

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

#### IV. CONCLUSION

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

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

## THE THEORETICAL AND POLICY CHALLENGES IN CANADIAN COMPENSATION LAW

By JOHN MCLAREN\*

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

"Charley? Never heard of a dog named Charley. Hello Charley."

"I wouldn't want you to get in trouble with your boss. Think I ought to drag ass now?"

"What the hell?" he said. "He ain't here. I'm in charge. You ain't doing no harm."

"I'm trespassing."

"Know something? Fella camped here, kind of a nut. So I came to kick him off. He said something funny. He says, 'Trespassing ain't a crime and ain't a misdemeanour'. He says it's a tort."

Now what the hell does that mean? He was kind of a nut."

(John Steinbeck, *Travels with Charley*).

### I. INTRODUCTION

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

### II. THE PAST RECORD

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

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

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

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

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

<sup>2</sup> *Ibid.* at 78.

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

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

sociological, historical, or philosophical analysis to look through and behind the law.<sup>5</sup>

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

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

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

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

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

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

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

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

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

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

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

<sup>7</sup> T. Ison, *The Forensic Lottery* (1967).

<sup>8</sup> R.J. Gray & G. Sharpe, "Doctors, Samaritans and Accident Victims" (1973) 11 *Osgoode Hall L.J.* 1.

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

<sup>10</sup> I refer, of course, to the group led by Professor Ziegel of the University of Toronto, Faculty of Law.

<sup>11</sup> One exception is the work of an historian, M. Piva, on the inadequacy of tort law in the context of industrial accidents. See M. Piva, "The Workmen's Compensation Movement in Ontario" (1975) 1 *Ont. Hist. Soc.* 39.

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

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

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

<sup>15</sup> P. Atiyah, *Accidents, Compensation and the Law*, 1st ed. (1970) at 6-9.

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

### III. NORTH AMERICAN COMPARISONS

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

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

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

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

### IV. A NEW WAVE OF SCHOLARSHIP IN CANADA?

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

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

<sup>20</sup> *Supra*, note 16 at 211-15.

<sup>21</sup> *Ibid.* at 215-30. See G. Calabresi, *The Cost of Accidents* (1970); G. Calabresi & J. Hirschoff, "Toward a Test for Strict Liability in Torts" (1972), 81 Yale L.J. 1055; R. Posner, "A Theory of Negligence" (1972) 11 J. Leg. Stud. 29; R. Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law* (1980); G. Fletcher, "Fairness and Utility in Tort Theory" (1972), 84 Harv. L. Rev. 537.

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

<sup>16</sup> E. White, *Tort Law in America: An Intellectual History* (1980) at 63-113.

<sup>17</sup> N.T. Dowling, "Compensation for Automobile Accidents: A Symposium" (1932) 32 Columbia Rev. 785.

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

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

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

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

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

<sup>23</sup> See E. Picard, *Legal Liability of Doctors and Hospitals* (1977), and *supra*, note 6.

<sup>24</sup> See I. Saunders, ed., *The Future of Personal Injury Compensation* (1978).

<sup>25</sup> L. Friedmann, *A History of Law in America* (1973).

<sup>26</sup> M. Horwitz, *The Transformation of American Law 1780-1860* (1977).

<sup>27</sup> P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

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

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

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

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

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

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

<sup>31</sup> G.A. Smith, "Liability for the Negligent Conduct of Litigation: The Legacy of *Ronde v. Worsley*" (1983) 47 Sask. L. Rev. 211.

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

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

<sup>32</sup> E. Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2 Law & Phil. 37.

<sup>33</sup> E. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247.

<sup>34</sup> R. Pritchard & A. Brudner, "Tort Liability for Breach of Statute: A Natural Rights Perspective" (1983) 2 Law and Phil. 89.

<sup>35</sup> S.C. Coval & J.C. Smith, "Compensation for Discrimination" (1982) 16 U.B.C.L. Rev. 71.

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

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

<sup>38</sup> I. Saunders & K. Cooper-Stevenson, *Personal Injury Damages in Canada* (1981).

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

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

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

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

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

<sup>41</sup> J. Weir, *Structured Settlements* (1984).

<sup>42</sup> *Andrews v. Grand & Toy Alta Ltd.*, *supra*, note 37 at 236.

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

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

The past five years have also marked an increase in the number of articles that look beyond the law of negligence to other tort actions. In some cases the emphasis is on doctrine and theory. This is true, for example, of Dean Burn's instructive pieces on civil conspiracy and torts injury to economic interests,<sup>47</sup> and Professor Girard's thoughtful comment on the development of a new theoretical basis for nuisance.<sup>48</sup> In other instances the research has a more functionalist flavour to it. This is the case, for instance, with the two pieces on the law of defamation by Professor Robert Martin that examine respectively the use of inter-

locutory injunctions in libel cases, and the problems associated with letters to the editor as the source of defamation actions.<sup>49</sup> Both issues are examined in the broader context of balancing freedom of speech with the need to protect the individual from groundless attacks on his or her reputation. Professor Feldhusen takes a similar approach in his article on judicial immunity from suit in which he balances the value of a judge reaching decisions candidly and fearlessly with the right of individuals to be free from unwarranted or malicious attacks on their reputations.<sup>50</sup>

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

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

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

<sup>45</sup> G. Robertson, "Informed Consent in Canada: An Empirical Study" (1984) 22 Osgoode Hall L.J. 139.

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

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

<sup>48</sup> P. Girard, "An Expedition to the Frontiers of Nuisance" (1980) 25 McGill L.J. 565.

<sup>49</sup> R. Martin, "Inlocutory Injunctions in Libel Actions" (1982) 20 U.W. Ont. L. Rev. 129; R. Martin, "Libel and Letters to the Editor" (1983) 9 Queens L.J. 88.

<sup>50</sup> B. Feldhusen, "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980) 29 U.N.B.L.J. 73.

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

<sup>52</sup> J. Morrison, "Pesticide Poisoning Issues in Personal Injury Liability" (1983) 47 Sask. L. Rev. 97.

<sup>53</sup> D. Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John Sharp* (1980).

<sup>54</sup> *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

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

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

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

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

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

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

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

<sup>61</sup> S. McCaffery, "Private Remedies for Transboundary Pollution Damage in Canada and the United States: A Comparative Survey" (1981) 19 U.W. Ont. L. Rev. 35.

<sup>62</sup> J. Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (1981) 281.

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

<sup>55</sup> B.J. Reiter, "Contracts, Torts, Relations and Reliance" in B. Reiter and J. Swan, eds., *Studies in Contract Law* (1980) at 235; M. Bridge, "The Overlap of Tort and Contract" (1982) 27 McGill L.J. 872; M. Bridge, "Defective Products Contributory Negligence, Apportionment of Loss and the Distribution Chain — *Lambert v. Lewis*" (1982) 6 Can. Bus. L.J. 184; N. Rafferty, "The Impact of Concurrent Liability in Contract and Tortious Negligence upon the Running of Limitation Periods" (1983) 32 U.N.B.L.J. 189; N. Rafferty, "Concurrent Liability in Contract and Tort: Recovery of Pure Economic Loss and the Effect of Contributory Negligence" (1982) 20 Alta. L. Rev. 357; N. Rafferty, "Liability for Contractual Misstatements (1984) 14 Man. L.J. 63; J. Irvine, "Contract and Tort: Troubles Along the Border" (1980) 10 C.C.L.T. 281; J. Irvine, "Case Comment: *Surety v. Carroll Hatch*" (1980) 10 C.C.L.T. 266; J. Irvine, "Case Comment: *Canadian Western Nait v. Pathfinders Survey Ltd.*" (1981) 12 C.C.L.T. 256; J. Irvine, "Case Comment: *John Maron Gas v. New Brunswick Telephone Co. and Ward v. Dobson Construction Ltd.*" (1983) 24 C.C.L.T. 213; J. Blom, "The Evolving Relationship Between Contract and Tort" (1985) 10 Can. Bus. L.J. 257; B. Morgan, "The Negligent Contract Breaker" (1980) 58 Can. B. Rev. 299.

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

<sup>57</sup> D. Cohen, *supra*, note 43.

<sup>58</sup> Weir, *supra*, note 41.

<sup>59</sup> J. O'Connell & C. Brown, "A Canadian Proposal for No-Fault Benefits Financed by

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

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

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

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

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

<sup>66</sup> M. Bridge, "The Overlap of Contract and Tort" (1981-82) 27 McGill L.J. 872.

<sup>67</sup> P. Auyah, "No Fault Compensation: A Question That Will Not Go Away" (1980) 54 Tul. L. Rev. 271.

<sup>68</sup> T. Ison, *Workers' Compensation in Canada* (1983).

<sup>69</sup> P. Burns, *Criminal Injuries Compensation: Social Kennedy or Political Palliative for Victims of Crime* (1980).

<sup>70</sup> T. Ison, *Accident Compensation: A Commentary on the New Zealand Scheme* (1980).

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

<sup>72</sup> P. Weiler, *Reshaping Workers' Compensation for Ontario* (1980).

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

## V. THE FUTURE

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

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

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

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

<sup>73</sup> E. Belobaba, *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization* (1983).

<sup>74</sup> *Supra*, note 16 at 218-30.

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

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

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

<sup>75</sup> Englard, *supra*, note 22 at 68.

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

<sup>77</sup> *Supra*, note 16 at 230-43.

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

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

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

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

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

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

<sup>81</sup> A. Hutchinson & D. Morgan, "The Canegustian Connection: The Kaleidoscope of Tort Theory" (1984) 22 *Osgoode Hall L.J.* 69. See also B. Chapman, "Ethical Issues in the Law of Torts" (1982).

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

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

In the field of negligence law, it is time for more integrated and extensive critical analyses examining the various objectives claimed for liability under this head and the extent to which they are actually realized, applying not only legal but also economic, sociological, political, and philosophical analysis, and viewing negligence law in the context of both tort and compensation law in general. We need to know whether negligence law has the theoretical integrity that some claim for it, or whether theoretical consistency is a myth. Professor J.C. Smith in

his book on negligence law has laid much of the philosophical groundwork.<sup>83</sup> It is encouraging to learn that Professors Saunders and Cooper-Stephenson are working on a book on negligence that will attempt to address and evaluate the economic, sociological, and political values which underlie that area of liability.

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

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

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

<sup>83</sup> J.C. Smith, *Liability in Negligence* (1984).

<sup>84</sup> McLaren, *supra*, note 6.

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

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

Enough has been said already to suggest that much more comparative research between the civil and common law systems should be carried out in Canada. By way of example it would be fascinating to explore the issue of how far developments within the case law, especially at the Supreme Court of Canada level, are affected by the theoretical predisposition and legal training of the judges who have crafted the court's or the majority's decision in particular cases. Is it, for example, merely aberrational that Pigeon J.'s views on the exclusivity of contract and

tort, as articulated in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*<sup>87</sup> seemed to fly in the face of common law developments elsewhere or is the truth that his position was entirely consistent with the theory in Quebec law that a party to a contract cannot opt, in the event of a claim for liability, for a delictual rather than contractual action?<sup>88</sup>

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

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

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

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

<sup>87</sup> [1972] S.C.R. 769.

<sup>88</sup> On the characterization of this question in Quebec Law and an account of the divided state of the authorities, see J.L. Baudoin, *La Responsabilité Civile Délictuelle* (1973) at 15-18.

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

"Before it gets too dark I've got find a place to park. Know any place up the road where they'll let me stay the night?"

"If you pull over that way behind the pine trees nobody could see you from the road."

"But I'd be committing a tort."

"Yeah, I wish to Christ I knew what that meant."

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

BY MARY JANE MOSSMAN\*

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

### I. APPROACHING THE TASK: PROBLEMS AND PITFALLS

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

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

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

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<sup>1</sup> B. Laskin, *Cases and Notes on Land Law* (1964).

<sup>2</sup> A. Hargreaves, Book Review (1956) 19 Mod. L. Rev. 14; Professor Hargreaves was reviewing

## STRUCTURED SETTLEMENTS — AN ACTUARY'S VIEW

Donald R. Anderson\*

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

1. *What are Structured Settlements?*

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

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

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

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

2. *The Holland Committee Report*

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

This report dealt with the following advantages of periodic payments:

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

Against these advantages, the report discussed the following disadvantages:

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

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

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

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

### 3. *Income Tax Implications*

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

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

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

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

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

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

### 4. *Application of Structures*

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

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

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

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

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

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

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

1. High amounts, where taxes are expected to be onerous during the early years.
2. Cases where it is quite evident that the plaintiff will be unable to devise and execute a sound investment programme or will foolishly dissipate the funds to his own detriment or, especially, to the detriment of minor children.
3. Cases where the plaintiff intends to defer usage of some of the funds for a period of years, and where taxes would make it difficult to do so.
4. Cases where a plaintiff is steadfastly refusing a settlement which cannot be improved in court, and where a

structure will look better in view of its guaranteed payout over a period of years.

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

1. Where a structure is being proposed to save taxes, and where the plaintiff is expected to split the tax saving with the defendant, and yet where the tax implications have not been adequately analyzed and where taxes would not be very high anyway or where substantial tax savings can be accomplished through other devices.
2. Where the structure is proposed for a minor child, whose consent cannot, of course, be obtained, and where inflation may cause the income to be drastically reduced after the child comes of age. In these cases the child may feel that his interests were not properly looked after.
3. Where the rate of escalation in income is substantially lower than the predicted rate of inflation.
4. Cases where there is a mortgage or other debt to be paid off. This should normally be given priority over annuity purchase.
5. Cases where the plaintiff has special tax treatment, such as foreign residence.

##### 5. *Role of Actuary and Structurer*

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

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

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

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

#### 8. *Misunderstanding of Income Projections*

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

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

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

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

#### 9. *Mixed Investment Programmes*

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

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

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

#### 10. *The Investment Yield on Annuities*

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

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

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

#### 11. *What is Cross-up?*

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

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

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

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

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

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

## 12. Conclusion

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

## VOGEL v. CANADIAN BROADCASTING CORPORATION et al.

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

Held - January 13, 1981.  
Judgment - January 16, 1981.

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

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

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

Held - Order accordingly.

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

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

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

## AN ALTERNATIVE TO STRUCTURED SETTLEMENTS: THE USE OF TRUSTS

*Stephen G. Blair\**

### Introduction

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

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

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

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

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

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

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

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

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

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

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

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

#### Effects of Inflation

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

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

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

#### Tax Effects

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

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

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

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

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

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

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

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

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

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

#### **Some Considerations in Preparing the Trust Document**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Summary

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

## THE PRODUCTION OF CLINICAL NOTES AND RECORDS

*Robert Roth and Stephen E. Firestone\**

### Introduction

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

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

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

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

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MEASURE OF DAMAGES FOR THE WRONGFUL  
DEATH OF A CHILD

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

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

Introduction

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

has been brought such damages as the Court thinks proportioned to the injury resulting from the death."<sup>2</sup>

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

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

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

<sup>1</sup> *Ibid.*, R.S.A. 1955, c. 111, s.4(1).

<sup>2</sup> *Ibid.*, (1852), 18 Q.B. 93, 118 E.R. 35 (Q.B.).

<sup>3</sup> (1858), 3 H. & N. 211, 157 E.R. 448 (Exch.).

<sup>4</sup> (1885), 11 S.C.R. 422, at p. 433. (Emphasis added).

<sup>5</sup> *Ibid.*, at p. 432.

<sup>6</sup> *Ibid.*, at p. 432.

<sup>7</sup> *Ibid.*, at p. 432.

<sup>8</sup> [1968] S.C.R. 71. (1967), 66 D.L.R. (2d) 97.

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

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

### I. *The Benefits Provided by Children*

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

The first, and simplest, set of such hypotheses is that couples will have more children the greater are the benefits which children are perceived to provide and the lesser are the costs.<sup>10</sup> For example, it has often been suggested that rural families have traditionally had more children than have urban families both because food and shelter were less expensive in rural areas than urban and because children have been more

productive in rural areas than urban.<sup>11</sup> Similarly, it has also been argued that programs which have provided aid to mothers with dependent children have increased fertility rates by reducing the costs of children,<sup>12</sup> and that increases in the wage rates of young women have decreased fertility rates by increasing the incomes which are foregone (costs) when women remain at home (to look after their children).<sup>13</sup>

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

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

<sup>10</sup> G. Becker, *A Treatise on the Family* (1981), pp. 96-97.

<sup>11</sup> M. Hong, AFDC Income, Recipient Rates, and Family Dissolution (1974), 9 J. Human Resources 303.

<sup>12</sup> See the articles in (1973) 81 J. Political Economy, Supplement.

<sup>13</sup> B. Fleisher and G. Rhodes, Fertility, Women's Wage Rates and Labor Supply (1979), 69 American Economic Rev. 14.

<sup>14</sup> J. Behrman and P. Taubman, Birth Order, Schooling and Earnings (1986), 4 J. Labor Economics S121.

<sup>15</sup> A. Leibowitz, Home Investments in Children (1974), 82 J. Political Economy, Supplement S111.

<sup>16</sup> For an excellent review of this literature, see R. Lee and R. Bulatao, *The Demand for Children: A Critical Essay*, in R. Bulatao and R. Lee, *Determinants of Fertility in Developing Countries* (1983), p. 233.

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

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

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

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

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

estimate can be derived of both the benefits and the costs which have been foregone. The difference between these estimates becomes the pecuniary estimate of the damages payable to the parents.

## III. Valuing a First Child

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

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

<sup>17</sup> T. Espenshade, *The Cost of Children in Urban United States* (1973).

<sup>18</sup> J. van der Gaag, *On Measuring the Cost of Children* (1982), 4 *Children and Youth Services Rev.* 77.

<sup>19</sup> L. Olson, *Costs of Children* (1983), ch. 4.

<sup>20</sup> C. Edwards, *USDA Estimates of the Cost of Raising a Child: A Guide to Their Use and Interpretation* (1981), Miscellaneous Publication Number 1411.

<sup>21</sup> E. Lazear and B. Michael, *Estimating the Personal Distribution of Income with Adjustment for Within-Family Variation* (1986), 4 *J. Labor Economics* S216.

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

<sup>18</sup> *New York Times*, *Court Weighs Suit by Parents in Birth of Unthought Child* (March 24, 1985), 1. (Facts identical to those in *Keats*, *ibid.*)

**TABLE I**  
Percentage of Family Expenditures  
on Consumption Devoted to First Child

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

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

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

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

There is also some evidence to indicate that expenditures vary with the age of the child. Relying on the studies cited in footnotes 19-22,<sup>25</sup> I propose to assume that the percentage of family consumption devoted to the first child is fifteen per cent from birth to age six, twenty per cent

from ages six to twelve, and twenty-five per cent from ages twelve to eighteen.

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

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

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

<sup>24</sup> (1982) Cat. No. 13-120, October 1984.

<sup>25</sup> Source: Statistics Canada, *Employment, Earnings, and Hours* (various issues), Cat. No. 71-002.

<sup>26</sup> For simplicity, I have assumed that the net discount rate of growth of the parents' incomes over the child's lifetime equals the rate of interest - not an unreasonable assumption in Canada. (See C. J. Bruce, *Assessment of Personal Injury Damages* (1985), chapters 5 and 9), *supra*.

<sup>27</sup> *Infra*, p. 352.

<sup>24</sup> *Supra*.  
<sup>25</sup> *Supra*, p. 349.

TABLE 2

Estimated Cost of Raising First Child: Canada, 1982 and 1985<sup>a</sup>

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

<sup>a</sup> See the text, *supra*, p. 351, for the derivation of the figures in this Table.

TABLE 3

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

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

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

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

This implies that if the child dies on its eighteenth birthday, the parents will have paid for all of the costs of its upbringing but will yet not have received the present value of \$6,000 per year over forty years. This figure, which proves to be \$142,848,<sup>33</sup> represents the first estimate of the loss suffered by parents if their first child dies on its eighteenth birthday. It is reproduced in the first row of Table 3, against the heading "Constant Annual Value—Benefits Equal to Costs". Similar calculations have been made with respect to children dying on their sixth and twelfth birthdays, except that in those cases the future costs which have been "saved" have been deducted from the future benefits which have been lost. In the cases of the child killed on its sixth birthday, for example, costs "saved" are (\$170,081 - \$74,933 =) \$95,148 whereas the present value of benefits lost is \$162,411. Thus the net loss is estimated to be \$66,993.

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

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

<sup>31</sup> Statistics Canada, *Life Tables, Canada and the Provinces 1980-1982* (1984), Cat. No. 84-532, p. 18.

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

<sup>33</sup> The real discount rate applied to obtain this figure is 3.0 per cent.

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

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

#### IV. Valuation of Second and Subsequent Children

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

Two differences arise between the costs of raising the first and second child. First, the direct costs of raising the second child are often lower than those for the first because many of the items purchased for the first—such as baby furniture or a larger car or house—can be shared by the second. Second, assume that women plan to return to the labour force when their youngest children are four years old. If they have only one child, they will have to remain out of the labour force for four years. If they have a second child two years later, they will have to extend that stay out of the labour force for that two years. In this case, the indirect cost of the second child is the value of the mother's wages for only two years.<sup>35</sup>

Of those studies which have been completed in the last ten years, most appear to support the conclusion that the second child costs about two-thirds as much as the first. Olson,<sup>35</sup> for example, found that the

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

#### V. Two Caveats

##### A. Loss of Support

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

<sup>34</sup> J. Muellbauer, Testing the Barten Model of Household Composition Effects and the Cost of Children (1977), 97 *The Economic J.* 460.

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

<sup>38</sup> *Supra*, p. 352.

<sup>39</sup> *Infra*, p. 356.

<sup>40</sup> *Supra*, p. 352.

<sup>34</sup> *Supra*, p. 352.

<sup>35</sup> *Op. cit.*, footnote 21.

TABLE 4

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

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

TABLE 5

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

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

## B. Mitigation

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

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

## Conclusion

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

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

<sup>41</sup> *Supra*, p. 352.

<sup>42</sup> *Supra*, pp. 352, 356. The correspondence between the losses reported in Tables 3 and 5 and those calculated under the mitigation assumption will be closer, the younger is the deceased child. However, the courts are more likely to require mitigation, the younger <sup>43</sup> *Ibid*.

**TABLE 6**  
Recent Canadian Decisions Concerning Damages  
Arising from the Wrongful Death of a Child

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

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

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

<sup>44</sup> *Supra*, p. 358.

**CRIMINAL INJURIES COMPENSATION:**

**SOCIAL REMEDY OR  
POLITICAL PALLIATIVE FOR  
VICTIMS OF CRIME?**

by

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

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

Prince Edward Island has passed no relevant Act.

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

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### C. CANADA: STATUTORY PROVISIONS FOR RESTITUTION

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

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

The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do anyone or more of the following things as specified in the order, namely . . .

(e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof . . .

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

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

We can conclude:

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

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

<sup>96</sup> RSC 1970 c C-34.



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

### (c) Minimum Limits

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

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

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

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

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

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

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

<sup>166</sup>Miers *Responses to Victimization* (1978) at 78-9.

worker's pre-injury earnings.<sup>161</sup>

does the scale of awards.

Workmen's Compensation in  
Workmen's Compensation Board  
Injuries Compensation scheme,  
and it now reads:

where the Board makes an  
award such amount as it

an amount equivalent to the  
and the victim been a workman  
Compensation Act, who had  
injury. . . .

by the cited portion of s.15(1),

such a clause is Quebec. The  
shall dispose of the applica-  
Compensation Act, of the case  
arising out of or in the course  
compensation to victims of crimes  
injury.

do have plans in which awards

(1)(a) 27(1) and 28(1). Compensation

Workmen's Compensation Board for

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

(d) Funding

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

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

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

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

<sup>169</sup> British Columbia *Sixth Annual Report* at 7.

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

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

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

(e)

claimant figure of calculated

Blame

noted that public charitable. The tion schemes with the 1969 to 1975 Compensation Board is victims are unaware of the supplies the various police force designed to draw the attention may be eligible for compensation. Whether such a measure will remains to be seen.

Although it is not clear application rate, what is apparent making the public aware of the have left the Boards to grapple represent less than a total employees of other government. This may be explained as a consequence

From the nature of the the idea of complete crime-victimance suggests that that legislature and others in the future, perhaps the other provinces all indicate are not many such indications charity.

<sup>171</sup> *Eleventh Report of the Criminal In*

<sup>172</sup> In British Columbia there were 595 1971 there were 1,098 persons charged (note 169), and there would be many unsatisfied crimes, in which we could expect because the laying of charges and prosecution of the victim in the judicial process and not would inform him of the compensation cases. See note 34 *supra*.

<sup>173</sup> Ianni *Preventive Legal Education Development Conference on Legal*

<sup>174</sup> *Ninth Report* at 5.

diverse into two categories. In the claimants into the very high end of the average award for pain and suffering—an essentially artificial, for the most part not precise.

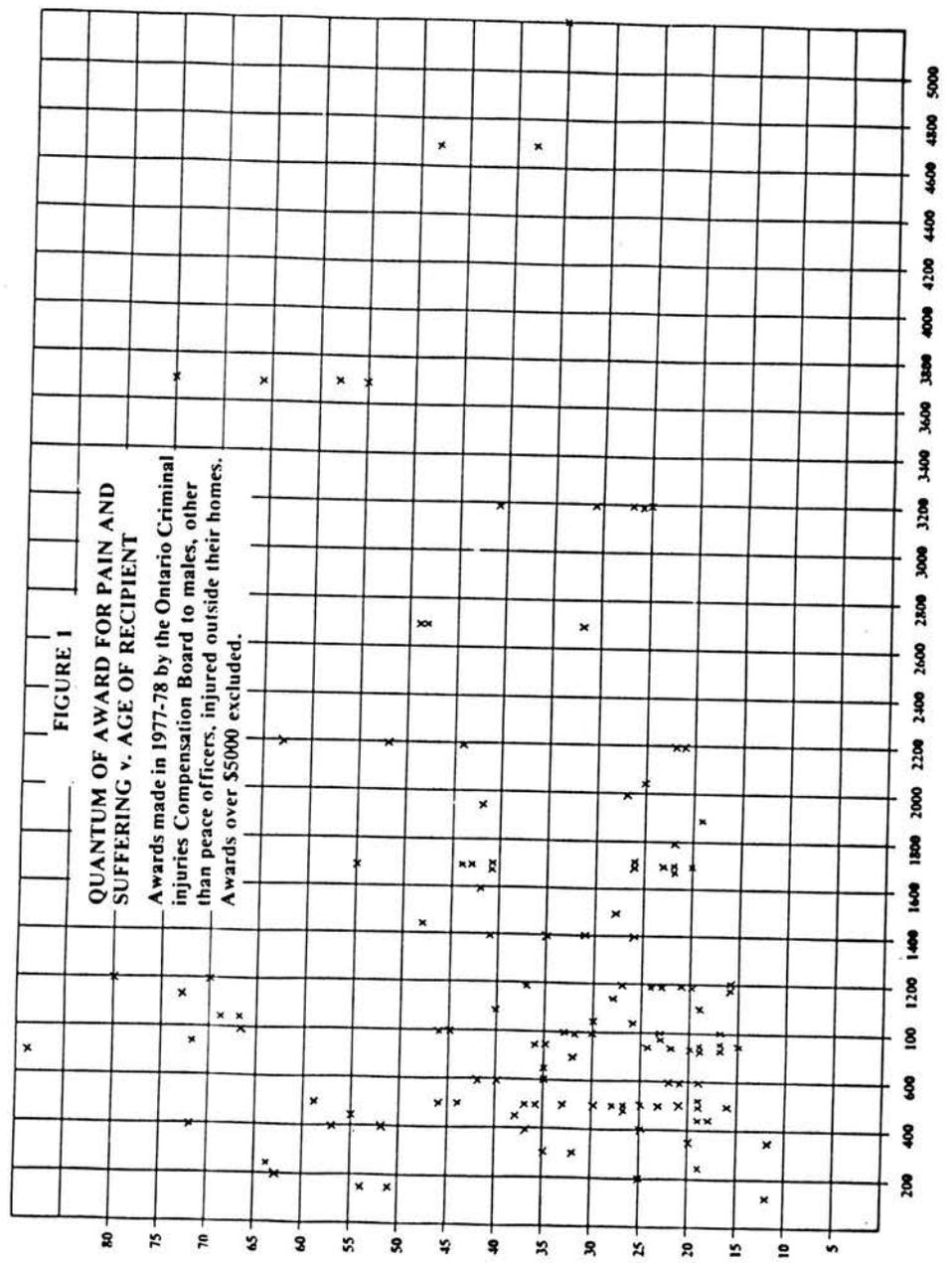
When looking at the ages of those males who received awards from the Ontario Board for injuries to peace officers injured in the home, it is not given in the Report, and it would have required too small a

sample to analyze the injuries suffered, but it is noted (134) might mean that in some cases appear with comparable frequency perhaps be due to the fact that the relevant being fixed.

When looking at the awards for pain and suffering are awarded, but still higher than those for their own residences. Slightly higher. Both these last two results are due to the crimes involved, but this is not precisely

BRITISH COLUMBIA

to report its awards in a consistent manner. It gave an illustration of a non-pecuniary losses were available for the non-pecuniary purposes of analysis. That



and those involving non-

sexual attacks and they received... This is an average of... comparable figure for Ontario... show any pattern, ranging... any one quantum.

38 female claimants and... of pain and suffering a... claimant. In respect of pain... 213,165.00, an average of... the results from Ontario... the men. This difference... why for female claimants... due to the fact that males... awarded. As Figures 2 and... of a non-sexual offence... awards of approx... for pain and suffering in... does not change, but the

then, show that awards... suffered a sexual attack... significantly greater... higher awards than do... awards of greatest quanta... the Board in British... pain and suffering, and... that province.

throughout. The average... mathematicians as the... of such awards. This... large awards will... Ontario and British... three facts are evident

mode"—is of course... was approximately... may reflect the infla... the bulk of the... since the "median",... approximately... Third, although... 100.00, above that

FIGURE 2  
AWARDS FOR PAIN AND SUFFERING  
MADE IN BRITISH COLUMBIA  
DURING THE CALENDAR YEAR 1974  
TO MEN

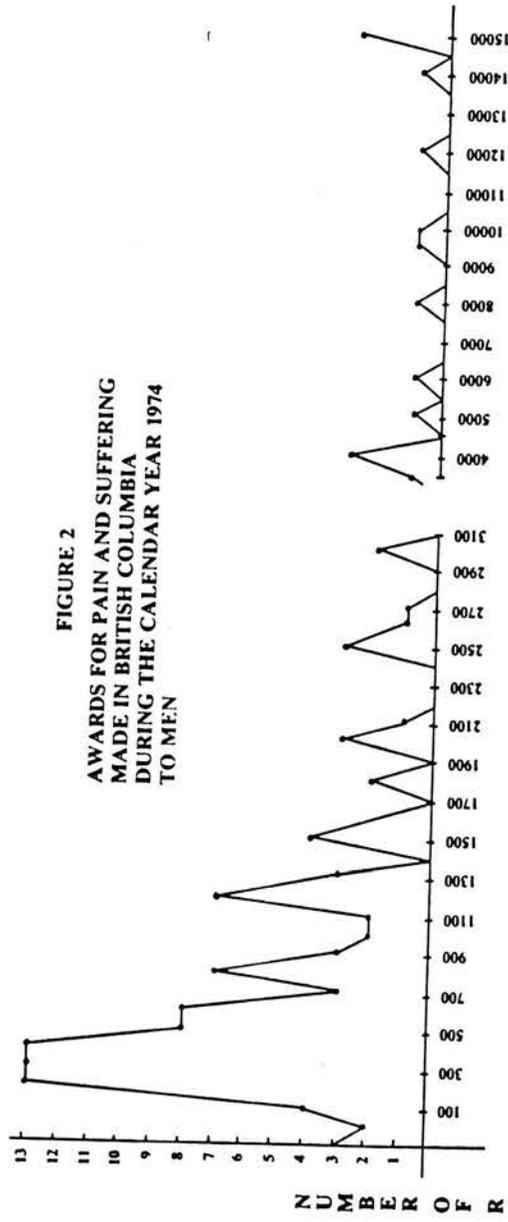
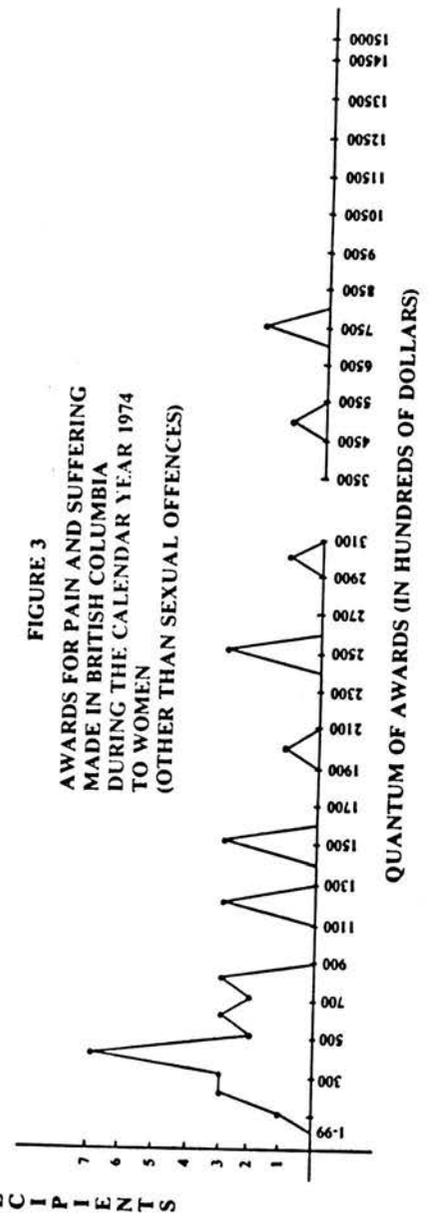
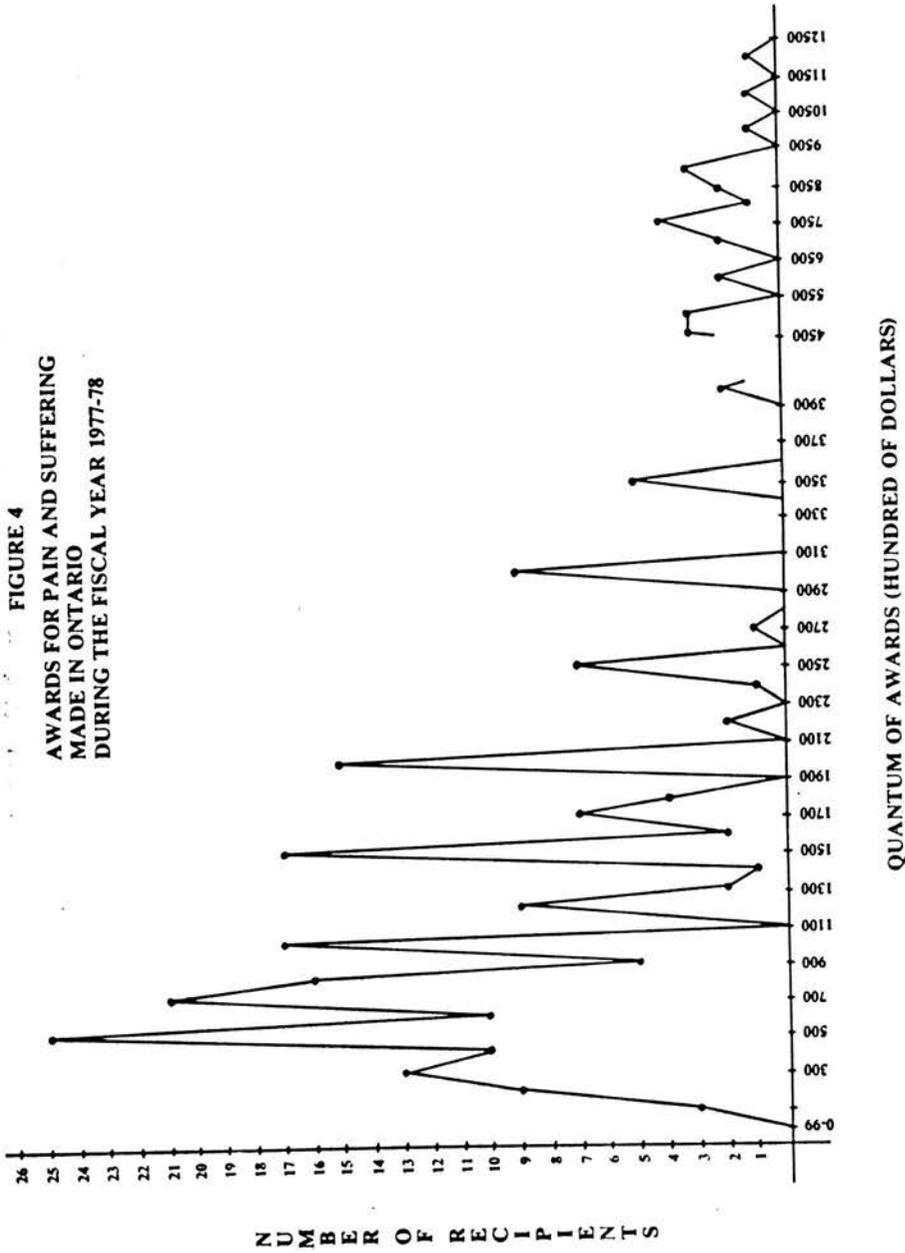
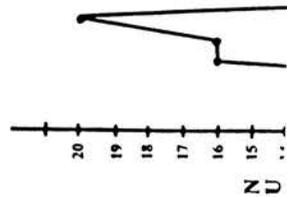


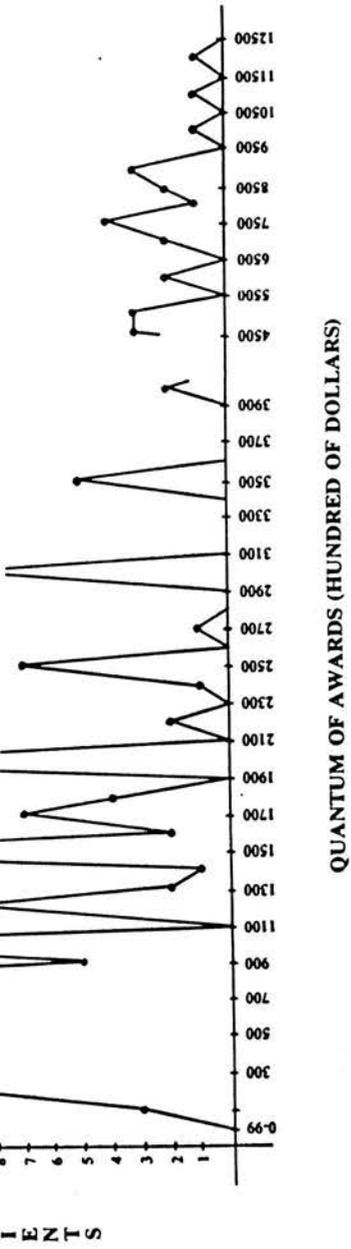
FIGURE 3  
AWARDS FOR PAIN AND SUFFERING  
MADE IN BRITISH COLUMBIA  
DURING THE CALENDAR YEAR 1974  
TO WOMEN  
(OTHER THAN SEXUAL OFFENCES)





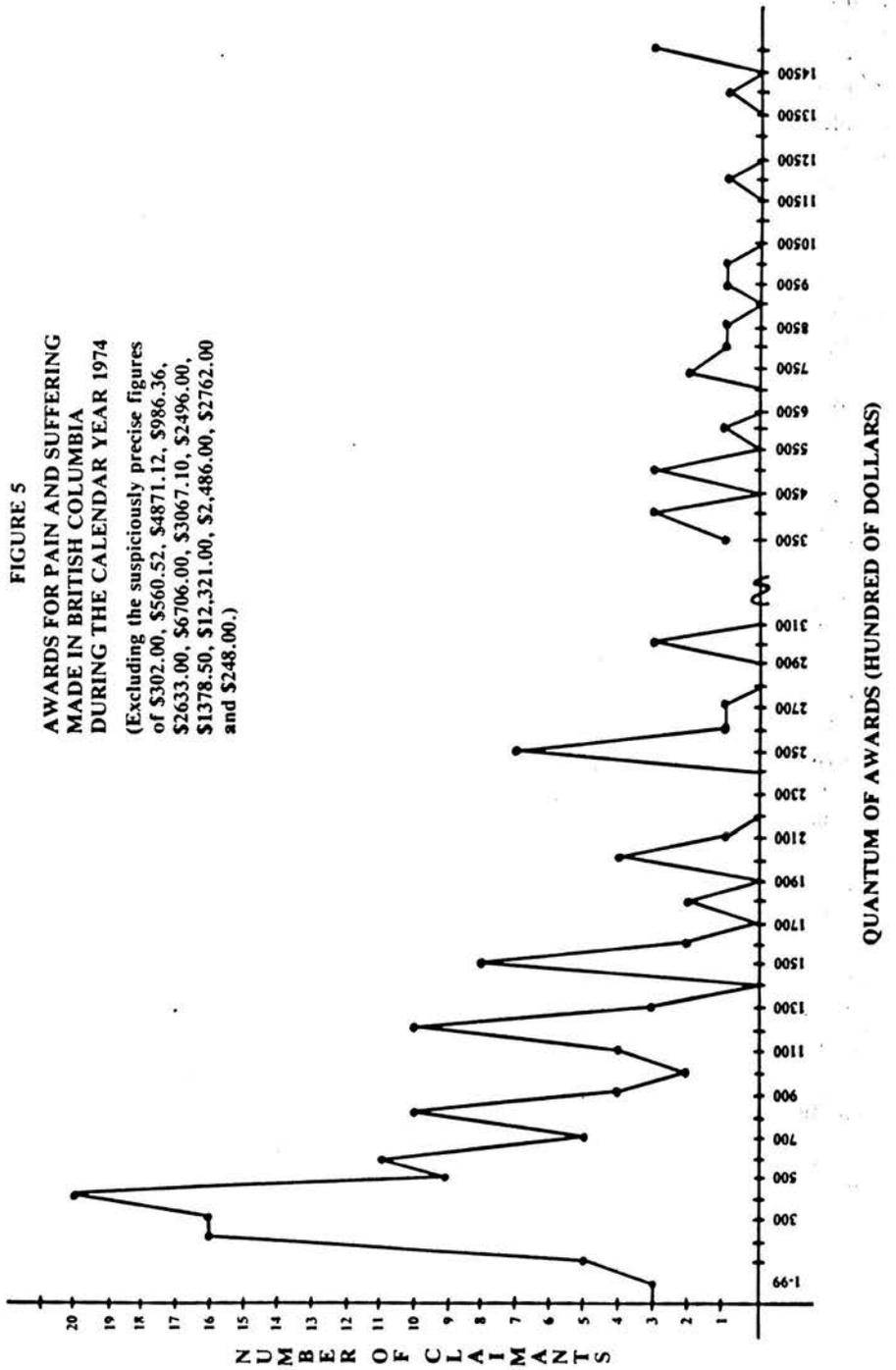
**FIGURE 5**  
**AWARDS FOR PAIN AND SUFFERING**  
**MADE IN BRITISH COLUMBIA**  
**DURING THE CALENDAR YEAR 1974**  
 (Excluding the suspiciously precise figures  
 of \$302.00, \$560.52, \$4871.12, \$986.36,  
 \$2633.00, \$6706.00, \$3067.10, \$2496.00,  
 \$1378.50, \$12,321.00, \$2,486.00, \$2762.00  
 and \$248.00.)





QUANTUM OF AWARDS (HUNDRED OF DOLLARS)

**FIGURE 5**  
**AWARDS FOR PAIN AND SUFFERING**  
**MADE IN BRITISH COLUMBIA**  
**DURING THE CALENDAR YEAR 1974**  
 (Excluding the suspiciously precise figures  
 of \$302.00, \$560.52, \$4871.12, \$986.36,  
 \$2633.00, \$6706.00, \$3067.10, \$2496.00,  
 \$1378.50, \$12,321.00, \$2,486.00, \$2762.00  
 and \$248.00.)



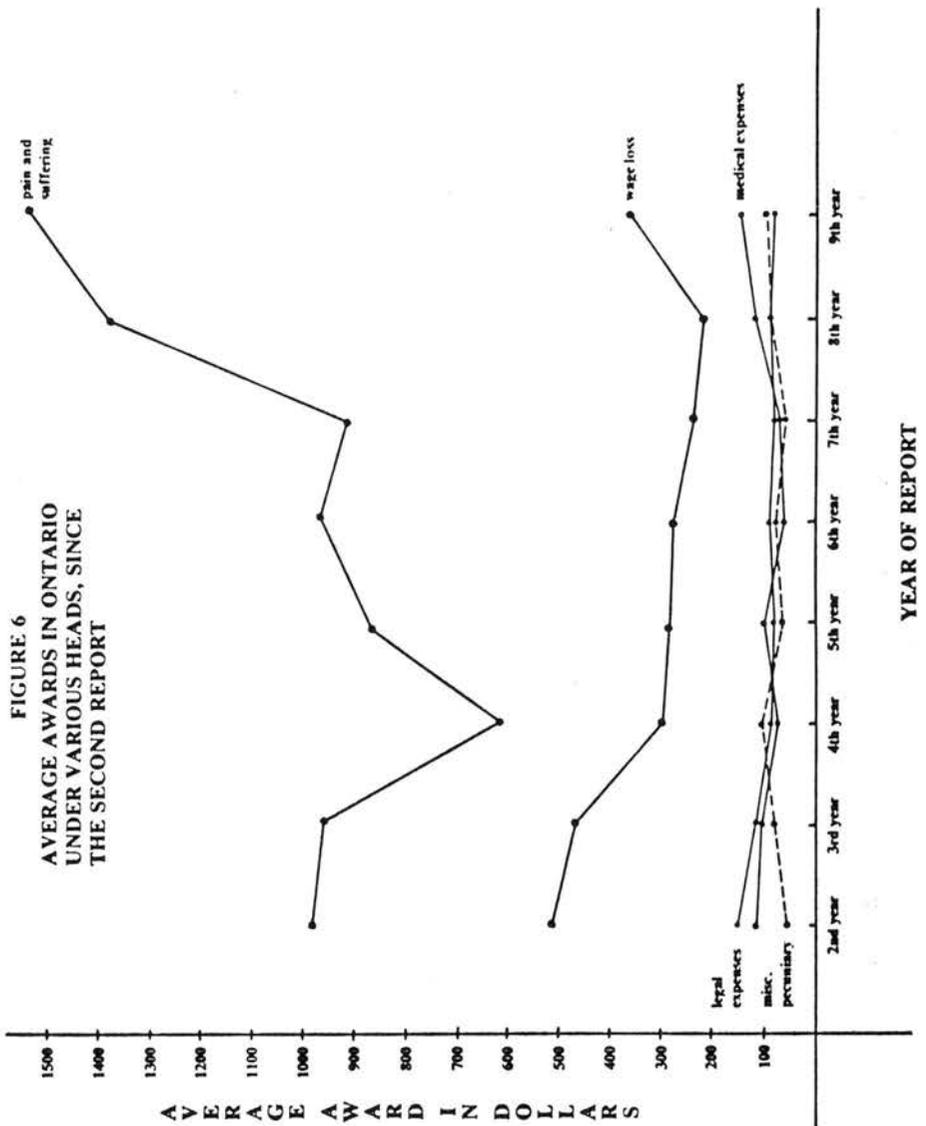
QUANTUM OF AWARDS (HUNDRED OF DOLLARS)

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

's *First and Second Reports* tion,<sup>90</sup> the predecessor of the or this reason the figures that wards. It will be noted that l expenses, and awards for ost no variation over those until the last year when they

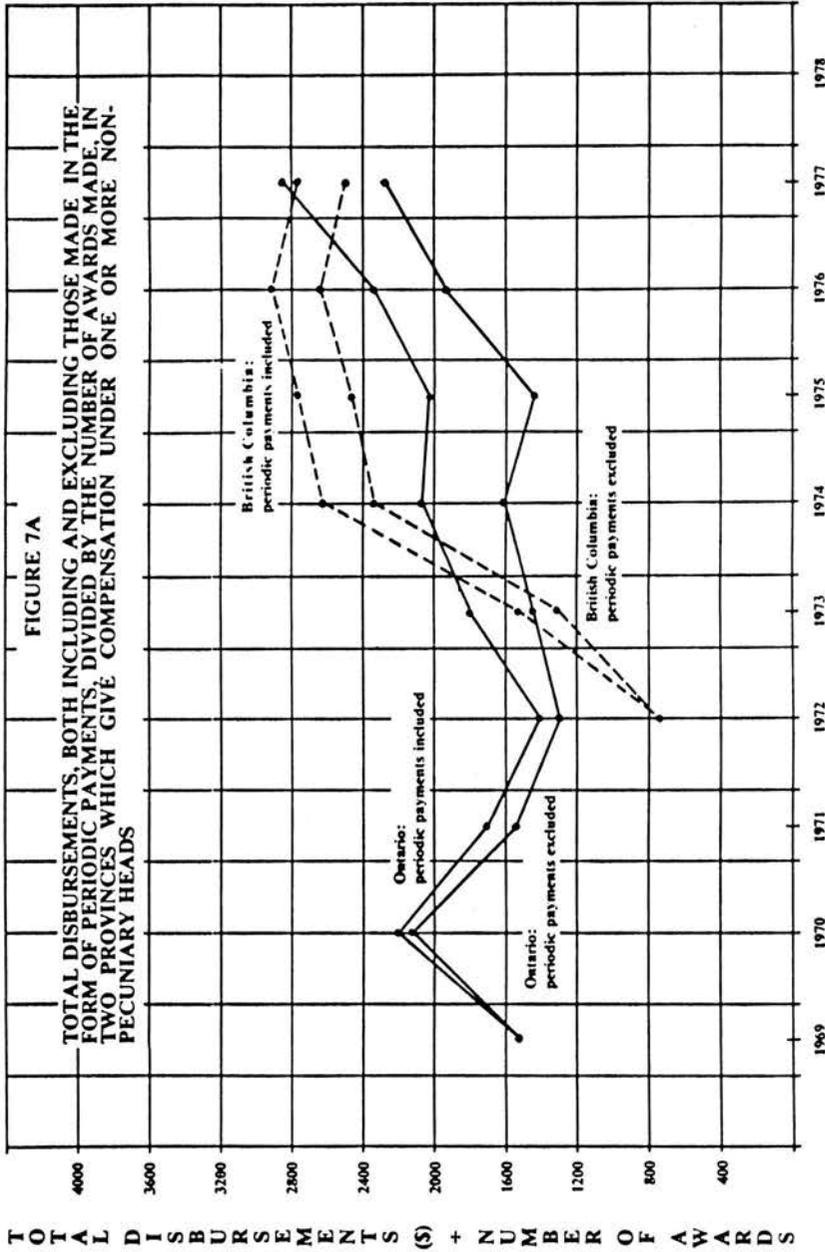
other hand, have increased under this head and awards Expressed as a percentage for pain and suffering were the *Fourth Report*, 59.2% 63.2% during the period od covered by the *Seventh Report*, and 65.5% dur- a steady increase save in ward for lost wages made tant.

is that awards for pain rease, much faster than The Board's percep- the claimant's mental ill be influenced by the upper limit on ublished,<sup>93</sup> is not yet pain and suffering



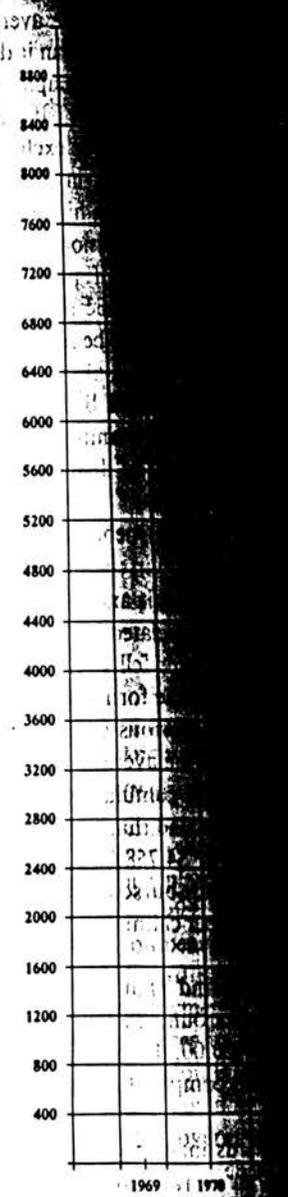
Report at 38-39, 13, and Ninth

and suffering" Mann Victim and Pen 203 at

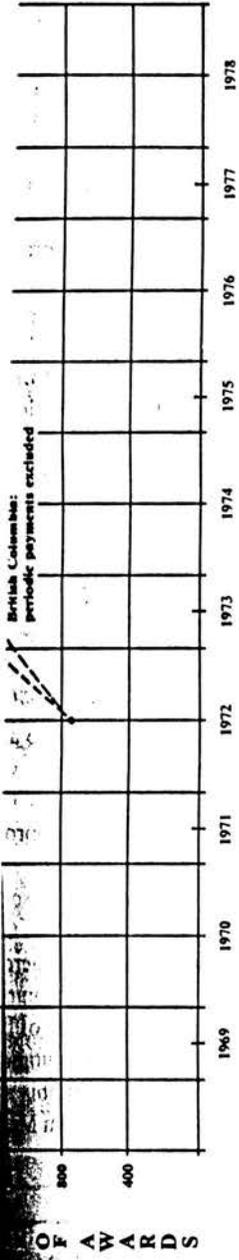


YEAR (FISCAL YEAR SINCE 1972 IN ONTARIO, CALENDAR YEAR OTHERWISE)

DISBURSEMENTS (\$) + NUMBER OF AWARDS



YEAR (CALENDAR YEAR SINCE 1972 IN ONTARIO, CALENDAR YEAR OTHERWISE)



YEAR (FISCAL YEAR SINCE 1972 IN ONTARIO, CALENDAR YEAR OTHERWISE)

DISBURSEMENTS (\$) + NUMBER OF AWARDS

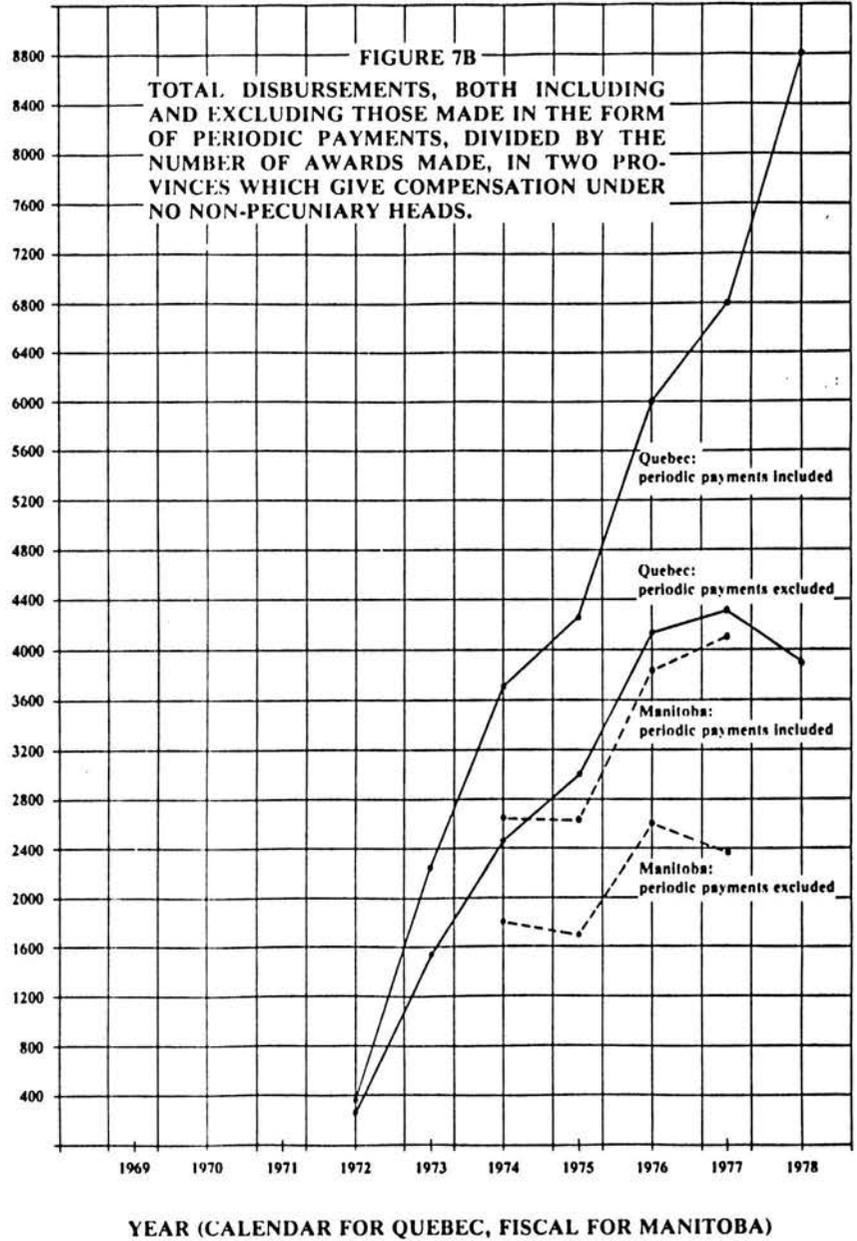


TABLE II  
 COSTS OF ADMINISTERING CRIMINAL INJURIES COMPENSATION SCHEMES  
 (IN FIVE JURISDICTIONS<sup>133</sup>)  
 SHOWING ADMINISTRATION COSTS AS PERCENTAGE OF TOTAL PAID

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

Footnotes for table

<sup>133</sup> Figures cannot be compared with the Territories and the "costs" has no meaning. The figures were made in 1973-74. Development Section (agreements). Finally the value of lump-sum payments and value of other pensions. 166 awards, of which 90 were approved [Manitoba] since 1975 is quite unreliable.

<sup>134</sup> Since the publication of its annual report administering its scheme. This such data. It was only in the first money dispersed by the Criminal our table for Ontario only starts but that data is for the calendar such data in a table with all of

<sup>135</sup> The *Public Accounts of British Columbia* Criminal Injuries Compensation Board annual reports. Such data will not be for the Board's reports on monies paid. "Monies paid" will be previous years as well as monies awarded did not pick up in the year of the award in the year which the claimant has not the Ontario Board's *Eighth Report* the provincial auditors public accounts less than 1% cannot affect our figures. *Ninth Report* showed a total cost show a total of \$1,629,896.00 paid. However, we have no figures to use its reports.

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

<sup>136</sup> The public accounts of Alberta show the Board before the year 1972-73, and 1975-76. We have therefore included

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

<sup>137</sup> Sources: *Public Accounts of Saskatchewan* at F61 1974-75 at F60 1975-76 at F

<sup>138</sup> Tableau XVI supplied by the Quebec

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

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

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

<sup>143</sup>*Infra* at p255.

<sup>144</sup>*Third Report* (1974) award no 14274 at 19.

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

<sup>146</sup>Which is compensated at least in British Columbia and Saskatchewan but not in Ontario.

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

<sup>148</sup>*Ibid*. The data is presented below:

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

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<sup>149</sup>British Columbia A

<sup>150</sup>*Ibid* s3(1)(b)(i).

<sup>151</sup>*Ibid* s2(1).

<sup>152</sup>*Ibid* s3(1)(b)(ii).

<sup>153</sup>*Ibid* s14

<sup>154</sup>*Ibid* s3(1)(d).

<sup>155</sup>*Ibid* s17(2)(a).

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

TABLE I  
LIMITS OF AWARDS UNDER CANADIAN COMPENSATION SCHEMES

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

<sup>4</sup>Alberta Act s13(3)(c).

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

<sup>6</sup>Manitoba Act s12(3)(c).

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

But what of those apply for registration? If be denied compensation

<sup>7</sup>New Brunswick Act s17(2) lump-sums paid in instalments *supra* pp152-157.

<sup>8</sup>The Newfoundland limits interpretation. It establishes "red", "(b)" to "pecuniary matters set out in . . . (b), (c) out in . . . (e) . . . shall not of \$1,000 for each of (b), (c) In the case of maximum limit s.(ii)(a), establishing a limit on "(e)" could be

<sup>9</sup>North West Territories O

<sup>10</sup>Ontario Act s19. For a 17-18.

<sup>11</sup>Saskatchewan Act s18(3)

<sup>12</sup>Yukon Territory Ordinance that awards will not exceed payment of \$500 per month bined with a periodic payment \$15,000"? Does it exceed

<sup>13</sup>Linden *Victims of Crime* not discussed.

<sup>14</sup>*Ibid.*

<sup>15</sup>Nfld Regulation 331/78

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

TABLE II

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

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

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

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

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

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

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

(What  
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compensable

Still, it  
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of under \$200. This  
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removed, and that such  
therefore assume that the  
of compensation to those  
compensation itself, con  
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claims of those 12 pers  
administrative costs result  
would only be the difference  
compensation and (b) the ad  
each of the 12 persons. In any  
tion, the Board in British  
\$218,412.24<sup>33</sup> excluding the cost  
was first established. Over that p  
per award of \$571.76 for admin  
awards to those 12 claimants wou  
that figure, which is \$6,861.00. In  
British Columbia at most \$8,000 to  
those three years. This is not a par

Of course, as inflation co  
experience a compensable loss of  
loss provision will diminish. Tabl  
claims rejected because the quant  
expressed as a percent of the numbe  
It is evident from this that the effe  
steadily decreasing since 1972,

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

<sup>33</sup>British Columbia *Third Report* at 6[\$116  
at 13 [\$38,157.25].

Information Services

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Phone: (204) 945-3746

Date: July 8, 1986

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### COMPENSATION POLICY FOR WRONGFUL CONVICTION SET

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

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

Highlights of the policy for wrongfully convicted accused are:

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

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

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

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

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

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

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

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

MINISTERIAL STATEMENT

Hon. Roland Penner, Q.C.

Madame Speaker:

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

BACKGROUND:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CAUCUS PAPER

Department of the Attorney-General

### COMPENSATION FOR WRONGFULLY CONVICTED AND IMPRISONED PERSONS

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#### GUIDELINES

##### BACKGROUND

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

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

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

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

##### DRAFT GUIDELINES FOR ELIGIBILITY TO APPLY FOR COMPENSATION

The following are prerequisites for eligibility for compensation:

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

- (1) The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
- (2) Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.
- (3) Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a Criminal Code offence, other federal penal offences, or provincial offences.
- (4) As a condition precedent to compensation for a Criminal Code or other penal offences, there must be a free pardon granted under Section 683(2) of the Criminal Code or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b).

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

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

- a) If a pardon is granted under Section 683, a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or
- b) If a reference is made by the Minister of Justice under Section 617(b), a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c), to the effect that the person did not commit the offence.

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

#### CONSIDERATIONS FOR DETERMINING QUANTUM

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

1. Non pecuniary losses
  - a) Loss of liberty and the physical and mental harshness and indignities of incarceration;
  - b) Loss of reputation which would take into account a consideration of any previous criminal record;
  - c) Loss or interruption of family or other personal relationships.

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

2. Pecuniary Losses

- a) Loss of livelihood,, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;
- b) Loss of future earning abilities;
- c) Loss of property or other consequential financial losses resulting from incarceration.

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

- a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;
- b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

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

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Roland Penner, Q.C.

July 3, 1986

1986

## CHAPTER 28

## CHAPITRE 28

Bill 30

Projet de loi 30

### THE JUSTICE FOR VICTIMS OF CRIME ACT

### LOI SUR LES DROITS DES VICTIMES D'ACTES CRIMINELS

(Assented to September 10, 1986)

(Sanctionnée le 10 septembre, 1986)

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

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

#### PART I DECLARATION OF PRINCIPLES

#### PARTIE I DISPOSITIONS DÉCLARATOIRES

##### Declaration.

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

##### Énoncé de principe

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

##### Victims concerns.

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

##### Importance des préoccupations des victimes

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

##### Victims assistance.

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

##### Aide aux victimes

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

#### - Debt owed to victims.

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

#### Responsibility to report and assist.

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

#### Treatment of victims.

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

#### Access to services.

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

#### Early Information for victims.

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

#### Réparation

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

#### Obligation d'assistance

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

#### Respect des victimes

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

#### Services

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

#### Information

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

### Access to Information.

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

- (a) the scope, nature, timing, and progress of the prosecution of the offence in which he or she was the victim;
- (b) the role of the victim and of other persons involved in the prosecution of the offence;
- (c) court procedures; and
- (d) crime prevention.

### Alternative resolutions.

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

### Prompt return of property.

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

### Consider victims interests.

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

- (a) the need to receive fair restitution for the offence; and
- (b) the need for prompt disposition of prosecutions and prompt execution of judgments, orders and decisions granting restitution, compensation or other redress.

### Accès à l'Information

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

- a) l'étendue, la nature, la durée prévue et l'état de la poursuite relative à l'infraction dont elles subissent les conséquences;
- b) leur rôle et celui des autres personnes qui prennent part aux poursuites pour l'infraction;
- c) les procédures judiciaires;
- d) la prévention des actes criminels.

### Règlements amiables

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

### Recouvrement des biens volés

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

### Considérations relatives aux intérêts des victimes

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

- a) sur la nécessité de recevoir une juste réparation à l'égard de l'infraction;
- b) sur la nécessité de régler rapidement la poursuite et d'exécuter promptement les jugements, les ordonnances et les décisions portant réparation, compensation, ou toute autre mesure de redressement.

PART II  
VICTIMS ASSISTANCE

Definitions.

6 In this Act  
"committee" means the "Victims Assistance Committee"; ("Comité")  
"fund" means the "Victims Assistance Fund"; ("Caisse") and  
"judge" includes a Justice of the peace, a magistrate and a provincial judge; ("Juge")  
"minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act. ("ministre")

VICTIMS ASSISTANCE COMMITTEE

Establishment.

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

Regard for principles.

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

Applications and submissions.

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

- (a) the needs and concerns of victims; and
- (b) the provision and funding of research and services relating to victims.

Guidelines.

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

PARTIE II  
ASSISTANCE AUX VICTIMES

Définitions

6 Les définitions qui suivent s'appliquent à la présente loi.  
"Caisse" La Caisse d'assistance aux victimes. ("fund")  
"Comité" Le Comité d'assistance aux victimes. ("committee")  
"Juge" S'entend aussi bien du Juge de paix, du magistrat que du Juge de la Cour provinciale. ("judge")  
"ministre" Le membre du Conseil exécutif que le Lieutenant-gouverneur en conseil charge de l'application de la présente loi. ("minister")

COMITÉ D'ASSISTANCE AUX VICTIMES

Création

7 Est institué le Comité d'assistance aux victimes.

Objet

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

Demandes et observations

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

- a) les besoins et les préoccupations des victimes;
- b) la mise en oeuvre et le financement de recherches et de services visant les victimes.

Lignes directrices

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

### Recommendations.

8(4) The committee shall make recommendations to the minister on the use of the fund and may make recommendations relating to

- (a) the development of policies respecting victims services; and
- (b) any other matter within the scope of the principles set out in this Act that the minister refers to the committee for its recommendation.

### Research and distribution of information.

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

### Review.

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

### Examination of documents.

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

### Report.

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

### Recommandations

8(4) Le Comité présente au ministre des recommandations quant à l'utilisation de la Caisse. Il peut par ailleurs faire des recommandations à l'égard des éléments suivants :

- a) l'élaboration de politiques relatives aux services aux victimes;
- b) les questions relatives aux principes énoncés dans la présente loi dont le ministre saisit le Comité pour recommandation.

### Recherches et documentation

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

### Examen

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

### Examen de documents

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

### Rapport

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

#### Report laid before Legislature.

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

#### Membership.

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

#### Specified members.

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

#### Term.

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

#### Continuation.

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

#### Chairperson.

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

#### Conflict of Interest.

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

#### Dépôt du rapport devant la Législature

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

#### Composition

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

#### Représentation au sein des membres du Comité

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

#### Mandat

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

#### Expiration du mandat

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

#### Présidence

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

#### Inhabilité

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

## VICTIMS ASSISTANCE FUND

### Establishment.

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

### Surcharge.

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

### Amount of surcharge.

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

### Exception.

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

### Surcharge where no fine.

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

### Surcharge may vary.

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

## CAISSE D'ASSISTANCE AUX VICTIMES

### Création

12 Est constituée la Caisse d'assistance aux victimes.

### Amende supplémentaire

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

### Montant de l'amende supplémentaire

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

### Absence d'amende supplémentaire

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

### Amende supplémentaire minimale

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

### Discretion judiciaire

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

#### Other sources.

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

#### Grants from the fund.

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

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

#### No direct compensation.

16(1) The fund shall not be used to provide direct compensation to individual victims.

#### Applications submitted to committee.

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

#### Trust fund.

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

#### Autres sommes portées au crédit de la Caisse

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

#### Subventions

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

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

#### Compensation

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

#### Présentation des demandes au Comité

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

#### Fiducie

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

#### Payments from fund.

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

#### Investment of excess moneys.

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

#### Credit the account of the fund.

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

#### Fiscal year.

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

### PART III GENERAL

#### Application.

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

#### Regulations.

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

#### Paievements

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

#### Placement du surplus

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

#### Versements au ministre des Finances

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

#### Exercice

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

### PARTIE III DISPOSITIONS GÉNÉRALES

#### Champ d'application

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

#### Règlementation

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

**Reference In Continuing Consolidation.**

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

**Commencement of Act.**

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

**Codification permanente**

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

**Entrée en vigueur**

22 La présente loi entre en vigueur par proclamation.

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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. Sophonow, 32, spent 45 months in



Penner says compensation policy in line with federal guidelines

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 through a court order.

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

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 conclusive, 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 impressionner 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 Glindin, vice-president of the Manitoba Trial Lawyers' Association, echoed Cuddy's comments.

"The guidelines he set up are so restrictive it's ridiculous," Glindin 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?"

Glindin 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."

Glindin said he agreed compensation shouldn't be automatic when someone is found guilty since many acquittals

"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 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.

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## Penner says compensation policy in line with federal guidelines

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 originally or the incarceration of the accused subsequently was wrongful, nor does it mean that an accused has been proven innocent."

"It means, simply, that in the minds

of the jury or ... 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

anything but the innocence of the person charged."

Cuddy said people who have been compensated elsewhere, such as Ontario nurse Susan Neilles, 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.

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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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<sup>35</sup>.

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.

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

Moderateur : 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 I :

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 indemnisateur, 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

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 atténuée 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 sûr pour l'adoption d'un système universel, automatique, d'indemnisation du préjudice corporel?*

Ainsi que l'a fort éloquemment exprimé, hier, M<sup>e</sup> 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?

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

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'abord d'avoir 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 deductibles 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. : Héliène 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. : H  l  ne Gagn  -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. : H  l  ne Gagn  -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. : H  l  ne Gagn  -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, incidentally. One of the things that I was talking about was the responsibility to pay out the right amount, not to minimize the payout. 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 embarrassing surplus; which is why the rate of levy was .79 cents per hundred. It was reduced to bring down the reserves because they were embarrassingly 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 deliberately 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, vous aurez deux indemnités, 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.

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 réadaptation pour un montant illimité, des indemnités de perte de revenu payables pour une période maximum de trois ans représentant 85 % du salaire de la victime jusqu'à un montant maximum 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 1000 \$ pour les frais funéraires.

La loi permet un recours de droit commun pour tous dommages pécuniaires 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 précèdent 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 M<sup>e</sup> 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 éloquent 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.

*1<sup>er</sup> palier : Coordination entre les indemnités de droit commun et celles des régimes spéciaux*

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

*1<sup>re</sup> 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.

*2<sup>e</sup> 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 indemnités 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.

*2<sup>e</sup> 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 M<sup>e</sup> Mistral 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. : M<sup>e</sup> 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 parlons 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. : M<sup>e</sup> 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 rajustements pour l'inflation prévus par la Cour suprême. Cela m'amène d'abord à commenter ce que M<sup>e</sup> 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 complémentaires 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<sup>2</sup> 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 Margat. 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 exécutoires. 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 exécutoires 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. : M<sup>e</sup> 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 délictueux ou quasi délictueux 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 délictueux ou quasi délictueux lors d'une demande de libération d'une faillite me semble la position à maintenir.

**II. 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 allégeraient un peu le fardeau imposé aux personnes qui doivent assumer le coût des indemnités? Cela ne réglerait 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

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# LIABILITY OF THE CROWN

Second Edition

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*by*

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alleging any direct liability on the part of the Crown arising out of its administration of prisons.<sup>122</sup> 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,<sup>123</sup> and it has been implemented in British Columbia's Crown proceedings statute.<sup>124</sup> A similar recommendation has been made by a law reform committee in New Zealand,<sup>125</sup> 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.<sup>126</sup> 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.

<sup>122</sup> *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.).

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

<sup>124</sup> 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.

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

<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> The Supreme Court of Canada in *Manitoba Fisheries v. The Queen* (1978)<sup>129</sup> 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,<sup>130</sup> 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<sup>131</sup> could affect private rights, and therefore the question of compensation rarely arises. The *Burmah Oil* case<sup>132</sup> 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

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

<sup>128</sup> 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.

<sup>129</sup> [1979] 1 S.C.R. 101.

<sup>130</sup> 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.

<sup>131</sup> 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.).

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

of the United Kingdom had not accepted liability in tort in 1942.<sup>133</sup> 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.)<sup>134</sup>

#### Significance of legal authority

Legal authority for a governmental act must be derived either from a statute or from the prerogative.<sup>135</sup> This principle, which is basic to constitutional and administrative law, is usually traced back to *Entick v. Carrington* (1765),<sup>136</sup> 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".<sup>137</sup> The very existence of a prerogative power is sometimes a matter of doubt,<sup>138</sup> and sometimes there is doubt as to whether a power that once existed has been displaced by statute.<sup>139</sup> 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?<sup>140</sup>

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),<sup>141</sup> 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".<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

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.

<sup>141</sup> (1881) 6 App. Cas. 193 (H.L.).

<sup>142</sup> *Id.*, 213.

<sup>143</sup> *Ibid.*

<sup>144</sup> *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.<sup>31</sup>

## Judicial immunity

### Common law protection

A judge is immune from liability in tort for any act done within his or her jurisdiction.<sup>32</sup> 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",<sup>33</sup> which would be impossible if the judge were liable to be "harassed by vexatious actions".<sup>34</sup> 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.<sup>35</sup> 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.

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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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".<sup>40</sup>

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)<sup>41</sup> 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

<sup>36</sup> 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.

<sup>37</sup> 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.).

<sup>38</sup> *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.

<sup>39</sup> Sadler, note 32, above, 310.

<sup>40</sup> 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.

<sup>41</sup> (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)<sup>42</sup> 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),<sup>43</sup> 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<sup>44</sup> 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?'"<sup>45</sup>

In common with other commentators,<sup>46</sup> 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),<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> On this point, the decision in *Sirros v. Moore* was overruled.<sup>50</sup>

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.<sup>51</sup>

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),<sup>52</sup> 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.<sup>53</sup> At common law, therefore, the Commission would be liable to suit if its report were otherwise actionable.<sup>54</sup> 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.<sup>55</sup> 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.

<sup>52</sup> [1985] 2 S.C.R. 716.

<sup>53</sup> 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.

<sup>54</sup> 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.

<sup>55</sup> 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.<sup>56</sup> Others define the scope of protection in terms of "the execution of [the judge's] duties",<sup>57</sup> 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;<sup>58</sup> 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.<sup>59</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> 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.

<sup>58</sup> 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

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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* 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.

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 *McElean* 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<sup>1</sup>. 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-

# 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."<sup>1</sup>

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."<sup>2</sup>

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,<sup>3</sup> 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*<sup>4</sup> 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*)<sup>5</sup> but Canadians outside the public sector may benefit in situations where either the government itself is prepared to take responsibility for damage (Claims Regulations)<sup>6</sup> 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*).<sup>7</sup>

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."<sup>8</sup>

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.<sup>9</sup> 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,<sup>10</sup> 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."<sup>11</sup>

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."<sup>12</sup>

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."<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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."<sup>16</sup>

### III. THE COMPENSATION DELIVERY SYSTEM

Special compensation plans exist in many countries, including Canada.<sup>17</sup> 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.<sup>18</sup>

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*<sup>19</sup> and *Canada Pension Plan*<sup>20</sup> 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 than that that group has mounted a more effective political lobby on government to change laws on their behalf.<sup>21</sup> 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*<sup>22</sup> 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<sup>23</sup> 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<sup>24</sup> made pursuant to the *Penitentiaries Act*<sup>25</sup> 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*<sup>26</sup> are examples of 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,<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>)

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<sup>30</sup> made pursuant to the *Aeronautics Act*,<sup>31</sup> 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*),<sup>32</sup> or their animals have been harmed by infectious or contagious disease (*Animal Disease and Protection Act*),<sup>33</sup> and in the case of the *Plant Quarantine Act*<sup>34</sup> 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.<sup>35</sup>

### 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*<sup>36</sup> 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.<sup>37</sup> Under recent amendments to the legislation,<sup>38</sup> 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<sup>39</sup> and the War Veterans Allowance Board,<sup>40</sup> 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*<sup>41</sup> 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*.<sup>42</sup> 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 Residue 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*<sup>43</sup> or a board of arbitration in the case of the *Yukon Placer Mining Act*<sup>44</sup> 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*<sup>45</sup> 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<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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",<sup>50</sup> lawyers will have to change some basic assumptions about "rugged individualism"<sup>51</sup> 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."<sup>52</sup>

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."<sup>53</sup>

## 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

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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.
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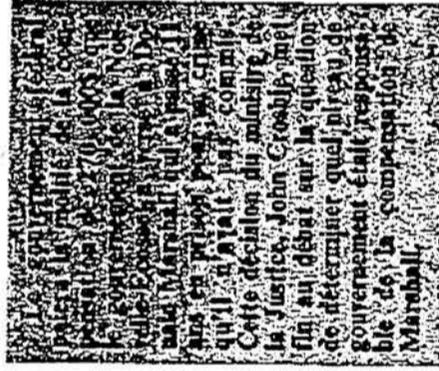
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11. (1984) 58 Australian L.J., pp. 134-135.
12. POLICY OPTIONS POLITIQUES, April 1987, p. 5.
13. Final Report of the Ontario Task Force on Insurance (May 1986), p. 61.
14. *Idem*.
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16. Final Report 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, 1985-86, 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.
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# 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



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 Esbary, 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.

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 Miqmaq Indian who is now 31, was convicted of murder and

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The Federation extends Greetings to the  
Canadian Bar Association  
and uses their pages to announce the removal  
of the Federation's Head Office to Montreal

# Nfld. unions appealing 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 ont demandé à la Cour Supérieure de la province de la Nouvelle-Écosse de réviser deux décisions relatives à des projets de loi approuvés en mai 1983. Le premier concerne la modification à la Loi sur le service public limitant le droit de grève législative. La seconde porte sur une modification à la Loi sur les normes du travail faisant passer de 50 à 25 pour cent le nombre de travailleurs essentiels temporaires.

December 1984, reduced the notice required for temporary layoffs from 16 weeks to two weeks, depending on amount of time worked, and made the shorter notice requirement retroactive. Judge Seamus O'Regan April 19 ruling on the validity of Bill 37 was the result of appeal of a decision by the Labor Standards Tribunal launched by Wabush Mines. The mining company, which operates an iron-ore mine Wabush, appealed the tribunal decision that stated the company should have given 500 workers 16 weeks' notice of a temporary layoff when the mine closed down for the weeks at the end of 1981. Wabush Mines had given only four weeks' notice of the layoff, so the tribunal ruling meant the company owed the workers 12 weeks of pay.



CRIMINAL PROCEDURE

A PROPOSAL FOR COSTS IN CRIMINAL CASES

A Study Paper Prepared by the  
Project on Criminal Procedure

August 1973

Project Staff

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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 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<sup>1</sup> 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 anomalous 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:

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*"(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 suspect 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

A PROPOSAL FOR COSTS IN CRIMINAL CASES

This proposal follows upon a full research report<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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,<sup>4</sup> but other provinces including Ontario, New Brunswick, and Manitoba have not.<sup>5</sup>

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,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The only exceptions that obtain here are for defamatory libel<sup>9</sup> (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.<sup>10</sup> Again, costs awards in the latter situation are extremely rare. Finally, judicial practice relating to the extraordinary remedies varies from province to province.<sup>11</sup> 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,<sup>12</sup> Northern Ireland,<sup>13</sup> New South Wales,<sup>14</sup> and New Zealand.<sup>15</sup> 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.<sup>16</sup> As we will discuss somewhat later there is a second rationale in the punitive and deterrent effect of costs awards,<sup>17</sup> 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,<sup>18</sup> 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, incompetence or serious neglect can be attributed 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.<sup>21</sup> 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,<sup>22</sup> or (b) in compensating all accused persons for costs that should not have to be suffered in a criminal prosecution,<sup>23</sup> 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.

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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,<sup>24</sup> 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,<sup>25</sup> 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.<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup> 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,<sup>29</sup> 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".<sup>30</sup> 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<sup>31</sup> 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".<sup>32</sup> 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".<sup>33</sup> So too are all accused persons against whom charges are dropped or suspended<sup>34</sup> 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":<sup>35</sup> "(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.<sup>36</sup> 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.<sup>37</sup> It may be conceded of course that other common law jurisdictions, including England,<sup>38</sup> 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,<sup>39</sup> 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<sup>40</sup> would require costs to be awarded as of right to all acquitted accused<sup>41</sup> 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"<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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",<sup>45</sup> 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".<sup>46</sup>

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<sup>47</sup> 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.<sup>48</sup> Probably one reason for this limitation is an undue restriction by the courts on their discretionary power.<sup>49</sup> 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,<sup>50</sup> 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 compensation based on this direction of the compensation rationale can be 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 least all of those who are not convicted,<sup>51</sup> 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 prohibitively expensive to provide for costs awards to all accused persons it would be quite feasible to provide for costs to be awarded to those most in need of them. A further compromise might be made to limit such awards to acquitted or discharged accused persons,<sup>52</sup> 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<sup>53</sup> 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".<sup>54</sup> 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,<sup>55</sup> 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.<sup>56</sup> 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,<sup>57</sup> 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".<sup>58</sup> 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.<sup>59</sup> 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,<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> 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"<sup>63</sup> 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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

## 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.<sup>68</sup> 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.<sup>69</sup> 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,<sup>70</sup> 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.<sup>71</sup> The courts have no special ability to determine economic need and since nearly all provinces now have established compensation systems for victims of crime<sup>72</sup> 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.<sup>73</sup>

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 consideration is whether costs should be awarded to the Crown against an accused. Formerly, in indictable cases, costs could be awarded against a convicted accused.<sup>74</sup> And although the provision for such costs was removed by a later revision o

the Criminal Code,<sup>75</sup> they may still be awarded in summary conviction cases.<sup>76</sup> 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.<sup>77</sup> That principle was restated in the report of the Ontario Royal Commission Inquiry in Civil Rights.<sup>78</sup> 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".* <sup>79</sup>

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<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> If that role is accepted then it seems more than reasonable that where the prosecution was justified<sup>83</sup> 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 of 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 appropriate 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 legislation 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,<sup>84</sup> 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<sup>85</sup> 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"<sup>86</sup> 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.<sup>87</sup> 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...",<sup>88</sup> 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".<sup>89</sup> One of those safeguards, as expressed in the famous case of Woolmington v. Director of Public Prosecutions<sup>90</sup> and now contained in the Canadian Bill of Rights,<sup>91</sup> is that an accused "is presumed innocent until proved guilty according to law in a fair and public hearing...".<sup>92</sup> It is our view that, for "true crimes" at least,<sup>93</sup> 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.<sup>94</sup>

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".<sup>96</sup> 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 Lief 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 compensation 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 in the discretion of the trial judge and, if the criteria 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 eligibility 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 is 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 application 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 statistics he concludes that for both indictable and summary conviction cases there were only, approximately, 30,000 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 costs 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.