might well ask how many plaintiffs

would, in fact, be able to earn interest at that level had the defendant paid them the money at the date that the cause of action arose. Conversely, I suppose one could wonder how many defendants would be able to borrow funds at a rate as low as the prime rate. I invite the reader to consider, in the appropriate circumstances, asking the court to modify the rate of prejudgment interest pursuant to s. 140 of the *Courts of Justice Act, 1984*.

The prejudgment interest provisions of the *Courts of Justice Act, 1984* do not apply to actions commenced under the old Act. For reference purposes, the relevant prime rates as contemplated by the *Judicature Act* are set out in Appendix B.

B. Discount Rate

One of the more difficult rules to find in most of the indices is the discount rate for future pecuniary damages. Rule 53.09 provides that the discount rate to be used in determining the amount of an award in respect of future pecuniary damages to the extent that it reflects the difference between estimated investment and price inflation rates is 2½% per year.

The Court of Appeal in *Dziver et al. v. Smith* (1983), 146 D.L.R. (3d) 314, 41 O.R. (2d) 385, held that a discount rate other than 2½% could be applied if it is shown that the investment income will be subject to the cost of professional investment advice or the plaintiff's income, barring the accident, would have increased at a greater rate than the rate of inflation, or the cost of future care will increase at a rate greater than the rate of inflation.

In *McDermid v. The Queen in right of Ontario* (1985), 53 O.R. (2d) 495, 5 C.P.C. (2d) 299 (H.C.J.), Rosenberg J. utilized rule 2.03 which allows the court to dispense with compliance of any rule in the interests of justice to establish discount rates of 6.0% and 6.5% depending upon the time period being considered. Obtaining a variation of the discount rate in these proportions can have a significant impact upon the client's recovery.

C. Criminal Code

It is unlikely to come up very often in practice but one should be aware of the existence of s. 305.1(1) of the *Criminal Code*. That section provides that anyone who enters into an agreement to receive interest at a criminal rate is guilty of an offence. While this section is intended to deal with loan sharking, it does provide that the criminal rate is one where the effective annual rate of interest

calculated in accordance with generally accepted actuarial practices and principles exceeds 60% on the credit advance. There may be some commercial transactions where the interest rate as defined under the section as including all charges and expenses whatsoever paid or payable for the advancing of the credit may result in a criminal rate and thus not be enforceable: see *Cope v. Rowlands* (1836), 2 M. & W. 149, 150 E.R. 707.

The Supreme Court of Canada in *Nelson v. C.T.C. Mortgage Corp.* (1986), 29 D.L.R. (4th) 159*n*, [1986] 1 S.C.R. 749, affirmed the British Columbia Court of Appeal, 16 D.L.R. (4th) 139, [1985] 2 W.W.R. 560, in holding that, where the effective annual rate of a mortgage exceeded 60% by reason of a prepayment provision, the rate did not constitute a criminal rate and the mortgage was enforceable.

D. Income Tax Considerations

There continues to be some confusion regarding the assessing position of the Department of National Revenue as to whether interest on a damage award, whether prejudgment or postjudgment, constitutes income for purposes of the *Income Tax Act*, S.C. 1970-71-72, c. 63. Interpretation Bulletin IT-396R (May 29, 1984) would seem to indicate that those amounts are taxable. However, the Ministry has advised the Insurance Bureau of Canada that prejudgment/pre-settlement interest for 1986 will not be considered as taxable income. Moreover, I understand that the Ministry has advised that such interest will not be included in income until the *Income Tax Act* is amended to deal specifically with such payments.

E. Claims against the Crown

The Federal Court of Appeal had occasion to consider the question of interest in *Marshall v. The Queen*, [1986] 1 F.C. 437. Section 35 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), provides:

> 35. In adjudicating upon any claim against the Crown, the Court shall not allow interest on any sum of money that the Court considers to be due to the claimant, in the absence of any contract stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.

The court considered this provision together with the *Crown Liability Act*, R.S.C. 1970, c. C-38. Subsection 3(1) of that Act reads:

> 3(1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

The court held that, as a private person would be liable for interest, the Crown's liability was no different.

F. Policy Limits

Pursuant to s. 214(*c*) of the *Insurance Act*, R.S.O. 1980, c. 218, the insurer must pay all costs taxed against the insured and any interest accruing after the entry of judgment upon that part of the judgment that is within the limits of the insurer's liability. Madame Justice Van Camp held in *Re Allstate Ins. Co. of Canada and Lappalainen*, [1984] I.L.R. ¶1-1809, 9 C.C.L.I. 216 (Ont. H.C.J.), that the liability under that section is to indemnify the insured against the amount of the judgment including prejudgment interest, if any, up to the limits of the policy and not exceeding it. If the amount of prejudgment interest brings the amount of the judgment in excess of the policy limits, then the insurer is only liable for the policy limits.

This holding can take away an insurer's incentive to settle such cases at an early stage. In *Stamper v. Finnigan* (1986), 75 N.B.R. (2d) 301, [1987] I.L.R. ¶1-2152, the Chief Justice of New Brunswick's Court of Queen's Bench made a finding directly opposite to the *Allstate* decision. Clearly this area of the law remains unsettled.

G. Interest Act

No article dealing with interest would be complete without a reference to the *Interest Act*, R.S.C. 1970, c. I-18. Two sections which need to be considered from time to time are ss. 4 and 8 which read as follows:

> 4. Except as to mortgages on real estate, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent.
>
> . . . . . .

(i) where the judgment is given upon a liquidated claim, from the dated the cause of action arose to the date of the judgment, or

(ii) where the judgment is given upon an unliquidated claim, from the date the person entitled gave notice in writing of his claim to the person liable therefor to the date of judgment.

(4) Where the judgment includes an amount for special damages, the interest calculated under subsection (3) shall be calculated on the balance of special damages incurred as totalled at the end of each six month period following the notice in writing referred to in subclause (3)(*b*)(ii) and at the date of the judgment.

(5) Interest under this section shall not be awarded,

(*a*) on exemplary or punitive damages;

(*b*) on interest accruing under this section;

(*c*) on an award of costs in the action;

(*d*) on that part of the judgment that represents pecuniary loss arising after the date of the judgment and that is identified by a finding of the court;

(*e*) except by consent of the judgment debtor, where the judgment is given on consent; or

(*f*) where interest is payable by a right other than under this section.

(6) The judge may, where he considers it to be just to do so in all the circumstances,

(*a*) disallow interest under this section;

(*b*) fix a rate of interest higher or lower than the prime rate;

(*c*) allow interest under this section for a period other than that provided,

in respect of the whole or any part of the amount for which judgment is given.

Sections 137 through 139 of the *Courts of Justice Act, 1984* dealing with interest as presently in force are as follows:

137(1) In this section and in sections 138 and 139,

(*a*) "bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to the chartered banks;

(*b*) "date of the order" means the date the order is made, notwithstanding that the order is not entered or enforceable on that date, or that the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed;

(*c*) "postjudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent;

(*d*) "prejudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent;

(*e*) "quarter" means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December.

(2) After the first day of the last month of each quarter, the Registrar of the Supreme Court shall forthwith,

(*a*) determine the prejudgment and postjudgment rate for the next quarter; and

(*b*) publish in *The Ontario Gazette* a table showing rate determined under clause (*a*) for the next quarter and for all the previous quarters during the preceding ten years.

138(1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated,

(*a*) where the order is made on a liquidated claim, from the date the cause of action arose to the date of the order; or

(*b*) where the order is made on an unliquidated claim, from the date the person entitled gave notice in writing of his claim to the person liable therefor to the date of the order.

(2) Where the order includes an amount for special damages, the interest calculated under subsection (1) shall be calculated on the balance of special damages, incurred as totalled at the end of each six-month period following the notice in writing referred to in clause (1)(*b*) and at the date of the order.

(3) Interest shall not be awarded under subsection (1),

(*a*) on exemplary or punitive damages;

(*b*) on interest accruing under this section;

(*c*) on an award of costs in the proceeding;

(*d*) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(*e*) where the order is made on consent, except by consent of the debtor; or

(*f*) where the interest is payable by a right other than under this section.

(4) Where a proceeding is commenced before this section comes into force, this section does not apply and section 36 of the *Judicature Act*, being chapter 223 of the Revised Statutes of Ontario, 1980, continues to apply, notwithstanding section 187.

139(1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

(2) Where an order provides for periodic payments, each payment in default shall bear interest only from the date of default.

(3) Where an order is based on an order given outside Ontario or an order of a court outside Ontario is filed with a court in Ontario for the purpose of enforcement, money owing under the order bears interest at the rate, if any, applicable to the order given outside Ontario by the law of the place where it was given.

(4) Where costs are assessed without an order, the costs bear interest at the postjudgment interest rate in the same manner as if an order were made for the payment of costs on the date the person to whom the costs are payable became entitled to the costs.

(5) Interest shall not be awarded under this section where interest is payable by a right other than under this section.

(6) Where an order for the payment of money is made before this section comes into force, this section does not apply and section 37 of the *Judicature Act*, being chapter 223 of the Revised Statutes of Ontario, 1980, continues to apply, notwithstanding section 187.

APPENDIX B

PRIME RATES

Chartered Banks Rate on Prime Business Loans
(Source: Bank of Canada Review)

PERIOD	RATE	PERIOD	RATE
July 1978	9.25	Jan. 1983	12.00
Aug. 1978	9.75	Feb-Mar. 1983	11.50
Sept. 1978	10.25	Apr-Dec. 1983	11.00
Oct. 1978	11.00		
Nov-Dec. 1978	11.50	Jan-Feb. 1984	11.00
		Mar-Apr. 1984	11.50
Jan-June, 1979	12.00	May, 1984	12.00
July-Aug. 1979	12.50	June, 1984	12.50
Sept. 1979	13.00	July, 1984	13.50
Oct. 1979	14.75- 15.00	Aug-Sept. 1984	13.00
Nov. 1979-Feb. 1980	15.00	Oct. 1984	12.50
Mar. 1980	15.75	Nov. 1984	12.00
		Dec. 1984	11.25
Jan.-Feb. 1981	18.25		
Mar. 1981	17.75	Jan. 1985	11.00
Apr. 1981	18.25	Feb. 1985	11.50
May 1981	19.50	Mar. 1985	11.75
June 1981	20.00	Apr. 1985	10.75
July 1981	21.00	May-July, 1985	10.50
Aug. 1981	22.75	Aug-Sept. 1985	10.25
Sept. 1981	21.25	Oct-Dec. 1985	10.00
Oct. 1981	20.00		
Nov-Dec. 1981	17.25	Jan. 1986	11.00
		Feb. 1986	13.00
Jan-Feb. 1982	16.50	Mar. 1986	12.00
Mar-May, 1982	17.00	Apr. 1986	11.25
June 1982	18.25	May-June, 1986	10.25
July 1982	17.25	July-Dec. 1986	9.75
Aug. 1982	16.00		
Sept. 1982	15.00	Jan-Feb. 1987	9.25
Oct. 1982	13.75	Mar. 1987	8.75
Nov. 1982	13.00	Apr. 1987	9.25
Dec. 1982	12.50	May-July, 1987	9.50
		Aug.-Sept. 1987	10.00
		Oct.-Dec. 1987	9.75

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SUPREME COURT OF CANADA REFORM

*Eric Gertner**

Introduction

Perhaps at no other time in its 112-year history has the Supreme Court of Canada attracted so much attention — from lawyers and academics, journalists and even the general public — and so many calls for changes. The increased scrutiny of the court's performance can no doubt be associated with the court's new Charter jurisprudence and the fact that the court is now seen by many as an important partner in the making and development of our fundamental laws.

The advent of the *Canadian Charter of Rights and Freedoms* and the court's role in developing the Charter's potential has, in turn, resulted in calls for reform of the court. At the time of writing, full constitutional entrenchment of the court is being played out at both the federal and provincial levels, as the country debates adoption of the Meech Lake Accord. At the same time, two federal Bills introduced during the present Session of Parliament would, if enacted, legislatively change the way that the court operates on a day-to-day level. Bill C-53,[1] as originally drafted, was intended to do away with virtually all appeals as of right to the Supreme Court, extending the court's leave to appeal jurisdiction to well over 90% of its docket. The second Bill, Bill C-72,[2] would make the Supreme Court officially bilingual. Since the court is already functionally bilingual, this legislative "change" would be a formal, although a symbolically significant one. As intimated above, these legislative proposals can be traced back to the *Constitution Act, 1982*, including the *Canadian Charter of Rights and Freedoms*. The abolition of appeals as of right is, in part, a

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[1] 2nd Sess., 33rd Parl., 35-36 Eliz. II, 1986-87.

[2] 2nd Sess., 33rd Parl., 35-36 Eliz. II, 1986-87.

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Leanne Todd*

Structured Settlements and Structured Judgements: Do They Work and Do We Want Them?

I. *Introduction*

Structured settlements are an alternative to traditional lump sum settlements for personal and fatal injuries claims. Under a structured settlement the defendant, generally a casualty insurer, satisfies all or part of the claim via periodic payments to the plaintiff.

The object of this paper is to investigate the effectiveness of structured settlements to determine the desirability and feasibility of structured judgments. Note that structured settlements are voluntary and courts currently reject any notion that they have inherent jurisdiction to grant damages in any form other than lump sum.

Analysis will be undertaken on both an academic and application basis via scholarly and industry writings as well as interviews with lawyers, judges and representatives of the insurance industry.[1]

II. *Structures — why do we need them?*

The purpose of personal or fatal injuries damage compensation is *restitutio in integrem,* meaning to place the victim in a position similar to that he or she would have been in but for the tortious act. Traditionally this has been achieved in the form of lump sum damages, the purpose of which is to give the plaintiff a capital amount which if properly invested would generate a fund capable of fully compensating the plaintiff during his or her lifetime for any losses or ongoing expenses resulting from the tort. Exhaustion of the fund is intended to coincide with plaintiff's death.[2] The inherent risks associated with this form of compensation are evident.

a) Mortality Risk — The plaintiff bears the risk that he or she will live longer than anticipated when the damages were calculated creating a shortfall. Conversely there is the possibility that the plaintiff's estate will enjoy a windfall due to premature death. The crux of the problem is the uncertainty of forecasting future events. In *MacDonald* v. *Alderson*[3] O'Sullivan J.A. questioned the validity of calculating damages on an estimated life expectany which could prove to be totally inappropriate.

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1. The author wishes to thank all those who assisted her in the preparation of this paper.

2. Justice Dickson, as he was then, defined lump sum awards in *Andrews* v. *Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229, at 260.

3. [1982] 3 W.W.R. 385 (Man. C.A.).

> I have some difficulty with the idea that a lump sum should be calculated in such a way that it will be used up over an assigned life expectancy. Some live shorter and some live longer. It would be imprudent for the recipient of a damage award to invest and spend it on the basis that his award would be exhausted over the period of his assigned life expectancy; if he did so he would be a pauper at the end of the period of his anticipated life; how could he survive if he lived longer than his expected years? . . . what is sought to be given to the plaintiff is an amount that is likely to enable the plaintiff to be compensated for as long as he suffers damage from the tortfeasor, over the length of his actual life.[4]

b) Financial Management — The plaintiff bears the responsibility, risk and expense of "properly investing" the capital amount of the lump sum such that it will adequately provide for the loss. The plaintiff is left vulnerable to the dangers and worries of a dynamic economy. One bad investment could have long-term implications for the plaintiff's basic care. Some courts and settlements allow a gross-up of special damages for financial management fees. Although this allowance is of some assistance it does not remove the free market risk.

c) Dissipation — U.S. studies indicate that ninety per cent of windfalls are dissipated within a five year period.[5] For a seriously injured plaintiff who has lost all or part of his income earning capacity this means that he will become reliant on family and or the state for his basic care needs.

d) Miscalculation — Damages are calculated on uncertain predictions of future needs and losses, the plaintiff bears the risk of miscalculation such that the award will prove inadequate over time. While the defendant bears the risk of being over charged, the implications are far more serious for the individual who has lost income earning capacity than for a casualty insurer or uninsured defendant who maintains this capacity.

e) Income Tax Liability — Although Revenue Canada has taken the position that damages for personal and fatal injuries are not taxable, the interest income generated by such funds is liable to taxation. This is of significance to lump sum awards which are intended to compensate the plaintiff when combined with the resulting interest income. Some jurisdictions in Canada allow a tax gross-up which is intended to offset the anticipated income tax liability.[6] Tax gross-ups are only allowed on

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4. *Ibid.*, at 399-400.

5. Edwin Upenieks, "Structured Settlements, Are They Here to Stay?" (1982), 3 *Advocates Quarterly* 393, at 406.

6. British Columbia has adopted the view that the S.C.C. rejected the concept of income tax adjustments in the Trilogy by not providing for them in those cases, reference *Leischner* v. *West Kootney Power and Light Company*, [1986] 3 W.W.R. 97 (B.C.S.C.). Ontario however has

the future care head of damages for personal injuries and for lost support for dependants in fatal injury claims. The average for future care tax gross-ups is thirty five percent.[7] Tax gross-ups require the court to forecast the future income tax rate, the interest income to be earned, the time period and the future care costs which will be subject to taxation.[8] Clearly without some adjustment or consideration for tax liabilities the plaintiff will be under compensated.

f) Non-Reviewable — The common law doctrine of finality means that damages are once and for all, the plaintiff cannot return to the defendant for more money. This is incongruent with the ongoing nature of personal and fatal injury claims and forces damages to be assessed on speculative future needs and events.

The inadequacies of lump sum compensation and the need for reform of our tort compensation system has been the subject of many critical comments by both academics and practitioners. One of the more memorable cries came from Justice Dickson, as he was then, in *Andrews:*

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure in time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once and for all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation; it is subject to fluctuation on investment; income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and extensive care and long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in light of the continuing needs of the injured person and the cost of meeting those needs.[9]

Justice Dickson's pleas have gone unmet by the legislatures of Canada, statutes enabling the courts to employ reviewable awards or periodic payment plans have not yet come to pass. However there has been

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rejected this position and allows tax gross ups for future care damages. In a notorious case of late, *McErlean* v. *Sarel* (1987) unreported, the Ontario Court of Appeal held that a trial gross-up of 153% of future care damages was excessive and reduced it by half. Note that in Nova Scotia there has not yet been a decisive holding on this matter but the plaintiff bar and casualty insurance industry have taken the view that Nova Scotia will follow the Ontario courts, thus for purposes of negotiating structured settlements tax gross-up is considered.

7. John P. Weir, *Structured Settlements,* (Toronto: Carswell Legal Publications, 1984).
8. Note that some care costs are tax exempt.
9. *Andrews, supra* note 2, at 236.

development outside of the court's jurisdiction, parties can and have voluntarily employed structured and reviewable settlements.[10]

While calling for legislative reform Justice Dickson and the Supreme Court of Canada addressed the arbitrary nature of damage assessment for personal injury cases in what has been labeled "The Trilogy".[11] The court established an itemized approach to personal injury damage assessment which increased the precision and reviewability of awards. "The Trilogy" also marked a shift in the objective of damage assessment. The itemized heads of damage looked more to the plaintiff's needs versus loss.[12] Note that a needs approach to damage compensation not only allows greater precision, but is more directly responsive to the basic principle of damage compensation, placing the plaintiff in the position he would have been in but for the injury. However, the uncertainties associated with income tax adjustments: inflation, life expectancy, future care needs, and lost income earning potential, still remain.

There is no doubt that the "Trilogy" has improved lump sum awards, but only insofar as they more closely meet the plaintiff's needs; most of the risks still remain as does the need for a better alternative. The administrative burden has been increased as a result of the "Trilogy", there would appear to be a direct relationship between administrative and evidentary burden and the precision and fairness of compensation.

III. *History of Structures*

Structured settlements have been viewed by many as the way of the future in personal and fatal injury compensation and structured judgment as the natural consequence of that development. To appreciate the role that structures currently play and could play in the future of our tort compensation system, we must look at the history and adequacy of personal injuries compensation in Canada.[13]

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10. The only reviewable settlement reported to date is *Steeves* v. *Fitzsimmons* (1975), 110 O.R. (2d) 387 (H.C.), where the injuries sustained by a living child prior to birth were too speculative to be definitively calculated until later years.

11. *Andrews, supra* note 2; *Arnold* v. *Teno*, [1978] 2 S.C.R. 287; *Thorton* v. *S.Dist. No. 57 Bd. of Trustees*, [1978]2 S.C.R. 267.

12. The itemized heads of damages identified in the "Trilogy" are:
   (1) pecuniary loss - full compensation for;
      a) special damages
      b) prospective loss of earnings and profits
      c) cost of future care
   (2) non-pecuniary loss - fair and reasonable compensation;
      includes pain and suffering, loss of life expectancy, loss of amenities of life.

13. Because of the differences in damage assessment between personal and fatal injuries this paper will focus on the former, although it is equally applicable to fatal injuries with slight modification in damage assessment.

The history of structured settlements dates back to the early 1950's when they were first employed in Sweden, France, West Germany, Australia and New Zealand. Only Sweden has evolved to a mandatory structured judgment system of compensation.[14]

Structures were next seen in the United States, where in 1958 a jury imposed a structured judgment.[15] Since that time structures have been used extensively in voluntary settlements and some states have passed legislation enabling courts to impose structured judgments, although this experience has not been altogether successful.[16] The ever growing size of damage awards in the United States provides a catalyst for the use of structures because they represent a significant savings to the insurance companies.[17] Some of the more notable American cases which employed structures in their settlements were the thalidomide cases of the 1960's and the Ford Pinto cases of the 1970's.

The thalidomide cases of the late 1960's are generally recognized as the central catalyst introducing structured settlements into North America. In 1968 structured settlements arrived in Canada when eight sets of Ontario parents brought friendly actions to the Supreme Court of Ontario for approval of structures negotiated in the United States in conjunction with thalidomide claims in that country.[18] By 1983 structured settlements were being employed in a significant percentage of the large personal injury claims[19] and in notable cases such as the fatal injuries claims resulting from the Ocean Ranger disaster.[20]

The growth of structured settlements in Canada can be attributed to the increasing number of million dollar awards for personal and fatal injuries. Prior to 1980, such awards were rare, but the "Trilogy" combined with growing future care costs and tax gross-ups have made for a significant increase.[21] Further impetus has been derived from the "Insurance Crisis" of the 1980's, the availability and affordability of

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14. Upeneiks, *supra* note 5, at 395.
15. *M & P Stores* v. *Taylor*, 326 P. 2nd 804 (Okl SC).
16. As many as fifteen states within the United States have adopted the Model Periodic Payment of Judgment Act. See Weir, *supra* note 7, at 36.
17. William Monopoli, "New Way to Settle Suit Wins Favor", *Financial Post*, Jan 17/81.
18. Weir, *supra* note 7, at 9-11.
19. Justice Holland, "Structured Settlements in Injury and Wrongful Death Cases" (1987), 8 *The Advocates Quarterly* 186.
20. "All Could Benefit from Insurance Plans", *Halifax Chronicle Herald*, Jan 11/84. $7.1 million dollars was paid out by casualty insurers to fund structured settlements with a potential payout of $23 million dollars to the dependants of victims of the Ocean Ranger disaster.
21. Note that the casualty insurance industry believes that claims for personal and fatal injuries are lower in this region than they are in others such as Ontario, where the average income is higher resulting in a higher claim for lost future earning capacity. Industry writings indicate that the average size of claim is increasing and can mainly be attributed to rising future care costs.

insurance is being threatened by the rising size of damage awards, coupled with depressed investment income in the insurance industry.

In 1980 the Ontario Commission on Tort Compensation (the Holland Commission) acknowledged certain benefits of structures and recommended that the Ontario Courts of Justice Act be amended to allow judges to award structured judgment where both parties consented.[22] This amendment was not passed until 1984 and has yet to be judicially considered.[23] The failure of structured judgments on consent can be attributed to two factors; first, if parties were prepared to consent to a structure they would be inclined to do so prior to incurring the expenses of litigation. Secondly, the availability of tax gross-ups encourage the plaintiff to take the risk that the court will overcompensate them by virtue of a generous tax adjustment.[24] In jurisdictions where tax adjustments are not recognized the plaintiff would be more inclined to structure while the defendants would be discouraged by the absence of the tax gross-ups and resulting loss of relative savings. Further, in a structured settlement the defendant would want to compensate the plaintiff with after tax dollars for lost future income capacity because the plaintiff would not be liable to tax under a structure while a court applying the rule in *Jennings*[25] might use pre-tax dollars in the calculation of this head of damage.[26]

The year 1986 saw the Ontario Task Force on Insurance (the Slater Report) recognize the benefits of structures and while not endorsing structured judgments, it did recommend a future review of both structured judgments and income tax reform.[27] The Ontario Branch of the Canadian Bar Association filed with the task force a proposal for structured judgments, thereby indicating support of the concept within the practising bar.

An Inquiry into Motor Vehicle Accident Compensation in Ontario (the Osborne Commission) was held in 1987. It too considered mandatory structured judgments, in particular a rather extensive proposal

22. *Commission on Tort Compensation Report*, Toronto, August 1980.

23. S.O. 1984, c.11, s.129.

24. Courts have traditionally tended to err on the plaintiff's side because of the grave implications of under compensation for the plaintiff. See David Harvey, "Structured Settlements", *Canadian Underwriter*, April 1987, at 28.

25. *R* v. *Jennings*, [1966] S.C.R. 532, later affirmed by the S.C.C. in the trilogy. The case held that lost future earning capacity was a capital asset and should be assessed on pre-tax dollars, with the intention that the anticipated tax liability on the anticipated interest income from the lump sum will roughly equate with the difference between pre-tax and after-tax dollars.

26. Bruce Feldthusen, Mandatory Structured Judgments" (1988), 1 *Canadian Insurance Law Review* 1, at 11-18.

27. *Final Report from the Task Force on Insurance*, Law Reform Commission of Ontario, May 1986. (55,59).

was prepared by a company specialized in structured settlements. Further analysis of periodic payment was undertaken by the Law Reform Commission of Manitoba in 1987.[28]

IV. *Structured Settlements — how they work*

Structures are intended to avoid the pit falls of lump sum damages, particularly the mortality, investment, dissipation and miscalculation risks in addition to avoiding the additional expense of financial management and tax gross-ups. Obviously if structures are able to achieve these objectives they are an improvement on our current tort compensation system and should be investigated for further exploitation of their benefits. An analysis of structured settlements, how they work and their effectiveness is the basis for evaluating the desirability of structured judgments.

To recap, structured settlements are voluntary agreements whereby the defendant satisfies all or part of a damage claim for personal or fatal injuries in the form of periodic payments to the plaintiff.[29] A settlement has been defined as a business bargain in which the plaintiff sells his claim to a private buyer for the best price he can get and the buyer negotiates for as little as he has to pay. The amount of the settlement will be affected not only by legal principles, but by factors such as the uncertainty of litigation and the extent of the plaintiff's needs.[30] Because structures are settlements, they generally occur prior to trial, but after litigation has commenced. Many lawyers find that settlement discussions arise so late in the proceedings that there is no time to prepare or assess a structure alternative. In such cases the trial date could be deferred or the trial could proceed as scheduled with the parties negotiating a structured settlement after a judgment has been rendered for a lump sum. There is nothing in the various civil procedure rules to preclude this alternative. Such a tactic could improve the bargaining position for a structure, especially if there is a collection risk due to the award exceeding the liability limit covered by the casualty insurer or the absence of insurance coverage. Further the judgment would serve as a useful guideline in determining the value of the claim.

Judicial recognition of structured settlements has been limited. By nature, settlement occurs outside the jurisdiction of the courts. However,

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28. Report on Periodic Payment of Damages for Personal Injuries and Death, *Manitoba Law Reform Commission*, Winnipeg 1987.
29. Note that the defendant is usually not the actual tortfeasor but the tortfeasor's casualty insurer who will accept liability to the extent of the agreed policy limits after which point the defendant tortfeasor's personal assets are subject to recovery.
30. P.S. Atiyah, *Accident Compensation and the Law*, (1975), at 279.

there are two roles the courts can play in regard to structured settlements. First is in the pre-trial conference, many judges take the opportunity of a pre-trial conference to encourage parties to settle where there is no substantial question of liability. If the case at hand is appropriate for a structure the court could prevent the time and expense of litigation by suggesting the possibility of a structured settlement.[31] The second role for the court is to approve a settlement concerning infants or incompetents.[32] Courts have been receptive to such settlements.

The lump sum and periodic payments of the structure are the subject of an agreement between the parties and cater to the plaintiff's needs as nearly as possible. In effect a structure is a financial package which represents a budget for life for the plaintiff. Tailoring of the structure is achieved by including in the agreement any combination of a number of options. Terms and options of the structure are limited only by the imagination of the parties and the funding available. The following list is representative of options currently employed:

a) Up-front lump sum — This is used for the out of pocket expenses to date, past lost wages, any necessary remodelling of the plaintiff's living accommodations, special transportation needs, special equipment, lawyer's fees, etc.

b) Rehabilitation payments — For any special rehabilitation requirements.

c) Medical payments — Cover all future care costs.

d) Income payments — Substitute for lost future earning capacity.

e) Education Payments — Cover any special or post secondary education expenses for the plaintiff or plaintiff's dependants as agreed.

f) Balloon payments — These are pre-arranged future lump sum payments either for specified capital expenditures such as a new wheelchair or they can be left to the plaintiff's discretion.

g) Reserve fund — This is a single sum payment which will be compounded until such time as it is required to restructure the income payment, pay for extraordinary medical or other expenses ie: death benefits.

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31. *Taylor* v. *Bottle et al*, [1982] C.C.H. 88-587 (Ont. Dist. Ct.). The court acknowledged a lack of jurisdiction to award a structured judgment but prior to making an order advised the parties that a structured settlement was appropriate and encouraged them to consider the option. Subsequently a consent judgment was ordered for a structured settlement.

32. Civil procedure rules require that settlements for infants and incompetents be approved by the court. The process is little more than a rubber stamping in most jurisdictions because counsel are expected to have acted with all due diligence on behalf of the infant or incompetent. For a thorough analysis of the evidentary requirements of a court when reviewing a proposed structured settlement see *Fusch* v. *Brears et al*, [1986] 3 W.W.R. 409 (Sask.Q.B.).

h) Indexing — This is used to counter inflation and can be fixed or tied to a variable factor such as cost of living or the inflation rate.

i) Reversionary Interest — The annuity can be arranged such that after the plaintiff's death and the minimum guaranteed payout, the defendant casualty insurer receives the balance between the principle paid and any amounts paid out.[33]

These options, like options on a new car, all increase the cost of the package. As such they are a matter of negotiation between the parties.

Structures are funded by one of three possible financial vehicles, trust fund, self funded or annuity.[34] In practice, annuities are the only acceptable vehicle because neither the trust fund nor self funded methods satisfy the requirements of Revenue Canada; thus, do not offer the same tax saving advantages.[35] Further, plaintiff counsel would not be willing to accept a self funded structure because the casualty insurer does not enjoy the same financial integrity of a life insurance company regulated under the Canadian and British Life Insurance Company Act.[36]

The negotiation of structured settlements requires a certain familiarity with structures and what they are capable of. The primary rule is never agree to a structure without knowing it's principle value because the awesome nature of the figures associated with structures and the diversity of alternative structures makes relative assessment difficult. The principle value offers the only consistent guideline for evaluation between structure alternatives and between structures versus lump sum. Many defence bar resist disclosing this information, but a telephone call to another structured specialist with the details of the proposal will generate an approximate principle value. Needs analysis and structure design are the major components of negotiation, both are critical to achieving a workable and desirable structure.[37]

The complexity of structures is evident and as in most complex areas of our society, specialists have arisen. Most if not all structures are arranged through and implemented by structured specialists. There are

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33. This list represents a composite of information gained from various articles and industry material. For an additional reference of options see Leon Lewis, "Tailoring the Structure", *Law Society of Upper Canada Continuing Education Material*, April 23, 1983.

34. For a full explanation of financing options see Weir, *supra* note 7, at 36-47.

35. These requirements are set out in Interpretation Bulletin IT-365R2 and will be discussed later in this paper.

36. R.S.C. 1970, c.I-15, s.64(2). Note that no Canadian life insurance company has failed since Confederation, this is in sharp contrast to the United States where there is valid concern for the financial integrity of life and casualty insurance companies and a corresponding concern for the potential default on annuities. See Holland, *supra* note 19, at 191.

37. A complete review of negotiating principles is beyond the scope of this paper, for a comprehensive reference see Weir, *supra* note 7 and various information distributed by the structure specialists.

three prominent firms in Canada which offer structure services to plaintiff and defendant bar without charge.[38] These firms act as brokers, earning a commission from the annuities they purchase for the structure. All life insurance companies offer competitive commissions to minimize any conflict of interest for the specialist between his commission and the better interest of the parties. The structure specialist is a non-adversarial role and relies on complete disclosure of the parties to develop appropriate alternative structure proposals.

The structured settlement market is extremely competitive, not only in the pricing of annuities, but in the services specialists provide. The creative initiative which developed structures, continues to develop new and different structure designs to add to the advantages already present. Specialists are also improving their service through the use of computers, for example McKellar's recently introduced a new "Catastrophic Loss Spread Sheet" which greatly simplifies the analysis of proposed structures for complex personal injuries cases. Further development is evidenced by the use of life insurance for the primary caretaker of the plaintiff. In many cases care is provided by family members at no or greatly reduced expense. A structure can provide an annuity which will pay life insurance premiums on the life of the primary caretaker. If they should predecease the plaintiff then the payout will be used to fund another annuity for the additional cost of a replacement caretaker. This arrangement avoids over compensation in the years when care costs are low, while ensuring that the higher financial burden can be met when and if it materializes.

Specialists support a broad variety of educational undertakings concerning structures. They frequently host in-house seminars for law and insurance firms and associations. They actively participate in commissions and task forces where structures are discussed, putting forward information and proposals for reform. In general the specialists take a very pro-active role in the development and marketing of structures.[39]

It is important to remember that structures are merely an alternative to lump sum damages, not a replacement. Structures are not appropriate in every case situation, their application is fact specific. Some general guidelines have emerged for situations that would be most benefited by structures:

a) Awards exceeding \$50,000 — It is difficult to justify the additional administrative cost of a structure relative to the savings which

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38. Baxter, Henderson and McKellar are the three structure specialist firms in Canada.

39. For examples of specialist involvement in education and reform see the 1987 Osborne Commission and the Insurance Institute of Ontario Structured Settlement Seminar 1988.

could be achieved from an award smaller than $50,000. Situations concerning children are generally excepted from this rule because such cases would involve minor injuries and deferred payment of even a small amount can result in a substantial amount in ten to twenty years time. Amounts as small as $10,000 to $20,000 have been structured for children. A second exception are plaintiffs who are currently in a high tax bracket or would be pushed into a higher tax bracket by the interest from the lump sum thereby incurring significant tax loss.

b) Infants — Cases involving infants are nearly always appropriate. Because of the longer life expectancy period the resulting increase in calculation risks of such damages could be minimized by a structure. The caution here is inflation and some appropriate protection from the payments becoming worthless over the extended period anticipated. While the tax savings aren't initially as good for children as they are for adults, structures can extend exemption from tax lability beyond age twenty-one. Despite attempts to bring the interest rate provided by the Official Guardian's Office into line with commercial rates a structure probably offers as good a return if not better.

c) Serious bodily injury — The more serious the injury the greater the future care costs and subsequently the greater benefit structures have to offer either by avoiding the tax gross-up, or where gross-ups are not allowed, by lessening the under compensation of the plaintiff due to income tax liability.

d) Financial management — In cases where the plaintiff is intellectually impaired or an infant they are precluded from exercising good financial discretion and outside management is required. Outside financial expertise is also prudent where the award is of such a size that the average person could not be expected to have the ability to manage it efficiently. Structures have the advantage that they are self managing, avoiding any management cost and guarantee payment and protection from premature dissipation due to poor management or investment.

e) Reduced life expectancy — Sub-standard mortality rates are only available on investments attached to life expectancy such as annuities and they provide a higher rate of return than traditional investment vehicles.

f) Tax gross-ups — This additional expense can be avoided by the use of a structure.

g) Fatal injury claims — These claims are intended to compensate the surviving dependants for their loss of support. This loss is assessed on after tax dollars and is subsequently subject to tax gross-up where available. This expense can be avoided by the use of a structure and the periodic payments will more closely replace the lost support. Further, children do not receive the same special tax exemption for interest

income on fatal injury damages that they do on personal injury damages. This will be discussed under the tax advantages of structures later in this paper.

h) Significant lost future earnings — The *Jennings* case established that future lost earnings were to be calculated on a pre-tax basis and not subject to gross-up.[40] The view was that any overpayment of lost earnings created by not deducting the income tax that the plaintiff would have been liable for, would approximately equal the anticipated tax liability for the interest income earned on the lump sum damages. There is a strong argument that this rule would not apply to structures because the plaintiff will receive all payments tax free and to calculate the damages on the basis of pre-tax versus post tax dollars would be to overcompensate the plaintiff, therefore a structure should be able to save the difference of the tax. Any argument that future lost earning capacity is not appropriate for periodic payment is rejected. Although Jennings held that future earning capacity is a capital asset, there is no ready market where such an asset can be liquidated. Further, periodic payment more closely simulates the loss than does a lump sum.

i) Excess limits claims — There are claims where the damages exceed the liability limit contracted between the defendant casualty insurer and the defendant tortfeasor thus leaving the tortfeasor's personal assets at risk. These cases pose collection expenses and bad debt risk, it is often possible for the claim to fit within the liability limits if it is structured. The structure alternative protects the plaintiff from the expense of collecting against the defendant tortfeasor's personal assets, if indeed there are any or enough assets and precludes a bad faith suit by the defendant tortfeasor against the defendant casualty insurer.[41]

j) Dependants — Structures offer security for both plaintiff and their dependants. They can be especially useful in funding post secondary education of dependants.

k) Deferred Future Loss — Where loss will not accrue for some time the damages can be correspondingly deferred until it is anticipated that they will be required. For example, a plaintiff may be able to continue employment for a period of time prior to their injuries deteriorating their ability to do so.

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40. *Supra*, note 25.

41. *Pelky* v. *Hudson Bay Ins. Co.*, [1982] I.L.R. 1-1493 (Ont. H.C.). A bad faith suit by a defendant tortfeasor against his casualty insurer, alleging a failure to reasonably settle within the policy limits. The court considered the insurer's duty and while they failed to establish any guidelines the case clearly indicates that it would be unreasonable to discard any offer to settle without due consideration.

l) Multiple Parties — Structures can make the best of a situation where there are limited funds to compensate multiple plaintiffs. Similarly, it is useful where there are multiple defendants.

Structures are generally not recommended where there is substantial consumer debt that could not be satisfied by a lump sum component within the structure, for example a house mortgage. These liabilities carry a higher interest liability than an annuity could generate.

The savings made possible through structures varies dramatically according to the award. They have been reported to be as high as fifty percent, but average between ten to forty percent.[42]

V. *Advantages of Structures*

Structures offer distinct advantages overcoming many of the pit falls of lump sum awards.

a) Income Tax Advantages — Relief from the tax gross-up is the most commonly touted advantage because it realizes the greatest financial saving of structures over lump sum. Revenue Canada has traditionally treated damages received for personal or fatal injuries as free from tax liability, but any resulting interest income as liable to taxation. With the introduction of structures, Revenue Canada took the position that the method of payment, periodic or lump sum, was irrelevant to the characterization of the income; thus, periodically paid damages for personal injuries enjoy the same preferred tax treatment as lump sum damages. This policy is not directly expressed in the Income Tax Act,[43] but in Interpretation Bulletin IT-365R2.[44] The following are requirements established in the bulletin:

s. 1(a) limits the special provisions to damages for personal and fatal injuries.

s. 2 clarifies that amounts for special or general damages are exempt from tax liability even if they are calculated with reference to lost income.

s. 3 clarifies that structures funded by an annuity to make periodic damage payments to the plaintiff are not considered to be annuity contracts for purposes of subsections 12.2(3) and 56 (1) and that the payments themselves are not considered to be annuity payments.

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42. See Weir, *supra* note 7, "Structured Settlements the Claims Persons View", [May, 1988] *For The Defence*, 29.

43. S.C. 1970-71-72. c 63.

44. This bulletin was issued May 8, 1987, replacing IT-365R and Special Release IT-365R May 25, 1984. The latest bulletin did not alter but reaffirmed and clarified Revenue Canada's earlier position.

However an annuity purchased by a plaintiff with funds received for personal or fatal injuries is liable to taxation.

s. 4 stipulates that no portion of the damages will be liable to tax even if calculated with reference to interest. However where an amount for damages is held on deposit or in trust all such interest income is taxable. Note, this precludes structures funded by trust funds from enjoying the same status as those funded by annuities.

s. 5 defines structured settlements for Revenue Canada's purposes and lists the criteria that structures must meet:

(a) there must be a claim for damages in respect of personal or fatal injuries.

(b) the claimant and the defendant insurer must have an agreement whereby damages will be paid on a periodic basis.

(c) the defendant insurer must;

(i) purchase a single premium non-assignable, non-commutable and non-transferable annuity which produces payments as agreed between the defendant insurer and the plaintiff.

(ii) make an irrevocable order to pay the plaintiff. Note this protects the plaintiff should the defendant insurer default because creditors would not be able to seize the annuity as an asset of the insurer.

(iii) retain a contingent liability for the payments in case the annuity should default.

Advanced tax rulings are individually binding decisions by the tax department on a particular tax matter. In the early days of structures such rulings were sought as a matter of course, now with IT-365R2 and the prevalence of structures it is not necessary except in cases where compliance is questionable or there is a substantial deferment period prior to payments commencing. The process is relatively inexpensive and expedient. Often, when required, structured specialists will make the application as part of their service.

Revenue Canada's requirements clearly make the defendant casualty insurer owner and annuitant with the plaintiff as a third party beneficiary. Subsequently, it is the defendant casualty insurer who must report the annuity payments as taxable income, but will not be liable for tax because of offsetting claims and payout expenses.

The implications of the tax treatment is that the interest income generated by the annuity will never be subject to tax. The defendant avoids costly tax gross-ups; the plaintiff avoids under compensation due to tax liability and Revenue Canada underwrites the dollar savings.

While Revenue Canada is forgoing potential taxable income, their position with respect to the non-taxable nature of payments to the

plaintiff under structures is not inconsistent with their traditional policy. Further the social benefits derived from structures represent a potential savings for government, it is argued that the relative loss is minute, if at all existent, because the annuity market creates jobs as well as taxable corporate and personal incomes.[45]

There has been a lobby in Canada to remove tax liability from interest income on damages payments. To date this scheme has been resisted because it is a marked shift from Revenue Canada's traditional position and now that structures are available to achieve the same end without tax reform the necessity has decreased. It is not clear how administratively feasible such a scheme would be because plaintiffs would have to distinguish the damage principle and interest income from their personal savings and interest income. Politically such a policy would not likely meet with much support because of our current period of fiscal restraint and the fact that on the face of it the insurance industry and not the plaintiff would stand to gain the greatest benefit.

The greatest tax advantages are gained for either very large awards where the tax liability would be significant or for the plaintiffs whose marginal tax bracket would be increased by the interest income generated by the lump sum damages. The benefit for children is not initially as great as it is for adults because paragraph 81(1) (g.1) of the Income Tax Act exempts children up to age 21 years from tax liability for interest income earned on damages for personal injuries. This exemption applies only to children, and only for personal injuries, not for fatal injury damages.[46]

b) Flexibility — Flexibility is the second most significant benefit of structures, their continuous and flexible nature is more congruent with the plaintiff's needs and the principles of tort compensation.

The flexibility inherent in designing structures was outlined earlier and is a distinct advantage over lump sum damages. However, that flexibility ends when the annuity is purchased and the finality doctrine takes hold. The finality doctrine is of greater significance to structures because unlike lump sum awards where the plaintiff maintains his power of discretion over the damages, under a structure the plaintiff's discretion is sharply limited to the extent of the payments due. There is no right under a structure to claim or control future payments. But how significant is this loss of control? If the damages prove inadequate there is only a short term advantage to full discretion over the fund, at least a structure guarantees that payments will be ongoing. Further, reserve funds described earlier in

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45. Frank McKellar, "Structured Settlements - A Current Review" (1979-81), 2 *The Advocates Quarterly* 389.

46. For a general reference see J.R. Wilson, "The Tax Treatment of Structured Settlements", *Law Society of Upper Canada Continuing Education Material*, April 23, 1983.

this paper are not available for lump sum awards. This fund could be used to cover extraordinary expenses or to restructure an inadequate award. Reserve funds are like a modified review option because they provide an opportunity to review the award and if a review is unnecessary the principle can be reverted to the defendant, avoiding overpayment to the plaintiff and unnecessary expense to the defendant.

c) Guaranteed Payment — Payments are guaranteed under a structure, there is no investment worry, risk or expense. Since annuities are self managing and the payments are tailored to expenses minimizing any build up of capital in the plaintiff's hands, the need for a financial management gross-up is eliminated. The peace of mind associated with freedom from risk and administrative demands should not be underestimated.

d) Periodic Payment — The nature of periodic payments achieves two benefits. First, payments can be matched to anticipated expenses which are usually due on a monthly basis. Investment income is not usually paid out on a monthly basis and where such arrangements can be made there is generally a loss in the rate of return. Thus structured versus lump sum damages are more congruent with the plaintiff's spending requirements.

The second benefit is the discouragement of dissipation. As stated earlier, a pitfall of lump sum damages is that they can be prematurely dissipated due to poor investment or spending resulting in the plaintiff becoming a burden on family and or the state. This possibility is sharply curtailed by the employment of periodic payments because the plaintiff is not in the position to invest or spend any of the award that has not yet become due to him. However, as further insurance against early dissipation the plaintiff's payments cannot be attached or assigned, in practice the plaintiff would likely be able to secure an advance from lending institutions on the basis of guaranteed fixed future income.

e) Shifting Mortality Risk — Shifting of the mortality risk is a significant advantage to both the plaintiff and defendant because the life insurance company selling the annuity is not concerned with individual mortality but aggregate mortality of a like group. Life Insurance companies are in the business of guaranteeing mortality risks and via the life annuities, they, not the defendant or plaintiff bear the mortality risk. This shift means that the damages are calculated on the basis of averages and aggregate mortality tables without any concern for unexpected extended life span. The plaintiff's benefit is guaranteed payments for life, if that is the agreement, while the defendant benefits because their payout is lower than it may otherwise have been because the payments for life removes any contingency payment for unanticipated life extension.

f) Sub-Standard Mortality Rates — Discounted for sub-standard mortality rates can be used by life insurance companies when issuing annuities. Essentially the plaintiff is assigned a discounted life expectancy and treated as older than he is for purposes of calculating the rate of return on the principle invested. This results in higher payments for the same principle because the payout period is expected to be shorter. This consideration is not available for other financial investment vehicles and while a plaintiff could achieve it by purchasing his own annuity, the payments would be subject to taxation.

g) Benefits to Society — Society clearly stands to gain from the increased economic efficiency of structures. In this period of insurance crisis any savings to the insurance industry should have a stabilizing effect on availability and affordability of insurance. It is argued that this stability coupled with increased use of annuities increases economic activity, employment and taxable personal and corporate income. A decreased probability of premature dissipation and increased responsiveness of awards is of value to society because it should result in a decreased burden on state social programs. The only expense of structures to society is the questionable loss of revenue.

VI. *Disadvantages of Structures*

The benefits of structures must be achieved at the expense of certain disadvantages to the plaintiff and defendant.

a) Loss of Discretion Over the Damages — From the plaintiff's perspective the cost is freedom of control and discretion over the damages. This is a concern when the agreed payments prove to be inadequate or a plaintiff's priorities or needs change. For example, should the plaintiff decide he would like to buy a house, in a structured settlement such an expenditure would have to be anticipated; while with a lump sum the plaintiff is able to exercise his own discretion and change priorities and payments at will, but at a greater risk.

Discussions with practising lawyers indicate that some plaintiffs feel the need to control the damages out of a sense of distrust of the defendant or finality of the dispute. Some plaintiffs initially have to overcome an impression of social assistance or welfare. These are perception problems because the plaintiff often does not understand that the defendant is required to pay the full principle at the time of settlement, that the payments are guaranteed and the substantial tax and financial management benefits that periodic payments offer them.

b) Administrative Costs and Contingent Liability — The defendant casualty insurer, while saving money in the end by avoiding management fee and tax gross-ups and taking advantage of sub-standard mortality

rates and reversionary interests where applicable, does incur some disadvantages, in particular, administrative expense and a contingent liability for the life of the structure. Insurers are concerned with finality of a case because the ongoing claims represent not only an unidentified liability, but administrative costs. Structures do not offend the crystallization and finality of the primary liability, but they do require ongoing administrative attention and the contingent liability must remain on the books for the remaining life of the annuity. The contingent liability has the effect of devaluing the insurers assets because while the liability is not likely to crystalize, the liability, not the probability, appears on their financial statements. This could be of importance for smaller insurers who are concerned with their financial image.

c) Trap for the Unwary — The complexity of structures and the awesome nature of the figures associated with them make them a trap for the unwary. This in and of itself is not a reason to avoid structures, rather an opportunity to learn more about them.

Also to be considered in assessing the overall value of structures are those pitfalls of the current lump sum compensation system which structures are unable to avoid. In particular the inherent uncertainty of assessing future care costs, lost earning capacity, inflation, and the absence of reviewable damages.

a) Future Care Costs — These costs are currently increasing at a rate greater than overall inflation, this creates a current valuation problem. Further, the future care needs of plaintiffs cannot be ascertained with any degree of certainty because every case is different. Short of reviewable damages there is no way to avoid the inherent uncertainty of speculating future care needs and costs.

b) Lost Earning Capacity — Lost earning capacity can never accurately be assessed because of all the potential intervening factors such as unemployment, economic depression, rehabilitation, etc. The uncertainties are even more acute when the plaintiff is a child because there is no way to accurately forecast what their career path would have been. The nature of uncertainty in this head of damage is "what could have been", thus not even reviewable damages, which allow the parties to reassess the damages in the future, could completely alleviate the vagarity of this head of damage.

c) Inflation — Inflation is a serious consideration for structures because it has the capacity to completely undermine the adaquacy of periodic payments. Some authors assert that the fixed payment aspect of structures increases the risk of inflation for the plaintiff because they are not able to take advantage of market changes and are locked into a fixed rate of return and inflation protection, be it indexing, reserve funds or

balloon payments. Currently lump sums provide for inflation via present value discount rates which are a rough means of determining the current value of future dollars.[47] This method is not applicable to structures, nor is it viewed as a reliable indicator of inflation. It is true that prudent investment of the lump sum coupled with good fortune may provide a better hedge on inflation, but the risks of imprudent investment and bad fortune should not be underestimated. Safer investments tend to be debt based with a low return and a greater vulnerability to inflation. In addition, structures have the advantage of being non-taxable therefore less vulnerable to devaluation in times of rising inflation.[48]

Of the alternate inflation fighting methods employed by structures, linked indexing appears to be the best. The disadvantages of lump sum compensation for inflation is that their resulting interest income attracts tax liability and tends to create a catch up situation which defeats the purpose of structures. Indexing represents the most effective and ideologically congruent alternative because the purpose of indexing is to keep the periodic payments in synchrony with the current economic demand. There are two methods of indexing, fixed, which is indexed at a particular percentage or dollar amount per year or linked, where the index is linked to a variable economic indicator such as the Consumer Price Index (CPI), Gross National Expenditure (GNE), the Treasury Bill Rate or any combination thereof.[49] The problem with these economic indicators is that they are historical in nature and not designed as forecasting tools, but they are variable and are to some degree representative of economic change, unlike fixed indexing which remains constant despite future developments.The hazard of fixed indexing is clearly illustrated by the thalidomide cases of the 1960's which were, based on expert forecasts, indexed at two percent.[50] Therfore, with it's variable nature, linked indexing offers the best hedge against inflation short of reviewable awards. The difficulty arises in relation to the uncertainty inherent in linked indexing which makes it substantially more expensive than fixed indexing and correspondingly less attractive. Weir in his 1984 publication on structured settlements estimates eighty percent of structures employed fixed indexing.[51] There is no indication of where this figure stands today, but an alternative chosen by many plaintiffs today is a fixed index plus a periodic lump sum supplement.

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47. These rates are generally set in the various provincial civil procedure rules, for example Nova Scotia Civil Procedure Rule 31.10(2).
48. Feldthusen, *supra* note 26, at 22.
49. Weir *supra* note 7, at 69-72.
50. *Ibid.*, at 10.
51. *Ibid.*, at 72.

d) Reviewable Damages — Although structures are not currently reviewable the use of reserve funds creates a quasi review option. Balloon payments could be used for the same purpose, but they would be paid directly to the plaintiff thus the interest would be liable to tax whereas reserve funds are used to finance an additional annuity held by the defendant and payable to the plaintiff.

Structures would however facilitate a review process easier than would the lump sum system, because the payouts under a structure are not intended for future but current compensation, thus the review would only have to determine if the periodic payments are adequate to meet the current and future needs. There would be no necessity to consider the amount previously paid and if it were properly dissipated, as would be required in any review of lump sum damages.

In the final analysis of advantages and disadvantages of structures versus lump sum damages, it is clear that structures have eliminated some, but not all the uncertainty of damage assessment. Structures provide a net benefit and managable disadvantages to all parties.

VII. *Structured Judgments*

It is evident that structured settlements have come to play an important role in our personal and fatal injuries compensation system. The questions, facing us now are: should this role be extended?, should courts be imposing structured judgments?, do they have the necessary authority?, and what advantages and disadvantages could we anticipate?

a) Do we want structured judgments? — There are primarily two arguments against structured judgments.

i) Too Paternalistic — It is asserted that it would be unnecessarily paternalistic of the courts to impose a form of damages that the plaintiff did not want. Structured judgments do not deny the plaintiff's right to damages merely the method in which they are paid. A court might be inclined to order a structure for any of a variety of reasons; fear of premature dissipation due to poor financial management or spending, the uncertainty of tax gross-up or the increased economic efficiency of structures and the resulting benefits for society.

The first of the reasons places the court in the position of big-brother looking out for those it believes cannot take care of themselves. The plaintiff may or may not be financially sophisticated, but that is not for the court to determine because it is not an issue at trial. Some might argue that the gross-up for management fees puts the plaintiff's financial sophistication into issue, but this is not necessarily the case, the sheer size of the award or age of the plaintiff could make

outside financial management a necessary and prudent requirement. Justice Spence stated in *Arnold* v. *Teno* that;

> Even if the plaintiff were an adult and not disabled, she would need professional assistance in the management of such a large sum of money as is being awarded in this case.[52]

Thus on a purely individualistic level it is paternalistic of the court to impose structured judgments for the mere purpose of avoiding premature dissipation, but there are saving factors. The courts other reasons could relate to the benefits to be derived by society. Premature dissipation of damages translates into a burden on social programs and tax dollars, structures can decrease the probability of such reliance and tailor the damages more closely to the plaintiff's actual needs. This coupled with the other benefits to society as discussed under structured settlements establishes a strong public policy argument in favour of structured judgments.

(ii) Restriction of the Plaintiff's Rights — Social benefits cannot in and of themselves justify structured judgments. There must be no adverse affect on the plaintiff such that he would be prevented from achieving the purpose for which the damages were intended, that of placing him in as similar a position as possible to that he would have been in but for the injury. The only disadvantage to the plaintiff resulting from structured judgment over lump sum damages is the loss of freedom of discretion over the total damage award, but if properly designed the structured judgment does not preclude the plaintiff from being adequately compensated, if anything it ensures that he will be.

Currently the courts go to great lengths to ensure that the plaintiff's needs are adequately compensated and the defendant is liable for significant management and tax gross-ups above and beyond the actual damages, yet the plaintiff is under no obligation to use the damages for the purposes for which they were intended, he has full discretion to spend the funds in any manner he sees fit. While a structure does not guarantee that the funds will be used for their intended purpose it sharply decreases the plaintiff's access to funds and resulting investment and spending ability. An argument against this restriction of discretion is that it is discriminatory, that other windfall recipients such as lottery winners and testamentary beneficiaries are not limited in control over their windfall. The major difference is that such windfalls were not given with a prescribed purpose, unless of course it was a conditional testamentary gift in which case the courts generally hold the condition to be valid. Further the recipients of such

52. *Arnold, supra* note 11, at 328.

windfalls have not lost their future income earning capacity as have many plaintiffs in personal injury cases.

b) Do courts have the authority to impose structured judgments? — In terms of requisite jurisdiction courts generally reject any notion that they have the authority to grant damages in any form other than lump sum. A case which is cited as authority for this position is *Fetter* v. *Beale*[53], which held that after recovery for an injurious act, no action can be maintained on account of any consequences occasioned by that act. Essentially the case affirms the doctrines of finality and *res judicata,* which provides that damages are for once and for all and precludes litigation of the same matter twice. There is nothing in the case which states that damages must be paid in a lump sum or precludes the use of periodic payments. Structures do not offend the finality doctrine because they are final at the time the structure is purchased and neither party can alter the terms. The contingent liability held by the casualty insurer is a contractual term between the insurer and the life insurance company selling the annuity.

Andrews is another case cited to support the argument that courts lack the inherent jurisdiction to award structured judgments. A statement from that case quoted earlier in this paper was a plea by Justice Dickson, as he was then, for legislative intervention authorizing periodic awards. This statement implies that Justice Dickson believed the Supreme Court of Canada to be without the inherent jurisdiction to impose damages in the form of periodic payments. The Supreme Court is free to backtrack from this inference especially since the comment was made prior to the *Charter of Rights and Freedoms* and the court's new pro-active role in creating and interpreting law. The *Charter* should offer valid arguments for the rights of plaintiffs and defendants and reasonable limits to such rights under s. 1.

Therefore, adherence to lump sum damages is merely a common law tradition and as such can be ignored except where statutorily expressed as in the Ontario Courts of Justice Act s. 129. This provision allows courts in Ontario to award structured judgment where both parties consent, thereby implying that structured judgments are not otherwise authorized. Other provinces are not restricted by such statutory inferences.

Despite this conclusion courts are likely to uphold the traditional approach and resist the pro-active approach taken by the Manitoba Court of Appeal in *Watkins,*[54] where the court assumed an inherent jurisdiction to award structured judgments. The most direct and certain

53. (1702), 91 E.R. 1122.
54. *Watkins* v. *Olafson*, [1987] 5 W.W.R. 193 (Man. C.A.).

method to establish judicial jurisdiction for structured judgments would be via legislative reform. This would erase any doubt and put pressure on the courts to consider more closely the alternative of structured judgments and the adequacy of tort compensation for personal injuries. Legislation would also ensure that a coherent structured judgment scheme was uniformly available and applied.

c) What advantages and disadvantages could we anticipate?

(i) There is no reason to believe that any of the benefits of structured settlements would be lost because Revenue Canada does not make a distinction between damage awards versus settlements and the other benefits would not be altered by a change in the manner in which the structure was achieved.

(ii) The real issue is what the concerns of structured judgments will be outside the loss of discretion for the plaintiff. Administration costs and procedures and how our Legal system would deal with structured judgments would be the greatest concern.

There are two possible procedures for imposing structured judgments. First the court could hear evidence and determine in detail the structure to be imposed. Second, the court could determine the principle for which the defendant will be liable and let the plaintiff design the structure most appropriate to his needs. The burgeoning workload and responsibilities of our judicial system demand as efficient a process as possible, thus the evidentary burdens of a court determined structure would be unreasonable. Rather, since the plaintiff is in the best position to know his needs, he, not the court could most efficiently design an appropriate structure. The risk is that the plaintiff would allocate the payouts in a manner which would defeat the purpose of a structure. This could be overcome through the requirement of a court approval for the proposed structure. The courts could employ the same review procedure established in *Fucsh*[55] for the approval of structures for infants and incompetents.

In determining the appropriate principle the court would be required to go through the same calculations and assessments it would undertake to determine a lump sum award except for the calculation of the tax and management fee gross-up. Currently when lawyers are considering a structured settlement in order to determine the principle for an acceptable structure they calculate the lump sum including the tax and management fee gross-ups and discount that figure anywhere from ten to forty percent of the claim.[56]

55. *Fucsh, supra* note 32.

56. Savings associated with structures have been reported to be as great as 50%. See Weir *supra* note 7, at 67, "Structured Settlements, the Claims Persons View", *For The Defence*, May 1988, at 29.

Inflation would have to be considered by any proposed structured judgment scheme. Since the court does not have to worry about bargaining power, as do the parties of the dispute, the court could freely employ the more expensive option of linked indexing. The legislation enabling structured judgments could specify the appropriate linking factor or it could be left to the court to determine on evidence presented at trial. The court's use of linked indexing would encourage parties to voluntarily consent to this more representative method of indexing over the inflexible fixed method.

All heads of damage would have to be calculated on an after tax basis to avoid overcompensating the plaintiff. This is particularly important for lost future earning capacity which under the *Jennings* rule is calculated on pre-tax dollars in order to compensate for anticipated tax loss, because there is no tax loss associated with structures this rule should not apply.[57]

Any recommended scheme for structured settlements must include judicial discretion. This is necessitated by virtue of the fact that structures are not appropriate in all cases. The objective of the court should be to provide *restitutio in integrem* in whatever form would be appropriate in the particular case at hand.

There are several reasons to believe that structured judgments are viable today. Both the courts and the practising bar are familiar with the concept and structures that have been employed over a long enough period that their results can be evaluated. The "insurance crisis" of the 1980's has heightened the need for a more economically efficient compensation system. Further the needs compensation objective of damages can be more closely achieved through the use of structures, and finally the government is being lobbied for structured judgments by some very influential groups including the insurance industry and the practising bar.[58]

d) Canadian case law on structured judgments — A discussion of structured judgments would not be complete without a careful analysis of the case law. *Watkins* v. *Olafson,*[59] was the first of only two reported structured settlements in Canada. In *Watkins* the Manitoba Court of Appeal imposed a structured judgment while varying damages awarded at trial for a motor vehicle accident which rendered the thirty-three year old plaintiff a quadriplegic. The appeal was not heard until nine years after the accident, during which period interim payments were made.

57. Feldthusen, *supra* note 26, at 17.

58. Refer to structured judgment proposals by the Ontario branch of the Canadian Bar Association to the Slater Commission and the proposal by MacKellar to the Osborne Commission.

59. *Watkins, supra* note 54.

Two facts were found by the Appeal Court to be of particular importance, first, the province of Manitoba was a defendant party in the matter, second, while the plaintiff expressed an interest to live independently he had spent a cumulative total of six of the last nine years in hospital under the free care of the provincial health plan.

The appeal was launched by the defendants against the quantum of damages awarded under all heads of damages except non-pecuniary and special damages. While allowing the appeal and varying the damages the court took an admittedly innovative approach and applied a structured settlement to the future care head of damages awarding lump sum for all other heads. By employing a structure they were able to avoid the concerns regarding the uncertainty of tax gross-up, anticipated life expectancy and inflation.

The court did not stop at the conventional structured scheme, but modified the continuous payment aspect by stipulating a condition precedent. The government of Manitoba was ordered to pay into court annually a sum sufficient to cover the maximum payments for that year, the fund was then to be controlled by a trustee who would make monthly payments to the plaintiff once it had been established that he was living independently and not under the provincial health care program. Any remaining balance in the fund was to be credited to the province.

The judgment does not mention an annuity, thus compliance with Revenue Canada requirements and subsequent tax benefits are questionable, and if they are available would they be available to a private defendant under a similar structure?

The court did not have any difficulty in awarding the structure in relation to future care only. This is of particular importance because there were substantial interim payments made to the plaintiff which the court held against the lump sum award, this would not have been possible if the structure were viewed as an all or nothing means of damage payment and could have discouraged defendants in the future from advancing interim payments.[60]

In effect the court imposed a reviewable award subject to collateral benefits enjoyed by the plaintiff. Currently, most collateral benefits are clearly excluded in calculating lump sum damages[61] and under structured settlements they are a matter of negotiation between the parties, noting that if the matter went to trial they would not be considered. Ideologically, collateral benefits should be considered when compensation is made on a pure needs versus loss basis; however, our tort system

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60. Interim payments are an important means of minimizing claim liability. See C.J. Horkins, "Tactics to Limit You Exposure", *Without Prejudice*, April 1988, at 49.
61. Weir, *supra* note 7, at 26.

even with it's new needs perspective has not yet abandoned it's protection of collateral benefits and is unlikely given their traditional view that the consideration of collateral benefits leads to an unwarranted windfall for the defendant and would discourage individuals from providing themselves with insurance pensions and other such collateral benefits. As such it would seem unfair and inconsistent to consider collateral benefits under structured judgments when they are not treated similarly under lump sum damages. In the very least, collateral benefits should be treated equally under both forms of compensation.

The judgment clearly states that the structure was feasible because of two conditions; the province was a defendant in the action and they also bear the financial responsibility for the provincial health care system. The motivation for the award would appear to be protection of government coffers by preventing a plaintiff from claiming future care costs from the same defendant who would in a different capacity be required to provide free health care. The problem with this is that it ignores the provincial health care program's right to subrogation for health care provided in relation to a tortious act.[62] This sets a dangerous precedent which could be extended beyond the limits which the court intended. Clearly hospital services have no better or worse right to subrogation because one of the defendants is itself. What if the federal government were a defendant to the action, would they receive special treatment? There is little doubt that if the defendant were a private insurance company the plaintiff would not have been limited in his claim for future care costs, he would have been able to collect the full amount despite his living independently or under provincial health care.

The court states that it is their duty to keep damages to as reasonable a level as possible without under compensating the plaintiff, because they must protect the public interest and because the legislature has failed to respond to the times. This is a valid argument, but there is a counter argument that they have indeed under compensated the plaintiff by refusing him his full claim to future care damages merely by incidence of who the defendant was rather than by any other legal principle.

This decision rejects lump sum damages as unworkable in adequately compensating plaintiffs for future care costs because of the uncertainty of tax gross-ups, life expectancy, future care needs, rate of return on investments and the discount rate to be used. The court noted that lump sum awards are growing larger to compensate for the additional expenses they attract, such as management fees and tax gross-ups. Such expenses

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62. The particulars of subrogation are beyond the scope of this paper, but as a matter of course provincial health plans do subrogate health care expenses in insurance and workmen's compensation cases. See *Ontario Health Insurance Plan*, infra note 64.

of damage compensation. One significant casualty insurer in Nova Scotia stated that it was their objective to structure all personal and fatal injury claims.[65] Five years ago their success rate was approximately one percent, today it is hovering over fifty percent with a greater success rate for claims over a million dollars. A recent example of a successful structure concerned a twenty year old girl from a wealthy Ontario family who suffered a broken neck while working on a *Katimavic* project here in Nova Scotia. The young woman was a bright student with prospects for a career in law. The plaintiff's claim was handled by a top Toronto litigator who accepted on behalf of his client a two point seven million dollar structure on a lump sum claim valuation of four million dollars.

Indications from structured specialists, insurance industry and plaintiff bar indicate there are approximately six claims per year in Nova Scotia that exceed one million dollars, with a significantly larger number falling within the one hundred thousand dollar to one million dollar range. There are no statistics on a provincial or national basis, which substantiate this estimate. Nor are there any statistics available for Nova Scotia or elsewhere in Canada, indicating the prevalence of structures. A 1987 American study stated that structures were used in fifty percent of personal and fatal injury claims in the United States and at a growing, but unidentified rate in Canada.[66]

From the defence bar perspective structures are easier to negotiate now because there are a limited number of lawyers practicing in the insurance area in Nova Scotia and they have developed a competent level of knowledge and familiarity with the structured concept. Indications are that this is true in other areas of the country and that a direct relationship exists between the familiarity with the structure concept, the prevalence of structures and ease of negotiation.

The first hurdle that structures meet are the prejudices and practices of the practicing bar. All structured specialists believe that a lack of awareness and resistance of the unknown stunt the application potential of structures. The fact that structures have been around for some time now and the visibility of their results have decreased this problem. Some lawyers have suggested that it would be negligent for a lawyer practicing in the area of personal and fatal injuries to not consider the structure alternative.

The second hurdle remaining is the plaintiff himself. Lawyers and structured specialists now focus on educating plaintiffs about structures and the advantages they offer.[67] Most plaintiff resistance stems from

65. This objective excludes discretionary claims such as whiplash.
66. D. Harvey, "Structured Settlements", *Canadian Underwriter*, April 1987, at 28.
67. See, "Plaintiff's Guide to Structured Settlements", Baxter Annuities.

ignorance of the concept and or an inappropriate allocation between up-front and periodic payments. This highlights the need to identify the plaintiff's needs and wants accurately and design the structure appropriately. Lawyers generally acknowledge that their presentation of the structure concept has significant influence on the plaintiff. Because of the weight of their presentation and the awesome nature of the figures associated with structures, most plaintiff lawyers prefer to review the structure alternative themselves, prior to showing it to the client.

IX. *Conclusions*

It is evident that structured settlements are beneficial in personal injuries claims, with a direct relationship between the advantages and the increasing severity of the injury and resulting future care needs. Structures benefit not only the parties involved but society as well. The advantages of structures vary with the circumstances and are not always better than lump sum damages. The need for structures, and their advantages, are based on the pitfalls of lump sums; if these pitfalls could be corrected the need and advantages of structures would decrease correspondingly. Until that time, structures facilitate the shift from compensating the plaintiff's loss to compensating their needs in personal and fatal injuries compensation. If the shift to needs compensation is to be complete structured judgments must be used to ensure that plaintiffs in jurisdictions without tax and or management fee gross-ups are adequately compensated and protected from erosion of their awards from these variables. Structures by their periodic nature provide a more adequate and fair remedy for personal and fatal injury claims because they replace any loss of continuous income and pay for future care needs as they arise without placing great responsibility and risk on the plaintiff to invest and spend the damages wisely.

Although structured settlements have enjoyed increasing success, as awareness of and experience with structures grows there will always be cases where structured settlements would be appropriate, but are refused. Structured judgments give the courts the opportunity to reclaim the advantages of structures where they would otherwise be lost. There is no worry that structured judgments would kill off the use of structured settlements, quite the reverse, the loss of control by the parties resulting from litigation in addition to the resulting expenses would encourage parties to settle out of court and use structures where appropriate because if even one party wanted a structure and the case was appropriate for a structure, they could force the matter to court and achieve there what they could not in negotiated settlement. Although dated, a 1965 study indicated that less than five out of one hundred personal injury claims

reached litigation, the balance were settled. The ever rising costs of litigation have only served to reinforce this settlement trend. Most litigators would state that the majority of clients are better served by settlement than litigation and their objective is to only litigate in the relatively small number of cases where litigation is beneficial, for example where a principle or liability is at issue.[68]

In these days of the *Charter* the most common argument which is mounted against structured judgments is the imposed loss of the plaintiff's freedom of discretion over the damage award. This argument is made despite any advantages to the plaintiff, but as discussed earlier such limitations should be found reasonable under s.1.

Judges and counsel will have to be educated about structures and where they are most effectively employed. A judicial procedure will have to be designed to maximize the efficiency and advantages of structures.

There would be little hope of the judiciary developing a coherent and consistent system of structured judgments without legislative intervention because some courts and counsel would resist the new alternative. Legislative reform would offer the greatest uniformity of procedure and availability of this remedy.

One of the best features of the tort compensation system is the ability to tailor awards to the specific case. Historically the courts were concerned with appeasing the plaintiff to avoid retributive acts, later the goal was to compensate loss and today the concern is for the plaintiff's future needs. It is only logical that one method of compensation could not adequately achieve these various goals. Lump sum damages are no longer generally suitable for personal and fatal injuries compensation. Structures are better suited to the current objective of needs based compensation. To not empower the courts to employ this proven tool is to handicap them in their attempt to fairly compensate the plaintiff without overburdening the defendant, and to ensure that damage awards for personal and fatal injuries will be unnecessarily complex and expensive.

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68. Weir, *supra* note 7, at 23.