

Current Issues in the Assessment of Reasonable Notice Periods

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The doctrine of reasonable notice is fundamental to the law of wrongful dismissal. In essence, the doctrine simply means that, in the absence of an express agreement to the contrary, an employer may only terminate an employee without just cause upon providing reasonable notice of termination, or pay in lieu thereof.

A key issue in most cases is the determination of the quantum of reasonable notice.

There has developed over the last couple of years a number of distinctive approaches which judges have adopted in order to determine reasonable notice. One approach takes the position that the court should ask the question "What would the parties have agreed to at the time the contract was formed if they had addressed the issue?" For lack of a better term I have called this the **Presumed Intention Method**. The other major approach is to examine the situation of the parties at the time of the termination and for the Court to determine the quantum based on the likelihood of the plaintiff finding alternative employment. This can be called the **Public Policy Method**.

The purpose of this paper is to examine these concepts in a critical manner, and hopefully offer some suggestions for reform.

I. PRESUMED INTENTION METHOD

This approach was first articulated in a decision of the Ontario Court of Appeal entitled *Lazarowicz v. Orenda Engines Ltd.*¹

This case involved a professional engineer who was approximately 49 years of age at the termination. He had been employed with the defendant for just under 3 years. Throughout his employment he had been employed as a professional engineer, and had received a number of merit increases over the years. Of considerable importance to the Court was that the plaintiff had left secure previous employment of over 5 years in order to join the defendant.

The Trial Judge in his reasons seemed to rely almost exclusively on judicial precedents in determining the appropriate notice period. As can be seen by the following quote, he compared certain factors such as job position and skill in previous cases, and from that determined the appropriate notice.

I am of the opinion that the plaintiff's position and status was certainly superior to that of the vulcanizer considered in Mitchell v. Sky (supra) and that, despite the fact that the plaintiff was not engaged in any management or supervising duties, such as the plaintiff in Wyatt v. Combination Storm Window (supra), he was engaged in tasks requiring a very considerably greater degree of skill and experience than was the plaintiff in that case and he should be entitled to the same amount of notice that Judson J. found the plaintiff there was entitled to.

On the other hand it would appear that the plaintiff in Abbot v. G.M. Gest (supra) was the manager of a very considerable branch of engineering corporation and, therefore, I think that the plaintiff is not entitled to as much as the 4 month's notice allowed to the plaintiff in that case.²

In the Court of Appeal, the Court found that the Trial Judge was not wrong in assessing 3 months notice, but seemed to take a different approach in determining the quantum of reasonable notice. Their approach is quite succinctly set out in the following quote:

Having concluded that his hiring was for an indefinite period, the next question is, to what notice was he entitled on the termination of that employment? The answer may be given that he was entitled to a reasonable notice. To put it in that language is not to informative because another question immediately follows, namely, what is reasonable? Opinions might differ as to what was reasonable, but in reaching an opinion a reasonable test would be to propound the question, namely, if the employer and the employee at the time of the hiring had addressed themselves to the questions as to the notice that the employer would give in the event of him terminating the employment, or the notice that the employee would give on quitting, what would their respective answers have been?

We are not prepared to say that the learned trial Judge's view as to the length of notice, namely 3 months, was wrong. We think it was reasonable particularly having regard to the availability to this defendant of comparable positions upon his employment being terminated by this defendant or, as I put it earlier, conversely, the replacement problem that would

*confront the defendant if the plaintiff quit and the defendant was called upon to get someone with the same qualifications to fill his shoes.*³

This case lay relatively unnoticed however until the early 1980s. In a decision of the Ontario High Court entitled *Bohemier v. Storwal International Inc.*⁴ Saunders, J. quotes *Lazarowicz*. The key issue in this case was the degree to which the poor economic situation of the defendant was relevant in determining the notice period. The plaintiff in this case was a foreman with over 35 years service.

In determining notice, the Trial Judge said as follows:

A number of cases were cited in argument but, as has often been said, such cases depend on their particular facts and are of little help in determining the issue. The Ontario Legislature in the Employment Standards Act, R.S.O. 1980, c. 137, has provided for a minimum period of eight weeks where the period of employment has been ten years or more. That is the maximum period of service set out in the statute and it is the period upon which the payment to the plaintiff was based. It seems to me that the character of the employment of the plaintiff with Storwal does not entitle him to a lengthy period of notice on the basis of decided cases and the reasons I have stated. If the issue had been addressed at the time he was first employed, it would not have been reasonable for his employer to have agreed to a notice period sufficient to enable him to find work in difficult economic times. In saying this I hope that it is not thought that I am unsympathetic to the plight of the plaintiff. His claim, however, is based on the contract and it is not reasonable to expect that his employer would or could have agreed to assure that his notice of termination would be sufficient to guarantee that he would obtain alternative employment within the notice period.

It is, however, my view that the age and length of loyal service by the plaintiff and the condition of his health, which was known to Storwal, entitle him to a considerably longer period of notice than might otherwise be the case. His period of employment is three and one-half times more than the maximum service specified in the Employment Standards Act. While he might have and did, in fact, require longer notice, I consider that a reasonable notice period for him to have been given would have been eight months. It follows that Storwal has breached its contract with the plaintiff in not giving him sufficient notice and is liable to him in damages.

The Court of Appeal, in very short written reasons, increased the notice period to 11 months as they did not feel the Trial Judge gave the proper weight to the seniority of the employee, however they did not comment on the appropriateness of the *Lazarowicz* approach.⁵

In *Antonaros v. S.N.C.*,⁶ Mr. Justice White of the Ontario Supreme Court (High Court of Justice) was called upon to decide the appropriate notice period for a 48 year old senior technologist with only 8 months service, who the Court found had been induced away from secure employment. The Trial Judge referred to the usual *Lazarowicz* excerpt and found that 8 months was proper notice. The Court in this case made a specific finding that at the time of hiring the whole issue of job security was discussed and certain long term assurances were given to the plaintiff that his employment would last 3 to 5 years.

The next major case to consider the *Lazarowicz* case was the decision of the Manitoba Court of Appeal in *Yosyk v. Westfair Foods Ltd.*⁷

This case involved the determination of appropriate notice for 3 supervisors in a retail establishment. Their ages varied from 24 to 38 years and their seniority was from 3 to 4 years. All of the plaintiffs had started off as bargaining unit employees but had held the front line management positions from 1.5 to 4 years. The Trial Judge gave each plaintiff a different notice period based largely on their respective seniority.

I have inserted quite a lengthy quote from the Court of Appeal case because I believe it nicely illustrates the judicial reasoning utilized in the *Lazarowicz* line of cases.

The length of notice which is reasonable is not a matter for subjective judgment. It must be determined having regard to the intention of the parties. The test was stated by Roach J.A. delivering the judgment of the Court of Appeal of Ontario, in Lazarowicz v. Orenda Engines Ltd. (1960), 26 D.L.R. (2d) 433 at p.436, [1961] O.R. 141 at p.144 when he said:

"Opinions might differ as to what was reasonable, but in reach an opinion a reasonable test would be to propound the question, namely, if the employer and the employee at the time of the hiring had addressed themselves to the question as to the

notice that the employer would give in the event of him terminating the employment, or the notice that the employee would give on quitting, what would their respective answers have been?"

This test was applied in two recent Manitoba cases. It was applied by Jewers J. in Gilman v. Winnipeg Board of Jewish Education (1986), 39 Man. R. (2d) 21, and by Darichuk J. in Balchin v. Diecast Morwest Ltd. (1987), 46 Man. R. (2d) 201. In my opinion, it is the proper test in all these cases, save for one refinement. The relationship between an employer and an employee is not a static one. During it, the contract is often amended by agreement on such fundamental terms as remuneration and the responsibilities of the employee. In a similar manner, the intention of the parties as to the length of notice required to end their relationship may change. The relevant intent is that which the parties had when the contract was last changed prior to the events leading to its termination.

The learned trial judge did not, in my respectful opinion, apply the correct principles in determining the proper notice period. He attached far too much importance to the relatively short length of time each plaintiff had served the employer and gave no consideration to the factors which the parties themselves would have considered if they had addressed their minds to the question before the events leading to termination.

Although he did not expressly adopt it, the learned trial judge may well have been misled by the approach taken by the parties.

If what happened in this court is a guide, the parties did not invite the trial judge to decide the length of notice on the proper principles. Instead they attempted to compare the facts in this case with those in other cases already decided and to say that, because similarity, the period of notice in this case should be equated to the period of notice allowed in the allegedly comparable case.

Such a comparison is of limited value. Lord Loreburn in M'Cartan v. Belfast Harbour Com'rs, [1911] 2 I.R. 143 at p. 145, offered this caution:

"But it is an endless and unprofitable task to compare the details of one case with the details of another, in order to establish that the conclusion from the evidence in one case must be adopted in the other also. Given the rule of law the facts of each case must be independently considered [...]"

This cause is particularly apt where the case which a party seeks to compare with the one at bar is either reported in summary form only or, if fully reported, is one in which the judge has given only a brief synopsis of the facts and has not indicated the weight he attached to each.

In Lazarowicz v. Orenda Engines Ltd., supra the court thought that the parties would have taken into account the nature and duration of his previous employment, the security it would

have provided him, the character of the employee's work and his length of service. The court also thought that the employee would have been influenced by the availability of alternative employment and the employer by the availability of a replacement worker. These factors are not, of course, exhaustive. In determining what period of notice would have been reasonable in any particular case, the court may have regard to any further factor which it thinks the parties themselves would have considered if they had applied their minds to the issue before the happening of the events which led to the termination.

In the case at bar, each of the plaintiffs had been employed previously as a unionized clerk subject to a collective agreement. There is no evidence as to what they were paid in that capacity. Nor do we know precisely what job security was provided by the collective agreement. We do know that as a matter of law the collective agreement must have contained provision that, subject to lay-off under proper circumstances, each plaintiff who had completed her probationary term could only be dismissed for just cause. Just cause for dismissal under a collective agreement should not, however, be equated with just cause for termination under an individual employment contract. Under a collective agreement, the question is whether the employer has just cause to bring to an end the employer/employee relationship whereas under an individual contract, the employer has an absolute right to bring that relationship to an end and the only question is whether there was justification for summary dismissal without notice.

The junior management position of supervisor was one in which each plaintiff was given an opportunity to prove her ability and efficiency. Each would hope that her performance would earn her promotion within the company or a better job offer from another employer. In accepting the challenge which the position offered, each of the plaintiffs would have accepted that, if the employer found her work unsatisfactory, the employer would be entitled to terminate the relationship by giving her relatively short notice. A relatively short notice period would have been accepted, in my view, because each plaintiff in turn would have wished to be in a position to accept a better job offer from another employer without having to give lengthy notice. Any one of the plaintiffs would have been astounded to learn on the day before her alleged insubordination that she would have to give six or more months notice before taking up a better job opportunity.

Although ultimately, if any one of the plaintiffs had remained in the same position over a lengthy period, length of service may have become an important factor in determining the period of notice to which she was entitled, I am of the view that each of the plaintiffs was in an upwardly mobile position in which a lengthy period of notice would have been more detrimental to her than to the employer.

This is not a case in which employee replacement is a factor. The manner in which each plaintiff was promoted from the rank of clerk for a probationary period demonstrates that the employer would have had no difficulty finding a replacement worker.

Each plaintiff found difficulty in finding an equivalent position with another employer because of a shortage of such positions. The employer offered no evidence to show that equivalent positions were available to a person with the right qualifications, experience and personality. In those circumstances, which I assume the parties were aware of when each plaintiff was promoted to the rank of supervisor, I am of the view that the parties themselves would have agreed that, although the notice period should not be lengthy, it should be longer than the common standard of one month. In my view the period the employer and each plaintiff would have agreed upon was one of three months.

In my view, the appeals should be allowed to the extent which I have indicated but the employer, who persisted on appeal in its futile attempt to justify summary dismissal, should pay the costs of the appeal.

As one can see, the court went quite far in assuming what was in the minds of the parties when the plaintiffs were promoted to the position of supervisor. It assumed that since this position was a junior one, it must have been the intention of each of the plaintiffs to either receive a promotion or utilize her new skills in another company. There did not seem to be any evidence to support such a finding.

More importantly the court in *Yosyk* seems to assume that *Lazarowicz* stands for the proposition that the reasonable notice that must be given by an employer to an employee is necessarily equal to the reasonable notice which must be given by an employee to his employer at the time of resignation. It is for that reason presumably which the court made reference to the fact that "Anyone of the plaintiffs would have been astounded to learn on the day before her alleged insubordination that she would have to be six or more months notice before taking up a better job opportunity."

In my submission it is erroneous to construe the *Lazarowicz* case as standing for the proposition that notice of termination must be equal to notice of resignation. The Court in that decision speaks of two separate issues to be decided, one of notice on termination and one of notice on resignation. The Court further asks "What would their respective answers have been?"

This implies that there would have been two different types of questions and two different answers.

The criteria in determining these notices are totally different, as the factors that determine how long it takes to get a job are often totally opposite to how long it would take to hire someone. For example, an employee might reasonably consider that his age would be a significant factor in his ability to find suitable employment, especially when the job is of a limited skill level. On the other hand, an employer of an older, low skill level employee would not be unduly concerned about the length of time it would take to replace such a worker because he could probably readily hire either an employee of the same age or considerably younger. In fact since the employment market is one determined by supply and demand, it is clear that in most cases the notice requirement would be quite different. An employee entering a market of high unemployment would desire and require a lengthy notice period of termination, while his employer would need a much shorter period in which to hire a qualified staff given that there was a glut of readily available replacements for the employee who resigned. The reverse would also be true, in that if a specific job market was experiencing high employment, it is the employer who would need a long time to find a replacement and the employee who would require a shorter time to find a new position.

This proposition has judicial backing in two Ontario decisions: *Oxman v. Dustbare Enterprises*⁸ and *Bell v. Trail-Mate Products of Canada Ltd.*⁹

The following quote from Mandel, J. in the *Bell* case clearly sets forth this proposition:

*It is a non sequitur that the notice to be given by an employee who resigns is to be identical to that to be given by an employer who dismisses the employee. The purpose of the employee's notice is to enable the employer to find another employee. The purpose of the employer's notice is to enable an employee to find new employment. In a field where there are only two major competitors, and the employee has resigned from one to go to the other, the field is very limited for such employee to obtain new employment. The employer, on the other hand, has greater resources to fill the vacancy and in that regard, see Moore v. Zurich Ins. Co. (1984), 4 C.C.E.L. 188 (Ont. Co. Ct.).*¹⁰

It is because of this misunderstanding of the *Lazarowicz* decision that I believe the Manitoba Court of Appeal in *Yosyk* came to the conclusion which they did. The court seemed to view the two notice periods as the same and therefore asked themselves the following two questions and gave the following two answers:

- 1) What period of resignation would the employees have wished? Answer: As each employee would wish to be able to leave the company at the earliest moment for a better job, they would not have wanted a lengthy notice period.
- 2) What period of termination would the employer have wished? Answer: The employer would have recognized a need for the employees to have sufficient time to pursue other employment in a tight employment market and would have agreed to something more than the "common standard of one month."

This approach was further developed and followed in a recent 1990 decision of the British Columbia Court of Appeal entitled *Woodlock v. Nova Corp International Consulting Inc.*¹¹

In this case, Southin, J.A., conducted an extensive review of the principles behind the *Lazarowicz* and the *Bardal* cases. The case involved a 47 year old employee with 15 years service. He received a promotion to Vice-President in 1981, which is the position he held at the time of his termination in 1986.

Southin J.A. clearly felt that the *Lazarowicz* line of cases was a preferable method of analysis over the *Bardal* line of cases as can be seen in the following quotes from the case:

I begin this judgment with these passages because, in my opinion, they point out that the law on reasonable notice in the termination of contracts of employment for an indefinite period has in the last 30-odd years taken a peculiar turn.

From the proposition that reasonable notice is to be determined as of the time of making of the contract, and that the length of notice is the same whether it is the employer giving notice to the employee or the employee to the employer, the law appears to have come, without the profession realizing what was happening, to the proposition that reasonable notice is to be determined as of the termination of the contract according to the Judge's opinion of reasonableness, and it is not relevant to consider whether, if the employee wanted to leave, he had to give 18 months' or 2 years' notice to the employer.

In my opinion, the Ontario Court of Appeal was right in Lazarowicz v. Orenda Engines Ltd., supra, and, if McRuer C.J.H.C. was expressing in the passage I have quoted the second proposition, which is what the passage has been taken to mean, although without addressing the point, in such cases as Ansari v. B.C. Hydro, supra, I think he was wrong. I note that Roach J.A. did not mention the judgment of McRuer C.J.H.C.

I do not overlook that many cases in British Columbia have quoted the passage from Bardal v. Globe & Mail Ltd., supra, with approval. In 1989, in Lojstrup v. British Columbia Buildings Corp., [1989] 4 W.W.R. 605, 34 B.C.L.R. (2d) 357 (C.A.), Macdonald J.A., speaking for himself, Taggart, and Macfarlane J.J.A., quoted without apparent disapproval the judgment of Mr. Justice Roach, and, at the same time, quoted the judgment of McRuer C.J.H.C. I acknowledge, however, the passage quoting Lazarowicz v. Orenda Engines Ltd. might be thought to be obiter dicta.

What is the proper approach?

As I know of no judgment of the Supreme Court of Canada bearing on the point, I consider it is open to go back in time in an attempt to ascertain the rule.

[...]

I do not understand how we came to rely on Bardal v. Globe & Mail Ltd., a judgment of a single Judge, when, upon the construction given it, it cannot be reconciled with Lazarowicz v. Orenda Engines Ltd., a judgment of the Ontario Court of Appeal.

No useful purpose would be served, I think, in my referring to the many judgments at trial that have been delivered in British Columbia in recent years on these vexed questions.

I need only refer to the judgment of the Chief Justice in Ansari v. B.C. Hydro which I quoted at the opening of these reasons. The judgment has led, as I understand it, to a general comparing in many wrongful dismissal cases of the facts in those cases with the facts in Ansari v. B.C. Hydro and so led in the case before us.

If it is true, as it was plainly true in the 19th century, that the question of notice is a jury question, it cannot be useful to compare cases unless consistency is valued over an application of principle to individual facts.

In my opinion, the Manitoba Court of Appeal in its judgment in Yosyk v. Westfair Foods Ltd.; Vernon v. Westfair Foods Ltd.; Vivian v. Westfair Foods Ltd, [1988] 3 W.W.R. 155, 49 D.L.R. (4th) 260, 51 Man. R. (2d) 191 (C.A.), addressed the correct principle.

[...]

Because there is, in truth, an unresolved conflict of rationale between, on the one hand, the Lojstrup decision which quotes Lazarowicz v. Orenda Engines Ltd. and, on the other hand, the B.C. Hydro & Power Authority series of decisions and Suttie v. Metro Transit, I consider it is open to me to follow the appellate decisions in Ontario and Manitoba and to ask what would the parties have agreed when the contract was made was a reasonable notice for the one to give the other?

Once having decided to adopt the *Lazarowicz* test, as adopted by *Yosyk*, Southin J.A. determined that the crucial time to determine the presumed intention of the parties was when the plaintiff received his last promotion, which was 1981. Having adopted this date as the relevant date, the Judge went on to presume the parties intention as follows:

If one accepts that the date of his appointment as vice-president is the crucial date, then the availability or non-availability of employment and the economic difficulties of the employer at the time of termination are both irrelevant to the issue of length of notice. I cannot conceive that in 1981 the employer would have agreed that the absence of jobs for the plaintiff should be a factor in increasing notice unless the plaintiff also agreed that economic difficulties of the employer should reduce it.

What I do think is that, if business was booming, the employer for its part would have wanted a substantial period of notice from the plaintiff so as not to be without, so to speak, a Captain of CanOcean, and the employee for his part would not have wanted to be obliged to give such a long period of notice as to be unable to take a position offering more money and prestige. Each would, I think, have said, however, "In fairness, some consideration, if one or the other want to terminate our relationship, must be given to the length of time our relationship has lasted since it first began in 1971, but that is not the chief factor.

It can probably be said, in certain kinds of employment e.g., domestic service (if such still exists these days) length of service would be thought at the outset of the relationship by both parties to be the most important factor. In the Employment Standards Act, S.B.C. 1980, c.

10, s. 42, it is the only factor. But to an employer and an employee in the position of the parties to this cause, I think it a very unimportant factor.

In this case, all the evidence discloses of the state of affairs in 1981 is the wide ranging responsibilities of the plaintiff and, by inference, from the statement in an affidavit filed on behalf of the respondents that business started to decline in 1982, that business was prospering.

I should have preferred to decide this case on much more extensive evidence of conditions in 1981, including the availability of other employment of the same order then. But the plaintiff who brought this application under R. 18A must rest upon the evidence he adduced.

On that paucity of evidence, I cannot say that the parties, in 1981, if they had addressed the issue would have fixed a longer period than 12 months.

As we can see, Madame Justice Southin made the same error that the Manitoba Court of Appeal did in *Yosyk* in that she assumed that notice of termination must be equal to notice of resignation.

However, Madame Justice Southin's rationale has not been widely accepted, even in her own province. In *Tysoe v. Plant Forest Products Corp.*,¹² Mr. Justice Hutchison of the British Columbia Supreme Court, when asked to follow the decision of Southin J.A. in *Woodlock* said the following:

The defendant's counsel has urged me to follow the decision of Southin J.A. in Woodlock v. Novacorp International Consulting Inc. 18 July 1990 CA010612 [now reported at 32 C.C.E.L. 245, [1990] 6 W.W.R. 454, 48 B.C.L.R. (2d) 1, 72 D.L.R. (4th) 347 (C.A.)] in which she accepted the test advanced by Roach J.A. in Lazarowicz v. Orenda Engines Ltd., [1961] O.R. 141, 26 D.L.R. (2d) 433 (C.A.):

a reasonable test would be to propound the question, namely, if the employer and the employee at the time of the hiring had addressed themselves to the questions as to the notice that the employer would give in the event of him terminating the employment, or the notice the employee would give on quitting, what would their respective answers have been?

Wood J.A. gave dissenting reasons for judgment in that case. Macdonald J.A., who agreed in the result reached by Southin J.A., accepted the trial Judge's finding that the job offer of less value than the one terminated was a factor to take into account: he did not associate himself with Southin J.A.'s reasoning. Both Wood J.A. and Macdonald J.A. said the purpose

of the implied term to give reasonable notice is to permit the employee an opportunity to find new employment (Wood J.A. at [unreported] p. 14, Macdonald J.A. at [unreported] p. 2). Neither questioned the law as it was set out by McEachern C.J.S.C. in Ansari, supra, who held that the principles set forth by McRuer C.J.H.C. in Bardal v. Globe & Mail Ltd., [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (H.C.), are those to be applied.

Neither Macdonald J.A. nor Wood J.A. adopted the test approved by Southin J.A. For these reasons, I do not propose to follow the reasons of Southin J.A. as I conclude they are not binding on me. Moreover, they appear to be contrary to the weight of authority in British Columbia. I do so reluctantly as the approach advocated by Southin J.A. is an attractive one and is better suited to present conditions than that based on Bardal, supra; it has the advantage in a case such as this, where the parties redefined the contract in May 1988, of allowing for the factors that led to that consensus being taken into account. Had I followed Southin J.A.'s reasons I would have concluded that in April 1988 when the parties could foresee the approaching economic gloom, they would probably have settled on 6 months' notice. As it is, using the conventional method approved by the earlier decisions of the Court of Appeal in this province, I find reasonable notice in this case to be 12 months.

The "redefinition" to which the trial judge made reference is the fact that in May 1988, five months prior to the plaintiff's dismissal, the company had instituted an across the board wage cut for all employees, including the plaintiff.

In my submission, there are a number of fundamental problems with the Presumed Intention Method.

The legal theory behind this method is presumably the general contract damages rule in *Hadley v. Baxendale* in which it was held that "a contract breaker is only liable for such damages as may fairly and reasonably be considered either arising naturally from such breach of contract itself, or as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract itself, as the probable result of the breach of it."

The Courts who adhere to the Presumed Intention Method have assumed that this requires the court to determine the quantum of reasonable notice the parties would have agreed upon had they discussed the issue at the time of hiring or upon the last promotion. However the rule in

Hadley v. Baxendale only extends to identification of the type of damage incurred, not the quantum of damages.

Harvin Pitch, the noted author of *Damages for Breach of Contract*¹³ explains this point:

A defendant who has breached a contract is not liable for losses which are "remote." The test of remoteness is whether the parties at the time of contracting, could reasonably have contemplated the occurrence of the type of loss suffered given their knowledge of each other's affairs. The test of "reasonable contemplation" is applied as of the date of contract rather than as of the date of breach or trial. Furthermore, it is sufficient if the parties contemplated the type of damage without being required to have predicted the extent of it. Thus, for example, a vendor agreeing to supply goods to a buyer may reasonably contemplate at the time of contracting that the buyer may be required to purchase alternate goods in the market place at higher prices if the goods are not delivered. The fact that upon non-delivery the buyer may be required to pay substantially higher prices for replacement goods will not prohibit recovery of substantial damages, since the type of damage suffered, although not its extent, was within the reasonable contemplation of the parties at the time of contracting.

Therefore all that is necessary to fulfil the *Hadley v. Baxendale* test is a finding that the parties, at the time of their entering into the contract, would have reasonably contemplated that the employee, if terminated without just cause, would likely be unemployed for some period of time and thus suffer a loss of wages and benefits. It is not necessary to find that the parties would have agreed on a specific number of months notice.

It cannot be realistically argued that parties entering into an employment contract would not contemplate lost income as one of the natural consequences of a summary dismissal, thus it is perfectly consistent with *Hadley v. Baxendale* to say that the court need not therefore inquire into the very question asked in *Lazarowicz*.

After all is said and done the overall goal of the Court is to apply a term to a contract which the parties did not address themselves. This inevitably means that the Court is going to do what it feels is fair in the circumstances. It is more intellectually honest if judges admit up front that

what they are doing is imposing their own sense of fairness on a situation, rather than hiding under the illusion that they are only trying to discover the presumed intention of the parties.

This opinion was forcefully put forward by Mr. Justice Osborne of the Ontario Supreme Court (High Court of Justice) in *Thomson v. Bechtel Canada Ltd.*:

The reasonable notice term of this oral contract of employment is an implied term. Whether this term and a term relating to the amount of notice are implied by resort to pure policy or by an oblique consideration to what the parties would have agreed to had they considered the issue at the time of hiring, does not matter. The policy approach seems to me to be more realistic than does resort to the law of implied contract. In an indefinite contract of employment the Courts have consistently included within the contract of employment a term that reasonable notice of termination will be given in the event that the employer-employee relationship is severed by either party. The issue of reasonable notice presents little difficulty in most cases, including this one. The length of the notice required is the problem.

The Courts have recognized that the dominant purpose of any given notice period is to enable the terminated employee to obtain other work. It seems to me that, academic analysis aside, the term that is actually implied is that reasonable notice of termination will be given. The Courts will determine what is reasonable in the circumstances as a matter of policy, not implied contract.

I regard resort to the consideration of what notice the parties would have agreed to at the time of hiring, in this case 1970, as being somewhat artificial. In many cases, were the issue to have been considered at the time of hiring with the views of both employer and employee being placed on the table, there would never have been any contract of employment in the first place. In any event, in this case, whether the policy approach or the implied contract approach is taken, the result is the same.¹⁴

This same reasoning was adopted by Mr. Justice O'Leary of the Ontario Supreme Court (High Court of Justice) in *McBride v. W.P. London & Associate Ltd.*¹⁵ in which he said that he had no problem accepting the fact that the determination of reasonable notice "contains a large public policy ingredient."

The Presumed Intention Method requires the Court to first ascertain the relevant date as to when the parties presumed intention should be determined. *Yosyk* makes it clear that the relevant date need not be the actual hiring as the contract of employment is amended from time

to time, thus the reasonable notice requirement would also change over time. The Court held that the relevant date to determine the presumed intent is the date when the contract was last changed prior to the event leading to its termination. The determination of this date can be crucial, as we saw in the *Tysoe* case, where the trial judge said that had he applied the *Lazarowicz* test, he would have reduced the notice period by one-half, since the last change to the employment contract was a wage reduction due to poor sales which took place shortly prior to the final lay-off.

The question then becomes, what type of event triggers this reexamination of the parties intention? *Tysoe* says a wage reduction triggers the event while both *Woodlock* and *Yosyk* state that promotions will cause the parties to have to renegotiated their presumed intentions. What about changes to one's title or job duty changes, salary increases or geographic transfers, do these all trigger a new employment contract? It is clear that this very critical area would have to be examined in each case, further adding to the complexity, uncertainty and legal cost of terminating employees.

If this method is generally adopted, it means that an area already fraught with a high level of unpredictability will get only worse, as counsel will be less able to advise their clients beforehand as to the likely outcome of a court case. This will both compound the difficulty in obtaining a settlement, or in the case of less than wealthy plaintiffs (which is most of them) force them into cheap settlements because they can't take the risk of losing a case. As a matter of practicality, over 99% of the cases seen by an employment lawyer are settled prior to trial. One of the reasons for this is that experienced lawyers in this field develop a good "feel" for what the case is worth based on the employee's age, position and years of service. If the additional element of presumed intention is asserted into the notice formula, even experienced lawyers will be at a loss to properly advise their client as to the possible outcome of a case.

A number of the cases which have adopted the Presumed Intention Method have commented negatively on the fact that counsel had not presented any evidence of the employment situation or the economic climate when the parties entered into or renegotiated their presumed

intention. The presentation of data of this type would necessitate the hiring of experts to testify as to the historical economic conditions. This would add considerably to the cost of such litigation, a cost which most middle or working class plaintiffs could not afford. This would create a dramatic advantage for the well funded employer who could engage experts without any real fear of having to face an opposing expert.

On the other hand, there is a plentitude of books, manuals and data bases available to counsel, the judiciary and the public which conveniently list hundreds of decided cases. This ever growing list keeps on adding to the predictability of new cases, as long as the judge adopts the method of following similar precedents. The author of this paper maintains a computerized database of over 950 wrongful dismissal cases, listing factors such as case name, the age of the employee, the position, salary, seniority, case citation, year of the case, judge's name and notice period awarded. This database is available to the public through the Search Law facility of the Law Society of Upper Canada. Thus there is no excuse for a trial lawyer to walk into court with a bunch of cases that bear no relevance to the case at bar, instead a well prepared lawyer should be able to present the trial judge with 5 to 10 cases where the plaintiffs have similar age, position, seniority to the case before the Court. Surely that sort of information, which is readily available to counsel without the necessity of hiring expensive experts, can be of great assistance to the trial judge. Of course, no two cases are exactly alike, but quite often the similarities greatly outweigh the differences so that a reasoned and thoughtful reliance on past cases can be undertaken.

II. PUBLIC POLICY METHOD

The leading case in this area is *Bardal v. Globe and Mail*, where McRuer, C.J.H.C. said:

*There could be no catalogue laid down as to what was reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of employment, the length of service of the servant, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant.*¹⁶

To give you some idea as to how often this case has been followed, a review of The Canadian Abridgement from Volume I to 1990 indicated that this case was either applied, followed, considered or referred to in 149 cases.

An initial reading of *Bardal* would lead one to the conclusion that the Court should consider the following 5 factors in determining reasonable notice:

- 1) position of the plaintiff;
- 2) age;
- 3) length of service;
- 4) availability of other employment; and
- 5) the plaintiff's experience, training and qualifications.

However, over the years numerous other factors have been considered by the Courts. In fact Mr. Howard Levitt, in his book entitled *The Law of Dismissal in Canada*¹⁷ cites authorities for the proposition that 76 separate factors have been considered by the Courts in arriving at reasonable notice!

This unwieldy number of factors clearly makes the question of reasonable notice highly unpredictable and in my submission, highly unsatisfactory.

The issue of multiple factors was carefully considered in *Ansari v. British Columbia Hydro & Power Authority*.¹⁸ This case arose out of a massive layoff of about 660 employees. The parties decided that they would consolidate four representative cases and have the Court decide on those and then leave it to the parties to settle the other outstanding cases. Chief Justice McEachern took the opportunity to expound on the law of wrongful dismissal in relation to the factors that should be considered in determining reasonable notice. The following excerpts are indicative of his methodology:

In Gillespie v. Bulkley Valley Forest Industries Ltd., [1975] 1 W.W.R. 607, 50 D.L.R. (3d) 316 (B.C. C.A.), it was said that the factors enumerated by McRuer C.J.H.C. should not be regarded as exhaustive but with great respect, they are indeed the most important factors, and other matters which have crept into the assessment of this kind of damages are not of great significance.

While the character of employment and levels of responsibility are important, it does not appear to me that the Courts have been seriously concerned with the minutia of the employment being terminated or with the specific competence or incompetence of the employee. Perhaps proceeding on the biblical direction that "the labourer is worth of his hire", (Luke 10.7). the law does not seem to treat special competence or the lack of it as a particularly important factor in the determination of the notice period, although Courts have occasionally commented upon the performance of the dismissed employee.

[...]

Further, it does not appear useful to attempt nice distinctions between the comparative employment functions of these employees. Thus, in my view, it is not necessary minutely to investigate the degree or level of specialization of these plaintiffs. It is enough to observe that they are all highly skilled graduate engineers whom B.C. Hydro was satisfied to employ in responsible positions. Those factors alone are sufficient to entitle these employees to a longer notice period than in many other cases.

Also, I do not consider it useful to make distinctions between these professional employees who did or did not supervise other employees. Such a concept is pervasive in some disciplines, but it is not a particularly relevant consideration when employees are professionally skilled and are employed because of such skill.

[...]

The next important factor in fixing the period of reasonable notice is length of service. This is the only important factor that does bear directly upon the employee's prospects for future employment although long service may add materially to the age of the employee which does bear upon employment possibilities.

For reasons which are largely subjective and which I would not presume to disturb, the law requires a longer notice period for a long-term employee even though discharged employees of the same age, skill and responsibility suffering under the same economic factors must be assumed to require an equal period to obtain equivalent employment. The reasons for this anomaly may be that a long-term employee has a moral claim which has matured into a legal entitlement to a longer notice period.

Advancing years are also an important factor to be considered along with years of service because age bears so importantly upon the prospects for other similar employment. The

Court cannot be unmindful of the fact that employment opportunities for older engineers are extremely limited.

[...]

At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.

In restating this general rule I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.

What all this means, in my view, is that the general statement of factors quoted above from Bardal are the governing factors, and it would be better if other individual or subjective factors had not crept into the determination of reasonable notice. In my view such other matters are of little importance in most cases.

In the course of his reasons, McEachern C.J.S.C. dismissed or discounted the following factors: termination pay offered to other employees; performance level of the plaintiff; economic circumstances of the employer, and the fact that the employee made a geographic move to obtain the position.

In the end Ansari calls for a determination of reasonable notice in essence upon a consideration of 4 primary factors:

1. age;
2. position;
3. seniority; and
4. availability of alternative employment.

The first three factors of age, position and seniority are objective and usually easy to determine. The fourth factor, that is the availability of alternative employment, is really more of

a conclusion than a factor as rarely do the Courts hear evidence as to the state of the employment marketplace in a particular field. For instance in *Ansari*, there is no indication in the reasons for judgment that the Court heard any evidence, expert or otherwise, as to the availability of work in British Columbia for professional engineers. Instead the Court seemed to apply certain preconceived notions to the availability of alternative employment, namely:

- a) the older one is, the harder it is to find a job;
- b) the longer one's seniority, the harder it is to get a job; and
- c) the more specialized one's profession is, or the higher up you are up the corporate ladder, the harder it is to find a comparable position.

The Public Policy Method gives little more than nominal lip service to the doctrine that the presumed intention of the parties at the commencement of employment is a relevant factor. It in effect simply assesses the situation at the time of the breach, and based on criteria as they exist at that time, determines what the Court feels is a fair notice period, bearing in mind that the notice period should in some rough way estimate how long it would take a plaintiff in similar objective circumstances to find alternative employment.

In my submission, there are some distinct advantages to the Public Policy Method as compared to the Presumed Intention Method.

If the main factors of age, position and seniority are given substantially more weight than the other factors, then the level of predictability is raised immeasurably. This is beneficial to the employer as it has a better idea of its potential liability at the time of discharge and can assess the cost accordingly. If the employer knows up front what the termination costs will be, it may inspire them to retrain the employee, transfer the employee or provide the employee with working notice, instead of pay. The employee also greatly benefits from increased predictability of the notice period, in that it removes or lessens one important uncertainty from an already risky litigation experience. Most plaintiffs in wrongful dismissal actions are average middle class people who can ill afford litigation even at the best of times, and certainly less so when they are unemployed.

Employers can afford to take more risks in this sort of litigation, both because of greater financial resources and of their longer term approach to these sort of matters. An employer who terminates perhaps 20 people a year is not so concerned about the cost of one dismissal as it is with the overall annual cost of terminations. Therefore the employer may be willing to take a risk on litigating the notice period because if it loses badly on one case, it can hopefully be made up by winning one or two others. The plaintiff however only has his one case, he cannot "average out" his severance entitlements over 2 or 10 law suits.

By looking at the situation at the time of dismissal, the Court avoids the artificiality of trying to figure out what the parties would have agreed to at a time when the parties clearly were not thinking about the issue in the first place. A trial judge is neither a psychic nor an expert on interpersonal communication therefore he or she is not properly equipped to assess two parties innermost intentions and assumptions, as they existed in the past. The Court however is generally very good at evaluating and assessing fairness and equity in keeping with current social trends, and thus is well equipped to consider and balance the various factors in assessing the period of time for which a person should be compensated by his former employer.

The Public Policy Method recognizes that an employment relationship is an ongoing and sometimes lengthy contractual commitment, and not a short term, one shot deal like the supply of a piece of machinery. For a short term contractual commitment like the supply of machinery, it is quite reasonable to hold the parties to their intentions as of the time the contract was entered into, as the time span between the formation of the contract and its breach is relatively short. It is therefore fair to assume that little would have changed about the parties' intentions in that limited time frame. Moreover, any evidence necessary to show the parties' intentions, for example documents or testimony from live witnesses, is more likely to exist where the time span between contract formation and breach is limited. However, in an employment situation, especially in a long term relationship, surrounding circumstances unrelated to the plaintiff's individual position may have changed dramatically over the years. A classic example would be an employee, who when hired, possessed a skill level in keeping with the then current technology, who 20 years later,

is hopelessly out of date due to his or the company's failure to keep up with current technology. At the time of hiring, the job situation may have been quite good and furthermore, it would not have been foreseeable at that time that technological changes would occur as rapidly as they ultimately did. Is this plaintiff to be bound in 1990 to what the parties' presumed intention was in 1960? The world today changes too fast for any one of us, except maybe Jeanne Dixon and her astrology gang, to be able to predict what is going to happen next month, let along 10 or 20 years from now. Why then do we presume an employer and an employee have more insight into the future than even the "experts" do? Moreover, in a long term employment situation there is virtually no hope of the parties, especially the employer, being able to present any credible evidence as to what did or did not take place at the time of hiring. Here the plaintiff has a distinct advantage for three reasons: first of all he was there and therefore can testify as to what did or didn't take place; second, the odds are that the employer's representative who hired the plaintiff is no longer with the organization, or if he is, has no specific recollection of the meeting; and third, if the employer's representative is no longer available, the plaintiff can testify as to what the employer's representative told him, as this evidence is admissible as it is the statement of an adverse party.

There is however at least one problem with the Public Policy Method.

Rarely if ever do the Courts ever question the 3 basic premises of reasonable notice, that is:

- 1) The older you are the harder it is to get a job;
- 2) The longer you are with one company the harder it is to get a new job; and
- 3) The more specialized you are or the higher up the corporate ladder you are the longer you will be unemployed.

I am not aware of a single case where any detailed data was presented to a Court to either uphold or attack these preconceptions, rather they seem to be based purely on the judges personal

outlook and assumptions. However, one could legitimately ask the following questions regarding these assumptions:

1. Might not a 25 year old with one year's job experience have a tougher time getting a comparable job than a 35 year old with 10 years work experience?
2. Might not an employee with 5 years proven experience with one employer have an easier time obtaining new employment than another employee of the same age who has had 4 different jobs in the last 5 years?
3. Who would have an easier time getting a job, a 45 year old bookkeeper with 10 years seniority but no knowledge of computers, or a 45 year old V.P. of Marketing, with 10 years seniority in a company specializing in laptop computers?

At least age and seniority are objective in the sense that they apply equally to all classes, gender and races of people. The third category of position, however is fraught with class biases and assumptions. Generally speaking the more money you make, the longer your notice period will be, considering all other factors to be equal. This is based on the assumption presumably that a dismissed Vice President could only apply to 10 possible positions in a given area whereas a car mechanic could apply for 100 positions in the same area. Even if that were true, it ignores the fact that there may only be 15 unemployed Vice Presidents competing for the 10 vacancies whereas there may be 400 unemployed mechanics chasing 100 jobs. Therefore the chances of obtaining a job for the Vice President would be 2:3 whereas the chance of the mechanic achieving the same goal is 1:4 . However, under the current law, the Vice President would probably get about double the reasonable notice of the mechanic.

III. REFORM

Overall I submit that the Public Policy Method is the more preferable method of evaluating reasonable notice, primarily because it avoids the artificiality of the Presumed Intention Method

and secondly, if it is applied in a manner by which age, position and seniority are the major factors, it greatly enhances the level of predictability.

However, there are a number of ways in which the Public Policy Method could be improved:

1. Too much consideration is given to non-core factors, thereby lessening predictability and increasing the subjective aspect of the decision-making process. It is undoubtedly important for the common law to maintain flexibility in order to adapt to ever changing conditions, however it may well be feasible to first establish the "standard notice period" based on the core factors of age, position and seniority and only then adjust the notice period, either up or down, based on a consideration of important non-core factors. However, some limitation on the degree of variation should be observed, otherwise the system loses the advantage of predictability. For instance if a variation factor of 25% was accepted, then a judge would first determine the standard notice period, which for example could be 12 months. Then the judge would consider whether any non-core factors are significant enough to move the notice period to as low as 9 months or as high as 15 months. Only in truly exceptional circumstances would the notice period either go below 9 or above 15 months.
2. In order for the judiciary and the public to derive the information so that the standard notice period can be determined, it is essential that judges clearly address the issues of age, position and seniority in their written and oral decisions. Numerous cases I have read make no specific reference to either the plaintiffs age, position or seniority, thereby minimizing the ability of other parties to utilize the case in other proceedings.

3. Counsel should be encouraged by the judiciary to provide them at trial and pretrial with relevant case law on notice periods, quoting cases with similar age, position and seniority to their own plaintiffs. This information is readily available both in book format and on existing computer database.

As the law presently stands, there is considerable dispute between various courts and various Provinces as to which method of analysis is appropriate. By way of closing I would like to quote from Southin, J.A. in *Woodlock v. Novacorp Int.*:

*I make this comment. Assuming that Lazarowicz v. Orenda Engines Ltd. remains the law of Ontario and knowing that Yosyk v. Westfair Foods Ltd. is the law of Manitoba, and, being doubtful of the law of British Columbia, I hope that there will be an occasion for the Supreme Court of Canada to determine the correct principle. Differences on a matter such as this from common law province to common law province cannot be helpful to the conduct of commerce.*¹⁹

FOOTNOTES

1. *Lazarowicz v. Orenda Engines Ltd.*, [1961] O.R. 141, Roach J.A.
2. *Lazarowicz v. Orenda Engines Ltd.* (1960), 22 D.L.R. (2d) 568 at 578 (Ont. H.C.), Spence J.
3. *Supra* note 1 at 144-145.
4. *Bohemier v. Storwal International Inc.* (1982), 142 D.L.R. (3d) 8 at 14, 40 O.R. (2d) 264, Saunders J.
5. *Bohemier v. Storwal International Inc.* (1983), 4 D.L.R. 383, Brooke, Thorson & Cory JJ.A.
6. *Antonaros v. S.N.C.*, (1984), 6 C.C.E.L. 264.
7. *Yosyk v. Westfair Foods Ltd.* (1983), 49 D.L.R. (4th) 260.
8. *Oxman v. Dustbare Enterprises* (1986), 13 C.C.E.L. 209 (H.C.J.) (1989), 23 C.C.E.L. 159 (Ont. C.A.).
9. *Bell v. Trail-Mate Products of Canada Ltd.* (1987), 15 C.C.E.L. 39 (Ont. Dist. Ct).
10. *Ibid.* at 52.
11. *Woodlock v. Nova Corp International Consulting Inc.* (1991), 32 C.C.E.L. 245.
12. *Tysoe v. Plant Forest Products Corp.* (1991), 34 C.C.E.L. 124.
13. H. Pitch, *Damages for Breach of Contract* (Toronto: Carswell, 1985) at 94.
14. *Thomson v. Bechtel Canada Ltd.* (1984), 3 C.C.E.L. 16 at 19.
15. *McBride v. W.P. London & Associate Ltd.* (1984), 47 O.R. (2d) 333 (Ont. H.C.J.)
16. *Bardal v. Globe and Mail*, [1960] O.W.N. 253 at 255.

17. H. Levitt, *The Law of Dismissal in Canada* (Ontario: Canada Law Book, 1985).
18. *Ansari v. British Columbia Hydro & Power Authority* (1986), 13 C.C.E.L. 238, [1986] 4 W.W.R. 123, 2 B.C.L.R. (2d) 33 (S.C.), aff'd (19 November 1988) Doc. No. CA 005827 (B.C.C.A.).
19. *Woodlock*, *supra* note 11 at 273-274.