

REPAIRING THE LAW OF DAMAGES

by DALE GIBSON*

The fruit that spilled in such profusion from the Supreme Court of Canada's cornucopia of tort damages law on January 19, 1978, was of many varieties. Some was sweet, some was bitter, and some was not yet ripe.

Four different cases were involved. In *Andrews*¹ and *Thorton*,² the plaintiffs were young men, one of high school age and the other just recently launched on his adult career, who were rendered permanently quadriplegic by tortious acts. In *Teno*³ the victim was a four-and-a-half year old girl, of normal capabilities, who suffered brain damage which reduced her intellectual powers to the borderline category, seriously impaired her speech, and made walking difficult and most other manual functions impossible for her. In *Keizer*⁴ the plaintiff was a young widow with a six-month-old child, who sued under the Ontario *Fatal Accidents Act*⁵ for loss of financial support as a result of her husband's wrongfully caused death.

In each case the trial court awarded damages which most observers regarded as generous, at least in contrast to past awards. The total assessments approached or exceeded the million dollar mark in three of the four cases. These awards were reduced by the court of appeal in every instance, and in all but one of them the reduction was dramatic. When the Supreme Court of Canada granted leaves to appeal on the question of quantum of damages, it was expected to provide lower courts with a clear indication as to whether the generous approach of the trial courts or the restrained approach of the courts of appeal is to be preferred in future cases. Such unequivocal guidance cannot be found in the sums awarded by the Supreme Court, which were about midway between those of the trial and appellate levels in three of the cases; and somewhat less than the most generous court of appeal assessment in the fourth. Yet if one looks beyond the final figures to the Court's policy pronouncements and calculation techniques, there is much in these decisions to interest and assist lawyers and judges engaged in the assessment of damages for personal injuries. Regrettably, some aspects of the decisions will probably also generate future confusion and injustice.

* Faculty of Law, University of Manitoba.

1. *Andrews v. Grand & Toy Alberta Ltd.* [1978] 1 W.W.R. 577; (1978), 3 C.C.L.T. 225 (S.C.C.).

2. *Thornton v. Board of School Trustees, Prince George* [1978] 1 W.W.R. 607; (1978), 3 C.C.L.T. 257 (S.C.C.).

3. *Arnold v. Teno* (1978), 3 C.C.L.T. 272 (S.C.C.). Liability was also a serious issue in this case, but it will not be discussed in this comment.

4. *Keizer v. Hanna* (1978), 3 C.C.L.T. 316 (S.C.C.).

5. R.S.O. 1970, c. 164.

1. *A Plea for Legislative Reform*

Mr. Justice Dickson, who wrote the Court's unanimous opinions in the *Andrews* and *Thorton* cases, as well as the majority opinion in *Keizer*, began by stressing the need for a statutory reform of the law of damages. The common law requirement that damages be awarded in a single, unreviewable, lump sum was singled out for particular criticism:

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump-sum system and a once-and-for-all award.

The lump-sum award represents problems of great importance. It is subject to inflation; it is subject to fluctuation on investments; income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured and the cost of meeting those needs.⁶

His Lordship acknowledged that the English Law Commission has recommended to the contrary,⁷ but suggested that this was the result of "strong opposition from insurance interests and the plaintiffs' bar."⁸ While that may have been an unfairly perfunctory dismissal of a thoughtful study by the English Commission,⁹ His Lordship's purpose was not to examine the question in depth, but rather to provoke Canadian law reformers to turn their attention to the problem. It is to be hoped that his remarks succeed in doing so, for, as these four cases amply demonstrate, not even the most able and foresightful court can perform successfully the prodigious feats of prophecy demanded of it by existing damages law in cases of grievous long-term personal injuries.

2. *Attempts at Greater Precision*

The calculation procedures endorsed by the Supreme Court in these cases included two important guidelines that will contribute to somewhat greater precision in a necessarily inexact exercise. The common practice of awarding general damages in a single global sum, with no indication of the amounts allocated to each type of loss, was criticised:

6. *Supra* n. 1, at 580-81.

7. Law Commission, Report No. 56, "Personal Injury Litigation — Assessment of Damages" (1973) 9.

8. *Supra* n. 1, at 581.

9. The question was examined at length in the Law Commission's Published Working Paper No. 41, 1971.

The method of assessing general damages in separate amounts, as has been done in this case, in my opinion, is a sound one. It is the only way in which any meaningful review of the award is possible on appeal and the only way of affording reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby that each of the various heads of damage going to make up the claim has been given thoughtful consideration.¹⁰

Even more significant was the Court's approval of a modified actuarial approach to calculating long-term future pecuniary losses rather than the rough and ready approach employed by English courts. The English technique is apparently based on the philosophy that since great precision is unattainable by any method of computation, there is no point attempting more than a "seat of the pants" estimate. English Courts simply compute the sum required to compensate the plaintiff for a single year and multiply that figure by an arbitrarily chosen "multiplier," which is much smaller than the number of years during which the loss is actually expected to extend. *Mitchell v. Mulholland*¹¹ offers an illustration of the method. The plaintiff was a young man permanently incapacitated by an automobile accident. At the time of trial his life expectancy was 35 years, of which 29 would normally have been working years if the accident had not deprived him of his ability to work. Rejecting actuarial evidence as to the amount required to be invested in order to produce the plaintiff's estimated lost income and health care costs over the period in question, the English Court of Appeal simply multiplied the average annual nursing costs and earning losses by 14. The multiplier of 14 was pulled from thin air. The reason the multiplier is less than the actual expected duration of disability is that there are other factors to be taken into account, such as the earning potential of the invested lump sum award, and the various contingencies not included in life expectancy and work expectancy calculations. The theory is that a wisely chosen multiplier will produce the same result as an award of total estimated losses discounted for these many variables.

At least two things are troubling about this approach. First, it is difficult to accept the courts' rather arrogant assumption that their intuitive powers are more reliable than a actuary's professional skills. The justification usually offered for that assumption is the fact that actuarial calculations "... deal merely with the average case," and pay "... insufficient regard to the particular plaintiff with whom we are concerned...".¹² The fact that actuarial information may need to be adjusted in the

10. *Supra* n. 1, at 580, per Dickson, J. On the question of non-pecuniary damages, however, the Court was of the opinion that itemization would not be useful: see *infra*, n. 74.

11. [1971] 2 All E.R. 1205 (C.A.) aff'd [1971] A.C. 666 (H.L.).

12. Per Edmund Davies L.J. in *Mitchell v. Mulholland*, *supra* n. 11, at 1211-12.

light of individual characteristics is no reason to reject the information as a starting point for calculations, however.¹³ And if evidence to the contrary is not forthcoming, would a court not be justified in assuming that the plaintiff's characteristics correspond to those of the average person?¹⁴

The second disturbing feature of the "multiplier" approach is that it seems to produce damage awards consistently lower than those indicated by the actuarial method. Judicial intuition seems to have a distinct conservative, not to say niggardly, bias.

The approach preferred by most Canadian courts in recent years has been somewhat more scientific. This method involves an attempt to estimate, often with the aid of actuarial evidence, the sum which if invested prudently would produce an annual payment of the required amount over the expected period of loss. In the cases under review, the Supreme Court of Canada made clear its approval of such an approach. Nevertheless, Mr. Justice Dickson cautioned, on behalf of the Court, that actuarial data must be taken with a grain of salt:

The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession; but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful approach and a sharper tool than the "multiplier-multiplicant" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot and does not purport to speak as to the individual sufferer. So long as we are tied to lump-sum awards, however, we are tied also to actuarial calculations as the best available means of determining amount.¹⁵

Both the Court's call for more detailed itemization of damage awards and its support of a modified actuarial technique, indicate an apparent desire for greater precision and accuracy in the computation of damage awards. It is puzzling, therefore, to note that in three of the four cases involved, the Court adopted a rather blunt-edged "rounding off" technique which introduced a small but significant element of unnecessary imprecision into the process. In the *Andrews* case, for example, the various items of general damages totalled \$741,413.00. The award was then arbitrarily "rounded off" at an even \$740,000.00.¹⁶ In the *Teno* case the plaintiff gained \$1,600.00 as a result of a similar simplification. In *Thornton* the rounding off cost the plaintiff \$3,700.00. No explanation was offered as to why these awards were rounded to the nearest ten thousand dollars. Not

13. See, for example, the approach of Berger J. in *White v. Parkin* (1974), 46 D.L.R. (3d) 411, 419-20 (B.C.S.C.).

14. Edmund Davies L.J. denied the propriety of such an assumption in the *Mitchell* case. *supra* n. 11, at 1211-12.

15. *Supra* n. 1, at 581.

16. *Id.*, at 606.

even neatness was achieved, since after arriving at a rounded-off figure for general damages, the Court then added the special damages, which were uneven amounts, and made allowance for contributory negligence. In the result, therefore, the final award made to the plaintiff in each of these cases was an uneven sum. While it is true that the amounts added or subtracted by this rounding off process are relatively small, compared to the huge damage awards in question, the sums are nevertheless significant in absolute terms. A practice which can result in a damage award being either increased or decreased by five thousand dollars, depending upon the luck of the calculations, is very difficult to justify.

3. *Humane Standard for Future Care*

Counsel for defendants seeking to limit the level of damage awards often draw the courts' attention to a statement made by the Saskatchewan Court of Appeal almost a quarter century ago: "It is clear that a jury must not attempt to give damages to the full amount of a perfect compensation."¹⁷ The English cases upon which this statement was based were decided before it was firmly established in English law that the goal of damage awards is *restitutio in integrum*: to restore the plaintiff as fully as money can to his pre-accident position. Most modern English authorities treat those early cases as meaning only that allowances must be made for future contingencies.¹⁸ These facts seem to have overlooked by the Saskatchewan Court of Appeal, and those who continue to quote its words.

Mr. Justice Dickson who wrote the Supreme Court of Canada's reasons for judgment in the *Andrews* case made a rather similar comment: "There cannot be 'complete' or 'perfect' compensation."¹⁹ His Lordship should not be taken, however, to have approved the assertion of the Saskatchewan Court of Appeal that courts should not *strive* for perfect compensation. He was merely commenting on the inadequacy of money as compensation for personal injuries:

Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness . . . ²⁰

Indeed, all four decisions under review constitute a clear affirmation of the restitution concept. Underlying them all is unequivocal acceptance of the principle that where losses can be translated into dollars full compensation should be the goal. The

17. *Taylor v. University of Saskatchewan* (1955), 15 W.W.R. (N.S.) 459, 466 (Sask. C.A.).

18. See *McGregor on Damages* (13th ed. 1972), para 1097.

19. *Supra* n. 1. at 586.

20. *Id.*, at 586.

Court's treatment of the question of compensation for future care in the *Andrews* and *Thornton* cases offers particularly strong evidence of this.

The principal issue was whether the plaintiffs were entitled to a level of compensation permitting them to live in a home setting, or would have to settle for less desirable but more economical institutional care. The medical evidence left no doubt that it would be psychologically much better for the plaintiffs to have their own houses or apartments than to live in a hospital. However, they would both require twenty-four hour nursing assistance, which could be provided much less expensively in an institutional setting. The trial courts in both cases had awarded damages on the basis of home care,²¹ while the courts of appeal had reduced the awards to sums approximating the cost of institutional care.²² The Supreme Court reinstated the higher standard. As Mr. Justice Dickson put it in the *Andrews* case:

... there is no duty to mitigate, in the sense of being forced to accept less than real loss . . . An award must be moderate, and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation not retribution. But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment. It does not mean that *Andrews* must languish in an institution which on all evidence is inappropriate for him.²³

This statement will be warmly welcomed by those who believe that the level of Canadian damage awards for grievous personal injuries has been unacceptably low until now.

4. *Estimating Losses of Future Earnings*

When it came to awarding sums to compensate for the deprivation of earning potential, the Court exhibited both a less confident and a less generous attitude than on the question of future care. These two attitudes were no doubt related; given the plaintiffs' onus to prove all elements of their claims by a preponderance of evidence, and the grave difficulty of proving that their future income would have been high if they had not been injured, it is not surprising that the defendants were accorded the benefit of the doubt. The unfair results which this approach produces in cases like those under review, may indicate that there is a need to re-examine the placement of the burden of proof in relation to future earnings.

21. *Andrews*, [1974] 5 W.W.R. 675 (Alta. S.C.); *Thornton*, [1975] 3 W.W.R. 622 (B.C.S.C.).

22. *Andrews*, [1976] 2 W.W.R. 385 (Alta S.C. -App.); *Thornton*, [1976] 5 W.W.R. 240 (B.C.C.A.).

23. *Supra* n. 1, at 588.

In the case of persons well advanced in their careers at the time of injury the problem is not too difficult. The *Keizer* case involved a *Fatal Accidents Act* claim with respect to the death of a 33-year-old tool room foreman. The Court had little difficulty estimating his average future earnings at \$15,000 a year. Where an earning level has been firmly established, the courts are prepared to assume its continuance, even where the level is well above average earnings. In *The Queen v. Jennings*,²⁴ for example, a 52-year-old plaintiff was earning \$30,000 a year at the time of his injury, and the Supreme Court of Canada based its award for the loss of future income on the assumption that he would have continued to earn at that level for the remainder of his working life. As a rule, income is frozen at the pre-accident level; the possibility of an increase in earning power is seldom taken into account, perhaps on the theory that it is offset by the contingency that income might also have been reduced for one reason or another.²⁵

Where the plaintiff is a child, or a young person standing at the threshold of his or her career when injured, as in three of the four cases under review, the situation is much less satisfactory. In the absence of established earning patterns upon which reliable predictions of lifetime income levels can be based, the courts face an impossible task. The Supreme Court's estimates of future earnings in the *Andrews*, *Thornton*, and *Teno* cases provide graphic illustrations of the problem.

In the *Andrews* case, the plaintiff was a twenty-one-year-old apprentice carman with Canadian National Railways, earning about \$10,000 a year. His average annual future income was estimated at \$15,000, which was roughly half-way between his wage as an apprentice and the maximum salary for a fully trained carman. The possibility that he might have taken up a different type of work, or might have risen to a supervisory position, was not considered. The plaintiff in the *Thornton* case fared even less well, because his injury was sustained before he had left high school and established an earning record. In his case, counsel agreed to an average annual wage of \$10,000.

A comparison of the *Andrews* and *Thornton* cases shows that it is generally to the plaintiff's advantage to have established an employment record by the time of the accident. There may, however, be features of the existing employment situation which operate to the plaintiff's detriment. The same two cases illustrate this point, in a rather odd way. *Thornton*, who did not have a job, was assumed to have had a normal

24. (1966) 57 D.L.R. (2d) 644 (S.C.C.).

25. There are occasional exceptions, such as *Home v. Corbeil*, [1956] O.W.N. 391 (Ont. C.A.), but they are quite rare.

working life expectancy — until age 65.²⁶ Andrews, on the other hand, worked for an employer who permitted retirement on full pension at age 55,²⁷ so the Court accepted the lower figure, saying that it was “reasonable to assume that he would, in fact, retire as soon as it was open for him to do so on full pension.”²⁸ What the Court seems to have overlooked is that there would not have been a “full pension” available when Mr. Andrews reached age 55. If he had been offered an opportunity to retire at that age with the cessation of all income other than government social security payments, it is very unlikely that he would have exercised the option. The Court’s use of the early retirement age would seem to make sense only if it had awarded him, in addition to damages for lost salary, a sum equivalent to the employer’s expected contributions to his pension fund.

The extreme difficulty of adequately assessing earning impairment for young plaintiffs was even more wretchedly evident in the case of four-and-a-half-year-old Diane Teno. In the absence of any reliable evidence as to what kind of career so young a child would eventually pursue, the lower courts adopted as a guide the position of her mother, who earned \$10,000 a year as a primary school teacher. Why the mother rather than the father was seen as the appropriate role model was not explained. The father’s occupation and income are not even mentioned in the reasons for judgment.²⁹ Moreover, even the mother’s modest income was found by the Supreme Court to be too generous an estimate of the child’s pre-injury earning potential. Mr. Justice Spence commented:

... We are entitled to say that the infant plaintiff would not have become a public charge. To award an annual loss of income of the sum of \$5,000 is to make an award of an amount which, in the present economic state, is merely on the poverty level, yet I cannot justify an award based on an amount of \$10,000 . . . I think that we would be doing justice to both the plaintiff and defendants, and I find it equitable, to determine that the infant plaintiff would, at least,³⁰ have earned \$7,500 per year for her business life.³¹

Some readers may question his Lordship’s use of the adjective “equitable” to describe the assumption that the child’s lifetime earning potential would be half-way between the poverty line and the current income level of the parent of the same gender.

26. *Supra* n. 2, at 618. A slight actuarial adjustment was made in both cases.

27. *Supra* n. 1, at 595.

28. *Id.*, at 595.

29. *Supra* n. 3, at 311. Further evidence that sexist assumptions may have affected the award can be found in the following statement of Spence J., at 309: “There can be no evidence whatsoever which will assist us in determining whether she ever would have become a member of the work force or whether she would have grown up in her own home and then married.”

30. The significance of the words “at least” is obscure. The award was based on the estimate of \$7,500, less an allowance for contingencies.

31. *Supra* n. 3, at 310.

The *Andrews*, *Thornton*, and *Teno* cases all involved young people whose employability was totally destroyed. There was no evidence (other than differences in age and sex) that their pre-injury earning potential had been different. Yet the same court, on the same day, assessed their loss of future earnings on the basis of annual averages of \$15,000, \$10,000 and \$7,500 respectively. Surely this is unacceptable.

There will never be a satisfactory method of divining the might-have-been, of course. The sooner legislatures relieve courts of this impossible task, the better. Yet is it not possible in the meantime to devise a more rational judicial approach to situations where there is no significant prior earning pattern? At the very least, all such cases should be treated alike; there can be no justification for variations like those cases under review. Gender-based indicia must certainly be rejected; the assumption that women will continue in the future to pursue different and less remunerative careers than men can no longer be sanctioned. Perhaps the soundest approach would be to base the award in such cases on the national average income of Canadians in full-time employment. The plaintiff should certainly not expect to be compensated on the assumption that he would have been an unusually high income earner, but why should he be presumed to have been any less successful than the average Canadian? On the basis of recent figures, an estimate of about \$12,500 per annum would be indicated if this approach were adopted.³²

A final point of interest in the Supreme Court's treatment of the subject of future earnings is a question posed by Mr. Justice Dickson in *Andrews*: "Does one give credit for the 'lost years'?"³³ Although it is not clear why it needed to be asked in this case, the question is an important one. The answer given by Mr. Justice Dickson may not attract universal applause.

Suppose I am a healthy young person in my early twenties, with a life expectancy of 50 years, and a probable future working life of 40 years. If I am injured in a manner which reduces my life expectancy to 5 years, and completely destroys my ability to work, am I entitled to be compensated for 35 years' loss of potential earnings? Or am I entitled to only the earnings lost during the 5 years I am expected to survive?

English courts have held that the appropriate period is the shorter of the two.³⁴ The High Court of Australia views the matter differently, however. That court held in *Skelton v. Collins*³⁵ that the award for loss of earning potential should be

32. *Financial Post*, Apr. 1, 1978, estimated average weekly earnings of Canadians in December 1977 at \$256.04.

33. *Supra* n. 1, at 595.

34. See *Oliver v. Ashman*, [1962] 2 Q.B. 210 (C.A.); *McCann v. Sheppard*, [1973] 1 W.L.R. 540 (C.A.).

35. (1966), 115 C.L.R. 94 (Aust. H.C.).

based on the entire pre-accident work-life expectation. (It should be pointed out, though, that the actual award made under this head in that case was very modest, since a substantial deduction was made for unincurred living expenses during the years after the plaintiff's expected death.)

The same year the *Skelton* case was decided in Australia, the Supreme Court of Canada sidestepped the issue. In the *Queen v. Jennings*³⁶ a damage award was approved which took no account of the "lost years." However, Mr. Justice Cartwright was careful to point out in that case that the Court was concerned only with the total amount of the award, and not with its particular components. He added:

I am not expressing agreement with the view . . . that because the normal life expectancy of the plaintiff of 22.43 years had been reduced by his injuries to 5 years he should be compensated only for the earnings he would have been expected to receive during the five-year period.³⁷

Now, in the *Andrews* case, the Court has finally dealt with the issue forthrightly. Rejecting the English approach, and expressly approving the *Skelton* decision in this regard, Mr. Justice Dickson stated on behalf of a unanimous Court:

When viewed as the loss of a capital asset consisting of income-earning capacity rather than a loss of income, the answer is apparent: it must be the loss of that capacity which existed prior to the accident. This is the figure which best fulfills the principle of compensating the plaintiff for what he has lost.³⁸

The desirability of compensating for the "lost years" is not as obvious to the writer as it was to Mr. Justice Dickson. While the English approach may seem harsh, it can be justified. The purpose of a damage award is to replace what has been lost by the plaintiff to the extent that money can do so. Since money is unlikely to be useful in the afterlife, it makes sense to restrict the plaintiff's compensation to the period when money remains meaningful to him. To over-compensate the plaintiff monetarily during his shortened life span in order to take account of the years after his death does not serve the purpose of *restitutio in integrum*. Some compensation for the reduction of one's life expectancy should certainly be provided, but, it is submitted, it would be better to treat this as a form of non-pecuniary loss which, as will be seen, is subject to different principles. (The foregoing comments would not apply to *Fatal Accidents Act* situations such as the *Keizer* case, of course, since they involve actual monetary losses by living survivors after the victim's death.)

36. *Supra* n. 24.

37. *Id.*, at 653-54.

38. *Supra* n. 1, at 595.

It would appear that Mr. Justice Dickson's comments on the subject of the "lost years" were *obiter dicta*. Since Andrews' reduced life expectancy was still considerably longer than his expected work span before the accident it would not have made any difference if the reduced figure had been used. There was really no need, therefore, to say anything about the problem of the "lost years." The Court is not to be faulted for expressing an opinion on the subject; it is a refreshing change from its usual frustrating practice of leaving tantalizing questions dangling. It is to be hoped, however, that law reformers and legislators will give some thought to the suitability of the solution suggested by Mr. Justice Dickson before it is widely adopted and applied by the other courts.

5. *Allowance for contingencies*

Most predictions are based upon the assumption that current trends will persist. We all know, however, that this assumption will often be proven false; the future holds many surprises, both pleasant and unpleasant. To take account of the uncertainties, the courts frequently make use of a contingency discount when calculating damages for long term future losses. The investment required to produce the compensation needed over the expected period of loss is arbitrarily reduced by some percentage in recognition of such contingencies as the possibility that the plaintiff's earning power might have been reduced, even without the accident, by other injuries, illness, demotion, economic depression, etc., or the possibility that the plaintiff's economic losses might some day be covered by a publicly funded social welfare scheme.

The fallacy inherent in this practice is that it assumes only detrimental contingencies. The likelihood is as great that the plaintiff's career might have soared far beyond its pre-accident level had he not been injured, or that even existing public health services might be terminated by a retrogressive government in the future. Since the beneficial possibilities seem to balance the detrimental ones, it is submitted that the "contingency discount" is an unnecessary impediment to the goal of perfect monetary restitution for which the law of damages strives.

The practice was approved and applied by the Supreme Court of Canada, however, in the cases under review. While acknowledging that contingencies can be both good and bad,³⁹ and commenting that any variation for contingencies will "assure either over-compensation or under-compensation, depending on whether or not the event occurs,"⁴⁰ Mr. Justice

39. *Id.*, at 596.

40. *Id.* at 593. Since only discounts are employed it is difficult to see how overcompensation could occur as a result of the adjustment.

Dickson accepted a 20 per cent discount of the sums estimated for the cost of future care and the value of lost future earnings in the *Andrews* and *Thornton* cases. The same percentage was employed in *Teno*,⁴¹ and a similar discount was also made in *Keizer*,⁴² although the precise percentage was not disclosed.

Mr. Justice Dickson admitted in the *Andrews* case that the contingency discount is "obviously arbitrary" and "not entirely satisfactory."⁴³ He pointed out that "this whole question of contingencies is fraught with difficulty."⁴⁴ Unhappily, he seemed to regard the Court as powerless to resolve these difficulties. They are, he seemed to imply, an unavoidable concomitant of the "illogical practice of awarding lump-sum payments for expenses and losses projected to continue over long periods of time."⁴⁵ Yet a solution was within the Court's power: it could simply have rejected the contingency discount outright. True it is that legislative institution of periodic reviewable damage awards could remove the problem, but in refusing to provide an interim solution in the absence of legislative action the Supreme Court of Canada was abdicating its own responsibilities.

6. Allowance for Inflation

A contingency that is usually accorded special consideration by the courts is the future performance of the economy. If 1988 dollars will be worth only one-half the value of 1978 dollars, a damage award intended to provide adequate compensation during that ten year span must in some way offset the operation of inflation. But how can a court predict the value of the 1988 dollar? It could be double rather than half the present value.

The effects of past inflation or deflation are easy to compute, and courts are willing to adjust present-day awards to correspond to the real value of the past awards.⁴⁶ However, the problem of providing satisfactorily for future changes in the economy has produced a confusing variety of judicial responses.

In England it now seems well established that no adjustment will be made for future variations in the value of money.⁴⁷ The reason usually given for this refusal, apart from the unpredictability of economic variables, is the fact that lump-sum damage awards are intended to be invested by the plaintiff. If wisely invested, it is said, the resulting income will fluctuate

41. *Supra* n. 3, at 312.

42. *Supra* n. 4, at 331 ff. (Spence, J.); 339 ff. (Dickson, J.).

43. *Supra* n. 1, at 596.

44. *Id.*, at 593.

45. *Id.*

46. *Eg.*, *Crosby v. O'Reilly* (1974), 43 D.L.R. (3d) 571 (Alta. S.C.-App.), aff'd (1975), 51 D.L.R. (3d) 555 (S.C.C.).

47. *Taylor v. O'Connor* [1970] 1 All E.R. 365 (H.L.).

over time in close approximation to the fluctuations in the value of money. Therefore, it is argued, there is no cause to be concerned about either inflation or deflation.⁴⁸ When considered against the background of the rough and ready "multiplier" method by which English courts compute future losses, this approach may be defensible. It is not appropriate for Canada, however, because the actuarial method employed here depends upon an estimation of the actual earning power of the lump-sum investment. Merely knowing that the earning power of the investment bears a close relationship to the rate of inflation does not give the actuary the information he needs to do his job.

Canadian courts commonly set off the estimated annual inflation rate against the estimated annual interest rate on sound investments, and treat the remainder as the real earning power of the investment for the purpose of calculating an appropriate lump-sum award. This procedure was employed by the Supreme Court of Canada in the cases under review. Although it can be demonstrated that this "set-off" technique produces somewhat different results than would be obtained by first calculating the interest and then devaluating for inflation,⁴⁹ the convenience of the method probably makes up for its slight inaccuracy. However, the actual calculations made by the Supreme Court on this occasion are highly questionable.

In the *Andrews* case the trial court, assuming a long-term interest rate of 8 per cent and a long-term inflation rate of 3 per cent, concluded that the real earning power of the lump-sum investment would be 5 per cent. The Supreme Court of Canada varied this calculation significantly. Mr. Justice Dickson's explanation was as follows:

The approach which I would adopt . . . is to use present rates of return on long-term investments and to make some allowance for the effects of future inflation. Once this approach is adopted, the result, in my opinion, is different from the 5 per cent discount figure accepted by the trial judge. While there was much debate at trial over a difference of a half of one percentage point, I think it is clear from the evidence that high quality long-term investments were available at the time of trial at rates of return in excess of 10 per cent. On the other hand, evidence was specifically introduced that the former head of the Economic Council of Canada, Dr. Deutsch, had recently forecast a rate of inflation of 3-1/2 per cent over the long-term future. These figures must all be viewed flexibly. In my opinion, they indicate that the appropriate discount rate is approximately 7 per cent. I would adopt that figure. It appears to me to be the correct result of the approach I have employed, i.e., having regard to present investment

48. See, for example, the remarks of Lord Denning, M.R., in *Cunningham v. Harrison* [1973] 3 All E.R. 463, 470 (C.A.).

49. Suppose, for example, that \$1,000 were invested for a year at 5% interest, in a completely stable economy. At the end of the year the investor would have \$1,050. If, however, the same sum were invested at 10% in an economy affected by a 5% inflation rate, the investor would conclude the year with \$1,100, which would, however, be worth only \$1,045 in terms of "year one dollars".

market conditions and making an appropriate allowance for future inflation. I would, accordingly, vary to 7 per cent the discount rate to be used in calculating the present value of the awards for future care and loss of earnings in this case. The result in future cases will depend upon the evidence adduced in those cases.⁵⁰

The same 7 per cent discount figure was used in the *Thornton* and *Teno* cases, and the trial court's use of a 6-1/2 per cent rate in the *Keizer* case was approved by the Supreme Court.

To test the validity of the Court's conclusion that the real earning rate of the invested damage awards in these cases will be about 7 per cent, it is instructive to examine the past performance of the Canadian economy. Such an examination discloses that although it is extremely difficult to predict the future trends in either interest rates or inflation rates, there is, as the English courts have pointed out, a close relationship between the two.

Interest Rates and Inflation in Canada, 1965-75⁵¹

| Year and Quarter | Interest Rates | | | | | Inflation | Earning Rate | |
|------------------|-------------------------|---------------------------|-----------------------------------|---------------------------------|---------|-------------------------------------------------|------------------------------------------------------------------------|------|
| | 90-Day Commercial Paper | 3-5-Year Government Bonds | 10-Year-and-Over Government Bonds | McLeod, Young, Weir Industrials | Average | Year-Over-Year % Change in Consumer Price Index | % Excess of Average Annual Interest Rate over Average Annual Inflation | |
| 1965:1 | 4.43 | 4.62 | 5.06 | 5.50 | 4.90 | 2.0 | | |
| 1965:2 | 4.81 | 4.87 | 5.16 | 5.64 | 5.12 | 2.3 | | |
| 1965:3 | 5.22 | 5.09 | 5.32 | 5.83 | 5.37 | 2.5 | | |
| 1965:4 | 6.09 | 5.23 | 5.40 | 6.05 | 5.69 | 2.9 | | |
| | 1965 | | | | | 5.27 | 2.43 | 2.84 |
| 1966:1 | 6.07 | 5.37 | 5.58 | 6.22 | 5.81 | 3.4 | | |
| 1966:2 | 6.28 | 5.39 | 5.66 | 6.30 | 5.91 | 3.8 | | |
| 1966:3 | 6.40 | 5.76 | 5.75 | 6.83 | 6.19 | 3.9 | | |
| 1966:4 | 6.63 | 5.58 | 5.76 | 6.83 | 6.20 | 3.9 | | |
| | 1966 | | | | | 6.03 | 3.75 | 2.28 |
| 1967:1 | 5.39 | 4.76 | 5.48 | 6.65 | 5.57 | 3.0 | | |
| 1967:2 | 5.54 | 5.68 | 5.87 | 7.07 | 6.04 | 3.3 | | |
| 1967:3 | 5.95 | 6.10 | 6.19 | 7.43 | 6.42 | 4.0 | | |
| 1967:4 | 6.57 | 6.48 | 6.54 | 7.59 | 6.80 | 3.8 | | |
| | 1967 | | | | | 6.21 | 3.53 | 2.68 |
| 1968:1 | 7.39 | 7.12 | 6.91 | 7.93 | 7.34 | 4.5 | | |
| 1968:2 | 7.20 | 6.79 | 6.62 | 8.05 | 7.17 | 4.1 | | |
| 1968:3 | 6.19 | 6.25 | 6.60 | 7.82 | 6.72 | 3.6 | | |
| 1968:4 | 6.65 | 7.06 | 7.27 | 8.18 | 7.29 | 4.2 | | |
| | 1968 | | | | | 7.13 | 4.10 | 3.03 |
| 1969:1 | 7.04 | 7.27 | 7.22 | 8.43 | 7.49 | 3.8 | | |
| 1969:2 | 7.82 | 7.62 | 7.50 | 8.89 | 7.96 | 4.8 | | |
| 1969:3 | 8.43 | 8.06 | 7.81 | 8.91 | 8.30 | 4.9 | | |
| 1969:4 | 9.17 | 8.29 | 8.33 | 9.29 | 8.77 | 4.5 | | |
| | 1969 | | | | | 8.13 | 4.50 | 3.63 |
| 1970:1 | 7.89 | 7.32 | 7.93 | 9.24 | 8.10 | 4.7 | | |
| 1970:2 | 7.31 | 7.07 | 8.09 | 9.24 | 7.93 | 3.7 | | |
| 1970:3 | 6.68 | 7.12 | 7.88 | 9.19 | 7.72 | 3.0 | | |
| 1970:4 | 5.58 | 5.42 | 6.99 | 8.83 | 6.71 | 2.2 | | |
| | 1970 | | | | | 7.62 | 3.40 | 4.22 |
| 1971:1 | 3.53 | 5.19 | 6.76 | 8.37 | 5.96 | 1.7 | | |
| 1971:2 | 3.98 | 6.02 | 7.30 | 8.52 | 6.46 | 2.2 | | |
| 1971:3 | 4.99 | 5.63 | 6.97 | 8.32 | 6.48 | 3.2 | | |
| 1971:4 | 4.32 | 5.09 | 6.56 | 8.24 | 6.05 | 4.2 | | |
| | 1971 | | | | | 6.24 | 2.83 | 3.41 |

50. *Supra* n. 1. at 600.

51. Adaptation of table in J.E. Pesando, *The Impact of Inflation on Financial Markets in Canada* (1977) 7-8, based on information provided by the Bank of Canada Review.

| Year and Quarter | Interest Rates | | | | | Inflation | Earning Rate |
|------------------|-------------------------|---------------------------|-----------------------------------|---------------------------------|---------|-------------------------------------------------|------------------------------------------------------------------------|
| | 90-Day Commercial Paper | 3-5-Year Government Bonds | 10-Year-and-Over Government Bonds | McLeod, Young, Weir Industrials | Average | Year-Over-Year % Change in Consumer Price Index | % Excess of Average Annual Interest Rate over Average Annual Inflation |
| 1972:1 | 5.15 | 6.29 | 7.24 | 8.24 | 6.73 | 4.8 | |
| 1972:2 | 5.16 | 6.68 | 7.45 | 8.34 | 6.91 | 4.3 | |
| 1972:3 | 5.01 | 6.57 | 7.46 | 8.46 | 6.88 | 4.8 | |
| 1972:4 | 5.15 | 6.00 | 7.12 | 8.15 | 6.61 | 5.2 | |
| 1972 | | | | | 6.78 | 4.78 | 2.00 |
| 1973:1 | 5.24 | 6.50 | 7.30 | 8.22 | 6.82 | 5.8 | |
| 1973:2 | 7.40 | 7.19 | 7.74 | 8.40 | 7.68 | 7.3 | |
| 1973:3 | 8.95 | 7.25 | 7.72 | 8.62 | 8.14 | 8.2 | |
| 1973:4 | 10.25 | 7.25 | 7.70 | 8.81 | 8.50 | 9.0 | |
| 1973 | | | | | 7.79 | 7.58 | .21 |
| 1974:1 | 9.20 | 7.57 | 8.19 | 9.26 | 8.56 | 9.7 | |
| 1974:2 | 11.70 | 9.24 | 9.46 | 10.45 | 10.21 | 10.8 | |
| 1974:3 | 11.04 | 8.89 | 9.67 | 10.99 | 10.15 | 11.0 | |
| 1974:4 | 10.25 | 6.96 | 8.77 | 10.72 | 9.18 | 12.0 | |
| 1974 | | | | | 9.53 | 10.88 | -1.35 |
| 1975:1 | 6.86 | 6.71 | 8.47 | 10.15 | 8.05 | 11.7 | |
| 1975:2 | 7.25 | 7.49 | 8.88 | 10.57 | 8.55 | 10.5 | |
| 1975:3 | 8.94 | 8.86 | 9.70 | 11.40 | 9.73 | 10.9 | |
| 1975:4 | 9.34 | 8.39 | 9.35 | 11.06 | 9.54 | 10.2 | |
| 1975 | | | | | 8.97 | 10.83 | -1.86 |
| 1976:1 | 9.99 | 8.55 | 9.39 | 10.82 | 9.69 | 9.3 | |
| 1976:2 | 9.20 | 8.47 | 9.35 | 10.74 | 9.44 | 8.5 | |
| 1976:3 | 9.47 | 8.40 | 9.16 | 10.33 | 9.34 | 6.5 | |
| 1976:4 | 8.16 | 7.57 | 8.47 | 9.83 | 8.51 | 5.9 | |
| 1976 | | | | | 9.25 | 7.55 | 1.70 |
| 1977:1 | 7.77 | 7.78 | 8.83 | 9.88 | 8.57 | 6.8 | |
| 1977:2 | 6.99 | 7.64 | 8.72 | 9.63 | 8.25 | 7.6 | |
| 1977:3 | 7.25 | 7.81 | 8.61 | 9.55 | 8.31 | 8.4 | |
| 1977:4 | 7.23 | 8.10 | 8.77 | 9.71 | 8.45 | 9.1 | |
| 1977 | | | | | 8.40 | 7.98 | .42 |

Average for total period surveyed 1.79

This data seems to establish that until the abnormal period of the last few years the relationship between inflation and interest rates was a relatively stable one, upon which a court might well be justified in basing an assumption as to the long-term real earning power of investments. However, the difference between the two rates has been nowhere near the 7 per cent figure adopted by the Supreme Court for the future.⁵² The average real interest rate over the 13-year period surveyed was only 1.79 per cent. This figure is distorted, of course, by the extraordinary fact that inflation soared above investment income during two of the years surveyed. But even if we ignore recent abnormalities, and consider only the years 1965-1972, the average spread between interest and inflation was only 3.01 per cent. The highest differential in the entire 13 year period was only 4.22 per cent.

If the past has anything to tell the future in these matters, therefore, it would appear that even the assumption of the trial judge in the *Andrews* case that the damage award could be expected to run at 5 per cent annually in real terms was an overestimate. The Supreme Court's conclusion that the plaintiffs

52. I am indebted to Professor T.G. Ison for having drawn attention to this fact.

could count on earning 7 per cent will leave those plaintiffs seriously undercompensated unless they encounter extraordinary good luck in their investment experiences.

Mr. Justice Dickson commented in *Andrews* that: "The result in future cases will depend upon the evidence adduced in those cases."⁵³ Counsel for future plaintiffs will do well to produce more thorough economic data than that which led the Supreme Court to its unfortunate conclusions in the *Andrews*, *Thornton*, *Teno* and *Keizer* cases.

7. Tax Complications

In *British Transport Commission v. Gourley*⁵⁴ the House of Lords drew attention to what they regarded as an anomaly of tax law having a serious impact on awards of damages for loss of earnings. Whereas the lost income, if actually earned through employment, would have been liable to substantial taxation, the damage award in lieu of income is not generally regarded as taxable. If the defendant were required to pay the plaintiff a sum equal to his gross earnings, rather than to his "take-home" pay after taxation, it was argued, the plaintiff would be overcompensated. The difference between the two figures can be very great; in the *Gourley* case itself, the plaintiff's gross income loss was £37,720, while the net figure was only £6,695. The House of Lords held by a majority that since income tax is an inescapable exigency of earning, it would be unrealistic to award the plaintiff more than his net, after-tax, income.

Critics of the *Gourley* decision have attacked it for many reasons.⁵⁵ One of the most commonly voiced criticisms is the fact that because there are so many unpredictable variables involved, it is impossible to estimate the potential tax liability of the plaintiff's potential future earnings with any hope of even approximate accuracy. Another difficulty with the *Gourley* approach is that income tax is paid on investment revenue earned by the lump-sum award. In cases of long-term losses, where interest on an invested lump sum is intended to provide a portion of the plaintiff's income replacement, it would be unfair to assume that the plaintiff will escape taxation. An award based on that assumption would fall short of providing full compensation.

For several years after the *Gourley* decision, the situation in Canada was very confused. In 1966, however, the Supreme Court of Canada finally decided not to follow *Gourley*. In *The Queen v. Jennings*⁵⁶ the plaintiff was a highly paid business

53. *Supra* n. 1, at 600.

54. [1956] A.C. 185 (H.L.).

55. See, for example, G. Bale, "British Transport v. *Gourley* Reconsidered," (1966) 44 Can. B. Rev. 66.

56. *Supra* no. 24.

executive rendered permanently unconscious by an automobile accident. He was expected to live in a comatose state for several years. When assessing damages for his loss of prospective income, the Supreme Court refused to take the incidence of income tax into account, and based the damages on the amount of his gross earnings.

It seemed that the issue had been settled for Canada. A few nagging ancillary questions remained, such as whether an award of damages for lost income might eventually be held to be subject to income tax in Canada,⁵⁷ whether the imposition of a capital gains tax in 1972 changed the situation,⁵⁸ and whether the investment income from a fund established to provide for future medical care should be subject to taxation.⁵⁹ Nevertheless, the *Jennings* case appeared to establish that the courts should not concern themselves with the incidence of taxation when assessing damages for lost earning potential. This ruling was confirmed by the Court in the *Andrews*, *Thornton* and *Teno* cases.

Surprisingly, however, the majority of the Court did make an allowance for income tax in the *Keizer* case. Arguing that there is a "fundamental distinction" between a claim made directly by an injured plaintiff and one advanced by dependents of a deceased tort victim under fatal accidents legislation, Mr. Justice De Grandpré in *Keizer* supported the deduction of anticipated income tax when computing the deceased's income. The majority of the Court agreed.⁶⁰ This conclusion was all the more remarkable because the Supreme Court had held little more than two years previously, in *Gehrmann v. Lavoie*,⁶¹ that taxation is not to be considered in dependency claims any more than in other types of cases.

The full Court did not sit in the *Gehrmann* case, however. Mr. Justice Spence, who wrote the reasons for four members of a five-man court on that occasion, dissented on this issue in *Keizer*. Mr. Justice de Grandpré had refused to deal with the question in *Gehrmann*. The other judges who participated in the *Gehrmann* case changed their minds in *Keizer*. Mr. Justice Dickson was quite frank in admitting this:

57. This uncertainty was one of the reasons the Supreme Court decided as it did in the *Jennings* case. Judson J. did hazard the opinion that they are not taxable, however. *Id.* at 655. Most observers seem to agree with that view, on the ground that the capitalization involved in the lump-sum approach removes the award from the realm of income.

58. The Court's use of the term "capital asset" to describe the plaintiff's pre-accident earning capacity (e.g., Per Dickson, J. in the *Andrews* case, *supra* n. 1. at 601) suggests that the award may be subject to capital gains tax. The prevailing view, however, seems to be that because the award is the result of a judicial order rather than the sale of an asset, it should not be regarded as a capital gain. Would the situation be different in the case of an out-of-court settlement between the parties? If so, counsel would be wise to ensure that the settlement is confirmed by a consent judgment.

59. See *infra* n. 66 and accompanying text.

60. *Supra* n. 4. at 323.

61. [1976] 2 S.C.R. 561 (S.C.C.).

Although, as a member of the court, I shared in the decision in *Gehrmann v. Lavoie* . . . I have concluded, upon reading the reasons for judgment . . . (prepared by Mr. Justice Spence and by Mr. Justice de Grandpré in this appeal) . . . and upon further reflection, that de Grandpré J. is correct in law and that the impact of income tax should be taken into account in assessing a damage award under the *Fatal Accidents Act* . . . ⁶²

Was this volte-face justified? Mr. Justice Dickson offered the following explanation for distinguishing the two situations. In cases where injured persons are claiming directly, he contended:

. . . it is earning capacity and not lost earnings which is the subject of compensation . . . A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.

In contrast with the situation in personal injury cases, awards under the *Fatal Accidents Act* . . . should reflect tax considerations, since they are to compensate dependants for the loss of support payments made by the deceased. These support payments could only come out of take-home pay, and the payments from the award will only be received net of taxes . . . ⁶³

Is this not a distinction without a difference? Is the dependent's interest in the wage earner's earning capacity not a "capital asset" substantially similar to the wage earner's own interest? The difficulties involved in attempting to forecast the burden of future taxation are certainly as great in one case as in the other. And the interest earned on the invested damage award will be as taxable in one case as in the other. It was in recognition of the latter fact that Mr. Justice de Grandpré pointed out in the *Keizer* case the necessity of calculating the loss in a manner that would provide full compensation for the dependent's lost expectancy net of tax on the invested award.⁶⁴

The difference in final result between the two approaches is not as great as it might seem at first glance. The deduction which the Court has called for in dependency cases to cover the deceased's tax liability is partially offset by the amount that must be added to compensate for taxation of the investment income. The offset is not complete, however, since payments to the dependents do not come entirely from the investment income, but also derive in part from non-taxable encroachments on the capital fund.

If it were possible to estimate the potential tax liability accurately, the approach laid down in *Keizer* for dependency claims would result in somewhat more equitable compensation

62. *Supra* n. 4, at 338.

63. *Supra* n. 1, at 601.

64. *Supra* n. 4, at 322 ff.

than that which was employed for personal injury claims in the other cases. However, as Mr. Justice Dickson pointed out in the *Andrews* case: "The exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with the political winds."⁶⁵ That being the case, complete disregard of taxation would seem to be the preferable approach. In any event, the Supreme Court's compromise solution of employing one approach for personal injury cases and the other for dependency claims has nothing to commend it. Law reformers take note.

Another tax problem to which Mr. Justice Dickson drew attention also deserves legislative consideration. It is not just the interest earned on the investment of damages for lost income which is taxable; the investment earnings of a fund provided for the cost of future health care are equally liable to taxation. This does not correspond to any form of tax for which the plaintiff would have been liable if he had not been injured. Since the incidence of taxation is disregarded in the calculation of damages for personal injuries, taxing the plaintiff's health care fund results in undercompensation. Some relief is provided by sections of the *Income Tax Act* which authorize certain health care cost deductions, but Mr. Justice Dickson was of the opinion that these existing exemptions may not provide adequate protection to the plaintiff:

The legislature might well consider a more generous income tax treatment of cases where a fund is established by judicial decision and the sole purpose of the fund is to provide treatment or care of an accident victim.⁶⁶

It is to be hoped that this suggestion will reach the attention of those responsible for the annual revisions to the *Income Tax Act*.

8. *Non-pecuniary Losses: Measuring Unhappiness.*

Perhaps the most difficult task involved in the assessment of damages for grievous personal injuries is to fix an appropriate sum to compensate for non-pecuniary losses, such as pain and suffering, and the deprivation of amenities. It is important that such misfortunes be compensated in some manner. From the plaintiff's personal point of view they often constitute the most devastating consequences of the tort; failure to take them into account would leave the plaintiff with an understandable sense of injustice. Yet how can one rationally assign a monetary value to such non-economic losses? As Mr. Justice Dickson observed in the *Andrews* case: "There is no medium of exchange for happiness. There is no market for expectation of life."⁶⁷

65. *Supra* n. 1. at 601.

66. *Id.*, at 601-602.

67. *Id.*, at 602.

In their search for a solution to this formidable problem, courts have been floundering for many years. Finally, in the cases under review, the Supreme Court of Canada has provided some authoritative guidance on the question. Although the guidance offered will no doubt be regarded as controversial, it is in the writer's view commendable as far as it goes. Much more remains to be done, however.

Speaking for the full Court in *Andrews*, Mr. Justice Dickson pointed out that all damage awards for non-pecuniary losses "must of necessity be arbitrary or conventional."⁶⁸ He also cautioned that policy factors, such as "the social burden of large awards"⁶⁹ should play a larger role here than when courts are dealing with the "paramount" issue of "adequate future care."⁷⁰ This does not mean, however, that damages for non-monetary harm should be merely nominal. His Lordship called for "fair and reasonable"⁷¹ awards, whose purpose should be to provide "solace" in the form of "physical arrangements which can make . . . life more endurable."⁷² He seems to have had in mind the purchase of pleasures to offset some of the unhappiness and hardship brought about by the injury: "Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries."⁷³ Such awards, though conventional, and uniform for all parts of Canada, should vary with the intensity of the loss. The specific type of detriment suffered should not matter, however; all forms of non-pecuniary loss should be covered in a single global award.⁷⁴ The upper limit for this global award should, "save in exceptional circumstances" be \$100,000.00.⁷⁵

The *Andrews*, *Thornton*, and *Teno* cases were all judged by the Court to be appropriate for the full \$100,000.00 award. "It is difficult to conceive," said Mr. Justice Dickson, "of a person of his age losing more than *Andrews* has lost,"⁷⁶ and the other two cases were similarly viewed. In all three cases the trial courts had assessed significantly higher sums for non-pecuniary losses: \$150,000.00 in *Andrews* and \$200,000.00 in *Thornton* and *Teno*.

68. *Id.* Inexplicably, Spence J. stated in *Teno*, *Supra* n. 3, at 313, that he preferred to avoid awarding "an arbitrary conventional sum," but: "Rather, I adopt the course taken by my brother Dickson in *Andrews* . . ."

69. *Supra* n. 1, at 602.

70. *Id.*

71. *Id.*

72. *Id.*, at 603.

73. *Id.*

74. *Id.*, at 605.

75. *Id.*

76. *Id.*, at 604.

So much for the upper limit. Although the establishment of a \$100,000.00 ceiling for non-monetary detriments may not be popular in all quarters, it seems reasonable. It permits a substantial sum of money to be allocated for the purchase of substitute pleasures without going to ridiculous extremes. Future courts must bear in mind, of course, that it may be necessary to alter the figure to take account of decreases or increases in the value of money.

How are less grievous cases to be dealt with? What percentage of \$100,000.00 should properly be awarded to compensate for an injury which does not seriously impair the plaintiff's earning ability, but results in lifetime pain when walking? or prevents the pursuit of a hobby to which the plaintiff was passionately devoted before the accident? or deprives him of the pleasure of sex? or causes severe facial disfigurement? Even though a ceiling has now been established, it will remain an extremely difficult task to put a price on pain and displeasure in situations where less than the full award is called for.

Perhaps the courts should consider using a ten-point scale. If juries and trial judges were required to grade the plaintiff's total non-monetary losses on such a scale, using the *Andrews*, *Thornton* and *Teno* cases as illustrations of ten-point situations, some small measure of consistency might be expected.

Calculations would be complicated by the time factor, of course, since the pain suffered by two plaintiffs might be similar in intensity but very different in duration. Precise computation of time periods would not serve any useful purpose; the fact the plaintiffs in the *Andrews* and *Thornton* cases have somewhat shorter life expectancies than the little girl in *Teno* should not really matter. Yet long-term detriments must clearly be treated more generously than those of short duration. It might be desirable to set an upper limit of, say, 10 years, or perhaps 200 months, and to disregard detriments which persist beyond that period.

Objectivity must not become a fetish. It is important to ensure that the exercise remains subjective, in the sense that the court examines not the nature of the detriment itself, but the impact it has on the plaintiff. If two amateur pianists of the same age and ability were both forced by the loss of a hand to give up their hobby, but A adjusted fairly well to the deprivation, while B was emotionally devastated by it, B should be entitled to greater compensation than A.

An illustration might help to clarify the manner in which the above suggestions might operate in practice. Suppose that a married couple, in their mid-thirties, both suffered serious

physical injuries in an automobile accident. Both were trapped in the vehicle for a period of almost 24 hours before help arrived. While the husband was knocked unconscious by the impact, the wife retained consciousness during most of the period before rescue. During all that time she experienced excruciating pain, believed that her husband was dead, and feared that she would not be found before it was too late. The emotional trauma of that experience left her with a condition of recurring emotional depression, which is expected to continue with gradually diminishing intensity for several years. Injuries to her body have left severe permanent scarring which causes her great embarrassment and therefore prevents her wearing bathing suits, evening dresses, and other scanty attire in public. She was unable to walk for about 6 months after the accident, and will always experience moderate pain whenever she attempts to walk more than twenty or thirty feet at a time. The husband, who had been a talented amateur athlete, will be confined to a wheelchair for life. He has developed considerable skill in and enthusiasm for wheelchair athletics, but does not find them as satisfying as his previous activities. Nevertheless, his attitude is cheerful, and he is developing other hobbies, primarily drawing and painting. The marriage does not appear to have been endangered by the accident; indeed, husband and wife seem closer now than they were before it occurred. In neither case have their career prospects been significantly altered; both are schoolteachers, and have been able to continue their previous work with little modification. A jury asked to assess the non-monetary detriments suffered by these two plaintiffs on a scale such as that suggested above, might begin by dividing the total possible assessment of \$100,000.00 into ten annual sums of \$10,000.00. In the case of the wife, they would probably rate her total suffering during the first year very high — perhaps between 8 and 10. This would entitle her to between \$8,000 and \$10,000 for that year. For subsequent years, the assessment would diminish significantly, with perhaps a rating of only 1 (\$1,000) or less in the final year. For the husband, the assessment would probably be more constant over the ten-year period, because of his rapid emotional adjustment to his situation he would probably be found to have suffered less than his wife during the first year. Compared to the plight of the plaintiffs in the *Andrews* and *Thornton* cases he might be found to have sustained a five point or six point loss that year, entitling him to \$5,000 or \$6,000. Probably the assessment would not be reduced by more than about a point, if at all, for each of the subsequent years.

While the foregoing may seem bizarre to some,⁷⁷ it is advanced seriously, in the belief that it is a technique that could

77. The writer has been accused by colleagues of attempting to create an arcane new science: dolorimetrics.

be employed effectively, and with a degree of consistency, by trial judges and juries alike. It would, however, require further help from the Supreme Court of Canada. Having provided a good starting point in the form of three examples of situations calling for a maximum award, it is now up to the Court to provide further illustrations of situations appropriate for various lesser levels of compensation. The Supreme Court of Canada has not seen the last of the non-economic loss problem.

9. *Awards in Trust for Gratuitous Benefactors*

A problem that has troubled the courts for a long time is whether to award damages with respect to losses that have already been compensated by the generosity of some third party. If the plaintiff's employer has voluntarily paid the cost of his nursing care, for example, should the plaintiff be entitled to receive that sum from the defendant as well? A subsidiary problem is whether the answer to the first question would be different if the benefaction took the form of services in kind (actual nursing care provided by a relative or friend, for example) rather than of monetary assistance. Both questions were answered by the Supreme Court of Canada in the cases, under review, but the cursory manner in which they were dealt with suggests that the Court might not have realized how controversial their suggested solutions are.

When Lord Denning was a trial judge, he hit upon an innovative solution to the dilemma of the third-party benefactor. In *Dennis v. London Passenger Transport Board*⁷⁸ he was called upon to award damages for "lost earnings" to a man whose employer had voluntarily continued his wages during the period of convalescence. Rather than either disallow the claim, as the defendant contended he should, or close his eyes altogether to the voluntary payments, as the plaintiff urged, he ordered payment of the sum in question to the plaintiff *in trust* for the employer. This unconventional but common-sense solution was the subject of considerable debate, and attracted little judicial support in the years that followed.⁷⁹ Even Lord Denning seems to have abandoned it.⁸⁰ Now, in both *Thornton* and *Teno*, the Supreme Court of Canada has adopted the same approach. Without mentioning the *Dennis* case, or exhibiting any awareness that the procedure is in any way unusual, the Court awarded the plaintiffs in both cases \$7,500.00 to be held in trust for their

78. [1948] 1 All E.R. 779 (K.B.).

79. *McGregor on Damages*, (13th ed. 1972), para. 1123 describes the approach with approval. See also his earlier and fuller discussion: (1965), 28 *Modern L. Rev.* 638. According to H. Luntz, *Assessment of Damages* (1974), para. 4.110. Australian courts have "repudiated" it however. It has also been disapproved by some Canadian courts; see: *Smith v. Toms* (1963), 44 W.W.R. (N.S.) 592 (B.C.S.C.); *Gilliss v. Breau* (1971), 19 D.L.R. (3d) 615 (N.B.S.C.-App.).

80. He made no reference to the *Dennis* case when deciding a similar matter in *Cunningham v. Harrison*, *supra* n. 48.

respective mothers, who had provided valuable nursing services.

The fact that the mothers' assistance had been provided in kind, rather than in financial form, raised another potential difficulty. Canadian authorities have been divided as to whether gratuitous services should be treated in the same fashion as gratuitous payments. Although there has been general agreement in recent years that financial benefits by a third party should be altogether disregarded, some Canadian courts have held that no damages should be awarded with respect to services gratuitously provided.⁸¹ Other courts, following recent English cases, had treated the gift of services in the same way as the gift of money.⁸² The latter line appears now to have the approval of the Supreme Court of Canada.

Although it is unfortunate that the Court did not deign to explain its conclusion and its rejection of contrary authorities, the result is, like so many other aspects of these milestone cases, a significant step forward for the law of tort damages in Canada.

81. *Eg., Hamilton v. Hayes* (1963), 36 D.L.R. (2d) 687 (B.C.S.C.).

82. *Eg., Fitzner v. MacNeil* (1966), 58 D.L.R. (2d) 651 (N.S.S.C.); *Hasson v. Hamel* (1977), 78 D.L.R. (3d) 573 (Ont. Cty. Ct.).