REMEDIES - A VIEW FROM THE TOP

Address by the Honourable Mr. Justice Gordon Blair
to the Canadian Institute for the Administration
of Justice Seminar on Remedies,
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This conference on remedies could not have come at a more interesting time. This is so because of a number of developments which I will discuss in turn. First, there is a growing consensus that there must be a re-evaluation of the legal doctrines underlying the remedies granted by the courts. Secondly, pressure continues for the provision of remedies by extra-judicial tribunals. Thirdly, the possibility of an effective role for class actions looms on the horizon. Finally, courts are faced with the Herculean task of devising remedies to give substance to the new rights established by the Charter.[1]

My list of important remedial issues does not pretend to be exhaustive.[2] Others will be discussed at this conference. My purpose is simply to highlight some issues and raise some questions which may contribute to our discussions throughout the next two days.

1. JUDICIAL REMEDIES

First, I will discuss some of the developments affecting established judicial remedies. The common law has always been remedies oriented. It developed not by the pursuit of abstract legal rights but by the pursuit of

remedies available to suitors through established legal and equitable procedures. This practical bent of our legal system is epitomized by Judge Abella's statement that "[t]he importance of lawyers lies in their ability to transfer laws into remedies".[3] That transformation has not always been easy. Early lawyers were constrained in their pursuit of remedies by the rigid categories of the forms of action. Today, the question of "how" remedies may be obtained - from what tribunal and through what procedure - remains an integral part of the subject of remedies.

The great English legal reforms of the nineteenth century eliminating the forms of action and the fusing of law and equity were intended to give substance precedence over form. But in many branches of the law, the old procedural heritage remained. All are familiar with Maitland's famous turn of the century statement: "The forms of action we have buried but they still rule us from their graves."[4] Later, eminent judges viewed these procedural vestiges as obstacles to be overcome. Lord Atkin said, in 1941, "where these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred".[5] Lord Denning spoke of stepping over "the tripwire of previous cases" and bringing "the law into accord with the needs of today".[6]

Notwithstanding these bold judicial pronouncements, available remedies remained inadequate in many instances. For example, remedies for essentially the same type of wrong varied depending on whether an action was based on contract or tort. For quite technical reasons, equitable remedies were not always available when the circumstances cried out for them. Only recently, as a result of the perception of these anomalies, has it been realized that the theory of remedies is as important as the theory of liability in determining the rights of litigants. The result is to give Judge Abella's lawyer greater freedom to select the remedy which is most suitable rather than one prescribed by rigid theories of liability or procedure. In the preface to his recent book Injunctions and Specific Performance, Professor Sharpe explains this development:

> Despite the importance of the subject, systematic treatment of remedial issues is a relatively recent development. In the case of injunctions and specific performance, analysis has tended to focus on principles which evolved in the pre-Judicature Act era of a dual-court system. Recently, however, both courts and commentators have begun to rationalize these remedies in more modern terms, questioning their availability in some instances while extending it in others. It is surely time to formulate principles governing remedial choice which focus on the particular advantages of one remedy or another rather than simply to follow criteria which evolved before the fusion of law and equity. This also means that equitable and legal remedies should be looked at as a whole. To this end, I have worked closely with Professor S. M.

> Waddams, whose book The Law of Damages is published simultaneously with this as a companion volume.[7]

(a) Tort and Contract

An example of this development is the lowering of the barrier between contract and tort and the growing acceptance of concurrent liability. From the same facts, there may be substantially different results depending on whether an action is based on contract or tort. This is because of the different bases for damage assessment in contract and tort and also of the applicable limitation periods. In addition, there is no right of apportionment or contribution in contract.

The search by lawyers for better remedies has lead to the acceptance of concurrent liability. This gives claimants the option to raise a claim that will produce the most effective remedy. As recently as 1972, the rule seemed settled by our Supreme Court that the performance of a contractual obligation could not give rise to liability in tort. The rule was expressed by the dictum of Pigeon J. in Nunes Diamonds Ltd. v. Dominion Electric Protection Co. that:

> ... tort liability ... is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independant tort" unconnected with the performance of that contract.[8]

However, subsequent decisions of Provincial Courts of Appeal make it clear that concurrent liability in tort and contract can and does exist in Canada. In John Maryon International Ltd. et al. v. New Brunswick Telephone Co. Ltd.[9], the Court of Appeal of New Brunswick restricted Nunes Diamonds[10] to fact situations where the plaintiff is attempting to circumvent contractual limitations on tort liability. After reviewing the conflicting case law, including Nunes Diamonds, Mr. Justice La Forest stated:

> I am merely saying that if a person fails to perform a duty of care he owes to another person, he should not be absolved from the performance of that duty simply because failure to perform that duty will also result in his failure to perform a contract, unless, of course, he absolves himself by his contracts against liability flowing from his failure to perform that duty.[11]

The acceptance of concurrent liability has been accompanied by decreased emphasis on the different bases upon which damages are assessed in contract or in tort. The traditional rule is that damages in contract are those which were "within the contemplation of the parties" and in tort those which were "reasonably foreseeable". There is, however, a growing body of thought that there is no longer a difference in the underlying principles governing damages in tort and contract. In Kienzle v. Stringer, Zuber J.A. stated that there was no distinction between the test of reasonable foreseeability in tort and reasonable contemplation in contract:

> It is, I think, apparent that neither of these tests is a measure of precision and I number myself along those who are unable to see any real difference between them.
>
> It may be helpful to recognize that in using the terms "reasonably foreseeable" or "within the reasonable contemplation of the parties" courts are not often concerned with what the parties in fact foresaw or contemplated. (I leave aside those cases where the disclosure of special facts may lead to the conclusion that a party has assumed an extraordinary risk.) The governing term is reasonable and what is reasonably foreseen or reasonably contemplated is a matter to be determined by a court. These terms necessarily include more policy than fact as courts attempt to find some fair measure of compensation to be paid to those who suffer damages by those who cause them.[12]

This view was affirmed by the Ontario Court of Appeal in Robert Simpson Co. Ltd. v. Foundation Co. of Canada where Mr. Justice Cory said:

> In this age of complex relationships between those engaged in commerce it should not be unusual to observe diverse claims arising out of those relationships. It should come as no surprise that an act may constitute both a breach of a contract and a breach of a duty owed to the plaintiff.
>
> The differences in result of an action based upon a breach of contract or tortious act appear to be fast disappearing. For example, it is difficult for me to appreciate what, if any, difference there might be either in the test to be applied in determining the remoteness of the damages or in the measure of the damages flowing from an act that might be termed a breach of contract or a breach of a duty owed to

> the plaintiff (apart from some agreement of the parties as to damages that is set out in the contract).[13]

Professor Waddams argues that the issue of foreseeability and remoteness, which resulted in differences in the quantum of damages in tort and contract damages may be non-existent.[14] He suggests, echoing Mr. Justice Zuber in Kienzle v. Stringer[15], that the question is what is the appropriate measure of damages in each case. Mr. Justice Krever recently stated that the type of damage for which a plaintiff can recover is "becoming less dependant on the theory of liability on which it is based"[16]. As examples he mentions several recent cases in which damages for economic loss traditionally restricted to contractual claims were awarded in claims arising from negligence even where there was no physical or property damage.[17] In cases such as Jarvis v. Swan Tours[18], the Courts have awarded damages for mental distress despite the traditional position that they are not available in an action based on a contract.[19] Finally, although the question is not authoritatively settled, a Canadian Court has awarded punitive damages for breach of contract.[20]

I will not attempt to discuss all the ramifications of recent decisions which have explored the borderline between tort and contract. The law is still developing. The pressure for choice of remedies in contract and tort has

produced observable change. There is an almost synergistic effect between the equalization of remedies and the alternation of theories of liability in contract and tort.

Professor Waddams goes further and argues that in the calculation of damages the law is becoming more concerned with the interest being protected than with the underlying theory of liability. In the preface to his recent book on damages, he explains his decision to organize his material by the type of interest protected:

> Books on damages have conventionally divided the subject according to areas of substantive law, dealing with contracts separately from torts, while collecting together all kinds of damage claims arising out of the same area of law. However, from the point of view of compensation, it is the interest protected that is the logical connecting factor, not the source of the legal obligation. For this reason I have here approached the law of damages according to the interest for which the money award is a substitute, so that all claims for loss of property, for example, are dealt with together, whether the loss is caused by conversion, destruction of the property, or non-delivery by a seller. In all cases the plaintiff's complaint is that, if the wrong had not been done, he would now have property that in fact he does not have. The problems that arise in translating the plaintiff's claim into a money sum are identical, or at least very closely analogous.[21]

(b) Equitable Remedies

The second example of the emergence of new theories of remedies is the changing relationship between common law and equitable remedies. The traditional approach, derived from the days when courts of law and equity were separate, was that equitable remedies such as injunctions were to be granted only when the legal remedy of damages would not adequately compensate the plaintiff. Professor Sharpe argues that the Courts are moving away from this hierarchical approach and are beginning to grant equitable remedies based on their appropriateness for both parties and not merely the adequacy of damages as compensation for the plaintiff and concludes:

> As is the case with specific performance, in deciding whether to grant injunctions, modern courts are less and less willing to be bound by tradition alone, and more and more willing to base their decisions on the relative advantages and disadvantages of damages or an injunction. The courts do seem to be moving steadily closer to a "non-hierarchical" scheme of remedy selection.[22]

This trend is reflected by the development and expansion of Mareva and Anton Pillar injunctions as well as the increasing importance of injunctive relief, in general, as an effective remedy. It seems likely that there will be an even more flexible and innovative use of equitable remedies now that the Charter has been entrenched.

(c) Personal Injury Compensation

A third area, which has caused particular concern in recent years, in part because of the increasing size of awards, is personal injury compensation. In Andrews v. Grand and Toy[23] and later, in Lewis v. Todd[24], Mr. Justice Dickson discussed the difficulties of making an acurate assessment of damages and the inadequacies of lump sum compensation and suggested the desirability of periodic payment and review when he said:

> ... it is highly irrational to be tied to a lump-sum system and a once-and-for-all award.
>
> The lump-sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.[25]

A special committee was established by the Chief Justice of Ontario to consider Chief Justice Dickson's appeal for a periodic payment system.[26] It concluded that no scheme could operate without the consent of the parties and recommended legislation to permit such consent judgments providing not only for periodic payment but also future

review of damage awards. This recommendation was incorporated this year in Ontario's new Courts of Justice Act.[27] The increasing use of structured settlements also attests to the utility of an alternative to lump-sum damage awards. This is a problem which will not disappear and the likelihood exists of further public studies of forms of compensation for personal injuries.[28]

The difficulty of assessing damages has been intensified in Ontario by the right given by the Family Law Reform Act in 1978 to spouses, children, grandchildren, parents, grandparents, brothers and sisters to recover damages for the death or injury of a relative. These damages may include compensation for loss of guidance, care and companionship[29]. Comparable legislation has been enacted in other provinces and substantial damage awards under it have been upheld by the Supreme Court of Canada.[30] Courts are still struggling with the problem of assessing damages which are frequently intangible and always difficult to measure. Each case has been decided on its own facts - sometimes with results that are difficult to reconcile. It is still too early to tell whether disparate results will invite some standardization of awards modelled on that achieved by the Supreme Court in the assessment of non-pecuniary damages.

(d) Other Remedies

Time does not permit comment on declaratory, restitutionary, criminal and other remedies which will be discussed at this conference. Their importance is obvious as is their capacity for innovative development to meet the demands of a rapidly changing society.

At the beginning I suggested that the subject of remedies is inseparable from procedure. No overview of remedies can be confined simply to a description of what remedies are available. It necessarily must encompass who or what tribunal provides remedies and how or by what procedure a claim for a remedy may be made. We must therefore take into account structural and procedural changes which have the effect of broadening access to remedies. These include the three matters which I will now discuss: extra-judicial tribunals, class actions and the Charter.

2. EXTRA-JUDICIAL TRIBUNALS

This century has witnessed a proliferation of extra-judicial tribunals. These perform regulatory and administrative functions beyond the competence of the ordinary courts. A substantial number, however, have displaced the courts, in whole or in part, in their traditional role of dispute resolution and the provision of remedies.

The pressure for extra-judicial remedies will continue. It arises from public dissatisfaction with the delay, expense and uncertainty of judicial proceedings. To a degree it also reflects Chief Justice Dickson's concerns about the adequacy and efficacy of damage assessment. To a considerable extent it is founded on a belief in the insurance principle and that people should be compensated for hazards they must endure as ordinary incidents of life such as highway accidents and toxic substances introduced into commerce and the environment by manufactured products and industrial processes. This is not the occasion to repeat the arguments for and against "liability without fault". It suffices to say that it is a concept with wide appeal and enduring vitality. It is periodically stimulated by the demonstrable failure of established legal processes to deal with urgent social problems.[31]

Other pressures appear to be at work in Canada. Recent events have shown that provincial governments are anxious to increase their powers to create extra-judicial tribunals to perform social and legal functions which they regard as important. Such tribunals have been restrained in their activities by s. 96 of the Constitution Act which prevents them from assuming functions previously reserved to the courts.[32] In response to provincial pressure, the Federal Government, in August 1983, proposed a constitutional amendment designed to give the provinces greater latitude in

the establishment of extra-judicial tribunals without impairing the status of the courts.[33] The proposed amendment encountered much criticism and is being reconsidered but it is quite likely that a similar proposal will appear again. The rather prosaic subject of remedies could thus become involved with the constitutional and political disputes which are the lot of a federal state.

3. CLASS ACTIONS

For the time being, the possibility of effective class actions has been eliminated in the common law provinces. The Supreme Court of Canada, in Naken v. General Motors[34] reversing the Ontario Court of Appeal[35], made it clear that without legislative change, class actions would be strictly limited. A recent report of the Ontario Law Reform Commission[36] recommended that the Rules of Court be amended to provide for class actions largely on the model of the Federal Court class action rules of the United States.[37]

Pressure for class actions is likely to grow as remedies are sought under the Charter. Many of the constitutional cases in the U.S. result from class actions, particularly where the issue is a system-wide violation of a right. Despite the wide-spread use of class actions, their value is still a contentious issue. In an article in the Harvard Law Review, Professor Arthur Miller described the fervour of partisans on both sides of the issue as follows:

> Class action adherents would have us believe it is a panacea for a myriad of social ills, which deters unlawful conduct and compensates those injured by it. Catch phrases such as "therapeutic" or "prophylactic" and "[taking] care of the smaller guy" are frequently trumpeted. Its opponents have rallied around characterizations of the procedure as a form of "legalized blackmail" or a "Frankenstein Monster". ... They assert that many [class action] cases are unmanageable and inordinately protracted by opposing counsel, crating a certain millstone or dinosaur character that diverts federal judges from matters more worthy of their energies.[38]

Obviously much discussion of class actions lies ahead but some change is indicated because of the obvious difficulty of exposing one plaintiff to the hazards of litigation affecting many others who are denied the right of participation.

4. CHARTER REMEDIES

The Charter will unquestionably focus attention on remedies. Section 24(1) provides:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

It casts the judiciary into the "uncharted sea" referred to by Chief Justice Deschenes in the Quebec Education[39] case.

The questions it raises are many. I cannot hope to enumerate all of them let alone suggest answers in this brief address. I will confine myself to remedies and leave aside

the interesting questions of what court is competent to grant them and of the development of procedures which will minimize disruption of ongoing legal proceedings, particularly in criminal cases.

The full dimensions of the problem which Canadian courts will face are now fast becoming apparent. Up to the present, courts have dealt with the Charter in terms with which they are familiar and have granted traditional remedies. Evidence has been ruled inadmissible; accused have been acquitted; convictions have been quashed; and all or parts of offending statutes have been declared unconstitutional. These are effective remedies because the power to enforce them lies with the judiciary.

But non-traditional remedies are also available where the Charter has been infringed - the most obvious being damages. There is already evidence that our courts are prepared to use this remedy in a variety of circumstances, wherever they consider it appropriate. I cite some examples.

In Collin v. Lussier[40], a 1983 decision of the Federal Court Trial Division, a prisoner who was moved unjustifiably from a medium to maximum security prison thus breaching his right to security of the person under section 7 of the Charter, was awarded $18,136 in damages for pecuniary loss, psychological damage, medical care, denial of security of the person and exemplary damages. In assessing the

quantum of damages, which were not challenged by the Crown, Mr. Justice Decary relied on pre-Charter authorities to define the categories and arrive at an appropriate award.

The Federal Court Trial Division awarded $500 to an accused who was denied his right to counsel.[41] The damages were given as punitive damages for the purpose of providing a deterrent. The accused suffered no actual loss as he pleaded guilty to the offence.

Justice D. C. MacDonald of the Alberta Court of Queen's Bench gave leave to an accused to seek damages as compensation for five days during which he was jailed for contempt of court without being allowed his legal rights.[42] In his reasons Justice MacDonald stated that it was not an appropriate case to quash the indictment since the offence was serious and that damages might be a satisfactory alternative.

The Manitoba Court of Appeal said, in obiter, that an accused might seek damages where he has been subject to an illegal search and seizure.[43]

From these examples, it will be seen that the damages were intended to serve several purposes: compensation, deterrence and punishment. At this stage, it is clear that the role of damages in Charter cases is not limited to compensation. I can see every advantage in retaining the remedy of damages as a flexible instrument to compensate, to punish or to deter and as either a primary or

a secondary remedy for Charter violation as it appears they have been used in the United States. There may be theoretical objections to the use of damages as a primary remedy in Charter cases because of the public interest involved, but I would not regard such objection as overwhelming where damages provide the most simple, effective and just remedy. Others may differ. There is bound to be discussion about the role of damages in Charter cases and in particular the propriety of using them for deterrent or punitive purposes.

Because of the usefulness of damages as a remedy in Charter cases, there is likely to be discussion of the jurisdiction of particular courts to award damages and the desirability of altering procedural rules, if necessary, to permit them to do so. The courts have dealt differently with procedural obstacles in order to avoid multiple legal proceedings. In Collin v. Lussier[44], damages were awarded on a motion for certiorari and mandamus. The Crown challenged the jurisdiction of the Court to award damages, arguing that a separate action should have been brought by the plaintiffs. Mr. Justice Decary, however, ruled that the purpose of the Federal Court Rules of Procedure was to facilitate proceedings and that as the plaintiff had proved liability and established damages, "it would diminish the remedy ... to require him to bring another proceeding in the Federal Court in order to obtain the redress he is entitled to have".[45]

The Ontario Court of Appeal, in Re Seaway Trust and the Queen[46] refused to allow the plaintiffs to proceed by motion for judicial review before the Divisional Court in a challenge against the constitutional validity of a provincial statute. It directed that the matter be tried as an ordinary action and one of its reasons for doing so was that the Divisional Court had no jurisdiction to award damages which were a possible remedy in the case.

In my view the long term impact of the Charter will be less important in criminal law, where it has been most prominent initially, and much more important in other areas. We already have evidence of this in the recent Supreme Court of Canada decision in the Quebec Education[47] case and the Ontario Court of Appeal opinion on the Reference on Minority Language Education Rights[48]. The Quebec decision simply declared a particular section of the Quebec legislation to be inconsistent with the Charter and therefore of no force and effect. The Ontario case covered much broader territory resulting in a judicial decision on the manner in which minority language education should be provided and the rights of minority language citizens to manage and control it.

One might say "so far, so good". But what happens if governments and legislatures fail to comply with judicial prescriptions? It would be foolish to ignore the fact that changes in statutes and administration mandated by the courts

may sometimes be unpopular and costly to taxpayers. The experience of the United States shows that serious problems may arise in providing effective Charter remedies.

In the United States, one can trace the development of these problems from the mid-1950's. The courts, faced with challenges which reflected the new awareness of civil rights, particularly for blacks, began with the confident belief that their opinions would be respected and their constitutional directions would be complied with. Instead, they were met in some areas with defiance, delay and evasion. The tumultuous history following the historic anti-segregation decision in Brown v. Board of Education[49] provides a sombre warning. In the face of non-compliance, the courts were compelled to make increasingly detailed orders to achieve desegregation in public school systems.

Until 1971, the U.S. courts generally left the formulation of the remedial plan to the defendant, limiting its role to a decision that the violation had occurred and then approving the remedy and making the necessary order. However, in 1971, after six years of litigation in a school desegregation suit failed to produce a workable solution despite the trial court's repeated preference for a "home grown" solution, the courts in Swann v. Charlotte-Mecklenberg Board of Education[50] appointed an expert to design a solution. While that tactic ultimately provided the

incentive for the defendant to devise an acceptable plan, it marked the beginning of a more activist role for the courts in remedy design.

A parallel development also encouraged greater court intervention in remedy formulation. Violations of rights were found not only because of unequal treatment, which had been the underlying basis for the initial desegration decisions, but also because of the existence of substandard conditions. The courts focussed on quality as well as equality. This development can be seen in cases dealing with conditions in prisons and mental institutions. For example, in Holt v. Sarver[51], the court set general standards for prison conditions in Arkansas based on the sixth amendment prohibition against cruel and unusual punishment.

The United States Federal Courts have employed a number of innovative institutional and structural remedies for violations of constitutional rights. They have issued detailed decrees for the reapportionment of legislative districts[52] as well as the operation of school and prison systems[53]. They have taken over the management of institutions to ensure constitutional compliance[54]. The extent of this detailed involvement is illustrated by the following excerpt from an article in Newsweek several years ago:

> When U.S. District Judge W. Arthur Garrity Jr. found that the schools of Boston were racially segregated and

> ordered a desegregation plan requiring busing, violence broke out at South Boston High School. Dissatisfied by school officials' compliance with his plan, Garrity placed the high school in Federal receivership, much as a bankrupt corporation, and became in effect its principal. He ordered the Boston school board to spend more money than it had in its budget. He required the board to pay the moving costs from St. Paul, Minn., to Boston for a new headmaster he hired. In Federal court one day, Garrity pondered the purchase of tennis balls for South Boston High.

Certain conclusions can be drawn from the United States experience. Courts will move from their traditional role of dispute resolution to the correction of social wrongs through institutional revision. This will affect not only the type of remedy but also the process by which it is formulated. I will briefly summarize some probable results.

First, Charter remedies will not be limited to those traditionally available at law or in equity and will not be restricted by the rules governing them. Courts will have to fashion new remedies appropriate for each case. In particular, the ancient aversion to continuing supervison will have to be disregarded because it may be required sometimes with management of public institutions to ensure compliance with the Charter.

Secondly, courts will have to relax their traditional objection to interventions by interested parties. Their judgments no longer will merely settle disputes between the original parties to the litigation. They will, in major cases, take the form of what Americans call "institutional

decrees", tantamount to legislative acts, requiring changes which affect a broad range of citizens. As a result, courts will not only feel compelled but will find it helpful to admit interest groups as intervenants or amici curiae in the proceedings. It seems likely that the fashioning of remedies in the form of institutional decrees, after a Charter violation is established, may become the subject of separate hearings to which intervenants may be admitted more easily and with less disruptive effect.

Thirdly, since Charter rights benefit groups as well as individuals, there is likely to be an increased demand for adequate class action procedures. Participation by various interest groups, whether defined by sex, language, ethnic background or otherwise, will require the formulation of rational and uncomplicated class action rules.

Fourthly, the role of settlement in constitutional litigation may have to be reconsidered. If, for example, a prisoner is offered an inducement to withdraw a serious claim about jail overcrowding, can a court sanction the settlement and leave the real issue undecided ignoring the rights of other prisoners? This kind of dilemma can be avoided by the admission of an intervenant to replace an original party as was done by the Supreme Court of Canada in Law Society of Upper Canada v. Skapinger[55].

Finally, the nature of evidence and the facilities for obtaining it may change in Charter cases. It is plain that courts have already decided to lower the traditional barriers and admit relevant evidence in the form of statistical, economic, sociological, demographic and other data which might be excluded in ordinary litigation. It seems that this development may be carried further as courts seek to fashion appropriate remedies. In the United States, in order to determine the impact and effectiveness of remedies, courts have not only admitted intervenants and amici curiae. They have also called expert witnesses of their own motion and employed special masters with expertise in the subject of the litigation to assist in devising and administering remedies.

CONCLUSION

I conclude as I began by emphasizing the importance of remedies in the day-to-day administration of the law and in the development of our jurisprudence. They are in the words of Justice Estey "the only cutting edge in the entire vast legal machine".[56] Remedies, however, cannot be considered in isolation from other legal, political and social developments. At present, their importance is emphasized by the the re-evaluation of their role in ordinary

judicial proceedings, the continuing demand for new remedies from other tribunals and the prospect of their innovative use to guarantee the effectiveness of the Charter.

1 Canada Act, 1982 (U.K.), 31-32 Eliz II, c. 11, Schedule B, Constitution Act, 1982, Part I, Canadian Charter of Rights.

2 For an overview of remedies and their history, see The Honourable Mr. Justice W. Z. Estey, "The Law of Remedies - An Overview", Law Society of Upper Canada Special Lectures, Remedies (1980).

3 Judge Rosalie S. Abella, "Access to Legal Services by the Disabled", Report to the Attorney-General, Ontario, June 1983, p. 7.

4 Maitland, The Forms of Action at Common Law (1909), p. 296.

5 United Australia Ltd. v. Barclays Bank, [1941] A.C. 1, 29.

6 Hill v. Parsons (C.A.) & Co. Ltd., [1972] Ch. 305, 316.

7 Robert J. Sharpe, Injunctions and Specific Performance (1983), at pp. v-vi.

8 [1972] S.C.R. 769 at 777-8, 26 D.L.R. (3d) 699, 727-28 (S.C.C.).

9 (1982), 141 D.L.R. (3d) 193, 221.

10 Supra, f.n. 8.

11 Supra, f.n. 8. See also, Dominion Chain v. Beale (1976), 12 O.R. (2d) 201, Dabous v. Zuliani (1976), 12 O.R. (2d) 23; con. Messineo v. Beale (1978), 20 O.R. (2d) 49.

12 (1981), 35 O.R. (2d) 85 at pp. 89-90. For a more detailed discussion of this subject, see J. R. Maurice Gauvreau, "The Interrelationship of Contract and Tort", The Advocates' Society Journal (1984) Vol. 3, No. 2, pp. 4-13.

13 Robert Simpson Co. Ltd. v. Foundation Co. of Canada (1982), 36 O.R. (2d) 97 (C.A.) at 109.

14 Stephen Waddams, The Law of Damages (1983), at paras. 1177-1185.

15 Supra, f.n. 12.

16 The Honourable Mr. Justice Horace Krever, "Professional Responsibility - Lawyers and Accountants", Torts in the 80's, Law Society of Upper Canada Special Lectures, p. 445.

17 Supra, f.n. 16, at pp.458-59.

18 [1973] Q.B. 233.

19 Newell v. C.P. Airlines (1977), 14 O.R. (2d) 752; Pilon v. Peugeot Canada Ltd. (1980), 29 O.R. (2d) 711; Widdington v. Dickinson (1982), 133 D.L.R. (3d) 472; Bohemien v. Storwall International Inc. (1982), 40 O.R. (2d) 264-5, aff'd Ont. C.A. (1983), 44 O.R. 361; Brown v. Waterloo (1983), 43 O.R. (2d) 113 (Ont. C.A.).

20 Brown v. Waterloo (1982), 37 O.R. (2d) 277, (Ont. S.C.). This issue was not discussed by the Court of Appeal, supra, f.n. 18. New Brunswick Electric Power Commission v. International Brotherhood of Electrical Workers (1976), 22 N.B.R. (2d) 364 (N.B.S.C.); Nantel v. Parisien (1981), 18 C.C.L.T. 79 (Ont. S.C.); Centennial Center v. VS Services Ltd. (1982), 40 O.R. (2d) 253; Edwards v. Harris Intertype (1983), 40 O.R. (2d) 572, appeal dismissed by Ont. C.A., unreported, June 8, 1984.

21 Supra, f.n. 14, at pp. v-vi.

22 Supra, f.n. 7, at p.8.

23 (1974), 54 D.L.R. (3d) 85, (Alta S.C.T.D.), var'd 64 D.L.R. (3d) 663, (Alta S.C. App. Div.), var'd [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452.

24 [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257.

25 Andrews v. Grand & Toy Alberta Ltd., supra, f.n. 23, at p. 236 S.C.R., p. 458 D.L.R.

26 Report of Ontario Commission on Tort Compensation, 1980.

27 Courts of Justice Act, (1984) c. 11, s. 129.

28 See, for example, Waddams, supra, f.n. 14, at pp. 325-52 and Report of Royal Commission on Civil Liability and Compensation for Personal Injury (London, HMSO, 1978), s. 565 (Pearson Commission Report).

29 Family Law Reform Act, R.S.O. 1980, c. 152:
60.-(1) Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part II, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

(2) The damages recoverable in a claim under subsection (1) may include,

(a) actual out-of-pocket expenses reasonably incurred for the benefit of the injured person;

(b) a reasonable allowance for travel expenses actually incurred in visiting the injured person during his treatment of recovery;

(c) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the injured person, a reasonable allowance for loss of income or the value of the services; and

(d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred.

30 See Ellyn "Something Old, Something New": Judicial Development of Damages Claims under section 60, Family Law Reform Act (1982) 3 Advocates' Quarterly 312, Morse and Kryworuk, Section 60 of the Family Law Reform Act: a Review of Three Recent Cases on the Assessment of Damages to Family Members of Injured and Fatally Injured Plaintiffs, (1984) 27 C.C.L.T. 209.

31 Edwin Chen, "Asbestos Litigation is a Growth Industry", Atlantic Monthly, July 1984.

32 Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714.

33 "The Constitution of Canada, a Suggested Amendment Relating to Provincial Administrataive Tribunals", a Discussion Paper published by the Miniter of Justice of Canada, 1983. The proposed amendment was the addition of s. 96B as follows:

96B. (1) Notwithstanding section 96, the Legislature of each Province may confer on any tribunal, board, commission or authority, other than a court, established pursuant to the laws of the Province, concurrent or exclusive jurisdiction in respect of any matter within the legislative authority of the Province.

(2) Any decision of a tribunal, board, commission or authority on which any jurisdiction of a superior court is conferred under subsection (1) is subject to review by a superior court of the Province for want or access of jurisdiction.

34 General Motors of Canada Limited v. Naken et al., [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385.

35 Naken et al. v. General Motors of Canada et al. (1978), 21 O.R. (2d) 780.

36 Report of the Ontario Law Reform Commission, Class Actions, 1982.

37 See discussion of Ontario Report: Brian Grossman Q.C., "Reforming Ontario's Class Action Law", The Advocates' Society Journal (1984) Vol. 3 No. 1 at p. 9 and J. W. Rowley Q.C., "Class Action Reform: A Major Departure From Fundamentals", ibid. p. 13.

38 Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem" (1979) 92 Har. L. Rev. 664 at pp. 665-66.

39 Protestant School Board of Greater Montreal et al. v. Minister of Education of Quebec et al. (1982), 140 D.L.R. (3d) 33 at 53.

40 (1983), 6 C.R.R. 89.

41 R. v. Crossman (1984), 12 W.C.B. 167 (F.C.T.D.).

42 R. v. Germain (1984), 12 W.C.B. 35 (Alta. Q.B.).

43 R. v. Esau (1983), 4 C.R.R. 144.

44 Supra, f.n. 40.

45 Supra, f.n. 40, at p.108.

46 (1983), 6 C.R.R. 365.

47 A.G. of Quebec v. Quebec Association of Protestant School Boards et al. (1984), unreported, released July 26, 1984.

48 Unreported, released June 26, 1984, 26 A.C.W.S 146.

49 347 U.S. 483 (1954), 349 U.S. 294 (1955). The U.S. history is reviewed by Fletcher, "The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy" (1982), 91 Yale L.J. 635.

50 402 U.S. 1 (1971).

51 309 F. Supp. 362 (E.D. Ark. 1970) - a court ordered separation of prisoners' barracks and implicitly threatened to close a prison facility unless conditions were brought up to constitutional standards; Wyatt v. Stickney 344 F. Supp. 373, 387 (M.D. Ala. 1972), aff'd in part, rev'd in part sub nom Wyatt v. Aderholt 503 F. 2d 1305 (5 Cer: 1974) - a court ordered reorganization of mental health institutions in Alabama. The court order included a direction for water temperatures for patient use and for dishwashing and laundry

use; New York State Association for Retarded and Parisi v. Carey 357 F. Supp. 752 (E.D.N.Y. 1973) - closing of a facility for the mentally retarded.

52 In Baker v. Carr 369 U.S. 186 (1962), the U.S. Supreme Court overruled an earlier decision of that court in Colegrove v. Green 328 U.S. 549 (1946) and held that the issue of malapportionment among electoral districts was a justiceable issue and remanded the case to the district court for appropriate relief. The court later set the "one person - one vote" as the formula to be applied in ordering reapportionment. Reynolds v. Simms 377 U.S. 533 (1964).

53 Morgan v. McDonough, 540 F. ed 527 (1 Cer: 1976), Cert. denied 429 U.S. 1042 (1977) - A receiver was appointed for the Boston School Committee to run the school.

54 Perez v. Boston Housing Authority 400 N.E. ed 1231 (Mass. 1980) - A court-appointed receiver was placed in charge of the Boston Housing Authority.

55 (1984) 11 C.C.C. (3d) 481.

56 Supra, f.n. 2, at p.2.