ANNUAL SURVEY OF CANADIAN LAW

TORTS: PART II

Colleen M. Edwards, M. Justin Hopkins,* Donna G. White**

* Of the Board of Editors (1981-82).

VI. Breach of Statutory Duty

It has been said that the use of statutes in determining the incidence of tort liability has become one of the most unsatisfactory areas in the entire field of tort law.[392] Since legislative enactments have become abundant in recent years, the courts will have to grapple more frequently with the issues of whether the statute confers a cause of action upon an individual and, if so, what procedural effect should be given to it.

During the survey period there were few cases which clarified the area. In *Canadian Pacific Airlines Ltd. v. The Queen*[393] the plaintiff airline brought an action against the Crown in right of Canada for breach of a statutory duty in failing to maintain the runways of its airports free of snow, thereby causing cancellation of some of the plaintiff's flights; there was a lawful labour stoppage at the time. The action was based on section 3(*c*) of the Aeronautics Act,[394] which states that the Minister has a duty to "maintain all government aerodromes".

The trial judge dismissed the action, stating: "I conclude the Minister's duty prescribed by para. 3(*c*) of the statute is not a duty enforceable by persons, including the plaintiff, injured or aggrieved by default. It is a public duty only. For breach, the Minister answers to Parliament alone."[395] At the appeal level Heald J. and Kerr D.J. came to the conclusion that the Minister's conduct was reasonable and therefore did not deal with the issue of whether a civil action could be brought since the statute had not been breached. Le Dain J. agreed that the appeal should be dismissed but on the ground that the Aeronautics Act did not give a civil cause of action:

> Whether a breach of statutory duty gives rise to a civil right of action in persons injured by it has been said to be a question of statutory construction that depends on "a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted": *Cutler v Wandsworth Stadium Ltd.*, [1949] A.C. 398 at p. 407. There would appear to be two questions involved: (a) Was the duty imposed, at least in part, for the benefit or protection of the particular class of persons of which the plaintiff forms part? (b) If this be the case, is a right of action excluded by the existence of other sanction or remedy for a breach of the duty, or on general grounds of policy? It would appear to be, in the final analysis, a question of policy, particularly where the liability of the Crown is involved. A distinction is to be drawn between legislation very clearly directed to the benefit or protection of a particular class of persons, such as that which imposes safety standards for the benefit of workmen, of which the case of *Groves v. Wimbrone* . . . is an example, and legislation which imposes a general duty to provide a public service or facility. The opinion has been expressed that in

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[392] C. Wright & A. Linden, Canadian Tort Law: Cases, Notes and Materials 237 (6th ed. 1975).

[393] [1979] 1 F.C. 39, 87 D.L.R. (3d) 511 (App. D. 1978).

[394] R.S.C. 1970, c. A-3.

[395] [1977] 1 F.C. 715, at 729, 71 D.L.R. (3d) 421, at 431 (Trial D.).

> the latter case the Courts will be more reluctant to recognize a private right of action.[396]

The appellant argued that a private right of action was created because there was reliance on a public service. Le Dain J. summarily dismissed this contention and instead searched for an intention in the statute to confer this right.

> [I]t appears to me to be legislation that was enacted in the interests of the country as a whole and not for the benefit or protection of any particular class of persons. The airlines which might be affected were not yet in existence. But even assuming that the duty must in some measure be considered to be a duty for the benefit of the airlines that were expected to make use of the aerodromes, I cannot conceive that it was the intention of Parliament to create Crown liability for the kind of loss that is claimed in the present case. To ascribe to Parliament an intention to give the commercial airlines a right of action for economic loss resulting from a failure to keep an airport open would be to ascribe to it an intention to create a category of Crown liability extending in nature and scope far beyond that for injury to person or property then existing under federal legislation. There would have to be a clear indication of an intention to transfer loss of this kind from the airlines to the public treasury.[397]

The basis of this decision seems to be public policy rather than statutory construction, because the court is clearly trying to limit Crown liability. In the search for a fictional intention of the legislature to confer a private right of action, courts have a wide discretion and this leads only to confusion in predicting the outcome of cases.

In situations involving landlords and tenants the courts have been quite willing to confer a private right of action. One example of this was *Gaul v. King*,[398] a decision of the Nova Scotia Court of Appeal. Under the Nova Scotia Residential Tenancies Act[399] there was a duty on the landlord to "keep the premises in a good state of repair". The court held that this statute gave rise to a right of action in tort in favour of a tenant who was injured as a result of disrepair. To support his conclusion that a right of action existed, apart from contract, the judge looked to some of the Ontario cases[400] on point in addition to the trend throughout Canada and the United States to allow recovery in tort for breach of residential tenancy acts.

In discussing the procedural effect of the statute, the court considered the three alternative tests of liability: (1) breach of the statute is *prima facie* evidence of negligence; (2) negligence must be proven by

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[396] *Supra* note 393, at 47, 87 D.L.R. (3d) at 517 (footnotes omitted).

[397] *Id.* at 51, 87 D.L.R. (3d) at 520 (footnote omitted).

[398] 33 N.S.R. (2d) 60, 57 A.P.R. 60, 103 D.L.R. (3d) 233 (C.A. 1979). *See also* Dye v. McGregor, 20 O.R. (2d) 1, 86 D.L.R. (3d) 606 (C.A. 1978); Lindstrum v. Basset Realty Ltd., 30 N.S.R. (2d) 278, 49 A.P.R. 278, 90 D.L.R. (3d) 328 (S.C. 1978).

[399] S.N.S. 1970, c. 13, s. 6(1).

[400] *E.g.*, *Re* Quann & Pajelle Invs. Ltd., 7 O.R. (2d) 769 (H.C. 1975); Cunningham v. Moore, [1973] 1 O.R. 357, 31 D.L.R. (3d) 149 (H.C. 1972).

the plaintiff; (3) breach of the statute is negligence *per se*. Once again relying on Ontario cases, the judge decided that the plaintiff was entitled to succeed upon showing a breach of the statutory duty resulting in injury; breach of the statute is evidence of negligence.

A different procedural effect was found to exist in *The Queen v. Saskatchewan Wheat Pool*,[401] a decision of the Federal Court, Trial Division. The plaintiff, Canada Wheat Pool, directed the defendant, who operated a grain elevator, to load the grain into its ship. The grain was infested, forcing the plaintiff to expend a large amount of money to fumigate. An action was brought for breach of statutory duty, the statute being the Canada Grain Act.[402] Collier J. looked to the entire statute in order to determine whether a civil cause of action could be brought and concluded that although the Act provided for prosecution and penalties for its breach, civil remedies were not necessarily excluded. The court allowed the action without specifying exactly how the statute contemplated a private cause of action. As to its procedural effect, the court concluded that the statute imposed an absolute, not a qualified, duty and therefore the fact that reasonable care might have been taken was irrelevant.

Finally, an interesting case on its facts was *Pugliese v. National Capital Commission*[403] from the Supreme Court of Canada. The plaintiffs were landowners whose homes suffered severe structural damage due to excessive pumping of water by the defendant, in contravention of the Ontario Water Resources Commission Act.[404] One of the actions brought was for breach of statutory duty. Howland J.A. of the Ontario Court of Appeal first noted that the statute did not expressly provide for a civil remedy. He then went on to say:

> In determining whether there is a right of action by a member of the public for breach of a statutory duty, four considerations may be relevant:
> (a) Was the object of the statutory provision to prevent damage of the nature which occurred? see *Gorris et al. v. Scott* (1874), L.R. 9 Ex. 125.
> (b) Was the provision enacted to impose a public duty only, or was it enacted to impose in addition to the public duty a duty which could be enforced by an individual who was aggrieved? see *Phillips v. Britania Hygienic Laundry Co., Ltd.*, [1923] 2 K.B. 832 at pp. 840-1.
> (c) Were the statutory remedies of punishment by way of criminal prosecution or by action at the instance of the Ministry intended to be the only remedies available? see *Phillips v. Britania Laundry Co., Ltd.*, *ibid*.

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[401] [1980] 1 F.C. 407, [1979] 6 W.W.R. 16 (Trial D. 1979).

[402] S.C. 1970-71-72, c. 7, s. 86(c).

[403] [1979] 2 S.C.R. 104, 25 N.R. 498, 8 C.C.L.T. 69, 97 D.L.R. (3d) 631 (S.C.C. 1979), *rev'g* 3 C.C.L.T. 18, 79 D.L.R. (3d) 592 (Ont. C.A. 1977) on the issue of breach of statutory duty *only*. The Court of Appeal decision was affirmed on other grounds. For further discussion of the other aspects of the case, *see Note*, 13 OTTAWA L. REV. 417 (1981).

[404] R.S.O. 1970, c. 332, s. 37(3) (renamed The Ontario Water Resources Act by S.O. 1972, c. 1, s. 70(1)); *now* R.S.O. 1980, c. 361.

(d) Would the contemplated beneficiaries of the performance of the duty be without an effective remedy unless a remedy is implied from the statutory provisions? see *McCall v. Abelesz et al.*, [1976] 2 W.L.R. 151.[405]

After looking at the statute in question, Howland J.A. concluded that its object was the general regulation of the taking of water and not the prevention of damages by pumping; the statute was meant to protect the public as a whole. Therefore there was no private right of action. The plaintiffs also had other courses of action so they were not left without a remedy.

The conclusion of the Ontario Court of Appeal was overturned by the Supreme Court of Canada. Once again the Court took the approach of considering the statute as a whole to determine whether the legislature intended to allow a private right of action. The Court concluded that the Act "is not only in the public interest but also in the private interest of all land owners who are liable to suffer damage from excessive pumping".[406] It followed from this that the statute had defined what amount of pumping was reasonable and therefore any pumping in violation of the Act was a nuisance.

Pugliese is a good example of the confusion in this area of the law. Both appeal courts came to apparently correct interpretations of the statute in question while attempting to determine legislative intent. Predicting the outcome of any action based on breach of statutory duty continues to be quite a difficult matter.[407]

VII. Imperfectly Protected Interests

A. *Nervous Shock*

"Recovery for negligently inflicted 'nervous shock' is one of the growth areas of negligence law."[408] Since this comment was made in the last survey on torts, the issue of nervous shock seems to have become a part of the mainstream of negligence law, resulting in scant litigation.[409]

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[405] *Supra* note 403, at 53-54, 79 D.L.R. (3d) at 619.

[406] *Supra* note 403, at 115, 25 N.R. at 508, 8 C.C.L.T. at 81, 97 D.L.R. (3d) at 638-39.

[407] For other cases dealing with breach of statutory duty during the survey period, *see Wade*, *supra* note 197; *O'Reilly*, *supra* note 222; Martin v. Lowe, 19 B.C.L.R. 46, 109 D.L.R. (3d) 133 (S.C. 1980); Edmonton Mint Ltd. v. The Queen, 94 D.L.R. (3d) 312 (F.C. Trial D. 1978); *Stermer*, *supra* note 258; St. Andrews Airways Ltd. v. Anishenineo Piminagan Inc., [1977] 6 W.W.R. 682, 80 D.L.R. (3d) 645 (Man. Q.B.); Crosty v. City of Burlington, 21 O.R. (2d) 753, 91 D.L.R. (3d) 572 (Cty. Ct. 1978).

[408] Binchy, *supra* note 1, at 348.

[409] In addition to the *Duwyn* case discussed here, *see* Griffiths v. C.P.R., 6 B.C.L.R. 115 (C.A. 1978); *Cameron*, *supra* note 289; Waugh v. Charron, 18 N.B.R. (2d) 591 (S.C. 1977); Kernested v. Desorcy, [1978] 3 W.W.R. 623 (Man. S.C. 1977), *aff'd on other grounds* [1979] 1 W.W.R. 512 (C.A. 1978).

The Ontario Court of Appeal, in a very detailed and well-reasoned judgment, has settled the law as to the test for nervous shock.[410] In *Duwyn v. Kaprielian*[411] the plaintiff left her infant son in a parked car while doing some errands. While she was gone the car was rammed from behind, frightening the infant and causing him to cry, although he was not injured. On returning, the plaintiff discovered a crowd gathering and her son gone; a passerby had taken him into his car. Due to an unpleasant accident in her past, the plaintiff was unable to deal with the situation and her son. The infant's personality underwent a drastic change. In a negligence action brought by the mother for herself and on behalf of her son, the trial court held that the nervous shock was unforeseeable and dismissed both claims. On appeal, the infant's claim was allowed.

The trial judge found that the test of nervous shock was foreseeability of nervous shock. In his opinion the nervous shock of neither plaintiff was foreseeable. In addition, the judge found that in order to find the defendant liable for damages to the infant, he would have to find him liable for those of the mother.

On the first of these points, Morden J.A. stated: "I accept the principle applied by the trial Judge that the test of liability for nervous shock is the foreseeability of nervous shock. This puts the law of negligence concerned with this kind of claim, at least according to its verbal formulation, into line with general negligence law."[412] Although His Lordship found this to be the test, he thought it "difficult to disagree with" the proposition that the foresight of physical injury and shock is the same.[413]

On the second point dealt with by the trial judge, Morden J.A. disagreed; the infant's claim was not derivative. His claim could succeed because the accident was a "substantial factor" contributing to the child's condition and the shock was foreseeable due to the child's age which increased susceptibility to trauma. Although the mother's inability to comfort her child added to the child's condition, it did not preclude recovery. On this point, Wilson J.A. drew an analogy with medical errors:[414] a mother treating her child is reasonably foreseeable just as a doctor treating the injuries of a patient is foreseeable; it follows from this that it is quite possible that the doctor's treatment might make the patient worse. Madame Justice Wilson concluded

> that it is preferable to treat medical error as a fact of life and therefore reasonably foreseeable within the principle of the *Wagon Mound*. . . . Having concluded, therefore, that this case is one of liability for an unforeseen degree of damage of a foreseeable type, and that aggravated injury resulting from the abortive ministrations of the mother was reasonably

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[410] For a critique of the test, *see* Smith, *The Mystery of Duty*, in STUDIES IN CANADIAN TORT LAW, *supra* note 31, at 26-30.

[411] *Supra* note 314.

[412] *Id.* at 133, 94 D.L.R. (3d) at 435.

[413] *Id.* at 137, 94 D.L.R. (3d) at 438. *Contra Cameron*, *supra* note 289, at 444.

[414] *Id.* at 145-46, 94 D.L.R. (3d) at 446-47.

> foreseeable within the principle of the *Wagon Mound*, I would . . . allow the infant plaintiff recovery for the full extent of his injuries.[415]

The mother's action for nervous shock failed, although Morden J.A. stated: "[A] mother who temporarily leaves her young baby . . . *may*, depending on the facts of the case, suffer nervous shock upon witnessing the accident or coming upon its aftermath."[416] The shock was found to be unforeseeable because the mother was hypersensitive.

B. *Economic Loss*

Economic loss has been identified by the courts as an area requiring special consideration, although why this is so has not always been clear. Unfortunately, the courts have attempted to formulate limiting rules which may not be appropriate for many of the unique and complex situations which occur.[417] This often results in confusion and misinterpretation of the existing law.[418] In the following three cases the courts restricted the ambit of recovery for economic loss,[419] two dealing with the problem as one of duty and one as an issue of remoteness.

In *Fraser-Brace Maritimes Ltd. v. Central Mortgage & Housing Corp.*[420] the plaintiff, a builder, brought a negligence action against the defendant for failure to enforce certain contract provisions against the second defendant, which resulted in economic loss.[421] Jones J.A., for the Nova Scotia Court of Appeal, held that while one could recover economic losses under the principles enunciated in *Rivtow Marine*,[422] the foreseeability of economic loss in every case did not always give rise to a duty of care. "The acceptance of the appellant's contention would unduly restrict the right of parties to contract and place an undue burden on them to protect the interests of third parties. The imposition of a duty

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[415] *Id.* at 145-46, 94 D.L.R. (3d) at 447.

[416] *Id.* at 141, 94 D.L.R. (3d) at 442.

[417] For further discussion, *see* Smith, *The Mystery of Duty*, in STUDIES IN CANADIAN TORT LAW 1, *supra* note 31, at 15-22; Solomon & Feldthusen, *Recovery for Pure Economic Loss: The Exclusionary Rule*, in STUDIES IN CANADIAN TORT LAW, *id.* at 167.

[418] *See, e.g.*, Fuller v. Ford Motor Co. of Canada, 22 O.R. (2d) 764, 94 D.L.R. (3d) 127 (Cty. Ct. 1978). For a correct interpretation of the law, *see* Ital-Canadian Invs. Ltd. v. North Shore Plumbling & Heating Co., [1978] 4 W.W.R. 289 (B.C.S.C.). *See also* Schwartz, *Jurisprudential Developments in Manufacturers' Liability for Defective Products where the Only Damage is Economic Loss*, 4 CAN. BUS. L.J. 164 (1979).

[419] *See also* Hofstrand Farms Ltd. v. The Queen in Right of the Province of B.C., 22 B.C.L.R. 348, 114 D.L.R. (3d) 347 (S.C. 1980); Bowen v. City of Edmonton, [1977] 6 W.W.R. 344, 80 D.L.R. (3d) 501 (Alta. S.C.).

[420] 42 N.S.R. (2d) 1, 77 A.P.R. 1, 117 D.L.R. (3d) 312 (C.A. 1980).

[421] For discussion of the interaction between tort and contract in relation to economic loss, *see* Annis, *Tort or Contract: Recovery for Economic Loss*, 13 OTTAWA L. REV. 469 (1982).

[422] Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530 (1973).

in tort in this case would be a direct entrenchment on the sphere of contract."[423] In this case, the court, undoubtedly wary of opening the floodgates of litigation, would not impose a duty of care on the defendant as it found the plaintiff was merely trying to get a guarantee that it would not suffer loss, under the guise of a breach of duty of care.

In *McLaren v. British Columbia Institute of Technology*[424] the plaintiff brought an action for negligent, as opposed to intentional, interference with his contract of employment. The court discussed the fact that *Hedley Byrne*[425] extended the recovery of damages to losses arising apart from physical injury. In considering this unusual cause of action, the court speculated on whether it should go further and extend the principle in *Hedley Byrne* to

> impose a duty of care on those who may cause foreseeable unintentional harm of an "economic" character through interference in, or damage to, contractual rights of others, specifically rights employed under a contract of employment. . . . Here the duty would arise . . . from the nature of the contractual relationship. . . . This does not appear to be another step in the extension of the concept of actionable negligence which would flow logically from the existence of a duty of care on those who choose to exercise special skills in their own business. The movement is not a step but a leap and a leap in quite a different direction. This is not the manner in which the law has historically made its progress.[426]

Once again a court has signified its reluctance to extend a duty of care in tort merely because the damages are economic and not physical.

Finally, in *Bethlehem Steel Corp. v. St. Lawrence Seaway Authority*[427] the Federal Court once again illustrated the restrictive approach adopted by many courts towards this problem. The issue here was whether two parties could claim for lost profits and the cost of shipping goods overland when the plaintiff's ship hit a bridge, destroying it and blocking the canal underneath. Addy J. disallowed both claims, stating: "[I]n my view, the range of cases, where economic loss which is not dependent upon physical damage of some sort is recoverable, remains . . . very limited."[428] In this instance, the fact situation did not fit into any of the "exceptions" which allow for recovery of economic loss.

In two other cases during the survey period recovery for economic losses was approved[429] with the reasoning of one based on remoteness and the other on a merging of duty and remoteness. In *Trappa Holdings*

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[423] *Supra* note 420, at 27-28, 77 A.P.R. at 27-28, 117 D.L.R. (3d) at 331. *See also* Feldthusen, *Pure Economic Loss Consequent Upon Physical Damage to a Third Party*, 16 WESTERN ONT. L. REV. 1 (1977).

[424] [1978] 6 W.W.R. 687, 7 C.C.L.T. 192, 94 D.L.R. (3d) 411 (B.C S.C.).

[425] *Supra* note 100.

[426] *Supra* note 424, at 693, 7 C.C.L.T. at 201, 94 D.L.R. (3d) at 416.

[427] [1978] 1 F.C. 464, 79 D.L.R. (3d) 522 (Trial D. 1977).

[428] *Id.* at 470, 79 D.L.R. (3d) at 527.

[429] *See also* Ordog v. District of Mission, 110 D.L.R. (3d) 718 (B.C.S.C. 1980); *Jacks*, *supra* note 54; *Whittingham*, *supra* note 54; H.L. & M. Shoppers Ltd. v. Town of Berwick, 28 N.S.R. (2d) 229, 43 A.P.R. 229, 82 D.L.R. (3d) 23 (S.C. 1977).

Ltd. v. Surrey & Imperial Paving Ltd.[430] the plaintiff sued in both negligence and nuisance for damages for economic loss when access to his business was hampered. In allowing the claim, Ruttan J. distinguished *Star Village Tavern v. Nield*,[431] in which a claim for economic losses was denied where the plaintiff's business suffered due to a damaged bridge restricting access. In that case, however, a negligent motorist had caused the blockage to the business in an accident, while in *Trappa* the blockage was occasioned by a deliberate act — the paving of the access road. Ruttan J. stated that he agreed with the opinions expressed in *Star Village* but here "potential liability to [the] plaintiff was not beyond the contemplation of the defendants, but on the contrary was always present in their minds."[432] The court relied on the two-pronged test enunciated in *Gypsum Carrier Inc. v. The Queen*[433] for determining whether the economic loss is recoverable: it must be reasonably foreseeable (not too remote) and also result directly from the careless act; both criteria were satisfied here.

Finally, in *Yumerovski v. Dani*[434] the plaintiffs bought plane tickets from the defendant's travel agency in order to fly to Yugoslavia. While driving the father of one of the plaintiffs to the airport, the defendant had an accident, resulting in the death of the father. The plaintiffs brought an action for damages for economic loss resulting from the defendant's negligence when they could not recover the cost of the unused tickets.

In allowing the claim, the Ontario County Court, in a very detailed judgment, thoroughly canvassed the cases in the area and came to the conclusion that although some judges speak of duty and others of remoteness, these are essentially the same thing. McCort J. stated: "The logic of a requirement that there be physical damage as a condition precedent to allowing a claim for economic loss, completely eludes me."[435] Evidently, the judge was not concerned with the problem of increased litigation and awards. The court allowed recovery for economic loss in the absence of physical damage.

As can be seen from the foregoing cases, the law relating to economic loss is still uncertain as to whether it is a question of the extension of the *Hedley Byrne* duty or one of remoteness. In relation to this uncertainty, Solomon and Feldthusen have written: "The source of the problem is not the unique nature of pure economic loss, but rather the fault basis of negligence itself, and it is within this wider forum that this debate should be held."[436]

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[430] [1978] 6 W.W.R. 545, 95 D.L.R. (3d) 107 (B.C.S.C.).
[431] [1976] 6 W.W.R. 80, 71 D.L.R. (3d) 439 (Man. Q.B.).
[432] *Supra* note 430, at 554, 95 D.L.R. (3d) at 116.
[433] [1978] 1 F.C. 147, 78 D.L.R. (3d) 175 (Trial D. 1977).
[434] 18 O.R. (2d) 704, 83 D.L.R. (3d) 558 (Cty. Ct. 1977).
[435] *Id.* at 707, 83 D.L.R. (3d) at 561.
[436] *Supra* note 417, at 183.

C. *Negligent Misrepresentation*

Although there has been a great number of cases dealing with negligent misrepresentation during the survey period, the courts have been fairly conservative and have done little to extend the principles laid down in *Hedley Byrne & Co. v. Heller & Partners Ltd.*[437] One particularly vexatious problem that has been of some concern since 1972 is the effect of the existence of a contract between the parties upon the question of whether a duty of care can be imposed. According to Pigeon J. in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*: "[T]he basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract."[438] The following cases illustrate the ways in which the courts have attempted to distinguish *J. Nunes Diamonds* in order to allow recovery in tort.[439]

In *Sodd Corp. v. Tessis*[440] the defendant, a chartered accountant and trustee in bankruptcy, misrepresented the value of the goods to the plaintiff while selling stock of a furniture business. On the basis of this representation, the plaintiff submitted a tender, later discovering that the items were over-valued by 100%. He brought an action for negligent misrepresentation. The plaintiff succeeded at trial, since the court found that the defendant could not rely on an exemption clause in the advertisement for the sale excluding all warranties or conditions resulting from misrepresentation as to "designation, classification, quality or condition" of the assets; the advertisement was also found to be misleading.

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[437] *Supra* note 100. For further discussion of the area, *see* Bourque, *Negligent Misstatement*, 25 CHITTY'S L.J. 306 (1977).

[438] *Supra* note 79, at 777-78, 26 D.L.R. (3d) at 727-28.

[439] For other cases dealing with negligent misrepresentation during the survey period, *see* Olsen v. Poirier, 28 O.R. (2d) 744, 111 D.L.R. (3d) 512 (C.A. 1980); Chand v. Sabo Bros. Realty Ltd., 14 A.R. 302, [1979] 2 W.W.R. 248 (C.A.), *modifying* 10 A.R. 352, 81 D.L.R. (3d) 382 (S.C. 1977); Patrick L. Roberts Ltd. v. Sollinger Indus. Ltd., 3 Bus. L.R. 174, 84 D.L.R. (3d) 113 (Ont. C.A. 1978); Sharadan Builders Inc. v. Mahler, 22 O.R. (2d) 122, 93 D.L.R. (3d) 480 (C.A. 1978); John Bosworth Ltd. v. Professional Syndicated Devs. Ltd., 24 O.R. (2d) 97, 97 D.L.R. (3d) 112 (H.C. 1979); Wynston v. MacDonald, 27 O.R. (2d) 67, 105 D.L.R. (3d) 527 (H.C. 1979); Friesen v. Berta, 100 D.L.R. (3d) 91 (B.C.S.C. 1979); Komarniski v. Marien, [1979] 4 W.W.R. 267, 100 D.L.R. (3d) 81 (Sask. Q.B.); Van Der Kuilen v. Todd, [1979] 3 W.W.R. 165 (Sask. Q.B.); Federal Savings Credit Union Ltd. v. Hessian, 8 R.P.R. 32, 98 D.L.R. (3d) 488 (N.S.S.C. 1979); Silva v. Atkins, 20 O.R. (2d) 570, 88 D.L.R. (3d) 558 (H.C. 1978); Jung v. District of Burnaby, [1978] 6 W.W.R. 670, 91 D.L.R. (3d) 592 (B.C.S.C.); Athans v. Canadian Adventure Camps Ltd., 17 O.R. (2d) 425, 4 C.C.L.T. 20, 80 D.L.R. (3d) 583 (H.C. 1977); Manuge v. Prudential Assurance Co., 81 D.L.R. (3d) 360 (N.S.S.C. 1977).

[440] 17 O.R. (2d) 158, 2 C.C.L.T. 245, 79 D.L.R. (3d) 632 (C.A. 1977).

On appeal, the defendant claimed that *J. Nunes Diamonds* barred the action as there was a contract involved which contained an exemption clause excluding liability. In rejecting this argument, Lacourcière J.A., delivering the judgment of the Ontario Court of Appeal, stated:

> We are . . . unable to accept the appellant's argument that since the relationship between the parties was contractual, the *Hedley Byrne* principle does not apply on the basis of *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.* . . . However, the present case did, in fact, involve a precontractual negligent misrepresentation which induced the plaintiff to submit its tender, and the defendant's liability follows on the authority of *Esso Petroleum Co. Ltd. v. Mardon*. . . .[441]

J. Nunes Diamonds has, therefore, been restricted by *Sodd* to exclude tort actions *only* when there is a post-contractual representation.

Both *J. Nunes Diamonds* and *Sodd* were distinguished in the late case of *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*[442] The plaintiffs, dealers franchized by the defendant Dunlop to sell its products, defaulted under a debenture because their business was not financially successful; in fact, it operated at a loss. One of the many actions brought against Dunlop was one for negligent misrepresentation. After reviewing *Hedley Byrne*, Rutherford J. of the Ontario High Court found that there was no fiduciary relationship, but "Dunlop owed the plaintiffs a duty to be careful in respect of representations made relating to past profitability and anticipated future performance of the outlet . . . ",[443] on the basis of *Esso Petroleum Co. v. Mardon*.[444] However, given these facts, the exclusion clause in the agreement limiting contractual liability arising apart from express terms was effective even to exclude negligent misrepresentation.[445] "I do not read [*Sodd*] as laying down any general rule of law as to the effect of exemption clauses in relation to claims for damages for negligent misrepresentation."[446] Consequently, the existence of a contract may not necessarily bar a tort action, although it may defeat it.

This case was distinguished on its facts in *Roberts v. Montex Development Corp.*[447] In that case the plaintiff, after making specific inquiries as to soundproofing, bought a condominium and later discovered it to be quite noisy. One of his actions was against both the vendor and real estate agent for negligent misrepresentation. The court, in considering whether *J. Nunes Diamonds* excluded a tort action where a contractual relationship existed between the parties, found that the representation made was pre-contractual and therefore actionable on the

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[441] *Id.* at 160. 2 C.C.L.T. at 248, 79 D.L.R. (3d) at 634-35.

[442] 19 O.R. (2d) 380, 85 D.L.R. (3d) 321 (H.C. 1978).

[443] *Id.* at 396, 85 D.L.R. (3d) at 336.

[444] *Supra* note 86.

[445] Rutherford J. relied on Peters v. Parkway Mercury Sales Ltd., 10 N.B.R. (2d) 703, 58 D.L.R. (3d) 128 (C.A. 1975).

[446] *Supra* note 442, at 399, 85 D.L.R. (3d) at 339.

[447] [1979] 4 W.W.R. 306, 100 D.L.R. (3d) 660 (B.C.S.C.).

basis of the *Sodd* decision. Distinguishing *Ronald Elwyn Lister*, the court stated: "I can see no logical reason against holding, as I do, that since the escape clause in the present case was ineffective to exclude liability in contract, it is equally ineffective to exclude liability in tort."[448] Once again, *J. Nunes Diamonds* posed little problem for the court.

In another case during the survey period, *Nelson Lumber Co. v. Koch*,[449] *J. Nunes Diamonds* was interpreted in an extraordinary way. Mr. Koch wanted a contractor who would assemble a pre-fabricated home. The manufacturer of the materials recommended someone whom he knew to have made an assignment in bankruptcy. When the contractor failed to complete the home, the manufacturer was sued for negligent misrepresentation. In considering *J. Nunes Diamonds*, Bayda J.A. (as he then was) of the Saskatchewan Court of Appeal made the following three observations. The first was that Pigeon J.'s remarks[450] in that case were *obiter dicta*:

> There were two claims advanced by the plaintiff in [*J. Nunes Diamonds*], one in contract and the other in tort. Pigeon, J. . . . dealt with the claim in contract in one sentence by simply agreeing with the dismissal of the claim as proposed by Spence, J., in his dissenting judgment. He dealt with the claim in tort by finding that the statements put forward as constituting misrepresentations by the defendant were not misrepresentations upon which the plaintiff could have relied. Given that finding there could not be a tort of any kind based on misrepresentation, whether of the *Hedley Byrne* or any other type. It was only after reaching that conclusion that Pigeon, J., went on to consider some of the aspects of the case in the light of the *Hedley Byrne* principle. The observations he made in that respect were clearly not necessary for the decision he had already reached, and must, I think, be regarded as *obiter dicta*.[451]

Bayda J.A. then observed that Mr. Justice Pigeon was dealing with the situation of a post-contractual misrepresentation, while this was a pre-contractual statement on which an action could be founded; *Sodd* was relied on. Finally Bayda J.A. went on to find that the tort alleged here was independent of the contract between the parties; the contract was for the sale of building materials whereas the tort was based on statements concerning the competence of the contractor.[452]

Concluding that Pigeon J.'s statements were *obiter* is indeed a unique interpretation. In addition to this novel conclusion, *Nelson Lumber* is noteworthy for its rejection of the Privy Council decision of *Mutual Life & Citizen's Assurance Co. v. Evatt*.[453] In *Evatt* Lord Diplock, for the majority, sought to restrict the class of person to whom the duty of care applied to those who made it part of their business to dispense expert information. This restriction on *Hedley Byrne* has never

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[448] *Id.* at 316, 100 D.L.R. (3d) at 668.
[449] 13 C.C.L.T. 201, 111 D.L.R. (3d) 140 (Sask. C.A. 1980)
[450] *See* text accompanying note 438 *supra*.
[451] *Supra* note 449, at 227, 111 D.L.R. (3d) at 156.
[452] *Id.* at 227-28, 111 D.L.R. (3d) at 156-57.
[453] [1971] A.C. 793, [1971] 1 All E.R. 150 (P.C.) (Aust.).

really been applied in Canada although it was cited with apparent approval by Pigeon J. in *J. Nunes Diamonds*. In this instance Bayda J.A. found that such a rigid restriction could not be accepted. Rather, the correct approach involved the following considerations:

> (1) while it is important to pay heed to the development of the law which followed the enunciation of the *Hedley Byrne* principle it is equally important not to lose sight of the original principle as it was formulated by the five speeches delivered in the case; (2) it is necessary to assess on their own merits the circumstances of the particular situation before the Court; (3) one should determine whether a special relationship between the parties can be found even though the facts do not precisely fall within any one of the tests prescribed in the *Hedley Byrne* case or in any subsequent case: it is enough to determine that the fact situation falls generally within the framework of the *Hedley Byrne* doctrine; (4) broadly speaking one should treat the body of case authority that has developed in this area as a guide or aid and not a series of rigid tests to be met.[454]

Mr. Justice Bayda's lucid and well-reasoned judgment on this point is indeed a significant contribution to the law of negligent misrepresentation.

Another interesting twist on *J. Nunes Diamonds* was evident in the reasoning of Hickson J.A. of British Columbia in *District of Surrey v. Carroll-Hatch & Associates Ltd.*[455] An engineering firm was sued for negligent misrepresentation and breach of contract when it failed to warn the plaintiff that the soil tests it had conducted were inadequate. The plaintiff succeeded in both actions, the court holding that:

> The decision in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.* . . . does not prevent the Court from finding [the defendant] liable for negligence as well as for breach of contract, in the present circumstances. In the *Nunes* case, the parties had by their contract agreed on the extent of the liability of the defendant in the event a breach of contract occurred. In those circumstances, it was held that it was not appropriate to rewrite the terms of the agreement between the parties to impose a greater liability than that agreed upon between the parties. However, it is clear that a party to a contract may, because of the relationship established thereby between the parties, assume common law duties in addition to the obligations imposed by the contract. When such a duty is not performed, it is not then open to the negligent party to attempt to avoid the consequences of his negligence by invoking the contract, if its terms do not limit the liability.[456]

Hickson J.A. did not elaborate on these common law duties, even to suggest instances in which they may arise. This appears to be a very weak argument, which fails to deal adequately with the reasoning in the case it is attempting to distinguish.

The *Surrey* decision has since been reviewed by the British Columbia Supreme Court in *Toronto Dominion Bank v. Guest*.[457] In that case a bank was sued for damages for the negligent misrepresentations of

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[454] *Supra* note 449, at 222-23, 111 D.L.R. (3d) at 153.

[455] *Supra* note 346.

[456] *Id.* at 250, 101 D.L.R. (3d) at 236.

[457] 10 C.C.L.T. 256, 105 D.L.R. (3d) 347 (B.C.S.C. 1979).

its manager. The court, interpreting Hickson J.A.'s reference to common law duties, found these to mean "other, or different obligations",[458] again, a rather elusive definition. In addition, the court found that *Surrey* limited *J. Nunes Diamonds* to situations where the alleged tort was committed by the contracting party or his servant while carrying out his contractual obligations. With respect, *J. Nunes Diamonds* itself clearly indicated when a tort action was barred; the court did not qualify *J. Nunes Diamonds* in that respect. In conclusion, the court found that neither the bank nor the manager was liable in tort: the wrongful statement was an act of the employer under the contract.[459]

In addition to the above-mentioned cases dealing with the problems raised by *J. Nunes Diamonds*, there were two judgments during the period under review which imposed high standards of care on the professionals involved — insurance agents and stockbrokers. In the first of these, *Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada*,[460] an action was brought against an insurance agent for negligent misstatement for the failure to warn of a gap in coverage. At trial, the agent was found to be liable in both tort and contract; the relationship between the plaintiff and defendant insurance agent imposed on the latter a special duty of care when advising about insurance coverage.

On appeal, the defendant argued that the trial judge was imposing too sweeping a duty on insurance agents as they should not be expected to be insurers; they cannot know about all aspects of their client's business. Madame Justice Wilson, in rejecting this argument, stated:

> But there are other cases, and in my view this is one of them, in which the client gives no such specific instructions but rather relies upon his agent to see that he is protected and, if the agent agrees to do business with him on those terms, then he cannot afterwards, when an uninsured loss arises, shrug off the responsibility he has assumed. If this requires him to inform himself about his client's business in order to assess the foreseeable risks and insure his client against them, then this he must do. It goes without saying that an agent who does not have the requisite skills to understand the nature of his client's business and assess the risks that should be insured against should not be offering this kind of service.[461]

The extent of the insurance agent's duty seems to be broad, but it is not really an unreasonable burden considering that these agents are professionals and should be providing adequate advice as to coverage.[462]

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[458] *Id.* at 263, 105 D.L.R. (3d) at 352.

[459] For another case decided during the survey period where *J. Nunes Diamonds* barred the action, *see* Beebe v. Robb, 81 D.L.R. (3d) 349 (B.C.S.C. 1977).

[460] 17 O.R. (2d) 529, 81 D.L.R. (3d) 139 (C.A. 1977).

[461] *Id.* at 538-39, 81 D.L.R. (3d) at 149.

[462] *See also* McCann v. Western Farmers Mutual Ins. Co., 20 O.R. (2d) 210, 87 D.L.R. (3d) 135 (H.C. 1978). For further discussion of the duty of care owned by an insurance agent to his client, *see* Irvine, *The Insurance Agent and his Duties Some Recent Developments*, 10 C.C.L.T. 108 (1978-79).

The other case which could possibly have wide repercussions, this time for stockbrokers, is that of *Elderkin v. Merrill Lynch*,[463] a decision of the Nova Scotia Court of Appeal. The defendant stockbroker represented to the plaintiff that he was in close contact with the officers of a particular company and therefore had inside information. After advising the plaintiff to buy the company's shares, the company collapsed and the stock became worthless. In an action by the buyer for negligent misrepresentation, the court found that a duty of care arose on the basis of the principles set out in *Hedley Byrne* — a duty not to be negligent in giving advice. The stockbroker was found liable for the plaintiff's financial losses. Unfortunately, the court did not clearly state what type of factors would be crucial in finding that a stockbroker had been negligent. Will a stockbroker be liable for his client's financial losses whenever a stock drops? The parameters of the duty of this type of professional need to be clearly defined.

VIII. Occupiers' Liability

Over the past few years the blurred distinction between the duty owed to invitees and licensees and the introduction of legislation in a number of provinces has increasingly clarified the area of occupiers' liability.[464] The following comment of Lord Denning is gradually becoming obsolete:

> A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away.[465]

A. *Invitees*

In *Lange v. Campbell Farm Equipment Ltd.*[466] the plaintiff brought his snowmobile into the defendant's place of business to be repaired. Although the defendant was not a qualified mechanic, as a favour he said he would take a look at it. While the plaintiff was raising the rear end of the running machine to enable the defendant to get a better look, the track broke loose, cutting off the plaintiff's leg below the knee. The plaintiff's action was dismissed at trial since the possibility of the track breaking was not reasonably foreseeable under the general law of negligence.

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[463] 22 N.S.R. (2d) 218, 31 A.P.R. 218, 80 D.L.R. (3d) 313 (C.A. 1977).

[464] *See* Wayand, *Owners Beware: Themes and Variations in Property Law*, 28 U.N.B.L.J. 155 (1979); V. Di Castri, Occupiers' Liability (1981).

[465] Dunster v. Abbott, [1953] 2 All E.R. 1572, at 1574, 98 Sol. J. 8, at 10 (C.A.).

[466] [1979] 4 W.W.R. 23, 97 D.L.R. (3d) 674 (Sask. C.A.).

On appeal, it was argued that an invitor/invitee relationship existed. Brownridge J.A., Wood J.A. concurring, finding that a customer in a shop is the most common example of an invitee, held that the duty owed was to use reasonable care to prevent damage from unusual dangers of which the invitor knew or ought to have known. The court judged the defendant by the standard of a small-town farm machinery dealer with little mechanical knowledge who undertook, as a favour, to repair a snowmobile, not the standard of a fully qualified snowmobile mechanic. There was no evidence that the defendant ought to have known of the danger of excessive acceleration.

In a strong dissent, Hall J.A. found that the defendant should have known of the inherent danger:

> In my opinion, it is not necessary for one to be an expert or a mechanic to realize that a snowmobile being operated in the manner the one in the instant case was operated, that is, with its tracks raised off the ground and its motor speeded up to a very high rate, constituted a dangerous thing.[467]

Hall J.A. also stated that it was irrelevant that the defendant was doing a favour; once he had agreed to try to fix the snowmobile, he was under a duty to see that the plaintiff was protected from any injury.

Although cases such as *Lange* have been frequent during the survey period,[468] some courts have moved away from the rigid invitee/licensee distinction, as was evidenced in the Ontario case of *Urzi v. Board of Education for the Borough of North York*.[469] The plaintiff slipped on an icy walkway owned by the defendant, which had been shovelled but not salted or sanded. Finding for the plaintiff, Holland J., relying on *Bartlett v. Weiche Apartments Ltd.*,[470] stated: "It appears to me that this categorization [of invitee/licensee] has been loosened by the authorities and that there is no difference between the duty owed to an invitee and that owed to a licensee. . . ."[471] The duty owed was to take reasonable care to avoid foreseeable harm from unusual dangers of which the occupant knew or ought to have known.[472] Ice on the sidewalk was an unusual danger of which the defendant knew.

In *Cropp v. Potashville School Unit No. 25*[473] the plaintiff student fell on a walkway leading up to the school operated by the defendant.

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[467] *Id.* at 33, 97 D.L.R. (3d) at 683.

[468] Walter v. Sun Life Assurance Co. of Canada, 3 A.R. 437, 96 D.L.R. (3d) 367 (C.A. 1979); Kennedy v. The Queen in Right of Canada, 116 D.L.R. (3d) 206 (Fed. Ct. Trial D. 1980); Pajot v. Commonwealth Holiday Inns of Canada Ltd., 20 O.R. (2d) 76, 86 D.L.R. (3d) 729 (H.C. 1978); *Bishop*, *supra* note 317; Johnston v. Sentineal, 17 O.R. (2d) 354, 80 D.L.R. (3d) 571 (H.C. 1977); Assie v. Saskatchewan Telecommunications, [1978] 6 W.W.R. 69, 7 C.C.L.T. 39, 90 D.L.R. (3d) 410 (Sask. C.A.); *Wilson*, *supra* note 346.

[469] 30 O.R. (2d) 300, 116 D.L.R. (3d) 687 (H.C. 1980).

[470] 7 O.R. (2d) 263, 55 D.L.R. (3d) 44 (C.A. 1974).

[471] *Supra* note 469, at 305, 116 D.L.R. (3d) at 692.

[472] This case was not decided under the Occupiers' Liability Act, 1980, S.O. 1980, c. 14, proclaimed in force 8 Sep. 1980 (*now* R.S.O. 1980, c. 322), because the Act does not affect rights arising before the Act came into force.

[473] *Supra* note 186.

Allowing the action, the Saskatchewan Court of Queen's Bench held that the plaintiff was not an ordinary invitee because he was required by statute to be in school. A higher standard of care was, therefore, required than that owed to an invitee: a duty to supervise students' use of the walk and to warn them of its dangers. The defendant was negligent in maintaining a dangerous walkway.

B. *Licensees*

The categorization of licensee has also been subject to change. Traditionally, the licensee was protected from injury caused to him by a concealed trap which was known to the occupier. Recently the distinction between the duty owed to an invitee and licensee has been blurred. In *Alaica v. City of Toronto*[474] the plaintiff was injured when he fell on a concrete base at the entrance of the skating rink operated by the defendant. At trial, the judge found that the crust on the snow's surface over the concrete base constituted an unusual danger of which the defendant should have known.

On appeal, Evans J.A. found that this characterization made by the trial judge was unsupported; the conditions did not create an unusual danger. Discussing the duty an occupier owes to a licensee, Evans J.A. stated:

> The law as to occupier's liability has recently been thoroughly canvassed in the Supreme Court of Canada in *Mitchell v. C.N.R.*, [1975] 1 S.C.R. 592, 6 N.S.R. (2d) 440, 46 D.L.R. (3d) 363, 1 N.R. 344, and in this Court in *Bartlett v. Weiche Apts. Ltd.* (1974), 7 O.R. (2d) 263, 55 D.L.R. (3d) 44. That law was correctly stated by the learned trial Judge, at 7 O.R. (2d) 536 at p. 541, when he quoted from the *Bartlett* case in which Jessup J.A. after stating that the duty of a licensor to a licensee arises with respect to both obvious and concealed dangers held that the proper principle to be applied was as follows:
>
> " 'It is to take reasonable care to avoid foreseeable risk of harm from any unusual danger on the occupier's premises of which the occupier actually has knowledge or of which he ought to have knowledge because he was aware of the circumstances. The licensee's knowledge of the danger goes only to the questions of contributory negligence or *volenti*.' "
>
> In our opinion, there was no unusual danger in the facts of the present case. The learned trial Judge made an inference of fact, unsupported by the evidence when he concluded that the plaintiff's foot went through a crust on the snow's surface, and that this condition constituted an unusual danger of which the defendant was aware or should have been aware. We would go even further and say that even if the inference could have been supported by the evidence, it would not fasten liability upon the defendant under the test set in *Bartlett v. Weiche Apts. Ltd.* . . .[475]

It appears as though the duty owed to an invitee and a licensee is one and the same.

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[474] 14 O.R. (2d) 697, 1 C.C.L.T. 212, 74 D.L.R. (3d) 502 (C.A. 1976).
[475] *Id.* at 698, 1 C.C.L.T. at 215, 74 D.L.R. (3d) at 503.

Another case which took the same approach was *Evans v. Forsyth*,[476] in which the plaintiff, canvassing for a candidate in a federal election, hurt her ankle in a fall on the defendant's steps. The plaintiff claimed she was an invitee because canvassing is a matter of public interest, but Mr. Justice Lazier found her to be a licensee "at best". Once again the court relied on *Bartlett v. Weiche Apartments Ltd.*[477] to hold that the duty owed was to take reasonable care to avoid foreseeable risk of harm from unusual dangers of which the occupier knew or ought to have known: essentially the same duty owed to an invitee. In this instance, the duty had not been breached because there was no unusual danger.

C. *Trespassers*

Two significant judgments involving children were delivered during the survey period. In *Walker v. Sheffield Bronze Powder Co.*[478] Holland J. of the Ontario High Court drastically changed the law of occupiers' liability as it relates to children. The two plaintiffs, aged eight and nine, entered the closed premises owned by the defendant, a distributor of paint supplies. One of the children lit a match near a barrel which had been used to store chemicals, causing an explosion and injuring both plaintiffs. Normally, a person who enters another's land without permission is a trespasser. However, courts have often classified a child in this situation as a licensee if the occupier knew or ought to have known of the frequent presence of children on his land. Holland J. did not classify the plaintiffs as either, however: "These boys would fall into the category of trespassers or, because of the conduct of the occupier, licensees. Fortunately we appear to be no longer required to differentiate between the two."[479] Holland J. relied on *British Railway Board v. Herrington*[480] as establishing a new duty owed by occupiers to trespassers: a duty to act with "ordinary humanity". The court found that the duty of ordinary humanity is to take reasonable care, although it has been suggested that this is an extension of *Herrington*,[481] which stated that "[t]he duty to act with common humanity is not equivalent to the duty to take reasonable care and is a compromise between the traditional restricted duty and the ordinary common law duty of care."[482]

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[476] 21 O.R. (2d) 210, 90 D.L.R. (3d) 155 (Cty. Ct. 1978).

[477] *Supra* note 470.

[478] *Supra* note 195.

[479] *Id.* at 105, 2 C.C.L.T. at 105, 77 D.L.R. (3d) at 382.

[480] [1972] A.C. 877, [1972] 1 All E.R. 749 (H.L.). *See* the annotation by Klar on this case, 2 C.C.L.T. 97 (1977), which discusses the possibility that *Herrington* does not support the proposition that one need not distinguish between a trespasser and a licensee.

[481] Klar, *id.* at 98-99.

[482] *Id.* at 99.

The judge then went on to discuss *Mitchell v. C.N.R.*,[483] where Laskin J. (as he then was) did not talk of unusual danger, but merely of foreseeable risk of harm. From this the judge concluded that "at least where we are dealing with children, we are no longer required to categorize the child as a trespasser or licensee or strain to find an allurement. We apply ordinary negligence law."[484] In this instance, the danger was foreseeable and the defendant failed to guard adequately against it; therefore, he was negligent. This seems to be a major step forward in the protection of child trespassers and trespassers in general.

A second and rather dissatisfying case dealing with child trespassers was *Wade v. C.N.R.*,[485] a decision of the Supreme Court of Canada. The child plaintiff was injured by a moving train while on the defendant railway's property without permission. One of the issues was whether the railway's duty was defined by the general law of negligence or by the more restricted rules of occupiers' liability. At trial, it was found that the plaintiff was a licensee who had been lured onto the property by the existence of gravel piles and the train itself. Unfortunately, the jury then seemed to have treated the case as one involving ordinary negligence, without referring to the special rules of occupiers' liability; the defendant was found to be negligent. On appeal,[486] the Nova Scotia Court of Appeal upheld the trial court's finding that the defendant was liable but based its finding on occupiers' liability law rather than on negligence. The Chief Justice stated:

> I conceive that an occupier's duty is to take reasonable steps to warn or guard a trespasser against a thing, condition *or activity* on any part of his land, if he knows or should know:
>
> (1) that the thing, condition *or activity* is dangerous in some aspect for such a trespasser; and
>
> (2) that such a trespasser will likely come on that part of his land.[487]

On appeal,[488] the Supreme Court of Canada, de Grandpré J. for the majority, reversed the finding of liability on the part of the defendant railway. In discussing whether the case should be decided according to the principles of ordinary negligence law, de Grandpré J. held:

> Whether these facts are examined in the light of the classic rules governing the liability of an occupier toward a licensee (the status of the child is found by the jury) or in that of the so-called new occupier law requiring the occupier to act with reasonable humanity, plaintiff cannot succeed unless defendant, as a reasonable person, was under a duty to act differently due regard being given to the requirements of tort law as to foreseeability.[489]

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[483] [1975] 1 S.C.R. 592, 46 D.L.R. (3d) 363.

[484] *Supra* note 195, at 107, 2 C.C.L.T. at 107, 77 D.L.R. (3d) at 383.

[485] *Supra* note 197. For comments on the case, *see* Klar, *A Comment on Wade v. C.N.R.*, 3 C.C.L.T. 194 (1977); Gibson, *Comment*, 56 CAN. B. REV. 693 (1978).

[486] 14 N.S.R. (2d) 541 (C.A. 1976) (Macdonald J.A. dissenting).

[487] *Id.* at 567.

[488] *Supra* note 197.

[489] *Id.* at 1083, 3 C.C.L.T. at 187, 80 D.L.R. (3d) at 228.

Mr. Justice de Grandpré then went on to discuss foreseeability, a concept alien to the law of occupiers' liability and essential to negligence law. It was held that no duty of care was owed to the plaintiff, because the accident was unforeseeable and nothing could have prevented it. Therefore, although the majority recognized that previous cases such as *Walker* had altered the law as it related to child trespassers, it did not decide the issue on that basis.

Laskin C.J.C. in dissent, Spence and Dickson JJ. concurring, agreed that the ordinary principles of negligence were applicable:

> [T]he respondent's duty here arises not simply from its occupancy of the right-of-way but from its positive activity in carrying on train operations. This is not a case in which the injury arose from the condition of the property but rather from an activity carried on by the respondent on its property. In this respect . . . there is every reason to measure the respondent's liability by ordinary principles of negligence.[490]

The distinction between active and passive duties may be an unworkable one and it was not adequately explained by the Chief Justice. He was unwilling to disturb the jury's finding of a duty owed and a breach of that duty.

In conclusion, the law of occupiers' liability as it applies to child trespassers is in a state of confusion. Traditionally, this type of entrant was classified as an implied licensee in order to afford more protection. Recently, this has changed with the introduction of a duty of common humanity. Finally, the Supreme Court of Canada seems to have suggested that the ordinary rules of negligence apply. Occupiers' liability law and negligence law seem to have merged, at least where child trespassers are involved.

D. *Contractual Entrants*[491]

In *Klyne v. Town of Indian Head*[492] the plaintiff was struck in the eye by a hockey stick while watching a game in the defendant's arena, where there was no glass barrier above the boards. At trial, Halvorson J., speaking for the Saskatchewan Court of Queen's Bench, stated:

> By selling a ticket to the plaintiff to attend the hockey game, the defendant assumed certain obligations. These were concisely stated by MacPherson, J. in *Reese v. Coleman et al.*, [1976] 3 W.W.R. 739 at p. 741:
>
> > The law is that the occupier of premises who brings the public into them for a fee to see a game, race or other spectacle undertakes no absolute duty or warranty of safety. He promises to use reasonable care to ensure safety. He is obliged to guard spectators not against every possible danger but only against those which may be reasonably

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[490] *Id.* at 1073, 3 C.C.L.T. at 179-80, 80 D.L.R. (3d) at 221.

[491] *See* Adair, *Occupier's Liability to the Contractual Visitor*, 2 ADVOCATES Q. 320 (1980).

[492] *Supra* note 365.

> assumed to be possible: *Payne v. Maple Leaf Gardens Ltd.*, [1949] O.R. 26, [1949] 1 D.L.R. 369 (C.A.); *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, [1932] All E.R. Rep. 208. The duty is a term of the contract between the owner and the spectator and the term is implied by law.
>
> The promotor [*sic*] is not, however, responsible for injuries to paying spectators resulting from such risks as by the nature of the spectacle the spectator must have understood and be presumed to have assumed, *e.g.*, being struck by a hockey puck while watching a hockey game: *Murray v. Harringay Arena*, [1951] 2 K.B. 529, [1951] 2 All E.R. 320. . . .[493]

He found that an occupier owed a high duty, namely, to take reasonable care to ensure safety to a contractual entrant. In this instance the trial court found that the defendant owed a duty to spectators to protect them from flying hockey sticks. *Payne v. Maple Leaf Gardens Ltd.*,[494] which held that being struck by a hockey stick was so unusual as to be unforeseeable, was distinguished: "[T]he likelihood of [being struck] is not only reasonably possible but is actually to be anticipated."[495] This duty was breached because no precautions were taken to protect the spectators. This was so, even though it was not the custom in rural Saskatchewan to place plexiglass guards above the boards. As for the issue of *volenti non fit injuria*, a spectator was deemed not to have accepted the risk of being hit with a stick, although he would have been deemed to have accepted the risk of harm from a hockey puck.[496] However, the plaintiff was contributorily negligent and two-thirds at fault.

On appeal, the defendant was found to have taken all reasonable precautions under the circumstances. It was customary for spectators to stand by the boards while watching the game. Moreover, plexiglass screens were not common in rural Saskatchewan, but only in larger centres where professionals played. The appeal was allowed.

E. *Legislative Intervention*

As is evidenced by the previous cases, provincial legislation is required to replace the confusing morass of occupiers' liability law.

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[493] *Id.* at 745-46, 92 D.L.R. (3d) at 749-50.

[494] [1949] O.R. 26, [1949] 1 D.L.R. 369 (C.A.).

[495] *Supra* note 365, at 476, 92 D.L.R. (3d) at 750.

[496] *See* Hagerman v. City of Niagara Falls, 29 O.R. (2d) 609, 114 D.L.R. (3d) 184 (H.C. 1980), which held that the occupier need not provide safety in all circumstances. He must merely "use reasonable care to prevent injury or damage from danger which is known or which ought to be known". *Id.* at 613, 114 D.L.R. (3d) at 189. Flying pucks are an inherent danger in a hockey game and all reasonable precautions were deemed to have been taken in this case.

Hitherto statutory reform has been slow[497] with statutory regimes in place only in Alberta,[498] British Columbia[499] and Ontario.[500]

Two cases were decided under the British Columbia Act during the survey period: one, *Kirk v. Trerise*,[501] correctly applied the statutory duty but the other, *Story v. City of Prince George*,[502] re-introduced the entire common law pertaining to occupiers' liability while virtually ignoring the statute.

In *Kirk* the defendant's dog bit the plaintiff, who brought an action in *scienter* and negligence, the latter being based on section 3 of the Occupiers' Liability Act.[503] According to the Act, the occupier must take reasonable care to see that the plaintiff is reasonably safe when using the premises. Andrews J. added that the risk still had to be foreseeable, that is, a real risk, not a mere possibility. In this instance, the court held that it was foreseeable that the dog might jump on someone and cause harm.

In *Story* the plaintiff fell on an icy laneway beside the library operated by the defendant city. One of the actions brought was under the Occupiers' Liability Act. After quoting the Act and concluding that the duty was one of reasonable care, MacKinnon J. went on to express the view that it was the same duty as was owed at common law: to avoid foreseeable harm from unusual danger of which the occupier knows or ought to know. On this basis, the court found that the danger was not an unusual one and dismissed the action. The court managed to ignore the reasonably simple statutory duty and adopt the old common law duty, thereby defeating the purpose for enacting the statute in the first place.

This case has fortunately not set a pattern for the statutory interpretation of other occupiers' liability acts, either in Alberta[504] or Ontario.[505] In fact, most courts have refrained from introducing and discussing any of the old occupiers' liability law.

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[497] *See* MANITOBA LAW REFORM COMMISSION, PAPER ON OCCUPIERS' LIABILITY (C. Edwards Chairman 1980); SASKATCHEWAN LAW REFORM COMMISSION, PROPOSALS FOR AN OCCUPIERS' LIABILITY ACT — REPORT TO THE ATTORNEY GENERAL (R. Cuming Chairman 1980); SASKATCHEWAN LAW REFORM COMMISSION, TENTATIVE PROPOSALS FOR AN OCCUPIERS' LIABILITY ACT (R. Cuming Chairman 1980).

[498] Occupiers' Liability Act, S.A. 1973, c. 79; *now* R.S.A. 1980, c. O-3.

[499] Occupiers' Liability Act, S.B.C. 1974, c. 60.

[500] The Occupiers' Liability Act, 1980, S.O. 1980, c. 14; *now* R.S.O. 1980, c. 322. *See also* ONTARIO MINISTRY OF THE ATTORNEY GENERAL, DISCUSSION PAPER ON OCCUPIERS' LIABILITY AND TRESPASS TO PROPERTY (1979).

[501] 14 B.C.L.R. 310, 103 D.L.R. (3d) 78 (S.C. 1979), *rev'd* [1981] 4 W.W.R. 677 (B.C.C.A.).

[502] 11 B.C.L.R. 224, 99 D.L.R. (3d) 464 (S.C. 1979).

[503] S.B.C. 1974, c. 60.

[504] For cases interpreting the Alberta Occupiers' Liability Act, S.A. 1973, c. 79 (*now* R.S.A. 1980, c. O-3), *see Cullen*, *supra* note 47; Nasser v. Rumford, 4 C.C.L.T. 49, 83 D.L.R. (3d) 208 (Alta. C.A. 1977); *Epp*, *supra* note 365; Arnold v. Gillies, 15 A.R. 41, 93 D.L.R. (3d) 48 (Dist. C. 1978).

[505] As of Nov. 1980, there were no reported cases dealing with the Ontario Occupiers' Liability Act, 1980, S.O. 1980, c. 14, which was proclaimed in force 8 Sep. 1980; *now* R.S.O. 1980, c. 322.

IX. STRICT LIABILITY

A. *Rylands v. Fletcher*[506] *Liability*

Liability on the basis of the leading decision in *Rylands v. Fletcher* has traditionally been imposed upon defendants who have brought onto or accumulated on their land something which has caused damage to another by reason of its escape. The rule was propounded by Blackburn J. in the celebrated judgment of the Exchequer Chamber. On appeal to the House of Lords, Lord Cairns added an additional requirement, namely, that the defendant's use of his land must have amounted to a "non-natural" use. These criteria have been the subject of much academic debate and a perusal of recent case law in this area evidences a movement away from a strict adherence to Lord Cairns' elusive "non-natural use" requirement.[507]

In *Cruise v. Niessen*[508] the defendant was held liable for damage done to the plaintiff's flax crop from aerial herbicide spraying carried out by the defendant pilot at Niessen's request. In this case, the Manitoba Court of Queen's Bench rejected the traditional notion that in order for a defendant to be held liable under the doctrine of *Rylands v. Fletcher*, he must be making an unusual or non-natural use of his land. Instead, Solomon J. chose to emphasize the notion of escape and stated:

> [A]erial spraying of herbicides by farmers can no longer be regarded as an unusual operation. . . . This acceptance of aerial spraying procedure, however, does not relieve the person using such method from the responsibility for damages such operation would do to neighbours' crops if the herbicide so applied is permitted to escape and damage crops on a neighbour's land. . . . If, during such application, a farmer allows herbicide to escape onto his neighbour's land and damage that neighbour's crop, the farmer who released the herbicide is responsible for such damage under the principle of absolute liability established by *Rylands v. Fletcher*. It is not the aerial application that makes the user of herbicide liable for damages, it is the action of allowing the herbicide, a dangerous substance, to escape beyond the

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[506] L.R. 3 H.L. 330, 19 L.T. 220 (1868), *aff'g* L.R. 1 Ex. 265 (1866). In Metson v. R.W. de Wolfe Ltd., 43 N.S.R. (2d) 221, 81 A.P.R. 221, 117 D.L.R. (3d) 278 (S.C. 1980), the defendant horticulturalists "top dressed" their land with animal manure. Heavy rains resulted in a steady flow of surface water from the defendant's land, contaminating the plaintiff's well. Richard J. found the defendant liable, stating that the case was a classical application of the long established principle set out in Rylands v. Fletcher.

[507] *See* Irvine, *Annotation*, 14 C.C.L.T. 225, at 226-27 (1980-81).

[508] [1977] 2 W.W.R. 481, 2 C.C.L.T. 53, 76 D.L.R. (3d) 343 (Man. Q.B.), *rev'd supra* note 267. *See also* Bartel v. Ector, 90 D.L.R. (3d) 89 (Sask. Q.B. 1978), which applied the decision in *Cruise* and emphasized the notion of escape, rather than non-natural use, in holding the defendant strictly liable for damage done to the plaintiff's crop by herbicide which escaped during aerial spraying. Also of interest is Fenn v. City of Peterborough, 14 O.R. (2d) 137, 73 D.L.R. (3d) 177 (H.C. 1976), *aff'd* 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (C.A. 1979).

> boundaries of his own property that makes the user liable for damage to neighbours' crops.[509]

This decision, therefore, represents a significant departure from the original "non-natural use" requirement.[510] As Professor Klar has pointed out,[511] this case provides an illustration of the expansion of the *Rylands v. Fletcher* doctrine in order to protect the community from what Professor Linden has labelled the "limited number of activities so fraught with risk . . . that the negligence standard is felt to provide insufficient protection against them".[512] According to the *Cruise* decision then, the only important factor is that a dangerous substance escaped. "It matters not whether that substance is the most commonly found and useful substance that land occupiers possess — if it escapes, and is dangerous, there is absolute liability. . . . If 'danger' is the only criteria, where will the courts decline to apply *Rylands v. Fletcher*?"[513] Although the defendant was found to be not liable on appeal, the appeal court simply disagreed with the trial judge's finding that the plaintiff's damages were occasioned directly by the actions of the defendant. The reversal of the decision by the Manitoba Court of Appeal does not, therefore, change the aspect of the case which expands the basis of liability under this doctrine.[514]

In *Carmel Holdings Ltd. v. Atkins*,[515] light furnace oil seeped from an underground tank on the defendant's property into the bottom of the elevator shafts of the plaintiff's hotel. In determining whether or not to apply the rule,[516] the court stated that no test for distinguishing between natural and non-natural use had ever been laid down with any accuracy:

> If a thing which escapes from the land is inherently dangerous and harm results, then there is "strict liability" under the rule in *Rylands v. Fletcher*. If

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[509] *Id.* at 483-84, 2 C.C.L.T. at 57, 76 D.L.R. (3d) at 345.

[510] It must be noted, however, that much of the case law in this area continues to cling to the notion of non-natural use. *See, e.g.*, Bottoni v. Henderson, 90 D.L.R. (3d) 301 (Ont. H.C. 1978) and *Guerard Furniture Co.*, *supra* note 213. In the latter case, a latent defect had caused a toilet tank on the second floor of the defendant's building to spring a leak, flooding the plaintiff's ground floor premises. It was held that Rylands v. Fletcher did not apply since the water contained in and flowing through the washroom fixtures on the second floor was not inherently dangerous and was not a "non-natural or special use" of land. Also, in Hudson v. Riverdale Colony of Hutterian Brethren, 114 D.L.R. (3d) 352 (Man. C.A. 1980), the defendants were held strictly liable for the damage caused by the escape of a fire which they had allowed the municipal authorities to start on their property in an attempt to contain a grass fire. The "dangerous" substance escaped from the defendants' land and the plaintiff's lands suffered damage. The defence of "act of a stranger" was unavailable to the defendants since they had acquiesced in the setting of the fire. *See also Elfassy*, *supra* note 213.

[511] Klar, *Annotation*, 4 C.C.L.T. 58 (1978).

[512] Linden, *Whatever Happened to Rylands v. Fletcher?*, in STUDIES IN CANADIAN TORT LAW, *supra* note 31, at 325.

[513] Klar, *Annotation*, 2 C.C.L.T. 53, at 54 (1977).

[514] *See* Klar, *supra* note 511.

[515] [1977] 4 W.W.R. 655, 2 C.C.L.T. 227 (B.C.S.C.).

[516] The defendant was also found liable in nuisance.

> the thing . . . is not inherently dangerous, there is not liability under the rule unless there has been non-natural use.[517]

However, Craig J. found it unnecessary to decide whether or not the storage of 1,200 gallons of fuel oil is a natural use of land. Although he concluded that the defendant was liable on the basis of the rule in *Rylands v. Fletcher*, he stated that in the event that storage of fuel oil was considered to be a natural use of land, the defendant would be alternatively liable in nuisance. In this sense the decision is consistent with the result in the *Cruise* case. The trend seems to be towards a steady erosion of the notion of non-natural use. Non-natural use no longer requires that the use be unusual or abnormal. It appears that the notion has been expanded to cover "uses which involve an added or special danger to others".[518]

B. *Breach of Statutory Duty*

In *The Queen v. Saskatchewan Wheat Pool*,[519] the Canadian Wheat Board (an agent of the plaintiff) held a number of terminal elevator receipts for grain issued by the defendant. The Board directed that a cargo of wheat be loaded upon a certain vessel and the appropriate receipts were surrendered to the defendant who caused the quality and quantity of wheat specified to be loaded as directed. It was later discovered that part of the grain was infested with rusty grain beetle larvae and the cargo had to be fumigated, at an expense in excess of $98,000 to the Board. The plaintiff, as principal, sought to recover these expenses from the defendant on the ground that the defendant was in breach of its statutory duty as defined in section 86(*c*) of the Canada Grain Act,[520] which states:

> 86. No operator of a licensed elevator shall
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> . . . .
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> (*c*) except under the regulations or an order of the Commission receive into or discharge from the elevator any grain, grain product or screenings that is infested or contaminated or that may reasonably be regarded as being infested or contaminated. . . .

The court held that a civil right of action on the part of aggrieved individuals was not precluded by the fact that penalties for non-compliance were included in the relevant statute. Considering the objectives of the statute in light of the objectives of the Canada Grain Commission,[521] the court ruled that the duty imposed on a person by

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[517] *Supra* note 515, at 661, 2 C.C.L.T. at 237.

[518] Klar, *Annotation*, 2 C.C.L.T. 227, at 231 (1977).

[519] *Supra* note 401.

[520] S.C. 1970-71-72, c. 7.

[521] As enunciated in s. 11 of the Canada Grain Act, S.C. 1970-71-72, c. 7: "[T]o establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets".

section 86(*c*) was litigable in a civil sense by a person injured as a result of the breach. The court also ruled that the duty imposed by section 86(*c*) was an absolute duty: "To ensure that grain is, indeed, a dependable commodity for domestic and export markets, an absolute prohibition against discharging infested grain has, in my view, been imposed by the legislators."[522]

C. *Animals*

While no major innovations in this area of the law occurred during the survey period, the following cases are of interest. *Spanton v. Laviolette*[523] was novel in that it canvassed the extent of liability of a dog owner for the conduct of his pet in an unusual situation. The defendant's dog, a mixed Labrador and Saint Bernard, was being exercised in a field immediately adjacent to a major roadway. He was unleashed in the field and ran into the road, coming into contact with the plaintiff's Volvo. The dog was uninjured save a small cut on his paw, but the car did not fare as well and suffered considerable damage. Historically, a dog owner was liable for his pet's behaviour if he had *scienter* of a dog's character; that is, if the owner had, or could be deemed to have had,[524] knowledge of the dog's propensities. In this case, since there was no evidence of a previous disposition on the part of the dog to run in traffic, the owner was held not to be strictly liable. However, he was held liable on ordinary principles of negligence. In the unusual circumstances, since the driver of the car had seen the dog in sufficient time to reduce his speed and thus alleviate the severity of the impact, the court applied section 4 of the Negligence Act[525] and assessed the driver's responsibility at seventy-five percent.

In *Moffat v. Downing*,[526] a very recent decision of the Ontario Court of Appeal, the defendants were held liable for the actions of their retriever. The dog had run after the plaintiff, who was riding a horse along the shoulder of the road in front of the defendants' house. The horse reared, throwing the plaintiff to the ground, after the dog chased it snapping at its heels. The horse then turned into the roadway, where it

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[522] *Supra* note 401, at 418, [1979] 6 W.W.R. at 28.

[523] 19 O.R. (2d) 21, 83 D.L.R. (3d) 740 (Ont. Small Cl. Ct. 1977).

[524] *See, e.g.*, Weeks v. Weeks, 18 Nfld. & P.E.I.R. 1, 47 A.P.R. 1, 81 D.L.R. (3d) 371 (P.E.I.S.C. 1977). Here, the plaintiff brought an action to recover damages occasioned by the defendant's "scrub bull". The bull had entered the plaintiff's land and had impregnated six purebred heifers that were too young to be bred and suffered stunted growth and decreased milk production as a result. Unlike the situation in the *Spanton* case, knowledge of the bull's propensities was imputed to the defendant because the bull was allowed to roam at large and had had to be removed from the plaintiff's field on numerous occasions. Since the bull was following his "normal tendencies", the resulting injury could have been foreseen by the defendant.

[525] R.S.O. 1980, c. 315.

[526] 16 C.C.L.T. 313, 120 D.L.R. (3d) 560 (Ont. C.A. 1981). *See* Irvine, *Annotation*, 16 C.C.L.T. 313 (1981).

was struck by a car operated by the second plaintiff. At trial, the defendant dog owners were held not liable. On appeal, however, Weatherston J.A. found the defendants liable in negligence. His Lordship stated: "[I]t is right nowadays to impose liability for negligence, when the facts justify such a finding, without having to resort to the ancient rules that required a dog's master to have knowledge of some vicious or mischievous propensity of the dog."[527] In his opinion, since the dog was allowed to play adjacent to a public highway which the defendants knew was well-travelled by both cars and horses, they ought to have foreseen that such an accident could occur. Consequently, they were held liable for the injuries suffered by both plaintiffs. On the basis of these two cases, it appears that the courts are imposing a stricter notion of strict liability than previously. By favouring general principles of negligence over the traditional principle of *scienter*, a plaintiff need no longer prove knowledge of the animal's propensities in order to recover. Perhaps the old adage that every dog is entitled to one bite is doomed to go the way of the dodo.[528]

D. *Vicarious Liability*

The most noteworthy case in this area during the survey period is the decision of the Ontario Court of Appeal in *Yepremian v. Scarborough General Hospital*.[529] The novel issue raised was the liability of a public hospital for the negligent treatment of a patient by a doctor who was a member of the medical staff but not an employee of the hospital.[530] At trial,[531] Holland J. found the hospital liable and stated:

> [T]he hospital . . . has an obligation to provide service to the public and has the opportunity of controlling the quality of medical service. From the point of view of the doctor, through the surrender of some independence by reason of the control that may be exercised over him by the hospital and by making his services available at certain specified times, he attains . . . the privilege of making use of the hospital facilities for his private patients. . . . [I]n the circumstances of this case, by accepting this patient the hospital undertook to him a duty of care that could not be delegated. . . .
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> [T]he hospital is responsible in law for the negligence of Dr. Rosen.[532]

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[527] *Id.* at 318, 120 D.L.R. (3d) at 562.

[528] *See also Kirk*, *supra* note 501; Gill v. MacDonald, 14 Nfld. & P.E.I.R. 438, 33 A.P.R. 438, 80 D.L.R. (3d) 21 (P.E.I.S.C. 1977); Sgro v. Verbeek, 28 O.R. (2d) 712, 111 D.L.R. (3d) 479 (Ont. H.C. 1980).

[529] *Supra* note 267.

[530] As Blair J.A. pointed out *id.*, at 539, 110 D.L.R. (3d) at 558, the hospital would have unquestionably been held liable had the doctor in question been a paid employee.

[531] *Supra* note 267. For a discussion of a hospitals' primary liability, *see* Wellesley Hosp. v. Lawson, [1978] 1 S.C.R. 893, 15 N.R. 271, 76 D.L.R. (3d) 688 (1977).

[532] *Id.* at 535, 6 C.C.L.T. at 112, 88 D.L.R. (3d) at 184.

The Court of Appeal reversed the decision and found the hospital not liable. Arnup J.A. stated that the trial judge had founded liability upon a breach of the hospital's *own* duty. Since no court in Canada had ever found a "non-delegable duty of care" owed by a hospital to the patient, a hospital would not be liable for failure by a specialist who was not a hospital employee to use reasonable skill and competence in the treatment of a hospital patient under his care.[533]

> I agree with the trial Judge . . . that the Yepremians had every right to expect that a large public hospital . . . would provide whatever was required to treat seriously ill or injured people, but I do not think it follows that the public is entitled to add the further expectation: 'and if any doctor on the medical staff makes a negligent mistake, the hospital will pay for it'.[534]

Houlden and Blair JJ.A. dissented, both being of the view that the hospital had assumed, and would be expected to assume, complete responsibility for the plaintiff's treatment. Blair J.A. pointed out that "[n]o case binding on this Court has held that hospitals are liable only for the negligence of doctors employed by them."[535] Houlden J.A. expressed his strong dissent thus:

> While the negligent act may be committed by a particular individual, that act is part of the over-all medical care provided by the hospital. It is medical care that is sought by the patient; and it is proper medical care that should be provided. The primary responsibility for the provision of this medical care is . . . that of the hospital, and the hospital cannot delegate that responsibility to others so as to relieve itself of liability.[536]

Although leave to appeal to the Supreme Court of Canada was granted,[537] the case was settled[538] and the appeal discontinued. The discontinuation of the appeal has left several issues unsettled and the complexity of the questions raised by the case are such that a pronouncement by the Supreme Court of Canada would have been desirable. Ellen Picard, writing before the settlement was reached, stated that the case "seems destined for the Supreme Court of Canada".[539] She pointed out that the hospital might have been found vicariously liable for the actions of the doctor if the more modern "organization test" had been applied. This test amounts to an examination of the individual's role in the organization: is he an integral component or a mere accessory? "The 'control test' which suited an agricultural and developing industrial society hardly seems apt for this business institution and should be usurped by the 'organization test'. However, none of the learned justices

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[533] *Supra* note 267, at 513, 13 C.C.L.T. at 130, 110 D.L.R. (3d) at 531-32.

[534] *Id.* at 514, 13 C.C.L.T. at 131, 110 D.L.R. (3d) at 532.

[535] *Id.* at 559, 13 C.C.L.T. at 166, 110 D.L.R. (3d) at 577.

[536] *Id.* at 563, 13 C.C.L.T. at 199, 110 D.L.R. (3d) at 581-82.

[537] 2 Sep. 1980. *See* 120 D.L.R. (3d) 37 (Ont. C.A. 1980).

[538] For details of the settlement, *see* Yepremian v. Scarborough Gen. Hosp., 15 C.C.L.T. 73 (Ont. H.C. 1981). For an interesting note on the novel nature of such a "structured settlement", *see* Fien, *Annotation*, 15 C.C.L.T. 79 (1981).

[539] Picard, *Annotation*, 14 C.C.L.T. 81 (1980-81).

hearing this case looked beyond the traditional 'control relationship' namely that of employer-employee.''[540]

Perhaps the best resolution of the issue is that propounded by Arnup J.A., who pointed out the substantial degree of control exercised by government over public hospitals. ''If liability is to be imposed upon hospitals for the negligence of its [*sic*] medical staff . . . not employed by the hospitals, . . . it should be the function of the Legislature, as a policy question, to decide whether and under what conditions such liability is to attach.''[541]

X. PRODUCTS LIABILITY

Technically, there is still no tort of ''products liability''. In practice, both contract and tort provide the framework for products liability issues.[542] American courts and legislative bodies have been more active in the field, developing protection through strict liability,[543] while Canadian courts have been slow to respond to the recent advances in ''consumerism''. As Professor Waddams has commented, the law of negligence in Canada ''approaches, without quite reaching'' strict liability.[544] In his opinion, ''the adoption of a rule of strict liability would

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[540] *Id.* at 84.

[541] *Supra* note 267, at 527, 110 D.L.R. (3d) at 545. Other cases during the survey period dealing with the issue of vicarious liability are: Mader v. MacPhee, 25 N.S.R. (2d) 236, 36 A.P.R. 236, 84 D.L.R. (3d) 761 (C.A. 1978); Campbell v. Blackett, 13 Nfld. & P.E.I.R. 64, 29 A.P.R. 64, 80 D.L.R. (3d) 252 (P.E.I.C.A. 1977); Co-Operative Fire & Casualty Co. v. Doiron, 28 N.B.R. (2d) 520, 63 A.P.R. 520, 108 D.L.R. (3d) 107 (C.A. 1979); Dixon v. The Queen in Right of the Province of British Columbia, 24 B.C.L.R. 382, [1980] 6 W.W.R. 406 (C.A.); Barrett v. The Ship ''Arcadia'', 2 C.C.L.T. 142, 76 D.L.R. (3d) 535 (B.C.S.C. 1977); *Toronto Dominion Bank*, *supra* note 457; Rheaume v. Gowland, 8 B.C.L.R. 93, 91 D.L.R. (3d) 223 (S.C. 1978); Payne v. Donner, 5 Sask. R. 164, 118 D.L.R. (3d) 265 (C.A. 1980); Reese v. Coleman (No. 2), 3 Sask. R. 38, [1979] 2 W.W.R. 64 (C.A.); Aziz v. Adamson, 11 C.C.L.T. 134 (Ont. H.C. 1979); *Chartier*, *supra* note 39; Keizer v. Hanna, [1978] 2 S.C.R. 342, 19 N.R. 209, 82 D.L.R. (3d) 449; *Holmes*, *supra* note 116; Robitaille v. Vancouver Hockey Club, [1981] 3 W.W.R. 481, 16 C.C.L.T. 225 (B.C.C.A.); Shroeder v. Gibb, 117 D.L.R. (3d) 513, 15 C.C.L.T. 235 (S.C.C. 1981); Vic Priestley Landscaping Contracting Ltd. v. Elder, 19 O.R. (2d) 591, 85 D.L.R. (3d) 720 (Cty. Ct. 1978); Ling v. Transamerica Comm. Corp., 31 O.R. (2d) 33, 118 D.L.R. (3d) 188 (H.C. 1980); Lacusta v. Straus, 17 A.R. 113, 96 D.L.R. (3d) 165 (Dist. C. 1979); Sulyok v. Camoll, 73 D.L.R. (3d) 417 (N.S.S.C. 1977).

[542] The following discussion will deal only with the tort aspects of products liability.

[543] For further discussion of this ''revolution'' in the U.S., *see* C. WRIGHT & A. LINDEN, *supra* note 1, at 13-68 to 13-73. *See also* Zaid, *The Emerging Law on Product Liability and Consumer Product Warranties*, 4 CAN. BUS. L.J. 2, at 13-14 (1979).

[544] Waddams, *Products Liability in Canadian Common Law*, 12 R.J.T. 25, at 25-26 (1977). Waddams contends that in three respects Canadian law falls short of strict liability: (1) There is no liability in negligence for products thought by experts to be safe at the time of distribution, *e.g.* thalidomyde; (2) There is also no liability in negligence if the defective part comes from a sub-supplier; and (3) The practical problems of proving negligence still exist. *See also* S. WADDAMS, PRODUCTS LIABILITY (2d ed. 1980).

not make any far-reaching or radical change in the incidence of liability under the present law, but . . . would be highly desirable as a simplification and rationalization."[545]

The lack of notable cases in Canada since the last survey on products liability has prevented the further development of a coherent body of law in this area. Most of the noteworthy cases have concerned the recoverability of damages for economic loss.[546] Since the 1973 decision in *Rivtow Marine Ltd. v. Washington Iron Works*,[547] the buyer of a defective product has generally been precluded from recovering damages for the cost of repairing the article, such damages being classified as pure economic loss.

The Ontario County Court held otherwise, however, in the recent case of *Fuller v. Ford Motor Co. of Canada*.[548] The plaintiff brought an action in both contract and tort against the retailer and manufacturer of a car with defective brakes. He sought to recover the cost of repairing the car, which had been damaged in an accident, and was successful in the negligence action. Houston J., commenting on the recoverability of damages, remarked: "For some obscure reason it has been the policy of the law in Canada, but not in the U.S.A., to limit economic losses in cases where negligence is the basis of the claim and property damage has been caused rather than physical injury."[549] The judge then proceeded to

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[545] Waddams, *id.* at 26.

[546] For further cases during the survey period, *see Labrecque*, *supra* note 267; *MacLachlan*, *supra* note 220; *Good-Wear Treaders Ltd.*, *supra* note 263; Smith v. Inglis Ltd., 25 N.S.R. (2d) 38, 6 C.C.L.T. 41, 36 A.P.R. 38, 83 D.L.R. (3d) 215 (C.A. 1978); Schulz v. Leeside Devs. Ltd., [1978] 5 W.W.R. 620, 6 C.C.L.T.. 236, 90 D.L.R. (3d) 98 (B.C.C.A.); Davidson v. Connaught Laboratories, 14 C.C.L.T. 251 (Ont. H.C. 1980); Lebed v. Chrysler Canada Ltd., 25 O.R. (2d) 161, 100 D.L.R. (3d) 553 (H.C. 1979); Leitz v. Saskatoon Drug & Stationery Co., 4 Sask. R. 35, [1980] 5 W.W.R. 673, 112 D.L.R. (3d) 106 (Q.B.); *Dunsmore*, *supra* note 278.

See also S. SCHWARTZ, J. ZIEGEL & L. ROMERO, PRODUCT LIABILITY: REFLECTIONS ON LEGAL ASPECTS OF THE POLICY ISSUES (J. Guss ed. 1979); H. TEBBENS, INTERNATIONAL PRODUCT LIABILITY (1979); THE LAW OF PRODUCTS LIABILITY: GOOD HEAVENS THERE'S A SNAIL IN THERE! (R. Stradiotto Chairman Canadian Bar Ass'n 1978); Schwartz, *supra* note 418; Cane, *Physical Loss, Economic Loss and Products Liability*, 95 L.Q.R. 117 (1979); Linden, *Tort Law's Role in the Regulation and Control of the Abuse of Power*, in 1979 SPECIAL LECTURES L.S.U.C. 67; Bocksteigel, *Coordinating Aviation Liability*, 2 ANNALS AIR AND SPACE 15 (1977); Matte, *Product Liability of the Manufacturer of Space Objects*, 2 ANNALS AIR AND SPACE 375 (1977); Feldthusen, *Pure Economic Loss Consequent upon Physical Damage to a Third Party*, 16 WESTERN ONT. L. REV. 1 (1977); Stradiotto, *Practical Problems Concerning the Preparation of Products Liability Cases*, 12 R.J.T. 37 (1977); Linden, *Tort Liability for Defective Drugs*, 1 LEGAL MED. Q. 169 (1977).

[547] *Supra* note 422.

[548] *Supra* note 418.

[549] *Id.* at 769, 94 D.L.R. (3d) at 132.

rely on Laskin J.'s reasoning in *Rivtow*[550] to support his decision to award damages despite the absence of physical injury. It should be noted, however, that Laskin J.'s comments on the possibility of recovering damages for purely economic loss were unfortunately a minority opinion, with which the majority in *Rivtow* did not concur.

In contrast, the New Brunswick Court of Appeal subsequently applied the *Rivtow* reasoning correctly in *Thomas v. Whitehouse*,[551] where the buyers sought damages from a builder for the negligent construction of their house. Dismissing the action, Limerick J.A. stated: "The Canadian Courts including the Supreme Court of Canada have not yet extended the principle of liability for negligence of the builder to third parties or subsequent purchasers for damages suffered by the goods or the building itself."[552]

In *Ital-Canadian Investments Ltd. v. North Shore Plumbing & Heating Co.*,[553] where the manufacturer was sued in negligence for the replacement cost of defective heating units, the British Columbia Supreme Court concurred in the finding that a plaintiff could not claim damages for economic loss unaccompanied by property or personal damage.

Finally, in *Maughan v. International Harvester Co. of Canada*,[554] the Nova Scotia Court of Appeal held that the business user of a negligently manufactured machine purchased from a dealer was entitled to recover in negligence his lost profits from the manufacturer: "[The plaintiff] should recover any determinable dollar loss directly attributable to the breakdowns."[555] MacKeigan C.J. found that the economic loss here came close to falling within the ratio of the Supreme Court of Canada majority in *Rivtow*, although there was little factual similarity between the cases.

In conclusion, it may be said that Canadian courts have been reluctant to expand the area of products liability, either by moving

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[550] Mr. Justice Laskin stated:

> The present case is not of the *Hedley Byrne* type . . . but recovery for economic loss alone is none the less supported under negligence doctrine. It seems to me that the rationale of manufacturers' liability for negligence should equally support such recovery in the case where . . . there is a threat of physical harm and the plaintiff is in the class of those who are foreseeably so threatened. . . .

Supra note 422, at 1218, [1973] 6 W.W.R. at 713, 40 D.L.R. (3d) at 549.

[551] *Supra* note 222.

[552] *Id.* at 490, 48 A.P.R. at 490, 95 D.L.R. (3d) at 767.

[553] [1978] 4 W.W.R. 289 (B.C.S.C.).

[554] 38 N.S.R. (2d) 101, 69 A.P.R. 101, 112 D.L.R. (3d) 243 (C.A. 1980).

[555] *Id.* at 132, 69 A.P.R. at 132, 112 D.L.R. (3d) at 265.

towards the American position of strict liability[556] or by allowing recovery for pure economic loss. Given this judicial wariness, provincial legislation may be necessary to rectify the situation.[557]

XI. DEFAMATION

Although there has been a plethora of cases in the area of defamation during the past few years,[558] there has been little change in the substantive law. Actions in the area have concerned the defences of fair comment and privilege, especially in cases involving statements about public officials and questions of malice, pleadings, retraction and capacity.

The leading case of *Cherneskey v. Armadale Publishers Ltd.*[559] broke no new ground, although it presents dire implications for the right

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[556] Wright and Linden, commenting on the reasons why Canadian courts have not imposed strict liability, wrote:

> Perhaps Canadian industry, being less developed than American, needed more protection. Perhaps our judges are less willing to intrude on what they believe is a legislative responsibility. Perhaps our bar has not been as bold in advancing new theories of liability. In any event, the time is drawing near when our courts will have to choose which path they will follow.

Supra note 543, at 13-68.

[557] A manufacturer's liability to anyone who reasonably could be expected to use a consumer product has been extended in Saskatchewan to encompass injuries which are "reasonably foreseeable as liable to result from the breach": *see* The Consumer Products Warranties Act, R.S.S. 1978, c. C-30, s. 27. New Brunswick is to impose strict liability on manufacturers of dangerous products: *see* Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, s. 27 (not yet in force). The Ontario Law Reform Commission in its REPORT ON PRODUCTS LIABILITY (Ministry of Attorney-General 1979) has also recommended the imposition of strict liability. For similar suggestions in England, *see* REPORT OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY (Lord Pearson Chariman 1978).

[558] In addition to the cases discussed here on defamation, *see* Wilson v. Taylor, 31 O.R. (2d) 9, 15 C.C.L.T. 34, 118 D.L.R. (3d) 335 (H.C. 1980) (notice of action); Frisina v. Southam Press Ltd., 30 O.R. (2d) 65, 116 D.L.R. (3d) 376 (H.C. 1980) (notice of action); Boushy v. Sarnia Gazette Publishing Co., 30 O.R. (2d) 667, 117 D.L.R. (3d) 171 (H.C. 1980) (discovery); Wesolowski v. Armadale Publishers Ltd., 3 Sask. R. 330, 112 D.L.R. (3d) 378 (Q.B. 1980) (defence of fair and accurate report); Bassett v. C.B.C., 30 O.R. (2d) 140, 116 D.L.R. (3d) 332 (H.C. 1980) (jurisdiction of the Ontario H.C.); Deveau v. Greater Vancouver Antique Dealers Assoc. (No. 2), [1978] 2 W.W.R. 95 (B.C.S.C.). For articles on defamation, *see* Williams, *Decorum in Defamation*, in STUDIES IN CANADIAN TORT LAW, *supra* note 31, at 273; Symmons, *New Remedies Against Libellers of the Dead? A Look at the Recommendations of the Faulks Committee on Defamation*, 18 WESTERN ONT. L. REV. 521 (1980).

[559] [1979] 1 S.C.R. 1067, 24 N.R. 271, [1978] 6 W.W.R. 618, 7 C.C.L.T. 69, 90 D.L.R. (3d) 321 (1978). For further discussion of the *Cherneskey* case, *see* Klar, *Developments in Tort Law: The 1978-79 term*, 1 SUP. CT. L. REV. 311, at 314-30 (1980); Doody, *Comment*, 58 CAN. B. REV. 174 (1980); McLaren, *The Defamation Action and Municipal Politics*, 29 U.N.B.L.J. 123, at 141-45 (1980); Klar, *The Defence of "Fair Comment"*, 8 C.C.L.T. 149 (1979).

of a citizen to speak freely on public affairs. The defendant editor, publisher and owner of a newspaper printed a letter to the editor which described the plaintiff alderman as exhibiting a "racist" attitude. The newspaper, but not the writers of the letter, were sued in libel. At trial, the jury found the letter to be libellous. The judge would not allow the defence of fair comment[560] to be put to the jury, however, since the newspaper did not have an honest belief in the opinions expressed in the letter. This decision was overturned by the Saskatchewan Court of Appeal,[561] where Bayda J.A. held that if the newspaper honestly believed that the letter expressed the honest opinion of the *writer* and the newspaper was not motivated by malice in publishing the letter, the defence of fair comment was established. In the Supreme Court of Canada Ritchie J. for the majority expressly rejected Bayda J.A.'s findings and upheld the trial decision. In holding that the publisher of a libellous statement had to have an honest belief in the opinion expressed — a subjective test — Ritchie J. was adhering closely to previous decisions. It has always been the case that a newspaper stands in no better position than the author of the libellous opinion: "One of [the] ingredients [of the defence of fair comment] is that the person writing the material complained of must be shown to have had an honest belief in the opinions expressed and it will be seen that . . . the same considerations apply to each publisher of that material."[562] One of the unusual aspects of this case was that the defendants themselves denied having an honest belief in the opinions expressed in the letter. Ritchie J. distinguished the cases relied on by Bayda J.A. in the Court of Appeal with respect to this particular point.[563]

After clearly stating the prerequisite of a successful defence of fair comment to be a personally held, honest belief, Ritchie J., it is submitted, confused the issue by raising the possibility that the publisher might prove the defence by showing that the *author* of the letter honestly believed in the opinion expressed therein:

> It appears to me to follow from this that where, as here, there is no evidence as to the honest belief of the writers of the letter, and the newspaper and its publisher have disavowed any such belief on their part, the defence of fair comment cannot be sustained.
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> . . . .
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> [The] authorities satisfy me that the newspaper and its editor cannot sustain a defence of fair comment when it has been proved that the words used

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[560] For other cases on the defence of fair comment, *see* Barltrop v. C.B.C., 25 N.S.R. (2d) 637, 5 C.C.L.T. 88, 36 A.P.R. 637, 86 D.L.R. (3d) 61 (C.A. 1978); England v. C.B.C., [1979] 3 W.W.R. 193, 97 D.L.R. (3d) 472 (N.W.T.S.C.); Holt v. Sun Publishing Co., 100 D.L.R. (3d) 447 (B.C.C.A. 1979). For discussion of *Barltrop*, *id.*, *see* Merry, *An Expert's Reputation*, 5 DALHOUSIE L.J. 392 (1979).

[561] [1977] 5 W.W.R. 155, 2 C.C.L.T. 298, 79 D.L.R. (3d) 180 (Sask. C.A.).

[562] *Supra* note 559, at 1079, 24 N.R. at 280, [1978] 6 W.W.R. at 623, 7 C.C.L.T. at 77, 90 D.L.R. (3d) at 330.

[563] *Id.* at 1085-86, 24 N.R. at 285-86, [1978] 6 W.W.R. at 628-29, 7 C.C.L.T. at 82-83, 90 D.L.R. (3d) at 334-35.

> in the letter are not an honest expression of their opinion and there is no evidence as to the honest belief of the writers.[564]

Although Ritchie J.'s decision is disappointing in that it failed to deal with the policy aspects of a principle of law which more or less eliminates the availability of the defence of fair comment to a newspaper publishing letters to the editor, Dickson J.'s minority dissenting judgment is far more satisfying in this respect. Whereas the majority used a subjective test to determine whether the comment was "fair", Dickson J. espoused a two-pronged test, the objective part being, "is the comment one that an honest, albeit prejudiced, person might make in the circumstances?"[565] and the subjective part, "whether the publisher himself was actuated by malice".[566] As Mr. Justice Dickson pointed out, the "subjective" test works well when the writer alone is sued for libel; it does not work at all, however, when a newspaper is involved.

The dissenting judgment also clearly addressed the public policy issues arising in the case.

> Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled. . . . I agree that the publisher of a newspaper has no special immunity from the application of general laws, and that in the matter of comment he is in no better position than any other citizen. But he should not be in any worse position. That, I fear, will be the situation if one fails to distinguish between the writer of a letter to the editor, and the editor, or if one compresses into one statement the several steps in the requisite process of analysis of the defence of fair comment.[567]

In *Cherneskey* the Court was adhering closely to previous decisions but, with respect to the majority, "it is a very pedestrian application of the previous case law and it has enormously threatening social implications."[568] The Supreme Court of Canada overlooked an "opportunity to enunciate a reasonable rule"[569] concerning the defence of fair comment as applied to letters to the editor. In order to rectify this

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[564] *Id.* at 1088-89, 24 N.R. at 289-90, [1978] 6 W.W.R. at 632, 7 C.C.L.T. at 86, 90 D.L.R. (3d) at 337-38.

[565] *Id.* at 1098, 24 N.R. at 301, [1978] 6 W.W.R. at 643, 7 C.C.L.T. at 97, 90 D.L.R. (3d) at 345. Dickson J. cited the recent British text of C. DUNCAN & B. NEILL, DEFAMATION (1978) as authority for his objective test.

[566] *Id.* at 1099, 24 N.R. at 302, [1978] 6 W.W.R. at 643, 7 C.C.L.T. at 98, 90 D.L.R. (3d) at 345.

[567] *Id.* at 1097-98, 24 N.R. at 300-01, [1978] 6 W.W.R. at 642, 7 C.C.L.T. at 96-97, 90 D.L.R. (3d) at 344-45.

[568] Williams, *Defamation*, in 2 ALBERTA LAW FOR THE 80's 177, at 190-91 (Legal Education Soc'y of Alberta 1979). *See also* Whitelaw, *Libel Law: The Press Takes a Hard Left Hook*, 3 CAN. LAWYER 12 (1979).

[569] Williams, *id.* at 193.

problem in the present state of the law, therefore, statutory changes are needed in each province's libel and slander legislation.[570]

In contrast to *Cherneskey* was *Masters v. Fox*,[571] where the British Columbia Supreme Court seemed to have a different view of the role of the press. Two of the defendants, a newspaper editor and owner, had published a letter written by the third defendant Fox stating that the plaintiffs, who were running for municipal office, were doing so "to con the people into believing they are concerned with local issues and the orderly progress of the community — when in point of fact they are much more interested in spreading their particular brand of political venom — all of it under the guise of community interest . . . ".[572] The defendants' argument concerning fair comment failed because the alleged opinion was found to be a statement of fact which was false. The issue of malice was therefore irrelevant, but the court did comment that the paper was not motivated by malice because it was merely providing a forum for the public "to let off steam."[573] There was no suggestion in this case that the newspaper had to have an honest belief in the opinion expressed.

In *Stopforth v. Goyer*[574] the Ontario Court of Appeal similarly seemed to be moving towards greater freedom of the press to comment on public officials. The defendant, the Minister of Supply and Services, had commented to the press outside the House of Commons: "I do not believe that ministerial responsibility extends to cases of misrepresentation or gross negligence", referring to the plaintiff, a senior civil

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[570] The *Cherneskey* decision led the Ontario and Alberta Law Reform Commissions to recommend to the 1979 Uniform Law Conference the following change in existing defamation legislation:

> 8.1 Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant or the person who expressed the opinion or both, did not hold the opinion, if a person could honestly hold the opinion.

THE RULE IN CHERNESKEY 9 (Institute of Law Research 1979). Note that this amendment adopts Dickson J.'s "objective" test of fair comment. There was some concern at the Conference that this change would allow publishers to print letters which they knew did not contain the honest opinions of the writers. Therefore, a slight variation was made in the amendment:

> 8.1 (1) Where the defendant published alleged defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant did not hold the opinion if,
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> (a) the defendant did not know that the person expressing the opinion did not hold the opinion;
>
> and
>
> (b) a person could honestly hold the opinion
>
> (2) For the purposes of this section, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.

Id. at 10.

[571] 85 D.L.R. (3d) 64 (B.C.S.C. 1978).

[572] *Id.* at 65.

[573] *Id.* at 74.

[574] 23 O.R. (2d) 696, 8 C.C.L.T. 172, 97 D.L.R. (3d) 369 (C.A. 1979).

servant. The civil servant won his action for libel at trial,[575] when the judge refused to give effect to the defence of qualified privilege. Prerequisites for a successful invocation of the defence of qualified privilege are that the person making the alleged libellous statement had a duty to say what he did and that the recipient had a reciprocal duty to receive the information. In this instance the trial judge found that the defendant, having already made his views known in the House, added nothing by speaking to the press; moreover, the defendant also did not prove that the press had a reciprocal duty to listen.

The Minister's appeal was allowed by the Court of Appeal, where Jessup J.A. stated: "[T]he electorate, as represented by the media, has a real and *bona fide* interest in the demotion of a senior civil servant for an alleged dereliction of duty. . . . The appellant had a corresponding public duty and interest in satisfying that interest in the electorate."[576] With respect, this is in direct conflict with previous decisions on the point.[577] Jessup J.A. implied that there was a duty on the public, as represented by the media, to hear the information and that, therefore, the defence of qualified privilege extended to the news media. However, the news media has no actual *duty* to disseminate information any more than the public has a duty to hear it; the newspaper has only a *right* to comment. The press consequently should not claim to represent the public. This *obiter* of Mr. Justice Jessup, however, may relieve the press of some liability for defamation in this area and allow for freer commentary on public officials.

Another case concerning qualified privilege was *McLoughlin v. Kutasy*[578] in which the majority of the Supreme Court of Canada reversed the jury's finding of malice at trial. The plaintiff claimed that the company doctor's report evaluating him as a prospective employee was libellous in that it referred to him as having a "psychopathic personality". The defence of qualified privilege failed at trial because the jury found malice on the part of the doctor as a result of an earlier negative encounter with the plaintiff. The Supreme Court of Canada affirmed the Court of Appeal's reversal of this finding. Mr. Justice Spence, writing for the dissenting minority, held that there was some evidence on which the jurors could have found malice and that "deference and full weight"[579] should be given to a jury verdict. Since defamation actions must be tried by a jury, the minority felt that the jury's decision had to be respected.

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[575] 20 O.R. (2d) 262, 4 C.C.L.T. 265, 87 D.L.R. (3d) 373 (H.C. 1978).

[576] *Supra* note 574, at 699-700, 8 C.C.L.T. at 178, 97 D.L.R. (3d) at 372.

[577] *See* Banks v. Globe & Mail Ltd., [1961] S.C.R. 474, 28 D.L.R. (3d) 343; Globe & Mail Ltd. v. Boland, [1960] S.C.R. 203, 22 D.L.R. (2d) 277; Jones v. Bennett, [1969] S.C.R. 277, 66 W.W.R. 419, 12 D.L.R. (3d) 291 (1968). *See also* Williams, *Annotation*, 8 C.C.L.T. 173 (1979).

[578] [1979] 2 S.C.R. 311, 26 N.R. 242, 8 C.C.L.T. 105, 97 D.L.R. (3d) 620.

[579] *Id.* at 314, 26 N.R. at 252, 8 C.C.L.T. at 115, 97 D.L.R. (3d) at 628.

In *Davies & Davies Ltd. v. Kott*,[580] the Supreme Court of Canada once again reversed a trial jury's finding, but this time because the judge had left the question of malice in respect of the defence of qualified privilege[581] with the jury when he should not have done so. The trial judge must be satisfied that there is not only some evidence of malice, but a probability of malice, before the question can be left with the jury. The defence of qualified privilege raises a presumption against malice and therefore more than *some* evidence must be found. "The presumption would be meaningless if the merest scintilla of evidence would suffice to displace it."[582] If an error of law is the reason why the jury's finding was overturned then the Supreme Court was justified in its action. However, one writer has suggested that "at the root of the Supreme Court's decision was its opinion that the jury's decision was sufficiently unreasonable to warrant its reversal. . . . To argue that there was not sufficient evidence for a reasonable jury to [find malice] was effectively to conclude that the *Davies* jury had acted contrary to the weight of the evidence."[583]

In the widely publicized case of *Vander Zalm v. Times Publishers*,[584] the British Columbia Minister of Human Resources was depicted in a political cartoon as "gleefully" plucking the wings from flies. He sued for defamation against the artist, editor and publisher of the newspaper and won at the trial level[585] because the judge held that the defence of fair comment was unavailable.

On appeal, this finding was reversed. Nemetz C.J. held that the trial judge had applied the wrong test as to whether a comment is "fair". The true test was not whether the jury agreed with the comment, but whether it was "honestly held by the writer". In this instance, the cartoonist honestly held the view that at times the Minister had acted cruelly and thoughtlessly. *Quaere* whether the opinion was also honestly held by the newspaper which published it? None of the appeal judges raised the point, but if *Cherneskey* is taken to be good law, which it obviously is, then the newspaper must also have an honest belief in the opinion expressed in order to rely on the defence of fair comment.

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[580] [1979] 2 S.C.R. 686, 27 N.R. 181, 9 C.C.L.T. 249, 98 D.L.R. (3d) 591.

[581] For further cases on the defence of qualified privilege, *see* Hanly v. Pisces Prods. Inc., [1981] 1 W.W.R. 369 (B.C.S.C. 1980); Upton v. Better Business Bureau of the Mainland of British Columbia, 23 B.C.L.R. 228, 114 D.L.R. (3d) 750 (S.C. 1980). For cases concerning the defence of absolute privilege, *see* Stark v. Auerbach, [1979] 3 W.W.R. 563, 11 B.C.L.R. 355, 98 D.L.R. (3d) 583 (S.C.); Voratovic v. Law Soc'y of Upper Can., 20 O.R. (2d) 214, 87 D.L.R. (3d) 140 (H.C. 1978).

[582] *Supra* note 580, at 694, 27 N.R. at 188, 9 C.C.L.T. at 257, 98 D.L.R. (3d) at 596.

[583] *See* Klar, *Developments in Tort Law*, *supra* note 559, at 345.

[584] [1980] 4 W.W.R. 259, 18 B.C.L.R. 210, 12 C.C.L.T. 81, 109 D.L.R. (3d) 531 (C.A.). For discussion of the appeal decision, *see* Williams, *Case Comment: Vander Zalm v. Times Publishers*, 12 C.C.L.T 119 (1980).

[585] [1979] 2 W.W.R. 673, 8 C.C.L.T. 144, 96 D.L.R. (3d) 172 (B.C.S.C.).

At the appeal level only one justice, Aikins J.A., found no defamation at all.[586] In his opinion, the law of defamation applied equally well to political cartoons but it is simply more difficult to ascertain the meaning conveyed. Everyone understands that a political cartoon is satire and therefore cannot be viewed in a "vacuum". Aikins J.A. contended that the ordinary man knows that political cartoons are not to be taken literally. Since this more liberal view was not held by the other justices at either the trial or the appeal levels, cartoons will still be judged by the harsh rules which apply to all publications.

The case of *Lougheed v. C.B.C.*[587] raised considerable interest not only because the premier of Alberta was involved, but also because it was a "rare display of judicial recognition of the unique character of the medium [of film] in the field of defamation".[588] The decision concerned the obscure but important point as to how detailed pleadings must be.[589] Premier Lougheed sued the C.B.C. for alleged defamatory statements contained in a television play entitled "The Tar Sands", in which the Premier was represented under his own name. Lougheed claimed the film portrayed him as being inept, irresolute, outsmarted by corporations and so on. His pleadings, however, did not detail which parts of the play were defamatory but rather claimed the whole presentation to be libellous.

Clement J.A. of the Alberta Court of Appeal held that the particulars in the statement of claim were not sufficient for the C.B.C. to be able to prepare a thorough defence. Lieberman J.A. reiterated that the pleadings were crucial in a defamation case but went on to say that television has a unique character and the particulars must reflect that fact.

In *Burnett v. The Queen*,[590] another case involving the C.B.C., the plaintiff claimed he was defamed in the television documentary "Connections". Part of his statement of claim requested: (1) a declaration that he had never been involved in laundering money for organized crime; and (2) a full retraction. O'Driscoll J. of the Ontario High Court struck out this latter part. The Ontario Libel and Slander Act[591] provides only for damages, not for a retraction. Section 5(2)(*d*) mentions a retraction, but merely as an action the defendant can take voluntarily to mitigate damages. Therefore, although a retraction would appear to be the most effective remedy in a defamation action, no court has yet ordered it for a successful plaintiff.[592]

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[586] *Supra* note 584, at 286, 18 B.C.L.R. at 236, 12 C.C.L.T. at 116, 109 D.L.R. (3d) at 557.

[587] 15 A.R. 201, [1979] 3 W.W.R. 334, 8 C.C.L.T. 120, 98 D.L.R. (3d) 264 (C.A.). For discussion of the case at the trial level, *see* Williams, *Annotation*, 4 C.C.L.T. 289 (1978).

[588] Evans, *Defamation in Broadcasting*, 5 DALHOUSIE L.J. 659, at 663 (1979).

[589] *See also* Paquette v. Cruji, 26 O.R. (2d) 294, 12 C.P.C. 177, 103 D.L.R. (3d) 141 (H.C. 1979) (a plaintiff cannot be deprived of his action where the particulars are not within his knowledge).

[590] 23 O.R. (2d) 109, 94 D.L.R. (3d) 281 (H.C. 1979).

[591] R.S.O. 1970, c. 243, s. 5(2); *now* R.S.O. 1980, c. 237, s. 5(2).

[592] For further discussion of the "remedy" of retraction, *see* Fleming, *Retraction and Reply: Alternative Remedies for Defamation*, 12 U.B.C.L. REV. 15 (1978).

Two conflicting cases concerning capacity to sue were decided during the survey period.[593] In *City of Prince George v. British Columbia Television System Ltd.*[594] the municipality sued a television station for an alleged defamatory statement accusing city council members of being corrupt and inept. The issue before the British Columbia Court of Appeal was whether the city had the capacity to bring suit in the first place. The court held that section 15 of the British Columbia Interpretation Act[595] allowed the city to sue in its corporate name for any harm except assault. The action was therefore allowed, even though the comments were made about the council members, not about the city itself.[596]

The opposite conclusion was reached in *Church of Scientology of Toronto v. Globe & Mail Ltd.*[597] The alleged defamation occurred in an article stating that the College of Physicians and Surgeons of Ontario was worried that members of the Church were practising medicine without a license. As a non-profit corporation, the Church of Scientology had the capacity to bring a suit if its reputation were impaired. However, the Ontario High Court held that "[a] corporation cannot maintain an action of libel for words which reflect not upon itself but solely upon its individual officers or members. . . ."[598] The court found that the words complained of did not refer to the Church but to its members, and therefore the officers had to bring the action themselves.

Admittedly, where a non-human plaintiff is concerned, it is often difficult to ascertain whether any particular statement is directed towards the organization or its constituent members. However, there seems to be a definite conflict between the *Prince George* and *Church of Scientology* cases.

XII. NUISANCE

A. *Basis of Liability*

It is generally accepted that the tort of nuisance is a civil wrong resulting in an "interference of a direct or consequential nature with the use and enjoyment of land by the occupier thereof".[599] In the period

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[593] *See also* Seafarers Int'l Union of Can. v. Lawrence, 21 O.R. (2d) 819, 92 D.L.R. (3d) 116 (Div'l Ct. 1978).

[594] [1979] 2 W.W.R. 404, 10 M.P.L.R. 24, 9 C.P.C. 49, 95 D.L.R. (3d) 577 (B.C.C.A.). *See also* McLaren, *supra* note 559, at 125-26.

[595] S.B.C. 1974, c. 42.

[596] It is crucial in a defamation action to identify the person or legal entity being defamed. *See, e.g.*, Halprin v. Sun Publishing Co., [1978] 4 W.W.R. 685 (B.C.S.C.); Mouammar v. Bruner, 19 O.R. (2d) 59, 84 D.L.R. (3d) 121 (H.C. 1978).

[597] 19 O.R. (2d) 62, 84 D.L.R. (3d) 239 (H.C. 1978).

[598] *Id.* at 65, 84 D.L.R. (3d) at 242.

[599] *Supra* note 2, at 17-1.

under review, several significant cases arose which expanded the basis of liability in nuisance.[600]

Nor-Video Services Ltd. v. Ontario Hydro[601] is noteworthy since, unlike the situation in most nuisance cases, the interest interfered with and the resulting harm were not "of a physical nature to land or tangible property nor . . . personal discomfort, annoyance or inconvenience".[602] The defendant utility company located an electrical power facility very close to the plaintiff's cable television station. The resulting interference with reception and transmission of broadcasts forced the plaintiff to stop supplying the signals of one television station to its subscribers. The Ontario High Court stated that television reception is of high social utility, particularly in remote communities, and is an interest worthy of protection. "The category of interests covered by the tort of nuisance ought not to be and need not be closed . . . to new or changing developments associated . . . with normal usage and enjoyment of land."[603] The court found that the plaintiff's use of its property was not of such a delicate or abnormally sensitive nature as to render the interference or resulting injury non-actionable in nuisance. On the contrary, an ability to use or enjoy property to the same extent as was possible before the interference, or to put it to its full business use, is a right that is entitled to the same protection and preservation as a tangible, physical interference with a person's enjoyment of his property. Consequently interference with television reception was added to the list of activities which may form a basis of an action for nuisance.

A decision with more significant impact was handed down by the Supreme Court of Canada in *Pugliese v. National Capital Commission*.[604] In this case, the homes of over one hundred people were severely damaged when the water level below them was lowered substantially by contractors engaged by the Regional Municipality of Ottawa-Carleton to construct a collector sewer. Quantities of water greatly exceeding the daily maximum set by the Ontario Water Resources Act[605] were pumped from the ground to facilitate tunnelling operations. The abstraction of ground water in such quantities resulted in shifting and compression of the soil strata beneath the plaintiffs' properties and caused such damage as severe cracking of foundations, ceilings and fireplaces, sloping floors and shifting window and door frames. An application initially was made to Galligan J. pursuant to Rule 124 of the Ontario Rules of Practice to determine whether or not the facts alleged by the plaintiffs constituted a

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[600] For a useful review of the principles of liability in nuisance and a discussion of various types of actionable interference, *see* Muirhead v. Timbers Bros. Sand & Gravel Ltd., 3 C.C.L.T. 1 (Ont. H.C. 1977). *See also* Caplin v. Gill, 5 B.C.L.R. 115, 84 D.L.R. (3d) 765 (S.C. 1977).

[601] 19 O.R. (2d) 107, 4 C.C.L.T. 244, 84 D.L.R. (3d) 221 (H.C. 1978).

[602] *Id.* at 116, 4 C.C.L.T. at 254, 84 D.L.R. (3d) at 230.

[603] *Id.* at 117, 4 C.C.L.T. at 256, 84 D.L.R. (3d) at 232.

[604] *Supra* note 403.

[605] *Now* R.S.O. 1980, c. 361.

valid cause of action.[606] After giving the matter preliminary consideration, Mr. Justice Galligan exercised his discretion under section 35 of the Judicature Act[607] and referred the following question to the Ontario Court of Appeal:[608]

> Does an owner of land have a right to the support of water beneath his land, not flowing in a defined channel, and does such an owner have a right of action in negligence or nuisance or under *The Ontario Water Resources Act* . . . for any damage resulting from the abstraction of such water?[609]

The Court of Appeal decision was based primarily upon an examination of the English rule restated as recently as 1969 in *Langbrook Properties Ltd. v. Surrey County Council*.[610] The basic principle, as enunicated by Plowman J., is that "a man may abstract the water under this land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this may result in the abstraction of water percolating under the land of his neighbour and, thereby, cause him injury. In such circumstances . . . the damage is *damnum sine injuria*."[611] The Ontario Court of Appeal held that, in light of the English rule, a person does not have an *absolute* right to the support of water beneath his land not flowing in a defined channel, but a cause of action will arise if such abstraction of water results in interference amounting to actionable nuisance or negligence. It was further held that the pumping of water in excess of limits set by the Ontario Water Resources Act did not give rise to a cause of action.[612] The appeal decision, therefore, resolved that limits must be placed on the strict application of the English rule in order to alleviate injustice that may result.[613]

On appeal to the Supreme Court of Canada the issue was narrowed further. Pigeon J., speaking for the Court, stated that he assumed the English rule to be a correct statement of the law but that the rule was rendered inoperative in Ontario by virtue of section 37 of the Water Resources Act of 1961.[614]

> Assuming that at common law no abstraction of subterranean water not flowing in a defined channel could be considered unreasonable no matter how damaging, this is no longer true in Ontario since 1961. . . . [T]he damage caused can no longer be said to be *damnum sine injuria*. . . . The statute has defined what is reasonable. . . . [A]ny pumping in violation of s. 37 is to be considered as a nuisance when causing damage to other properties.[615]

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[606] The trial judgment is reported at 15 O.R. (2d) 335 (H.C. 1977).

[607] *Now* R.S.O. 1980, c. 223, s. 34.

[608] *Supra* note 403.

[609] *Id.* at 132, 3 C.C.L.T. at 24, 79 D.L.R. (3d) at 596.

[610] [1969] 3 All E.R. 1424, [1970] 1 W.L.R. 161 (Ch. 1969).

[611] *Id.* at 1439-40, [1970] 1 W.L.R. at 178.

[612] *Supra* note 403, at 157-58, 3 C.C.L.T. at 56, 79 D.L.R. (3d) at 621.

[613] *Id.* at 151, 3 C.C.L.T. at 48, 79 D.L.R. (3d) at 615.

[614] *Supra* note 403, at 112, 25 N.R. at 505, 8 C.C.L.T. at 78, 97 D.L.R. (3d) at 636-37.

[615] *Id.* at 115, 25 N.R. at 508, 8 C.C.L.T. at 81, 97 D.L.R. (3d) at 639.

As has been pointed out by Ronald Lunau in his comment on this decision,[616] the Supreme Court of Canada's resolution of the issue leaves something to be desired. It appears that the English rule providing that a landowner has an absolute right to abstract ground water flowing in undefined channels has been left intact, save in Ontario, where the rule is altered by statute. Lunau suggests that the decision is disappointing in two respects. First, the section of the Ontario Act relied on by the Court does not support the construction attributed to it. The Act purports to regulate water resources and does not pretend to define a standard of care with respect to the rights and duties of landowners. Second, an interpretation of the decision would indicate that any pumping *within* the limits set by section 37 would appear to be reasonable and not give rise to a cause of action, regardless of the nature or extent of the resulting damage.[617] The decision of the Ontario Court of Appeal is much more satisfying as it considers whether or not the absolute English rule should be applied universally, regardless of resulting harshness. In holding that landowners have no *absolute* right of support but have the right not to be subjected to interference amounting to actionable negligence or nuisance,

> [t]he court . . . expressed the notion that the rights arising from the ownership of land have two aspects: a positive one — the right to act — and a negative one — the right to exclude unreasonable interference. The articulation of this notion works a significant development in defining the legal relationship between neighbouring landowners. . . .[618]

B. *Unreasonable Use*

The tort of private nuisance is said to be committed when the defendant is held to be responsible for an act or course of conduct which results in physical injury to land or substantial interference with the use or enjoyment of land and "where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable".[619] The determination of liability in nuisance "requires a balancing between the competing rights of landowners: just as one landowner has the right to exploit his land, his neighbours have the correlative right to be free from unreasonable interference with the enjoyment of their lands".[620] The task

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[616] *Abuse of Rights of Ownership of Land: A New Tort? National Capital Commission v. Pugliese*, 13 OTTAWA L. REV. 417 (1981).

[617] *Id.* at 422.

[618] *Id.* at 420.

[619] H. STREET, THE LAW OF TORTS 219 (6th ed. 1976). A quick perusal of some of the cases in this area reveals a blurring of the distinction between an "unreasonable use" and a "natural use" of land. *See, e.g., Bottoni, supra* note 510, where the top portion of an old tree snapped off during a windstorm and fell on the plaintiff's roof causing substantial damage. Steele J. stated, *id.* at 304, that there can be "no liability for nuisance where the use of property is a natural use such as the growing of a tree".

[620] *Supra* note 616, at 417.

that falls to the court, therefore, is to assess the degree of interference that is unreasonable in the circumstances. In *Royal Anne Hotel Co. v. Village of Ashcroft*,[621] the British Columbia Court of Appeal stated that where physical damage occurred, it was not difficult to decide that the interference was in fact unreasonable. The determination becomes more difficult where the physical injury suffered is minimal or non-existent due to the intangible nature (odours, noise, vibrations) of the interference. Factors to be taken into consideration by the court to assist in this determination include the frequency and duration of the disturbance, the character of the neighbourhood, the value of the interest sought to be protected and the social utility of the act complained of as weighed against the significance of the injury caused.

The decision in *O'Regan v. Bresson*[622] provides a good illustration of the application of such a test and the weighing of the respective proprietary rights of the adversaries. In this case the defendants, who lived next door to the plaintiff, trained and stabled horses in close proximity to the plaintiff's house. The plaintiff complained of numerous noises and odours, the constant traffic of horses past his house and the attraction of flies and rats to the manure and feed piles in the neighbouring barns. While the court found nothing unreasonable in most of the acts complained of, McLellan Cty. Ct. J. stated that the washing and grooming of the horses within fifty-seven feet of the plaintiff's door and the number of horses stabled in the nearby barn had "tipped the scales" in the plaintiff's favour. The increase in the number of horses kept and the consequential increase in objectionable factors associated with the horses rendered the defendants liable as "unreasonable users" of their property.[623]

The decision in *Pugliese*[624] is also consistent with the concept of "unreasonable user". The application of this case may be limited in the sense that in order for liability to ensue, it is still necessary to establish that the abstraction of ground water exceeded the quantity authorized by the Ontario Water Resources Act[625]. In this light, it is conceivable that only large-scale water removal operations will attract liability under the nuisance head of damages. As David Percy has pointed out in his annotation to this case, the repercussions of the *Pugliese* decision in the field of negligence liability may be far more momentous than in the area

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[621] [1979] 2 W.W.R. 462, 8 C.C.L.T. 179, 9 M.P.L.R. 176, 95 D.L.R. (3d) 756 (B.C.C.A.).

[622] 23 N.S.R. (2d) 587, 3 C.C.L.T. 214, 32 A.P.R. 587 (Cty. Ct. 1977).

[623] Another interesting aspect of this case was an action instituted on behalf of the infant son of the plaintiff claiming damages on the basis that his allergies and asthmatic condition had been brought about by contact with horse hair and horse dandruff. The action was dismissed, the court stating that his condition was due to an "abnormal sensitiveness". The mere fact that the defendants stabled and tended their horses in close proximity to the plaintiff's residence, thereby causing the infant to suffer from an unusual allergy, did not render the defendants liable in nuisance.

[624] *Supra* note 403.

[625] *Now* R.S.O. 1980, c. 361.

of nuisance. Since the limits of reasonable extraction of ground water have been defined by statute, "the recognition of negligence liability could affect many smaller projects, as a risk of harm can be created by many ground water schemes which do not amount to an unreasonable use of land."[626]

C. *Defence of Statutory Authority*

Throughout the period under review, the cases evidence a steady erosion of the defence of statutory authority. In *Temple v. City of Melville*[627] a water-main installed and maintained by the defendant municipality froze and broke, flooding the basement of the plaintiff's business premises. Dealing with the municipality's defence of statutory authority, Brownridge J.A. of the Saskatchewan Court of Appeal stated that in a private nuisance action,

> the onus on a defendant which relies on the defence of statutory authority is not met by merely showing that it was not negligent; it must go further and establish that the nuisance complained of was either expressly or impliedly authorized by the statute or was an inevitable consequence of the exercise of its statutory powers.[628]

In this case, the municipality was unable to discharge the heavy onus and was held liable.

In *Royal Anne Hotel Co.*[629] a sewer system constructed and operated by the municipality backed up as a result of a random blockage and damaged the plaintiff's property. Even though the municipality was not

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[626] Percy, *Annotation*, 3 C.C.L.T. 19, at 21 (1977). *See also* Ross v. The Queen in Right of The Province of Alberta, 25 A.R. 527, 13 Alta. L.R. (2d) 182, 113 D.L.R. (3d) 308 (Q.B. 1980).

[627] *Supra* note 213.

[628] *Id.* at 265, 11 C.C.L.T. at 113, 10 M.P.L.R. at 222, 105 D.L.R. (3d) at 311. However, as an illustration of the steady erosion of the defence of statutory authority, *see Assie*, *supra* note 468, where Brownridge, J.A., a year earlier, found the defendant utility company not liable after the plaintiff's cultivator was caught in sagging telephone wires and damaged. He stated in *obiter* that the defendant was entitled to succeed on the alternative basis of statutory authority. Agreeing with the trial judge's finding that the defendant had not been negligent, Brownridge J.A. cited with approval the words of Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, at 455-56 (H.L. 1878): "[I]t is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone. . . ."

[629] *Supra* note 621. *See also* Fairview & Leather Specialists Ltd. v. City of Dartmouth, 40 N.S.R. (2d) 313, 73 A.P.R. 313, 115 D.L.R. (3d) 364 (C.A. 1980), where the defence of statutory authority failed in a similar situation since there was no mandate in the statute to create a nuisance and the escape of water and sewage was not necessarily incidental to the operation of the system. Likewise in Wiebe v. Rural Municipality of De Salaberry, 11 C.C.L.T. 82 (Man. Q.B. 1979), the municipality's defences of statutory authority and overriding public benefit failed since the defendant failed to discharge the onus of showing that the nuisance was an inevitable consequence of the exercise of the statutory power.

negligent in the maintenance of the system and the system was adequate in all other respects, the plaintiff succeeded in his action. In order to sustain liability for nuisance, the interference with the plaintiff's land need not be accompanied by negligence.[630] The fact that the actions of the municipality had been authorized by statute afforded no defence since the municipality had not discharged the onus of showing that the nuisance was an inevitable consequence of what was authorized by the statute.[631] The municipality also raised in defence the fact that the sewer system was constructed and operated for the benefit of the public at large. The court dismissed this argument, stating that

> the mere fact that such conduct may be of great social utility . . . will not attract greater licence or immunity. There is no reason why a disproportionate share of the cost of such a beneficial service should be visited upon one member of the community by leaving him uncompensated for damage caused by the existence of that which benefits the community at large.[632]

XIII. BUSINESS TORTS

A. *Intimidation*

Many significant changes in the law relating to economic or business torts have occurred in the recent past. However, the tort of

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[630] *See also* Corkum v. Lohnes, 43 N.S.R. (2d) 477, 81 A.P.R. 477, 121 D.L.R. (3d) 761 (C.A. 1981). However, *see Guerard Furniture Co.*, *supra* note 213, where a toilet tank in the washroom of the second floor of the defendant's building sprang a leak and flooded the plaintiff's premises. Since the leak was due to a latent defect of which the defendant was unaware, the interference was not the result of any wrongful act or omission and the court found the defendant not liable in nuisance. For a possible resolution of the cases where liability in nuisance is strict and those where negligence must be shown, *see* McLaren, *Nuisance in Canada*, in STUDIES IN CANADIAN TORT LAW 320, at 334-37 (A. Linden ed. 1968). *See also* T.H. Critelli Ltd. v. Lincoln Trust & Savings Co., 20 O.R. (2d) 81, 4 C.C.L.T. 217, 86 D.L.R. (3d) 724 (H.C. 1978), where the defendant was held liable as an "unreasonable user" after constructing a nine story building immediately adjacent to and flush with the neighbouring wall of the plaintiff's two story building. The plaintiff was compensated in damages for the cost of reinforcing his roof to withstand the increased snowload caused by the projection of the defendant's roof. Since the plaintiff had constructed his building first taking all reasonable precautions, it was incumbent upon the defendant, who was aware of the potential danger to the plaintiff, to take steps to prevent the inevitable damage.

[631] Also, in *Nor-Video Services Ltd.*, *supra* note 601, the defendant was held liable since it was neither inevitable nor necessary that the plaintiff's television reception, and hence the enjoyment of his property to its full business use, should be so diminished. The fact that the Hydro company's actions were authorized by statute did not render the defendant immune from liability.

[632] *Supra* note 621, at 468, 8 C.C.L.T. at 187, 9 M.P.L.R. at 182, 95 D.L.R. (3d) at 761. With regard to liability under the head of public nuisance, *see* Blanchard v. Cormier, 25 N.B.R. (2d) 496, 51 A.P.R. 496 (Q.B. 1979), *aff'd* 30 N.B.R. (2d) 198, 70 A.P.R. 198 (C.A. 1980); Ross v. Wall, 14 C.C.L.T. 243, 114 D.L.R. (3d) 758 (B.C.C.A. 1980); Arm River Enterprises v. McIvor, 85 D.L.R. (3d) 758 (Sask. Q.B. 1978); *Trappa Holdings Ltd.*, *supra* note 430; *Assie*, *supra* note 468.

intimidation in particular has begun to evolve as a very effective means of redressing grievances of individuals against both government and big business. As has been pointed out most effectively by Professor Klar, tort law is possessed of an inherent flexibility which enables it to adjust to new situations. "Tort law has enormous potential to act as an important and effective tool in the hands of the private citizen to remedy abuse and injustice no matter how large or important the perpetrator of the injustice is."[633]

Mintuck v. Valley River Band No. 63A[634] provides a perfect illustration of this. The plaintiff was a treaty Indian who lived on the Valley River Band reserve. With the approval of the band council he had leased a sizeable farm and an additional plot of land from the Crown. Shortly after signing the lease for the additional land, the plaintiff began to experience acute difficulties in carrying on his farming operation. The second lot was situated almost two miles away from his original farm and he often found the only road between the properties blocked by vehicles. Consequently, he was unable to get the necessary farm equipment through. Stray cattle were often allowed to roam over his land and band members drove trucks over his farm, causing considerable damage to his crops. The plaintiff and his family were threatened with firearms. Harassment and interference with the plaintiff's farming operations with the aim of forcing him to abandon his rights to the new lease continued until the newly elected chief and band council passed a resolution terminating the plaintiff's lease. The court found the resolution cancelling the lease to be of no effect since the band council was not privy to the lease contract between the plaintiff and the federal Crown. The defendants were found guilty of the tort of intimidation.[635] The case is important since it establishes the existence of the tort of two-party intimidation in Canada, a principle which was previously anything but clear.

Another significant decision in this area is that of the Supreme Court of Canada in *Central Canada Potash Co. v. Government of Saskatchewan*.[636] The appellant was a potash producer in Saskatchewan. The potash industry had suffered from a depressed market as a result of overproduction and United States regulation, so that the Saskatchewan government set up a quota scheme to regulate production. The appellant objected to the operation of the scheme. Accordingly, a letter was sent to the appellant by the Deputy Minister of Mineral Resources outlining that the appellant's potash producing license would be cancelled and that the

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[633] Klar, *Annotation*, 2 C.C.L.T. 2, at 2 (1977).

[634] [1977] 2 W.W.R. 309, 2 C.C.L.T. 1, 75 D.L.R. (3d) 589 (Man. C.A.).

[635] Matas J.A. also ruled that the defendants were guilty of unlawful interference with Muntuck's economic interests.

[636] [1979] 1 S.C.R. 42, 23 N.R. 481, 6 C.C.L.T. 265, 88 D.L.R. (3d) 609 (1978), *rev'g* [1977] 1 W.W.R. 487, 79 D.L.R. (3d) 203 (Sask. C.A.), *rev'g* [1975] 5 W.W.R. 193, 57 D.L.R. (3d) 7 (Sask. Q.B.). *See* Klar, *Annotation*, 6 C.C.L.T. 266 (1979).

Department would recommend the cancellation of its subsurface mineral lease if it failed to comply. The appellant contended that its production of potash was reduced as a result of threats contained in this letter. It also contended that the regulations setting up the scheme were unlawful as *ultra vires* the provincial government and that the appellant had suffered lost profits as a result of being forced to comply. At trial, the appellant was awarded $1,500,000 in damages on the basis that since the directives relied on by the government were in fact *ultra vires*, the threats were unlawful and amounted to intimidation. In the Court of Appeal, however, this judgment was reversed. Culliton C.J.S. found that the scheme enacted was within provincial jurisdiction as a means of providing for the conservation, management and orderly development of the potash industry. The regulations were also upheld as they did not constitute an attempt to invade the field of trade and commerce. Consequently, the court found that a threat to do what could be done legally could not constitute a cause of action and the appeal was allowed. On appeal to the Supreme Court of Canada, the judgment of the Court on the issue of intimidation was delivered by Martland J.[637] Rather than basing his decision on the lawfulness of the threat, His Lordship chose instead to emphasize the element of reasonableness. In his opinion, if the "intimidator" held an honest and reasonable belief that his demands were lawful, his actions would not amount to intimidation. "[T]he tort of intimidation is not committed if a party to a contract asserts what he reasonably considers to be his contractual right. . . ."[638] Martland J. continued:

> I am also of the view that if the course of conduct which the person making the threat seeks to induce is that which the person threatened is obligated to follow, the tort of intimidation does not arise. . . .
>
> In the present case the *Potash Conservation Regulations, 1969* made under the *Mineral Resources Act* prohibited the appellant from exceeding a specified production of potash. By conforming to the requirements of the Regulations, the appellant would not suffer damage and, therefore, the claim for intimidation is not well founded.[639]

It follows from this reasoning that a finding that the regulations were *ultra vires* the Saskatchewan legislature would not necessitate a finding of intimidation since at the time the alleged threat was made, the legislation was unchallenged and the Deputy Minister was merely seeking to enforce conformity with legislation in accordance with his duty. Martland J. further propounded that the tort of intimidation is not committed unless the alleged intimidator intended to cause injury to the plaintiff. As there was no evidence that the Deputy Minister had such intention, the appeal failed.

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[637] Laskin C.J.C. wrote a separate judgment on the constitutional issue but adopted Martland J.'s reasons regarding the appellant's claim in tort.

[638] *Supra* note 636, at 88, 23 N.R. at 522-23, 6 C.C.L.T. at 307, 88 D.L.R. (3d) at 640.

[639] *Id. See also* Bendix Home Systems Ltd. v. Clayton, [1977] 5 W.W.R. 10 (B.C.S.C.).

B. *Inducing Breach of Contract*

In *Vale v. International Longshoremen's & Warehousemen's Union, Local 508*[640] the appellant was a loading master who, on instructions from his employer, assisted a partly loaded strike-bound vessel to leave the harbour. Because of pressure brought to bear on his employer by the union, the appellant was dismissed from his employment without notice. Although the appellant received in excess of $12,000 from his employer in settlement of an action for wrongful dismissal, the British Columbia Court of Appeal held the respondent union liable to pay $15,000 to Vale as compensation for the deprivation of his opportunity to pursue his chosen profession in his chosen location. At trial, the judge had awarded no damages against the union on the ground that the sum already received by the appellant had been sufficient compensation and damages could not be awarded twice. The Court of Appeal felt, however, that Vale had sustained loss in two different ways and that the sum received from his employer for summary dismissal without notice was not compensation for the loss occasioned by the union.

In *McLaren v. British Columbia Institute of Technology*[641] the plaintiff sought to amend his writ and statement of claim to include, *inter alia*, a claim that the defendant, his former employer, and certain of his co-workers had caused his dismissal by their negligence. The plaintiff purported to base this claim on the famous words of Lord MacMillan in *Donoghue v. Stevenson*[642] that "the categories of negligence are never closed." The court, however, refused to allow the amendment and held that no action would lie for negligent (as opposed to deliberate) conduct inducing breach of contract or interference with contractual relations.[643]

C. *Appropriation of Personality*

Only in recent years has the concept of appropriation of personality become separate and distinct from the tort of defamation[644] and from considerations of infringement of trademark and copyright. Although the cases in this area are few in number, they seem to evidence a trend on the part of the courts to recognize a proprietary right in a person's image or name and to compensate him for invasions of this right without the necessity of proving damage in the traditional tortious sense. Instead, damages are assessed by reference to the commercial value of the plaintiff's permission to market his personality. In all likelihood, this area will be one of great growth in the coming years.

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[640] [1979] 5 W.W.R. 231, 9 C.C.L.T. 262 (B.C.C.A.).

[641] *Supra* note 424.

[642] *Supra* note 224.

[643] *See also* Neyland v. Genstar Ltd., 76 D.L.R. (3d) 697 (B.C.S.C. 1977)

[644] *See* Krouse v. Chrysler Canada Ltd., 1 O.R. (2d) 225, 13 C.P.R. (2d) 28, 40 D.L.R. (3d) 15 (C.A. 1973).

The following two cases are of interest as illustrations of the expanding basis of liability under the emerging tort of appropriation of personality. In *Athans v. Canadian Adventure Camps Ltd.*[645] the plaintiff was a professional water-skier who had earned international recognition and who promoted his image and personality commercially. The first defendant operated a children's summer camp at which water-skiing was an important part of the program. The camp commissioned a promotional brochure from the second defendant, a public relations firm. This brochure incorporated a graphic representation of a water-skier in action based on a photograph which portrayed the plaintiff in a pose and setting identifiable with him personally and which the plaintiff used for his own promotion purposes. The photograph was described by one witness as the most famous water-skiing picture in the world. Although the defendant claimed that the line drawing was not intended to be a representation of a particular person, the court found, on the basis of the evidence, that the graphic representation was identifiable as the plaintiff by members of the public who were knowledgeable about the sport. The plaintiff sued, *inter alia*, for wrongful appropriation of his personality. The Ontario High Court held that the plaintiff had a "proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitled him to protect that right if it is invaded".[646] The plaintiff was awarded $500 in damages for the commercial use of his representational image by the defendants without his consent.

In *Racine v. C.J.R.C. Radio Capitale Ltée.*[647] the plaintiff sought damages from the defendant radio station for the advantage gained from the use of his name and reputation. The plaintiff, a former professional football player, was retained by the defendant as part of a broadcast team for play-by-play descriptions of football games. After only three games, however, the plaintiff's employment was terminated for reasons which were unclear.[648] The court accepted the plaintiff's evidence regarding the extent to which the defendant radio station enjoyed an improvement in sales and popularity flowing from its use of the plaintiff's personality and awarded $850 in damages under this head of liability.

D. *Unlawful Interference with Economic Relations*

Although the tort of unlawful interference with economic interests is one of "uncertain ambit",[649] it is one that has received increased attention in recent years. In *Spicer v. Volkswagen Canada Ltd.*[650] the

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[645] 4 C.C.L.T. 20, 80 D.L.R. (3d) 583 (Ont. H.C. 1977).

[646] *Id.* at 30, 80 D.L.R. (3d) at 592.

[647] 17 O.R. (2d) 370, 80 D.L.R. (3d) 441 (Cty. Ct. 1977).

[648] In the same action, Racine was awarded damages for wrongful dismissal.

[649] CLERK AND LINDSELL ON TORTS, para. 808 (14th ed. A. Armitage & R. Dias 1975).

[650] 28 N.S.R. (2d) 496, 43 A.P.R. 496, 91 D.L.R. (3d) 42 (C.A. 1978).

court applied this rather nebulous doctrine and found the appellant liable in damages for its actions in instructing the respondent's bank not to honour cheques over $1,000 that had not been signed by its nominee. The respondent carried on the business of a Volkswagen dealership under a franchise agreement with the appellant. The by-laws of the franchisee's company required that a change in cheque signing procedure be authorized by the board of directors. This was not done and the court found that the appellant's actions amounted to a deliberate and unlawful interference with the conduct of business of the company and that the adversely affected shareholders of the respondent were entitled to damages.[651]

The potential for growth under this form of action has been assessed by Professor Klar:

> It is both useful and confusing to have a residual action — a tort of "uncertain ambit". It is useful because, where all else fails, there is something to fall back onto. It permits the law of torts to expand as far as the courts wish it to. It is confusing because it tends to cloud the nominate torts. Why have specific nominate torts when you can lump practically all of the factual situations into a tort of unlawfully interfering with economic interests? Is that, after all, not the gist of every action in the area of the economic torts?
>
> Aside from the uncertainties, there can be no doubt that this area is ripe for future actions. The potential of these torts for policing unlawful economic activities seems at this point to be unlimited.[652]

XIV. Tort of Discrimination

The tort of discrimination was established as a common law remedy — distinct from a complaint of discrimination under section 13 of the Ontario Human Rights Code[653] — during the survey period[654] but was unfortunately eradicated on appeal to the Supreme Court of Canada.[655] Following the Ontario Court of Appeal's decision in *Bhadauria v. Board of Governors of Seneca College of Applied Arts & Technology*,[656] Professor Gibson stated: "Given sympathetic and intelligent care and

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[651] *See also* British Columbia Ferry Corp. v. Telecommunications Workers' Union, 16 B.C.L.R. 160, 105 D.L.R. (3d) 360 (S.C. 1979).

[652] Klar, *supra* note 633, at 7. For cases during the survey period dealing with deceit and fraudulent misrepresentation, *see* Sorenson v. Kaye Holdings Ltd., 14 B.C.L.R. 204, [1979] 6 W.W.R. 193 (C.A. 1979); C.R.F. Holdings Ltd. v. Fundy Chemical, 21 B.C.L.R. 345, 14 C.C.L.T. 87 (S.C. 1980); Hyndman v. Jenkins, 29 Nfld. & P.E.I.R. 331, 82 A.P.R. 331, 16 C.C.L.T. 296 (P.E.I.S.C. 1981); Thompson v. Sharpe, 2 C.C.L.T. 134, 77 D.L.R. (3d) 55 (Ont. C.A. 1977); *Sodd Corp.*, *supra* note 440.

[653] *Now* R.S.O. 1980, c. 340.

[654] Bhadauria v. Board of Governors of Seneca College of Applied Arts & Technology, 27 O.R. (2d) 142, 105 D.L.R. (3d) 707 (C.A. 1979).

[655] 37 N.R. 455, 124 D.L.R. (3d) 193 (S.C.C. 1981).

[656] *Supra* note 654.

nourishment by future Courts, the infant tort of discrimination can grow to productive adulthood."[657] After discussing the Supreme Court of Canada's decision, Professor Hunter had the following to say: "Alas, it was not to be; the Supreme Court of Canada's attitude was more akin to that of abortionist than midwife."[658] Victims of discrimination are now relegated to the sole remedy of an inquiry under the Ontario Human Rights Code.

In *Bhadauria*, the plaintiff, an East Indian woman, applied for ten teaching positions at Seneca College but was not even granted an interview, although she was highly qualified. Instead of making a complaint under the Ontario Human Rights Code which would have resulted in an investigation and the possibility of a settlement, she claimed damages for the common law tort of discrimination. The defendant applied to have the plaintiff's statement of claim struck out as disclosing no reasonable cause of action. The application was granted by Mr. Justice Callaghan[659] who indicated that he was following the judgment in *MacDonald v. 283076 Ontario Inc.*,[660] which held that there was no civil cause of action in cases of discrimination because the Ontario Human Rights Code established a comprehensive scheme for dealing with the problem. On appeal, the trial judgment in *MacDonald* was overturned[661] because the judge had misconstrued the issue; thus the trial judgment in *Bhadauria* was undermined.

Madame Justice Wilson for the unanimous Court of Appeal in *Bhadauria* noted that there were actually two causes of action involved in the case: (1) a common law action for the tort of discrimination; and (2) breach of the statutory duty not to discriminate. Dealing with the common law remedy, Wilson J.A. (as she then was) canvassed the authorities which *prima facie* stand for the proposition that there is no common law action for discrimination.[662] These cases were found to be of little aid, however, since they all involved hotels, theatres or restaurants and the consequential right to the service being provided to other members of the public. Madame Justice Wilson, after considering cases such as *Re Drummond Wren*,[663] found a general public policy evidencing a repugnance toward discrimination. This public policy could also be seen in the preamble to the Ontario Human Rights Code:

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[657] Gibson, *The New Tort of Discrimination: A Blessed Event for the Great-Grandmother of Torts*, 11 C.C.L.T. 141, at 150 (1980).

[658] Hunter, *The Stillborn Tort of Discrimination*, 14 OTTAWA L. REV. 219, at 224 (1982). For a pre-*Bhadauria* but still useful discussion of the tort of discrimination, *see* Hunter, *Civil Action for Discrimination*, 55 CAN. B. REV. 106 (1977).

[659] *Supra* note 654, at 144, 105 D.L.R. (3d) at 709.

[660] 23 O.R. (2d) 185, 95 D.L.R. (3d) 723 (H.C. 1979).

[661] 26 O.R. (2d) 1, 102 D.L.R. (3d) 383 (C.A. 1979).

[662] Christie v. York Corp.,[1940] S.C.R. 139, [1940] 1 D.L.R. 81 (1939); Rogers v. Clarence Hotel, [1940] 2 W.W.R. 545, [1940] 3 D.L.R. 583 (B.C.C.A.).

[663] [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.).

> I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights. If we accept that "every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin", as we do, then it is appropriate that these rights receive the full protection of the common law. The plaintiff has a right not to be discriminated against because of her ethnic origin and alleges that she has been injured in the exercise or enjoyment of it. If she can establish that, then the common law . . . afford[s] her a remedy.[664]

In other words, if there is a right, there must be a corresponding remedy.[665]

As for the Code, it did not exclude a common law remedy, according to the Court of Appeal; rather, it supported the proposition of such a remedy because the appointment of a board of inquiry to investigate a complaint was a matter of ministerial discretion.

The Court of Appeal decision was followed by the Ontario High Court in *Aziz v. Adamson*.[666] Linden J. clearly believed that the common law remedy did not depend on the human rights legislation.[667]

Chief Justice Laskin, speaking for the Supreme Court of Canada, reversed the findings of Madame Justice Wilson on the ground that the provisions of the Code were comprehensive. After delineating the investigatory scheme set up for complaints concerning discrimination, Laskin C.J.C. stated that the comprehensiveness of the Code was "obvious" and the fact that the Minister could, in his discretion, refuse to appoint a board of inquiry did not support the contention that the Code allowed a civil cause of action.[668]

After briefly mentioning the fact that *Re Noble & Wolf*[669] in the Ontario Court of Appeal took a different view of public policy than the court did in *Re Drummond Wren*, Laskin C.J.C. stated:

> The view taken by the Ontario Court of Appeal [in *Bhadauria*] is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the Courts but rather makes them part of the enforcement machinery under the *Code*.

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[664] *Supra* note 654, at 150, 105 D.L.R. (3d) at 715.

[665] Wilson J.A., as she then was, relied on Ashby v. White, 2 Ld. Raym. 938, 92 E.R. 126 (K.B. 1703) in support of this proposition.

[666] *Supra* note 541. *See also* McIntyre v. University of Manitoba, [1980] 6 W.W.R. 440, 113 D.L.R. (3d) 112 (Man. Q.B.).

[667] *Id.* at 138.

[668] *Supra* note 655, at 462, 124 D.L.R. (3d) at 198.

[669] [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A. 1949), *rev'd sub nom.* Noble and Wolf v. Alley, [1951] S.C.R. 64, [1951] 1 D.L.R. 321 (1950). At the Court of Appeal level, it was held that the covenant in the conveyance in question was not contrary to public policy because it was not oppressive to the public interest. At the Supreme Court of Canada the covenant was found to be void for uncertainty, the Court made no pronouncement on public policy.

> For the foregoing reasons, I would hold that not only does the *Code* foreclose any civil action based directly on a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the *Code*. The *Code* itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.[670]

The Court offered little support for the proposition that the Code subsumed the common law remedy for discrimination, except for the ground that the Code was comprehensive.

The Supreme Court of Canada's decision was definitely unsatisfactory because of the ways in which it dealt with both the law and public policy. For instance, it is an established principle of statutory interpretation that statutes only derogate from the common law to the extent that they do so expressly. The Ontario Human Rights Code does not expressly preclude a civil remedy for discrimination; the board of inquiry only has exclusive jurisdiction once a complaint has been filed. Moreover, the existence of a statutory remedy does not limit the possibility of bringing a common law action, as the Supreme Court of Canada itself held in *Jordan House Ltd. v. Menow*.[671] As things stand, victims of discrimination no longer have a choice of remedies.[672]

XV. Damages for Personal Injury and Death[673]

The computation of the quantum of a damage award has traditionally been a most troublesome task for the courts. The judiciary in the various provincial jurisdictions has long struggled with the problem and the divergence of approach in various regions, which has resulted in a serious lack of uniformity. "[T]he fortuitous appeal of four high award cases to the Supreme Court of Canada, almost simultaneously, all of which involved important and difficult questions of law, provided the Supreme Court of Canada with a perfect opportunity to satisfy the need for guidance."[674] It was with gratitude, therefore, that the infamous

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[670] *Supra* note 655, at 467, 124 D.L.R. (3d) at 203.

[671] [1974] S.C.R. 239, 38 D.L.R. (3d) 105 (1973).

[672] For these and further criticisms of the Supreme Court of Canada's judgment, *see* Hunter, *The Stillborn Tort of Discrimination*, *supra* note 658.

[673] A recent and very comprehensive book on this subject is K. Cooper-Stephenson & I. Saunders, Personal Injury Damages in Canada (1981).

[674] Charles, *A New Handbook on the Assessment of Damages in Personal Injury Cases from the Supreme Court of Canada*, 3 C.C.L.T. 344 (1977-78). Also of interest are: Braniff & Pratt, *Tragedy in the Supreme Court of Canada: New Developments in the Assessment of Damages for Personal Injuries*, 37 U. Toronto Fac. L. Rev. 1 (1979); Bissett-Johnson, *Damages for Personal Injuries — The Supreme Court Speaks*, 24 McGill L.J. 316 (1978); Feldman & McNair, *General Damages in Personal Injury Suits: The Supreme Court's Trilogy*, 28 U. Toronto L.J. 381 (1978); McLachlin, *What Price Disability? A Perspective on the Law of Damages for Personal Injury*, 59 Can. B. Rev. 1 (1981).

trilogy of personal injury cases (namely *Andrews v. Grand & Toy Alberta Ltd.*,[675] *Arnold v. Teno*[676] and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*[677]) followed by *Keizer v. Hanna*,[678] which involved a fatal accident, were embraced by bench and bar alike. "Whether the Supreme Court's efforts are more accurately described as providing a 'Handbook' of new rules or merely 'an effort to eliminate some of the dark crannies of the law' ",[679] the result of this series of cases has been to make the law of damages the target of serious study and to encourage uniformity in approach. The guidance provided by these important cases and subsequent damage cases which "fine-tuned" many of the principles enunciated has made the quantification of damages much less a matter of making awards on the basis of common sense or of a "gut reaction" than previously. "[I]t is no longer acceptable . . . to quantify damages on the basis of so many dollars for such-and-such a type of injury, in the light of 'experience', 'judgment', or a 'feeling for what is right'. Damages must now be carefully calculated in as scientific a manner as possible, having regard to the plaintiff's socio-economic circumstances."[680] Because of the extent of the "renovations" to the law in this area during the period which is the focus of this survey and the multitude of reported cases, this section will highlight the major developments on a thematic rather than case-by-case basis.

A. *General Principles*

It is clear that the plaintiff's claim must be reasonable,[681] but "[p]roviding the plaintiff can legitimately prove his loss and his future needs, the court will not be deterred by the largeness of the amount required to compensate for the loss and the financial effect on the defendant or his ability to pay."[682] Generally, damage awards should not purport to punish the defendant, nor should they be influenced by sympathy for the victim. "An assessment must be neither punitive nor influenced by sentimentality. It is largely an exercise of business judgment."[683] A similar statement may be found in *Andrews*: "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

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[675] [1978] 2 S.C.R. 229, 19 N.R. 50, 83 D.L.R. (3d) 452.

[676] *Supra* note 204.

[677] [1978] 2 S.C.R. 267, 19 N.R. 552, 83 D.L.R. (3d) 480.

[678] *Supra* note 541.

[679] Charles, *The Supreme Court of Canada Handbook on Assessment of Damages in Personal Injury Cases*, 18 C.C.L.T. 1, at 6 (1981).

[680] *Supra* note 673, at preface.

[681] *See, e.g., Andrews*, *supra* note 675, at 242, 19 N.R. at 62, 83 D.L.R. (3d) at 462.

[682] Charles, *supra* note 674, at 351.

[683] *Supra* note 541, at 351, 19 N.R. at 216, 82 D.L.R. (3d) at 462.

of the injured person. What is being sought is compensation, not retribution.''[684]

Quantum of compensation is assessed according to the ''actuarial'' method which ''requires the computation of a lump sum to furnish a certain annual sum over a certain period of years, at the end of which the lump sum is exhausted''.[685] This approach was approved in *Keizer*: ''[T]he Court is faced with the task of determining the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process.''[686]

In fatal accident cases, compensation for *pecuniary* loss is the guiding principle.[687] The aim is to restore the dependant to the financial position he or she would have occupied had the death not occurred. This was most recently re-emphasized by the Supreme Court of Canada in *Keizer*,[688] where de Grandpré J. stated: ''Under the *Fatal Accidents Act*,[689] what must be determined is the pecuniary benefit lost by the plaintiff because of the untimely death of the deceased. . . .''[690]

A damage award in fatal accident cases, in the words of Dickson J.,

> must be neither punitive nor influenced by sentimentality. . . . The question is whether a stated amount of capital will provide, during the period in question, having regard to contingencies tending to increase or decrease the award, a monthly sum at least equal to that which might reasonably have been expected during the continued life of the deceased.[691]

B. *Itemization Approach*

During the survey period, the formerly accepted practice of awarding a ''global'' sum of damages to cover all pecuniary loss was abandoned in favour of the more accurate ''itemization'' approach. In *Andrews*, Dickson J. stated:

> The method of assessing damages in separate amounts . . . 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

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[684] *Supra* note 675, at 242, 19 N.R. at 62, 83 D.L.R. (3d) at 462.

[685] *Supra* note 673, at 411. However, *see Kwong*, *supra* note 230, where the ''multiplier'' approach was adopted.

[686] *Supra* note 541, at 352, 19 N.R. at 217, 82 D.L.R. (3d) at 462.

[687] However, Alberta is unique in this respect since s. 8(2) of the Fatal Accidents Act, R.S.A. 1980, c. F-5, s. 8(2) [en. S.A. 1978, c. 35, s. 11(*c*)] provides a statutory scheme for awarding damages for bereavement.

[688] *Supra* note 541.

[689] R.S.O. 1970, c. 164, *repealed by* The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 79, *now* R.S.O. 1980, c. 152.

[690] *Supra* note 541, at 371, 19 N.R. at 235, 82 D.L.R. (3d) at 467 (footnote added).

[691] *Id.* at 351, 19 N.R. at 216-17, 82 D.L.R. (3d) at 462.

> various heads of damage going to make up the claim has been given thoughtful consideration.[692]

This approach is particularly desirable where large sums are involved. The itemization approach entails a calculation or assessment under each of four separate heads of damage, namely special damages (pre-trial pecuniary loss), prospective loss of earnings or profits, cost of future care and non-pecuniary loss. The amounts awarded under each head are added together to comprise the final award. Often, the classifications will be sub-divided and awards will be more specifically itemized.

While the Supreme Court of Canada did not go so far as to rule that all major damage awards be assessed according to the itemization approach, in reviewing a substantial damage award in *Keizer*,[693] the Court criticized the lower court's global approach. Dickson J. stated: "The judgment does not assist us, or the parties, by explaining why $65,000 should be considered to be the appropriate award."[694] By and large, courts across the country have accepted the fact that the itemization approach makes good sense. In *Trizec Equities Ltd. v. Guy*[695] Macdonald J. of the Nova Scotia Court of Appeal stated: "Henceforth, general damage awards must, in my view, be assessed in separate amounts in accordance with the opinion of Dickson J. Any prior contrary pronouncements by this or other provincial appeal courts have been effectively overruled by the *Andrews* case."[696] The Ontario Court of Appeal came to a similar conclusion in *Reibl v. Hughes*.[697] Brooke J.A. stated that "[a]n assessment of damages by way of a global award . . . is not in accord with the principles enunciated by the Supreme Court of Canada. . . ."[698]

It appears that global awards are appropriate only where the evidence adduced is insufficient to allow the court to make a reasoned and precise calculation under the various heads of damage. This places a duty on counsel to present the appropriate particulars to allow the court to make an itemized award. In *Windrem v. Hamill*[699] Hughes J. stated:

> I am mindful of and see merit in the expressed desirability of assessing general damages under separate heads, rather than making a global award . . . . In this particular instance, however, the nature and presentation of the evidence as to damages as already described by me as 'anything but satisfactory' leads to the latter appproach.[700]

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[692] *Supra* note 675, at 235-36, 19 N.R. at 56, 83 D.L.R. (3d) at 457-58. *See also* Kiddell v. Kulczycki, [1977] 3 W.W.R. 216 (Man. Q.B.).

[693] *Supra* note 541.

[694] *Id.* at 351, 19 N.R. at 216, 82 D.L.R. (3d) at 461.

[695] 26 N.S.R. (2d) 1, 5 C.C.L.T. 172, 40 A.P.R. 1, 85 D.L.R. (3d) 634 (C.A. 1978).

[696] *Id.* at 8-9, 5 C.C.L.T. at 177, 40 A.P.R. at 8-9, 83 D.L.R. (3d) at 642.

[697] *Supra* note 127.

[698] *Id.* at 30, 89 D.L.R. (3d) at 128.

[699] [1978] 3 W.W.R. 684, 86 D.L.R. (3d) 254 (Sask. Q.B.).

[700] *Id.* at 693, 86 D.L.R. (3d) at 261.

The necessity of adducing such extensive evidence has been criticized as creating unnecessary volume, complexity and costs as well as inviting potential conflicts in the evidence.[701] In *Holian v. United Grain Growers Ltd.*[702] Monnin J.A. expanded upon the use of actuarial evidence. He agreed with the words of Macdonald J.A. in *Trizec Equities Ltd.*[703] to the effect that actuarial evidence provides a scientific cure to an estimate based on various subjective and highly uncertain variables. Monnin J.A. stated that "[a]ctuarial evidence is only to be used as a guide in the assessment of compensation for pecuniary loss, and the exact amount arrived at by the actuary need not be accepted by the judge."[704] He did, however, recognize the danger of the judge accepting parts of the expert's report and incorporating them into his own calculation without making the same deductions as the expert did.

In the final analysis, the role of expert and statistical evidence appears to have assumed a rather incongruous shape. On the one hand, cases stress the importance of such information. In *Lewis v. Todd*,[705] the most recent pronouncement of the Supreme Court of Canada on this topic, Dickson J. stated that

> the award of damages is not simply an exercise in mathematics which a Judge indulges in. . . . The evidence of actuaries and economists is of value in arriving at a fair and just result. . . . If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary *restitutio in integrum* expert assistance is vital.[706]

On the other hand, His Lordship emphasized in the same judgment that a judge

> must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all circumstances seems to the Judge to be inordinately high it is his duty . . . to adjust those figures downward; and in like manner to adjust them upwards if they lead to what seems to be an unusually low award.[707]

No matter how "vital" scientific and actuarial evidence may be in order to enable the court to make a reasoned rather than an arbitrary award, the court has an inherent power to adjust an award arrived at by mathematical means in order to ensure that the compensation is both reasonable and fair to the parties.

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[701] *See* Charles, *supra* note 679, at 10-14. *See also Holian*, *supra* note 267, at 502, 13 C.C.L.T. at 271.

[702] *Id.*

[703] *Supra* note 695.

[704] *Supra* note 267, at 503, 13 C.C.L.T. at 272, 114 D.L.R. (3d) at 450.

[705] [1980] 2 S.C.R. 694, 34 N.R. 1, 14 C.C.L.T. 294, 115 D.L.R. (3d) 257.

[706] *Id.* at 708, 34 N.R. at 14, 14 C.C.L.T. at 308, 115 D.L.R. (3d) at 267.

[707] *Id.* at 708-09, 34 N.R. at 14, 14 C.C.L.T. at 308-09, 115 D.L.R. (3d) at 267-68.

C. *Compensation for Pecuniary Loss*

One general principle that emerges from the cases in this area is that the plaintiff is entitled to full compensation for pecuniary loss. This principle applies equally to personal injury cases and to fatal accident claims. While it is recognized that *restitutio in integrum* is not usually possible, the object of a damage award under this head of compensation is to restore, as well as possible, the plaintiff to his pre-accident position.

> 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. . . . Money is a barren substitute for health and personal happiness, but to the extent within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.[708]

Clearly, a perusal of the decisions of the Supreme Court of Canada reveals an underlying "unequivocal acceptance of the principle that where losses can be translated into dollars full compensation should be the goal".[709]

1. *Special Damages*

Generally, this classification encompasses all expenses and lost earnings and profits up to the date of trial. Since these amounts are concrete and capable of accurate calculation, there is a heavy onus on the claimant to particularize and prove the losses for which he seeks compensation.[710] The losses claimed must be directly attributable to the defendant's conduct or, in other words, to be recoverable the damages must not be too remote. Such things as medical expenses incurred prior to the date of trial and pre-trial income losses ordinarily form the bulk of special damage awards. However, more remote claims are recoverable as long as they are reasonable. For example, in *Green v. Hibbs*[711] the plaintiff was awarded costs incurred in visiting his injured fifteen-year-old son who had been hospitalized as a consequence of the defendant's negligence. The court assessed the reasonableness of the claim with regard to the age of the child, the extent of his illness, his mental and physical condition and the costs of visitation. The court also noted that during the early stages of hospitalization frequent visits were desirable but as time progressed less frequent visits were sufficient. In *Hasson v.*

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[708] *Supra* note 675, at 241-42, 19 N.R. at 62, 83 D.L.R. (3d) at 462.

[709] Gibson, *Repairing the Law of Damages*, 8 MAN. L.J. 637, at 641-42 (1978).

[710] *See supra* note 673, at 45-46. *See also* Green v. Hibbs, 18 Nfld. & P.E.I.R. 468, 47 A.P.R. 468, 84 D.L.R. (3d) 80 (Nfld. S.C. 1978). Goodridge J. stated at 469, 47 A.P.R. at 469, 84 D.L.R. (3d) at 81, that "special damages . . . must be specifically claimed and strictly proved."

[711] *Id.*

Hamel[712] the plaintiff recovered a "reasonable amount" from the defendant in order to compensate her daughter for providing nursing and domestic services to the plaintiff after a car accident. The subsequent case of *De Marco v. Toronto Transit Commission*[713] applied this principle and awarded the plaintiff a sum of $1,000 for domestic and household services which had been rendered by the plaintiff's daughter following the plaintiff's injury. The "reasonable" amount of compensation was arrived at by valuing the daughter's services at $2.50 per hour for a total of 400 hours.[714] A similar situation arose in *Coderre v. Gauthier*.[715] Here the court awarded compensation where the expenses of nursing assistants had been paid by a religious order of which the plaintiff was a member. The court concluded that the defendant should not be entitled to benefit from the philanthropy of a third party and allowed the plaintiff to recover special damages with respect to these expenses subject to an undertaking that the plaintiff give the sum to the order.

Most personal injury cases include some form of claim for pre-trial loss of earnings or profits. The calculation of such losses is straightforward where a plaintiff has been off work for a short time; the court merely multiplies his basic rate of pay by the length of time he has been out of work. Complications arise where the plaintiff is out of work for an extended period of time or is permanently disabled. In such cases, many subjective factors and contingencies must be taken into account. These issues will be discussed fully below. It is clear, however, that in accordance with the principle of remoteness of damage, a loss must be a direct consequence of the accident in order to be recoverable.[716] For this reason, a plaintiff cannot recover lost wages for a period spent in hospital if he would have been out of work during that period regardless of the accident. In *Penner v. Mitchell*[717] the plaintiff claimed special damages

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[712] 16 O.R. (2d) 517, 78 D.L.R. (3d) 573 (Cty. Ct. 1977). *See also* Ellyn, *Damages for the Injured Plaintiff: Can the Value of Non-Contracted Services be Recovered Under Ontario Law*?, 2 ADVOCATES' Q. 47 (1979). It should be noted that the donor of such services may bring a claim directly against the tortfeasor on a *per quod* basis. *See* Popescul, *Action Per Quod Consortium Amisit*, 43 SASK. L. REV. 27 (1978-79). *See also* Racicot v. Saunders, 27 O.R. (2d) 15, 103 D.L.R. (3d) 567 (H.C. 1979).

[713] 19 O.R. (2d) 691, 86 D.L.R. (3d) 451 (Cty. Ct. 1978).

[714] For a discussion of the difficulties inherent in valuing such services and the inequities which may result, particularly where the donor of the services is carrying out duties in two households or has given up a career, *see* K. COOPER-STEPHENSON & I. SAUNDERS, *supra* note 673, at 144-45.

[715] 19 O.R. (2d) 503, 85 D.L.R. (3d) 621 (H.C. 1978). *See also* Urbanski v. Patel, 84 D.L.R. (3d) 651 (Man. Q.B. 1978).

[716] *See, e.g.*, Hellens v. Pederson, [1977] 3 W.W.R. 372 (B.C.S.C.), where the plaintiff was awarded $10,000 to compensate him for loss of seniority during his period of convalescence. However, his claim for damages for inability to find employment after recovering from his injuries was disallowed as being too remote. His inability to find work was due to economic conditions generally and was not directly a consequence of the accident.

[717] *Supra* note 287.

for loss of income during the thirteen-month period between the accident and the trial. The damages were reduced, however, because the plaintiff would have been unable to work for some three months during this period as a result of a heart condition unrelated to the accident. "To include in her award damages for the three-month period would result in her being over-compensated . . . [and] would have the result of including in the award a sum she would not have earned even if the motor accident had not occurred."[718] The cases in this area also clearly enunciate that no deduction for income tax should be made from earnings lost prior to the date of trial.[719]

2. *Prospective Loss of Earnings/Profits*

In arriving at a quantum figure for lost future earnings and profits the court must attempt to compensate the plaintiff for all prospective pecuniary gains he would have enjoyed but for the accident. It has been suggested that here courts are forced to gaze deeply into a crystal ball in order to determine what sort of career the victim might have had and to assess his prospects and potential prior to the accident.[720] The first step in the calculation is to quantify the plaintiff's level of earnings. This amounts to an

> [e]stimation of the weekly, monthly or annual earnings or profits, or its equivalent in the value of services, which the plaintiff would have made or performed but for his or her injury; and subtraction of the amount, if any, he or she will now be capable of earning, or the value of services he or she will now be able to perform.[721]

Ordinarily, it is relatively easy to arrive at a reasonable estimate of a plaintiff's future average level of earnings. In *Andrews*, for example, the Court recognized that the plaintiff's earning capacity would be somewhat higher than his level of earnings at the date of the accident and chose a figure midway between his present salary and the maximum salary for the plaintiff's line of work. The problem is not so easily resolved, however, where the plaintiff is a child or young adult who has not yet embarked on a career. In *Arnold v. Teno*[722] Spence J. propounded that the court must be free to assume that the infant would not have become a public charge. Here, the plaintiff was awarded an annual loss of income of $7,500, a figure fifty percent higher than the poverty level at the time of the action.

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[718] *Id.* at 337, 6 C.C.L.T. at 141. *See also Cropp*, *supra* note 186; Wren v. Superintendent of Ins. (No. 2), 15 O.R. (2d) 322, 75 D.L.R. (3d) 567 (H.C. 1977); Henderson v. Vaillancourt, [1979] 1 W.W.R. 345, 94 D.L.R. (3d) 670 (Alta. C.A. 1978); *Laurent*, *supra* note 116.

[719] *See* Armstrong v. Steward, 7 C.C.L.T. 164 (Ont. H.C. 1978); Wightman v. Coley, 25 O.R. (2d) 269, 100 D.L.R. (3d) 689 (Ont. H.C. 1979).

[720] *See Andrews*, *supra* note 675, at 251, 19 N.R. at 70, 83 D.L.R. (3d) at 469.

[721] *Supra* note 673, at 152.

[722] *Supra* note 676.

Although the plaintiff's mother was a school teacher earning in excess of $10,000 annually, Spence J. disagreed with Zuber J.A.[723] that "in the absence of any other guide" her mother's career could be used as an indication of the infant plaintiff's potential. The court should not assume that an infant plaintiff will follow in her parents' footsteps, thus reducing the defendant's liability to compensate the injured plaintiff for lost future income.[724]

The calculation of lost future income may sometimes require an assessment of the plaintiff's "lost chances". In *Conklin v. Smith*[725] a twenty-year-old college student who had been planning to become a commercial pilot had his leg amputated as a result of an accident. The Supreme Court of Canada affirmed the trial judge's award of $60,000 on top of the basic compensation for prospective loss of earnings on the basis that, as a result of his injuries, the plaintiff had to abandon his plan and study for a less profitable career.

> [W]e have the case of a young man who had shown academic excellence, one might almost say brilliance . . . who had shown great determination and perserverance and who, upon all of the evidence, had the health qualifications to allow him to apply his intelligence and earn himself a good living. . . . There would seem to have been a reasonable probability that apart from the accident he would have earned from $4,000 to $6,000 more per year.[726]

The additional award was made, not on the basis that the plaintiff definitely would have become a commercial airline pilot, but because this had been a reasonable probability.

Once the plaintiff's level of earnings is established, the figure arrived at is multiplied by the duration of the period over which the loss will be sustained. In cases involving serious accidents and permanent disability this calculation will amount to a quantification of the plaintiff's working life expectancy. The question that springs immediately to mind is whether such quantification should be based on the plaintiff's pre-accident life expectancy or on the basis of a shortened "post-trauma" life span. In *Andrews* Dickson J. resolved logically that in fulfilment of the principle of restitution, and in view of the fact that the plaintiff was being compensated for the loss of a capital asset of income earning capacity rather than merely for lost income, an award had to be based on the loss of capacity which existed prior to the accident.[727]

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[723] 11 O.R. (2d) 585, 67 D.L.R. (3d) 9 (C.A. 1976).

[724] *Supra* note 204, at 19 N.R. at 39, 83 D.L.R. (3d) at 636-37.

[725] [1978] 2 S.C.R. 1107, 22 N.R. 140, 5 C.C.L.T. 113, 88 D.L.R. (3d) 317.

[726] *Id.* at 1115-16, 22 N.R. at 147, 5 C.C.L.T. at 120, 88 D.L.R. (3d) at 323.

[727] *Supra* note 675, at 251, 19 N.R. at 70, 83 D.L.R. (3d) at 469. Under the heading of future loss of income, *see also* Larocque v. Lutz, [1980] 2 W.W.R. 97, 16 B.C.L.R. 348 (S.C.); *Trizec Equities Ltd.*, *supra* note 695, *rev'd* [1979] 2 S.C.R. 756, 19 N.R. 301, 99 D.L.R. (3d) 243.

3. *Cost of Future Care*

Quantification under this head of damage encompasses not only the costs of medical care but all post-trial expenses which would not normally have been incurred by the plaintiff but for the accident. "[T]o the extent within reason that money can be used to sustain or improve the health of the injured person it may properly form part of a claim."[728]

The primary purpose of compensation here is to ensure that the plaintiff receives adequate care for the duration of his or her life.[729] While a plaintiff's claims must be reasonable, there is no doubt that an injured plaintiff is entitled to a very high standard of care. Particularly where young victims are involved this means that a plaintiff will be entitled to home care rather than institutional care. As Dickson J. enunciated in *Thornton*,[730] medical evidence has established that the life span of a youthful quadriplegic is directly proportional to the nature of care provided.

> With home care, the injured person can be expected to live a normal, or almost normal, life span. With institutional care, it can be expected that he will not live a normal life span. It is difficult, indeed impossible, to fashion a yardstick by which to measure "reasonableness" of cost in relation to years of life. It is sufficient . . . to say that before denying a quadriplegic home care on the ground of "unreasonable" cost something more is needed than the mere statement that the cost is unreasonable. There should be evidence which would lead any right-thinking person to say: "That would be a squandering of money — no person in his right mind would make any such expenditure." Alternatively, there should be evidence that proper care can be provided in the appropriate environment at a firm figure, less than that sought to be recovered by the plaintiff.[731]

The same conclusion was reached in the *Andrews* case where Dickson J. stated that the standard of care to which an injured plaintiff is entitled is above the "marginal assistance" provided by statutory schemes relating to veterans and injured workers.

> The standard to be applied . . . is not merely "provision", but "compensation", *i.e.* what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care. If there were severe mental impairment, or in the case of an immobile quadriplegic, the results might well be different; but where the victim is mobile and still in full control of his mental faculties . . . it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better.[732]

Social cost or the burden on the defendant to provide such a high standard of care is not generally a factor to be taken into account. Recognizing that

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[728] *Supra* note 675, at 241-42, 19 N.R. at 62, 83 D.L.R. (3d) at 462.
[729] *Supra* note 204, at 323, 19 N.R. at 33, 83 D.L.R. (3d) at 632.
[730] *Supra* note 677.
[731] *Id.* at 280-81, 19 N.R. at 564, 83 D.L.R. (3d) at 487-88.
[732] *Supra* note 675, at 246, 19 N.R. at 65-66, 83 D.L.R. (3d) at 465

the bulk of defendants are insured, which results in a distribution of the cost through insurance premiums, Dickson J. stated: "I do not think the area of future care is one in which the argument of the social burden of the expense should be controlling, particularly . . . where the consequences of acceding to it would be to fail in large measure to compensate the victim for his loss."[733] Likewise, in *Thornton* it was stated that

> it is an error of law to regard the ability of the defendant to pay as a relevant consideration in the assessment of pecuniary damages. The correct principle is proper compensation for the injuries suffered by the victim. . . . Fairness to the defendant is achieved not by a reduction for ability to pay, or by an arbitrary slashing of the award, but by assuring that the plaintiff's claims are legitimate and justifiable.[734]

Ability to pay or social cost may possibly be taken into account in making a choice between several acceptable alternatives, but certainly not where the choice is simply between home or institutional care.[735]

D. *Contingencies*

In awarding compensation for the cost of future care and prospective losses of earnings and profits, the courts have recognized that many extraneous factors may come into play at some future point which may have a positive or negative effect on the basis upon which compensation has been computed.

1. *Prospective Loss of Earnings/Profits*

In order to constitute a realistic assessment of loss, such contingencies as strikes, sickness, unemployment and accidents should be taken into account in awarding compensation for loss of prospective earnings and profits. This was recognized as early as 1879 in *Phillips v. London & South Western Railway*:[736] "As to compensation for money loss in the time to come, supposing there had been no accident, there are a thousand circumstances which might have prevented the plaintiff from earning a fixed income."[737] Traditionally, large adjustments have been made to awards, often on the basis of relatively unlikely or remote occurrences. For example, in *Jackson v. Millar*[738] a twenty-five percent reduction was

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[733] *Id.* at 248, 19 N.R. at 67-68,D.L.R. (3d) at 467.

[734] *Supra* note 677, at 277-78, 19 N.R. at 562, 83 D.L.R. (3d) at 485-86. For a criticism of this approach, *see* P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 186 (2nd ed. 1975).

[735] *See Andrews, supra* note 675, at 248, 19 N.R. at 68, 83 D.L.R. (3d) at 467. *See also Malat, supra* note 309, where compensation was denied for income tax payable on an award for cost of future care.

[736] 49 L.J.Q.B. 233, [1874-80] All E.R. Rep. 1176 (C.A. 1879).

[737] *Id.* at 237, [1874-80] All E.R. Rep. at 1180-81.

[738] [1976] 1 S.C.R. 225, 4 N.R. 17, 59 D.L.R. (3d) 246 (1975).

made to reflect the possibility that the plaintiff might suffer from financial disaster or fall into alcoholism or drug abuse. Within the last few years, the cases reveal a trend towards moderation in the reduction of awards for such speculative reasons. In *Schrump v. Koot*,[739] a decision of the Ontario Court of Appeal, it was held that future contingencies which are less than probable are factors to be taken into account only if they are shown to be substantive, not speculative. Furthermore, *dicta* seem to indicate that, where sufficient evidence is adduced, it may be possible for the court to minimize drastically or even ignore the contingency factor.[740] In *Thornton*[741] Dickson J. stated: "The imposition of a contingency deduction is not mandatory, although it is sometimes treated almost as if it were to be imposed in every case as a matter of law. The deduction, if any, will depend upon the facts of the case, including the age and nature of employment of the plaintiff."[742]

In *Lewis*[743] the Supreme Court of Canada set out to establish some guidelines in this area. These have been summarized by Professor Charles as follows:

> 1) There should be no automatic deduction imposed but it is permissible for a Court to recognize and give effect to contingencies, both good and bad, which may be reasonably foreseen.
> 2) Having recognized the possibility of certain contingencies being relevant the Court must thereby, with the assistance of actuarial evidence, establish the probability of the recognized contingencies happening.
> 3) The trial Judge should consider "whether there is evidence that takes the plaintiff or deceased's situation outside the 'average'; whether there are any features for which no account was taken in the actuarial tables, either because the factor is entirely personal to the individual or because the 'average' is not adopted for the category or class to which the person belongs, e.g., police officers".[744]

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[739] *Supra* note 274.

[740] *See supra* note 673, at 246-49.

[741] *Supra* note 677.

[742] *Id.* at 283, 19 N.R. at 566, 83 D.L.R. (3d) at 489.

[743] *Supra* note 705.

[744] *Supra* note 679, at 23. *See also Teno*, *supra* note 205, where Zuber J.A. declined to reduce damages on account of contingencies. Instead he allowed a moderate increase since the contingencies tending to increase damages outweighed those tending to diminish damages. In the trial judgment of Lan v. Wu, [1979] 2 W.W.R. 122, 7 C.C.L.T. 314 (B.C.S.C.), Bouck J. criticized the practice of making an automatic reduction for contingencies based on a mere guess. On appeal, however, the British Columbia Court of Appeal, [1981] 1 W.W.R. 64, 14 C.C.L.T. 282, reduced the plaintiff's damages for future loss of income by the "frequently applied" twenty percent rate. In *Fenn*, *supra* note 508, at 458, 104 D.L.R. (3d) at 232 (C.A.) the court stated: "One may appropriately ask why the concept of contingencies has almost always been interpreted as a factor which should *diminish* a damage award. Surely there are contingent factors which may lead to the *enlargement* of damages." Also of interest are: Julian v. Northern & Central Gas Corp., 31 O.R. (2d) 388, 118 D.L.R. (3d) 458 (C.A. 1980); Cattapan v. Mitchell, 27 O.R. (2d) 87, 105 D.L.R. (3d) 509 (H.C. 1977); *Bond*, *supra* note 267; *Malat*, *supra* note 309.

2. *Cost of Future Care*

Any reduction for contingencies in the cost of future care should be made separately from a contingency reduction made under the head of future loss of earnings. "The 'contingencies and hazards of life' in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings. . . ."[745] The possibility of early death is not taken into account as a contingency since post-accident life expectancy is a preliminary calculation which forms the basis of the entire damage award.[746] Reductions here are not so frequently made as a matter of course. Instead, they are based more subjectively on the plaintiff's situation and the facts of each case.

> Whereas under loss of earnings statistical figures are very relevant, since they form the best estimate of the probabilities, that is not so under this head, unless figures are available for persons with injuries similar to those of the plaintiff. . . . [M]edical expenses are for the most part . . . almost entirely related to the plaintiff's particular injuries. Thus the contingencies and possibilities may well have been built into the original assessed level of expense.[747]

E. *Non-Pecuniary Damages*

While it is universally recognized that no sum of money can adequately compensate a personal injury victim for pain and suffering, a severed limb or an impairment of his or her mental faculties, the underlying purpose of an award for non-pecuniary loss is to "provide the injured person 'with reasonable solace for his misfortune' ".[748] Since 1978, this "functional" approach has been embraced by the Supreme Court of Canada in personal injury cases. The aim is

> not to quantify either an asset or lost happiness, but instead to assess the amount which . . . will provide a reasonable measure of consolation to the victim for his particular mental condition, whether it be the result of pain and suffering, loss of amenities or loss of expectation of life, or all three.[749]

A corollary of the adoption of this functional approach is that, since *Andrews*, the unconscious or "unaware plaintiff" is not entitled to damages for non-pecuniary loss.[750] The previous position, enunciated as

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[745] *Andrews*, *supra* note 675, at 249, 19 N.R. at 68, 83 D.L.R. (3d) at 467. *See also Malat*, *id.*

[746] *See* K. COOPER-STEPHENSON & I. SAUNDERS, *supra* note 673, at 332-34.

[747] *Id.* at 334.

[748] *Supra* note 675, at 262, 19 N.R. at 79, 83 D.L.R. (3d) at 476.

[749] *Supra* note 673, at 344.

[750] Likewise, the amount of an award for non-pecuniary loss should not depend solely on the seriousness of the plaintiff's injuries but also upon the plaintiff's subjective ability to appreciate his or her condition. Thus, Dickson J. stated in Lindal v. Lindal: "An appreciation of the individual's loss is the key and 'the need for solace will not necessarily correlate with the seriousness of the injury'." 39 N.R. 361, at 369 (S.C.C. 1981).

recently as 1966 in *Regina v. Jennings*,[751] was to the effect that "damages for loss of the amenities of life are not to be reduced by reason of the fact that the injured person is unconscious and unaware of his condition."[752] According to the functional approach, "[d]amages for intangible loss are intended to provide solace for mental distress. Absent awareness, there is no mental distress. Absent mental distress, there is no need for solace and thus no need for compensation."[753]

Unlike compensation for pecuniary loss, which should be assessed using an itemization approach, it is perfectly acceptable, and in fact preferable, for damages under the head of non-pecuniary loss to be expressed "globally". As Dickson J. propounded in *Andrews*:[754]

> It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses.[755]

The Supreme Court of Canada has also recognized the "temptation for extravagant claims by the victim"[756] and the trend towards enormous awards exhibited by courts in the United States. Consequently, an artificial upper limit of $100,000 was set in *Andrews* for cases involving plaintiffs with injuries similar to those suffered by Mr. Andrews or, more specifically, young adult quadriplegics.[757] With a view to encouraging regional uniformity in like cases the Court stated:

> Cases like the present enable the Court to establish a rough upper parameter on these awards. It is difficult to conceive of a person of his age losing more than Andrews has lost. . . . Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life . . . but variation should not be made merely for the Province in which he happens to be.[758]

While the Court did attempt in the trilogy to establish guidelines in this area, it did not go so far as to outlaw awards in excess of the $100,000 limit. In fact, the very wording of the judgment indicates otherwise; Dickson J. suggested that the figure "must be viewed flexibly

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[751] [1966] S.C.R. 532, 57 D.L.R. (2d) 644.

[752] *Id.* at 542, 57 D.L.R. (2d) at 652-53.

[753] *Supra* note 673, at 378.

[754] *Supra* note 675.

[755] *Id.* at 264, 19 N.R. at 81, 83 D.L.R. (3d) at 478.

[756] Charles, *supra* note 674, at 353.

[757] In Senft v. MacGregor, 15 B.C.L.R. 76, 99 D.L.R. (3d) 466 (C.A. 1979) it was pointed out that the upper limits set by the Supreme Court of Canada should be generally applicable in all cases.

[758] *Supra* note 675, at 263, 19 N.R. at 81, 83 D.L.R. (3d) at 477.

in future cases in recognition of the inevitable differences in injuries, the situation of the victim and changing economic conditions''.[759] His Lordship also conceded that ''exceptional circumstances'' may exist in a particular case to warrant a higher award. In *Fenn v. City of Peterborough*,[760] for example, $125,000 was awarded because the plaintiff had experienced substantially more pain than had the plaintiffs in the cases comprising the trilogy and also because in the time since those cases ''there has been an appreciable erosion in the value of money.''[761] The most recent pronouncement of the Supreme Court of Canada on this point is the case of *Lindal v. Lindal*.[762] In this case the plaintiff was awarded $135,000 for non-pecuniary loss at trial.[763] Fulton J. was of the opinion that the ''exceptional circumstances'' of the case were sufficient to take the case beyond the $100,000 limit; he considered that the consequences of Brian Lindal's injuries (lack of mobility, severe personality disorder, inability to communicate and severe brain damage) were substantially more serious than those in the *Andrews* and *Thornton* cases. On appeal to the British Columbia Court of Appeal,[764] the amount awarded for non-pecuniary loss was reduced to $100,000. Taggart J.A., speaking for the court, felt that although the impairment of Lindal's mental faculties was a serious disability, the plaintiffs in *Andrews* and *Thornton* were immeasurably worse off. Further, in comparison to the injuries suffered by the child in the *Teno* case, Lindal's injuries were not serious enough to warrant an award in excess of $100,000. The Supreme Court of Canada[765] affirmed the decision of the Court of Appeal and stated that the trial judge had failed to appreciate the significance of the $100,000 conventional sum set by the trilogy.

> He seems to have assumed that the figure of $100,000 was a measure of the 'lost assets' of the plaintiffs in those cases. The issue was seen as one of quantifying and comparing the losses sustained.
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> The difficulty with this approach is with the initial premise. The award of $100,000 for non-pecuniary loss in the trilogy was not in any sense a valuation of the assets which had been lost by Andrews, Thornton and Teno. As has been emphasized, these assets do not have a money value.
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> . . . .
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> No one would suggest that the injuries suffered by these . . . individuals were precisely identical. The Court recognized that their situations were in many ways quite different. Notwithstanding these differences, the Court awarded the same sum for non-pecuniary loss.
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> . . . .
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> [I]t would be unwise to foreclose the possibility of ever exceeding the guideline of $100,000. But, if the purpose of the guideline is properly

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[759] *Id.*
[760] *Supra* note 508.
[761] *Id.*, 25 O.R. (2d) at 452, 104 D.L.R. (3d) at 226.
[762] *Supra* note 750.
[763] [1978] 4 W.W.R. 592, 5 C.C.L.T. 244 (B.C.S.C.).
[764] 25 B.C.L.R. 381, 115 D.L.R. (3d) 745 (C.A. 1980).
[765] *Supra* note 750.

> understood, it will be seen that the circumstances in which it should be exceeded will be rare indeed.[766]

Although it may not be certain whether the Supreme Court of Canada intended to set a strict upper limit, it seems clear that the result has been the setting of a standard for those persons requiring maximum compensation, against which less severe injuries are to be measured.[767] This desire to promote and maintain moderation in awards for non-pecuniary loss is to be commended. From a policy point of view, the financial and medical needs of a plaintiff are satisfied under respective heads of pecuniary loss. As Professor Charles has pointed out, "non-pecuniary awards are like the icing on the cake"[768] and the "uncertainty that surrounds the assessment of non-pecuniary loss makes it difficult to justify large awards for this head of damage".[769] Moderation and a consideration of social cost[770] seem eminently reasonable in awarding monetary compensation for losses which defy monetary quantification and where the purpose of the award is simply "to make life more endurable".[771]

F. *Capitalization: The Discount Rate*

Since a lump sum damage award can generally be invested at a rate of interest which exceeds the rate of inflation, the amount of damages awarded must be reduced to take this fact into account. The percentage by which the award is reduced is commonly referred to as the discount or capitalization rate. The process was explained by Dickson J. in *Andrews*: "What rate of return should the Court assume the appellant will be able to obtain on his investment of the award? How should the Court recognize future inflation? Together these considerations will determine the discount rate to use in actuarially calculating the lump sum award."[772] In the later case of *Lewis v. Todd*[773] the rationale for the application of the discount rate was expanded upon:

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[766] *Id.* at 373-74.

[767] *See, e.g., Schulz, supra* note 546, where the appeal court reduced the plaintiff's award on the basis that his injuries were not comparable to those of Mr. Thornton. Here, the plaintiff was able to wash and dress himself and drive a car. Leave to appeal to Supreme Court of Canada was refused, 23 Jan. 1979. *See also* Robson v. Official Administrator, County of Cariboo-Prince George, 12 B.C.L.R. 208, 101 D.L.R. (3d) 306 (C.A. 1979); Cromwell v. Dave Buck Ford Lease Ltd., [1980] 4 W.W.R. 322, 109 D.L.R. (3d) 82 (B.C.S.C.); Meglio v. Kaufman Lumber Ltd., 16 O.R. (2d) 678, 79 D.L.R. (3d) 104 (H.C. 1977).

[768] Charles, *supra* note 674, at 354.

[769] *Id.*

[770] *See Lindal, supra* note 750, at 371.

[771] *Supra* note 675, at 262, 19 N.R. at 80, 83 D.L.R. (3d) at 477.

[772] *Id.* at 254, 19 N.R. at 73, 83 D.L.R. (3d) at 471.

[773] *Supra* note 705.

> As it is not open to a court . . . to order periodic payments adjusted to future needs, the [plaintiffs] . . . receive immediately a capital sum roughly approximately the present value of the income they would have received. . . . They are able to invest this capital sum and earn interest thereon. A proportion of the interest received may be offset by the effect of inflation. To the extent that the interest payments exceed the rate of inflation, there is . . . a benefit which can be expressed as the 'real rate of return'. These would clearly be enrichment of the plaintiff at the expense of the defendant if the court did not take this benefit into account in making an award. Accordingly, the court applies a so-called 'discount factor', i.e., the real rate of return which the plaintiff can expect to receive on the damage award.[774]

In *Andrews*, a seven per cent discount rate was applied on the basis that the average return on long-term investments at the time was ten percent and that the inflation rate was three and one half percent. Following *Andrews*, the courts in many provincial jurisdictions adopted the seven percent rate in situations where no evidence was adduced tending to show that this rate was inappropriate.[775] Recently, however, the Supreme Court of Canada pointed out that no particular rate could be set and applied in all cases:[776] "[T]he discount rate is normally a factual issue which will turn on the evidence advanced in individual cases."[777] Therefore, the parties are free, and encouraged, to adduce economic and statistical evidence relevant to the expected difference between interest rates and inflation over the period of loss. Consequently, "while discount rates continue to range as high as 7 per cent, rates in the vicinity of 2-3 per cent are beginning to appear more often."[778]

G. *Taxation*

While the law is clear that damage awards in the hands of a plaintiff are not directly taxable,[779] the effects of income taxation must be taken into account in two contexts in arriving at a quantum figure.

First, taxation of income generated by investment of the award is relevant as it will effectively "reduce the amount of money actually

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[774] *Id.* at 710, 34 N.R. at 15-16, 14 C.C.L.T. at 309-10, 115 D.L.R. (3d) at 268-69.

[775] For a statistical overview of the discount rate applied in the various provincial jurisdictions, *see* Klar, *Annotation*, 7 C.C.L.T. 318 (1978) and Charles, *supra* note 679, at 26. *See also* McQueen, *Consideration of Inflation in Calculating Lost Future Earnings*, 62 CORNELL L. REV. 803 (1977); Fleming, *The Impact of Inflation on Tort Compensation*, 27 AM. J. OF COMP. LAW 51 (1977); Dexter, Dollay & Murray, *Inflation, Interest Rates and Indemnity: The Economic Realities of Compensation Awards*, 13 U.B.C.L. REV. 298 (1979).

[776] However, some provincial jurisdictions have legislated a discount rate. *See* Judicature Amendment Act, 1979, S.O. 1979, c. 65, s. 4(1), *now* R.S.O. 1980, c. 223, s. 37; S.N.S. 1980. c. 54, s. 4.

[777] *Lewis*, *supra* note 705, at 709, 34 N.R. at 15, 14 C.C.L.T. at 309, 115 D.L.R. (3d) at 268.

[778] *Supra* note 673, at 456.

[779] Cirella v. The Queen, [1978] 2 F.C. 195, 83 D.L.R. (3d) 553 (Trial D. 1977).

available for the plaintiff's needs".[780] As has been indicated by Professor Charles,[781] the Court of Appeal decisions in *Thornton*[782] and *Teno*[783] awarded additional sums in order to compensate for the tax burden. The Supreme Court of Canada, however, has held that in view of the difficulty in forecasting future rates of taxation, the degree of speculation involved and the various exemptions and deductions available to taxpayers with respect to medical costs, no allowance in compensation for tax payable on income accruing from investment of the award is justified.[784]

Second, in personal injury cases, the influence of income taxation has dictated that future lost income should be computed on a "pre-tax" or "gross income" basis. Unlike fatal accident cases, the objective of an award for lost earnings in injury cases is to compensate the victim for his lost earning capacity.

> [I]t 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.[785]

In fatal accident cases, however, the approach is quite different. The Supreme Court of Canada had originally held in *Gehrmann v. Lavoie*[786] that income tax should not be subtracted from damage awards in fatal accident cases. However, the same Court's recent pronouncement in the *Keizer* case has led to the regular practice of considering income tax which the deceased would have been liable to pay in arriving at a figure representing the value of the deceased's support. As de Grandpré J. said:

> It seems to me that what the widow and the child have lost in this case is the support payments made by the deceased, support payments which could only come out of funds left after deducting the cost of maintaining the husband, including the amount of tax payable on his income. I cannot see how this pecuniary loss could be evaluated on any other basis than the take-home pay, that is the net pay after deductions on many items, including income tax.
>
> . . . .
>
> It is quite obvious that basing an award under the *Fatal Accidents Act* on gross income would fail to take into consideration the realities of life in a modern state and would, in some cases, give to the dependants a fund greatly in excess of their financial loss. Income tax must therefore be taken into consideration.[787]

The reasoning behind this approach is that in such cases, the deceased's dependents are considered "not to have suffered loss of an asset but

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[780] Charles, *supra* note 674, at 359.
[781] *Id.*
[782] [1976] 5 W.W.R. 240, 73 D.L.R. (3d) 35 (B.C.C.A.).
[783] *Supra* note 205.
[784] *Supra* note 204, at 323-24, 19 N.R. at 33-34, 83 D.L.R. (3d) at 632-33.
[785] *Supra* note 675, at 259, 19 N.R. at 77, 83 D.L.R. (3d) at 474.
[786] [1976] 2 S.C.R. 561, 6 N.R. 570, 59 D.L.R. (3d) 634 (1975).
[787] *Supra* note 541, at 371-72, 19 N.R. at 235-36, 82 D.L.R. (3d) 467-68.

rather loss of support payment. Realistically, . . . such payments are available to the dependent [*sic*] only after personal expenses and taxes of the deceased breadwinner have been paid."[788] The practice of taking income tax into account has been the target of some criticism,[789] and some concern has been expressed with respect to the degree of "guesswork" involved.[790] As Professor Charles astutely pointed out, the controversy is not easily resolved: "If taxes are ignored, there is the possibility of overcompensation. . . . If taxes are taken into account by the Court, there are real difficulties associated with an accurate determination of taxes that will accrue."[791]

H. *Management Fees*

In *Arnold v. Teno*[792] the Supreme Court of Canada affirmed the Ontario Court of Appeal's award of $35,000 to enable the plaintiff, Diane Teno, to retain financial advice upon reaching majority. Recognizing the plaintiff's need for professional assistance in the management of such a large sum of money, intended to be invested so as to provide for her over her lifetime, Spence J. stated that "[i]t is appropriate to allow an amount to cover the annual fee which will be entailed."[793] It is important to note that the plaintiff had suffered a loss of mental capacity as a result of the accident and it appears likely that the court will decline to allow a claim for management fees where a plaintiff's faculties are not similarly impaired.[794] The trial decision in *Lan v. Wu*[795] exhibited a marked

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[788] *Supra* note 679, at 31.

[789]

> If taxation is considered, the Court has to predict not only at what level the plaintiff or deceased would have been taxed in the years ahead but, in addition, to compute the tax that would be payable on the proceeds of the award in the hands of the plaintiff or dependant. The variables inherent in such predictions are numerous, particularly when lengthy periods of time are involved.

Id. at 32.

[790] *See, e.g.*, Farmer's National Bank & Trust Co. of Astabula v. Coles, 33 N.B.R. (2d) 248, 80 A.P.R. 248 (Q.B. 1981).

[791] *Supra* note 679, at 34. *See also* Krishna, *Tax Factors in Personal Injury and Fatal Accident Cases: A Plea for Reform*, 16 OSGOODE HALL L.J. 723 (1978); Rea, *Inflation, Taxation and Damage Assessment*, 58 CAN. B. REV. 280 (1980); Krishna, *Taxation of Personal Injury Awards: A Wiry Methuselah*, 3 DALHOUSIE L.J. 385 (1976-77); Gibson, *supra* note 709.

[792] *Supra* note 204.

[793] *Id.* at 328, 19 N.R. at 38, 83 D.L.R. (3d) at 636. *See also Fenn, supra* note 508; Lamont v. Pederson, [1979] 6 W.W.R. 577, 6 Sask. R. 361 (Q.B.), *aff'd* [1981] 2 W.W.R. 24, 7 Sask. R. 18 (C.A.).

[794] However, Spence J. in *Arnold, supra* note 676, at 328, 19 N.R. at 37, 83 D.L.R. (3d) at 635, suggested otherwise: "Even if the infant plaintiff were adult and not disabled, she would need professional assistance in the management of such a large sum of money. . . ."

[795] *Supra* note 744.

departure from this approach. The British Columbia Supreme Court awarded $25,000 as a management fee on the basis that any ordinary person would require professional advice in investing a large sum of money in order to guarantee a satisfactory yield over a lengthy period of time. The Court of Appeal reversed the trial decision on this point, however, and disallowed the award.[796] A similar approach to that of the Court of Appeal was taken in *Lamont v. Pederson*,[797] where the trial court declined to award financial management fees on the basis that the plaintiff had suffered no mental disability and had offered no evidence of incapacity to manage his affairs. The rationale for awarding management fees appears to be "that the victim should receive the Court award of damages undiminished by costs that may be necessarily incurred if the award is to be utilized more effectively".[798] It seems logical that such awards be made where the plaintiff has suffered some form of mental impairment where such impairment is attributable to the negligence of the defendant. However, where the plaintiff was incapable of handling his or her affairs prior to the incident giving rise to the cause of action or where a person claims entitlement to management fees merely by reason of a self-proclaimed inability to handle large sums of money, it seems logical that policy would militate against such awards. In light of the relative ease with which secure investments may be made that yield well in excess of ten percent, it is unlikely that expert advice is necessary to provide for an adequate capital return. A defendant should be entitled to be not liable for additional fees where the plaintiff's lack of financial "savvy" is not a direct consequence of the defendant's negligent conduct.[799]

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[796] *Id.* Leave to appeal to Supreme Court of Canada was refused, 7 Oct. 1980.

[797] *Supra* note 793.

[798] *Supra* note 679, at 37.

[799] Undiscussed cases which deal primarily with the assessment of damages in fatal accident cases are: Mensick v. Dueck, [1979] 3 W.W.R. 263, 9 C.C.L.T. 149 (B.C.S.C.); Chapman v. Verstraete, [1977] 4 W.W.R. 241 (B.C.S.C.); Sakaluk v. Lepage, 6 Sask. R. 249, [1981] 2 W.W.R. 597 (C.A. 1980); *Julian*, *supra* note 744; Mason v. Peters, 30 O.R. (2d) 409, 117 D.L.R. (3d) 417 (H.C. 1980); *Lamont*, *supra* note 793; Clement v. Leslies Storage Ltd., [1979] 2 W.W.R. 577, 97 D.L.R. (3d) 667 (Man. C.A.); Gallant v. Boklaschuk, 7 C.C.L.T. 302, 90 D.L.R. (3d) 370 (Man. Q.B. 1978).