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 1, Ontario.

CASE AND COMMENT

CAUSATION — "FACT" OR "LAW" — LAST WRONGDOER —NEGLIGENT MEDICAL TREATMENT — WORKMEN'S COMPENSATION.—The judgment of the English Court of Appeal in *Rothwell* v. *Caverswall Stone Co. Ltd.*,[1] being of the ungodly host of English "court" decisions dealing with Workmen's Compensation, might easily be overlooked in Canada. The latter is a country where, to use the language of an American writer on Workmen's Compensation,[2] we have reached "the proposed millenium in compensation acts—when both sides will be lawyerless, and written decisions will be unnecessary." There are many in this country, however, particularly in the legal profession, who believe that in ousting the courts' jurisdiction—and the lawyers' concomitant prerogatives—in compensation matters, we have taken a further step towards "bureaucracy triumphant" from which we should be rescued (by the legal profession) in the matter of appeals through the ordinary courts. The *Rothwell* decision is well worth consideration by this small—but vocal—group. It also affords an admirable illustration of judicial technique and raises, in addition, some far-reaching queries on a matter still within the competence of courts in this country, namely, the extent of tortious liability, more frequently, and erroneously, we believe, referred to as "causation".

The facts, fortunately, were simple. A workman, in the course of his employment, sustained injuries when he was caught in machinery and fell from a platform. At a neighbouring hospital

[1] [1944] 2 All E.R. 350.
[2] HOROVITZ, WORKMEN'S COMPENSATION, 173.

he was treated and X-rays taken of the arm, but not of his shoulder. Some months later, and after his discharge from the hospital, the workman through his own doctors discovered that he had sustained a fractured dislocation of the right shoulder. When discovered, it was too late to treat the dislocation which had become permanently irreducible, and as a result the workman was partially incapacitated for life. On a claim for compensation under the English Workmen's Compensation Act, 1925, the county court judge found that the dislocation could have been cured if it had been discovered in time, and that the failure of the hospital to discover it was negligence. Having so found, the county judge held that such negligence constituted a *novus actus interveniens*, and he dismissed the application for compensation because "the workman's present incapacity was due substantially to bad medical treatment and not to the original injury." The appeal to the Court of Appeal was from this award.

The question before the Court was, therefore, in one sense, quite simple. There was no doubt that the workman was partially incapacitated. The only issue was whether such incapacity was one which, in the words of the Act, "results from the injury". Simple facts — simple issue; yet the Court of Appeal was divided. Scott L.J. delivered a vigorously robust judgment in which, notwithstanding three other Court of Appeal judgments,[3] he decided the workman was entitled. To him the issue presented was crystal-clear, and he was enabled to reach a result consonant with his view of common sense and legislative policy by finding that other decisions of the Court of Appeal were at variance with the three already mentioned. The other two members of the Court, without expressing any independent view, felt that the county court judge's award was justified under the authorities. Luxmoore L.J. apparently accepted previous leading authority as *compelling* the county court judge to hold as he did. Du Parcq L.J. took refuge in the county court judge's finding as one of "fact" and, the judge having properly "directed" himself, the finding could not be disturbed.

The difference of opinion raises fundamental questions, not the least important being the distinction between "fact" and "law". In a sense, the basic law governing the situation is the statute which speaks of incapacity "which results from the injury". If we say that the only question remaining is one

[3] *Humber Towing Co.* v. *Barclay* (1911), 5 B.W.C.C. 142; *Rocca* v. *Stanley Jones & Co. Ltd.* (1914), 7 B.W.C.C. 101; *Lakey* v. *Blair & Co. Ltd.* (1916), 10 B.W.C.C. 58.

of pure fact — of cause and effect — it seems to us that the judgment of Scott L.J. is incontrovertible. There can be no doubt whatever that "but for" the injury arising in the course of the workman's employment there would have been no resulting incapacity. The relation between cause and effect is clear. That is not to say that the injury was the "sole" cause. It was not. The conduct of the medical staff at the hospital was undoubtedly an additional cause. As Scott L.J. pointed out, however, the Court of Appeal in *Harwood* v. *Wyken Colliery Co.*,[4] in 1913 clearly recognized the possibility of concurrent causes in fact. Indeed, in that case Hamilton L.J. expressly stated that "to read the word 'solely' into the Act after the word 'injury' is not interpretation but is legislation." Several other Court of Appeal decisions cited by Scott L.J. make it clear that a "fresh cause arising casually" does not affect the pure question of fact which the Act seems to call for in the term "results". Thus the introduction of germs into a wounded foot by walking on it and probably reopening it, resulting in erysipelas, blood-poisoning and death, did not prevent the Court of Appeal in *Dunham* v. *Clare*[5] from holding that death resulted from the original injury. Even stronger, in *Williams* v. *Graigola Merthyr Co. Ltd.*,[6] the wife of a workman being medically treated for a knee injury, unknown to the doctor, applied the "old wives' remedy of a cow-manure poultice." The doctor subsequently having lanced the knee in ignorance of the poultice, tetanus developed and the workman died. Again the Court of Appeal held that death resulted from the original injury. It is true that a new cause was added, but who can deny, as a matter of fact, that the original injury was not *a* cause from which death resulted? It was because of such cases that Scott L.J. felt free to reach the conclusion that he did.

Buth Luxmoore and du Parcq L.JJ., however, based their decision on the county court judge's determination of a question of fact as opposed to a rule of law. If, however, there was in truth, and as a matter of physical phenomenon, a relation of cause and effect, it would seem to be obvious that any limitation imposed by these judges must have been based on something other than fact. English courts and English writers have frequently described "proximate" cause in the law of tortious liability as a question of fact. In truth, as has been pointed out

[4] [1913] 2 K.B. 158.
[5] [1902] 2 K.B. 292.
[6] (1924), 17 B.W.C.C. 202.

many times, it is seldom any such thing.[7] That there are situations of pure fact involved in the cases is true. Thus, the failure to ring a gong may not be a cause in fact if the accident would have happened whether a gong were rung or not.[8] Such cases form but a minute part of the bewildering case law on "causation". The really difficult cases are those where an act is readily recognized by everyone capable of tracing cause and effect as a cause, but where for various policy reasons, the courts are not willing to extend liability. Such cases in torts are cluttered up by adjectives—"proximate", "remote", "natural or probable", "direct", "effective", "*causa causans*" and so on *ad infinitum*. All are cases of cause in fact. They must therefore be considered as decisions of policy, or law, which refuse to trace liability beyond a given point. The courts themselves have made this part of the law bewildering by refusing to recognize openly that they are dealing not with causation at all, but with responsibility. Inasmuch as du Parcq L.J., in the present case, insisted strongly on the right of an arbitrator to decide cases like the present in "the province of fact", one can sympathize with the remarks of Scott L.J. regarding the intellectual dishonesty which dodges difficult questions of policy—or law—under the guise of refusing to disturb questions of fact. He points out that in many of the decisions quoted the Court of Appeal has reversed the arbitrator. This means, as he puts it, that "the appellate court has analyzed the decision of first instance and seen that behind the factual form there has lurked a question of law — often a principle of high importance in the interpretation of the Act." On the other hand, frequently a Court of Appeal will, as du Parcq L.J. seems clearly to have done in the present case, refuse to interfere with a finding of fact. As to this Scott L.J. points out:

> But where the analysis is difficult and it is hard to see exactly what the point of law really is, there is a terrible temptation—to which I am sure my brethren will at least theoretically confess, and to which I am equally sure that I have myself succumbed before now—to shirk the intellectual task and take refuge in the view that the judgment under appeal was a finding of fact, with which we are forbidden to interfere.

The result is paradoxical. In the present case Scott L.J. seems, as we have indicated, clearly right in saying that the incapacity resulted as a matter of fact from the injury. He, however, was insisting that the question concerned a rule of

[7] See, for example, GREEN, THE RATIONALE OF PROXIMATE CAUSE (Kansas, 1927).

[8] *Cf. Hebert* v. *Calgary* (1940), 51 C.R.T.C. 67.

law. Du Parcq L.J. would, if it were a question of fact alone, seem to be clearly wrong and to have been placing a judicial limitation as a matter of law on the words of the Act. Yet he was insisting that the question was solely one of fact. Nothing could serve better to illustrate how we delude ourselves by believing that the administration of justice can be neatly parcelled out between "law" and "fact".

Perhaps no small part of the difficulty in the present case arose from the injection of a statute into a sphere where courts have been unhampered in working out their own policy.

The law of torts is concerned with determining when, and to what extent, one person can shift a loss which he has sustained to another. While a primitive society may have felt that the actor should bear any damage caused by his acts, the development of notions of fault, of limiting liability in accordance with some concept of "wrong", is too well known to be discussed here. The problem whether, once a man's conduct involves some departure from social standards, liability should be unlimited, or whether liability should be limited to risks the likelihood of which made the conduct "wrongful", is still with us. It lies behind much of the "causation" language of the cases. On the one side we have *Re Polemis*,[9] which having characterized a defendant's conduct as negligent, held him accountable for all injuries, foreseeable or unforseeable, resulting directly from such conduct. On the other, stands the doctrine of *Bourhill* v. *Young*,[10] which, influenced by American writing, adopted the "duty" approach to determine extent of liability.[11] Such approach accepts the view that a man should not be responsible for harms, the risk of which were not sufficiently foreseeable or expectable at the time of acting. It is possible to say that with respect to such harms the defendant is not negligent since they did not fall within the ambit of his duty of care. Such an approach at least makes clear—by speaking of duty—that the problem is one of policy, or law, for the court. More frequently, however, we speak of the damages being "too remote". This too is a policy function but, as Scott L.J. remarks, in a difficult or border-line case the court dodges its responsibility by treating it as a question of fact.

Whatever may be the sounder approach—whether by "duty" or "cause", whether in favour of a limited liability as indicated in *Bourhill* v. *Young*, or an extended liability as indi-

[9] [1921] 3 K.B. 560.
[10] [1943] A.C. 92.
[11] See 21 Can. Bar Rev. 65.

cated in *Re Polemis* — it is apparent that the courts are masters of the situation unhampered by legislation. In the main it is probably true to say that they have attempted to keep liability more or less commensurate with what they felt was "fault", although the process has been uneven due to obscurantist talk of "cause". Much of this technique may have stemmed from procedural technicalities involved in determining whether trespass or case was the proper form of action.

That this is so can be seen from the manner in which *Scott* v. *Shepherd*[12]—the famous "squib" case—has been used indiscriminately in the modern cases on negligence. As that case was only concerned with the form of action, it is amazing to observe its vitality in modern cases which are concerned —or at least *should* be concerned—with the substantive problem of extent of liability. The doctrine of the last conscious human actor as breaking the "chain of causation",[13] and more particularly, the doctrine of the "last wrongdoer", (being the form in which such doctrine has most strongly survived) may stem back to this confusion. Much has been written on this problem, and in this REVIEW[14] we have before ventured the opinion that the doctrine was today, even in the domain of common law torts, deprived of much of its former importance.

If, as courts are today willing to admit, an innocent act of a third person will not relieve a negligent defendant from liability, it is difficult to see why the negligent character of that intervening act should insulate a defendant from liability. Theoretically the doctrine may be sound since the injured plaintiff may be relegated to his rights against the negligent intervener. Practically, however, his right may be useless, and it is difficult to see why one wrongdoer should be able to shelter behind another wrongdoer's back.

We had believed that even in the field of common law torts, the decision of the Ontario Court of Appeal in *Mercer* v. *Gray*,[15] holding that a negligent defendant was liable for damages which had been aggravated by medical treatment which was erroneous, indicated a further falling away from the last wrongdoer rule. It is true that in that case McTague J.A. spoke of the possibility of the surgeon's treatment being so negligent as to be actionable, in which case he indicated that the plaintiff would have his action against the surgeon and the defendant

[12] (1773), 2 Wm. Bl. 892.
[13] See Lord Sumner in *Weld-Blundell* v. *Stephens*, [1920] A.C. 956.
[14] See 16 Can. Bar Rev. 136, 138.
[15] [1941] 3 D.L.R. 564.

would be relieved by this *novus actus interveniens*. On a previous occasion in this REVIEW we criticized this statement,[16] and cited *Prosser* on *Torts*,[17] who stated that "it would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg." The majority judgment of the Court of Appeal in the *Rothwell* case indicates that even in the common law field the English courts, at any event, are not willing to give up so easily their attachment to the last wrongdoer rule.

Apart from the fact, however, that the *Rothwell* case will, no doubt, be used in common law actions of negligence to limit a defendant's liability and free him from damages attributable in part to negligent medical care, the more serious question remains whether such common law doctrine should have any place in a workmen's compensation scheme. The common law doctrine of last wrongdoer—whether good or bad (and on the whole we believe it to be bad)—was based, as we have indicated, on the belief that liability should not be incommensurate with fault, and that damages from unforeseeable, and hence unpreventable, risks of harm were no more fairly to be placed on a defendant than left to lie with the plaintiff. Disregarding the effect which the widespread use of liability insurance should have on this individualistic doctrine, it seems apparent, as Scott L.J. points out, that such reasoning is inapplicable to a statutory system of workmen's compensation in which fault or its absence plays no part. There is no hardship on an individual employer in awarding compensation since this burden is spread over industry as a whole and becomes an item in the cost of production. As he states, "what remains of the legal idea of fault . . . is largely the result of judicial legislation". This is apparent in the cases where a workman has, in England, been deprived of compensation by his "unreasonable" conduct in refusing medical treatment.[18] This reintroduction of something akin to contributory negligence does seem, as Scott L.J. indicates, to be logically inconsistent with the scheme of workmen's compensation. How much more inconsistent is the introduction of the limiting principle of a third person's negligence in freeing an employer! An Act designed to give speedy and cheap protection to a workman as an incidental cost of production is now subject to the difficult question of determining whether medical treatment, of which the workman is hopelessly ignorant and the selection

[16] 19 Can. Bar Rev. 610.
[17] P. 362.
[18] See *Steele* v. *Robert George & Co. Ltd.*, [1942] A.C. 497.

of which is beyond the workman's control in many cases, was above or below proper medical standards. The following remarks of Scott L.J. state the situation clearly, and forcibly:

> To have enacted that the amount of compensation should be generally dependent upon the degree of skill or want of skill of the doctors would have been irrational or even ridiculous. If in the course of treatment a noxious bacillus gets a foothold and necessitates an amputation, that, in common sense, is (at any rate from the workman's point of view), a mere incident of the injury. If a nurse is the negligent cause of the bacillus getting in, the same comment still applies: equally, if the surgeon is negligent. Negligence of those to whom the treatment of the patient is entrusted is wholly irrelevant to the social policy on which the legislation is based. In other words, it has, in my humble opinion, nothing to do with statutory workmen's compensation.

The majority judgments indicate how difficult it is for common law judges to free themselves from the individualistic approach of the common law. We believe that it should be a matter of pride in this country that workmen are not faced with the legalism of protracted appeals to the highest courts, of which the *Rothwell* case is but one in a never-ending series. On the other hand, it may be said that if there were no appeals, awards of county court judges like that in the present case denying compensation, would stand unchallenged, and that this is actually what happens in the Canadian administration. To this, the answer would seem to be that our awards are not made by county court judges and are not, therefore, from the outset, surrounded with the traditional hallmarks of the common law. Boards who are familiar with the policy of the Act, who are not bound by legal precedent, who can correct or change a course of decision at will if found to be erroneous, seem to us a far better guarantee of a workable system in the interests of the labouring class than any amount of judicial legislation proceeding on *a priori* assumptions of fault which are totally out of accord with the policy of workmen's compensation.

It has frequently been said that boards unchecked by legal review can act arbitrarily. This is true. At the same time one cannot fail to appreciate the seeming unwillingness of the majority in the present case to check "arbitrary" action. Du Parcq L.J. felt that as the county court judge had not "misdirected" himself on the law, his findings of "fact" must stand. If this means anything, it can only mean that as long as one utters the magic legal formula—anything goes. This, of course, is true with regard to juries. When, however, the decision is left to a judge who decides from the bias of common law

"fault" and "individualism", one is a little more skeptical of the possibility of avoiding policy decisions from the common law point of view. This, in essence, was the basis of Scott L.J.'s dissent who at least wished the court to give guidance on a matter of policy — or law. With appeals on compensation matters well established in England one might, at least, have expected this much. It will be interesting to see what position the House of Lords adopts on "fact" versus "law", and the doctrine of "last wrongdoer".

C. A. W.

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CONFLICT OF LAWS—PERSONS PERISHING IN ONE DISASTER —PRESUMPTION OF SURVIVORSHIP.—In the case of *In re Cohn*[1] Mrs. Cohn and her daughter Mrs. Oppenheimer, German nationals domiciled in Germany, were on October 14, 1940, killed in London, England, as a result of an explosion caused by a German air raid in circumstances rendering it uncertain which of them survived the other. Letters of administration, with a translation of the will of Mrs. Cohn, were granted in England to the Public Trustee, and an English court had to decide whether the administration of the estate should proceed on the footing that Mrs. Oppenheimer survived her mother (so as to take under a gift in the will to the three daughters of the testatrix in equal shares) or on the footing that Mrs. Oppenheimer did not survive her mother. The subject of this gift being movables, the law governing succession would of course be German law, whereas any matter of evidence relating to administration as distinguished from succession would be governed by English law.

German law provides that if it cannot be proved that of several deceased persons or persons declared dead one has survived the other, it is presumed that they have died simultaneously. English law (s. 184 of the Law of Property Act, 1925, substantially the same as s. 1 (1) of the Ontario Statutes, 1940, c. 4) provides that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, the deaths shall, for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be presumed to have survived the elder.

It was held by Uthwatt J. that these statutory provisions were not rules of evidence, but were substantive provisions of

[1] [1945] Ch. 5.

their respective laws, and that the German statute was applicable as part of the domiciliary law of succession. Consequently Mrs. Cohn's estate was to be distributed on the footing that Mrs. Oppenheimer did not survive her mother.

The result of the decision was that the movables of the estate of Mrs. Cohn were distributed directly between Mrs. Oppenheimer's surviving sisters (under a gift to Mrs. Cohn's children in equal shares). In other words, there was one succession under Mrs. Cohn's will instead of there being two successions, that is, to Mrs. Cohn's estate and to Mrs. Oppenheimer's estate. A similar result might have been reached by a finding of fact that the deaths were simultaneous, so as to exclude the operation of s. 184 of the Law of Property Act, 1925, on that ground.[2] In the *Cohn* case, however, Uthwatt J. found "as a fact that the circumstances in which Mrs. Cohn and Mrs. Oppenheimer were killed were such that it is uncertain and cannot be proved which of them survived the other," and it was therefore necessary for him to consider the question of the conflict of laws, namely, whether the statute of 1925 was inapplicable on the ground that it was part of English succession law, limited in its application to a succession governed by English law. The following passage from his judgment states his course of reasoning:[3]

> The mode of proving any fact bearing on survivorship is determined by the *lex fori*. The effect of any fact so proved is for the purpose in hand determined by the law of the domicile. The fact proved in this case is that it is impossible to say whether or not Mrs. Oppenheimer survived Mrs. Cohn. Proof stops there. Section 184 of the Law of Property Act, 1925, does not come into the picture at all. It is not part of the law of evidence of the *lex fori*, for the section is not directed to helping in the ascertainment of any fact but contains a rule of substantive law directing a certain presumption to be made in all cases affecting the title to property. As a rule of substantive law the section is relevant where title is governed by the law of England. It has no application where title is determined by the law of any other country.

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EVIDENCE—"ADMISSIONS" MADE IN EVIDENCE TAKEN ON COMMISSION—WHETHER ADMISSIBLE AGAINST OTHER PARTY.—

[2] See *In re Grosvenor, Peacey* v. *Grosvenor*, [1944] Ch. 138, and *Re Mercer, Tanner* v. *Mercer*, [1944] 1 All E.R. 759, discussed (1945), 23 Can. Bar Rev. 70; see also *In re Howard, Howard* v. *Treasury Solicitor*, [1944] P. 39.

[3] [1945] Ch. 5, at pp. 7, 8.

Tinney v. *Tinney*, [1945] 1 W.W.R. 390 contains a curious ruling on evidence that seems very hard to reconcile with principle. The ruling is that an "admission" is not evidence against any party except the one who made it, even though it is made under oath in judicial proceedings.

The facts in that case were that the co-respondent in a divorce suit gave evidence on commission, in the course of which she admitted adultery with the respondent. At the trial it was held that this evidence was not admissible against the respondent. The evidence was given under oath and there seems to be no doubt that the respondent had notice of the holding of the commission and could have attended to cross-examine.

The judge's ruling is summarized by his saying (p. 396) that there is no authority for any distinction "between confessions which had their origin *extra judicium* and those made *in judicio*."

It is submitted that this is an approach that beclouds the real issue, and that designating evidence under oath an "admission" or "confession" is a red herring across the trail, since in ordinary parlance those terms denote statements not under oath, but which are evidence against the speaker, in spite of that, because they are statements against his interest.

When statements are made under oath they are admissible as "evidence", and it becomes irrelevant (except as to weight) whether the statement is against the speaker. That is statements may be admitted on either of two grounds:

(a) that they are sworn to;

(b) that they are made by the party against whom they are admitted, and are against his own interest.

The general rule, of course, is that evidence must be sworn and given in curial proceedings, and when it is, it is evidence at large, evidence against any party against whom the court thinks it tells. Unsworn admissions, *extra curiam*, are an exception to the general rule, and are only evidence against the speaker. They are not evidence against anyone else because evidence in general requires the safeguards of the laws against perjury and the opportunity of the person prejudiced to cross-examine. But these safeguards are unnecessary where a witness makes statements against himself, and it does not matter where he makes them.

The idea however that sworn evidence becomes inadmissible against others as soon as it becomes unfavourable to the witness

seems entirely a misconception; it confuses two tests of admissibility which are entirely distinct.

Moreover far from there being no authority for using against another evidence that contains "admissions" or "confessions" telling against the witness, examples of such evidence being admitted are seen every day. They are seen in cases where accomplices give evidence against accused persons. They are seen in cases where prisoners are being jointly tried. It would be a grotesque situation if, whenever any accused weakens under cross-examination and makes statements damaging to himself, his evidence ceases to be admissible against his co-defendants.

Both these illustrations show the unsoundness of the ruling in *Tinney* v. *Tinney*.

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INTERNATIONAL LAW — PRISONERS OF WAR — CRIMINAL RESPONSIBILITY — Three recent Canadian cases have considered a question which does not seem to have been squarely raised previously in any common law jurisdiction, viz., the responsibility of a prisoner of war for acts contravening the domestic law of the detaining power, such acts being committed for the purpose of or in the course of an escape.

The first of the cases, *Rex* v. *Krebs*,[1] a decision of a police magistrate in Ontario, laid down the proposition that "a prisoner of war is not punishable for anything he may reasonably do to escape, or having escaped, to preserve his liberty". The decision did not turn on any question of jurisdiction but merely on the assumption that a prisoner of war stands in a different position than a subject or resident in the territory of the detaining power; in effect, acts which would be crimes if committed by an ordinary inhabitant are not crimes if committed by a prisoner of war to accomplish an escape or to enable him to remain at large. The second case, *Rex* v. *Shindler*,[2] a decision of a police magistrate in Alberta, reached a result directly contrary to that in *Rex* v. *Krebs* but the magistrate in the *Shindler* case appeared to treat the matter as one of the jurisdiction of Canadian courts, and he took the view that whatever may have been the position before the Geneva Convention of 1929, concerning the Treatment of Prisoners of War, the terms of that Convention provided a sufficient basis of jurisdiction, and that although the accused

[1] [1943] 4 D.L.R. 553.
[2] (1944), 82 Can. C.C. 206.

had, after his escape, stolen an automobile by means of which he sought to make good his escape, he was nevertheless guilty of theft and punishable.

The third case, *Rex* v. *Brosig*,[3] a judgment of the Ontario Court of Appeal, involved, strictly speaking, a conviction of an escaped prisoner of war for the theft of articles for personal use and not as part of or incidental to the escape. Two factors predominated in the result reached by the Court: (1) the Geneva Convention; and (2) the fact that members of the Canadian armed forces were subject to the ordinary criminal law. It would seem that the Court was mainly concerned with its jurisdiction over the accused. There was no rule of domestic law to guide it save the implication arising from the fact that all persons in the territory and members of the local armed forces were amenable to ordinary criminal process. No rule of customary international law on the subject could be adverted to, but if there were an exemptive rule of that kind it is probable that the Court could have integrated it with the domestic law and applied it as part thereof. The Court did place particular emphasis on the Geneva Convention, ratified by Canada on September 1, 1935, and pointed to the Convention's references to judicial, as oppose to disciplinary, proceedings and punishment, as recognition of the jurisdiction of the domestic courts of the detaining power over acts of prisoners of war. The references to "judicial" and "disciplinary" in the Convention are not very clear in their implications, for they may easily be references to types of proceedings against prisoners of war which can be taken by the detaining power through its prisoner-of-war administration rather than references to ordinary court proceedings as opposed to proceedings by prisoner-of-war camp administrators. Thus "disciplinary" might refer to punishment which can be imposed without any formal "trial" while "judicial" envisages formal proceedings. But, since by the same token, "judicial" can refer to ordinary court proceedings, there was no clear reason for the Ontario Court of Appeal to decline jurisdiction. The case was before it not of its own choice but because the competent prosecuting authorities saw fit to lay a charge in the ordinary criminal courts instead of dealing with the matter as one of disciplinary punishment of the prisoner upon his return to camp custody.

[3] [1945] 2 D.L.R. 232.