fertilization is occurring, as they discover the intellectual challenges to be found in historical, sociological and economic analyses of private law. Experience elsewhere has shown that there are few better stimuli to high-quality legal research than inter-generational intellectual conflict.[127] There is, therefore, cause for real excitement about the future of fundamental civil law scholarship.

IV. CONCLUSION

It is now appropriate to address explicitly the question why, given the important theoretical position of analytical studies in the civil law, fundamental non-empirical scholarship has not yet flourished in Quebec. Several contributing factors have already been mentioned: the relatively recent university tradition in law; the small size of the legal academic community, comprising at most one hundred professors; the deflection of scholarly energies to the Civil Code Revision Project; the seduction of public law in the 1960s and 1970s; and the demands of magisterial pedagogy. Considering these various impediments, it is remarkable that much research in civil law of any dimension has been generated by law professors.

Yet there is one other factor which cannot be ignored: the scholarly tradition in Quebec private law has been harmed by its insularity. In 1985, however, the prognosis is favourable. The broader interests of younger civil law scholars — in empirical research, comparative law and historical, economic and sociological analysis — will eventually transform the agenda for civil law research. If the university tradition flourishes as one of openness and embrace, the unique features of Quebec's private law culture, including its bilingual and bisystemic character, will propel civil law scholarship to the vanguard of twentieth-century Canadian legal research. In this sense, 'understanding civil law scholarship in Quebec' means understanding that the historical record of, and immediate prospects for, fundamental analytical scholarship *(la doctrine)* are indeed much brighter than elsewhere in Canada.

[127] The tension between realists and formalists that was played out in the United States in the 1930s is only the most well known of these controversies. For a civil law perspective see Atias, "La controverse doctrinale dans le mouvement du droit privé" (1983) 8 R. de la recherche juridique 427.

THE THEORETICAL AND POLICY CHALLENGES IN CANADIAN COMPENSATION LAW

By John McLaren*

This article examines the traditional torts-based focus of scholarship in Canadian compensation law, notes the growth of theoretical and interdisciplinary speculation in recent years, and considers both the potential for and character of more extended research of the latter types in the future. Comparisons are made with recent trends in compensation law in both England and the United States.

"Charley? Never heard of a dog named Charley. Hello Charley."
"I wouldn't want you to get in trouble with your boss. Think I ought to drag ass now?"
"What the hell?" he said. "He ain't here. I'm in charge. You ain't doing no harm."
"I'm trespassing."
"Know something? Fella camped here, kind of a nut. So I came to kick him off. He said something funny. He says, 'Trespassing ain't a crime and ain't a misdemeanour'. He says it's a tort.
Now what the hell does that mean? He was kind of a nut."
(John Steinbeck, *Travels with Charley*).

I. INTRODUCTION

This article begins by analysing the deficiencies in Canadian research in both torts and compensation law and attempts to identify the gaps in our knowledge and perceptions. Comparisons are drawn with the record of research in both England and the United States. It then moves on to examine Canadian research in torts and compensation law in the five years since the Consultative Group on Research and Education in Law (the Arthurs Committee) began its work in 1980. It concludes with suggestions on the future challenges to Canadian torts and compensation scholars and some reflections on the logistics of meeting those challenges most effectively. Specific reference is made to recent research trends among English and American scholars.

II. THE PAST RECORD

To test the impression that Canadian legal research was heavily doctrinal, notably lacking in historical and comparative analysis, and

* Professor, Faculty of Law, University of Calgary.

devoid of speculation into the philosophical, sociological, cultural, and economic implications of law, the Arthurs Committee surveyed the research techniques of Canadian law professors. The survey revealed that Canadian legal research was essentially law library based, with a heavy emphasis on the doctrinal, a modest focus on theories, and a minimal concern with comparative and interdisciplinary perspectives.[1] Torts suffers as much as other subject areas from the general imbalance identified above.[2]

The picture presented coincides with the writer's view of the state of Canadian research in the law of torts since the mid-1960s. The bulk of writing has been doctrinal and largely confined to the law of negligence. Moreover, within negligence law, the context of the research has been almost exclusively the law emanating from trial and appeal courts. Little has been written about the positive process of settlement. Perhaps because of the flexible and often elusive character of the principles and concepts of negligence law, there has always been a greater concern for theoretical critique in tort law than has been the case in other less yielding and permeable areas of the law. Indeed, much time has been spent on developing theoretical models for stabilizing the shifting relationship between duty of care, breach of duty, and remoteness of damage.[3] Remarkably, however, other issues in negligence have been effectively ignored. Until recently, for example, the law of damages as it applied in negligence cases was sidestepped as judicial 'hocus pocus', below the dignity of or impossible for torts scholars to try to fathom or, more importantly, to influence.[4] Moreover, in negligence law the theorizing has been essentially introspective, with little attempt to employ economic, sociological, historical, or philosophical analysis to look through and behind the law.[5]

Outside negligence law the pickings have been slim indeed. While some of the other tort actions have received modest attention, nuisance in particular, others such as the various species of trespass, defamation, and that seemingly peripheral group of economic torts, including deceit, passing off, inducing breach of contract, conspiracy, intimidation, and causing harm by unlawful means, have been largely ignored. This narrow substantive focus parallels what most tort teachers have addressed in the classroom. With the exception of the intentional torts to the person, which have been covered more for their pedagogical value than anything else, negligence law has been 'front and centre' in most curriculums.

The dearth of contextual and policy work on negligence and on the broader panoply of tort actions has reflected the inability of Canadian tort scholars to see their discipline as anything but self-contained and self-generated. There has been a conspicuous lack of 'functional' scholarship — that is, looking first at forms of conflict within society, the interests at stake in these conflicts, and the harms caused, and only *then* asking whether tort law has a legitimate or useful role in their solution. Traditionally, the assumption has been that if tort law has been applied, that disposes of the logically prior and fundamental policy question of whether it is an effective medium for handling the type of conflict at issue. Negligence can be addressed very easily on a relatively narrow doctrinal basis: an approach that may be favoured, because that field so dominates the practice of tort law. Torts like nuisance, defamation, false arrest, and the litany of economic torts that are litigated far less frequently are difficult to tackle without explaining the broader underlying social tensions often beyond the fiftful and capricious reach of tort litigation. The writings of several scholars on the relevance of tort law solutions to privacy and the environment and Professor Weiler's seminal policy analysis of false arrest and defamation excepted, tort scholars have typically kept well clear of these more profound issues.[6]

---

[1] Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (1983) at 75-80.

[2] *Ibid.* at 78.

[3] See *e.g.*, J. Fleming, "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31 Can. B. Rev. 471; J.C. Smith, "The Mystery of Duty" in L. Klar, ed., *Studies in Canadian Tort Law* (1977) 1; D. Gibson, "A New Alphabet of Negligence" in A. Linden, ed., *Studies in Canadian Tort Law* (1968) 189; J. Fleming, "The Passing of Polemis" (1961) 39 Can. B. Rev. 489; J.C. Smith, "Requiem for Polemis" (1965) 2 U.B.C.L. Rev. 159; J.C. Smith, "The Limits of Tort Liability in Canada: Remoteness, Foreseeability and Proximate Cause" in A. Linden, ed., *ibid.* 88; J. McLaren, "Negligence and Remoteness — The Aftermath of Wagon Mound" (1967) 32 Sask. L. Rev. 45; D. Gibson, "Wagon Mound in Canadian Courts" (1963) 2 Osgoode Hall L.J. 416; G. Fridman & J. Williams, "The Atomic Theory of Negligence" (1971) 45 Aust. L.J. 117.

[4] There were, however, notable exceptions. See *e.g.*, G. Bale, "*British Transport Commission* v. *Gourley* Reconsidered" (1966) 44 Can. B. Rev. 66; B. Dunlop, "The High Price of Sympathy: Damages for Personal Injuries" (1967) 17 U. Toronto L.J. 51; K. Cooper, "A Collateral Benefits Principle" (1971) 49 Can. B. Rev. 501; K. Cooper, "Assessing Possibilities in Damage Awards — The Loss of a Chance or the Chance of a Loss" (1973) 37 Sask. L. Rev. 193.

[5] Two legal scholars who, to their credit, have applied modes of philosophical analysis to tort law are Professors J.C. Smith and E. Weinrib.

[6] See A. Lucus, "Legal Techniques for Pollution Control: The Role of the Public" (1971) 6 U.B.C.L. Rev. 167; P. Elder, "Environmental Protection Through the Common Law" (1979) 12 U.W. Ont. L. Rev. 107; J. McLaren, "The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?" (1972) 10 Osgoode Hall L.J. 505; P. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer" in A. Linden, ed., *supra*, note 3 at 416; P. Weiler, "Defamation, Enterprise Liability, and Freedom of Speech" (1967) 17 U. Toronto L.J. 278.

The absence of concern to explore the social and economic context of the law of torts has been matched by a dearth of empirical study to test its effectiveness in practice. Apart from work such as that of Professor Ison on accident compensation,[7] of Professors R.J. Gray and Sharpe on physicians' attitudes to liability for malpractice,[8] and the Osgoode Studies on automobile accident and criminal injuries compensation,[9] empirical methodology has remained a mysterious craft to torts scholars.

The same hesitancy about asking the more important general social and economic policy questions is also seen in the lack of literature on the relationship between torts and other forms of ordering, providing for, and responding to risks. With the notable and gratifying exception of a group of mainly contracts scholars who have analyzed and developed the law of products liability, including its tort aspects, the interaction of tort, contract, and property has been largely left in cold storage.[10] Similar neglect is noticeable in the relationship between insurance and tort law. This absence of scholarship is particularly remarkable considering that by far the greatest volume of torts cases, those involving automobile accidents, embody a hybrid system of tort loss shifting and insurance loss distribution.

Until recently Canadian tort teachers and scholars have been content to rely on rather sterile English historical analyses of tort law. The Canadian experience and whether it has been, as traditionally assumed, a pale and uncritical reflection of English wisdom, has been ignored. More particularly, there has been no study of the place of tort law within the history of social values and policy within Canada.[11]

Perhaps the most surprising lacuna is in the area of serious comparative work on civil and common law solutions to the compensating of harm in Canada. In a country that has a built-in laboratory for such endeavours, the dearth of comparative scholarship in torts and delict is stark testimony to the inability of scholars to look beyond what is

[7] T. Ison, *The Forensic Lottery* (1967).

[8] R.J. Gray & G. Sharpe, "Doctors, Samaritans and Accident Victims" (1973) 11 Osgoode Hall L.J. 1.

[9] Osgoode Hall Study on compensation for victims of automobile accidents, *Report* (1965); Osgoode Hall Study on compensation for victims of crime, *Report* (1968). Both studies were carried out under the direction of Professor (now Mr. Justice) Linden.

[10] I refer, of course, to the group led by Professor Ziegel of the University of Toronto, Faculty of Law.

[11] One exception is the work of an historian, M. Piva, on the inadequacy of tort law in the context of industrial accidents. See M. Piva, "The Workmens' Compensation Movement in Ontario" (1975) 1 Ont. Hist. Soc. 39.

familiar, to that which enriches our general knowledge of law, its purpose and functioning, and leads to reform.

If the Canadian research record has been bleak in the area of tort law, it has been dismal in the more general area of compensation law. With the singular exception of Professor Ison, abetted earlier by J.C. McRuer, Otto Lang and, more recently, by Professors Glasbeek and Hasson,[12] Canadian scholars have neither analyzed alternative systems of compensation and social benefits, nor engaged in comparative critiques of the various approaches. The result is an overwhelming ignorance of what the Canadian compensation system is, how it works, and whether it makes any sense, whether in terms of distributive justice or plain economics.

Before the charge is levelled that "he protesteth too much," I should state that the unimpressive picture that I have painted may reflect as much the relative immaturity of academic legal education and scholarship in Canada as any wilful desire to avoid the broader issues. Until the early sixties, both the imperatives of professional formation and the small size of full-time faculties militated against a significant volume of legal research on tort law. Remarkably enough, what scholarship there was, although quite traditional in focus, was of a high quality.[13] With the sixties and the rapid growth in the number of schools and the size of both faculty and student complements, priority was given to filling the gaps in knowledge of the basic principles and concepts, in particular with the demands of the classroom in mind.[14] Canada was not alone in the limited scope of its research into torts and compensation law. These deficiencies formed the basis for the critique by Professor Atiyah of traditional English education and research in the law of torts, which constitutes the preface to his seminal work, *Accidents, Compensation and the Law*.[15] He noted the paradox that the standard English torts course and texts were crammed with material on every conceivable tort, and much information about rules and principles culled from appellate court

[12] See *supra*, note 7; T. Ison, "Human Disability and Personal Income" in L. Klar, ed., *supra*, note 3 at 425; J. McRuer, "The Motor Car and the Law" in A. Linden, ed., *supra*, note 3 at 303; O. Lang, "The Activity Risk Theory of Tort: Risk, Insurance, and Insolvency" (1961) 39 Can. B. Rev. 531; H. Glasbeek & R. Hasson, "Fault — The Great Hoax" in L. Klar, ed., *ibid.* at 395.

[13] The work of scholars such as C.A. Wright, M.M. MacIntyre, and W.A. Bowker was indeed seminal in laying the groundwork for much of the doctrinal study that followed.

[14] This argument, it must be admitted, did not impress Professors Veitch and R. MacDonald in their critique of scholarly output of Canadian law teachers in 1978. See E. Veitch & R. MacDonald, "Law Teachers and Their Jurisdiction" (1978) 56 Can. B. Rev. 710.

[15] P. Atiyah, *Accidents, Compensation and the Law*, 1st ed. (1970) at 6-9.

decisions, but totally ignored crucial practical aspects of the tort compensation process, such as settlement, as well as the place of tort law within the complex of compensation and income replacement systems devised by both private initiative and the welfare state. Moreover, they did not examine whether the system is fair in the results it produces, and can be justified in economic terms. Implicit in Atiyah's criticisms is that the innate conservatism of English lawyers and legal academics has blinded them to social context.

III. NORTH AMERICAN COMPARISONS

Tort and compensation law in Canada and England has traditionally compared by and large unfavourably in both quality and quantity with the leading research in the United States. In America there has been for many decades a more probing and intellectually rigorous approach towards scholarship in these areas. As Edward White has pointed out, both torts teaching techniques and scholarship in the United States, after being influenced heavily by 'objective legal theory' with its stress on deductive logic at the turn of the century, were touched by the challenge of the realists to those earlier comfortable notions.[16] This challenge began in the late 1920s and resulted in movement away from a focus on principles and rules towards the emphasizing of facts, context, and policies. The same skepticism about traditional legal principles and rules also manifested itself in the first serious attempt to construct an alternative to the tort system for compensating the victims of automobile accidents: the Columbia Plan.[17]

Even after the Second World War, the notion of balancing interests as a form of 'social engineering' remained strong in tort theory. Prosser, in particular, who had enormous influence on the teaching and researching of torts in the 1950s and 1960s, was able to blend elements of the realist and conceptualist views to provide a conceptual structure, but one that was flexible enough to allow for the careful balancing of interests and the consideration of the broader social policy issues implicit in the particular disputes before the courts.[18] In addition to this more open and inquiring analysis of tort problems, a number of American scholars, for

[16] E. White, *Tort Law in America: An Intellectual History* (1980) at 63-113.

[17] N.T. Dowling, "Compensation for Automobile Accidents: A Symposium" (1932) 32 Colum. L. Rev. 785.

[18] *Supra*, note 16 at 139-79. See also White's chapter on the contribution to torts theory of Judge Traynor, *ibid.* 180-210.

instance Conard, Robert Keeton and O'Connell, advocated a move away from tort litigation to comprehensive systems of 'no fault' insurance for automobile accidents.[19]

In the 1970s the focus of American scholarship in torts and compensation law changed from the functional, consensus emphasis of Prosser to a new concern with conceptual justification and integrity. However, the approach and its intellectual context is very different from the earlier era of conceptualism in American tort law.[20] First, much of the conceptual writing involves the application of knowledge and methodology from other disciplines, in particular economics, history, and ethics. Accordingly, the search for conceptual truth has proceeded not from within the legal system as it did with Langdell, Holmes, and Ames, but from outside it. Second, there is greater diversity of opinion on both objectives and methodology. Although much of the writing on torts and compensation law in the 1970s reflected the strong strain of individualism in American political and economic thought, some writers, notably Calabresi and Posner, adopted a highly utilitarian approach based on free market economic theory, while others, in particular Epstein and Fletcher, applied ethical theory, in particular the notion of 'corrective justice', to construct theories of liability.[21] These differences in theoretical underpinnings, together with negative reactions from concept skeptics, or those wedded to the more communitarian and instrumental notion of 'distributive justice', mean that within the last few years American torts and compensation scholarship has come to be marked by considerable debate and controversy as scholars not only develop their own positions, but also engage those whose views they find untenable.[22]

IV. A NEW WAVE OF SCHOLARSHIP IN CANADA?

Despite the rather bleak picture of Canadian torts and compensation law scholarship that emerges from the Arthurs Report, there were signs

[19] A. Conard, *Automobile Accidents: Costs and Payments* (1964); R. Keeton & J. O'Connell, *Basic Protection for the Traffic Victim* (1965). See also L. Green, *Traffic Victims, Tort Law and Insurance* (1958).

[20] *Supra*, note 16 at 211-15.

[21] *Ibid.* at 215-30. See G. Calabresi, *The Cost of Accidents* (1970); G. Calabresi & J. Hirschoff, "Toward a Test for Strict Liability in Torts" (1972) 81 Yale L.J. 1055; R. Posner, "A Theory of Negligence" (1972) 1 J. Leg. Stud. 29; R. Epstein, *A Theory of Strict Liability Toward a Reformulation of Tort Law* (1980); G. Fletcher, "Fairness and Utility in Tort Theory" (1972) 84 Harv. L. Rev. 537.

[22] See, for instance, the critique in White, *ibid.* at 230-43; I. Englard, "The System Builders: A Critical Appraisal of American Tort Theory" (1980) 9 J. Leg. Stud. 27; R. Abel, "A Critique of American Tort Law" (1981) 8 Brit. J. Law & Soc. 199.

that the landscape was beginning to improve as the Arthurs Committee began its work in 1980. As part of a more general pattern of maturation in Canadian legal research, the focus of torts and compensation law was expanding beyond the bounds of traditional doctrinal analysis. Policy issues were being raised more readily and openly in negligence law; both Hohfeldian analysis and principles of moral philosophy were used to establish the criteria of liability in negligence, and some attempts were being made at the type of functional research in tort law both within and outside the parameters of negligence, the application of tort law to both medical malpractice and to environmental problems being two examples.[23]

External developments were also influential. The establishment of the New Zealand Accident Compensation Scheme; the studies of accident compensation in Australia, Britain, and several Canadian provinces, including British Columbia, Manitoba and Ontario; the implementation of a 'no fault' insurance scheme for road accident victims in Quebec following the Gauvin Commission recommendations; and the more general move in North American jurisdictions towards low level 'no fault' benefits all stimulated discussion and some writing on the issue of compensation and how to deal with the adverse consequences of accidents most fairly and effectively.[24]

Furthermore, the movement in the United States to use both economic theory and analysis in liability was exciting interest in Canadian legal academic circles, especially at the University of Toronto where a Law and Economics programme was established. Although historical scholarship on tort and compensation law in Canada had yet to materialize, the application of socio-historical research to civil liability in the nineteenth century, in the United States by Friedman[25] and Horwitz,[26] and in England by Atiyah,[27] and the pioneer work of Professor Risk at Toronto into the development of the law and the economy in nineteenth-century Ontario[28] cumulatively raised interesting possibilities for the application of this methodology to these areas of the law.

The output and pattern of research on torts and compensation law in Canada since 1980 has fulfilled the promise inhering in those trends.

[23] See E. Picard, *Legal Liability of Doctors and Hospitals* (1977), and *supra*, note 6.

[24] See I. Saunders, ed., *The Future of Personal Injury Compensation* (1978).

[25] L. Friedman, *A History of Law in America* (1973).

[26] M. Horwitz, *The Transformation of American Law 1780-1860* (1977).

[27] P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

[28] See especially R. Risk, "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 U. Toronto L.J. 199; R. Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective" (1977) 27 U. Toronto L.J. 403.

A canvass of both texts and articles in periodicals in Canada in the past five years shows that the majority of what is written is still doctrinal or a blend of the doctrinal and theoretical. However, an increasing number of pieces use analytical tools and theory drawn from other disciplines, especially economics and philosophy; they view the law of torts in a more functional context, explore the overlap between torts and other modes of compensation and risk allocation, and examine both the law of torts and compensation law as social phenomena with political, economic, social, historical, cultural, and philosophical contexts and implications.

In the analysis and development of theory, policy issues are increasingly discussed in the context of known facts about the relationship or setting at issue, and don't rely upon impressionistic views which do little more than explain the writers' understanding of the policy factors affecting the courts or the legislatures. Thus, in her important book on the liability of doctors and hospitals, Professor Picard analyses the changing character of the law in the light of medical practice, the institutional realities of the modern hospital, and the expectations of the contemporary patient.[29] Indeed, functional analysis and critique is apparent generally in the increasing body of literature on medical liability.[30] A similar concern with functional context, in this instance the practicalities of professional responsibility in the legal profession, is evident in Professor G.A. Smith's detailed analysis of the law relating to the negligent conduct of litigation.[31] This mode of analysis is not only useful for critiquing the present state of the law, but also generates valuable contextual information for future courts addressing these particular issues of liability, and for legislatures crafting statutes relating to them.

A number of recent articles show an increasing use of philosophical reasoning in policy choices as to liability, the testing of concepts, and the analysis of the actual working of the law by the courts. Professor E. Weinrib has even developed a theory of negligence based on the

[29] E. Picard, *Legal Liability of Doctors and Hospitals in Canada*, 2d ed. (1984). See also E. Picard, "The Liability of Hospitals in Common Law Canada" (1980-81) 26 McGill L.J. 997.

[30] See *e.g.*, B.M. Dickens, "Legal Approaches to Genetic Diagnosis and Counselling" (1980) 1 Health Law in Canada 25; S. Rodgers Magnet, "Legislating for an Informed Consent to Medical Treatment by Competent Adults" (1980-81) 26 McGill L.J. 1056; W. Bowker, "Minors and Mental Incompetents: Consent to Experimentation, Gifts of Tissue and Sterilization" (1980-81) 26 McGill L.J. 951; M. Somerville, "Randomized Control Trials and Randomized Control of Consent" (1980) 1 Health Law in Canada 58.

[31] G.A. Smith, "Liability for the Negligent Conduct of Litigation: The Legacy of *Rondel* v. *Worsley*" (1983) 47 Sask. L. Rev. 211.

postulates of Aristotelian and Kantian philosophy,[32] and he has used that theory to argue persuasively for a duty of 'easy rescue' derived from contractual values, which he believes should be acceptable to both the utilitarians and the moral philosophers.[33] In a similar vein Dean, Prichard and Professor Brudner have used Hegel's theory of remedies adroitly to construct a principled approach to deciding whether breach of a statute should give rise to a civil cause of action in tort.[34] Professors J.C. Smith and Coval have employed Hohfeldian analysis and theories of legal and moral obligation effectively to point to the difficulties in providing damages for a 'tort' of discrimination,[35] and Dean Burns and Professor Smith demonstrate the dangers in overextending liability for misfeasance, which they fear will be the result of ill-considered applications of Lord Wilberforce's notion of "assumed duty" in *Anns* v. *Borough of Merton*.[36] Philosophical analysis clearly assists in the ordered development of principle by inducing careful reflection on reasonable and workable associations of legal and moral obligation, and precise articulation and matching of correlative rights and duties.

The interest in applying economic analysis to torts problems has also emerged recently in the writings of Canadian torts teachers. Thus far, however, its compass has been much narrower, as most of the writing is related to the assessment of damages in negligence cases. The application of a more systematic and principled approach to the award of damages in the trilogy of cases that came before the Supreme Court of Canada in 1978 has turned what was largely a wasteland for research into fertile pastures.[37] Since 1978 Professors Saunders and Cooper-Stephenson have published their work on personal injury damages, which very skillfully addresses the need of practitioners for spurs to creative thinking in the crafting of damage awards, and the interest of academics in critique of the system and suggestions for reform.[38] Two economists, Professors Bruce and Rae, have studied the utility of economic and

[32] E. Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2 Law & Phil. 37.

[33] E. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247.

[34] R. Prichard & A. Brudner, "Tort Liability for Breach of Statute: A Natural Rights Perspective" (1983) 2 Law and Phil. 89.

[35] S.C. Coval & J.C. Smith, "Compensation for Discrimination" (1982) 16 U.B.C.L. Rev. 71.

[36] P. Burns & J.C. Smith, "The Good Neighbour on Trial: Good Neighbours Make Bad Law" (1983) 17 U.B.C.L. Rev. 93; *supra*, note 35.

[37] See *Andrews* v. *Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229; *Teno* v. *Arnold*, [1978] 2 S.C.R. 287; *Thornton* v. *Board of School Trustees of School Dist. No. 57 (Prince George)*, [1978] 2 S.C.R. 267.

[38] I. Saunders & K. Cooper-Stevenson, *Personal Injury Damages in Canada* (1981).

actuarial evidence in the process of assessment and calculation.[39] Encouraging, too, is the debate and engagement among those who research and speculate upon the award of compensation. Professor Bale, who is strongly committed to a system of comprehensive accident compensation, has ably opened up debate by refusing to accept as an initial premise that all that needs to be done is to make the process of calculation more effective, and arguing that structural changes are needed to allow a torts fund from which periodic payments reflecting the actual ongoing financial needs of the accident victim can be made.[40] Professor Weir in a recent book has detailed one way this can be achieved, that is through the structured settlement, and in the process has revealed much about the claims and settlement process.[41] The emerging dialectic is important if complacency, so often the curse of lawyers, is not to reflect attention from the very real weaknesses in the process of awarding tort damages to which Mr. Justice Dickson himself adverted in his judgment in *Andrews* in 1978.[42]

Notable and welcome exceptions to this concentration on the quantification of damages are Professor Feldthuson's book and articles by Professors Smillie and Cohen on economic negligence. Each of these writers applies economic analyses in dealing with the issue of how far tort liability for purely economic loss should extend.[43]

Interest among torts scholars in using quantitative analysis and empirical methodology to test both the level of coincidence between theory and judicial practice, and the actual impact of judicially articulated principle on individual behaviour is growing, albeit gradually. Professors Smith and Coval together with Ms. Rush have recently demonstrated

[39] See C. Bruce, "The Calculation of Foregone Lifetime Earnings: Three Decisions of the Supreme Court of Canada" (1979) 5 Can. Pub. Pol'y 155; C. Bruce, "The Introduction of Economic Factors into Litigation Cases: Ontario's 2½ Percent Solution" (1982) 60 Can. B. Rev. 677; C. Bruce, "Four Techniques for Compensating Tort Damages" (1983) 21 U.W. Ont. L. Rev. 1; S. Rea, "Inflation, Taxation and Damage Assessment" (1980) 58 Can. B. Rev. 180; S. Rae, "Inflation and the Law of Contract and Torts" (1983) 14 Ottawa L. Rev. 465. See also P. Boyle and J. Murray, "Assessment of Damages: Economic and Actuarial Evidence" (1981) 19 Osgoode Hall L.J. 1.

[40] See G. Bale, "Encouraging the Hearse Horse Not to Snicker: A Tort Fund Providing Variable Periodic Payments for Pecuniary Loss" in F. Steel & S. Rodgers Magnet, eds., *Issues in Tort Law* (1983) 91. See also G. Bale, "Adding Insult to Injury: The Inappropriate Use of Discount Rates to Determine Damage Awards" (1983) 28 McGill L.J. 1015.

[41] J. Weir, *Structured Settlements* (1984).

[42] *Andrews* v. *Grand & Toy Alta. Ltd.*, *supra*, note 37 at 236.

[43] B. Feldthusen, *Economic Negligence* (1984); J. Smillie, "Negligence and Economic Loss" (1982) 32 U. Toronto L.J. 231; D. Cohen, "Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords" (1984) 18 U.B.C.L. Rev. 289.

the value of simple quantitative analysis in assessing the utility of tests applied in tort law. In their article, they argue for a new and consistent test for resolving remoteness of damage issues and evaluate the utility of their test against all previously decided negligence cases involving remoteness issues in Canada, England, Australia, and New Zealand.[44] Obviously, before developing a new test of the limits of liability, it is important to assess its likely appeal to the judges. Given the impossibility of canvassing opinion directly, the only workable predictive technique is to examine their track record over a sufficient volume of decided cases. Of considerable significance is Professor Robertson's comment on his survey of the reaction amongst surgeons to the decision of the Supreme Court of Canada in *Reibl* v. *Hughes*.[45] His careful detailing of the survey and its results shows that claims that are often made for the didactic and preventative role of negligence law may not be nearly as strong as conventional wisdom would have it. Finally, an interesting and provocative challenge to the assertion that deterrence is a negligible factor in tort law and automobile insurance has been thrown down by Professor Bruce in an analysis of scientific literature and statistical data, which he suggests proves the opposite.[46] These instances of the use of empirical methodology point the way to much more that could be done to test the practical import of the cherished and oft repeated assumptions of torts teachers and scholars.

The past five years have also marked an increase in the number of articles that look beyond the law of negligence to other tort actions. In some cases the emphasis is on doctrine and theory. This is true, for example, of Dean Burn's instructive pieces on civil conspiracy and torts injury to economic interests,[47] and Professor Girard's thoughtful comment on the development of a new theoretical basis for nuisance.[48] In other instances the research has a more functionalist flavour to it. This is the case, for instance, with the two pieces on the law of defamation by Professor Robert Martin that examine respectively the use of interlocutory injunctions in libel cases, and the problems associated with letters to the editor as the source of defamation actions.[49] Both issues are examined in the broader context of balancing freedom of speech with the need to protect the individual from groundless attacks on his or her reputation. Professor Feldthusen takes a similar approach in his article on judicial immunity from suit in which he balances the value of a judge reaching decisions candidly and fearlessly with the right of individuals to be free from unwarranted or malicious attacks on their reputations.[50]

The functional approach allows the broader questions of the relevance and utility of tort actions in solving pervasive social problems to be posed. More of this functional context work has emerged in the past five years. Good examples are Mr. McIntosh's skillful blending of doctrinal analysis and policy in addressing accidents associated with immunization;[51] Mr. Morrison's article on pesticide poisoning;[52] and the collection of essays on privacy law edited by Professor Gibson.[53] The scope of the last extends well beyond the solutions supplied by tort litigation to equity, administrative, and criminal law, and is prefaced by a philosophical overview of privacy that demonstrates both the intellectual and practical limits of the concept. In the process one gets a far more realistic view of the strengths and weaknesses of tort law as a medium of conflict resolution. The broader comparative approach in these articles and essays is valuable not only in setting out the options, but also in blunting the natural ardour of torts teachers and scholars who tend to assume that this branch of the common law has unlimited potential for improving the human condition.

Alongside the assessment of personal injury damages, the most significant growth area in torts writing relates to the overlap between contract and torts. From an almost complete vacuum (with the occasional reflection that there might be something to the decision in *Hedley Byrne* v. *Heller & Partners Ltd.*),[54] we have moved to an expanding and increasingly profound body of writing. Valuable doctrinal analysis had

[44] S.C. Coval, J.C. Smith & J. Rush, "'Out of the Maze': Towards a Clear Understanding of the Test for Remoteness in Negligence" (1983) 61 Can. B. Rev. 559. See also M. Litman & G. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" (1984) 62 Can. B. Rev. 457 for analyses of cases involving challenges to wills on the ground of testamentary incapacity and solicitors' negligence as a cause.

[45] G. Robertson, "Informed Consent in Canada: An Empirical Study" (1984) 22 Osgoode Hall L.J. 139.

[46] C. Bruce, "The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature" (1984) 6 Law & Pol'y 67.

[47] P. Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982) 16 U.B.C.L. Rev. 229; P. Burns, "Tort Injury to Economic Interests: Some Facets of Legal Response" (1984) 58 Can. B. Rev. 103.

[48] P. Girard, "An Expedition to the Frontiers of Nuisance" (1980) 25 McGill L.J. 565.

[49] R. Martin, "Interlocutory Injunctions in Libel Actions" (1982) 20 U.W. Ont. L. Rev. 129; R. Martin, "Libel and Letters to the Editor" (1983) 9 Queens L.J. 88.

[50] B. Feldthusen, "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980) 29 U.N.B.L.J. 73.

[51] W.K. McIntosh, "Liability and Compensation Aspects of Immunization Injury: A Call for Reform" (1980) 18 Osgoode Hall L.J. 584.

[52] J. Morrison, "Pesticide Poisoning Issues in Personal Injury Liability" (1983) 47 Sask. L. Rev. 97

[53] D. Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John Sharp* (1980).

[54] *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*, [1864] A.C. 465 (H.L.).

been supplied by Professors Reiter, Bridge, Rafferty, Irvine, Blom, and others.[55] More recently, the theoretical and broader economic and social issues inherent in the relationship between an appropriate scope of agreement, action in reliance, the allocation of risks, and general notions of obligation have come into focus. Professor J.C. Smith has thrown down the challenge to the courts to "develop and refine a set of principles based on reliance which will fill the gap between the traditional law of negligence and the traditional law of contract."[56] Professor Cohen has gone further in the context of liability for pure economic loss and suggested that it is vitally important, lest we get carried away by the lure of accident compensation theory to the detriment of choice and the *ex ante* allocation of risks, to stand back and determine whether the increasing intrusion of tort law into the marketplace, and in particular into the relationship between the consumer and remote supplier, is economically and socially desirable.[57] Applying the tools of economic analysis he concludes that it is not.

Although the change is not nearly so dramatic, there are also signs that interest is stirring in the relationship between tort and insurance law. Professor Weir's work on structured settlements analyses how the annuity concept in life insurance can be used to compensate for a major structural defect in the tort litigation system.[58] Also creative is the call by Professors O'Connell and Brown for a system of no-fault benefits financed not by a state-run scheme of social insurance, but by the assignment of torts rights to liability insurers in return for guaranteed compensation.[59] The plan, specifically related to the Canadian liability context, represents a constructive compromise for achieving greater

[55] B.J. Reiter, "Contracts, Torts, Relations and Reliance" in B. Reiter and J. Swan, eds., *Studies in Contract Law* (1980) at 235; M. Bridge, "The Overlap of Tort and Contract" (1982) 27 McGill L.J. 872; M. Bridge, "Defective Products Contributory Negligence, Apportionment of Loss and the Distribution Chain — *Lambert* v. *Lewis*" (1982) 6 Can. Bus. L.J. 184; N. Rafferty, "The Impact of Concurrent Liability in Contract and Tortious Negligence upon the Running of Limitation Periods" (1983) 32 U.N.B.L.J. 189; N. Rafferty, "Concurrent Liability in Contract and Tort: Recovery of Pure Economic Loss and the Effect of Contributory Negligence" (1982) 20 Alta. L. Rev. 357; N. Rafferty, "Liability for Contractual Misstatements" (1984) 14 Man. L.J. 63; J. Irvine, "Contract and Tort: Troubles Along the Boarder" (1980) 10 C.C.L.T. 281; J. Irvine, "Case Comment: *Surrey* v. *Carroll Hatch*" (1980) 10 C.C.L.T. 266; J. Irvine, "Case Comment: *Canadian Western Nat'l Gas* v. *Pathfinders Survey Ltd.*" (1981) 12 C.C.L.T. 256; J. Irvine, "Case Comment: *John Maryon Int'l Ltd.* v. *New Brunswick Telephone Co.* and *Ward* v. *Dobson Construction Ltd.*" (1983) 24 C.C.L.T. 213; J. Blom, "The Evolving Relationship Between Contract and Tort" (1985) 10 Can. Bus. L.J. 257; B. Morgan, "The Negligent Contract Breaker" (1980) 58 Can. B. Rev. 299.

[56] J.C. Smith, "Economic Loss and the Common Law Marriage of Contracts and Torts" (1984) 18 U.B.C.L. Rev. 95.

[57] D. Cohen, *supra*, note 43.

[58] Weir, *supra*, note 41.

[59] J. O'Connell & C. Brown, "A Canadian Proposal for No-Fault Benefits Financed by

distributive justice in the compensation system at a time when governments seem reticent about taking the initiative.

While the field of comparative civil — common law analysis still remains largely untilled, articles by Professor Glendon on the relationship between contract and tort in the two systems and by Professor Perret on the substance of the Quebec no-fault automobile insurance scheme at least encourage further speculation.[60] In the comparative context of Canadian and American legal developments, Professor MacCaffery's analysis of approaches to environmental control and regulation in the two countries and its relevance to transboundary pollution is a good example of the practical benefits of the comparative method.[61]

The most encouraging developments in the last five years have taken place in the area of historical analysis. The influence of legal historians in both England and the United States and the seminal work of Professor Risk have borne fruit in historical studies of the social context of both tort and compensation law. Professor Nedelsky in her essay on Canadian nuisance law between 1880 and 1930, the high period of industrial development in this country, has demonstrated the value of relating the development of a body of case law to the social and economic realities of the age.[62] In the process she has suggested the need for skepticism about the extent to which Canadian judges merely parroted the wisdom of their English counterparts. Moreover, she has pointed to further important work that needs to be done on the intellectual and political motivations of the judges who decided the cases analysed. In the same context the present writer has endeavoured in two pieces on legal responses to environmental abuse caused by industrial development to place the role of tort law, especially the nuisance and riparian rights actions, in its proper and modest place.[63]

Professor Risk has produced a splendid history of the weaknesses of the common law in addressing the problem of industrial accidents,

[60] M.A. Glendon, "Observations on the Relationship Between Contract and Tort in French Civil Law and Common Law" (1980) 11 R.D.U.S. 213; L. Perret, "Le régime de 'No-Fault' integral de la nouvelle loi sur l'assurance" in F. Steel & S. Rodgers Magnet, eds., *Issues in Tort Law* (1983) 51.

[61] S. McCaffery, "Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Survey" (1981) 19 U.W. Ont. L. Rev. 35.

[62] J. Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (1981) 281.

[63] J. McLaren, "Nuisance Law and the Industrial Revolution — Some Lessons from Social History" (1983) 3 Oxford J. Leg. Stud. 155; J. McLaren, "The Tribulations of Antoine Ratte: A Case Study in Environmental Regulation of the Nineteenth Century Canadian Lumbering Industry" (1984) 33 U.N.B.L.J. 203.

and the circumstances surrounding its supersession by the administrative workers' compensation scheme established in Ontario in 1914.[64] Professor Tucker's work on employers' liability and on the genesis of occupational health and safety legislation in Canada is also instructive in terms of social development and the inadequacy of the common law.[65] In a more conservative vein, Professor Bridge has clarified significantly the historical development of tort and contract and so helped define the proper sphere of each.[66]

Finally, the issue "that will not go away,"[67] that of no-fault or socialized insurance, continues to excite and challenge Canadian scholars. Two important texts, by Professor Ison on workers' compensation,[68] and by Dean Burns on criminal injuries compensation,[69] show how these systems work in practice. Dean Burns' work goes further in comparing Canadian models with counterparts elsewhere, and in using quantitative analysis to test the underlying assumptions of this form of compensation. The value of comparative analysis is also evident in the work on the New Zealand Accident Compensation Scheme. Professor Ison's book provides valuable insight into the day-to-day working of the scheme and its strengths and weaknesses,[70] while Professors Klar and Gaskins have developed useful critiques based upon tort theory and the economic values underlying the scheme respectively.[71] At the level of policy analysis as a basis for reform of an existing state compensation system, Professor Weiler's report on workers' compensation in Ontario represents an important contribution to the literature.[72]

Beyond these analyses and critiques, there has been a new call for a far more comprehensive move in Canada to a state-administered system

[64] R. Risk, "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (1983) 418.

[65] E. Tucker, "The Determination of Occupational Health and Safety Standards in Ontario, 1860-1982: From Market Politics to . . . ?" (1984) 29 McGill L.J. 261 and "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory" (1984) 22 Osgoode Hall L.J. 213.

[66] M. Bridge, "The Overlap of Contract and Tort" (1981-82) 27 McGill L.J. 872.

[67] P. Atiyah, "No Fault Compensation: A Question That Will Not Go Away" (1980) 54 Tul. L. Rev. 271.

[68] T. Ison, *Workers' Compensation in Canada* (1983).

[69] P. Burns, *Criminal Injuries Compensation: Social Remedy or Political Palliative for Victims of Crime* (1980).

[70] T. Ison, *Accident Compensation: A Commentary on the New Zealand Scheme* (1980).

[71] L. Klar, "New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective" (1983) 33 U. Toronto L.J. 80; R. Gaskins, "Tort Reform in the Welfare State: The New Zealand Accident Compensation Act" (1980) 18 Osgoode Hall L.J. 238.

[72] P. Weiler, *Reshaping Workers' Compensation for Ontario* (1980).

of first party insurance for all accidents resulting in personal injury. This is the thrust of the well-argued and stimulating report by Professor Belobaba on products liability resulting in personal injury.[73] These works aid both in making useful comparisons between the various elements of the present compensation system, and in suggesting beneficial changes to it.

V. THE FUTURE

The expansion of focus and the enriching of substance in Canadian research and writing in torts and compensation law evident in the past five years can be expected to continue. A small but growing number of scholars are and will continue to be dissatisfied with confining themselves to traditional speculation. Moreover, the new flame of curiosity is likely to be fanned by both the pluralism in theoretical debate, and the transnational nature of the discussion. Although much of this debate to date has been stimulated by the law and economics movement in the United States, a similar phenomenon is occurring between law and sociology, psychology, history, and philosophy, and this present dialogue is being conducted with genuine enthusiasm and a sense of the importance of intellectual engagement.

Given this intellectual ferment, what areas of torts and compensation law need to be developed further in Canada?

The intrusion of non-legal theory into torts and compensation scholarship in Canada has not yet extended far. Except for the notion of distributive justice in the work of Professor Ison, and Professor Weinrib's use of moral philosophy, we lack the developed and comprehensive theorizing that has marked recent tort law in the United States. There is obviously room for much more work of this sort.

Hopefully, a greater diversity of theoretical approaches will emerge in Canada than was apparent until recently in the United States. Work on tort law there was commonly criticized as reflecting unduly the individualistic strains in the American political, social, and economic tradition and reducing tort law to rationalization in exclusively private law terms. In Calabresi's theory of market deterrence, Posner's quest for the economically efficient result, Epstein's system of corrective justice, or Fletcher's reciprocity theory, the focus has been the same: the adjustment of the position of the individual parties.[74] Moreover, this

[73] E. Belobaba, *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization* (1983).

[74] *Supra*, note 16 at 218-30.

objective theory of liability has been found to be somewhat unrealistic, laden with individualistic or free enterprise values, and more a mode of analysis than an explanation of a system of substantive justice. As Professor Englard has observed:

> The response of modern American scholarship to the crisis in tort law consists of an extraordinary effort to fashion an improved general theory of liability. These attempts are doomed to failure because in all their present forms they constitute a desperate rear guard action to preserve a traditional system of individualism in a changing world.[75]

There are strong arguments for a more pluralistic climate for speculation on torts and compensation law in Canada. Our political, social, and economic tradition contains definite and important collective strains, and state instrumentalism in the form of legislation and administrative regulation has been readily accepted as a means of achieving greater social justice.[76] Given the disorganized development of the law of torts in particular, and compensation law in general, and the varied objectives they serve, it seems naive to claim that either can be neatly accommodated within a particular theoretical master plan. It makes far more sense to approach the areas in a functional way and to relate theory more closely to the practical objectives served by the law in different situations.[77] This is not to dismiss or devalue the utility of applying theory and analysis of other disciplines, but to use it to improve the compensation system, rather than to dominate it. While Canadians should recognize the value of economic thought and notions of corrective justice in solving compensation problems where considerations of economic efficiency or of individual responsibility demand it, the value of perceptions drawn from other disciplines, especially psychology, politics, and sociology should be recognized, and attention directed to the demands of distributive justice. As we are likely to maintain what Atiyah has described as a mixed system of compensation for the foreseeable future,[78] this diverse approach is essential if what we think is going to bear any relationship with what we do. We would do well to look closely at the new wave of scholarship on tort and compensation law in Britain. It exhibits a diversity of views and a healthy skepticism for theoretical purity, recognizes the value of attempting both to synthesize the research product of different disciplines and to accommodate diverse theoretical positions, and maintains a concern

[75] Englard, *supra*, note 22 at 68.

[76] See G. Horowitz, *Canadian Labour in Politics* (1968) at 3-22; S. Wise, "Liberal Consensus or Ideological Battleground: Some Reflections on the Hartz Thesis" (1974) Can. Hist. Assoc. Papers 1.

[77] *Supra*, note 16 at 230-43.

to look beyond tort litigation to alternative ways of achieving distributive justice.[79] It is also important that we recognize and work with the enrichment of theory that flows from the coexistence within our law of both the common and civil law traditions.

There is an additional danger in emulating too closely the neo-conceptualist scholarship in the United States: we may merely generate a closed debate between the keepers of the arcane mysteries involved. I confess to having difficulty in cracking the mind set of the writers of tort law and deciphering the jargon in some of the more 'advanced' theoretical work now appearing. I fear that, unless we recognize that in law theoretical speculation is most valuable where it helps us understand what actually happens in the world, we will progressively be involved in intellectual narcissism, which will divorce us entirely from reality. Our move beyond the narrow confines of traditional legal to interdisciplinary analysis is no guarantee against insularity and undue introspection.

The claim that the law of torts can be reduced to explanation by so-called objective economic or ethical theory is being increasingly challenged not only by the traditional skeptics, but also by progressive and Marxist thinkers. The latter see the present compensation system and the conditions that make it necessary as reflections of the capitalist system, and the solution in changes ranging from the greater socialization of risk avoidance and compensation to social revolution.[80] Like it or not, the claim of conceptual perfection invariably generates challenge and leaves us with competing versions of the truth. A sensible place for Canadians to start may be the wry piece on theoretical pluralism in torts and compensation law by Professors Hutchinson and Morgan.[81]

There is still room for basic doctrinal and theoretical work in a number of fields. Typically these are areas that lie outside the ambit

[79] See *e.g.*, S. Guest, "The Economic Analysis of Law" (1984) Current Leg. Prob. 233; C. Velianovski, "The Economic Approach to Law: A Critical Introduction" (1980) 7 Brit. J. Law & Soc. 158; A. Ogus, "Do We Have a General Theory of Compensation?" (1984) Current Leg. Prob. 29; M. Davis, "The Road from Morocco: Polemis Through Donoghue to No-Fault" (1982) 45 Mod. L. Rev. 534; F. Trinidade, "A No-Fault Scheme for Road Accident Victims in the United Kingdom" (1980) 96 L.Q. Rev. 581; W. Bishop, "Economic Loss in Tort" (1982) 2 Oxford Leg. Stud. 1; P. Cane, "Justice and Justifications for Tort Liability" (1982) 2 Oxford J. Leg. Stud. 30. Of singular importance in this regard is D. Harris *et al.*, *Compensation and Support for Illness and Injury* (1984).

[80] See Abel, *supra*, note 22; R. Abel, "A Socialist Approach to Risk" (1982) 41 Maryland L. Rev. 695; R. Pierce Jr., "Encouraging Safety: The Limits of Tort Law and Government Regulation" (1980) 33 Vand. L. Rev. 1281.

[81] A. Hutchinson & D. Morgan, "The Canegusian Connection: The Kaleidoscope of Tort Theory" (1984) 22 Osgoode Hall L.J. 69. See also B. Chapman, "Ethical Issues in the Law of Torts" (1983)

of the law of negligence, namely nuisance, defamation, the intentional torts, and the economic torts. All of these areas raise fundamental issues of policy. Underlying nuisance litigation is the broader issue of the conflict between exploitative and conservatory land use and the extent to which each is to be saddled with the external costs of economic development. Defamation cases raise the important issue of the balance between free speech and protection of reputation in a democratic society. The setting of this balance is likely to acquire greater significance since the clear recognition of freedom of speech as a fundamental constitutional value by the *Charter*. The intentional torts, insofar as they overlap with criminal law, create opportunities for speculation on the functions of punishment, deterrence, retribution, and compensation. Moreover, to the extent that questions emerge that relate to the mediation of police powers and the right of the individual to be free from unwarranted arrest and harassment and to be entitled to be fairly treated by the criminal process, public law considerations again intrude. Insofar as the economic torts focus on the industrial relations area, both their functional validity and operation will be affected by considerations of the balance of power in labour management relations, and of how best to moderate conflict within that context.

While there are still gaps in our knowledge of principles, concepts, and rules, we need to fill them in a way that makes us sensitive to the theoretical and policy challenges inherent in these conflicts. Moreover, we need to appreciate the practical limits of tort law as a solution to such conflicts. There is cause for optimism here. An instructive article by Professor Cassels on public nuisance stimulated by the debate over its use as an expedient to deal with annoyance and disturbance caused by street prostitutes,[82] and ongoing work by Dean Burns and Professor Vaver on the economic torts, and by Professor Ray Brown on defamation suggest future extended and intellectually challenging work on the nominate torts.

In the field of negligence law, it is time for more integrated and extensive criticial analyses examining the various objectives claimed for liability under this head and the extent to which they are actually realized, applying not only legal but also economic, sociological, political, and philosophical analysis, and viewing negligence law in the context of both tort and compensation law in general. We need to know whether negligence law has the theoretical integrity that some claim for it, or whether theoretical consistency is a myth. Professor J.C. Smith in his book on negligence law has laid much of the philosophical groundwork.[83] It is encouraging to learn that Professors Saunders and Cooper-Stephenson are working on a book on negligence that will attempt to address and evaluate the economic, sociological, and political values which underlie that area of liability.

Our knowledge of the place of tort law within the more general field of compensation law is primitive. These are signs that the relationship between tort and insurance law is opening up, although clearly much more needs to be done to investigate both the theoretical and practical elements of the relationship. Our knowledge of other systems, such as workers, and criminal injuries compensation, should help us make useful comparisons. Torts scholars and teachers are still woefully ignorant of the relationship between tort compensation and the complex of social benefits available to those who suffer misfortune in our society. Only if someone happens also to teach that 'Cinderella' of courses, Social Welfare Law, is that connection likely to be made and developed. This virgin field of research calls out for extensive work on the comparative analysis of rules, process, and policy.

Empirical research has been largely absent from torts and compensation law scholarship in Canada. As a consequence we are almost totally ignorant of the end results of the various elements of the torts and compensation process. When we pontificate confidently about the effect of injunctive relief or damages awarded in nuisance actions, we do so without any idea of what typically happens thereafter. Does the grant of injunctive relief actually cause polluters to clean up their acts, or do they merely buy out the complainers at a price more favourable to the latter than if no action had been taken or damages awarded? If the latter does happen, it undercuts some of the assumptions that I personally have made about the social engineering function of nuisance law.[84] When we fret over the issue of the extension of liability in negligent infliction of economic loss cases, is our reflection aided by knowledge of the incidence and availability of insurance for business interruption? Rarely do we give the matter any thought. When we carefully craft tortious damage awards for seriously injured plaintiffs, how much do we know about the sufficiency of the amount awarded over the long haul, the cumulation or otherwise of benefits including tort damages, and the record of accident victims in dealing with the lump sum damage awards they

[82] J. Cassels, "Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication" (forthcoming, Can. B. Rev.).

[83] J.C. Smith, *Liability in Negligence* (1984).

[84] McLaren, *supra*, note 6.

receive? The answer is precious little. We would benefit from more sophisticated economic and actuarial knowledge, yet we know little or nothing of the actual track record of accident victims who have received damage awards. The absence of data on the disposition of tort damages is matched by ignorance of the economic fate of those who receive compensation through other systems, such as workers' compensation. A comparison of the fate of accident victims of the same age with similar injuries and similar economic and educational status at the hands of the tort system on the one hand and the workers' compensation system on the other would be helpful in determining social policy. Thus far this sort of comparative systems research has been totally lacking.

Some momentum has already been achieved in the use of historical research. The importance of continuing the search for the historical record is demonstrated by a recent article from England. The decision in *Rylands* v. *Fletcher* has puzzled torts scholars for over a century now and every conceivable theoretical justification has been canvassed. Moreover, scholars have speculated on whether the judgment mirrored the conservative values of the judges. Just when one might have thought that the decision had been laid to rest as an unresolved enigma, Professor Brian Simpson has suggested in a masterful piece of historical analysis that the decision to impose strict liability may have been related more to the impact on judicial thinking of major disasters caused by dam failures in Britain in the 1850s and 1860s and legislative reaction to them than conceptual integrity or the power of precedent or legal tradition.[85] While Canadian scholars often tend to assume that our jurisprudence lacks classic cases of this type, there are examples of decisions that warrant this sort of analysis. The Sudbury 'copper smelter' litigation of the 1910s is but one pregnant example. Also, much needs to be done on the history of social legislation that overlaps tort law.[86]

Enough has been said already to suggest that much more comparative research between the civil and common law systems should be carried out in Canada. By way of example it would be fascinating to explore the issue of how far developments within the case law, especially at the Supreme Court of Canada level, are affected by the theoretical predisposition and legal training of the judges who have crafted the court's or the majority's decision in particular cases. Is it, for example, merely aberrational that Pigeon J.'s views on the exclusivity of contract and tort, as articulated in *J. Nunes Diamonds Ltd.* v. *Dominion Electric Protection Co.*[87] seemed to fly in the face of common law developments elsewhere or is the truth that his position was entirely consistent with the theory in Quebec law that a party to a contract cannot opt, in the event of a claim for liability, for a delictual rather than contractual action?[88]

The process of comparison should not stop at the common law. Differences in philosophy and social policy are also reflected in legislation and administrative arrangements, and these warrant examination, especially in the context of comprehensive compensation schemes. For example, to determine whether other provinces should adopt more extensive no-fault benefits for automobile accident victims, an important focus of research should be the Quebec scheme and the experience with it in practice.

Traditionally, torts and compensation law scholarship has been a largely individual vocation. However, this pattern is changing; more work is now being carried out by pairs of scholars. This is a desirable trend because it encourages communication between legal scholars, and also opens the door to collaboration between legal researchers and those from other disciplines. Given the broad thrust of much of the needed research, the encouragement of joint effort is crucial. At a time of fiscal restraint in higher education it is unlikely that such initiatives will take place exclusively in specially designated institutes or centres. Accordingly, compensation scholars will have to rely on less formal networking expedients. The Tort Law Section of the Canadian Association of Law Teachers has been successful in the past in encouraging dialogue between and writing by torts scholars. We should assist in securing the funding for joint interdisciplinary research on compensation law. In particular we should work towards the initiation of a programme that will tie together the extensive cross-disciplinary work that can tell us how the present system is working and engender the theoretical brainstorming that will inform proposals for change. The Arthurs Report has created a favourable climate for initiatives of this sort, especially in the Social Sciences and Humanities Research Council. As well, Professor Belobaba has renewed the challenge to us to look seriously at the weaknesses of the present system in relation to personal injury and to respond with creative and sensible prescriptions for change. Moreover, governmental fiscal restraint, together with the structural difficulties of getting country-wide

[85] A. Simpson, "Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands* v. *Fletcher*" (1984) 13 J. Leg. Stud. 209.

[86] Professor Risk has pointed the way here in his essay on workers' compensation. Another important and suggestive piece of social historical analysis is P. Bartrip & S. Burman, *The Wounded Soldiers of Industry* (1983).

[87] [1972] S.C.R. 769.

[88] On the characterization of this question in Quebec Law and an account of the divided state of the authorities, see J.L. Baudoin, *La Responsibilité Civile Delictuelle* (1973) at 15-18.

agreement, make it unlikely that major public research initiatives will be taken. In any event, as the Arthurs Report itself observes, there are advantages in terms of independence and objectivity in not 'hitching our wagon' to government and its priorities. If we wish to encourage interdisciplinary research and to focus on the important social policy issues that surround the compensation of harm, then the challenge is ours to meet!

> "Before it gets too dark I've got find a place to park. Know any place up the road where they'll let me stay the night?"
> "If you pull over that way behind the pine trees nobody could see you from the road."
> "But I'd be committing a tort."
> "Yeah, I wish to Christ I knew what that meant."

TOWARD 'NEW PROPERTY' AND 'NEW SCHOLARSHIP': AN ASSESSMENT OF CANADIAN PROPERTY SCHOLARSHIP

BY MARY JANE MOSSMAN*

While the particular nature of property law makes both the undertaking of property scholarship and its assessment difficult, Professor Mossman finds that the general question essential to any assessment of legal scholarship remains the same, that is, the underlying methodological inquiry. An analysis of three topics in property law — the doctrine of estates in land, landlord and tenant, and matrimonial property — reveals a lack of contextual awareness in the legal writing. If the principles of property law are to be sufficiently dynamic to provide protection for 'new property' claims, legal scholars must develop a critical awareness of the values and choices that underlie the scholarly inquiry.

I. APPROACHING THE TASK: PROBLEMS AND PITFALLS

Twenty years ago, in the preface to his casebook, *Cases and Notes on Land Law*,[1] Professor Laskin (as he then was) quoted and agreed with a statement of Professor Hargreaves, written in 1956,[2] assessing the state of property scholarship; Hargreaves had asserted:

> Not since Littleton has there been a serious attempt to isolate [the principles of English land law] from their historic origin, to examine them as living contributions to contemporary thought, and to apply them in the construction of a systematic analysis of the whole field which would satisfy the demands of scientific jurisprudence and prove worthy of the greatest system of property law that the world has ever known.[3]

Hargreaves' assertion was an assessment of property scholarship in England, and Laskin was even less enthusiastic about the state of property scholarship in Canada at that time:

* Associate Professor, Osgoode Hall Law School, York University, Toronto. The author is grateful for research assistance provided by Ms. Theresa Mcpherson, Law 1986, Osgoode Hall Law School, and patient re-typing by Ms. Kasandra Sharpe.

[1] B. Laskin, *Cases and Notes on Land Law* (1964).

[2] A. Hargreaves, Book Review (1956) 19 Mod. L. Rev. 14; Professor Hargreaves was reviewing

STRUCTURED SETTLEMENTS – AN ACTUARY'S VIEW

Donald R. Anderson*
F.C.I.A., F.S.A., F.C.A.P., M.A.A.A.

In a recent judgment in these volumes, namely Yepremian v. Scarborough Gen. Hosp. (1981), 15 C.C.L.T. 73, Mr. Justice R.E. Holland discussed judicially the increasingly important phenomenon of the "structured settlement" in personal injury cases. A brief note by Mr. C.M. Fien, following that case, 15 C.C.L.T. 79, provided a further and cautionary perspective upon these questions. In the article which follows, the question is analyzed from an actuarial vantage-point. The author is a prominent Toronto actuary, who among his other current activities, is engaged in the preparation of a book dealing with actuarial evidence, to be published by The Carswell Company Limited. J.C.I.

1. *What are Structured Settlements?*

The term "structured settlement" refers to voluntarily agreed schemes of periodic payments, replacing lump sum payments in actions for loss of future income.

The term "structure" apparently comes from the idea that such a scheme can be shaped to meet the needs of the situation, by varying the income from year to year, by deferring certain elements of income, by allowing for lump sum payments at various times in the future, and by proving escalation of payments in an effort to offset the effects of inflation.

Although the payments could be made on a basis allowing for direct payments from the defendant or his insurer to the plaintiff, subject to possible periodic reassessment of loss, the current interest in structured settlements has largely centered around proposals to purchase an annuity from a life insurance company, with the payments increasing each year to help compensate for inflation.

---

* Donald R. Anderson is President of D.R. Anderson Associates, in Toronto, and is Chairman of the Committee on Actuarial Evidence of the Canadian Institute of Actuaries.

One of the principal motivations for this development has been a desire to reduce income tax liabilities, and in so doing, provide the defendant with some reduction in cost while providing the plaintiff with higher after-tax income. The income tax implications are discussed in more detail in section 3, below.

2. *The Holland Committee Report*

The Chief Justice of Ontario requested the formation of a special committee of judges and lawyers to look into this question. This committee, called the Committee on Tort Compensation, under the Chairmanship of Mr. Justice R.E. Holland, published its report in August 1980.

This report dealt with the following advantages of periodic payments:

1. Ability to make reassessments
2. Consistency with workmen's compensation and social security
3. Reduction in plaintiff-instigated delays
4. Encouragement of rehabilitation
5. Earlier benefit to plaintiff
6. Reduction of "compensation neurosis"
7. Reduction of pressure on plaintiff to settle
8. Simplification of tax calculations in fatal cases
9. Tax advantages of period payments
10. Avoidance of necessity of assessing widow's likelihood of remarriage in fatal cases
11. Avoidance of dissipation of awards
12. Protection against inflation.

Against these advantages, the report discussed the following disadvantages:

1. Lack of finality
2. Loss of incentive to rehabilitation
3. Encouragement of snooping
4. Plaintiff may be deprived of his preferred result
5. Insurers unable to close their books
6. Plaintiff requires a capital sum to compensate for loss of capital asset (ability to earn)
7. O.H.I.P. subrogated expenses should be paid in lump sum
8. Area of concern is a relatively small part of total injury award picture
9. Undue burden on uninsured defendant
10. Lump sum can be obtained by out-of-court settlements
11. The problem of fixed dollar insurance limits
12. Problems associated with death of plaintiff
13. The need for adequate security
14. Necessity to prohibit assignments
15. Need for procedural changes
16. Less need for periodic payments in fatal cases.

The Committee on Tort Compensation concluded it was desirable to encourage the use of periodic payments, and proposed that the Rules of Procedure be modified to clarify the powers of the courts in respect to reviewable judgments, judgments for periodic payments, and restrictions on the disposition of awards.

Because most of the interest in structured settlements centres around the use of annuities to provide the periodic payments, this is the main thrust of the comments which follow.

However, it is important to consider that reviewable judgments and restrictions on the disposition of awards remain important issues to be dealt with, and may have application in certain cases. Moreover, a judgment for periodic payments that does not involve the purchase of an annuity may also have a legitimate place.

3. *Income Tax Implications*

The Holland Committee report contains a copy of an opinion from Price Waterhouse & Co., Chartered Accountants, dated June 4, 1980 and a further report dated June 6, 1980, enclosing a copy of a letter of June 2, 1980 from Revenue Canada-Taxation concerning the taxation treatment of tort compensation awards payable in instalments.

Price Waterhouse asked Revenue Canada-Taxation to rule on a hypothetical case where a person injured in a motor vehicle accident was awarded a stated sum monthly for the rest of his life.

Revenue Canada ruled that regardless of whether the court-awarded payment is a lump sum or a series of payments, the amount received is not taxable income. Thus, even though the monthly payments include interest earnings, they are considered to be entirely non-taxable income to the injured person so long as the annuity is not owned by the annuitant.

In practice, it is considered desirable that the plaintiff not be offered a choice between a lump sum and the annuity that it could purchase, because the very existence of that power to choose might run the risk of an allegation by Revenue Canada of constructive receipt of the lump sum.

Revenue Canada indicated that the only amount that would be taxable would be any income in excess of the amount of the award.

If the damage award is paid in a single lump sum, the amount of the award is not taxable income, but if it is invested, the investment income is taxable income. In practice, this means that the tax burden is very heavy in the first year, and that it rises for a few years when withdrawals from the fund are less than the investment earnings, resulting in rising fund balances and rising investment earnings.

4. *Application of Structures*

Structured settlements are essentially settlements, as distinct from awards. In other words, they are the product of negotiation, and, although litigation may improve the atmosphere for negotiation, it is not typically the role of the court to impose a structure as the judgment in a trial where the plaintiff seeks a

lump sum amount. The plaintiff still has a right to demand a lump sum amount.

For a structured settlement to be the preferred outcome of a settlement, it must naturally commend itself as being of greater advantage to the parties than a cash settlement.

It is important to realize that structured settlements do not eliminate the need to determine an accurate valuation of the lump sum quantum of damages, since, as stated above, the plaintiff has a right to such lump sum. The defendant does not have the right to look into the plaintiff's tax position and demand that the plaintiff take less than the lump sum that would be appropriate. Moreover, the plaintiff can demand that the defendant compensate for reasonably incurred income taxes and investment counselling expenses attendant on a lump sum settlement.

Structured settlements must fit within the existing framework of the legal rights of the parties. They are primarily useful in facilitating out-of-court settlements when the parties understand what amount is likely to come out of court.

Once quantum is known, it is possible to determine what part of it should be paid in cash and what part can be applied to purchase deferred benefits. Then, it is possible to examine various structures to determine the one which best meets the needs of the situation.

Certain situations which cry out for the use of structured settlements include:

1. High amounts, where taxes are expected to be onerous during the early years.

2. Cases where it is quite evident that the plaintiff will be unable to devise and execute a sound investment programme or will foolishly dissipate the funds to his own detriment or, especially, to the detriment of minor children.

3. Cases where the plaintiff intends to defer usage of some of the funds for a period of years, and where taxes would make it difficult to do so.

4. Cases where a plaintiff is steadfastly refusing a settlement which cannot be improved in court, and where a structure will look better in view of its guaranteed payout over a period of years.

It sometimes happens that a structure is proposed for the wrong reasons, or in situations where it will cause difficulty in later years. These include:

1. Where a structure is being proposed to save taxes, and where the plaintiff is expected to split the tax saving with the defendant, and yet where the tax implications have not been adequately analyzed and where taxes would not be very high anyway or where substantial tax savings can be accomplished through other devices.

2. Where the structure is proposed for a minor child, whose consent cannot, of course, be obtained, and where inflation may cause the income to be drastically reduced after the child comes of age. In these cases the child may feel that his interests were not properly looked after.

3. Where the rate of escalation in income is substantially lower than the predicted rate of inflation.

4. Cases where there is a mortgage or other debt to be paid off. This should normally be given priority over annuity purchase.

5. Cases where the plaintiff has special tax treatment, such as foreign residence.

5. *Role of Actuary and Structurer*

Counsel, whether acting for plaintiff or defendant, should not confuse the roles of the structurer and the actuary. The actuary can be extremely helpful in determining the quantum, apart from factors relating to liability. He can also assess the value of structures, and can show their tax implications as compared to the tax implications of lump sum awards.

The structurer can obtain competitive quotations from a number of insurance companies on a variety of annuities and can

Life insurance companies in Canada have an excellent record and are closely supervised by the government. Even in the great economic depression of the 1930's, no policy-holder ever failed to receive his claim. Having said that, it is still true that insurance companies stometimes fail. Counsel may be well advised to obtain from an independent actuary an opinion as to the financial condition of the insurance company whose annuity is being considered as low bidder.

In advising his client as to the interpretation to be placed upon such an opinion, plaintiff's counsel may wish to raise the issue of the risks that the plaintiff may encounter in investing the proceeds of the action, and the difficulty in obtaining and utilizing appropriate investment advice.

8. *Misunderstanding of Income Projections*

One major source of concern in the application of annuities has arisen over the interpretation of schedules of payments. For example, a structure might provide for payment of $1,000 per month in the first year, $1,030 in the second year, and in subsequent years the payments would increase by 3 per cent each year, ostensibly to take care of inflation.

If the plaintiff is age 20, such a schedule may well run for 70 years, by which time the income will be $7,918 per month, and the accumulated payments will be $2,767,129. This may easily be interpreted as an award of $2.7 million and be so understood by the plaintiff and so reported in the media, along with comments like "one of the largest settlements in the history of the courts", whereas it is really a fairly modest settlement when looked at in lump sum terms.

The plaintiff's friends may look on him as a millionaire, whereas in reality he is on a steady road to financial disaster. If inflation continues at 10 per cent over his lifetime, his income will have the purchasing power of only $268 per month in 20 years and only $72 per month in 40 years. If he should live to age 90, his $7,918 per month will only purchase $10 worth of goods.

The actuary can be useful in making sure that the parties understand the economic significance of the award, by showing the estimated future purchasing power of the income on the basis of various reasonable assumptions as to future inflation.

9. *Mixed Investment Programmes*

In any discussion of the merits of structured settlements and the use of annuities, there should be careful consideration of other options which may commend themselves, and use should be made of competent tax planners.

Under present Canadian tax law (1981) considerable advantage can be obtained through the investment in common shares, preferred shares and convertible preferred shares. Moreover the capital gains treatment of income from bonds and debentures bought at a discount should be considered. There are also merits in investment in a principal residence, with tax free capital gains and the elimination of tax on the money that would otherwise have to be invested.

Usually it will be found that a mixed investment programme is best, with the intelligent use of a variety of investments and continuous monitoring under expert guidance to ensure that the programme remains sound in light of emerging changes in the tax and investment conditions.

10. *The Investment Yield on Annuities*

Frequently the parties to a structured settlement negotiation will look at an annuity proposal and say, "What interest rate does that insurance company provide on the money they get?"

Unfortunately, insurance companies do not disclose the interest rate they use in calculating premiums. Even if they were to reveal the rate, it would not tell the whole story, because the insurer will be making various other charges for expenses, commissions, mortality margins and other risks. The parties will be none the wiser to know the interest rate employed.

However, the actuary can help them by calculating what interest rate would produce the insurer's quoted rate on the basis of reasonable mortality assumptions. In short, he can look at the rate from the point of view of the customer, and provide a useful and meaningful appraisal of its merit.

11. *What is Gross-up?*

Before leaving the question of structured settlements, it is important to consider the issue of "gross-up". This refers to

the amount that should be added to a lump sum settlement to compensate the plaintiff for the income tax that he will have to pay on investment income.

Gross-up is difficult to calculate, because the additional capital sum necessary to produce the gross investment income which will produce the desired net income after tax will, in itself earn extra investment income which will attract extra tax, and may place the gross income into a higher tax bracket.

Further difficulties arise over the question of whether the investment income will come from bonds, shares of stock, real estate or other sources having different tax treatment, including the deferment of tax.

Also, where the plaintiff has other income, should the tax on the investment income from the award be worked on the basis of his tax bracket including such other income? If so, how should one deal with the possibility of future changes in that other income?

With the aid of computers the actuary can calculate gross-up on the basis of various assumptions.

12. *Conclusion*

Future developments in structured settlements are difficult to predict. As in any other matter relating to the determination of damages, new approaches are constantly emerging, and changes sometimes occur very rapidly.

VOGEL v. CANADIAN BROADCASTING CORPORATION et al.

British Columbia Supreme Court
Esson J. [In Chambers],

Heard January 13, 1981.
Judgment January 16, 1981.

Defamation – Alleged libels in broadcasts – Rolled-up plea – Pleadings – Demands for particulars – Specificity of response required of defendant – B.C. R. 19(12)(b).

The defendant corporation broadcast twice, on the same evening, radio and television reports which alleged that "British Columbia's Deputy Attorney-General has interfered with the judicial system . . . [and] used his position to influence the course of justice to help friends and associates"; itemizing three cases said to involve such interference. The plaintiff issued a statement of claim alleging that the reports, set out therein in full, were libellous. By one paragraph of their statement of defence, the defendants entered a "rolled-up plea", averring that ". . . insofar as the words and pictures referred to in the Statement of Claim consisted of statements . . . they were in fact true in substance, and true in fact, insofar as the words consisted of expressions of opinion these opinions were fair and bona fide comments made without malice upon the facts which were and are a matter of public interest". The plaintiff demanded particulars as to which of the words in the impugned reports were alleged by the defendants to be statements of fact; and as to the facts and matters upon which the defence relied in support of their alleged truth. The defence sought particulars of which facts in the statement of claim were alleged to be false, and which statements were alleged to have been given with malice. To this latter demand, the plaintiffs enumerated 10 items paraphrasing remarks in the broadcasts, which were asserted by the plaintiffs to be false. The defendants, in response to the plaintiff's demand for particulars, stated that the defendants regarded as statements of fact "the statements set out in paragraphs 1, 2, 3, 5, 6 & 7 of the Plaintiff's Answer to Demand for Further and Better Particulars"; and as to the "facts and matters relied upon", made a series of statements of fact mostly though not exclusively, to be found in the broadcast reports.

The plaintiff applied to require the defendants to give more ample particulars, challenging the adequacy of the defendant's response as just summarized.

Held – Order accordingly.

sistent with prudent precautions against a known risk, then a solicitor might still be found liable for negligence.

We have also seen that there is no conclusive method for solicitors to determine, in advance, whether a court will hold that their customary procedures protect their clients' from a known risk.

Unfortunately, rapid developments in the law coupled with increased specialization render it virtually impossible for today's overworked practitioner to keep abreast of all the current changes in the practice of law. Customary practices are constantly undergoing revision to meet the needs of the public and the demands of the legal system. It would be impracticable to expect that solicitors should be aware of these developments and, moreover, that they should realize that these practices might be inconsistent with prudent precautions against a known risk. For that reason, members of the Canadian Bar are likely to continue facing suits of this kind and continue raising the defence of customary practices in the future.

AN ALTERNATIVE TO STRUCTURED SETTLEMENTS: THE USE OF TRUSTS

*Stephen G. Blair**

Introduction

Lawyers who practise personal injury litigation routinely advise clients on the relative merits of "structured settlements" and cash settlements in the course of settlement negotiations. A third alternative, a trust which can be used in combination with the other two, is often overlooked and yet, is increasingly more attractive. Each settlement vehicle has its own advantages and disadvantages. These must be considered in each case in order to select the most suitable arrangement from each client's perspective.

A structured settlement offers several attractive features. It is a virtually risk free investment in the form of an annuity contract placed through a major life insurance company. It guarantees that the payments contracted for will be made regardless of the fluctuations which occur in the financial markets. The payments are also guaranteed by the defendant's casualty insurer. The casualty insurer remains obligated to make all payments provided for in the annuity contract if the life insurance company is unable to do so. At the same time, the capital used to fund the annuity contract remains in the hands of the life insurance company and the injured party has no access to it. There is, therefore, no risk of improvident depletion of capital by the injured party.

Structured settlements are worry free in the hands of the injured party who usually receives a monthly cheque in a predetermined guaranteed amount over the course of the settlement together with, in many cases, periodic lump sum payments. The timing and amounts of all payments are specified by contract. The payments received by the injured party are tax free in the injured party's hands so long as the Revenue Canada requirements for tax free status are met at the outset.

* Of Osler, Hoskin & Harcourt, Ottawa.

Assume the case of a 20-year-old plaintiff offered $300,000 plus costs to settle. The plaintiff is free to take the entire amount in cash or to place the entire amount into a structured settlement or to take part of it in cash and the remainder of it in the form of a structured settlement. The following illustrates the combined use of trusts and structured settlements.

The sum of $100,000 can be used to purchase a conventional life annuity structured settlement. At prevailing rates this would yield the recipient $600 to $850 per month tax free depending upon the guarantee period chosen and whether or not the payments are indexed.

The second $100,000 can be placed into a trust created by the injured party for his or her own benefit. Assuming a rate of return of 10% per annum, this will yield $10,000 per year in income less corporate trustee fees.

The third $100,000 can be used to purchase another "structured settlement" which will only provide lump sum payments at five-year intervals over 25 years. These payments can then be directed into the trust as they fall due and will increase its capital value. The increasing funds available to the trust will create more income to supplement the amounts paid under the conventional structured settlement. In addition, increasing capital will be available to provide funds for major purchases such as residences and to provide for ongoing care. Finally, the lump sums as they fall due, will help to protect the capital of the trust fund and its income from the effects of inflation.

The $100,000 sum can be paid to a life insurance company in order to yield the following guaranteed lump sum payments, tax free, at five-year intervals assuming a 10% per annum compounded rate of return:

DATE SET ASIDE	AMOUNT SET ASIDE	TO YIELD	ON
Dec. 1, 1987	$ 20,000	$ 32,220	Dec. 1, 1992
Dec. 1, 1987	$ 20,000	$ 51,880	Dec. 1, 1997
Dec. 1, 1987	$ 20,000	$ 83,540	Dec. 1, 2002
Dec. 1, 1987	$ 20,000	$134,560	Dec. 1, 2007
Dec. 1, 1987	$ 20,000	$216,700	Dec. 1, 2012
TOTAL SET ASIDE	$100,000	$518,900	TOTAL YIELD

As can be seen from the above example the initial amount of $100,000 set aside in 1987 will grow to $518,900 over 25 years

thereby providing the trust with increased capital over the years. This growth occurs in a tax free and virtually risk free environment and the funds are not available to be squandered away. The above payments can be guaranteed to be made regardless of whether or not the injured party survives.

After 25 years the trust fund will have a capital value of some $620,000 comprising the initial sum of $100,000 plus the capital "injections" of about $520,000 over 25 years. Of course, the capital of the trust itself may grow over the course of this 25-year period and its value might exceed $620,000 after 25 years.

Effects of Inflation

While the prospect of a trust fund of $620,000 after 25 years sounds attractive, the effects of inflation must be kept in mind. The following table illustrates the effects of inflation on the capital sum of $620,000 over a period of 25 years:

Average rate of Inflation (compounded)	Real value of Capital Fund
3%	$296,115
4%	$232,572
5%	$183,087
6%	$144,459
7%	$114,234
8%	$ 90,531

As can be seen from the above table, even relatively modest rates of inflation can have damaging effects over 25 years and this factor must be borne in mind when advising clients on the merits of a trust plan. It also illustrates that trustees should not rely solely on the lump sum payments to provide increased capital. They should, where appropriate, make investments which will increase the capital value of the trust property as well.

Tax Effects

This article is not designed to present a detailed review of the tax consequences which arise from an *inter vivos* trust of this sort. The taxation of trusts and their beneficiaries is currently under review by the government. Draft amendments were released on October 1, 1987, by the Department of Finance. Practitioners should bear in mind the probability of tax changes arising out of these proposals as they are intended to be effective for tax years of

trusts commencing after 1987. In the circumstances, an advanced ruling should always be considered where a trust is used in combination with a structured settlement.

Income earned and retained by trusts is subject to taxation. Presently, the minimum rate of tax which applies to trusts in Ontario is about 51%. Dividend income earned by the trust is subject to the dividend tax credit which reduces the net tax payable to some extent. Similarly, capital gains earned by the trust are given their usual treatment in that only a portion of any capital gain need be included in the calculation of the income of the trust.

The tax payable by a trust can often be substantially reduced in two ways. First, income of the trust which is paid directly to a beneficiary resident in Canada is subject to being taxed in the beneficiary's hands at his own personal rate of tax. Using the above example, the injured party would initially receive approximately $10,000 per year from the trust (assuming a 10% rate of return) which would supplement his monthly tax free income from his annuity payment. Assuming that he has no other income and allowing for personal deductions (or personal tax credits *per* the white paper proposals), the injured party will pay very little tax on the $10,000 which he receives from the trust. If the $10,000 represents dividend income from taxable Canadian corporations the tax would likely be nil.

Secondly, the trustees and the beneficiary can make the "preferred beneficiary election". This is an important tax planning provision which enables the trustees and the injured party-beneficiary to take advantage of the injured party's often lower marginal rate of taxation without actually paying any income to the injured party. The trustees and the beneficiary can "elect" to have the income of the trust attributed to the beneficiary and taxed at his personal rate of tax rather than at the normal rate of tax for trusts, about 51%. The trustees do not actually pay the funds to which the election applies to the beneficiary and these funds may be accumulated and invested within the trust. The draft tax legislation appears to contemplate the continuation of the preferred beneficiary election in the case of protective trusts of this sort.

In order to qualify as a preferred beneficiary the injured party-settlor of the trust must also be its beneficiary. Revenue Canada Interpretation Bulletin 394 discusses the preferred beneficiary election under current legislation.

Recently, the government has proposed a $100,000 lifetime

exemption from capital gains tax for individuals. Again, by using the preferred beneficiary election or by paying income directly to the beneficiary, it *may* be possible for the beneficiary of the trust to take advantage of his lifetime exemption which would not be available if the income of the trust were to remain within the trust. This exemption is only raised as a possibility which depends on the survival of the lifetime exemption and its precise application to trusts of this sort and their beneficiaries following the implementation of the proposed tax reforms.

Trusts of this type may last for many decades until funds are exhausted or the injured party dies. The *Income Tax Act*, S.C. 1970-71-72, c. 63, currently provides that all trusts are deemed to dispose of all capital property (other than depreciable property) every 21 years at its fair market value. Such a "deemed disposition" can create serious tax consequences in a case where there are accrued capital gains which have not been realized prior to the time of the deemed disposition. Trustees must bear this 21-year rule in mind and they should ensure that capital gains are realized on a timely basis in order to avoid a potentially large capital gains tax liability at the end of each 21-year period. One of the proposed amendments may exclude the application of the 21-year rule where the interests of the beneficiary are vested indefeasibly in possession. This proposed amendment is clearly intended to apply in cases of corporate and commercial trusts and its application to personal *inter vivos* protective trusts of the sort contemplated herein is not yet clear.

Many of the tax rules and benefits discussed herein relating to trusts are dependent upon the trust having Canadian resident trustees. Similarly, the beneficiary of the trust must be resident in Canada in order to qualify for the preferred beneficiary election.

Some Considerations in Preparing the Trust Document

A trust of this type contemplated requires a comprehensive irrevocable trust agreement which will adequately protect the moneys invested on behalf of the injured party. At the same time, the agreement must provide flexibility to meet the injured party's changing needs and investment goals. In addition, it must be tax effective. The following are some factors to be considered.

Serious consideration must be given to the investment powers of the trustees. Where appropriate, they should be given wide discre-

tionary powers to invest as they see fit in order to meet the sometimes conflicting goals of earning adequate income, ensuring capital growth and planning for tax avoidance.

An unfettered investment power carries with it the risks of fluctuating income and potential capital losses through financial mismanagement or on account of factors beyond the trustees' control. The combined use of corporate and personal trustees will help to minimize the occurrence of fluctuating income and capital loss. A prudent corporate trustee will ensure that only a small portion of the trust's capital is invested in highly speculative type investments and this will minimize the chances of capital loss. Likewise, the corporate trustee will take a balanced view of the injured party's current income needs and it will ensure that adequate funds are available to the injured party in both the short and longer term.

Trustees should have a discretion to pay income to the injured party or on his behalf or to accumulate income as they see fit. The trust should allow for the encroachment upon capital of the trust by the trustees in their absolute discretion. In some cases, the trust may contemplate a complete distribution of capital being made to the injured party. Such a distribution would be possible in cases where the injured party demonstrates a capability of effectively managing his money and the trustees are satisfied that their involvement in the matter is no longer necessary.

One special investment merits consideration. The trustees should have the power, in appropriate cases, to purchase a residential property (*i.e.*, a house or condominium) for the injured party to live in. It would be possible for the trust to take advantage of the capital gains exemption provided for principal residences in the following way.

The home would be bought in the name of the beneficiary. The trust could lend the money necessary to purchase the home to the beneficiary and it could secure its interest in the property by requiring the beneficiary to place a mortgage on the property in favour of the trust. In some cases, where the property increases in value, the trust could advance more capital to the beneficiary which would be secured by further mortgages against the property or by terms in the original mortgage allowing for further advances.

Upon the sale of the property the injured party would benefit from the personal residence exemption from capital gains tax. The trust would be secured for all amounts advanced to the beneficiary

in respect of the house and its capital would be returned to it. The trust and the beneficiary would both benefit from the favourable tax treatment afforded to principal residences.

A provision should be included which allows both the corporate and personal trustees to resign, on proper notice, subject to the appointment of new trustees. The agreement should provide for ongoing representation by at least one corporate trustee and one personal trustee throughout the existence of the trust. Where appropriate, consideration can be given to making the injured party a trustee in his own right. In order to ensure harmony between the corporate and personal trustees, a further provision should be included which gives the personal trustees the right to appoint a new corporate trustee upon giving appropriate notice to the existing corporate trustee.

A specific provision should be included in the trust agreement to provide for the use of the preferred beneficiary election referred to above.

The trust should provide for the disposition of trust property in the event of the death of the injured party. The agreement may contain a provision allowing the injured party to dispose of trust property in accordance with his will. The agreement should also provide for a scheme of distribution of trust property in the cases of an intestacy or of a beneficiary who fails to exercise a power of appointment in his will.

Protective trusts of this sort are designed to benefit a particular injured party during his lifetime. As a result, there should be an express waiver of the "even-hand" rule. Normally, the "even-hand" rule requires trustees to balance the interests of both the life and residuary beneficiaries. However, with such a waiver in place, the trustees will have the freedom and discretion to confer all benefits on the injured party without regard to the needs of the residuary beneficiaries, if any.

An area of considerable concern can be the fees payable to the trustees. Often, personal trustees do not seek fees and a provision to this effect can be included in the agreement. Corporate trustees, on the other hand, require that fees be paid. Usually, these fees consist of a flat or a percentage fee for care and management of the capital. In addition, a percentage fee for income is collected. It is worthwhile to attempt to negotiate the fees payable to the corporate trustee. Such fees can be an important factor in choosing the corporate trustee and they are a

matter open to some negotiation. In particular, it should be determined whether or not the corporate trustee will waive all or a portion of its fees in the case of investments held in its own securities. Trustees fees are currently deductible against income earned by the trust for tax purposes.

For its fees, the corporate trustee will handle the day-to-day affairs of the trust including the banking arrangements, safekeeping of securities, recording of income, payment of income, and preparation of tax returns.

Summary

Bearing in mind fluctuating interest rates, uncertain prospects of future inflation and the unpredictable needs of the injured party, it may not be wise to place all or substantial portions of settlement funds into a conventional structured settlement. Similarily, large cash payments to injured parties carry with them the risk of substantial loss through improvident spending or investments. A carefully planned trust arrangement, sometimes used in combination with a structured settlement, will provide for greater flexibility and protection against an unwarranted depletion of funds. The trust can also be used in combination with structured settlements to obtain the tax advantages offered by them.

THE PRODUCTION OF CLINICAL NOTES AND RECORDS

Robert Roth and Stephen E. Firestone *

Introduction

Recently, there has been a flurry of activity in the personal injury field with respect to the appropriate test to be applied with respect to the disclosure of a treating doctor's clinical notes and records. Any test that is ultimately adopted must be cognizant of the various interests that come into play.

There are fundamentally two ways that a party may move for the production of a treating doctor's clinical notes and records. The first of these is production directly from the non-party doctor pursuant to rule 30.10 of the Rules of Civil Procedure. The second is production by way of the recent "best efforts" approach which has developed pursuant to rules 30.02(1), 30.03, 34.10, and 34.15. By this approach a plaintiff's solicitor may be ordered to make his best efforts to obtain the clinical notes and records directly and, if they are obtained, he may be ordered to produce all or part of them to the moving party. In this article we will look at the soundness of this recent approach with respect to the production of a treating doctor's clinical notes and records. We will also look at the recent case law which has interpreted the above-noted rules and the specific requirements which the courts have determined must be met before a court will order the production of a treating doctor's clinical notes and records.

Production from Non-Parties with Leave; Rule 30.10 of the Rules of Civil Procedure

Pursuant to rule 30.10, a moving party may obtain directly from a treating doctor a copy of his clinical notes and records by satisfying the court that the stringent two-part test set forth in rule 30.10(1)(*a*) and (*b*) has been met. That rule states:

* Of Sommers & Roth, Toronto.

MEASURE OF DAMAGES FOR THE WRONGFUL DEATH OF A CHILD

Christopher J. Bruce*
Calgary

In St. Lawrence v. Lett the Supreme Court of Canada ruled that damages may only be awarded in fatal accident claims if those damages are "capable of a pecuniary estimate". The purpose of this paper is to argue that the value which parents place upon a child is capable of pecuniary estimate and, therefore, that (non-dependent) parents may be able to mount a successful claim for damages following the death of a child. This argument is based upon recent theories of fertility which hold that couples choose the numbers of children which they will bear based upon comparisons of the "costs" and "benefits" which children will bring to them. Estimates are made of the net losses of benefits which will arise if a child is killed, variously, on its sixth, twelfth, or eighteenth birthday.

Dans la cause St. Lawrence c. Lett, la Cour suprême du Canada a décidé que des dommages-intérêts peuvent être accordés dans les cas de réclamations faisant suite à un accident mortel, seulement si ces dommages-intérêts "peuvent être évalués en termes pécuniaires". Le but de cet exposé est de démontrer que l'on peut évaluer en termes pécuniaires la valeur que les parents attachent à un enfant et que, par conséquent, des parents (qui ne sont pas des dépendants) peuvent intenter avec succès un procès en dommages-intérêts à la suite du décès d'un enfant. Cet argument s'appuie sur des théories récentes de la fertilité qui avancent que les couples choisissent le nombre d'enfants qu'ils auront en se basant sur des comparaisons des "coûts" et des "bénéfices" que les enfants occasionneront. Les devis sont calculés d'après les pertes nettes de bénéfices qui seront encourues si un enfant est tué, et cela de façon variable selon qu'il a atteint son sixième, son douzième ou son dix-huitième anniversaire.

Introduction

In most jurisdictions which follow the English legal system, claims by family members pursuant to a fatal accident are brought under legislation which has been modelled on Lord Campbell's Act.[1] This legislation is generally so broadly worded that recovery for all losses, whether pecuniary or non-pecuniary, could be allowed. Section 2 of Lord Campbell's Act, for example, says only that such damages may be awarded as are proportioned to the injury resulting from such death to the defendants respectively. Canadian legislation based upon this Act is similarly ambiguous. The Alberta Fatal Accidents Act, for example, states only that ". . .the court may give to the parties. . . for whose benefit the action has been brought such damages as the Court thinks proportioned to the injury resulting from the death."[2]

In spite of the leeway which this legislation gave them, however, the courts moved quickly to limit the rights of recovery. In *Blake* v. *Midland Railway Company*,[3] the English courts interpreted Lord Campbell's Act to exclude non-pecuniary damages altogether; and in *Franklin* v. *South Eastern Railway Company*.[4] they further restricted recovery to loss of ". . . reasonable expectation of *pecuniary* benefit. . ." The Canadian courts soon followed, and in *St. Lawrence & Ottawa Railway* v. *Lett*,[5] the Supreme Court of Canada concluded that ". . .the injury [to the claimants] must not be sentimental or the damages a mere solatium, but must be *capable of a pecuniary estimate*. . .".

On the other hand, the majority decision in *St. Lawrence* made it clear that the phrase "capable of a pecuniary estimate" was not meant to require that ". . . the loss was a pecuniary loss of so many dollars or so much property".[6] Rather, provided that the injury was "substantial", compensation could be awarded for the loss of many types of benefits which would not normally be bought and sold in the market place, or otherwise valued in pecuniary terms. In particular, in *St. Lawrence* the Supreme Court upheld a jury award of $860 to each of five dependent children for the loss of ". . .the care, education and training. . ."[7] of their mother. Furthermore, the decision in *St. Lawrence*, (and in a number of intervening cases), was reaffirmed by the Supreme Court in its recent decision in *Vana* v. *Tosta*.[8] There, a twelve and a half year old girl and a ten year old boy were awarded $2,000 and $1,000, respectively, for the loss of the ". . .care, education. . .training. . .guidance, example and encouragement. . ."[9] of their mother.

In short, Canadian precedent suggests that compensation may be awarded in fatal accident cases even when the losses involved are not normally considered to be pecuniary in nature. Rather, the losses need only be "capable of a pecuniary estimate". Granted, the line of cases which supports this view refers virtually exclusively to claims in which children have lost the guidance of their mother. Nevertheless, the possibility remains that the courts will entertain the argument that parents are entitled to compensation for the loss of a child, provided that the plaintiffs

---

*Christopher J. Bruce, of the Department of Economics, University of Calgary, Calgary, Alberta.

1. R.S.A. 1955, c. 111, s.4(1).
2. (1852), 18 Q.B. 93, 118 E.R. 35 (Q.B.)
3. (1858), 3 H. & N. 211, 157 E.R. 448 (Exch.).
4. (1885), 11 S.C.R. 422, at p. 433. (Emphasis added).
5. *Ibid.*, at p. 432.
6. *Ibid.*, at p. 432.
7. [1968] S.C.R. 71, (1967), 66 D.L.R. (2d) 97.

can offer a "pecuniary estimate" of the value of that loss. It is my intention in this paper to describe a technique by which an objective estimate of this value might be constructed.

The argument will be developed in six parts. In Part I, I will offer empirical and theoretical support for the propositions: (1) that couples choose the sizes of their families on the basis of the perceived costs and benefits of children; and (2) that many of the benefits which children are perceived to bring to their parents arise after the children have reached adulthood and left home. In Part II, I will argue that the pecuniary loss suffered by parents upon the death of a child may be derived by estimating the difference between the benefits which they have foregone and the costs which they have "saved". In Sections III and IV, I will show how empirical estimates of the values of first and subsequent children may be derived. Two caveats will be raised in Part V. And in Part VI, I will contrast the estimates of losses derived in Parts III and IV with those which have been established in a number of recent Canadian cases.

I. *The Benefits Provided by Children*

In the last two decades a consensus has begun to develop among social scientists concerning the major factors which alter human fertility rates. These factors have been found to be consistent with the assumption that couples make rational choices about the numbers of children which they wish to have. Although it is recognised that many births will be the unplanned concomitant of sexual activity, biologically-based theories—which rely, for example, on assumptions about average numbers of years of fertility, effects of breast feeding on spacing between births, and ability of parents to provide sustenance for their children—have lost favour. Their place has been taken by theories which assume that parents (as a rule) choose to have children only if they believe that the benefits which children will provide them exceed the costs. The reason that this latter set of theories has become popular is that the hypotheses which it has produced have been verified in large numbers of empirical tests conducted in many countries, using data from many different time periods.

The first, and simplest, set of such hypotheses is that couples will have more children the greater are the benefits which children are perceived to provide and the lesser are the costs.[10] For example, it has often been suggested that rural families have traditionally had more children than have urban families both because food and shelter were less expensive in rural areas than urban and because children have been more productive in rural areas than urban.[11] Similarly, it has also been argued that programs which have provided aid to mothers with dependent children have increased fertility rates by reducing the costs of children;[12] and that increases in the wage rates of young women have decreased fertility rates by increasing the incomes which are foregone (costs) when women remain at home (to look after their children).[13]

Recent extensions to the theories of child-rearing have been built on the assumption that parents derive pleasure not only from the companionship of their children while the latter live at home, but also from the companionship *and the accomplishments* of their children when the latter become adults. A number of researchers, for example, have employed this assumption to derive hypotheses concerning the effects which parental behaviour will have upon the (adult) earnings and educational attainments of their children. Two articles which have reported success in employing this approach have recently been published by Fleisher and Rhodes[14] and by Behrman and Taubman.[15] Additional, indirect support for the hypothesis that parents value their children's adult accomplishments derives from the findings that as women's potential labour market incomes rise they have fewer children but spend more time and money on the education of each child.[16] The implication which is generally drawn from this observation is that women with high incomes substitute the benefits which they derive from the accomplishments of their children for the benefits which they could have derived from direct contact (companionship) with additional children.

To summarise, although conclusive empirical evidence has yet to accumulate, a consensus has begun to develop among researchers concerning the "demand" for children. According to this view, couples choose to have children if they perceive that the benefits to be derived from that choice exceed the costs. The relevant costs are of two types: the direct costs of feeding, clothing, and otherwise raising the child plus the indirect costs which arise when time which could have been spent elsewhere (for example, in work or leisure) is devoted to child-rearing. The benefits are of three major types: children can provide their parents with

---

[10] For an excellent review of this literature, see R. Lee and R. Bulatao, The Demand for Children: A Critical Essay, in R. Bulatao and R. Lee, Determinants of Fertility in Developing Countries (1983), p. 233.

[11] G. Becker, A Treatise on the Family (1981), pp. 96-97.

[12] M. Honig, AFDC Income, Recipient Rates, and Family Dissolution (1974), 9 J. Human Resources 303.

[13] See the articles in (1973) 81 J. Political Economy, Supplement.

[14] B. Fleisher and G. Rhodes, Fertility, Women's Wage Rates and Labor Supply (1979), 69 American Economic Rev. 14.

[15] J. Behrman and P. Taubman, Birth Order, Schooling and Earnings (1986), 4. J. Labor Economics S121.

[16] A. Leibowitz, Home Investments in Children (1974), 82 J. Political Economy, Supplement s111.

income, they can act as friends and companions, and they can offer their parents a source of pride in their accomplishments.

II. *Valuing the Loss Suffered Upon the Death of a Child—The Theory*

Two aspects of the theory developed in the preceding part are important to the estimation of the pecuniary loss suffered upon the death of a child. First, it was argued that couples will not choose to have children unless they perceive that the benefits to be derived from children equal or exceed the costs. This implies that an estimate of the cost of raising a child will act as a minimum valuation of the benefits which that child provides to its parents. For example, if the cost of raising a child to adulthood is $150,000, and if couples only choose to have children if the benefits equal or exceed the costs, couples who choose to have a child must value the benefits produced by that child at a *minimum* of $150,000. Indeed there is some precedent in both Canadian[17] and American[18] common law for the view that the benefits of "unwanted" children at least equal the costs. This leads one to suspect that consistency would require that the courts find that the benefits of "wanted" children considerably exceed the costs.

Second, it was argued in the preceding part that whereas most of the costs of raising children were incurred in the years during which the children remained in their parents' home, many of the benefits from children would be obtained after they had left home. What this implies is that, at most stages in a child's life, the benefits which the parents expect to obtain over the remaining years of its life will exceed the costs, even if lifetime benefits equal lifetime costs. For example, assume that the $150,000 costs of raising a child are spread equally over the first twenty years of its life; that is, assume that those costs are $7,500 per year. Assume also, for simplicity, that the benefits obtained from that child are expected to amount to $5,000 per year for 30 years. If the child is killed at age twelve, the parents will "save" ($8 \times \$7{,}500 =$) $60,000 in costs but will lose ($18 \times \$5{,}000 =$) $90,000 in benefits.

It is these two factors in combination which make the loss suffered as a result of the death of a child "capable of a pecuniary estimate". From statistical sources concerning the average child, or from information provided by the plaintiffs, one can identify the costs of raising a child to adulthood. Using these costs as the basis of an estimate of the benefits obtained from the child, and by making an assumption concerning the manner in which benefits are distributed across the child's lifetime, an estimate can be derived of both the benefits and the costs which have been foregone. The difference between these estimates becomes the pecuniary estimate of the damages payable to the parents.

III. *Valuing a First Child*

In order to estimate the loss of value following the death of a child, it is necessary to calculate the present value of the costs of raising the child to maturity. In turn, this requires that estimates be made of both the direct expenditures on goods and services and the indirect costs which arise when the mother (or father) chooses to forego labour market earnings in order to care for the child. In this part, I will make an estimate of these costs for the average Canadian family, based upon the results of a number of studies which have been conducted since 1970. Employing a number of alternative assumptions concerning the manner in which the benefits from children are spread over their parents' lives, I will then estimate the average losses suffered when children are killed on each of their sixth, twelfth, and eighteenth birthdays. For purposes of analysis I will initially assume that the child in question is the first child of parents who are both twenty-two years old at the time of its birth and that the child will cease to be dependent upon its parents on its eighteenth birthday. I will subsequently consider the case of children other than the first born.

A large number of studies have been conducted, in many countries, in an attempt to estimate the direct costs of raising a child. These studies report their findings in one of two forms: either as an annual dollar cost or as a cost given as a percentage of parental income. Although significant differences can be found among the latter estimates, there is a cluster in the range of fifteen to twenty per cent of family income. Among middle income earners, for example, Espenshade[19] estimates that the cost of the first child is 31.6 per cent of family income, van der Gaag[20] estimates that this cost is twenty-five per cent of family income, Olson[21] estimates that it is twenty per cent of income, the United States Department of Agriculture[22] estimates that it is approximately fifteen to twenty-five per cent of income, and Lazear and Michael estimate that it is sixteen per cent of family income.[23] Relying on these studies, I propose to assume that the direct costs of raising the first child are twenty per cent of family income.

---

[17] *Keats* v. *Pearce* (1984), 48 Nfld. & P.E.I.R. 102, 142 A.P. 102 (Nfld. S.C.). (K. became pregnant after tubal ligation performed by P. failed. When she kept the baby, the court found that she had suffered no net damage.)

[18] New York Times, Court Weighs Suit by Parents in Birth of Unsought Child (March 24, 1985), 1. (Facts identical to those in *Keats*, *ibid.*)

[19] T. Espenshade, The Cost of Children in Urban United States (1973).

[20] J. van der Gaag, On Measuring the Cost of Children (1982), 4 Children and Youth Services Rev. 77.

[21] L. Olson, Costs of Children (1983), ch. 4.

[22] C. Edwards, USDA Estimates of the Cost of Raising a Child: A Guide to Their Use and Interpretation (1981), Miscellaneous Publication Number 1411.

[23] E. Lazear and B. Michael, Estimating the Personal Distribution of Income with Adjustment for Within-Family Variation (1986), 4 J. Labor Economics S216.

TABLE I

Percentage of Family Expenditures
on Consumption Devoted to First Child

Expenditure Category	Family Expenditure (a)	Estimated Percentage of Category Devoted to Child(b)	Estimated Percentage of Total Consumption Devoted to Child
	(1)	(2)	(3)
Food	20.7%	25%	5.2%
Shelter	22.7	15	3.4
Household Operation	5.8	25	1.5
Household Furnishings	4.9	10	0.5
Clothing	8.4	20	1.7
Transportation	16.3	20	3.3
Health Care	2.6	30	0.8
Personal Care	2.5	20	0.5
Recreation	6.2	25	0.4
Reading	0.7	15	0.1
Education	1.0	30	0.3
Tobacco and Alcohol	4.3	0	0
Miscellaneous	3.9	15	0.6
Total	100.0%		18.3%

(a) Derived from Statistics Canada, Family Expenditure in Canada, 1982, No. 62-555, Table 8.

(b) Estimates for food, clothing, and personal care were derived from: C. Bruce, Assessment of Personal Injury Damages (1985), Chapter 14. The remaining figures in column (2) are intended simply to represent conservative estimates of expenditures on the first child.

As a check on the appropriateness of this figure I have performed the calculations indicated in Table 1.[24] The first column of that Table identifies the manner in which the average Canadian family (of two or more persons) distributed its consumption expenditures among thirteen categories of goods and services in 1982. In the second column, I have estimated, on a conservative basis, the percentage of expenditures in each category which would be devoted to the first child. The figures in the first two columns have then been combined to produce column (3). The sum of the entries in that column, 18.3 per cent, represents a conservative estimate of the fraction of family consumption which is devoted to the first child.

There is also some evidence to indicate that expenditures vary with the age of the child. Relying on the studies cited in footnotes 19-22,[25] I propose to assume that the percentage of family consumption devoted to the first child is fifteen per cent from birth to age six, twenty per cent from ages six to twelve, and twenty-five per cent from ages twelve to eighteen.

Increasingly, Canadian women are returning to the labour force before their youngest children are of school age. For this reason, I will assume that family income consists solely of the father's income until the child is four years old and that after that time it consists of the sum of the parents' incomes. For a measure of these incomes, I rely on Statistics Canada's publication, Income After Tax, Distributions by Size in Canada.[26] There it is reported that in 1982 average annual earnings, after tax, among individuals aged twenty-five to forty-four were $19,590.50 for male and $11,503 for females.

Thus, in the first four years of the child's life the father is assumed to earn (4 × $19,590.50 =) $78,362 (in 1982 dollars), of which fifteen per cent, or $11,754.30, is spent on the child. In the next two years, the mother and father earn (2 × ($11,053 + $19,590.50) =) $61,287, of which fifteen per cent, or $9,193.05, is devoted to the child. When the child is between the ages of six and twelve the parents are assumed to earn (6 × ($11,053 + $19,590.50) =) $183,861, of which (0.20 × $183,861 =) $36,772.20 is spent on the child; and between the ages of twelve and eighteen the parents again earn $183,861, of which (0.25 × $183,861 =) $45,965.25 is devoted to the child. Direct expenditures over the child's entire lifetime, therefore, are estimated to amount to $103,684.80. To this must be added the mother's foregone earnings during the child's first four years, here estimated to be (4 × $11,053 =) $44,212, to produce a total cost of $147,896.80 (in 1982 dollars). Finally, to convert this figure into a 1985 equivalent, I multiply by fifteen per cent—the approximate increase in weekly wages and salaries between 1982 and 1985[27]—to obtain a figure of $170,081.32, or approximately $170,000.[28]

The results of the calculations in the preceding paragraph have been summarised in the first seven columns of Table 2.[29] In addition, the last two columns of Table 2 report the cumulative expenditures at various ages, in both 1982 and 1985 dollars. For example, the $65,159.35 figure in the second last column indicates that that was the cost of raising a child to age six in 1982. The comparable figure in the last column then indi-

[24] *Supra*.

[25] *Supra*, p. 349.

[26] (1982) Cat. No. 13-120, October 1984.

[27] Source: Statistics Canada, Employment, Earnings, and Hours (various issues), Cat. No. 71-002.

[28] For simplicity, I have assumed that the net discount rate of growth of the parents' salaries over the child's lifetime equals the rate of interest - not an unreasonable assumption in Canada. (See C.J. Bruce, Asessment of Personal Injury Damages (1985), chapters 5 and 9).

[29] *Infra*, p. 352.

TABLE 2

Estimated Cost of Raising First Child: Canada, 1982 and 1985[a]

Age of Child	Family Income: Mother	Father	Total	Percentage Devoted to Child	Direct Expenditures on Child	Mother's Foregone Earnings	Total Expenditures on Child	Cumulative Expenditures in "1982 Dollars"	Cumulative Expenditures in "1985 Dollars"
0-4	—	$ 78,362	$ 78,362	15	$11,754.30	$44,212	$55,966.30	$ 55,966.30	$ 64,361.25
4-6	$22,106	39,181	61,287	15	9,193.05	—	9,193.05	65,159.35	74,933.25
6-12	66,318	117,543	183,861	20	36,772.20	—	36,772.20	101,931.55	117,221.28
12-18	66,318	117,543	183,861	25	45,965.25	—	45,965.20	147,896.80	170,081.32

[a] See the text, *supra*, p. 351, for the derivation of the figures in this Table.

TABLE 3

Pecuniary Loss Resulting from the Death of a First Child, Under Alternative Assumptions About Benefits

ASSUMPTIONS: Distribution of Benefits Over Lifetime	Ratio of Benefits to Costs	AGE OF CHILD AT DEATH: 6	12	18
Constant Annual Value	Benefits Equal to Costs	$ 66,993	$100,254	$142,848
	Benefits Exceed Costs by 25%	107,865	138,532	178,560
25% of Benefits Obtained After Child Leaves Home	Benefits Equal to Costs	39,625	39,857	42,500
	Benefits Exceed Costs by 25%	73,326	63,019	53,125

cates that this cost had risen to $74,933.25, or approximately $75,000, by 1985.

In order to obtain the loss of benefits following the death of a child, the cost data outlined in Table 2 must be combined with assumptions concerning both the ratio of expected benefits to costs and the manner in which those benefits are distributed across the child's life. Initially, I will assume that benefits exactly equal costs and that the annual value of the benefits derived by the parents is constant over the duration of the child's life.[30] As the average Canadian woman has a life expectancy of fifty-eight years at age twenty-two[31] (the assumed age at which her child is born), I will assume that the number of years over which the child will provide benefits to its parents is fifty-eight. Thus, as the present value of the cost of raising a child for eighteen years has been estimated to be approximately $170,000 at the time of birth, and as the present value of lifetime benefits is assumed to equal that cost, average annual benefits are found to be $6,000 (in 1985 dollars).[32]

This implies that if the child dies on its eighteenth birthday, the parents will have paid for all of the costs of its upbringing but will yet to have received the present value of $6,000 per year over forty years. This figure, which proves to be $142,848,[33] represents the first estimate of the loss suffered by parents if their first child dies on its eighteenth birthday. It is reproduced in the first row of Table 3, against the heading "Constant Annual Value—Benefits Equal to Costs". Similar calculations have been made with respect to children dying on their sixth and twelfth birthdays, except that in those cases the future costs which have been "saved" have been deducted from the future benefits which have been lost. In the case of the child killed on its sixth birthday, for example, costs "saved" are ($170,081 − $74,933 =) $95,148 whereas the present value of benefits lost is $162,411. Thus the net loss is estimated to be $66,993.

Instead of assuming that the benefits provided by children are spread evenly over their lives, it might be more reasonable to assume that parents derive greater benefits while their children are living with them than they do after the children have left home. For purposes of illustration, I have

[30] The Gallup Poll reports that parents' satisfaction with their relations with their children remains virtually unchanged over their lifetime. In a 1981 poll, 76 per cent of those 18-29, 80 per cent of those 30-49, 83 per cent of those 50-64, and 81 per cent of those 65 years and over reported that they were highly satisfied with their relations with their children. (George Gallup, The Gallup Poll: Public Opinion 1982 (1983), p. 16).

[31] Statistics Canada, Life Tables, Canada and the Provinces 1980-1982 (1984), Cat. No. 84-532, p. 18.

[32] This figure has been derived under the assumptions that the nominal value of benefits increases at the rate of inflation of the consumer price index and that the real discount rate is 3.0 per cent.

[33] The real discount rate applied to obtain this figure is 3.0 per cent.

calculated the effect of assuming that twenty-five per cent of the benefits from the child are obtained after it leaves home and that the remaining benefits are spread evenly over the eighteen years the child is at home. In this case, annual benefits are $8,961 per year while the child is at home and $42,500 during the entire period after it has left home. Under this assumption, parents lose benefits of $42,500 if an eighteen year-old child dies and ($92,273 + $42,500 − $95,148 =) $39,625 if a six year-old child dies. These figures and the comparable figure for a twelve year-old child are reported in the third row of Table 3.[34]

In the introduction to this part, I noted that a number of recent decisions of the Canadian and American courts have suggested that the benefits provided by "unwanted" children at least equalled the costs. If this is the case, one might reasonably assume that the benefits of a "wanted" child would exceed the costs. In this light, I have repeated the calculations in Table 3 on the assumption that lifetime benefits exceed lifetime costs by twenty-five per cent; that is, on the assumption that the present value of lifetime benefits was ($170,000 × 1.25 =) $212,500. The results of these calculations are reported in the second and fourth rows of Table 3.

IV. *Valuation of Second and Subsequent Children*

It is a commonplace that the second child, and any subsequent child, will be less expensive to raise than the first. Thus, if the model developed in this paper is applied *pari passu* to the valuation of second and subsequent children, one will find that that value is less than was estimated for the first child. Although the courts may well be reluctant to award lower damages for the loss of the second than the first child, it will prove useful to compare the two valuations.

Two differences arise between the costs of raising the first and second child. First, the direct costs of raising the second child are often lower than those for the first because many of the items purchased for the first—such as baby furniture or a larger car or house—can be shared by the second. Second, assume that women plan to return to the labour force when their youngest children are four years old. If they have only one child, they will have to remain out of the labour force for four years. If they have a second child two years later, they will have to extend that stay out of the labour force for that two years. In this case, the indirect cost of the second child is the value of the mother's wages for only two years.

Of those studies which have been completed in the last ten years, most appear to support the conclusion that the second child costs about two-thirds as much as the first. Olson,[35] for example, found that the second child cost sixty-nine per cent as much as the first; Muellbauer[36] found that this ratio generally fell between forty-four and ninety per cent (depending upon age and parent's income); and van der Gaag and Smolensky[37] found that it fell between seventy-five per cent and one hundred and twenty-five per cent for children over six. (For children under six they found that the first child cost the parents nothing.) Applying this assumption to the income figures employed in Table 2,[38] and assuming that the mother increases her stay out of the labour force for only two years when she has a second child, I have derived Tables 4 and 5,[39] which are analogous to Tables 2 and 3,[40] respectively. As is to be expected from the assumptions which have been made, the losses for a second child, reported in Table 5, are approximately sixty per cent of those for a first child, reported in Table 3.

V. *Two Caveats*

A. *Loss of Support*

It is important to note that the valuations in Tables 3 and 5 do not incorporate an element for loss of financial support. If evidence is led which indicates that the child would have provided financial support to the parents, or that the child would have offered services which the parents would normally have had to purchase in the market—such as helping in the parents' store or offering the parents accommodation in the child's home—it may be appropriate to increase damages to account for the loss of those benefits. On the other hand, if no such evidence is led, the courts must be wary of any claim that children in general provide support to their parents. Statistics Canada reports, for example, that in 1982 the average family headed by males younger than forty-five devoted less than 2.5 per cent of its expenditures (that is, less than $725 per year) to gifts and contributions to family members outside the spending unit; that families headed by males between the ages of forty-five and sixty-five devoted less than 4.5 per cent of expenditures ($1,200) to such contributions; and that families headed by males over sixty-five received less than 1.7 per cent of their incomes (that is, less than $460 per year) in the form of "other money receipts". In short, Canadians, on average, do not appear to devote a significant portion of their incomes to the support of individuals outside the immediate family unit.

---

[34] *Supra*, p. 352.

[35] *Op. cit.*, footnote 21.

[36] J. Muellbauer, Testing the Barten Model of Household Composition Effects and the Cost of Children (1977), 97 The Economic J. 460.

[37] J. van der Gaag and E. Smolensky, True Household Equivalence Scales and Characteristics of the Poor in the United States (1982), 28 Rev. Income and Wealth 17.

[38] *Supra*, p. 352.

[39] *Infra*, p. 356.

[40] *Supra*, p. 352.

TABLE 4

Estimated Cost of Raising Second Child: Canada, 1982 and 1985

Age of Child	Family Income: Mother	Father	Total	Percentage Devoted to Child	Direct Expenditures on Child	Mother's Foregone Earnings	Total Expenditures on Child	Cumulative Expenditures in "1982 Dollars"	Cumulative Expenditures in "1985 Dollars"
0-4	—	$ 78,362	$ 78,362	10	$ 7,836	$22,106	$29,942	$29,942	$ 34,433
4-6	$22,106	39,181	61,287	10	6,129	—	6,129	36,071	41,482
6-12	66,318	117,543	183,861	13	23,902	—	23,902	59,973	68,969
12-18	66,318	117,543	183,861	17	31,256	—	31,256	91,229	104,913

TABLE 5

Pecuniary Loss Resulting from the Death of a Second Child, Under Alternative Assumptions About Benefits

ASSUMPTIONS: Distribution of Benefits Over Lifetime	Ratio of Benefits to Costs	AGE OF CHILD AT DEATH: 6	12	18
Constant Annual Value	Benefits Equal to Costs	$ 36,885	$58,629	$ 88,232
	Benefits Exceed Costs by 25%	61,977	82,286	110,302
25% of Benefits Obtained After Child Leaves Home	Benefits Equal to Costs	19,792	21,302	26,228
	Benefits Exceed Costs by 25%	40,600	35,615	32,785

B. *Mitigation*

The analysis of parts II, III and IV assumes that the parents will be unable to mitigate their damages by having another child. If the court requires that this form of mitigation be undertaken, what is the appropriate measure of damages? First, the calculations of parts III and IV suggest that the costs of raising a child may exceed the benefits, particularly in the early years of the child's life. For example, in part III, I showed that when it was assumed that lifetime benefits equalled lifetime costs and that benefits were spread evenly over all years of the parents' lives, the average annual benefit of a first child could be estimated to be $6,000. Furthermore, in Table 2,[41] I estimated that the total cost of raising a child to its sixth birthday was $74,933.25. Thus, if the parents were required to "start again" they would have suffered a net loss of $74,933.25 − (6 × $6,000) = $38,933.25.

In addition, the parents may incur greater costs raising the "replaced" child than they did raising the child who was killed. For example, if the mother had returned to work following the birth of the first child, she may have increased her real earnings above those which were available to her at the time she had her first child. Thus, the cost to her of staying home to raise the "replaced" child would exceed the cost of raising the first child. When these costs are added to the net loss calculated in the preceding paragraph, the total losses associated with the death of a child may not differ significantly from those which were reported in Tables 3 and 5.[42]

Conclusion

The purpose of this article has been to suggest that damages upon the death of a child are "capable of a pecuniary estimate". The method which was devised for constructing this estimate was applied to the valuation of the loss which the "average" Canadian family would suffer if a first or second child was to be killed upon its sixth, twelfth or eighteenth birthday. The results of that valuation indicate that the loss following the death of a first child falls between $39,625 and $178,560, and following the death of a second child between $19,792 and $110,302, depending upon the age of the child and upon various assumptions made about the benefits which parents derive from their children.

To conclude the article, it may be of interest to compare the damage estimates reported in Tables 3 and 5[43] with recent awards made by the

---

[41] *Supra*, p. 352.

[42] *Supra*, pp. 352, 356. The correspondence between the losses reported in Tables 3 and 5 and those calculated under the mitigation assumption will be closer, the younger is the deceased child. However, the courts are more likely to require mitigation, the younger the deceased.

[43] *Ibid.*

TABLE 6

Recent Canadian Decisions Concerning Damages
Arising from the Wrongful Death of a Child

Citation	Deceased: Age	Deceased: Sex	Damages to: Parents	Damages to: Other Family Members	Family in Total
Fraser v. *Young* (1983), 19 A.C.W.S. (2d) 136 (Ont. Co. Ct.)	13	Male	$10,000	$10,500	$20,500
Hatlen v. *Kaps Transport* (1983), 49 A.R. 98 (Alta. Q.B.)	13	Male	10,000	—	10,000
Hutcheson v. *Harcourt* I.L.R. 20 A.C.W.S. (2d) 477 (Ont. C.A.)	Adult	Male	10,000	3,000	13,000
Jagt's Estate and Smith v. *Isnor and Phelan* (1983), 133 A.P.R. 274, 61 N.S.R. (2d) 274 (N.S.S.C.)	17	Male	8,000	—	8,000
Kinnons' Estate v. *Traynor and Pole* (1982), 46 A.R. 75 (Alta. Q.B.)	15	Female	15,000	—	15,000
Lloyd Estate v. *Ruel and Ruel* (1983), 100 A.P.R. 270, 38 N.B.R. (2d) 270 (N.B.Q.B.)	16	Male	8,000	—	8,000
Marcoux et al. v. *Lacoursiere* (1983), 21 A.C.W.S. (2d) 194 (Ont. H.C.)	17	Male	15,000	5,000	20,000
Mason v. *Peters* (1982), 39 O.R. (2d) 27 (Ont. C.A.)	11	Male	45,000	5,000	50,000
Morrissette. Salagubas and Hosaluk (1984), 32 Sask. R. 25 (Sask. Q.B.)	13	Male	6,000	—	6,000
Wessel v. *Kinsmen Club* (1982), 37 O.R. (2d) 481 (Ont. H.C.)	15	Male	8,000	9,600	17,600

Canadian courts. For this purpose, I propose to employ as my basis for comparison the figures in the fourth rows of Tables 3 and 5 as it is my subjective view that they embody the most realistic sets of assumptions about benefits. Those figures suggest that damages should be valued at approximately $60,000 following the death of the family's first child, and at approximately $35,000 following the death of any other child.

With few exceptions, these figures exceed the damages which have been awarded by the Canadian courts, *but do not lie outside the range which the courts have found "acceptable"*. Table 6[44] summarises the findings in ten recent claims arising from the death of a child. There it is seen that total damages (excluding special damages for medical and funeral expenses) varied from $6,000 to $50,000. Accordingly, I would suggest that evidence based upon the approach outlined here might well be considered by the courts to be useful information for the purposes of damage assessment.

[44] *Supra*, p. 358.

CRIMINAL INJURIES COMPENSATION:

SOCIAL REMEDY OR POLITICAL PALLIATIVE FOR VICTIMS OF CRIME?

by

PETER BURNS,

LL. M. (Hons.) Otago, Professor of Law,
The University of British Columbia; Barrister
and Solicitor of the Supreme Courts of
British Columbia and New Zealand.

NOTE:
PHOTOCOPY INCLUDES TABLE OF CONTENTS AND SOME TABLES & FIGURES FROM THE BOOK ON AWARDS ONLY.

BUTTERWORTHS
VANCOUVER

TABLE OF CONTENTS

TABLES

FIGURES

THE CRIMINAL INJU
have been enacted by the

Alberta:
British C
Manitob
New Bru
Newfou
Northwe
Revise
Ontario
Quebec:
Saskatch
Yukon
Ordin

Prince I

Nova S
not y

—

THE CRIMINAL INJURIES COMPENSATION SCHEMES IN CANADA have been enacted by the following legislation:

Alberta: SA 1970 c75
British Columbia: SBC 1972 c17
Manitoba: SM 1970 c56
New Brunswick: SNB 1971 c10
Newfoundland: S Nfld 1968 No 26
Northwest Territories: Ordinances 1973 (1st) c4 *also in* Revised Ordinances of 1976 c C-23
Ontario: SO 1971 c51
Quebec: SQ 1971 c18
Saskatchewan: SS 1967 c84
Yukon Territory: Ordinances 1975 c2 *also in* Consolidated Ordinances of 1976 c C-10.1.

Prince Edward Island has passed no relevant Act.

Nova Scotia has enacted a compensation scheme which has not yet been proclaimed into effect: SNS 1975 c8.

---

have made the restitutionary
in which the judge made a
3,635.2s. Od., and the Court
the ground that it exceeded

to those persons who are
uries compensation scheme,
benefit would probably be
a, as we shall see,[89] the vast
ssault, robbery, murder, or
Quebec[90] and New York[91] and

murder, attempted murder,
unding or assault were dealt
were brought in Magistrates
ught in Crown Court,[93] so the
e likely to see his assailant, if
Court rather than in Crown
order that he might seek
though it might still be high
victims of violent crimes.[94]

amount is now £1000: *The*
The Criminal Law Act 1977

Victims Compensation
the following types of
"auto" (?) 22; and
physical injuries" and
an assault, a kid-

1(a) at 146.

may be estimated by
should be equal to
now, £1,000) upper
have shown not only

C. CANADA: STATUTORY PROVISIONS FOR RESTITUTION

Restitution as part of the criminal process must be found in federal statutes, criminal matters being exclusively federal under the *British North America Act*.[95] In fact compensation and restitution provisions are all found within the *Criminal Code*.[96] Restitution in the sense of the return of stolen property or compensation for property lost or damaged by the offender during the commission of his offence receives close attention, but restitution in the sense of payments to the victim in respect of his bodily injury or the consequences thereof is permitted only in the context of a probation order.

In the case of a probation order the relevant section is s.663(2), which reads:

> The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do anyone or more of the following things as specified in the order, namely . . .
>
> (e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof . . .

94 (Cont)

Year	Number of Awards	£ paid	Average £ paid	price Consumer index (1975 = 100)	Average £ paid in constant £
1977-78	14,052	10,106,513	769	146.2	526
1976-77	13,951	9,677,389	693	135.0	513
1975-76	11,500	6,476,680	563	116.5	483
1974-75	10,708	5,059,396	472	100.0	472
1973-74	9,024	4,048,069	448	80.5	556
1972-73	8,322	3,449,544	414	69.4	596
1971-72	8,102	3,300,948	407	63.6	639

[Sources: British Board's *Fourteenth Report* cmnd 7396 at 26-27; International Monetary Fund *International Financial Statistics* July 1979 at 386 item 64.]

We can conclude:
(1) The average award is almost twice the old upper limit of £400 but is less than the new upper limit of £1,000.
(2) The increase in awards—and hence the increase in the victim's loss, which is what the awards represent—is due almost entirely to inflation and so will continue in the future.
(3) The new limit of £1,000 is high enough to permit "full" compensation of most victims.

95 *British North America Act* (UK) 30 & 31 Vict c 3 s 91(27).

96 RSC 1970 c C-34.

It will be observed that most scheduled Criminal Code offences are found in the schemes of all jurisdictions or of no jurisdiction. Sections 248, 249 and 250 are found only in the schedule of British Columbia, but no claim appears yet to have been based upon them. Section 251(1), "procuring a miscarriage", is found in the schedule of only three jurisdictions, Manitoba, New Brunswick and Saskatchewan. In chapter 6 we will discuss the question of contributory negligence, and will observe that the victim of a scheduled offence will generally be denied compensation if they have acquiesced in their injury. Most persons injured by the commission of an offence under s.251(1) will have acquiesced in the offence and will not be compensable. In any event, an offence under s.251(1) may be an assault (or for example where there is no real consent in the case of a young girl or where the policy of the law is to negate consent in cases of intended corporal hurt) which is included in the schedules of all jurisdictions. The inclusion of s.251(1) in three of the nine jurisdictions is intriguing but of little practical significance.

Indeed, of these 49 scheduled offences, only half have been utilized as the basis of claims before compensation boards. Table II shows the awards

TABLE II

NUMBER OF AWARDS OF THE BRITISH COLUMBIA BOARD, 1973-1977,[155] OF THE QUEBEC BOARD, 1972-1978,[156] AND OF THE MANITOBA BOARD, 1971-1977,[157] BY TYPE OF OFFENCE INVOLVED.

Code section	B.C.	Quebec	Manitoba	Code section	B.C.	Quebec	Manitoba
78/79	4	13	0	228	89	128	25
86	19	18	24	240(1)	1	1	0
144	48	53	16	244/245(1)	77	48	0
145	13	15	2	245(2)	691	824	176
146	2	6	0	246(1)	45	112	1
149	17	23	2	246(2)	0	1	0
156	0	1	0	247	4	20	0
176	10	2	2	302	266	455	79
203	1	2	0	381	0	0	1
204	13	23	0	387(2)	0	1	0
212	86	281	42	389	6	56	18
217	16	72	19	392	0	61	0
222	83	235	33				

155 *Second Annual Report of the British Columbia Criminal Injuries Compensation Board* at 9 *Third Report* at 8 *Fourth Report* at 10 *Fifth Report* at 8 *Sixth Report* at 8. The *First Report* does not break down the offences as per the schedule.

156 Data supplied by the Quebec Criminal Injuries Compensation Division of the Worker's Compensation Board Table XVIII *Reparation des demands d'indemnisation approuvees selon la nature du crime.*

157 Annual Reports of the Crimes Compensation Board of Manitoba Calendar Years: 1971 (at 3) 1972 (at 1) 1973 (at 1); Fiscal Years: 1974-1975 (at 1) 1975-1976 (at 1) 1976-1977 (at 3) 1977-1978 (at 3). None of the reports covers the period January 1 1974 to April 1 1974 when the reporting period changed from the calendar to the fiscal year.

will rise with inflation and the nature of their schemes makes them comprehensive compensation schemes. In two jurisdictions, Alberta[165] and Saskatchewan awards are not expressly limited.

(c) Minimum Limits

Most jurisdictions include a minimum loss requirement which can be viewed as a type of financial need criterion. A loss of under $100, say, cannot be taken to seriously affect the victim's financial well-being. As one author has said:[166]

> A system of social welfare is characterized by the payment of benefits designed to alleviate poverty or serious hardship, and those schemes which employ proof of financial hardship as a pre-condition of compensation embrace, wittingly or otherwise, a similar objective. Indeed, since all schemes employ a minimum loss condition . . . this objective is, although diluted, ubiquitous.

---

165 In practice, Alberta is the only province, other than the anomalous provinces of Manitoba and Quebec, with unlimited awards. But too much must not be made of this. In Alberta awards may be made for lost wages, maintenance of children born as a result of rape, expenses necessarily incurred as a result of the injury, and other pecuniary loss: S Alta 1969 c23 s13(1). None of these is within the Board's control as awards for pain and suffering are, and it would seem to be with respect to pain and suffering awards that the presence of a limit would most be felt.

Consider the following figures from Alberta, which has no limit, and Ontario, which has one, for 1971. The Alberta figures have had eight of the 82 awards ignored since those were the awards made in respect of injuries suffered before the Act came into force, which received compensation only if the victim were still incapacitated over a year later: S Alta 1969 c23 s26. It was felt that those awards would misleadingly skew the figures towards the high end.

	Ontario (196 awards)		Alberta (74 awards)	
	Total	Average	Total	Average
Medical expenses	22,953.30	117.10	6,697.40	90.51
Lost earnings	88,122.00	449.63	31,777.63	429.43
Funeral & burial costs	5,213.29	26.60	561.00	7.58
Loss to dependents	26,107.63	133.20	8,350.00	112.84
Other pecuniary loss	15,869.23	80.96	2,677.56	36.18

It is clear that the absence of an upper limit on awards in Alberta did not affect their size. It might have affected awards for pain and suffering, which averaged $958.93 in Ontario, but such awards are in Alberta only granted to good Samaritans and only a total of $3,610.00 during the entire year was awarded under that head.

Sources: Ontario *Third Report* Alberta *Annual Report* for 1971.

166 Miers *Responses to Victimization* (1978) at 78–9.

All other writers, however, agree that minimum loss requirements are necessary to keep the boards from being swamped by trivial (and perhaps unfounded) claims. There appear to be no grounds for believing that such a minimum loss condition represents a serious needs test or otherwise reflects a view of the compensation scheme as a system of charity.

(d) Funding

An under-funded board would be a sure indication that the legislature did not honestly establish it to compensate victims. This is apparent in some American jurisdictions. Thus in Tennessee[167] awards are made exclusively out of a fund which comes from "a twenty-one dollar fine imposed on persons convicted of crimes against persons and property". Such a provision might well satisfy the taxpayer, but can hardly instil confidence in the applicant before the board. In British Columbia in 1971 there were 863 persons convicted on indictment of offences against the person; 1,138 convicted on indictment of offences against property with violence, 5,491 convicted on indictment of offences against property without violence and 214 convicted on indictment of malicious offences against property. There were 81 summary convictions for common assault.[168] If those 7,787 convicted persons each paid $21.00, the fund would realize $163,527.00. While crime has probably increased since 1971, such an increase would still not produce the $585,939.00 awarded in 1974 nor the $1,230,682.00 awarded in 1977.[169] In fact such an underfunded scheme cannot be other than a political device, designed to impress the public but to do little or nothing for the victims.

No Canadian jurisdiction has any limit on the amount of funds that can be paid out, other than limits on the award that any one person may receive and limits on the total awards payable in respect of any one offence. Nor have the Boards' reports ever indicated that applicants have been rejected because the board has run out of funds.[170] The funding of Canadian schemes suggests an actual commitment to the schemes.

---

167 *Tennessee Public Acts* c736 (1976). See Eisenstein *Tennessee's Criminal Injuries Compensation Act* (1976-77) 7 Memphis St U L Rev 241 at 258.

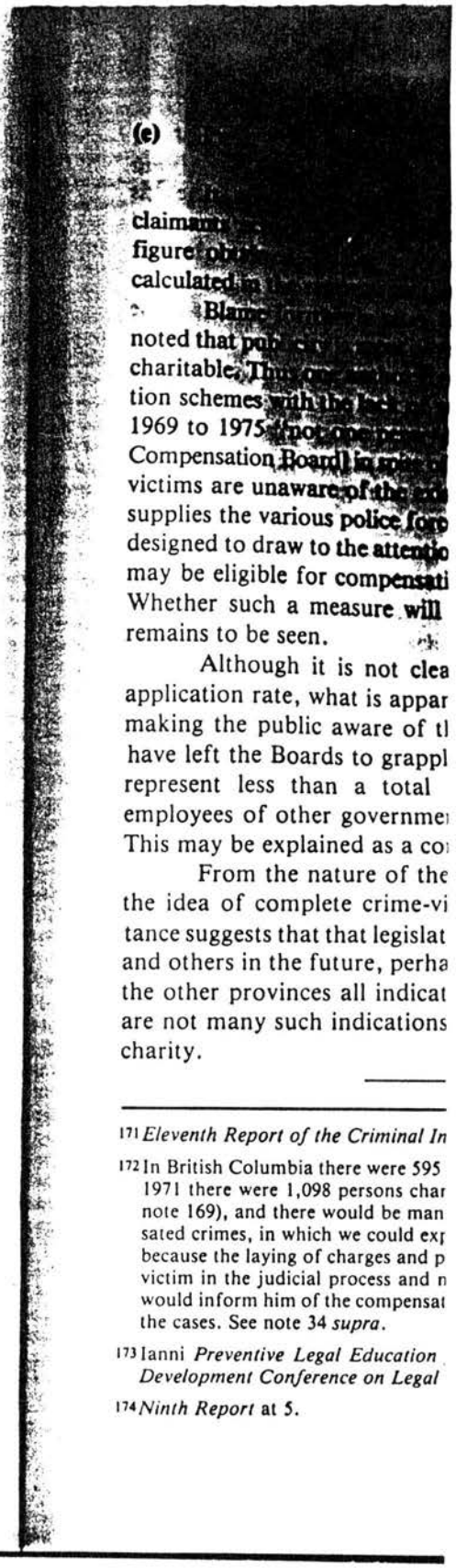
168 Statistics Canada *Statistics of Criminal and Other Offences* (1971) tables 6A and 13.

169 British Columbia *Sixth Annual Report* at 7.

170 Contrast this with the situation in Massachusetts, where in the early years of the program the gulf between the total value of the awards and the monies appropriated was wide:

	1969	1970	1971	1972	Total
Awards (in $)	4,498	60,885	45,974	125,418	236,775
Appropriation (in $)	1,000	30,000	65,000	57,000	162,000

The shortfall was $74,775 or over 30%. Source: Edelhertz and Geis *Public Compensation for Victims of Crimes* (1974) at 108.



(c)

claima
figure
calculated
Blam
noted that pu
charitable. Th
tion schemes
1969 to 1975
Compensation Board
victims are unaware of the
supplies the various police
designed to draw to the attentio
may be eligible for compensati
Whether such a measure will
remains to be seen.

Although it is not clea
application rate, what is appar
making the public aware of t
have left the Boards to grappl
represent less than a total
employees of other governme
This may be explained as a co

From the nature of the
the idea of complete crime-vi
tance suggests that that legislat
and others in the future, perha
the other provinces all indicat
are not many such indications
charity.

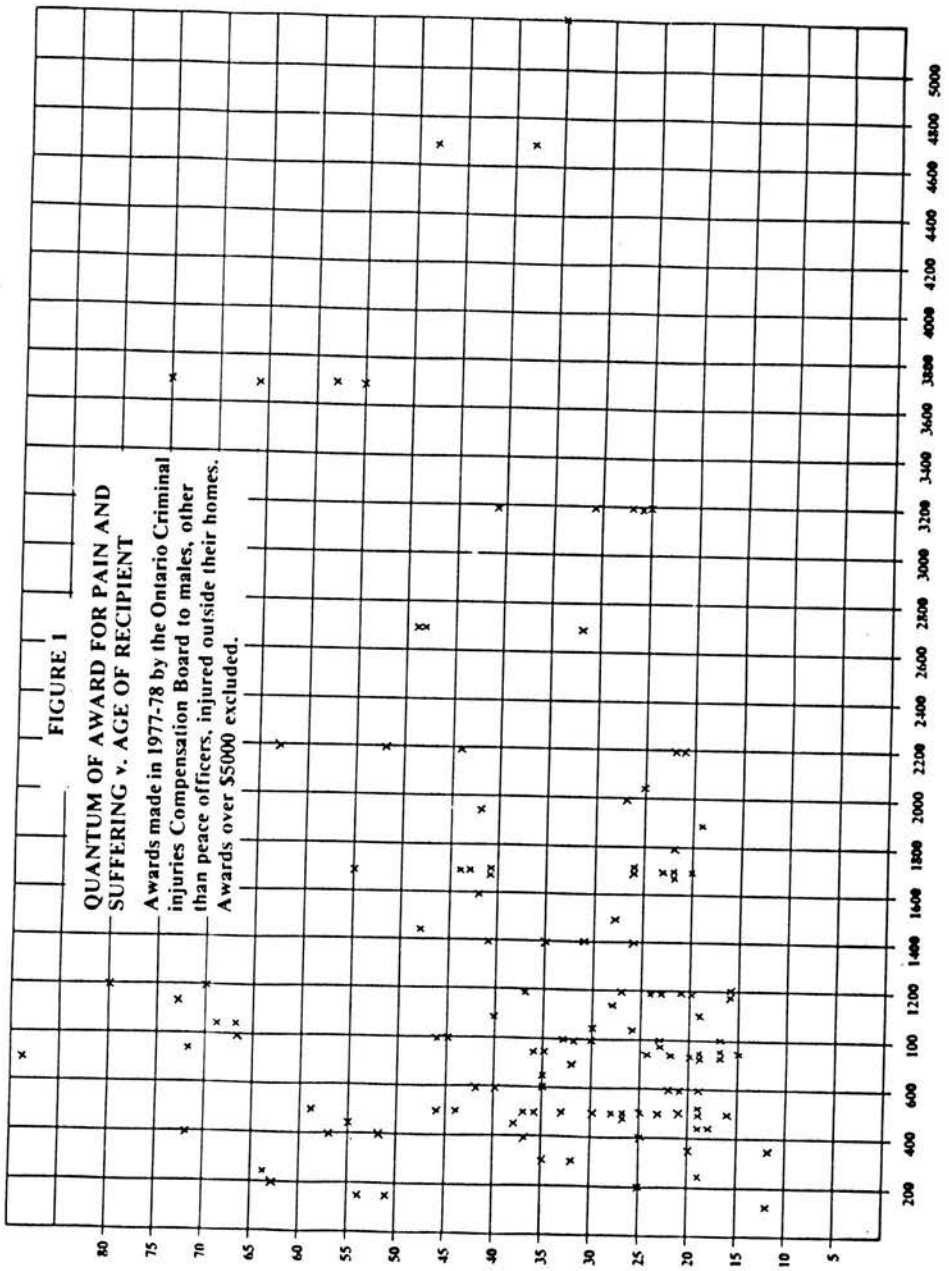
---

171 *Eleventh Report of the Criminal In*

172 In British Columbia there were 595
1971 there were 1,098 persons char
note 169), and there would be man
sated crimes, in which we could exp
because the laying of charges and p
victim in the judicial process and n
would inform him of the compensat
the cases. See note 34 *supra*.

173 Ianni *Preventive Legal Education*
Development Conference on Legal

174 *Ninth Report* at 5.



iniverse into two categories.
1 the claimants into the very
nining the average award for
ere 12 claimants aged 65 and
t of pain and suffering—an
essentially artificial, for the
iot precise.
wing the ages of those males
Ontario Board for injuries
ds those persons received in
peace officers injured in the
ot given in the *Report*, and
ld have required too small a

the injuries suffered, but it
ted (134) might mean that in
ppear with comparable fre-
d perhaps be due to the
d relevant being fixed.
ween the age of the claimant

for pain and suffering are
awards, but still higher than
ir own residences. Slightly
. Both these last two results
e crimes involved, but this
mizations are ever precisely

ITISH COLUMBIA

port its awards in a consis-
rd gave an illustration of a
non-pecuniary losses were
ible for the non-pecuniary
purposes of analysis. That

al and those involving non-

ual attacks and they received
ering. This is an average of
parable figure for Ontario,
how any pattern, ranging
any one quantum.
38 female claimants and
ct of pain and suffering a
imant. In respect of pain
15,165.00, an average of
e results from Ontario,
he men. This difference
athy for female claimants
due to the fact that males
warded. As Figures 2 and
of a non-sexual offence,
ing awards of approx-
or pain and suffering in
oes not change, but the

hen, show that awards
ffered a sexual attack.
significantly greater
igher awards than do
rds of greatest quanta
5 the Board in British
ain and suffering, and
hat province.
ughout. The average
thematicians as the
of such awards. This
lly large awards will
Ontario and British
ree facts are evident

ode"—is of course
was approximately
ay reflect the infla-
d, the bulk of the
ce the "median",
approximately
Third, although
00.00, above that

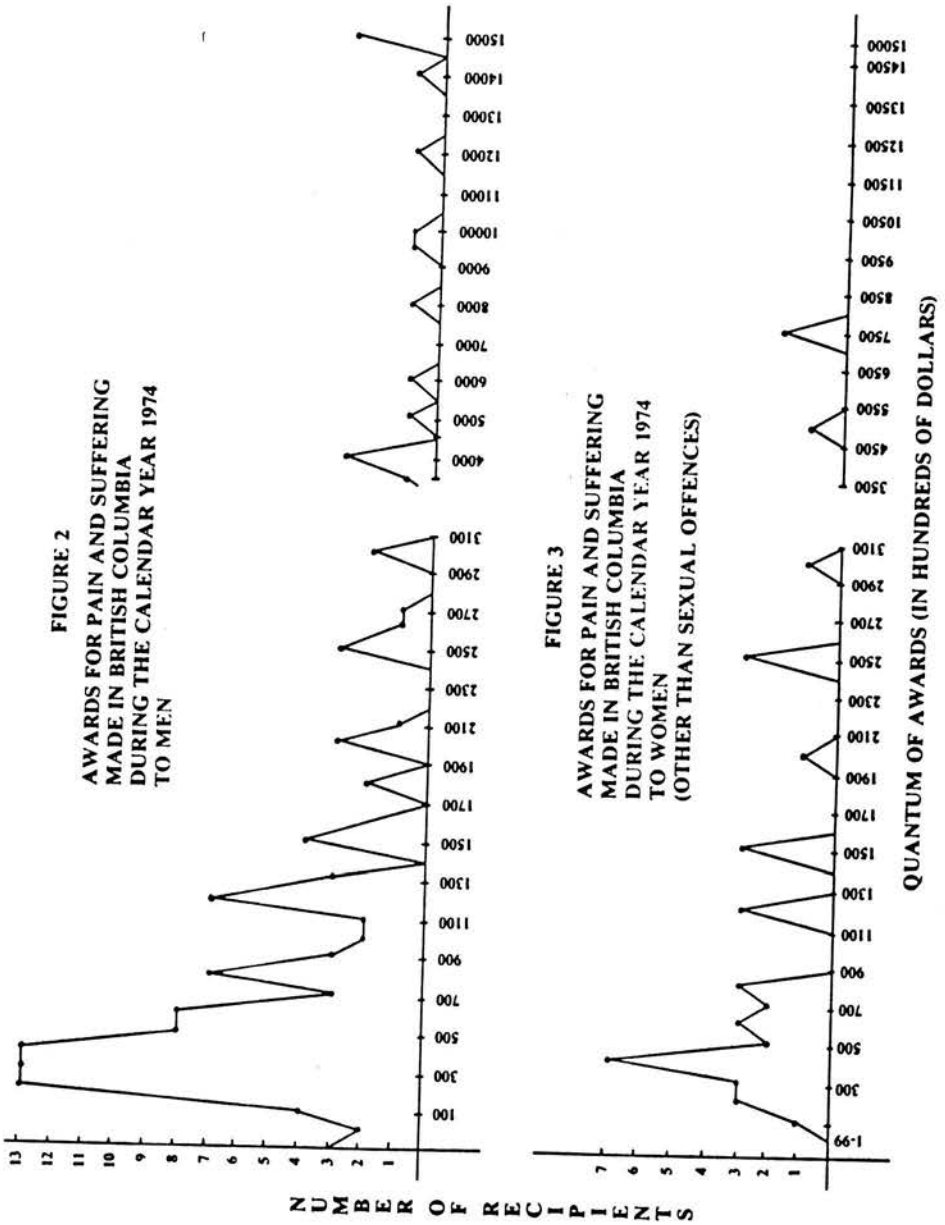
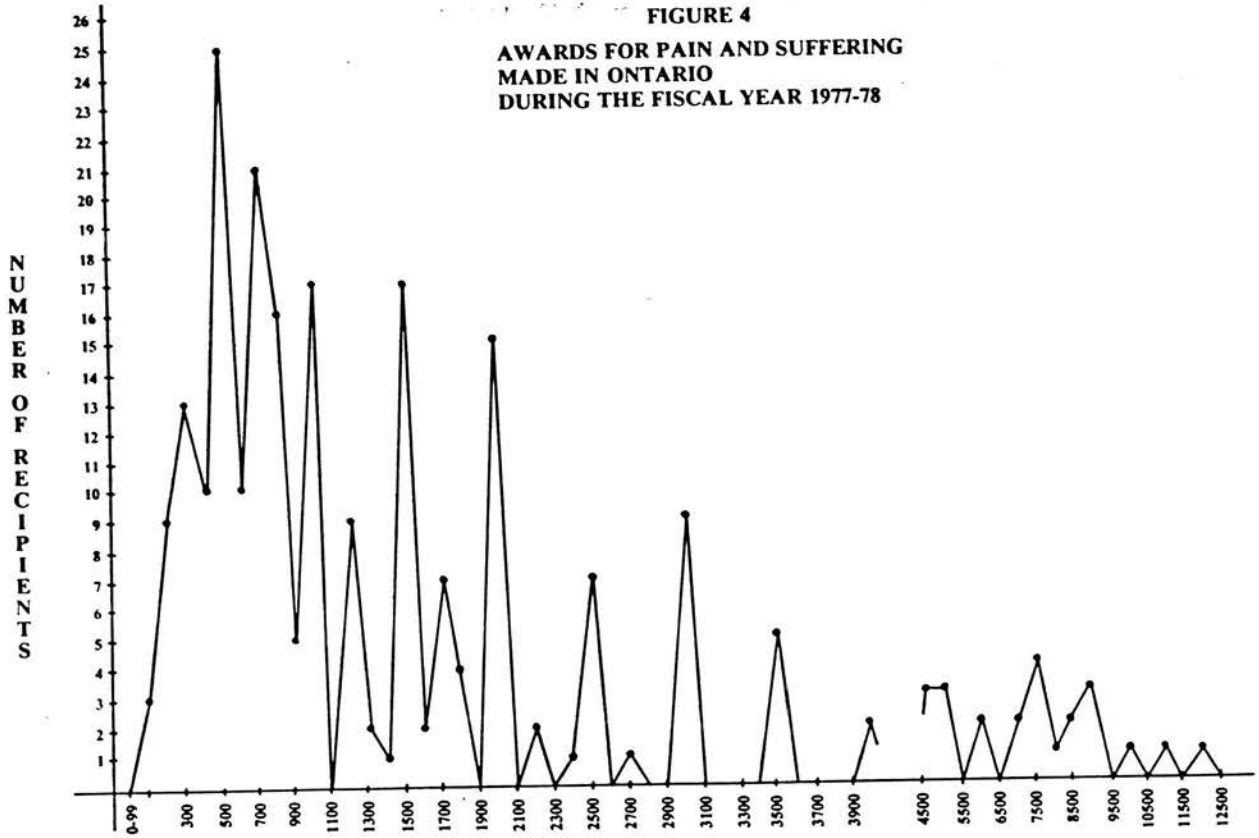


FIGURE 4

AWARDS FOR PAIN AND SUFFERING
MADE IN ONTARIO
DURING THE FISCAL YEAR 1977-78



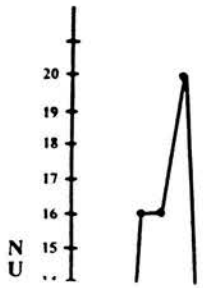


FIGURE 5

AWARDS FOR PAIN AND SUFFERING
MADE IN BRITISH COLUMBIA
DURING THE CALENDAR YEAR 1974

(Excluding the suspiciously precise figures of $302.00, $560.52, $4871.12, $986.36, $2633.00, $6706.00, $3067.10, $2496.00, $1378.50, $12,321.00, $2,486.00, $2762.00 and $248.00.)

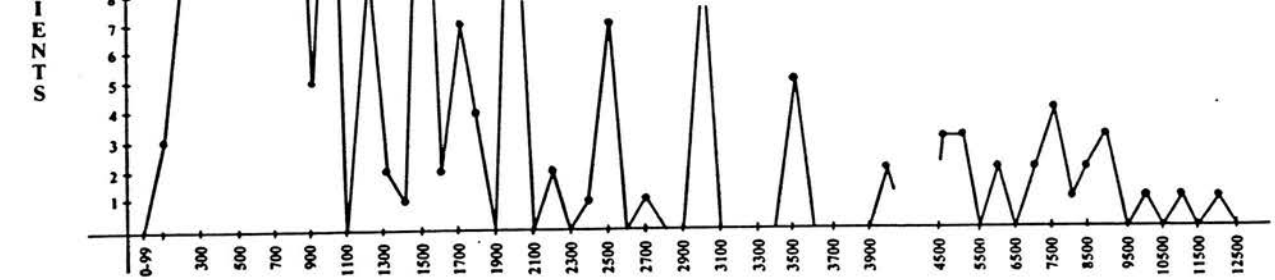
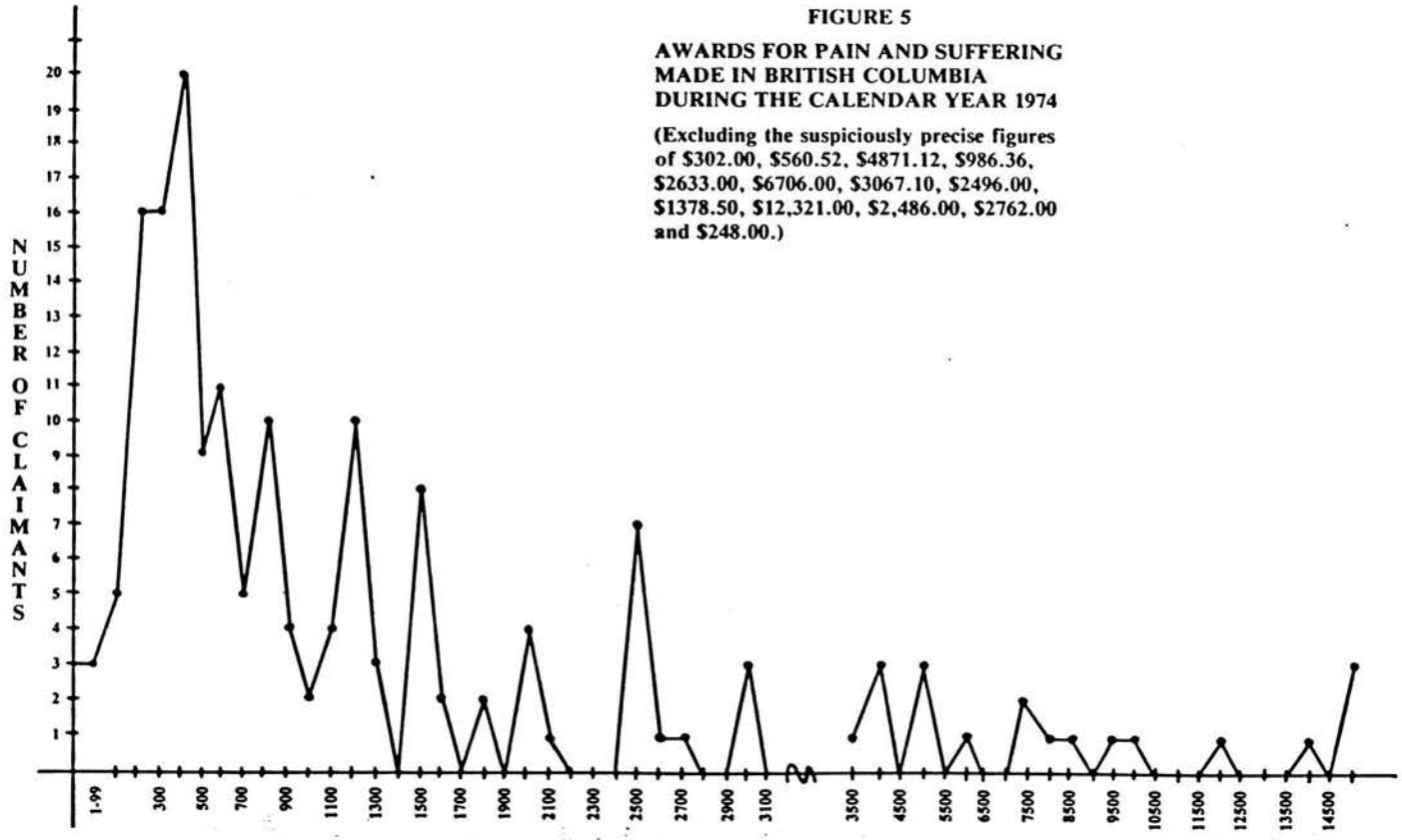


FIGURE 5

AWARDS FOR PAIN AND SUFFERING MADE IN BRITISH COLUMBIA DURING THE CALENDAR YEAR 1974

(Excluding the suspiciously precise figures of $302.00, $560.52, $4871.12, $986.36, $2633.00, $6706.00, $3067.10, $2496.00, $1378.50, $12,321.00, $2,486.00, $2762.00 and $248.00.)



r funeral and burial expenses,
e a victim has died as a result
awards for wage loss and for
h of the victim. Awards made
,[89] graphed against the year in

's *First and Second Reports*
tion,[90] the predecessor of the
For this reason the figures that
wards. It will be noted that
al expenses, and awards for
nost no variation over those
until the last year when they

other hand, have increased
e under this head and awards
Expressed as a percentage
for pain and suffering were
the *Fourth Report*, 59.2%
63.2% during the period
od covered by the *Seventh*
Report, and 65.5% dur-
a steady increase save in
ward for lost wages made
rtant.

that awards for pain
rease, much faster than
The Board's percep-
the claimant's mental
ell be influenced by
the upper limit on
blished,[93] is not yet
pain and suffering

Report at 38–39,
13, and *Ninth*

nd suffering"
lmann *Victim*
d Pen 203 at

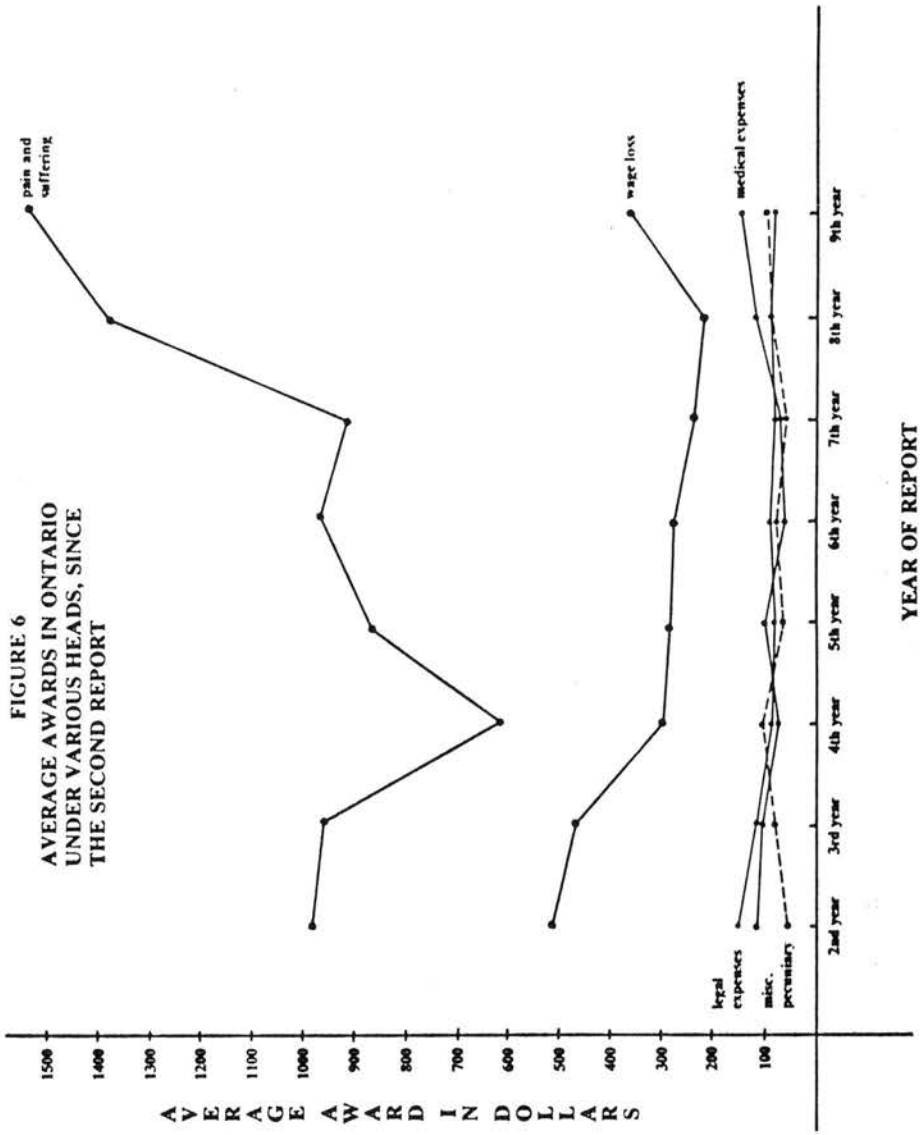


FIGURE 6
AVERAGE AWARDS IN ONTARIO UNDER VARIOUS HEADS, SINCE THE SECOND REPORT

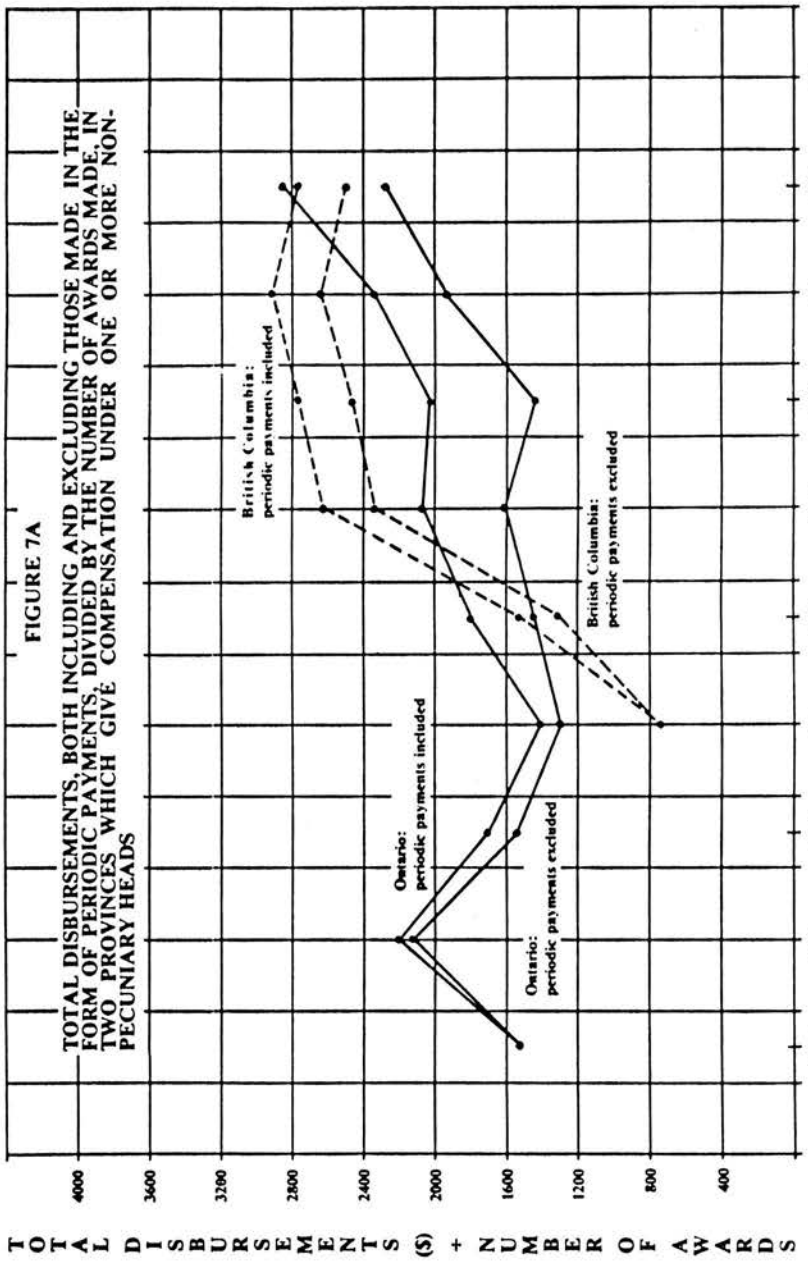
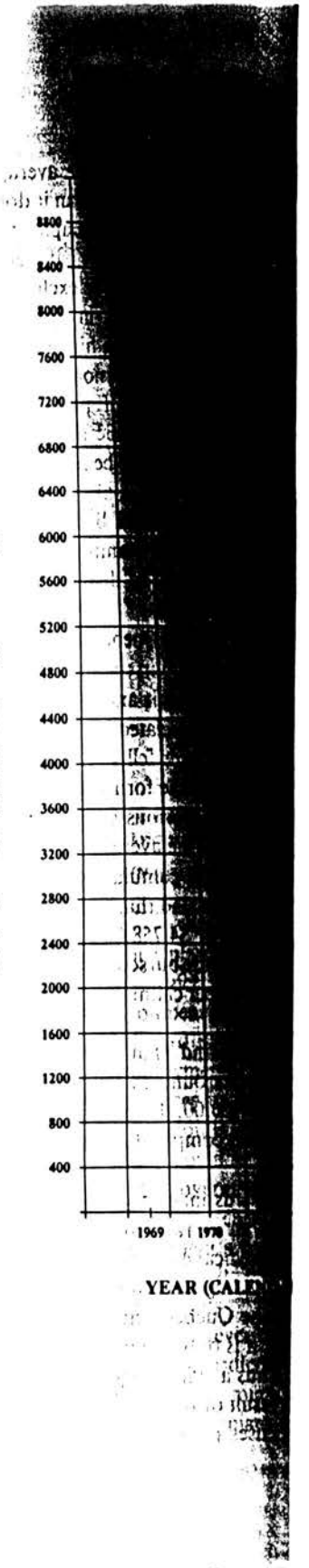


FIGURE 7A

TOTAL DISBURSEMENTS, BOTH INCLUDING AND EXCLUDING THOSE MADE IN THE FORM OF PERIODIC PAYMENTS, DIVIDED BY THE NUMBER OF AWARDS MADE, IN TWO PROVINCES WHICH GIVE COMPENSATION UNDER ONE OR MORE NON-PECUNIARY HEADS



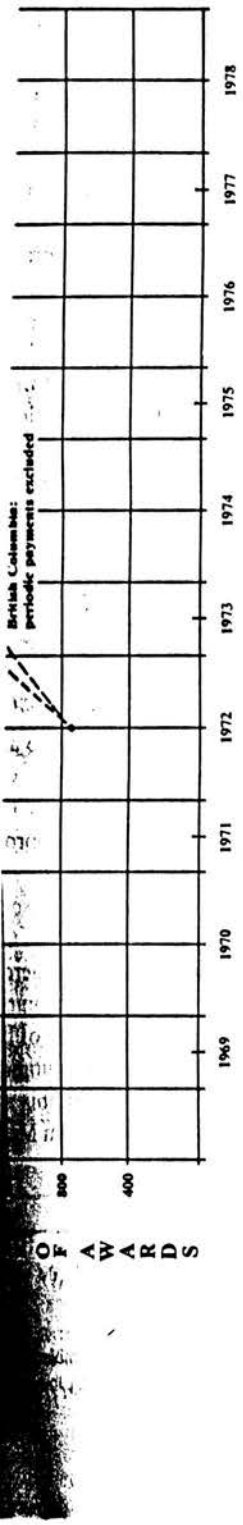


FIGURE 7B

TOTAL DISBURSEMENTS, BOTH INCLUDING AND EXCLUDING THOSE MADE IN THE FORM OF PERIODIC PAYMENTS, DIVIDED BY THE NUMBER OF AWARDS MADE, IN TWO PROVINCES WHICH GIVE COMPENSATION UNDER NO NON-PECUNIARY HEADS.

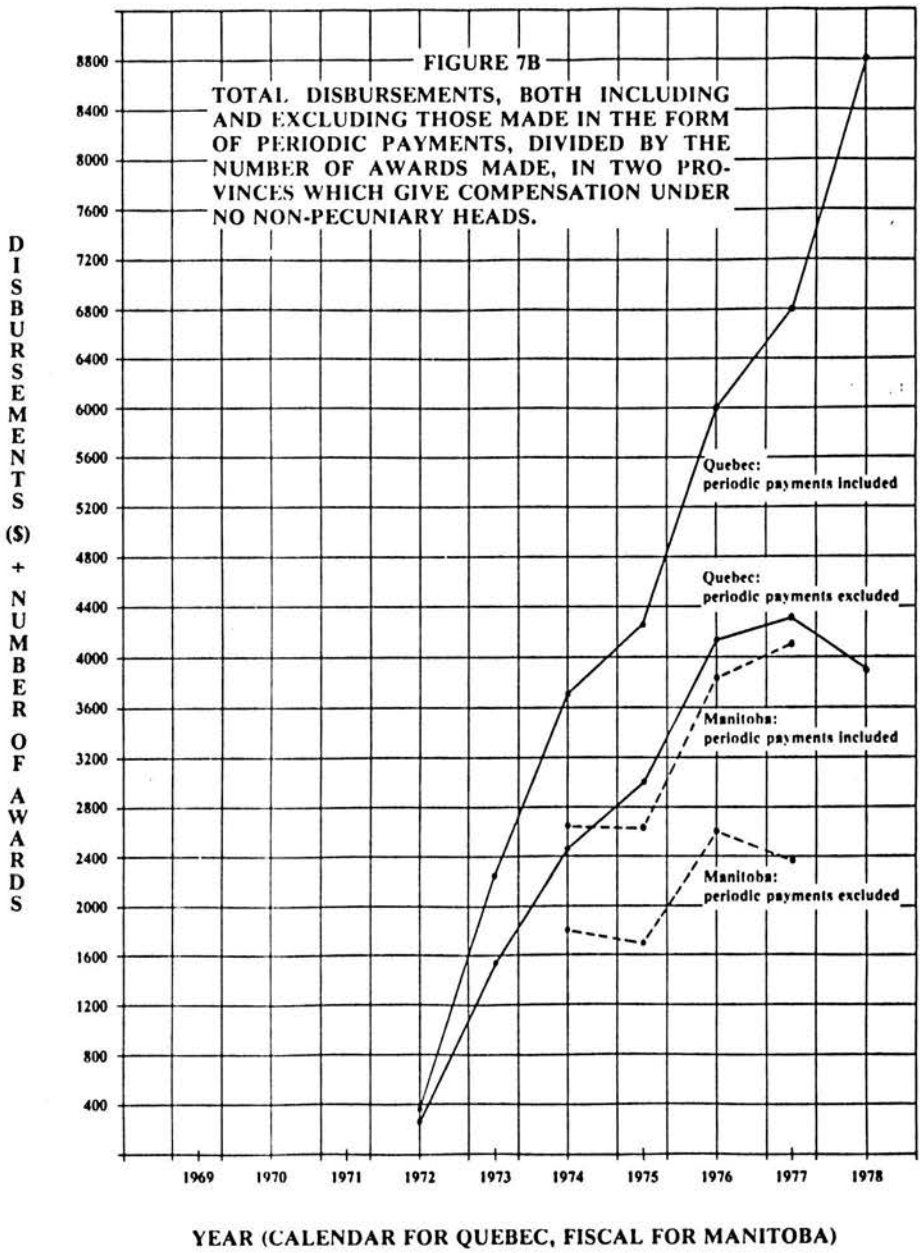


TABLE II

COSTS OF ADMINISTERING CRIMINAL INJURIES COMPENSATION SCHEMES (IN FIVE JURISDICTIONS[133]) SHOWING ADMINISTRATION COSTS AS PERCENTAGE OF TOTAL PAID

Year	Administration Costs ($)	Total Paid ($)	Percentage	Administration Costs ($)	Total Paid ($)	Percentage
	ONTARIO[134]			BRITISH COLUMBIA[135]		
1970-71						
1971-72	100,637	399,811	25			
1972-73	193,144	615,413	32			
1973-74	205,317	730,401	28	62,333	193,896	32
1974-75	259,073	726,880	36	116,921	585,939	20
1975-76	306,090	899,785	34	143,095	858,246	17
1976-77	394,496	1,410,812	28	251,997	1,241,282	20
1977-78	427,533	1,629,896	26	269,942	1,230,681	22
TOTAL	1,886,290	6,412,998	29.4	844,288	4,110,044	20.5
	ALBERTA[136]			SASKATCHEWAN[137]		
1970-71						
1971-72				24,984	32,546	77
1972-73	35,552	109,203	32	24,071	50,216	48
1973-74	17,968	124,905	14	26,044	57,529	45
1974-75	24,989	158,693	15	19,329	181,408	11
1975-76	34,994	239,270	15	18,010	139,290	13
1976-77				17,054	122,956	14
1977-78				19,924	166,464	12
				37,616	175,843	21
TOTAL	113,503	632,071	18	187,032	926,252	20.2
	QUEBEC[138]					
1970-71						
1971-72						
1972-73	69,527	107,439	65			
1973-74	94,379	688,273	14			
1974-75	98,251	1,189,520	8			
1975-76	108,219	1,787,723	6			
1976-77	153,829	2,523,940	6			
1977-78	158,681	2,837,296	6			
1978-79	205,096	2,600,130	8			
TOTAL	887,984	11,734,322	8			

Footnotes for tab

133 Figures cannot be
Territories and the
costs" has no meani
were made in 1973
Development Section
agreements]. Finally M
value of lump-sum pa
value of other pensions
166 awards, of which 90
Board only listed admini
were approved [*Manitoba*
since 1975 is quite unreliab

134 Since the publication of its *Fi*
administering its scheme. Thi
such data. It was only in the fi
money dispersed by the Crimi
our table for Ontario only start
but that data is for the calendar
such data in a table with all of t

135 The *Public Accounts of British Co*
Criminal Injuries Compensation Bo
annual reports. Such data will not
tions, for the Board's reports spea
monies paid. "Monies paid" will i
previous years as well as monies awa
did not pick up in the year of the a
in the year which the claimant has n
the Ontario Board's *Eighth Report*
the provincial auditors public acco
less than 1% cannot affect our fig
Ninth Report showed a total c
show a total of $1,629,896.00 paid.
However, we have no figures to use
its reports.

Sources: *British Columbia Sixth A*
Report at 9 *Third Annual Report*
represented only a portion of 1972,
administration or cost of introduc
Annual Report. For this reason ou
year refers to the calendar year, an

136 The public accounts of Alberta sho
Board before the year 1972-73, a
1975-76. We have therefore includ

Sources: *Public Accounts of Alber*
and 1976-76 at 106.

137 Sources: *Public Accounts of Saskat*
at F61 1974-75 at F60 1975-76 at F

138 Tableau XVI supplied by the Queb

of teeth knocked out and a full upper denture fitted.[142] Similarly, in British Columbia, as we will see,[143] where compensation is awarded under the same heads as the eight jurisdictions which we have been considering, one claimant received $150.00 for "loss of sick leave credits".[144] It would seem that such compensation must fall under the residual head. On the other hand, the Ontario Board in its *Seventh Report* denied an applicant compensation "because [he] received weekly sick leave benefits from his employer which exceeded any amount which the Board may have ordered".[145] This suggests that the Board in Ontario does not feel that the residual head permits payment for loss of sick leave benefits.

With the exception of compensation for the costs of appearing before the Board, which seems to be recoverable under the residual head in Ontario, costs of some incidental property damage, which seems to be similarly allowed under the residual head in several other jurisdictions, costs of the victim's funeral, and the value of the sick leave which the claimant may have used up as a result of the injury,[146] it is unclear what compensation is permitted under the residual heads. These residual heads are not insignificant: in the Ontario *Ninth, Eighth* and *Seventh Reports* the monies awarded under the residual head exclusive of counsel fees[147] were approximately equal to those monies awarded in respect of medical expenses,[148] but the reports of the awards do not indicate exactly what expenditures or losses gave rise to those awards. Whether they are costs and expense related, as referred to, *supra*, remains an open question.

---

142 *In the Matter of the Application of Thomas Earl Ashcroft and Myron Novosad* in *Awards of the Crimes Compensation Board* (1970) 35 Sask L Rev 75 at 80. See also *In the Matter of the Application of Rose Helen Zarchkowski* in *Awards of the Crimes Compensation Board* (1969) 34 Sask L Rev 53 at 59.

143 *Infra* at p255.

144 *Third Report* (1974) award no 14274 at 19.

145 *Ontario Seventh Report* (1975-1976) award no 200-801 at 99.

146 Which is compensated at least in British Columbia and Saskatchewan but not in Ontario.

147 Those reports give the heads of awards as "medical expenses", "loss of earnings", "pecuniary loss to dependents of deceased victims", "pain and suffering", "funeral and burial expenses", "legal fees" (or "counsel fees") and "other pecuniary loss". We are considering this latter. *Ninth Report* (1977-1978) at 9 *Eighth Report* (1976-1977) at 13 *Seventh Report* (1975-1976) at 29.

148 *Ibid*. The data is presented below:

	Medical Expenses	*Other Pecuniary Loss*
Ninth Report	$50,424.08	$54,276.35
Eighth Report	$55,624.09	$56,170.70
Seventh Report	$39,979.02	$33,618.40
Total	$146,027.19	$144,065.45

Table I shows the maximum and the minimum compensation payable under each compensation scheme.

TABLE I

LIMITS OF AWARDS UNDER CANADIAN COMPENSATION SCHEMES

	MAXIMA					
	PER CLAIMANT			PER OCCURRENCE		
	Lump Sum	Periodic Payments	Lump Sum and Periodic Payments	Lump Sum	Periodic Payments	Minimum
Alberta[4]	X	X	X	X	X	$100
British Columbia[5]	$15,000	$414/month	The lump sum can be as much as $15,000. If the lump sum is $7,500 or less, the periodic payment can be as much as $414/month, otherwise the periodic payment must not exceed $207/month	$100,000	$2,899/month	$100
Manitoba[6]	X	X	X	X	X	$150
New Brunswick[7]	$5,000 per claimant, whether paid in a lump sum or in instalments.					$100
Newfoundland[8]	$5,000 plus expenses	$150/month plus expenses	$2,500 plus $150/month plus expenses	$20,000, plus expenses plus compensation for pain and suffering	$50,000, plus expenses plus compensation for pain and suffering	X
North West Territories[9]	$15,000	$414/month	The lump sum can be as much as $15,000. If the lump sum is $7,500 or less, the periodic payment can be as much as $414/month, otherwise the periodic payment must not exceed $207/month	$100,000	$2,899/month	$100
Ontario[10]	$15,000	$500/month	$7,500 plus $500/month	$100,000	$175,000	X
Quebec	X	X	X	X	X	X
Saskatchewan[11]	$5,000 per claimant, whether paid in a lump sum or in instalments.					$50
Yukon[12]	$15,000	$500/month, maximum payable $25,000	X	$75,000	$125,000	$100

[4] Alberta Act s13(3)(c).

[5] British Columbia Act ss5(2), 13(1)-13(4). The figure of $414/month should really be 1/12 x 50,000 x 1/2 $[r_1 + r_2]$ where r_1 is the rate for Government of Canada securities of ten years or over as published in the Bank of Canada Statistical Summary of January, and r_2 is the comparable figure for June. We have replaced both r_1 and r_2 by 9.94%, the rate as of August 8, 1979. That amount is fixed as of the date of the injury and is not adjustable even though the relevant interest rates may fluctuate upwards or downwards: Workers' Compensation Board of British Columbia, *Criminal Injuries Compensation*, (1978) at 44.
Expenses are allowed *in addition* to the maximum compensation of $15,000 or $7,500 plus periodic payments: *Re The Criminal Injuries Compensation Act* (1973-74) 1 Workers' Compensation Reporter 75. In this regard B.C. is similar to Newfoundland. Increases in the B.C. benefits were promised in the 1980 throne speech: [1980] *Votes and Proceedings of the L.A. of B.C.* dated 29 Feb., 1980, at 9.

[6] Manitoba Act s12(3)(c).

It is noteworthy
awarded under each
"expenses actually
upper limit on awar
which really represent
persons carry medical
than is the general pop
incurring medical expe
partially recompensed
insurance sources. But
held by all citizens of O
is a beneficiary for the
Act providing he (*a*) is
and (*c*) has received pr
Commission and he ha
services in question.
medical expenses as the

But what of thos
apply for registration?
be denied compensation

[7] New Brunswick Act s17(2)
lump-sums paid in instal
supra pp152-157.

[8] The Newfoundland limits
interpretation. It establishes
red", "(b)" to "pecuniary
matters set out in . . . (b),
out in . . . (e) . . . shall not
of $1,000 for *each* of (b);
In the case of maximum li
tains s.(ii)(a), establishing
a limit on "(e)" could be

[9] North West Territories Or

[10] Ontario Act s19. For a c
17-18.

[11] Saskatchewan Act s18(3)

[12] Yukon Territory Ordinan
that awards will not exceed
payment of $500 per mon
bined with a periodic pay
$15,000"? Does it exceed

[13] Linden *Victims of Crime*
not discussed.

[14] *Ibid.*

[15] Nfld Regulation 331/78 s

claims leading to awards in two jurisdictions and to denials in other jurisdictions) and the number of claims which were rejected for reasons unrelated to the quantum of the loss. These three figures have been calculated for Ontario, which has no minimum loss requirement and which awards compensation for pain and suffering, Quebec, which has no minimum loss provision, and which does not award compensation for pain and suffering, British Columbia, which has a minimum loss provision of $100, but which awards compensation for pain and suffering, and Manitoba, which has a minimum loss provision of $150 and which does not award compensation for pain and suffering.

TABLE II

DISPOSITION OF CLAIMS IN CERTAIN CANADIAN JURISDICTIONS WITH RESPECT TO THE QUANTUM OF THE LOSS

	Number of Awards Made	Number of claims of under $100, leading to awards in Ontario and Quebec and to denials in British Columbia and Manitoba	Number of claims denied for reasons unrelated to quantum	Number of claims of under $100 as a percent of total number of claims
Ontario[28]	2,036	36	168	1.6%
Quebec[29]	258	15	64	4.5%
British Columbia[30]	382	12	118	2.4%
Manitoba[31]	426	113	209	15.1%

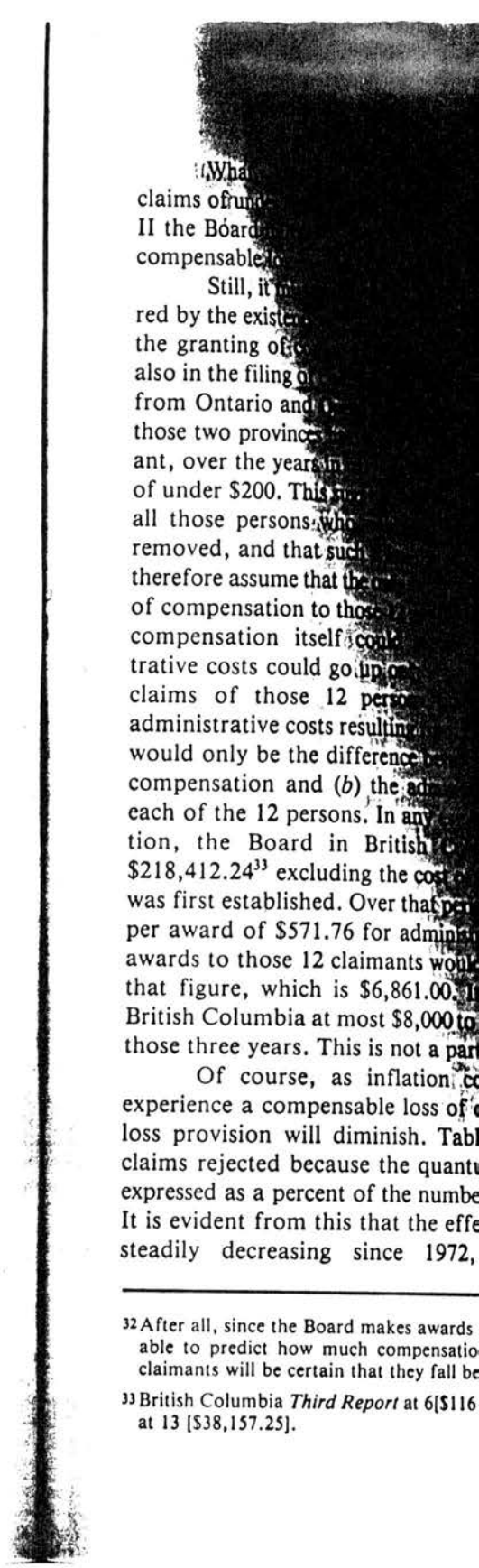
The most striking point made by this Table is that in those jurisdictions which allow compensation for pain and suffering, Ontario and British Columbia, only a small fraction of the claimants were found to have suffered compensable loss under $100. This fraction increased several-fold in Quebec and Manitoba, two jurisdictions which do not award compensation for pain and suffering.

28 Sources: Ontario *First Report* at 6 *et seq* *Second Report* at 16 *et seq* *Third Report* at 26 *et seq* *Fourth Report* at 12 *et seq* *Fifth Report* at 11 *et seq* *Sixth Report* at 7 *et seq* *Seventh Report* at 9 *et seq*. After the *Seventh Report* Ontario stopped listing all its awards in the Reports and we cannot see how many were for under $100.00.

29 Sources: Quebec *First Report* at 76 *et seq* *Second Report* at 37 *et seq*. As of August 1979 the most recent Quebec Report covered only 1973.

30 British Columbia *First Report* at 9 *et seq* *Second Report* at 10 *et seq* *Third Report* at 9 *et seq*. From the *Fourth Report* onwards British Columbia has not published details of the reasons for denial of awards, and we cannot complete the Table beyond the *Third Report*.

31 Manitoba *First Report* at 1 *Second Report* at 1 *Third Report* at 1-2 *Fourth Report* at 1-2 *Fifth Report* at 3-4 *Sixth Report* at 3-4. The lower limit in Manitoba is $150.00, not $100.00, and the Table for Manitoba must be read with $150.00 in place of $100.00 in columns 2 and 4.



32 After all, since the Board makes awards
able to predict how much compensatio
claimants will be certain that they fall be

33 British Columbia *Third Report* at 6[$116
at 13 [$38,157.25].

Manitoba

Information Services

Room 29
Legislative Building
Winnipeg, Manitoba, CANADA
R3C 0V8

Phone: (204) 945-3746

News Service

Date: July 8, 1986

COMPENSATION POLICY FOR WRONGFUL CONVICTION SET

A policy on compensation for wrongfully convicted and imprisoned persons was announced today by Attorney-General Roland Penner.

Manitoba is the first province to adopt a policy on compensation for wrongful conviction. "This policy ensures that we are in compliance with the U.N. Covenant on Civil and Political Rights," said Mr. Penner.

Highlights of the policy for wrongfully convicted accused are:

. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.

. Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.

. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a Criminal Code offence, other federal penal offences, or provincial offences.

. As a condition precedent to compensation there must be conclusive evidence of the innocence of the individual, established either through the application of Section 617 (new trial), 683 (free pardon) of the Criminal Code, or where a new or newly discovered fact substantially supports the innocence of the accused.

Mr. Penner indicated that there would be no inquiry into the investigation leading to the trial of Thomas Sophonow, nor would any compensation be considered.

"In my view," Mr. Penner said, "there is no need for such an inquiry. It should be remembered that there have been three public trials during which all police officers connected with the investigation have given evidence and have been subjected to vigorous cross-examination by experienced counsel.

"The very public nature of the trials has resulted in intense scrutiny of every step of the investigation and in my view has uncovered nothing that would warrant a further inquiry. There is nothing to suggest that legal standards and requirements have not been met. It is hard to envisage an inquiry that could do anything else except try the matter for yet a fourth time. This is surely not warranted.

"Under the policy being announced today it would be open for Mr. Sophonow if he has proof of his innocence to come forth with that proof in order to claim compensation. Whether an inquiry would then be directed would, of course, depend on the nature of the evidence to be adduced."

MINISTERIAL STATEMENT

Hon. Roland Penner, Q.C.

Madame Speaker:

I am today announcing our Government's policy with respect to compensation for wrongfully convicted and imprisoned persons.

BACKGROUND:

Despite the many safeguards in Canada's criminal justice system, innocent persons are occasionally convicted and imprisoned. Recently three cases (Marshall, Truscott, and Fox) have focussed public attention on the issue of compensation for persons who have been wrongfully convicted and imprisoned. In appropriate cases compensation should be awarded in an effort to relieve the consequences of wrongful conviction and imprisonment.

On May 19, 1976, Canada acceded to the International Convenant on Civil and Political Rights. Article 14(6) of the Covenant provides as follows:

> 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.

As I have advised the House from time to time senior officials in my Department have been working with their counterparts in other jurisdictions to develop a uniform set of guidelines to deal

with this issue. The guidelines which I am tabling in the House today are in line with the proposed national policy which has been developed to this point. I should point out that, in fact, Manitoba will be the first province to formally adopt these guidelines. It is anticipated however that some other provinces and the federal government will be adopting such guidelines in due course. Without reading all the guidelines into the record at this time (since the guidelines as such are being tabled as an attachment to this statement) I wish to stress the following principles:

In my view compensation should only be granted to those persons whose innocence has been conclusively proved as opposed to persons who were found not guilty. In the Fox, Truscott and Marshall cases all three were found to be innocent.

It follows from that principle that the actual innocence of a convicted person should be established independently, e.g., by the processes provided in the Criminal Code for the granting of a free pardon or for seeking a declaration to that effect by an appellate court. In no case should a declaration of the innocence of an accused and a decision to grant compensation be a political decision.

It will be seen that the application of the criteria being announced today to the case of Thomas Sophonow does not result in any payment of compensation to him at this time.

The final decision of the Court of Appeal of Manitoba overturning his conviction and directing that a verdict of acquittal be entered was not a finding that he was innocent. It was a finding that, in the view of the Court of Appeal, there were sufficient errors made by the trial judge during the third trial to warrant overturning that conviction. The Manitoba Court of Appeal further held that since

there had already been three trials, it would not be in the interests of justice to direct yet a new trial.

In coming to the conclusion that there should not be a new trial, Mr. Justice Twaddle, speaking for the majority in the Court of Appeal, was concerned that in view of the notoriety the case had occasioned, it would be difficult to find a jury of twelve citizens totally uninfluenced by what they had already seen or heard. In his judgment Mr. Justice Twaddle confined himself to saying that on the basis of the evidence placed before the jury at the third trial, he would not have convicted the accused had he been trying the matter. However, and this is crucial, Mr. Justice Twaddle was not prepared to say that a properly directed jury could not or would not convict the accused.

Indeed further note should be taken of the record in this case, namely, that two juries did in fact convict the accused. Furthermore, following the first trial (at which a jury was unable to arrive at any verdict) the Court of Appeal itself denied Mr. Sophonow's application for bail as not being in the public interest. At that time in ordering a new trial Mr. Justice Philp of the Court of Appeal, with Mr. Justice Matas concurring, stated "there is evidence pointing to the guilt of the accused (and) the evidence may well have supported the conviction of the accused."

There has been a formal request from Mr. Sophonow through his Counsel not only for compensation but for the appointment of a commission of inquiry to examine the conduct of the police in the investigation and the production of evidence in the Sophonow case. In my considered view there is no need for such an inquiry. It should be remembered that there have been three public trials during which all police officers connected with the investigation have given evidence

and have been subjected to vigorous cross-examination by experienced counsel. The very public nature of the trials has resulted in intense scrutiny of every step of the investigation and in my view has uncovered nothing that would warrant a further inquiry. There is nothing to suggest that legal standards and requirements have not been met. It is hard to envisage an inquiry that could do anything else except try the matter for yet a fourth time. This is surely not warranted. Under the policy being announced today it would be open for Mr. Sophonow if he has proof of his innocence to come forth with that proof. Whether an inquiry would then be directed would, of course, depend on the nature of the evidence to be adduced.

Members should be mindful of the need both to compensate those whose innocence has been independently established and, at the same time, to avoid shackling the timely and thorough investigation of crime and the need to charge persons where evidence at the time warrants the laying of such a charge. A subsequent verdict of acquittal does not mean that either the laying of the charge originally or the incarceration of the accused subsequently was wrongful, nor does it mean that an accused has been proven innocent. It means, simply, that in the minds of the jury or, as in this case, the Court of Appeal the Crown has not satisfied the burden placed on it to prove guilt on the accused beyond a reasonable doubt.

I conclude by emphasizing that the policy we are announcing today which requires proving the actual innocence of an accused before compensation is paid, is one which, I am sure, will be supported by the vast majority of Manitobans. This policy is consistent with our legal traditions and with our international undertakings.

CAUCUS PAPER

Department of the Attorney-General

COMPENSATION FOR WRONGFULLY CONVICTED AND IMPRISONED PERSONS

GUIDELINES

BACKGROUND

Despite the many safeguards in Canada's criminal justice system, innocent persons are occasionally convicted and imprisoned. Recently three cases (Marshall, Truscott, and Fox) have focussed public attention on the issue of compensation for those persons that have been wrongfully convicted and imprisoned. In appropriate cases, compensation should be awarded in an effort to relieve the consequences of wrongful conviction and imprisonment.

On May 19, 1976, Canada acceded to the International Covenant On Civil and Political Rights. Article 14(6) of the Covenant provides as follows:

> "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." (emphasis added)

In acceding to the Covenant, the Government of Canada undertook to "take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

DRAFT GUIDELINES FOR ELIGIBILITY TO APPLY FOR COMPENSATION

The following are prerequisites for eligibility for compensation:
Since compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) a further criteria would require:

(1) The wrongful conviction must have resulted in imprisonment, all or part of which has been served.

(2) Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.

(3) Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a Criminal Code offence, other federal penal offences, or provincial offences.

(4) As a condition precedent to compensation for a Criminal Code or other penal offences, there must be a free pardon granted under Section 683(2) of the Criminal Code or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b).

(5) Eligibility for compensation would only arise when Sections 617 and 683 were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

Since compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) a further criteria would require:

a) If a pardon is granted under Section 683, a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or

b) If a reference is made by the Minister of Justice under Section 617(b), a statement by the Appelate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c), to the effect that the person did not commit the offence.

It should be noted that Section 617 and 683 may not be available in all cases in which an individual has been convicted of an offence which he did not commit. For example, where an individual has been convicted and a verdict of acquittal is later entered by an Appelate Court. As well, these provisions would not apply to convictions for provincial offences. In such cases the individual may be eligible for compensation where, on independent investigation, there is conclusive evidence that the individual did not commit the offence and did nothing to unduly cause the investigation to focus on him.

CONSIDERATIONS FOR DETERMINING QUANTUM

The quantum of compensation shall be determined having regard to the following considerations:

1. Non pecuniary losses

a) Loss of liberty and the physical and mental harshness and indignities of incarceration:

b) Loss of reputation which would take into account a consideration of any previous criminal record;

c) Loss or interruption of family or other personal relationships.

Compensation for non pecuniary losses should not exceed $100,000.

2. Pecuniary Losses

a) Loss of livelihood,, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;

b) Loss of future earning abilities;

c) Loss of property or other consequential financial losses resulting from incarceration.

In assessing the above mentioned amounts, the following factors should be taken into account:

a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;

b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

Reasonable costs incurred by the applicant in obtaining a pardon or verdict of acquittal should be included in the award for compensation.

Roland Penner, Q.C.

July 3, 1986

1986

CHAPTER 28

Bill 30

THE JUSTICE FOR VICTIMS OF CRIME ACT

(Assented to September 10, 1986)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

PART I
DECLARATION OF PRINCIPLES

Declaration.
1(1) It is hereby declared that among the principles that should guide society as a whole in providing justice for victims of crime are those set out in this Part.

Victims concerns.
1(2) When the laws of society are offended, victims suffer consequences and have needs and concerns that deserve consideration separate and apart from the interest of society as a whole.

Victims assistance.
1(3) The hardships created by an offence against the laws of society should be shared by society as a whole, and victims should be assisted in addressing their particular needs and concerns.

CHAPITRE 28

Projet de loi 30

LOI SUR LES DROITS DES VICTIMES D'ACTES CRIMINELS

(Sanctionnée le 10 septembre, 1986)

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

PARTIE I
DISPOSITIONS DÉCLARATOIRES

Énoncé de principe
1(1) La société toute entière a des principes aux termes desquels elle assure le respect des droits des victimes d'actes criminels. Certains d'entre eux sont énoncés dans la présente partie.

Importance des préoccupations des victimes
1(2) Il faut tenir compte des besoins et des préoccupations des victimes lésées par l'infraction aux lois de la société, indépendamment de l'intérêt de l'ensemble de celle-ci.

Aide aux victimes
1(3) La société toute entière devrait partager le préjudice découlant de l'infraction à ses lois. Il faudrait aider les victimes à faire face à leurs besoins et à leurs préoccupations.

Debt owed to victims.
1(4) When a person offends the laws of society that person shows a disregard for persons who may be harmed by unlawful acts and that person owes a debt to society generally, and to victims, whether or not the offence has affected a specific, identified victim.

Responsibility to report and assist.
2 Victims of, or witnesses to, a crime should report the crime and co-operate with law enforcement authorities by providing information and attending court as required.

Treatment of victims.
3(1) Law enforcement officers, prosecutors, judges, corrections officers, health and social service personnel, and the media should treat victims with courtesy, compassion and dignity and with a respect for their privacy.

Access to services.
3(2) It is recognized that victims should have access to social, legal, medical and mental health services that are responsive to their needs and that dependants, guardians and spouses of victims may have needs similar to those of victims.

Early information for victims.
4(1) Law enforcement, court, health and social services personnel, at the earliest practical opportunity, should inform victims of the services and remedies available to them and their responsibilities.

Réparation
1(4) Que l'infraction touche ou non une personne donnée et identifiable, ceux qui contreviennent aux lois de la société doivent réparation à l'ensemble de celle-ci, ainsi qu'aux victimes, puisqu'ils font preuve d'insouciance à l'égard des personnes qui sont susceptibles de subir les préjudices d'actes illicites.

Obligation d'assistance
2 Les victimes et les témoins d'actes criminels devraient dénoncer ceux-ci. Ils devraient coopérer avec les organismes chargés de l'application de la loi en leur donnant les informations nécessaires et en comparaissant selon les besoins.

Respect des victimes
3(1) Les personnes chargées de l'application de la loi, les procureurs, les juges, les agents de correction, le personnel des services de santé et des services sociaux ainsi que les membres des médias devraient traiter les victimes avec courtoisie, compréhension et dignité, et respecter leur vie privée.

Services
3(2) Il est reconnu que des services sociaux, légaux et médicaux, ainsi que des services en matière de santé mentale, qui répondent aux besoins particuliers des victimes devraient leur être offerts. Il est également reconnu que les personnes à la charge des victimes, les tuteurs et les conjoints des victimes peuvent avoir des besoins semblables à ceux des victimes.

Information
4(1) Le personnel des services chargés de l'application de la loi, celui des services judiciaires et celui des services de santé et des services sociaux devraient informer les victimes, à la première occasion propice, des services et des mesures de redressement qui leur sont offerts, ainsi que de leurs responsabilités.

Access to information.

4(2) Information should be made available to a victim about

(a) the scope, nature, timing, and progress of the prosecution of the offence in which he or she was the victim;

(b) the role of the victim and of other persons involved in the prosecution of the offence;

(c) court procedures; and

(d) crime prevention.

Alternative resolutions.

5(1) Where appropriate, victims should be encouraged to participate in mediation, conciliation and informal reconciliation procedures to resolve disputes and determine financial or other redress.

Prompt return of property.

5(2) Where stolen property is recovered, it should be returned to the victim as soon as possible.

Consider victims interests.

5(3) Before making decisions in any matter that is before them, law enforcement personnel, prosecutors and judges, should consider the particular needs and concerns of the victim, including

(a) the need to receive fair restitution for the offence; and

(b) the need for prompt disposition of prosecutions and prompt execution of judgments, orders and decisions granting restitution, compensation or other redress.

Accès à l'information

4(2) Les victimes devraient pouvoir obtenir des informations sur les sujets suivants :

a) l'étendue, la nature, la durée prévue et l'état de la poursuite relative à l'infraction dont elles subissent les conséquences;

b) leur rôle et celui des autres personnes qui prennent part aux poursuites pour infraction;

c) les procédures judiciaires;

d) la prévention des actes criminels.

Règlements amiables

5(1) Il faudrait, lorsque cela est à-propos, inciter les victimes à prendre part à des mesures de médiation ou de conciliation, ou à des procédures informelles de rapprochement, afin de favoriser le règlement des litiges et de fixer des mesures de redressement, pécuniaires ou autres.

Recouvrement des biens volés

5(2) Les biens volés qui ont été récupérés devraient être restitués aux victimes le plus rapidement possible.

Considérations relatives aux intérêts des victimes

5(3) Le personnel chargé de l'application de la loi, les procureurs et les juges devraient tenir compte des besoins et des préoccupations particuliers des victimes avant de prendre des décisions quant aux questions dont ils connaissent. Ces considérations portent notamment :

a) sur la nécessité de recevoir une juste réparation à l'égard de l'infraction;

b) sur la nécessité de régler rapidement la poursuite et d'exécuter promptement les jugements, les ordonnances et les décisions portant réparation, compensation, ou toute autre mesure de redressement.

PART II
VICTIMS ASSISTANCE

Definitions.

6 In this Act

"committee" means the "Victims Assistance Committee"; ("Comité")

"fund" means the "Victims Assistance Fund"; ("Caisse") and

"judge" includes a justice of the peace, a magistrate and a provincial judge; ("juge")

"minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act. ("ministre")

VICTIMS ASSISTANCE COMMITTEE

Establishment.

7 There is hereby established a committee to be known as: "The Victims Assistance Committee".

Regard for principles.

8(1) The committee shall be guided by and shall promote the principles set out in this Act.

Applications and submissions.

8(2) The committee may receive from any person, organization or institution applications and submissions relating to

(a) the needs and concerns of victims; and

(b) the provision and funding of research and services relating to victims.

Guidelines.

8(3) The committee shall work with prosecutors and with law enforcement agencies, courts, social agencies and other organizations able to serve victims in order to assist them in developing guidelines that promote the principles set out in this Act and that relate to their activities.

PARTIE II
ASSISTANCE AUX VICTIMES

Définitions

6 Les définitions qui suivent s'appliquent à la présente loi.

"Caisse" La Caisse d'assistance aux victimes. ("fund")

"Comité" Le Comité d'assistance aux victimes. ("committee")

"juge" S'entend aussi bien du juge de paix, du magistrat que du juge de la Cour provinciale. ("judge")

"ministre" Le membre du Conseil exécutif que le lieutenant-gouverneur en conseil charge de l'application de la présente loi. ("minister")

COMITÉ D'ASSISTANCE AUX VICTIMES

Création

7 Est institué le Comité d'assistance aux victimes.

Objet

8(1) Les principes énoncés par la présente loi guident le Comité. Celui-ci en favorise la mise à effet.

Demandes et observations

8(2) Le Comité peut recevoir de toute personne, organisme ou institution des demandes et des observations relatives aux sujets suivants :

a) les besoins et les préoccupations des victimes;

b) la mise en oeuvre et le financement de recherches et de services visant les victimes.

Lignes directrices

8(3) Le comité travaille de concert avec les procureurs, les agences chargées de l'application de la loi, les tribunaux, les organismes de services sociaux et les autres organismes susceptibles de rendre service aux victimes. Il le fait de façon à aider ces entités à établir des lignes directrices qui favorisent la mise à effet des principes énoncés dans la présente loi tout en étant reliées aux activités de ses entités.

Recommendations.
8(4) The committee shall make recommendations to the minister on the use of the fund and may make recommendations relating to
(a) the development of policies respecting victims services; and
(b) any other matter within the scope of the principles set out in this Act that the minister refers to the committee for its recommendation.

Research and distribution of information.
8(5) The committee shall promote research into and the distribution of information about victims services, needs and concerns.

Review.
8(6) The committee shall review the operation, development and cost of victims services and research projects for which money from the fund is being received or sought.

Examination of documents.
8(7) The committee may require an applicant for funding or a recipient of funding under section 15 to submit to the committee such reports, contracts, or documents related to the application or receipt as the committee considers advisable.

Report.
8(8) The committee shall, within 4 months after the end of every fiscal year of the government, make a report to the minister on the activities of the committee for that fiscal year.

Recommandations
8(4) Le Comité présente au ministre des recommandations quant à l'utilisation de la Caisse. Il peut par ailleurs faire des recommandations à l'égard des éléments suivants :
a) l'élaboration de politiques relatives aux services aux victimes;
b) les questions relatives aux principes énoncés dans la présente loi dont le ministre saisit le Comité pour recommandation.

Recherches et documentation
8(5) Le Comité favorise d'une part la recherche en matière de services aux victimes et celle visant les besoins et les préoccupations des victimes, d'autre part la diffusion d'information à cet égard.

Examen
8(6) Le Comité étudie l'administration, le développement et le coût des services aux victimes et des projets de recherche à l'égard desquels des subventions de la Caisse sont demandées ou octroyées.

Examen de documents
8(7) Le Comité peut exiger de ceux qui demandent des subventions ou de ceux qui en reçoivent dans le cadre de l'article 15 qu'ils lui présentent les rapports, les contrats et les documents relatifs au financement qu'il considère pertinents.

Rapport
8(8) Le Comité présente au ministre un rapport d'activités relatif à l'exercice écoulé, dans les 4 mois qui suivent la fin de l'exercice du gouvernement.

Report laid before Legislature.
8(9) The minister shall lay a copy of the report of the committee before the Legislative Assembly forthwith after receiving the report or, if the Legislative Assembly is not then in session, within 15 days after the commencement of the next session.

Membership.
9(1) The committee shall be comprised of not less than 7 and not more than 15 members to be appointed by the Lieutenant Governor in Council.

Specified members.
9(2) The committee shall include at least two victims of crime and shall include representation from law enforcement agencies, prosecutors, the judiciary and members of the Law Society of Manitoba who are not employed by the government and who have experience as defence counsel.

Term.
9(3) Each member shall be appointed to the committee for a term of not more than 3 years.

Continuation.
9(4) Where the term of a member expires, the member shall continue to serve until a successor is appointed.

Chairperson.
10 The Lieutenant Governor in Council shall designate one of the members as chairperson of the committee.

Conflict of interest.
11 A member of the committee who is associated with an applicant for funding under section 15 shall disclose that association and thereafter may vote on any question relating to the proposed recommendation by the committee unless the member has a direct pecuniary interest in the grant.

Dépôt du rapport devant la Législature
8(9) Le ministre dépose devant l'Assemblée législative le rapport du Comité dès sa réception si l'Assemblée siège ou, sinon, dans les 15 jours du début de la session suivante.

Composition
9(1) Le Comité est composé d'au moins 7 et d'au plus 15 membres nommés par le lieutenant-gouverneur en conseil.

Représentation au sein des membres du Comité
9(2) Le Comité se compose d'au moins deux victimes d'actes criminels et de représentants des agences chargées de l'application de la loi, des procureurs, de l'appareil judiciaire et des membres de la Société du Barreau du Manitoba qui ne sont pas à l'emploi du gouvernement et qui ont de l'expérience à titre d'avocats de la défense.

Mandat
9(3) Les membres du Comité reçoivent un mandat d'au plus 3 ans.

Expiration du mandat
9(4) Les membres du Comité sont maintenus à leur poste, à l'expiration de leur mandat, jusqu'à nomination de leur successeur.

Présidence
10 Le lieutenant-gouverneur en conseil choisit le président parmi les membres du Comité.

Inhabilité
11 Les membres du Comité doivent, le cas échéant, faire part de leur lien avec ceux qui demande des subventions aux termes de l'article 15. Ils peuvent ensuite voter quant aux questions relatives aux recommandations proposées par le Comité, à moins d'avoir un intérêt pécuniaire direct à l'égard des subventions.

VICTIMS ASSISTANCE FUND

Establishment.
12 There is hereby established a fund to be known as: "The Victims Assistance Fund".

Surcharge.
13(1) Subject to subsection (4) and any other Act of the Legislature, where a person is convicted of an offence under an Act of the Legislature or a regulation under such an Act, a surcharge shall be conclusively deemed to have been imposed against the person and shall be collected in the same manner as a fine, and where a fine has been imposed the surcharge shall be collected with the fine.

Amount of surcharge.
13(2) The surcharge imposed under subsection (1) shall be an amount determined by multiplying the amount of the fine by a percentage prescribed by the Lieutenant Governor in Council but the percentage so prescribed shall not exceed 20%.

Exception.
13(3) No surcharge shall be imposed in respect of any parking offence.

Surcharge where no fine.
13(4) Where a person receives a reprimand or is convicted of an offence but no fine is imposed in respect of the offence, the surcharge under subsection (1) shall be $25.

Surcharge may vary.
13(5) Where the judge, having regard to the circumstances, including the degree of financial hardship a surcharge would impose on a person, determines that a surcharge or the amount of a surcharge is inappropriate, the judge may reduce or waive the surcharge.

CAISSE D'ASSISTANCE AUX VICTIMES

Création
12 Est constituée la Caisse d'assistance aux victimes.

Amende supplémentaire
13(1) Sous réserve du paragraphe (4) et des autres lois provinciales, la condamnation pour infraction aux lois provinciales ou à leurs règlements d'application prononcée par le juge de paix est réputée emporter péremptoirement une amende supplémentaire. L'amende supplémentaire est perçue de la même manière que toute autre amende; elle est le cas échéant perçue en même temps que l'amende imposée.

Montant de l'amende supplémentaire
13(2) L'amende supplémentaire visée au paragraphe (1) représente le pourcentage de l'amende imposée que fixe le lieutenant-gouverneur en conseil. Elle ne peut cependant représenter plus de 20 % de l'amende imposée.

Absence d'amende supplémentaire
13(3) Les infractions relatives au stationnement n'emportent aucune amende supplémentaire.

Amende supplémentaire minimale
13(4) L'amende supplémentaire visée au paragraphe (1) est de 25 $, au cas de réprimande ou lorsque la condamnation est prononcée mais qu'aucune amende n'est imposée.

Discrétion judiciaire
13(5) Le juge peut réduire le montant de l'amende supplémentaire visée au présent article, ou même ne pas imposer celle-ci, lorsqu'il considère qu'elle n'est pas opportune eu égard aux circonstances, notamment compte tenu de l'importance du fardeau financier qu'elle imposerait à la personne.

Other sources.
14 Money from any person or source made payable to the fund shall be credited to the fund and money received that is subject to trust conditions shall be disbursed pursuant to those conditions.

Grants from the fund.
15 Subject to any trust conditions under which money is received into the fund, the Lieutenant Governor in Council may authorize expenditures from the fund for

(a) promotion and delivery of victims services;
(b) research into victims services, needs and concerns;
(c) distribution of information respecting victims services, needs and concerns;
(d) remuneration of members of the committee for their services and for reimbursement of reasonable expenses incurred on behalf of the committee; and
(e) any other purpose the Lieutenant Governor in Council considers necessary for carrying out the purposes and promoting the principles set out in this Act.

No direct compensation.
16(1) The fund shall not be used to provide direct compensation to individual victims.

Applications submitted to committee.
16(2) Any application for a grant from the fund shall be submitted to the committee for a recommendation as to whether the grant should be made.

Trust fund.
17(1) The fund shall be under the control and supervision of the Minister of Finance and shall be held in trust for the purposes of this Act in a separate account in the Consolidated Fund.

Autres sommes portées au crédit de la Caisse
14 Toute somme payable à la Caisse, quelle qu'en soit la source, lui est créditée; les sommes reçues aux termes de fiducies sont utilisées conformément aux stipulations de ces dernières.

Subventions
15 Sous réserve des stipulations des fiducies aux termes desquelles les sommes sont versées à la Caisse, le ministre peut autoriser des dépenses de la Caisse pour les fins suivantes :

a) promouvoir et offrir des services aux victimes;
b) mener des recherches à l'égard de services aux victimes et à l'égard des besoins et des préoccupations de celles-ci;
c) diffuser de l'information relative aux services aux victimes, et aux besoins et préoccupations de celles-ci;
d) rémunérer les membres du Comité et rembourser les dépenses raisonnables faites au nom du Comité;
e) favoriser la mise à effet de la présente loi et des principes y énoncés.

Compensation
16(1) La Caisse ne peut servir à compenser directement et individuellement les victimes .

Présentation des demandes au Comité
16(2) Les demandes de subventions sont soumises à la recommandation du Comité.

Fiducie
17(1) La Caisse est placée sous le contrôle et l'autorité du ministre des Finances; elle est détenue en fiducie dans une compte distinct du Trésor aux fins de la présente loi.

Payments from fund.
17(2) The Minister of Finance may make payments from the fund in accordance with any authorization granted under section 15.

Investment of excess moneys.
17(3) If at any time the balance to the credit of the fund or the amount received subject to trust conditions is in excess of the amount that is required for the immediate purposes of this Act or the trust conditions, the Minister of Finance may invest the excess and any income therefrom shall be credited to the fund.

Credit the account of the fund.
17(4) Money that is received for or otherwise credited to the fund shall be deposited with the Minister of Finance for the account of the fund.

Fiscal year.
18 The fiscal year of the fund shall be the 12 month period ending on March 31 in any year.

PART III
GENERAL

Application.
19 This Act does not create any civil cause of action, right to damages or any right of appeal on behalf of any person.

Regulations.
20 The Lieutenant Governor in Council may make regulations
(a) prescribing anything required by this Act to be prescribed; and
(b) generally for carrying out the purposes of this Act.

Paiements
17(2) Le ministre des Finances peut effectuer des paiements de la Caisse conformément aux autorisations accordées dans le cadre de l'article 15.

Placement du surplus
17(3) Le ministre des Finances peut placer, au bénéfice de la Caisse, l'excédent des sommes portées au crédit de la Caisse ou reçues aux termes de stipulations de fiducie et de celles nécessaires dans l'immédiat pour l'application de la présente loi ou le respect desdites stipulations. Les fruits de ces placements sont portés au crédit de la Caisse.

Versements au ministre des Finances
17(4) Les sommes reçues ou portées au crédit de la Caisse sont remises au ministre des Finances au bénéfice de la Caisse.

Exercice
18 La Caisse a un exercice de 12 mois qui se termine le 31 mars de chaque année.

PARTIE III
DISPOSITIONS GÉNÉRALES

Champ d'application
19 La présente loi ne confère aucun motif d'action civile, aucun droit à des dommages-intérêts ni droit d'appel.

Réglementation
20 Le lieutenant-gouverneur en conseil peut, par règlement :
a) prescrire ce qui doit l'être aux termes de la présente loi;
b) prendre des mesures afin de mettre à effet la présente loi.

Reference in Continuing Consolidation.

21 The Act may be referred to as chapter J40 of the Continuing Consolidation of the Statutes of Manitoba.

Commencement of Act.

22 This Act comes into force on a day fixed by proclamation.

Codification permanente

21 La présente loi est le chapitre J40 de la Codification permanente des lois du Manitoba.

Entrée en vigueur

22 La présente loi entre en vigueur par proclamation.

Printed by the Queen's Printer
for the Province of Manitoba

Imprimée par l'Imprimeur
de la Reine du Manitoba