Economic Analysis of False Imprisonment in Canada: A Statistical and Empirical Study

Introduction and theoretical background

Older approaches as well as new approaches to the study of the law of torts, "try to find a theory to explain the social function of the negligence concept and of the fault system of liability that is built upon it."[1] Canadian authors[2] and other authors[3], have identified six functions of the law of torts. One of those functions is deterrence. The focus of deterrence is on the prevention of accidents. The effect of deterrence may be specific when it involves sanctioning an individual tortfeasor in order to discourage him from repeating his undesirable conduct. By deterring a single individual, the law may have a general deterrent effect, because the prospect of civil liability may discourage other individuals from engaging in undesirable conduct[4].

At least two different approaches have been put forward in the 1970's in order to explain how the deterrence function of the law of torts works. Tort law as ombudsman has been developed by Linden[5], who suggests that tort law can act as a specific as well as a general deterrent in its role as ombudsman. He suggests that a well publicized suit which requires the defendant to justify his conduct may have a much greater deterrent impact than damages. Linden goes so far as to say that "infused with vitality, tort law in its role as ombudsman will continue to serve Canadians, despite its imperfections, until a better way is found. Tort law, with its human focus, enables individuals to protest peacefully and rationally against abuse of power."[6] The trial is a potent tool for tort law in its role as an ombudsman because the court, according to Linden, "makes its decision without the necessity of considering the economic consequences of the decision it makes"[7].

Professor Atiyah[8] and Professors Williams and Hepple[9] agree that the

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[1] R.A. Posner, "A Theory of Negligence", (1972) 1 Journal of Legal Studies, 29.

[2] See R.M. Solomon, B.P. Feldsthusen & S.J. Mills *Cases and Materials on the Law of Torts*, Toronto, Carswell Co. Ltd., 1982, p. 16; C.A. Wright & A.M. Linden, *Canadian Tort Law, Notes and Materials*, 7th ed., Toronto, Butterworths, 1980, ch. 1.

[3] G. Williams, "The Aims of the Law of Torts" (1951) 4 Current Legal Problems, 137.

[4] R.M. Solomon, B.P. Feldsthusen & S.J. Mills, *supra.*, footnote 2, at 16.

[5] A.M. Linden, "Tort Law as Ombudsman" (1973) 51 Can. Bar Rev., 155, A.M. Linden, *Canadian Tort Law*, 3rd ed., Toronto, Butterworths, 1982, at 19; A.M. Linden, "Reconsidering Tort Law as Ombudsman" in F.M. Steel & S. Rodgers-Magnet, *Issues in Tort Law*, Toronto, Carswell Co. Ltd., 1983, 1-23; A.M. Linden "Torts in the 80's — A Canadian Perspective" in L.S.U.C. *Special Lectures — Torts in the 80's*, Don Mills, Ontario, Richard De Boo Publishers, 1983, 385-402.

[6] A.M. Linden, "Reconsidering Tort Law as Ombudsman" in F.M. Steel & S. Rodger-Magnet, *Issues in Tort Law*, Toronto, Carswell Co. Ltd., 1983, 1-23 at 21.

[7] *Ibid.*, at 14.

[8] P.S. Atiyah, *Accidents, Compensation and the Law*, 2nd ed., London, Weidenfeld & Nicholson, 1975, at 499-502.

[9] G.L. Williams & B.A. Hepple, *Foundations of the Law of Torts*, London, Butterworths, 1976, at 170-173.

analogy of tort law acting as ombudsman has some merit in promoting social change. Professors Fridman[10] and Henderson[11] strongly oppose the use of tort law as ombudsman. Mr. Justice Linden specifically applies his conception of tort law as ombudsman to police and citizens. He argues that "the law of torts has been more effective to date than other mechanisms, despite the fact that it is slower and more expensive"[12].

The proponents of economic analysis of the law of torts also see deterrence as the principal function of tort law. Posner[13] advocates that the function of tort law is deterrence and prevention of accidents. In analysing the functions of tort law, Linden[14] categorizes the economic approach to law as market deterrence.

> Market deterrence is seen as a particular type of general deterrence, concerned with reducing the social costs of accidents by influencing behavior through the market. Tort damages are costs and market deterrence operates on the premise that by increasing the cost of harmful activities, tort law will shift resources to safer and more efficient processes, firms and industries[15].

Linden does not reject market deterrence proposed by the advocates of economic analysis of tort law, but he states that "law would probably never survive if market deterrence were its *only* aim. However, market deterrence may be achieved *in addition* to the other objectives of tort law, as a kind of bonus"[16].

Tort law as ombudsman is proposed as a means to achieve social reforms. Mr. Justice Linden confesses that the view was espoused that the law of torts might serve ordinary people in their struggle for a more human civilization by operating "as an instrument of social pressure upon centres of governmental, financial and intellectual power"[17]. Posner, on the contrary, describes his interest as a scholar in doing positive economic analysis of law. "Positive analysis refers to the attempt to understand and explain, rather than improve the world. Explanation is the domain of science, and economics is the science of rational human behavior"[18].

Both approaches have been applied to intentional torts as well as to negligence. Tort law as ombudsman has been applied to police-citizen relation-

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[10]G.H.L. Friedman, *Introduction to the Law of Torts*, Toronto, Butterworths, 1978, at 271-272.

[11]J.A. Henderson, "Expanding the Negligence Concept: Retreat from the Rule of Law", (1976) 51 Ind L.J., 467.

[12]A.M. Linden, *supra*, footnote 6, at 8.

[13]R.A. Posner, "A Comment on No-Fault Insurance for all Accidents" (1975) 13 Osgoode Hall L.J. 471; see also R.A. Posner, *Tort Law, Cases and Economic Analysis*, Boston, Little, Brown & Co., 1982, at 8.

[14]A.M. Linden, *Canadian Tort Law*, 3rd ed., Toronto, Butterworths, 1982, 16-19.

[15]R.M. Solomon et al, *supra.*, footnote 2, at 17.

[16]A.M. Linden, *supra.*, footnote 14, at 19. The emphasis is mine.

[17]A.M. Linden, *supra.*, footnote 14, at 16-19. See also, A.M. Linden, *supra.*, footnote 6, at 1.

[18]R.A. Posner, "Uses and Abuses of Economics in Law" (1979) 46 Univ. of Chicago Law Rev. 281-306, at 287.

ships by Linden[19]. Weiler[20] promotes the idea that tort law can be used to control police arrest practices. Linden[21] argues that the tort of false imprisonment serves as one way of overseeing police and security officers' activities, and may provide some deterrence of sub-standard police behavior.

The economic analysis of law approach has also been applied to intentional torts. Posner[22] has used an economic approach, even though it is not usually thought of as an especially apt tool for resolving such basic value questions as life versus property. Landes & Posner[23] have developed an economic theory of intentional torts. According to that theory, intentional fault usually involves gross non-compliance. Intentional fault is gross because a person who deliberately exposes himself to liability crosses a threshold, after which aggravation of the fault is less costly. From the economic perspective, intentional fault should be deterred if its social cost exceeds its social benefits, but not otherwise. If the illicit benefit from non-compliance is given no social weight, then the social cost of intentional fault will exceed the social benefit, and deterrence will be appropriate.

In an economic analysis of punitive damages, if it pays to cross the threshold at all, it pays to cross it a long way. "If punitive damages are added to compensatory damages, it is possible to restore a situation in which compliance minimizes the injurer's cost. This is accomplished by imposing punitive damages equal to the illicit benefits of non-compliance"[24].

Research objectives and methodology

The research sets out to evaluate two theories which view deterrence as a social function of tort law. The economic analysis of law theory postulates that individuals act for their own benefits and that when the cost of an activity is higher than the cost of compliance, then compliance is accepted. Tort law as ombudsman is a theory that emphasizes drawing public attention to litigation in order to promote social change and to deter certain activities by the defendants.

In order to assess the two above-mentioned theories, we will focus on the

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[19]A.M. Linden, "Tort Laws' Role in the Regulation and Control of the Abuse of Power" in L.S.U.C. *Special Lectures — The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control*, Toronto, Richard De Book Publishers, 1979, 67-107 at 71-73; A.M. Linden, *supra.*, footnote 14, at 20-21; A.M. Linden, *supra.*, footnote 6, at 7-8; A.M. Linden "Torts in the 1980's — A Canadian Perspective" in L.S.U.C. *Special Lectures — Torts in the 80's* Don Mills, Ontario, Richard De Boo Publishers, 1983, 385-402 at 391.

[20]P.C. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer" in A.M. Linden, *Studies in Canadian Tort Law*, Toronto, Butterworths, 1968, 416-469.

[21]A.M. Linden, "Tort Laws' Role in the Regulation and Control of the Abuse of Power", *supra.*, footnote 19, at 72.

[22]R.A. Posner, "Killing or Wounding to Protect a Property Interest" (1971) 14 The Journal of Law and Economics, 201-232.

[23]Landes & R.A. Posner, "An Economic Theory of Intentional Torts" (1981) 1 Int'l Rev. L. & Econ 127.

[24]R.D. Cooter, "Economics Analysis of Punitive Damages" (1982) 56 Southern California Law Rev. 79-101, at 89. See also D.D. Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982) 56 Southern California Law Rev., 1-78; D.D. Ellis, "An Economic Theory of Intentional Torts: A Comment" (1983) 3 Int'l Rev. L. & Econ 45-57.

tort of false imprisonment. This tort dates back to the 13th century. The tort falls in the category of intentional torts, a type which both theories have boasted of being able to explain.

It is hypothesized that the economic analysis of false imprisonment cases will show that the damges awarded are not high enough to deter from arresting innocent persons, especially in cases of shoplifting. On the other hand, it is hypothesized that tort law as ombudsman can explain the stricter procedures and the fear expressed by police departments and store managers.

The method used will consist in the analysis of all reported Canadian cases of false imprisonment since 1950. We have decided to use cases after 1950 for three reasons. First, the Canadian cases were all decided in Canada after 1950, since appeals to the Privy Council were abolished in 1949. Second, the law relating to false imprisonment is well settled, and little change has occurred. Third, it will be easier to compare the amount of damages granted to the plaintiffs.

Both the economic analysis of law and the sociolgical approach to law acknowledge the use of cases as a means to conduct scientific research. Cooter states that "the economic approach proceeds by constructing a mathematical model, deducting testable hypotheses from it, and conducting the tests. Thus, the economic approach carries prefabricated hypotheses to the data, whereas the traditional method builds directly from the cases"[25]. The sociological approach fostered by Carbonnier[26] also uses cases as its data.

The reported Canadian cases on false imprisonment will be divided into three categories, depending on whether the defendant was a police officer, an employee or security guard in a store, or an individual. These distinctions are important because the evidentiary requirements are different when a police officer is involved and when a private citizen is involved. Police officers only have to show that they had reasonable and probable grounds to believe an offence had been committed by the plaintiff in order to exonerate themselves in an action for false imprisonment. Individuals, on the other hand, have to prove that a criminal offense has in fact been committed and that they had probable and reasonable grounds to believe that the plaintiff was guilty of that offence[27]. The distinction between private individuals and store employees is considered because of the changing attitude in some of the United States[28].

The amount of damages, general and punitive, will serve as an indicator of the economic cost of not complying with the law. Since it is difficult to evaluate if the damages ordered by the courts are large enough to deter the

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[25] R.D. Cooter, "Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a review of the Major Books" (1982) 29 U.C.L.A. Law Rev. 1260-1269 at 1265.

[26] J. Carbonnier, *Sociologie juridique*, Paris, Presses Universitaires de France, 1978.

[27] A.M. Linden, *supra*., footnote 14, at 79. See also W.E. Horkins "False Arrest Today" in L.S.U.C. *Special Lectures — New Developments in the Law of Torts*, Toronto, Richard De Boo Ltd., 1979, 241-258 at 252; J.G. Fleming, *The Law of Torts*, 6th ed., Sydney, The Law Book Co. Ltd., 1983, at 94.

[28] A.D. Axelrod & T. Elkind, "Merchants' Responses to Shoplifting: An Empirical Study" (1976) 28 Stanford Law Rev. 589-612. See also P.C. Stenning & C.D. Shearing, *Powers of Private Security Personnel*, Ottawa, Law Reform Commission of Canada, 1980.

defendants from not complying with the law, an empirical study was carried out in the Moncton area. The city of Moncton is located in eastern Canada and has a population of about eighty thousand people. A sample of merchants from the city of Moncton were asked to fill out a questionnaire regarding their total cost of preventing shoplifting, inclusive of floorwalkers, arrest of shoplifters, the number of civil suits for false imprisonment and the amount of damages paid to the plaintiffs. The fear aspect of civil litigation by arrested shoplifters was also canvassed, since Linden's theory seems to insist that people tend to conform to law through fear of public opinion.

Results and Discussion

Fifty-six reported cases on false imprisonment were analysed[29]. As shown in Table 1, 60% of all reported actions have been brought against police officers, and 30% of reported actions against stores. It is also to be noted that in Ontario and British Columbia, actions have been brought against defendants

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[29] *List of Reported Canadian Cases on False Imprisonment from 1950 to 1983;*
Bahner v. *Marwest Hotel Co. Ltd. & Muir* (1970), 75 W.W.R. 729
Ball v. *Manthorpe et al* (1970), 15 D.L.R. (3d) 99 (B.C.)
Banerjee v. *K-Mart Canada Limited & Little* (1983), 43 Nfld. & P.E.I. 252
Braaten v. *Parry et al* (1979), 5 Sask. Rep. 305
Barret v. *Lorette & Ross* (1979), 27 N.B.R. (2d) 621
Benedetto v. *Bunyan et al*, [1981] 5 W.W. R. 193 (Alta. Q.B.)
Besse v. *Thom* (1980), 107 D.L.R. (3d) 694
Bradley v. *Town of Woodstock* (1978), 22 N.B.R. (2d) 45
Breau v. *K-Mart Canada Ltd.* (1980), 32 N.B.R. (2d) 488
Campbell v. *Saint & Loveless* (1981), 38 Nfld. & P.E.I.R. 15
Carpenter v. *SS Kresge Ltd. et al* (1978), 21 O.R. (2d) 165
Chaytor v. *London...Association of Fashion & Price* (1961), 30 D.L.R. (2d) 527
Crowe v. *Noon et al*, [1971] 1 O.R. 530
Delancey v. *Dale & Co. Ltd.* (1959), 20 D.L.R. (2d) 12 (N.S.)
Eagle Motors Ltd. v. *Makatoff* (1971), 1 W.W.R. 527
Fleck Bros Ltd. v. *Petrovtsas* (1964), 45 D.L.R. (2d) 190
Fletcher v. *Collins et al*, [1968] 2 O.R. 618
Foran v. *Tatangello et al*, (1976), 14 O.R. (2d) 91
Foth v. *O'Hara et al* (1958), 24 W.W.R. 533
Frey v. *Fedoruk et al*, [1950] S.C.R. 517
Garthus v. *Van Caeseele* (1959), 27 W.W.R. 431
Green v. *Pike & Bagley* (1953), 8 W.W.R. 369
Hayward v. *F.W. Woolworth Ltd. et al* (1979) 23 Nfld. & P.E.I.R. 17
Hucul v. *Hicks* (1966), 55 D.L.R. (2d) 267
Ihnat et al v. *Jenkins et al*, [1971] 2 O.R. 534
Karogiannis v. *Poulus and T. Eaton Co. Ltd.*, [1976] 6 W.W.R. 197
Kennedy v. *Tomlinson* (1958), 13 D.L.R. (2d) 734; rev'd 20 D.L.R. (2d) 273
Kendall et al v. *Gambles Canada Ltd. et al*, [1981] 4 W.W.R. 718 (Sask. Q.B.)
Kingsmith v. *Denton*, 3 A.R. 315
Koechlin v. *Waugh* (1957), 11 D.L.R. (2d) 447
Kozak v. *Beatty et al* (1957), 7 D.L.R. (2d) 88
Lang v. *Burch & Carlson* (1982), 18 Sask. R. 99 (CA)
Lebrun v. *High-Low Foods Ltd. & Parry* (1968), 65 W.W.R. 353
Levesque v. *Jacques* (1980), 29 N.B.R. (2d) 300
Liorti v. *Andrews et al*, [1974] 2 O.R. (2d) 130
MacKenzie v. *Martin*, [1952] O.R. 849
Misiner v. *L.V. Trabert Ltd. et al* (1982), 51 N.S.R. (2d) 633
Mockler v. *Town of Grand Falls* (1953), 32 M.P.R. 51 (N.B.).
Moore v. *Slater et al* (1979), 101 D.L.R. (3d) 176
Perry & Galley v. *Fried & Gorman* (1972), 9 N.S.R. (2d) 545
Psathas et al v. *F.W. Woolworth Co. Ltd. et al* (1981), 35 Nfld. & P.E.I.R. 1
Reid v. *DeGrott and Brown* (1964), 49 M.P.R. 246 (NSSC in B.)
Reid & Reid v. *Webster et al* (1966), 52 M.P.R. 138
Roberts v. *Buster's Auto Towing Service Ltd. et al*, [1977] 4 W.W.R. 428

other than stores and police officers. In Ontario, three actions were commenced against a magistrate[30] and one against a probation officer[31]. The actions against the magistrates were dismissed on the ground that justices of the peace are protected unless they go beyond their jurisdiction and act maliciously. An interesting case, *Tanner* v. *Norys*[32], involves a psychiatrist who, under the *Mental Health Act*, had signed a certificate stating that the plaintiff had mental problems and should be involuntarily admitted to a mental institution. The plaintiff was admitted 3 times and released each time. The trial division allowed the action and granted $26,000.00 in damages. This decision was reversed on appeal, but the reasoning used by the court of appeal is not convincging. In *Kozak* v. *Beatty*[33] a Saskatchewan court held a police officer liable for $1,000.00 for involuntarily admitting the plaintiff to a mental institution. In order to be admitted involuntarily, a person must be apparently suffering from a mental disorder at the time of the apprehension.

A few cases have emerged to protect citizens against false imprisonment and illegal detention. There has been little success against magistrates, but in cases of mental disorders and involuntary commitment, there are encouraging possibilities despite the appeal court decision in *Tanner* v. *Norys*.

Table 1: Number of cases by common law provinces against stores, police and others.

	Alta.	B.C.	Man.	N.B.	N.S.	Nfld.	Ont.	P.E.I.	Sask.	Total
Stores	1	5	1	1	4	4			2	18/30%
Police	5	10	2	4	3	1	9	1	3	38/60%
Others	1	2					4			7/10%
Totals:	7	17	3	5	7	5	13	1	5	63*

*The total number is larger than the 56 cases because, in some cases, suits are brought against police officers and stores.

As is shown in Table 2, plaintiffs have been more successful against store owners than against the police. Plaintiffs have in fact been successful against store owners in 72% of the cases, whereas they have been successful against police officers in only 46% of the cases.

Romilly v. *Weatherhead* (1975), 55 D.L.R. (3d) 607
Sandison v. *Rybiak*, [1974] 1 O.R. (2d) 74
Schuck et al v. *Stewart et al*, [1978] 5 W.W.R. 279 (B.C.)
Sharpe et al v. *Woolco Dept. Stores* (1978), 20 Nfld. & P.E.I.R. 23
Tanner v. *Norys*, [1979] 5 W.W.R. 724
Valderhaug v. *Libin et al* (1954), 13 W.W.R. 383, (Alta)
Vidito v. *Vaughan*, 4 N.S.R. (1965-69), 629
Whitehouse v. *Reimer et al* (1980), 21 A.R. 541, 11 A.R. (2d) 252; new trial ordered by appeal court (1980) 14 A.R. (2d) 380; action dismissed (1981), 16 A.R. (2d) 76
Willan v. *R. (Ontario)* (1978), 20 O.R. (2d) 587
Williams v. *Webb et al* (1961), 27 D.L.R. (2d) 465 (Ont. C.A.)
Wing Lee v. *Jones et al* (1953), 9 W.W.R. 322

[30] *Foran* v. *Tantangello et al*, (1976), 14 O.R. (2d) 91; *McKenzie* v. *Martin*, [1952] O.R. 849 and *Kennedy* v. *Tomlinson* (1958), 13 D.L.R. (2d) 734; rev'd 20 D.L.R. (2d) 273

[31] *Willan* v. *The Queen* (1978), 20 O.R. (2d) 587

[32] [1979] 5 W.W.R. 724

[33] (1957), 7 D.L.R. (2d) 88.

Table 2: Cases decided in favour of plaintiffs and in favour of defendants when action is brought against police officers, stores owners and others.

	Police	Stores	Others
In favour of plaintiffs	18 (46%)	13 (72%)	2 (30%)
In favour of defendants	21 (54%)	5 (28%)	5 (70%)
Total:	39 (100%)	18 (100%)	7 (100%)

The higher success rate in actions against store owners can be explained by the fact that for a defendant store owner to be successful, he has to show that a crime was in fact committed, and not only that he had reasonable and probable grounds to believe that the defendant had committed an offence, as is the case for a police officer. A closer look at the factors present when a defendant store owner succeeded in his defence, shows that when a crime has been committed, the store owner may on probable and reasonable grounds, arrest a customer who is reasonably believed to have stolen[34]. Two recent decisions go even further. In *Karogiannis* v. *Poulus and T. Eaton Co. Ltd.*[35], Judge Rae stated that it was not necessary that the defendant show that the plaintiff actually committed theft, but only that he had reasonable grounds for believing, and did believe, that a theft had been committed. Judge Rae was well aware of the thin grounds for his decision, and end his opinion by saying he did not go to the question of whether there was indeed a theft, but in case he was wrong, he was prepared to say that he had been satisfied that the plaintiff had stolen the sweater as Poulus thought. In *Banerjee* v. *K-Mart*[36], Judge Riche seems to agree with Judge Rae's opinion that no theft need be proven, and decided for the defendant store employee, who was justified in arresting a person who apprently committed theft. In the latter case, the plaintiff had left a department store with goods, which she had not paid for, to show to her husband for approval. The facts of each case may indicate there was a theft, but the reasons for decision, if followed, could very well change the law relating to false imprisonment in cases of shoplifting. Reasonable and probable grounds that theft has been committed would be enough to allow security officers to stop potential shoplifters. It would give security officers almost the same power of arrest granted to police officers by the Criminal Code.

When the normal procedure of justice has been put into motion without improper motives, then the defendant will be successful even if there has been an error. In *Wing Lee* v. *Jones*[37], the defendant was successful. He had stated the facts to a police officer who later, on his initiative, arrested the plaintiff on reasonable and probable grounds that theft had been committed. In *Delaney*

[34] *Hucal* v. *Hicks* (1966), 55 D.L.R. (2d) 267.

[35] [1976] 6 W.W.R. 197.

[36] (1983), 43 Nfld & P.E.I. Reports 252.

[37] (1953), 9 W.W.R. 322.

v. *Dale and Co. Ltd.*[38], the appeal court of Nova Scotia dismissed an action by a plaintiff who was arrested under the *Absconding Debtor Act* of that province. The court said that where the order had not been set aside for illegality, the defendant could not be found guilty of false imprisonment. This conclusion is supported by the fact that when there is a warrant for arrest or intervention of the judicial system, defendants are successful in 92% of the cases as shown in Table 3.

Table 3: Decisions in favour of plaintiffs when arrest is conducted with or without a warrant.

	Warrant or judicial system	Without warrant
For the plaintiff	1 (8%)	28 (70%)
For the defendant	11 (92%)	12 (30%)
Total:	12 (100%)	40 (100%)

The plaintiff has been successful in only one case out of twelve when a warrant was issued. In *Willan* v. *The Queen*[39] false imprisonment occurred through the negligence of the defendant probation officer who did not have reasonable and probable grounds to believe that the plaintiff had not been reporting to a probation officer.

On the other hand, the defendants who arrested without a warrant succeeded in only 30% of the cases. In half of the cases, where the defendants were successful, arrest had been made by a police officer who had reasonable and probable grounds to believe that a theft or crime had been committed[40]. In another case, the police officer was successful for arresting the defendant without a warrant because the *Intoxicated Persons Act* of New Brunswick allows a peace officer to arrest any person who, on reasonable and probable grounds, is believed to be drunk in a public place[41].

The other cases involving arrest without warrant by persons other than police officers were dismissed because the limitation period had run out[42] or as stated earlier, because a theft had been committed[43].

In the cases where the courts have decided for the plaintiff, damages range from $60.00 to $7,000.00. Only once did the court award a fairly large

[38](1959), 20 D.L.R. (2d) 12 (N.S.).

[39](1978), 20 O.R. (2d) 587.

[40]*Green* v. *Pike & Bagley* (1953), 8 W.W.R. 369; *LeBrun* v. *High & Low Foods Ltd. & Parry* (1968), 65 W.W.R. 353; *Roberts* v. *Buster's Auto Towing Services Ltd. et al*, [1977] 4 W.W.R. 428; *Schuck et al* v. *Stewart et al*, [1978] 5 W.W.R. 279 (B.C.); *Reid* v. *DeGroot and Brown* (1964), 49 M.P.R. 246 (NSSC in B.); *Williams* v. *Webb et al* (1961), 27 D.L.R. (2d) 465 (Ont. C.A.).

[41]*Barrett* v. *Lorette & Ross* (1979), 27 N.B.R. (2d) 621.

[42]*Ihnat et al* v. *Jenkins et al*, [1972] 2 O.R. 534.

[43]*Hucul* v. *Hicks* (1966), 55 D.L.R. (2d) 267 *Banerjee* v. *K-Mart Canada Ltd. & Little* (1983), 43 Nfld & P.E.I. Reports, 252; *Karogiannis* v. *Poulus and T. Eaton Co. Ltd.*, [1976] 6 W.W.R. 197.

amount of money. In *Tanner* v. *Norys*[44], a judge of Queen's Bench awarded $26,500.00 against a psychiatrist. The action was, however, dismissed by the appeal court.

As can be seen from Table 4, in 51% of all cases decided for the plaintiff, the court allowed damages of less than $1,000.00. Only in 11.5% of the cases did the court allow damages between $5,000.00 and $7,000.00. In fact, in 72% of the cases, the courts have awarded damages under $3,000.00.

Table 4: Amount of damages awarded to the plaintiff against stores, police officers and others.

	$0-999	$1000-1999	$2000-2999	$3000-3999	$4000-4999	$5000	Total
Stores	7	2	3	2			14 (41%)
Police Officers	8	2		3	1	3	17 (48%)
Others	3					1	4 (11%)
Total	18 (51%)	4 (11.5%)	3 (9%)	5 (14%)	1 (3%)	4 (11.5%)	35 (100%)

It should also be noted that no damages higher than $4,000.00 were awarded against store owners. By contrast, in four out of seventeen cases involving the police, damages of more than $4,000.00 were awarded to the plaintiff. In seven cases, punitive damages were awarded against the defendants. In three of these cases, punitive damages were awarded against police officers[45]. The highest amount was $5,000.00 in *Whitehouse* v. *Reimer*[46], in which case a 24 year old taxi driver and part-time university student stopped his taxi in the loading zone in front of a hotel to pick up a fare. Although the taxi driver was entitled to be there, the defendant policeman ordered him to move. When the plaintiff insisted on his right to remain, the policeman pulled him from his taxi, assaulted him, arrested him and imprisoned him for a day. Subsequently, the policeman laid charges against the plaintiff of resisting arrest and causing a public disturbance, both of which were dismissed six months later. Five thousand dollars were awarded to the plaintiff, together with the plaintiff's pecuniary loss and the cost of this legal defence to the two criminal charges, which were dismissed. In awarded punitive damages, the judge stated that civil liberties must be protected and that punitive damages could promote such protection and deter police officers from abusing their power.

> The court is the final line of defence for the protection of the civil liberties and rights of the individual citizen. As such, it cannot and must not condone misconduct or abuse or authority on the part of any police officer. There has been a disturbing increase in this type of occurrence, not only in this jurisdiction, but in this country. It is necessary to bear in mind that one's attention is only drawn to those cases in which

[44][1979] 5 W.W.R. 724.

[45] *Levesque* v. *Jacques* (1980), 29 N.B.R. (2d) 300; *Whitehouse* v. *Reimer* (1980), 21 A.R. 541, 11 A.R. (2d) 252, new trial ordered by appeal court (1980), 14 A.R. (2d) 380, action dismissed (1981), 16 A.R. (2d) 76, *Bahner* v. *Marwest Hotel Co. Ltd. & Muir* (1970), 75 W.W.R. 739.

[46]See cases cited, *supra.*, footnote 45.

> a victim has the fortitude and conviction to seek redress for the violation of these rights[47].

Where store owners are involved, punitive damages are never for more than $2,500.00[48]. The reasons for low punitive damages against store owners were discussed in *Hayward* v. *Woolworth* where the trial judge was hesitant to impose punitive damages on the store. He stated that:

> Bearing in mind that the cost to a retailer of shoplifting is ultimately passed on to the consumer, it would be wrong for a court to assess against a retailer exemplary damages so high as to inhibit the reasonable discouragement of shoplifting. On the other hand, it would be wrong for a court to assess exemplary damages so low as to make the retailer less concerned or unconcerned about the consequences of failing to justify the arrest of suspected shoplifter[49].

In *Tanner* v. *Norys*[50] the trial judge was prepared to award $12,500.00 as punitive damages against a psychiatrist who caused the plaintiff to be involuntarily committed to a mental institution. The trial judge stated that the exemplary aspect includes elements of deterrence and punishment of the defendant personally because he demonstrated malicious conduct and disrespect for the liberty of a patient and the sanctity of his person.

The award of compensatory and punitive damages that are generally low, ($1,306.00 average in cases involving merchants and $2,402.00 average in cases involving police officers) pose a problem in explaining the deterrent effect of false imprisonment.

Our empirical study of stores in the greater Moncton area reveals that larger stores with nationwide branches, spend less on security (security guards, floorwalkers, etc.) than what they would lose from theft if they had no such policy. Two out of six of these larger stores also say that they are not afraid of being sued for false imprisonment, and that they are willing to take chances. All of the large stores say that they willing to risk being sued for false imprisonment, rather than to stop using security personnel, even if errors sometimes occur in arresting innocent customers, although most store managers say that they do not take useless risks.

The larger stores also have a well defined procedure before arresting a customer. The security person must see the customer take the object. The customer is then followed everywhere in the store and is only arrested outside the store. The security person must be sure the customer is guilty of theft before arresting him. The customer is then asked to follow the security personnel to an office. As little disturbance as possible is made. At the office, the customer is asked to empty his pockets and the city police are called to the store, where the customer is handed over to the police. When the security personnel are not sure if there has been a theft, particularly in the case of

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[47] *Whitehouse* v. *Reimer et al* (1980), 21 A.R. 541 at pp. 575-576, (1980), 11 A.R. (2d) 252, at 281.

[48] *Hayward* v. *F.W. Woolworth Ltd. et al* (1979), 23 Nfld & P.E.I. Reports 17; *Sharpe et al* v. *Woolco Dept. Stores* (1978), 20 Nfld & P.E.I. Reports 23; *Bahner* v. *Marwest Hotel Co. Ltd. & Muir* (1970), 75 W.W.R. 729; *Eagle Motors Ltd.* v. *Makaoff* (1971); 1 W.W.R. 527.

[49] *Hayward* v. *F.W. Woolworth Ltd. et al* (1979), 23 Nfld & P.E.I. Reports 17 at 33.

[50] [1979] 5 W.W.R. 724.

juveniles, a notice prohibiting the youth from coming back in the store is issued under the *Petty Trespass Act*.

Table 5 shows that by contrast to larger store managers, small store owners said that they are afraid of being sued if they apprehended an innocent customer. They also fear losing clients if one is arrested illegally. They said that they want to avoid bad publicity by going to court, or by being accused of false arrest in the local newspaper. They also say that the value of whatever is stolen is too small to risk arresting people or to consider hiring security personnel.

Table 5: Large and small store percentages of loss from theft, procedures used to protect from theft and expression of willingness to use security personnel and arrests in regard to cost of not using such measures.

	Large	Small	% of losses over sales	Procedures for protection	Cost of security procedures offset losses	Fear of arrest
Store no. 1	x		1.5%	Security personnel follow outside	Yes — but watch	No
Store no. 2	x		2%	Security personnel follow outside	Yes — but watch for errors	No
Store no. 3	x		1%	Security personnel follow outside	Yes — but watch for errors	No
Store no. 4	x		4.5%	Security personnel follow outside	Yes, take chances	
Store no. 5	x		1.4%	Security personnel follow outside	Yes, don't take chances	
Store no. 6	x		1%	Security personnel follow outside	Yes, not afraid for image	No
Store no. 7		x	.02%	Under key		Yes
Store no. 8		x	?1%	Staff match		Yes
Store no. 9		x	?	Under key		Yes
Store no. 10		x	?	None		Yes

It can be deduced from Table 5 that the larger the losses from theft, the more willing the stores are to take chances at arresting customers. On the other

hand, when the losses from theft are low, as is the case for smaller stores, the store owners express their fear of being sued for false arrest, fear of bad publicity, and fear of losing clients. For these small stores they prefer not using security personnel, and prefer to lose a few dollars worth of merchandise, rather than to risk arresting innocent customers, or losing clients from bad publicity. On the contrary, those nationwide stores who experience high losses from theft are prepared to risk arresting innocent customers.

Such a position is supported by the fact that damages awarded are low and that very few actions for false imprisonment are commenced by wrongfully arrested customers. Even if there are threats of lawsuits, those threats are often dropped after the store has excused itself for wrongfully arresting the customer. According to our information, no actions for false imprisonment have been brought against the five largest stores in the Moncton area for the last few years. Only one case was settled out of court for $2,000.00. All stores report threats which were dropped after proper excuses were received or, as one manager said, "actions were dropped upon receiving a letter from the store's lawyer listing the customer's criminal record".

Conclusion

Our research has shown that in the cases of false imprisonment reported in Canadian jurisprudence from 1950 to 1983, police officers have been sued more often than store owners for falsely arresting innocent persons. We could not draw any conclusion from the cases involving police officers, since it is very difficult to obtain information regarding faulty police procedures from the police; this information is only available in rare cases when a public inquiry is ordered and a probe into police practice in arresting citizens is conducted. A detailed sociological study should be conducted for more insight into this matter[51].

As far as false arrest by store owners of customers suspected of stealing, it is easier to collect data from the store managers, although the data may be questioned with some suspicion.

Our study of cases and questionnaires administered to store managers leads us to the following conclusions. First, the pure economic cost of arresting customers suspected of stealing is not high enough to stop larger stores from risking the arrest of innocent customers. This conclusion is derived both from the responses to our questionnaires and from the low damages awarded against store owners' employees in cases of false arrest. The fact is that "exemplary damages must not be so high as to inhibit the reasonable discouragement of shoplifting"[52]. This observation leads us to a policy consideration. The courts will protect the innocently arrested customer, but not at the expense of imposing too strong a burden on store owners. Recent dicta in *Karogiannis*

[51] A detailed survey of the legal aspects of police powers in search and seizure in criminal law enforcement has been released by the Law Reform Commission of Canada, *Police Powers — Search and Seizure in Criminal Law Enforcement*, working paper 30, Ottawa, Minister of Supply and Services, Canada, 1983, 356.

[52] *Hayward* v. *F.W. Woolworth Ltd. et al* (1979), 23 Nfld & P.E.I. Reports 17 at 33.

v. *Poulus and T. Eaton Co. Ltd.*[53], and in *Banerjee* v. *K-Mart*[54] would go even farther in protecting store owners from actions by innocent customers, provided reasonable and probable grounds for arresting could be shown. In cases of smaller stores, the economic and apprehended economic effect of falsely arresting an innocent customer is perceived as being so high by store owners that it would discourage them from arresting customers. It can be concluded from our study that the economic aspect has a definite influence on behaviour of store owners vis-à-vis their customers.

Secondly, our study did show to some extent that judges do take into account the economic consequences of the decisions they make. The reasoning of the trial judge in *Hayward* v. *Woolworth*[55], in refusing to grant "exemplary damages so high as to inhibit the discouragement of shoplifting" indicates that he did take the economic consequences into consideration. Furthermore, the fact that damages for false imprisonment never exceed $4,000.00 against store owners, indicate that judges do take economic consideration into account.

In order to counter-balance the social cost of the illicit behaviour (false arrest) with the social benefits derived from it, the judge would have to impose exemplary damages that would bring the equation to zero. This is difficult because the social benefits (reduction of theft) may depend on whether or not there are security measures. Proof economic or sociological studies in similar stores, with similar clientele, with or without similar security measures, tending to show the costs and benefits of such measures, would have to be heard. Our law of evidence tends to restrict such external evidence. It is submitted that judges do take into account those considerations even if it is not done scientifically.

Thirdly, it can be inferred from our questionnaires that larger stores as well as smaller stores are knowledgeable and conscious of the possibility of being sued for falsely arresting an innocent customer. Smaller store owners are afraid of arresting innocent customers. Larger stores follow very well defined procedures before arresting a customer. The will not risk arresting without being "99% sure" as they have stated. Furthermore, an alternative procedure to arresting a customer is to issue a notice under the *Petty Trespass Act* providing that the person not come back in the store. These considerations may be used to confirm the view of the proponents of economic analysis of law who say that "tort damages are costs and market deterrence operates on the premise that by increasing the cost of harmful activities, tort law will shift resources to safer and more efficient processes, firms and industries"[56].

The fear expressed by small store owners and the careful use of defined procedures and alternative methods by larger stores could also be interpreted in favour of Mr. Justice Linden's theory of tort law acting as an ombudsman through deterrence from fear of publicity derived from trials, news reports,

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[53][1976] 6 W.W.R. 197.

[54](1983), 43 Nfld & P.E.I. Reports 252.

[55](1979), 23 Nfld & P.E.I. Reports 17 at 33.

[56]R.M. Soloman et al, *supra.*, footnote 2, at 17.

and media reports. Even if the results of our questionnaires are not conclusive, the results obtained by Axelrod and Elkind[57] may be helpful in understanding the behaviour of merchants. The searchers found that California merchants were very conservative in arresting customers suspected of shoplifting. Although the law will exonerate a merchant who arrests an innocent customer on reasonable and probable grounds that a theft had been committed, even if no theft was in fact committed, the California merchants would not arrest unless two persons had seen the customer taking an object, and unless they were absolutely sure that the customer had committed a theft.

Empirical data collected in Axelrod and Elkind's study show that very few civil suits are intituted and that damages are seldom awarded for more than $5,000.00. On the other hand, the cost of defending a civil law suit cannot be an important factor, having regard to the fact that only a few falsely arrested clients ever sue in civil courts. Axelrod and Elkind[58] say that the cost of defending a lawsuit was not the main reason given for the conservatism of the California merchants. It seems that the economic factors alone, calculated in money's worth, cannot account for the whole deterrence.

Among the reasons advanced for acting within the law and avoiding the arrest of suspected clients were the fear of embarrassment, anguish and loss of reputation for a mistakenly accused suspect. Even if those fears are unrealistic from a pure economic point of view, it seems that they were the main reasons deterring the California merchants from arresting suspected clients. The same conclusion may be drawn from our questionnaire as it pertains to small store owners, although it is not as clearly expressed by larger store managers.

Factors other than economic factors, in the strict sense, explain the behaviour of the merchants. The use of tort law as ombudsman may come in handy to explain those psychological factors such as fear of loss of reputation and fear of embarrassment. The tort law as ombudsman theory emphasizes the potent impact of the public attention raised in the context of the tort suit. That impact may be greater in the United States than in Canada, but for merchants who depend on people for doing business, the threat of a lawsuit may be serious.

Tort law as ombudsman may account for the fears of merchants, but if that theory accounted for one hundred percent of the variance, the result would be that no arrest would be executed by merchants on suspected clients. Some other factors must be retained, especially to explain the behavior of larger Canadian store managers in relation to shoplifters.

It is suggested that both the economic analysis of law and the law as ombudsman theories interplay in explaining the deterrence effect of the law relating to false imprisonment. The economic factors cannot be reduced to money. There are psychological factors involved in accounting for the cost of a transaction. The fear of losing one's reputation or one's clients is part of that cost which may vary from one individual to the other.

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[57] *Supra.*, footnote 28.

[58] *Supra.*, footnote 28, at 600.

In that sense, tort law as ombudsman may explain part of the whole phenomenon of deterrence, but economic analysis cannot be discounted. Both approaches are complementary until a more sophisticated economic analysis theory takes into account costs other than monetary disbursements.

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