DEVELOPMENTS IN
TORT LAW:
THE 1993-94 TERM

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I. INTRODUCTION

In the 1993-94 Term the Supreme Court did not decide as many torts cases as it has in some recent years, although some of the issues treated in the few decisions which did come out raise fundamental questions for the proper understanding of tort law. In all, the Court decided nine torts cases. However, three of these, Cunningham v. Wheeler, Cooper v. Miller, and Shanks v. McNee, all concerned the vexing question of when to deduct collateral benefits from damages, and were dealt with under one set of judgments. Two others, Brown v. British Columbia (Minister of Transportation and Highways) and Swinamer v. Nova Scotia (Attorney General), both of which concerned negligence actions against public authorities, while treated separately in different judgments, involved much overlap in the judicial opinions offered. This review of the 1993-94 Term will deal with these five cases in some detail in Parts II and III.

This leaves four cases, each of which received independent treatment from the Court. Two of these are hardly worth a mention. The first, Gibney v. Gilliland, was a one-paragraph oral judgment for the Court, delivered by Iacobucci J., affirming a British Columbia Court of Appeal decision that the trial judge's finding that no failure on the part of the respondent could be shown to be causative of the appellant's injury was supportable by the evidence. The other, Granville Savings and Mortgage Co. v. Slevin, was a two-page judgment of the

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Court, given orally by Cory J., which set aside a Manitoba Court of Appeal judgment for the respondents, and accepted instead the trial judge's view that the respondent members of a law firm had been negligent in failing to secure for a mortgage company a first charge on the property of another of the law firm's clients. Justice Cory agreed with the trial judge that the mortgage company had retained the respondent lawyers expressly to secure the first charge, and had reasonably relied upon them doing so. Comment on these two cases can be limited here to the raising of an eyebrow, indicating some surprise that they should be the sort of appeals the Court would even choose to hear.

However, the remaining two tort cases the Court chose to hear this last Term are more interesting. The first of these, Galaske v. O'Donnell,6 which dealt with a driver's duties to ensure that child passengers wear seat-belts, is discussed briefly in Part IV, and the other case, Tonguzzo-Norvell v. Burnaby Hospital,7 which dealt with measures of damages, is discussed at more length in Part V.

II. THE DEDUCTIBILITY OF COLLATERAL BENEFITS: CUNNINGHAM v. WHEELER, COOPER v. MILLER, AND SHANKS v. MCNEE

1. Background to the Cases

These three cases,8 all on appeal from the Court of Appeal for British Columbia, each involved a plaintiff who had suffered injury in a negligently caused motor vehicle accident. As a result of the accidents, each plaintiff was off work for a time and collected disability benefits pursuant to plans established under the collective agreements signed between the various employers and unions involved. These plans differed slightly in their details. No direct deductions were made from Cunningham's pay for the right to receive disability benefits, although the trial judge accepted evidence that the size of the benefits negotiated under any collective agreement would have a negative impact on the hourly wage. Cooper contributed 30 per cent of the costs of both her long-term and short-term plans directly through payroll deductions. Shanks contributed either 30 or 50 per cent of the costs to his long-term plan (depending on the different collective agreements which had been signed at different times), but there were never any such payroll contributions for his short-term disability plan.

All three plaintiffs subsequently brought actions in tort against the parties who had negligently injured them in the motor vehicle accidents. Each successfully claimed damages at trial for the full wages they would otherwise have been paid for the period they were unable to work. For reasons which largely turned on the presence or absence of the payroll deductions referred to above, the British Columbia Court of Appeal reversed the trial judgment in Cunningham, upheld the judgment in Cooper, and upheld the trial judgment with respect to the long-term benefits in Shanks while reversing on the short-term ones. It fell to the Supreme Court to determine on appeal whether a plaintiff's payroll contributions for disability benefits should be so decisive in answering the larger question whether benefits received as compensation for lost wages from collateral sources are to be deducted from damages received in a subsequent tort action.

2. The Majority View

The majority opinion was delivered by Cory J., with Sopinka, Iacobucci, and Major JJ. concurring. According to Cory J., while it is clear as a matter of principle in tort law that a "plaintiff is not entitled to a double recovery for any loss arising from the injury,"9 it is also well accepted in both the English and Canadian case law "that payments received for loss of wages pursuant to a private policy of insurance should not be deducted from the lost wages claim of a plaintiff."10 Failure to make these deductions, of course, would mean that the plaintiff would receive the very double recovery which tort principle seems to proscribe. However, the private insurance exception had been firmly established in Bradburn v. Great Western Railway Co.11 and, according to Cory J., there was a "good reason" for continuing on with it. If any change was now to be made in the rule, it was for the legislatures to make it, something they seemed reluctant to do.12

For Cory J., the Bradburn insurance exception is largely justified as a matter of fairness between the plaintiff and the defendant:

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8 All these cases were decided by the Supreme Court on the same day under a single judgment. Unless the context calls for the separate treatment of one of the three disputes, all three cases will be cited as Cunningham v. Wheeler, [1994] 1 S.C.R. 359.
9 Supra, note 1, at 396.
10 Id.
12 Supra, note 1, at 401.
I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.13

This emphasis on fairness between the parties, and more particularly on the personal sacrifice of the plaintiff as compared to the wrongdoing of the defendant, is what makes relevant the fact that the plaintiff might have "paid for" the benefit in question. However, for Cory J., it is "too narrow an exception"14 for this purpose to focus just on whether the plaintiff has paid insurance premiums under a private insurance contract, or even whether the claimant has made direct payroll contributions under an employer-provided plan. It is quite possible, indeed likely in the view of Cory J., that under a collective agreement with his or her employer the plaintiff will have just as much paid for the benefits through "a reduction in the hourly rate of pay"15 as if he or she had purchased a policy of disability insurance from a separate private insurer.

This view that the plaintiff will likely have had to give up some quid pro quo to receive a disability plan from his or her employer hardly seems very controversial. However, to this Cory J. added the somewhat more speculative point that it would be socially regressive, on the one hand, to impose deductibility upon plaintiffs receiving their benefits from plans negotiated as part of a collective agreement, while, on the other hand, following Bradburn, not to require such deductibility for benefits received from private insurance. This is because, according to Cory J., the former is the method of choice for "working people" to protect their interests, whereas the latter is used by "top management and professionals."16 As we shall see below, McLachlin J. has a different sociological view as to the economic status of those using private insurance as compared to those insured under employer-provided plans.

However, it is the easy willingness of Cory J. to find evidence that the plaintiff has paid for the benefits in question which most distinguishes his judgment. In his view it was because the plaintiff had failed to adduce any evidence that he had paid for the disability benefits in question that the plaintiff failed to avoid deductibility in Ratych v. Bloomer,17 a recent case where the Supreme Court had also considered the general issue of deductibility of collateral benefits from tort damages and, according to some commentators at least,18 where the Court had seemed to adopt a broader deductibility rule. Now, in addition to narrowing Ratych to an essentially evidentiary interpretation, Cory J., in this most recent trilogy of cases, has indicated further that the Supreme Court will be quite accommodating in its willingness to accept evidence as sufficient to meet this burden. In the case of Cunningham, for example, the evidence that the plaintiff had paid for the benefits indirectly through a reduced hourly wage was sufficient for a reversal of the Court of Appeal decision, which had imposed deductibility on the plaintiff because no direct contributions were made through payroll deductions. This much was easy. However, in the case of Shanks, while there was no comparable evidence called to indicate that in the collective bargaining the plaintiff's hourly wage had been reduced in exchange for receiving the benefit, there was evidence that the collective agreement containing the disability plan had been arrived at after a four-month strike. According to Cory J., that the collective agreement was only reached after such "a lengthy and difficult bargaining process" was sufficient evidence that there "must have been trade-offs made by the employees in return for the collateral benefits which were received."19 This suggests, surely, that the Supreme Court is prepared to draw some fairly easy inferences from largely circumstantial evidence, and that the burden of proof established in Ratych may now not be a very onerous one for the plaintiff.20

3. The Minority View

In her opinion for the minority, McLachlin J. (La Forest and L'Heureux-Dubé JJ. concurring) argued that each of the three Ps of "principle, precedent and policy" points to the conclusion that a plaintiff who has been indemnified for a loss cannot claim it over again from the tortfeasor. As for principle, she found herself in basic agreement with Cory J. about the most fundamental consideration in the awarding of tort damages:

13 See, e.g., Taylor, "When is a Loss Not a Loss?: The Deductibility of Collateral Benefits after Ratych v. Bloomer" (1990-91), 12 Advocates’ Q. 231.
14 Supra, note 1, at 414.
15 It should be conceded that Cory J. goes on to point out that because the plaintiff had agreed to give up to the employer the return of the Unemployment Insurance premiums, there was further evidence that the employee had paid for the disability plan. However, it does seem that for Cory J. the evidence concerning the strike was strong enough to stand on its own.
The fundamental principle is that the plaintiff... is entitled to a sum of damages which will return the plaintiff to the position that the plaintiff would have been had the accident not occurred, in so far as money is capable of doing this... At the same time, the compensation must be fair to both the plaintiff and the defendant. In short, the ideal of the law in negligence is fully restorative but non-punitive damages. The ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's actual losses, and no more... Double recovery is not permitted.\textsuperscript{21}

Justice McLachlin also agreed with Cory J. that there is a well-established private insurance exception to this general principle precluding double recovery, and that it should be maintained. Her point of disagreement, therefore, was only with the scope of the exception. Where, according to Cory J., the exception covers the cases at issue, for McLachlin J. such employment plans do not fall within the exception.

Her reasoning to this result arises out of her survey of the relevant precedents, and more specifically from her view that the particular contract for private insurance which established the exception in \textit{Bradburn v. Great Western Railway Co.}\textsuperscript{22} was a non-indemnity contract. Indemnity contracts indemnify the policy holder for a stipulated loss; non-indemnity contracts, on the other hand, are contracts for the payment of a given sum upon the happening of a certain event. Life insurance is the paradigmatic example of the latter. For McLachlin J., the language of the judges in \textit{Bradburn} suggests that in that case it was the contract rather than the loss which was the primary reason why the plaintiff received a payment from the insurer. Indeed, to the extent that this is true, it is probably incorrect to think of the plaintiff in \textit{Bradburn} as being compensated by the private insurer for the loss and, therefore, inaccurate to characterize the ruling in that case as being any sort of exception to the general compensatory rule against double recovery.

In any event, if there is an exception in \textit{Bradburn}, it was only within the limited scope of non-indemnity contracts that such an exception was established. Moreover, according to McLachlin J., this exception has not been extended any further in subsequent case law (with the exception of \textit{Parry v. Cleaver},\textsuperscript{23} on which more will be said below), and there was little reason to do so in the trilogy of cases before the Court.

\textsuperscript{22} \textit{Supra}, note 11.
\textsuperscript{23} [1969] 1 All E.R. 555 (H.L.).

Mention of the possibility or not of extending prior case law brings us, after principle and precedent, to the third of McLachlin J.'s "three Ps", namely, policy. This is how McLachlin J. characterized the majority view that it is unjust for a deductibility rule to deprive the plaintiff of the benefit of something for which he or she may have paid under an employer-provided disability plan. Justice McLachlin appeared to object to this "plaintiff contribution argument" for three reasons.

First, she refused to accept any suggestion which might be made that merely because the plaintiff had paid for the benefit, he or she had not really been compensated for the tort loss at all but only, as it were, fairly "paid back" for what she termed a "substitute loss" on the contributions already made:

The fact that the plaintiff has contributed to the plan does not enter into the chain of reasoning which tort principles require. And even if this contribution could somehow be considered, the amount credited to the plaintiff would at best be the cost to the plaintiff of the contribution, in many cases a sum much smaller than the claim for loss of wages. So the fact that the plaintiff has made a contribution to the plan does not avoid the problem of double recovery.\textsuperscript{24}

Justice McLachlin does not cite anyone as having made such an argument, so it is difficult to judge whether hers is an effective reply to it. However, it is interesting to note in passing that her reply does discount very heavily, as something which is irrelevant to the "chain of reasoning which tort principles require", the one fact that appears most decisive on the majority view; namely, that in those cases where deductibility should not apply it is because the plaintiff has paid for the benefit in question.

Justice McLachlin went on to argue that the law reflects the logic of her first reply, but the point she makes here is better seen as an independent second reply to the plaintiff contribution argument:

The law has consistently refused to compensate a plaintiff because he or she took precautions which minimized the loss flowing from the negligent act. The defendant takes the plaintiff as the defendant finds the plaintiff. Sometimes this increases the damages a defendant must pay, as in the case of what the law calls the "thin skulled" plaintiff. Sometimes it decreases the damages the defendant must pay. The point is simply this: the fact that the plaintiff is more or less vulnerable and hence suffers greater or lesser damages as a consequence of the defendant's negligence

\textsuperscript{24} \textit{Supra}, note 21, at 381-82.
will not be reflected in the actual award of damages. The plaintiff will be compensated to the full extent of the loss, and no more, regardless of the measure of the plaintiff's personal vulnerability.25

Justice McLachlin is correct, of course, that the law does not easily compensate a plaintiff for the costs he or she might incur in either avoiding, or minimizing the losses of, an accident. However, the favourable reviews given by some to Laskin J.'s dissent in Rintow Marine Ltd. v. Washington Iron Works,26 a judgment which would have provided for just such recovery, and which has had its enthusiastic followers on the bench, argue for making this point with some caution. Moreover, the possibility that there may be real differences between a rule that does not accommodate the costs of reasonable avoidance or mitigation of loss and a rule providing for the general deductibility from damages of collateral benefits which have already been paid to the plaintiff, or between the latter rule and the thin skull rule, seem to cry out for more analysis than McLachlin J. provides here.

In her third reply to the majority's plaintiff contribution argument, McLachlin J. disputed whether, under a deductibility rule, the plaintiff is truly deprived of the benefit of his or her contributions to a collateral benefits plan in the way the argument suggests. Such plans are meant ex ante to cover situations where there may be no defendant to sue for lost wages, or where, for example, recovery is uncertain because the defendant is judgment proof or difficult to identify. There may also be problems if recovery, while forthcoming, is long-delayed. In all these situations, says McLachlin J., the "plaintiff enjoys the benefits provided by the plan regardless of whether deduction of plan benefits from tort claims is required or not."27

Justice McLachlin must be careful that this last reply does not prove too much. It suggests, for example, that the primary motivation for a plaintiff to pay for a collateral benefits plan is to recover from the collateral source in those situations where there is little prospect of recovering damages for the loss from a defendant. As a converse this argues that there will be little willingness to pay on the part of such plaintiffs for such benefits and, correspondingly, little willingness for insurers or employers to offer them, in just those situations where solvent defendants can be found to pay damages. But how then do we explain the problem which we face in these cases, namely, that insurers or employers have paid out benefits in those situations where there is also a defendant to be sued? This can only be because the plaintiff has paid for these benefits ex ante, in which case, despite McLachlin J.'s reply, we are back to the plaintiff contribution argument, or the plaintiff has not paid for them because the insurer or employer is collecting the benefit through a right of subrogation ex post. However, McLachlin J. recognizes that the right of subrogation is rarely exercised.28 Indeed, this fact provides her with her fifth policy argument for avoiding double recovery by way of a deductibility rule. However, if the insurer or employer is not collecting from the defendant ex post through the exercise of a right of subrogation, then that same insurer or employer must, if it is to break even, be collecting from the plaintiff ex ante for any payments it expects to make. In either case, we are led back to the fact that the plaintiff has paid for the benefits in question and, therefore, to the plaintiff contribution argument.

Justice McLachlin considered a range of other policy arguments which might be used to support a rule of non-deductibility rather than the deductibility rule she favours. She summarily dismissed the view that there might be some losses in deterrence of defendants' wrongdoing if defendants face smaller damage awards under a deductibility rule. She said that it "strains credulity" that "people's decisions about the care they take in the way they drive their automobiles" might be affected by the prospect of paying damages which include, rather than do not include, an account of wage benefits paid to the plaintiff.29 This summary dismissal of the empirical foundations of deterrence theory is supported by only one reference,30 and is weakened because McLachlin J. only referred to the deterrent effects which operate at the defendant's care level. There may well be, as some empirical studies of insurance pricing have suggested, other deterrent effects to be found at the defendant's choice of activity level.31 Justice McLachlin was on firmer ground when she rejected the deterrence argument as a matter of principle.32

25 Id., at 382.
26 Id., at 382-33.
27 Id., at 382-33.
28 Id., at 387.
29 Id., at 383-84.
31 For a review of the empirical evidence on tort law, including a discussion of its various deterrent effects at the care and activity levels, see Dewees and Trebilcock, "The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence" (1999), 30 Osgoode Hall L. J. 67.
32 Supra, note 21, at 384. For an argument that tort law principles cannot be about deterrence, see Weinrib, "Understanding Tort Law" (1989), 23 Val. U. L. Rev. 485.
Justice McLachlin also rejected at the level of principle the policy argument that, as between the prudent plaintiff and the negligent defendant, it is the latter, as a wrongdoer, who should bear the loss. She claimed first, that (at least between these two parties) there is no loss to bear since by assumption the plaintiff has been compensated.\textsuperscript{32} Second, she argued that there is a fallacy, based on the misapplication of punitive theory to tort law, in thinking that, under a deductibility rule, the defendant will escape the punishment he or she properly deserves as a wrongdoer.\textsuperscript{33} On the latter point, McLachlin J. is surely correct; where there is no actual loss, there is no wrong relevant to tort law for which the defendant should pay. (Consider, for example, the party who negligently exposes others to the risk of injury but, luckily, injures no one; for such “negligence in the air”\textsuperscript{34} there is no remedy in tort.) However, the first point seems to beg the question at issue. Where the plaintiff has been compensated by a collateral source, he or she has, typically (and certainly under an indemnity contract, the class of case for which McLachlin J. is most inclined to impose deductibility), been compensated \emph{for a loss}. The issue is what difference this should make to the recovery of damages in tort law.

There are two other policy considerations which, according to McLachlin J., also fail in their attempt to support a non-deductibility rule in the cases before the Court. The first of these is the argument that it is socially regressive to provide an exception to the general rule of deductibility only to those plaintiffs (largely “top management and professionals” according to Cory J.) who privately insures for collateral protection, and not provide the same exception to the less well off who insure for such losses through their employer. First, McLachlin J. disputed, as we have already seen, that the original Bradburn exception is as broad as this argument suggests, since in her view it only covers non-indemnity contracts. Second, she doubted that there is any empirical basis for the suggested regressivity; there are plenty of employees who are insured with their employer and who are very well off, just as there are many who are self-employed and privately insured who would fall into the category of the less well off. On this last point, surely, it is hard to disagree. However, what one is most left with at the end of this exchange between McLachlin and Cory J. is a sense that sociological studies are better left to the experts.

\textsuperscript{32} Id., at 384-85.
\textsuperscript{33} Id., at 386.
\textsuperscript{34} This phrase appears in various cases, but the most well known is probably Palisgraf v. Long Island Ry. Co., N.Y. 339 (1928), \textit{per} Cardozo C.J.

The last policy argument considered by McLachlin J. is an argument which she thinks shows the advantage of a broad rule favouring deductibility. The rule proposed by the majority, she said, is a rule which increases uncertainty and, therefore, the need for litigation. This is because it will require constant attention to whether the plaintiff has paid for the benefit or not. A broad rule of deductibility, on the other hand, because it does not make the plaintiff's contributions an issue, will not be plagued by this uncertainty. Nor will it do, says McLachlin J., to presume in favour of non-deductibility by deeming, absent compelling evidence to the contrary, that the plaintiff has paid for the benefits in question. This leaves \textit{Ratycz v. Bloomer},\textsuperscript{35} which placed a clear burden on the plaintiff to adduce evidence of contribution, undistinguished and, further, presumes that the Supreme Court has the power to replace the fact-finding task of the trial judge with its own presumptions and deeming provisions.

None of these points is particularly convincing. Taking the last point first, the Supreme Court has not been shy in the past to comment on the proper role to be played by factual presumptions in trial court adjudication; the judgment of Sopinka J. in \textit{Snell v. Farrell}\textsuperscript{36} provides a recent and powerful example. Why, therefore, should the Court show a reticence to do so now? Second, it is not at all clear that the deductibility approach will avoid the tough borderline issues which McLachlin J. says are so problematic for the plaintiff contribution argument. After all, the deductibility approach continues to incorporate the \textit{Bradburn} exception, and there is every reason to think that there will be as much uncertainty surrounding the distinction between indemnity and non-indemnity contracts as that surrounding plaintiff contribution considerations.

This last point might suggest that it is high time to reconsider the \textit{Bradburn} exception to the general rule precluding a plaintiff's double recovery for a given loss. After all, the \textit{Bradburn} case forms the strong precedential basis for both the majority's view (\textit{per} Cory J.) that in these cases the plaintiff's contributions are decisive against deductibility, and the minority's view (\textit{per} McLachlin J.) that there is an important difference between indemnity and non-indemnity contracts. If these issues are the source of so much uncertainty and litigation, as the opinion of McLachlin J. suggests, then perhaps the \textit{Bradburn} exception has outlived its original justification and could profitably be exorcised from the law of tort, by an act of the legisla-
tured if necessary. However, a proper assessment of this proposal requires us to look more closely at the case law which forms the background for the recent trilogy of Supreme Court of Canada cases. As we shall see, there is good reason in tort law for keeping the Bradburn exception, and others like it, although there is also reason for thinking that the Supreme Court of Canada, on both the majority and minority side of the matter, has not fully appreciated their true rationale.

4. Previous Case Law and Analysis

(a) Bradburn v. Great Western Railway Co.

In Bradburn v. Great Western Railway Co., it was held that damages for personal injury should not be reduced by amounts payable to the plaintiff by a private insurer. Bradburn had suffered injuries as a passenger on a train and had collected some compensation from his insurer for the time he was laid up and confined to his bed because of the accident. Nevertheless, he also claimed damages at trial for the full extent of his losses incurred during this time. The railway argued that the insurance proceeds should be deducted from the damages due in the tort action, but the Exchequer Court rejected this view.

As McLachlin J. recognized in her survey of the prior case law in Ratych v. Bloomer, and as Cory J. did in his review of the cases in Cunningham v. Wheeler, the original reasoning used in Bradburn was causal. While the payment of the insurance proceeds to Bradburn was certainly conditional on the occurrence of the accident as a causa sine qua non, it was not a sufficiently proximate consequence of the accident to be taken into account in the determination of damages.

Although Bramwell B. and Pigott B. each made this proximity argument, they did so in slightly different ways. Bramwell B. emphasized, somewhat cryptically, that a complete and fully independent account of the accident and its proximately consequential damages existed prior to the calculation of any proceeds payable under the insurance contract:

The damages which the plaintiff sustained at the hands of the defendant, as the jury found, amounted to the sum of £217. Because he had sustained these damages somebody else gave him £31, and, therefore, it is said he has not been damaged to the amount of £217. It is because he has been damaged to the amount of £217 that he got the £31...

Pigott B., on the other hand, approached the same issue from the other direction, stressing that the contract to pay the insurance proceeds existed independent of the tort action:

He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company, for that express purpose, that he gets the money from them. It is true that there must be the element of accident in order to entitle him to the money; but it is under and by reason of his contract with the insurance company, that he gets the amount....

Thus, each of the Bradburn opinions stresses in its own way that the tort accident and its consequential damages are independent of and, therefore, remote from the insurance proceeds. However, the language chosen by Pigott B. appears to have been the more influential in subsequent cases. Indeed, Pigott B. may have, somewhat inadvertently, laid the foundations for both the majority and the minority judgments in Cunningham 120 years later.

Proximity is an issue always relevant to the recovery of damages in tort law. It helps to characterize those consequences which lie within the ambit of the defendant's wrongdoing and which, therefore, it is properly (and particularly) the business of the defendant to correct by paying damages to the plaintiff. However, because he chose in Bradburn to emphasize more the remoteness or independence of the insurance contract and not a complete and independent account of the tort and its proximate consequences, Pigott B. focused on the fact that the plaintiff's right to receive the insurance proceeds depended on his or her having paid for them through premiums. Unfortunately, since Bradburn, this emphasis on the fact that the plaintiff has paid for the collateral benefits has somehow become unmoored from its origins in remoteness and assumed a different and independent significance. Now, according to Cory J. in Cunningham, for example, to deprive the prudent plaintiff of benefits which he or she has paid for is unfair, especially if to do so is to advantage a wrongdoer. This changes the characterization of the fact concerning the plaintiff's contribution from something properly relevant to

39 Supra, note 36, at 965.
40 Supra, note 21, at 397.
remoteness into something more relevant to a question of how to "let the best person win," an issue McLachlin J. rightly criticized as irrelevant to the concerns of tort law.43

However, McLachlin J. committed the same sort of error in emphasizing that the Bradburn insurance contract was a non-indemnity contract. This also follows, presumably, from the emphasis which Pigott B. gave to the contract as one independently providing for "a sum of money" to be paid to the plaintiff in the event of an accident. Where the majority emphasized that the plaintiff has paid for this right, McLachlin J. emphasized that the contract provides for the payment of a certain sum of money, and not to indemnify a variable loss. However, McLachlin J. made the point in a way which also cuts it loose from any of its original grounding in remoteness. One can easily imagine situations where the collateral payment is made to indemnify a loss, but where it still seems inappropriate, because of its remoteness, to deduct the payment from the damages the defendant owes the plaintiff. Indeed, the case of charitable payments to the plaintiff in the wake of an accident, another exception to the general rule against double recovery, and one no less established than the Bradburn exception, would appear to be an example.44 Clearly, the charitable payment exception makes a nonsense of any attempt to organize systematically all the exceptions under a plaintiff contributions rationale. But since a charitable payment, even when focused on the indemnification of a particular loss, is also not deducted from the plaintiff's damages, this exception would equally seem to undermine any claim that McLachlin J. might want to make that in Cunningham she is the one who has offered a systematic account of the relevant case law.

The idea of remoteness, unruly and imprecise though it is, promises to provide just such an account. Unfortunately, however, the Supreme Court of Canada seems to have accepted an interpretation of the case law which discounts the importance of remoteness in this area of the law. In Ratych, for example, McLachlin J. argued45 that the causal reasoning used in Bradburn was "discredited" by the House of Lords in another leading case, Parry v. Cleaver,46 and replaced with a "source of benefit" theory which, as she developed it, bears little or no resemblance to remoteness. And Cory J. also argued that the reasoning accepted in Parry, and which he goes on to adopt in Cunningham v. Wheeler,47 involved a shift away from what he called the "causal reason" account provided in Bradburn. This suggests that, for the Supreme Court of Canada at least, Parry was a turning point for the law, a point where remoteness as the framework for collateral benefits cases was abandoned and other tests introduced. Parry, therefore, is a case calling for close scrutiny.

(b) Parry v. Cleaver

Despite what the Supreme Court might have said about it, a broad reading of all the judicial opinions in Parry v. Cleaver48 suggests that it is reasonable to interpret this case as still being based on traditional notions of remoteness and proximity. Moreover, had the Court interpreted the case this way in Ratych v. Bloomer49 and Cunningham v. Wheeler,50 it is arguable that we would have been provided with a better sense of why a plaintiff's contributions might sometimes (but not always) be relevant to the issue of collateral payment deductibility, or why characterizing the insurance contract in Bradburn as a non-indemnity contract might sometimes (but not always) also be significant. In other words, we would understand better what is motivating both the majority and minority positions on the Court. The hard truth is that, under the aspect of remoteness, both sorts of considerations (as well as others) are relevant to the issue of damages and the deductibility of collateral benefits. However, because neither consideration can operate as a decisive test of remoteness, excluding the equal relevance of the other, reasonable people will inevitably disagree in their judgments on whether a particular case requires deductibility. This, for example, is what explains the division of opinion amongst the law lords in Parry.

In this case, a police constable was injured while directing traffic...
and was unable to return to work. For over a year after the accident, the plaintiff remained with the police force and continued to receive his full salary. After being discharged from the force, the plaintiff, in addition to receiving wages from other employment, also received a police force disability pension to run for the rest of his life. Eligibility for this disability pension was contingent on an individual having put in ten years of pensionable service and on the injury having been sustained while on duty. It was also agreed that both the plaintiff and the police authority had made (at least notional) contributions to the disability pension fund.

The law lords were agreed that the full wages which the plaintiff received after the accident but before discharge from the force should be deducted from any damages received from the defendant for lost wages. Similarly, they were agreed that the wages received from the plaintiff's civilian employment subsequent to discharge should also be deducted. Finally, the law lords also were agreed that, for the period after the date on which the plaintiff would normally have retired from the force, the money received from the disability pension should be deducted from any damages claimed for the loss of the full pension which he would normally have received had he retired at that date.

However, the law lords were divided (three to two) on whether the disability pension should be deducted from damages claimed for lost wages over the period between the plaintiff's discharge from the police force and the time of normal retirement. They delivered five different opinions, with the majority supporting non-deductibility.

According to both McLachlin J. in Ratych and Cory J. in Cunningham, the most salient of the majority opinions in Parry was Lord Reid's. Justice Cory noted, for example, that Lord Reid rejected the remoteness explanation for non-deductibility as "artificial and unreal". Instead, he opted for the "real and substantial" reason that it was because the plaintiff had either paid for the benefits, as in private insurance, or earned them through prior service, as in the case of a service pension, that such benefits should be non-deductible. It would be "unjust and unreasonable" to deduct the money which the plaintiff spent on premiums and the benefit from it should not be "like kind" with, the damages against which it is to be off-set.

Thus, for Lord Reid it is not sufficient that the plaintiff paid for the benefit if its deductibility against damages is to be avoided; it must also be the case that the benefit falls within the same category as, or is of "like kind" with, the damages against which it is to be offset.

However, Lord Reid explicitly addresses this different treatment of the disability pension in the two time periods, and his reasons for doing this suggest that there is more to the issue of deductibility than whether the plaintiff has paid for the collateral benefit in question:

The answer is that in the earlier period [before retirement] we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind.

Thus, for Lord Reid it is not sufficient that the plaintiff paid for the benefit if its deductibility against damages is to be avoided; it must also be the case that the benefit falls within the same category as, or is of "like kind" with, the damages against which it is to be offset.

However, why should this be? While Lord Reid does not give any explicit reason, Lord Wilberforce's majority judgment, to which McLachlin J. makes no reference in Ratych, offers us a clue. As we shall now see when we trace this idea of damage categories through the other judicial opinions in Parry, the issue of causal remoteness has not been left as far behind as the opinion of Lord Reid, and McLachlin J.'s citation of it, might suggest.

After surveying the somewhat conflicting cases in English law dealing with the deductibility of pension benefits, Lord Wilberforce...
turned for assistance to three decisions of the Australian High Court. In particular he quoted the following passage from the judgment of Windeyer J. in *Paff v. Speed*:

It is, in my view, a mistake to think that there is some general rule governing the admissibility of evidence of pensions of all sorts in all cases of personal injury. Damages for personal injury are compensatory. The first consideration is what is the nature of the loss or damage which the plaintiff says he has suffered. A defendant can always call evidence that contradicts the case the plaintiff seeks to establish. If, as here, a plaintiff claims that he has been deprived of a pension that was one of the advantages of the particular service in which he was, the defendant can prove that, in fact, he has a pension. If a plaintiff claims that he has incurred expenses for medical treatment or for an artificial limb, the defendant can show that these things were provided for him without charge. But a claim that because of physical injuries the plaintiff's capacity to earn money has been destroyed is not met simply by showing that he has received money or other assistance from a charity, a former employer, a friend or the State.\(^{66}\)

According to Windeyer J., therefore, the plaintiff's own claim for damages determines the category within which the defendant must work in arguing, in reply to that claim, for the deductibility from damages of certain benefits already paid to the plaintiff. Thus, a plaintiff's claim for damages for a lost pension that he or she would otherwise have received from a former employer is met by the defendant showing that the plaintiff is receiving an alternative pension that the plaintiff would not have received but for the accident. On the other hand, a plaintiff's claim for damages for lost earnings arising out of an inability to work at the former job, while it is met by the defendant pointing out that the plaintiff has earnings from alternative employment, is not met by the defendant showing that the plaintiff is receiving money from another source, be it charity, the state, or even a disability pension provided by that same employer. The latter payments to the plaintiff, while obviously beneficial and quite possibly contingent on the occurrence of the accident, are simply irrelevant to the specific claim for damages that he is making against the defendant.

Why irrelevant? Why should the plaintiff, by choosing certain categories of damages, be able to restrict the defendant's ability to introduce set-offs between categories? Why not some more global and less category-specific accounting of how in toto the accident has made the plaintiff worse off? This is where considerations of remoteness and proximity come in. Consider, for example, this old chestnut: because the defendant has negligently collided with the plaintiff's car, the plaintiff fails to sail on time with the *Titanic*, an accident which has the effect, therefore, of saving the plaintiff's life. Had the plaintiff sailed with the ship, the plaintiff almost certainly would have drowned. Why not set this benefit off against any damages the plaintiff suffers in the car accident? After all, the accident does not seem to have made the plaintiff worse off, *all things considered*. But the accident has caused the plaintiff a loss (i.e., a damaged car, personal injury), and for this the plaintiff will recover in tort, whatever the more global calculus of costs and benefits might suggest. And the reason for this is remoteness. What might have happened to the plaintiff on the *Titanic* had the accident not occurred, or even what did happen there to others, is simply too remote from the accident linking the plaintiff with the defendant. More specifically, it is no part of what makes the defendant's negligent behaviour wrong that the plaintiff might, even with reasonable foreseeability, fail to be at some dock in sufficient time to sail. Rather, what makes negligent driving wrong is that it might result in foreseeable injury to the plaintiff's person or property, consequences which in turn might make it impossible for the plaintiff to work and, therefore, earn wages or a pension for retirement. Thus, the plaintiff can properly bring these last mentioned categories of injury into account in a claim for damages in a way that the defendant cannot properly bring into account the offsetting benefits to the plaintiff of having missed the ship's sailing. The former losses from the accident lie within the ambit of the defendant's wrongdoing, or are proximate to it, in a way that the latter benefits of the accident are not. In this way, therefore, the issue of remoteness not only limits the plaintiff to the sort of damages claimable as proximately consequential to the defendant's wrongdoing, but it also restricts the range of benefits which the defendant can properly identify as an offset to the plaintiff's damages.

Of course, it will often be controversial whether, for example, in *Parry*, it is appropriate to categorize a disability pension as coming from some remote source, in which case there should be no deductibility, or whether it is more properly viewed as a replacement for

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\(^{66}\) Id., at 581, quoting *Paff v. Speed*, supra, note 44, at 567.
lost earnings in the event of injury, in which case it should be integrated with the plaintiff’s wrongful loss and be deductible, perhaps even if it has been paid for. However, that there would be such controversy, calling for the sorts of judgments about which quite reasonable people might disagree, is nothing new to adjudication, and certainly nothing new to remoteness. And to avoid such controversy in favour of some more easily determined calculation, for example, as to what might be fair between a prudent plaintiff who has paid for the benefits and a defendant wrongdoer who has not, is somewhat akin to the drunk who, having lost his or her keys in the dark, looks for them under a street lamp because there is more illumination there.

Moreover, this interpretation of the controversy as one grounded in different judgments about remoteness explains much of what is said by the various law lords in *Parry* in a way that the more exclusive focus on whether the plaintiff has paid for the benefits does not. Lord Wilberforce, for example, is quite careful in his opinion to attempt to disentangle the payment of the disability pension from the plaintiff’s claim for a loss in earning capacity. He points out, for example, that nothing in the plan prevents the plaintiff from drawing his disability pension along with any new wage he might make with a new employer, a wage which Lord Wilberforce notes could well exceed his former pay as a police officer. This suggests that the pension is not meant to top up or insure for lost earning capacity. Also, Lord Wilberforce emphasizes that the plaintiff must have ten years of pensionable service before he can claim the disability pension, and that disability must be the result of an accident occurring in the course of duty, both facts which would be largely irrelevant to its consideration as insurance for lost earning capacity, but ones which help to characterize the payment of it as something other than, or remote from, insurance for lost wages.

Now the reference by Lord Wilberforce to the service put in by the

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[^Supra]: *Parry*, id., at 582.
[^Id.]: *id.*, at 582.
[^44]: *Bradburn*, note 44, at 582.

plaintiff is not important because it shows that the plaintiff has somehow “paid for” the disability pension, something which might be important on the account of the case law advanced by Cory J. in *Cunningham*. Nor does he mention that the plaintiff can collect both the pension as well as a new wage because it helps to characterize the payment as other than an indemnity for a loss, something which would be important to McLachlin J. in the same case. Rather, these two features are emphasized because they help to characterize the pension benefit as something other than, or remote from, lost earnings and, therefore, something for which it is inappropriate to make any deduction against damages claimed for lost earning capacity.

Lord Morris, speaking in dissent for the deductibility of the disability pension payments from damages in *Parry*, clearly sees these benefits as being in the same category as, and therefore capable of being viewed as an offset to, lost earnings. However, while his judgment of the matter differs from that provided by Lord Wilberforce, it is, nevertheless, a judgment on the same issue of remoteness. Consider the following remarks of Lord Morris. After indicating his own firm acceptance of the opinions of Bramwell and Pigott BB. in *Bradburn*, Lord Morris continues:

I think that it would seem to most people...that there would be neither reason nor justice in any suggestion that money received under such a contract of insurance should be taken into consideration. So also would it seem to most people to be contrary to reason and justice if the impulses of sympathy and of concern which prompt gifts or benevolent arrangements lead to the result that a claim against a defendant has to be diminished. All these matters are purely the personal and private affairs of a plaintiff.

It is not for a defendant to inquire what use a plaintiff has made of his own money. If a defendant who is sued asks the plaintiff whether or not he had a gift from a friend or whether or not he had saved money and invested it and whether his investments had prospered and if so to what extent or whether or not he had taken out any insurance policies the reply, firm though courteous, could well be that the defendant should only concern himself with his own affairs. The position will be entirely different if the plaintiff in asserting his loss himself stated that he had a contract with an employer and claims that he has lost the remuneration for which that contract provided. If a plaintiff sets up a contract of employment as the basis of his claim and asserts that he has lost his salary under the contract he must for the sake of completeness acknowledge, if it be the fact, that under the very same contract he is receiving some sum less than his salary. If under the contract he continues, in the events that have happened, to receive half his pay he cannot assert that he has lost all his pay. If he receives part of his pay, even if it is given the
name of sick pay, he cannot assert that he has lost all his pay. Nor can he say that, because he had the wisdom to obtain a contract under which it was provided that he would get his half pay or sick pay, he may ignore their receipt and claim the amount of his full pay. Nor can he say that it was because of his service in the past or because he had earned them that his half pay or his sick pay came to him with the result that he could claim his whole pay as lost pay. He would not have lost his whole pay. If under the terms of a contract of employment the time comes when instead of having full pay or half pay or sick pay a person retires with a pension, the loss which he suffers is the difference between the amount of his pay and the amount of his pension. Where the arrangements leading to a pension are an essential part of the contract of employment then the pension benefits are very much more akin to pay than anything else. Indeed, it is often asserted that a pension is a form of deferred pay and is taken into account in fixing remuneration.\(^{61}\)

Several points are worth emphasizing about this long passage. The first is that the basis for the distinction between the personal affairs of the plaintiff, which the defendant should not be permitted to call into account in the litigation, and those more public affairs, to which some such judicial reference can properly be made, is that the plaintiff will have made the latter into a public issue when he made his claim for a specific sort of damages. Thus, the defendant himself obviously does not consider this category of loss as too remote from the accident that occurred or from the wrongdoing of the defendant which occasioned it. Thus, if the defendant, in arguing for collateral benefits to be deducted from damages, only works his own argument within the same category of loss identified by the plaintiff, remoteness of that category of loss should not be an issue between the parties. In this respect, therefore, both Lord Morris and Lord Wilberforce (the latter in citing Windesyer J.) have adopted a similar approach to the problem. We can also now make some sense of why Lord Reid showed a comparable sensitivity to the plaintiff's categories of loss in his opinion.

Second, Lord Morris, more explicitly than Lord Wilberforce, rejects the idea that the plaintiff might be able to avoid deductibility of any benefits from his claim for damages simply because he had paid for or otherwise earned them. What matters is whether the plaintiff has actually incurred the loss under the contract which he claims, regardless of whether he has paid for any coverage of that loss. Indeed, in Lord Morris's view, the fact that pension benefits are viewed as deferred pay and are probably "taken into account in fixing remuneration", that is, paid for, is a reason for deducting such benefits from a plaintiff's claim for lost earnings, since such benefits obviously form an integral part of the employment contract and, therefore, are not to be treated apart from it under a remoteness analysis. This is exactly the opposite of what the plaintiff contribution argument achieves in Cunningham (per Cory J.), where it is no longer informed by remoteness analysis, but operates instead as an indicator of what fairness requires between the parties.

Third, and this is where his judgment differs from that of Lord Wilberforce, Lord Morris characterizes the plaintiff's claim against the defendant as a claim for the loss of all those benefits which, but for the accident, he would have received had he continued under his employment contract with the police force. This larger category of claim is to be contrasted with the two more specific sorts of claims, for lost wages and for a lost pension, which are emphasized in the judgments of Lord Reid and Lord Wilberforce and which provide the different categories of loss between which set-off, or deductibility, is not to occur. By lumping lost wages and lost pension benefits together into one larger category of lost contractual benefits, Lord Morris can better see his way to setting off the disability pension benefits against damages.

On this third point, the other dissenting judge in Parry, Lord Pearson, is in basic agreement with Lord Morris. However, he makes the point in terms that link the whole issue of how to categorize the plaintiff's damages, an issue that all the lords consider salient even if their judgments on this matter do not always agree, with the more traditional tort concerns about causation and remoteness. This suggests that Lord Reid's invocation of the different categories of "like" damages, between which, as he suggested, set-offs or deductibility should not occur, may not be as far removed from the traditional conceptions of remoteness as a literal reading of his judgment might have led us to believe. Consider in particular the following remarks from Lord Pearson's judgment in Parry:

One has to consider whether the ill-health pension is "too remote" to be properly taken into account in determining the appellant's nett (sic) loss of income in the pre- and post-retirement periods... Possible synonyms or variants of the phrase "too remote" are "completely collateral", "independent" and "not sufficiently connected" and no doubt several others can be suggested. The phrase is meant to be imprecise, and should continue to be imprecise, because it needs to have flexibility in order to be justly applied to the greatly varying facts of particular cases. I think it is useful to enquire, what is the thing from which the item must not be too remote,
to which it must not be completely collateral, of which it must not be independent, or with which it must be sufficiently connected? Obviously, there must be some connection with the accident, and I think also with the head of damages, into the calculation of which the item is sought to be introduced. I think the mental picture is this: here on one side is the accident with its train of direct and natural consequences happening in the ordinary course of events, and all the consequences are solely or predominantly caused by the accident: there on the other side is some completely collateral matter, outside the range of such consequences, having the accident as one of its causes but on a fair view predominantly caused by some extraneous and independent cause.\(^2\)

This passage shows a very traditional kind of tort reasoning and it is apparent that we are now far from that question which focuses exclusively on whether it is appropriate, as a matter of fairness between the parties, to transfer to a tortfeasor, by way of a deductibility rule, the benefits of a pension scheme for which a prudent plaintiff may well have paid.

Nevertheless, although Lord Wilberforce does not explicitly use the same remoteness language as Lord Pearson, his reasoning for the majority does point to the importance of the same kind of "extraneous and independent causes" which will take the plaintiff's disability pension outside the range of consequences proximate to the accident. For Lord Wilberforce, as we have seen, these are that the plaintiff must also have ten years of pensionable service before he can collect the disability pension and that he must be performing his police duties when the accident occurs. Moreover, as already mentioned, Lord Wilberforce emphasizes that the pension would be available to the plaintiff along with any new salary he received in alternative employment; this suggests to Lord Wilberforce that the pension is not really "sufficiently connected" to (certainly it is not contingent upon) lost wages.

However, Lord Pearson's judgment of the same remoteness issue is quite different. For him the accident is the predominant if not the only cause of the pension benefit, and he has quite a different view from that of Lord Wilberforce as to what the intention of the pension was vis-a-vis lost salary or earning capacity:

As to causation, was the pension in the present case too remote in the sense that it was caused by something remote from and wholly collateral to the accident and its direct and natural train of consequences? The accident disabled the appellant, and it caused his compulsory retirement, and

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\(^2\) Id., at 587-88.
5. Conclusion

The majority view in the Supreme Court of Canada, as represented by the opinion of Cory J. in *Cunningham v. Wheeler*, is that plaintiff contributions to employer-provided disability pension plans are the decisive factor in determining the deductibility of such benefits from a plaintiff's claim for tort damages. Where there is evidence, even weak circumstantial evidence concerning collective bargaining, that the plaintiff has somehow paid for the benefit, perhaps through a lowering in the hourly wage, then the benefit will not be deducted. This is what the majority has taken from the well-established private insurance exception laid down in *Bradburn v. Great Western Railway Co.*. The minority view, represented by McLachlin J., favours a general rule of deductibility, but will admit a limited exception for collateral payments made under a non-indemnity contract. This is how the minority sees the *Bradburn* exception. Both the majority and the minority members of the Court appear to favour these sorts of considerations over more traditional tort analyses based on remoteness. Remoteness, they say, was rejected by the House of Lords in *Parry v. Cleaver*.

It is not so much that the Supreme Court of Canada offers misdirection in emphasizing considerations dealing with plaintiff contributions or non-indemnity contracts as it is that it offers no direction at all. The truth is that both plaintiff contributions and payments made under non-indemnity contracts are relevant to the collateral payments issue, but they are relevant only under that very aspect of remoteness the Supreme Court has rejected. Unmoored from remoteness analysis, these considerations merely float about, unexplained and unconvincing. Nor can they be secured to that other exception to the general principle precluding double recovery by the plaintiff, an exception no less well-established than the private insurance exception in *Bradburn*, namely, the charitable payments exception. Somewhat inconveniently for the Supreme Court of Canada, charitable payments are not paid for by the plaintiff, and they are often directed specifically at the indemnification of a loss. Nevertheless, they are not deductible.

However, remoteness analysis can explain why both sorts of considerations emphasized by the different positions on the Court might be relevant to the deductibility issue. Indeed, the use to which Lord Wilberforce puts such considerations, as well as some others, in *Parry* is a case in point. Under a remoteness analysis, the plaintiff must bring a damage claim under the aspect of the defendant's wrongdoing, that is, as the kind of damage the foreseeability of which makes the defendant's behaviour wrong. Not all losses suffered by the plaintiff, even if foreseeable by the defendant and caused by his negligence, will be relevant. This limits, of course, the kinds of claim the plaintiff can make against the defendant, but it also limits the scope of the defendant's reply against the claim. Not all offsetting benefits, even if foreseeable and if caused by the accident, can be called into account against the plaintiff's claim for damages. We can see this most clearly in the *Titanic* hypothetical discussed above.

But the same sort of analysis is working in the more subtle problems involving offsetting collateral benefits. By making a claim under a specific category of loss, such as lost earning capacity, the plaintiff is implicitly arguing that this particular kind of loss is not too remote from the defendant's wrongdoing. Thus, if the defendant replies with an argument that offsetting benefits are *within* that category, there is little danger that the reply will fall prey to a remoteness problem. Plaintiffs cannot have their cake and eat it too. Only if the defendant attempts to reach across categories to embrace a more global determination of cost and benefit might problems arise for the defendant.

This explains why in *Parry* even Lord Reid, despite his explicit disavowal of remoteness analysis, was reluctant to allow the defendant to cross the boundary between categories of loss in any argument for offsetting benefits. But the real work in explaining the possible difference between categories in that case was done by Lord Wilberforce. According to him, the plaintiff's claim for loss of earnings should not be affected by his receipt of disability pension payments. When the defendant tried to invoke the latter as an offsetting benefit of the accident, the defendant reached into a category which, for Lord Wilberforce, was different from lost earnings. The evidence for this, according to Lord Wilberforce, was that these payments would not be forthcoming unless the plaintiff had put in ten years of service and the accident had occurred in the course of duty, neither of which would be relevant facts for a scheme of insurance designed primarily to replace lost earnings. Indeed, as Lord Wilberforce also emphasized, nothing in the pension scheme precluded the plaintiff from collecting a new salary in addition to the disability pension.

Where the first and third of these features of the pension plan
track the arguments advanced by the Court regarding the importance of plaintiff contributions and non-indemnity payments respectively, Lord Wilberforce’s judgment, because it is informed by the more general issue of remoteness, can point to the second feature of the pension plan — that the accident must occur in the course of duty — as also being significant. Thus, while some, like Lord Pearson in Parry, may disagree with Lord Wilberforce’s judgment that those are decisive factors in properly characterizing the disability payments as remote from lost earnings, at least there is a better sense in Lord Wilberforce’s judgment why these factors might be significant to tort law and why, just as important, other factors might also be relevant. Moreover, under the same analysis we can see our way to an easy characterization of the charitable payments exception as well; such payments, for example, will typically be too remote from any claim the plaintiff might make that the defendant has wrongfully and foreseeably interfered with the plaintiff’s earning capacity.

The invocation of comparable factors by the Supreme Court of Canada to decide these cases seems quite ungrounded and ad hoc by comparison. We can only hope that because the Court remains closely divided on the issue, it will soon find another opportunity to return to the problem and root its analysis of it in the traditional remoteness considerations of tort law.

III. NEGLIGENCE CLAIMS AGAINST PUBLIC AUTHORITIES: BROWN V. BRITISH COLUMBIA AND SWINAMER V. NOVA SCOTIA

1. Background to the Cases

These two companion cases, decided on the same day under closely overlapping judicial opinions, each involved a plaintiff who had been injured while driving a vehicle on a provincial highway. In Brown v. British Columbia (Minister of Transportation and Highways), the plaintiff had skidded on an icy patch of the highway at around 9:15 a.m. on Friday, November 8, 1985 and gone over an embankment. Three other accidents had already occurred earlier the same day and an R.C.M.P. officer, after each of these accidents, had called his local attachment requesting that a sand truck be sent out to sand the road. On the third call, at around 8:30 a.m., the officer was informed that the provincial Department of Highways had been contacted and

that a sanding truck should be on its way from the local office in the nearby town of Gold River.

As it happened, the Department was still on its summer schedule in Gold River. Unlike for the winter schedule, where six or seven men would be working on three shifts for seven days a week, the summer schedule meant that at Gold River the Department worked with only four men on one shift for four days of the week. The remainder of the week (including Fridays) was covered by using an emergency call-out system. It was the intention of the Department of Highways to change over from the summer to the winter schedule during the week following the accident. Those dates of changeover between schedules, as well as the details of shift obligations under them, were matters of negotiation between the department and the employees union, and had a serious impact on both the budget and personnel considerations within the department.

On this particular Friday, the Department in Gold River had some difficulty contacting the duty sand truck operator because it did not have his telephone number. As a result it was obliged to contact the duty sand truck operator at Campbell River instead. He left Campbell River to sand the highway between the two towns at around 8:30 a.m. and reached that particular part of the highway where the plaintiff had had his accident about eight minutes after it occurred. At trial, the plaintiff maintained that the Department was negligent in (1) adopting the scheme that it did at Gold River to get the necessary highway sanding done, and (2) failing to operate this system properly because it did not know the phone number of the sand truck operator who was on call. The Court added that the failure to know the phone number was a contributary cause of the accident, and concluded that the system for road sanding adopted at Gold River was perfectly rational given all the circumstances facing the Department.

In Swinamer v. Nova Scotia (Attorney General), the plaintiff was injured when a diseased tree, located on private property abutting a provincial highway, fell onto his truck in November 1993. The dis-
case would not have been obvious to a lay person, although an expert might have suspected the presence of the disease on a close inspection and could have confirmed it by drilling into the tree. As part of its ordinary highway maintenance activities, the Department of Transportation removed trees identified as hazards either by members of the public or by Department personnel. These were invariably obviously dead trees whose branches might fall on the highway.

However, earlier in 1983, the Department had received a series of complaints about dead trees along the roadways in one particular county. The local divisional engineer did not have the funds in his particular maintenance budget to remove them. Thus, he assigned a local foreman to survey the roads and to identify and count the dead trees so that the full extent of the problem could be properly gauged. The foreman was not a trained forester, but he did have some knowledge of trees and could spot a dead one. In his survey of the 800 kilometres of county roads, he counted over 200 dead trees, including one very close to the tree which caused the plaintiff's accident. On the basis of the foreman's survey, the divisional engineer filed a report with the regional manager of the Department in October 1983 and requested funding to remove the trees identified as dead. Early in 1984, funding was approved for the removal of 66 of the trees.

At trial, the defendant Department was found liable because of the negligent manner in which it carried out its policy of inspecting the trees. The trial judge felt that an expert should have been consulted to train the foreman to identify the disease in question and remove them. Thus, he assigned a local foreman to survey the roads and to identify and count the dead trees so that the full extent of the problem could be properly gauged. The foreman was not a trained forester, but he did have some knowledge of trees and could spot a dead one. In his survey of the 800 kilometres of county roads, he counted over 200 dead trees, including one very close to the tree which caused the plaintiff's accident. On the basis of the foreman's survey, the divisional engineer filed a report with the regional manager of the Department in October 1983 and requested funding to remove the trees identified as dead. Early in 1984, funding was approved for the removal of 66 of the trees.

At trial, the defendant Department was found liable because of the negligent manner in which it carried out its policy of inspecting the trees. The trial judge felt that an expert should have been consulted to train the foreman to identify the disease in question and that steps should have been taken to remove the diseased tree. However, the Nova Scotia Court of Appeal overturned the trial judgment, finding that the Department had neither the duty nor the power to remove dead trees, and that, if the key consideration for the possible liability of a public authority continues to be the one adopted in Just, namely, whether the conduct complained of by the plaintiff lies within the ambit of a policy decision or whether, under some policy, the conduct is operational, involving how the policy is carried out. If the conduct is operational, then it is subject to the usual scrutiny of a court for possible negligence.

This obviously makes it crucial to have some understanding of what distinguishes policy from operational conduct, and it is the elusive nature of this distinction which has so exercised commentators in this area since Lord Wilberforce first made use of it in Anglo-Cana-
idian jurisprudence in Anns v. Merton London Borough Council.76 We shall have good reason to return to this practical issue, and to look at how Cory J. manages it in these cases, but it is important to under­stand first how the distinction is worked into the overall structure of Cory J.'s approach. Again, without an understanding of why, or how, some special consideration is being worked into a tort action — that is, without some appreciation of its form — we shall not be in much of a position to determine appropriately its content.

For Cory J., a negligence action against a public authority seems to begin in a way similar to any other private law tort action:

As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty.77

Furthermore, on the facts of all these cases involving a plaintiff's use of a public highway, there is "no doubt", according to Cory J., that the province, as the public authority maintaining the highways, owed a duty of care to the injured plaintiffs. In Just, Cory J. put the point as follows:

In light of that invitation to use both the facilities and the highway leading to them, it would appear that apart from some specific exemption, arising from a statutory provision or established common law principle, a duty of care was owed by the province to those that use its highways. That duty of care would extend ordinarily to reasonable maintenance of those roads. The appellant as a user of the highway was certainly in sufficient proximity to the respondent to come within the purview of that duty of care. In this case it can be said that it would be eminently reasonable for the appellant as a user of the highway to expect that it would be reasonably maintained. For the Department of Highways it would be a readily foreseeable risk that harm might befall users of a highway if it were not reasonably maintained.78

Thus, on the analysis so far, analysis first developed in Just and quoted at length in both Swinamer and Brown, Cory J. grounds the duty of a defendant public authority to a foreseeable plaintiff in the same sort of "proximity" terms as any other defendant in a private law tort action.

The different treatment of the public authority comes in at the second stage of Cory J.'s analysis. With the prima facie duty of care established in these terms, the question then arises as to whether there is any reason to exempt the public authority from the duty. This exemption can arise either because there is some specific statutory provision or, more important here, because the conduct alleged to be in violation of the duty constitutes a "policy" decision. Thus, for Cory J., it appears that the policy characterization of the defendant's impugned conduct is important because it carves out one of two possible exceptions (the other being the express statutory exemption) to the general duty which the defendant public authority owes to plaintiffs who might foreseeably be injured by its negligent conduct. However, the relationship between the general proximity rule and its exceptions is not much explained.

This mention of a two-staged analysis might suggest that the general approach adopted by Cory J. has some close affinity with the approach used by Lord Wilberforce in Anns.79 After all, Lord Wilberforce also adopted a two-staged approach to the duty question in Anns, basing the first stage on general considerations of proximity, and asking at the second stage whether any other considerations ought to limit the duty. Certainly, this sounds like a general rule con­joined (somehow) with a series of exceptions.

However, as McLachlin J. emphasizes in her opinion in Swinamer,80 Lord Wilberforce was careful to distinguish the case of a public authority from the case of a private individual as possible defendants to a tort action:

What then is the extent of the local authority's duty towards these persons? Although, as I have suggested, a situation of "proximity" existed between the [relevant local public authority] and [the plaintiffs], I do not think that a description of the [former's] duty can be based upon the "neighbourhood" principle alone...So to base it would be to neglect an essential factor which is that the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law.81
Justice McLachlin goes on to interpret this passage in a way that shows Lord Wilberforce's approach to be structurally different from that offered by Cory J. in *Just, Swinamer, and Brown:*

There is no private law duty on the public authority until it makes a policy decision to do something. Then, and only then, does a duty arise at the operational level to use due care in carrying out the policy. On this view, a policy decision is not an exception to a general duty, but a precondition to the finding of a duty at the operational level.\(^{82}\)

The emphasized words reveal what McLachlin J. feels is an important structural difference between the approach to public authority negligence adopted by Lord Wilberforce in *Anns* and the approach used by Cory J. in *Just, Swinamer, and Brown.* As her opinion ends somewhat abruptly after the quoted passage, however, and since in both *Swinamer* and *Brown* she agrees in the result with Cory J., we are left only to speculate on the difference which might be made by introducing policy into tort law adjudication in such a structurally different way. As we shall see below, there are some different implications for the liability of public authorities in the two approaches.

Before turning to that more detailed analysis, however, some comment on what might amount to yet a third structural approach to the problem is in order, namely, that proposed by Sopinka J. in *Just and Brown.* As already indicated above, Sopinka J.'s opinion in *Brown* is brief, and seems to depend on a full and complete understanding on what Sopinka J. said in dissent in *Just.* It is clear from *Just* that Sopinka J. considered Cory J.'s majority judgment a departure from precedent and dangerously expansive of the liability of public authorities. Alluding to what he saw then as a "crisis in liability insurance," Sopinka J. stated that "while the law of torts must move with the times, this is not a time to move."\(^{83}\) Nor, apparently, have the times changed much since *Just,* because the same arguments for restricting any expansion in the liability of public authorities, so convincing to Sopinka J. in 1989, appear to be just as convincing in 1994.

For Sopinka J., the starting point for analysis is the distinction between a public duty to maintain highways and a public power to do so. The provincial highways departments in all of these cases, in his view, have no duty to maintain their highways. Instead, they have the power to do so, and "the manner and extent to which this power is exercised is a matter of statutory discretion."\(^{84}\) Indeed, says Sopinka J., if there were a statutory duty in such cases (as there is in some provinces other than those involved in these cases), "it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns.*"\(^{85}\)

This last point does make some sense, and raises fundamental questions about the analysis provided by Cory J. In his opinions in all these cases, Cory J. feels obliged to ground the liability of the different provincial highways departments in both a private law proximity analysis and a breach of some statutory duty of care.\(^{86}\) Where Sopinka J. points to the redundancy of the former duty given the latter, one might just as easily have wondered why a survey of the statutes for a duty (as opposed to a defence of statutory authority) was also required since, for Cory J., a duty based on proximity was already taken as given. It is as if Cory J. does not quite believe his own claim that the duties of public authorities *can,* subject to the exceptions, be found under general private law principles of proximity, and feels obliged to find the duty in some legislative enactment.

Perhaps, his approach is not so very far after all from that of McLachlin J., for whom a policy decision is a necessary "precondition" to finding a tort duty for a public authority.

However, no sooner does Sopinka J. make his point that Cory J.'s opinion is overly burdened by an excess of duties, an excess that can be avoided if one interprets the statutes as only providing for a power and not a duty, than he adds that "it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care."\(^{87}\) This comment is confusing for two reasons. First, since it seems to preserve an important role for the policy/operational distinction, it somewhat limits the impact of his claim in the

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\(^{82}\) *Id.,* supra, note 67, at 424.

\(^{83}\) *Id.*

\(^{84}\) *Id.,* supra, note 69, at 1236.

\(^{85}\) *Id.*

\(^{86}\) *Id.*

\(^{87}\) *Id.*

next paragraph that he "would prefer not to use the 'policy/operational' test as the touchstone of liability." It is difficult to think that Sopinka J. could really have meant to make the latter argument since the general tenor of his opinions in Brown and Just implies both a discount on the worth of the policy/operational distinction and a call for limitations on the judicial review of legitimate actions by public authorities. The better view of his opinion is probably that he would like to discard the policy/operational distinction altogether and limit judicial review of public action to those areas where the relevant legislation has posited an explicit public duty. Where the public authority, by acting negligently, has stepped outside the limits of that duty, it may attract liability. This is how Sopinka J. interprets the Anns principle in Just. However, as he makes clear there, "if a statutory duty to the plaintiff is breached, the private duty based on the neighbourhood principle is unnecessary."

Thus, in the final analysis, the three judicial opinions in Brown and Swinamer reduce to offering two different structural approaches to the problem of negligence actions against public authorities. Justice Cory, at least if we can ignore some of his backward glances at statutory duties, seems most inclined to bring public authorities under the general private law duties of tort law and to carve out the necessary exemptions for them under the aspect of policy. This is what commits him to using the policy/operational distinction. Justices Sopinka and McLachlin would rather not find any such general private duty for public authorities, but instead would route any possible liability either through an explicit statutory duty or the public authority having made an express policy decision. Breach of that duty, or a lack of due care in carrying out that policy decision, would be possible grounds for liability. Where McLachlin J. can see her way to using the terms "policy" and "operational", the general thrust of Sopinka J.'s opinion is that this distinction is unhelpful. Whether these two different structural approaches must flesh themselves out in different liability judgments in particular cases remains to be considered.

3. Some More Practical and Particular Implications

It is reasonable to wonder whether structural differences in the various judicial approaches to negligence claims against public authorities will have much real impact on how particular cases turn out. After all, in both Brown and Swinamer, all the justices of the Supreme Court were agreed that the plaintiff should not recover. Furthermore, whatever distance the individual members of the Court might have sought to put between themselves in their modes of reasoning, the fact remains that Cory and McLachlin J.J. both made use of the same policy/operational distinction, and Sopinka J., while declaring an aversion to it, made use of a comparable distinction between powers and duties or between what is discretionary and non-discretionary in public decisionmaking. Finally, where the members of this Court did disagree, as in Just, the reason did not seem all that "structural", but turned instead on different individual judgments as to whether the defendant's impugned conduct fell within the ambit of policy or discretion. Surely this suggests that the really important analysis is not so much structural as substantive, coming in the details which distinguish policy from operations, or discretionary power from duty.

Such a conclusion would be premature, however. Important implications follow from the differently structured approaches to this problem. Moreover, a closer look at these different implications gives us a clue as to who might have made the better substantive judgment in Just, and who might have offered the better reasoning in Brown and Swinamer.

That the differently structured approaches to the problem might have substantively different implications should not be surprising, even though all the approaches seem to use some version of the policy/operational dichotomy. There is, after all, an important difference between using policy to ground a duty ab initio (per Sopinka and McLachlin J.J.) and using policy to cut back on a duty established according to quite different criteria, such as might be found in private law (per Cory J.). The latter is a "duty plus a policy-based exception" strategy, and only allows policy to limit a private law duty which would otherwise be available. However, the former strategy, which is a "policy as precondition" strategy, can carve out duties not otherwise available in private law. It can, therefore, allow policy to...

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98 Supra, note 88.
99 Supra, note 91.
100 Supra, note 90.

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be the basis for a more extensive liability for public authorities than would be true for individuals subject only to private law principles. There is some irony in this, of course, since it was clearly the intent of Sopinka J., who uses the policy as precondition strategy, to limit the liability of public authorities in Just.

An example will help to illustrate the point. Consider the facts of Stevens-Willson v. City of Chatham. In this case, firefighters from the City of Chatham fire department arrived at the scene of a fire, but failed to turn on the water at the hydrant to fight it promptly. The fire completely destroyed the plaintiff’s mill. It seems that an unusual “sputtering noise”, and a “sizzling ball of flame which sounded like a lot of fire crackers or fuses exploding”, made the firefighters fear that by turning on the water they would risk electrocuting themselves. Thus, they “stood milling around in helpless confusion”, not bothering to shut off the electricity or cut the wires, even though had they done so they would have been able to fight the fire effectively and safely, thereby avoiding injury to themselves and fire damage for the plaintiff. The plaintiff sued for the avoidable damage, but lost because Lamont J. construed the action of the firefighters as nonfeasance rather than misfeasance. This was a result Lamont J. considered “very unsatisfactory”, but one to which he thought he was driven by “the state of the law.”

It is interesting to speculate on why Lamont J. found this result “very unsatisfactory”. The confidence with which he announces this as his evaluation of the legal result in the case tells us that he had no difficulty assessing the reasonableness of the public action. This was not a case where the judge, because of worries about judicial competence, felt that he had to defer to some public determination of right conduct. For Lamont J., the conduct of the city’s firefighters was clearly inappropriate in the circumstances.

But what made it so? Would this conduct have been so inappropriate if a group of private individuals, comparably expert but in fear for their own safety, had failed to turn on the water? Here the argument from nonfeasance seems to have some purchase on us that it does not have on the actual facts in the case, Lamont J.’s invocation of the idea notwithstanding. This is because individuals have no prior duty to effect a rescue (certainly not a dangerous rescue) in such circumstances. But that would be an odd argument for a public

95 Lord Diplock makes a comparable point about the different obligations of private individuals and public authorities in Dorset Yacht Co. v. Home Office, [1970] A.C. 1004 (H.L.) (a case where Borstal trainees under public supervision escaped and damaged the plaintiff’s property in the course of their escape). At 1066-67, he said:

But the analogy between “negligence” at common law and the careless exercise of statutory powers breaks down where the act or omission complained of is not of a kind which would itself give rise to a cause of action at common law if it were not authorized by the statute. To relinquish intentionally or inadvertently the custody and control of a person responsible in law for his own acts is not an act or omission which, independently of any statute, would give rise to a cause of action at common law against the custodian on the part of another person who subsequently sustained tortious damage at the hands of the person released.

It is arguable that, although Lord Diplock does not use the terms “policy” or “operational”, the origins of that distinction are in Dorset Yacht rather than Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.). This fact, together with the passage quoted above, provides grounds for believing that in Swinamer McLachlin J. has a better interpretation of the two-staged test in Anns than does Cory J. See supra, text at note 80.
in the case of the Chatham firefighters. Structure does make a difference to particular results.

Now let us reconsider the highway maintenance cases of Just, Swinamer, and Brown. In Just, Cory J. found that the obligation to maintain the highways extended to the reasonable prevention of injury to travellers from dangerously situated rocks which could fall on the highway. It is small surprise, therefore, that he would find a comparable duty in Swinamer to take reasonable steps to prevent trees from posing the same danger. After all, the familiar schoolyard taunt constantly reminds us that both sticks and stones may break our bones.

In what, therefore, lies the distinction for Cory J. between Just and Swinamer? Since there are no statutory exemptions in either case, the difference has to be, if we accept Cory J.'s approach, that the impugned conduct was operational in Just and a policy decision in Swinamer. But that distinction does seem strained. How can a prior duty to maintain the highway, and to prevent injury from falling rocks and trees, be limited as a matter of reasonable policy in the case of trees but not in the case of rocks? Carving out a liability exception in the one case but not the other seems manifestly unreasonable, and certainly implausible as a policy choice.

If one looks more closely at what Cory J. actually says about the two cases, however, it becomes clear that the difference between them is not, even for him, the fact the conduct is policy in one case and operational in the other. Rather, the difference comes closer to what McLachlin J. identifies as significant in Swinamer, namely, that a prior policy decision has been made in the one case and not in the other. Cory J. distinguishes Swinamer from Just most explicitly in the following passage:

In this case, the survey was undertaken in order to identify dead trees and those trees which represented obvious dangers to travellers on the highway. There was no general policy in effect to inspect trees. This is what distinguishes this case from Just, where there was a general policy to inspect potentially dangerous rocks and take steps to eliminate them. Here the policy was limited. Its purpose was to identify obviously dead and dangerous trees in order to apply for funds to remove them... The survey is an example of a preliminary step in what will eventually become a policy decision involving the expenditure and allocation of funds.

This suggests that the difference between a policy and an operational decision is not, as Cory J. had suggested in Just, a difference which goes to “the nature of the decision” the defendant made. Rather, the difference is in how that impugned decision relates to a prior decision which is itself not reviewable for its reasonableness. In both Just and Swinamer the plaintiff was complaining that the level of inspection by public officials for possible hazards on provincial highways was inadequate. However, according to Cory J., while an inspection policy was already in place in Just, about whose negligent operation the plaintiff could, therefore, reasonably complain, in Swinamer there was no such policy. What was in place in Swinamer, as Cory J. recognized, was the more limited policy of surveying trees as a “preliminary step” to a more heavily funded policy of tree inspection and removal. If the latter policy was not in place, the plaintiff obviously could not complain about its operation.

Now the plaintiff can reasonably complain about the negligent operation of the survey policy and, in fact, did so in Swinamer, claiming that the survey should have involved someone more expert than the foreman. But the argument would likely be inadequate for two reasons, only one of which is addressed by Cory J. in his majority judgment. Justice Cory rejects the plaintiff's claim in operational negligence on substantive grounds. In his view, the decision to forego the use of an expert in the survey was perfectly reasonable in the circumstances, that is, not a breach of the duty.

But there is another reason why the plaintiff's claim that the survey was negligent is inadequate. Even if the survey had been more expertly carried out, sufficiently expert to provide a preliminary identification of the diseased tree, the fact remains that, without an additional policy of subsequent inspection and removal, the tree may well have fallen anyway. Thus, allegations of the negligent operation of the survey, while appropriately structured to meet the duty requirement of a tort action against public authorities, would do the
plaintiff little good. What the plaintiff also needs to show is that the breach by the defendant public authority of a duty arising out of its own prior policy decision is causally relevant to the injury suffered.

In this respect the plaintiff who sues a public authority is in the same position as any other plaintiff in a tort action; he or she will need to show that there is a duty, that there was a breach of that duty, and that there was some causal connection between the breach and the resulting injury. It is small wonder, therefore, that the plaintiff in Swinamer did not rest his case solely on an allegation of operational negligence in the survey, but also went on to allege that the failure to remove the tree involved negligence in the maintenance of the highway. However, as we have already seen, where the former allegation fails on substantive grounds (i.e., fails to show breach of the duty) and for reasons of causation, the latter allegation fails because there was as yet no policy in place to inspect and remove trees and, therefore, no duty against which operational considerations could be measured.

These comments on the difference between Just and Swinamer are also relevant to Brown. In Brown, it will be recalled, the plaintiff complained (1) that in November the Department of Highways had not yet moved to the winter schedule for maintaining the roads, and (2) that there was a failure to operate the summer scheduling system properly since the local office did not have the duty driver's phone number. Justice Cory dismissed any liability claim under (2) on the same grounds used by the Court of Appeal. Although their failure to have the phone number was "undoubted negligence", it was not a contributing cause of the accident; even if they had had the phone number, the duty driver would not have been able to sand the road in time to prevent the accident.104 This exemplifies the sort of difficulty, referred to above, that plaintiff in Swinamer would also have faced; even if he had been able to show negligence in the survey, he would not have been able to show, without pointing to a further policy decision involving closer tree inspection and removal, that a non-negligent survey would have prevented the diseased tree from falling on the highway and causing him injury.

As for the negligence claim under (1), the problem for the plaintiff was that the continued use of the summer schedule simply was the policy decision. Thus, since the facts of this decision would constitute the basis for the existence of the duty, they could not at the same time provide any grounds for thinking that the duty was breached.105

That would be to use the same facts to collapse the duty into its own prior policy decision. But note, as was indicated above, that this is a problem only because we have to preserve the possibility of a relationship (viz., a breaching relationship) between two different things, namely, the impugned conduct, on the one hand, and an independent and prior policy decision which creates the public duty on the other. Thus, nothing about the impugned conduct considered on its own is decisive for a finding of no liability. For example, that it involved budgetary or cost considerations, or the setting of priorities for the allocation of scarce resources, is not important. As so many commentators on the policy/operational dichotomy have noted, these same sorts of "policy" considerations come into play at every level of decisionmaking, even the operational.106 Rather, the point is merely the familiar one that in tort law the plaintiff must prove both that the defendant owed the plaintiff a duty and that this duty was breached. The oddity in negligence suits against public authorities is that there is often a special temptation for the plaintiff to use the same facts for each. This is because, unlike duties for individuals, the public authority's duty is not a given, but must also condition, like breach, on a public decision.

The plaintiff in Brown will want to protest that this is a mere caricature of his argument. He may concede the obvious point that the decision to do something, such as continue with the summer schedule, cannot be operational negligence with respect to the decision and, therefore, the duty to do exactly the same thing (that is, continue with the summer schedule). Nevertheless, he may argue that this decision can be operational negligence with respect to the prior more general duty and decision to maintain the provincial highways. This claim does not use the same facts to collapse the existence of a duty into its breach. Rather, we have a duty argument based on the allegation of facts X and a breach of duty argument based on the allegation of quite different and subsequent facts Y that, far from collapsing the breach into the duty, are meant to show that the defendant's conduct is inconsistent with satisfying the duty.

But this recasting of the negligence claim cannot be adequate for the plaintiff's purposes either. What the plaintiff must show in an action against a public authority is that, on facts X, the public authority has made a policy decision and thereby taken on a duty.

104 Supra, note 88, at 444.

Then the plaintiff needs to show that, on some different set of facts $Y$, this same public authority has breached the duty so taken on. It will not be sufficient to allege the same facts for each of these two steps; that is the point about collapsing breach into duty. But it will also not be sufficient to allege so different and general a set of facts $X$ at the duty stage that nothing in the set of facts $Y$ at the breach stage could possibly be inconsistent with the duty. This would be to set up a duty so indeterminate in its content that it provides no real guidelines for the court to determine whether a defendant public authority has breached the duty.

In some respects, this last point seems to be the one that Sopinka J. was attempting to make in *Just* when he said:

It can hardly be suggested that all the learning that has been expended on the difference between policy and operational [sic] was expended to immunize the decision of a public body that something will be done but not the content of what will be done...The concern that has resulted in extending immunity from review in respect of policy decisions is that those entrusted with the exercise of statutory powers make the decision to expend public resources. It is not engaged by a decision simply to do something: it is the decision as to what is to be done that will entail the taxation of the public purse.\(^{106}\)

However, how Sopinka J. makes this point clearly shows that he is motivated by a substantive concern that courts not be allowed to review policy decisions and, in particular, decisions about how public authorities expend public resources. This brings him to the brink of the policy/operational dichotomy he seeks so hard to discount in *Brown* and, moreover, does so in a way that attempts to isolate the special feature, or "nature", of policy decisions, namely, that they involve choices on how to expend public resources. But, as Sopinka J. and others have recognized elsewhere, this feature of policy decisions is also shared by decisions at the operational level.

The point against allowing the plaintiff to allege a duty without determinate content does not have to be made this way, however. Rather, the point can be made as a way to preserve the integrity of the different components of a conventional negligence action. Indeed, the problem in allowing the plaintiff to allege a duty too indeterminate in its content is the complement to the problem posed by the plaintiff using the same set of facts to collapse the existence of a duty into its breach. In the latter kind of problem, proof of the breach is too close to proof of the existence of the duty to count, separately, as

\(^{106}\) *Supra*, note 90, at 1254-55.

also being a *breach* of that duty. In the former kind of problem, the breach is in a sense too far from the duty to count as being a breach of *that* duty. Put another way, the former is problematic because it does not preserve all the distinct parts of a whole, whereas the latter is problematic because it does not preserve the whole in which these are, supposedly, the parts. In either case, the integrity of the negligence action is compromised.

In the final analysis, therefore, we can make some sense of the details of Cory J.'s opinion in *Swinamer* and *Brown*, and how these details might contrast with the details Cory J. highlighted in *Just*. However, it is hard to do so within the overall structure Cory J. sets out in these cases. The better structure for appreciating the details Cory J. actually uses in *Swinamer* to distinguish that case from *Just* seems to have been provided by McLachlin J. One might reasonably have hoped, however, for some more detailed guidance from her in the case. Nevertheless, in all these cases, if one combines the structure offered by McLachlin J. with the details presented by Cory J., there is reason for thinking that the Supreme Court has provided us with a principled understanding of both the scope and limits of negligence actions against public authorities.

4. Conclusion

The analysis of negligence claims against public authorities, and the unwieldy policy/operational distinction more specifically, often tempts commentators into one of two extreme positions. On one side are those who would have us believe that virtually all decisions by public authorities are policy decisions involving collective choices on appropriate distributions of entitlements amongst members of the community. As such, for reasons of institutional competence and legitimacy, it is not appropriate that these decisions be reviewed by the courts.\(^{107}\) On the other side are those who champion the capacity of traditional tort law principles, developed largely for interactions between private parties, to accommodate the special problems posed by the negligence of public authorities. Often the argument will be that these special concerns can be taken into account in an appropriate determination of what constitutes a breach of the duty of care given "all the circumstances of the case".\(^{108}\)

On the Supreme Court, the judicial opinion that will most please

\(^{107}\) See, e.g., Cohen and Smith, *supra*, note 105.

the commentators in the first group is that of Sopinka J. He is clearly the judge on the Court who is most concerned about the dangers of having the courts review decisions of public policy. Commentators in the second group will have to take comfort from the opinion of Cory J. and his attempt, at least in the first stage of his analysis, to assimilate the public authority negligence cases to the traditional law of negligence. They will continue to be troubled by his use of the policy/operational distinction, however, particularly because it shows up as grounds for an exemption from the usual tort law duties rather than as a factor to be taken into account under the standard of care.

However, it is McLachlin J. who best preserves the integrity of tort law, so much prized by the first group, while at the same time recognizing the special nature of a negligence action against public authorities, something about which the second group worries most. Under her approach to the problem, the plaintiff cannot sue in tort for a benefit, no matter how reasonable, if the public authority has yet to decide, under its exclusive prerogative, that this is a benefit to which the plaintiff has a claim. Thus, to this extent at least, tort law does not displace policy. Nor can the plaintiff, once a public decision to provide a benefit has been made, sue under that scheme for his or her fair share. This is a job for administrative law. But the plaintiff can sue a defendant public authority for the negligent operation of such a benefit scheme if the negligence means that the plaintiff did not receive the benefit to which he or she was entitled. Here traditional tort principles will apply, and will even reach past the allegations of nonfeasance which might have protected private defendants.

Thus, in the view of McLachlin J., tort law neither interferes with public policy nor defers to it unquestioningly in the face of apparent negligence. Rather, it waits until a policy decision establishes the relevant duty in a determinate way and assesses the subsequent conduct of public authorities in the light of that duty. This, it seems, is a very sensible way for negligence law to proceed.

IV. SEAT-BELT DUTIES: GALASKE v. O'DONNELL

1. Factual Background

In Galaske v. O'Donnell,109 the plaintiff, aged eight, and his father were passengers in the defendant's truck. The defendant did not insist that his passengers, including the boy, put on their seatbelts before setting off on a short journey to the defendant's vegetable garden. The defendant explained his reluctance to insist that the boy wear his seatbelt as a wish not "to take the 'fathership' away from his friend."110 He admitted that he was aware of the importance of seatbelts for safety (indeed, he had been stopped and warned by the police about seatbelts on three earlier occasions), and conceded that "if young Karl had been in the vehicle alone with him he would have insisted that he wear the seat belt."111 Unfortunately, on the way to the vegetable garden, the defendant's car was struck at an intersection by another vehicle driven by the second defendant in the case. The father was killed and the plaintiff rendered paraplegic.

The trial judge held that the accident itself was solely caused by the second defendant's negligence. The only issue on appeal was whether the first defendant, because he had not insisted that the boy wear his seatbelt, should also be held partially responsible for any additional damages suffered by the plaintiff as a result. The Court of Appeal of British Columbia agreed with the conclusion of the trial judge that, in the circumstances, the first defendant was not negligent in failing to ensure that the boy wore his belt. A majority of the appeal court justices noted in particular that it was significant that the boy's father was present in the vehicle and that the defendant and the father were close friends.

2. Opinions on the Supreme Court: Agreement Despite Diversity

Seven justices of the Supreme Court (La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, and Major JJ.) heard the appeal and five agreed to allow it, sending the issue of how serious the first defendant was in his negligence back to the trial court for a determination. However, despite the agreement among the five justices on the final disposition of the case (only Sopinka and Major JJ. dissented from this disposition), the fact that three different opinions were offered amongst the five, with one of these, by McLachlin J., being reported as a partial dissent, might make some observers think that there was some real disagreement amongst them on how the case should be handled on the way to this result. In fact, when closely read, little distinguishes the three different opinions supporting the majority disposition of the case, and one might reasonably

110 Id., at 676.
111 Id.
wonder why separate opinions, one of which is reported as being in "partial dissent", had to be written at all.

Justice Cory (L'Heureux-Dubé and Gonthier JJ. concurring) said that the trial judge had been mistaken in holding that there was no duty the defendant driver owed to the plaintiff as a passenger in his car. This was a mistake of law and, as such, revivable by the Court. However, while concurring with Cory J. in this result, McLachlin J. was concerned to emphasize that if the trial judge had found, first, that there was a duty owed by the defendant to the plaintiff, and, second, that there was no liability in the case because there was no breach of that duty, she would not have allowed the appeal. This is because, according to McLachlin J., determinations of breach are "fact-driven", and appellate courts should generally not interfere with the trial judge's determination of the facts unless nothing in the trial record supported the determination. Nevertheless, since in this case the trial judge had explicitly said "I find there was no duty of care", McLachlin J. felt confident that the lower courts had committed an error in law and, therefore, that the Supreme Court was right to remit the case for another trial.

Nevertheless, it is odd that McLachlin J. felt it so necessary to offer her opinion as a partially dissenting view from the opinion offered by Cory J. It seems that McLachlin J. only felt obliged to say something about the distinction between the duty of care and the standard of care because this distinction was at the heart of the case dissent offered by Major J., and concurring in by Sopinka J. According to them, the Court was interfering with the trial judge's determination of the facts by allowing the plaintiff's appeal. Despite the trial judge's reference to there being "no duty of care", in their view there was "too much time spent by both of the courts below on the standard of care to conclude they had neglected to find that a duty of care existed." In the opinion of Major J., the trial judge's denial of a duty in the case was at most "loose terminology".

But it should have been reasonably clear to anyone that the opinion of Cory J. turned on the question of whether or not there was a duty, and not the more factual question of whether there was a breach of the standard of care. Justice Cory began his analysis of the issues in the case by announcing the relevance of the two-staged duty test in Anns v. Merton London Borough Council as paraphrased by Wilson J. in Kamloops (City of) v. Nielsen. Certainly this should have signalled from the beginning that the salient issue for him was one of duty rather than the standard of care. Moreover, his subsequent analysis that the driver owed a duty to his passengers to drive safely that this duty extended to ensuring that child passengers under the age of 16 buckle their seatbelts because the driver "is in a position of control" and, finally, that this duty, based as it was on the fact of driver control, was not "negated" for the driver simply because a parent was present (although that might mean that the parent was also responsible), all goes to suggest that he was concerned throughout the case to show that there was a legal duty owed by the defendant to the plaintiff.

Furthermore, Cory J. expressly admitted that the standard of care is a "mixed question of law and fact", and that it would usually be a question for the trial judge to determine whether the standard had been breached given all the circumstances of the case. And he seemed ready to concede that it may even be, as McLachlin J. suggested in her opinion, that the age of the child or the presence of a parent would be relevant factors in determining what the appropriate standard of conduct should be for a driver with respect to his or her passengers. However, it was Cory J.'s point throughout his opinion to emphasize that in this case the defendant driver "took no steps whatsoever to ensure that the child passenger wore a seat belt." This, he suggested, "amounted to a finding that there was no duty at all resting upon the driver." And this, said Cory J., could properly be reversed as an error of law.

In his two paragraphs of concurring opinion, La Forest J. also expressed some concern about the distinction between the duty and the standard of care. Moreover, it was a distinction, he said, which he would like to draw "more sharply than Cory J. does". However, having made this point, and having conceded that the standard of care is usually for the trial judge to determine, La Forest J. appeared to pronounce boldly his own view that the standard of care was vio-

117 Supra, note 109, at 660.
119 Id., at 698.
120 Id., at 699.
121 Id., at 690.
122 Id., at 698-99.
123 Id., at 691.
124 Id., at 691.
125 Id., at 675-76.
126 Id., at 675.
bled in this case. He said, for example, that “the mere fact that the
respondent thought about the situation and then decided to do noth-
ing is, in my view, insufficient...to meet that standard.”126 Perhaps
this choice of words encouraged McLachlin J. to distance herself from
the majority with a partially dissenting opinion.

If that is so, however, she need not have concerned herself. Like
the opinion of Cory J., the opinion of La Forest J. only has the
appearance of second guessing the trial judge on the “fact driven”
question of breach. That is because La Forest J., as much as Cory J.
with whom he concurred, was only emphasizing that the defendant
did nothing to ensure that the plaintiff buckled up. However, for the
doing of nothing to count as the satisfaction of a duty, as the trial
judge seemed to find, it would have to be that there was no real duty
for the driver to do anything at all. And as both La Forest and Cory
JJ. properly recognized, the latter finding, while seemingly about the
facts of breach, would have to involve a mistake in law about duty. As
a consequence, therefore, they were quite right to remit the case to
trial. Moreover, it appears that for all her claimed dissent, McLachlin
J. would have done better to concur with them.

V. ASSESSING DAMAGES FOR THE DEATH OF AN INFANT:
TONEGUZZO-NORVELL v. BURNABY HOSPITAL

1. Factual Background

In Toneguzzo-Norvell v. Burnaby Hospital,127 the infant plaintiff
suffered serious injury as a result of oxygen deprivation during her
birth. The respondent physician and hospital admitted liability; the
only issues at trial concerned the assessment of damages. At trial, in
addition to awarding sums for non-pecuniary loss, management fees,
and past care, the judge also awarded much larger sums for future
income loss ($292,758) and the costs of future care ($1,524,746).
These latter sums reflected the fact that the plaintiff was now
severely mentally disabled and blind from her injuries and would
“continue to exist until her death, totally incapacitated
and incapable of
displaying any cognition beyond that of a reflexive nature.”128

The British Columbia Court of Appeal reduced the trial judge’s
award on the grounds that he had overestimated the child’s life
expectancy by seven years and had failed to make a deduction for

personal living expenses from the portion of the award relating to
lost earning capacity for the years after the child’s death (the so-
called “lost years” of her life). These two issues, together with a
third, which raised the question whether female earnings tables
were properly used to determine the plaintiff’s lost income, were
appealed to the Supreme Court.

2. The Judgment of the Supreme Court

Justice McLachlin delivered the judgment of the Supreme Court,
with all nine justices present. Of the three issues presented on
appeal, two can be dealt with relatively quickly. The third, however,
which concerns the deductibility of living expenses from the award
for lost income during the “lost years” of life, suggests some deeply
philosophical questions about what the Court should be doing in
awarding damages for an early death.

As for the first issue, the proper estimate of the plaintiff’s life
expectancy, McLachlin J. reviewed the record of expert testimony
presented at trial and concluded that, while the Court of Appeal
might have seen the matter differently from the trial judge, the dif-
ference between them was a still only a matter of what weight
should be given disparate pieces of potentially conflicting evidence.
This, McLachlin J. argued, is properly the province of the trier of
fact, and an appellate court is wrong to interfere with the trial judg-
ment unless there is evidence of “palpable or overridding error”. As
there was no such indication of error in this case, McLachlin J. con-
cluded that the Court of Appeal had erred in reducing the estimate
of life expectancy from that provided by the trial judge.

The second issue concerning the trial judge’s use of female earn-
ings tables was also dealt with by McLachlin J. as an evidentiary
matter. Counsel for the plaintiff had argued that the Supreme Court
should substitute an award for lost income based on male earnings
tables, but McLachlin J. rejected the argument:

Any attempt to implement this submission on this appeal runs squarely
up against the impediment that, on the record and submissions before
the trial judge, it is impossible to say that the trial judge erred, much less
that his conclusion on the award for lost future earning capacity was
wholly erroneous. The trial judge in fact went further than counsel for
Jessica urged him to do in considering the potential inequity of applying
earning tables based on past earnings of women. Given that the only evi-
dence on the record before the trial judge was the earning table for
women, and given that he was asked to apply only this table, the most the

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126 Id., at 676.
128 Id., at 117.
Thus, it was because of how the case had been presented at trial that the Supreme Court was not in a position to entertain arguments that female earnings tables should be replaced by other alternatives, such as "gender neutral" tables or even male earnings tables. "Consideration of these arguments", McLachlin J. added, "must await another case, where the proper evidentiary foundation has been laid."

The third issue on appeal concerned the deductibility, over the period of "lost years" of the plaintiff's life, of the costs of living from the claim for loss of earning capacity over that period. It was agreed that a deduction for personal living expenses must be made from the award for lost earning capacity for the years the plaintiff would actually live. This was deemed necessary, it seems, if the living expenses already covered in the award for the cost of future care was not to be duplicated. However, the question in this third issue was whether a similar deduction should be made from the award for lost earning capacity for the period after the projected date of the plaintiff's death.

It is difficult to resist commenting at this point on the proper form which a consideration of such arguments should take. It will be tempting to effect some distributive justice within a tort action, in this context, for example, through the use of gender neutral earnings tables. However, on at least one view of the matter, the temptation should be resisted. While gender neutral earnings tables should be used when the best guess as to the future pattern of earnings for the plaintiff seems no difference in earnings between the sexes, gender distinct earnings tables are in order if that future, unhappily, still holds out, on a best estimate, the potential for inequality. It is not the purpose of tort law to correct overall patterns of inequality across society, and it is both unfair and nonsensical to lay the burden of such correction at the feet of the defendant (quite possibly a woman) who just happens to have injured the plaintiff (quite possibly a man) who just happens to have injured the plaintiff in some accident quite unrelated to the goals of the redistribution. A negligently caused accident is unlikely to identify in any systematic way those parties which, on both sides of a proper redistribution, should be the ones identified.

However, on a different view of the matter, it is arguable that the difference in earnings between the sexes reflects conscious discrimination and, therefore, the denial of the equal moral personality of men and women. (Note that, on the first view, while the unequal earnings of men and women is deemed to be undesirable as a matter of distributive justice, the judgment need not imply that there has been any such conscious discrimination.) But it is the business of tort law to respect this abstract form of equality, an equality which holds between persons as such, even if it is not the purpose of tort law to correct certain distributions between persons because of the "kinds" of persons they are (e.g., rich or poor, morally good or bad, etc.). Thus, on this second view of the matter, the use of gender distinct earnings tables in the determination of damages is inappropriate for tort law.
This last mentioned implication should suggest that a connection can be made here with the deductibility of collateral benefits. Since, as seen in Ratych v. Bloomer137 and as discussed in Part II, McLachlin J. is inclined towards a general rule of deductibility of collateral benefits, with only limited exceptions, it should not be surprising, perhaps, that the same concerns about double recovery by the plaintiff would incline her in this case towards the deductibility of personal living expenses from an award for lost earning capacity.

However, in our earlier discussion of the collateral benefits issue, we saw that it was important to consider under what category of injury the plaintiff was bringing the claim, since that set the stage for the remoteness analysis which would discipline both the plaintiff’s claim and the defendant’s invocation of offsetting benefits. Now remoteness is not, strictly speaking, at issue in this case, a case that only concerns the determination of damages. But the framing of the plaintiff’s claim does seem to have some comparable implications for the appropriate award of damages and what should be deducted from it. Consider again, for example, the millionaire who works, but not to earn a living. When she is negligently injured and can work no longer, her complaint is not that she cannot earn a living, but that she cannot do the work she really wants to do. In other words, she is pointing to the amenities of the job, not its net remuneration. What damages? It is hard to know what might be the measure of such a loss, and it is not surprising, perhaps, that for practical reasons we continue to use the market measure of it, namely, lost earnings. However, when the loss is framed this way, to suggest that “to earn income one must live and incur the attendant expenses” does seem beside the point. One could just as easily have said that, or something analogous, about a damage claim for the loss of a car. The consumption of any good in life presupposes that we can first meet life’s more basic expenses.

Perhaps, however, the plaintiff millionaire should be construed as making a more general claim for the loss of what was beneficial in her chosen life. The measure of these, albeit crude, might well be the income she earned from her principal occupation in life less the costs she would have to incur to carry on that occupation. By framing her claim around a life rather than a job, the plaintiff opens up her claim to a more global calculus of what that life promised her as a net benefit. She will always have to bear in mind, of course, that some such claims might be too grand, and thus too remote from the defendant’s wrongdoing even if caused by it. Not every consequence is, after all, an aspect of the defendant’s wrongdoing. But one can certainly imagine that some such claim about the loss of life’s net benefits might succeed and that the appropriate measure of that loss might be the discounted value of lifetime earnings less the costs of living.

What then of the infant plaintiff in Tonenguizzo-Norvell? How should we think of framing her different claims? On one very natural account she is seeking damages for the loss of all the amenities of a life she never had. One measure of that, perhaps the only one we have, is our best prediction of the income she would have earned less what it would have cost her to earn it. Her life simply had to have that much net worth for her. Moreover, the measure of this loss, as earnings net of all costs including personal living expenses, should be the same regardless of whether the loss comes before or after the date now projected for her death. Thus, this approach supports the view of McLachlin J. and the British Columbia Court of Appeal.

But there is also a way to frame the plaintiff’s claim that makes some sense of what the trial judge may have been trying to do. After all, there is a difference, surely, between the loss one experiences in life for the loss of a job and the loss one sustains (“experiences” is obviously not the right word) when one loses years off one’s life. Moreover, this is a difference which obviously does turn on the date projected for death. Given this difference in the losses, it seems odd that we should measure them the same way, by loss of earnings net of personal living expenses. The two claims for two very different losses would seem to call for different measures.

However, the different measures used by the trial judge do not seem to capture the difference in the required way. The best measure of the loss one experiences when one loses one’s job in life may well be earnings net of personal living expenses. Certainly, that seems a good measure of the loss for those of us who, unlike the millionaire, have to work for a living. But it is hard to understand why the proper measure of the lost years of one’s life should be the lost earnings from one’s job, at least if one is trying to preserve the distinction between a life and the jobs in it. Moreover, this is true whatever we might choose to do about deductions for personal living expenses. Thus, the trial judge may have been right to worry about a difference that could exist between the different losses a plaintiff might sustain, but it seems that the relevant distinctions are not captured by the particular measures of loss that he used.

There is also reason to think that the particular plaintiff in Tonenguizzo-Norvell could not argue for the different losses in the way

described here. Her incapacitation after the injury was so severe, she showed no ability to display anything but reflexive cognition, that it is unlikely that she will have much experience in life of job loss. Thus, the particular version of the argument for differences in losses, differences that turn on the projected date of death and that call for different measures, does not seem plausible in this case.

However, the point of this brief excursion into the different views of McLachlin J., the Court of Appeal, and the trial judge in Toneguzzo-Norvell is not to offer convincing argument that any one approach to the deductibility of personal living expenses from damages is obviously the correct one. Rather, it has only been to suggest that the issues are interesting ones that will require closer scrutiny than they have been given here or, for that matter, in the Supreme Court.

VI. CONCLUSION

In the final analysis, the tort law decisions of the Supreme Court of Canada for the 1993-94 Term have to receive a mixed review. In Cunningham v. Wheeler, the Court has managed, without actually overruling Ratych v. Bloomer, to move away from its rule favouring the general deductibility of collateral benefits. However, the decision continues to be a close one and it seems likely that the issue will have to be revisited. It is to be hoped that in their next round of debate on this matter, both Cory and McLachlin JJ. will seek to secure their arguments more firmly in the fundamentals of tort law. At the moment each is clutching to a partial truth of the matter, mistaking what is only an aspect of remoteness for an exclusive and decisive test of deductibility.

The prospect is only a little better in the area of negligence claims against public authorities. The two-staged test of Anns v. Merton London Borough Council, and now Just v. British Columbia, appears to be alive and well in both Brown v. British Columbia (Minister of Transportation and Highways) and Swinamer v. Nova Scotia (Attorney General), despite attempts elsewhere in the common law world to bury it once and for all. The test combines a general principle with an unprincipled list of exceptions, and it is no surprise that some have found it an unruly horse to ride. Justice Cory's attempt to fill in the two stages by carving out of the background of private law a second stage policy exception for public authorities only adds to the confusion. However, McLachlin J. has provided the beginnings of a better account in Swinamer. Unfortunately, by giving us only the briefest possible opinion, we are forced to wait for further details and developments.

Finally, in Galaske v. O'Donnell and Toneguzzo-Norvell v. Burnaby Hospital, we are left with two cases in which there is a mismatch between a problem and the analysis the problem receives. Galaske seems to have an excess of analysis, certainly an excess of opinion and dissent. A close look at the different views reveals that a majority of the Court is pretty much agreed on the problem and how it should be handled. Toneguzzo-Norvell, on the other hand, asks genuinely interesting questions about how we should properly understand the nature of the loss in "lost years", and how we should produce a measure of that loss once we understand it. But the Court's treatment of these issues is disappointingly brief. As philosophers will remind us, however, these are eternal questions, and we should probably not despair. The Court will eventually get around to giving them the analysis they deserve.