Damages for Personal Injuries — The Supreme Court Speaks

Any attempt to elicit or synthesize the principles which emerge in the four important Supreme Court of Canada decisions[1] on damages for personal injuries in tort runs the risk of superficiality. The aim of this case note is to provide practitioners and students with some indication of the principles on which subsequent cases will be determined. More detailed analysis of the decisions will no doubt emerge in due course in lengthier articles.

I. TENO v. ARNOLD — THE QUESTION OF LIABILITY

Teno v. *Arnold* alone[2] of the cases involves an important issue of an appeal on the question of liability as well as the question of the principles on which damages are awarded which emerge in the other cases. The facts are relatively simple. Diane, a child of four and a half years of age, resident in Windsor, Ontario, was permitted by her mother to accompany her six year old brother to purchase ice cream from the truck driven by Stuart Galloway and owned and operated by J. B. Jackson Ltd. At the time the children asked her permission to make their purchase the mother was talking to her husband in Detroit (a long distance call but one carrying a low charge). The street was in a residential area, without sidewalks, and in the summer carried a reduced volume of traffic. About twenty-five children lived in the block where the accident occurred. Both children had received repeated instructions on how to cross the street; they had previously bought ice cream from a truck in the vicinity and the mother further admonished them to "watch out for cars" before giving them the money with which to buy the ice cream. The driver of the ice cream truck served Diane

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[1] *Teno* v. *Arnold* (1978) 19 N.R. 1, 3 C.C.L.T. 272 (S.C.C.). *Thornton* v. *Board of School Trustees of School District No. 57 (Prince George)* [1978] 1 W.W.R. 607, 19 N.R. 552 (S.C.C.). *Andrews* v. *Grand & Toy Alberta Ltd* [1978] 1 W.W.R. 577, 3 C.C.L.T. 225 (S.C.C.). *Keizer* v. *Hanna and Buch* (1978) 19 N.R. 209, 3 C.C.L.T. 316 (S.C.C.).

[2] There was, however, a question in *Keizer* v. *Hanna, ibid.*, about whether Buch, the original owner of the vehicle causing the accident, had divested himself of ownership in favour of Hanna, the driver at the time. As the apparent intention of the parties was that Hanna was only to become owner on production of an insurance policy relating to the vehicle, Buch remained liable as owner of the vehicle. See *infra*, note 5.

first and then bent down to serve her brother. At this point Brian Arnold, aged eighteen, who was driving his father's car was about one hundred and twenty to one hundred and thirty yards away and travelling at about twenty miles per hour. Galloway, aged nineteen, failed to see the approach of Arnold through the large rear window of the truck (from which he had earlier seen the children's approach) nor did he observe that the children were in danger when they crossed the street to return home. In the ensuing accident Diane became permanently disabled.[3]

At first instance, Keith J. held the defendants liable in the following proportions:

⅓ against the defendants Brian Arnold,[4] the driver, and Wallace Arnold, the owner of the car;[5]

⅓ against the defendants J.B. Jackson Ltd, the owner of the vehicle and Stuart Galloway, the person in control of the ice cream truck; and

⅓ against the defendant J.B. Jackson Ltd.

The Court of Appeal held the mother, Yvonne Teno, ¼ to blame and the liability of the other defendants was reduced from ⅓ to ¼.

The basis for imposing liability on the driver and owner of the car which struck Diane posed no particular problem. The ice cream truck had its lights flashing to indicate that customers were being served and the Court concluded that the driver had failed to keep a sufficient lookout to avoid the children, a common danger in the vicinity of ice cream trucks. The driver seems to have been preoccupied with whether or not a friend of his was at home in the neighbourhood. The only surprise is that the Arnolds' share of responsibility was so small.

The case against the truck driver, Galloway and J.B. Jackson Ltd is more difficult. It was urged that under section 105(1) of *The Highway Traffic Act* of Ontario[6] the owner of the ice cream

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[3] *Teno* v. *Arnold* (1978) 19 N.R. 1, 30 (S.C.C.).

[4] Under the provisions of *The Highway Traffic Act*, (R.S.O. 1970, c.202, s.133(1) is the current provision, though R.S.O. 1960, c.172, s.106(1) was in force at the time of the accident) the onus of proof is on the driver to show that the accident did not occur as a result of his negligence or improper conduct. S.133(2) provides that s.133(1) does not apply to collisions between motor vehicles, nor to actions brought by passengers against the driver of a car in which they were riding.

[5] Under s.105(1) of *The Highway Traffic Act*, R.S.O. 1960, c.172, now R.S.O. 1970, c.202, s.132(1), the owner of a vehicle is liable for the negligence of anyone in control of a vehicle with the owner's permission.

[6] R.S.O. 1960, c.172 (now R.S.O. 1970, c.202, s.132(1)).

truck was liable for the negligence of anyone in control of the vehicle with his permission and that the usual onus of proof was reversed so that the driver or owner had to prove that due care had been exercised.[7] The argument that these provisions applied notwithstanding that the vehicle in question was not the one which inflicted the actual injury and that the defendants' vehicle was not in active use on the road at that time was accepted by Keith J. and the Ontario Court of Appeal but turned out to be quite academic in the eyes of the Supreme Court of Canada. The Court found other reasons for imposing liability on the driver of the ice cream truck and his employer.[8] The attractive nature of the vehicle to children (adorned as it was with cartoons and equipped with the "Pied Piper's" bells), their age and the surrounding circumstances created a duty towards the children. This duty could only have been discharged either by handing the children their wares together so that the elder child could control the younger or by checking that the street was clear before giving them the ice cream. However, the decision goes further in holding that J.B. Jackson Ltd owed a direct duty to children independent of its vicarious responsibility. The flashing lights with which the vehicle was equipped (reminiscent of a school bus) and the sign on the truck "Wait on the Curb — I'll come to you" indicated that the nature of the risk to children was well appreciated. It was even suggested that the ice cream truck needed an employee to escort children from the truck across the road after being served,[9] and, if this was uneconomic, the enterprise should not have been undertaken.[10] The youth, inexperience and lack of training on the part of the driver (especially in dealing with children), common in seasonal jobs, was regarded as significant. The allurement doctrine, however, would not explain the whole case against J.B. Jackson. Many static stores in dangerous locations downtown are immensely attractive to children. But an ice cream truck equipped with bells or chimes, which emphasize the ephemeral nature of its visit, lures out young children from homes where they would otherwise be safe in residential areas where parents may well feel supervision is unnecessary. As Spence J. said:

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[7] *The Highway Traffic Act*, R.S.O. 1960, c.172, s.106(1) (now R.S.O. 1970, c.202, s.133(1)).

[8] *Supra*, note 3, 9.

[9] *Quaere* would an escort be required while the child was en route to the truck.

[10] *Supra*, note 3, 14, adopting the argument of Keith J. and the Ont.C.A., [1976] 11 O.R. (2d) 585.

> [S]o soon as these defendants put that ice cream truck in operation on the streets of Windsor in the fashion which has been described above, then they put themselves into such a relationship with their child patrons that they became the neighbours of those children and in the words of Lord Atkin, "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".
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> To the objection that what is charged against these defendants is an omission and not a commission, and that liability in negligence can only be found in the case of an omission when it is a failure to do what others carrying on a like business ordinarily do, or when it is so obviously needed that it would be folly for anyone to fail to so act, my answer is that the latter category exactly fits the actions of the defendant J. B. Jackson Limited. It was inevitable that when the company attracted the patronage of young children, on the evidence found to be so young that they were of pre-school age with little ability to comprehend danger and none to read, then to take proper steps to see that these children were not subjected to the gravest danger of traffic accidents was only to fail to do what anyone with the slightest common sense would have done.[11]

This line of reasoning which found favour with the three levels of courts[12] attracted some criticism. Pigeon J.[13] thought that requiring two employees per truck was uneconomic and few municipalities had required it. All that the ice cream vending company had to do was to act in a reasonable way.

Some debate had taken place in the Ontario Court of Appeal and in the Supreme Court of Canada about whether Diane's mother had behaved reasonably. The Ontario Court of Appeal imposed upon her a proportionate responsibility of twenty-five percent. De Grandpré J. (in his dissenting judgment) concluded:

> With respect, I do not agree with my brethren that the mother has committed no negligence. If an ice cream merchant is responsible to his young customer because his employee failed to take the reasonable care owed to a child who had become his "neighbour", the mother, in the circumstances of this case, can not be said to be in a better position. The duty of care resting on a parent is a paramount one and does not come to an end because a third party comes into the picture and is found to have been negligent for having allowed the child to cross the street and for having failed to warn that child of an approaching car. The mother, who had just given to her two young children (6 and 4½ years old respectively) the money to buy ice cream and who knew that the truck was on the other side of the boulevard, cannot be said to be under a lesser duty than that resting on the merchant's employee.[14]

Keith J. and the majority of the Supreme Court felt otherwise. The mother was preoccupied on the phone, the children had bought

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[11] *Supra,* note 3, 13-14.
[12] The trial Judge, the Ont.C.A. and the majority of the S.C.C.
[13] *Supra,* note 3, 46.
[14] *Ibid.,* 49.

ice cream from the same truck before, they had been properly schooled on how to cross the road and thus she had not fallen below the standard of a reasonably prudent mother in the locality, the relevant test in such a case.[15]

De Grandpré J. might even have gone further and held that there was no liability on the part of the ice cream truck driver or his employer.[16] This emphasis on the parents' responsibility to supervise their children seems to have diminished steadily since cases like *Phipps* v. *Rochester Corporation.*[17] There is something slightly paradoxical in holding that traffic risks are slight enough to be disregarded by parents but not by ice cream vendors.

One suspects that although the courts have rejected the concept of ability to pay when assessing damages,[18] it is relevant in deciding whether or not to impose liability. Unfortunately, spreading or shifting of loss, a rational concept, seems to be an implicit rather than explicit feature of so many cases. It has, however, little to do with traditional fault-based tort laws. The decision of the Supreme Court of Canada to spread the loss amongst the driver of the car and its owner, the driver of the ice cream truck and its owner, and J.B. Jackson Ltd in a principal as opposed to vicarious liability is very important. In fact, however, only two insurers would be involved: the insurers of the car and J.B. Jackson's insurers. The latter insured the ice cream truck and, possibly, any other liability of J.B. Jackson. It is not clear whether the full measure of damage would be recovered by Diane Teno from the two insurers. If there were any shortfall, the obvious defendant to pursue for the balance would be J.B. Jackson Ltd. It would then be up to Jackson to recover this sum by way of contribution and indemnity from the other concurrent tortfeasors. In the case of Galloway, good industrial relations preclude this possibility[19] and the inability of young persons such as Galloway (and possibly Arnold) to pay may make this right of recovery illusory. In all probability neither Brian Arnold nor Stuart Galloway would have insurance operating whilst they drove other peoples' motor vehicles relying instead on the owners' insurance.

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[15] *Ibid.*, 23..

[16] *Ibid.*, 48-49.

[17] [1955] 1 Q.B. 450.

[18] *E.g.*, the comments of Dickson J., *infra*, note 32, in *Andrews* [1978] 1 W.W.R. 577, 587-88 (S.C.C.).

[19] Despite *Lister* v. *Romford Ice and Cold Storage Co.* [1957] A.C. 555 (H.L.).

II. QUANTIFICATION OF DAMAGES — THE LIVE SURVIVING VICTIM

A. Introduction

At first instance the decisions produced awards in two cases of over a million dollars: $1,022,477.48 in *Andrews*[20] and $1,534,058.93 in *Thornton*[21] and just under a million ($950,000) in *Teno* v. *Arnold*.[22] Some of these awards were reduced drastically on appeal. In *Andrews*[23] and *Thornton*[24] the awards were roughly halved. In *Teno v. Arnold*[25] the award was reduced only by $75,000. Nevertheless the almost simultaneous occurrence of several enormous damage awards in different provinces meant that the time was ripe for the Supreme Court of Canada to give guidance and some underlying coherence to the approach to such cases in the future.

In the Supreme Court of Canada the trial awards were restored in part. A first impression from the judgment is that large awards are here to stay and that many drivers will need to increase their public liability insurance substantially to cover the possibility of a million dollar award. In *Thornton* general damages were $810,000,[26] *Andrews* $740,000[27] and in *Teno* v. *Arnold* total damages were $540,000, as set by the Supreme Court of Canada.[27a] Clearly these sums exceed by a considerable margin the paltry $35,000 minimum liability cover required in Nova Scotia.[28] A second impression is that the Court by hearing these cases together hoped to stabilize awards pending the possible introduction of more general no-fault schemes in Canadian provinces. Quebec, following Saskatchewan, Manitoba and British Columbia, has moved ahead with its no-fault motor insurance scheme[29] and the Pearson Report

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[20] (1975) 54 D.L.R. (3d) 85 (Alta. S.C.T.D.).

[21] [1975] 3 W.W.R. 622 (B.C.S.C.).

[22] (1975) 55 D.L.R. (3d) 57 (Ont.H.C.).

[23] (1976) 64 D.L.R. (3d) 663 (Alta S.C. App.Div.).

[24] [1976] 5 W.W.R. 240 (B.C.C.A.).

[25] (1976) 11 O.R. (2d) 585 (C.A.).

[26] Plus a further $49,628 special damages including $7,500 for the plaintiff's mother.

[27] Plus special damages of $77,344 subject to a finding of 25% contributory negligence, leaving damages of $613,008.

[27a] A detailed breakdown of damages is set out in an appendix at the end of this commentary.

[28] See *Insurance Act*, R.S.N.S. 1967, c.148, s.95.

[29] *Automobile Insurance Act* (1977), Bill 67, 2d Sess., (1st reading), 31st Leg. (Que.).

in the United Kingdom[30] has made proposals which go further than the Quebec act but not as far as those in New Zealand.[31] Dickson J. made an eloquent plea against the blunt instrument of the lump-sum system with its "once and for all" award:

> 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. In making this comment I am not unaware of the negative recommendation of the British Law Commission (Law Com. 56 — Report on Personal Injury Litigation — Assessment of Damages) following strong opposition from insurance interests and the plaintiffs' bar.[32]

However, Dickson J. recognized that a move towards periodic payments or other schemes required legislative intervention and was not a suitable topic for judicial initiative.

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[30] Royal Commission on Civil Liability and Compensation for Personal Injuries, 1978, Cmnd. 7054-I-III, H.M.S.O. The main proposals include:

1. A "no-fault" system of motor insurance which will mean that everyone who suffers in a car accident will be compensated, whether they can prove that the accident was someone else's fault or not.
2. A new social security benefit for all children with severe handicaps, whatever the cause. In addition "vaccine damaged" children will be free to pursue their tort remedy, if any.
3. No change in the fault-based system of tort compensation for industrial injuries, but a higher scale of benefits under the no-fault social security industrial injuries scheme.
4. "Strict" liability for injuries caused by defective products, *i.e.*, no necessity to prove negligence by the producer.
5. More rational ways of calculating damages particularly in the way damages are assessed. Social security benefits received should be offset in full against any awards of damages, thus eliminating double compensation. At present other benefits are taken only partly into account in calculating damages.
   In cases of long-lasting injury, provision should be made for inflation-proof periodic payments to be made instead of a lump-sum award.

In *The Times*, London, May 10th, 1978, 3, it was announced that the British Government would make a tax-free payment of £10,000 to children who have been severely damaged by vaccines over the past 30 years.

[31] The Royal Commission of Inquiry into Compensation for Personal Injury, leading to the *Accident Compensation Act 1972*, Stat. N.Z. 1972, vol.1, no 43. See further Fahy, *Accident Compensation Coverage for Industry, Home and Recreation* (1976).

[32] *Andrews, supra*, note 18, 581.

B. Principles

For assessing damages in personal injury cases, Professor Charles[33] has extracted the following twelve principles from the four Supreme Court cases dealt with above:

(1) The judge should assess damages using an itemization approach rather than a global approach.

(2) Courts should continue to use actuarial evidence as long as lump sum payments are made, but with the realization that actuarial predictions are not as accurate in relation to individual cases as they might seem to be.

(3) General principles:

(a) The mitigation of damage principle has no place in personal injury cases.

(b) There should be full compensation for pecuniary loss.

(c) The law cannot provide perfect or complete compensation and the plaintiff has a duty to be reasonable in his claim.

(d) The award must be moderate and fair to both parties.

(e) Compensation must not be determined on the basis of sympathy for the victim but neither should the court try to punish the defendant.

(4) The primary or guiding principle in total disability cases is to ensure that the injured plaintiff should be adequately cared for during the rest of his or her life.

(5) A lump sum should be awarded to cover all non-pecuniary losses such as (i) pain and suffering, (ii) loss of amenities, and (iii) loss of enjoyment of life. The upper limit in most total disability cases will be $100,000 unless exceptional circumstances exist.

(6) In computing lost future earnings, the court should take into account various factors that might increase or decrease the plaintiff's earning capacity. This will, in most cases, result in a reduction of the amount computed, but, in most cases, the percentage reduction will be small.

(7) When capitalizing to present value, courts should recognize the effects of inflation upon damage awards and the fact of high interest rates. This can best be done by adopting a discount rate of 7 per cent in relation to sums awarded for cost of future care and loss of future earnings.

(8) Allowance for tax:

(a) In non-fatal injury cases the effect of taxation is not to be considered in computing loss of future earnings or in relation to taxation of the award.

(b) In fatal injury cases the effect of taxation upon the lost dependency is to be taken into account.

(9) Credit should be given for the "lost years". Capitalization of future earnings capacity should be based on the expected working life span prior to the accident rather than the shortened life span.

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[33] *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, 365.

(10) In computing the future [lost] earnings of a very young child, it is not proper to assume that the child will necessarily adopt the vocation of the parent and to calculate lost future earnings on this basis.

(11) In cases where the plaintiff is mentally incapable of handling his or her own affairs, it is proper to add a management fee to the damage award.

(12) The cost of providing basic necessities should be deducted from the award for loss of future income rather than from the award for cost of future care.

Clearly, not all of these principles are of equal weight. Some are rather elusive[33a] and others require balancing so that the interests of both parties are fairly protected. This note attempts to emphasize some of the more important principles.

C. Evidence & methods of calculation

Given that lump sum awards are with us to stay, there is an urgent need to refine the tools available to the court. In estimating the cost of future care of a paraplegic or quadriplegic, often the vital element of life expectancy is supplied by reference to healthy twenty-three year olds rather than twenty-three year old quadriplegics.[34] Until actuaries are able to provide the specific tables, if this is possible, the court can rely merely on the hypothesis of expert witnesses such as Drs Weir and Gingras that a reduction of five years from the norm seems reasonable.[35] Moreover the Court was at some pains to point out that actuarial evidence is based on *group* rather than *individual* experience and may give calculations an illusory appearance of accuracy.[36]

The need to guard against an illusion of accuracy is accompanied by the modern trend for Canadian courts to itemize the components of an award under various headings rather than to adopt a more "global" approach.[37] Such an itemized approach gives appellate courts more chance of supervision, allowing them to examine the

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[33a] *E.g.*, 3 (d) and (e).

[34] See *Andrews, supra,* note 18, adopting the views of McGillivray C.J. of the Alberta Appellate Division in the same case.

[35] See *Andrews, ibid.*, 592.

[36] *Ibid.*, 581.

[37] See further Charles, "Justice in Personal Injury Awards: The Continuing Search for Guidelines" in Klar (ed.), *Studies in Canadian Tort Law* (1978), 37. In one of the last cases involving a global approach, a global award of $250,000 to a 56 year old plaintiff earning $40,000 *per annum* in respect of loss of earnings and non-pecuniary losses, was reduced to $133,000. See *Trizec Equities Ltd* v. *Guy* (1978) 26 N.S.R. (2d) 1 (App.Div), (Macdonald Jones & Cooper JJ.). Leave given to appeal to Supreme Court of Canada, April 21st, 1978.

individual components of an award as well as the total sum arrived at. This also requires the trial court to clarify the basis on which the calculations were made. In *Keizer* v. *Hanna,* Dickson J. concluded with some regret that "it is difficult, if not impossible, to know what use, if any, the trial judge [had] made of actuarial tables to which he was referred"[38] nor was the judgment of the Ontario Court of Appeal much more helpful since, as Dickson J. also noted,[39] it gave no explanation as to *why* its award of $65,000 should have been regarded as appropriate.

D. Pecuniary loss

The Supreme Court of Canada has made a conscious attempt to hold down non-pecuniary losses by imposing an upper limit of $100,000 for such losses.[39a] In the case of pecuniary losses, however, no such similar restraint can be detected and the Court expressly held that the ability of the defendant to pay is irrelevant in the quantification of pecuniary loss.[39b]

1. *Future care*

In *Andrews,* a male traffic accident victim of twenty-one lost the use of his legs, his trunk, his left arm and most of his right arm. His misery was compounded by loss of bowel, bladder and sex functions. He required turning and repositioning in bed every two hours and regular physiotherapy. The attendance of a male orderly at all times was regarded as essential and his position was without hope of improvement. In *Thornton,* as a result of inadequate supervision during a physical education class, a fifteen year old youth suffered injuries rendering him a quadriplegic. In *Teno,* the young girl suffered severe head injuries leaving her with reduced intellectual capacity ("in the dull-normal range") and a possibility of post traumatic epilepsy, slow and indistinct speech, unsteady gait, permanent severe impairment of the left hand and a severe spastic weakness of the right side affecting the use of her right hand, the latter being likely to improve over the next three years.

The question in such cases is whether the family of the young person should be obliged to provide services at little or no cost to the tortfeasor. If the child requires services that the parents cannot

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[38] (1978) 19 N.R. 209, 213-14 (S.C.C.).
[39] *Ibid.,* 216.
[39a] *Supra,* note 18, 605.
[39b] *Ibid.,* 587-88.

provide or cannot be expected to provide, should the award reflect the cost of care provided in an institution?

In *Thornton,* strong expert evidence was introduced that life in an auxiliary hospital or other institutional setting was unsuitable for youthful quadriplegics because they would lack recreational and treatment facilities and would be forced to mix with predominantly older patients. Such a life would be lonesome, the patient would feel forgotten and might lose his will to live.[40] In light of this and other evidence that the provision of an ongoing practical level of orderly care would involve costs of $4,305 per month plus a capital sum of $65,000 to cover the cost of a home, an Econo-Van equipped for quadriplegic use and other equipment, the trial Judge, Andrews J., approved expenditures on this scale. The figures, however, were adjusted on appeal:

> I have no doubt that the increase in life expectancy would be enhanced if the ideal level of care proposed for the respondent is available. The question is, however, whether that ideal level of care with its attendant cost is one which should be imposed upon the appellants.[41]

On this basis, and after speculating (without any evidence to back this view) that several quadriplegics might share their resources and cut costs by setting up a group home or that the State might take an increased interest in the care of quadriplegics, the Court of Appeal reduced the monthly figure available for future care to $1,500 and deleted the sum provided for the purchase of a home and the Econo-Van. In effect, this compelled the appellant to life in an institutional setting, which in turn, because of the depressing environment and the minimal level of care provided, reduced his life expectancy. This conclusion in turn reduced the capital sum required to produce the requisite monthly figure — a clear example of a self-fulfilling prophecy.

The Supreme Court strongly deplored the practice of an Appellate Court conjuring up, of its own account, possibilities without support in the evidence as to practicability or cost.[42] Dickson J. concluded that ability or inability to pay was an irrelevant criterion in the assessment of damages.[43] The Court felt that fairness to the defendant was achieved by asking whether the plaintiff's claims were legitimate and justifiable and whether right-thinking persons

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[40] "They die ... because 'there is nothing to help them live' ", comment of Dr. Ezzedin, an expert witness in *Thornton,* [1978] 1 W.W.R. 607, 612, 19 N.R. 552, 560 (S.C.C.).

[41] [1976] 5 W.W.R. 240, 247 *per* Taggart J.A..

[42] *Supra,* note 40, 613.

[43] *Ibid.,* 614 and 616.

would regard this as a squandering of money.[44] In order to deny cost on the ground that it was unreasonable, more was required than merely to demonstrate its size. Much the same view was expressed in *Andrews*. The Alberta Appellate Division[44a] had considered that care for Andrews in his home environment at $4,135 per month was unrealistically high. The principle of mitigation of damage was alleged to require that Andrews accept institutional care, and therefore, without giving reasons for selecting the particular figure, the monthly care cost was reduced to $1,000 per month. Dickson J. rejected the view that mitigation of damages applied in this type of case.[45] The appellant's desire to live in a home environment was neither unrealistic, nor chosen simply to inflate the damages. The Supreme Court of Canada was not prepared to consider that Andrews' mother (to whom in fact he was not particularly close) should have helped to minimize the quantum of damage. Even if they had been on close terms and the mother had provided services for her son, it did not follow that these should be on a gratuitous basis.[46] In particular, Dickson J.[47] rejected the Appellate Division's contention that the appellant's disinclination to live in an institution was equivalent to him saying that "... he would not live in Alberta, as he did not wish to face old friends, ... and that he wished to live in Switzerland or the Bahamas".[48] Dickson J. also rejected the Appellate Division's analogy[48a] that being cared for in his own home amounted to supplying him with a private hospital. This was to imply an extravagant standard of care when in reality all that was being sought was practical nursing provided by two orderlies and a housekeeper.[49] Contrary to the Appellate Division's view, Dickson J. was not prepared to accept that reasonably-minded persons would regard home care as an unreasonable expense. Workmen's compensation and federal pension rates did not provide an appropriate basis for comparison.[50] Compensation and fault are involved in tort cases, and workmen's compensation or pension schemes involve different bases.

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[44] *Ibid.*

[44a] *Supra,* note 23.

[45] *Andrews, supra,* note 18, 585-87.

[46] *Ibid.* Note the *quantum meruit* awards of $7,500 to the plaintiffs' mothers in *Thornton* and *Teno.*

[47] *Supra,* note 18, 589.

[48] *Supra,* note 23, 701.

[48a] *Ibid.*

[49] *Supra,* note 18, 589.

[50] *Ibid.*

The distinction drawn by Dickson J. between compensation in tort cases and "provision" in workmen's compensation is, however, not without difficulty, especially where (as with the principal liability of J.B. Jackson Ltd in *Teno*) the fault is marginal and may involve loss spreading rather than fault. At the same time the combined ability of workmen's compensation schemes and our social services to deal with cases of very severe injury may need examination. Universality of coverage and the provision of *something* by way of compensation for pecuniary losses without proof of fault, may not even cover the extremely high cost of future care in cases of severe injury, quite apart from lost future earnings and non-pecuniary losses. Dickson J. concluded that it was inappropriate to speculate (without evidence) on the possibility that Andrews might enter an institutional setting and not spend the entire lump sum award. Except for minors and mentally disordered persons, plaintiffs have the flexibility to control their awards.[50a] In short, society will have to accept that insurance rates will go up and it cannot expect them to be kept artificially low by depressing damage awards below their proper level.

In fact, it may well be in the interest of insurance companies and the state to consider setting up group home units for quadriplegics, with shared orderly care and in close proximity to hospitals where medical resources are available and more economic. However, until such schemes are available (and at present such facilities are rare)[51] and evidence of their existence is actually brought before

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[50a] Since the decision there have been reliable reports that Mr Andrews tried to set up his own home but then found life in the Grand View Auxiliary Hospital more practicable and more congenial.

[51] The ongoing problem is illustrated by a recent article by Yaffe, entitled "Quadriplegic tired of hospital life" in *The Globe and Mail* (Toronto), Apr. 4, 1978, 14 about Mr Ken Ashbee, a 37 year old quadriplegic victim of a car accident in 1965 who as been living in a hospital for 10 years:

> "Every time Mr Ashbee leaves the hospital, he signs out. He signs in when he returns. His friends must visit him between 11 a.m. and 9 p.m. He eats when the trays are wheeled en masse out of the cafeteria. Patients and staff open his door and enter his room without ever knocking or considering that he might want to be alone.
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> 'I have to fight like hell to keep my self-respect and stay active. I live without privacy, without freedom and dignity.'
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> Mr Ashbee said that the staff tell him repeatedly that if he is unhappy at the hospital, he is free to leave. 'There's the catch,' the dark-haired man said with a smile. For disabled people in Ontario, there are few places — other than hospitals and nursing homes — to live.
>
> Mr Ashbee, the victim of an automobile accident in 1965, does not regret the years he has spent in rehabilitation and chronic care hospitals.

the court, the Supreme Court is unwilling to speculate on their relevance. As between the auxiliary hospital and his own home, the Supreme Court will prefer to award damages sufficient to enable the victim to have his own home. In contrast to *Thornton*, no capital claim was made in *Andrews* to cover the cost of purchasing a house, though the figure agreed in both lower courts for $14,200 for equipment was allowed to stand. In both *Thornton* and *Andrews*[52] depreciation over six years was allowed in respect of the Econo-Van. In eastern Canada, where the use of salt on roads in winter is more common, there may be a case for a higher depreciation figure.

He said in an interview yesterday that 'an isolation period was needed for my physical and mental adjustment to my disability.' But he said he now is ready to try life in the community and be independent.

Mr Ashbee's name is on a list of people who are to move next year from the aging Dunn Avenue institution into a new chronic care hospital at 550 University Avenue. When the prospect of moving from one hospital room into another is raised, Mr Ashbee shakes his head.

'I'm not going. I have a lot at stake here. I've made up my mind. I will not move into a new hospital.' Life in a chronic care hospital 'means a total write off' for a young person, he said.

Mr Ashbee, an accountant and poet, would like to work but finds it impossible to cope with a job while living in a chronic care hospital. He worked for just over a year in 1974 but 'it was such a hassle getting out of the hospital and coming back that I quit my job. I'll never try to work again while I'm in a hospital.'

He is hoping to get married but how is it possible while he is living in a hospital, he asked.

'I want to be able to get up on my own time. I want to be able to have home-cooked food. Everyone has a right to live a normal, active life. If I stay in here I'm going to be entirely dependent on others for the rest of my life.'

The few Metro Toronto group homes and apartments offering support services for handicapped people are full and have waiting lists. And so Mr Ashbee is working on his own alternative.

He is a member of a committee which is attempting to design a 12 to 15-unit housing project for the disabled in the Parkdale area.

Mr Ashbee recently secured a $12,000 Canada Works grant to survey the recreational and accommodation needs of handicapped people.

The Central Mortgage and Housing Company has said it will support the committee's project providing the province agrees to pay the cost of support services, such as attendant care. However, a March 7 letter from the Social Service Ministry informed Mr Ashbee that the province has no funds available for any new projects.

David Pitt, chairman of a provincial committee studying the housing problem, said that his committee will present to the province within the next few weeks its recommendations regarding the future development of housing for the disabled."

[52] See further Appendices B & C.

Whether it is better to claim for the cost of buying a house or renting an apartment may be to some extent a matter of choice. The apartment rental element must reflect the need for an apartment big enough for the equipment and possibly "live-in staff". Awarding a claim for house purchase gives the victim a saleable cash asset which may, in some circumstances, increase in value, in contrast to the "wasting asset" approach on which lump sums are usually based. However, the upkeep on the property may be expensive, particularly if the victim is unable to do the usual "do it yourself" jobs undertaken by householders not subject to a disability.

In calculating the capital sum necessary to provide for future care, it follows that the life expectancy will reflect the longer life resulting from home rather than institutional care. As accurate life expectancy figures for quadriplegics at a given age do not yet seem to exist, the best courts can do is rely on the evidence of the expert witnesses and modify the figures available for the general public.[53]

In the *Teno* case, Yvonne Teno had provided care for Diane up to the date of trial (for which she was compensated with $7,500 as a *quantum meruit*).[54] However, it was impracticable for her to continue to supply this care in the future. It therefore became necessary to provide care for Diane within the family home (one attendant five days per week on a twenty-four hour basis, and weekend cover provided by a relay of attendants working shifts). When Diane reached nineteen, it was reasonable to expect her to make her own home and at this point the cost of providing attendants would rise from $21,000 *per annum* to $27,000 *per annum*. This cost of care, as might be expected, was less than in the cases involving quadriplegics. Spence J. in the Supreme Court of Canada agreed with the trial Judge that a home rather than institutional setting was the only appropriate one for Diane.

A further problem arose in *Teno*: the cost of future care of nearly $350,000 did not cover the ordinary cost of living. In *Andrews* however, Dickson J. suggested that these items were better dealt with by way of inclusion in future care:

> To determine accurately the needs and costs in respect of future care, basic living expenses should be included. The costs of [necessities] when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable

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[53] *E.g.*, the "best guess" of Drs Weir and Gingras, the expert witnesses in *Andrews*. See *supra*, p.324.

[54] Her father was entitled to just under $7,500 as special damages incurred in respect of Diane prior to the trial.

> to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.[55]

In *Thornton* Dickson J. said that this "reflects the fact that the costs of necessities may be different when in an infirm state than when in a state of health. A difference would also arise if there is a difference in the contingency factor".[56] Since basic needs such as food, shelter, and clothing should be included in the cost of future care, a deduction must be made from the award for prospective earnings to avoid duplication. At the same time there is the possibility of some of the $4,000 per month being surplus to requirements if the victim is subsequently hospitalized for a period.[57] For this contingency the Supreme Court in *Thornton* and *Andrews* reduced the capitalized sum by twenty per cent. This seems more reasonable than the approach of the British Columbia Court of Appeal which was to depress the level of provision to $1,500 per month (thus virtually ensuring that Thornton would live in an institution), and then further to reduce the award by thirty per cent on the basis that he might enter a general hospital for special treatment at some time. Much the same criticism could be made of the decision of the Alberta Appellate Division in *Andrews*.

2. *Lost earnings*

The second item of pecuniary loss is lost earnings. Whereas the Court had some basis for predicting future earnings in respect of a twenty-one year old in *Andrews*, predicting the lost earnings of a toddler in *Teno* was almost completely speculative. Her ability and motivation are uncertain and whether the traditional homemaker role will exist in fifteen years time, or whether Diane would have married is equally uncertain. In the face of this the Ontario Appeal Court deemed that Diane, like her mother, would have become a teacher earning $10,000 *per annum*.[57a] The Supreme Court of Canada could not justify this but arrived at the figure of $7,500 as being the equitable difference between a poverty level of $5,000

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[55] *Supra*, note 18, 593-94. See Appendix B for a detailed breakdown of the cost of necessities. It is not clear why the depreciation rate for an Econo-Van should be so different in two adjacent provinces.

[56] *Supra*, note 40, 618. See Appendix C for a detailed breakdown of the cost of necessities.

[57] The high risk of quadriplegics suffering from urinary or respiratory infections perhaps explains why a contingency deduction was made in these cases but not in *Teno*.

[57a] *Supra*, note 25, 602.

per annum and the figure of $10,000 *per annum* attributed as earnings by the Ontario Court of Appeal.[57b] Of interest here is the Court's emphasis on the provision of care aspect of the case; the loss of earnings aspect becomes secondary. If the Court has ensured that the victim is properly cared for in the future, the limitations on the Court in making an award for lost income are more acceptable. By the time the Court had deducted a twenty per cent contingency to cover the possibility that illness, or any one of a number of factors might have prevented her working from the ages of twenty to sixty-five (the normal retirement age) lost earnings were reduced to an estimated $6,000 *per annum.*

In *Andrews* the Court had somewhat more information on which to base its assessment of the twenty-one year old victim's prospective earnings. The Appellate Division had assessed his earnings at $1,200 per month — midway between his current earnings of $830 per month and the maximum for his type of work of $1,750 per month. Although the Supreme Court regarded this as a little conservative the award was allowed to stand. However, the length of working life was assessed on the basis that Andrews could have retired at age fifty-five on a full pension. The Supreme Court, affirming the trial judgment, based Andrew's working life expectancy on his pre-accident working life expectancy, refusing to follow the much criticized decision in *Oliver* v. *Ashman*[58] that working life should be calculated on the *post-accident* shortened expectancy.[58a] On this Andrews' working life expectancy was calculated at almost thirty-one years. Again a twenty per cent deduction for contingencies was made, although arguably the loss of earnings or reduced earnings was no more likely than that Andrews' career might have gone better than expected. However, although the Court believed better evidence of contingencies might exist, none had been adduced and the trial Judge's figure was allowed to stand. Since there was no evidence supporting this sum, the twenty per cent deduction might equally have been reduced or disregarded. The danger in such a procedure is that contingencies become a one-sided device for keeping awards down.

Thornton represented an intermediate case in which the victim was fifteen at the time of the accident and eighteen at the time of trial. There counsel had agreed to ascribe to the plaintiff a possible

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[57b] *Supra,* note 3, 40. The mean between two wrong answers apparently provides the correct one.

[58] [1962] 2 Q.B. 210 (C.A.).

[58a] *Supra,* note 18, 595.

base income of $850 per month. No evidence emerged as to the basis of the figure of $850 but it was nevertheless accepted by the Supreme Court. The trial judge made no deduction for contingencies (for example, being made redundant, or becoming unfit or unable to work) since these, on the evidence, were no more likely than that the plaintiff would have received promotion and salary increases. The beneficial and adverse possibilities cancelled one another out. The Court of Appeal, however, imposed a ten per cent deduction, and the Supreme Court of Canada declined to interfere.

3. *Rule in Oliver* v. *Ashman*: *The lost years doctrine*

Calculation of the costs of future care has been determined on the basis of the post-accident life expectancy. However, some controversy has arisen over the calculation of lost earnings. The English rule in *Oliver* v. *Ashman* determines lost earnings on the basis of post-accident life expectancy. This necessarily means that in due course the dependents of the victim on his death will inherit a decreased sum with which to face the future.[59] In Canada the lost earnings calculation, at least since *Andrews* (though probably for long before) and in Australia since *Skelton* v. *Collins*,[60] proceeds on the basis of the pre-aecident life expectancy. In *Andrews* Dickson J. referred to the manifest injustice of the *Oliver* v. *Ashman* rule as revealed in *McCann* v. *Sheppard*[61] where, because the victim died between the trial and appeal, the damages for lost earnings were reduced from £15,000 to £400. If the defendants sought to enforce their own claim under fatal accidents legislation, they could face either statute of limitations problems or the merger of the "Fatal Accidents" claim with that of the victim's own claim. If, however, the victim has no dependents (within the meaning given to the word by the Act) using the pre-accident life expectancy may lead to an unexpected windfall to those inheriting from him. This is, however, consistent with the approach in *The Queen* v. *Jennings*[62] which

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[59] As in *McCann* v. *Sheppard* [1973] 1 W.L.R. 540 (C.A.).

[60] (1966) 39 A.L.J.R. 480 (Aust.H.C.).

[61] *Supra*, note 59.

[62] [1966] S.C.R. 532. In *Cirella* v. *The Queen* [1978] C.T.C. 1 (F.C.T.D.) the Court treated a claim for "special damages" comprising lost earnings between the accident and the trial as free from tax by analogy with the post-trial position in respect of lost earnings under the *Jennings* decision. In *Jennings*, *supra*, 544, Judson J. suggested that a claim for lost earnings as special damages may be different. It is a moot point whether taking such a sum free of tax overcompensates a plaintiff for his delay in receiving the funds. What is certain is that it under-compensates the tax authorities.

characterizes the loss as that of a capital asset. An alternative would be to allow the dependents an action independent of the victim for the financial loss accruing to them during the victim's lost years. It is unlikely, but not impossible, that section 60 of *The Family Law Reform Act, 1978*[62a] of Ontario was intended, or is wide enough, to cover this.

4. *Quantification of damages — taxation problems*

a) The Nature of Claims and Tax Repercussions

The nature of a Fatal Accident claim is for the loss of the money or services which the dependents would have received from the deceased. In making the assessment the court deducts from the deceased's income that portion which he would have spent on himself and, (despite the qualms of the Supreme Court of Canada)[63]

[62a] S.O. 1978, c.2.

"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 R.S.O. 1970, c.164, s.3(1), *amended.*

(2) The damages recoverable in a claim under subsection 1 may include,

(a) actual out-of-pocket expenses reasonably incurred for the benefit of the injured person;

(b) a reasonable allowance for travel expenses actually incurred in visiting the injured person during his treatment or recovery;

(c) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the injured person, a reasonable allowance for loss of income or the value of the services; and

(d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred."

[63] The majority of the Supreme Court of Canada in *Gehrmann* v. *Lavoie* [1976] 2 S.C.R. 561 had decided that tax was not to be deducted in calculating damages under fatal accidents legislation. However, by the time of *Keizer* v. *Hanna*, de Grandpré J., who had reserved his position in *Gehrmann* v. *Lavoie*, had won over all the Supreme Court except Spence J. to the view that income tax was deductible in a fatal accidents case. De Grandpré J. alone of the members of the Supreme Court raised a question of the mechanics of the calculation:

"Two approaches are to be found in the jurisprudence; one is that outlined by Cowan C.J.T.D. in *Spurr* v. *Naugler* (1974), 50 D.L.R. (3d) 105 ... and another in the decision of the House of Lords in *Taylor* v. *O'Connor*

on his taxes. The remainder is the figure regarded as provision for the dependents. In contrast, claims by victims for the injuries they themselves have suffered, since *The Queen* v. *Jennings*,[64] have been classified as loss of a capital asset and therefore not subject to income tax. The reaffirmation of *Jennings* in the recent Supreme Court of Canada decisions has apparently not removed all doubts as to its correctness. Within two months of the decisions, Macdonald J.A. of the Nova Scotia Appeal Division said:

> I well appreciate the inherent problems that would be involved if income tax were to be taken into account in assessing damages for loss of future earnings, yet, with respect, it seems unrealistic to me not to make some allowance for it. In this day of high wages, high taxation and high damage awards, to make an assessment of damages for loss of future earnings without considering, as a factor, the incidence of taxation, is to cloak the award in a coat of artificiality which in many cases will result in over compensation. The law, however, is as stated in the *Jennings* case and I shall refrain from saying anything further on the subject except to express the hope that the Supreme Court of Canada will, in the opportune case, reconsider the *Jennings* principle.[65]

... [1970] 1 All E.R. 365. In the *Spurr* case Cowan C.J.T.D. deducted the income tax 'on that part of the gross income not available for the widow and the other dependents' (p.110). In *Taylor* we find the following in the speech of Lord Reid (pp.367-68):

> 'But take the present case. The respondent will have the £10,000 to which I have referred and damages in respect of: (a) loss of her dependency; and (b) loss of her interest in the savings which the husband would have made. The damages for the loss of dependency ought to be such that she will have available to spend each year free of tax a sum equal to the amount of the dependency. But if the damages are calculated without a reference to income tax that will not be so. Suppose the damages are sufficient to buy an ordinary annuity for her life of that amount. Part of each year's anuuity payment will be a return of capital and will not be taxable; but that part which is truly income will have to bear tax. So the amount available to her to spend will fall short of what it should be by the amount of that tax. The damages will, therefore, have to be increased by an amount necessary to counteract this shortfall. This shortfall will be increased by the present high rates of interest.'

To my mind, both approaches stem from the same philosophy but the means chosen by the House of Lords are to be preferred. The method outlined in *Spurr* only gives an exact result if care is taken not to *pro*-rate the income tax between the deceased and the dependents. Keeping in mind the progressive feature of the taxing statute, the greater bite of the tax should be on the deceased's share because the remainder coming to the dependents attracts a lower rate."

[64] *Supra*, note 62, in contrast to the British position following from *British Transport Commission* v. *Gourley* [1956] A.C. 185 (H.L.).

[65] See *Trizec Equities Ltd* v. *Guy*, *supra*, note 37, 25-26.

In principle there is no reason why the wife's claim for the loss of a husband should not have been regarded as a claim for the loss of a capital asset, but such claims traditionally have not been so regarded. There is no doubt that deducting tax prior to establishing the appropriate level of damages merely operates to confirm the aphorism that it is cheaper to kill than to maim. Even disregarding the high cost of future care in *Teno*, *Thornton* and *Andrews*, the comparison of an award of $93,500 in *Keizer* (covering wife and son) with the awards in the other cases is striking. Tax will, of course, be payable on the future interest earned by the lump sum damage award unless, as the Court noted in *Teno*, some statutory exemption or deduction applies. The capital element returned on the exhausting fund basis is not, however, taxable as income. Currently an exemption exists in respect of income arising from damages awarded for personal injury of persons under twenty-one until they attain that age.[66] Equally, medical expenses exceeding three per cent of the taxpayer's income are deductible and would include the cost of the sort of orderly care involved in several of the current cases.[67] However, although the Court in *Teno* noted these factors, they concluded that future changes in tax laws were so uncertain that it was impossible to assess an amount to cover future income tax liability.[68]

E. *Contingencies*

In the past the contingency rule has generally operated to reduce damages, sometimes by substantial percentages.[69] This somewhat pessimistic preoccupation by courts with the possibility that the victim, even if he had not been injured, would be made redundant, become a drug addict or suffer an illness rendering him unfit for work, now seems to have been restrained. In both *Andrews* and *Thornton* Dickson J. rejected the view that all contingencies were likely to be adverse. The figure now is likely to be low,[70] perhaps

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[66] See *Income Tax Act*, S.C. 1973-74, c.14, s.81(1)(g.1), as am. by S.C. 1974-75-76, c.26, s.44(2).

[67] See *Income Tax Act*, S.C. 1970-71-72, c.63, s.110(1)(c)(iv), as am. by S.C. 1976-77, c.4, s.43(1).

[68] *Supra*, note 3, 35.

[69] The reduction has sometimes been as high as 37%. *E.g.*, *Atkins* v. *Ulrichsen* [1973] 3 W.W.R. 406 (B.C.S.C.).

[70] The contingency figure imposed by the Supreme Court of Canada in *Thornton* was 10% for loss of future earnings and 20% for future care, and 20% in *Andrews* for both. No contingency appears to have been deducted in *Teno* in relation to future care, although a 20% deduction was made from the sum for loss of future earnings.

twenty per cent, unless supported by evidence. In *Andrews*[71] Dickson J. requested lawyers to obtain further evidence, if possible, and asked courts to show how they had arrived at their figure. The question of contingencies was more fully discussed in *Keizer* v. *Hanna*,[72] a Fatal Accidents claim by the twenty-seven old wife of a thirty-three year old tool room foreman. The contingencies which were adverted to by the trial Judge included:[72a]

(a) Possibility of remarriage;

(b) Possibility of widow's death before expiry of joint expectancy period;

(c) Possibility of deceased's dying under other circumstances prior to expiry of said joint expectancy period;

(d) Possibility of deceased husband's retiring before expiry of joint expectancy period;

(e) Acceleration of inheritance to widow — bearing in mind likelihood of increased inheritance in event death had not occurred;

(f) Possibility the infant child may not be a burden to the father or require additional benefits for the full period of his calculated working life.

As to (e) the acceleration of inheritance to the widow, the trial Judge clearly believed (and the Appellate Court found no reason for thinking the contrary), that the acceleration of the inheritance was offset by it being much smaller than if the husband had lived out his expected life span. Again the emphasis seems to be on acting to reduce awards only by virtue of contingencies of which there is evidence.[73] As Dickson J. said in *Keizer*:

> It is, of course, true that a trial judge must consider contingencies tending to reduce the ultimate award and give those contigencies more or less weight. It is equally true there are contingencies tending to increase the award to which a judge must give due weight. At the end of the day the only question of importance is whether, in all the circumstances, the final award is fair and adequate. Past experience should make one realize that if there is to be error in the amount of an award it is likely to be one of inadequacy.[74]

Factors (b) and (c) although cited in both the judgment of the

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[71] *Supra*, note 18, 596.

[72] *Supra*, note 38.

[72a] [1975] 7 O.R. (2d) 327, 333 (County Ct.).

[73] Sometimes certain facts will be assumed; *e.g.*, that dependent children usually become self-supporting. Thus in relation to factor (f) the trial Judge accepted that the son would not normally have been a burden on his father for his whole working life.

[74] *Supra*, note 38, 216.

trial Judge and the Court of Appeal were, in Spence J.'s view,[75] invalid considerations since both already had been dealt with in establishing the joint life expectancy. Factor (d), according to Spence J. and the Ontario Court of Appeal, was too narrowly drawn by the trial Judge since it did not cover the possibility of other factors affecting the deceased husband's ability to earn (for example, industrial accident, unemployment etc.). Moreover there was the further factor overlooked by the trial Judge:

> [T]he possibility that the husband, had he lived, might have ceased to provide support for his wife and child for a variety of other reasons — some emotional, some mental, some due to later developed changes in character.[76]

Despite the length at which the Court dealt with the matter, damages in *Keizer* were reduced by only $1,500 to cover the contingencies — a clear contrast to the twenty per cent deducted in relation to some or all of the claims in *Thornton, Teno* and *Andrews.*

In a 1973 lecture,[77] Mr Justice Haines concluded that Canadian courts presumed that all contingencies applied and that the burden was on the plaintiff to rebut them. As the recent Supreme Court decisions show, not all contingencies are adverse to the plaintiff and the evidential burden cannot rest on him to rebut those in his favour. The critical question is what should a court do when the possibility of contingencies is raised but without any evidence to assist the court in deciding what figure to attribute to them. The trial Judge's deduction of twenty per cent in *Andrews* was necessarily arbitrary, (Kirby J.'s own choice of word),[78] and probably based more on experience than actual evidence placed before the Court at the trial. Since the majority of the contingencies appear to reduce rather than increase damages,[79] if a trial Judge reduces damages by a

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[75] *Ibid.*, 224.

[76] *Ibid.*, 225.

[77] "New Developments in the Law of Torts" in Law Society of Upper Canada, *Special Lectures* (1973), 27.

[78] *Supra,* note 20, 101.

[79] Although it must surely be a moot point whether the possibility of Mr Andrews's career prospering beyond that expected by the court was more likely than the sum total of the negative contingencies of illness, accident, unemployment, premature retirement, *etc.,* in *Thornton* the Supreme Court, on relatively little evidence decided to deduct 20% for contingencies from the cost of future care (see *supra,* p.331) and 10% from future earnings. The trial Judge had thought that the contingencies relating to future earnings were evenly divided and therefore deducted nothing. The B.C.C.A., with little evidence, reduced the agreed income of $850 par month by 10% and this was upheld by the Supreme Court of Canada. Perhaps some small deduction can be justified for the accelerated payment of long term future earnings.

moderate amount (twenty per cent or less) this is unlikely to be set aside on appeal. This is not, however, a foregone conclusion because, as Dickson J. pointed out in *Thornton*, "[t]he imposition of a contingency deduction is not mandatory, although it is sometimes treated almost as if it were to be imposed in every case as a matter of law".[80] The courts may well refuse to accept reductions based on a mere speculation of a widow's chance of remarriage or acceleration of inheritance. Counsel for defendants may be well advised to place actual evidence of contingencies before the court if they possibly can. There seems to be developing on the part of the courts a reluctance to use contingencies merely as a way of keeping down damage awards. Dickson J. said in *Keizer*[81] "[p]ast experience should make one realize that if there is error in the amount of an award it is likely to be one of inadequacy."

F. *Collateral benefits*

In *Keizer*, when establishing the appropriate award, the majority of the Supreme Court of Canada deducted the amount paid to the appellant as insurance benefits. So far as collateral benefits are concerned, a difference of approach has emerged between benefits received from private or public sources (such as private or public financed or regulated schemes, to which the plaintiff has contributed directly or indirectly, or has an entitlement as of right) and other schemes. In relation to the former benefits the tendency seems to be to disregard these in quantifying damages. To do otherwise would either be to punish the victim for his foresight in making provision for his dependents, or to deprive him of rights which vested in him by virtue of his direct or indirect contribution or to which he has a right independent of the liability of a third party.[82] Moreover this would give an unwarranted windfall to the tortfeasor in terms of reduced liability.[83] So far the cases seem to allow accumulation of: Canada Pension Plan benefits,[84] unemployment benefits,[85] welfare payments,[86] private accident insurance benefits,[87] *ex gratia* payments[88] and payments under a contract of employment

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[80] *Supra*, note 40, 618.
[81] *Supra*, note 38, 216.
[82] See *Boarelli* v. *Flannigan* [1973] 3 O.R. 69, 75 (C.A.).
[83] See *White* v. *Parkin* [1974] 3 W.W.R. 509, 521 (B.C.S.C.).
[84] *Supra*, note 82.
[85] *Bourgeois* v. *Tzrop* (1957) 9 D.L.R. 214 (N.B.S.C. App.Div.).
[86] *Supra*, note 82.
[87] *Canadian Pacific* v. *Gill* [1973] S.C.R. 654. See also *The Family Law Reform Act, 1978*, S.O. 1978, c.2.
[88] *Cunningham* v. *Harrison* [1973] 3 All. E.R. 463 (C.A.).

for sick leave benefits.[89] In many of these cases the similarity with insurance is emphasized, for a person upon joining the scheme has no way of knowing whether he will qualify for benefits. In relation to other schemes the "foresight" argument applies less clearly and may even fly in the face of the wording of a statutory scheme, especially where, as in *Keizer* v. *Hanna,* the plaintiff had received payment under a state sanctioned introduction of a limited "no-fault" insurance scheme in 1971.[90] This scheme, when properly construed,[91] provided that the benefits under the 1971 amendment complied with the extension of the word "insured", and the addition to section 237 of *The Insurance Act*[92] required the deduction of the benefits from the *Fatal Accidents Act*[92a] award.

In other cases the courts have characterized payments in such a way as to allow deductions. One recent case seemingly out of step with other cases is *Trizec Equities Ltd* v. *Guy,*[93] in which the Nova Scotia Appeal Division characterized early retirement pension payments to the plaintiff as in reality a form of reduced salary or deferred salary payment notwithstanding that this was a contributory scheme. As the plaintiff had been appointed to the Board of Directors and had earned directors fees for the time between accident and trial (money he would not have received whilst an employee), these were added to the pension in calculating his lost earnings during this period. No deduction for future directors fees for the period after the trial was made because of the uncertain ability of the plaintiff to continue as a director. No allowance seems to have been made for the fact that, had the plaintiff worked through to his normal retirement date (assumed by a majority of the court to be sixty years because of the plaintiff's pre-existing ill health), his retirement pension would have been much higher than the amount accruing under the early retirement pension. Leave to appeal to the Supreme Court of Canada was granted, *inter alia,* on this

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[89] *Wren* v. *Superintendent of Insurance (No. 2)* (1977) 75 D.L.R. (3d) 567 (Ont.H.C.).

[90] *The Insurance Amendment Act, 1971,* S.O. 1971, c.84.

[91] See *Gorrie* v. *Gill; McRoberts* v. *Gill* [1976] 9 O.R. (2d) 73 (C.A.).

[92] *The Insurance Act,* R.S.O. 1970, c.224, s.237, as am. by s.17 of *The Insurance Amendment Act, 1971,* S.O. 1971, c.84.

[92a] R.S.O. 1970, c.164.

[93] *Supra,* note 37. See also *Woodworth* v. *Farmer* (1963) 39 D.L.R. (2d) 179 where Ilsley C.J. refused to allow accumulation where a plaintiff had continued to receive his wages as of right from his employer. He was not entitled to recover the same sum from the wrongdoer because he had simply suffered no loss of wages. The insurance sickleave cases were treated as distinguishable.

point. In distinguishing the "accumulation" cases,[93a] the Court noted that there was a difference between public and government schemes. The line, however, is not easy to draw, nor is consistency easy to find. Subrogation where authorized by statute[94] or contract is in many ways the most equitable answer.

G. *Duplication*

Clearly some of the heads of pecuniary loss overlap with one another. For instance, food and clothing can be treated as part of the cost of future care. In so doing they will reflect the fact that the cost of necessities may be higher for the accident victim and the relevant contingency factor may be different from that applicable to healthy people. By the same token, when dealing with loss of income some allowance must be made for the fact that some of that income (around fifty-three per cent)[95] would have had to have been expended by the plaintiff on necessities of life, and therefore a deduction of the appropriate percentage must be made to prevent the victim recovering twice over for the same expense. For non-pecuniary losses the award of a global sum prevents duplication of analytically distinct sums which merge at the margins.

H. *Management costs*

The investment skills required to ensure that the capitalized sum produces the requisite revenue are considerable, especially in a constantly changing tax situation. In *Teno* v. *Arnold*[96] Spence J. allowed an award of $35,000 to cover management expenses from the time that Diane became an adult and the efficient services of the Ontario Official Guardian[96a] were no longer available. Admittedly, Diane's intellectual capacity was reduced but the problems of managing a large capital sum are daunting for a quadriplegic and while no management element was included in *Thornton* or *Andrews*, a claim in a similar case in the future might be successful.

[93a] *Wren, supra,* note 89; *Boarelli, supra,* note 82; *Borugeois, supra,* note 85; and *Gill, supra,* note 91. See *Trizec Equities Ltd, supra,* note 37, 22.

[94] See, *e.g., The Hospital Services Commission Act,* R.S.O. 1970, c.209, s.20 (i) & (h); *The Workmen's Compensation Act,* R.S.O. 1970, c.505, s.8(4). However, subrogation may not solve all problems — see Fleming's comment in (1974) 52 Can.Bar Rev 103.

[95] See *Andrews, supra,* note 18, 593-94.

[96] *Supra,* note 3, 38.

[96a] See *The Infants Act,* S.O. 1970, c.222, s.1(6).

I. *Capitalization, Inflation & the discount rate*

In relation to the pecuniary losses, the problem arises of producing out of a capital sum, together with its interest, a sum sufficient to cover the estimated future care for the plaintiff and his estimated lost earnings, so that at the end of the relevant period (retirement or death) the fund is exhausted. This leads to the question of what is an appropriate rate of interest on which to base one's calculations, given that a child like Diane Teno may be expected to live for a further sixty or more years. The present high interest rates may not continue. Even if long term (twenty year)[97] quality high investments now carrying interest at over ten per cent were utilized, they might fall in value and require reinvestment three times or more during the plaintiff's lifetime. By that time inflation, according to the late Dr Deutsch[98] of the Economic Council of Canada, may have dropped to three and one half per cent and by the same token interest rates will have dropped, although by this stage one might predict a substantial decrease in the purchasing power of the doller from present levels. At these lower rates the return would be inadequate to produce the figure needed to cover future care or lost earnings. Canadian courts have not followed the decisions of some other jurisdictions[99] to disregard the present high interest rates, a side effect of inflation, and to hope that using a lower rate of interest (for example, five to six per cent)[100] than that currently prevailing will to some extent compensate the victim for inflation. Of course, tax will be paid on some or all of the interest actually accruing. The effect of different interest rates is graphically illustrated by an example taken from Spence J.'s judgment in *Teno*.[101] The present value of $1,000 *per annum* for 66.9 years, if calculated at four and one half per cent was $21,563, at six and one half per cent, $15,685 and at eleven per cent, $9,100. In *Teno* v. *Arnold, Thornton,* and *Andrews* seven per cent became the discount although de Grandpré J. vigorously objected to the court arriving at such a rate when the wife had agreed with the defence to figures

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[97] See the evidence of Mr Grindley in *Thornton, supra,* note 40, 615.

[98] *Andrews, supra,* note 18, 600.

[99] *E.g.,* the "Diplock approach" in *Mallett* v. *McMonagle* [1970] A.C. 166, 175 (H.L.) using 4%-5% as a rate representing a stable economy, and making calculations on that basis and leaving further inflation out of the account. In fairness it should be pointed out that at that time sterling's purchasing power was falling by a mere 3½% and double digit inflation had not yet arrived.

[100] As the rate representing a long term stable economy.

[101] *Supra,* note 3, 35.

being introduced based on an interest rate of between nine and ten per cent. This seems to be an interim approach part way between the "Diplock Approach"[101a] and more complicated attempts at taking long-term inflation into account. However, when the seven per cent discount rate is subtracted from a ten per cent nominal interest rate on secure investments, one arrives at a figure of three per cent. If that figure were to be accepted as the appropriate discount rate representing the long-term real interest rate, then the capital sum required in cases like *Thornton* would be appreciably higher. The courts, however, might find this frightening in terms of the size of awards.

J. *Non-pecuniary damages*

In contrast to pecuniary damages, the tradition has arisen of awarding a global sum[102] for pain and suffering, loss of amenities[103] and loss of enjoyment of life or loss of expectation of life. Not infrequently the award has been large, although none approached the recent award of $128,500,000 to a scarred victim who had undergone fifty-two operations, with more to come, after he had been gravely burned as a result of a Ford Pinto (with an allegedly known design fault in its tank location) catching fire after an accident.[104] The courts have recognized that money is a poor substitute for the non-pecuniary losses and there is no objective yardstick for its measurement. The money awarded aims at helping make up for what has been lost ,"to alleviate the disaster... to enable [the victim] to live as tolerably as may be in the circumstances".[105] Some personal aspects enter the picture, so that an injury to a finger on the left hand may affect an amateur pianist more than a non-musician, but nevertheless some attempt now must be made to prevent these awards from becoming extravagant. In *Thornton* and *Teno* awards of $200,000 were made before the cases reached the Supreme Court

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[101a] See *supra*, note 99.

[102] The elements are said to merge at the edges, although they are analytically distinct as Dickson J. suggested in *Andrews*, *supra*, note 18, 605. "To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period and to cause mental pain and suffering in the contemplation of this prospect."

[103] Loss of limbs, cosmetic injuries, inability to participate in activities formerly enjoyed, *etc.*

[104] The damages were subsequently reduced to $6.6 million on the ground that $122 million of punitive damages was execessive, *Halifax Chronicle-herald*, Apr. 1st, 1978. In Canada punitive damages are normally only awarded for intentional torts.

[105] *Warren* v. *King* [1963] 3 All E.R. 521, 528 (C.A.).

of Canada. In the past, awards of not dissimilar proportions had been approved by the Supreme Court of Canada, largely on the basis of non-interference with awards by provincial courts of appeal. In *Hamel* v. *Prather*[106] Moir J.A. of the Alberta Supreme Court Appellate Division had predicted that unless the Supreme Court of Canada intervened, awards for non-pecuniary loss would steadily rise. That point has now been reached and an upper limit of $100,000 established. Clearly, if such severely injured plaintiffs as those in the present case receive only $100,000 awards in other less serious cases will be substantially lower.[107]

In fatal accidents cases no claim is allowed for non-pecuniary losses although by way of a partial exception in *Vana* v. *Tosta*,[108] the Supreme Court of Canada treated as a pecuniary loss a sum of $2,000 - $3,000 for the loss of training, guidance, example and encouragement that only a mother can give.[108a] Under Scottish[109] law a claim for *solatium* is permitted and in Alberta a proposal has been made[110] to allow parents, the surviving spouse and children to each claim as a class upto $3,000 for bereavement.

III. CONCLUSION

The detailed rules set forth in these decisions seem to be predicated on the further demise of jury trials in personal injury cases since

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[106] [1976] 2 W.W.R. 742, 748.

[107] In *Trizec Equities* v. *Guy, supra,* note 37, the Appeal Division of the Nova Scotia Supreme Court, allowed the plaintiff $25,000 for non-pecuniary loss resulting from an accident which caused the plaintiff severe back and neck pain, affected his ability to walk, prevented him from working, and caused him reactive depression. In reaching this figure the Court compared the plaintiff's plight with that of the plaintiffs in *Teno, Thornton* and *Andrews.* However the recent case of *Lindal* v. *Lindal* [1978] 4 W.W.R. 592 (B.C.S.C.) was also decided after the S.C.C. decisions. Fulton J. awarded a plaintiff $135,000 as non-pecuniary damages on the basis that the $100,000 limit could be exceeded where the injuries were even more severe than in *Teno, Thorton* or *Andrews.*

[108] [1968] S.C.R. 71. See also *Franco* v. *Woolfe,* especially the judgment of Haines J. at first instance, (1974) 52 D.L.R. (3d) 355 (Ont.H.C.), modified on appeal, (1976) 69 D.L.R. (3d) 501 (Ont.C.A.).

[108a] S.60(2) of *The Family Law Reform Act, 1978,* S.O. 1978, c.2, consolidates this by allowing recovery for: "(d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred."

[109] Fleming, *The Law of Torts* 5th ed. (1977) 658-59. See also N. Territories of Australia, S. Australia and Ireland and the authorities referred to in Report 24 of the Institute of Law Research & Reform, University of Alberta, *Survival of Actions and Fatal Accidents Act Amendment* (1977), 17.

[110] See *ibid.*

the rules are less easily applied by juries. Moreover, the award of substantial amounts of damages may inspire a false sense of security for plaintiffs unless the combination of insurance and a corporate defendant (*Teno* and *Andrews*) or a defendant with access to substantial resources (the School Board in *Thornton*) is capable of paying the huge damage award. One wonders how the Supreme Court would have reacted if one of these cases had involved a private motorist with minimum cover and no resources, or an uninsured driver, where the statutory uninsured drivers fund was the provider of damages. Perhaps they might have speculated on the need for legislation to ensure that public liability cover carried by motorists is adequate to cover cases of disastrous personal injuries.

Alastair Bissett-Johnson*

* * *

Appendix A

Teno v. *Arnold*

Diane Teno's Claim

A. *For future care:*	
To provide a fund of $21,000 *per annum* for 57 years, calculated at discount rate of 7%	$294,387
To provide an additional sum of $6,000 *per annum* commencing in 19 years and continuing for the balance of her life	54,735
(This sum will have generated a fund of $82,708 by 1984).	
B. *Loss of future income:* Fixed at $6,000* *per annum* for 45 years commencing in 1984 when this sum at a discount rate of 7% will have accumulated a fund of $82,008	54,272
C. *Non-pecuniary damages:*	100,000
D. *Management fee:*	35,000
Total damages for Diane Teno	$538,394
Rounded off at $540,000.	
In addition Diane's father was entitled to $14,979.62 special damages of which $7,500 were held in trust for Diane's mother as a *quantum meruit* for caring for Diane prior to trial.	

* Estimated earnings of $7,500 *per annum* subjected to a 20% deduction for contingencies.

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* Of the Faculty of Law, Dalhousie University. I should like to acknowledge the many invaluable discussions on this topic which I had with my colleague, Professor Hudson Janisch, which resulted in this note's present form. The mistakes are, of course, my own.

Appendix B

Andrews v. *Grand & Toy Alberta Ltd*
Mr. Andrews' Claim

A. *Pecuniary Loss*	
1. *Cost of future care*	
— special equipment* (wheel chairs, electric hospital bed, Econo-Van with power lift, hand controls, *etc.*)	$ 14,200
— amount for monthly payments (monthly amount $4,135;** life expectancy 45 years; contingencies 20%; capitalization rate 7%).	557,232
2. *Prospective loss of earnings* (monthly amount $564; work span 30.81 years; contingencies 20%; capitalization rate 7%).	69,981
B. *Non-pecuniary Loss* — compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life	100,000
Total General Damages	$ 741,413
Rounded off at $740,000.	

To arrive at the total damage award, the special damages of $77,344 must be added to give a final figure of $817,344 *subject to 25% contributory negligence* = $613,008.

* *Special Equipment*

Standard wheelchair	$ 525.00
Electric wheelchair	1,100.00
Econo-Van vehicle with specialized power lifts, power steering	8,500.00
Electric hospital bed	375.00
Hoyer lift (and attachments)	460.00
Home-aid hardware and architectural changes	450.00
Daily living sundries	150.00
Electric typewriter	500.00
Tape recorder	775.00
Electric garage door opener	215.00
Commode chair	225.00
Hand-control for van	175.00
Cairns selector control	750.00
Total	$14,200.00

***Breakdown of monthly expenses*

Two trained orderlies on two ten-hour shifts	$ 2,516.00
Rent - three - bedroom apartment	415.00
Utilities	35.00
Food	110.00

Clothing	40.00
Alberta Health Care	7.00
Prescription Drugs	12.00
Repairs and replacement of equipment	87.00
Van replacement — basis of six years	118.00
Non-prescription medical supplies	25.00
Insurance (including van)	40.00
Transportation for medical and recreational purposes	80.00
Personal incidentals	80.00
Housekeeper	525.00
Household incidentals	40.00
Dental care	5.00
Total	$ 4,135.00

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Appendix C

Thornton v. *Board Of School Trustees Of School District 57 (Prince George) et al*
Gary Thornton's Claim

A. *Pecuniary Loss*

1. *Cost of Future Care*

(a) Initial Capital Outlay for:	
Home	$ 45,000
Econo-Van Motor Vehicle	8,500
Home Care Equipment*	12,000
(b) Capitalized annual cost of future care (monthly amount of $4,305,** life expectancy 49 years; contingencies 20%; capitalization rate 7%)	586,989

2. *Loss of Future Earnings* ($407 per month; work-span 43 years; contingencies 10%; capitalization rate 7%) 61,254

B. *Non-pecuniary Loss*
Compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life 100,000

Total General Damages	$ 813,743
Rounded off at	$ 810,000

To arrive at the total damage award, the special damages of $49,628, which includes $7,500 to be held in trust for the appellant's mother, must be added to give a final figure of $859,628.

** Initial equipment outlay expenses.*

2 wheelchairs:	
standard wheelchair	$ 561.00
replacement (4 years)	
electric chair	1,389.00
replacement (5 years)	
Hi-Low hospital bed	415.00
Hoyer lift (and attachements)	460.00
Home care hardware and architectural changes	450.00
Daily living comfort sundries (sheepskins, cushion bedding, etc.)	500.00
Electric typewriter	500.00
Tape recorder	187.00
Five room basic furnishing	6,100.00
Commode chair	225.00
Electric garage door opener	215.00
Hand control for Van (installed)	175.00
Cairns Selector Control	780.00
Cablevision hookup cost (2)	25.00
Programmed Telephone installation	20.00
Total	$12,002.00

***Breakdown of monthly expenses*

Home — taxes, repairs and upkeep (painting, replacement of furnace, etc.)	$ 100.00
Utilities	38.00
Food	130.00
Clothing	45.00
Alberta Health Insurance	8.00
Prescription Drugs 20% of cost	12.00
Repair and replacement of equipment	111.50
Motor vehicle replacement — 6-year depreciation factor (less $1,500 trade-in value at end of 6-year period	98.00
Non-prescription medical supplies	25.00
Insurance (includes motor vehicle)	57.00
Transportation for medical and recreation	90.00
Personal incidentals and needs (all grooming aids, hygiene, and personal comfort needs)	80.00
Registered nursing orderly — 3 shifts at $932.00 a shift (based on 7 days/week and 8 hr. shifts)	2 796.00
Housekeeper (minimum) 7 days a week (no allowance for holidays)	575.00
Household incidentals and maintenance (linen, cablevision, utensils, replacement, etc.)	55.00
Dental care	5.00
Programmed telephone	30.00
Contingency fund for future unascertainable expenses	50.00
Total	$ 4,305.50

Appendix D

Keizer v. *Hanna*
Mrs Keizer's Claim for herself and her son

Pecuniary Loss

Mr Keizer's expected annual earnings		$ 15,000	
LESS Tax	$3,200		
Personal use	1,800		
Personal support	3,000	8,000	
Amount available for dependants		7,000	*per annum*
Capitalized sum required to produce $7,000 *per annum* for 31 years (Mr Keizer's working life expectancy) at 6½% discount rate		95,000	approx.
Less small discount for contingencies		1,500	
Total Damages		93,500	
Divided as to Mrs Keizer		$ 78,500	
Stephen Keizer, her son (money paid into court)		$ 15,000	