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L'expérience ontarienne

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SOMMAIRE

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I have been asked by Professor Perret to comment on two matters in Ontario that deal with the issues of compensation of personal injury victims. They are : (a) the history and causes for the passage of Section 129 of the *Courts of Justice Act*, and (b) some reflections by a plaintiffs' lawyer on The Slater Report.

I. SECTION 129 OF THE COURTS OF JUSTICE ACT OF ONTARIO

Because of, I believe, the constitutional right to trial by jury in the United States, and the general practice of the Court having the jury render a simple verdict in a personal injury action of a finding for the plaintiff of $ 100,000 or for the defendant, there is not the same necessity for the presentation of very carefully calculated computations to determine such issues as future loss of income earning capacity or the pecuniary loss suffered by a husband as the result of the death of a breadwinning wife.

Before 1977, the Ontario Courts deliberately shied away from such calculations and awarded damages much like a U.S. jury, on a rather speculative overall lump sum basis without any real attempt at careful breakdown of the various heads of damage — particularly future economic loss and future care costs.

After the trilogy in the Supreme Court of Canada, it became the obligation of every Court, jury or judge alone, to quantify with as much precision as possible these heads of damage.

A trade-off was engineered by the Supreme Court of Canada — a lid on general damages as a matter of social policy, but unlimited

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damages to compensate for economic loss and future care costs. The emphasis promptly changed in the profession to develop all the actuarial, accounting and economic expertise to quantify this portion of the claims, with rather spectacular results, at least in terms of absolute figures. A significant increase in damage awards in total resulted.

Perhaps the high water mark was reached in the *McErlean*[1] case, where Fitzpatrick, J., on sound evidence, assessed the total damages of a then 21 year old boy at over $ 7,000,000.

Unfortunately, that judgment fell to be delivered coincidentally with the actual or perceived "crisis" in the insurance industry, worldwide and in Ontario. What is little known is that the bulk of that assessment was agreed by counsel.

One result of the appointment and study of the Slater Task Force was the set-up of a committee of the Ontario Branch of the Canadian Bar Association, which included strong representation from the practising bar, plaintiff and defence, insurance industry, executives, corporation risk manager, insurance adjusters, agents and brokers, and others who attempted a review of the system of compensation of personal injury victims, with a view to suggesting modifications to the system to correct perceived inequities in the system. The result was a shopping list of suggested changes.

Perhaps the most significant change suggested involved the *ridiculous situation that has arisen where the defendant is called upon to pay a form of gross up* of the award in effect to the federal government to offset the tax on the invested capital award which provides the stream of income necessary to defray future care costs, or in the case of the breadwinner fatal the same stream of income required to replace the loss of support suffered by widow and children.

The vehicle that in the last nine years has assisted to solve this problem has, of course, been the structured settlement. That method very simply provides the stream of income free of taxation and therefore free of the burden which the defendant must assume of the gross up. The defect of this vehicle, however, has been that it can only be accomplished by way of settlement, and either party can prevent a structured settlement. The Courts have been powerless to impose structured settlements because at least uncertainty as to whether the structuring so imposed will be honoured by the Department of National Revenue, as well as a concern that the imposition on either plaintiff or defendant is an unwarranted interference on the right to a one time lump sum award to cover all past and future losses.

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1. *McErlean* c. *City of Brampton et al.*, 32 C.C.L.T. 199.

In cases of long term future care costs, and long term support loss and even future loss of income, our Courts have been required to provide a one and forever lump sum amount to reflect these losses.

Circumstances change. The $ 1 million required for future care of the severely brain damaged child is predicated upon his living the time required to use up the notional stream of income generated by the $ 1 million. Suppose he dies 10 years early, or worse — suppose he lives an *extra* ten years? There has been in Ontario no facility for either the plaintiff or the defendant insurer to return to the Court — the defendant to demand a refund of the balance of the moneys no longer required for the care of the plaintiff, or the plaintiff to demand more money because in the circumstances he hadn't been given enough.

As a result of the trilogy decisions then, the amounts of money involved were substantial and because the Courts could not revise their decisions in later years because of changed circumstances, there existed a real uncertainty as to whether in the long run one party or the other would suffer a real inequity.

The Bench and Bar Council Committee on Tort Compensation in Ontario chaired by Mr. Justice R.E. Holland, a few years ago, attempted to come to grips with all of these problems, and recommended a number of things, among them that the Court be permitted to order a defendant to pay all or part of an award for damages periodically on terms such as — in the event of the death of the victim requiring the care costs, the periodic payments would cease. As well, what was obviously needed in a utopian world would be the right of both parties to periodic review — the defendant to demonstrate that because of the plaintiff's improved circumstances or condition he no longer requires the care, or requires less of it, and the plaintiff to demonstrate he is entitled now to more, because of such things as unanticipated higher inflation or greater requirements for care than had been anticipated.

One would have to say that the plaintiff ought not to complain about such a proposal. But the defendants, insured or uninsured, certainly complained. In effect the defendant is buying under such a system, a long term 5 - 10 - 30 - 50 year open-ended contingent liability, and no defendant and no insurer in her right mind would ever agree — so ran the position of the insurers, and they could hardly be blamed.

The result of the report, however, was the passage of now S. 129 of the *Courts of Justice Act.*

> In a proceeding where damages are claimed,
> (a) for personal injuries; or
> (b) under Part V of the *Family Law Reform Act*, for loss resulting from the injury to or death of a person,
>
> the Court may, with the consent of all affected parties,

(c) order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just;
(d) order that the award for damage be subject to future review and revision in such circumstances and on such terms as the Court considers just.

It is, you will see, entirely dependent upon the consent of all the affected parties. I have heard of one or two cases where some such arrangement has been made, but none reported, and can think of the odd defendant like the federal or provincial government as a defendant who might be prepared to live with future review. Not your every day defendant, even business corporations would take on the risks of long term uncertain potential liability.

So the section hasn't meant much, and in respect of future review, isn't likely to.

However, the periodic payment aspect we think has a future. In respect of this, the Bar Association Committee has recommended that either the federal government should make provision for the non-taxability of income when directed to care costs, as a matter of deduction from taxable income, or alternatively, and probably preferably the granting of power to the Court to impose structured settlements on defendants but not on plaintiffs. The plaintiffs would still have the right to lump sum judgments if they refuse to structure, but no award would be made for gross up.

So that there be no doubt about the significance of the gross up — in *McErlean* it amounted to more than $ 3,000,000.

II. The Slater Report

The hallmarks of the judicial system involved in the compensation of personal injury victims in Ontario have been historically :

(i) the right to retain an advocate to prepare and present the case for damages of the victim;
(ii) access to the Courts when settlement cannot be agreed upon;
(iii) the right to damages tailored specifically and carefully to *that* victim, and *all* the damages including those for pain and suffering;
(iv) the right to such levels of compensation dependent upon the innocence of the victim.

The profession, plaintiff and defence, have fought vigorously to preserve these hallmarks. The self-interest of the profession in the preservation of the system is a given, and therefore the plea for this justice in the system is always suspect, coming from the mouths of the lawyers.

The issues that must be considered against the preservation of that system are, I think, obvious :

(i) Is the cost to the taxpayers of the judicial system including the fees of the lawyers too much to pay? Can a bureaucracy deliver the service required to process the claims more cheaply and sufficiently effectively to warrant the destruction of the hallmarks?

(ii) Is it time to simplify the system to compensate victims on a meat chart method — that is, remove the hallmark of the tailoring of losses to the particular victim?

(iii) Are the amounts of money in total being paid to victims and the cost of the system reaching the point where it is beyond the reasonable power of motorists, manufacturers, doctors to pay?

(iv) Should all victims, regardless of their own fault or innocence, recover their damages equally?

The Slater Task Force faced these issues most unfortunately in a crisis atmosphere with a deadline that prevented the kind of in-depth study that the problems, even those peculiar to Ontario, needed.

The most controversial, in fact the *only* really controversial recommendation, was for a no tort or threshold type plan short term in respect of motor vehicle accident victims, and a long term no tort (or really no access to the Courts) system of compensation for all personal injury victims, regardless of fault.

Make no mistake, there isn't enough money in the country to compensate *fully* for their losses, *all* victims regardless of fault.

To bring you up to date, the Ontario Government, we understand, referred these weighty issues to Mr. Justice Coulter Osborne for the extensive study that I am confident Dr. Slater and his staff would have loved to have been able to undertake.

I chaired the special committee of the Law Society on this problem, and it was our recommendation to the government that further extensive study (not done by Dr. Slater) should be undertaken. Finally, we felt strongly that a thorough study would involve careful assessment of the no fault system in Quebec, The Workers' Compensation system in Ontario, European methods and the New Zealand experience, among other matters.

CONCLUSION

Finally, let me say to you that each jurisdiction, whether it is a country, a state, or a province, has its own law, history, tradition, economic situation, competence of bench, and bar, and we are all

different. In the same way that the levels of damages ordinary to California or Manitoba are different than they are in Ontario, so the system, if there are changes to be made, should be carefully tailored to the Ontario scene.