DELEGATION TO COBOURG COUNCIL

19 February 2019

RE: FLOATING PLAYGROUND

I am asking council to notify ATL Distributing (ATL) that the Town of Cobourg is cancelling plans to support a floating playground at the beach commencing this summer. My reason for this request is based solely on my concern that the Town is exposing itself to unnecessary liability. My focus is limited to the liability issue largely because of my background: I hold a Master's degree in municipal politics from Queen's and a JD from the Queen's Law School in addition to an LL.M. in Constitutional Law from Osgoode Hall Law School. I also was on faculty teaching Law at Queen's Law School and the University of Windsor. I am very concerned with liability issues.

I have read the Floating Playground Analysis submitted by Messrs. Peacock and Hustwick along with the Appendices thereto. With all due respect, I take issue with the implied conclusion that Cobourg is better off entering into a 2-year contract than risking litigation in opting out of the venture.

1. Is There A Contract?

Obviously, if there is a valid contract, Cobourg would be honour-bound to fulfil its obligations. My understanding, especially on reading the Town solicitor's opinion, is no valid contract now exists. An RFP was issued with ATL being the successful bidder but due to ATL's inability to hire lifeguards, fulfillment of the contract was frustrated.

Had there been an enforceable contract, the Town would have had the opportunity to sue for lost revenue based on the unfulfilled contract. The fact is, that when ATL could not come up with the ability to meet its obligations, the signing of a contract was deferred.

In essence, a contract has two requirements: Offer and Acceptance. If the acceptance, which is indicated by Cobourg signing the contract, is absent, no contract exists. Just as Cobourg could not sue, for lost 2018 revenues, ATL cannot sue should Cobourg now decide it does not want a floating playground.

The letter from the Town's solicitor indicates that in her opinion, Cobourg can opt out of its intention to establish the water park. She notes that ATL has not provided the performance deposit as the Agreement was never executed and minimizes any risk for liability. She does however suggest that issues of fairness and good faith may be at issue and cites two cases in that regard. The *Zenix* case cited in the opinion letter is less persuasive since it dealt with a breach of

section 30.14 of the *Canadian International Trade Tribunal Act*, and is not a decision which binds any Ontario court. The Supreme Court of Canada decision of *Bhasin v. Hrynew* succinctly sets out what is involved in good faith bargaining. However, it would become applicable only if Cobourg decided to cancel the ATL bid and opt to contract with another bidder.

Until Cobourg has a signed contract in hand, no contract exists. We need not fear litigation upon cancellation of the project in its entirety.

2. What if the Town Goes Ahead and Proceeds with the Waterpark?

Assuming that ATL can perform its obligations, Cobourg is not off the hook should an event occur in which a user of the playground suffers personal injury or death. Any litigation lawyer will not only add ATL as a party defendant, Summer Water Sports who I assume is the operator and will also name the Corporation of the Town of Cobourg to the suit. Even if the Town escapes all liability there are obvious expenses incurred in defending such a suit.

If Cobourg is found even partially liable, even to the tune of 1%, depending on the financial position of ATL or its operator, Cobourg could find itself 100% liable. It is all well and good to say that there is substantial insurance coverage for ATL, but in many instances an insurer will take an off-coverage position to escape satisfying a damage award. Has any investigation been made of the financial viability of ATL or its operator? It is common business practice to have a shell company such as Summer Water Sports in place to manage risky operation leaving only Cobourg as the "deep pockets" defendant.

The Ontario Court of Appeal in *McErlean v. Sarel*, has set out the standard by which a municipality may find itself liable. The Court set out the legal tests involved. A floating park contains numerous foreseeable dangers and is operated in a town-sanctioned recreation area. The fact that many users will be children extends the scope of liability. It was only due to the fact that the City of Brampton was able to exclude itself from the tests established (i.e., not a town park and young riders of trail bikes being held to an adult standard) that Brampton was able to escape a multi-million dollar lawsuit. In the floating playground situation, the venue is a town advertised attraction and the users will be predominantly children. I have attached the Court of Appeal decision as an Appendix to these submissions.

Even though the Town has insurance, and assuming the Town's insurer will not find a loophole to evade payment of a claim, our premiums are dependant on not making claims. As with an insurance claim at home or with your automobile, even a single claim raises premiums. If the water playground is approved, expect substantially higher costs to the town paid for by Cobourg homeowners.

I urge Council to notify ATL that plans for a floating water park will not proceed.

John L. Hill
993 Ontario Street, Cobourg, Ontario

APPENDIX A

McErlean v. Sarel et al.

61 O.R. (2d) 396
[1987] O.J. No. 873
ONTARIO
COURT OF APPEAL
HOWLAND C.J.O., HOULDEN,
MORDEN, ROBINS AND
TARNOPOLSKY JJ.A.
29TH SEPTEMBER 1987.

* An application for leave to appeal from this decision to the Supreme Court of Canada (Estey, Wilson and Le Dain JJ.) was dismissed with costs on February 25, 1988. S.C.C. File No. 20632. S.C.C. Bulletin 1988, pp. 328, 359.

Torts -- Negligence -- Occupiers' liability -- Licensees -- City owning disused gravel pit -- Pit used, to knowledge of city, by trail bike riders -- No attempt to exclude -- Riders licensees.

Torts -- Negligence -- Occupiers' liability -- Licensees -- Gravel pit used by trail bike riders -- Sharp turn in road not an unusual danger -- No duty to warn licensees.

The defendant city owned a disused gravel pit which it planned to develop as a park. The pit was used, to the knowledge of the city officials, by trail bike riders, and no attempt was made to exclude them. The plaintiff, a boy of nearly 15 years of age, was injured while racing on his trail bike when he collided with another bike rider at a curve in a road in the gravel pit. The other rider was on the wrong side of the road. The curve was sharp, but capable of being negotiated at speeds of 50 m.p.h. The curve, and the limitations of visibility at it, were readily apparent. The road surface was good. In an action against the city and the other rider the city was found, at trial, to have been 75% at fault, and the other rider 15%.

On appeal by the city to the Ontario Court of Appeal, held, allowing the appeal, the plaintiff, no attempt having been made to exclude him, was a licensee. The city owed a duty to warn him of unusual dangers, but the curve, being similar to curves on many private roads on undeveloped country property, was not an unusual danger, and,

consequently, the city was not liable. The plaintiff and the other rider were equally at fault.

Damages -- Personal injuries -- Loss of earning capacity -- Contingencies -- Judge balancing negative contingencies against productivity increase -- Court of Appeal will not interfere.

Damages -- Personal injuries -- Cost of future care -- Contingencies -- Award based on home care for plaintiff's lifetime -- Award to be reduced on account of probability that lifetime home care will not be possible.

Damages -- Personal injuries -- Cost of future care -- "Gross up" for income tax -- "Gross up" to be allowed if supported by evidence.

Damages -- Personal injuries -- Cost of future care -- "Gross up" for income tax -- Evidence for plaintiff unchallenged and accepted by trial judge -- Judge ought to have reduced "gross up" on account of uncertain and speculative nature of calculations.

Damages -- Personal injuries -- Cost of future care -- Management fee -- Plaintiff wholly incapacitated -- Management fee of 5% not unreasonable.

APPEAL from a judgment of Fitzpatrick J., 32 C.C.L.T. 199, in favour of the plaintiff in an action for damages for personal injuries.

Cases referred to Hambourg v. T. Eaton Co. Ltd., 1935 CanLII 3 (SCC), [1935] 3 D.L.R. 305, [1935] S.C.R. 430; Indermaur v. Dames (1866), L.R. 1 C.P. 274; affd L.R. 2 C.P. 311; Mitchell et al. v. C.N.R. Co. (1974), 1974 CanLII 145 (SCC), 46 D.L.R. (3d) 363, [1975] 1 S.C.R. 592, 6 N.S.R. (2d) 440, 1 N.R. 344; Bartlett et al. v. Weiche Apartments Ltd. (1974), 1974 CanLII 816 (ON CA), 7 O.R. (2d) 263, 55 D.L.R. (3d) 44; Hanson et al. v. City of St. John et al. (1973), 1973 CanLII 145 (SCC), 39 D.L.R. (3d) 417, [1974] S.C.R. 354, 6 N.B.R. (2d) 292; Alaica v. City of Toronto (1976), 1976 CanLII 695 (ON CA), 14 O.R. (2d) 697, 74 D.L.R. (3d) 502, 1 C.C.L.T. 212; Whaling et al. v. Ravenhorst (1977), 1977 CanLII 1300 (ON CA), 16 O.R. (2d) 61, 77 D.L.R. (3d) 337, 2 C.C.L.T. 114; Polnicky et al. v. Queen's Motel et al., Ont. C.A. January 1, 1985, unreported; leave to appeal to S.C.C. refused [1985] 1 S.C.R. xii, 60 N.R. 210n; London Graving Dock Co. Ltd. v. Horton, [1951] A.C. 737; Campbell v. Royal Bank of Canada (1963), 1963 CanLII 92 (SCC), 43 D.L.R. (2d) 341, [1964] S.C.R. 85, 46 W.W.R. 49; City of Brandon v. Farley (1968), 1968 CanLII 115 (SCC), 66 D.L.R. (2d) 289, [1968] S.C.R. 150, 63 W.W.R. 116; McEllistrum v. Etches (1956), 1956 CanLII 103 (SCC), 6 D.L.R. (2d) 1, [1956] S.C.R. 787; Ryan et al. v. Hickson et al. (1974), 1974 CanLII 871 (ON SC), 7 O.R. (2d) 352, 55 D.L.R. (3d) 196; Veinot v. Kerr-Addison Mines Ltd. (1974), 1974 CanLII 20 (SCC), 51

D.L.R. (3d) 533, [1975] 2 S.C.R. 311, 3 N.R. 94; Booth et al. v. City of St. Catharines et al., 1948 CanLII 10 (SCC), [1948] 4 D.L.R. 686, [1948] S.C.R. 564; Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al. (1978), 1978 CanLII 12 (SCC), 83 D.L.R. (3d) 480, [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257, 19 N.R. 552; Andrews et al. v. Grand & Toy Alberta Ltd. et al. (1978), 1978 CanLII 1 (SCC), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50; Arnold et al. v. Teno et al. (1978), 1978 CanLII 2 (SCC), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272, 19 N.R. 1; Fenn et al. v. City of Peterborough et al. (1979), 1979 CanLII 77 (ON CA), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174, 9 C.C.L.T. 1; affd sub nom. Consumers' Gas Co. v. City of Peterborough, 1981 CanLII 66 (SCC), 129 D.L.R. (3d) 507, [1981] 2 S.C.R. 613, 18 C.C.L.T. 258 sub nom. Consumers' Gas Co. v. Fenn, 40 N.R. 425; Keizer v. Hanna et al. (1978), 1978 CanLII 28 (SCC), 82 D.L.R. (3d) 449, [1978] 2 S.C.R. 342, 3 C.C.L.T. 316, 19 N.R. 209; Lewis v. Todd et al. (1980), 1980 CanLII 20 (SCC), 115 D.L.R. (3d) 257, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 34 N.R. 1; Nielson et al. v. Kaufmann (1986), 1986 CanLII 2717 (ON CA), 54 O.R. (2d) 188, 26 D.L.R. (4th) 21, 36 C.C.L.T. 1 Statutes referred to Courts of Justice Act, 1984 (Ont.), c. 11, s. 129 Income Tax Act, 1970-71-72 (Can.), c. 63 Occupiers' Liability Act, R.S.O. 1980, c. 322, ss. 3(1), 4(1), (3), (4), 11 Rules and regulations referred to Rules of Civil Procedure, rule 53.09

G.F. Henderson, Q.C., J. Murray Davison, Q.C., Ian F. McGilp and C. Kirk Boggs, for appellant, Corporation of City of Brampton.

Earl A. Cherniak, Q.C., P.M. Iacono, Q.C., and Peter W. Kryworuk, for respondent.

BY THE COURT:-- This is an occupier's liability case. The appeal relates both to liability and damages. The occupier of the land at the relevant time was the appellant the Corporation of the City of Brampton. The trial judge found that the respondent Michael McErlean at the time of the accident was a licensee.

Prior to the commencement of the trial in June, 1984, the action had been discontinued against all defendants except the defendant Neil Sarel and the defendant the Corporation of the City of Brampton. At the conclusion of the trial, Fitzpatrick J. apportioned liability 75% against Brampton, 15% against Sarel and 10% against the respondent. He assessed the respondent's damages at $7,023,150 and gave judgment against the City of Brampton and Sarel for $6,320,835, 10% being deducted for the contributory negligence of the respondent. The parties are agreed that there were arithmetical errors in the judgment; we will be dealing with these errors at greater length later in these reasons.

Only the defendant the Corporation of the City of Brampton has appealed; the defendant Neil Sarel did not appeal. At the opening of argument before us, Miss Hilde M. English, who had acted as counsel at the trial for Sarel, appeared on his behalf and requested leave to withdraw from the hearing. She stated that Sarel had no objection, if the court saw fit, to our changing the apportionment of negligence and that she only desired to address the court if we proposed to alter the order for costs made by the trial judge. On this basis, we granted Miss English's request and permitted her to withdraw.

FACTS

The statement of facts contained in the reasons of the trial judge is, with respect, rather sketchy. In order for us to explain properly our reasons for judgment, we believe it is necessary to amplify the statement of relevant facts. Fortunately, there is little conflict in the evidence, and where there is conflict, as will be seen, we have in almost every instance accepted the findings of the trial judge.

The action results from a collision on August 13, 1977, between a trail bike driven by the respondent Michael McErlean and a trail bike driven by the defendant Neil Sarel.

Michael McErlean was born August 24, 1962. He was thus 11 days short of his 15th birthday at the time of the accident. Prior to the accident, he was in good health and engaged in the normal activities for a boy of his age. He was an average student in school. He had just completed grade 8 and was expecting to enter high school in the fall. He had never been in trouble with the authorities, nor had he been a discipline problem at home. He was mature for his age and witnesses described him as a responsible young man.

Michael had expressed to his parents a firm desire to be a policeman. He did not suffer from any disabilities that would have prevented him from following this career. According to his mother, this was not a subject on which he changed his mind. She said: "He had that on his mind all the time, that he wanted to be a policeman."

When Michael was about 12 years of age, he began to take an interest in trail bikes. When he was 14, he started to ride bikes belonging to his friends. His father testified that:
"Michael was very anxious to get one for himself. He felt he should have one because his friends had one." Michael was riding the trail bikes of his friends without the proper equipment. This troubled his father and in July, 1977, he yielded to the entreaties of his son and purchased a trail bike for him together with the necessary safety equipment, such as helmet, goggles, iron jaw, kidney pads and knee pads. Mr. McErlean agreed to pay for the bike, but Michael was to repay him out of his earnings

from summer employment. Michael received no instruction, apart from the instruction he received from his friends, concerning the operation of the bike.

The trail bike that John McErlean purchased for his son was a Honda 75 CC. Trail bikes are designed for recreational off- highway use. No licence is required for a trail bike, nor is any licence required for the operator. When moving the bike from one location to another, the operator pushes it along the side of the road. A trail bike is similar in appearance to a motor cycle except that the tires have a different tread. At its widest point, the bike is approximately three feet wide. Anthony Nicolosi, who was racing Michael McErlean just before the collision, testified that Michael's trail bike could attain a speed of 70-75 m.p.h. While there may be some doubt about that speed, there is no doubt that it could, as the trial judge found, attain the speed of 50 m.p.h.

When Michael first got the trail bike, he rode it in a farmer's field about half-a-mile from his home. This was a flat open area. Although his parents did not know it, it was not long before he began to venture into other locations.

August 13, 1977, was a bright, sunny day. The road surfaces were dry. On that day, Michael and a 14-year-old friend Charles Head had been trail bike riding at ABC Pit, a non-operating gravel pit, northwest of Chassel's Pit where the accident occurred. The ABC Pit is fenced and is regularly patrolled by the police who chase trail bike riders off the premises.

There was evidence that trail bikes in the mid-70s were a problem in gravel pits. Denis Schmiegelow, the president of Highland Creek Sand and Gravel Company Limited, which owns some 10 gravel pits, gave evidence for the respondent. He testified that to overcome the trail bike problem, Highland Creek had fenced its properties, had installed gates with locks at access points and had posted signs prohibiting entry.

There is no doubt that because of their terrain, gravel pits are attractive to trail bike riders. In examination-in-chief, Constable David Price of the Peel Regional Police was asked this question and gave the following answer:

> Q. Let me ask you this question: as a police officer, what is your experience as to what kind of an attraction, if any, these pits are, or were at that time, to children living in the area?
>
> A. There was a big attraction. It is free, it is out of sight of the police, it is hidden.

About noon on August 13th, Michael McErlean and Charles Head left the ABC Pit and went to Chassel's Pit. This is also a non- operating gravel pit. It is located about

three miles from the McErlean home. It is south of Highway 7 and west of Dixie Rd. Highway 7 is a four-lane highway running east and west.

The Corporation of the City of Brampton acquired Chassel's Pit from Bramalea Consolidated Developments Limited in January, 1976, as part of a scheme of land development. The deed was given pursuant to a subdivision agreement dated October 3, 1975, between the city and several developers. Bramalea was one of the developers named in the agreement. The developers agreed to pay a sum of money to the city to be used for the development of park lands and to convey certain property, including Chassel's Pit, to the city for use as park lands, for the privilege of being allowed to proceed with a large scheme of land development. Under the agreement the area was to be made into park lands at the expense of the developers and on completion a letter of acceptance was to be issued by the city; the letter was issued in 1979, some two years after the respondent's accident. The agreement also provided that the developers were to fence the Chassel's Pit property at their expense if requested by the city. The city never requested the developers to fence the property. Robert Reid, who was at the relevant time the deputy director of parks and development services for the Parks and Recreation Department of the City of Brampton, testified that the city did not require the developers to fence the property because it wished to keep the pit in its natural state, presumably until it developed the property as a park.

In 1975, the Corporation of the City of Brampton began to have trouble with trail bikes in public parks. The bikers were knocking over trees, driving through shrub beds, taking down signs, damaging park furniture and causing other difficulties. On February 10, 1975, it enacted By-law 22-75 to restrict the use of motorized recreational vehicles including trail bikes in city parks except in areas designated for such use. No attempt was made to enforce the by-law in Chassel's Pit, probably because the appellant did not regard it as park land. The Peel Regional Police had gone to the pit on some five or six occasions during the three-year period prior to the date of the accident because of swimming in the pit, beer parties at the rear of the premises, and noise complaints about mini-bikes. The police were never told that the pit had been conveyed by Bramalea to the appellant.

The city proposed to use Chassel's Pit as part of its park lands, but from January, 1976 to August, 1977, nothing had been done in this connection. The only use made of the property by the city was occasionally to fill water trucks during the summer months. The trial judge found that no attempt was made to exclude the public from the pit. He also found that the pit was "a park under development" and that at the time of the accident "Chassel's Pit was, in fact and law, a park".

The trial judge made the following findings with respect to Robert Reid's testimony and to the knowledge of city officials regarding youths riding trail bikes at Chassel's Pit [32 C.C.L.T. 199 at p. 203]:

> Mr. Reid, was the City of Brampton's official responsible for the park and gravel pit where the accident happened. He testified that he knew:
>
> (a) of the presence of children on the property;
>
> (b) of the condition of the road and curve;
>
> (c) that the area was an allurement to children;
>
> (d) that children drove trail bikes on other gravel pit properties of the City;
>
> (e) that there were problems with respect to the safety of trail bikes.
>
> He admitted that there was no intention on the part of the city to exclude teenagers from the use of the land in question and that he did not put his mind to the issue of the safety of the youths who used it. His concern about the land was directed only to the uses to which it would be put as a park.
>
> I find that city officials must have known that youths were riding trail bikes at Chassel's Pit.

There was a gravel road through the pit which ran south from Highway 7. At the entrance to the road, there was a gate. The trial judge found that the gate was generally open in 1976 and 1977. At the northern boundary of the pit along Highway 7, there was a wire fence three to four feet high, but the fence was old and in poor condition. There was evidence that at one or two other locations, there was some fencing on the perimeters of the pit, but generally speaking, the rest of the pit was unfenced. Exhibit 27, a sketch of the pit prepared by Green Investigation Services Limited, shows eight other access points in addition to the road coming off Highway 7. There were a number of trails in the pit which were used by pedestrians and trail bikers. On August 13th, Michael McErlean and Charles Head entered the pit by a trail which ran along the edge of an apple orchard adjacent to the south-west part of the pit.

The place where the gravel was excavated when the pit was operating had filled with water, creating a small lake about 1,000 ft. in length. This lake was used in the summer by youngsters as a swimming hole. The lake was on the east side of the pit immediately adjacent to the gravel road.

There was only one sign in the pit. It was a couple of yards down the road from Highway 7 beside the lake and to the east of the road. It read: "Swimming Is Prohibited Trespassers Will Be Prosecuted. BCDL". "BCDL" referred, of course, to Bramalea Consolidated Developments Limited, the previous owner of the property. With reference to this sign, the trial judge said [at p. 203]: "It was visible only to persons who entered from the north. The wording was ambiguous and capable of meaning that trespassers who violated the prohibition against swimming would be prosecuted."

On the road traversing the pit, there was a curve. Since the collision occurred on this curve, it is necessary to describe the road and the curve in some detail. The road was a good, smooth gravel road, running north and south parallel to the lake. As it came south from Highway 7, it was about 18 to 20 ft. wide for most of its length. It gradually narrowed as it approached the curve until at the point where the accident happened, it was only about 12 ft. wide. It then gradually widened out again to 18 to 20 ft. For most of the length of the curve, it was only 12 ft. wide. There was evidence that the narrowing of the road exacerbated the danger of the curve.

The curve began about 900 to 1,000 ft. south of Highway 7. It was what is called a reverse curve. As a driver proceeded southerly from Highway 7, the curve went first to the left, then to the right and then back to the left before it straightened out again. On the west side of the road near the place where the impact occurred, there were rocks, trees and shrubs around which the road was obliged to curve and which affected the visibility for drivers approaching from either direction.

Expert evidence was given for the respondent by Basil Haynes, an associate professor of civil engineering at the University of Toronto. He testified that from the centre line of the road at the northerly point of commencement of the curve, the line of sight was 55 to 60 ft. Gordon Hunter, an engineer with the Department of Highways for the Province of Ontario, testified that the stopping sight distance for a vehicle travelling 30 m.p.h. on a curve is a minimum of 200 ft. Sixty feet was thus only about a third of the required distance according to the standards of the Department of Highways.

The trial judge found that the curve was sharp and blind because of rocks, trees and bushes. However, he also found that though sharp, it was one that trail bike riders could round at speeds of up to 50 m.p.h. and still remain on their own side of the road. From a review of the evidence, he arrived at this conclusion: "The combination of circumstances, a road which narrowed at a sharp, blind curve and its use by other young trail bike riders, was an unusual danger for trail bike riders."

When Michael McErlean and Charles Head arrived at Chassel's Pit, there were a number of other boys and trail bikes in the pit. Michael had driven up and down the

road and around the curve a number of times before the accident. The trial judge found that Michael "knew in detail the dangers of the curve" and that "it was used by [other] young trail bike riders".

The driver of the other trail bike involved in the collision was the defendant Neil Sarel. He was 13 years of age at the time of the accident. He had also been to the ABC Pit on the morning of August 13th, and like Michael McErlean, he had entered Chassel's Pit through the apple orchard. The trial judge found that Sarel was an inexperienced driver. This is not borne out by the evidence. Sarel testified that his father and brother had taught him how to ride a trail bike, and he had been riding one for about a year before the accident. Sarel gave evidence that he had been up and down the road in Chassel's Pit on some 18 to 20 occasions prior to August 13th; he was thus well aware of the hazardous nature of the curve.

About 2:00 p.m. on August 13th, Michael McErlean asked another young boy, Anthony Nicolosi, to race him. They drove to the north end of the gravel road at Highway 7, turned around and proceeded south. Nicolosi was on McErlean's left. Nicolosi testified that both trail bikes were on the right-hand side of the road as they proceeded south. McErlean pulled ahead of Nicolosi as they approached the curve. Nicolosi said that McErlean "started taking [him]", so he slowed down and McErlean preceded him around the curve. The trial judge found that both Nicolosi and McErlean had slowed down before they reached the curve. Nicolosi said that he was about 12 ft. behind McErlean when the collision occurred. We will be referring to Nicolosi's evidence in greater detail later in these reasons.

Although there was some conflict in the evidence about McErlean's speed as he entered the curve, the trial judge found that he "entered the curve well on his own side and at a speed of about 35 miles per hour". While there does not appear to be any evidence to support the trial judge's finding that McErlean had slowed his trail bike before the curve was reached, there was evidence to support his finding that McErlean entered the curve at 35 m.p.h. Notwithstanding Mr. Henderson's careful analysis of the evidence, we cannot, therefore, interfere with that finding.

On August 13th, the defendant Neil Sarel had borrowed a trail bike from a friend, Kelly MacDermid. Just prior to the collision, he was driving northerly on the road through the pit. The trial judge found that Sarel had been weaving back and forth on the road at about 15 to 20 m.p.h. and was entirely on the west half (McErlean's half) of the road at the time of the impact. He found that Sarel's being on the west half of the road resulted from his inexperience as a driver rather than as a result of an error in judgment. As we have pointed out, the evidence does not support the trial judge's finding that Sarel was an inexperienced driver. The evidence is, however, overwhelming that Sarel was well over on McErlean's side of the road when the

accident happened. Sarel testified that he only saw McErlean for a split second prior to the collision.

The two trail bikes collided about midpoint of the curve. Sarel went flying through the air and landed in the bushes at the west side of the road. McErlean was trapped by the two bikes. At the time of the accident, McErlean was wearing a helmet, work-boots and swimming trunks. There is no suggestion that faulty equipment in any way contributed to his injuries.

In the collision, Michael McErlean sustained a badly comminuted fracture of the left femur. His kneecap was removed and his ankle was fused. The most serious injury, however, was to his brain. Dr. Charles H. Tator, the specialist in neurosurgery who treated Michael at Sunnybrook Hospital on the day of the accident, testified that Michael "suffered a major injury to the brain, in particular the brain stem". He was of the opinion that it was "extremely unlikely" that there could be any significant improvement in Michael's condition in the future. He was also of the opinion that so long as Michael's physical needs were taken care of, he could live "to almost normal life expectancy". The estimates of Michael's life expectancy range from zero to 10 years less than average. The trial judge found that it was five years less than average, and this finding was not challenged on the appeal.

Michael was at Sunnybrook Hospital for two and a half months. He was then transferred to Peel Memorial Hospital where he remained for 13 months. From there, he went to the Crippled Children's Centre for nine months. Then he went to The Villa, a private hospital in Thornhill. He did not do well at The Villa, and on August 9, 1980, his parents took him home. Since that time, he has been cared for at home where he is receiving excellent attention.

At the time of the accident, the McErleans were the owners of a split-level house in Brampton. In order to care for Michael, it would have been necessary to make certain structural alterations to the house. Since this would have been costly, Michael's parents sold their home and purchased a bungalow into which they moved in March, 1981. They have made structural alterations in this house to accommodate Michael.

At the time of the trial, Michael's mother, Maureen McErlean, was 51 years of age. Prior to the accident, she was a receptionist in a hospital. She had returned to work after Michael's birth, and except for some time off work when a second child, a daughter, was born in 1967, she had worked steadily until the time of the accident. She testified that she would have continued to work if it had not been for Michael's accident.

Since August, 1980, when Michael was brought home, Maureen McErlean has devoted herself full-time to his care. Michael requires constant attention; this is provided by his mother with some outside assistance from organizations such as the Victorian Order of Nurses and the Red Cross. Mrs. McErlean, at the time of trial, was receiving treatment for hypertension. It is unclear whether or not this was caused by taking care of Michael. At the trial, she acknowledged that she would not be able to continue indefinitely to care for Michael. She told the trial judge that when she is no longer able to look after him, she would like him to be cared for in a home setting.

John McErlean, Michael's father, was 48 years of age at the time of the trial. He was a general manager of Ehrlick's Transport, a company that transported racehorses throughout North America. In his off-hours, he assisted his wife in caring for Michael.

Michael McErlean at the time of the trial was six feet two inches and weighed approximately 200 lb. Because of the excellent care that he is receiving, his health is good. Dr. J. Clifford Richardson in his report of May 2, 1983, stated that Michael is grossly demented, speechless and severely paralyzed. He is completely helpless and unable to communicate. He is incontinent by bladder and bowel. These functions are taken care of by the use of diapers. He has to be fed, but he has a good appetite and eats well. He requires total care. He spends most of his time in bed. With the help of both parents, he is placed in a wheelchair about once a week, but he can tolerate this for only about two hours. He suffers from epileptic seizures. Dr. Richardson was of the opinion that if something incapacitated Mrs. McErlean, Michael would need care in a chronic hospital.

LIABILITY

The law of Ontario with respect to the liability of occupiers of land was drastically changed in 1980 by the enactment of the Occupiers' Liability Act, R.S.O. 1980, c. 322. As a result of this Act, the measure of responsibility of those who occupy land to those who enter upon the land no longer depends on the rigid and formalistic common law classifications of trespassers, licensees and invitees -- classifications which, as the welter of case-law on this subject amply demonstrates, tend to confuse rather than assist in reaching a resolution of disputed questions of liability. Rather than continue to predicate an occupier's duty on an entrant's status, the Act establishes a common duty of care.

In accordance with the all-embracive concept of negligence law, an occupier of premises is now under a duty (s. 3(1)) to take such care as in all the circumstances of the case is reasonable to see that persons entering the premises are reasonably safe while on the premises. There are, however, exceptions to this duty. Where, for instance, risks are willingly assumed by the person who enters on the property, the

occupier's duty is limited to not creating a danger with the deliberate intent of doing harm or damage to the person and to not acting with reckless disregard of the person's presence (s. 4(1)); and a person who enters vacant or undeveloped rural premises for the purpose of a recreational activity is deemed to have willingly assumed all risks (s. 4(3) and (4)).

The effect of these and other provisions of the Occupiers' Liability Act need not however be considered in the factual circumstances presented by this case. The tragic accident which gives rise to this lawsuit occurred well before the Act came into force and the rights and liabilities of the parties are clearly not affected by this legislation (s. 11). In this case, the court is required, in all likelihood for the last time, to address the issue of an occupier's liability to a person on his property according to the common law rules governing this area of the law at the time of the accident.

The first question to be asked is whether the respondent, Michael McErlean, was on the appellant's property as a trespasser or a licensee, it being common ground that he was not an invitee. In our opinion, the respondent must be categorized as a licensee and not a trespasser. A licence to enter or remain on property may be given by conduct which manifests consent or permission. Here, it is clear that the appellant made no effort to exclude pedestrians, bikers or others from its property by means of signs (except with respect to swimming) warning not to trespass, by the erection of adequate fencing, by supervision or by any other means. Their entry from time to time onto the lands over an appreciable period was readily ascertainable if not actually known. The owner's failure to object to their presence can reasonably be construed as tacit permission to their entry. Persons who, for instance, took short-cuts across this long-vacant piece of property or who came there to walk their dogs or ride their motorcycles or trail bikes cannot be treated as mere trespassers. The owner's inaction, while not amounting to an invitation to use the property, at least manifested a willingness to permit them entry and indicated its toleration of their presence. In these circumstances, the owner so conducted itself that it cannot be heard to say that it did not give permission. This is not a case in which an occupier unsuccessfully sought to prevent people from trespassing on its lands, nor is this a situation in which precautions against their intrusion would be unduly burdensome or expensive or, based on past experience, likely to be futile. Applying the common law approach, this respondent must, in our opinion, be treated as a licensee (albeit, on the authorities, a "bare licensee" or a "licensee without an interest") and the occupier's liability must be determined on the basis of that relationship: see, generally, Prosser and Keeton, The Law of Torts, 5th ed. (1984), c. 10; Fleming, The Law of Torts, 6th ed. (1983), c. 21; and Linden, Canadian Tort Law, 3rd ed. (1982), c. 18.

What then is the duty owed by an occupier of land to a licensee? Traditionally, it has been spoken of as a duty to warn of concealed dangers or traps of which the occupier

had actual knowledge: Hambourg v. T. Eaton Co. Ltd., 1935 CanLII 3 (SCC), [1935] 3 D.L.R. 305, [1935] S.C.R. 430. This is plainly a less stringent duty than the duty owed to an invitee which has long been expressed as a duty to take reasonable care to prevent damage from unusual danger of which the invitor knew or ought to have known: Indermaur v. Dames (1866), L.R. 1 C.P. 274; affirmed L.R. 2 C.P. 311. However, in 1974, the Supreme Court of Canada in Mitchell et al. v. C.N.R. Co. (1974), 1974 CanLII 145 (SCC), 46 D.L.R. (3d) 363, [1975] 1 S.C.R. 592, 6 N.S.R. (2d) 440, a case involving a nine-year-old infant-licensee, abandoned the traditional requirement that the danger be concealed and held that mere knowledge of likely danger on the part of a licensee falling short of voluntary assumption of risk will not of itself exonerate the occupier. Later that same year, this court in Bartlett et al. v. Weiche Apartments Ltd. (1974), 1974 CanLII 816 (ON CA), 7 O.R. (2d) 263, 55 D.L.R. (3d) 44, a case involving a three-year-old infant-licensee, thoroughly canvassed the then current law as to an occupier's liability to a licensee. Based on an analysis of the judgments of the Supreme Court of Canada in Mitchell et al. v. C.N.R. Co., supra, and in Hanson et al. v. City of St. John et al. (1973), 1973 CanLII 145 (SCC), 39 D.L.R. (3d) 417, [1974] S.C.R. 354, 6 N.B.R. (2d) 292, Jessup J.A., speaking for the majority of the court at p. 267 O.R., p. 48 D.L.R., restated the general principle governing the liability of an occupier to a licensee in the following terms:

> It is to take reasonable care to avoid foreseeable risk of harm from any unusual danger on the occupier's premises of which the occupier actually has knowledge or of which he ought to have knowledge because he was aware of the circumstances. The licensee's knowledge of the danger goes only to the questions of contributory negligence or volenti.

That test has been applied by this court in other licensor- licensee situations: see, Alaica v. City of Toronto (1976), 1976 CanLII 695 (ON CA), 14 O.R. (2d) 697, 74 D.L.R. (3d) 502, 1 C.C.L.T. 212; Whaling et al. v. Ravenhorst (1977), 1977 CanLII 1300 (ON CA), 16 O.R. (2d) 61, 77 D.L.R. (3d) 337, 2 C.C.L.T. 114 (C.A.); and Polnicky et al. v. Queen's Motel et al. (C.A.), released January 10, 1985, unreported. It represents an accurate statement of the law in effect at the time of this accident, and liability in this case must be determined in accordance with the principles enunciated therein.

Aplying this test, an occupier's liability is clearly limited to "unusual dangers" on his property and does not extend to every danger that might be found thereon. Thus, the first and most important question to be asked in this instance is whether at the time and place of the accident there was an "unusual danger" on the occupier's premises which created a foreseeable risk of harm.

Prior to the Mitchell case, the term "unusual danger" was applied to the duty owed by an occupier to an invitee, but not to the duty owed a licensee. The latter duty related only to "concealed dangers" or "traps". "Unusual danger" was defined by the House of Lords (per Lord Porter) in London Graving Dock Co. Ltd. v. Horton, [1951] A.C. 737 at p. 745, as follows:

> I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think Phillimore, L.J., in Norman v. Great Western Railway Co., [1915] 1 K.B. 584, 596, is speaking of individuals as individuals but of individuals as members of a type, e.g., that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack though it would be for a motor mechanic. But I do not think a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.

(Emphasis added.)

This definition has been generally accepted and was specifically adopted by the Supreme Court of Canada in Campbell v. Royal Bank of Canada (1963), 1963 CanLII 92 (SCC), 43 D.L.R. (2d) 341, [1964] S.C.R. 85, 46 W.W.R. 49, and in City of Brandon v. Farley (1968), 1968 CanLII 115 (SCC), 66 D.L.R. (2d) 289, [1968] S.C.R. 150, 63 W.W.R. 116. In light of the fact that Mitchell has blurred the distinction between an occupier's duty to an invitee and his or her duty to a licensee, this definition of "unusual danger" can be applied by analogy also to the case of an occupier's duty to a licensee.

An occupier's duty is limited to "unusual dangers" on the theory that he or she is entitled to assume that ordinary reasonable people know and appreciate usual or common dangers and need not, therefore, be warned or otherwise protected against them. No list of dangers that categorically meet this concept of unusualness can be drawn up because, as Fleming points out (op. cit., pp. 432-3), "the quality of unusualness depends not only on the character of the danger itself, but also on the nature of the premises on which it is found and the range of experience with which the [entrant] may fairly be credited". In the final analysis, the issue of what is an unusual danger clearly must, like so many issues in the law of torts, depend on the facts and circumstances of the given case.

In this case, the issue is whether the curve in the gravel road on the appellant's non-operating gravel pit constituted an unusual danger to licensee trail bike riders

generally and, more specifically, to the respondent Michael McErlean. If it was not an unusual danger, it follows that there can be no liability. If, on the other hand, it was an unusual danger, then, applying the Bartlett v. Weiche Apartments Ltd. test, it must next be asked whether the appellant had, or because of circumstances of which it was aware, should have had, knowledge of that unusual danger, and, if so, whether it failed to take reasonable care to avoid the foreseeable risk of harm thereby created. Before considering these issues, there are, however, two matters that may appropriately be dealt with at this stage.

The first relates to the trial judge's finding that the property in question was "park land". In his view, as we have pointed out, "Chassel's Pit was, in fact and law, a park" at the time of the accident. With due deference, this cannot be so. The evidence simply does not support such a conclusion. Indeed, it establishes beyond peradventure that the property was not in fact a park at that time. As we indicated earlier, these lands were acquired by the appellant municipality in January, 1976, a year and a half before the accident, as part of a scheme of land development. During that year-and-a-half period, no physical changes were made to the property and it remained, as before, an unused, partially fenced, former gravel pit on which there was an apple orchard, a small lake, a gravel road, a number of trails and a sign bearing the initials of the previous owner warning, "Swimming is Prohibited Trespassers Will Be Prosecuted". People continued to occasionally come onto the property to walk, to swim, to ride motor bikes, to meet and to party. None of those people could have thought themselves to be in a park owned by the City of Brampton. The sign itself was incompatible with that notion. The ownership of the property was not known to the public, or even to the Peel Regional Police, and the lands were in no sense held out as a public park. The legal or planning steps that may have been taken internally by the appellant or its officials with a view to the eventual development and use of the lands as a park are not relevant to the determination of an occupier's liability in tort.

The trial judge's conclusion that the lands were a park was made primarily, and in our view unnecessarily, to elevate the status of the respondent from that of trespasser to that of licensee. But the erroneous finding that the accident happened on "park land in the City of Brampton" was referred to elsewhere in his reasons. We think it important that the status of these lands be made clear and there be no confusion on this point. To describe them as "park land" is tantamount to saying that they were thrown open by the city to the public for recreational purposes. That would raise a number of questions. For instance, were members of the public using the park there as a matter of right; would they then be entitled to rely on the city to ensure that the park was safe for the activities being carried on therein; is the common law responsibility of a municipality to persons coming onto public park lands any higher or different than the responsibility owed by a licensor- occupier of private property? Those and like

questions do not, however, arise in the factual circumstances of this case. These lands were not a park or represented as a park, and the appellant's responsibility is identical to that of any private property owner. It stands in no different position than its predecessor in title would have stood had this accident happened before title had been transferred. In short, the fact that the lands upon which this accident occurred happen to have been owned by a municipal corporation has no bearing on the question of its liability, and the resolution of that issue ought not to be coloured by that fact.

The second matter to which reference may conveniently be made at this stage is the age of the respondent and of the defendant Neil Sarel. Their ages (and the ages of other trail bike riders) clearly played a significant role in the trial judge's decision on the question of the occupier's liability and in his assessment of the contributory blameworthiness of the respondent and Sarel. Their ages were also important, if not basic, to a number of the contentions advanced on the respondent's behalf in support of the judgment in appeal.

It is well-established that, as a general rule in determining negligence, children are not required to conform to the standard of conduct which may reasonably be expected of adults. Their conduct is judged by the standard to be expected of children of like age, intelligence and experience. This is essentially a subjective test which recognizes that the capacities of children are infinitely various and accordingly treats them on an individual basis and, out of a public interest in their welfare and protection, in a more lenient manner than adults. A child at one end of the scale may be of such tender years as to be manifestly incapable of exercising any of those qualities of intelligence and experience which are necessary to enable him or her to perceive a risk and realize its unreasonable character while a child at the other end may be quite as capable as an adult of exercising such qualities. In each case, the question is whether the child "exercised the care expected from a child of like age, intelligence and experience": McEllistrum v. Etches (1956), 1956 CanLII 103 (SCC), 6 D.L.R. (2d) 1 at pp. 6-7, [1956] S.C.R. 787 at p. 793. There are, however, exceptions to this general rule.

Where a child engages in what may be classified as an "adult activity", he or she will not be accorded special treatment, and no allowance will be made for his or her immaturity. In those circumstances, the minor will be held to the same standard of care as an adult engaged in the same activity. This exception, which has been widely accepted in the United States (see Prosser and Keeton, op. cit., p. 181), was recognized in this province in Ryan et al. v. Hickson et al. (1974), 1974 CanLII 871 (ON SC), 7 O.R. (2d) 352, 55 D.L.R. (3d) 196. In that case, two boys, one 12 years old and the other 14 years old, were each found partially to blame for the injury caused to another child as a result of their negligent operation of snowmobiles. Goodman J. concluded that children who engage in adult activities, such as snowmobiling, are entitled to no special privilege and are required to meet the

standard of the reasonable person. Goodman J. (at p. 358 O.R., p. 202 D.L.R.) approved as "eminently sensible" the principles set forth by Professor Linden in his then current text, save with respect to his suggestion that the court should take into account whether the adult activity was one which is normally insured, and held them equally as applicable to snowmobiles as to automobiles, whether or not such vehicles are used on or off the highway. We reproduce the passage from Linden, to which reference was made, as it now appears in the latest edition, op. cit., at pp. 126-7:

> Special rules for children make sense, especially when they are plaintiffs; however, when a young person is engaged in an adult activity which is normally insured, the policy of protecting the child from ruinous liability loses its force. When the rights of adulthood are granted, the responsibilities of maturity should also accompany them. The legitimate expectations of the community are different when a youth is operating a motor vehicle than when he is playing ball. As one American court suggested, juvenile conduct may be expected from children at play, but "one cannot know whether the operator of an approaching automobile ... is a minor or adult, and usually cannot protect himself against youthful imprudence even if warned".
>
> There has been a movement toward holding children to the reasonable person standard when they engage in adult activities. A more lenient standard for young people in the operation of motor vehicles, for example, was thought to be "unrealistic" and "inimical to public safety". When a society permits young people of 15 or 16 the privilege of operating a lethal weapon like an automobile on its highways, it should require of them the same caution it demands of all other drivers.

This concept applies with equal force to the present case. Just as the law does not permit a youth engaged in the operation of an automobile to be judged by standards other than those expected of other drivers, it cannot permit youths engaged in the operation of other motorized vehicles (whether there are any statutory restrictions with respect to age or not) to be judged by standards other than those expected of others engaged in the same or like activity. The critical factor requiring greater care is the motor-powered nature of the vehicle. Automobiles, snowmobiles, power boats, motor cycles, trail bikes, motorized mini-bikes and similar devices are, it is manifest, increasingly available to teenagers, and are equally as lethal in their hands as in the hands of an adult. Machines of this nature, capable as they are of high rates of speed, and demanding as they do the utmost caution and responsibility in conduct, present a grave danger to the teenage operator in particular, and to others in general if the care used in the course of the activity drops below the care which the reasonable and prudent adult would use. The potential risks of harm involved in such activities are apparent, and they must be recognized by parents who permit their teenagers the use of such powerful machines. While teenagers may in other instances be judged by

standards commensurate with their age, intelligence and experience, it would be unfair and, indeed, dangerous to the public to permit them in the operation of these power-driven vehicles to observe any lesser standard than that required of all other drivers of such vehicles. The circumstances of contemporary life require a single standard of care with respect to such activities.

With those genereal observations in mind, we return to the factual circumstances of this case. The road in question was a good, smooth, gravel road. Because of the natural presence of rocks, trees and bushes, it had a curve or, as some witnesses described it, a "bend" or a "corner" in it. The road was about 18 to 20 ft. in width at its widest point narrowing gradually to about 12 ft. at the point where the accident occurred. Visibility around the curve was plainly restricted by the dense growth of trees and bushes along the west side of the road. None the less, by way of comparison, as Mr. Haynes, the plaintiff's expert, acknowledged, the road was "quite a bit better" than the average bush road in Muskoka, and similar curves were not unusual on private and secondary roads in that area nor, we think it obvious, elsewhere in the province. While the trial judge described the curve as "sharp" and "blind", he found it one that trail bike riders could round at speeds of up to 50 m.p.h. and still remain on their own side of the road.

The respondent was an experienced trail bike rider. He had driven up and down the road and around the curve a number of times before the accident. He knew the physical condition of the property. He knew of the existence of the curve. He knew that it was used by other trail bike riders. "Michael McErlean", the trial judge said, "knew in detail the dangers of the curve at Chassel's Pit" (emphasis added). Possessed of this knowledge, he decided to race his friend Anthony Nicolosi, who was also an experienced trail bike rider and with whom he had often ridden before, so as "to see who was fastest". Nicolosi owned a Suzuki 100 CC that had been clocked as having a top speed of 70 to 75 m.p.h. He thought that McErlean's bike was "almost as fast" as his. He described what transpired prior to the collision and during the race as follows:

> Q. What conversations did you have while at the pit with Michael McErlean before the accident occurred?
>
> A. Well, he thought he could beat me so I asked him, "Let's race to see who is fastest".

Q. I'm sorry, what was the other thing you said?

> A. Well, he thought he could beat me, so I asked him to race.

Q. Did you say "to see who was fastest"?

A. Yes, but it was all straight down, that's the way it went. Right?

Q. All right now, was anyone else in the place aware, to your knowledge, that there was going to be a race?

A. Yes.

Q. Who else?

A. There was about 20, 25 guys standing around. We told them we were going to race and set off on the road, and Neil [Sarel] wasn't one, or Neil and the other guys were just riding around, Neil was not by the road then.

Q. Where were these guys standing around?

A. There was a bunch of hills around.

. . . . .

Q. Now, what happened after that?

A. Well, he told me to race and we just drove up, like.

Q. Up where?

A. Up the road.

Q. How far up the road?

A. Right to the top.

Q. Now, is Highway 7 at the north end of that road?

A. Yes.

Q. Okay, and what had been your previous experience with the corner on that road? Had you driven -- I think you have already told me?

A. Yes, I have drove it, not too many times, along that road, I would just climb around the hills.

Q. Had you ever been to Chassel's Pit before?

A. Yes.

Q. Now, I would like to know what your experience was in driving through the corner in question; for instance, how fast had you been able to drive through it, if you know?

A. Full out, there is no problem, 50, 55.

. . . . .

Q. Were you as experienced a trail bike rider as Michael McErlean, if you know?

A. No.

Q. When you and Michael got up to the Highway 7 and the road, how did you turn around?

A. Just turned them around.

Q. Both of you?

A. Yes.

Q. Now, if this was to be a race, was there any starter?

A. No, we just standed together and I said, "One, two, three" and we took off.

Q. All right now, at the start of the race were you side by side?

A. Yes.

Q. Which side were you on and which side was Mr. McErlean on?

A. I was on the left, he was on the right.

. . . . .

Q. All right, tell us about the race as you recall it?

A. We both got even, going down. Then he started taking me, just before he got to the corner, and I geared down, and he just went flying around the corner, and I was just getting around the corner and I seen him hit Neil.

Q. How hard did you accelerate your motorcycle during the, what you told us about?

A. It was full out until I came to that corner, and I couldn't take it.

Q. Did you observe how Michael McErlean was driving his motorcycle?

A. Yes, he was the inside, the right, and he came around, and Neil was on the same side coming from the opposite direction.

Q. Did he gain on you at some point?

A. Yes.

Q. And was that before --

A. Before the corner.

Q. All right, how far ahead of you did Michael McErlean get at any time during the trip south to the curve?

A. Four feet, five feet.

Q. Can you give us your best estimate of the speed of the two motorcycles?

A. I would say he was doing about 50, 55 and I was doing about 45, 40.

Q. And did Mr. McErlean's speed change in any way, to your observation, before the accident occurred?

A. Again, sir?

Q. Did he slow down speed or stay at the same speed before the collision occurred?

A. Full speed, the same speed.

(Emphasis added.)

The trial judge erroneously found that the respondent had slowed down before he and Nicolosi had reached the curve. That finding, as we have said, is unsupported by the evidence; none of the witnesses testified that the respondent reduced his speed before the accident. Nicolosi's testimony that McErlean stayed "at full speed, the same speed" is uncontradicted and, indeed, is confirmed by other testimony to the effect

that the bikes were racing at "full throttle" and there was no change in speed as they approached the curve.

The trial judge's further finding that McErlean had won the race before the curve was reached, if that finding was intended, as it would appear to be, to mean that the race was over before the curve was reached, is also unsupported by the evidence. There is no evidence indicating that the finish line of the race was to be at a point north of the curve or, indeed, where the finish line was to be. Nicolosi's concession that he had been beaten by McErlean and had geared down just before the curve cannot be taken as meaning that the race was then completed or that McErlean considered it to have been completed. Indeed, Nicolosi's evidence would indicate that it was intended that the race was to continue beyond the curve, and McErlean's driving was consistent with that intention.

These inaccurate findings may, as the appellant asserts, have led the judge to err in his assessment of the evidence relating to the speed at which the respondent entered the curve. But be that as it may, this much is clear. The respondent entered the curve at the same speed he had attained immediately before reaching the curve -- and that, manifestly, was the maximum speed to which he had then accelerated his motor bike. In short, he raced into the curve and, contrary to the judge's conclusion, did not slow down before doing so. Even if he were racing at 35 m.p.h., as the trial judge found, his speed was patently excessive in the circumstances.

Recognizing, for the reasons set forth earlier, the applicability of the reasonable person standard to a 15-year- old-boy engaged in the operation of a motor bike, the question to be asked with respect to the respondent's liability for the accident is: "What would a reasonable and prudent driver of this type of vehicle have done in these circumstances?" Clearly, such a driver would not race into an area of limited visibility. It would be apparent to him or her that the road curved, that the dense foliage around which it curved obstructed or at least partially obstructed his or her vision, and that others might also be on the road. In these circumstances, any reasonable driver exercising ordinary perception, intelligence and judgment would reduce his or her speed to the extent necessary to meet the obvious hazards resulting from restricted vision. A reasonable driver could not help but be aware of the risks involved in driving at a speed that did not enable him or her to ascertain the situation that lay ahead and that did not ensure that he or she could proceed in safety. But more basic than that, a reasonable and prudent driver would not race in a location where the natural physical surroundings obstructed or partially obstructed his or her view without, at the very least, first making certain that the roadway was clear of others during the race. In this respect, it might be perhaps noted that the respondent and Nicolosi did, in fact, inform some of the other boys in the vicinity that they were about to engage in a race but, regrettably, they did not so inform the defendant Sarel.

With the respondent's detailed knowledge of the potential dangers of this curve and his full awareness of the presence of other riders, his conduct in racing as he did can only be seen, it must regrettably be said, as reckless in the extreme. The trial judge was right, therefore, in finding that the respondent was negligent and that his negligence contributed to the collision.

The defendant Sarel has not appealed the finding of negligence made against him at trial and is content that the court change the apportionment of fault if it should see fit to do so. It is, therefore, unnecessary to review further the evidence upon which this defendant was found negligent. However, as we stated earlier, the trial judge misconceived the testimony in respect to Sarel's experience as a trail bike rider. Sarel was not "an inexperienced rider", and there is no basis for the suggestion that "if he could not drive a vehicle well enough to control it, he ought not to drive it at all", or for the conclusion that his being on the west half of the road resulted from his inexperience as a driver rather than as a result of an error in judgment. The evidence establishes Sarel as a trained and experienced driver who had been up and down the road in Chassel's Pit on many occasions prior to the day of the accident. Like McErlean, he was familiar with the curve and the effect which the rocks, trees and bushes around which it passed had on the visibility of drivers approaching from either direction.

With the negligence of the respondent and Sarel established, the question remaining is whether the owner of the land upon which this unfortunate accident occurred bears any responsibility in law for the occurrence. A licensor is patently not a guarantor of a licensee's safety or an insurer against all injuries which may result from the condition of his or her property. As we have said, a licensor's duty at common law is limited to unusual dangers of which he or she knew, or because of circumstances of which he or she was aware, ought to have known existed with respect to the property. The duty does not extend to usual or common dangers which ordinary reasonable persons can be expected to know and appreciate.

Accepting that the curve could be a danger and that the appellant-landowner should have known that its property was being used in the recreational operation of trail bikes, can it be said that this condition constituted an unusual danger? In our opinion, it cannot be so classified. The requisite quality of unusualness is not present in this case, and the circumstances adverted to by the trial judge in his brief reasons do not elevate the condition into one of unusual danger. We are concerned here with a country-type road on undeveloped private property running between a small lake on one side and dense bush on the other that can only be seen as commonplace and not out of the ordinary in this province. The existence and state of the one curve in this road was open to ordinary observation. It had been there for a long time. When travelled with due care and attention and at an appropriate speed, it was not

dangerous. The curve had not been the subject of recent change nor the source of prior mishap. It was not concealed or hidden, nor was it unexpected. It could readily be seen at a considerable distance by persons approaching from either direction.

The shape, width, contour and general condition of the road itself did not make it unsafe for trail bike riders; they could round the curve at speeds of up to 50 m.p.h. and still remain on their own sides. The presence of rocks, trees and shrubs along the west side of the road, and around which the road necessarily curved, were equally apparent. The fact that this naturally wooded area reduced the sight lines and diminished the ability of persons using the road to see fully what lay ahead was manifest. The driver of any form of motorized vehicle exercising ordinary care and prudence could be expected to and would appreciate the danger of a blind or partially blind spot in a roadway. For his or her own protection and the protection of others whom he or she knew might be on the road, a prudent driver could reasonably be expected to avoid such a danger by proceeding at the reduced speed demanded by the circumstances, and with the caution required to avoid any risk of collision. We can find nothing unusual or unexpected about a curve of this nature in a roadway situated on private property in a location of this kind. The drivers involved in this accident were, of course, fully aware of the state of this road and the obvious hazards of the curve. These road conditions would be apparent to anyone operating a trail bike in broad daylight at this site.

It is contended that the age of the trail bike riders using the road rendered it an "unusual danger". This was one of the circumstances relied upon by the trial judge ("its use by other young trail bike riders") in reaching his conclusion that the danger was unusual for trail bike riders. In support of that conclusion, counsel for the respondent stressed the involvement of "children" in the driving of the motor bikes and, along the same line, submitted that the court ought "not [to] apply the objective standard of care of a reasonable man, but rather the standard of behaviour to be expected of a child of like age, intelligence and experience" in considering whether the plaintiff was negligent. Age also formed the basis for the further argument by counsel for the respondent that this former gravel pit was an "attraction" to young trail bike riders in that it served to bring them onto the property. As a consequence, it was submitted that the doctrine of allurement was properly applicable and relevant to the finding and apportionment of liability in this case. The trial judge, it might be added, specifically found, in the context of the respondent's status in relation to the occupier, that "the area was an allurement to young trail bike riders".

There is no doubt that the age of a person on an occupier's land, whether there as trespasser, licensee or invitee, can be an important factor in determining the occupier's liability for injury sustained as a result of the condition of his or her land. In the case of very young children, dangers which may not be considered unusual to persons

more capable of looking out for themselves, may be considered unusual to such children, and the occupier may accordingly be obliged to provide them with greater protection than others. The policy considerations underlying the scope of an occupier's duty to child-licensees are succinctly set forth in the following passage from Fleming, op. cit., at p. 448 (see also, pp. 447-50) where the learned author states:

> Beyond question the standard of safety due to licensees must be applied with reasonable regard to the physical powers and mental faculties which the occupier, at the time of giving the licence, knew or ought to have known the licensee possessed. But some difficulty has been experienced in determining what allowance ought to be made for the physical and intellectual shortcomings of infants who, obviously, cannot be judged by adult standards and are usually incapable of contributory negligence. Commonplace features of a building or land may be a danger to a little child: it may see much but apprehend little; it is usually impervious to warning. Is then the licensor "practically bound to see that the wandering child is as safe as in a nursery?" Not only would this impose an intolerable burden, but it could lead to the disappearance of amenities which many local authorities and private persons voluntarily provide for the entertainment of children. Moreover, it might be thought socially unfortunate if parents of very young children were allowed to evade their own responsibilities by shifting the obligation of looking after them to strangers.

In this case, however, our concern is not with children whose "physical and intellectual shortcomings" are such that they "obviously, cannot be judged by adult standards" and for whom extra precautions must be taken. The condition present on these premises is not one that young trail bike riders are unable to recognize and appreciate because of their age. They are not in the same position as those children with whom the courts were concerned in cases such as Bartlett v. Weiche Apartments Ltd., supra, Mitchell et al. v. C.N.R. Co., supra, and Whaling et al. v. Ravenhorst, supra; and the condition of the premises in this case, unlike the condition of the premises in cases such as Veinot v. Kerr-Addison Mines Ltd. (1974), 1974 CanLII 20 (SCC), 51 D.L.R. (3d) 533, [1975] 2 S.C.R. 311, 3 N.R. 94, and Booth et al. v. City of St. Catharines et al., 1948 CanLII 10 (SCC), [1948] 4 D.L.R. 686, [1948] S.C.R. 564, was not a condition about which the occupier had any knowledge superior to that of those on the property.

As stated earlier, minors entrusted with the operation of motor-powered vehicles of this nature are required to meet the ordinary standard of care of a reasonable person in the circumstances. An occupier's duty towards young trail bike riders is no different than his or her duty towards older trail bike riders; a danger which cannot be characterized as unusual to the latter, will not be found unusual to the former. In each case, riders using the road on this particular property (whether they are, say, 14, 18 or 20 years of age, or more) can be expected to observe the obvious obstruction to their

view and to exercise reasonable care for their own safety and the safety of others by bringing their motor bikes under control and operating them with the care and attention demanded by the situation.

Nor does the age of the trail bike riders render the doctrine of allurement applicable to this case. That doctrine applies where an occupier has reason, because of the nature of the property or some artificial attraction thereon, to anticipate the presence of children (usually trespassing children) whose vulnerability, immaturity and want of judgment are such that they will not likely discover or appreciate the risks of injury which they may encounter. The doctrine cannot be invoked in the case of teenagers, who are required to conform to the reasonable person standard or who, in any event, know and understand the condition of the property, for the purpose of imposing a greater duty on an occupier than the duty owed to others similarly obliged to operate their vehicles in conformity with the ordinary standards of reasonable care.

It is, of course, true that trail bike riders seek out the rough terrain found on lands such as gravel pits in order to develop and demonstrate their skills and abilities in handling a motor bike designed for such conditions. This form of recreational activity has inherent within it, as the necessary safety equipment makes clear, the risk of personal injury. This risk is manifestly increased when these bikes are driven negligently or without due regard to the existing topographical features or physical conditions of the area. Where the hazards are actually known, or are so obvious that persons participating in the activity can reasonably be expected to observe and avoid them by the exercise of ordinary care, the occupier will not ordinarily be required to warn the participants of self-evident dangers or to alter his or her lands by eliminating all of those obvious conditions that patently spell danger if the requisite standard of care is not exercised. A tacit permission to come onto property as bare licensees does not confer a right to total protection against all hazards. There are, of course, cases where, despite knowledge or obviousness, the unreasonableness of the risk and the likelihood of injury are such that the owner may be obliged to take further precautionary steps. That, however, is not this case. The respondent and Sarel were cognizant of the condition of this road and of the presence of other riders on this day. Had they each exercised ordinary care and prudence, the accident would not have happened. It might be added that the evidence does not indicate that the road was used as a race course on any prior occasion, and the owner had no actual knowledge of any such use.

While one must have every sympathy for the respondent, we are unable to find any basis in law upon which the appellant can be held liable for this terrible tragedy. The accident, in our opinion, was proximately caused by the combined negligence of the respondent and the defendant Sarel and, having regard to all the circumstances, we would deem them equally at fault.

DAMAGES

We turn now to the appeal with respect to damages. Notwithstanding that we have found that the trial judge erred in finding the appellant liable for the respondent's injuries we believe that we should express our opinion on the damages issues which were argued before us.

As we have already said the total damages assessed before the deduction of 10% for the respondent's contributory negligence were $7,023.150. According to the trial judge's reasons, this amount was arrived at in the following manner:

Special damages (agreed upon) $ 250,000

Non-pecuniary general damages
(agreed upon) 170,000

Present value of the cost of future care, including gross-up 5,709,702

Present value of the loss of future employment income to age 65 567,020

Present value of pension beginning at age 65 11,992

Investment management fee 314,436

TOTAL $7,023,150

> The appellant has made the following submissions with respect to the assessment of damages:

1. The trial judge made certain arithmetical errors in calculating the total damages amount.

2. The trial judge erred in failing to reduce the award for loss of future employment income to take account of contingencies.

3. The trial judge erred in failing to reduce the award for the cost of future care to take account of contingencies.

4. The trial judge erred in awarding a gross-up for income tax on the cost of future care award; alternatively, if gross up is an appropriate head of damages, the amount allowed by the trial judge is too great.

5. There is duplication with respect to certain items of damage.

6. The trial judge erred in awarding a 5% investment management fee.

We have already referred to the devastating injuries which the respondent suffered. In addressing the appellant's submissions we shall make no more reference to the evidence than is necessary to deal with the point raised.

1. The trial judge made certain arithmetical errors in calculating the total damages amount

The reasons for judgment do not set forth all of the component parts of the assessment. There is no dispute that the trial judge intended to rely upon evidence given by Murray A. Segal, an actuary called to give evidence on behalf of the respondent, as the basis for his award. This evidence is compendiously set forth in a letter dated January 25, 1985, which was entered as an exhibit at the trial. The following calculations are apparent from this letter:

Present value of cost of future care $2,054,366

Gross-up on cost of future care 3,136,324

Present value of loss of future employment income to age 65 507,020

Present value of loss of pension income beginning at age 65 11,992

TOTAL $5,709,702

Having regard to the foregoing evidence the parties are agreed that the reasons contained these two errors:

(1) The trial judge counted twice the amount of $519,012, which represents the present value of the total of loss of future employment income and pension income ($507,020 + $11,992). This amount ($519,012) was included in error as part of the present value of the cost of future care which, in the trial judge's reasons, totalled $5,709,702, including gross up. It was counted a second time, correctly, as loss of future income. The correct amount for this part of the damages should be $519,012 less than $5,709,702, or $5,190,690.

(2) In counting lost employment income the second time, the trial judge used the amount of $567,020 rather than the correct amount of $507,020. The resulting error is $60,000.

The parties are agreed that the reasons contain a third error which flows from the first two errors made. It lies in the calculation of the investment management fee of $314,436. This fee is based on 5% of the total of the cost of future care (including gross up) and the loss of future income. The trial judge said that this was $6,288,714 but this amount was, by reason of the first two errors, $579,012 too much. The correct figure is $5,709,702.

The parties differ on how much should be deducted from the award by reason of this error. It appears that the difference lies simply in the fact that the appellant has recalculated the investment management fee on the initial basis of 90% (after deducting 10% for the respondent's contributory negligence) of $5,709,702 and added the resulting amount to the total of the first two errors, $579,012. On the other hand, the respondent has applied the 90% to the total of the three reductions. The parties do not disagree that, with respect to the calculation of the fee for investment management, the starting figure should be $5,709,702. We think that the respondent's approach is the right one.

Before leaving this part of our reasons we would observe that the kinds of errors which we have been discussing should not be made the subject-matter of an appeal. If the clear errors in the reasons had been brought to the attention of the trial judge, undoubtedly he would have corrected his findings before the formal judgment was prepared. Even after it was signed and entered the formal judgment could have been amended on a motion, on consent, to the trial judge.

2. The trial judge erred in failing to reduce the award for loss of future employment income to take account of contingencies

The trial judge's reasons respecting the loss of future income from employment are [at pp. 205-6]:

> The only career in which the plaintiff ever expressed an interest was that of a policeman. Because of the stability of his family environment I find that the plaintiff would probably have earned more than the national average and that the negative and positive contingencies balance each other. I find that the plaintiff would probably have earned an average of $20,000 a year.
>
> In computing lost future income, no deduction is made because of the plaintiff's life expectancy having been reduced. He is entitled to have the loss calculated using the time until when he will be or would have been 65. Because his income, had he been able to work, would have been subject to tax, he is entitled to the present value of $20,000 a year for his working life expectancy and not to a sum which would

> produce $20,000 a year after tax. Using 2.5 per cent to determine the present value, that figure is $567,020.

We have already noted that the correct amount for the present value of the loss of future employment income is $507,020 and not $567,020.

The appellant submits that "traditionally" courts have reduced lost income damages by some percentage amount in order to reflect the uncertainties of future employment. The respondent's basic reply to this is that there is no mandatory requirement that there be a deduction for contingencies in every case and that on the evidence in this case the refusal to make a deduction is reasonable.

On the basis of the evidence adduced and the way in which the trial judge's reasons are expressed we think that the appellant is correct in its contention that the trial judge did not find that the respondent would likely have become a police officer. If he had made this finding then he would have used a higher amount than $20,000 to represent the annual income. On the evidence, beginning in 1983 or 1984, the earnings of a police officer would have been somewhat higher than $20,000. However, the reasons, fairly interpreted, indicate that the trial judge found that the respondent would have been a stable and productive member of the work-force and that his income at the beginning of his employment would have been $20,000 a year.

The present value calculation, resulting in the amount of $507,020 (not $567,020), preserves the purchasing power of this $20,000 in terms of 1983 dollars to age 65. However, there was evidence given by Mr. Segal that during inflationary times average salaries and wages have increased at a faster pace than general price inflation when measured over the long term. He said that they increase at 2% per year faster than inflation. This was an average over a 50-year cycle. When this evidence, which was not challenged by the appellant, is taken into account it forms an ample basis supporting the trial judge's conclusion that the negative and positive contingencies balance each other.

In light of the foregoing we would not be justified in interfering with the award on the ground submitted.

3. The trial judge erred in failing to reduce the award for the cost of future care to take account of contingencies

On the matter of the cost of future care the trial judge said [at p. 205]:

> There is no question but that Michael McErlean will be better off in his own home than in an institution. The evidence was uncontradicted as to the cost of his care at

> home, that is the cost over and above the cost-of-living of a person in the position he would have been in if he had not been injured. It set out the cost of two levels of care and the cost of the lower is $77,226 a year.
>
> The evidence was that the plaintiff has a life expectancy of from zero to ten years less than average and I find it is five years less than average.
>
> Of the $77,226 a year required for the plaintiff's special care, $45,137 will not be subject to tax because it will be for eligible medical expenses. The only evidence as to future inflation was that it will average 9 percent a year. Using that figure, the others set out above and a real rate of return on the money invested of 2.5 percent as required by Ont. R. 53.09, it was calculated that it will require $5,709,702 to provide the plaintiff with $77,226 a year, pay tax on the part of the income which will be subject to it, and be all gone at the end of the plaintiff's expected life.

As we have already noted, the correct amount, as agreed upon, is not $5,709,702 but, rather, $5,190,690, comprising $2,054,366 for the cost of future care and $3,136,324 for gross up. We shall deal with the question of gross up in the next part of these reasons. We deal now with the appellant's submission that the trial judge erred in failing to reduce this part of the award to take account of contingencies.

The "uncontradicted" evidence upon which the trial judge relied was contained in a report prepared by Mrs. Jane I. Staub, M.A., C.Psych., relating to the future care of the respondent and its costs.

This report stated that the cost of caring for the respondent in a chronic-care institution would be about $50,000 a year and that the cost of each of two methods of providing home care would be $77,226 and $101,032 or more. The difference between the costs in the two methods of provision of home care is accounted for by the costs of outside help. The more expensive method involves employing two attendants staffed through an agency, one full-time and the other for eight hours a day. The less expensive method involves the hiring of a live-in valet by the respondent's guardian and the staffing of an eight-hour-a- day attendant through an agency.

The report contains the following statements:

> Michael is currently being cared for by his parents, particularly his mother, in their home in Brampton ...
>
> ... I believe that it is reasonable for Mr. and Mrs. McErlean to have Michael's care needs met at home for as long as possible since he is apparently happy living there. Thus, all my remarks will be geared towards enabling this to happen and to have

> Michael's care needs met on a consistent and reliable basis in a manner satisfactory to Michael and his parents.
>
> > Mr. McErlean, 47 years of age on September 7th, 1983, may have a normal life expectancy of 27 years. Mrs. McErlean, 50 years of age on January 16th, 1983, may have a normal life expectancy of 27 years. While it is conceivable, if not probable, that either or both parents could be physically incapable of caring for Michael before 27 years have passed, my proposed care plan will include 27 years (1984 to 2011) as a care-in-the-home plan at which point Michael will be 48 years old. According to Dr. J. Clifford Richardson (May 2nd, 1983 report), Michael's life expectancy may be considered as 10 years less than that of a normal, healthy male, that is until age 64 years. I see no reason to assume that the remaining 16 years of Michael's life need to be spent anywhere but in his familiar home even though both of his parents may have died at earlier times. Therefore, the care- in-the-home plan is envisioned to span 43 years (1984 to 2027) over his expected lifetime.

When the report was entered into evidence counsel for the plaintiff said that counsel for the defendants were agreed that it became evidence of the truth of facts stated in it and that they would not be calling any evidence to contradict it.

The appellant submits that where a cost of future care award is based on the assumption that the plaintiff will be cared for at home, the court should reduce the total amount by a percentage to reflect the possibility that the plaintiff may in the future require intermittent or permanent hospitalization and so will not require constant home care. The following passage in Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al. (1978), 1978 CanLII 12 (SCC), 83 D.L.R. (3d) 480 at p. 488, [1978] 2 S.C.R. 267 at p. 282, [1978] 1 W.W.R. 607, is cited in support of this submission:

> With regard to contingencies, in view of the fact that home care is to be the standard, I think it must be recognized that the duration of such care may be affected by such contingencies as difficulty in staffing a self-contained establishment or the need to enter hospital for special treatment. I think that some contingency allowance is proper and I would be prepared to accept an allowance of 20%.

The respondent's basic responses are:

> (1) The appellant consented to the evidence relating to the cost of future care and undertook not to call any evidence to contradict the plaintiff's evidence.

> (2) The trial judge used the lower of two undisputed estimates as the cost of future care. That decision effectively constituted a deduction "as if for contingencies". The trial judge must have concluded that no further deduction was warranted, particularly as the evidence indicated that there were no problems with regard to staffing at home and that the respondent's injuries, and the quality of care which he was receiving, were such that there did not appear to be any foreseeable need that he enter hospital for special treatment.

We think there is validity in the appellant's submissions. The calculation of these damages is based on the assumption that the respondent's care in the home would be constant throughout the balance of his life. However, by reason of several possibilities, such as the respondent's need for intermittent or permanent hospital care, staffing problems (the direct hiring of a valet presents more problems of this kind than the provision of an attendant through an agency), and the lack of guardian supervision and provision of back-up care by his parents (chiefly his mother) by reason of their incapacity or death, we do not think that this assumption is a reasonable one. We have earlier referred to the respondent's mother's evidence that she would not be able to continue indefinitely to care for the respondent.

In our view, the factors we have just mentioned are genuine contingencies which must be considered. We do not think that they are covered by the "uncontradicted" evidence. As we read the trial transcript relating to the cost of future care, the trial judge was to accept the cost of care figures contained in the Staub report relevant to the method of care he thought was reasonable and appropriate, but the report was not to prevent him from exercising his own judgment on issues that were not factual cost amount issues. For example, as we have just indicated, the trial judge had to choose the appropriate method of care from the alternatives set forth in the report. He was also required, in our view, to consider from a common-sense point of view the possibilities which could prevent the respondent from having constant home care for the balance of his life.

With respect to the respondent's second response, we do not think that the trial judge's selection of the lower of two estimates of the annual cost of future care constitutes, or was in any way intended to constitute, a deduction for contingencies. The most that can be drawn from his decision in this regard is that he thought that the method of care which could be provided at an annual cost of $77,226 a year was more reasonable than the more expensive method.

During the hearing of the appeal, the question was discussed whether, having regard particularly to the respondent's mother's age and health, it would be more reasonable to find that the annual cost of $77,226 would run for a period more like 20 years rather than for the balance of the respondent's life. After the hearing, counsel for the

respondent asked the court for permission to file evidence of the cost of future care based on $77,226 a year for 20 years after December 1, 1983, and $50,000 a year (representing the annual cost of care in an institution) thereafter for the balance of the respondent's life. We granted this request. According to this evidence the cost of future care, on the basis indicated, would be $1,749,707 and the income tax gross up would be $1,690,058. We shall deal with the gross up issue in the next part of these reasons.

As we have said, we think that the trial judge erred in not considering the matter of contingencies relating to the cost of home care. On the evidence in this case, we do not consider it probable that the respondent can be provided with constant home care for the balance of his life. The deduction for contingencies could be effected by either following the approach set forth in the preceding paragraph or deducting a percentage of the award of $2,054,366. We appreciate that neither alternative reflects in any sort of an exact way how the duration of home care would be interrupted, although the first alternative seems to us to represent a likely eventuality. We select it because, in the circumstances of this case, it seems less arbitrary (and fairer to the respondent because it defers to the end of the future period the incidence of the lower annual costs) than to deduct a percentage.

In the result, on the evidence before the court, we would have awarded the sum of $1,749,707 for the cost of future care before gross up.

4. The trial judge erred in awarding a gross up for income tax on the cost of future care award; alternatively, if gross up is an appropriate head of damages, the amount allowed by the trial judge is too great

To repeat, in part, what we have already said, the trial judge, relying on the evidence of Murray A. Segal, the actuary called on behalf of the respondent, found that the present value of the cost of future care was $2,054,366 (this is the agreed upon correct amount) on December 1, 1983 ($77,226 a year in constant purchasing power of 1983 money) and held that this amount should be increased by $3,136,324 to cover the estimated amount of income tax that would be payable on the income from it. The appellant, in challenging this increase for gross up, makes the following basic submissions:

(1) The respondent is not entitled in law to a gross up on an award for the cost of future care.

(2) Even if the respondent is entitled in law to claim a gross up, the award should not have been made because any loss with respect to the effect of income tax was avoidable.

(3) If gross up is an appropriate head of damages the amount awarded by the trial judge is too great.

Before addressing these submissions we shall refer, at greater length, to Mr. Segal's evidence. A substantial part of it is conveniently outlined in a letter which was filed as an exhibit at the trial. The relevant part reads:

> As I mentioned in previous correspondence and in the testimony I gave in court, it seems to us that a practical approach to determining the amount by which the portion of the award for the ongoing cost of Mr. McErlean's care and treatment [should be increased] would be to assume: firstly, that Mr. McErlean will use his award and the net investment income thereon remaining after he pays income tax on that investment income at the end of each year in which it is earned to provide himself with a stream of payments calculated to last for the period of his reduced remaining life expectancy which are constant in terms of real purchasing power but which will therefore increase in nominal terms at the assumed rate of general price inflation during that pay-out period; and secondly, that the combined rates of income tax imposed by the federal and provincial governments will remain constant, but that personal exemptions and deductions as well as the income brackets to which those rates of tax will be applied, will also increase in the future at the same pace as that assumed rate of general price inflation. It should be noted that this approach assumes that the fund resulting from the award and the net investment income thereon remaining after the injured person pays income tax on that investment income will be drawn upon to meet his or her ongoing future costs as they are being incurred over the expected pay-out period, i.e. that the fund will be "self-liquidating" and will be completely exhausted by the end of that period.
>
> If the amount of the portion of the award that Mr. McErlean is granted for his loss of future income will be $519,012 and the investment income that he will derive from that portion of the award is taken as the base onto which would be added the investment income that he will derive from the portion of the award for the ongoing cost of his care and treatment
> -- and if the net amount of that latter portion of the award in the absence of income tax considerations will be $2,054,366 -- we estimate that the above approach would result in a gross up to offset the effects of income tax on the investment income that he will derive from that latter portion of the award of $3,136,324 (i.e. about 153% of the net amount of $2,054,366). The resultant grossed up portion of the award for the ongoing cost of Mr. McErlean's care and treatment would therefore amount to a total of $5,190,690
> (i.e. $2,054,366 plus $3,136,324).

> The gross up calculations referred to above take full account of the portion of the ongoing cost of Mr. McErlean's care and treatment that would be recognized as eligible medical expenses under section 110(1)(c) of the Canadian Income Tax Act and of the other deductions and exemptions that he can claim under that Act.

With respect to the last paragraph Mr. Segal gave evidence, which is reflected in reasons of the trial judge which we have quoted earlier, that he determined that of the $77,226 a year $45,137 would not be subject to tax because it would be eligible for deduction as a medical expense. Further, in his calculations Mr. Segal relied upon a long-term investment rate of 111/2% per year and a future inflation rate of 9% per year.

We turn now to the appellant's basic submissions.

(1) The respondent is not entitled in law to a gross up on an award for the cost of future care

The appellant submits that the Supreme Court of Canada in the "trilogy" (Andrews et al. v. Grand & Toy Alberta Ltd. et al. (1978), 1978 CanLII 1 (SCC), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577; Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al., supra; and Arnold et al. v. Teno et al. (1978), 1978 CanLII 2 (SCC), 83 D.L.R. (3d) 609, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272) has held that a plaintiff is not entitled to an award to cover tax on income from an award of future care. This very submission was considered and rejected by a five-member panel of this court in Fenn et al. v. City of Peterborough et al. (1979), 1979 CanLII 77 (ON CA), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174, 9 C.C.L.T. 1. The conclusion in Fenn is expressed on pp. 455-6 O.R., pp. 230-1 D.L.R., as follows:

> (e) Income Tax
>
> In his reasons for judgment the trial Judge spoke of the income tax burden that would fall upon the plaintiff and the necessity of providing the cost of future care as a tax paid sum in the plaintiff's hands. It does not appear in his assessment, however, that any specific allowance was made to cover the tax burden. The appellants took the position that the Supreme Court of Canada in Teno, Thornton and Andrews established a rule of law that the extra amount of money required to pay tax to ensure the cost of future care will be tax paid in the plaintiff's hands is not an allowable claim. We do not agree that those cases stand for that proposition. It is true that in none of those cases was a claim for amounts sufficient to meet tax liability allowed, but it appears that the claims failed for want of adequate proof. In Andrews (p. 260 S.C.R., p. 475 D.L.R.) and Teno (p. 325 S.C.R., p. 633 D.L.R.)

> reference was made to the possibility that the tax laws might be amended to afford more generous treatment to accident victims. Thus far, there has been no legislative response.
>
> It is important, however, to keep the tax question within its proper limits. The defendants are not obliged to provide a sum to pay the taxes that will be incurred on the interest income on the general damage award. We are concerned simply with the amount for future care. However, it must be recognized that other amounts which generate income will propel a plaintiff into a position where the tax rate applicable on the amounts in question will be higher. However, as was pointed out in both Andrews and Teno, the existence of s. 110(1)(c)(iv.1) of the Income Tax Act diminishes the problem. The tax problem is further complicated by the fact that the funds paid to a plaintiff such as Sandra Fenn out of a self-exhausting fund are part capital and part income and it is only the income portion which is subject to tax. In this case there was evidence given as to the tax burden that would fall upon the plaintiff but this evidence is not sufficient to enable us to make any specific assessment because this evidence fails to take into account the fact that the funds payable to Sandra Fenn are mixed capital and income and further the tax calculations mixed inextricably the tax liability on the income from her general damage award and the cost of future care. Thus, despite the commonly recognized fact of the inevitability of death and taxes, the evidence in this case falls short of enabling us to make a specific assessment under this head.

The appellant submits that since a gross up award was not in fact made in Fenn the foregoing statement should be regarded as obiter dictum only which should be followed. We do not agree with this submission.

First, we do not regard this statement as obiter dictum. The court held that while the plaintiff was entitled to claim an amount for gross up the claim failed for lack of sufficient evidence. We note that "the fact of some tax liability" was treated by the court as a "contingency which should be weighed in favour of the plaintiff" (p. 458 O.R., p. 232 D.L.R.). Courts in Ontario following Fenn have, where justified by the evidence, awarded damages in the form of a gross up with respect to awards for the cost of future care. We are not aware of any decision in which a court has refused to do so.

Secondly, and with respect to courts in other provinces which have taken the contrary view, we see no reason to differ with this court's interpretation of the trilogy in Fenn. As a matter of principle, regard has to be paid to the impact of taxation on income from the award for the cost of future care. If this impact is ignored, as the appellant submits it should be, then the award cannot accomplish its prime purpose, which is to assure that the plaintiff should be adequately cared for during the rest of his life. The

effect of the impact of taxation on the award would be to require capital portions of the fund created by the award to be expended sooner than they otherwise would be, with the inevitable result that the fund would be exhausted before it has served its purpose.

We see no reason in principle why an award of damages for the cost of future care should be treated differently from an award of damages for dependants under fatal accidents legislation where a gross up for income tax is recognized: see Keizer v. Hanna et al. (1978), 1978 CanLII 28 (SCC), 82 D.L.R. (3d) 449 at pp. 462-3, [1978] 2 S.C.R. 342 at p. 353, 3 C.C.L.T. 316, and Lewis v. Todd et al. (1980), 1980 CanLII 20 (SCC), 115 D.L.R. (3d) 257 at pp. 270-1, [1980] 2 S.C.R. 694 at pp. 713-4, 14 C.C.L.T. 294. The uncertain or speculative nature of the calculation of the award, if it be considered to be a policy basis for refusing to make it, is exactly the same in cost of future care and in fatal accident cases. If it does not stand in the way of compensating for taxes in the latter kind of case then it should not be a relevant ground of denial in the former kind.

The uncertain and speculative nature of future tax liability, however, should be relevant to the determination of the amount of the award and we shall return to its effect later in these reasons when we consider the appellant's third basic submission.

(2) Even if the respondent is entitled in law to claim a gross up the award should not have been made because any loss with respect to the effect of income tax was avoidable

The appellant submits that since it is open to the respondent to consent to a judgment for a structured settlement under s. 129 of the Courts of Justice Act, 1984 (Ont.), c. 11, under which damages would be paid periodically, and income tax avoided, if he refuses to consent, no gross up should be allowed. While we accept, of course, that the respondent is under a duty to mitigate his damages and should not be able to recover losses that are reasonably avoidable, we do not think that if he does not agree to accept periodic payments he should receive less than what he is entitled to as part of a lump-sum award. Whether or not a better system of compensation could be devised, and we are aware of various reform proposals in this regard, the respondent is legally entitled to a lump-sum judgment and is not legally obliged to accept periodic payments. He should not be penalized for asserting a claim to which he is entitled.

Further, as indicated, a judgment providing for periodic payments requires the consent of all parties and we are not persuaded that a party having consented to such a judgment would have a right of appeal, or at least, an unencumbered right of appeal from it. A party should not be forced into a position where his or her right of appeal is fettered.

(3) If gross up is an appropriate head of damages the amount awarded by the trial judge is too great

We shall first consider this particular submission on the basis on which it was presented, that is, on the basis of the amount of the cost of future care accepted by the trial judge, $2,054,366, and the amount of the gross up that he applied, $3,136,324. We shall then consider the question of gross up with respect to the amount we would award for the cost of future care, $1,749,707.

In support of the general submission that the amount of the gross up awarded by the trial judge is too great, the appellant advanced the following specific arguments.

> (a) The appellant submits that the trial judge erred in accepting the evidence of Mr. Segal and of Professor Carr, an economist, on behalf of the respondent, that the award would earn interest at 11.5% a year and that the future inflation rate would be 9% a year. The evidence was that as of December 1, 1983, the rate of interest on long-term Government of Canada bonds was 111/2% a year. (Between that time and the time of the trial, this interest rate had moved up.) As far as the future inflation rate is concerned, the appellant referred us to other trial court decisions where, on the basis of evidence before the court, lower future inflation rates were accepted. It is, at this point, apposite to refer to the following statements, both of Dickson J.: "In an adversary system it is the parties themselves, and not the court, who must come forward with claims for mitigation and with credible evidence to support those claims: see Karas v. Rowlett, 1943 CanLII 53 (SCC), [1944] S.C.R. 1." (Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al., supra, at p. 485 D.L.R., p. 277 S.C.R.). "... a Court, in our adversarial system, is largely confined to the evidence adduced at trial, and to argument related thereto" (Lewis v. Todd et al., supra, at p. 268 D.L.R., p. 709 S.C.R.).

In the present case, the appellant neither challenged the evidence of Mr. Segal and Professor Carr by cross-examination on the issues in question, to show that the figures they used should be lower, nor called evidence to contradict their evidence. Indeed the appellant's actuarial witness, Mr. Anderson, following the suggestion of the trial judge, availed himself of the opportunity to examine thoroughly Mr. Segal's evidence. Following this examination he agreed in his evidence that "by and large [he had] no quarrel with the calculations, with the figures given by Mr. Segal". On the last day of the trial this position was confirmed by counsel for the appellant who informed the trial judge:

> [S]o far as Mr. Segal's calculations are concerned, it's simply my intention to advise the Court that on his basis we have no quarrel with those figures. Mr. Anderson has reviewed them and we have no quarrel with them.

Whatever quarrel the appellant had with the respondent's claim it did not relate to the evidence of the investment and inflation rates which was presented by the respondent's expert witnesses.

In light of the foregoing, we cannot say that the trial judge was wrong in accepting the evidence of Mr. Segal and Professor Carr on this particular point. This is not to say, however, that the uncertain or speculative nature of this evidence should not have been taken into account in arriving at the ultimate award for the gross up.

> (b) The appellant also submitted that Mr. Segal's evidence, and hence the trial judgment, was in error in taking the respondent's total income into account in determining the rate of taxation to apply. This point has already been decided by this court, adversely to the appellant's submission: Nielsen et al. v. Kaufmann (1986), 1986 CanLII 2717 (ON CA), 54 O.R. (2d) 188 at p. 205, 26 D.L.R. (4th) 21 at pp. 38-9, 36 C.C.L.T. 1.
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> (c) Finally, the appellant has submitted that the amount of the gross up as calculated by the trial judge should be reduced to reflect the fact that some or all of the fund may or should be invested in tax sheltered securities and, also, the fact that all of the uncertainties relating to the future impact of income taxes appear to have been resolved against the appellant. We think that there is some substance to the second part of this general submission. On the particular evidence in this case relating to the kind of investments in the fund, to which we shall refer when considering the investment management fee, it is difficult to give effect to the first part.

In Lewis v. Todd et al., supra, at pp. 267-8 D.L.R., pp. 708-9 S.C.R., Dickson J. said:

> [T]he award of damages is not simply an exercise in mathematics which a Judge indulges in, leading to a "correct" global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the trial Judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award

> which in all the circumstances seems to the Judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.

This reflects a recognition that, despite the superficial appearance of accuracy and precision in the calculation of damages when actuarial and economic evidence is used, there is, underlying the process, great scope for error. With respect to the future impact of income taxation the variables and uncertainties include: future investment rates; future inflation rates; the components of the fund which comprise the award -- interest income, dividends and capital gains, all of which receive different tax treatment; future tax rates; future allowable exemptions and deductions in the computation of taxable income; and the amount of the plaintiff's income from other sources.

In the present case, the trial judge accepted all of the respondent's expert evidence and, more significantly, its ultimate results, uncritically. In so doing, we think, he erred. We appreciate that the explanation for this may well be that he did not receive the assistance from the appellant to which he was entitled. If he had considered the result of the gross-up calculation, which was substantially larger than the basic award for the cost of future care itself (in fact 153% of it), he might well have been compelled to conclude that it was inordinately high. He gave no consideration to the factors to which we have already referred relating to the uncertain and speculative nature of future tax liability, including the possibility of legislative changes that might afford more substantial, if not complete, relief to persons in the position of the respondent.

If the trial judge had addressed the matter of his residual discretion and adjusted the award accordingly, it may be that there would have been no basis which would justify our interference with the result. Since he did not address the matter and since we are of the opinion that the award for gross up is inordinately high, it is our duty to make the adjustment. Exercising our best judgment, we would have reduced the award for gross up by one-half, i.e., to $1,568,162.

As we indicated in the preceding part of these reasons we think that a more appropriate amount for the cost of future care would be $1,749,707. The gross up on this amount, as is also indicated in the preceding part, would be $1,690,058. For the reasons given with respect to the trial judge's award we think that this latter amount should be reduced by one-half, i.e., to $845,029. We appreciate that this is still a substantial amount but we are of the view that to reduce it further would impose too great a risk on the respondent. The real solution to the problems of gross up must lie in the area of legislative reform. We advert to it briefly in the following paragraphs.

We repeat an observation made by this court in Nielsen et al. v. Kaufmann, supra, at p. 206 O.R., p. 39 D.L.R., and add a further observation:

> The foregoing indicates that what is a proper amount for gross-up will depend largely on the facts presented to the court. The results in individual cases can, accordingly, vary widely. If a substantial degree of uniformity of treatment is considered desirable in these cases, then it appears to us that this is a matter for legislative intervention. The application of a precise statutory formula would, of course, be bound to involve certain arbitrary features. This, however, would be a policy matter appropriate for the Legislature.

If fundamental approaches to the problem, such as amending the Income Tax Act, 1970-71-72 (Can.), c. 63, to exempt from liability for tax income from a fund established by an award or settlement to provide for the cost of future care of injured persons are not taken, it may be that, more modestly, steps could be taken to provide for uniform investment and inflation rates based on reasonable data and adjusted from time to time on the basis of current data. (Cf. the provision in rule 53.09 of a standard discount rate reflecting "the difference between estimated investment and price inflation rates".) Such a provision would cover important components in the initial calculation of a gross up and would result in a larger measure of uniformity and predictability with respect to these awards than we now have.

5. There is duplication with respect to certain items of damage

We mention this item for the sake of completeness. It was raised in the appellant's factum and dealt with in the respondent's factum. It was not, however, pursued in the oral argument and we shall, accordingly, not deal with it.

6. The trial judge erred in awarding a 5% investment management fee

The trial judge's reasons on this issue are:

> As investment management will be required for the money awarded for future care and lost future income, and as the only evidence as to how much that would be was that it would probably be 5% of the amount to be invested, I assess the plaintiff's damages under that head at 5% of $6,288,714 which is $314,436.

As we have said, the correct amount is $5,709,702 and not $6,288,714.

The appellant submits that the management fee is not a reasonable or fair item of damages because it is not needed or, if it is, the benefits of the investment decisions resulting from proper management will offset the cost of the fees.

Both of these submissions are covered by the evidence of Mr. Segal, which is not challenged. He testified that the appropriate investment of the award would be in Government of Canada bonds. In his view, the purpose of the award was not to maximize the return (as, possibly, with other kinds of investments) but was to provide a stream of payments to give a certain level of care and treatment for a seriously injured person "and to take no risk".

It was suggested to Mr. Segal that if the award were put into bonds an investment manager would not be needed. He replied that even for a Government of Canada bond portfolio "you would need a certain degree of monitoring". That was why he testified in favour of "only 5%" of the original capital. If the purpose was to attempt to maximize the return, the rates charged by investment counsellors would be "in the order of one to one- half percent per year of the capital fund". This could result in an allowance for investment expense that was more than the 5% of the original capital.

We do not think that it can be said that someone in the respondent's position would not need assistance in the form of investment management or that, having regard to the unchallenged evidence, the amount of the fee assessed was unreasonable.

On the basis of the evidence before the court and of the amounts we would award ($507,020 for future employment income, $11,992 for loss of pension income, $1,749,707 for cost of future care, and $845,029 for gross up for a total of $3,113,748) the investment management fee of 5% would be $155,687.

Summary of our conclusions on damages

In the result, if we had found the appellant to be liable, we would have altered the award of the trial judge, before giving effect to any apportionment of liability, so that it would comprise the following amounts:

Special damages $ 250,000

Non-pecuniary general damages 170,000

Present value of the loss of future employment income to age 65 507,020

Present value of the loss of pension income beginning at age 65 11,992

Present value of the cost of future care 1,749,707

Gross up on cost of future care 845,029

Investment management fee 155,687

TOTAL $3,689,435

CONCLUSION

For the foregoing reasons the appeal is allowed, the judgment against the appellant set aside, and the action against it dismissed. In the circumstances, there will be no order as to costs with respect to the proceedings below or this appeal. The balance of the judgment below will be varied to accord with these reasons.

Appeal allowed.