THE LAW OF DAMAGES, by S.M. Waddams, Aurora: Canada Law Book, 1983, pp. cx and 756.

Throughout the colonial period and for most of the first century of our existence as a sovereign nation, Canadian Jurisprudence had been governed by the common law principles developed in England. With the abolition, in 1949, of the Privy Council as the final arbiter on judicial matters arising in Canada, a truly Canadian jurisprudential tradition began to emerge. The divergence from British principles was neither radical nor rapid but none the less it occurred. Nowhere is this more evident today than with the principles underlying and the law governing the award of damages to successful litigants.

Some of the most dramatic differences occur in personal injury and wrongful death cases. For instance, the taxation of compensation for loss of future earnings and the assessment of non-pecuniary loss are markedly different in the two jurisdictions. In Canada, a plaintiff receives an award with no deduction for income tax in personal injury cases[1] whereas a net of tax award is made in wrongful death actions[2] notwithstanding that the principal sums in both instances are exempt from taxation in the hands of the recipient.[3] In England, both circumstances are treated in a similar fashion with the plaintiff receiving compensation on the basis of after tax earnings.[4]

In dealing with the subject of non-pecuniary loss, the Supreme Court of Canada has established a number of fundamental principles governing the award of such compensatory sums.[5] These include: a) collective consideration of the previously separate items of pain and suffering, loss of amenities and loss of expectation of life; b) establishment of the upper limit ($100,000 in 1978 dollars) for such awards; and c) endorsement of the functional approach to the assessment of the loss of individual claimants. This position also differes from the British courts' approach.

In light of the emergence of uniquely Canadian approaches, a work such as Professor Waddams' *The Law of Damages* was long overdue. As evidenced by the wealth of material in the legal and fiscally oriented journals, there has been no dearth of writing on the subject of damages in the Canadian setting. These works, by their nature, have been limited in scope and coverage and consequently this book represents the first attempt at a comprehensive coverage of this large and complex area of the law.

As the title suggests, this book deals with the topic of damages. The author has not ignored other remedies or avenues which may be available to an aggrieved party. Where he feels it is appropriate, Waddams refers to those other or alternative courses which may be available, citing the

1. *The Queen in Right of Ontario* v. *Jennings* [1966] S.C.R. 532, subsequently aff'd in the "trilogy" (*Andrews* v. *Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229; *Thornton* v. *Board of School Trustees of School District no. 57 et al.* [1978] 2 S.C.R. 267; *Arnold* v. *Teno* [1978] 2 S.C.R. 287).
2. *Keizer* v. *Hanna* [1978] 2 S.C.R. 342.
3. ref. Revenue Canada Interpretation Bulletin IT-365R para. 5.
4. *British Transport Commission* v. *Gourley* [1956] A.C. 185 (H.L.).
5. Cf. the "trilogy" supra, footnote 1 and *Lindal* v. *Lindal* [1981] 2 S.C.R. 629.

appropriate reference on that particular subject. This is particularly useful in regard to the mutual cross-referencing (to the numbered paragraph level) between this and its companion volume, *Injunctions and Specific Performance* by Professor R.J. Sharpe.[6] The close collaboration between the two authors is evidenced by the way in which this cross-referencing facilitates the accessibility of the corresponding material in each text. To this end, both authors are to be commended.

The organization of the material is novel. Instead of separate sections or chapters dealing with torts, contracts and other areas of substantive law, Waddams has chosen to present his coverage in terms of the right or interest for which compensation is being sought. The one exception to this occurs in the chapter which deals with remoteness as a limiting principle.[7] Because of the parallels between principles involved and the more recent convergence of the law relating to remedies in tort and contract,[8] this structure is logical.

While the organization may prove somewhat difficult for the individual seeking to find all the principles governing a precise point of law, the layout of the material and the index make it readily accessible. Throughout the book, wherever legislative enactments may be relevant, the author summarizes the salient features of each and provides an analysis of the significance of the various provisions where they correspond and where they are divergent in application between jurisdictions. In each instance, the applicable legislative provisions of each of the provinces and the territories are presented.[9]

In substance the work is thorough and consistent, providing a retrospective as well as a prospective view of the law. In each section the author introduces the topic to be dealt with in common sense terms. This is achieved through the identification of the rationale, admittedly sometimes speculative on his part, underlying that aspect of the law of damages. This is followed by a review and analysis of the case law on the point. Where conflicts or discrepancies exist between cases, Waddams attempts to rationalize the differences. He does not hesitate to question the wisdom of some judgments and to offer his view of what is a more realistic approach to the issue.

The volume of case law considered is impressive with more than 2500 cases being referenced or cited. The early cases are primarily drawn from English decisions to establish the state of the law of damages. They are updated, to the time of writing, with applicable Canadian decisions. The references to other jurisdictions such as Australia or the United States are limited in number and employed primarily to illustrate how and where dissimilar principles have been applied.

The book is structured in three parts, the first of which represents two-thirds of the volume and covers the area of Compensatory Damages. This part opens with a brief discussion of the concepts involved in the

6. R.J. Sharpe, *Injunctions and Specific Performance* (1983).

7. Chapter 14 at p. 647.

8. Cf. Estey J's comments on the matter in *Asamera Oil Corp. Ltd.* v. *Sea Oil & General Corp.* [1979] S.C.R. 633 at p. 673.

9. Cf. §§ 835-851.

valuation of compensable losses or deprivations and proceeds to examine the various interests for which compensation may be sought. The chapter headings, in sequence of coverage include: Loss of Property, Loss of Service, Personal Injuries, Loss of Reputation, Damage to Economic Interests, Wrongful Death and Loss of Money.

Part II focuses on Non-Compensatory Damages, including chapters titled: Liquidated Damages, Awards Measured by the Defendant's Benefit, Nominal Damages, Exemplary Damages and finally a chapter on Survival Actions. Of particular interest in this section is the analysis of Canadian courts' handling of penalty or liquidated damages clauses in contractual relations.[10] Following a review of the cases on this point, the author concludes that unconscionability is the only acceptable rationale for the courts to strike down such terms. The same is true, he asserts, for not enforcing certain limitation of damages clauses which have been contracted by the parties. It is submitted that these conclusions are sound and just.

Part III is titled Limiting Principles and contains chapters on: Certainty, Remoteness and Mitigation. In all instances, coverage is limited to these topics as they specifically relate to the area of damages. It is refreshing to read a legal text which does not take several centuries of decided case law and attempt to fit all of the cases to the author's particular model of that area of the law. Instead, Professor Waddams focuses on principles while reviewing the case law and attempts to rationalize, in practical terms, those anomalies which exist. For example, in discussing the divergence in damage awards for conversion of property,[11] he suggests some cases carry strong overtones of allowing punitive or exemplary damages. This arises where the defendant has enhanced the value of the chattel and it is valued, for compensatory purposes, in its "processed" form as opposed to its "raw or unrefined" form.

The author persuades his reader that consistency in the law, particularly between the areas of damages and restitution, require a more suitable principle than that which appears to run throughout the cases. In this vein he proposes that the wrongdoer should be permitted to recover the cost of improvements so long as the plaintiff benefits from them. One would imagine that the benefit derived by the plaintiff must be of equivalent value.

While the overall impression of this book is quite favourable, there are a number of points with which one might take issue. First among these is Waddams' conclusion that the loss of sight in his only eye to a one-eyed individual is not to be valued the same as the loss of sight in both eyes to a two-eyed individual. This example arises in the discussion of reduction of damages for pre-existing condition.[12] This conclusion is sound in principle but perhaps the author has chosen a poor example to illustrate the point. Whereas with other faculties, one may conclude that a partial loss would dramatically diminish the value of the remaining portion of that physical sense, I would submit that this is not necessarily the case in rela-

10. Chapter 8, Liquidated Damages.

11. See §§ 281-288.

12. See § 1171.

tion to sight. While sustaining loss of sight in one eye may definitely limit an individual, the number and magnitude of such limitations need not be very significant except to the unusual individual (For instance, one whose occupation or lifestyle was dependent upon sight in both eyes).

Perhaps the better means of approaching such evaluations would be on a basis analogous to the functional approach endorsed by the Supreme Court for the valuation of non-pecuniary losses.[13] It is submitted, that on such a basis, it would be rare indeed to find a significant difference in the functional loss to individuals who lost all sight whether prior to the loss they had the sight of one or both eyes.

A second point of disagreement relates to a subject which has had a tremendous impact upon judicial decisions in recent years. It is the topic of inflationary influences and their impact, both actual and potential, upon the magnitude of damage awards. In the preface to the text, the author states:[14]

> Until recently, comparatively little attention has been paid to this area of the law [damages], but the impact of inflation, combined with the greater tendency of courts to analyze, explain and justify their awards, has made the area one of great theoretical and practical importance.

While the topic of inflation is addressed at several points throughout the work, it is submitted that the coverage does not do justice to the magnitude of the problem which still exists. This is particularly lamentable in light of the potential influence this[15] and other works by this author have had upon the deliberations of the judiciary of this country.

In fairness, the chapter titled Loss of Money, provides a thorough consideration of the influence of inflation upon the assessment of a plaintiff's claim in respect of the loss of use or decline in value of amounts owed. This coverage is limited to considerations of interest payments to successful litigants and is only part of the problem posed by inflation.

In regard to the assessment of the effect of and the consequent need for new approaches to the handling of inflationary pressures upon personal injury and wrongful death awards, this book leaves something to be desired. To illustrate, under the topic of discounting to present value of personal injury awards for the cost of future care, the author states:[16]

> The considerations here are the same as those discussed above in respect of loss of earning capacity, with the proviso that the incidence of future care will often be more sporadic than lost earnings.

This is the totality of the coverage on the subject. Granted, the earlier section concerning the loss of earning capacity is more comprehensive. However, the author has neglected to address what has been and continues to be a very controversial issue. It is conceded that the same basic principles apply to discounting to present value when considering inflationary pressures under both of these heads of damages.

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13. See *supra*, footnote 5.
14. At v.
15. Cf. *Lamb et al.* v. *Brandt* (1984) 30 C.C.L.T. 280. (B.C.C.A.) and *Bergen* v. *Sturgeon General Hospital* (1984) 28 C.C.L.T. 185 (Alta. Q.B.), both citing the author's comments on relationships and the prospects of remarriage for a widowed spouse.
16. See § 440.

To date the major point of contention has been the rate at which lump sum awards are to be discounted. It is submitted that more than one discount rate is applicable, particularly to give recognition to labour productivity factors.[17] The author makes reference to the use of multiple rates in a footnote to British Columbia Regulation 352/81[18] while discussing contingencies. He neglects to elaborate on the significance and inherent weakness of such provisions.

The rigidity of such provisions has subsequently been identified by Lambert J.A. of the British Columbia Court of Appeal.[19] Justice Lambert felt compelled by the Law and Equity Act[20] to apply the statutorily prescribed rate of 3.5 per cent to the award for future care costs notwithstanding that the bulk of such costs were attributable to the payment of wages for a homemaker/supervisor for the injured plaintiff. Lambert J.A. stated:[21]

> I think this anomaly is causing a distortion in some damage awards with respect to the calculation of a service component in the cost of future care.

Unfortunately, he was not prepared to exercise the discretion left to the courts by the Supreme Court,[22] as he stated:[23]

> I do not think that it would be appropriate for me to make an adjustment to the 3.5 per cent rate result to achieve the equivalent of a 2.5 per cent rate result by applying the overall discretion contemplated in *Lewis* v. *Todd*, since to do so would defeat the legislative requirement.

While a difference of one percentage point in the discount rate may seem minimal, its impact when compounded over the period in question (39.45 years in this case) can be quite significant. For instance, had the lower rate of 2.5 per cent been utilized in the *Pickering* v. *Deakin* [24] case, the capital sum awarded for future care would have been increased from $435,000 (on appeal) to more than $528,000; representing a difference of more than 21 per cent. It is because of such dramatic results that the need for a more detailed analysis of this problem is necessary. It may also be that it is beyond the scope of a work such as this, but it is hoped that future editions of this work will at least focus some attention on the problem.

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17. Three provinces now legislatively specify the discount rate to be employed in such cases: Judicature Amendment Act, S.O. 1979, c. 65, s. 6(5); Judicature Act, S.N.S. 1980, c. J-3, s. 42(fa); Law and Equity Act, R.S.B.C. 1979, c. 224, s. 51 [en. 1981, c. 10, s. 30]. Of these, only B.C. allows a lower rate to be applied to loss of earnings awards to recognize labour related productivity. There is authority to vary the legislated rate in Ontario where evidence justifying doing so is led at trial (*Dziver* v. *Smith* (1983) 41 O.R. (2d) 385 (C.A.)).
18. B.C. Reg. 352/81, in conjunction with s. 51 of the Law and Equity Act, prescribe a discount rate of 2.5 per cent to be applied to awards for loss of future earnings or loss of dependency (under the Family Compensation Act) and a rate of 3.5 per cent to be applied "in calculating the present value of all future damages other than [those specifically allowing the lower discount rate]".
19. *Pickering and Pickering* v. *Deakin et al.* (1984) 58 B.C.L.R. 145.
20. *Supra*, footnote 17.
21. *Supra*, footnote 19 at p. 160.
22. See the comments of Justice Dickson, as he then was, in *Lewis* v. *Todd* (1980) 115 D.L.R. (3d) 257 at 267-8.
23. *Supra*, footnote 19 at p. 161.
24. *Supra*, footnote 19.

In spite of the criticisms noted above, this book represents a valuable contribution to the legal literature. The law governing the awarding of damages continues to develop. Professor Waddams has achieved a major milestone with the production of this book. It is hoped that he will continue to update his work to reflect the constantly evolving subject which he has handled so well.

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