The Pearson Report: Guidelines For Canada?*

EDWARD VEITCH**

This essay seeks to examine the Pearson Report on civil liability and compensation for personal injury and compare its recommendations with the most recent developments pursued by judges in our courts.

> The subject of damages for personal injury is an area of the law which cries out for legislative reform.[1]

The Pearson Report is of immediate interest for Canadian law reformers who have turned their minds afresh to the forms of the law of damages and to the reform of the tort system generally in light of the pleas for change by the Justices of the Supreme Court of Canada in the important decisions of 1978. As one such party the writer, prior to reading Pearson, attended a symposium at the University of Calgary[2] to consider, amongst other things, these major judgments of January 19th, 1978. This not only fully lived up to its promise of being a tort-compensation schemes bazaar to outdo the juristic event dreamt of by Professor Twining,[3] but also served to prove the fallacy of Professor Posner's belief that in the market place of ideas the well-leavened must necessarily prevail over the half-baked.[4] In Calgary the old protagonists lobbed at each other their predictable salvoes. In order, the Honourable Sir Owen Woodhouse reminisced on a job well done,[5] while in response Mr. Justice Laycraft[6] doggedly, but skillfully, defended

**The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (H.M.S.O. Cmnd. 7054-1. 1978).

**M.A., 1963, LL.B., 1966 (Edinburgh). Professor, Faculty of Law, University of Windsor. Dean Designate at University of New Brunswick Law School.

[1] *Andrews*, v. *Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452, at 458 per Dickson J; *Thornton* v. *Board of School Trustees, Prince George* (1978), 83 D.L.R. (3d) 480; *Arnold* v. *Teno* (1978), 83 D.L.R. (3d) 609; and *Keizer* v. *Hanna* (1978), 82 D.L.R. (3d) 449. And see Charles, 'Justice in Personal Injury Awards; The Continuing Search for Guidelines', *Studies in Canadian Tort Law* (ed. Klar 1977), 37; Gibson, *Repairing the Law of Damages*, (1978) 8 Man. L.J. 637, and Veitch, *Bill 59 and the Reform of Fatal Accidents Legislation*, (1978) 10 Ottawa L. R. 114; Charles, *A New Handbook on the Assessment of Damages in Personal Injury Cases from The Supreme Court of Canada*, (1978) 3 C.C.L.T. 344; Bissett-Johnson, *Comment*, (1978) 24 McGill L.J. 316.

[2] 'The Future of Personal Injury Compensation', presented by the Faculty of Law, January 20-21, 1978.

[3] Twining, *The Juristic Bazaar*, (1978) 15 S.P.T.L.J. 70.

[4] Posner, *Economic Analysis of Law* (2nd ed. 1977), Ch. 28.

[5] Report of Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand (December 1967).

[6] Laycraft, *Reforming the Automobile Tort System*, (1971) Alberta L. Rev. 22.

the tort system with his proposals for more judges and a tariff scale for injury compensation. Thereafter Professor Rueben Hasson,[7] with eccentric humour, once again exposed the tort system which provoked Mr. Ted Rachlin Q.C.,[8] to do his best to defend the record of the swashbuckling trial lawyers who, by their courage, take on the large corporations and both achieve justice for their clients and establish socially beneficial standards of conduct by their courtroom successes.[9]

In an after-dinner speech Professor Jeffrey O'Connell[10] punched out some hard-nosed advice, based on his many years of experience, on how to push a compensation scheme through a legislature. At the same time he castigated the neanderthal defenders of the existing system in a barbed address. Another veteran, Professor Ison, who has long ago given up even a peremptory attack on the tort system,[11] lectured the participants on his new plan for income security for those suffering from the incidents of modern living.[12] In closing, Professor Allen Linden Q.C., now Mr. Justice Linden of the Ontario Supreme Court, offered his longstanding misgivings on the abolition of the tort system.[13]

That gathering followed the pattern of many held in the last decade at which able and sincere speakers, some in favour of the tort system and others dedicated to its abolition, have brayed at or near each other but rarely, if ever, have communicated. And this is to be expected because as every advocate knows, while it is almost impossible to reverse totally the opinion of an opponent, a compromise position is always possible.[14]

It is that compromise which is offered by Pearson:

> Our compensation systems should be looked at as a whole. Tort should be retained and, while the two systems of tort and social security should continue side by side, the relationship between them should be significantly altered. Social security should be recognized as the principal means of compensation. Double compensation should be avoided by offsetting social security benefits

---

[7]Hasson, *Blood Feuds, Writs and Rifles,* (1976) 14 Osgoode Hall L. J. 445; Glasbeek & Hasson, 'Fault — The Great Hoax', *New Studies in Canadian Tort Law* (ed. Klar 1977), 395.

[8]Of Rachlin, Wolfson & Malach, Toronto. Mr. Rachlin is chairman of the Insurance Committee, The Advocates Society of Ontario.

[9]*Contra:* Scheingold, *The Myth of Rights* (Yale U.P. 1974), at 124-6.

[10]Connell, *The Interlocking Death and Rebirth of Contract and Tort,* (1977) 75 Mich. L. Rev. 659, citing the author's major contributions.

[11]Ison, 'Human Disability and Personal Income', *New Studies in Canadian Tort Law* (ed. Klar 1977), 425.

[12]Ison, *The Politics of Reform in Personal Injury Compensation,* (1977) 27 U. Toronto L. J. 385.

[13]Linden, *Peaceful Co-existence and Automobile Accident Compensation,* (1966) 9 Can. Bar J. 5.

[14]The political realities in the decision-making were accurately diagnosed by Lewis, *Waiting for Pearson: The Policy Choices to be Made in Accident Compensation,* (1978) 12 The Law Teacher 1.

> in the assessment of tort damages. Money available should be spent on the more serious injuries rather on minor injuries. The range of those receiving compensation should be extended.
>
> No-fault compensation should be introduced for motor vehicle injuries. The no-fault provision for work injuries should be improved. A new benefit for all severely handicapped children should be introduced.
>
> The range of tort should be extended by introducing strict liability in some areas. Under tort, provision should be made for periodic payments for pecuniary loss.
>
> In administering compensation existing systems and institution should be used, but considerable simplification of the highly complicated social security system is desirable.
>
> Our terms of reference do not cover all injuries, and at least one million injuries every year, mostly those occurring in the home, would remain outside our proposals.[15]

That quotation accurately summarizes the Commission's achievements whose limited nature restricts commentary to detail and obviates wider criticism of the policy choices made.[16] Accordingly, this appreciation seeks to examine the substantive recommendations offered by sixteen persons[17] who dedicated five years of their lives[18] and incurred expenses of approximately $2,700,000[19] in the examination of the causes and compensation of human disability. Our question must be, not what did the British taxpayers get for their investment, but what, if anything, can we in Canada gain from this Report?

The policy statement reveals the choice to retain the pre-existing tort system, albeit with cosmetic improvements, and to add to it two no-fault schemes, one for motor vehicle injuries and a second for severely handicapped children, howsoever handicapped. At the same time the commissioners called for a rationalization of the existing compensation schemes for disablement through injury, disease or other incident. This half-way house will please neither the rabid abolitionist nor the dyed-in-the-wool retentionist of the tort system, but it may be the only acceptable political choice for this era of continuing fiscal conservatism.

---

[15]Pearson, *supra*, at 367.

[16]Lewis, *supra*, footnote 14; Weir, *Note* [1978] C.L.J. 222, at 226. Criticism of specific proposals is easy enough. The difficulty in appraising the Report as a whole is that it really isn't a whole at all — it is a congeries of those ideas which managed to collect a majority of voices in a Commission whose members displayed very diverse attitudes, ranging from intuitive humanity to dogmatic sophistication. The result is extremely English, but the two volumes of supporting data will be very useful.

[17]Pearson, *supra*, at iii and v.

[18]March 13, 1973 to March 1978.

[19]Pearson, *supra*, at ii: £1,337,446 of which £50,546 was spent on the cost of printing and publishing of the Report.

In this examination of the Report the order of presentation follows that of the document itself.

THE IMPROVEMENT AND RATIONALIZATION OF THE TORT SYSTEM

The Commission fixed on two main ideas: to make it easier for the victim to recover, and to sort out the wrinkles in the assessment, calculation and adjudication process of the award of compensation. Firstly, to answer the complaint that the tort system compensates solely on the basis of chance and luck, the members recommended that strict liability be imposed with respect to injuries caused by products and rail transport, by vaccine damage, by injury to volunteers for medical research, and in relation to injuries resulting from things and operations involving exceptional risks.[20]

This may be a genuine contribution, particularly with regard to products, for as John Fleming has suggested:

> Liability for defective products (or for short 'products liability') is not yet a coherent concept of our law. The present pattern of legal rules is an amalgam of contract and tort, of strict liability and negligence. It affords greater protection to the buyer against the retail seller than to accident victims against the manufacturer. It still places legalistic concepts like privity of contract before functional policies of compensation, accident prevention and loss spreading. But reform is in the air. While our courts have evidently been unequal to the task, there is now a good prospect of early legislative intervention.[21]

The idea of special responsibility for products dates from the mid-nineteenth century, but it only really developed in the twentieth century with the imposition of liability on the manufacturers of foodstuffs and automobiles. The underlying policies comprise the alleviation of the burden of proof on the victim, the spreading of the losses associated with accidents amongst all of the consumers and the recognition of the deterrence factor of increasing insurance premiums on manufacturers of dangerous products.[22]

---

[20]Pearson, *supra*, at 368, at 382-387.

[21]Fleming, *The Law of Torts* (5th ed.), at 498, footnotes omitted. And compare Waddams, *Products Liability* (1974).

[22]Defective services command similar consequences. As a result of rising frequency of suits against law firms in the Province of Ontario the Law Society of Upper Canada has had to accept an increase in the errors and omissions premium from $275 in 1977-78 to $450 for the year 1978-79. Recent cases have included: *Major* v. *Buchanan* (1975), 61 D.L.R. (3d) 46; *Gouzenko* v. *Harris* (1976), 1 C.C.L.T. 37; *Messineo* v. *Beak* (1977), 13 O.R. (2d) 329; and *Banks* v. *Reid* (1978), 18 O.R. (2d) 148.

Whether the recommendation of Pearson will achieve these goals must be questioned in the light of North American experience. It has been established that strict liability is not absolute liability so that in order to succeed the victim must show that the product was defective in form and unreasonably dangerous to the user. There have been disputes as to whether the plaintiff must establish one or both of these allegations. And indeed it has sometimes been argued that the consumer must prove that the product is harmful because there was something inherently wrong with it. That is, that the manner of design was at fault or there was a defect in the process of manufacture. At the same time considerable energies have been spent on determining whether or not the term 'defective' encompasses all of the three above. Equally the phrase 'unreasonably dangerous' has been held to mean ultra-hazardous, or abnormally dangerous or merely that the product caused injury. The exploration of the synonyms unsafe, harmful, injurious and unwholesome has made fortunes for some law firms. Further litigation has not cleared up the question who is covered by the responsibility of the manufacturer or supplier: the purchaser, the user or the bystander? Other unanswered queries are: is the liability of the manufacturer opened in time?[23] Is he liable only if notified within a certain number of days of defects in the product and can he successfully disclaim responsibility by the use of exculpatory clauses or by the use of the defences of abuse of product or consumer stupidity?

Therefore the contribution of the Commission is limited to that of nudging the judiciary along a path which they are already slowly traversing. There can be little doubt that the acceptance of the proposal will encourage rather than diminish litigation, and the social costs may be considerable. That is to say, when a California jury in 1978 awarded $127.8 million dollars (reduced on appeal to $6.8 million dollars) for injuries suffered when a Ford Pinto fuel tank exploded following a rear end collision the public debate in the United States over the costs of products liability to the consumer reopened with renewed vigour. The consumers there are reacting to the fact that the price paid for items that are identified as high risk-bearing includes a portion of the manufacturer's liability insurance premiums. While the larger corporations can usually obtain liability insurance the smaller firms are forced to go without due to their inability to afford the costs and because the alternative, that of ceasing operations, is for them unacceptable.

Yet one successful plaintiff's claim of substantial proportions against the firm "going bare" may have that effect and so put 50 or 100 workers out of work. Faced with these problems the trend in the United States

---

[23]Compare section 6 (4) of the draft Limitations Act of Ontario (Ministry of the Attorney General, September, 1977): "The running of time with respect to the limitation period fixed by this Act for an action to which the subsection applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case, he ought to know, (a) the identity of the defendant; and (b) the facts upon which his action is founded."

has been to resort to legislation to codify the varying common law decisions and so to give the insurance industry some basis for calculating their potential liabilities. This has been necessary because the insurance corporations have been raising premiums by as much as 1,500 per cent over the last few years on the premise that they have been forced to insure against the unknown. Therefore some 42 states are currently considering the enactment of products liability statutes which their backers hope will make the law more certain and place a ceiling on insurance premiums.

These problematic possibilities clearly were not considered in depth prior to the drafting of the recommendations of the Commission.

RATIONALIZATION OF THE AWARD OF DAMAGES

The second branch of the new and improved tort system is perceived by the Commission to lie in the rationalization of the awarding of damages. The basic principle of full reparation for loss sustained is upheld but the method of assessment and manner of payment are to be revised. Thus double compensation is to be avoided by deducting from damages all monies received through the social security system. Periodic payments are to be introduced for financial loss sustained, but with the option of a lump sum remaining. The incidence of income tax and inflation are to be considered in the assessment of the damages claimed. There is nothing strikingly original here and the detailed recommendations on the assessment of damages read very much like a synopsis of the academic writing on damages since the early 1960's throughout the common law world.

Damages for services rendered and renderable

The question of recovery for services given to an injured person by another has universally concerned the courts over recent years.[24] Pearson now clarifies the position by recommending that damages be recoverable without technical restriction and that the measure be that of the need of the recipient. Experience in Canada shows that the value may be calculated either by reference to the market price of such services[25] or by using an evaluation based on the input of the class of donor to the gross national product.[26] Further the Supreme Court

[24]See clause 4, The Law Commission (No. 56) *Report on Personal Injury Litigation — Assessment of Damages* (1973) which attempted to deal with the problems raised by *Schneider* v. *Eisovitch* (1960), 2 Q.B. 430 and *Gage* v. *King* (1961), 1 Q.B. 188 and intensified by *Cunningham* v. *Harrison* (1973), Q.B. 942, *Donnelly* v. *Joyce* (1973), 3 All E.R. 475. And see Gibson, *supra*, footnote 1, at 659-660.

[25]*Hasson* v. *Hamel* (1977), 16 O.R. (2d) 517.

[26]*Franco* v. *Woolfe* (1974), 6 O.R. (2d) 227.

of Canada in *Thornton* and *Teno* adopted the long defunct notion of Lord Denning M.R.[27] of awarding monies to the plaintiff to be held in trust for the donor third party.

Conversely, where the injured person is deprived of the opportunity of giving services to his relatives his loss of capacity is compensable in damages. This concept has links with the Scots law of solatium by which relatives of the deceased recover for their loss of possible services from the deceased,[28] but principally derives from the 150 years of juridical interpretation of Lord Campbell's Act in its various guises.[29] What we are seeing here is the recognition of the hitherto unarticulated notion of compensating a nuclear family for an intrusion by a money assessment of the intangible harm so sustained.[30] This must also be the basis for the Commission's recommendation that an award of loss of society be made available in the awkward cases of the deaths of minor children and non-earning spouses whose loss was difficult to quantify under the purely financial calculation of the 19th Century legislation.[31] But for us the old 'St. Lawrence Rule'[32] already went beyond the restricted idea of pecuniary loss attributable to the death of the deceased by a second head of damages for the loss of guidance, example, encouragement, training and education provided by the deceased. This latter day legal fiction was developed to meet the limitations of the original Lord Campbell's Act although the extensions of the fiction have been slow to gain acceptance. There still remain questions as to whether the head of damages only applies to the loss of a mother and not the loss of a father and whether children alone can be the beneficiaries.

Loss of Amenity[33]

The giving of money for loss of enjoyment of life has always provoked charges against the tort system of intuitive decision making and guess work as to the imponderable. The Commission, having made the decision to continue and enlarge the range of awards for

---

[27]*Dennis* v. *London Passenger Transport Board,* [1948] 1 All E.R. 779,

[28]Veitch, *Solatium — A Debt Repaid?* (1972), 7 Ir. Jur. 77.

[29]Now the *Fatal Accidents Act 1976,* C. 30.

[30]*Family Law Reform Act* 1978 (Statutes of Ont. 1978 c. 2), s. 60 (2) (d).

[31]Veitch, *supra,* footnote 1, at 118.

[32]*St. Lawrence & Ottawa R. Co.* v. *Lett* (1885), 11 S.C.R. 422; *Vana* v. *Tosta,* [1968] S.C.R. 71; *Trudel* v. *Canamerican Auto Lease and Rental Ltd.* (1975), 59 D.L.R. (3d) 344; *Franco* v. *Woolfe* (1976), 69 D.L.R. (3d) 501; *Clement* v. *Leslies Storage Ltd.* (1978), 82 D.L.R. (3d) 469; *Lewis* v. *Todd* (1978), 5 C.C.L.T. 167, 170 ff. per Lacourciere J. A. dissenting.

[33]Ogus, *Damage for Lost Amenities: For a Foot, a Feeling or a Function,* (1972) 35 Mod. L.R. 1.

intangible losses, rejected a tariff scale and gave its approval to lump sum awards for such losses. The controversy over compensation for intrusion of sexual capacity comprehensively illustrates the problems.[34]

Pain and Suffering

An important paper by O'Connell and Simon[35] revealed that 70 per cent of the injured persons interviewed did not realize that pain and suffering was compensable and so did not expect any money. The proponents of compensation schemes have consequently railed against such payments as being the very proof of the irrationality of the tort system and have resisted, unsuccessfully, the addition of these awards to their schemes.[36]

The Pearson Commission favours retaining lump sum payments for pain and suffering but the members split equally as to the setting of ceilings for the awards.

By way of comparison the Supreme Court of Canada in January of 1978[37] attacked this problem of ceilings for pain and suffering and decided upon an arbitrary figure of $100,000. The Justices accepted that there is an injury comprising mental anguish flowing from the realization of the injury and that this is a necessary consequence of the physical harm. But they also observed that awards have been increasing as courts have laid emphasis on the subjective appreciation of the plaintiff's injury rather than attempt to assess an award which would be fair as between both plaintiff and defendant and all others similarly injured. The members of the court also spoke to the social burden of increasing insurance costs[38] in order to justify their decision to limit awards under this heading. What the Supreme Court did not tell us was how to operate these ceilings. For example, is the ceiling price to apply to the very worst case imaginable with a scaling down of awards pertinent to lesser injuries? Or should the trial judge assess the damages as before then reduce his assessment to the maximum? What factors should go into the assessment — severity, characteristics

---

[34]*V. v. C. (1972), 26 D.L.R. (3d) 527, and Meglio* v. *Kaufman Lumber Ltd.* (1978), 79 D.L.R. (3d) 104.

[35]*Payment for Pain and Suffering — who wants what, when and why?* (1972) U. Ill. L.F.I.

[36]Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand,* (1973) 21 Am. J.C.L. 1.

[37]*Andrews* v. *Grand & Toy Alberta Ltd.; Thornton* v. *The Board of School Trustees of School District No. 57* and *Arnold* v. *Teno, supra,* footnote 1. And compare similar attempts in the United States: *Temple* v. *Liberty Mutual* 336 So. 2d 299 (La. App. 1978) where the court set conventional limits of $40,000 for intangible losses to surviving spouses and $30,000 to each surviving child.

[38]Conversely, at least one trial judge has expressed the opinion that the new scheme of overall calculation of damages approved by the Supreme Court of Canada has served to increase awards considerably — *Cole* v. *Canadian Pacific Ltd.* (1978), 22 N.B.R. (2d) 328, at 342 per Barry J.

of the individual, length of time of expected suffering, and what else? In addition there was no direction given as to if and when the ceiling ought to be modified to cope with the devaluation of the dollar.[39]

Also it should be said that the awards of trial and appellate courts in Canada,[40] at least, may often be disguised payments to relatives of disastrously injured persons whom they will have to care for indefinitely. The aim of assistance with the meeting of staggering legal costs cannot be overlooked.[41]

The Unconscious Plaintiff

The Commission's views represent a reversal of the existing English rule[42] by which substantial damages are given to an unconscious injured person. Commonwealth jurisdictions, such as Australia and Canada, did not accept that metropolitan rule but in Canada at least we have not proceeded without difficulty. Most recently the Alberta Court of Appeal[43] made a plea for assistance from the Supreme Court of Canada in dealing with a conscious plaintiff unaware of her condition. The judgments reiterate all of the pertinent arguments. By majority the court determined that the prevailing principle should be moderation of damages and that an artificial ceiling of $50,000 should be set. Nevertheless the judgments reveal the judicial unhappiness with their solution to the problem. That is, the court argued that the problem really is one of philosophy rather than law and that the traditional explanations of damages awards do not apply in these cases. The judges recognized that money cannot provide a benefit for this class of injured persons especially where all medical benefits are State-provided, and that punishment of the wrong-doer is irrelevant where compulsory insurance is a fact and where there exists a state fund to provide for monies not collectable from an insurer. They questioned the justification for granting a large sum of money to the particular plaintiff just because she happened to be a victim of a motor vehicle accident, and in so doing reviewed the provisions for persons injured in industry, by a criminal act, and on active service with the armed forces. They concluded that as other victims would merely receive monthly

[39]There are other jurisdictions where such ceilings are employed. In Ireland a statutory figure of £1,000 is set for intangible losses suffered by dependants of a deceased, which figure has become the routine award. By comparison, in Scotland a conventional figure set by the courts for similar losses has been increased regularly to cope with the devaluing pound. See Veitch, *supra*, footnote 28 at 90-93. Compare *Lindal* v. *Lindal* (1978), 5 C.C.L.T. 224, which overrides the ceiling.

[40]*Teno* v. *Arnold*, 7 O.R. (2d) 276, aff'd, 11 O.R. (2d) 585.

[41]In the United States courts routinely award attorneys' fees in addition to compensatory and punitive damages: *Ponce de Leon Condominiums* v. *De Girolamo* (1977) 232 S.E. 2d 62.

[42]*Wise* v. *Kaye* (1962), 1 Q.B. 638; *West* v. *Shephard*, [1964] A.C. 326.

[43]*Hamel* v. *Prather*, [1975] 2 W.W.R. 681; (1976), 2 W.W.R. 742.

pensions with hospital care at public expense there was sparse justification for granting a massive lump sum payment to this particular individual. The Commission and the judges would therefore appear to be arriving at the similar conclusion, by comparable analysis and by acceptance of the same value judgments.

Wrongful Death

Under this heading the members recommend the extension of the class of relatives who may claim damages for the loss of one of their number by the adoption of the recent consolidation of the Scots law.[44] This however does not cover the common law spouse whose right to recovery has been accepted elsewhere[45] in a deliberate attempt to rationalize the classes of persons entitled to recover under both the tort and social security systems. As the common law wife does not recover under the British social security then the policy of rationalization is seen to prevail over ideas of justice. However in view of the number of persons living in relationships outside of legal marriage[46] the more expanded definition of spouse adopted in Ontario copes with such relationships of affinity. The new class includes:

> 60.—(1) Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part II, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction. *(Family Law Reform Act* (Ont. 1978).

Even this new list does not recognize the dependancy interests of such as fiancees,[47] the *de facto* separated spouse[48] and other close relations and others living within the deceased's household and wholly or partly supported by him.[49]

---

[44]*Damages (Scotland) Act,* (1976 C. 13) Schedule 1.

[45]The *Family Law Reform Act,* 1978 (Ont.) ss. 1 (f), 14 (b) and 60.

[46]In Ontario, with a population of approximately eight million in 1973, the number was estimated to be one quarter of a million spouses living apart, of which number two thirds were separated and not divorced, and many living with other partners. The number of single persons living in extra-marital relationships is believed to be sizeable.

[47]*Currie* v. *Wardrop* 1927, S.C. 538 in which the fiancee recovered for nervous shock caused by witnessing injury to the prospective groom.

[48]*Lerman* v. *MacLean* (1978), 6 Alberta L. Rev. (2d) 68; accord: *Davies* v. *Taylor,* [1974] A.C. 207.

[49]*Hopkins* v. *McFarland* (1976), 15 O.R. (2d) 330.

Remarriage and Divorce

The Commission disagrees with the policy of section 4 of the *Law Reform (Misc. Provs.) Act* of 1971[50] which provides that in assessing damages for loss of dependancy no account should be taken of a widow's remarriage or her prospect thereof. Logically, the Commission suggests that the court should be permitted to take into account the marriage of the bereaved prior to the trial but should not speculate either as to the future remarriage prospects of the survivor or as to the possibilities of divorce[51] between the deceased and the survivor prior to the accident. This still leaves open the fact of remarriage between trial and appeal.[52]

If the overriding purpose of these recommendations is to make more accurate the damages calculation then surely remarriage and divorce factors are readily ascertainable from national statistics[53] on which annuity calculations are uniformly based. The availability of such tables reduces the weight of the arguments of the Supreme Court of Canada, upholding the views of the trial judge, that no significance can be attached to such guesswork.[54]

Collateral Benefits[55]

Which benefits are and which are not to be taken account of in the assessment of damages has until now provided some judges, lawyers and some law teachers with their reason for living. Both in England,[56] and more recently in Ontario,[57] attempted clarification by legislation has not been convincing, while over the same period the English[58]

---

[50]See Fleming, *The Law of Torts* (5th ed.), at 653-654.

[51]Judges have unanimously rejected attempts by defence counsel to argue the prior instability of the marriage between the plaintiff and the deceased: *Plachta* v. *Richardson* (1975), 4 O.R. (2nd) 654.

[52]*Mercer* v. *Sijan* (1977), 14 O.R. (3d) 12.

[53]*Measuring Marriage Prospects,* (1971) 45 A.L.J. 114 and 160. Compare *Julian* v. *Nor & Central Gas Corp.* (1978), 5 C.C.L.T. 148.

[54]*Keizer* v. *Hanna, supra,* footnote 1, at 460. At trial (see (1975), 7 O.R. (2d) 327, at 334) the judge observed honestly:

> On the question of the widow's prospects of remarriage my discerning eye provokes me to rate same highly but I am loath to attach much weight to this impression because of the apt comments of Phillimore J. in *Buckley* v. *Allen and Ford (Oxford), Ltd.,* [1967] 1 All E.R. 539.

[55]Cooper, *A Collateral Benefits Principle,* (1971) 49 Can. B. Rev. 501; Charles, "Justice in Personal Injury Awards", *Studies in Canadian Tort Law* (ed. Klar 1977) 37, 74 ff.

[56]The *Law Reform (Personal Injuries) Act* 1948, s. 2 (1), (11 & 12 Geo. 6 c. 41).

[57]The *Family Law Reform Act,* s.o. (1978) c. 2.

[58]*Parry* v. *Cleaver,* [1970] A.C. 1; *Daish* v. *Wauton* (1972), 1 Q.B. 262.

and Commonwealth[59] judges have been no more successful in their individual efforts at rationalization.

And likewise in Canada. The Supreme Court of Canada has determined that while income tax is an irrelevant consideration for personal injuries awards,[60] it is a proper deduction in the assessment of dependants claims in a wrongful death action.[61] At the same time the courts have held that the Canada Pension Plan,[62] registered savings plans and pension refunds[63] on death of the deceased cannot be said to be benefits accruing by reason of the death of the deceased. Yet despite the broad dicta of the Ontario Court of Appeal[64] in regard to contracts of insurance, judges across the country continue to struggle with pension benefits,[65] foreign welfare benefits[66] and no-fault insurance payments.[67]

The Commission has tried to tidy things up by proposing that the full value of social security benefits payable to an injured person or his dependants as a result of an injury for which damages are awarded should be deducted in the assessment of damages. Benefits to be taken into account are those payable to the plaintiff as a result of the injury which rationally excludes state retirement pensions, child benefit and maternity benefits. As before, payments received under contracts of insurance, occupational disability pensions and charitable aid are to be disregarded.

The fine arguments in the Report on these problems particularly remind the reader that here, as throughout much of the Report, the Commission appears to have usurped the role of the English Law Commission.

Moreover, the conclusions are not startling for the Canadian reader, since some of the provinces have made considerable efforts to

---

[59]Fleming, *supra*, footnote 50, at 224-231 and 656-658.

[60]*The Queen* v. *Jennings*, [1966] S.C.R. 532.

[61]*Keizer* v. *Hanna*, *supra*, footnote 1.

[62]*Canadian Pacific Ltd.* v. *Gill*, [1973] S.C.R. 654.

[63]*Clement* v. *Leslies Storage Ltd.* (1978), 82 D.L.R. (3d) 469.

[64]*Boarelli* v. *Flannigan* (1973), 36 D.L.R. (3d) 4, now codified in section 64 (1) of the *Family Law Reform Act*, 1978.

[65]*Krause* v. *Davey*, [1971] 2 O.R. 670, 18 D.L.R. (3d) 674; *Plachta* v. *Richardson*, 4 O.R. (2d) 654, 49 D.L.R. (3d) 23; *Bates* v. *Illerburn*, 8 O.R. (2d) 467, 58 D.L.R. (3d) 339, varied on other grounds, 12 O.R. (2d) 721, and compare *Spurr* v. *Naugher*, 11 N.S.R. (2d) 637, 50 D.L.R. (3d) 105.

[66]*Pollington* v. *Air-Dale Ltd.*, [1968] 1 O.R. 747, 67 D.L.R. (2d) 565.

[67]*Milone* v. *Harty*, 7 O.R. (2d) 241; *Gorrie* v. *Gill* 9 O.R. (2d) 73, 59 D.L.R. (3d) 481: approved by the Supreme Court of Canada in *Keizer* v. *Hanna*, *Supra*, footnote 1 at 453.

meet the problems by legislative change. The Province of New Brunswick provides one example:

> 7 In assessing damages in an action brought under this Act there shall not be taken into account:
>
> (a) any sum paid or payable on the death of the deceased under any contract of insurance or assurance, whether made before or after the coming into force of this Act;
>
> (b) any premium that would have been payable in future under any contract of insurance or assurance if the deceased had survived;
>
> (c) any benefit or right to benefits, resulting from the death of the deceased, under the *Workmen's Compensation Act,* or the *Social Welfare Act,* or the *Child Welfare Act* or under any other Act that is enacted by any legislature, parliament, or other legislative authority and that is of similar import or effect;
>
> (d) any pension, annuity or other periodical allowance accruing payable by reason of the death of the deceased;
>
> (e) any amount that may be recovered under any statutory provision creating a special right to bring an action for the benefit of persons for whose benefit an action may be brought under this Act.[68]

The Form of Damages

The main recommendation is that damages for future pecuniary loss caused by death or serious injury should take the form of periodic payments. This is aimed at the criticisms of the tort system that lump sum calculations require a present prediction of the unknowable future loss after the manner of a long-range weather forecast. The payments are supposed to replace the real need of the plaintiff for future income but this proposal must obviously withstand the human desire for capitalized damages which alone can be transformed into the pipe-dream.[69]

The matter of variation is to be dealt with by limiting review to alterations in the injured person's financial losses caused by the changes in his medical condition. The premature death of the injured party gives an action to the dependants for their lost dependancy. In contrast, damages for non-financial loss are to continue to be awarded in lump sum form.

---

[68] *Fatal Accidents Act,* R.S.N.B. 1973, c. F-7, s. 7.

[69] Fleming, *Damages: Capital or Rent,* (1968), 19 U. Toronto L. J. 295.

Clearly the recommendations merit serious consideration,[70] but only in comparison with the systems adopted in New Zealand[71] and Quebec[72] and with regard to the years of practice of our own workers' compensation schemes. In New Zealand the loss of earning capacity is calculated on the basis of the pre-tax earnings of the claimant with the periodical payment being eighty per cent of that figure, the payment itself remaining taxable. Where the individual does not make a total recovery then the payments continue at eighty per cent of permanent loss of earning capacity. In only exceptional cases are these payments commuted into a lump sum payment. In the event of death the wholly dependant surviving spouse receives payments equal to nalf of the compensation which would have been payable to the deceased had he survived but been totally unable to earn. A child is entitled to one sixth of that figure. Under the Quebec scheme weekly benefits by way of income indemnity replacement are payable on the calculation of the victim's net income up to a maximum of $18,000 dollars gross income. The deductions include income tax, unemployment insurance contributions, contributions to the Quebec Pension Plan and those made under the Health Insurance Act. Where the victim dies the dependants are entitled to compensation based on that which the victim would have received had he survived but totally incapacitated. The dependants' entitlement is based on the scale of sixty-five per cent for one dependant, seventy-five per cent for two dependants plus five per cent for each other dependant up to a maximum of ninety per cent.

The Calculation of Damages

With the exception of the full deduction of the relevant social security benefits the Commission recommends the retention of the calculation of damages by the time-honoured judicial hunch quantified by the multiplier and dressed up in catchy algebraic formulae.

The controversy over the incidence of taxation[73] is to be resolved by basing periodic payments for future pecuniary loss on the gross

[70]Dickson J. in *Andrews, supra,* footnote 1, at page 458 pleaded:

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

[71]*Accident Compensation Act,* 1972, No. 43.

[72]The Quebec *Automobile Insurance Act,* (Bill 67, 31st Leg. Que., 2nd sess., 1977, effective March 1st, 1978).

[73]*B.T.C.* v. *Gourley,* [1956] A.C. 185, *contra The Queen* v. *Jennings,* [1966] S.C.R. 532. And compare *Teno* v. *Arnold* (1974), 7 O.R. (3d) 274, at 309, the trial judge increased the provision for future care and maintenance because of the inevitability of increases in the incidence of taxation.

equivalent of the net annual loss and rendering the payments as taxable earned income to the recipient. The multiplier to be employed in the particular case is to be taken from a table constructed to allow for inflation of earnings and prices combined with the fluctuation in the interest rates.[74]

That simple British solution is, of course, predicated on the acceptance of the periodic payments principle. In the meantime we have managed to get ourselves into something of a tangle on both the inflation and taxation issues.

As Professor Gibson[75] has convincingly shown, the figures chosen by the Supreme Court of Canada in the set-off of the estimated annual inflation rate against the estimated interest rate on sound investments were severely prejudicial to the plaintiffs in the calculation of the real earning power of the investment of the appropriate lump-sum award. That writer's conclusion that the burden lies on plaintiff's counsel to lead much more detailed and comprehensive evidence as to the nature of interest rates and inflation is inescapable.

Equally with the question of taxation as an element in the quantifying of damages, the judicial record is uneven. The seeming conclusiveness of the ruling of the Supreme Court in *Jennings*[76] has crumbled in the face of the following questions:

(a) should an award of damages for lost income be subject to income tax,[77]

(b) should interest earned on damages awards be taxable as income,[78]

(c) should the investment income from a fund established to provide for future medical care be taxable, and

(d) should the possibility of the future increase in the incidence of taxation be an appropriate factor in the assessment of damages awards?[79]

These vexing questions, the answers to which Pearson provides little assistance, fully justify the hints for legislative cure given by the Supreme Court of Canada.

---

[74]Pearson, *supra*, at 145.

[75]*Supra*, footnote 1, at 648-652.

[76]*Supra*, footnote 60.

[77]Cf.: *Girouard* v. *M.N.R.*, [1977] C.T.C. 2588 cited by Goldstein, *The Taxation of Damages*, (1978) Advocates Quarterly 282, and see that author's views expressed at 300.

[78]*Income Tax Act*, S.C. 1970-71-72, c. 63, IT-365, March 21, 1977, paras. 6, 11 to 16.

[79]*Teno* v. *Arnold* (1974), 7 O.R. (2d) 276, varied 11 O.R. (2d) 585, *Lewis* v. *Todd* (1978), 5 C.C.L.T. 167.

Adjudication

Two, of many, criticisms of the tort system have been those of its administrative costs and the delay in the payment of compensation. The Commission reacts to these, in part, by recommending that jury trials, which on average take twice the time of judge trials, should not be re-introduced in personal injuries actions. This, to some, must be the archetypal "band-aid" remedy.[80]

In Canada, where jury trials are rare anyway,[81] some provinces, as disparate as Alberta and Ontario, have instituted the pre-trial settlement procedure with some success. This has been taken a step further by the State of Michigan in which a trial judge at any stage of the proceedings, with the aid of a second judge brought in for the specific purpose, can 'wood-shed' the lawyers and so promote a settlement with the consent of the parties. Some Michigan Circuit judges have claimed not only a seventy per cent success rate but also claim not to have heard an automobile running-down case in over eighteen months to the date of writing.[82]

In this same portion of the Report[83] the Commission recommends the continuation of the judicial practice of itemizing awards which serves to assist counsel in their decisions whether or not to appeal trial judgments on quantum, either because of overlap or under-estimation of a particular heading of damages.

That this is now the approved practice in Canada is clear from the dicta of Mr. Justice Dickson in *Andrews:*

> The method of assessing general 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, thus insuring them that each of the various heads of damage going to make up the claim has been given thoughtful consideration.[84]

---

[80]"The time has passed for band-aid remedies like more judges, or small claims arbitration procedures. If the outlook and motives of the legal profession are to command the pride and respect of the public, it may be time for a more searching, less self-interested response to the calls for personal injury compensation reform." Penny, *Review,* (1971) 84 Harv. L. Rev. 761, 766 quoted by Ison, "Human Disability and Personal Income", *New Essays in Canadian Tort Law* (ed. Klar 1977) at 425.

[81]Some statistics on the decline of the jury trial in civil cases in Canada are to be in the Report of the Ontario Law Reform Commission on the Administration of Ontario Courts, Ministry of the Attorney General (1973), part 1 at 331-334.

[82]Stacey and Kittante JJ., in the trial of *White* v. *Algoma Steel,* Nov. 1st & 2nd 1978, Wayne Country Circuit Court, Detroit, Michigan.

[83]Pearson, *supra,* at 378.

[84]*Supra,* footnote 1, at 457-458.

STREAMLINING AND EXPANDING THE WORKERS' COMPENSATION SCHEME

The Commission offers a variety of proposals for simplification and improvement of the compensation system for work injuries and diseases. The recommendations are matters of detail rather than policy, which is limited to the retention of the employee's tort action against his employer for injury 'arising out of and in the course of employment'.

On to this new and improved system is to be grafted a no-fault scheme for road injuries involving motor vehicles on roads and other land to which the public has access.[85] The comprehensiveness of the coverage reminds the Canadian reader of the Quebec no-fault scheme which came into effect on the 1st of March 1978.[86] The highlights of the road injuries proposals are: similarity of benefits between work and road victims; revenue to be collected for road injuries through a petrol levy; and the tort action is to remain untouched with regard to the burden of proof to be met by the victim. The scheme is to be administered by the Department of Health and Social Security.

Special recognition is given to victims under the age of twelve and of those in receipt of a retirement or widow(er)'s pension. The scheme would provide cover to those injured while involved in criminal activity but a discretion is given to the Secretary of State for Social Services to discontinue payments where continuation would be repugnant to public opinion.

As to who is covered: the benefits are available to all injured in the United Kingdom whether or not they are habitually resident there, but payments are made to non-residents only during the period of their residency in the United Kingdom.[87]

The Commissioners did not address themselves to the problems encountered by the administrators of the New Zealand scheme so that their British counterparts will be left to sort out for themselves answers to the difficulties raised there.[88]

---

[85] *Ibid.*, at 205 ff.

[86] The Quebec *Automobile Insurance Act* (Bill 67, 31st Leg. Que., 2nd session 1977).

[87] This avoids the panicky reaction of the rest of Canada and the New England American states to the Quebec no-fault scheme which does not cover those visiting or passing through the jurisdiction. This has implications for the tourist industry.

[88] Palmer, *Accident Compensation in New Zealand: The First Two Years,* (1977) 25 Am. J.C.L. 1, at 4-5.

As for the reaction of the practicing lawyers to the intrusion on their bread and butter business, we can but wait and see.[89] If the North American experience is anything to go by then concerted opposition can be expected.[90] In Quebec Premier Levesque has found it necessary to lecture the Bar on their adverse reactions and reveal for them their confusions between public interest and the interests of lawyers and their myopic approach to the hierarchy of individual and collective rights. Many lawyers fear a drop of up to fifty per cent in their earnings, but perhaps they should look abroad to the developments in other jurisdictions where it has been suggested that there is more than enough work to replace that lost.[91]

On the other hand trial lawyers in North America have managed to hold onto their business through the manipulation of their schemes, by the retention of the tort suit as recommended by Pearson, and that may be the British experience.

CONCLUSION

What then is the stature of Pearson?[92] Will it have the enormous impact of the Beveridge Report on Social Insurance[93] or the relative insignificance of the Morton Report on Marriage and Divorce;[94] and more selfishly, what guidance can we find in the varied recommendations? With regard to the proposals for reform of the law of damages there is not much which is new or which we have not already tried for ourselves. What is valuable however is the setting out in cold print all of the arguments for and against each possibility. The policy considerations are clearly stated at every point. What we have then is a sort of compendium of arguments which hopefully will facilitate our own decisions on change.

On the much wider issues of extensions of 'no-fault' it must be borne in mind in making that assessment that the Pearson Commission could not consider all injuries, and so were precluded from

---

[89]In *Andrews*, Dickson J. had no doubt that the reform in Britain had been aborted by the combined opposition of 'insurance interests and the plaintiffs' bar', *supra*, footnote 1, at 458.

[90]O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, (1977) 56 Neb. L. Rev. 23 at 34.

[91]Luntz, Compensation and Rehabilitation: A Survey of the Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia and the National Compensation Bill 1974, p. 134. The author lists: labour law, human rights and civil liberties, consumer affairs and environmental protection.

[92]The Commissions offerings on air transport (chap. 19), waterways (chap. 20), railways (chap. 21), animals (chap. 30) are unexceptionable.

[93]Beveridge Report on *Social Insurance and Allied Services* (1942), (Cmd. 6404).

[94]Morton Report of the *Royal Commission on Marriage and Divorce* (1966), (Cmd. 9678).

making recommendations with regard to compensation for injuries in the home; nor could they consider compensation for sickness. There could be no recommendation for accident prevention or rehabilitation, which many will see as the greatest shortcoming.[95] Nevertheless the overall scheme presented within the Report points to how the gradual extension of no-fault to cover all incidents of living[96] can be achieved. What is proposed is a politically acceptable compromise which will permit the overall costs to be monitored while decisions are made as to greater extensions of the no-fault system. Thus at some point after implementation the electorate, whether unitary British or provincial Canadian, can decide whether or not it desires, and can afford a fully-blown scheme after the Antipodean model. Until that time the compensation for injury provided by the expanded social security system and the common law of tort in Canada and the United Kingdom must live in peaceful co-existence.[97]

---

[95]Ison, *supra*, footnote 11.

[96]Luntz, *Compensation and Rehabilitation* (1975), at 51 ff.

[97]Linden, *supra*, footnote 13.