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## Law Reform Notes

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*Law Reform Notes is produced twice yearly in the Legislative Services Branch of the Department of Justice, and is distributed to the legal profession in New Brunswick and the law reform community elsewhere. Its purpose is to provide brief information on some of the law reform projects currently under way in the Branch, and to ask for responses to or information about items that are still in their formative stages.*

*The Department is grateful to all of those who have commented on items in earlier issues of Law Reform Notes; we encourage others to do the same. We also repeat our suggestion that, if any of our readers are involved either professionally or socially with groups who might be interested in items discussed in Law Reform Notes, they should let those groups know what the Department is considering and suggest that they give us their comments. We are unable to distribute Law Reform Notes to everybody who might have an interest in its contents, for its contents are too wide-ranging. Nonetheless we would be pleased to receive comments from any source.*

### A: UPDATE ON ITEMS IN LAW REFORM NOTES #3

*There have been few developments in relation to the items described in Law Reform Notes #3; time was too short between the 1994 fall sitting of the Legislature and the spring sitting 1995. In this section, we will only comment on items on which there is something to add to what was said in issue #3.*

#### 1. Fatal Accidents Act

The suggestion in Law Reform Notes #3 was that the Act should be amended to allow common law spouses to bring claims under the Act. This has now been accomplished under An Act to Amend the Fatal Accidents Act, chapter 39 of the Acts of New Brunswick 1995, which applies to deaths occurring on or after April 13, 1995.

#### 2. Intestacy

In issue #3 we suggested that section 31 of the Devolution of Estates Act should be repealed without replacement, thus abolishing the rule that "advancements by way of portion" had to be brought into account in distributions on intestacy. We received no criticism of that

suggestion, and are proposing to recommend legislation accordingly.

#### 3. Access to neighbouring lands

The responses to this item agreed that it would be useful to create legislation under which property owners could obtain access to neighbouring lands when it was necessary for them to go there to do things such as maintain their own property. We will be examining this idea further.

#### 4. Deregulation

Nobody has yet taken up our invitation to identify statutory or common law rules that "needlessly complicate the commercial or

personal lives of their clients," and that might be suitable candidates for reform under the government's deregulation initiative. The invitation is still open.

## B. NEW ITEMS

### 1. Inter-spousal Tort Immunity

An Act to Amend the Law Reform Act, chapter 40 of the Acts of New Brunswick 1995, has abolished the doctrine of inter-spousal tort immunity in New Brunswick in relation to causes of action arising on or after May 1, 1995. Note that the amendment also repealed s.4 of the Contributory Negligence Act, under which, where a married person was partly responsible for injuries to his or her spouse, no "damages, contribution or indemnity" was recoverable in relation to the married person's contribution to the injuries.

### 2. Damages for Personal Injuries

The Insurance Bureau of Canada has requested that we look at a number of issues surrounding the assessment of damages in personal injury cases. Several of the items they have identified relate to areas of law in which the status quo has been subject to much academic, judicial, and advocates' criticism -- for example, pre-judgment interest law, the collateral source rule, and the tax treatment of damage awards. Some of the law in these areas has already undergone legislative change in other provinces. The IBC's specific recommendations relate to automobile accidents, but most of the legal principles involved are of general application, and we have dealt with them on that broader basis.

The automobile context does, nonetheless, add a further dimension of 'public interest' to the discussion. Automobile insurance is compulsory, and anything paid out as compensation is directly reflected in the premiums that motorists are obliged to pay. Figures prepared by the IBC suggest that the tort rules they have criticized may account for as much as 15% of the 'ultimate loss cost' for personal injuries in automobile accidents. If that figure is right, and if the IBC and others are correct in their criticism of the existing law, the current cost of automobile insurance to the consumer is being substantially inflated by inappropriate principles of recovery.

### 2(a) Pre-judgment Interest on Non-Pecuniary Damages.

The suggestion is that pre-judgment interest should not be awarded on non-pecuniary damages (damages for pain, suffering and loss of amenities of life). That is the present law, recently amended, in British Columbia. Other provinces have a variety of different provisions.

In New Brunswick, pre-judgment interest is governed by s.45 of the Judicature Act. The section does not differentiate between pecuniary and non-pecuniary damages, and gives the trial judge complete discretion in deciding whether to award pre-judgment interest, as well as in choosing both a pre-judgment interest rate and the date from which interest will run. We are informed that the normal practice at present is that interest is awarded for non-pecuniary damages at a commercial rate from the date of the statement of claim.

The rationale behind the current practice of awarding interest is that successful plaintiffs are 'kept out of their money' from the day on which the defendant is notified of the claim, and should be compensated for this. The criticism, on the other hand, is that although this may be true in relation to things like contract debts or pecuniary damages in personal injury cases, it has little application to non-pecuniary damages. Pain, suffering and loss of amenities of life, the critics would say, do not 'crystallize' at an identifiable point in time from which pre-judgment interest must run in order to ensure that a plaintiff is fully compensated. Rather, the damage award represents the judge's attempt to assign a financial value to things which, by their nature, cannot really be quantified in financial terms. To apply pre-judgment interest to this, the critics argue, is artificial and inappropriate. If we were to follow this line of reasoning, pre-judgment interest on non-pecuniary damages would be eliminated entirely.

It has been alternately suggested that, if pre-judgment interest is to be awarded on non-pecuniary damages, it should be at lower rate than interest on pecuniary damages. This suggestion is based on the rationale that commercial interest rates consist of two parts: a "loss of use" component reflecting the actual increase in money that the plaintiff might have gained if the money had been available for

investment in the period before the judgment, and a "loss of value" component to compensate for inflation. The suggestion is that pre-judgment interest on non-pecuniary damages should seek only to compensate for the "loss of use". The reasoning is that since non-pecuniary damages awards reflect money value at the time the award is made, rather than at the time of the injuries or of the statement of claim, they are already adjusted for inflation. To adjust for inflation again by awarding interest at a commercial rate is to overcompensate the plaintiff. Economists estimate that an interest rate of around 3% would provide for the "loss of use" component alone, since historically, and for different rates of inflation at different times, a reasonable return on investments has been approximately 3% above the rate of inflation.

Some of the other common law provinces have changed the way pre-judgment interest is awarded for non-pecuniary damage. British Columbia has chosen the first approach (no pre-judgment interest is awarded on non-pecuniary damages), whereas Alberta and Ontario have chosen a modified version of the second approach (interest is awarded at 4% in Alberta and 5% in Ontario on non-pecuniary damages). Manitoba has adopted a different modification of the second approach: no interest *per se* is awarded on non-pecuniary damages, but the judge may make "allowance for the loss of opportunity for the successful party to invest the amount of the damages".

We would appreciate comment on whether New Brunswick should move to one or another of these approaches, or whether it should stick to its existing law. Our initial view is that those who have advocated the elimination of pre-judgment interest on non-pecuniary damages probably have the better arguments in principle. At times, however, the practical point is made on the other side that pre-judgment interest is useful in providing an incentive to defendants, or their insurers, to settle sooner rather than later. How much weight does this comment deserve? And if the comment is an important one, might the appropriate legislative response be to make a more direct link between pre-judgment interest and defendants' delay. Might it be sensible, in other words, if pre-judgment interest on non-pecuniary damages became available only in those cases in which a defendant is guilty of

improper delay?

## 2(b) Pre-judgment Interest on Pecuniary Damages.

Though the IBC did not suggest reform of the law of prejudgment interest on pecuniary damages, we have reviewed the matter in conjunction with our review of non-pecuniary damages. The method currently used in New Brunswick to calculate pre-judgment interest on pecuniary damages (special damages, including out-of-pocket expenses) has been criticised elsewhere as not being sophisticated enough and as resulting in unfairness to one side or the other.

New Brunswick's current legislation, s.45 of the Judicature Act, gives the judge complete discretion over a calculation that may be complex, since plaintiffs will have been 'kept out of their money' for differing lengths of time with respect to each individual out-of-pocket item. We understand that currently judges use the "half-rate" rule: the items are totalled and interest is awarded at half the commercial rate for the entire period from the date of the accident to trial or settlement regardless of when each expense was sustained. The idea is that this provides a simple and reasonable rule of thumb. Some expenses will have been incurred earlier in the pre-trial period; some will have occurred later. Adding them all up and using half the interest rate averages things out in a simple way.

Some other provinces' legislation provides for more precise methods of calculation. British Columbia, Saskatchewan, Manitoba, Ontario, Prince Edward Island and Newfoundland have three or six month add-up periods: expenses incurred during these blocks of time are added up and interest is awarded for each block. Some jurisdictions have legislated a rate of interest linked to the Bank of Canada rate and some publish quarterly tables of interest rates to be applied to each block of time. Many provincial statutes also allow for the exercise of judicial discretion to vary the rate of interest in special circumstances, such as when the plaintiff or defendant has been guilty of undue delay.

We would be interested to know whether people feel that a more exact method of the kind described above would be an improvement. We are inclined to think that the present "half-rate" rule, although not as sophisticated as an add-up

method, is probably good enough, especially bearing in mind that s.45 of the Judicature Act is flexible enough to allow a litigant to argue that the "half-rate" rule is inadequate in a particular case. However, others may have different views.

### 2(c) Collateral Source Rule

It has been suggested that the collateral source rule, which has frequently been criticized but was recently reaffirmed and extended by the Supreme Court of Canada in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, should be reversed for personal injury cases. In *Cunningham*, the majority of the SCC held that the victim of a tort who has collateral benefits "in the nature of insurance" (i.e. for which she he or has paid premiums or made other contributions) can claim twice for the same loss, once from the collateral source and once from the tortfeasor. Providers of collateral benefits have, in theory, the right to subrogation, but the SCC observes that in practice they rarely exercise this right. As a result, the plaintiff "double recovers" to the extent of the collateral benefits.

The Osborne Commission into motor vehicle accident compensation in Ontario (1988) estimated that 30% of plaintiffs had collateral sources of recovery through workplace benefits, private disability insurance policies, unemployment insurance and the like, and that double recovery in these cases gave plaintiffs an average of 136% of their awards. The most striking double recoveries occurred in cases of minor injury where lost income was well within the amount provided by employer disability plans. The Commission also noted that most plaintiffs were surprised to find that they could recover twice for the same loss. Ontario has since legislated to reverse the collateral source rule in relation to tort-based recoveries for automobile accidents.

The criticism of the collateral source rule is that it is contrary to basic principles of compensation in tort: that a tortfeasor is only required by law to pay for the loss that he or she causes, and to the degree that a plaintiff has collateral benefits, no real loss has been suffered. The argument on the other side is that the tortfeasor should not benefit from the prudence of the plaintiff in making arrangements for collateral benefits, and that if a collateral source chooses

not to recover from the plaintiff subsequent to a judgment, this is no business of the tortfeasor's.

We would be interested to receive comment on both the theory and the practical operations of the collateral source rule. Our present view is that the criticism of the existing law is more persuasive than the arguments in its support. Given the basic principles of recovery in tort, any rule that leads to 'double recovery' must be viewed with suspicion, and we do not believe that it is sufficient to treat 'double recovery' as being exclusively a matter between the plaintiff and the collateral source. The current law appears to be influenced too much by the idea that the defendant is a 'wrongdoer,' even though the kind of conduct that will provide a basis for a finding of legal liability often falls far short of what would normally be considered to be real culpability. We are not convinced in any event that there is anything inherently wrong with the idea that a defendant, even a truly culpable one, might benefit from the prudence of the plaintiff in making the arrangements under which the collateral benefits become due. Defendants in tort regularly either benefit from, or suffer from, the physical and financial situations of the people they injure. If a plaintiff is physically robust or has taken physical precautions against injury, the injuries suffered may be less, and the defendant derives from this the benefit of a smaller damages award. We are inclined to see the collateral source rule in the same light; the plaintiff has taken financial precautions, and the result is that the financial injury is less severe.

Our present view, then, is that the basic rule in New Brunswick should be that where a plaintiff is entitled to recover from both a collateral source and a defendant in relation to the same loss, the damages recoverable should be limited to the excess, if any, of the loss over the collateral benefits. This seems to be defensible in principle, simpler to operate, and less random in its effects than the existing law. A corollary would be that the collateral source should no longer have the ability to recover the collateral benefits through subrogation; there might perhaps be exceptions to this, but if so they should be expressly established by legislation which set out not only the collateral source's right to recover, but also a workable process by which recovery might occur.

We have also considered separately the position in relation to automobile accidents. Here, because defendants are all obliged to be insured, the real decision is whether the cost of the collateral benefits should be borne by the collateral source or by the defendant's insurer. Our present view is that this is a question that can be dealt with on pragmatic grounds, whatever the ultimate decision may be on the general approach to the collateral source rule. In the automobile context, a decision that there should be no 'double recovery' and that the benefit of this should go to the defendant's insurer should ultimately be reflected in the cost of automobile insurance, while a decision that the benefit should go to the collateral source should ultimately affect the cost of collateral benefit arrangements. We see this choice between alternative financial results as being one that the government could legitimately arrive at on policy grounds alone, and without necessarily implementing the general reversal of the collateral source rule discussed above.

Note that the suggestions above are only intended to apply to cases in which the plaintiff survives the accident. If the plaintiff is killed, the Fatal Accidents Act kicks in, and s.7 of that Act lists various items such as life insurance proceeds and survivors' pensions that are not to be taken into account in deciding what the 'pecuniary loss' of the deceased's dependants has been. We have not yet considered whether the reasoning described above for inter vivos cases has any application to fatal accidents, where the issues and interests involved are different from those that arise where the plaintiff survives. The scope of the project at present is limited to inter vivos situations.

#### 2(d) The Tax Treatment of Damage Awards

The suggestion is that damages for loss of income should be awarded net of income tax rather than on a gross basis as they are at present; i.e. that a deduction should be made from the tort award that is equivalent to the amount of tax the plaintiff would have had to pay had he or she earned the money as income. The rationale is that it is the net income, rather than the gross income, that represents the plaintiff's actual loss and that this is therefore all that the defendant should be obliged to pay in order to ensure that the plaintiff is fully compensated. The courts in the UK and Australia apparently use net

income as their starting point in calculating loss of income, but in Canada the case-law has proceeded differently.

The practice of awarding lump sum damages on a gross basis was approved by the Supreme Court of Canada in *R. v. Jennings*, [1966] S.C.R. 532. At that time, it was unclear to the Court whether lump sum damages were taxable in the hands of the plaintiff. Revenue Canada had not traditionally taxed them, but the *Income Tax Act* did not explicitly reject such a possibility, and there had not yet been litigation on the issue between the tax department and a taxpayer. Faced with this uncertainty as to whether its award might be taxable, the Court decided to err on the side of caution and award the plaintiff the larger amount.

In 1978 Revenue Canada did decide to tax a plaintiff's lump sum loss of income award. The taxpayer contested the assessment [*R. v. Cirella* (1978), 77 D.T.C. 5442 (F.C.T.D.)] and won. The trial division court found as a matter of statutory interpretation that awards for loss of income did not derive from a "source" within the meaning of the *Income Tax Act* and hence could not be taxed. Revenue Canada did not appeal, nor did it amend the Act. It subsequently issued what is now Interpretation Bulletin IT365R2 stating that damages, whether lump sum or periodic, are not taxable, but the interest earned by investing a lump sum damage award is taxable.

The case for awarding damages on a 'net' basis appears strongest in relation to pre-trial loss of income. There it seems simple and realistic to say that the net income rather than the gross income represents the plaintiff's actual loss. Other scenarios are more complicated, though -- for example, when there is long-term loss or reduction of future income, and the impact of taxation on the plaintiff's income at any particular time may be hard to predict with any confidence.

At present we see three main alternatives here:

1. Maintain the status quo. The criticism of this is that it takes the plaintiff far beyond *restitutio in integrum*, both as to past income and as to future income.

2. Award pre-trial loss of income on a net basis but future loss of income on a gross basis. This, admittedly, creates an anomaly by treating income differently at different times, but it has the attraction of avoiding the need to speculate about the plaintiff's future tax liabilities. It means that the defendant does not pay too much for a past loss that is actually known but it gives the plaintiff the benefit of the doubt where it is not actually known what the impact of taxation in the future will be.

3. Place all awards for loss of income on a net basis. We see no major problems here in relation to past income, but as to future income we can only realistically see this working if the calculation were done on a basis that was rough and ready, but that erred in favour of a smaller tax deduction rather than a larger one where the position was unclear. For example, one might legislate a presumption as to future income that tax would only have been payable at the basic rate. Gross-up would presumably also have to be added in. The end result of this rough and ready calculation might not be perfect, but awarding lump sum damages for future losses is an inexact science at the best of times.

We would welcome comment on these alternatives, or on any others that people may suggest.

#### 2(e) Seatbelts/Contributory Negligence

What is suggested here is that, in motor vehicle accidents, a plaintiff's failure to wear a seatbelt should give rise to a rebuttable presumption of 25% contributory negligence. We feel that the main issue here is whether 25% is the appropriate figure, and that this may well be a question on which issues of highway safety policy, and of encouraging seatbelt use, may be important factors in the eventual decision.

So far as concerns the legal position, it now seems clear that in normal circumstances failure to wear a seatbelt will amount to 'fault' for purposes of establishing contributory negligence. What then has to be established is the extent to which this 'fault' caused the plaintiff's injuries -- a task that is inevitably speculative and may require expert evidence. Judges such as Denning L.J., *Froom v Butcher* [1975] 3.All E.R. 520, and Hoyt J.A., *Mabey v Richards* (1983) 42 N.B.R. (2d) 91,

have suggested that it would be more sensible if the law provided a conventional figure. We tend to agree.

If that is done, all that is left is to establish what the conventional figure should be. We would appreciate comment on the suggested figure of 25%. This is certainly within the range of figures to be found in New Brunswick cases. We have the impression that it is towards the higher rather than the lower end of the range, but this is where, once more, the issues of highway safety policy may become an operative factor. If the amendment is intended to provide an added incentive to seatbelt use, setting the conventional figure at the higher end of the range might well be sensible. Otherwise, what would the element of incentive be?

We would also appreciate comment on whether the 25% figure should be, as originally suggested, a rebuttable presumption or whether either (a) it should not be rebuttable at all (i.e. a 25% reduction in all cases), or (b) it could only be rebutted by establishing that the failure to wear the seatbelt had not contributed to the injuries at all (i.e. the debate would be between a 25% deduction and a 0% deduction). We think there may be something to be said for the latter of these approaches. While it would mean that it was rarely worth litigating over the 25% deduction, it would still provide a safety valve for exceptional cases. It would also mean that the plaintiff was not at risk of the defendant arguing in a particular case that the seatbelt deduction should be more than 25%, a result that has been reached in some New Brunswick cases.

#### 2(f) Deductions for contingencies

This was not one of the items raised by the IBC, and we have not yet reviewed the matter in detail, but in the course of examining the law of compensation for personal injuries, one comment that did arise was that the present practice of adjusting a damages award to allow for the 'contingencies of life' seems a rather speculative venture. Moreover, the focus normally appears to be on adverse contingencies (e.g. the risk of unemployment) rather than on favourable ones (e.g. the possibility of finding a better job). We can see that in some cases there may be an identifiable prospect that a specific 'contingency' will affect the plaintiff and should be taken into account, but in the absence of such identified

circumstances our initial reaction reaction is to wonder whether a general adjustment to damage awards on the basis of 'contingencies' is justifiable.

Is this a matter which deserves further examination?

2(g) Periodic payment of damages/  
structured settlement

Underlying a number of the complaints that have been made of the existing law is the question of whether it would be desirable to establish a system under which plaintiffs' compensation would be paid periodically rather than assessed on a lump sum basis. The current law on assessment of damages has been criticized as a 'forensic lottery,' especially in cases in which seriously injured plaintiffs may (or may not) live for a long time after the accident with substantial needs. The reforms suggested in response to this are expressed in different ways - as providing for 'periodic payment of damages' or permitting a judge to 'impose a structured settlement' -- and some jurisdictions have introduced legislation along these lines.

Is this something that New Brunswick should investigate? We have not done so yet, but we think that we probably should. It is hard to read a case like *Andrews v Grand & Toy*, [1978] 2 S.C.R. 229, the leading authority on the calculation of lump sum damages for personal injuries, without being impressed by the criticisms made there of the lump sum approach.

2(h) Other Items

Are there other items related to the assessment of damages for personal injuries that we should take on board while the items above are under review? If so, please let us know.

*Responses to any of the above should be addressed to Tim Rattenbury, Legislative Services Branch, Department of Justice, P. O. Box 6000, Fredericton, New Brunswick, E3B 5H1. We would like to receive replies no later than July 15th, if possible.*