C.A. No. 02848

NOVA SCOTIA COURT OF APPEAL

Chipman, Freeman and Roscoe, JJ.A.

Cite as: Corkum v. Sawatshy, 1993 NSCA 201

BETWEEN:	)	
	)	
BOYD CORKUM	)	Randall P. H. Balcome
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
BARTLEY SAWATSKY and	)	David A. Miller, Q.C.
CHARLES SAWATSKY	)	for the Respondents
	)	
Respondents	)	
	)	
	)	Appeal Heard:
	)	November 15, 1993
	)	
	)	
	)	
	)	Judgment Delivered:
	)	December 15, 1993

THE COURT: The appeal is allowed and the cross-appeal is dismissed as per reasons for judgment of Chipman, J.A.;

Roscoe, J.A., concurring and Freeman, J.A., dissenting by separate reasons.

CHIPMAN, J.A.:

This is an appeal by the plaintiff and a cross-appeal by the defendant from an award of damages for personal injuries made in the Supreme Court.

The appellant, then age 53, sustained a serious whiplash injury when his vehicle was struck by that of the respondents on May 26, 1989. The respondents admitted liability and further by letter from their counsel dated September 28, 1992 admitted that the injuries rendered the appellant:

> "totally and permanently disabled from the duties of his then employment and for all employment for which he was capable of engaging by reason of education, training or experience."

The appellant lives with his wife in Scotts Bay, Kings County, on a large farm and woodland property. He has a grade seven education and has spent his entire working lifetime as a farmer, woodsman and mill operator. He has no formal trade training and is entirely self-taught in his various skills. He worked very long hours and had no spare time for hobbies or recreation. He was in good health prior to the accident.

The appellant began accumulating property about 30 years ago when he acquired a farm from his brother. Later he bought the family homestead and surrounding lands from his father. He then acquired a third farm and over the years he purchased woodlots. At the time of the accident he had a total of 1,028 acres of property in the Scotts Bay area. The principal businesses carried on by him were logging, milling and Christmas tree growing. He also had beef cattle and pasture lands. He employed one man full time since 1986, as well as seasonal workers in the logging and milling operations.

The appellant and his wife had five children, one of whom died in infancy and another in 1986 at the age of 22. His son and one daughter live in the vicinity and the other daughter has moved away. The son has a trucking business but has, from time to time, assisted his father in the milling operation.

There was evidence relating to the appellant's injury and treatment. Extensive treatments of the neck and

associated pain were of no avail, resulting in continuous pain and restriction of body movements. As well, an emotional component to his disability has developed and he suffers from emotional distress and depression as a result.

The trial took place in Kentville on September 29 and 30, 1992 and in Halifax on October 6 and 13, 1992. The trial judge's lengthy written decision was filed January 25, 1993.

The trial judge reviewed the evidence consisting of that of the appellant and his wife, medical reports filed as exhibits, accounting evidence called on behalf of both parties, evidence of the value of the appellant's property, actuarial evidence and evidence relating to the forest business. He assessed non-pecuniary damages at $60,000.00. The parties do not now challenge the appropriateness of this award and it need not be further considered.

The issue of pecuniary damages was much more complicated.

The appellant, in his own evidence, did not testify with respect to his earnings, nor did he shed any light on whether, as a result of his labours, he was able to acquire money's worth through such things as heat for his home and other buildings, food for the family or other goods in kind. Nor did the appellant establish the value of any labour which he had provided in the construction or repair of the many buildings on the property. The respondents' appraiser described these buildings in considerable detail. Their condition varied all the way from poor to very good. The report filed by the appellant's accountant simply states that renovations and construction were performed by the appellant on his residence, the barn, a warehouse, mills and a welding shop during the period 1965 to 1975. There was no evidence of recent contributions or their value and none of the efforts referred to in the report related to the years 1981 - 1990 which were employed by the accountants. The sole evidence offered in support of his claim for monetary loss was presented through Carl Kent, C.A., whose report dated January 11, 1991 was delivered the following month to the respondents' solicitor. The report was premised on the assumption that the appellant would not recover from his injuries so as to resume his work and it purported to

calculate his monetary loss resulting therefrom from the date of the accident until the normal retirement age of 65. Kent's report reviewed the nature of the appellant's business and contained tables which reflected his income for tax purposes in the returns for the year 1981 to 1989. Here are the figures produced by Kent for net farm income before depreciation and income tax adjustments:

1981	**1982**	**1983**	**1984**	**1985**
$9,006.	$4,632.	$18,581.	$(11,519.)	$1,508.

1986	**1987**	**1988**	**1989**	**10 Months of 1990**
$(1,360.)	$6,760.	$13,002.	$6,667.	$39,072.

On its most favourable interpretation (a four year average) such income averaged about $7,100.00 before the accident. Kent acknowledged that the appellant's business was only "marginally profitable at the best of times". However, Mr. Kent took the view that as a result of the appellant's inability to work as before, the business suffered substantial losses to the end of 1990. These not only wiped out the income but generated a large net loss. Mr. Kent then projected these losses as continuing until the normal retirement age of 65. He took four different approaches, all based on the premise that the appellant would have experienced a 10% growth over the years had the accident not occurred, would have continued to maintain his businesses with a profitable return, but as a result of the accident would instead suffer large losses which he projected through to the year 2000 when the appellant would attain the age of 65. On this basis, he presented a total damage claim for future loss of income of approximately $823,963.00 in his revised report of August, 1991. These numbers were arrived at by averaging his four different methods of calculation.

The trial judge considered that Mr. Kent's approach and conclusions were seriously weakened on cross-examination and he accepted in preference to the evidence of Mr. Kent that of John B. Carter, a chartered accountant who

testified on behalf of the respondents.

Mr. Carter prepared a report, subsequently amended, which projected past and future loss of income based on the raw data developed in the Kent report, and making assumptions on the basis of other evidence on behalf of the respondents indicating a much less optimistic outlook for growth of the appellant's business. Mr. Carter also made projections of future cash flows based on a discount rate of 2.5% as prescribed in Civil Procedure Rule 31.10(2) and based on a 5% rate as calculated by Brian Burnell, an actuary, which he and Mr. Burnell both opined was a more reasonable rate over an eight year term.

The trial judge much preferred and accepted the evidence of Carter to that of Kent. In particular, he rejected Mr. Kent's projections of a 10% growth in earnings over the years. He said:

> "I find that but for this accident Mr. Corkum's operations would have continued much the same, or worse, but not better as they had before May, 1989."

The trial judge also considered the evidence and report of Arthur Speed, an appraiser, and stated that he accepted his opinion, his methodology and the assumptions upon which it was based. Mr. Speed's conclusion as to the gross value of the plaintiff's entire holdings was that they were worth $735,000.00 and that such sum could be realized, if not on a sale en bloc, then by way of an orderly disposition of the various parcels over a period of two years.

Accepting the evidence of Carter, Speed and the other testimony on behalf of the respondents as to the outlook for farming and forestry, the trial judge calculated the pecuniary loss.

As to the past loss, he relied on Schedule 2 of Mr. Carter's report:

	1991	**1990**	**1989**	**TOTAL**
Actual Revised Loss	$(29,137)	$(30,272)	$(6,667)	$(66,076)

Weighted Average Net Income Expected (Based on $7,108.00 per Schedule 5)	7,542	7,836	7,463	$ 22,841
Excess Cost and Lost Earnings	36,679	38,108	14,130	$ 88,917
Section B Automobile Insurance Benefits	(6,673)	(7,280)	(4,340)	$(18,293)
Net Loss of Past Earnings	$30,006	$38,028	$ 9,790	$ 70,624

It will be noted that this calculation includes not only the net income but the losses incurred to keep the operation floating. The total of these costs and lost earnings was $88,917.00 from which $18,293.00 in Section B automobile insurance benefits paid by the appellant's insurer was deducted. The net loss of the past earnings was $70,624.00.

The trial judge then concluded that these ongoing losses should not be imposed upon the respondents indefinitely, but that the appellant had a duty to mitigate his loss by liquidating his assets. He found on the evidence that as early as 1991 the appellant must be taken to have realized that he was totally disabled and would remain so for the balance of his working life. In January of that year the Kent report, based on this assumption, was prepared. The trial judge found that the appellant was entitled to wait a reasonable period of time to evaluate the effects of his injuries, but by early 1991 the time had come to move. The trial judge found that it was reasonable for Mr. Carter to use January 19, 1991 as the trigger date from which the appellant should have begun his efforts to dispose of his assets and mitigate his loss. Allowing two full years for this process and assuming the full loss on the basis of none of the property having been disposed of prior to the end of those two years, he fixed the cost of maintaining the business until the assumed disposition (December 31, 1992) as found by Mr. Carter to be $40,161.00.

Future earnings were arrived at by taking the weighted average net income of $7,108.00 indexed annually to December 31, 1992 with a 5% inflation factor. A multiplier of 7.359 was provided by the actuary to arrive at the present

value of these earnings until the age of 65, using the discount rate of 5%. The result was $54,914.00.

These numbers ($70,624, $40,161 and $54,914) added up to a gross loss of $165,699.00.

The next exercise carried out by the trial judge was to consider the effects of mitigation which he felt should be undertaken in the form of an orderly disposition of the appellant's properties completed as of December 31, 1992. From the estimated proceeds of the sale was deducted the replacement of the personal residence (or its exclusion from the sale process), disposition costs on the basis of 5% real estate commission on gross proceeds of $750,000.00 and debt associated with the property of $194,488.00, giving net proceeds of $484,038.00 after giving account to reduction of the Farm Loan Board debt. The annual real value of these net proceeds by applying the discount factor of 5% is $12,101.00. By taking a multiplier of 6.411, (incorporating the discount rate of 5%) and an expected working life of 7.077 years until age 65, the present value of additional sources of future funding was $126,658.00. This sum was deducted from the gross loss of $165,699. It represented, the trial judge considered, the additional value of funding available to the appellant as a result of the sale of the property giving no allowance for inflation and only up to the age of 65, all of which would be a benefit flowing to the appellant as a result of his deemed mitigation exercise.

Carter and Burnell considered that an appropriate discount rate was 5%, not the 2.5% fixed by Civil Procedure Rule 31.10(2).

The trial judge accepted that a 5% discount rate was more appropriate than the 2.5% rate set out in the Civil Procedure Rules and he referred to **Armstrong v. Baker and McCrindle** (1992), 11 N.S.R. (2d) 239 as authority for the proposition that where the 2.5% rate was not realistic as reflecting the difference between interest rates and inflation, it was open to either party at trial to adduce evidence to show a more appropriate rate. The result here was that the 5% rate, which was less favourable to the appellant in these calculations, was accepted.

Finally, the trial judge dealt with the respondents' contention that but for the appellant's settlement of his claim against his own insurer on the eve of trial for $9,000.00, a full stream of payments was available to him for life, and that by virtue of the provisions of the **Insurance Act**, the defendant was released to that extent. The trial judge rejected this contention referring to the decision of this Court in **MacKay v. Rovers** (1987), 79 N.S.R. (2d) 237. He therefore deducted only the sum of $9,000.00. The award for pecuniary damages may thus be summarized:

Loss of Past Earnings	$ 70,624.00	
Cost of maintaining business property until disposition	$ 40,161.00	
Loss of Future Earnings	$ 54,914.00	
Gross Loss		$165,699.00
Less Section B Benefits Paid	$ 9,000.00	
Subtotal	$156,699.00	
Less Present Value of Additional Sources of Future Funding	$126,658.00	
Balance	$ 30,041.00	

To these figures was added the sum of $60,000 for non-pecuniary damages. The trial judge also awarded prejudgment interest at 7% per annum and costs.

The appellant challenges the trial judge's conclusion that he was obliged to mitigate his loss by liquidating the extensive landholdings which he could no longer manage. He further claims that it was wrong to credit the respondents with the presumed income that would be enjoyed from the deemed date of liquidation to the age of 65 commuted at the discount rate of 5%. The appellant claims that no such credit should have been allowed. The appellant also claims that the

trial judge erred in calculating the present value of future streams of monies by using a discount rate of 5% rather than 2.5% as required by Civil Procedure Rule 31.10(2). The appellant also invites this court to revisit the calculation of pecuniary damages generally, based on the appellant's diminished earning capacity as a result of the accident.

The respondents cross-appeal on the ground that they should have received credit for the future stream of Section B Benefits which, in their submission, the appellant was entitled to receive from his automobile insurer and which was available to him.

Thus there are three issues which may be restated:

(1) The duty of the appellant to mitigate, its extent, and whether the damages should be recalculated based on diminished earning capacity.

(2) The proper discount rate.

(3) Whether credit should be given for future payments to which the respondents say the appellant was entitled and had available to him under the Section B Benefits of his own motor vehicle policy.

1. CALCULATION OF DAMAGES AND MITIGATION:

In addition to challenging the assessment by the trial judge based on a liquidation of his property, the appellant submits that this court should award a larger sum for pecuniary damages, based on the appellant's diminished earning capacity.

In reviewing the pecuniary damage award generally, it is important to keep in mind that the objective in awarding damages is full compensation - to put the injured party, as far as money can do it, in the position in which that party was prior to the accident. In **Engel v. Salyn et al.** (1993), 147 N.R. 321 at 328 Gonthier, J. speaking for the Supreme Court of Canada said:

> "In assessing damages for pecuniary losses, the objective sought is full compensation. Although it is virtually impossible to evaluate future losses with complete accuracy, the trial judge must attempt to put the injured party in the position that the party would have enjoyed if the accident had not occurred . . . In the case of self-employed persons, quantifying the victim's contribution to the business is inherently difficult. The best approach to calculating future losses must be dictated by the particular circumstances. Expert witnesses may assist the judge in determining the most appropriate method of calculation."

It is also essential to keep in mind the evidence led by the parties on the issue of pecuniary loss here. Other evidence might have been introduced, but in considering the correctness of the trial judge's decision, we are constrained by the record and his findings of fact unless they can be shown to be palpably wrong. I have the impression that evidence which would have supported a higher pecuniary damage award may have existed. The duty of this court, however, is to stand in the middle and not take up one side or the other by indulging in suppositions, or considering possibilities or theories, not firmly rooted in the evidence led at the trial. In the adversary system, it is the parties themselves and not the court who must come forward with the claim or defence with credible evidence in support of their position. See Dickson, J. in **Thornton v. Board of School Trustees** (1978), 19 N.R. 552 at p. 561. This court is inevitably governed in large measure by the manner in which a case is presented at trial.

Moreover, our role is a limited one. We cannot interfere with an award of damages unless it has been arrived at upon wrong principles or is inordinately low or high.

I am unable to find in the evidence sufficient material to support a larger award based on loss of the appellant's earning capacity. The starting point for such an approach is his historical net income of approximately $7,100.00 per annum. One cannot find in the record evidence of additional contributions to the business or other enrichment that could, on a balance of probabilities, be attributed to the appellant's earning power.

The forest operations, which accounted for about 90% of the appellant's gross revenue in the last four years

before the accident and 84% over the last eight, were not regarded by the trial judge with optimism for the future. He reviewed the gloomy trends which had been developed and which were anticipated. He then pointed out:

> "There were thus two other factors which signalled further difficulty in Mr. Corkum's forest product operations. The absence of any capital cost allowance provisions for 1981 to 1990 spelled trouble ahead in modernizing or even maintaining structures and equipment. Secondly, many of the tasks in which Mr. Boyd Corkum was personally involved were dangerous. He was getting older . . ."

And later:

> "I am not satisfied that there were any obvious, positive trends for Mr. Corkum's future operations. Like Mr. Carter, I reject Mr. Kent's use of a flat 10% rate of growth in revenue for all future years. I reject each of the four methods employed by Mr. Kent for the reasons stated by Mr. Carter in his critique..."

The trial judge said with respect to Mr. Carter's evidence:

> "If he were called upon to give business advice to Boyd Corkum, he said the only recommendation he could possibly make would be that the plaintiff sell the assets and live well off the interest income generated."

And finally:

> "There is no evidence that Mr. Corkum's property and assets had increased in value over the last few years before the mishap, or that they would increase in value at any greater rate than inflation."

This is particularly pertinent. The value of Mr. Corkum's assets was developed over a 30 year period. The evidence fails to reveal sufficient particulars of the recent acquisitions or improvements to enable any conclusion to be drawn that the value increased otherwise than by reason of inflation. The unquantified hearsay evidence that the appellant's efforts were put into construction and repairs of buildings ended at the year 1975. It would be dangerous to attempt to quantify additional earning capacity in the future on the basis of growth in value of assets in the past.

It would be unsafe to utilize the figures put forward by Mr. Kent. Not only did the trial judge reject his entire

approach but, specifically, he rejected his premise that there would be a growth rate of 10% in earnings to retirement date and rejected as well the four different methods of calculation adopted by Mr. Kent. Further, the overall figure of $823,963.00 was arrived at without discounting to present values.

The findings of the trial judge were not shown to be erroneous. Indeed, ample support can be found for them in the evidence. One must not confuse losses in the appellant's business with loss of his earning power. A proper foundation for assessing damages more favourably on the basis of lost earning capacity was simply not provided.

I am thus of the opinion that we should review and calculate the award as did the trial judge - in response to the evidence provided by the parties at the trial.

The appellant led evidence of lost earnings through his chartered accountant only. He was able to show that following his accident not only did his net income disappear but losses were sustained in merely keeping the business afloat. The position taken on his behalf was clearly stated by the trial judge:

> "Mr. Corkum argues that he has earned the right to stay on his farm and asks that the defendant be obliged to finance the continued operation of his business for almost eight years or in other words to a retirement age of 65."

The trial judge did not accept this position. He said:

> "Mr. Corkum had the option, and I find, the duty, after it became clear in his own mind that he was permanently disabled, to take all reasonable steps to cease business operations and to sell income producing assets so as to convert them to assets which would then produce investment income."

The trial judge acknowledged that he was faced with a very unusual situation. He made a key finding that, taking into account all the contingencies identified by the respondents' experts, it was reasonable to assume a retirement age for the appellant at 65 - the cut off point chosen by his own accountant. Whether or not the appellant had been injured, it was implicit in his own accountant's analysis that at some time sooner or later he would be required to sell his business assets

when, because of advancing age, ill health or some other unforeseen event he would be unable to apply his own physical labour and managerial skills to the business. This is a reasonable finding by the trial judge supported by the evidence as a whole. I say this notwithstanding the appellant's assertion in his testimony that it was his intention not to retire, but to work as long as he possibly could. The backbreaking work load carried on by him could only be maintained by a vigorous person in the prime of life and health. The appellant was asked at the trial whether he had discussed with his son prior to the accident the ultimate disposition of the farm and he said that he had not. The son now operates the sawmill but no evidence of the financial basis on which he does so was produced. It does not appear from the evidence that there was any likelihood that any of his children would take over the business.

In rejecting the appellant's contention that the respondents should maintain the losses of his business until normal retirement age, the trial judge pointed out that to give an award based on such an hypothesis would enable the appellant to receive his award, liquidate his property, and in effect be doubly enriched. The appellant, as a victim, was entitled to be compensated for the damage suffered but no more. It was with this basic principle in mind that the trial judge approached the issue of just what the appellant ought as a reasonable person to do once he was confronted with the inability to manage his property.

In **Kellar v. Estate of Generaux** (1983), 45 A.R. 73 (Alberta Court of Queen's Bench). The plaintiff owned a forest products processing business which was dependent upon his ability to fly his own aircraft. Due to injuries he received in a motor vehicle accident, he was unable to do so and for this reason, among others, was forced to close his plant. At p. 77 the court said:

> "As in all damage claims, there comes a point in time beyond which there is a duty on an aggrieved party to mitigate damages. One cannot charge business losses to a wrongdoer ad infinitum. The problem here as I see it is to arrive at an equitable interval during which losses should be charged to the wrongdoer."

I have reviewed the authorities cited by counsel, including **Andrews v. Grand and Toy Alberta Limited** (1979), 19 N.R. 50; **Thornton, supra,** and Cooper-Stephenson and Saunders, **Personal Injuries Damages in Canada,** 1981, p. 586 to 592. I conclude that a person sustaining injuries as a result of a tort cannot claim for losses that could, by reasonable steps, be avoided. To speak in terms of a duty to mitigate when dealing with a personal injury claim is imprecise. However, while it is clear from **Andrews and Thornton** that a plaintiff is not obliged to accept less than full compensation simply because it is expensive, the plaintiff must be reasonable in making the claim.

There is no duty to accept less than a full recovery but there is a "duty" to prevent the loss from escalating unreasonably - not to claim avoidable losses. Put another way, what is being considered is not so much mitigation as simply what is the reasonable approach to take in determining the compensation - the exercise designed to put the appellant, as far as money can do it, in the same position he was prior to the accident. There is a limitation on recovery of losses to those which are reasonable. What is reasonable in each case is a question for the court having regard to all the circumstances. In this case, the trial judge concluded:

> "Accordingly, I find that it was reasonable and appropriate Mr. Carter to use January 19, 1991 as the trigger date from which the plaintiff should have begun his efforts to dispose of his assets and mitigate his loss. This was, after all, just slightly less than two years after the motor vehicle mishap, during which time the plaintiff had undergone considerable medical treatment which, he now says, did not result in any substantial improvement to his condition."

The appellant really cannot challenge the validity of this finding. At most, he submits that notwithstanding it, the respondents should continue to foot the bill. He speaks in terms of being forced to sell his property. The trial judge made it very clear that he could not force the appellant to sell his property, but simply require that the escalating losses cease at that point where the appellant as a reasonable person would take that step - a step which he would, in any

event, be required to take sooner or later as his health and vigour declined. The time frames allowed by the respondents' expert witnesses and accepted by the trial judge are reasonable, and I am unable to find any error in the trial judge's award for loss of past earnings, cost of maintaining the business property until disposition and the loss of future earnings, all of which result in a gross loss of $165,699.00.

In **Engel v. Salyn et al.** (1993), 147 N.R. 321 the Supreme Court of Canada accepted the approach of calculating pecuniary damages of a self-employed person by reference to the cost of that person's replacement labour in the business. Gonthier, J. recognized at p. 328 as did the trial judge in this case that in the case of a self-employed person the process of quantifying the victim's contribution to the business is inherently difficult. The approach taken there in dealing with a young person only partially disabled and engaged in a profitable business was considered appropriate. At p. 329 Gonthier, J. said:

> "Once again, I wish to stress that the appropriate method of calculation depends on the circumstances of the case."

In my view, the trial judge here correctly accepted the increased cost of carrying on the appellant's business with extra expense for a period of 3 1/2 years from the date of the accident until such time as he should, acting reasonably, have accepted the fact that he could no longer carry on business and completed the exercise of disposing of it.

That the premature loss of business was a tragedy to the appellant is beyond debate. The non-pecuniary aspects of this disaster are substantial indeed, but they were or should have been taken into account in fixing the amount of $60,000.00 for non-pecuniary damages which has not been challenged.

I do, however, have difficulty with the exercise from this point onward.

The trial judge has accepted the evidence of Mr. Speed, his methodology and his values. On this footing, it is a fair conclusion that somewhere between January, 1991 and January, 1993, the appellant should have been able to

dispose of his property after payment of debts and allowing for keeping the homestead or replacing it, realize the sum of $484,038.00.

The timing of this liquidation was, however, forced upon the appellant as a result of the respondents' wrongdoing. This court can take judicial notice that farming in Nova Scotia is undergoing hard times. The respondents' own witnesses speak of the slow growth in the forestry business. This court can take judicial notice as well of the fact that there is a deep recession in progress and that real property values have fallen off. While accepting Mr. Speed's opinion, it is noteworthy that the number of sales used by him as comparables were comparatively few and involved, comparatively speaking, small blocks of property.

In postulating the liquidation of the appellant's property, Mr. Speed and the respondents have given him credit for a real estate commission of 5% on $750,000.00. However, a review of Mr. Speed's extensive and detailed report makes clear that no reasonable person undertaking such a major project as this disposal would do so without incurring the cost of a detailed appraisal. As well, there would be legal, moving and possibly surveying costs. While all of these costs would, in all probability, be ultimately incurred when the property was finally sold, it is proper to allow some figure to compensate for the acceleration of them in time. Again, there are no firm figures before us, but we are not precluded from taking this into account in estimating compensation for a forced early sale. It is inherently probable that such expenses would be incurred.

While it is impossible to make a precise calculation of the economic loss flowing from the fact that the sale was forced upon the appellant, it does not follow that this court is unable to make an award to compensate for this fact. As in such cases as making allowances for contingencies and in establishing loss of earning capacity of a child, this process must necessarily be arbitrary. See for example **Anderson et al v. James et al** (1992), 87 D.L.R. (4th) 419, especially at pp. 424 - 426. Doing the best I can, I would consider reasonable allowances under this heading totalling $40,000.

The final question is whether the trial judge was correct in crediting against the other pecuniary losses, the present value of the additional sources of funding made available as a result of the deemed disposition of the property. The respondents argue that this only puts the appellant exactly where he should be and would, in effect be financially had there been no loss. I do not agree with this because this exercise is in reality a forced sale imposed upon the appellant as a result of the wrongdoing of the respondents. But for the total disability imposed upon him by their wrong, he could have disposed of the property at a time of his choosing, enjoyed these additional sources of future funding, and still have available his skills and time to work elsewhere or do whatever he chose. The appellant is required to put forth a reasonable claim. That to my mind consists of claiming damages on the basis of disposing of his property in the time frame set by the trial judge so that the respondents will not have to bear the continued escalating losses resulting from the appellant's inability to manage the business further. It is not, in my opinion, reasonable that he should give the respondent credit for the assumed betterment he would enjoy by converting his property into cash. It is inappropriate to say that he must mitigate by giving such credits. Based on a reasonableness test, it is also inappropriate that he should be forced to do so.

Subject therefore to further adjustments as a result of the other issues raised, I would accept the trial judge's assessment of a gross loss made up of the three items of loss of past earnings, cost of maintaining the business property until disposition and loss of future earnings without any deduction for the present value of any additional sources of future funding. I would add the allowance for the estimated losses as a result of the forced disposition.

2. **DISCOUNT RATE:**

The trial judge was satisfied from the evidence that this was a case where the spread between interest rates and general price inflation should be pegged at other than the 2.5% provided for by Civil Procedure Rule 31.10(2). He referred to **Armstrong v. Baker and McCrindle, supra**, in support of the proposition that it was open to lead evidence to show

that the mandated capitalization rule is not reflective of the difference between the criteria stipulated in the rule.

The appellant submits that this is an incorrect interpretation of the rule. I agree. The rule provides:

> "31.10(2) The rate of interest to be used in determining the capitalized value of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2.5% percent per annum."

The reader could be forgiven for concluding that the rule very clearly states that the difference between interest rates and inflation is deemed to be 2.5%. However, in **McCrindle** the court referred to the following passage from the decision of Hallett, J. (as he then was) in **Comeau v. Marsman et al.** (1981), 47 N.S.R. 550 at 560.

> "As can be seen from the words used in Civil Procedure Rule 31.10 the judges did not intend that the only discount rate that could be appropriate in any particular case would be 2.5%. The fixing of the discount rate at 2.5% is intended to reflect only the difference between interest rates and the rate of inflation. In any given case, there could be other factors that would indicate that this discount rate would be inappropriate."

Mr. Justice Hallett was not saying that there might be cases where a different rate was appropriate to reflect the difference between interest rates and the rate of inflation. He was saying that a different rate might be appropriate because the difference between interest rates and inflation rates may not be the relevant inquiry. This is clear from what immediately follows the passage quoted above:

> "I am thinking of a situation where the deceased had a record of increases in the years immediately preceding his death which would show that his annual income increases were substantially in excess of the annual increase in the consumer price index so that he could have expected to earn and thus benefit his family by a percentage substantially greater than the percentage increase in the consumer price index. Under such circumstances, a discount rate less than 2.5% would seem to be appropriate to reflect in a practical way the probability that his income would have outpaced inflation."

Mr. Justice Hallett went on to consider Mr. Comeau's income pattern and concluded that there was no justification for using a discount rate other than 2.5% because the increases in his salary expressed as a percentage of his

previous years wages were decreasing and its increase in the final year of employment approximately matched the increase in the consumer price index.

Mr. Justice Hallett did not say that it was open to the court to entertain evidence that the difference between interest rates and the rate of inflation was other than 2.5%. What he said was that there were appropriate cases where the measure to be applied was not necessarily the difference between interest rates and the rate of inflation. In such cases appropriate evidence could be led.

In the present case the inquiry by the expert witnesses was directed to determining the spread between interest rates and the rate of inflation. Notwithstanding their views that over a short term it might in reality be different than 2.5%, inquiry into that subject is foreclosed by the Rule which determines the rate at 2.5%. Clearly, this Rule was passed by the judges with the intention that it would avoid the expense and uncertainty involved in evidence being brought forth in every case on that point. There was no suggestion in this case that Mr. Corkum's pattern of future earnings would depart materially in either direction from the rate of inflation, and thus the standard measure for a discount rate should be used. Accordingly, I would amend the calculations of the trial judge for future earnings by applying the discount factor of 2.5%.

3. DEDUCTION OF ACCIDENT BENEFITS:

Section 140(1) of the **Insurance Act** provides:

"140 (1) Every motor vehicle liability policy shall provide

(a) medical, rehabilitation, loss of income, death and funeral expense benefits; and

(b) other benefits,

set forth in Schedule B to this Part, as the coverage in Schedule B may be added to or increased from time to time by the Governor in Council.

Schedule B, Part II deals with Loss of Income:

> "Subject to the provisions of this Part, a weekly payment for the loss of income from employment for the period during which the insured person suffers substantial inability to perform duties of his occupation or employment, provided,
>
> (a) such person was employed at the date of the accident;
>
> (b) within 30 days from the date of the accident and as a result of the accident the insured person suffers substantial inability to perform the essential duties of his occupation or employment for a period of not less then seven days;
>
> (c) no payments shall be made for any period in excess of 104 weeks except that if, at the end of the 104 week period, it has been established that such injury continuously prevents such person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience, the Insurer agrees to make such weekly payments for the duration of such inability to perform the essential duties."

I pause to observe that with respect to the payments made after the end of the 104 week period, they are only made for the duration of such inability to perform the essential duties.

Weekly payments are $140.00. The no fault scheme then makes provision for releases in certain cases. Section 140(2) provides:

> "(2) Where an insurer makes a payment under a provision of a contract of insurance referred to in subsection (1), the payment constitutes, to the extent of such payment, a release by the insured person or his personal representatives of any claim that the insured person or his personal representatives or a person claiming through or under him or by virtue of the **Fatal Injuries Act** may have against the insurer and any other person who may be liable to the insured person or his personal representatives if that other person is insured under a contract of the same type as is specified in subsection (1), but nothing in the subsection precludes an insurer from demanding, as a condition precedent to payment, a release to the extent of the payment from the person insured or his personal representative or any other person."

Section 146(2) provides:

> "(2) Where a claimant is entitled to the benefit of insurance within the scope of Section 140, this, to the extent of payments made or available to the claimant thereunder, constitutes a release by the claimant of any claim against the person liable to the claimant or the insurer of the person liable to the claimant."

At the time of the accident, the appellant was insured under a standard automobile policy issued by Sun Alliance Insurance Company. This policy contained the mandatory Section B Accident Benefits provided pursuant to Part VI of the **Act** and Schedule B thereto. The insurer paid weekly indemnity benefits of $140.00 for 104 weeks following the accident. It then refused to continue payments. By order dated September 6, 1991 the insurer was added as a party defendant to this action. The relief claimed was a declaration that the appellant was entitled to the payment of weekly accident benefits while he was unable to work by reason of his injuries and judgment for such weekly indemnity benefits as are payable. However, at the pre-trial conference on September 15, 1992 appellant's counsel presented an order for dismissal of the plaintiff's action against Sun Alliance advising that a settlement had been reached. The settlement was that the appellant received payment of $9,000.00 in consideration of surrendering all claims against Sun Alliance. The respondents were given no notice of this settlement. They claim that it prejudiced their rights. Evidence adduced by the respondents' actuary was that at a 5% discount rate the value of this stream of payments if continued for the rest of the appellant's lifetime would be $64,065.00. The appellant sought credit for this latter sum rather than $9,000.00, relying on Section 146, Subsection (2) set out above.

The respondents must show that by the actions of the appellant they were deprived of a release to which they were entitled by reason of this legislation. They state that the evidence establishes the appellant was entitled to the benefit of future payments and that these future payments were available to him until he compromised his action without

consultation with the respondents. Their position is that the appellant was totally disabled from engaging in any occupation for which he was reasonably suited, as of January 1991. They say that he was so disabled at the time of the trial and they refer to their admission to that effect which was tendered on September 28, 1992, some two weeks after they learned of the settlement with Sun Alliance.

The trial judge resolved this issue by pointing out that **Cattapan et al. v. Mitchell et al.** (1978), 105 D.L.R. (3rd) 508 relied on by the respondent was not helpful as it dealt with the case of a plaintiff who accepted a lump sum for a stream of disability payments being made and to which he was clearly entitled. In this case entitlement was the very issue. The trial judge referred to the decision of this Court in **MacKay v. Rovers** (1987), 79 N.S.R. (2d) 237. This Court referred to the decision of the Ontario Court of Appeal in **Stante v. Boudreau** (1981), 112 D.L.R. (3d) 172 and quoted with approval from the decision of Zuber, J.A. when he said at p. 178:

> "The clear intention of the Ontario Legislature in adding Schedule E benefits to policies of automobile insurance in Ontario was to confer a benefit on the accident victim and to provide some basic compensation irrespective of fault. Section 237(2) operates to prevent double compensation. To hold that a plaintiff's claim for damages has now been fragmented and that he may be obliged to pursue two law suits instead of one would be to frustrate the purpose of this beneficial legislation."

Hart, J.A., speaking for this Court in **Rovers, supra**, at p. 250 then said:

> "If it is alleged by a defendant that the damages he would otherwise have to pay would be reduced by the amount the plaintiff could have recovered under the no-fault provisions of an insurance policy, the burden rests firstly with the defendant to show that such a policy exists. If the defendant is able to show that such payments have been made or that they are available to a plaintiff entitled thereto, then the defendant should succeed unless the plaintiff is able to establish that such payments have been claimed and refused. It is not necessary for the plaintiff to show that the issue between the plaintiff and the insurance company has been litigated but only that the insurer has taken the position that the plaintiff is not entitled to recover."

In **Rovers**, the Court concluded that as the accident benefit insurer had clearly indicated to the plaintiff's solicitor that Section B benefits were available, then notwithstanding that the plaintiff did not avail herself of them, they must be deducted.

As to the respondents' argument, the trial judge concluded:

> "Here Mr. Corkum was entitled to and did receive some benefits. Sun Alliance then refused him further benefits beyond the 104 week period. As is made clear in **MacKay, supra**, Mr. Corkum was under no obligation to pursue his no fault Section B insurer any further. However, he did sue Sun Alliance and shortly before trial they reached a settlement of about $9,000.00 which the defendants now argue grossly undervalues Mr. Corkum's true entitlement. If the defendants' submission were accepted, it would lead to the anomalous result that his decision to pursue some action against his own insurer might actually result in reducing his total recovery by almost $64,000.00 (using the defendants' revised figures).
>
> . . .
>
> In this case, unlike the situation where a plaintiff has made no claim, it may be suggested that the defendants have not really been prejudiced by Mr. Corkum's settlement. While it is true that had he pursued his litigation against Sun Alliance he might have received more than $9,000.00 the law is clear that he was not obliged to do so in the face of his own insurer's refusal to pay the claim. Having sued and settled the defendants at least are given credit for all benefits paid, including the amount negotiated as a lump sum. From a policy perspective, plaintiffs ought to be encouraged to settle claims against their own Section B insurers and not be thwarted by having to obtain the consent of the defendants (presumably, insurers). Whether it was wise for Mr. Corkum to buy out his claim for only $9,000.00 is not the point. If, as it has been said, no fault insurance was promoted by insurance companies to avoid litigation and reduce the cost of insurance to policy holders then, in the absence of clear legislative amendments any such "loss" should be borne by the defendant and not the plaintiff. I see no basis in law or on policy grounds to refuse to shift the loss where, as here, the net result of Mr. Corkum's settlement is to give the defendants a credit of $9,000.00 which they would not otherwise have received."

In my view, the short answer is that the respondents have failed to establish that the appellant was "entitled" to the future stream of income payments calculated by Mr. Burnell to amount of $64,065.00 over his lifetime. Nor

have they established that any of these benefits (apart from the $9,000.00) was "paid" or "available" to him. Sun Alliance entered a denial to his claim. Even though it was established at the trial that as of that time the appellant was permanently disabled from the duties of all employment in which he was capable of engaging by reason of education, training or experience, it does not necessarily follow from that that it was shown that this situation would last for a lifetime. His matter of entitlement was in dispute with Sun Alliance and no money was (other than the $9,000.00) "paid" or "available" to him from Sun Alliance. In the absence of evidence of fraud or bad faith in dealings between the appellant and the Sun Alliance, this is a case where the general principle referred to Hart, J.A. in **MacKay v. Rovers** must apply. There was a denial from Sun Alliance. Instead of accepting it as he might have done, the appellant joined Sun Alliance as a defendant. He was not obliged to do so, but as a result of subsequent negotiations, he did recover $9,000.00 which enured to the defendant's benefit. In the absence of some clear requirement in the legislative scheme that he should do more, I am of the opinion that he was not obliged to. True, if he had been offered the payments as in **MacKay v. Rovers** or if he had even neglected to make a claim (**Madill v. Chu**, [1977] S.C.R. 400; **Stante v. Boudreau, supra**, at p. 177 - 178) the result would undoubtedly be otherwise. On the facts as presented, I am of the opinion that the trial judge applied the correct policy considerations in dealing with this difficult issue.

4. SUMMARY:

In summary, I would substitute for the damages awarded by the trial judge the following:

Past Earnings	$ 70,624.00
Cost of Maintaining Property to the end of 1992	$ 40,161.00
Future Earnings	$ 60,550.00
Pecuniary Damages arising out	

of forced sale of property	$ 40,000.00
Non-Pecuniary Damages	$ 60,000.00
Subtotal	$271,335.00
Less Section B Benefits paid	$ 9,000.00
TOTAL AWARD:	$262,335.00

I would, therefore, award the appellant the sum of $262,335.00, less any amounts paid on account, together with prejudgment interest of 7%. There has been at least one payment on account. Counsel were not asked during the argument for their views on the date or dates from which prejudgment interest should run on the various items of the award. I would propose that counsel provide the Court with this information within two weeks so that the order can be prepared. If they cannot agree, then opposing submissions should be made to the Court within that two week period. The formal order of the Court should then be issued.

The costs at trial should be adjusted by applying the relevant tariff to an amount involved at $212,335.00, being the amount awarded less $50,000.00 paid before trial. I would allow the appellant his costs of this appeal and cross-appeal in the amount of 40% of the adjusted costs at trial, together with disbursements when taxed.

I would allow the appeal and dismiss the cross-appeal.

J.A.

Concurred in:

Roscoe, J.A.

FREEMAN, J.A.: (Dissenting)

I am in general agreement with the conclusions of Justice Chipman on all scores except the calculation of lost earning capacity and its reflection on the overall award, which I consider inadequate.

The position of a court of appeal has remained unchanged since **Nance v. B.C. Electric Railway**, [1915] A.C. 601 and was restated by McIntyre J. in **Andrews v. Grand and Toy** at p. 235 as follows:

> "It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, of where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a court of appeal is entitled to intervene."

In my view the trial judge erred in failing to take into account various components of Mr. Corkum's income in assessing his earning capacity, accepting instead only one element of his earning capacity, his net cash income, as a measurement of future loss. As a result his assessment of Mr. Corkum's earning capacity, and therefore the total award for damages, was inordinately low. The trial judge also deducted from Mr. Corkum's loss the income that might have been earned as interest on his capitalized assets in the amount of $126,658. To my mind the latter is by far the more serious error, introducing into the assessment of damages a consideration of the plaintiff's net worth which is entirely irrelevant to his capacity to earn. Justice Chipman's reasons correct the problem, but I find the principle so alarming I must add a comment.

The principle of deducting interest income derived from the capitalization of an injured party's assets is dangerous both because it has no foundation in law and because it penalizes enterprising and provident citizens such as Mr. Corkum. To illustrate: A, B and C are all 50 years old, married with two children. A works in industry earning $50,000 a year which he spends to maintain his lifestyle; B works in industry earning $50,000 a year from which he has saved $50,000

invested at ten per cent interest; C left a similar job, borrowed from the bank and bought his own business, from which he earns $50,000, living on $40,000 and paying the bank $10,000 a year; he now has a $100,000 equity in the business. A, B and C are totally and permanently disabled, each suffering a loss of earning capacity of $50,000 a year or $500,000 during their working expectancies of ten years. Applying the principle introduced at trial, A recovers $500,000 from the tortfeasor, B recovers $500,000 less $50,000, the interest on his savings at ten per cent for ten years, and C recovers $500,000 less $100,000, the income on the capitalized value of his equity in the business he has had to sell, invested at ten per cent for ten years. Clearly, it is unfair to B and C to recover less than A, when all lost earning capacities of equal value. It is immaterial to the tortfeasor that B and C will enjoy higher incomes than A. What they provided for by their own effort and thrift is their own concern. The assets owned by each, and the income resulting from their capitalization, are an irrelevant consideration in the assessment of damages for lost earning capacity.

This court must now "attempt to put the injured party in the position that the party would have enjoyed if the accident had not occurred." (See **Engel v. Salyn**, [1993] S.C.R. 306 at p. 313.) Under **Civil Procedure Rule** 62.23(1)(b) this court is empowered to "draw inferences of fact and give any judgment, allow any amendments, or make any order which might have been made by the court appealed from or which the appeal may require."

Past Earnings

The text book **Remedies, Cases and Materials**, 2nd Edition, Berryman, Cassels, Cromwell, Mullan, Sadinsky, Sharpe and Waddams, Toronto, 1992, concisely sets out the current state of the law in regard to estimating earning capacity at p. 496:

> "The trilogy confirmed that loss of earning capacity is loss of a capital asset and is distinct from loss of earnings per se. Thus, the method of calculating this head of damages is the same for both pre-trial and future losses. The only difference is that proof of pre-trial earning capacity will be based on known facts and not forecasts as to the future. Where the injury is short term the actual lost earnings will probably be an accurate assessment of the lost earning capacity.

> In most cases a reasonable estimate of the income profile of an injured person can be made by reviewing the person's existing wages, including all benefit packages (e.g. pensions, entitlement to stock options, and welfare benefits), his or her employment history, and the prospect of continued employment in that occupation."

Loss of past earnings was calculated, in my mind correctly, to be $70,624.00 for the period beginning with Mr. Corkum's accident on May 26, 1989, to the end of 1991. That figure was generated by the respondent's accountant, accepted by the trial judge and adopted by this court. It included Mr. Corkum's net cash income of about $7,500 a year at relevant times. The overall figure fairly represented what Mr. Corkum would have earned during that period had he not been disabled, less $18,293 for Section B insurance benefits he received during the same period. Leaving aside the Section B benefits the figure is $88,917, or $34,419 a year which I would round to $34,500. That figure quite properly reflects the amount Mr. Corkum had to earn--and did earn--as a self-employed farmer-woodsman to maintain the value of his asset base together with the cash income he was able to turn to his own use. By his asset base I mean those capital assets--his land, equipment and buildings, including his house--necessary to Mr. Corkum to earn a living and continue in the way of life he had chosen for himself. If he had not been able to earn enough to pay his fixed expenses with something left over he would not, of course, have been able to retain a cash income. Both elements reflect what he had been accustomed to earning; together they are a measure of his earning capacity.

Future Earnings

If Mr. Corkum's lost earnings were at the rate of $34,500 a year in 1989 1990 and 1991, I cannot understand how his lost future earnings can be fairly calculated at $60,550 for the period from December 31, 1991, the final date for his lost past earnings, until his assumed date of retirement when he is sixty-five, August 13, 2000. That is approximately eight and a half years. By my rough arithmetic, that works out to $7,124 a year, the rough equivalent only of his net cash income.

That figure represents only the cream skimmed off the top of Mr. Corkum's proven earning capacity. It takes $34,500 to fill the bottle. His net cash income was only the amount he was able to keep for his own use after earning what was required to hold his little empire together. Deprived of that environment, in which he could have been largely self-sufficient, there is no evidence he could live on $7,124 a year. If $34,500 was a correct calculation of his lost past annual earnings, establishing his earning capacity, the same figure should have been used for calculating his lost future earnings. Applying that to the same time period would result in $296,125 for Mr. Corkum's lost future earning capacity. To my mind that is a much more appropriate figure than $60,550. It is still not a generous one for a person of Mr. Corkum's proven industry and enterprise.

Self employed persons

In my view the preparation of the income profile of self employed persons, of whom farmers are a particular category, must be approached on an entirely different basis from those who are employed by others. As the employee of himself he is entitled to a wage. As the employer of himself he is entitled to the benefits that employees earn for their employers beyond their wages. The benefits enjoyed by employers resulting from the earning capacities of their employees in excess of their wages are basically the payment of fixed costs, enabling the employer to maintain plant and equipment, and profits.

A person's capacity to earn, in its simplest sense to generate wealth by applying labour to raw materials with the aid of the employer's capital assets, therefore includes earnings for both the employee and the employer. The employer of other persons does not have a claim for the lost earnings of his disabled employees because they, in theory, can be replaced. From the employer's point of view it is usual to include wages with other items in the cost of sales, such as cost of raw materials, heat, light, advertising and transportation to name a few, which must be paid before earnings can be realized, but that is a matter of accounting preference.

In **Engel v. Salyn** Gonthier J. stated at p. 313:

> "In assessing pecuniary losses, the objective sought is full compensation. Although it is virtually impossible to evaluate future losses with complete accuracy, the trial judge must attempt to put the injured party in the position that the party would have enjoyed if the accident had not occurred. (see **Andrews v. Grand & Toy Alberta Ltd**., [1978] 2 S.C.R. 229, **Arnold v. Teno**, [1978] 2 S.C.R. 287 and **Thornton v. School District No. 57 (Prince George)**, [1978] 2 S.C.R. 267). In the case of self-employed persons, quantifying the victim's contribution to the business is inherently difficult. The best approach to calculating future losses must be dictated by the particular circumstances.

The inclusion only of net cash income--cash profits--in a damage award for a self-employed person results in a flawed calculation based on a narrow interpretation of income, and leaving wages and other employer benefits out of the reckoning. It is wrong in law because it ignores the objective of full compensation. In Mr. Corkum's case he appears to have paid himself no wages, and cash profits were small, so the other benefits he enjoyed as the employer of himself assume a heightened significance. The other benefits are principally the fixed expenses, the costs involved in keeping, and keeping up, the lands, buildings and equipment necessary to his livelihood and way of life, together with the value he was steadily adding to that asset base. The value of the fixed costs were included by Justice Chipman in the past wages calculation and can be readily quantified on the evidence. The value added to the assets on an annual basis is more difficult to assess.

If Mr. Corkum had been employed, say, as a heavy equipment operator, earning wages of $34,500 a year, and spent the first $25,000 on the expenses of maintaining his home and car, there can be no question that he would be entitled to compensation based on $34,500 in the event of total disability. In his case he chose to apply the first $25,000 he earned to the expenses of maintaining a property that included his home and equipment that included his means of transportation and in addition, permitted him to enjoy an independent way of life. Had his records shown that he was paying himself $25,000 in wages, which he applied to the same purposes, there can be no doubt he would be entitled to compensation for that amount.

To Mr. Corkum it was obviously important to keep his assets, worth whatever it cost him annually to do so. He had no source of income other than his own efforts, so his earning capacity had to be great enough to enable him to keep his assets and enjoy a cash income besides. If he now must sell those assets he is of course free to invest the money and enjoy the interest, but that is his concern. What the court is concerned with is determining the value not of the tangible assets he had acquired prior to his accident, but of the intangible though very real capital asset he lost; the ability to work hard and make money.

Mr. Corkum's Lost Earning Capacity, alternative approach

While the calculation I have used above based on proven past earning capacity may be the preferable one, Mr. Corkum's income profile, always difficult in the case of a self-employed person, can be arrived at by a different route based on facts in evidence and reasonable inferences. A valid inference may be drawn as a guiding and controlling principle from the considerable value of the assets Mr. Corkum had accumulated, although that value is of little direct help in an assessment of his annual earning capacity.

From the whole of the evidence it is apparent that Mr. Corkum had been an exceptionally industrious individual and that his loss is a substantial one. He was essentially a farmer, although it would appear that the forestry aspects of his operations had assumed more economic importance than farming. A comment by Carl Kent, Mr. Corkum's chartered accountant who was called as an expert witness on his behalf, provides a perspective for evaluating Mr. Corkum's efforts:

> "From my experience in dealing with farmers, they measure income in many ways, and one is in pleasure of being a farmer, which I can't address because it's outside my expertise. The other is the annual net income, and I think very common among farmers, at least in Kings County, the farmers I've had experience with, one measure is the eventual disposition of the farm property. It's not uncommon for farmers to operate that farm for a number of years, and upon reaching a certain age to sell the farm and retire, and I think it's fairly commonly accepted that the income from the eventual disposition of the farm is as much a part of the income of the farm as the annual

operating income."

This presents a skeleton which can be fleshed out by some of the facts in evidence. Mr. Corkum's earning capacity was a function of the time and energy he put to productive use, the varied skills he had acquired and the intelligence and experience he brought to the management of his affairs--a unique combination that could not be replaced by hiring somebody in his place. In **Engel v. Salyn** Gonthier J. quoted Wakeling J.A. of the Saskatchewan Court of Appeal who criticized the replacement costs approach:

> "It is important to recognize that Engel is not a wage earner but a business proprietor and her loss of capacity to earn must be assessed on that basis. The calculation of the loss does not therefore call for a detailed analysis of wages paid to others, but rather an analysis of the factors which make up Engel's contribution as one of the proprietors of a bakery business. That contribution involved her physical and intellectual energy, her business acumen, administrative, organizational and marketing skills and those other accomplishments which contributed to the operation of a bakery business she and her husband managed on an equal basis. . . ."

It is an obvious conclusion, supported by the evidence, that Mr. Corkum's earning abilities were directed toward three main ends: the costs of keeping his assets, his net cash income, and enhancement of his asset base. Without the latter element it could not have reached an appraised value of $735,000 on the cash investment of $200,000 over a 20 year period calculated by Mr. Kent.

1. Cost of Maintaining Assets

The calculation of an annual income of $34,500 was based on the figures of John B. Carter, the chartered accountant called by the respondents who used the basic data of Mr. Kent, who provided the following table of Mr. Corkum's fixed costs:

Interest, Property Taxes and Insurance	
1985	$33,446
1986	

21,015		
	1987	
23,132		
	1988	
16,191		
	1989	
28,834		
	5-year average	$24,524

Mr. Corkum had to earn and pay out the amounts shown in each year before he could take out his net cash income for living expenses. It is significant that without Mr. Corkum's efforts the losses calculated by Mr. Carter were greater than, not less than, the average fixed expenses. I am satisfied that it is more probable than not that Mr. Corkum's earning capacity included an average of about $25,000 earned each year to pay the fixed expenses associated with ownership of his assets. Left out of this reckoning for want of evidence is the cost in money and effort involved in the physical maintenance of the assets, such as silviculture in his woodlots and repairs to buildings, equipment and roadways, all of which were necessary merely to keep the value from declining, and all of which had to be provided from Mr. Corkum's earnings, or earning effort, before he could take out any cash income for himself and his wife.

2. **Living Expenses--net cash income**

I accept $7,124 a year as Mr. Corkum's net cash income. I take notice that that figure is 36 per cent of the average all Nova Scotia annual incomes-- $20,848--reported by Statistics Canada based on the 1991 census, which includes incomes of those who are not employed. I consider $7,124 a year an entirely unrealistic assessment of Mr. Corkum's total earning capacity.

His standard of living, acknowledged to be above the subsistence level which the net income figures might suggest, in all likelihood included benefits from his operations such as his own beef, dairy products and firewood. That should be a factor in calculating his earning capacity. However no evidence was led on this point and I will therefore

add nothing to the figure of $7,124..

3. Growth of Assets

Mr. Corkum's operation was obviously solvent, making money rather than losing it. Based on Mr. Kent's evidence as to direct asset purchases of only $200,000, it had to gain value at the average rate of $26,750 a year over 20 years to reach the assessed value of $735,000. The total increase of $535,000 may be attributed both to inflation and to value added by Mr. Corkum's efforts. This would seem consistent with Mr. Kent's suggestion that farmers put much of their effort into increasing the value of their holdings so they represent a substantial value on their retirement. While Mr. Corkum enjoyed what he was doing so much that he never planned to retire, it would appear that much of the value of his efforts was going back into his operation. The overall pattern is one of significantly rising value on a sustained basis.

(It is interesting, but without relevance, to note that if Mr. Corkum had hired out as an employee at the present average Canadian wage of $20.58 an hour [recently reported in a CBC news broadcast] and limited himself to working sixty hours a week, he would have been earning in excess of $60,000 a year. That is the rough equivalent of the total of the three components of his earning capacity, the fixed costs, net cash income and average increase in his asset value.)

However the average increase of $26,750 a year in the value of Mr. Corkum's land and equipment is of limited help in calculating annual earning capacity because the major increases may have taken place long before any relevant period, and there is no evidence as to the effects of inflation in this context. While his ability to improve the value of his assets on a sustained basis was in all likelihood a major component of Mr. Corkum's earning capacity, the evidence led on his behalf is not adequate to permit it to be reliably quantified. On the other hand there is some evidence that Mr. Corkum's efforts were genuinely increasing his worth and that he has suffered genuine damage by being deprived of the ability to continue doing so. It would be an injustice to Mr. Corkum to leave this factor entirely out of the reckoning of the value of

his earning capacity. Being deliberately conservative, I would consider it more probable than not that the minimum value added annually to Mr. Corkum's assets by his own efforts was $2,500. I would include that in the evaluation of his earning capacity.

Assessment of lost earning capacity

To arrive at a total of Mr. Corkum's annual earning capacity before his accident, which presumably would have continued until his retirement, it is therefore necessary only to total the three figures arrived at above, as follows:

Cost of maintaining assets	$25,000
Living expenses	7,124
Growth of assets	2,500
Total	$34,624

I would therefore assess Mr. Corkum's earning capacity at $34,500 per year for the nine year period from 1992 to August 13, 2000, when Mr. Corkum becomes 65, both inclusive. Mr. Corkum did not intend to retire at sixty five, and he was in excellent health until the accident. Having omitted any allowance for physical maintenance and self-sufficiency and having drastically pared the value of his earning capacity reflected by the growth of his assets, I would not reduce this amount further for contingencies. Therefore I would assess a gross value of $296,125 for Mr. Corkum's loss of earning capacity over that period.

It is intended that the amount to be paid to Mr. Corkum should in theory provide him with an income of $34,500 a year until he is sixty-five. Both interest and inflation are factors. The capital sum actually paid by the respondents should be sufficient to include sums of $34,500 payable as of December 31, 1992 and December 31, 1993, both bearing interest at five per cent per annum, $34,500 on the 31st day of December in each year from 1994 to 1999 inclusive, and a further sum of $20,125 payable July 31, 2000. I would apply the 2.5 per cent discount provided for

under Civil Procedure Rule 18 to portions of the award calculated as payable after, but not including, December 31, 1993. This assumes a 2.5 rate of inflation and a five per cent rate of interest on the invested sum. Not having the proper formula, I would leave the net figure to be calculated by the parties.

I would allow the appeal and dismiss the cross-appeal.

I would have substituted the amount of $296,125, adjusted as indicated, for the future earnings figure of $60,550 in Justice Chipman's calculation of the damages award and otherwise adopt his figures.

Freeman, J.A.