

ROYAL COMMISSION ON COMPENSATION

FOR DONALD MARSHALL, JR.

L I T E R A T U R E

SUBMITTED BY

COUNSEL FOR THE COMMISSION

I N D E X

1. Linden, Canadian Tort Law (1977)
2. Compensation for Wrongful Imprisonment, A Report by JUSTICE (1982)
3. Sullivan, Three Methods of Tort Compensation (1982), 3 Advocates Quarterly 256.
4. Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death (1987).
5. Brown, Law of Defamation (1987).
6. McGregor on Damages (1988)
7. Short, Matters of Interest (1988) 9 Advocates Quarterly 105
8. Todd, Structured Settlements and Structured Judgments: Do They Work and Do We Want Them?, (1989) 12 Dalhousie Law Journal 445

F. Punitive Damages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹² [1964] A.C. 1129.

¹⁹³ [1971] 2 All E.R. 187.

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

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

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

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

¹⁹⁶ [1970] 1 O.R. 764.

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

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

A REPORT BY **JUSTICE**

Compensation for Wrongful Imprisonment

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L2

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A REPORT BY **JUSTICE**

Compensation for Wrongful Imprisonment

CHAIRMAN OF COMMITTEE
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Jacqueline Levine was Secretary of the Committee for its earlier meetings, but had to resign through ill health. Mrs Carol Harlow was obliged to resign owing to pressure of other work.

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

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INTRODUCTION

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

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

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

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

- (a) loss of liberty and the harshness and indignities of prison life;
- (b) loss of livelihood and property;

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

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

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

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

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

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

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

(b) the Court of Appeal has quashed a conviction on a reference from the Home Office;
and in a few other exceptional circumstances.

- 7 This inadequate provision does not cover cases in which;—
- (a) a conviction carrying a sentence of imprisonment is quashed on appeal from a Crown Court or a magistrates' court;
 - (b) a person is committed in custody for trial and the jury finds him not guilty, or he is discharged by the judge, or the prosecution offers no evidence;
 - (c) a person is detained or remanded in custody and is discharged or acquitted when he appears in the magistrates' court;
 - (d) a person is detained for questioning and released without being charged.

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

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

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

EXISTING PROVISIONS

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

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

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

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

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

- (a) In 1928, Oscar Slater, who had been imprisoned for eighteen and a half years for a murder he did not commit, was awarded £6,000 'compassionate allowance'.
- (b) In 1955, Emery, Thompson and Powers, who had been wrongly imprisoned for two years for assaulting a police officer, were awarded sums between £300 and £400.
- (c) In 1965, the three Cross brothers, who had spent eight months in prison for robbery, were awarded sums between £800 and £1,000. They had been identified by a woman who said that she recognised them in a dimly lit street from a second floor window. A watch they were alleged to have stolen was later found in the possession of another gang.
- (d) In 1974, Laszlo Virag, who had been wrongly identified and imprisoned for five years, was awarded £17,500.
- (e) In 1977, Patrick Meehan was pardoned by the Secretary of State for Scotland after serving six years for a murder committed by another man, whose confession was disclosed only after his death. Meehan, whose case was the subject of a book by Ludovic Kennedy, was awarded only £7,500, presumably because of his 'way of life'.

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

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

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

- (b) In 1977, Tom Naughton served three years of a ten year sentence for armed robbery. His alibi that he had been arranging to buy a car at a garage many miles away was disbelieved. A mechanic, who had left the garage shortly afterwards, was eventually traced and recognised Naughton and his friend who had called at the garage with him. The Court of Appeal quashed the conviction on a reference by the Home Secretary and Naughton was awarded £10,000.
- (c) Donald Benjamin was convicted in 1976 of raping a young woman whom he found baby-sitting in the flat of his girl friend, and sentenced to 12 years imprisonment. His defence was that she had willingly consented and that she had accused him of rape only because she was frightened of what her boy friend, who had convictions for violence, might do to her. She had confessed this to two friends who were sisters and who offered to give evidence. The younger sister, however, was threatened by the boy friend and refused to say anything when she went into the witness box. JUSTICE obtained statements from her and her mother. The Home Office ordered a police investigation which resulted in the case being referred to the Court of Appeal, which ordered a re-trial at which Benjamin was acquitted. He was awarded £9,000 compensation.
- (d) Albert Taylor was released in 1979 after serving 5 years of a life sentence for the murder of his fiancée's younger sister. A police investigation brought to light some further important medical

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Here again there is no guidance as to what circumstances

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

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

- (a) If the prisoner petitions the Home Secretary claiming that he was wrongly convicted and a police investigation is ordered, it is a matter of chance or influence at what level the claim will be decided. In the case of Roy Binns, it was decided at junior management level that no action should be taken on the Chief Superintendent's recommendation. On the other hand, representations by an M P or by JUSTICE normally receive the personal attention of the Minister of State.
- (b) Much depends on the zeal and objectivity of the investigating officer and the recommendation he makes.
- (c) When the Home Office has been satisfied that there may have been a miscarriage of justice and that some action is called for, then further hazards await the petitioner in that either he may be granted a pardon, or his case may be referred to the Court of Appeal with no certainty that his conviction will be quashed, or he may be released before he has served his full sentence without compensation and, what is worse, without any indication of whether he is judged innocent or guilty.

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

CONVICTIONS QUASHED ON APPEAL

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

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

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

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

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

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

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

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

ACQUITTALS AT TRIAL

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

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

- (i) the prosecution may offer no evidence because new evidence pointing to the accused's innocence has come to light or the available evidence has been re-examined and considered too weak to justify a trial;
- (ii) the prosecution may decide not to proceed because one of its vital witnesses is no longer available;
- (iii) the trial judge may of his own volition, or on a submission by the defence, direct the jury to acquit on the grounds of insufficient evidence;
- (iv) the judge may stop the trial and direct the jury to acquit because one or more of the prosecution witnesses have been clearly shown to be giving false evidence;
- (v) for a variety of reasons the jury may find the accused not guilty.

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

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

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

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

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

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

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

OUR PROPOSALS

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

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

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

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

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

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

IMPRISONMENT COMPENSATION BOARD

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

- (a) After the Board has accepted a claim as falling within its jurisdiction and being worthy of consideration it may refuse or reduce compensation if it considers that:—
 - (i) a conviction has been quashed on grounds that the Board regard as being a mere technicality;
 - (ii) it would be inappropriate in view of the imprisoned person's conduct in respect of the matters which led to the criminal proceedings;
 - (iii) the applicant has failed to give reasonable assistance to the Board in its efforts to assess compensation.
- (b) In respect of paragraphs a (i) and a (ii) above the Board will normally only consider evidence which was advanced at the trial or at the hearing of the appeal, except that it may consider and take into account matters which have come to light in the course of a subsequent investigation.
- (c) Where the applicant's claim is accepted as coming within the provision of the scheme the Board will grant compensation for:—
 - (i) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;

- (ii) loss of earnings by the imprisoned person or any dependant person where such loss is a direct consequence of the imprisonment;
- (iii) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependant person;
- (iv) pain suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependants.

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

- (d) Compensation will not be paid if the assessment is less than £250.
- (e) A person compensated by the Board will be required to undertake that any damages, settlement or compensation he may subsequently receive in respect of his wrongful imprisonment will be repaid to the Board up to the amount awarded by the Board.

ADMINISTRATION

- 47 (a) The Compensation Scheme will be administered by the Imprisonment Compensation Board, assisted by appropriate staff. Appointments to the Board will be made by the Lord Chancellor and in Scotland by the Lord President of the Court of Session. The Chairman and members of the Board, who will be legally qualified, will be appointed to serve for five years in the first instance, and their appointments will be renewable for such periods as the Secretary of State considers appropriate.
- (b) The Board will be financially supported through a grant-in-aid out of which payments for compensation awarded in accordance with the principles set out below will be made. Their net expenditure will fall on the votes of the Home Office and the Scottish Home and Health Department.
- (c) The Board will be entirely responsible for deciding what compensation should be paid in individual

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

PROCEDURE FOR DETERMINING APPLICATION

- 48 (a) The initial decision of the amount of any compensation awarded will be taken by one member of the Board. Where an award is made the applicant will be given a breakdown of the assessment of compensation except where the Board consider this inappropriate. Where an award is refused or reduced reasons for the decision will be given. If the applicant is not satisfied with the decision he will be entitled to a hearing before three members of the Board other than the member who made the initial decision.
- (b) Procedure at hearings will be informal and hearings will generally be in private. The Board will have discretion to permit observers, such as representatives of the press, radio and television, to attend hearings provided that written undertakings are given that the anonymity of the applicant and other parties will not in any way be infringed without the consent of all parties to the proceedings. The Board will have power to publish information about its decisions in individual cases: this power will be limited only by the need to preserve the anonymity of applicants and other parties.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

- 1 There are no statutory provisions in the United Kingdom for the payment of compensation to persons who have been wrongfully imprisoned, such as are required under Article 14(6) of the UN International Covenant on Civil and Political Rights or are in force in other member countries of the Council of Europe (paragraph 5).
- 2 It is neither right nor appropriate that decisions to grant compensation should rest with the Home Secretary if only because he is so heavily involved in the administration of criminal justice and the conduct of the police (paragraph 42).
- 3 In the light of the above we recommend that all claims for compensation should be determined, in respect of both eligibility and quantum, by an independent tribunal to be called the Imprisonment Compensation Board. The Board would be similarly constituted and operate on broadly the same principles as the Criminal Injuries Compensation Board (paragraph 46).
- 4 Persons who have been granted a free pardon under the prerogative of mercy or whose convictions have been quashed by the Court of Appeal on a reference by the Home Secretary would have an automatic entitlement to compensation as they effectively have under existing provisions for *ex gratia* payments (paragraph 44).
- 5 Persons whose convictions have been quashed on appeal should be automatically entitled to apply for compensation, but the Board would be entitled to refuse or reduce compensation if it considered that the conviction had been quashed on a mere technicality, or that it would be inappropriate in view of the claimant's conduct in respect of the matters which led to the criminal proceedings (paragraph 46 (i)).
- 6 In respect of the above, the Board would be entitled to take into account matters which had come to light in the course of a subsequent investigation. (paragraph 46(2)).

- 7 Persons committed for trial in custody and subsequently found not guilty or discharged for any of the reasons indicated in paragraph 36 should be entitled to apply for compensation if the trial judge grants a certificate or if counsel provides a written opinion in support of the application (paragraph 39).
- 8 A convicted person who has had part of his sentence remitted by the Home Secretary because of serious doubts about the rightness of his conviction should be entitled to apply to the Board for compensation and the Board should have power to call for all the papers in the case (paragraph 45).
- 9 In assessing quantum, the Board should award compensation under the headings in paragraph 46(3).
- 10 Legal aid should be available to claimants for the presentation of claims and for appeals against refusals by a single member of the Board (paragraph 34).

SCHEMES FOR COMPENSATION IN OTHER COUNTRIES

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

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

WEST GERMANY

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

- (a) Where a person has received a sentence which is subsequently quashed or reduced on appeal.
- (b) Where a person has suffered damage by being detained in custody pending trial or being kept in custody as a result of some other prosecution measure, and he is acquitted or the proceedings against him are discontinued.
- (c) Where the pre-trial criminal process is discontinued at the discretion of the Court or the State Attorney's Office.

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

Compensation is available for both pecuniary and non-pecuniary loss

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

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

SWEDEN

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

- (a) he has been found not guilty at his trial; or
- (b) the charges against him are withdrawn at the trial; or
- (c) the preliminary investigations are concluded without legal proceedings being instituted.

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

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

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

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

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

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

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

FRANCE

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

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

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

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

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

HOLLAND

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

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

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

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

COUNTRIES OUTSIDE EUROPE

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

SOUTH AUSTRALIA

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

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

WESTERN AUSTRALIA

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

OTHER AUSTRALIAN STATES

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

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

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

- (a) All were in favour of a scheme for compensation being implemented whether persons were ultimately acquitted at trial or on appeal or by way of pardon. A typical comment was:— For the balance to be maintained between rights of individuals and society's expectation of having the law enforced effectively, an effective system of compensation must exist.
- (b) The majority favoured compensation under specified heads of damage, but the representative of the probation service thought full tort damages should be given.
- (c) The majority felt other benefits (such as unemployment benefits) should be taken into account when calculating the quantum of the award; but the Social Action Lobby did not feel even this should be brought into the reckoning.
- (d) A majority were against any limit to the amount of any award, but a solicitor and one of the police responses were in favour of some maximum limit.
- (e) A majority were in favour of allowing categories of persons in addition to the acquitted claimant, to claim. One of the police to respond disagreed. A typical comment was:— It is essential that those financially dependant should be able to claim. It would be unwise to deny the right to claim for situations may arise where it is equitable and in accordance with natural justice that they should be able to do so. Similarly a majority felt representatives of a deceased claimant should be able to claim on behalf of the estate.
- (f) A majority were against claimants being required to establish their innocence. The police and the solicitor thought this

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

- (g) A majority were in favour of some bars to compensation (but not one of the police responding) such as where a claimant had contributed to his own misfortune; but in general these should not be absolute bars but a factor in assessing compensation.
- (h) On the tribunal to decide the claim, the responses were evenly split between an independent tribunal, the trial judge, and other judges or courts.
- (i) In general it was felt that an improvement in the procedures for granting bail would alleviate the problems of compensation for pre-trial detentions.

HOME OFFICE LETTER TO CLAIMANTS

*EXPLANATORY NOTE**EX GRATIA PAYMENTS TO PERSONS WRONGLY CONVICTED OR CHARGED:**PROCEDURE FOR ASSESSING THE AMOUNT OF THE PAYMENT*

- 1 A decision to make an *ex gratia* payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.
- 2 Subject to Treasury approval, the amount of the payment to be made is at the direction of the Home Secretary, but it is his practice before deciding this to seek the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made in the meantime.
- 3 The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that an *ex gratia* payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a memorandum is prepared by the Home Office. This will include a full statement of the facts of the case, and any available information on the claimant's circumstances and antecedents, and may call attention to any special features in the case which might be considered relevant to the amount to be paid; any comments or representations received from, or on behalf of, the claimant will be incorporated in, or annexed to, this memorandum. A copy of the completed memorandum will then be sent to the claimant or his solicitor for any further comments he may wish to make. These will be submitted, with the memorandum, for the opinion of the assessor. The assessor may wish to interview the claimant or his solicitor to assist him in preparing his assessment and will be prepared to interview them if they wish. As stated in paragraph 2 above, the final decision as to the amount to be paid is a matter entirely for the Home Secretary.
- 4 In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and/or loss of liberty, and any or all the

following factors may thus be relevant according to circumstances:—

Pecuniary loss

Loss of earnings as a result of the charge or conviction.

Loss of future earning capacity.

Legal costs incurred.

Additional expense incurred in consequence of detention, including expenses incurred by the family.

Non-pecuniary loss

Damage to character or reputation.

Hardship, including mental suffering, injury to feelings and inconvenience.

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

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

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

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

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

Joseph Sullivan*

A. Introduction

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

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

B. General Objectives of Assessment of Damages

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

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

C. Method Number One: Lump-Sum Award

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

1. Discount Rule

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

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

² (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, 36 C.T.T. 225.

³ (1978), 83 D.L.R. (3d) 480, [1978] 2 S.C.R. 267, 36 C.T.T. 257.

⁴ (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287, 36 C.T.T. 272.

⁵ (1978), 82 D.L.R. (3d) 449, [1978] 2 S.C.R. 342, 36 C.T.T. 316.

⁶S. A. Rea, Jr., "Inflation, Taxation and Damage Assessment", 58 Can. Bar Rev. 280

(1980), hereafter "Rea"; M. Brantl and A. Pratt, "Tragedy in the Supreme Court of

Canada: New Developments in the Assessments of Damages for Personal Injuries", 37

U of Tor Fac. of L. Rev. 1 (1979), hereafter "Brantl and Pratt".

⁷ Rea, *ibid.*, at p. 282; Brantl and Pratt, *ibid.*, at p. 24.

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

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

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

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

2. Contingency Deduction

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

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

⁹ *Supra*, footnote 6.

¹⁰ *Supra*, footnote 6 at pp. 283-4.

¹¹ *Supra*, footnote 6 at p. 285.

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

¹³ *Ibid.*, at p. 331.

¹⁴ R.S.O. 1980, c. 223.

¹⁵ R.R.O. 1980, Reg. 540.

¹⁶ [1967] 1 O.R. 396, 61 D.L.R. (2d) 12 (C.A.)

¹⁷ (1980), 115 D.L.R. (3d) 257 at p. 268, [1980] 25 C.R. 694 at p. 709, 14 C.C.L.T. 294 at p. 309.

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

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

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

D. Method Number Two: Reviewable Periodic Payment Schemes

1. Introduction

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

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

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

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

The court²⁶ goes on to recognize the "negative recommendation of the British Law Commission (Law Com. 56 — *Report on Personal Injury Litigation — Assessment of Damages*) [of a reviewable

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

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

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

2. Arguments for a Reviewable Periodic Payment Scheme

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

²⁰ [1979] 2 W.W.R. 122, 7 C.C.L.T. 314 (B.C.S.C.).

²¹ *Ibid.*, at pp. 132-3 W.W.R., p. 331 C.C.L.T.; see also C. A. Wright and A. M. Linden, *Canadian Tort Law, Cases and Materials*, 7th ed. (Toronto, Butterworths, 1980).

²² [1981] 1 W.W.R. 64, 14 C.C.L.T. 282 (B.C.S.C.).

²³ [1956] A.C. 185, [1955] 3 All E.R. 796 (H.L.).

²⁴ *Ibid.*, at p. 212 A.C.

²⁵ *Supra*, footnote 18 at p. 458 D.L.R., p. 236 S.C.R.

²⁶ *Supra*.

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

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

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

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

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

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

3. Arguments Against a Reviewable Periodic Scheme

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

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

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

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

²⁸ R.S.O. 1980, c. 152, Part I.

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

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

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

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

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

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

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

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

John Fleming has addressed this issue in an article³⁰ where he reviewed many of the same points covered by the Committee On Tort Compensation. A novel point raised by Fleming, however, is the alleged paternalism of all types of periodic payment systems (reviewable and non-reviewable). They lock the claimant into a set budget and life-style and do not allow the plaintiff to invest a lump sum the way he would prefer. A reviewable system may be altered only if needs change; it is unlikely alteration would be permitted if desires change. This is another factor in the debate, and is due for consideration.

E. Method Number Three: Structured Settlements

1. Introduction

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

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

2. Variations

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

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

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

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

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

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

Structured settlements have been in use in the United States for

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

3. The Annuity

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

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

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

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

4. The Tax Position

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

Lump-sum awards for personal injury are received tax free by a plaintiff. Interpretation Bulletin IT-365³⁴ outlines Revenue Canada's position. Paragraph 5 states that special and general damages will be received tax free except for "accrued loss of earnings to date of award or settlement". Income made on such awards (such as bank interest) will be taxable. There is a possible deduction from income available to all taxpayers for medical expenses. Section 110(1)(c) allows for a deduction for medical expenses to the extent that they exceed three per cent of the taxpayer's net income.³⁵ However, the "three per cent rule" is a major barrier to most taxpayers.³⁶ There is a series of other minor deductions in s. 110 for an injured plaintiff.

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

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

The normal tax treatment of annuities is of interest when discussing structured settlements. Grover and Iacobucci³⁸ have succinctly summarized it:

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

The Minister of National Revenue has made it clear that if one receives such an annuity in exchange for compensation for personal injury, then no tax liability is to be incurred.⁴⁰ Therefore, the plaintiff may collect the monthly payments tax free from the insurer's annuity. The insurer must own the annuity and the plaintiff must have no control over it⁴¹ in order to maintain the tax-free status. The government should be concerned about maintaining the structured settlement procedure as it provides much security for an injured party and thereby substantially reduces the risk of dissipation of an award, which may make the plaintiff a public charge. It should be noted that although this tax position is firm, it is not etched in stone! If a structured settlement is designed in such a way that Revenue Canada feels it is a tax dodge, then it may tax the income portion of the annuity payments as outlined above. For example, suppose a 35-year old doctor is injured and is entitled to a \$15,000 lump sum. Because this places him in a higher tax bracket, he decides to structure it with a long deferral period; this structure would provide for annuity payments to commence when he turns 65 years of age (i.e., 30 years from now), after the \$15,000 has earned substantial interest. Such an obvious dodge may make Revenue Canada tax the payments when they come. Structured settlements with long deferral periods are suspicious when they cease to be compensation for personal injury, but merely a long-term investment plan. One may

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

³⁴ Revenue Canada, March 21, 1977.

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

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

³⁷ R.R.O., 1980, Reg. 540.

³⁸ *Supra*, footnote 36, at p. 240.

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

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

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

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

5. Advantages

Structured settlements provide monthly payments over many years "a little at a time". Therefore, there is no chance that the entire award will be squandered or dissipated all at once. Next to the favourable tax treatment, this fact is probably the most popular advantage of structured settlements. Lump sums are meant to compensate the plaintiff for losses that will accrue over a lifetime; they are not prizes that injured plaintiffs win to make them feel better. Unfortunately, many times, large verdicts are quickly dissipated by plaintiffs. It is said that many well-meaning (and not well-meaning) friends and relatives descend upon a successful plaintiff and ask for loans, or invite the plaintiff to invest it in various ventures. Derek A. Cave recognizes this problem in his article⁴³ where he notes that:

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

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

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

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

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

⁴² [1972] C.T.C. 2303, 72 D.T.C. 1273 (T.R.B.).

⁴³ "Structured Settlements: An Alternative Resolution", 37 The Advocate 331 (1979).

⁴⁴ (1978), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287.

⁴⁵ Grossman and Norton, *supra*, footnote 31 at p. 116.

⁴⁶ Unreported, Supreme Court of Ontario No. 12486/77.

possible "all or nothing" verdict at trial; that is, if the court found that she was of sufficient intelligence to be liable, the defence may have had the action dismissed.⁴⁷

Even if the action had not been dismissed, damages may have been reduced by contributory negligence. In a case such as this, the insurer's counsel must be very careful: if the defence refuses a reasonable settlement offer (and take the risk that the trial verdict would save money for the insurance company), then the policy limits of the defendant might be extended in a subsequent action to cover a verdict that goes over policy limits.

There is a "policy limits issue" now pending in Ontario in another case. At trial the action was dismissed, but on appeal a different finding of liability was reached and judgment was entered in excess of policy limits. In a subsequent action, the insured is suing the insurance company for the amount he is bound to pay in excess of limits, resting the case on two grounds: bad faith in the settlement process *and* negligence. The insurance company has joined the original solicitor for the insurance company as third party in the action. This could present a nuance in the law. The California Supreme Court extended policy limits in such an action. In addition to awarding the insured the \$91,000 which she was bound to pay the plaintiff (in excess of limits), that court also awarded \$25,000 for the mental suffering of the insured caused by the anguish of owing the plaintiff \$91,000.⁴⁸

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

6. Disadvantages

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

injured party will live because of the fact that a structure sets his monthly income, maybe even for the rest of his life. The injured party must consent to the settlement, but none the less, the settlements do indicate a spirit which says, "we know what's best for you". Fleming⁴⁹ raised the paternalism issue when discussing the reviewable periodic schemes. Structures can be made very flexible to adapt to a particular plaintiff's needs, but cannot be altered. For example, the settlement may provide for additional sums to be paid when a plaintiff needs a large amount of money (perhaps when he reaches 25 years of age, he may need immediate money to buy a major asset like a house or sailboat). This is helpful, but we can only surmise when, during the course of his lifetime, he will need more funds than merely his monthly payments. A lump-sum award would provide more flexibility, as the plaintiff could allocate his money more freely during his lifetime. The element of inflexibility becomes more predominant when we are structuring for an infant, as the conjecture becomes more arbitrary. There is, however, a conventional way to avoid some of this rigidity. If we have a person locked into a straight 30-year structure which provides only for monthly payments, and at year ten he wants to buy a house, then he would probably be able to get a loan from the bank and use the structure payments as collateral. The payments could not be *diverted* to the bank, but they could be given to the bank when the plaintiff receives them.

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

⁴⁷ See *Gargouchie, Cohen*, [1940] 4 D.L.R. 810, [1940] O.W.N. 479 (H.C.J.), *M. Eltharum v. Fuchs* (1950), 6 D.L.R. (2d) 1, [1950] S.C.R. 787.

⁴⁸ See *Cristov, Security Insurance Co.*, 420 P. 2d 173 (Cal. S.C., 1967).

⁴⁹ *Supra*, footnote 30.

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

Brian Wheatley⁵⁰ points out the case of an eight-year-old minor who takes a structure in lieu of \$60,000 lump sum; this provides him with a yearly income of \$16,000 for the rest of his life. With a normal life expectancy the plaintiff can expect to receive \$1,000,000 tax free.

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

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

7. Calculation of Structured Settlements

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

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

8. Negotiating Structured Settlements

As has been already noted, the insurance company usually saves a little by structuring judgments. Suppose we have a case that would probably attract a trial lump-sum verdict of \$300,000 but both sides want to structure. If the insurer calculates that he can provide Plan "A" for \$180,000, then there is a lot of room for negotiation. The various additional features will cost the insurer more, but will still save money by avoiding a trial. The plaintiff, on the other hand, will be bargaining for more out of the plan by way of additional features, but he may not want to go to trial either; therefore, he cannot insist too strongly. From the plaintiff's point of view, it is essential that he know how much the structure is costing the insurer so that he can bargain more effectively. In the United States, some insurers take the position that the cost of the structure to the insurance company is none of the plaintiff's business⁵¹ and that the plaintiff need only be concerned about the adequacy of the plan. It is refreshing to report that in Canada there seems to be a freer flow of information regarding the cost of the structure.⁵² Even if the defendant insurer refuses to disclose the cost of the structure, a plaintiff counsel would only have to consult his own actuary, who could tell the plaintiff the cost. This is simply one element of the negotiation process.

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

⁵⁰ *Supra*, footnote 32.

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

⁵² *Supra*, footnote 41 at p. 13.

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

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

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

The section goes on to make requirements for security of debt. Interestingly enough, this section only applies "against a provider of health care services". The National Conference of Commissioners of Uniform State Laws has drafted the *Periodic Payments of Judgments Act*⁵⁴ which would allow American courts to enter a

structured judgment. Such legislation in Ontario would be beneficial to both insurers and plaintiffs. It should contain a stipulation that the judgment would be non-reviewable (unless on consent) and that the requesting party should choose the annuity company. This would avoid the problem of having the court choose which company should provide the structure. The judgment would parallel the approval that courts now make of infant structured settlements, and therefore there would be no undue burden on the judiciary.

9. Situations Adaptable To Structuring

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

F. Conclusion

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

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

⁵⁴ *Supra*, footnote 29.
⁵⁵ *Supra*, footnote 10.

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

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

APPENDIX

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

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

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

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

PRACTICE AND PROCEDURE BEFORE THE ONTARIO ENVIRONMENTAL APPEAL BOARD

*Grace Patterson**

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

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

I. Appeals to the Environmental Appeal Board

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

1. The Environmental Protection Act

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

(a) *Certificates of approval*

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

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¹ R.S.O. 1980, c. 141.

² R.S.O. 1980, c. 361.

³ R.S.O. 1980, c. 376.

REPORT
ON
COMPENSATION FOR PERSONAL INJURIES AND DEATH

ONTARIO LAW REFORM COMMISSION



CHAPTER 3

DAMAGES FOR NON-PECUNIARY LOSS

1. INTRODUCTION

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

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

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

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

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

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

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

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

2. THE NOTION OF NON-PECUNIARY LOSS

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

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

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

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

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

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

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

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

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

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

⁶ S.O. 1986, c. 4.

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

⁸ *Supra*, note 2.

⁹ *Supra*, note 2.

¹⁰ *Supra*, note 2.

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

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

2. THE NOTION OF NON-PECUNIARY LOSS

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

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

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

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

3. THE PURPOSE OF DAMAGES FOR NON-PECUNIARY LOSS

(a) INTRODUCTION

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

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

(b) PAIN AND SUFFERING

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

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

¹² *Supra*, note 2, at 264.

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

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

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

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

(c) LOSS OF AMENITIES AND SHORTENED EXPECTATION OF LIFE

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

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

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

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

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

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

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

¹⁹ *Ibid.*, at 371-72.

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

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

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

(d) CONCLUSION

Professor Anthony Ogus²⁶ has outlined three approaches to the assessment of damages for lost amenities:²⁷ the conceptual approach, which treats

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

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

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

²³ *Supra*, note 14.

²⁴ *Supra*, note 15.

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

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

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

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

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

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

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

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

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

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

²⁹ *Supra*, note 2, at 262.

³⁰ *Ibid.*, at 263.

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

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

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

4. SURVIVAL OF ACTIONS

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

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

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

³³ *Ibid.*, at 630.

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

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

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

³⁷ *Supra*, ch. 2, sec. 2(b)(i).

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

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

In California, for example, the Medical Injury Compensation Reform Act¹¹⁹ provides that non-economic damages, to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other intangible damages, should be limited to \$250,000 in personal injury accidents against health care providers. While the California limit is greater than the current value of the \$100,000 upper limit set in the Supreme Court of Canada's trilogy, it is also fair to say that California is identified as one of the areas in the United States where jury awards have tended to be most generous. Hence, in a sense, the California limit established by statute represents an even more dramatic policy decision than that represented in Canada by the trilogy, which merely adopted as a "rough upper limit" an amount that had been among the highest awarded in personal injury cases prior to the decisions of the lower courts in *Thornton*, *Andrews*, and *Arnold*.¹²⁰

6. ARGUMENTS AGAINST THE APPROACH IN THE TRILOGY

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

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

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

¹¹⁹ Cal. Civ. Code § 3333.2.

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

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

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

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

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

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

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

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

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

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

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

¹²⁵ *Ibid.*, at 107.

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

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

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

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

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

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

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

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

¹²⁹ *Supra*, note 32.

¹³⁰ *Ibid.*, at 643.

¹³¹ *Ibid.*

¹³² *Ibid.*, at 637.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³⁶ *Ibid.*, at 13.

¹³⁷ *Ibid.*, at 30.

¹³⁸ *Ibid.*

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

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

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

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

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

7. CONCLUSIONS

(a) THE APPROACH IN THE TRILOGY

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

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

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

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

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

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

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

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

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

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

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

¹⁴⁵ *Ibid.*, at 26.

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

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

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

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

As Chairman of the Ontario Law Reform Commission, I was a signatory of its 1973 *Report on Motor Vehicle Accident Compensation*. The Commission at that time, apart from the Chairman, comprised three legal practitioners, one of whom specialized as counsel in these particular areas of litigation, and the fourth was the distinguished former Chief Justice of the High Court of Ontario whose judicial career necessarily involved in this area an intimate knowledge of the law and a broad experience in its decision making. The Report of the Commission was unanimous, including the recommendation that "no compensation should be paid for non-pecuniary losses suffered as a result of a motor vehicle accident."

Nothing that I have read or heard since then has persuaded me that our decision at that date was wrong and it is therefore with regret that I must dissent from the recommendation of my colleagues in the current Report with respect to the award of non-pecuniary damages. It goes without saying that if there is to be compensation for non-pecuniary loss I would support the view that an upper limit, adjusted from time to time for inflation, be fixed by legislation. The figure of \$100,000 was determined in the *Andrews* case by the Supreme Court of Canada to be a proper award and my colleagues have recommended that the practice of our courts on this point since that case be confirmed. It is clear, of course, that the fixing of the figure at \$100,000, subject to adjustment for inflation, is no less arbitrary and no more logical than any other figure.

It was said in the *Andrews* case that there is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. It must also be said that as a philosophical matter it is highly doubtful whether money can buy back happiness or palliate pain, and even assuming that it can, when does one establish where an infusion of dollars begins to be palliative and at what point in future dosage does one run into the law of diminishing returns? It is a given, of course, that everything that can reasonably be provided in terms of present and future care ought to be provided and certainly one should not skimp on the one with an expectation that the slack will be taken up on the other.

It has been said in our current Report that some surveys have suggested that the people might be prepared to give up damages for non-pecuniary losses as a *quid*

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 & Woodwks. 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 & Woodwks. 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

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 warranted⁴²⁶ 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 Vindictory 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 & Woodwks. 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 Wks. of Can. v. Int. Brotherhood of Pulp, Sulphite and Paper Mill Wks.*, [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 vindictive 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

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 *Bartrop 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 trust⁴⁴¹ 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

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 \$400⁴⁵⁵ 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

- 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 Indus. 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]

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 law²; 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

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-

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 dignity¹⁷—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 one³⁰ 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 estate³³ "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

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 precedent⁴⁶; in such a search, what better authorities to leave standing than those in which exemplary damages had originated? In *Broome*⁴⁷ Lord

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 damages⁴⁸ 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 play⁵¹ 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

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*.

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, Goudrey & 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, subses. (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; Panam, 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. Versaford 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. Mattersbach (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. Pevsako* (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 2½% 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 \$100,000 in 1978 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. 30.

"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. Kosati, 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 *Bennecourt 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 *Cieri 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; Pufco 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 *Savoli & 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 *Landy v. Cameron* (1981), 20 C.P.C. 204, [1981] 1 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. Versaflood 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.Y. 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 action involving bodily injury, pre-judgment 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 *Envo 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 pre-judgment 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 pre-judgment interest is to be addressed in determining the sufficiency of an offer to settle. Consider the case of *Rushion 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 pre-judgment 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 pre-judgment 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 understanding 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, *i.e.* 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: *Heaney v. Best* (1979), 108 D.L.R. (3d) 366, 28 O.R. (2d) 71 (C.A.); *Borland v. Best* (1979), 108 (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 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, *Loongiew 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 *Rushion 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 *Dezner 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) 159n, [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 pre-judgment or post-judgment, 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 pre-judgment/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] 1 L.R. 41-1809, 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 pre-judgment interest, if any, up to the limits of the policy and not exceeding it. If the amount of pre-judgment 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* (1980), 75 N.B.R. (2d) 301, [1987] 1 L.R. 41-2152, 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. 1-18. 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.

(1) where the judgment is given upon a liquidated claim, from the date 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 bank rate 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.

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 integrum*, 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 expectancy 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

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

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 evidentiary 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

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 claims¹⁹ 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

14. Upeneiks, *supra* note 5, at 395.

15. *M & P Stores v. Taylor*, 326 P.2d 804 (Okla. 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,

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.

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 evidentiary 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

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

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 liability 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) Dependents — 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.

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.

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

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 crystallize, 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 vagary of this head of damage.

c) *Inflation* — Inflation is a serious consideration for structures because it has the capacity to completely undermine the adequacy 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 Therefore, with its 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.

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 manageable 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 evidentiary 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 damages⁶¹ 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

60. Interim payments are an important means of minimizing claim liability. See C.J. Horkins, "Tactics to Limit Your Exposure", *Without Prejudice*, April 1988, at 49.

61. Weir, *supra* note 7, at 26.

even with its new needs perspective has not yet abandoned its 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

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.

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