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TORTS: MONETARY RECOVERY IN OTHER THAN PERSONAL INJURY CASES

address by

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If this short paper seems unnervingly random in its subject-matter, "a thing of shreds and patches" from beginning to end, then I can only admit that appearances are not deceiving. Its function, as I conceive it, is to "flag" some of those issues concerning tort damages which are of current interest, yet have not been covered by my distinguished fellow-speakers. And that task inevitably sends me wandering among the less-frequented purlieux of tort law: some of them important; some interesting; and just a few, I hope, both. Comprehensiveness, of course, is not to be looked for here: anyone in need of that should consult Professor Waddams' imposing text on "The Law of Damages" (Canada Law Book Co., 1983).

Let us just consider the most obvious issue within my terms of reference:-

Destruction or Damage to Tangible Property

In this context, the basic principle governing the assessment of damages remains the same as it was when we were in law school, untroubled by any seismic upheavals such as that which has revolutionized personal injury litigation. Where chattels have been negligently destroyed or damaged, or have suffered harm in consequence of a trespass or nuisance, the primary aim remains that of restitutio in integrum; awarding to the plaintiffs "such a sum as will replace them, as far as can be done, . . . in the same position as if the loss had not been inflicted on them": (per Ld. Wright in Liesbosch Dredger v. S.S. Edison, [1933] A.C. 449 at 459). To this end, damages are quantified, ordinarily, by calculating the market value of the property immediately before and immediately after the accident, and awarding the difference. Sometimes, with doubtful logic, this is equated to the estimated cost of repairing the damaged thing; though plaintiffs who can show that even as repaired, it

is still worth less than before the accident, have from time to time recovered additional damages on this basis: see Payton v. Brooks [1974] R.T.R. 169 (C.A., obiter). There, a plaintiff whose new car, damaged by the defendant's negligence, had been made "as good as new" by expert repair, failed to convince the Court that even as repaired, its resale value was diminished. Had he succeeded in carrying his burden of persuasion, however, the English Court of Appeal made it quite clear that he would have been entitled to an additional award.

Unfortunately, the simple approach of "differential market values" outlined above, however we elaborate upon it, really cannot solve all problems. In the recent case of Tremear v. Park Town Motor Homes, [1982] 11 W.W.R. 444 at 455 (Sask.), Grotsky J. cited with approval this passage from Corpus Juris:-

> "Value of Personalty or Realty. In determining a question of value as an element of damages, resort is ordinarily to be had to the market value of the property involved. In some cases, however, the market cannot be referred to as a sole standard of value, but such other elements as are attainable must be considered, as where the property involved has not been bought and sold so as to have an established market value, or is so unusual in its character that there is little or no demand for it. Further, the property may be of such character that an award of the market value would not afford due compensation to the owner, in which case he may be entitled to recover the value of the property to himself, as in the case of loss or injury to wearing apparel, or household goods, although he is not entitled to a fanciful price which he may for special reasons place upon it."[1]

It is, indeed, not difficult to imagine situations where putative market prices afford no convincing guide to what the plaintiff has really lost. Sometimes, there is no "market" for such items, against which to gauge their value "before and after"; or the current conditions of the marketplace are so artifically dis-

torted by events that they afford no just yardstick of value: in such cases, Courts have shifted for themselves as best they may, guided only by the vague overall goal of restitutio in integrum, unassisted by any handy tool for precise calculation: see Piper v. Darling (1940) 67 Ll. L. Rep. 419. A more mundane problem arose in Thiele & Wesmar Ltd. v. Rod Service (Ottawa) Ltd., [1964] 2 O.R. 347, a case involving the negligent loss of business records by a mail carrier. The lost papers had no market value at all, yet cost $1,200 to replace. Very properly, in my respectful view, the Ontario Court of Appeal affirmed Stewart J.'s award of that sum in damages. As Stewart J. put it [1962] O.R. 615 at 617:-

> There are . . . a number of defences, some of which are novel, interesting and ingenious: and some are not. The first, in the latter category, is that the books had no instrinsic value, or at best (recalling the value of a peppercorn) of a nominal value and therefore the maxim de minimis non curat lex applies. There might be some validity in this argument if the action were for the value of the documents but it is not, being for damages for negligence flowing from their loss.

Perhaps, then, the best way of dealing with this class of case is to use the characterization technique here employed by Stewart J., and designate the (eminently fair) award as being for substantial economic loss directly and foreseeably flowing from the negligent destruction of intrinsically valueless chattels.

It is not quite so easy to analyse another recent Ontario judgment, not as yet fully reported: the decision of Osborne J. in Chappel v. Barati, (1984) 23 A.C.W.S. 148. There, the plaintiffs had purchased a rural property of some 80 acres for a future home; and had planted on this attractive, hilly property some 33,800 trees. These were all destroyed in a fire caused by the admitted negligence of the defendant. The trees were not planted for investment purposes, but for aesthetic reasons. They

had attained only 4 or 5 years growth when they were destroyed, and although they had been replaced with new seedlings, that growth was lost. But the evidence established that the fire had not significantly diminished the market value of this land. Did that mean the plaintiffs were entitled to no damages? Osborne J. adopted a commonsense approach, refusing to treat the difference-in-value test as a categorical imperative. Instead, he quoted Fleming on Torts and the informative decision, in his own Court of Appeal, in Scarborough v. R.E.F. Homes Ltd., (1979) 9 M.P.L.R. 255, and concluded that "the 'diminution of land value' approach in assessing loss will not always be adequate" and that "the difficulty in assessing real loss would not preclude the Court from attempting to assess it." Here, while land values had not diminished, there had been a real loss to the plaintiffs - they had seedlings where before they had saplings - and he awarded $7,500 to compensate them for that loss: in addition, be it noted, to the $2,500 it had cost the plaintiffs to re-plant.

There is - and I do not intend this as in any way a criticism - little or no indication of how the learned judge arrived at the $7,500 component in his award. His Lordship seems to have been guided, faute de mieux, simply by the dim lodestar of restitutio in integrum, in a case where the peculiar inelasticity of the real estate market deprived him of any more down-to-earth tool of quantification. Nothing in the judgment suggests that the plaintiffs were receiving monetary solace for sentimental considerations: their loss was a real, and not a purely subjective one; the fact that the market, with all its peculiarities, did not reflect that fact in terms of hypothetical prices, should not be allowed to displace that primary consideration. It is, with respect, hard to see what more (or less for that matter), Mr. Justice Osborne could have done.

It is, to be sure, plain upon the authorities that sentimental, non-rational considerations, inflating the value of an item to its owner, should not find reflection in the quantifica-

tion of damages. The old Nova Scotia case of Clarke v. Fullerton, (1871) 8 N.S.R. 348 (N.S. App. Div.) is still to the fore in discussions of this topic. Once however, it is realized that rational and non-sentimental values are not always reflected in the marketplace - a truth of which the Thiele and Chappel cases (Supra) should remind us - it is apparent that these principles are not always easy of application. Consider, for instance, the recent decision of the Manitoba Court of Appeal in Rawson v. Maher (1982) 15 Man. R. 6. In that case, the plaintiff had purchased a "rather ancient" car for $1,600 and promptly invested a further $2,622 in it, by installing a rebuilt engine. Within weeks, that vehicle was destroyed by the negligence of the defendant. It appeared that in the limited market for such refitted elderly vehicles, $2,200 was a realistic price. Yet this particular vehicle, with this particular engine, had moved the plaintiff to part with nearly double that sum just a few weeks before the accident. In these circumstances, the Court of Appeal considered the award of $2,200 inadequate. As Huband J.A. put it:-

> Against the defendant, the plaintiff is not limited to a claim based upon "actual cash value." He is entitled to the value to the owner, and while the two will often correspond, they are not necessarily the same, and they are obviously different in this case.
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> * * * * *
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> In my view, the plaintiff is entitled to a larger sum than the $2,200.00 he received from his collision insurer. But, "value to the owner" cannot be an unreasonable sum. If a person pays an exorbitant amount for a near worthless painting, he cannot claim a full amount upon its destruction by the tortious act of a third party. It might have that value to the owner, but the owner is not entitled to advance successfully an unreasonable claim. In my view, the plaintiff's claim must be tempered to some extent to avoid an unreasonable result. I would allow $3,000.00.

It would seem that what Huband J. does here is to discount part of the $4,222 actually spent by the plaintiff on his "pride and joy," this aged car, as being "unreasonable," in the sense of idiosyncratic or a matter of personal sentiment; while recognizing, to the tune of $800, that the real value of an item to an individual, by reason of quite rational personal tastes (not necessarily reflected in the marketplace) may well exceed the putative market price of similar goods. That seems, with respect, perfectly sensible, and one can hardly expect to be given more precise reasons, given the nature of the exercise.

Further Complication: the Profit-Earning Chattel, and some Ancillary Questions

Next, we may ask ourselves "What about the problem of the profit-earning chattel?" Here, the law's answer remains the same as it has done since 1933, when the House of Lords decided the Liesbosch Dredger v. S.S. Edison, [1933] A.C. 449. No purpose would be served here by elaborating the central thesis of that case, that the value to be placed upon such a chattel is its value as a "going concern," due regard being paid to its pending engagements - profitable or the reverse - at the date of the accident. That principle has been followed - usually with lavish quotation of the parent case - in many Canadian decisions in recent years, though since few contain anything original - they are usually "ship" cases not unlike Liesbosch itself - few find their way into the reports.

The complexities arise in relation to chattels which, though capable of generating profits, were by the choice of their owners idle, or working at less than their full profit-earning capacity, prior to the accident. While it is clear that even the owner of a non-profit making chattel may recover damages for loss of use - a doctrine well-established since "The Greta Holme" [1897] A.C. 596, even though the logical basis of recovery is speculative - it seems to be the law that where a profit-earning

chattel was, so to speak, underemployed before the accident, the plaintiff is entitled to recoup in damages only his actual losses, not the income he might in theory have generated with the chattel had he bestirred himself to do so: The Valeria, [1922] 2 A.C. 242. This may seen anomalous, but strenuous efforts have been made to reconcile the two lines of authority. Professor Waddams, writing of The Valeria, comments:-[2]

> This conclusion seems anomalous at first sight in comparison with the cases where the plaintiff recovers for loss of use of non-profit-making property. If the plaintiff owns goods for a non-profit-making purpose, he must prove his loss. It seems odd that the plaintiff should be better off if he makes no profit than if he makes a small profit. But the distinction does not rest on what profit the plaintiff in fact makes but on his purpose in owning the property. If he owns the property to make a profit but in fact makes none he has not lost anything by being deprived of the use; indeed, if he operates at a loss he may have gained. But where the plaintiff's purpose in owning the property is to fulfil a public duty or to give pleasure to himself or to confer a benefit on a member of his family, he does suffer a real loss by being deprived of the use of the property. As a practical matter this loss can only be measured by some rough rule, such as rental value or the cost of ownership.

More Uncertainty; the Problem of the Impecunious Plaintiff

Quite distinct from its concern with profit-earning chattels, the Liesbosch case will be remembered for another, and perhaps more contentious doctrine, encapsulated in these words of Lord Wright:-[3]

> "The appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts."

In short, the law of torts knows no "monetary thin-skull rule." Well, any such proposition may well have to be taken cum grano salis in the light of a procession of English Court of Appeal decisions which have vigorously "distinguished" Liesbosch on this point: see Martindale v. Duncan, [1973] 1 W.L.R. 574; Dodd Properties Ltd. v. Canterbury C.C. [1980] 1 W.L.R. 433; and Perry v. S. Phillips Ltd., [1982] 1 W.L.R. 1297. All suggest, to quote Lord Denning M.R. in the Perry case, that while in Liesbosch "Lord Wright said . . . that the loss due to the impecuniosity of the plaintiffs was not recoverable, I think that that statement must be restricted to the facts of the Liesbosch. It is not of general application . . . It is not applicable here."[4]

The drift of the English authorities, indeed, seems to be that the Liesbosch "doctrine" above is of very narrow application indeed. I shall not attempt here any detailed review of the Canadian, English and other Commonwealth authorities which attempt by vigorous "distinguishing" exercises to restrict its field of application, for that job has recently been done with admirable thoroughness by Mr. Gordon Phillips in [1982] 20 Osgoode Hall Law Journal, 18. Starting from the unprepossessing (but entirely truthful) premise that "The jurisprudence on this point is in a state of hopeless confusion," he makes a commendable effort at inducing order out of chaos. He notes that "impecuniosity" has acquired a clear enough meaning through the cases, and that "a plaintiff will be described as impecunious whenever he is compelled, in justifying his actions or explainng how it happened that he suffered certain damage, to point out that his funds were limited." He notes too, what has often been overlooked, the care with which Lord Wright himself, in Liesbosch exempted impecuniosity caused by the defendant's very acts from the ambit of his principle; while distinguishing another House of Lords case - Clippens Oil Co. v. Edinburgh & District Water Trustees [1907] A.C. 291, and so leaving open another important qualification to his broad "impecuniosity" rule. For the Clippens case seems to establish, in the words of McGregor,[5] that

"a plaintiff will not be prejudiced by his financial inability to take steps in mitigation." The remaining uncertainty, however, is considerable, for the characterization of an issue as one involving "mitigation" is not a straightforward or self-evident process: one might, indeed, tactlessly urge at this point that the Liesbosch case itself devolved upon an impecunious plaintiff's inability to mitigate his losses! Whether because the qualifying caes have not been pointed out to them, or because of the strong gravitational pull of the Liesbosch case itself, or because of an understandable reluctance to hold that that "leading case" has been wholly swallowed up by its exceptions, a pattern of extreme dishevelment has emerged in the case-law. The jurisprudence which has evolved in the English Court of Appeal cases, cited above, is that in contract at least, damages flowing from impecuniosity should be granted or denied simply in accordance with ordinary remoteness criteria of foreseeability (as per Hadley v. Baxendale, (1854) 156 C.R. 145), while the apparent rejection of that simple approach in the Liesbosch should be treated as an anachronism rooted in the "directness" or Polemis tests of remoteness, apparently prevailing in tort contexts in 1933. Accordingly, in England (and, as Phillips[6] notes, in New Zealand, too), the Liesbosch "has become irrelevant. There is no longer anything special about damages attributable in whole or in part to the plaintiff's impecuniosity. But such is not the case in Canada . . . ."[7]

No indeed. The vitality of Liesbosch on this "impecuniosity" issue is attested to by a host of Canadian cases; Professor Waddams[8] in a footnote to his work on Damages, collects together at least a dozen reported cases where Lord Wrights' words have been taken at face value, and even since that book went to press, yet another such case has been reported: Jones v. Taylor (1984) 27 Sask. R. 161. All or any of these may be defensible on their facts, in light of the applicable remoteness principles, but in none, one suspects, was the "blanket" proposition apparently made in Liesbosch, matched by counsel against the

formidable and complex array of authorities, throughout the Commonwealth, which suggest the need to qualify it strictly. Seized of all the authorities, I would argue that a Canadian judge would be driven to share Professor Waddams' conclusion that "These cases do not lay down a universal rule that damages caused by impecuniosity is irrecoverable . . .[9] Rather, it would seem, the cases are simply to be regarded as decisions, depending on their own facts, to the effect that the loss claimed was, in those cases, too remote . . . ." Similar conclusions, I note with some satisfaction, are reached by Mr. Phillips,[10] who urges that impecuniosity, however unforeseeable, should excuse a failure to mitigate, while losses attributable to impecuniosity should arguably be recoverable where, but only where, they satisfy the prevailing foreseeability tenets of remoteness. For the time being, however, in Canada the picture is confused and unpredictable in the extreme.

A case sui generis: Gold v. DeHavilland Aircraft Ltd.

Since the Liesbosch may be seen as a case concerning the proper limits of the "thin skull" rule, I make no apology for introducing here another, and more recent authority which might otherwise pass unnoticed, namely the judgment of Mr. Justice McKay in Gold v. DeHavilland Aircraft (Canada) Ltd., (1983) 25 C.C.L.T. 180 (B.C.S.C.). There, the defendants were used as manufacturers of a Twin Otter float-plane which crashed, killing eleven people, while trying to land on Vancouver Harbour in 1978. Among the plaintiffs was Airwest Airlines Ltd., lessees of the 'plane at the material time, who sought $736,000 for economic losses, due to a decline in customer confidence brought about by the crash. The evidence showed that Airwest, long plagued by labour disputes and an embarrassing sequence of earlier crashes, had been suffering from a progressive erosion of public confidence for a long time. The crash now in issue had merely been the "last straw," accelerating, perhaps only marginally, the total collapse of consumer-confidence in Airwest. Airwest re-

torted that their peculiar vulnerability, in the event of a further accident such as this, entitled them to invoke the "thin-skull rule"; and so displace the defendant's argument, that the prime cause-in-fact of the ultimate collapse was the dismal past safety record of the plaintiffs. McKay J. would have none of this, saying . . .[11]

> I do not accept the proposition that a heavier burden was imposed on DeHavilland with respect to Airwest than other carriers using DeHavilland aircraft. The service provided by DeHavilland to Airwest in the way of service bulletins and the supplying of parts was no different than the service to any carriers using DeHavilland aircraft. There are only a limited number of customers or potential customers for DeHavilland products throughout the world - I assume that DeHavilland has a pretty good knowledge of those customers, their operations and their routes. In particular I reject the proposition that a drastic drop in revenue was foreseeable and compensable because DeHavilland would be aware of Airwest's unfortunate operating record. What was DeHavilland to do - repossess its planes because Airwest posed an unacceptable and extraordinary risk? In my view liability must be limited to the risk of economic loss by a carrier with an acceptable performance record - beyond that limit the damages are too remote. The "thin skull" theory has no place in a claim such as this.

The Time for Computing Damages

Here we come to an issue fraught with difficulty which will not lie still. Suppose that a plaintiff has been deprived of his goods by reason of their negligent destruction or wilful conversion. Prima facie, he is entitled to their market value as damages; which is all well and good, assuming that that value has remained stable between the date of the tort and the date of judgment. But such an assumption will obviously not always correspond to the facts, and the law must make a choice between awarding the value of the goods when the tort was committed; their value at the date of judgment, (or even, if it could be argued, satisfaction of that judgment); or some intermediatepoint

perceived as fairer than the preceding alternatives. The cases do not at first blush display a consistent approach to this issue, and Professor Waddams has put his finger upon one reason at least for the disarray:-[12]

> "Discussion of the problems dealt with here has in the past been generally controlled by the form of action adopted by the plaintiff to assert his rights. Modern courts are rightly uncomfortable with an appearance of variation of substantive rights according to forms of action, and in several cases strenuous efforts have been made to avoid such a variation."

This feeling of discomfort with the formalism of the old law seems apparent in a couple of recent Manitoba cases I shall mention shortly, but before addressing those, let me just briefly consider some relatively settled issues.

Where the goods are such that their notional market value has actually declined between the date of the wrong and the date of the judgment, it seems clear that the tortfeasor cannot invoke this drop in the market to reduce his own liability, even though this may eventually leave the plaintiff better off than if the tort had not been committed; see Solloway v. McLaughlin [1938] A.C. 247, a Privy Council decision originating in Ontario. There, Lord Atkin said that "Disposal of the deposited shares amounted to nothing short of conversion, and the client on each occasion on which the shares were sold had vested in him a right to damages for conversion which would be measured by the value of his shares at the date of the conversion."

Now a few observations must be made about this. Firstly, talk about "vested rights" can lead one into error. No doubt a person has a vested right to sue in tort as soon as the last ingredient of that tort has been fulfilled. In the case of most torts, (though in the case of conversion the issue is debateable)[13] that has long been considered as "the moment when legally recognized damage occurs." That is the moment when the cause of action in tort "arises." However:-

(a) It does not follow as a logical imperative that because a cause of action "arises" on a given date, and because "vested" as of that date, that the quantum of redress afforded by that right of action mus be deemed petrified or "crystallized" as of that date. A Court may without violence to logic, and with due regard to considerations of justice or policy, assert that a cause of action arose at a given date, but that its monetary value rose, fell, or fluctuated erratically in the light of subsequent events. Such an approach may or may not be politic, or in accord with established law, but it is surely not illogical.

(b) At some risk of straying into irrelevance, it may be noted that the time-honoured doctrine that a cause of action "arises" when all its ingredients finally coexist, has in recent years been subject to a very important "gloss." Several Canadian courts,[14] following the lead of Lord Denning in Sparham-Souter v. Town & Country Devs. (Essex) Ltd., [1976] Q.B. 858, have held that for limitation purposes a cause of action in tort shall not be deemed to "arise" immediately upon occurrence of damage, but rather at that time, perhaps much later, when such damage would become discoverable by the reasonably vigilant plaintiff. Though latterly rejected in England, this very important doctrine has within the last month been approved by the Supreme Court of Canada: see City of Kamloops v. Nielsen, S.C.C. July 26, 1984. It is worthy of note that this so-called "Sparham-Souter doctrine" shows a nice congruency with the approach generally taken in assessing damages in conversion (and probably other torts too) where the market has risen subsequently to the tort. Here too, the Courts have said, in essence "The date of the wrongdoing, or the notional infliction of damage, is not what

matters: the date to concentrate upon is rather that date when the plaintiff becomes actually or constructively aware of his loss, and might reasonably be expected to do something about it:" see the judgments of the Supreme Court of Canada in Alberta v. Arnold, [1971] S.C.R. 209, and of the Manitoba Court of Appeal in Steiman v. Steiman, (1982) 23 C.C.L.T. 182 and Dominion Securities v. Glazerman, (1984) Unreported June 14, 1984; discussed post.

(c) The rule that where the market has fallen, damages in conversion shall be assessed as at the date of the initial commission of the torts, is defensible upon a variety of pragmatic footings, some discussed by Waddams (op. cit.),[15] others poignantly suggested by the facts of Solloway v. McLaughlin (supra) itself. These reasons in no way demand a similar approach in the situation where the market has risen in the aftermath of the tort, and indeed the Courts have tended, as we shall now see, to take a very different line in such cases.

Any discussion of the present issue is complicated by the need to come to terms with the difficult case of Asamera Oil Corp. v. Sea Oil & General Corp., [1979] 1 S.C.R. 633, varied at 677. In that case, Baud Corporation loane 125,000 shares in Asamera to Brook, Asamera's president, in fully negotiable form; to be pledged with a broker as security. The shares should have been returned (or replaced with similar shares) in 1960. After a series of wrangles and vicissitudes which need not be detailed here, proceedings were finally instituted by Baud in 1966 for the return of the shares, or damages for their wrongful detention. Now in 1960, when the shares ought to have been returned or replaced, their value had been a paltry 29 cents each. In 1969 they had peaked at $46.50, only to drop to $22 by 1971, when reasons for judgment were finally given by the trial court. What, then, was the appropriate date upon which to value the shares for the purpose of quantifying damages?

Estey J., for the Supreme Court of Canada, treated the case purely and simply as one of breach of contract, though his judgment roamed far and wide in other contexts. Why, it may be asked, did his Lordship not regard the case as one of detinue or conversion by a bailee? The answer, though not self-evident from the judgment itself, is persuasively explained by Professor Waddams in an indispensable paper[16] on this case: by the nature of the agreement, Band "had no proprietary interest" in the specific shares, and "was precluded from asserting legal rights designed to protect property rights from infringement" - notably, the rights afforded by the torts of conversion and detinue. Be that as it may, it is clear that any observations made by Estey J. in the Asamera case are obiter insofar as they relate to the proper date for computation of damages in conversion and detinue respectively. It would perhaps be instructive to set out the dicta in question, with the caveat, in all fairness, that Estey J. does not profess necessarily to approve of the conclusions he has gleaned from the cases:-

> Before proceeding further with the analysis of the nature and extent of damages in the field of contract law, it will be helpful to examine briefly the principles which have evolved in analogous situations in the law of torts. In conversion, the measure of damages has been said to be the value of the shares at the date of conversion, and in addition, consequential damages represented by the loss of the opportunity to dispose of the shares at the highest price attained prior to the end of trial: vide McNeil v. Fultz et al. (1906), 38 S.C.R. 198, per Duff, J. at 205; The Queen in right of Alberta v. Arnold (1970), 75 W.W.R. 201, per Spence J. I am aware of course that these cases were for the most part dealing with the wrongful refusal of a person under the liability of a trustee to deliver property to a beneficiary, but on principle the result would be the same in simple cases of conversion: vide McGregor on Damages, 13th ed. (1972), p. 671.
>
> In detinue, the measure of damages has been said to be the value of the shares at the end of the trial and, in addition, damages for the

> detention. The value of the shares at the end of the trial must be awarded on the basis that the action in detinue is, in fact, a quasi-proprietary action for return of the plaintiff's goods. If that cannot be done, then the clearest approximation of the plaintiff's loss is the value of those goods when they would have been recovered, that is, at the end of trial. In addition, an award must compensate the plaintiff for damages flowing from the wrongful detention of his property, which it seems must be assessed on the basis of the highest value of the goods between the date at which the plaintiff ought to have recovered possession and the end of trial.[17]

These observations - which I repeat are obiter dicta - have not passed uncriticized in the later case-law. The remarks about the measure of damages in conversion, for example, has been twice rejected by the Court of Appeal of Manitoba, in the pair of cases to which I will now turn.

The former of them is Steiman v. Steiman, supra,[18] decided in 1982. There, jewellery and objets d'art had allegedly been appropriated, upon the death of their owner, by various members of his family; to the chagrin of his widow, who sued for their return or for damages. While the value of the items was hotly disputed, it as clear that most would have greatly appreciated in value since they were converted. The pleadings might or might not have been sufficient to raise issues both of conversin and of detinue, but Hewak J.[19] gave judgment in conversion, qualifying damages upon the bsis of the estimated value of the property as at the date of the hearing, and apparently inclining to the comfortable view that in this respect conversion and detinue were alike. The Court of Appeal was not of that opinion however, and made it very clear that the measure of damages in the two torts was very different; citing inter alia the words of Diplock L.J. in Gen. & Finance Facilities v. Cooks Cars (Romford) Ltd. [1963] 1 W.L.R. 644 at 648:-

> "There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of

> action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue."

As for the proper date for assessment in conversion, moreover, the Court was clearly of opinion that Estey J., in the obiter dicta cited above, had fallen into error, and that in O'Sullivan J.A.'s words:-[20]

> I think it is clear from an examination of the cases that the weight of authority is in favour of the proposition that in simple cases of conversion there is no right to be awarded as consequential damages the difference between the market value at the time when it would have been reasonable to replace the converted goods and either their value at the time of trial or their highest value at some intermediate point.

Rather, the proper measure was the value of such goods at such time as the plaintiff, actually or constructively aware of his loss, might reasonably be expected to re-enter the market and purchase a substitute article, so mitigating his loss. This solution was favoured by Spence J. in Alberta v. Arnold, [1971] S.C.R. 209; would accord neatly with Estey's own analysis of the position in contract, as laid out in the Asamera case; and would prevent the plaintiff, in essence, from speculating at the defendant's expense. Let me quote once more from O'Sullivan J.A.'s judgment:-

> A person who finds his goods taken may continue to regard the goods as his own and sue in detinue for their return but if he elects to claim damages for conversion his damages must be based on the supposition that he has replaced the missing goods at market prices.
>
> The victim who replaces converted goods will not lose any appreciation in value by reason of a rising market. If the victim were permitted to recover damages as of the date of trial for goods which he has in fact replaced by purchase, he would gain twice from appreciation - once on the goods converted and once on the goods purchased.

> Thousands of cases are settled every day on the basis that a wrongdoer who destroys a chattel is bound to pay only that amount which will cover the cost of replacing the chattel at the time of the tort (or a reasonable time thereafter) plus loss of use limited to the period of time required to find a replacement. In insurance law, motor vehicle law, many branches of the law, this principle is accepted as basic.[21]

All of which seems, with great respect, exactly right. The same thesis is propounded, again by O'Sullivan J.A., in the very recent case of Dominion Securities v. Glazerman, handed down on June 14th, 1984. That case involved the conversion by unauthorized sale of certain shares, which had thereafter fluctuated very considerably in price. Once again, Estey J.'s suggestion in Asamera, that the plaintiff might recover in conversion "consequential damages represented by the loss of the opportunity to dispose of the shares at the highest price attained prior to the end of the trial" was rejected by a unanimous Court; which once more took the view that the relevant date was that at which the plaintiff might reasonably have been expected to mitigate his losses by purchasing substitute shares.

Now the Steiman case is under appeal to the Supreme Court of Canada, and we may expect these issues to be aired again in due course. But the solution favoured in Steiman and in Dominion Securities does not leave the law in a tidy state, for there is still the awkward matter of detinue to consider. One may sympathize with Professor Waddams' evident discontent, in a passage cited previously,[22] that such arcane and formalistic distinctions might still vex the law, but vex it they do. In both of the Manitoba judgments just cited, O'Sullivan J.A. is at pains to stress that no issue of detinue is before the Court, but his obiter dicta in the subject (some already quoted) leave on in no doubt that very different rules apply there. In the words of Professor Fleming:-[23]

> The conventional rule in trover was to take the value prevailing at the time of wrong, whereas in

> detinue it as that of judgment in view of the procedural nicety that the judicial order has always been cast in the alternative for recovery either of the goods or their value, and the latter was therefore not unreasonably thought to be that then prevailing. If cynical, the soundest advise was accordingly to sue in detinue on a rising and in conversion on a failing market.

Personally, I find nothing offensive in according this option to the victim of a wrongdoer, however anachronistic its foundations; especially since, as O'Sullivan J.A. again points out in Steiman,[24] the "cynical advice" adverted to by Fleming is far from foolproof . . .

> It is true that where there is a wrongful taking the victim may have the alternative of claiming in detinue, where the unsuccessful defendant must replace the goods or pay the value at the time of the trial. But the plaintiff then runs the risk of a falling market and of depreciation in value; the defendant's option to restore the goods continues to judgment and maybe even to execution.

But there, with feigned regret, I shall have to leave the matter.

Omnia Praesumuntur Contra Spoliatorem

Before shifting the focus to something very different indeed, it may be of interest to notice another "remedies issue" which surfaced in the Steiman case, supra. One difficult aspect of the case was the stubborn refusal of the defendants to produce many of the items allegedly converted, or even to admit to their existence. To resolve the obvious dilemma which thus confronted the Court, Hewak J. blew the dust off Volume 1 of Strange's Reports, and sought help from Pratt C.J.'s judgment in Armory v. Delamirie (1722) 1 Stra 505, 93 E.R. 664, so beloved of law students. There, it will be remembered, the jewel in a ring or brooch "found" by a chimney sweeper's boy, was misappropriated by the crooked jeweller's apprentice, and the grimy little victim

surprised the jeweler by bringing trover - to remarkable effect. Pratt C.J. evidently directed the jury to assess damages as best they could, in the absence of the jewel itself. But directed them that since its absence was itself due to the wrongful withholding of the jewel by the defendant, they should incline strongly against him:-

> As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

This jolly old principle has popped up spasmodically over the intervening centuries, notably in the "turkey-carcase" case of Grenn v. Brampton Poultry Co., (1958) 13 D.L.R. (2d) 279 [Ont. H.C.]. In Steiman, Hewak J. was adjudged by the Manitoba Court of Appeal to have used it rather too enthusiastically, however; and while that Court approved its use with regard to certain items, seemed to restrict the use of Armory to cases where the evidence of value, available to the Court, is not just meagre or unsatisfactory, but amounts to an absolute void. This straitened approach to the rule would seem to contrast with the attitude of the Courts in some older cases, such as McGee v. Rosetown Electric Co. [1918] 1 W.W.R. 552, and the many other older cases helpfully listed by Professor Waddams[25] in his valuable book. Perhaps all that Steiman is saying is that when there is evidence upon which damages may be quantified, Armory is not an authority for simply preferring the plaintiff's estimates, automatically, to the defendant's much lower ones. If so, well and good; but it is to be hoped that when the Supreme Court does come to address itself to Steiman v. Steiman, it will not consider the ancient rule in Armory v. Delamirie, and its proper ambit, to be beneath its consideration.