THE CANADIAN BAR REVIEW

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☞ **Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.**

The Twenty-sixth Annual Meeting of the Canadian Bar Association will be held in the City of Winnipeg, at the Royal Alexandra Hotel, on the 25th, 26th and 27th days of August, 1943.

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CASE AND COMMENT

TRUSTS—ALLOCATION BY CORPORATE TRUSTEE OF OWN MORTGAGES TO TRUST ESTATE.—Broadly speaking, the law of trusts accepts the following two propositions as well-established: (1) A trustee may not sell trust property to himself as an individual;[1] (2) A trustee may not sell his individual property to himself as trustee.[2] In either case the trustee is accountable for any profit and will be charged with any loss.[3] In connection with the second proposition, the fact that the subject of the sale would be a proper trust investment if purchased from a third person makes no difference. The beneficiaries may, however, be prevented from taking objection if they have consented or have acquiesced with a full knowledge of the circumstances. The policy of the law of equity against permitting any conflict between duty and interest is strong enough to warrant the assertion that only the consent of beneficiaries or statute can modify it.

In *National Trust Co.* v. *Osadchuk*[4] the Supreme Court of Canada was called upon to apply the second proposition to a corporate trustee. From a purely business standpoint, there may be something to be said for relaxing the stringency of the rules

[1] *Cf.* LEWIN ON TRUSTS (14th ed. 1939), p. 826.
[2] *Cf.* SCOTT ON TRUSTS, vol. 2. p. 875.
[3] *Cf.* Scott, *The Trustee's Duty of Loyalty* (1936), 49 Harv. L. Rev. 521, at p. 539 ff.
[4] [1943] 1 D.L.R. 689, affirming [1942] 1 D.L.R. 145.

governing the conduct of trustees in their application to a corporate trustee which acts for numerous trust estates, the assets of which may not always be fluid when an opportunity for a proper trust investment arises. But if this relaxation goes beyond mere administrative convenience, in connection with the advancing of money by the trustees for an investment for the trust estate, the door is open to abuses by trustees which it has been equity's role to prevent. And even in the case of this suggested relaxation, the onus should be borne by the trustee on the question whether the investment was really for the trust estate.[5]

In the *Osadchuk Case*, the corporate trustee, after becoming administrator of an estate, advanced its own funds upon the security of two mortgages which it took in its own name, and subsequently allocated them to the estate, debiting it for the amount of the advances. One of the mortgages was taken when there was insufficient money in the estate to make the necessary advance. The investment turned out to be a poor one and the beneficiaries, on coming of age, brought action for an accounting. The Supreme Court of Canada, affirming the majority judgment of the Saskatchewan Court of Appeal, held as a matter of fact that the transaction was void, being one by which the trustee disposed of property which it bought for itself rather than one by which the trustee was merely taking the concluding step in making an investment for the trust estate. What bulked large in the case was that the trustee had taken the mortgages in its own name, and thus had the disposal of them. It would have been more consistent with the trustee's argument to find that it had taken the investments in the name of the trust estate.

American courts have been as vigilant as English and Canadian courts in protecting the trust estate, but in many states statutory permission has been given to corporate trustees to deal with themselves, subject to certain limitations.[6] Even though they may as trustees invest in mortgages held by them in an individual or representative capacity, they are not relieved, however, of their duty to act with prudence in making the investment on behalf of trust estates.[7]

B. L.

[5] Gordon J. A. who dissented in the Saskatchewan Court of Appeal, [1942] 1 D.L.R. 145, proceeded on the ground that the onus was on the beneficiaries to show that there was a sale by the trustee rather than an investment originally taken for the estate. It seems difficult to appreciate this view, as a matter of trust law, even though 20 years had elapsed since the impugned transaction.

[6] *Supra*, note 3.

[7] *Cf. In the Matter of Dalsimer* (1937), 251 App. Div. (N.Y) 385, aff'd

NEGLIGENCE—FATAL ACCIDENTS ACTION—APPORTIONMENT.—Where there is a right to damages under the Fatal Accidents Act,[1] is the amount subject to apportionment by reference to the contributory negligence of the deceased? Roach J. held that it was, without discussion, in *Newell* v. *Gemmell*,[2] and now Chevrier J. has, also without discussion, come to the same conclusion in *Chapman* v. *C. N. R. and Parry Sound*.[3]

There is much to be said for the contrary view, especially in Ontario, since the Negligence Act[4] provides for apportionment only if fault is found on the part of the *plaintiff*. Where the plaintiff in a fatal accidents action has not been personally negligent, it would seem to be a forced construction to reduce the amount of his recovery by reference to the contributory negligence of the deceased. A fatal accident action, unlike a survival action, is in no sense for the benefit of the deceased's estate but is a statutory remedy for the benefit of dependants, conditioned only on whether the deceased would have had a cause of action had he lived; and since his contributory negligence is no longer a bar to action, his dependants cannot be met with the objection that the deceased could not have sued. Nothing in the Fatal Accidents Act justifies the courts in identifying the plaintiffs in a fatal accidents action with the deceased, in such a manner as to reduce the account of their recovery. Nor is the present wording of the Negligence Act broad enough, it is submitted, to make it applicable to fatal accidents actions.[5]

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CONSTITUTIONAL LAW—DEBT ADJUSTMENT.—The serious consequences of the invalidation of the Alberta Debt Adjustment Act, 1937,[1] not only for Alberta but also for Manitoba and Saskatchewan (in which similar statutes were enacted) has been recognized by the Government of Canada in a recent Order-in-Council, P.C., 3243 dated April 20, 1943. The Order-in-Council, made under the War Measures Act, establishes regulations, applicable only in the above mentioned three provinces, under

277 N.Y. 717, 14 N.E. (2d) 218. This case was referred to in the *Osadchuk Case* in the Saskatchewan Court of Appeal, but the reference to it by the Court does not reveal that the corporate trustee was held liable for making an imprudent investment.

[1] R.S.O. 1937, c. 210.

[2] [1938] O.W.N. 1.

[3] [1943] 2 D.L.R. 98 (Ont.).

[4] R.S.O. 1937, c. 115, s. 3.

[5] See Note (1941), 19 Can. Bar Rev. 291, for a fuller discussion of the problem.

[1] *Re Alberta Debt Adjustment Act, 1937*, [1943] 2 D.L.R. 1 (P.C.); see Note (1942), 20 Can. Bar Rev. 343; Note (1943), 21 Can. Bar. Rev. 310.

which the courts are empowered where mortgage actions and actions by vendors of land are brought against farmers, to order a stay, postpone payments and prescribe terms, etc., as may be deemed "necessary or proper for the purpose of retaining on the land during the state of war now existing an efficient and industrious farmer of whose good faith [the court] is satisfied and, in so far as is possible and consistent therewith, of fairly protecting all other persons having any interest in the land."

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NEGLIGENCE—DUTY OF CARE—NERVOUS SHOCK.—Just as we were going to press we received a letter from Dean Leon Green of Northwestern University, School of Law, dealing with the problems raised by the House of Lords' decision in *Hay or Bourhill* v. *Young* in connection with liability for nervous shock, which we discussed in the REVIEW for January. As Dean Green's analysis of any problem of tortious liability is always stimulating we obtained his permission to reproduce the substance of the letter. The questions raised are, we believe, of fundamental importance in the law of tort, and as there is evidence of a new approach to liability in the English decision the discussion is all the more valuable.

"The decision of the House of Lords in *Hay or Bourhill* v. *Young* marks a long step forward in placing doctrinal emphasis on a defendant's duty. The House of Lords successfully avoided the pitfalls of "proximate", "remote", "direct" or other "cause" doctrines into which all, except two or three, American courts almost invariably fall in disposing of similar cases.

This shifting of doctrinal emphaiss has come very slowly. While most courts in simple cases have always said that a defendant must have violated some duty owed the plaintiff personally, it has been difficult for them to follow the doctrine through in complex cases. My *"Rationale of Proximate Cause"*, which you so kindly cite in your footnotes, was written to speed the process. I recall in the earlier sessions of the *Torts Restatement* group, which I was invited to attend on some occasions, how the battle raged around this point. Many articles were written. My own were brought together and published in *"Judge and Jury"*. The *Palsgraf* case to which you refer grew out of the debate. Some of the hypothetical cases discussed by Judge Andrews were the products of the *Restatement* discussions. My good friend Professor Goodhart in his article, *"The Unforseeable Consequences of a Negligent Act"*, to which you refer, challenged me to reconcile my support of the *Smith* v. *London & South Western Ry. Co.* and *Palsgraf* cases. One of the chapters in *Judge and Jury* is an acceptance of his challenge. Also, in *"Law, A Century of Progress, 1835–1935"*, I attempted to meet the doubt cast by Professor Winfield upon the duty concept. The change in this country and in England on the part of both courts and writers to a more rational technique of dealing with negligence cases has

been very encouraging to me personally. The support given especially by Mr. Tilley and Professor Gregory, whose articles you cite, has been very helpful.

I am somewhat alarmed by two points in the opinions of the Lords referred to by you: (1) The great weight upon forseeability in the determination of duty; (2) the little weight given to the distinctions between the ordinary nervous shock case resulting in physical injury and the case of *Owens* v. *Liverpool Corporation*.

I have some doubts concerning the broad statements found in the several opinions of the Lords that the defendant owed the plaintiff no duty. The statute against speeding is designed among other things to prevent collisions, and hence for the purpose of protecting people on and near the highway from personal and property injuries. If in this case the collision had caused some part of one of the machines to be thrown over the tramway car and against the plaintiff, I dare think there would not have been the slightest hesitancy in giving her a recovery, and this even though ordinarily such a thing would not happen. In other words, there was a duty owed plaintiff against physical violence as a result of collision. Also, if the defendant's vehicle had been loaded with TNT and a terrific explosion had occurred and she had been hurt by the concussion, I dare think the duty would likewise have been found to exist. So too if the defendant's vehicle had been transporting some otherwise harmless chemical that as a result of the collision had been set off so as to produce an ominous spectacle of glares and colours along with the ordinary noise of the collision, the Lords would have been much harder pressed to deny her a recovery. In other words, the duty of defendant would have extended to hurts resulting from perils like these. But in the case in hand the Lords simply refused to extend defendant's duty to the sort of peril plaintiff suffered. There was a duty owing plaintiff by defendant due to her position as the passenger of another vehicle on the highway. He violated that duty and she was hurt as a result. But her hurt was not the sort of peril within the protection of the duty defendant was under to her.

The technique employed in the *Palsgraf* case is the same. No one doubted the high duty owed the plaintiff as a passenger waiting on the platform. But defendant's duty did not comprehend the risk of scales falling on her as a result of firecrackers dropped by another passenger negligently assisted to board a moving train. It is asked, of course, how far does a defendant's duty extend and how do you know when you have reached the limits of his duty? Lord Wright in discussing another point seems to me to give the only answer that can be given. He says: "The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury or the judge decides." In other words, the common law has developed a process to which cases may be submitted. The judge and jury are essential parts of that process. We may not like the result in a particular case, but we have to accept it because we have no better way to determine the case. Nor is it always easy to allocate the functions of judge and jury in hard cases, and if mistakes are made at this point, or rather if different judges disagree as to the proper allocation, we can not help that either. But generally we say that where the matter is clear, as it was in the case in hand, the court determines that the hurt falls without the scope of protection, while if the matter is doubtful the

judge says there may be protection if the jury so finds. That is the best the judicial process can do, and to my own way of thinking it is a very excellent best — a process that permits a fresh justice in every case, in every court, in all common law countries.

The point that bothers me most about the Lords' opinions is the formula which they seemed to think governed them in drawing the line of liability in the particular case. They seemingly fell back on "reasonable foresight", "reasonable and probable consequences", "reasonable contemplation", and other synonymous expressions of the same formula. Here it seems to me they crammed too much into the formula, however it may be expressed. After all, it is only a formula, and it works splendidly as a means of transferring or translating a case to a jury. But it seems entirely too restrictive and misleading to be used for the purpose of binding the judgment of a judge. Of course, foresight enters into the judge's judgment as well as it does that of a jury, but it is not the only factor that enters into the judgment of either. In the case of a jury, however, we do not follow the matter further than to give them a correct formula But in the case of the judge much more than foresight must be found. I shall not labour the point here, for I have dealt with it in *Judge and Jury* at length in discussing the duty problem. Suffice it to say here that there are hundreds of cases in which liability has been imposed where there was no forseeability, and hundreds of other cases in which liability was not imposed where there was the plainest forseeability. Taken literally forseeability is such a personal thing — one sees far, another is nearsighted; one is trained by experience, another has no experience or other training. After the happening, moreover, forseeability becomes hindsight and can never operate as forseeability. Then the question becomes what *should defendant have done* under all the circumstances. The forseeability formula is an excellent means of getting a jury judgment on that question. But as a rule of law to bind the judge it is an unfortunate phrase.

Of course the phrase is watered down in all sorts of ways. You do not have to forsee specific hurt but only general hurt. You do not have to foresee the particular person, but only the class of persons, etc. This is all right for a jury. But the judge must say whether: (1) there was a duty to this particular plaintiff, (2) there was a duty to this plaintiff with respect to the particular interest of his which was hurt, and (3) there was a duty as to the interest of the plaintiff with respect to the particular peril which befell him. Now foreseeability, *i.e.*, general experience, is important in satisfying himself on these points, but it is by no means the whole story. The judge must take into consideration the administrative difficulties, the moral climate, the economic consequences, the preventive effects of a decision, and finally what we call justice as between the parties. It is only when the judge is doubtful as to his own judgment as to the existence of a duty to the plaintiff with respect to the interest hurt and with respect to the particular peril to which he was subjected, that he submits the problem to the jury for its judgment. It is at that point that he employs the formula of "forseeability" as a means of calling the jury's experience and judgment to bear on the problem. This, however, now becomes the issue of negligence, *i.e.*, whether the defendant violated his duty, for by submitting the case to the jury the judge has necessarily determined that there may be liability if the jury so determines. He has performed his function in determining "duty", the jury must now perform its function

in determining "negligence". What the considerations in detail are that pushes either judge or jury this way or that in any case is not subject to specification. As human beings who understand something of other human beings we may make guesses, but after all, these forces are at large and lie behind law and give it such support as it has.

May I add that there is no necessity for following any doctrine to the bitter end or the jumping-off place. The *Smith* v. *London & South Western Ry.* case does not require it, for there the railway company's duty was assumed. The *Polemis* Case does not require it, for there the interest of plaintiffs in the integrity of their ship was clear. Nor does the doctrine of "foreseeable consequences" require that the doctrine of *Smith* v. *Railway* be repudiated. The two doctrines are complementary; both are required to allocate the functions of judge and jury in disposing of the problem of liability. They represent respectively the stages of duty and violation of duty, and as applied to the specific interest and specific hurt involved in any case will always call a halt to liability short of the absurd. Likewise they will not cut liability short of good sense. The only way either can go wrong is for the judgment of those making use of the process to go wrong. That is a risk all government must take.

Also the rescue cases do not seem so difficult to me as they do to you. I rather think the duty to the rescuer is strictly personal and as to the very peril he suffers. A defendant through his conduct places someone in danger. Likewise he places his rescuer in peril. The duty is to both victim and rescuer. Here it seems the inadequacy of "foreseeability" as a test of duty is very clear. Without reference to any foreseeability a defendant will be held liable to the rescuer if he appears on the scene to save human life or limb. (Seemingly not so as to property.) Moreover, even though plaintiff foresees his own danger and still plunges in, he is not defeated by contributory negligence. Some policy much stronger than mere foresight comes into operation here. Perhaps it is a habit or morality, perhaps a bit of preventiveness, perhaps even more of that thing we call justice.

In brief, unless the formula of foreseeability is dreadfully overworked and expanded so as to be meaningless, it will not suffice for the determination of both duty, which is the judge's function, and violation of duty, which is the function of the jury, assuming there is any evidence to require its submission. With all humility, it seems to me the Lords did not distinguish the difference in the two functions and did not appreciate the fact that the "foreseeability" formula is primarily one for use in obtaining the judgment of a jury.

The reaction of the Lords to *Owens* v. *Liverpool Corporation* is not surprising, though as suggested above, what they imply is somewhat alarming. On the basis of the reasoning employed in the *Owens* Case, it would seem to extend *Dulieu* v. *White & Sons* too far. But there is a way of sustaining the case. I think I am the only one who has taken the case out of the classification of personal injuries due to nervous shock. It seems to me that the interests in the two cases are entirely different. In *Dulieu* v. *White* and in many other cases like it, the nervous shock resulted in a hurt to the personality—a physical hurt. In *Owens* v. *Liverpool Corporation* it was a hurt to a relational interest—a family relation—the interest living members of a family had in a deceased member. If a corpse of a relative

is kicked around or otherwise abused, the courts react strongly against the offender. I believe protection to the same interest is also being provided against negligent treatment of the dead relative, though of course more guardedly. I do not see why this should not be true. The interest one has in a deceased parent, child or other close relative is one of the dearest interests known to men. That is the way I teach the case, and it has a lot of good company in American cases. If you are interested in the suggestion, you might look at my "*Cases on Injuries to Relations*" (Lawyers Co-operative Publishing Company), and my articles, "*The Right of Privacy*", 27 Illinois Law Review 237 (1933), "*Family Relations*", 29 Illinois Law Review 460 (1934).

If my position has any merit, then it is not so difficult to give good doctrinal foundation to *Hambrook* v. *Stokes Bros.* which has always appealed to my heart. And if the interest one has in a dead relative is subject to protection against negligent hurt, there is even more reason to protect the interest one has in a living child or spouse. In these cases too you have the added basis of physical injury to the plaintiff, while in the ordinary hurt to a family relation the hurt is at most an aggravated emotional disturbance. Thus it is that I am not so sure that *Waube* v. *Warrington* was properly decided, though the court more nearly appreciated the factors involved than appears in other cases. It seems to me that it would be unfortunate to rule out the possibility of recovery in extreme cases of this type, but I would agree that the judges should be very careful not to allow recovery to become a mere matter of routine."

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EVIDENCE—INTERROGATION OF ACCUSED IN ADMINISTRATIVE PROCEEDING.—Criticism of *R.* v. *Pantelidis*[1] in the April number raises several moot points; the decision itself is of much interest, and the criticism brings out the unformed state of the law on several questions involved. However, I am not satisfied that the law is as unformed as the critic assumed.

My own view goes with the majority of the Appeal Court's in this case, though I can well understand that such proceedings as were taken against Pantelidis should be unpopular in a democratic country. However, I think with the Chief Justice, that the tribunal upheld by the Court's decision was in effect a conscription tribunal, and the doings of such tribunals must be often unpalatable in a democracy. But can wars be carried on without unpalatable acts of the executive? We have however only to consider here whether what was done was lawful.

As I read the criticism, it does not question the Court's opinion that the Board of Inquiry was an administrative body;

[1] [1943] 1 D.L.R. 569.

it does question whether that status justified the Board's procedure. The gist of the criticism seems to be this:

> . . . . even administrative tribunals should be required, in the absence of express provision to the contrary, to conform to the policy against compellability of a person charged to give evidence to incriminate himself.

But no authority is offered for saying such a duty of conformity exists. The suggestion seems to be that administrative tribunals should differ very little from judicial tribunals.

That seems to me against authority. It has been decided that administrative tribunals are not bound to act only upon legal evidence; they may act upon hearsay, for instance[2] and upon unsworn evidence.[3] They do not even need evidence in the ordinary sense; they may obtain their information in any way they see fit.[4] In fact there seems to be no authority for saying that administrative tribunals need follow any of the methods of judicial tribunals, except the *audi alteram partem* rule, and even in doing that, they need not hold a hearing at all, so long as they give those concerned a chance to submit their contentions, as by forwarding these in writing.[5] There was no suggestion that Pantelidis did not have a hearing.

I do not think it conveys the right impression to say:

> The majority opinions partly justified the Board's procedure on the ground that it had power to examine the seaman under oath, so that whether he was a competent or compellable witness was irrelevant.

The majority view, as I judge it, was rather that the Board had power to interrogate the seaman and to act on his admissions, so that whether he was sworn or made a witness was irrelevant.

This seems a particularly apt case to demonstrate the impracticability of requiring administrative tribunals generally to follow curial methods. The Order in Council expressly authorized the Board, when the seaman's imprisonment for desertion ended, to imprison him further if he was still unwilling to ship on another vessel. How could the Board possibly function in such a case if it had to follow the methods of a court? The seaman could simply remain mute when approached by the officers of any ship. Can it seriously be argued that the Board's

[2] *Board of Education* v. *Rice*, [1911] A.C. 179 at 182.
[3] *Wilson* v. *Esquimalt & Nanaimo Ry. Co.*, [1922] 1 A.C. 202 at 213.
[4] *Local Gov't. Board* v. *Arlidge*, [1915] A.C. 120 at 133, 151.
[5] *Ibid.*

hands were tied until a witness could be found to swear that he had heard the seaman declare that he would not ship? The Board's whole position and function was so unlike a court's that any suggestion that it was bound to follow curial methods seems to answer itself.

Obviously the Board must have been intended to interrogate the seaman, as it did, and if it could do this on one occasion, how could its inability to do so on others be implied? I see nothing startling in the idea that tribunals, dealing with actions that bear directly on the war effort, should not be bound by the restrictions on courts. Indeed, I do not think the war could be carried on efficiently if they were. How, for example, could suspected fifth columnists be promptly dealt with if their guilt of some reasonable activity had to be proved beyond a reasonable doubt by legal evidence? I do not see why the same drastic powers exercised by the Home Secretary in England against suspected aliens should not be exercised by boards against deserting seamen.

In *Liversidge* v. *Anderson*[6] the House of Lords went very far in holding that the Home Secretary as an administrative tribunal had the widest powers for detaining suspect aliens, without anything resembling a judicial trial. Personally, I prefer Lord Atkin's dissenting view that the governing legislation gave only restricted powers. But certainly those who dislike *R.* v. *Pantelidis* will find no comfort in this or in any other of the recent English decisions on the Home Secretary's powers.

D. M. GORDON.

Victoria, B.C.

[6] [1942] A.C. 206.