MANITOBA

Compensation policy for wrongfully imprisoned rapped

By Bob Cox
Manitoba Correspondent

WINNIPEG — Manitoba's new policy on compensating people wrongfully convicted and imprisoned has come under strong criticism since being announced earlier this summer.

Attorney general Roland Penner outlined details of the policy, the first on the issue in Canada, in July.

The minister said Manitoba's guidelines are in line with a proposed national policy on compensation which other provinces and the federal government are expected to adopt in due course.

However, critics were quick to say the plan is so restrictive it makes it next to impossible for someone to qualify for compensation.

The guidelines deal only with people convicted and imprisoned who later have their innocence proven by conclusive evidence, not people who are charged and spend time in custody before a trial only to be found innocent later.

"I don't think this policy improves anybody's lot," lawyer Norm Cuddy said. "It misses the whole issue of what happens when people are arrested and locked up because of abuse by police and authorities of their powers.

"The policy doesn't take into account anything but the innocence of the person charged."

Cuddy said people who have been compensated elsewhere, such as Ontario nurse Susan Nelles, wouldn't qualify for compensation under the Manitoba program.

"The other thing is how difficult it is," Cuddy said. "It's much more difficult to prove your innocence than for the Crown to prove your guilt."

Penner made it clear that Thomas Sophonow, Cuddy's client, was not eligible for compensation.

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convicted and serve all or part of a resulting term in custody.

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This can be established through either the new trial (sec. 617) or free pardon (sec. 683) sections of the

of the jury or ... the Court of Appeal, the Crown has not satisfied the burden placed on it to prove guilt on the accused beyond a reasonable doubt."

However, Penner's whole policy left defence lawyers wondering why the government had bothered to announce it.

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La nouvelle politique manitobaine de compensation aux personnes condamnées et emprisonnées à tort limite la compensation aux personnes qui ont été condamnées, de fait, et dont l'innocence a été prouvée à la suite d'une preuve concluante, mais non celles qui furent accusées, ont été incarcérées, mais reconnues innocentes par après. Comme il est plus difficile de prouver son innocence que pour la Couronne de démontrer la culpabilité de quelqu'un, cette nouvelle politique ne semble pas impressioner grand monde et l'on se demande pourquoi on se donne même le mal de l'annoncer.

policy must go further than Penner's guidelines.

"I think you have to have something in the compensation policy that says when somebody is arrested and locked up because of bungling by the police or prosecution, then that person should be compensated," Cuddy said.

Jeff Gindin, vice-president of the Manitoba Trial Lawyers' Association, echoed Cuddy's comments.

"The guidelines he set up are so restrictive it's ridiculous," Gindin said.

"To have it as a prerequisite that a person has to be wrongfully convicted is ludicrous.

"Why does a person have to be convicted first and then found wrongfully convicted?"

Gindin said police and the Crown can hurt a person even if he is not imprisoned or convicted.

"Even if you have someone not imprisoned and he is charged wrongfully, he may have lost his job and he may have lost his family. There are many other ways that an accused can suffer than being wrongfully convicted and imprisoned."

Gindin said he agreed compensation shouldn't be automatic when someone is

anything but the innocence of the person charged."

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"The other thing is how difficult it is," Cuddy said. "It's much more difficult to prove your innocence than for the Crown to prove your guilt."

Penner made it clear that Thomas Sophonow, Cuddy's client, was not eligible for compensation.

Sophonow, 32, spent 45 months in jail while being tried three times for the December 1981 murder of doughnut shop waitress Barbara Stoppel.

However, Sophonow's ultimate acquittal by the Manitoba Court of Appeal last year "was not a finding that he was innocent," Penner said.

"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," Penner said.

He said it is still open for Sophonow to come forward with proof of his innocence, but he rejected Sophonow's call for an inquiry to examine the conduct of police in the investigation and the production of evidence in the case.

Penner said the three public trials of Sophonow provided adequate scrutiny of the police investigation and an inquiry would merely be a fourth trial of the matter.

"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," Penner said.

Among the guidelines Penner outlined for someone to qualify for compensation is that they are wrongfully

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convicted and serve all or part of a resulting term in custody.

Compensation is only available to the actual person wrongfully convicted and imprisoned and there must be conclusive evidence of the person's innocence.

This can be established through either the new trial (sec. 617) or free pardon (sec. 683) sections of the Criminal Code or where a newly-discovered fact substantially supports the innocence of the accused.

Penner said three recent Canadian cases (Marshall, Fox and Truscott) showed that in appropriate cases, compensation should be awarded to relieve the consequences of wrongful conviction and imprisonment.

But Penner said a person's innocence must be established independently, by the granting of a free pardon or 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," Penner said.

He said while being mindful of the need to compensate people whose innocence is independently established, there is also a need to avoid shackling the investigation of a crime and the need to charge persons where evidence warrants a charge.

"A subsequent verdict of acquittal does not mean that either the laying of the charge orlginally 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 ... the Court of Appeal, the Crown has not satisfied the burden placed on it to prove guilt on the accused beyond a reasonable doubt."

However, Penner's whole policy left defence lawyers wondering why the government had bothered to announce it.

It didn't apply to a number of recent Manitoba cases where people have spent time in jail for crimes they didn't commit.

They included the case of Eric Robinson, who spent nine months in jail accused of stabbing a man to death only to be released after it was discovered a Crown attorney failed to disclose evidence which cleared him.

The Crown didn't disclose evidence of an eyewitness during a preliminary hearing and Robinson was in jail until a senior Crown attorney reviewed the case and dropped the charge.

In the case of John Franklin Smith, the accused spent 10 months in jail after being convicted of manslaughter in the death of a five-week old baby girl in his care.

Smith, described as being of very low intelligence, was acquitted after a second trial where the judge ruled his confession to the killing couldn't possibly be true.

"This certainly doesn't fall within the guidelines," Cuddy, his lawyer, said. "Things would be different if somebody came forward and said 'I did it.' "

Suspicion was cast on the child's mother during the trial, but she denied killing her baby and was never charged.

Cuddy said any fair compensation

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Gindin said he agreed compensation shouldn't be automatic when someone is found not guilty since many acquittals are based on technical arguments or the admissibility of evidence.

However, Gindin said an acquitted person shouldn't have to shoulder the tremendous burden of proving his innocence.

"That policy presumes that everyone is guilty and if you want compensation you're going to have to prove your innocence," he said.

"To put on a person the total responsibility of proving he is innocent is just contrary to the whole presumption of innocence.

"They (police and Crown) should have the responsibility of having a good case if they charge someone."

Under the new compensation policy, anyone who qualifies would be eligible for up to $100,000.

The value of awards would be based both on non pecuniary and pecuniary losses.

Non pecuniary losses would include loss of reputation, loss or interruption of family, loss of liberty and the physical and mental harshness and indignities of incarceration.

Pecuniary losses include loss of livelihood, loss of earnings and future earning abilities and loss of property.

grèves de la C.T.C.U.Q. et celles de la compagnie Voyageur s'accompagnent d'une réduction dans le nombre des blessés et surtout dans celui des morts [35].

Malgré toutes les réserves que l'on peut exprimer sur ces statistiques et leur interprétation, celles que nous venons de mentionner nous amènent à une conclusion. Elles confirment en fait une impression qui ne manque pas de susciter les interventions successives de l'État et de certains groupes intéressés, interventions d'ordre législatif ou administratif ou du domaine des communications : une action isolée ne résout pas le problème social que représentent les accidents d'automobile.

Une amélioration de l'indemnisation des victimes réduit les conséquences néfastes des accidents, elle ne les fait pas disparaître. Si elle n'augmente pas le nombre des accidents, elle ne le réduit certes pas non plus. C'est pourquoi un régime comme celui de l'assurance automobile doit fatalement, à l'instar de celui des accidents du travail, déboucher sur l'organisation de la prévention des accidents. Un système efficace de prévention constituerait certainement la réalisation la plus remarquable de la réforme.

35. *Id.*, p. 122.

Débat « de lege ferenda » sur l'indemnisation du préjudice corporel

Modérateur : Louis Perret
Professeur à la Faculté de droit de l'Université d'Ottawa

Avant d'entreprendre ce débat *de lege ferenda* sur l'indemnisation du préjudice corporel, je commencerai par quelques remarques préliminaires.

Tout d'abord, je ne voudrais pas profiter de l'occasion, en tant que Président de ce colloque pour faire passer mes idées personnelles sur cette question. Le but de l'exercice est plutôt d'obtenir vos réactions. Du fait du caractère interdisciplinaire de ce forum, vos commentaires seront, sans doute, très éclairants pour ceux qui, en Ontario ou au Québec, ont charge des réformes dans ce domaine.

Par ailleurs, si j'ai préparé une série de questions, qui vous ont été distribuées, ce n'est pas pour orienter le débat dans un sens ou dans l'autre, mais uniquement pour que la réflexion soit focalisée sur les questions essentielles, et éviter ainsi qu'elle ne se perde dans les méandres de la discussion. Il s'agit donc essentiellement d'une base de réflexion, au cours de laquelle je n'hésiterai d'ailleurs pas à avancer alternativement des points de vue diamétralement opposés, afin de susciter un débat et d'obtenir, je l'espère, des réactions et peut-être un certain consensus sur tel point ou sur tel autre.

Enfin, mes commentaires, faits à propos de chaque question ou sous-question, n'auront pour but que de les replacer dans leur contexte, en exposant, en général, le pour et contre des solutions possibles.

Question 1 :

Le Québec et l'Ontario seraient-ils mûrs pour l'adoption d'un système universel d'indemnisation automatique, par l'État, du préjudice corporel, selon le modèle néo-zélandais, précédemment exposé par le professeur Terence Ison?

En effet, si l'on constate que, finalement, dans le système actuel d'indemnisation, l'ensemble des dommages est répercuté, par les assureurs ou l'État indemniseur, sur l'ensemble des citoyens, l'on peut se demander s'il ne serait pas plus simple d'indemniser automatiquement chaque victime. Cela éviterait en effet les affres et les lenteurs d'un procès, coûterait moins cher à tout le monde, tout en assurant une

indemnité de base à tous. C'est d'ailleurs le système que propose, à long terme, le Rapport Slater, pour l'Ontario.

Mais viennent immédiatement à l'esprit les sous-questions suivantes :

a) Un tel système est-il envisageable en l'état actuel des finances des provinces?

Il semble que non si l'on se fie, au Québec, aux déclarations de M. Pierre Paradis, ministre du Travail, à propos du déficit de plus de 1,8 milliard de dollars de la C.S.S.T. et de M. Ghislain Dufour, président du Conseil du patronat du Québec, à propos des coûts trop élevés de la C.S.S.T.

En Ontario, l'on n'a retenu des propositions du Rapport Slater que celles relatives à l'adoption d'un système d'assurance automobile, sans égard à la faute. Le Premier ministre David Peterson veut, par ailleurs, que, pour des raisons de coût, ce système soit laissé à l'entreprise privée.

b) En l'état actuel de nos mœurs et de la discipline de nos citoyens, peut-on envisager d'adopter un tel système d'indemnisation du préjudice corporel, sans égard à la faute, dans tous les secteurs d'activités?

D'après l'exposé précédent de M. De Montigny, les statistiques démontrent, sans doute, qu'il n'y a pas eu d'augmentation des accidents de la route depuis l'adoption de la nouvelle *Loi sur l'assurance automobile*.

Cependant, si l'on y regarde de plus près, ceux-ci ont augmenté très fortement durant la grève des policiers de 1984 et 1985 et ont au contraire très sensiblement diminué durant la période des fêtes de 1986 en raison de la campagne de sensibilisation et de l'application effective des nouvelles dispositions pénales concernant la conduite en état d'ébriété. Ceci prouve bien qu'en l'absence de sanctions de la faute civile, la sanction de la faute pénale doit être appliquée de façon rigoureuse, car, seuls, le civisme et l'instinct de conservation des individus ne sont pas suffisants, en l'état actuel de nos mœurs, pour nous dicter un comportement prudent et raisonnable. Que l'on pense un instant à la manière dont a été fêtée la dernière Coupe Stanley dans les rues de Montréal. Sans doute notre sens de la discipline est-il moindre que celui des Néo-Zélandais, tout en étant, par ailleurs, supérieur à celui d'autre pays? D'ailleurs n'est-ce pas pour cette raison que les lois sont différentes d'un pays à un autre, ainsi que le soulignait, il y a déjà plusieurs siècles, Montesquieu? Cela signifie que le système qui est peut-être bon pour la Nouvelle-Zélande, ne l'est pas forcément pour un autre pays.

Par ailleurs, l'abandon d'un système de responsabilité civile est en général accompagné, à titre préventif des accidents, non seulement de mesures policières, mais également de mesures d'éducation et de sécurité. Que l'on pense, par exemple, aux dispositions du *Code de la route* destinées à assurer la sécurité routière (ceinture de sécurité, normes de fabrication des automobiles, etc.) ou encore à la *Loi sur les accidents du travail et maladies professionnelles*, qui n'est que le complément d'une loi destinée à prévenir les accidents : la *Loi sur la santé et la sécurité au travail*. Les normes de sécurité qu'elle fixe pour éviter les accidents peuvent être contrôlées, dans leur application, par des inspecteurs. Mais peut-on imaginer le même genre de contrôle, ou d'intervention étatique dans les chaumières?

Enfin même si l'assurance-responsabilité atténue considérablement le rôle préventif de la responsabilité civile en diminuant l'impact des conséquences de la faute sur le patrimoine du responsable, du moins le principe est-il sauf grâce à l'augmentation des primes qu'entraînera une répétition de la négligence ou au refus de couverture qu'entraînera un risque, trop grand, lié au comportement antérieur de l'individu. L'article 2563 du *Code civil* exclut, par ailleurs, la couverture de la faute intentionnelle de l'assuré.

c) En l'état actuel de la philosophie de notre société, ainsi que de celle des différents groupes qui la composent, est-on mûr pour l'adoption d'un système universel, automatique, d'indemnisation du préjudice corporel?

Ainsi que l'a fort éloquemment exprimé, hier, Me V. O'Donnell, le fondement de la philosophie occidentale en matière de responsabilité civile est que la personne qui, par sa faute, a commis un dommage doit en répondre face à la victime. En d'autres termes, la personne doit répondre de ses actes.

Est-on prêt à abandonner un tel principe de base de notre société dans tous les domaines, c'est-à-dire même dans ceux où il n'existe pas de dangers particuliers, et où, normalement, un comportement raisonnable permet d'éviter les accidents? Le Barreau et les assureurs sont-ils prêts à laisser faire ou à encourager de tels changements? La responsabilité civile doit-elle avoir désormais pour but exclusif l'indemnisation, en toutes circonstances, de la victime? Ou doit-elle, au contraire, conserver pour fonction de faire répondre, sur son patrimoine, seulement celui qui aura eu un comportement fautif évitable?

Tel est l'enjeu de la question posée sur laquelle je vous invite à présent à réagir.

COMMENTAIRES

1. Q. : Robert Tétrault, professeur à la Faculté de droit de l'Université de Sherbrooke.

Pour répondre à la première question posée par le professeur Louis Perret ne serait-il pas pertinent d'avoir d'abord une information sur le niveau de revenu moyen en Nouvelle-Zélande? M. le professeur Ison, on me dit que c'est un pays où le revenu moyen est très élevé et où les écarts de revenus entre les différents groupes de la population sont faibles. Est-ce un élément qui peut favoriser l'implantation d'un système d'indemnisation universel, sans égard à la faute? Par ailleurs, deuxième question, toujours pour expliquer dans quelle mesure ce système a pu être adopté en Nouvelle-Zélande, est-ce que le niveau de risque d'accidents dans les industries a une influence sur le taux de cotisation? Cela peut avoir une incidence sur la mesure dans laquelle une société est prête ou non à accepter un tel système. Donc, M. Ison, si vous pouvez répondre à ces questions, cela permettrait peut-être, d'éclairer le débat.

R. : Terence Ison.

Yes, as far as income and taxes are concerned in New Zealand, salaries tend to be lower than in Canada, but most of the costs of living are also lower. However, some things such as automobiles are at a very high cost compared with Canada. Salaries compared with the cost of living are a bit lower than here, but not dramatically so.

The biggest contrast is in the urban/rural mix of the population. A much higher proportion of their population would be in agriculture compared with most provinces of Canada.

I'm not too familiar with their tax rates because I had the good fortune of not being taxed while I was there. I believe that the tax rates are a little higher than in Canada, but it is hard to compare because their tax rates include, to a large extent, their old age social security benefit and a large portion of their health care, so that they pay out of taxes things which we would pay out of our CPP contributions and OHIP contributions, etc. So if you add up what you might call the tax plus other deductables from income, they might pay a bit more than we do but it is not a big difference.

2. Q. : Robert Tétrault.

La deuxième question concerne les cotisations. Is there a relationship between the risk involved in an industry and the levy that is paid by a corporation or an industry?

R. : Terence Ison.

Yes, they use a classification system, the same as we do in most provinces in Canada for Workers' Compensation, so that industries are assigned to what you might call a levy rate. They have also introduced some merit rebate system in recent years, but they have so far stayed away from experience rating. There is a lot of pressure at the moment from the Employers' Federation to adopt a system of experience rating, much the same as we have in Workers' Compensation in some provinces in Canada. That would mean that the actual rate of levy paid by an employer would vary according to the claims cost experience of the workers employed by that employer. That would be a disaster. If they move to that it would have very negative consequences, but there is a serious risk that they may do it.

3. Q. : Hélène Gagné-Lamontagne, Bureau d'assurance du Canada.

Mr. Ison you mentioned earlier that one of the advantages of the New Zealand system was its universality. You mentioned that in 1972 when they prepared the program, they restricted the program to the automobile accident type of thing but later on they evolved to universality. What was the reason at that time : was it purely a political decision or was there some kind of a will of the public or how did it work out?

R. : Terence Ison.

After the legislation had been prepared there was an election and a change of government. But the change in the plan was not a big change. The original plan covered all employees for any type of accident at any time and place, plus all people injured in motor vehicle accidents. The only groups which were not covered, under the original plan, were people who were not in employment and were not injured in motor vehicle accidents. Thus, the groups that were not covered were mainly the sports injuries to those who were not employees, plus injuries to the elderly, domestic injuries to housewives, and recreational injuries to

children. Before the plan came into effect it was changed to include those groups.

The cost of covering those groups is still relatively small because they do not get the earnings loss compensation. They get the medical care, rehabilitation, and the lump sums, but they do not get compensation for loss of earnings, so that the cost of those claims is much smaller than the other claims.

Q. : Hélène Gagné-Lamontagne.

One of the elements which is often raised by the lawyers in Ontario in the discussions, right now, on the Slater Report and no-fault scheme, is that the present tort system will take care especially of students who would have an injury, at the age of 12 or 13. The no-fault scheme would not pay anything, as pretty much you mentioned in New Zealand, while the tort system would presume some kind of occupations for the next 40 years and then provide some kind of compensation for that element. Is there some kind of an in-between system to take care of those young people who would normally have to come up and work later on?

R. : Terence Ison.

Yes, my recollection is that they do have a provision for that in New Zealand, for paying earnings-related benefits after the person would have reached what you might call an earning age. In any event, there is no difficulty in building that sort of component into a comprehensive plan. There is no difficulty in building in a loss of earnings benefit for people who are out of the work force at the time of injury but likely to be in the work force sometime in the future.

I think that they could do better than they do for housewives, because a lot of them would, in the ordinary course of things, return to the work force later. There is under-compensation for young people and for housewives at the moment, but that's a particular feature of the particular plan. It's not an inevitable feature of a comprehensive plan. One could easily build in coverage for them.

Incidentally, tort liability isn't great for those groups either. Look at the decision in *Teno* v. *Arnold*, it wasn't all that good. One thing that is hopeless, in the cases of younger children in particular, is spending money arguing about what the occupation would have been, or what the rate of earnings would have been. It's absurd to be spending significant sums of money arguing about that. It's obviously more efficient to have a system that will arrive at a standard rate, and certainly my feeling is that until the people have a first foot on a career ladder, up until that point if

they're injured the compensation for loss of earnings ought to be uniform. We ought not to be speculating about what career this person would have had compared with another one, until they have reached the first foot of a career ladder.

Q. : Hélène Gagné-Lamontagne.

That's pretty much what the R.A.A.Q. is doing also. There were two things that you mentioned when you were talking about New Zealand. You said originally when it came into force in 1974 and gradually in the acceptance in New Zealand that there was some kind of abuse by lawyers, and then abuse by insurers. I'd like you to give me more details about that. Where was the abuse?

R. : Terence Ison.

I was not talking about under the current system, but under the previous system.

R. : Hélène Gagné-Lamontagne.

Oh the previous system. Okay I thought you meant the new system.

R. : Terence Ison.

No, under the previous system. I think that most of the abuse by the legal profession comes not in system operations but in system design. The legal profession, as with any other group in society (I don't think the legal profession is distinctive about this) has an enormous capacity to convince itself that its own interest coincides with the public interest. It has an enormous capacity, not the whole legal profession but particularly the litigation bar, to convince itself that litigation is good for people, that the clients like it. Of course, if it's the best thing going at the moment, then probably they do. But I think there is an element of self-deception in relation to system design.

As far as the insurance industry is concerned, it's rather different. There are all kinds of abuse in system operation. One of the big difficulties with the tort system and with disability insurance is that the first contact of the claimant is with an organization that has an interest adverse to that of the claimant. For therapeutic reasons, if for no other

reason, the first contact of a disabled person should be with an organization that has no adverse interest, that has an interest in paying the right amount, not that has an interest in minimizing the cost.

This was one thing on which there was some controversy in New Zealand, incidently. One of the things that I was talking about was the responsibility to pay out the right amount, not to minimize the pay-out. What happens, for example, when a claimant indicates that he would be happy with $ 600, but we know that the right amount would be $ 1,000? Do they pay him the $ 600 or the $ 1,000? There is controversy even within the organization on that question. If anxiety is going to be relieved and we are going to avoid adversarial conflict, the first contact between an injury victim and the system must be a contact with a person who has an interest in doing the right thing, not an interest in minimizing the pay-out. That of course is one of the difficulties with insurance company operated systems.

4. Q. : M. James R. Breithaupt, Président de la Commission de réforme du droit de l'Ontario.

Professor Ison, you commented upon the increase in assessments for industrial contributors in New Zealand from something like 70 cents to $ 1.30 coming up, which seems to be a very large increase. What is the financial status of the compensation fund at the present time, having read a comment that it was some millions of dollars in the hole at this point? Are there financing problems which will prevent the non-accident, that is the disease victim from getting into the program fully?

R. : Terence Ison.

The only financing problem at the moment has been an embarassing surplus; which is why the rate of levy was .79 cents per hundred. It was reduced to bring down the reserves because they were embarassingly high. What happened was that the Royal Commission Report was not entirely clear whether the system should be funded, or whether it should operate on a current cost basis. The statute was not clear on that either. The Commission began by trying to operate a fully-funded system. Then the decision was made a year or two ago to move to current cost financing, but with a significant reserve, and with a formula for reserves that would be a multiple of the year's revenue. Because of that move from full funding to current cost financing, there was a surplus in reserves. So for the last year or two, they have been deliberatly reducing the surplus. They probably won't move to $ 1.30 in one step, but $ 1.30 is about the average rate of levy which would be correct at the

moment if they were raising sufficient for current costs, and aiming at maintaining an appropriate level for the reserve.

The reserve, of course, is there to allow for fluctuations, in effect, to adjust for what you might call wrong predictions of revenue or of costs. They must have a reserve as a cushion. Thus to cover current costs plus maintaining an adequate reserve, they have calculated that they need an average levy of about $ 1.32 per 100 dollars of payroll. That's about half of the average compensation assessment in Canada, and the coverage is broader, so it's still relatively low.

The Employers' Federation is pressing for reductions in benefits, but there is no point in trying to meet that demand because that's the perennial demand of employers' organisations, I mean ever since we've had Workers' Compensation in Canada, employers' organisations have been demanding a reduction in costs, or reductions in benefits, and it's a demand that can never be met, so I don't think it's anything to worry about.

What has embarrassed them in New Zealand is that they adopted a superannuation plan under the previous National Government. It was a way of beating the Labour Party. They adopted a superannuation plan which was very generous and provided for retirement on of something like two thirds of the average national wage at age of sixty for everybody. It was very generous but burdensome. That created a negative reaction, but by that time the superannuation plan had become a sort of a sacred cow, so the negative pressure tended to operate on other systems.

When you look at the combined operation of New Zealand's systems, there is some over-payment. There is over-payment, for example, of people between the ages of sixty and sixty-five. Somebody may be drawing full earnings-related benefits from the Accident Compensation Plan, plus the superannuation benefit for those five years. So there is some overlap and overpayment. There are opportunities for economizing but there is no financial problem.

As far as disease coverage is concerned, it's essentially a question of priorities. What they have done, in effect, is what we do under our systems, they tend to over-compensate relatively minor disabilities, and tend to under-compensate the more serious ones. What I have been suggesting for some years now is a change in priorities from focussing on trauma to the exclusion of disease, to focussing on allocating resources by reference to the gravity of disablement rather than the cause. If they do that and simply realign priorities with the amount of money they are spending at the moment, they can cover disease.

5. Q. : Madame Vaillant, Présidente de la Commission d'appel en matière de lésions professionnelles.

J'aimerais faire un commentaire sur la première question posée par le professeur Louis Perret. Je ne peux pas y résister. Au sujet de l'adoption d'un système universel... et des sous-questions qui s'y rattachent. Je pense que la question majeure à poser est celle du contrôle de l'État, la notion d'État-providence. C'est une conception différente ou nouvelle de l'État. Il est d'ailleurs remis en question un peu partout, en même temps que le principe de l'universalité. Je pense, en effet, qu'on ne peut pas discuter d'un système universel d'indemnisation sans regarder l'ensemble des politiques sociales. Qu'un accidenté se retrouve avec un programme de réadaptation défrayé par la CSST ou encore qu'il se retrouve dans un centre d'accueil de réadaptation sous la responsabilité du ministère de la Santé et des Services sociaux, peu importe. Il y a 500 millions de dollars versés en réadaptation au Québec. Le rôle de l'État est en effet, non seulement d'administrer les finances de la province, en particulier le milliard de la CSST et les 7 milliards de la Santé et des Services sociaux, mais il est également possible d'établir les grandes politiques sociales. Jusqu'où doit-on aller? Jusqu'où peut-on aller? Cela fait partie de la politique sociale que l'État peut choisir de se donner. Dès lors, l'on doit se demander dans cette perspective, si le système universel d'indemnisation répond oui ou non à un consensus social? À mon humble point de vue, je ne le crois pas puisqu'au moment présent, on s'interroge un peu partout sur les principes de l'universalité des services sociaux dans tous les secteurs. Je vous ai fait ce commentaire, suite à l'expérience que j'ai eue dans le secteur de la Santé et des Services sociaux, tout simplement pour dire : que le travailleur soit indemnisé par un organisme plutôt que par l'autre, peu importe, mais il doit y avoir une approche globale du système d'indemnisation. Par ailleurs, si on se reporte à l'année 1978, date de l'adoption de la *Loi sur l'assurance automobile* et que l'on compare l'état d'esprit à cette époque avec celui d'aujourd'hui, huit ans plus tard, force nous est de constater qu'il y a eu une grande évolution dans les mentalités. Qu'on se souvienne des débats de l'époque et qu'on regarde où nous en sommes aujourd'hui, on constate qu'il y a eu une évolution des mentalités et qu'un consensus social s'est fait autour de cette question précise.

6. Q. : Hélène Gagné-Lamontagne.

Quant à la première question posée par le professeur Louis Perret, concernant l'universalité, évidemment les assureurs sont contre car cela implique automatiquement une étatisation, c'est-à-dire leur perte ou leur disparition.

R. : Louis Perret.

Pas nécessairement, le Rapport Slater propose de laisser ce secteur à l'entreprise privée.

Q. : Hélène Gagné-Lamontagne.

Je crois que c'est un peu utopique de penser que vous puissiez avoir un système universel d'indemnisation avec trois cents assureurs. C'est pour cela que le Bureau de l'assurance du Canada s'est objecté à l'universalité du système que le Rapport Slater a proposé. En ce qui concerne l'assurance automobile, évidemment, les assureurs, contrairement peut-être à ce qui a été dit par les avocats en Ontario, n'ont pas accepté la recommandation du Rapport Slater en ce qui concerne l'indemnité sans faute à 100 %. Ce qu'ils ont proposé c'est un régime mixte précis dont nous n'avons pas discuté hier, ni aujourd'hui : celui de l'État du Michigan. Ce système pourrait, peut-être, être le meilleur compromis pour les avocats afin de leur garder un certain chiffre d'affaires relié à l'assurance et aux indemnités. Il permet aussi de tenir compte des accidents très sérieux que l'on nous rapporte.

En effet lorsque nous discutons de ces problèmes, on nous apporte toujours le cas de l'étudiant en médecine qui a un accident la veille de sa graduation et qui est devenu paraplégique. Le système du Michigan nous semble actuellement le plus réaliste. Selon ce système [1], vous aurez deux indemnisations, une indemnisation provenant d'un régime sans faute pour une période de temps et pour certains genres de blessures et une autre, selon le droit commun, où vous conservez le droit de poursuivre dans des cas sérieux et permanents bien définis. Alors j'aimerais mentionner ici que c'est là l'avis des assureurs.

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1. Le régime d'assurance automobile du Michigan peut se résumer ainsi : la loi du Michigan oblige les propriétaires de véhicules circulant sur les routes du Michigan d'obtenir des assureurs privés une assurance obligatoire basée sur un régime d' indemnité sans faute.

Le régime prévoit le paiement des dépenses médicales ou de réadaptatio n pour un montant illimité, des indemnités de perte du revenu payables pour une période maximum de trois ans représentant 85 % du salaire de la victime jusqu'à un montant ma ximum de 2434 $ par mois (9/30/86). Il prévoit aussi des indemnités de remplacement de services jusqu'à 20 $ par jour pour une période de trois ans. Les survivants peuvent aussi recevoir les indemnités de perte de revenu, de remplacement de services et un montant forfaitaire de 1 000 $ pour les frais funéraires.

La loi permet un recours de droit commun pour tous dommages pécu niaires en excédent des montants minimum susmentionnés et pour les dommages non pécuniaires dans les cas de décès, blessures graves (préjudice esthétique ou mutilation).

Par contre un point sur lequel nous sommes entièrement en accord avec le Rapport Slater est celui qui concerne la réadaptation. Nous n'avons pas discuté beaucoup de ce problème; M. de Montigny l'a juste effleuré tout à l'heure, faute de temps. On a vu ce qui se passe en Nouvelle-Zélande, mais nous nous sommes rendu compte, d'après le Rapport Slater et d'autres études antérieures qui ont été faites dans les années 70, que dans le domaine de la réadaptation il règne un fouillis monumental.

Il semble, au contraire, que l'avantage d'un système universel soit la cohérence des mécanismes de réadaptation. Aussi, face à la victime, s'il y avait une possibilité de faire une concentration et une coordination, comme l'a mentionné M. Ison, ce serait une grande amélioration. Nous serions favorables à tout système qui introduirait une coordination au profit de la victime afin de lui faire profiter d'une réadaptation non seulement physique mais aussi sociale. De ce point de vue, nous félicitons la Régie de l'assurance automobile, parce qu'elle a fait un travail extraordinaire dans ce domaine, en collaboration, je crois, avec la Commission de la santé et de la sécurité du travail. À cet égard, nous ne pouvons qu'abonder dans le même sens que le Rapport Slater. Ce n'est évidemment pas facile à réaliser, mais il s'agit d'avoir une volonté politique de le faire.

R. : Louis Perret.

Puisque nous venons d'aborder la question des systèmes mixtes, passons à la deuxième question, celle qui envisage, comme solution alternative au système de l'universalité, une coexistence des deux mécanismes d'indemnisation, l'un basé sur la faute, l'autre sans égard à la faute.

QUESTION II :

Y a-t-il lieu d'améliorer le système actuel d'indemnisation dans lequel coexistent le régime d'indemnisation de droit commun basé sur la faute et les régimes spéciaux d'indemnisation automatique par l'État?

a) Existe-t-il un critère de délimitation de chacun de ces régimes?

Sur le plan formel il est bien sûr évident que le *Code civil* traite de tout ce qui n'est pas régi par des lois particulières et que ces dernières précisent leur champ particulier d'application.

Cependant, sur le plan de la philosophie de base l'on devra un jour s'interroger clairement sur ce qui justifie le maintien de tel type d'accident dans le giron du droit commun et ce qui justifie son exclusion? Ne vient-on pas, en effet, de faire passer de l'un à l'autre les victimes de vaccinations? Parviendra-t-on ainsi, pas à pas, avec le temps et de manière empirique, à un système universel à la néo-zélandaise? Ne doit-on pas, au contraire, se poser cette question fondamentale à l'heure de la réforme du *Code civil* : quel est le critère de détermination de chaque régime? Il apparaît en effet important de déterminer, à cette occasion, quel est le champ d'application du *Code civil* et celui des régimes spéciaux. Le critère de l'exclusion du régime de droit commun devrait-il être celui du danger particulier d'accident encouru par toute personne, même prudente, lorsque ce risque résulte de la nature de l'activité, de l'évolution du danger social ou du profit qu'en tire la société? Dans de telles situations la société prendrait en charge la *victime* en l'indemnisant de façon automatique par le biais d'une loi spéciale. Cependant dans ces mêmes hypothèses lorsque *l'auteur de l'accident* ne serait pas lui-même dans ces situations de danger où les erreurs sont presque inévitables, et lorsqu'effectivement l'accident serait dû à sa faute, il pourrait avoir à rembourser à l'État ce que ce dernier a payé à la victime. Tel serait le cas des auteurs d'actes criminels, mais tel ne serait pas celui des conducteurs distraits, encore que l'on pourrait envisager cette possibilité dans les cas de faute intentionnelle! Il n'y aurait cependant pas lieu de faire de distinction à l'égard de leurs victimes, car ces dernières sont exposées à des dangers inhérents à notre société et à son évolution. Il est donc normal qu'elle les prenne en charge par des lois particulières.

L'on peut cependant se demander s'il est nécessaire qu'il existe plusieurs lois pour remédier à un même type de problèmes? De plus, suite à l'exposé limpide de Me Mistrale Goudreau, l'on peut se demander si les indemnités qu'elles accordent ne devraient pas être coordonnées entre elles. La même question se pose, par rapport aux indemnités de droit commun, suite à l'analyse très éloquente de ces disparités, faites, hier, par M. V. O'Donnell.

b) La coordination entre les indemnités de droit commun et celles des régimes spéciaux se justifierait-elle?

Sur le plan de la justice naturelle, une fois que l'on a décidé d'indemniser les victimes de tel ou tel type d'accident, il n'y a rien qui justifie que, à préjudice égal, elles ne soient indemnisées de la même façon, avec les mêmes montants. Mais, si la coordination des indemnités paraît souhaitable, comment serait-elle réalisable? Il y aurait en effet deux paliers de coordination à considérer.

1er palier : Coordination entre les indemnités de droit commun et celles des régimes spéciaux

L'on peut dans ce cadre envisager deux méthodes alternatives.

1re méthode : le réajustement respectif des indemnités prévues dans chaque domaine

Ceci supposerait sans doute une augmentation de celles accordées par l'État et un plafonnement limitatif de celles du droit commun. Cela impliquerait une augmentation des primes versées à l'État et sans doute une diminution de celles versées aux assureurs. L'équilibre devrait donc être trouvé en tenant compte de la capacité de payer des citoyens et de leur désir de sécurité.

Ce type de solution est appliqué au Mexique où, selon l'article 1915 du *Code civil*, les indemnités de droit commun sont établies par référence aux indemnités accordées par l'État en matière d'accidents du travail. M. le professeur Moises Hurtado Gonzales nous parlera plus savamment, cet après-midi, de cette solution mexicaine.

2e méthode : l'établissement de recours complémentaires selon le droit commun

L'établissement du recours complémentaire permettrait en effet à la victime de récupérer, selon le droit commun, la différence entre l'indemnité versée par l'État et celle prévue par le droit commun.

Cette solution est celle qui a été proposée par le Rapport Nadeau, afin de solutionner le problème de la disparité des indemnités versées selon le droit commun et celles versées par la R.A.A.Q. C'est là le principe de l'actuel régime d'assurance automobile en Ontario, que proposent d'abandonner le Rapport Slater et le Premier ministre David Peterson. Cette possibilité de recours complémentaire entraîne, en effet, une augmentation importante des primes d'assurance automobile, correspondant à celle des indemnisations de droit commun accordées par les tribunaux.

Cette coordination des indemnités entre le régime de droit commun et les régimes spéciaux ne suppose-t-elle pas, par ailleurs, une coordination des indemnités accordées par ces derniers? Cela ne serait-il pas d'ailleurs conforme aux principes de base des systèmes de droit codifié tels que le nôtre? En vertu de ceux-ci, le *Code civil* doit être au centre du système, et toutes les lois particulières doivent graviter autour de lui d'une manière coordonnée avec lui et entre elles.

2e palier : Coordination des indemnités entre les divers régimes étatiques

Cette absence de coordination des indemnités entre les divers régimes spéciaux, qui a été brillamment exposée précédemment par Me Mistrale Goudreau, se justifie-t-elle? Ne s'agit-il pas de victimes du même type de circonstances dangereuses? Ne s'agit-il pas du même débiteur : l'État? Les uns, les accidentés du travail, bénéficient-ils de l'avantage de la pression syndicale dont ne bénéficient pas les autres? Ces derniers doivent-ils se regrouper de la même façon?

Par ailleurs ne serait-il pas souhaitable, pour les victimes, par souci d'économie et de simplification, de coordonner les organismes payeurs? De coordonner les procédures de réclamation et d'appel? De coordonner les organismes de réadaptation physique et sociale? Pourquoi d'ailleurs ne pas souhaiter une unification de ces lois, de leurs procédures et de leurs organismes?

Il est temps d'obtenir vos réactions sur cette deuxième série de questions.

COMMENTAIRES

7. Q. : Me Jeanne d'Arc Vaillant, Présidente de la Commission d'appel en matière de lésions professionnelles.

Si je peux me permettre un commentaire, je pense, d'après mon expérience de la *Loi sur les accidents du travail et les maladies professionnelles* et des diverses lois concernant la santé et la sécurité, qu'il est nécessaire de coordonner entre eux les différents régimes qui couvrent ces domaines d'indemnisation. Cela m'apparaît fondamental. Je pense, cependant qu'il serait très difficile d'adopter un système universel car dans la conjoncture actuelle il n'y aurait sûrement pas de consensus. Mais il n'en demeure pas moins nécessaire de coordonner l'ensemble, que ce soit les indemnités de remplacement de revenu ou les autres. Par ailleurs, au niveau des soins et des services, nous parlions tout à l'heure de soins à domicile et de réadaptation, je pense qu'il y a un travail de rationalisation à faire et que bien des choses sont possibles. Effectivement, si vous regardez la *Loi sur les accidents du travail et les maladies professionnelles*, ainsi que la *Loi sur l'assurance automobile*, toutes deux reposent sur un principe fondamental, celui de la réadaptation. L'objectif est, en effet, le retour au travail dans le même emploi ou dans un emploi convenable ou équivalent, selon la capacité résiduelle du travailleur, ce que la réadaptation aura permis de sauvegarder. Dans cette perspective, la réadaptation est fondamentale car elle permet de faire en sorte que quelqu'un revienne à une certaine

activité et puisse fonctionner avec le support d'orthèses, de prothèses ou d'autres types de services. Donc, je pense qu'au niveau de la réadaptation comme telle, que ce soit au Québec ou ailleurs, il y a une coordination nécessaire à faire entre les différents intervenants afin de minimiser les coûts et de permettre une organisation de services structurée, plutôt que de maintenir l'intervention de plusieurs ressources à des coûts différents et de façon désorganisée. Le professeur Ison soulevait quelques problèmes relatifs aux services en Nouvelle-Zélande. Je pense cependant que dans le système de la responsabilité civile, certaines mesures pourraient être prises pour diminuer sensiblement les coûts et permettre d'atteindre l'objectif de réadaptation, c'est-à-dire de permettre à l'accidenté de retourner à la vie normale le plus rapidement possible. L'objectif de l'indemnisation doit, bien sûr, être celui de la réparation mais aussi celui du retour à la normalité.

8. Q. : Me Pierre Dallaire de l'Étude Beaudry, Bertrand à Hull.

Une des choses qui m'apparaît ressortir de ce débat, en ce qui concerne les régimes d'indemnisation étatiques, d'une part, et le régime de droit commun, d'autre part, c'est bien sûr l'écart assez effrayant qu'on peut retrouver relativement à l'indemnisation de certaines catégories de préjudices. Si l'on prend les dommages non pécuniaires, le maximum offert est de 37 000 $ en vertu du Régime d'indemnisation des victimes d'accidents d'automobiles, alors qu'en vertu du droit commun il est passé de 100 000 $, en 1978, à 180 000 $ en faisant les réajustements pour l'inflation prévus par la Cour suprême. Cela m'amène d'abord à commenter ce que Me Létourneau disait hier, à savoir que les 100 000 $ constituaient selon lui un plafond immuable. Je pense qu'il est important de noter que la Cour suprême avait bien indiqué que ce plafond-là devait être ajusté pour tenir compte en particulier de l'inflation. Ce qui fait qu'aujourd'hui on parle de 180 000 $.

Il existe alors un écart de 143 000 $, en matière de dommages non pécuniaires, entre les deux régimes. Je suggère donc, pour que les régimes d'indemnisation étatiques aient encore une certaine crédibilité, qu'il serait peut-être logique de se tourner vers des solutions comme celle de l'établissement d'un régime mixte. En vertu d'un tel système, l'État assumerait effectivement un montant de base qui permettrait à toutes les victimes d'avoir une indemnité minimale, quelle que soit la faute et quelles que soient les circonstances. Un tel régime permettrait par ailleurs un recours de droit commun pour l'excédent, ce qui donnerait une possibilité d'indemnisation égale et intégrale pour tous.

R. : Louis Perret.

Si vous me permettez de réagir à ce commentaire en ce qui concerne le régime mixte. Selon la signification que vous avez donnée à ce terme, il s'agit d'une indemnisation de base automatique, payée par l'État, à laquelle viendrait s'ajouter un recours de droit commun. Ici je crois qu'il est possible de distinguer, selon les systèmes qui existent actuellement, entre le *no-fault absolu* et le *no-fault relatif*.

Le *no-fault absolu* exclut tous les recours compléme ntaires ou même subrogatoires. Il se présente dans les cas où les dangers existent tant pour la victime que pour l'auteur. Comme, par exemple, dans le cas d'un accident d'automobile. Le *no-fault relatif* permet, au contraire, des recours complémentaires. Il existe lorsque le risque ou le danger est à peu près inévitable pour la victime, mais pas pour l'auteur du danger. Ainsi, on est tous soumis aux risques d'un acte criminel, comme un vol ou un viol, que l'auteur est libre de commettre ou pas. Dans ce cas, l'auteur est celui qui crée les risques, et il a créé le danger en toute liberté. Donc, il apparaît normal qu'on puisse le poursuivre par voie de subrogation ou bien alors par voie d'action directe. Le but dissuasif de la responsabilité civile est ici maintenu, mais pas au détriment de la victime.

Nous avons par ailleurs noté hier[2] que le système de *no-fault relatif*, n'était pas, selon l'expérience ontarienne en matière d'assurance automobile, un remède contre l'augmentation des primes. Il a cependant un intérêt certain pour les victimes qui ont la garantie de recevoir une indemnité minimum de base.

QUESTION III :
Y a-t-il lieu d'améliorer le système de droit commun d'indemnisation du préjudice corporel?

Le but serait de préciser davantage les règles actuelles d'évaluation de manière à permettre aux assureurs de mieux établir leurs prévisions. Il serait également de parvenir à une réduction raisonnable des indemnités, en tenant compte davantage de la réalité et des capacités de payer tant des assureurs que des responsables. Ultimement cela aurait pour but d'éviter, ou du moins de diminuer, les faillites éventuelles des débiteurs. L'enjeu est, à tout le moins, de trouver d'autres solutions que le refus de couverture d'assurance ou que le plafonnement très bas de celle-ci par rapport aux montants des indemnités effectivement accordés par les tribunaux.

2. Cf. *supra*, p. 142.

a) Y a-t-il lieu de revoir le principe de l'indemnisation sous forme de capital versé en un paiement unique à caractère définitif?

Pour la victime il peut sembler préférable de recevoir, en un bloc, le montant global de l'indemnité. Quand elle le reçoit ainsi, elle est sûre d'être payée, elle peut le placer ou en disposer comme elle l'entend. Le danger est qu'elle survive à l'épuisement de ce capital.

Pour le responsable ou son assureur, l'inconvénient du système réside surtout dans l'incertitude concernant la durée exacte de la vie de la victime et dans celle du calcul exact du taux d'inflation durant toute cette période. Si la victime décède quelques mois ou années après le jugement final, alors que l'expectative de vie avait été fixée à une vingtaine d'années, c'est autant de payé en trop à la victime. Cette erreur peut être encore plus grave quand, en plus de la perte de revenu, le responsable a eu à payer en trop, pour ce même nombre d'années, le salaire d'une ou de plusieurs garde-malade à domicile, compte tenu du droit de la victime de résider chez elle et d'y être soignée.

L'incertitude des montants alloués par les tribunaux, jointe à leur augmentation vertigineuse, conduit à la recherche d'une solution alternative.

b) Solution alternative : l'indemnisation sous forme de paiements périodiques serait-elle plus juste?

Cette solution existe en France, ainsi que nous en parlera savamment, cet après-midi, M. Henri Margeat. Elle a été proposée au Royaume-Uni par le Rapport Pearson; elle est pratiquée en Nouvelle-Zélande et au Québec dans le cadre des régimes spéciaux d'indemnisation par l'État. Elle y est également utilisée dans le cadre de règlements hors cours. Une réforme de l'article 1149 du *Code civil*, qui permettrait aux tribunaux de les accorder, semble être souhaitée par plusieurs juges, dont M. le juge en chef Dickson dans l'affaire *Andrews*. Un tel mouvement semble également s'amorcer dans plusieurs États américains ainsi que nous l'expliquera, cet après-midi, le professeur David Warren.

1) Quels sont les avantages de ce système?

Outre le fait qu'il est plus facile de payer l'indemnité sous forme de paiements échelonnés, plutôt qu'en un seul versement, l'indemnité sera payée pendant la durée exacte de la vie de la victime et elle s'adaptera de façon précise au taux d'inflation. Une bonne part de l'incertitude des calculs et de ses conséquences pécuniaires semble ainsi écartée, dans le cas d'incapacités permanentes graves.

2) Quels en sont les limites?

Une première limite est le risque d'insolvabilité, à long terme, du débiteur, qui impose de prévoir des garanties et des sûretés pour ces paiements échelonnés dans le temps. Un deuxième écueil à éviter sera, sans doute, de veiller à ce que cette forme d'indemnisation ne soit pas considérée comme du revenu imposable. Une troisième limite de ce mécanisme est que le dossier n'est jamais clos entre le responsable et la victime.

c) Restructuration des indemnités actuelles?

Cette restructuration peut être envisagée à plusieurs égards :

1. Indemnisation séparée du déficit anatomo-physiologique pur et de son impact sur la perte de revenu de la victime? Ce procédé permet en effet de ne tenir compte, pour les pertes de revenu, que des incapacités permanentes ayant un impact réel sur le travail qu'effectuait la victime avant l'accident. Quant aux autres séquelles permanentes elles seront quand même indemnisées, mais sur une base forfaitaire non reliée à la perte de gains.
2. Meilleure évaluation de la capacité résiduelle de gains? Ce mécanisme consiste à évaluer si, en dépit de l'incapacité de la victime d'exercer son emploi antérieur, elle n'est pas capable d'en exercer un autre. Si tel est le cas, l'on évaluera le revenu possible de cet emploi potentiel et l'on diminuera d'autant sa perte de capacité de revenu, par rapport à son emploi au moment de l'accident. À la limite, si ce nouvel emploi est aussi rémunérateur que l'ancien, la perte de capacité de revenu sera considérée comme nulle. Une telle évaluation peut naturellement être faite de façon plus précise dans le contexte du système de paiement des indemnités sous forme de rente, car les paiements périodiques peuvent être révisés en fonction de l'état de la victime, c'est-à-dire selon l'amélioration ou la détérioration de sa capacité résiduelle de gains.
3. Dans cette perspective, il faut privilégier la réadaptation des victimes, de manière à réduire le montant des indemnités pour perte de revenu.
4. Adoption de normes plus précises pour l'évaluation du préjudice non économique afin d'éviter des écarts trop grands? Cela pourrait se réaliser en les coordonnant avec les régimes spéciaux d'indemnisation. Cela impliquerait des ajustements réciproques en fonction de la capacité de payer de la société.

5. Établissement de critères d'évaluation des dommages punitifs afin d'éviter tout risque d'excès?
6. Réfléchir sérieusement sur les moyens de réduire les coûts des soins à domicile pour les handicapés lourds et moins lourds, en tenant compte de la capacité de payer de la société.

Ces mesures non exhaustives permettraient sans doute de mieux fixer les règles de l'évaluation du préjudice corporel et, par voie de conséquence, elles permettraient aux assureurs d'établir leurs prévisions avec plus de sûreté.

7. Réfléchir aux moyens pour éviter les faillites des responsables, surtout lorsqu'ils n'ont pu s'assurer suffisamment et qu'ils sont de bonne foi.

Par ailleurs l'amélioration du système de droit commun ne suppose-t-elle pas également l'accélération du processus d'indemnisation?

d) Accélération du processus d'indemnisation?

Ne peut-on pas envisager, comme en France, la création de procédures d'offres raisonnables obligatoires, de la part des assureurs, aux victimes d'accidents? M. Henri Margeat nous entretiendra de cette nouvelle expérience française en matière d'assurance automobile.

Ne peut-on pas également favoriser dans ce domaine l'accélération des procédures par conciliation ou arbitrage? La question de l'évaluation du préjudice corporel ne pourrait-elle pas être confiée à un organisme neutre d'évaluation relevant, par exemple, de la Corporation professionnelle des médecins? Il s'agirait en quelque sorte de répéter, en l'adaptant, l'expérience des Centres d'estimation mis en place par le Groupement des assureurs automobiles du Québec. La solution rapide des litiges permettrait bien sûr à la victime d'être plus rapidement indemnisée. Mais elle permettrait aussi de payer plus vite sa réadaptation, ce qui aurait pour conséquence une réinsertion meilleure et plus rapide au travail. Par voie de conséquence, cela pourrait réduire l'indemnité pour perte de revenu. Enfin, le paiement rapide de l'indemnité diminuerait l'indemnité additionnelle de l'article 1056c du *Code civil*, qui est souvent importante (ex. : 3000000 × 10 % × 3 ans = 900000 $).

COMMENTAIRES

9. Q. : M. le juge Jules Blanchet, Cour supérieure de Montréal.

En fait vous aurez la réaction d'un juge. Je sais que tous les jugements que nous rendons sont exécutoires. Je sais aussi qu'ils ne sont pas tous exécutables. Dans les causes de responsabilité, nous devons appliquer la loi et une pratique est suivie; nous avons dans notre for intérieur une réaction qui tient compte aussi de l'équité.

Nous voudrions avoir dans l'avenir un plus large champ d'action. Il n'y a pas seulement la fameuse *Charte canadienne des droits et libertés* qui puisse permettre à des gens de soumettre des cas devant nous afin d'obtenir plus d'équité face à leur situation. Si nous avions un éventail de choix à notre disposition qui nous permettrait de rendre des jugements qui soient exécutables plus facilement, surtout dans le domaine de la responsabilité, nous serions bien heureux. En effet, la somme globale des indemnités à payer apparaît, dans plusieurs cas, tellement élevée qu'il peut en résulter deux victimes : celle qui prend son recours et celle qui doit payer.

10. Q. : Me René Trépanier de l'Étude Pagé, Duchesne, Desmarais, Picard, à Montréal.

Souvent nous sommes en présence de gens qui n'ont pas de patrimoine suffisant pour payer l'indemnité à laquelle ils ont été condamnés. Dans le cas où justement l'on voit le responsable d'un acte délictuel ou quasi délictuel faire faillite, certains considèrent que cela crée une autre victime, « la victime économique ». C'est une opinion; et si la société décide d'éviter de faire des « victimes économiques », je pense que du même coup elle doit aller au bout de son raisonnement et dire : il y a eu une victime déjà, nous ne voulons pas en faire une deuxième, il faut au moins trouver un moyen d'indemniser la première victime du montant auquel elle a droit. Et je pense que la société doit alors prendre le relais pour indemniser la première victime à la place du responsable à qui elle veut éviter la faillite. Pour éviter une « victime économique », on ne doit pas pénaliser encore davantage la première victime. La solution actuelle des tribunaux de ne libérer qu'à 50 % le responsable d'un acte délictuel ou quasi délictuel lors d'une demande de libération d'une faillite me semble la position à maintenir.

11. Q. : Michel Morin, professeur à la Faculté de droit de l'Université d'Ottawa.

J'ai été frappé par certains des problèmes inhérents à l'indemnisation accordée en vertu du droit commun. On a beaucoup parlé des frais d'administration, du problème des impôts futurs, ainsi que des aléas de la vie. On a aussi évoqué longuement les difficultés que posent le régime public et la difficulté qu'il y a à tracer une frontière entre les cas qui seront couverts par celui-ci et ceux qui ne le seront pas. Je m'interroge cependant sur la possibilité, évoquée par monsieur Perret, de pratiquer des paiements échelonnés, ainsi que sur la possibilité de réviser les montants des paiements lorsqu'il y a aggravation du préjudice. Ne s'agirait-il pas de mesures modestes qui allègeraient un peu le fardeau imposé aux personnes qui doivent assumer le coût des indemnités? Cela ne règlerait sans doute pas le problème des personnes qui sont acculées à la faillite, quoique cela pourrait en réduire le nombre. Quant aux assureurs, cette mesure pourrait peut-être diminuer les problèmes auxquels ils ont eu à faire face récemment.

QUESTION IV :

Y a-t-il lieu de contrôler l'inflation?

La question peut paraître naïve. Pourtant, par l'évidence de la réponse qu'elle suscite, elle a le mérite de rappeler que l'inflation est la cause principale de la crise actuelle de l'assurance-responsabilité civile et des difficultés d'évaluation du préjudice corporel. Elle souligne, en outre, que la solution à ces problèmes ne relève pas uniquement de la réforme du *Code civil* ou des lois, mais aussi, dans une très large mesure, de la direction de notre économie.

C'est sur cette dernière considération que nous devons, faute de temps, lever la séance.

LES EXPÉRIENCES ONTARIENNE ET ÉTRANGÈRES EN VUE DE L'AMÉLIORATION DU PAIEMENT DES INDEMNITÉS EN DROIT COMMUN

L'expérience française en matière de réparation

HENRI MARGEAT
Directeur de l'Union des assureurs parisiens
et Président de la Commission de coordination
des sinistres corporels en France

SOMMAIRE

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LIABILITY OF THE CROWN

Second Edition

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alleging any direct liability on the part of the Crown arising out of its administration of prisons.[122] The same conclusion would undoubtedly follow in all the Canadian jurisdictions that have followed the United Kingdom model. In those jurisdictions, as in the United Kingdom, an injured prisoner can successfully sue the Crown only by establishing vicarious liability, which means that the prisoner must be able to prove that the injury was caused by a prison officer committing a tort in the course of employment.

Reform of direct liability

It would obviously be desirable to eliminate the residual Crown immunities from tort that inhere in the Crown proceedings statutes that follow the United Kingdom model. This was recommended by the Law Reform Commission of British Columbia in 1972,[123] and it has been implemented in British Columbia's Crown proceedings statute.[124] A similar recommendation has been made by a law reform committee in New Zealand,[125] although this recommendation has not yet been implemented.

Lack of legal authority

General rule

No act (or omission) by the Crown or its servants (or by anyone else for that matter) gives rise to liability in tort unless (1) it is committed without legal authority, and (2) it is a tort. The first of these ingredients is discussed in this section, the second in the next section.

A governmental act may be authorized either by statute or by the prerogative; if so, then it is not tortious.[126] This does not always mean that a person who is injured by the act will go uncompensated, for the particular statute or prerogative may provide for the payment of compensation; but in such a case the claim for compensation is founded on the statute or the prerogative, as the case may be, and not on the law of torts.

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122 *Hall* v. *Whatmore* [1961] V.R. 225 (F.C.); *Morgan* v. *A.-G.* [1965] N.Z.L.R. 134 (S.C.); *Richards* v. *Vic.* [1969] V.R. 136 (F.C.).

123 Law Reform Commission of B.C., *Report on Legal Position of the Crown* (1972), 53, 61.

124 Crown Proceedings Act, R.S.B.C. 1979, c. 86, s. 2(c), providing that "the Crown is subject to all those liabilities to which it would be liable if it were a person". This provision is wisely not even limited to tort.

125 Public and Administrative Law Reform Committee (N.Z.), *Damages in Administrative Law* (fourteenth report, 1980), 40-41.

126 The defence of legal authority is explicit in the Canadian federal Crown Liability Act, s. 3(6), but not in the other Crown proceedings statutes.

Compensation under statute

If a statute authorizes an act that causes injury to a private person, and is silent respecting compensation for the injury, the general rule is that no compensation is payable in respect of the injury.[127] Since the act cannot be a tort because of the existence of statutory authority, common law damages are not payable either. The injured person is left without redress. Only an express statutory right to compensation would afford redress.

An exception to the general rule of no compensation is the case where a statute takes private property. In that case, if the statute is silent respecting compensation, the statute will be interpreted as implicitly requiring compensation to be paid.[128] The Supreme Court of Canada in *Manitoba Fisheries* v. *The Queen* (1978)[129] held that the establishment of a Crown monopoly of fish exporting amounted to a taking of the property of a private fish exporter who had been put out of business by the statute that established the monopoly. This meant that the exporter was entitled to compensation, despite the silence of the statute. With such a liberal definition of taking,[130] it may be anticipated that other injuries to property will be held to attract compensation.

Compensation under prerogative

It is now rare that the exercise of a prerogative power[131] could affect private rights, and therefore the question of compensation rarely arises. The *Burmah Oil* case[132] is the rare one in which the question did arise. In that case, the courts had to decide whether compensation was payable by the Crown for the destruction of oil installations in Burma during the second world war. The demolitions were carried out in 1942 on the instructions of the government of the United Kingdom in order to deny the resources to the advancing Japanese army. The oil companies whose property was destroyed were unable to bring their claim in tort because the Crown in right

127 See, e.g., *Allen* v. *Gulf Oil Refining* [1981] A.C. 1001 (H.L.) (establishment of oil refinery under statutory authority).

128 In the U.S.A. and the Australian federal jurisdiction, there are constitutional requirements of compensation for the taking of property. These do not exist in Canada, the U.K. or N.Z. See generally Hogg, *Constitutional Law of Canada* (2nd ed., 1985), 577-579.

129 [1979] 1 S.C.R. 101.

130 See also *The Queen B.C.* v. *Tener* [1985] 1 S.C.R. 533, holding that park legislation restricting plaintiffs' ability to exploit mineral rights was a taking that had to be compensated under provincial expropriation law.

131 Those common law powers that are unique to the Crown are prerogative powers. Most of these powers have now been displaced by statute, under the doctrine of *A.-G.* v. *De Keyser's Royal Hotel* [1920] A.C. 508 (H.L.).

132 *Burmah Oil Co.* v. *Lord Advocate* [1965] A.C. 75 (H.L.).

of the United Kingdom had not accepted liability in tort in 1942.[133] But even if the Crown had accepted liability by then, an action in tort would have failed because the courts held that the demolitions, although not authorized by any statute, were authorized by a prerogative power. The House of Lords also held, however, that the power was accompanied by an obligation to pay compensation for the property destroyed, and so the oil companies were held to be entitled to compensation. (This hard-won verdict was later denied them by retrospective legislation.)[134]

Significance of legal authority

Legal authority for a governmental act must be derived either from a statute or from the prerogative.[135] This principle, which is basic to constitutional and administrative law, is usually traced back to *Entick* v. *Carrington* (1765),[136] in which it was held that neither a search warrant signed by the Secretary of State nor a plea of "State necessity" could justify Crown servants in entering the premises of the plaintiff and seizing his papers. The plaintiff's action in trespass against the Crown servants was successful, for they were unable to establish the only defence which would suffice, namely, that "some positive law" had "empowered or excused" them.

Whenever a question of legal authority arises in an action, whether in tort or not, it is the duty of the courts to determine the existence and extent of the power relied upon. It is obvious that only Parliament can confer a statutory power, and it is equally well settled that "the King hath no prerogative but that which the law of the land allows him".[137] The very existence of a prerogative power is sometimes a matter of doubt,[138] and sometimes there is doubt as to whether a power that once existed has been displaced by statute.[139] Questions concerning the prerogative still arise for judicial determination from time to time, but the overwhelming bulk of governmental functions are now performed in pursuance, or purported pursuance, of statutory powers. The question whether official action is legally authorized or not is therefore nearly always a question of statutory interpretation: does the power conferred by the statute authorize what has been done?[140]

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133 As explained early in this chapter, the Crown in right of the U.K. became liable in tort in 1947.

134 War Damage Act 1965 (U.K.).

135 Legal authority could also be derived from a common law power that is not unique to the Crown, for example, the power to dispose of Crown property. Such a power is usually not classified as a prerogative.

136 (1765) 19 St. Tr. 1030 (K.B.).

137 *Case of Proclamations* (1610), 12 Co. Rep. 74; 77 E.R. 1352 (K.B.).

138 E.g., *Burmah Oil Co.* v. *Lord Advocate* [1965] A.C. 75 (H.L.).

139 E.g., *A.-G.* v. *De Keyser's Royal Hotel* [1920] A.C. 508 (H.L.).

140 Occasionally, lack of legal authority is alleged on the ground that, while the acts performed

Interpretation of statutory authority

In determining the scope of a statutory power, the governing principle of statutory interpretation is the presumption that a statutory power does not authorize acts that would be tortious at common law.

The leading case is *Metropolitan Asylum District* v. *Hill* (1881),[141] an action for nuisance brought against a hospital board. The board had established a smallpox hospital at Hampstead which constituted a common law nuisance to adjoining occupiers. The board defended the action on the basis that it was simply carrying out the orders of the Local Government Board, which had statutory power to establish hospitals in metropolitan areas. The House of Lords rejected this defence and granted the injunction sought. The Local Government Board's generally-worded discretion could be exercised without committing a nuisance; therefore, their lordships held, "the fair inference is that the Legislature intended that discretion be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose".[142] In the absence of express authority to commit the tortious act, authority would be implied only if the tortious act was "the inevitable result" of the exercise of the statutory power.[143] The hospital board could not show that the creation of a nuisance was the inevitable result of carrying out their statutory mandate.

The rule in *Metropolitan Asylum District* v. *Hill* has been applied in several cases in which sewerage systems have polluted rivers, causing a nuisance to riparian owners. In each case, the construction and operation of the sewerage system was authorized by statute, but the statutory power did not in express terms authorize the commission of a nuisance; nor was the commission of the nuisance an inevitable result of the exercise of the statutory power. It followed that the municipal body in charge of the sewerage system was liable for the nuisance caused by the system. That was the result in every one of the reported cases.[144]

Where the commission of a tort is "the inevitable result" of the exercise of a statutory power, then the statute must be interpreted as impliedly

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were within the terms of the statutory power, the statute is invalid as unconstitutional: see Pannam, "Tortious Liability for Acts performed under an Unconstitutional Statute" (1966) 5 Melb. U. L. Rev. 113; Hogg, *Constitutional Law of Canada* (2nd ed., 1985), 346-349.

141 (1881) 6 App. Cas. 193 (H.L.).

142 *Id.*, 213.

143 *Ibid.*

144 *Groat v City of Edmonton* [1928] S.C.R. 522; *Pride of Derby* v. *British Celanese* [1953] 1 Ch. 149 (C.A.); *Stephens* v. *Richmond Hill* [1956] O.R. 88 (C.A.); *Portage La Prairie* v. *B.C. Pea Growers* [1966] S.C.R. 150; *Lawrysyn* v. *Town of Kipling* (1965) 55 W.W.R. 108 (Sask. C.A.). See also *Tate & Lyle Industries* v. *Greater London Council* [1983] 2 A.C. 509 (H.L.) (construction of ferry terminal causing siltation of navigation channel held to be a public nuisance, despite statutory power).

in good faith in the intended execution of their duties. If the clause does not expressly preserve the vicarious liability of the Crown itself, the clause will immunize the Crown as well: the general rule is that the liability of the servant is a precondition of the vicarious liability of the master. But such clauses can be drafted so as to preserve the vicarious liability of the Crown, and this practice, which is common, is the only defensible one, because it leaves the injured victim with recourse against the Crown.[31]

Judicial immunity

Common law protection

A judge is immune from liability in tort for any act done within his or her jurisdiction.[32] An error of law or fact or both will not expose the judge to liability. This rule is said to be necessary to ensure that a judge is "free in thought and independent in judgment",[33] which would be impossible if the judge were liable to be "harassed by vexatious actions".[34] It is true that a judge would be placed in an intolerably vulnerable position, and there would be no end to litigation, if a disappointed litigant could turn around and bring fresh proceedings against the judge. These explanations treat the immunity as a doctrine specific to judges. But in truth judicial immunity is merely an example of the immunity that is enjoyed by all public officials who act within the scope of their statutory (or prerogative) authority. Judges, like other public officials, lose their immunity if they act outside the power legally conferred on them.[35] What is distinctive about the position of judges is that their authority or power, usually described as "jurisdiction", has always been treated as very extensive.

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31 In some jurisdictions, Crown servants are also protected by special limitation periods and notice requirements: see ch. 2, Remedies, under the heading "Limitation of actions", above.

32 On judicial immunity, see Rubinstein, *Jurisdiction and Illegality* (1965), 127-149; Brazier, "Judicial Immunity and the Independence of the Judiciary" [1976] Public Law 397; Sadler, "Judicial and Quasi-judicial immunities: A Remedy Denied" (1982) 13 U. Melb. L. Rev. 508; Aronson and Whitmore, *Public Torts and Contracts* (1982), 138-147; Glenn, "La responsabilité des juges" (1983) 28 McGill L.J. 228. As to whether judicial immunity persists in the face of a constitutional violation, see *Charters* v. *Harper* (1986) 31 D.L.R. (4th) 468 (N.B.Q.B.); Pilkington, "Damages as a Remedy for Infringement of the Can. Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517, 558-561.

33 *Garnett* v. *Ferrand* (1827) 6 B. & C. 611, 625; 108 E.R. 576, 581 (K.B.).

34 *Fray* v. *Blackburn* (1863) 3 B. & S. 576, 578; 122 E.R. 217, 217 (Q.B.).

35 The clearest case is the judge who commits a tort off the bench, for example, by driving a car negligently. In that case, his judicial office is irrelevant. But, even on the bench, a judge who acts outside the powers conferred upon him ceases to be a judge.

Superior court judges

It is sometimes said that a judge of a "superior court" is absolutely immune from personal liability for anything done as a judge.[36] The explanation usually given for this "absolute immunity" is that a superior court, because it is a court of general jurisdiction, has jurisdiction to determine its own jurisdiction, and can therefore never act outside its jurisdiction.[37] This explanation is far-fetched. There are limits to the jurisdiction of even a superior court. If a judge of a superior court, believing a jury's verdict of acquittal to be perverse, were to order the imprisonment of a person who had just been acquitted, it would be plain that the judge had acted without jurisdiction. In such a case, the better view, recently articulated by the House of Lords, is that the judge would be liable in damages for the tort of false imprisonment.[38] The fact is, however, that there is no reported example of a superior-court judge having been held liable in damages while acting as a judge.[39] The jurisdiction of a superior court is regarded as so broad that only the most egregiously arbitrary act could expose the judge to liability.

Inferior court judges

An "inferior court" is a court of limited jurisdiction, and any decision made by an inferior court regarding the limits of its own jurisdiction is subject to review by a superior court. It cannot be doubted, therefore, that a judge of an inferior court can act without jurisdiction, and "where there is no jurisdiction there is no judge".[40]

The absence of jurisdiction will not by itself give rise to any liability. All it will do is to deprive the judge of the defence of judicial immunity. Only if the judge's order would be a trespass to person or property, or some other tort, will the judge be liable. The *Marshalsea Case* (1612)[41] is one of the few cases where the two elements of lack of jurisdiction and a tortious act were present. The Court of Marshalsea had jurisdiction only over members of the King's household. When the Court ordered the committal to prison

36 See, e.g., *Sirros* v. *Moore* [1975] 1 Q.B. 118, 134-135, 146-147 (C.A.); *Nakhla* v. *McCarthy* [1978] 1 N.Z.L.R. 291, 303-304 (C.A.); *Morier* v. *Rivard* [1985] 2 S.C.R. 716, 739.

37 See, e.g., *Sirros* v. *Moore* [1975] 1 Q.B. 118, 138 (C.A.); *Nakhla* v. *McCarthy* [1978] 1 N.Z.L.R. 291, 304 (C.A.).

38 *In re McC.* [1985] 1 A.C. 528, 540 (H.L.), quoted (with some doubt) by Chouinard J. in *Morier* v. *Rivard* [1985] 2 S.C.R. 716, 741.

39 Sadler, note 32, above, 310.

40 Rubinstein, note 32, above, 128. Note, however, that, in an action for damages the concept of jurisdiction may be broader and less refined than it is for the purpose of judicial review: *In re McC.* [1985] 1 A.C. 528, 542-544 (H.L.); *Morier* v. *Rivard* [1985] 2 S.C.R. 716, 741-743.

41 (1612) 10 Co. Rep. 68b; 77 E.R. 1027 (K.B.).

of a person who was not a member of the King's household, the judge was held liable in damages for false imprisonment. *Houlden* v. *Smith* (1850)[42] is a similar case. A county court judge whose jurisdiction was limited to the county of Lincolnshire tried a resident of Cambridge, which was outside the county, and sentenced him to imprisonment. The judge was held liable in damages for false imprisonment.

Although actions against judges are few and far between, it is nevertheless true that a judge could be held liable for an act that was outside his jurisdiction, even though the judge honestly believed that the act was within his jurisdiction. The possibility that a judge could be exposed to liability for an innocent mistake so troubled Lord Denning M.R. that he attempted to establish a new rule, under which a judge who acted outside his jurisdiction would shed his immunity only if he knew that his act was outside his jurisdiction. In *Sirros* v. *Moore* (1974),[43] a judge of an inferior court ordered that an alien be detained in custody pending the completion of proceedings for his deportation. The judge had no power to make this order, and the detained person was released on habeas corpus two days later. The judge was not actuated by malice or any other improper purpose: he simply made a mistake as to the extent of his power. The detained person sued the judge for false imprisonment. On the traditional view of the law, the plaintiff was entitled to succeed: he had been injured by the tortious act of an inferior court judge acting without jurisdiction. But Lord Denning M.R. for the majority of the Court of Appeal[44] held that the traditional rule was no longer appropriate "in this new age". In his view, a judge of any level should be protected from liability for an act outside jurisdiction, as long as the judge acted in the honest belief that the act was within jurisdiction. This broader immunity was needed so that judges "may be free in thought and independent in judgment". No judge would have "to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?'".[45]

In common with other commentators,[46] it seems to me that Lord Denning's new rule is premised on an extravagant assessment of the fragility of judicial independence and fails to accord sufficient weight to the interests of the person injured by an illegal judicial act. Indeed the very facts of *Sirros* v. *Moore* belie the need for enhanced protection. The judge in that case, while not actuated by malice, had acted in a peremptory, even arbitrary, fashion, without giving any deliberate consideration to the question whether he had

42 (1850) 14 Q.B. 841; 117 E.R. 323.

43 [1975] 1 Q.B. 118 (C.A.).

44 Ormrod L.J. in a separate opinion agreed with Lord Denning. Buckley L.J. rejected the new honest belief defence; he concurred in the result, however, because in his view the judge's error was not jurisdictional.

45 [1975] 1 Q.B. 118, 136.

46 Brazier, note 32, above; Sadler, note 32, above.

the power to imprison the unfortunate plaintiff (who was not represented by counsel). In the result, the plaintiff was illegally imprisoned for two days. It seems obvious that the plaintiff ought not to have been denied the damages to which he would have been entitled before any other court at any time before 1974.

The expanded immunity announced by Lord Denning M.R. in *Sirros* v. *Moore* has been rejected by the House of Lords. In *In re McC.* (1984),[47] the House of Lords allowed an action for damages for false imprisonment to proceed against a magistrate. The magistrate lacked the power to impose a sentence of detention on a young offender who was not represented by counsel, unless the defendant had first been advised of his right to apply for legal aid. In this case, the magistrate had imposed a sentence of detention on a young offender who was not represented by counsel without first advising the defendant of his right to apply for legal aid. The House of Lords held that the sentence was given without jurisdiction, and that the magistrate could be sued for damages for false imprisonment.[48] Because the magistrate's error was an innocent one, he would have escaped liability under Lord Denning's expanded rule of immunity. But their lordships were unanimous in rejecting the view that a judge was liable only if he knew that his act was outside his jurisdiction. To introduce a requirement of knowledge would be a "fundamental" change in the law that would require legislation.[49] On this point, the decision in *Sirros* v. *Moore* was overruled.[50]

It seems safe to conclude that a judge of an inferior court is exposed to liability in tort when acting without jurisdiction, and it is immaterial whether or not the judge honestly believed that he had jurisdiction.[51]

47 1985] 1 A.C. 528 (H.L.).

48 There was an express immunity clause, which provided that no action would lie against a magistrate "unless the court before which the action is brought is satisfied that he acted without jurisdiction or in excess of jurisdiction". The decision could be treated as turning on this clause rather than on the common law of judicial immunity, but their lordships assumed that this clause made no change in the common law and treated the case as if it were a common law case.

49 [1985] 1 A.C. 528, 550, 559.

50 *Id.*, 551, 558.

51 In *Nakhla* v. *McCarthy* [1978] 1 N.Z.L.R. 291 (C.A.), the N.Z. Court of Appeal referred to *Sirros* v. *Moore*, but made no comment on the new rule there announced. The N.Z. case was an action against a superior court judge who, the Court of Appeal held, had acted within his jurisdiction. In *Unterreiner* v. *Wilson* (1982) 40 O.R. (2d) 197 (H.C.), Gray J. accepted Lord Denning's view of the law, although he found that the judges who were sued in that case had acted within jurisdiction; his decision was affirmed on appeal on the ground that no tort had been committed, and the Court of Appeal said nothing about judicial immunity: (1983) 41 O.R. (2d) 472 (C.A.). These decisions were in any event rendered before the decision in *In re McC.* Curiously, in *Morier* v. *Rivard* [1985] 2 S.C.R. 716, Chouinard J.

Statutory protection

Judicial immunity may be expanded or contracted by statute, and may be conferred by statute on bodies other than courts. In *Morier* v. *Rivard* (1985),[52] the question arose whether the Quebec Police Commission was liable in damages for statements made by the Commission in a report of a public inquiry censuring the conduct of a person who had been given no opportunity to be heard by the Commission at its inquiry. The Commission had failed to fulfil a statutory obligation to provide an opportunity to be heard to any person at risk of censure, and, as a result, the Commission was probably acting outside its jurisdiction in reporting as it had.[53] At common law, therefore, the Commission would be liable to suit if its report were otherwise actionable.[54] However, the members of the Commission were, by statute, afforded the same immunity as superior-court judges "for any act done or omitted in the execution of their duty". The Supreme Court of Canada, in a majority opinion written by Chouinard J., held that "duty" was a broader concept than jurisdiction, and that the phrase "in the execution of their duty" was apt to include acts that were outside jurisdiction. Since the Police Commission was carrying out its duty when it held an inquiry and submitted a report, it was immune from liability even for acts outside its jurisdiction. La Forest J. (with Wilson J.) dissented on the basis that the Commission's failure to comply with its statutory obligation to afford a hearing took the Commissioners outside the protection of the phrase "in the execution of their duty", just as it took them outside their jurisdiction.

The majority opinion in *Morier* v. *Rivard* gives a surprisingly wide scope to an immunity clause.[55] Immunity clauses have been enacted in most

for the majority of the Supreme Court of Canada at p.739 quoted with approval Lord Denning M.R.'s statement of the rule in *Sirros* v. *Moore*. This statement was obiter, because Chouinard J. held that the defendant commissioners were protected by a statutory immunity clause that applied to "any act done or omitted in the execution of their duty". But see *Royer* v. *Mignault* (1988) 50 D.L.R. (4th) 345 (Que. C.A.), requiring knowledge.

52 [1985] 2 S.C.R. 716.

53 Chouinard J. for the majority did not specifically so decide, but said (at p.745) that it was "possible" that the Commission had exceeded its jurisdiction. La Forest J. for the minority said (at p.750) that the Commission had acted outside its jurisdiction.

54 The facts do not seem to disclose a tort, unless the statements made were defamatory. However, the plaintiff sued for damages under a statutory cause of action created by Quebec's Charter of Human Rights and Freedoms.

55 Contrast *Roncarelli* v. *Duplessis* [1959] S.C.R. 121, holding that Premier Duplessis was not protected by an immunity clause that applied to "a public officer or other person fulfilling any public function or duty . . . [for] any act done by him in the exercise of his functions": by acting outside his authority, Premier Duplessis was not acting "in the exercise of his functions". Rubinstein, note 24, above, 144, points out that this interpretation renders the immunity clause nugatory, because there could be no liability in any event if the defendant

jurisdictions to protect the judges of inferior courts from actions for damages. Some of these clauses expressly deny protection for acts committed without jurisdiction, and therefore do not change the common law.[56] Others define the scope of protection in terms of "the execution of [the judge's] duties",[57] a phrase which is sufficiently close to the language of the clause in *Morier* v. *Rivard* that it would receive a similar interpretation, protecting some acts committed without jurisdiction. In Ontario and Quebec, the judges of inferior courts are simply given the same immunity as a judge of a superior court, and there is no reference to either the jurisdiction of the judge or the exercise of the judge's duties:[58] the meaning of these clauses is not clear, but *Morier* v. *Rivard* suggests that even an act outside jurisdiction would be protected, provided that the act bore some reasonable relationship to the judge's judicial duties.

Prosecutorial immunity

In the United States, the immunity of judges from liability in tort has been extended to public prosecutors, on the theory that the rationale for judicial immunity also applies to public prosecutors. It is said that public prosecutors, like judges, could not be expected to carry out their duties with courage and independence if they were exposed to suit whenever they failed to secure a conviction.[59] Even when a prosecutor has acted out of malice, or for some reason unconnected with the public good, the immunity persists. No lesser figure than Judge Learned Hand has defended this absolute immunity on the basis that it is impossible to know whether an allegation of malice is well founded until the case has been tried, "and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable

were acting within his legal authority. Nevertheless, such an interpretation is not a surprising one in light of the courts' notoriously narrow interpretations of privative clauses.

56 The Justices Protection Act 1848 (U.K.), s. 1, provides that no action lies against a justice of the peace for an act "within his jurisdiction" unless there is proof of malice and lack of reasonable and probable cause. Section 2 makes clear that no such proof is necessary in an action for an act outside jurisdiction. Section 1 is phrased in a confusing way, since under the general law an act within jurisdiction is not actionable and proof of malice would ordinarily cause the act to be outside jurisdiction. The case-law is briefly discussed in Rubinstein, note 24, above, 140-141 and Aronson and Whitmore, note 24, above, 140-144. Despite its imperfections, this U.K. Act has provided the model for immunity clauses in many other jurisdictions, e.g., Public Authorities Protection Act, R.S.O. 1980, c. 406, ss. 2, 3.

57 E.g., Provincial Court Act, R.S.B.C. 1979, c. 341, s. 37. This provision (and others) was quoted by Chouinard J. in *Morier* v. *Rivard* [1985] 2 S.C.R. 716, 735.

58 Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 98; Magistrates' Privileges Act, R.S.Q. 1977, c. P-24, s. 1, as amended by S.Q. 1982, c. 32, s. 117.

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L'expérience ontarienne

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SOMMAIRE

I have been asked by Professor Perret to comment on two matters in Ontario that deal with the issues of compensation of personal injury victims. They are : (a) the history and causes for the passage of Section 129 of the *Courts of Justice Act*, and (b) some reflections by a plaintiffs' lawyer on The Slater Report.

I. SECTION 129 OF THE COURTS OF JUSTICE ACT OF ONTARIO

Because of, I believe, the constitutional right to trial by jury in the United States, and the general practice of the Court having the jury render a simple verdict in a personal injury action of a finding for the plaintiff of $ 100,000 or for the defendant, there is not the same necessity for the presentation of very carefully calculated computations to determine such issues as future loss of income earning capacity or the pecuniary loss suffered by a husband as the result of the death of a breadwinning wife.

Before 1977, the Ontario Courts deliberately shied away from such calculations and awarded damages much like a U.S. jury, on a rather speculative overall lump sum basis without any real attempt at careful breakdown of the various heads of damage — particularly future economic loss and future care costs.

After the trilogy in the Supreme Court of Canada, it became the obligation of every Court, jury or judge alone, to quantify with as much precision as possible these heads of damage.

A trade-off was engineered by the Supreme Court of Canada — a lid on general damages as a matter of social policy, but unlimited

damages to compensate for economic loss and future care costs. The emphasis promptly changed in the profession to develop all the actuarial, accounting and economic expertise to quantify this portion of the claims, with rather spectacular results, at least in terms of absolute figures. A significant increase in damage awards in total resulted.

Perhaps the high water mark was reached in the *McErlean*[1] case, where Fitzpatrick, J., on sound evidence, assessed the total damages of a then 21 year old boy at over $ 7,000,000.

Unfortunately, that judgment fell to be delivered coincidentally with the actual or perceived "crisis" in the insurance industry, worldwide and in Ontario. What is little known is that the bulk of that assessment was agreed by counsel.

One result of the appointment and study of the Slater Task Force was the set-up of a committee of the Ontario Branch of the Canadian Bar Association, which included strong representation from the practising bar, plaintiff and defence, insurance industry, executives, corporation risk manager, insurance adjusters, agents and brokers, and others who attempted a review of the system of compensation of personal injury victims, with a view to suggesting modifications to the system to correct perceived inequities in the system. The result was a shopping list of suggested changes.

Perhaps the most significant change suggested involved the *ridiculous situation that has arisen where the defendant is called upon to pay a form of gross up* of the award in effect to the federal government to offset the tax on the invested capital award which provides the stream of income necessary to defray future care costs, or in the case of the breadwinner fatal the same stream of income required to replace the loss of support suffered by widow and children.

The vehicle that in the last nine years has assisted to solve this problem has, of course, been the structured settlement. That method very simply provides the stream of income free of taxation and therefore free of the burden which the defendant must assume of the gross up. The defect of this vehicle, however, has been that it can only be accomplished by way of settlement, and either party can prevent a structured settlement. The Courts have been powerless to impose structured settlements because at least uncertainty as to whether the structuring so imposed will be honoured by the Department of National Revenue, as well as a concern that the imposition on either plaintiff or defendant is an unwarranted interference on the right to a one time lump sum award to cover all past and future losses.

1. *McErlean* c. *City of Brampton et al.*, 32 C.C.L.T. 199.

In cases of long term future care costs, and long term support loss and even future loss of income, our Courts have been required to provide a one and forever lump sum amount to reflect these losses.

Circumstances change. The $ 1 million required for future care of the severely brain damaged child is predicated upon his living the time required to use up the notional stream of income generated by the $ 1 million. Suppose he dies 10 years early, or worse — suppose he lives an *extra* ten years? There has been in Ontario no facility for either the plaintiff or the defendant insurer to return to the Court — the defendant to demand a refund of the balance of the moneys no longer required for the care of the plaintiff, or the plaintiff to demand more money because in the circumstances he hadn't been given enough.

As a result of the trilogy decisions then, the amounts of money involved were substantial and because the Courts could not revise their decisions in later years because of changed circumstances, there existed a real uncertainty as to whether in the long run one party or the other would suffer a real inequity.

The Bench and Bar Council Committee on Tort Compensation in Ontario chaired by Mr. Justice R.E. Holland, a few years ago, attempted to come to grips with all of these problems, and recommended a number of things, among them that the Court be permitted to order a defendant to pay all or part of an award for damages periodically on terms such as — in the event of the death of the victim requiring the care costs, the periodic payments would cease. As well, what was obviously needed in a utopian world would be the right of both parties to periodic review — the defendant to demonstrate that because of the plaintiff's improved circumstances or condition he no longer requires the care, or requires less of it, and the plaintiff to demonstrate he is entitled now to more, because of such things as unanticipated higher inflation or greater requirements for care than had been anticipated.

One would have to say that the plaintiff ought not to complain about such a proposal. But the defendants, insured or uninsured, certainly complained. In effect the defendant is buying under such a system, a long term 5 - 10 - 30 - 50 year open-ended contingent liability, and no defendant and no insurer in her right mind would ever agree — so ran the position of the insurers, and they could hardly be blamed.

The result of the report, however, was the passage of now S. 129 of the *Courts of Justice Act.*

> In a proceeding where damages are claimed,
> (a) for personal injuries; or
> (b) under Part V of the *Family Law Reform Act*, for loss resulting from the injury to or death of a person,
>
> the Court may, with the consent of all affected parties,

(c) order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just;
(d) order that the award for damage be subject to future review and revision in such circumstances and on such terms as the Court considers just.

It is, you will see, entirely dependent upon the consent of all the affected parties. I have heard of one or two cases where some such arrangement has been made, but none reported, and can think of the odd defendant like the federal or provincial government as a defendant who might be prepared to live with future review. Not your every day defendant, even business corporations would take on the risks of long term uncertain potential liability.

So the section hasn't meant much, and in respect of future review, isn't likely to.

However, the periodic payment aspect we think has a future. In respect of this, the Bar Association Committee has recommended that either the federal government should make provision for the non-taxability of income when directed to care costs, as a matter of deduction from taxable income, or alternatively, and probably preferably the granting of power to the Court to impose structured settlements on defendants but not on plaintiffs. The plaintiffs would still have the right to lump sum judgments if they refuse to structure, but no award would be made for gross up.

So that there be no doubt about the significance of the gross up — in *McErlean* it amounted to more than $ 3,000,000.

II. The Slater Report

The hallmarks of the judicial system involved in the compensation of personal injury victims in Ontario have been historically :

(i) the right to retain an advocate to prepare and present the case for damages of the victim;
(ii) access to the Courts when settlement cannot be agreed upon;
(iii) the right to damages tailored specifically and carefully to *that* victim, and *all* the damages including those for pain and suffering;
(iv) the right to such levels of compensation dependent upon the innocence of the victim.

The profession, plaintiff and defence, have fought vigorously to preserve these hallmarks. The self-interest of the profession in the preservation of the system is a given, and therefore the plea for this justice in the system is always suspect, coming from the mouths of the lawyers.

The issues that must be considered against the preservation of that system are, I think, obvious :

(i) Is the cost to the taxpayers of the judicial system including the fees of the lawyers too much to pay? Can a bureaucracy deliver the service required to process the claims more cheaply and sufficiently effectively to warrant the destruction of the hallmarks?
(ii) Is it time to simplify the system to compensate victims on a meat chart method — that is, remove the hallmark of the tailoring of losses to the particular victim?
(iii) Are the amounts of money in total being paid to victims and the cost of the system reaching the point where it is beyond the reasonable power of motorists, manufacturers, doctors to pay?
(iv) Should all victims, regardless of their own fault or innocence, recover their damages equally?

The Slater Task Force faced these issues most unfortunately in a crisis atmosphere with a deadline that prevented the kind of in-depth study that the problems, even those peculiar to Ontario, needed.

The most controversial, in fact the *only* really controversial recommendation, was for a no tort or threshold type plan short term in respect of motor vehicle accident victims, and a long term no tort (or really no access to the Courts) system of compensation for all personal injury victims, regardless of fault.

Make no mistake, there isn't enough money in the country to compensate *fully* for their losses, *all* victims regardless of fault.

To bring you up to date, the Ontario Government, we understand, referred these weighty issues to Mr. Justice Coulter Osborne for the extensive study that I am confident Dr. Slater and his staff would have loved to have been able to undertake.

I chaired the special committee of the Law Society on this problem, and it was our recommendation to the government that further extensive study (not done by Dr. Slater) should be undertaken. Finally, we felt strongly that a thorough study would involve careful assessment of the no fault system in Quebec, The Workers' Compensation system in Ontario, European methods and the New Zealand experience, among other matters.

Conclusion

Finally, let me say to you that each jurisdiction, whether it is a country, a state, or a province, has its own law, history, tradition, economic situation, competence of bench, and bar, and we are all

different. In the same way that the levels of damages ordinary to California or Manitoba are different than they are in Ontario, so the system, if there are changes to be made, should be carefully tailored to the Ontario scene.

The Future of Personal Injury Compensation in the USA : Current Trends in the Medical Malpractice Field

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INTRODUCTION

During the past year numerous studies and proposals at both the federal and state levels have addressed new ways of dealing with civil liability for personal injuries [1]. The impetus has arisen from concern

1. The leading study is a two year effort requested by Sen. John Heinz and Rep. John Porter in 1985 to be undertaken by the U.S. General Accounting Office (GAO). The GAO has so far issued three of a projected series of five reports : *Medical Malpractice : No Agreement of the Problems or Solutions* (GAO/HRD-86-50, Feb. 24, 1986); *Medical Malpractice : Insurance Costs Increased but Varied Among Physicians and Hospitals* (GAO/HRD-86-112, Sep. 15, 1986); *Medical Malpractice : Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms* (GAO/HRD-

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FEDERAL COMPENSATION SCHEMES

by Martin S. Kalson*

I. INTRODUCTION

This article is about federal compensation schemes. Its purpose is to examine them within the context of the replacement of the common law action in tort by other methods of compensation. With the continuing viability of tort being called increasingly into question as a result of societal pressures to concentrate on compensating the victim rather than punishing the perpetrator of a civil wrong, an assessment of the impact of tort reform within the federal jurisdiction is timely.

In her book *Compensation and Government Torts*, Carol Harlow has observed that statutory compensation schemes may be overtaking the legal process in the United Kingdom as the normal machinery for distributing compensation:

> "Far more money passes from the state to its citizens through compensation schemes than through the tort system. Compensation is available for losses ranging from industrial injuries and injury attributable to violent crime; property damage occasioned by riots; to disturbance or annoyance arising through the construction of public works. The state has accepted responsibility for many "losses" which would never be allocated to it by the law of torts."[1]

His Honour Mr. Justice Allen Linden, Chairman of the Law Reform Commission of Canada, commented in *Studies in Canadian Tort Law* about:

> "... the numerous developments in Canadian social welfare that furnish compensation to injured people on a no-fault basis... These legislative compensation schemes render superfluous any consideration of tort theory in the areas where they operate. They were enacted fundamentally to replace or to supplement the segments of the tort compensation system which provided inadequate reparation, such as workmen's compensation, victims of crime, no-fault auto insurance and the like."[2]

At the far end of the spectrum lies the New Zealand Compensation Act which in 1972 abolished the right to sue in tort for the majority of the population in that country who are covered by the legislation. In return, a social insurance solution to the problem of compensation for personal injury or death was implemented, in the form of income replacement. It is largely irrelevant to this universal compensation scheme where, when, why or how an accident occurred because the amount of compensation awarded depends primarily on the needs of the injured person.

While the New Zealand experiment has been watched closely in other jurisdictions including our own,[3] in this country it would appear that we are moving towards a Canadian compromise between tort and no-fault systems, with an appropriate role for first party and liability insurance, both public and private. Inasmuch as the *Crown Liability Act*[4] and parallel legislation for the provinces has exposed both federal and provincial governments to civil actions from which they were formerly immune, thereby making the government itself liable much like any private person for its torts, a study of federal compensation schemes may be a useful indicator of the extent to which our overall compensation system is already a mixture incorporating traditional approaches and alternative mechanisms.

Preliminary research indicates that there has not been a conscious effort to develop a network of federal compensation schemes. What does exist would appear to have resulted from the government's response to particular needs which became apparent from time to time. No doubt provincial developments have also been *ad hoc* in nature. Still, if some understanding can be reached why these developments are occurring some projections may be possible concerning long term impacts for both public and private law. It should also be noted that existing federal compensation schemes not only make compensation available for federal government employees *(Government Employees Compensation Act)*[5] but Canadians outside the public sector may benefit in situations where either the government itself is prepared to take responsibility for damage (Claims Regulations)[6] or it has determined that it should be involved in an area where the delivery of compensation from one third party to another ought to be regulated *(Nuclear Liability Act)*.[7]

The general context of the current debate over the demise of tort and the rise of alternate forms of compensation will be presented in this article. As well, various federal compensation schemes chosen as examples will be outlined and categorized. The examination of relevant statutes, regulations and policies will include some discussion of the roles of administrative tribunals and other mechanisms in the assessment of compensation for personal injury, property damage and other losses. Finally, the role for both public and private lawyers as the trend from traditional legal processes to alternative compensation vehicles evolves will be briefly considered. Any conclusions reached, however, should be considered as preliminary only, given that this is a new area for study and the data assembled to date is not exhaustive.

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II. STATUS OF THE ACTION IN TORT

The arguments for and against the retention of tort liability as a vehicle to deliver compensation and to provide deterrence have been widely debated among academic legal authorities over the past quarter century. It is of course impossible to capture the nuances of this debate in a short article, therefore general descriptions must suffice. On the one hand, Atiyah has argued forcefully for the abolition of tort suits in England for personal injury cases, finding it difficult to resist the conclusion that the tort system is beyond repair and that the right path for reform is to use the moneys at present poured into that system for the improvement of benefits in other ways. In his book *Accidents, Compensation and the Law,* he wrote:

> And finally there is the difficulty... of justifying the different treatment accorded by the law at present to the victims of disease, and the victims of accidents, and among the latter class as between the victims of fault caused and non-fault caused accidents. Gone is the time when a new system for road accidents or for any other special category of unfortunates can be justified... There are already far too many special cases. What is surely needed is a single comprehensive system based on the existing social security system, but with benefits as adequate as society can afford."[8]

Even advocates for the retention of the tort system, such as Mr. Justice Linden, look to tort today primarily for its educative and ombudsman-type functions, rather than for its effectiveness in delivering compensation.[9] Ultimately, these writers see tort operating as part of a mixed system involving social security systems and no-fault plans.

In breaking the problem down further, the impact of tort law for deterrent purposes, which may historically have been its primary use, [10] has been diluted considerably by changing conditions in modern society. In particular, the fact that almost all drivers, business and industry carry some form of liability insurance has been a major development in this century. Many legal commentators agree that the admonitory effect of an adverse judgment on an individual is quite limited. This is so by the fact that a wrongdoer is protected from having to pay the costs of an accident because the financial burden is instead distributed among a large pool of premium or taxpayers in the society at large. As a result, the threat of potential tort liability as a means to deter careless conduct and to stimulate safety efforts is understandably diluted. Moreover, as Fleming has pointed out in his article *Is There a Future for Tort*:

> "... the tort system's residual effects in deterrence and punishment, such as they are, can also be enlisted by no-fault compensation. While social security and general welfare systems have a tradition of flat-rate premium rates, accident compensation plans such as workers' compensation and road accident schemes do... employ differential rates as reward or rebuke of individual accident records."[11]

In any event, as Deborah Coyne has recently observed in her article *Compensation without Litigation*:

> "... most observers will agree that our motor vehicle safety regulations, Criminal Code penalties, tougher environmental standards, consumer protection legislation and occupational health and safety legislation have been at least as effective in deterring and preventing risky activity."[12]

The Final Report of the Ontario Task Force on Insurance ("the Slater Report") speaks in terms of a dramatic transformation from deterrence to compensation in modern tort law which has occurred because the pervasiveness of liability insurance covering a multitude of risks has caused the judiciary to look at the availability of insurance before the question of liability. In his Final Report, Slater quoted Professor Philip Osborne's background study prepared for the Task Force, *A Critical Evaluation of Liability Insurance, Litigation and Personal Injury Compensation: The Lessons and Choices for Ontario*, which was referred to but not re-printed in the Final Report:

> "The massive transformation of the fault system... is a change which is explicable only on the basis of liability insurance and judicial compassion for the victims of social progress. Judges who in their written judgments give no indication of the prevalence of liability insurance are in fact keenly aware that in almost all cases the defendant is not paying, and they are in the last analysis deciding whether or not the plaintiff should be compensated from insurance monies... The prevalence of liability insurance fundamentally altered the moralistic nature of the loss-shifting function of fault. The loss-shifting mechanism was converted into a loss-spreading mechanism and it became more realistic to speak of the fault system as a fault insurance system. The punitive and deterrent aspects of fault were diminished and compensation became the predominant function of tort law."[13]

Arguably, it is not only the traditional function of deterrence which has been lost. An evaluation of the compensation function of tort law shows that tort has assumed a lesser significance in the overall compensation picture as well because compensation may be delivered more effectively by other means. While a court may impose liability on a wrongdoer, it cannot force him to pay a judgment if he does not have the financial means to do so. Even in the situation where a defendant has the ability to pay but is unwilling to do so, the process for recovery in most jurisdictions is protracted and costly.

As Slater has pointed out, compensation for personal injury for most Canadians is handled outside of the judicial system, no-fault being the norm for most injuries. This is reflected by the fact that of $2.5 billion that was paid out under various Ontario accident compensation schemes in 1981 to injury victims, only $250 million, that is ten per cent, was paid through tort.[14] With respect to motor vehicle accident compensation, the Ontario Law Reform Commission found in 1973 that 57 per cent of victims failed to recover any tort compensation.[15]

It is not the intention here to suggest that a universal compensation program as in New Zealand is likely to be implemented soon or at all in Canada. Although ideally this would be Slater's recommendation, he cautions that:

> "For all practical purposes... although a comprehensive disability program was endorsed by the Macdonald Commission, it appears that universal disability may have to await a much wealthier economic base for its implementation and also a complicated process of rationalization between federal and provincial authorities and private insurers of the vast array of no-tort compensation schemes... In many ways, then, universal disability compensation, although logically compelling, is realistically unattainable in the short-to-medium term."[16]

III. THE COMPENSATION DELIVERY SYSTEM

Special compensation plans exist in many countries, including Canada.[17] In his survey of the international scene (including North America, the United Kingdom, Western Europe, Israel and Australasia), Fleming refers to compensation plans covering automobile accidents, aircraft accidents, nuclear accidents, pollution and black lung victims, victims of violent crime, medical mishaps, vaccinations, medical experiments and sporting activities.[18]

While compensation may be seen to have overtaken deterrence as the primary objective of tort law, the difficulty remains that tort law by concentrating on fault rather than effect has failed to compensate victims adequately and to compensate some victims at all. The complexity of modern life means that proof of causation is extremely hard to find. The necessity of alternative compensation mechanisms is inevitable, therefore, if one of society's goals is to protect accident victims from financial hardship. This is so because innocent cause is often the only explanation for accidents. The trend both internationally and domestically has been towards collective security and the absorption of accidental losses by society, the operative principle being that a person who has suffered a substantial loss he was not in a position to prevent or avoid, which occurred through no fault of his own and as a result of actions taken by a third party whose identify may or may not be known, should not have to undertake expensive legal proceedings or incur great delay in order to obtain compensation.

An examination of the domestic situation shows that the process to deliver compensation other than by means of civil action began in Canada as early as 1914 when Ontario passed the country's first Worker's Compensation Act, thereby removing injuries suffered by workers from the tort system completely. Provincial health insurance plans, and the federal *Unemployment Insurance Act*[19] and *Canada Pension Plan*[20] are also examples of no-fault systems which are now available. All of these schemes have had a significant impact in compensating Canadians for matters which in earlier times would have required a civil suit at law in order to obtain redress for injury or damages. In all likelihood, legal action would not have been instituted at all, given the general state of accessibility to the courts, thereby leaving the aggrieved individual without any remedy.

In the area of automobile insurance, Saskatchewan introduced the first no-fault automobile accident insurance plan in the English-speaking world in 1946. Although vehicle plans vary, no-fault automobile accident benefits are now available in every province. Only Quebec by abolishing the tort action entirely has a "pure" no-fault plan, while in the other provinces no-fault benefits are meant to be the primary source of compensation, leaving the plaintiff to seek "add-on" damages in tort if his total losses exceed the available no-fault benefits.

Special compensation plans, existing or proposed, such as those related to drug injuries, pollution and victims of violent crimes have opened a further debate. One argument is that the no-fault concept is offensive because it enables wrongdoers to evade responsibility for their actions. Another is that although from a compensatory point of view these plans overcome the complaint that the traditional tort system wrongly conditions compensation on the fault of the injurer rather than on the merits of the victim, they may have created a new inequity by confining preferential treatment to victims of a specific cause, possibly for no better reason that that group has mounted a more effective political lobby on government to change laws on their behalf.[21] Yet a move to general compensation plans along the New Zealand model may be objectionable for failure to concentrate the cost of accidents on the industry-wide sources directly responsible for the damage caused.

The mix of the three basic methods available today to deliver compensation, those being tort, special compensation plans and comprehensive compensation regimes, differs from one jurisdiction to another. Ideally, the objective should be to ensure adequate compensation without delay while at the same time building in deterrence (for example, by means of deferential rating), and more concerted and effective regulation of risk-involving activity. Within the framework discussed to this point and in the context of some general trends which appear to be emerging, specific federal compensation schemes may now be examined.

IV. THE BASIS FOR COMPENSATION

This part of the paper represents an initial attempt to categorize federal compensation schemes based on the degree of fault on which compensation is based. For these purposes, therefore, federal compensation schemes may include a fault element. What such schemes possess in common, whether they are categorized here as fault, mixed or no-fault, is a shift away from the litigation process, even though it may not be displaced entirely.

1. Fault

The Claims Regulations administered by the Treasury Board have been enacted pursuant to the *Financial Administration Act*[22] to deal with claims by or against the Crown. These regulations apply, subject to limited exceptions, to every claim for damages for which the Crown is or may be liable under the *Crown Liability Act*. The procedure adopted under the regulations is that

where a federal government department, including the RCMP, becomes aware that an incident has occurred that may give rise to a claim for damages against the Crown, the Deputy Attorney General of Canada is informed and an internal investigation is conducted by the concerned department, with the assistance of the RCMP if necessary. Based on this investigation, the Department of Justice provides an opinion on liability, and in particular, on whether an officer or servant of the Crown caused the incident at issue by his or her negligence. Although there are some limitations, the Claims Regulations apply to motor vehicle accidents within Canada and to personal injury compensation. Provision is made in certain situations for reimbursement back to the Crown from a public servant who caused an accident.

The Claims Regulations do not provide a no-fault system. Nor do they preclude an action in tort or other civil action as an alternative to proceeding under the regulations. If the claim is rejected under the regulations then there would be no reason why a civil suit may not be started. The major purpose would appear to be to receive claims from affected individuals and to allocate compensation in appropriate cases in a fairly summary fashion. In this way, involvement by all concerned in costly and time-consuming court proceedings can be avoided. As such, the Claims Regulations should be considered part of the federal compensation scheme network.

Moreover, the Claims Regulations take into account the trend towards no-fault automobile insurance by waiving a claim against an employee for reimbursement of damages paid by the employer to a third party for bodily injury, death or property damage caused by an accident involving a Crown-owned or operated vehicle and waiving recovery in respect of damage to the vehicle when driven or operated by an employee within the scope of employment and when the damages were caused by the negligence of the employee. There is no protection available, however, in the event of claims arising in situations where there has been unauthorized use of government vehicles.

The National Defence Claims Order[23] which was also enacted pursuant to the *Financial Administration Act*, operates more or less according to the same principles as the Claims Regulations. The Order covers the tortious activity of Department of National Defence employees and members of the Canadian Forces acting within the scope of their duties and employment, including motor vehicle accidents causing death or injury to persons or damage to or loss of property. The public is also protected from the dangerous use and operation of weaponry and aircraft. As in the case of the Claims Regulations, an opinion on liability is necessary. It should also be explained here that it is the choice of the injured party whether to proceed under the Order or in court but clearly not to accumulate double compensation. Again, this is not a no-fault system but instead a method to streamline the provision of compensation that is warranted in particular cases, without generating more protracted proceedings.

Both the Claims Regulations and the National Defence Claims Order, therefore, are special compensation plans within the terms under discussion here. These instruments provide an opportunity to circumvent the delay and other problems associated with the operation of the tort litigation system. Both schemes also provide a lower threshold in terms of level of damages than an individual would normally consider worthwhile before seeking a remedy through the courts.

2. Mixed

Unlike the Claims Regulations and the National Defence Claims Order, the compensation scheme which is found in the Penitentiary Inmates Accident Compensation Regulations[24] made pursuant to the *Penitentiaries Act*[25] offers both fault-based and no-fault payments of compensation to inmate victims of an accident or an occupational disease attributable to participation in the normal program of a penitentiary. In practice, compensation is most often payable under these regulations to inmates who have been injured while performing work under the supervision of employees of the Correctional Service of Canada. Accident is defined in a way which includes fault-caused acts suffered by an inmate based on the wilful or intentional acts of others as well as chance events occasioned by physical or natural causes. Damage caused by environmental conditions, which is essentially no-fault, is also covered.

It is also the case that civil rights of action are not suspended, although compensation under the regulations will not be paid until the claimant signs a release of any right of action that he may have against the Crown arising out of the accident in relation to which the claim is made. Separate damage awards may co-exist, with the federal government paying the difference between the court-awarded damages and any greater award which is possible under the Regulations, in those situations where either the Minister has brought an action against a third party and obtained recovery on behalf of an inmate who has already instituted legal proceedings against someone other than the Crown and it is subsequently determined that he could have received a higher award under the Regulations.

The *Government Employees Compensation Act* and the *Merchant Seaman Compensation Act*[26] are examples or statutory regimes that similarly provide both fault and no-fault bases for compensation, in that an accident may result from an intentional act or a fortuitous cause. Unlike the regulatory schemes already referred to, they do in fact preclude the institution of civil causes of action against the Crown or a merchant seaman's employer arising from the same facts. The preclusion of other forms of legal action against the employer is consistent with the approach normally taken for legislation dealing with worker's compensation after which these statutes are patterned. Apart from the fact that both *Acts* recognize that a civil cause of action could be taken against some other person in what would probably be an exceptional situation, they represent more closely than other available examples what Slater has referred to as "no-tort" systems,[27] at least in relation to the party from which compensation will be required in most cases.

3. No-fault

Another method of compensation managed by

Treasury Board is the Ex Gratia Payment Order.[28] An *ex gratia* recovery of damages may be made to compensate a person on a discretionary basis for a loss of expenditure incurred, although there is no liability on the part of the Crown. In that sense, this is an example of a "pure" no-fault system. (Another form of *ex gratia* payment that is possible as a matter of government policy exists with reference to losses suffered by financial institutions which may be compensated in situations that involve fraud, negligence or malpractice on the part of public servants.[29])

In addition to the Ex Gratia Payment Order, there are several other statutes and regulatory regimes which operate on a no-fault basis. For example, the *Nuclear Liability Act* imposes absolute liability on the operator of a nuclear installation without proof of fault or negligence in the event of personal injury or loss of life arising from a nuclear incident. Another no-fault example is the Flying Accident Compensation Regulations[30] made pursuant to the *Aeronautics Act*,[31] which prescribe compensation for bodily injury or death resulting from flights undertaken by federal public servants in the course of their duties. There is also a group of statutes administered by the Department of Agriculture which are intended to provide compensation to farmers in the case where pesticide residue has affected agricultural products *(Pesticide Residue Compensation Act)*,[32] or their animals have been harmed by infectious or contagious disease *(Animal Disease and Protection Act)*,[33] and in the case of the *Plant Quarantine Act*[34] where a person has been adversely affected by the destruction or prohibition or restriction from sale of a plant intended to be introduced into the country which was found by government inspection to be infested by pests.

4. Compensation to victims of crime policy

This is not a federal compensation scheme *per se* but rather a policy administered by the Policy, Programs and Research Branch of the Department of Justice which is intended to integrate federal and provincial approaches in this area. It deserves to be referred to as an effective means for delivering damage awards to those individuals in our society who have suffered from violent crimes. In all provinces except Prince Edward Island, criminal injuries compensation schemes have been enacted to fill the gap which exists in tort law because offenders are rarely able to pay damages to the victims of their crimes. In 1985-86 the federal government paid approximately $2.5 million to nine provinces and the two territories with which it has cost-sharing agreements for this purpose.[35]

V. ADMINISTRATIVE DECISION-MAKING

Compensation boards as part of the federal compensation network may be found among the variety of administrative boards, tribunals, commissions and agencies which have proliferated at the federal level. While in the case of the Claims Regulations, the National Defence Claims Order, and the penitentiary and aeronautics regimes, the involvement of lawyers may be necessary to interpret the statute or regulation involved and to provide advice on who is a claimant and whether compensation is owed in a particular case, the types of issues considered by most lawyers to be administrative law problems will arise in connection with the constitution and operation of administrative tribunals.

Five models have been examined in the preparation of this article. It should also be noted without additional comment that Ministerial decision-making absent the involvement of administrative tribunals is available in many cases as the sole means for determining compensation. In some cases which will be discussed below, Ministerial decisions may be reviewed by an Assessor appointed from among the judiciary.

1. Board established by statute

The *Merchant Seaman Compensation Act* includes provisions governing the establishment of a Merchant Seaman Compensation Board to determine eligibility for compensation to a seaman (except where compensation may be claimed under the *Government Employees Compensation Act*), or his dependants or successors, who has suffered an accident in the course of his employment. The right to compensation provided by the *Act* exists in lieu of all other rights and actions against the employer. The Board has exclusive jurisdiction to decide compensation and its decisions on all questions of law and fact are deemed final and conclusive. Moreover, an order of the Board for the payment of compensation may be enforced as an order of a county or district court in a common law province where the employer resides or carries on business or the Superior Court of Quebec if the employer resides or carries on business in Quebec. As well, the Merchant Seaman Compensation Board is directly involved in the insurance of the risks of compensation arising under the *Act*, in that every employer is required to cover such risks by insurance or other means satisfactory to the Board. This further highlights the significance of the Board's involvement in the compensation process.

The *Nuclear Liability Act* which was enacted to deal with strict liability for nuclear damage constitutes a Nuclear Damage Claim Commission with extensive powers to assess compensation and to order the payment of claims for major accidents. Unlike the Merchant Seaman Compensation Board, the Commission has not been activated. However, in the wake of the Chernobyl incident in the Soviet Union and increased international and domestic concern about the possibility of nuclear accidents, this legislation is of current significance. Although untested, the *Act* has the potential for opening the door to recovery for remote causes of damage which might otherwise be barred, by providing that personal injury or property damage that is not directly attributable to an operator's breach of duty may be deemed attributable to the breach if it cannot be reasonably separated from injury or damage that is attributable to the breach of duty.

The Maritime Pollution Claims Fund established under Part XX of the *Canada Shipping Act*[36] is in essence an unsatisfied judgment fund. However, it is a compensation delivery mechanism insofar as it allows a first recourse when an injured party cannot identify the ship which spilled the oil causing his damage and also in the case of fishermen's claims for loss of income caused by shipsource pollution.[37] Under recent amendments to the legislation,[38] the fund would even

more closely fit the description employed here for a federal compensation scheme since it will become a fund of first resort for this type of claim. There will be a statutory obligation to investigate such claims and pay them if justified, seeking thereafter to recover the compensation paid by the government from the shipsource polluter. The amendments also extend the responsibilities of the fund into the Arctic.

The Canadian Pension Commission[39] and the War Veterans Allowance Board,[40] both of which are administered by the Department of Veterans Affairs, would also fit into the category of boards established directly by a governing statute.

2. Use existing federal boards

The *Northern Inland Waters Act*[41] establishes a Yukon Territory Water Board and a Northwest Territories Water Board to issue licences and to assign fees for water use in that part of Canada north of sixty degrees, with the object of providing for the conservation, development and utilization of water resources in the Yukon and Northwest Territories. The legislation, however, also recognizes by the requirement on the applicant to provide financial security as required by the board, the need for compensation in cases where the applicant's water use is liable to adversely affect the interests of licencees and owners and occupiers of property. Rather than establishing a separate tribunal for this purpose, the statute enables the "appropriate board", that is either of the two territorial water boards, to make this determination. This approach commends itself by its appropriation of the expertise of members of the two boards who have experience in water management and are assisted by professional and technical advisers.

3. Assessment or arbitration

The *Pesticide Residue Compensation Act* is a specialized form of compensation legislation to deal with the problem of contamination caused by a pesticide to a degree that the sale of a farmer's produce would be restricted from sale under the federal *Food and Drugs Act*.[42] The legislation requires the farmer to employ traditional civil action based on tort remedies as a prerequisite to access to the fund. While the initial decision to award compensation rests with the Minister, the *Act* allows an appeal from his decision on compensation to a hearing by an Assessor appointed by the Governor in Council from among the judges of the Federal Court of Canada or provincial superior courts. The Assessor has authority to confirm, vary, or refer the original decision back to the Minister. While a privative clause makes the Assessor's decision final and technically not open to appeal or judicial review, administrative law principles could apply to allow the inherent supervisory jurisdiction of the courts at common law to be invoked. Part II of the *Pesticide Reside Compensation Act* has been made applicable with such modifications as circumstances require to the *Animal Disease and Protection Act* and the *Plant Quarantine Act*.

An arbitrator in the case of the *Yukon Quartz Mining Act*[43] or a board of arbitration in the case of the *Yukon Placer Mining Act*[44] may be appointed to determine compensation for damage to surface interests caused by lawful mining activity, including the construction of drainage systems or other forms of disturbance to the surface.

4. Authority to establish special tribunal

The *Energy Supplies Emergency Act*[45] authorizes the establishment of a tribunal to hear and determine complaints concerning deprivation of property within the meaning of the statute, including authority respecting the determination and payment of compensation for such deprivation of property. Although the *Act* provides for the setting up of a compensation tribunal, none exists to date. This approach does not allow the certainty provided by clear statutory guidance as would be the case for boards established directly by the governing statute.

It should be noted that proposed emergencies legislation[46] will enact an alternative mechanism applicable to both that legislation and the *Energy Supplies Emergency Act*. The Emergencies Bill if enacted substantially in its present form allows compensation for loss, injury or damage suffered in the context of a national emergency to be awarded by the Minister, with an appeal of such awards available to an Assessor and Deputy Assessors chosen from among the judges of the Federal Court of Canada who may sit and hear appeals as required. Compensation ordered against the Crown would be payable from the Consolidated Revenue Fund. This would, therefore, become another example for the assessment category, on the enactment of the proposed legislation.

5. Use provincial boards

The prime example of this approach is the *Government Employees Compensation Act* which provides compensation for injuries and industrial diseases sustained by employees of the Government of Canada during their employment. According to the *Act*, employees are entitled to be compensated at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed. This is accomplished by retaining the compensation boards of the various provinces on a contractual basis to make the necessary determinations, meaning that compensation in the case of federal government employees is actually determined by the same board, officers or authority as that established by the law of the province for determining compensation paid to workers and dependants of deceased workers under provincial jurisdiction. The compensation ordered is then repaid by the federal government to the province concerned.

The federal compensation to victims of crime policy which was referred to earlier in this article is integrated with provincial criminal injuries compensation boards by means of federal financial contributions.

VI LAWYERS AND THE COMPENSATION PROCESS

The growth of federal compensation schemes remains largely uncoordinated and would not appear to reflect a coherent federal government policy on compensation *per se*. The variety of options, including varying degrees

of fault and integration of the tort system to different extents, and incorporating a variety of mechanisms for the identification of victims and compensation is, however, consistent with developments that are occurring outside the federal jurisdiction.

Using Ontario as an example, the debate surrounding the continued viability of the civil action in tort has entered the public forum. It should be noted that we are not talking about the "death of tort" but rather its reform in certain areas. Although a good deal of the law of torts is concerned with personal injuries or with negligence, in recent years there has been a rise in the significance of such torts as defamation and malicious prosecution. Presumably, the direction followed provincially will have some influence over time in respect of spheres of activity under federal jurisdiction or where the federal government plays an active role, for example as employer. An example presented in this paper is the *Government Employees Compensation Act* which is patterned after and integrally tied to provincial worker's compensation legislation.

Atiyah believes that tort reform would have profound implications for the legal profession in the United Kingdom, especially in the area of personal injury litigation which constitutes approximately eighty per cent of all litigation in the Queen's Bench Division.[47] In Ontario, the Ontario branch of the Canadian Bar Association and the Advocates' Society representing 1300 trial lawyers strongly opposed the recommendations of the Slater Report.[48] The view of many academic legal writers is that the legal profession has adapted and will continue to adapt well to societal changes. In England, for example, Atiyah recommended that legal aid be made available for appearances before social security tribunals to cushion the impact on the legal profession in the event that personal injury litigation is eliminated or drastically curbed.[49] Atiyah cautioned, however, that in order to avoid the excesses which many people associate with the courts, that is "delay, technicality, formality and excessive rigidity",[50] lawyers will have to change some basic assumptions about "rugged individualism"[51] in favour of principles of collective responsibility. Fleming has painted a brighter picture in connection with the legal profession's ability to move with the times while retaining the private Bar's traditional structure as a place and profession for individualists. In the concluding remarks of his article *Is there a future for tort?*, he has written about what some commentators have referred to as "relational torts":

> "Still, if, as I would predict, the law of tort will yield more and more ground to accident compensation in coming years, tort practitioners may yet take heart in the prospect of making up lost ground in expanding areas of economic losses, and, as in the United States, in the civilized mission of furthering civil rights, privacy and other personality interests."[52]

More federal compensation schemes will inevitably be developed as Parliament grapples with complex developments in the advancement of Canadian society which will inevitably carry with them adverse side-effects and repercussions. Public and private lawyers alike must understand how their respective clients will be affected. Harlow anticipates a continuing role for the courts in the interpretation of the many statutes governing different compensation schemes regulating government liability. Moreover, even though in her view the nature of the game is changing, she has suggested that an important role still remains for public lawyers:

> "... Increasingly, statute will provide for compensation and administrative boards and commissions will carry out the work of distribution. the growth of these new administrative processes exactly parallels the disorganized growth of administrative tribunals. The network is fortuitous and haphazard. But some of the confusion might... easily be avoided if we gave our minds to the problem. Some procedural values, for example, ought always to be respected and administrators ought to know this. Those are matters of concern which need our attention."[53]

VII CONCLUSION

This article is general in nature, given the evolution of developments in society as reflected by legislation, regulation and federal government policy, whose impact cannot yet be fully assessed or appreciated. Moreover, what may occur in relation to any specific area of legal activity now governed by the common law, as a consequence of future legislative, regulatory and policy development, rather than judicial action, is largely a matter of speculation.

Although when one looks at existing federal compensation schemes, something more than a "hit and miss" system may arguably have emerged. Still, knowledge about the current state of affairs and the possibility that more compensation will be delivered by these means in the future is important given overall societal change and the need for governmental response. Whatever approaches and systems develop in Canada, it can probably be generally agreed that their hallmark should be that to the extent possible within this country's financial means and consistent with a broad social consensus, those individuals who have suffered personal injuries or damage to or loss of property, whether directly attributable to third parties or not, are fairly compensated.

FOOTNOTES

1. London (1982), pp. 117-118.
2. Toronto (1977), p. 326.
3. For two views, see Richard Gaskins, *Tort Reform in the Welfare State: The New Zealand Accident Compensation Act* (1980), 18 Osgoode Hall L.J. 238; Lewis N. Klar, *New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective* (1983), 33 University of Toronto L.J. 80.
4. R.S.C. 1970, c. C-38, as amended.
5. R.S.C. 1970, c. G-8, as amended.
6. C.R.C. c. 683.
7. R.S.C. 1970 (1st Supp.) c. 29.
8. London (1980), 3rd ed., pp. 626-627.

9. Allen M. Linden, *Canadian Tort Law*, Toronto (1982), 3rd ed., p. 644.
10. John G. Fleming, *The Law of Torts*, Sydney (1983), 6th ed., p. 1.
11. (1984) 58 Australian L.J., pp. 134-135.
12. POLICY OPTIONS POLITIQUES, April 1987, p. 5.
13. Final Report of the Ontario Task Force on Insurance (May 1986), p. 61.
14. Idem.
15. Quoted in Deborah Coyne, *Compensation without Litigation*, POLICY OPTIONS POLITIQUES, April 1987, p. 6.
16. Final Report of the Ontario Task Force on Insurance, p. 69.
17. See John G. Fleming, *Drug Injury Compensation Plans* (1982), 30 American Journal of Comparative Law 297; Akio Morishima and Malcolm Smith, *Accident Compensation Schemes in Japan: A Window on the Operation of Law in a Society* (1986), 20 U.B.C.L.R. 491.
18. Fleming, *Drug Injury Compensation Plans*, pp. 304-305.
19. R.S.C. 1970-71-72, c. 48, as amended.
20. R.S.C. 1970, c. C-5, as amended
21. For example, see *Parents of pertussis vaccine victims cheer federal compensation moves*, Ottawa Citizen article, May 2, 1987.
22. R.S.C. 1970, c. F-10, as amended, s. 6.
23. C.R.C. c. 715.
24. SOR 83-687.
25. R.S.C. 1970, c. P-6, as amended, s. 29(1).
26. R.S.C. 1970, c. M-11, as amended.
27. Final Report of the Ontario Task Force on Insurance, p. 68.
28. P.C. 1974-4/1946.
29. *Guide on Financial Administration*, Chapter 9, Part 11.
30. SOR 78-778.
31. R.S.C. 1970, c. A-3, as amended, s. 7.
32. R.S.C. 1970, c. P-11, as amended.
33. R.S.C. 1970, c. A-13, as amended.
34. R.S.C. 1970, c. P-13, as amended.
35. Department of Justice Annual Report, 1985-68, p. 30.
36. R.S.C. 1970, c. C-9, as amended.
37. Fishermen's Notice of Claim for Loss of Income Regulations, C.R.C. c. 1423.
38. Bill C-39 received Royal Assent on March 26, 1987 but has not yet been proclaimed into force.
39. R.S.C. 1970, c. P-7, as amended.
40. R.S.C. 1970, c. W-5, as amended.
41. R.S.C. 1970 (1st Supp.) c. 28, as amended.
42. R.S.C. 1970, c. F-27, as amended.
43. R.S.C. 1970, c. Y-4.
44. R.S.C. 1970, c. Y-3.
45. S.C. 1978-79, c. 17, as amended, s. 22.
46. Bill C-77 ("An Act to authorize the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof.")
47. P.S. Atiyah, *Accident, Compensation and the Law*, London (1980), 3rd ed., p. 629.
48. For example, see Michael Crawford, *Return fire from lawyers on the faults of no-fault*, Canadian Lawyer, November 1986, p. 24; Allen C. Hutchinson, *Opposing no-fault insurance: Lawyers' concern is really for profit*, Globe and Mail, March 20, 1987.
49. P.S. Atiyah, *Accidents, Compensation and the Law*, London (1980), 3rd ed., p. 630.
50. Idem.
51. Ibid, p. 631.
52. (1984) 58 Australian L.J., p. 142.
53. *Compensation and Government Torts*, p. 166.

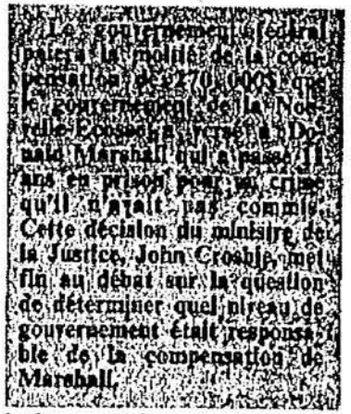
Federal govt. shares Marshall bill

By Wendell Leon
Nova Scotia Correspondent

HALIFAX — The federal government will pick up the tab for half the $270,000 compensation the province of Nova Scotia has paid Donald Marshall Jr., who spent 11 years in prison for a murder he didn't commit.

Justice Minister John Crosbie announced the $135,000 federal payment April 17, ending debate over which level of government was ultimately responsible for compensating Marshall for time spent behind bars and the legal costs of clearing his name.

Nova Scotia Premier John Buchanan caved in to mounting public pressure last fall and announced a compensation package only two days


Le gouvernement fédéral paiera la moitié de la compensation de $270,000 que le gouvernement de la Nouvelle-Écosse a versé à Donald Marshall qui a passé 11 ans en prison pour un crime qu'il n'avait pas commis. Cette décision du ministre de la Justice, John Crosbie, met fin au débat sur la question de déterminer quel niveau de gouvernement était responsable de la compensation de Marshall.

before calling a provincial election. But he has steadfastly refused to launch an inquiry into how the wrongful conviction came about.

Marshall, a Cape Breton Micmac Indian who is now 31, was convicted of murder and sentenced to life in prison for the 1971 stabbing of Sydney teenager Sandy Seale. In May 1983, the Appeal Division of the Nova Scotia Supreme Court heard new evidence in the case and acquitted Marshall of the crime.

Meanwhile, the question of what really happened in Sydney's Wentworth Park 14 years ago is still before the courts. Roy Newman Ebsary, 73, has stood trial three times for the slaying, but his latest manslaughter conviction and three-year prison sentence are under appeal.

On another front, a book chronicling the Marshall case by Toronto *Globe and Mail* reporter Michael Harris is headed for the publishers and should appear soon.

Nfld. unions appeal rulings upholding laws

By Joan Butler
Newfoundland Correspondent

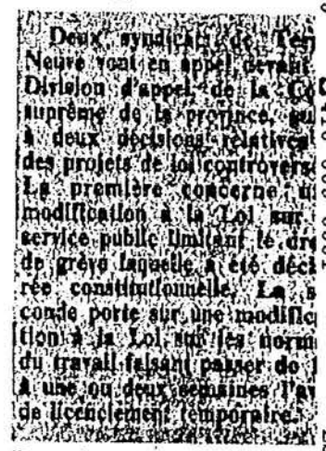
ST. JOHN'S — Two labor unions in the province are asking the Newfoundland Supreme Court, Court of Appeal, to hear their appeals of recent decisions upholding two pieces of controversial labor legislation.

The Newfoundland Association of Public Employees (NAPE) has filed an appeal of a Newfoundland Supreme Court, Trial Division, ruling that says the province's Bill 59 — An Act to Amend the Public Service (Collective Bargaining) Act, which limits the right to strike, is not unconstitutional.

NAPE, the province's largest public sector union, asked the Trial Division to rule the amendment, proclaimed in August 1983, unconstitutional because government's ability to designate up to half of a bargaining unit as essential employees denies those employees the right to strike and the right to bargain.

St. John's lawyer Jack Harris says he has been instructed by Local 6825 of the United Steelworkers of America in Wabush, Labrador, to prepare an appeal of a Labrador District Court decision that found the government was within its power when it passed Bill 37 — an amendment to the Labor Standards Act.

The amendment, proclaimed


Deux syndicats de Terre-Neuve vont en appel devant la Division d'appel de la Cour suprême de la province, qui a deux décisions relatives à des projets de loi controversés. La première concerne une modification à la Loi sur le service public limitant le droit de grève laquelle a été déclarée constitutionnelle. La seconde porte sur une modification à la Loi sur les normes du travail faisant passer de une ou deux semaines l'avis de licenciement temporaire.

December 1984, reduced t notice required for tempora layoffs from 16 weeks to o to two weeks, depending on t amount of time worked, a made the shorter notice r quirement retroactive.

Judge Seamus O'Regan April 19 ruling on the validi of Bill 37 was the result of appeal of a decision by the L bor Standards Tribuna launched by Wabush Mines.

The mining company, whi operates an iron-ore mine Wabush, appealed the tribun decision that stated t company should have giv 500 workers 16 weeks' noti of a temporary layoff when t mine closed down for thr weeks at the end of 1981.

Wabush Mines had giv only four weeks' notice of t layoff, so the tribunal ruli meant the company owed t workers 12 weeks of pay.

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

CRIMINAL PROCEDURE

A PROPOSAL FOR COSTS IN CRIMINAL CASES

A Study Paper Prepared by the
Project on Criminal Procedure

August 1973

Project Staff

Darrell W. Roberts, Director
Louise Arbour
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INTRODUCTORY NOTE

This paper is the first in a series of working papers to be published by the Procedure Project dealing with nearly all stages of Canadian criminal procedure. Other studies in progress from which working papers will be published in the near future concern "discovery" in criminal cases, plea bargaining, and police powers in search and seizure. As well studies are in progress concerning the jury, the jurisdiction of Canadian criminal courts and classification of offences, the form of the criminal charge, private prosecutions, the exercise of discretion by the police and prosecution in the charging process, and the use of prerogative writs in criminal law.

While it may seem strange with all of these studies underway that the very first paper by the Procedure Project should concern a subject that bears only incidentally on procedure, i.e. costs in criminal cases, we think it is a very important paper nevertheless and one which we are quite pleased to publish. That this paper is first is explained by the fact that before the Procedure Project commenced its studies a research study on costs in criminal cases was contracted by the Law Reform Commission and placed under the supervision of the Project. The Report[i] from this study was received by the Commission in November of 1972 and since then, as with all background studies prepared for the Commission, the Project has been engaged in the task - along with continuing its own studies on other subjects - in determining the kind of proposal that should be made. This working paper then represents the present state of the Project's research on the subject of costs in criminal cases and rather than wait for other papers on more traditional subjects to be ready we decided to publish it now.

At the outset of our consideration of this subject it seemed that our task was simply to prepare a proposal based on the Burns Report. But as our thinking and writing progressed we found it impossible to accept the major thrust of that Report, which is: that a system of costs awards be devised to compensate acquitted accused

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i The Report was prepared by Professor Peter Burns of the Faculty of Law at the University of British Columbia; see also footnote[1] infra; in publishing this study paper the Procedure Project is of the view that all of the issues bearing on the matter of costs in criminal cases are adequately raised in this paper and thus the background Report of Professor Burns will not be made available for distribution.

persons who are wrongly charged or truly innocent. While we agree that there is a need for compensation of economic losses and expenses suffered in criminal prosecutions we have concluded that this approach is unsound, at least for the various offences which are referred to as the criminal law of Canada, and that the attempt to avoid the consequence of such a system - the creation of a third verdict of "not proven" or "less-than-innocence" - by leaving the whole question of costs in the discretion of the courts is not satisfactorily achieved. Our paper therefore takes the direct approach of arguing for the payment of costs in criminal cases to all acquitted and discharged accused persons - or at least to those that can show economic need.

The major part of this paper is Part II which is devoted to a consideration of the various policy questions that are raised by a costs awards system. Part I, on the history of costs awards and on existing law and practice, is very brief because this background is already fully covered in the Burns Report. As well, any detailed discussion of comparative costs systems has been omitted, again because they are fully drawn in the Burns Report and do not substantially contribute to a discussion of the central question: what is the basis for awarding costs to successful defendants in criminal cases. Finally, while the Burns Report also recommends that the fees and costs allowable to witnesses, interpreters, and peace officers be revised upwards to realistic levels - the fees allowable to jurors as well - we decided to omit these matters from our paper. It has been noted before that these fees and costs are inadequate and of course it would be anomolous to institute a system of substantial costs to acquitted accused persons and not to other persons who suffer their own economic losses when involved with the administration of the system. But nevertheless the matter of costs awards to the "parties" in the criminal process is a very special question, particularly costs to the accused, and so in this paper we decided to omit all other questions.

In conclusion, in advancing the proposals in this paper we are not unaware of the possible, perhaps probable, reaction from some segments of the public to the suggestion that costs awards be paid to accuseds who are only technically innocent. Of course our proposal is not framed in these terms, but since the basic proposal is to provide costs compensation to all acquitted accused or at least to those showing need and not just to the innocent, the technically innocent are included. We are aware of the fact that there are some cases that fit into this category. The 1966 New Zealand Committee on Costs in Criminal Cases went further and held that:

> *"(T)here is a substantial class of cases where in the popular phrase the accused is "lucky to get off" - the prosecution has not quite clinched the case or the exacting standard of proof in criminal cases is not quite satisfied... In our opinion it would ordinarily be wrong to award costs in these sorts of cases".* ii

It is really not clear however just how substantial this class is; we uspect it is less substantial than those who advance it as a limitation on costs awards would have us believe - although probably the real answer is that no one really knows. As well, we question that it would "ordinarily be wrong to award costs in these sorts of cases". The New Zealand Committee does not explain why they held this opinion. However it is our view that if costs payments can be regarded not as "rewards" but as compensation for losses and expenses that should not be suffered by anyone in defending the prosecution of an offence then there is nothing "wrong" in awarding costs in this class of cases. Furthermore to not award costs in cases in this class is to imperil both the presumption of innocence and the very high value that our system places on the general verdict of not guilty. Finally, it would mean that a Project proposal on this subject, being the first stage at which discussion and reaction are sought, would itself be a political and philosophical compromise. At this stage at least, we are not prepared to make that compromise.

June 28, 1973

D.W. Roberts

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ii Report of Committee on Costs in Criminal Cases, 12 September 1966, Wellington New Zealand, para. 25.

A PROPOSAL FOR COSTS IN CRIMINAL CASES

This proposal follows upon a full research report[1] prepared for the Law Reform Commission of Canada by Professor Peter Burns of the Faculty of Law at the University of British Columbia. The report was received in the Fall of 1972 and received a limited circulation.[2] Since then the Procedure Project of the Law Reform Commission has been engaged in the task, more difficult than it had appeared at first sight, of drawing a proposal based on this report. The accomplishment of that task is now represented by this study paper which, while it does indeed follow and rely on much of the research of the Burns Report, it does not follow his major recommendations.[3]

In order to introduce the proposal it might prove valuable to review, in a general way, the existing law and practice regarding costs in criminal cases and then to examine the policy factors that seem to be involved in any criminal-costs system. Against this background the recommendations forming the proposal will be presented.

I Existing Law and Practice in Canada

At common law the general rule concerning costs in litigation is that the successful party to the proceedings is entitled to costs. However for criminal law, again at common law, certain exceptions exist to this rule including a subsidiary principle to the effect that unless there are statutory modifications or exceptional circumstances the Crown neither receives nor pays costs in its own courts. This principle evolved at a time when the political and legal doctrine developed in England equating the Crown with the state. But even this subsidiary principle has not been equally adhered to by the Canadian courts. British Columbia has followed it,[4] but other provinces including Ontario, New Brunswick, and Manitoba have not.[5]

Yet, perhaps of more importance, there have been a number of statutory modifications of the common law position including the enactment of several costs provisions in the Criminal Code. Unfortunately however, most of these enactments are quite meagre and it appears that there is no uniformity of practice in their application. While most of the provinces have provided for the award of costs in provincial offence matters, they are not commonly employed. Further, while the Criminal Code has granted more generous costs-awarding powers for summary conviction matters,[6] whether at trial or on appeal, it would seem that the powers exist in name only because (a) the courts are

reluctant to award costs against the Crown, and (b) the costs provisions have been interpreted restrictively to cover the very minimal fees and allowances contained in the schedule to the Code.[7] These fees and allowances are in no way related to an accused's actual costs in defending a prosecution. As well, our courts under the Code have no power to award costs on the hearing of indictable offences, and, indeed, appeal courts are specifically precluded from making any such awards.[8] The only exceptions that obtain here are for defamatory lible[9] (a rare prosecution today) and where the accused has been misled or prejudiced in his defence by a variance, error, or omission in an indictment or a count thereof.[10] Again, costs awards in the latter situation are extremely rare. Finally, judicial practice relating to the extraordinary remedies varies from province to province.[11] There is no discernable uniformity in the case law which has resulted in arbitrary awards turning on the geographic location of the hearing.

In summary, the law relating to the award of costs in criminal cases is confused and based largely on out-dated theories of the relationship of the citizen to the state. Yet other jurisdictions have recognized the need for such awards and extensive costs awards schemes have been enacted by the United Kingdom,[12] Northern Ireland,[13] New South Wales,[14] and New Zealand.[15] The question here considered is whether or not Canada should do the same and on what basis.

II Policy Considerations

There are a number of very basic policy questions that require consideration in determining whether or not our costs awarding system in criminal law is unsatisfactory and, if it is, how it should be altered. The first and fundamental question though is the rationale for awarding costs in criminal law. It is of primary importance because a number of other policy considerations may be determined by it.

To begin, as a general proposition it can be said that for litigation generally the primary rationale for awarding costs is to compensate the successful party for those costs incurred in successfully litigating a case.[16] As we will discuss somewhat later there is a second rationale in the punitive and deterrent effect of costs awards,[17] but to commence discussion it is safe to say that "compensation" is the primary rationale. But while this rationale has generally been fulfilled in civil

litigation, where in England and in Canada party and party costs are allowed to successful litigants, as a general rule it has never obtained in criminal cases. In part its absence from criminal law is a result of the historically rooted exception that the Crown, which conducts the vast majority of criminal prosecutions and provides the courts therefor, neither receives or pays costs in its own courts.[18] But more significantly it is likely that our criminal law system has never provided for costs awards, at least in favour of acquitted accused persons, out of a general feeling that to do so would go too far. After all, so the feeling might have been expressed, to secure an acquittal is reward enough and that:

> *"... the risk of a prosecution is one of the inevitable hazards of living in society and that there is no reason to shield the citizen against the financial consequences as long as no malice, incompentence or serious neglect can be attritubed to the prosecutor".* [19]

However, although this view has prevailed in the past it has been increasingly challenged by an opposing view that:

> *"(W)hen a prosecution has been brought and it subsequently turns out that through no fault of the accused he should never have been charged at all justice demands that the status quo should be totally restored and in particular he should be reimbursed for all the costs and expenses which he has properly incurred".* [20]

It is the contrary view which underlies the criminal costs awards schemes in other jurisdictions and which received support from Canadian lawyers and judges in a survey conducted by Professor Burns.[21] However the statement of the rationale in this form, i.e. "the accused should never have been charged at all", is somewhat different from its expression in civil litigation of compensating the successful party. In criminal law every accused person who is not convicted is a successful litigant and yet the restatement of the rationale would confine compensation in criminal cases to acquitted accused who are truly innocent. But, as well, the view that "the risk of a prosecution is one of the inevitable hazards of living in society" has been challenged from a second direction for which the development of criminal legal aid is but a reflection. It is the challenge that not only should all accused persons have equal access to legal representation and thereby receive

equal treatment before the law, which is the purpose of legal aid, but also that no accused should in addition to the prosecution of a crime suffer other economic hardships. While legal aid may look after the provision of legal counsel it does not compensate lost wages or lost business income or various other expenses or losses that may be suffered in court appearances in the defence of a prosecution. And while ideally these are losses that should not be suffered by anyone prosecuted with a crime they are especially vexing to those who cannot afford them. Thus the rationale for this challenge is not compensation of the successful party but simply compensation for costs that should not be suffered in any prosecution system - particularly by those who cannot afford them - and perhaps a starting point to begin such a compensation system would be with the acquitted accused.

Thus while it can be accepted that in a costs awards scheme compensation is the primary rationale and that it ought to be given some scope in criminal cases, very difficult questions remain. What is or should be the measure or amount of costs awards? Who should pay or provide the funds for costs awards? If compensation is the primary rationale should the focus be on compensating the successful party or a certain kind of successful party, or should the focus be on compensating those who need it? If compensation to the successful party should have some scope, should it include awards of costs to the Crown? The rest of this part will be devoted to a discussion of these questions.

A. The Nature and Measure of Costs Awards

From the expression of the compensation rationale, that is (a) in compensating those who should never have been charged at all,[22] or (b) in compensating all accused persons for costs that should not have to be suffered in a criminal prosecution,[23] it is clear that the concern is with reimbursement of real costs and expenses. It is not an effort at tokenism nor is it an attempt at payment of general damages analogous to pain and suffering damages in tort law. Examples of real costs and expenses that are frequently incurred in defending criminal charges are obvious. They of course include the fees and expenses of legal counsel (where they have been incurred), witness expenses, lost wages, lost business income in a small business that is dependent on the services of the accused, and travel and accommodation costs. These costs are easily calculated and represent the kind of compensation that could and, arguably, should be made in a criminal costs scheme.

No doubt one might argue that an innocent victim of the prosecution process should be paid substantial damages to compensate for the insult to his reputation. But, while the existence of the tort remedy is a partial answer to this contention,[24] the main response is that the source of all costs awards in criminal law is not the opposite party, the prosecutor, but the public through a fund set up for this purpose. Obviously serious problems would arise if legislation were enacted granting courts the power to award costs against informants, the police, and prosecutors. Fundamentally, to award costs against the Crown would undoubtedly operate to impede police officers and prosecutors from fearlessly pursuing their respective duties. Thus, if the state is to provide for the payment of costs awards some reasonable limit will be required. From the present vantage point where there are no provisions at all for payment of compensatory costs to criminal defendants it is somewhat unrealistic to expect that the public will be agreeable to pay not only actual costs incurred but general damages as well.

Another question that might be asked at this point is the relationship of costs awards to legal aid. All provinces now have criminal legal aid schemes and many of them, eight in fact at the time of this writing,[25] have signed federal-provincial agreements for federal financial assistance for their legal aid programs. Therefore, the question might be asked, with criminal legal aid from province to province becoming a reality why should costs awards be made as well? Well first the purpose of legal aid is not to compensate for costs that have been incurred but rather to ensure that no one charged with an offence will be denied adequate legal representation. If an accused is unable to afford legal counsel of his choice, legal aid will permit him to do so or will otherwise provide legal counsel.[26] But the purpose of costs awards, at least on the first direction of the primary rationale, is compensation of innocent accused persons, and, taking the second direction of this rationale,[27] compensation of accused persons who have suffered other economic expenses and losses. If either or both of the two directions of the compensation rationale are applied it is clear that a costs awards scheme would provide compensation not covered by any legal aid plan. To not provide for costs awards on the basis that legal aid services are generally available would discriminate against all persons who would not be entitled to legal aid. Furthermore it would fail to provide for compensation of the various other actual costs that are frequently incurred in the defence of a criminal prosecution.[28] As a final observation here, for the cost of obtaining legal counsel where this costs is not covered by a legal aid program the provincial legal aid tariff could serve as a basis for

compensation, and of course if legal aid were provided this item would be excluded from any costs award.

Further, a question might be raised about the relationship of costs awards to civil suits for malicious prosecution. But here again the availability of this remedy is no answer to the need for a general scheme of costs awards. In the first place the civil suit is confined to accuseds who were "maliciously" prosecuted i.e., knowingly or without reasonable grounds to believe that the accused committed the offence charged. However the need for costs compensation, even if confined to the innocent accused,[29] is much broader. Secondly even for the very restricted class of innocent accused persons who are maliciously prosecuted "(A)ny tort lawyer will know ... that the severe burden of proof placed upon the plaintiff in such proceedings makes this at best a far from certain remedy, and at worst a further snare and delusion to the innocent". [30] In sum this remedy will of course remain available but it is no answer to the need for a sensible scheme for awarding costs in criminal cases.

Finally for other loss items that should be included in costs awards such as lost wages or lost business income, they would of course have to be based on actual costs incurred and subject to certain limits. The question of what those limits should be may be the subject of some debate, but one approach would be to apply the minimum wage laws in force in the provinces and on that basis compensate losses whether they are losses of wages or losses of business income. Another approach would be to apply the compensation schedules of the various Workmen's Compensation Boards. But in addition it would likely be necessary, whatever approach is followed, to prescribe maximum awards for any one claimant notwithstanding the actual losses incurred. Thus for an applicant who may have lost a job as a result of a criminal prosecution and been out of work for a year before obtaining employment, it might be necessary, simply to keep the costs scheme within financial limits, to limit his award and all others similarly situated to a maximum award - eg. $5,000.00. As well the compensation board would be required to deduct any other income received such as unemployment insurance so that any double recovery would be avoided.

Although this has been a rather brief discussion of some very practical questions, it does permit one to observe that the questions do not represent serious obstacles in the way of a costs system.

B. Who Should Receive Costs Awards

The most difficult question to be resolved in establishing a costs awarding scheme is just who should receive them. For the moment we can leave aside questions of costs to the prosecution and deterrent costs to accused persons, as they will be discussed later, and concentrate on payments of costs awards to accused on the compensation rationale.

Earlier we noted[31] that one direction of the rationale for awarding compensation costs to accused persons is that where an accused is successful and "it ... turns out that through no fault of (his own) he should never have been charged at all justice demands that ... he should be reimbursed for all the costs and expenses which he has properly incurred".[32] But while this view has considerable appeal it also has its problems. In our system all persons who are acquitted after a trial are adjudged innocent not just those who "should never have been charged at all".[33] So too are all accused persons against whom charges are dropped or suspended[34] because at the outset of the criminal process all accused persons are presumed to be innocent. Thus, in theory at least, our system is one that does not provide for different kinds of innocence yet this is precisely what this direction of the compensation rationale would accomplish. As John M. Sharp pointed out in his article "Costs on Acquittal, Some Comparisons and Criticisms":[35] "(T)he disadvantage attached to providing that defence costs should 'normally be awarded to the innocent' would be the creation of two classes of innocence - innocence with costs and innocence without".

Undoubtedly, to some, Mr. Sharp's point is not a disadvantage at all but a benefit as it would tend to inject a measure of realism into the criminal law system. But clearly if that were the goal then rationally it should be accomplished directly by adopting, as in Scotland, the third verdict of "not proven" and not indirectly through a costs awards system.[36] To others, more aware of the disadvantages involved in a third verdict, the point is, if not a real disadvantage, at least a real risk that cannot be completely guarded against by leaving the question of costs in the discretion of the courts.[37] It may be conceded of course that other common law jurisdictions, including England,[38] have costs awards systems that compensate acquitted accused who "should never have been charged at all", and do so without shrouding costs applications or costs awards in secrecy,[39] and that this fact is, perhaps, some support for down-playing the concern that to adopt this direction will create two classes of innocence. As well those

more agreeable to this direction of costs awards would argue that to adopt Mr. Sharp's view[40] would require costs to be awarded as of right to all acquitted accused[41] and to all accused where charges have been abandoned. They would argue that while this may be the more academically sound position to adopt it would likely result in no costs awards system ever being established because (a) in all likelihood it would indeed "'stick in one's (the public's) throat' to see a man acquitted on a technicality and then receive his costs"[42] and (b) since all costs awards would have to come from the public purse such a broad scheme would be too expensive. However in response to these arguments these points might be made. First, it is very risky to place much weight on what other jurisdictions have done particularly when an examination of them reveals that, despite the theory, it is a rare case indeed where an acquitted accused receives costs.[43] Obviously if that is the case there is little need to be concerned about the risk of a third verdict. Second, it is indeed possible to provide for a wider system of costs to more persons than the few "truly innocent" who can demonstrate that innocence without advocating an expensive system of costs for everyone.[44] Third, the concern that it would "stick in one's throat" to see a man acquitted on a technicality and then receive his costs is quite unjustified and should not go unanswered. Quite apart from the value of the general verdict of not guilty to individuals who are acquitted, the concept of legal innocence that is accepted in that verdict has an independent value which is central to the over-all quality of criminal justice. The concern of our system is not to maintain the reputation of the technically innocent, but that of the system of justice itself. Those who would object to the payment of costs to acquitted persons whose factual innocence has not been proved would thereby appear to regard the rule relating to proof beyond a reasonable doubt and various "technical defences" such as lack of corroboration, or involuntariness in the taking of a confession, as unfortunate obstacles to the proper administration of justice. And while the criminal law does place a number of evidentiary barriers in the path of the prosecution of a criminal charge, they are there as essential safeguards in order to keep the reach of the criminal law and those charged with its enforcement within reasonable limits. It follows therefore that while there may be some undeserving accused who are, to use the phraseology of the New Zealand Report, "lucky to get off",[45] society as a whole derives a substantial benefit by the maintenance of the rules that make such a disposition possible. It is on this basis that any intrusion on the value of the verdict of legal innocence should be resisted and upon which it may be concluded that "all the principles of British (and Canadian) justice dictate that a man should not be penalized, sometimes severely, for defending himself successfully against a criminal charge in a court of law".[46]

A second and equally important problem with the first direction of the compensation rationale is that it is too limiting. To confine costs compensation to the "truly innocent" to be determined in the exercise of discretion by the courts[47] may limit cost awards, as in England, to very few persons. In England, while the principle behind the *Costs in Criminal Cases Act 1952* is reasonably broad, in practice costs have only been awarded to innocent accused persons in exceptional cases.[48] Probably one reason for this limitation is an undue restriction by the courts on their discretionary power.[49] But it would seem that another reason is that it is one thing to find innocence based on a reasonable doubt but quite another to establish innocence, for example probable innocence, for purposes of costs. And while that difficulty may minimize the risk that a costs awards system in favour of "innocent" accused persons will create a third verdict - because some of those denied costs may indeed be innocent but unable to prove it - it will also result in a costs awards system of little or no benefit to the vast majority of persons who are charged in the criminal process. That is not to say that the first direction (or dimension) of the compensation rationale should be ignored as having no merit. On the contrary it has considerable force by the very fact that it is the basis of costs awards systems in other jurisdictions. But at the same time by reason of the risk of the third verdict that it raises and its somewhat limited application it is not, by itself, a substantial enough basis for a costs awards system.

The second direction of the compensation rationale, that is in compensating all accused persons for costs that should not have to be suffered, would seem to be more promising. Again, as earlier noted,[50] a compelling argument can be made that no accused should, in addition to being charged with a crime and subject to the possibility of conviction, suffer the various economic losses that are incurred in defending that criminal allegation or in waiting for a plea of guilty to be entered. Of course in practical terms most accused cannot avoid incurring economic losses for the periods of time that may be spent either in gaol following an arrest or in court appearances. During these periods wage and other income losses occur in addition to the direct defence costs that are incurred. However the fact that such losses and costs are suffered is surely only a consequence of the criminal process not its object and an ideal system would be one where they were not incurred at all. Thus in pursuing this direction of the compensation rationale one might even argue that every accused person, whether subsequently convicted or acquitted, should be compensated for all costs reasonably incurred from the commencement of criminal proceedings to their conclusion, that is, to the point of a verdict or other termination. And while the immediate response to such a proposal would likely be that it is both too idealistic and prohibitively expensive, it

does underscore the point that a claim for costs compensati based on this direction of the compensation rationale can b made equally by all accused persons and not just those who are "truly innocent". If the concern of a costs awards scheme is to achieve greater justice for those who are processed by the criminal law system then it would seem just as important, if not more so, to focus on the economic losses that are suffered by all accused persons, or at leas all of those who are not convicted,[51] as those who might be judged "truly innocent". The ultimate purpose even of the latter direction is not to single out certain acquitted accused as being particularly innocent and therefore worthy of special mention, but to compensate these persons for economic losses incurred as a result of a prosecution. But since such losses are unfortunately borne by all accused persons it would be more just to approach that ultimate purpose directly. Thus while it would likely be prohibitiv expensive to provide for costs awards to all accused person it would be quite feasible to provide for costs to be award to those most in need of them. A further compromise might be made to limit such awards to acquitted or discharged accused persons,[52] but again on the basis of need rather than on the basis of who is the most innocent. To demonstrate need it should also not be necessary to show extreme poverty. Of course the poor would be covered by such a scheme if losses and expenses had been incurred. But, to refer again to the article of John M. Sharp, "the typical sufferer under the present law is the innocent[53] middle-upper income bracket defendant who just fails to qualify for legal aid and to whom the costs of a necessary defence represent a severe financial blow".[54] While there might be some disagreement as to the cut-off level for compensation, being either "middle-upper income bracket" or simply "middle income", and some difficulty in defining the criteria to be applied in determining need, the point is a sound one, that is that many average persons, not just the poor, should be compensated by a costs awards system. Thus instead of establishing a costs compensation scheme involving the courts in the exercise of discretion in favour of those acquitted accused who are "truly innocent", with the various problems thereby engendered,[55] it would be much more worthwhile to provide for a tribunal or board to exercise discretion on costs applications in favour of all acquitted or discharged accused persons who are most in need.[56] The value in the general criminal verdict of "not guilty" would remain uncompromised and yet substantial justice would be achieved.

C. Additional Questions Concerning Compensation Costs to Acquitted Accused Persons

While the general issues related to the two possible directions for costs compensation to accused

persons have been drawn, there are still other factors that should be considered.

1. Costs to "Innocent" Accused Persons

The main difficulty with this direction has already been outlined,[57] but perhaps it would be helpful to more fully present some of the arguments. The main argument proceeds that "(T)he disadvantage attached to providing that defence costs should normally be awarded to the innocent would be the creation of two classes of innocence - innocence with costs and innocence without".[58] What that means in ordinary language is that if an accused is charged with a criminal offence and is acquitted without receiving costs there is at least the risk that in the public eye he will still be regarded as less than innocent. If he should not apply for costs a suspicion of guilt would be raised, and if he should apply and be refused perhaps an even greater suspicion would be raised.[59] And while this risk would not seem too important where the offence charged is of a minor, regulatory nature, such as provincial motor vehicle or liquor offences,[60] it could assume crucial importance for Criminal Code and other federal statute crimes. Persons accused of these offences would run the risk that even if acquitted or otherwise freed, if costs were not obtained they would be forever prejudiced in obtaining or holding employment.[61] Persons in public service occupations and many others where trust, integrity, responsibility, and other personal attributes are job-important would be especially vulnerable. As well such a system of costs compensation could well put unbearable pressure on these people in the defence of a prosecution. To them it would never be sufficient to just be acquitted or to be content should the prosecution abandon a prosecution by a withdrawal or a stay of proceedings. Undoubtedly there are times when the Crown should not be permitted to commence a prosecution and then abandon it leaving a cloud over the accused.[62] But there are also situations when an abandonment of a charge can be viewed as a just result. For example the development in the United States of alternative disposition procedures grouped under the terms of "screening" or "diversions"[63] hold considerable promise. However this discretion of a costs

scheme would likely pressure many persons against availing themselves of these alternatives should they become available in Canada.[64]

One other question to be considered here, as to the first direction for costs compensation to accused persons, concerns the tribunal to be employed in making costs awards. If costs are to be determined by "innocence" then it would seem sensible to entrust that question to the trial judge. The judge will have heard all the evidence in the case and will be in as good a position as anyone to make that determination. As well the trial judge would be able to take into account the conduct of the accused in relation to the investigation and prosecution of the offence charged.[65] Thus in taking another criteria into account his role will, in theory at least, be less one of awarding costs on a determination of innocence and more one of making awards in the exercise of discretion taking both innocence and co-operativeness into account. Therefore the extra cost and difficulty in having "costs hearings" before a separate tribunal or board could be avoided.[66] However against this apparent advantage might be weighed the extra burden that would be added to the work of criminal trial judges and, perhaps, the possible reluctance of some of them to go beyond the traditional duty of determining innocence or guilt based on the presence or absence of reasonable doubt.[67]

2. Costs to the Acquitted and Discharged Accused Based on Need

While at first sight it would seem to be extremely difficult to determine a system of costs compensation based on need there is more than one approach that might be followed in order to solve the problem.

(a) The best approach would be to provide for maximum costs to be awarded for lost wages, lost income, and for counsel fees and other costs actually incurred, to all acquitted or discharged accused persons whose income is below a particular level.[68] The level could be fixed by determining gross income upon proof provided to the compensation tribunal and the system could be one of providing uniform costs to all those who qualify,

or more equitably, a system providing proportional benefits decreasing in accordance with an applicant's lesser need. Thus taking the gross income figure of $12,000.00 as being the fixed level up to which maximum awards would be made, for an applicant with a gross income 10 per cent over this level he would receive 90 per cent of available costs and for one whose income was 50 per cent over he would receive 50 per cent of his costs, and so on. However for those with much larger gross incomes there would come a point, i.e. at $24,000.00 or more, where no costs would be paid if this scheme were followed. If this should seem too harsh it could be made subject to a minimum limit of 25 per cent of costs being available to all applicants.

There are of course many variations that can be made upon this theme but the thrust of it is to provide full costs compensation to all applicants in the lower income bracket and a reasonably high measure of compensation to those in the middle income range. While some persons might complain about having to disclose their income, the more substantial complaint would come from those who would either be denied costs or receive only minimum awards. But on the other hand if the levels of compensation are fixed at reasonable levels, such as those above, this complaint would be confined to persons who receive substantial gross incomes and to persons of affluence. And to their complaint it would be reasonable to respond that greater social justice would be achieved by this costs system than by one which attempts to single out the innocent accused - or by not having one at all which would probably be the case if the model proposed were one of compensating all acquitted and discharged accused persons with their full costs.

(b) A second approach, and arguably less worthwhile, would be to reduce the amount of all costs awards to minimal levels, and then permit them to be awarded to all acquitted or discharged accused persons without discrimination as to need. It is the approach often favoured in other compensation schemes, such as no-fault awards in automobile accidents.[69] But in

order to make it feasible it would likely be necessary to make the amount of awards quite small and since, unlike no-fault schemes in tort law where the victim is permitted to prosecute a civil suit for damages in excess of the no-fault award, claimants would not have other sources available for compensation,[70] the value of this approach is lessened accordingly.

For both approaches it would be best to separate the costs system from the courts, at least for compensation costs.[71] The courts have no special ability to determine economic need and since nearly all provinces now have established compensation systems for victims of crime[72] it would be a relatively simple matter to include costs awards to acquitted or discharged accused persons in those systems. The funds for each province should be provided from the federal purse and thus it would simply be a case of each province administering those funds - much as they are now encouraged to do through agreements with the federal government for compensation of victims of crime.[73]

A problem that could be encountered with a liberal costs awards system is that judges and juries might, in certain cases, be reluctant to acquit since the accused would receive costs. This concern could be expressed in the sense that such a costs system would distort the burden of proof in criminal cases and result in convictions in cases where acquittals based on reasonable doubt would otherwise obtain. However this is at best a very speculative concern and to the degree that it could be a problem it would likely be alleviated if the awarding of costs to acquitted accused is divorced from the courts and determined by a separate compensation board based on economic need - which is of course the proposal in this paper.

D. Costs to the Prosecution

Another policy question that warrants considerat is whether costs should be awarded to the Crown against an accused. Formerly, in indictable cases, costs could be awarded against a convicted accused.[74] And although the provision for such costs was removed by a later revision o

the Criminal Code,[75] they may still be awarded in summary conviction cases.[76] But, history and present Criminal Code provisions aside, the argument is rather compelling that the expense of administering criminal justice should be borne by the state and not by the accused. Indeed the acceptance of this principle was the very reason for section 1044 being dropped from the Code in the 1953-54 Revision.[77] That principle was restated in the report of the Ontario Royal Commission Inquiry in Civil Rights.[78] In the words of McRuer C.J.:

> *"No person convicted of an offence should be required to subsidize the expense of his trial by having costs thereof levied against him".* [79]

It is our conclusion that this principle should be followed. While it is of course possible to conceive of a defence counsel attempting to employ improper tactics or for an accused to conduct himself in a disagreeable manner there is no necessity to penalize them with costs. Our courts have ample control over the use of their resources to control and prevent improper delay or the advancement of frivolous arguments without resort to the penalty of costs. As well, the availability of costs in favour of the Crown could have the effect of making defence counsel or the accused afraid to pursue quite legitimate arguments and defences.

E. Punitive and Deterrent Costs

As noted earlier[80] a second rationale for awarding costs is, in some situations, in their punitive and deterrent effect. In awarding costs the law may succeed in deterring frivolous prosecutions by punishing those who bring them. As well such awards may be used to discourage unacceptable investigation and prosecution practices such as excessive delay, unacceptable withdrawals of charges or stays of proceedings, and multiple charging. While these are hardly common practices, they do occur and it would seem that where they are unjustifiable the accused, whether eventually innocent or guilty, should be compensated for them.[81]

To apply this aspect of a costs scheme the eligibility for costs should be made by the trial court and once determined the amount of costs to be awarded could be the subject of a fixed scale collectable from the same compensation fund as compensation awards. In turn, to bring home the punitive and deterrent aspect of these awards, the fund should have a right of recovery (subrogation) against the prosecution officer or department concerned.

F. Other Costs Awards

One other person who may have a valid claim for criminal costs compensation is the private prosecutor or private informant. From time to time private prosecutions are still conducted in Canada, in fact with a heightened awareness of consumer and environmental problems they may be increasing. Moreover a strong argument can be made for the need to permit some private prosecutions in the traditional criminal law field.[82] If that role is accepte then it seems more than reasonable that where the prosecution was justified[83] and was brought because of a lack of interest by the regular prosecution authority the private informant or prosecutor should not be required to bear the expenses of the prosecution and should be compensated by a costs award.

Here again the eligibility for the award should be determined by the trial court on the traditional basis c reasonable and probable grounds and once determined the actual amount of the costs award based on the actual costs suffered or incurred by reason of the prosecution should be paid from the compensation fund.

III Recommendations

Measuring the existing system for costs in criminal cases against the policy issues just reviewed, it is not difficult to conclude that the existing system is totally inadequate and should be replaced by a full costs system. That new system should provide compensatory costs to all acquitted and discharged accused persons or at least to those for whom the economic costs suffered in the successful defence of a prosecution represent a severe financial blow. As well it should make provision for costs awards where, although even guilty, an accused has been subjected to unfair or oppressive investigative and prosecutorial practices. Finally it should permit costs to be awarded to private informants or prosecutors in appropria cases but otherwise costs awards should be denied to the Crown.

Based on these conclusions it is recommended that steps be taken, in part by changes to federal legislati and in part by federal-provincial arrangements, to provide a Canadian Criminal Costs system with these features:

1. The repeal of all existing costs provisions;

2. The granting of costs awards by Provincial Compensation Boards (the same boards that

are presently concerned with compensation awards to victims of crime) to all acquitted and discharged accused persons based on economic need. Maximum awards for counsel fees, lost wages or business income, actually expended or lost, are to be awarded to all applicants having a gross annual income of $12,000.00,[84] or less upon satisfactory proof as to the income level and as to the costs actually incurred, being provided to the Boards. For all applicants with a gross annual income in excess of $12,000.00, the amount of costs to be awarded shall be reduced by the percentage that the annual gross income exceeds the maximum income level of $12,000.00 (eg. an applicant with an income 10 per cent over $12,000.00 shall receive 90 per cent of costs incurred, etc.). Provided however that all applicants should be entitled to receive 25 per cent of their costs;

3. The costs awards to acquitted and discharged accused persons[85] should be based on maximum levels and should be in relation to:

   (a) counsel fees;

   (b) witness's expenses;

   (c) loss of wages or private business income;

   (d) travel and accommodation costs.

4. An award of punitive and deterrent costs to accused persons, whether acquitted or convicted, based on these factors:

   (a) whether, generally, the investigation - into the offence or related offences was conducted in a reasonable and proper manner;

   (b) whether, generally, the Crown conducted the prosecution or prosecutions in a reasonable and proper manner;

   (c) whether, generally, the conduct of the accused in relation to the investigations and prosecutions were reasonable.

5. The award of costs to a private informant or private prosecutor where the prosecution was commenced upon reasonable and probable grounds and where the Crown unreasonably refused to conduct the prosecution;

6. The award of costs against a private informant or private prosecutor where the prosecution was commenced without reasonable and probable grounds to believe that the accused committed the offence charged;

7. For costs awards in the cases of (4) (5) and (6), eligibility for costs should be determined by the trial or hearing court;

8. In the case of (4) once eligibility has been determined the applicant should receive a fixed costs award from the Provincial Compensation Board, upon presentation of a certificate of eligibility, the amount to be determined by those costs actually incurred by the accused and by the need to award punitive costs, (but in no case should an accused receive double costs under (2) and (4) above) and the Board should have the right to recover those costs from the Crown Officer, or Government Department, or local authority on whose behalf the Crown Officer was acting;

9. In the case of (5) once eligibility has been determined the applicant should be compensated by a costs award from the Provincial Compensation Board for actual costs incurred, as in (3) above;

10. In the case of (6) once eligibility has been determined (here the court clerk could act before the trial court as agent for the Provincial Compensation Board) the Provincial Board would have the right to claim against the private prosecutor all costs received by the acquitted or discharged accused;

11. The principles applicable to the trial situation shall apply to all appeals including appeal by way of trial de novo, to all hearings and appeals thereon for the Writs of habeas corpus, certiorari, mandamus, and prohibition relating to matters arising out of criminal charges under The Criminal Code or other federal statutes, and to cases where charges are withdrawn or proceedings stayed;

12. The Federal Government should provide the necessary money to fund the Criminal Costs system. This could be done by having the Federal Government provide the funds to the Provincial Compensation Boards under agreements requiring the money to be allocated as provided herein.

IV Conclusion

At the outset of this proposal we drew attention to the fact that while our proposal follows upon the Research Report of Professor Burns entitled "Relating to the Matter of Costs in Criminal Cases"[86] it does not follow all of his recommendations. Of course some are agreed with and have been recommended in this paper, such as provisions for punitive and deterrent costs and costs, in appropriate cases, to private prosecutors. But we are in fundamental disagreement with his principal recommendation of costs awards to "innocent" accused persons.[87] While we agree with the statement in the working paper of the British Columbia Law Reform Commission on "Costs of Accused on Acquittal" that "the criminal justice system is constantly in need of reform and very often oppressive when enforced in its present state...",[88] we do not agree that the way to relieve that oppression is to compromise on the high value our justice system places "on safeguards against the conviction of innocent persons".[89] One of those safeguards, as expressed in the famous case of Woolmington v. Director of Public Prosecutions[90] and now contained in the Canadian Bill of Rights,[91] is that an accused "is presumed innocent until proved guilty according to law in a fair and public hearing...".[92] It is our view that, for "true crimes" at least,[93] that a safeguard would be seriously compromised by a system of costs that would single out the truly innocent from those not so innocent and thus all acquitted accused for whom costs were denied or unavailable would be in a worse position than at the commencement of criminal proceedings; though acquitted and entitled to their freedom they would no longer be presumed innocent but, at the very least, subject to the suspicion of guilt with all of the consequent disadvantages that could attach to that condition.[94]

In further support for this view we refer again to the working paper of the British Columbia Law Reform Commission where it is noted:

> *"In assessing the proposal made in this working paper, the reader should bear in mind that the cases are few that lead to a clear-cut conclusion of innocence. Most evidence is circumstantial and the Judge or Jury must draw inferences about whether an accused did or did not commit a certain act and whether he did it knowingly or with a wrongful intention. These are matters for human judgment rather than scientific proof, and an accused who wins an acquittal on such judgment is entitled to have his acquittal taken at face value".* 95

Not only do we agree that this assessment is sound, but we suggest it argues against and not for a costs awards scheme that would favour the demonstrably innocent accused.

Thus while we recognize the value of costs compensation in criminal cases, our proposal is one that attempts to meet that objective directly by a system of costs awards to those acquitted and discharged accused persons to whom the actual "costs of a necessary defence represent a severe financial blow".[96] Further while we recognize that our proposal has its own difficulties, not the least of which are its financial implications, nevertheless we are prepared to defend it, and not one that would tend to create a second class of innocence, as a just solution to the need for costs compensation to acquitted and discharged accused persons.

End Notes

1. Burns, Research Report for the Law Reform Commission "Relating to The Matter of Costs in Criminal Cases" October, 1972, on file at the Commission (hereafter referred to as the Burns Report); Professor Burns research on the subject of Costs in Criminal Cases was actually done jointly for both the Federal Law Reform Commission and the British Columbia Law Reform Commission, and the British Columbia Commission has since published a working paper (No. 9) following the Report concerning costs in judicial proceedings for provincial offences.

2. The Burns Report was circulated to all Provincial Law Reform Commissions and to the Department of Justice.

3. The principal recommendation of the Burns Report is that costs should be paid to acquitted accused persons who are "wrongly accused" or "probably" innocent; see Burns Report at 89-93, and at 112. The Burns Report also recommends costs to be paid to all accused persons for abusive investigative and prosecutorial practices, and to the Crown in appropriate cases; see Burns Report at 89, 136, and at 105, 114, 120, 123-125, 126, and 134. Again we disagree with the Burns recommendation in favour of costs awards to the Crown. See infra at 3-20 for our discussion of these various issues.

4. The situation in British Columbia is generally governed by s.2(1) of the Crown Costs Act, R.S.B.C. 1960 c.87 wherein the Crown may not receive nor have costs awarded against it in the absence of statutory authority.

5. See eg., R. v. Guidry (1965) 47 C.R. 375, (1966) 2 C.C.C. 161 (N.B.C.A.).

6. See Criminal Code sections, 744(1)(b) (trial), 758 (trial de novo), 766 (stated case), 610(3) (appeals).

7. See Criminal Code section 772, and see the Attorney-General of Quebec v. Attorney-General of Canada (1945) S.C.R. 600, 84 C.C.C. 369, (1945) 4 D.L.R. 305 (S.C.C.)

8. Criminal Code section 610(3).

9. Criminal Code sections 656 and 657.

10. Criminal Code section 529(5).

11. On the issue whether or not provincial courts can make rules under s.438 of the Criminal Code authorizing the imposition of costs or whether their power is confined to the regulation of costs authorized by other substantive laws, there is a clear conflict of judicial practice: In British Columbia (Re Christianson (1951) 3 W.W.R. (N.S.) 133, 100 C.C.C. 289, 13 C.R. 22, [1951] 4 D.L.R. 462 (B.C.S.C.)) and Ontario (Re Ange [1970] 3 O.R. 153, 1970 5 C.C.C. 371 (Ont. C.A.), Re Sheldon Unreported, (1972) per Lieff J. (Ont. S.C.) the judicial view is that courts do not have such power, whereas in Saskatchewan the opposite view has been adopted: Ruud v. Taylor (sub. nom. R. v. Taylor; Ex parte Ruud) (1965) 51 W.W.R. 335, [1965] 4 C.C.C. 96 (Sask. S.C.).

12. Costs in Criminal Cases Act, 1952.

13. Costs in Criminal Cases Act, 1968.

14. Costs in Criminal Cases Act, 1967.

15. Costs in Criminal Cases Act, 1967.

16. The Canadian practice in civil cases is to permit the successful party to charge against the unsuccessful party a number of tariff items reflecting the work of the various stages of the litigation from commencement to termination.

17. See infra at 15.

18. See supra at 1.

19. New Zealand Law Revision Commission Report of Committee on Costs in Criminal Cases 1966 para 28 (quoted in Burns Report at 92).

20. Statement issued by the English (London) Bar Council October 11, 1967 in response to the inadequate compensat awarded to one Powell after charges were dropped of indecently assaulting a girl of 10. (Referred to in Sharp, "Costs on Acquittal, Some Comparisons and Criticisms" (1968) 16 Chitty's Law Journal 77).

21. See Burns Report at 106, 110, 112-114.

22. See supra at 3.

23. See supra at 3-4.

24. Although occasionally substantial damages can be recovered in tort for malicious prosecution, see eg. Bahner v. Marwest Hotel Company Ltd. and Muir (1969) 6 D.L.R. (3rd) 322; aff'd on appeal (1970) 12 D.L.R. (3rd) 646 (B.C.C.A.), it is really an uncertain and illusory remedy. See text infra at 6.

25. See Press Releases from Office of The Minister of Justice dated March 15, 1973.

26. Some legal aid programs, as in Ontario and British Columbia, permit an accused to select a lawyer from a panel or list of lawyers agreeable to receive legal aid cases. Others, as in Nova Scotia and in the city of Montreal, resemble a public defender system.

27. See supra at 3-4.

28. See supra at 4.

29. The point made here is that even if costs were confined to the "truly innocent accused" as in the Burns Report, (and following the first direction of the compensation rationale), there would still be a considerable gap between the needs of such a scheme and compensation obtainable through the tort remedy.

30. Sharp, "Costs on Acquittal, Some Comparisons and Criticisms" (1968) 16 Chitty's Law Journal 77 at 85.

31. See supra at 3.

32. See supra footnote 20.

33. An acquittal verdict covers both hearings on the merits and dismissals of charges where the Crown fails, or declines to adduce any evidence. And in the latter case while such an acquittal may not prevent the accused from being recharged with the same offence, see R. v. Chambers (1970) 1 C.C.C. 217, and R. v. Rosenberg (1970) 9 C.R.N.S. 366, it remains an acquittal for all purposes until that event.

34. Reference here is to withdrawals of charges and to stays of proceedings; see Criminal Code section 508.

35. See supra footnote 30 at 85.

36. While this is too large a question to fully cover all of the arguments on it, in this paper, it will be obvious that the authors are opposed to the introduction into Canada of a third verdict of "not proven".

37. The Burns Report leaves the eligibility for costs i the discretion of the trial judge and, if the crite of New Zealand were to be followed, in addition to the question of the accused's innocence the trial judge would be entitled to consider the conduct of the accused in relation to the investigation and prosecution of the offence charged. Thus to some extent it can be argued that since costs eligibilit is dependent upon the exercise of discretion taking a factor other than innocence into account the risk of creating a third verdict of less-than-innocence diminished - but only to some extent.

38. England has provided such costs since 1952; see Costs in Criminal Cases Act, 1952.

39. These jurisdictions do not require costs applicatio to be made in private chambers nor do they prohibit publication of costs awards or dismissals of costs applications.

40. The view that the "innocent" should not be singled out by costs awards.

41. See Sharp, "Costs on Acquittal..." supra footnote 30 at 85.

42. Ibid.

43. See Burns Report at 129-131 and at 121.

44. See Burns Report at 131-133. Taking the 1968 statis he concludes that for both indictable and summary conviction cases there were only, approximately, 30, cases of acquittals. Added to this figure would be all cases of withdrawals and stays of proceedings. But even then an unmanageable figure would not be attained. As well it is probable that for a good percentage of this total there would not be any cost in excess of legal aid assistance already provided.

45. See supra, introductory note at iv.

46. "The Times" (London) newspaper October 12, 1967.

47. See supra footnote 37.

48. See Burns Report at 121 and see also Sharp, "Costs on Acquittal..." at 80-81.

49. See Burns Report at 71-72 for comment on the 1959 Practice Direction of Lord Parker on the eligibility for costs.

50. See supra at 4.

51. As noted earlier those not convicted include not only the acquitted accused, but those against whom charges are dropped or abandoned.

52. This compromise is necessary not out of principle but simply to make the costs scheme economically feasible.

53. Here Sharp clearly includes all acquitted accused not just the truly innocent.

54. See supra footnote 30 at 85.

55. See supra at 7-9 and infra at 10-12.

56. See infra at 12-14.

57. See supra at 7-9.

58. See supra footnote 30 at 85.

59. Of course if the trial judge in determining costs eligibility were also to take into account the accused's conduct, then it is possible that this risk might be reduced since a refusal of costs could, in a few cases, be attributable to an accused's lack of co-operation. But for the reason that it is difficult to know, in any given case, what will amount to a lack of co-operation, and because our system is not one that requires the accused to be co-operative this is not a substantial point.

60. This very point is acknowledged in the British Columbia working paper on costs. See Working Paper No. 9 "Costs of Accused on Acquittal" para (k) at 62.

61. In answer to this point it would not be sufficient to argue that employers should not be concerned as to whether or not costs were applied for or obtained in considering job applicants who have been charged but acquitted. If there is a real chance that they would, then the reality is that this direction of a costs compensation system creates an unacceptable risk.

62. This is a complaint that is raised against excessive use of the power to stay proceedings contained in section 508 of the Criminal Code.

63. See eg. the discussion of these procedures in the Report of The National Conference on Criminal Justice, January 23-26 1973 at 7-32.

64. For cases that might come within a "screening" system, i.e., where upon an examination of resource allocation a decision is made not to continue a prosecution, an accused might be unwilling to agree to a withdrawal of the charge to facilitate screening if it meant a denial of costs that were tied to proof of innocence. If costs were not so tied to innocence little problem would exist: if costs were available at the stage of screening for cases where charges were withdrawn or proceedings stayed, conceivably the actual costs incurred at that point would be minimal. Furthermore, if all "screening" of cases i.e., abandoning of charges, and "diversion" of cases where the accused consents, were pursuant to an open, acknowledged system that operated subject to known criteria and to a system of review it would be reasonable in a costs compensation system (that did not favour the innocent accused) to not provide costs for these cases.

65. See supra footnotes 37 and 58.

66. Following the first direction of the compensation rationale, costs based on innocence, if eligibility for costs were to be determined by a separate tribunal, eg. a Compensation Board, the board would be required to hold its own hearing on innocence and any other factor that would determine costs eligibility and that would be an extremely trying and inefficient procedure.

67. This reluctance is probably a contributing factor to the restrictive interpretation of England's costs awards scheme; see supra at 8.

68. No doubt there will be some disagreement as to what that level should be. For purposes of this proposal we have taken the sum of $12,000.00 as the annual income level up to which full awards should be made. It is of course simply an arbitrary choice, but it does meet the concern of attempting to provide reasonable costs compensation both to persons in the lower income bracket and to middle-income earners.

69. See eg. the no-fault automobile accident scheme in British Columbia enacted in 1969 by An Act to Amend the Insurance Act S.B.C. 1969 C.11.

70. Subject to the limited availability of a tort suit for malicious prosecution.

71. For punitive or deterrent costs and for costs for or against private prosecutors it would be reasonable to have eligibility determined by the trial court. See supra at 15-16.

72. Eight provinces have enacted legislation providing for compensation to victims of crime. They are:

(1) Alberta, Criminal Injuries Compensation Act R.S.A. 1970 C. 75

(2) Ontario, Law Enforcement Compensation Act R.S.O. 1970 C. 237

(3) British Columbia, Criminal Injuries Compensation Act S.B.C. 1972 C. 17

(4) Saskatchewan, The Criminal Injuries Compensation Act S.S. 1967 C. 84

(5) Newfoundland, The Criminal Injuries Compensation Act S.N. 1968 C. 26

(6) New Brunswick, The Innocent Crimes Victims Compensation Act S.N.B. 1971 C. 10

(7) Québec, The Crime Victims Compensation Act S.Q. 1971 C. 18

(8) Manitoba, The Criminal Injuries Compensation Act S.M. 1970 C. 56

73. Agreements have now been completed with all eight of the provinces that have victim compensation schemes.

74. See Criminal Code 1927 section 1044.

75. See Criminal Code 1953-54 Revision; for a historical development of section 1044 see Martin's Criminal Code 1955 at 958-959.

76. Section 744(1)(a) Criminal Code R.S.C. 1970 C. 34 as amended to July 15, 1972.

77. See Hansard, House of Commons Debates IV at 2888.

78. Report No. 1 Vol. 2.

79. Ibid. at 927.

80. See supra at 2.

81. This aspect of costs awards could develop as a reasonable alternative to the rather "heavy" doctrine of abuse of process. See R. v. Osborn (1971) S.C.R. 184, (1970) 1 C.C.C. (2d) 482, (1971) 12 C.R.N.S. 1. See also R. v. K. (1972) 5 C.C.C. 46 (B.C.S.C.) and Attorney-General of Saskatchewan v. Macdougall 1972 2 W.W.R. 66.

82. This question is the subject of a special study presently in progress for the Procedure Project of the Law Reform Commission.

83. It should not be necessary for the private prosecution to result in a conviction. Rather the test of reasonable and probable grounds for conducting the prosecution should be sufficient.

84. As noted earlier, the sum of $12,000.00 as the income level up to which maximum awards might be made is an arbitrary choice; see footnote 67 supra.

85. If the abandonment of prosecutions through withdrawals and stays of proceedings were according to "open" criteria and subject to review then it might seem reasonable to withdraw some pre-trial determinations from a costs awards scheme. For example for withdrawals or stays to facilitate some alternative form of treatment consented to by the accused it would be unreasonable to make provision for costs awards when, because the alternative treatment is determined by the guilt and consent of the accused, when no costs would be awarded to convicted accused dealt with in the traditional trial and sentencing process.

86. See supra at 1.

87. See Burns Report at 89-93.

88. Working Paper No. 9 at 1.

89. Ibid. at 2.

90. (1935) A.C. 467 at 481-482.

91. S.C. 1960 C. 44.

92. Ibid. section 2(10).

93. The British Columbia Working Paper No. 9 does in fact briefly acknowledge the possibility that our concern is a real one for "true crimes". See Working Paper No. 9 para (k) at 62.

94. See supra at 11-12.

95. Working Paper No. 9 at 4.

96. Sharp, "Costs on Acquittal..." at 85.