CASE AND COMMENT

NEGLIGENCE — INJURY TO LICENSEE — DUTY OF LICENSOR TO LICENSEE. — In the recent case of *Sutton* v. *Bootle Corporation*[1] the Court of Appeal held that the duty of a licensor towards a licensee was to warn him of, and protect him from, dangers actually known to the licensor. It was hoped that this decision would clarify once and for all the murky atmosphere through which the courts have groped in search of a definite principle governing the duty of a licensor to a licensee. But certain dicta of Scott L.J., Asquith L.J. and Vaisey J. indicate that knowledge of the danger in certain circumstances may still be imputed to the licensor, with the result that the difference between the liability of an occupier towards invitees and licensees still remains incapable of exact definition.

In this case the plaintiff, a girl nine years of age, while attempting to stop and board a moving plank swing on a children's playground in a recreation ground maintained by the defendant corporation, was dragged off her legs and, in attempting to save herself, sustained such injury to the index finger of her left hand that it had to be amputated. What part of the swing caused the injury was not clear, but the trial judge, Stable J., held that the finger was caught and crushed between the unguarded lug and socket of a checking device, which was designed to prevent the swing from going too far. The swing had been supplied to the corporation by a firm of repute which had sold a very large number of such appliances all over the country, and no similar accident had occurred in connection which any of them. The corporation had no knowledge of the alleged defect in the swing. At the trial without a jury Stable J. held that the plaintiff was a licensee and that the defendant corporation had no knowledge of the danger, but he awarded the plaintiff damages on the narrow ground that it was the duty of a local authority, which provided implements for children to play with in a public recreation ground maintained by them, to provide safe and proper implements so far as, by the exercise of care and skill, it could do so.

The following findings of fact made by the trial judge were accepted by the Court of Appeal:

(1) the child's finger was nipped between the lug and the socket;

(2) the swing was defective and dangerous;

[1] [1947] 1 K.B. 359.

(3) the defendants did not know that it was defective and dangerous;
(4) the defect could have been remedied easily;
(5) there was no contributory negligence on the part of the plaintiff.

The Court of Appeal held that the defendant corporation owed the plaintiff only the obligation of a licensor to a licensee, that as licensors they were under no duty to do more than warn the plaintiff of dangers actually known to them, and that as they had no knowledge of any danger they were under no liability. Scott L.J., after deciding that the plaintiff was a licensee, says: "In the case of a licensee liability attaches, in my opinion, only if the occupier knows of the danger and fails to protect or warn. To decide in any particular case whether liability attaches, it is therefore essential to understand the nature of the danger very clearly. The court cannot otherwise safely decide the issue of knowledge or no knowledge."[2] Scott L.J. then proceeds to analyze minutely the complicated mechanism of the swing and discusses the theory advanced by the plaintiff that the child's finger was nipped between the lug and the socket, which the trial judge had found as a fact. Although he casts some doubt on this finding of fact, he says that he is compelled to accept it.[3] Then he goes on: "The only reason why I have at such length discussed the probabilities on this issue of fact is that it seems to me to compel the inference that the defendant corporation had neither knowledge *nor suspicion* that this danger was present in the swing; *and there was no evidence of anything to put them on inquiry*".[4] With regard to the impossibility of discovering the danger Scott L.J. says: "I can see no evidence which would, even to a skilled engineer, indicate danger. A fortiori there was no evidence that the corporation or its playground attendant had the faintest notion of the presence of the danger . . ."[5]

These dicta of Scott L.J. would seem to indicate that knowledge of the danger might have been imputed to the defendant if it had had the means of discovering the danger or even if it had suspected that the danger existed; and that the defendant in the case at bar could not have had actual knowledge because

[2] *Ibid.*, at p. 362. It is submitted that the issue of knowledge or no knowledge should not depend upon the nature of the danger but on the evidence submitted to the court as to whether the licensor had or did not have actual knowledge of the danger which caused the injury complained of.
[3] *Ibid.*, at p. 364.
[4] *Ibid.*, at p. 364 (the italics are mine).
[5] *Ibid.*, at p. 363.

the danger was so concealed that it could not have been discovered even by a skilled engineer.[6]

Asquith L.J., after accepting all the trial judge's findings of facts, says: "I agree with my Lord that the defendants owed the plaintiff the obligation of a licensor to a licensee and no more. A licensor is bound to do no more than warn a licensee entering land in his occupation of dangers actually known to him, and, since in this case the licensors have been found not to have known the danger, if any, the appeal should be allowed."[7] After finding that the plaintiff did not enjoy a special privileged status superior to that of licensee and that the doctrine of allurement did not apply in this case, Asquith L. J. continues: "The other point is whether the finding that the defendants did not know the dangerous character of the swing (if dangerous it was) ought, as counsel for the plaintiff argues, to be disturbed. My Lord, in the judgment just delivered, has given a detailed description of the mechanism of the swing which I respectfully adopt and will not repeat. Having regard to its construction and working, the occurrence of an accident to a small child with a very limited reach was in my view extremely unlikely and there were ample materials on which to base a finding that *neither through the attendant nor otherwise can knowledge of its dangerous character — if indeed it can be held to have possessed any — be properly imputed to the defendants.*"[8]

Vaisey J., after discussing the precise manner in which the plaintiff's finger was injured, says: "The authorities binding

[6] It is difficult to understand why the Court of Appeal accepted the finding of fact that the defect could easily have been remedied, if it would require a skilled engineer to detect it.

[7] *Ibid.*, at p. 365.

[8] *Ibid.*, at p. 369 (the italics are mine). Practically all occupiers have objects of a dangerous character or potentially dangerous objects, on their premises. For example, an occupier may have constructed a wooden bridge over a stream and in the course of time one of the planks may have become rotted in the centre while appearing to be sound on the surface. The occupier inspects the planks regularly but, owing to the defect not being visible, he is unable to locate it. A licensee falls through the defective plank into the water. Can it be said that the licensor, who has no actual knowledge of the defect in the plank which caused the injury and which was *the danger*, is liable because knowledge of the dangerous character of the whole bridge may properly be imputed to him? I submit that the licensor should not be fixed with liability in these circumstances, since he had no actual knowledge of the danger that caused the injury nor did he have an opportunity of acquiring such knowledge. In the case of *Gibson* v. *Toronto R. W. Co.* (1921), 19 O.W.N. 564, Masten J. held that where the damage arose through the non-repair of a sidewalk, which had in the ordinary course of time developed a hole through rot, the licensor was not liable to a licensee who tripped in the hole and fell and broke his arm. At page 565 Masten J. says: "If the defendants had repaired the sidewalk with planks known to be rotten and dangerous, they might have been liable to him [the licensee], but not where the only fault was the non-repair of the sidewalk which had in the ordinary course of time developed a hole through rot".

upon this court appear to me clearly to establish that on the defendant corporation's playground the plaintiff had the status of a licensee and was, as such, entitled to no greater protection than that afforded to her by being warned against such of the dangers which she might encounter there as (being latent as opposed to apparent or obvious dangers) were actually known to the defendant corporation . . . I am satisfied that *no knowledge can be imputed to the defendant corporation of any danger, or any risk of danger,* or of any defect of any kind in the swing, and that there has been no breach of any duty owed to the plaintiff by the defendant corporation to form a foundation for her action."[9]

Since the courts insist on dividing visitors to premises into the water-tight compartments of invitees, licensees and trespassers, it is submitted that, in order to justify the division and to make each of them water-proof, the licensor should only be responsible for warning or protecting the licensee from concealed dangers of which he has actual knowledge and which are not apparent to the licensee. Unless the licensor has actual knowledge of the danger that caused the injury, knowledge should not be imputed to him, since the danger then becomes one that he "ought to have known" and the duty to a licensee becomes the same as the duty to an invitee. Certain dicta of Lords Atkinson and Wrenbury in *Fairman* v. *Perpetual Investment Building Society,*[10] of Lord Hailsham in *Addie* v. *Dumbreck*[11] and of Slesser L.J. in *Weigall* v. *Westminster Hospital*[12] included the words "ought to know" in stating the duty of a licensor towards a licensee, but the Court of Appeal has on numerous occasions disclaimed these dicta as erroneous and not necessary to the decisions,[13] and the leading text books have adopted its view.[14]

The case of *Ellis* v. *Fulham B.C.*[15] somewhat obscured the distinction between actual knowledge and means of knowledge. In this case a child, playing in a paddling pool in a public park controlled by the defendant corporation, cut his foot on a piece of glass imbedded in the sand in the bottom of the pool. In an action for personal injuries Greaves-Lord J. found that the plaintiff was an invitee and that the defendant was liable. The Court of Appeal held that, although the plaintiff was a licensee,

[9] *Ibid.*, at p. 371 (the italics are mine).
[10] [1923] A.C. 74.
[11] [1929] A.C. 358.
[12] (1936), 52 T.L.R. 301.
[13] *Purkis* v. *Walthamstow B.C.* (1934), 151 L.T. 30; *Ellis* v. *Fulham B.C.*, [1938] 1 K.B. 212 and *Coates* v. *Rawtenstall B.C.*, [1937] 3 All E.R. 602.
[14] *Cf.* Salmond, 10th ed., pp. 483-4; Winfield, 3rd ed., pp. 555-6.
[15] [1938] 1 K.B. 212.

the defendant was liable, since its servants knew that there was a possible danger to children paddling in the pool and took measures to remove articles from the pool, but that the measures they took were inadequate. The defendant had no knowledge of the presence of the particular piece of glass that caused the injury. As one writer observes: "Thus superficially the principle was applied that only actual knowledge of the danger will result in liability; but in fact, the reasoning of the Court was nothing but a roundabout way of saying that the Council (defendant) ought to have been aware of the presence of the glass which caused the injury. It avoided this formulation simply by substituting knowledge of the danger and of traps in general for the knowledge of the actual trap. Thus the distinction between knowledge and the means of knowledge loses its meaning and with it the distinction between liability towards invitees and licensees."[16]

I do not think that the *Ellis* case went as far as the learned author suggests for the following reasons:

(1) The defendant had affixed a notice to a board near the pool stating that "owing to the risk of cut feet, persons must not take into the paddling pool any bottles, tins or other sharp materials". Thus the defendant had actual knowledge that the presence of glass would constitute a real danger to children paddling in the pool and had put up a notice for the very purpose of preventing the danger from arising.

(2) There was evidence that one of the defendant's agents, a parkkeeper, had been notified, not more than ten days before the infant plaintiff was injured, that another child had suffered a cut while paddling in the same pool and that the parkkeeper had bandaged the wound.[17]

(3) The defendant provided a staff of parkkeepers who were instructed to rake the pool every morning but, because the rake was inadequate for the purpose, it failed to remove the dangerous glass. Greer L.J. bases his judgment on this ground alone and says: "Having made a wholly inadequate provision for the removal of the dangerous object at the place where the plaintiff stepped, it seems to me they are liable to the plaintiff upon that ground and it seems to me quite unnecessary to enter into the other grounds which were put forth by the learned Judge as reasons in support of his judgment".[18] This ground was also put forth by Slesser L.J., who says, "The result is that this raking

[16] W. Friedmann (1943), 21 Can. Bar Rev. 84.
[17] *Ellis* v. *Fulham B.C.*, [1938] 1 K.B. 212, *per* Slesser L. J. at p. 231.
[18] *Ibid.*, at p. 225.

which is relied upon by the corporation as an adequate means of guarding against a known danger is proved on the admission of their own evidence to have been entirely ineffective".[19] In other words there was an element of negligence in taking inadequate steps to remove the dangerous glass and, if proper remedial measures had been taken, the offending pieces of glass would have been removed and there would have been no injury.

(4) The plaintiff, as in the *Sutton* case, was a small child to whom a higher duty of care was owed by the defendant.

(5) The defendant, although it did not have actual knowledge of the danger that caused the injury, had knowledge of a danger that was likely to cause injury.

The judgment of the Court of Appeal in the *Sutton* case indicates that in certain circumstances knowledge of the danger may still be imputed to a licensor and it would appear that the underlying reason for finding that the defendant corporation had no knowledge of the danger was because the danger was so concealed that it could not have been discovered even by a skilled engineer. It is unfortunate that the Court of Appeal did not seize the opportunity to cast aside the doctrine of imputed knowledge or means of knowledge and establish the clear-cut principle that, regardless of the nature of the danger, it is the duty of a licensor to warn or protect a licensee from concealed dangers of which he has actual knowledge and which are not apparent to the licensee.

It is conceivable that such a principle may impose a hardship on a licensee; in most cases it would be very difficult for him to prove that the licensor had actual knowledge, for it is unlikely that a licensor would advertise the fact that he had knowledge of a particular danger and thus supply the injured licensee with friendly witnesses to rebut the licensor's vehement denial. But since an invitee enters under a bond of material interest, is it not reasonable to extract a higher duty from an occupier towards him than towards a licensee who merely enters for his own benefit? Furthermore, if the antiquated species of invitees and licensees are to survive in this atomic age (and there is every reason to believe that they will) then the occupier should have some means of knowledge of his duties towards each species before he goes into court. And so should his solicitor.

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[19] *Ibid.*, at p. 232.

ILLEGAL PRACTICE OF PROFESSION — ARCHITECTS AND PROFESSIONAL ENGINEERS — QUEBEC — NATURE OF PROFESSIONAL MONOPOLY. — The decision of the Quebec Court of King's Bench in the case of *Province of Quebec Association of Architects* v. *Perry*[1] marks another incident in the long-standing feud between architects and engineers in the Province of Quebec and provokes reflection on the relationship of professional monopolies to the public interest.

Perry, a member in good standing of the Corporation of Professional Engineers of Quebec, had for remuneration prepared sketches, drawings and plans for, and had supervised the construction of, an extension to the plant of a manufacturing company to house a machine shop destined for the manufacture of precision parts. This work involved technical problems of eliminating vibration, providing for the maintenance of even temperatures and satisfactory lighting, and arranging for the proper and convenient location of electrical outlets.

The Association of Architects considered that he had infringed its monopoly and brought a penal action against him under section 12 of the Architects Act,[2] which provides in part:

> Any person who, although not being registered as a member of the said Association, takes or makes use of any such name, title or designation, or acts as an architect, or furnishes, for remuneration, plans or specifications to construct or remodel buildings, either directly or indirectly, shall be liable to a fine of not less than one hundred dollars nor more than two hundred dollars for the first offence . . . .

Perry contested the action, contending that he had only acted as an engineer within the meaning of the term as defined in section 2(4) of the Civil Engineers Act[3] and consequently came within the exception of section 12 of the Architects Act, which provides:

> Nothing in this section shall be interpreted as affecting in any manner whatsoever the rights and privileges conferred by law upon the members of the Corporation of Professional Engineers of Quebec.

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[1] [1947] K.B. 378.
[2] R.S.Q., 1941, c. 272.
[3] R.S.Q., 1941, c. 270, s. 2(4): "The expression 'civil engineer' means any one who acts or practises as an engineer in advising on, in making measurements for, or in laying out, designing or supervising the construction of railways, metallic bridges, wooden bridges the cost of which exceeds six hundred dollars, public highways requiring engineering knowledge and experience, roads, canals, harbours, river improvements, light houses, and hydraulic, electrical, mechanical, municipal or other engineering works, not including government colonization roads or ordinary roads in rural municipalities; but does not apply to a mere skilled artisan or workman".

Upon the issue thus briefly stated the members of the two professions rallied to the cause of their respective professional interests. Leading members of each profession appeared as witnesses in the proceedings. At least six prominent architects expressed the opinion that the work done by Perry fell exclusively within the province of the architect; at least seven prominent engineers testified with equal assurance and solemnity that it was truly engineering work, properly done by an engineer.

In the trial court Associate Chief Justice Tyndale found that there had in fact been a violation of the Architects Act and ordered the payment of a fine of $200 and costs. On appeal this judgment was unanimously confirmed.

Notwithstanding evidence that engineers had frequently designed similar buildings and that architects were frequently obliged to call in engineers to assist them with special problems encountered in the design and construction of buildings, the judges felt that it was the intention of the Legislature to create and maintain two separate and distinct monopolies, but admitted that they found difficulty in drawing the dividing line between them. The problem facing the court was clearly stated in the following remarks of Mr. Justice Errol McDougall:

> Each case must, therefore, be evaluated upon its special facts, particularly when the statutes, under which the conflicting privileges under consideration are put forward, approach so closely the one to the other, and leave imperfectly defined the precise line of demarcation at which the field of operation of the one avocation terminates and the other begins. Many cases must fall close to the line in that nebulous and shadowy region where the opposing exclusive rights approach one another, actually meet, and become merged; the area in which there exists, in a sense, a species of legal no man's land, to be occupied by one or the other of the competing groups at his or its peril.
>
> Until the Legislature has made the differentiation more definite and laid down the precise limits within which the architect and the engineer are to exercise their cognate functions, the Court may only endeavour, as best it may, to apply the existing statutes to the special facts submitted in a given case with a view to bringing about a reconciliation of the adverse claims. The closer the particular case approaches the line, the more palpable the difficulty becomes.[4]

In reaching their decision they approved and adopted a test suggested by Mr. Justice Rivard in a case involving a similar issue[5] in the sense that the nature and cardinal characteristics of the work done or to be done must be the controlling factor:

[4] [1947] K.B. 378, at pp. 385-386.

[5] *Association des Architectes de la Province de Québec* v. *Ruddick*, [1934] 59 K.B. 72, at pp. 78-79.

it is the exclusive function of the architect to furnish plans for buildings in which engineering is only incidentally involved, whereas the engineer has the right to deal with buildings which are only accessory to real engineering work.

The application of this test led the court to the conclusion that the work done by Perry was not predominantly an engineering work, that engineering skill only entered into it incidentally; hence the matter fell within the exclusive jurisdiction of the architects, on whose preserves Perry had trespassed.

There are overtones in the case which indicate that it was not an isolated instance of correctional or disciplinary proceedings against one recalcitrant or presumptuous individual, but a battle in the campaign for power between two professional monopolies, each claiming jurisdiction over an important and lucrative sphere of activity. One feature that the case had in common with previous litigious incidents in the same struggle[6] suggests that there may be a broader moral issue involved than the purely legal issue between the contending groups. This feature is that there was never any criticism of the work done by the nominal offender. In one previous case at least there was nothing but praise.[7] What then of the position of the public, which it is the function of the professions to serve?

It is submitted that in a democratic society the creation of a professional monopoly is or should be in the nature of a bargain or compact between the members of the profession and the public, represented by the Legislature, in which each party assumes certain obligations in consideration of those assumed by the other. The profession represents that by reason of the background, qualifications and traditions of its members it is best qualified to render service to the public in a certain field of activity; and in consideration of the public conferring (by statute) on it the exclusive right to render service in that field of activity, it undertakes to prescribe and enforce certain characteristics and qualifications for admission to membership and certain requirements of education and training for its members calculated to ensure that they will render to the public efficient and superior service in that field; it undertakes also to regulate and discipline its members so that the public may be assured that it will obtain the best and most loyal and efficient service in that field from that profession.

[6] *Ruddick* case, *loc. cit.*; *Corporation des Ingénieurs Professionels de Québec* v. *Jetté*, [1943] K.B. 408.

[7] *Jetté* case, *loc. cit.*

To be justified in continuing to exercise that exclusive right the profession should so carry out its part of the bargain that it will as a whole at all times continue to render to the public in all parts of its field of activity service superior to and more efficient than that offered by any other group. If any other profession or trade reaches a stage or degree of proficiency in any line of endeavour where its services, if rendered in any part of the field set aside for the original professional monopoly, might equal or surpass in efficiency those offered by members of the profession entitled to that monopoly, the latter has not fully carried out its bargain with the public and the limits of its monopoly should be reduced, or at least it should forego its exclusive rights in that part of the field until it has once again established and demonstrated superiority. If its monopoly is challenged, it should, before taking up the gauntlet, satisfy itself that the public is being served best by its own members; otherwise the revendication of its rights may produce only a hollow victory.

It is unwise for any profession to rely solely on its statutory rights to protect its domain. They are not immutable and may be modified or withdrawn by the Legislature, the representative of the public; in consequence they depend, in theory at least, on the satisfaction of the public with the services rendered. A profession should welcome justifiable competition from another group; competition contributes to its vitality, progress and the maintenance of its standards. If in a dynamic society its field of activity develops to such an extent that it is not possible for it to maintain its standards of service in all parts of the field, it should relinquish its exclusive rights to those parts which it cannot properly and efficiently cover better than any other profession, or broaden its base and effect a merger with its competitor.

The public is entitled to the best service obtainable, and the profession that does not offer the best is true neither to its trust nor to itself.

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CONFLICT OF LAWS — LIS ALIBI PENDENS — ACTIONS IN DIFFERENT JURISDICTIONS — MOTION FOR STAY — ONUS.— The excuse for my tackling this particular point must be that it is fairly simple — simple that is when speaking of any problem of conflict of laws — and fairly narrow — again speaking comparatively. It is the well-known problem of *lis alibi pendens.*

It has at least a flavour of Hollywood, for the particular instance arises out of arrangements between film companies and a film producer or producers for the distribution of films.

An action was commenced in Ontario in March 1947 by two Canadian companies against one Rank, various foreign corporations and two Canadian companies. Though the judgment to which reference will be made later does not go into the facts in any detail, it would appear that the basis of this action was a contract which the plaintiffs alleged governed the rights in Canada for the distribution of the films produced and distributed by some of the defendants and whose distribution was being controlled and handled in Canada by others of the defendants.

In July 1947 the plaintiffs commenced another action in New York State in which substantially the same relief was claimed, with of course certain necessary variations, and in which the parties, while substantially the same, were not identical, the two Canadian corporate defendants being omitted and other persons or corporations included as defendants.

The contract which is the foundation of the action also provided that it should be construed under the laws of the State of New York to the jurisdiction of which each of the parties submitted.

In these circumstances the defendant Rank moved under sections 15(f) and 20 of the Judicature Act to stay the Ontario action pending disposition of the New York action. The motion was heard and dismissed at the conclusion of the argument by McRuer C.J. in Weekly Court in Toronto.[1]

It seems clear that a distinction is to be made between the case of two actions for the same or substantially the same cause in the same jurisdiction and the case of two actions in different jurisdictions. In the former case there is a presumption that the plaintiff's procedure is vexatious and oppressive and the onus is on him to show otherwise. In the latter, this presumption does not arise and the onus is on the defendant to show that the plaintiff's procedure is vexatious and oppressive.[2] In fact, according to one of the cases cited by the Chief Justice,[3] the matter of convenience is not decisive and the onus is on the defendant to show both of the following conditions, first, that the continuance of the action, which he is asking should be stayed, works an injustice upon him because it is vexatious and oppressive

[1] *Empire Universal Films Ltd.* v. *Rank*, [1947] O.R. 775.
[2] 6 Hals., 2nd ed., p. 357.
[3] *St. Pierre* v. *S. American Stores*, [1936] 1 K.B. 382, *per* Scott L.J. at p. 398.

or otherwise an abuse of process and, secondly, that its stay would not cause an injustice to the plaintiff.

When one considers the case under review it must be clear that, as the proper law of the contract is the law of New York and the parties have submitted thereto, New York is clearly the *forum conveniens* for the decision of any dispute under the contract. There the law would be dealt with as law. In Ontario the law of New York would be found as any other matter of fact and the law of Ontario applied thereto in reaching the decision of the action.

Dealing with this point, the Chief Justice draws a distinction between the case of a contract stipulating that any dispute in respect to the contract "shall be decided exclusively by the laws of any particular state" and a contract stipulating that it "shall be construed according to the laws of a particular state, to the jurisdiction of which each of the parties submits". With deference the distinction is hard to draw.[4] Each of these stipulations simply seems to be an agreement as to the proper law of the contract. A distinction might appear if the former stipulation had been for a decision of disputes "exclusively by the courts of any particular state". Possibly also the latter stipulation may be so construed that it would appear to be an attornment to a particular court to the exclusion of any other.

But the real point seems to be that the stipulation in the contract in the case under review merely goes to the question of convenience. As has been stated, it is obvious that the courts of the place of the proper law of the contract are the *forum conveniens* for the determination of any dispute involving that law. That, however, on the cases is not decisive. If the parties by their contract have given exclusive jurisdiction to a particular court, that again is another question. It may be that the parties cannot by contract oust the jurisdiction of any court.[5] But in the light of such a stipulation the defendant has gone at least a long way in discharge of the onus on the points that are decisive.

The stipulation in the contract in the case under review, however, does not appear to be one giving exclusive jurisdiction to the courts of New York and the matter is clearly, therefore, one of convenience only and not decisive. Neither does it seem

[4] But see *Austrian Lloyd S. S. Co.* v. *Gresham Life Ass'ce Soc.*, [1903] 1 K.B. 249; *Racecourse Betting Control Bd.* v. *Secy for Air*, [1944] Ch. 114.

[5] *Hyman* v. *Hyman*, [1929] A.C. 601. Whether this case is confined to jurisdiction in matters in which more than the parties to the contract or action have an interest need not be discussed here.

in any way to assist the defendants to discharge the heavy onus upon them. Neither party could deny the jurisdiction of the New York court if the other invoked it. But that does not compel either to invoke it. There is also the point that the determination of points of law in one jurisdiction as points of law and, in the other, as points of fact might be an element in considering whether the defendant has discharged the onus of showing the proceedings in the latter to be vexatious and oppressive. But it could hardly be the sole ground for so deciding.

The judgment under review does not state the points upon which the defendants relied in showing the Ontario action to be vexatious and oppressive. Great reliance seems to have been placed upon the question of *forum conveniens*. Otherwise reliance seems to have been put upon the fact that the cause of action and the parties as well as the main relief sought in the two actions were substantially identical.[6] But in order to show the proceedings to be vexatious the defendant must show that there is no necessity for two actions. Substantial identity of cause, parties and relief does not fully show that, unless it be also shown that the differences are so trivial that for all practical purposes there is not only substantial identity but exact identity. Further than that it would seem that it must be shown that the remedy, execution of the relief if you like, is identical and equally available. But according to this judgment those things were not shown, or certainly not sufficiently shown to justify the court in acting with that great caution which the whole current of authority imposes upon it in such a case.

There is, however, a point that puzzles. It is stated that the onus is on the defendant to show two things, one affirmative — that the action is vexatious and oppressive or otherwise an abuse of process — the other negative — that a stay of the action will not be an injustice to the plaintiff. Clearly the demonstration of the latter alone would not be sufficient. The fact that it would not work injustice to the plaintiff to stay his action without more really gets back to the question of convenience. But how could a defendant show with sufficient clarity to overcome the enjoined caution of the court that the plaintiff's action was vexatious and oppressive or otherwise an abuse of process, without ipso facto proving the lack of injustice to the plaintiff in staying his action? It can surely be no injustice to stay an action that is vexatious

[6] Reliance was placed upon the dictum in *Phosphate Sewage Co.* v. *Molleson* (1876), 1 App. Cas. 780, *per* Lord Selborne at p. 787. The Chief Justice, although he does not so state in his reasons, rejected the argument based on that dictum.

and oppressive, nor one that is an abuse of process. If then the second or negative point that must be shown by the defendant is really included in the first or affirmative point and the second point is by itself quite insufficient to move the court to act upon its being demonstrated, it seems that stating the rule as requiring proof of both points is confusing. It might well lead a court to consider that proof that no injustice will be done the plaintiff by staying his action would lighten the onus on the defendant of showing with clarity that the plaintiff's proceeding is vexatious and oppressive. But a moment's thought will show the fallacy of such an argument.

The cases upon which this judgment is based, and which are summed up in the judgment of Scott L.J. cited above, were decided in the early eighties by judges whose judgments carry great weight, such as Jessel M.R., Cotton, Lindley and Bowen L.JJ. Nevertheless one cannot help but feel that the point here upon which the defendants placed strong reliance, namely, that the proper law of the contract was the law of New York and therefore the proper court for its determination was the New York court, ought to have greater weight than the authorities allow to be given to it.[7] Clearly the New York court is the more competent court because the law of the contract is a matter of law there. In the Ontario court it is a matter of fact. Errors of law are much more easily corrected than errors of fact.

Such a contest might arise between actions in different provinces of the Dominion. The same law would apply in that case, for the jurisdiction is no less "foreign" between provinces than it is between a province and a state of the Union. Yet a court of one province might find itself highly embarrassed to refuse a stay of an action upon a contract, the proper law of which was that of another province.

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AUTOMOBILE INSURANCE — ONTARIO — SECTION 205 (1) OF THE INSURANCE ACT — REQUIREMENTS OF PROOF. — *Dokuchia* v. *Paul Fire and Marine Insurance Company*[1] is an action under section 205 (1) of The Insurance Act of Ontario[2] against the insurer of the owner of an automobile. The plaintiff had recovered a judgment against the owner, one Domansch, and his judgment

[7] This is the effect of the dictum in *Phosphate Sewage Co.* v. *Molleson*, *supra*.

[1] [1947] O.R. 417.

[2] R.S.O., 1937, c. 256.

remained unsatisfied. The insurer did not defend that action on the ground that the risk was not one within the terms of the policy.

The facts were that the plaintiff, Dokuchia, was a driver employed by Domansch. The vehicle was operating badly and the owner requested his employee to stand on the running board while the vehicle was in motion and feed gasoline into the carburetor. While he was so doing and the owner was behind the wheel, an explosion took place, the employee was thrown to the ground and the truck ran over him.

The essential defence of the Insurance Company was that the risk was excluded under sections D and E of the Standard Automobile Policy which read as follows:

> provided always that the insurer shall not be liable
>
> (d) for any loss or damage resulting from bodily injury to or the death of any person being carried in or upon or entering or getting on to or alighting from the automobile; or
>
> (e) for loss or damage resulting from bodily injury to or the death of any employee of any person insured by this policy while engaged in the operation or repair of the automobile.

Under section 205 (1) of The Insurance Act any person having a claim against an insured for which indemnity is provided by a motor vehicle liability policy is entitled upon recovering a judgment to have the insurance money applied towards satisfaction of his judgment. Section 198 (1) of the act provides that an owner's policy shall insure the owner's car against the liability imposed by law upon the insured arising from the ownership, use or operation of the vehicle.

Roach J.A., in delivering the judgment of the Court of Appeal, took the view that, because of section 205 (1) and section 198 (1), the plaintiff was required to prove that his judgment against Domansch was based on a claim for which indemnity is provided by the policy. This involves proving, first, that his loss arose from the ownership, use or operation of the automobile and, secondly, that his loss did not come within the exceptions in the policy for which no indemnity is provided, that is, that he was not an employee and was not a passenger.

At the trial of the action against the company, the plaintiff proved the policy of insurance, the original judgment and the judgment on appeal, but no evidence was tendered as to the circumstances in which the plaintiff received his injuries or as to whether or not at the time he was injured he was in the employment of the insured.

According to Roach J., section 205 (1) creates a substantive right in a judgment creditor enforceable by action against the insurer, provided that the claim is one for which indemnity is provided by the policy. On the record before the court, there was nothing to show whether the plaintiff was or was not in the employment of the insured. Similarly, there was nothing to show whether the plaintiff was a passenger.

The appeal was allowed, but instead of dismissing the action a new trial was ordered to give the plaintiff an opportunity to prove what he had failed even to attempt to prove in the first trial against the Insurance Company. Why this concession should have been made to the plaintiff is not easy to comprehend since he had wholly misconceived in the first action what was essential to be proved in order that he should succeed.

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DELICTS AND QUASI-DELICTS — QUEBEC — QUANTUM OF DAMAGES — DEGREE OF FAULT — PUNITIVE DAMAGES. — The recently decided case of *Brassard* v. *Duperré et al.*[1] affords an instance of the confusion that reigns in Quebec as to the method of calculating the damages to be awarded a successful plaintiff. It is a familiar principle in the civil law that, outside the sphere of contracts, fault, however slight it may be, entails the obligation of compensating the victim for all damages that are the immediate and direct consequence of the fault. Once the plaintiff has proved fault on the part of the defendant, it is not open to the judge to reduce the amount of the award because of the slight degree of his fault or because of his good faith.

In the *Brassard* case the trial judge, after finding that the defendants were liable for an illegal arrest, held that the inexperience and good faith of the arresting officers should be taken into consideration in the appreciation of damages. This appears to be unfounded in law. The true doctrine was expressed by Anglin C. J. in the leading case of *Regent Taxi & Transport Company* v. *La Congrégation des Petits Frères de Marie:*

> Moreover, while in cases of responsibility for breach of contract the degree of fault, and foreknowledge of the probability of its affecting the plaintiff adversely, intent and even motive may be material (Art. 1074 C.C. et seq.), comparative slightness of the fault shewn affords no answer even in mitigation of damages, nor can the absence of foreknowledge, intent or motive be invoked to support a defence based on

[1] [1947] S.C. 339.

remoteness of damage in cases of quasi-délit entirely independent of any breach of contract by the defendant; Ortenberg's case (infra) affords an illustration. See also *Loranger* v. *Dominion Transport Co.* (1896), Q.O.R. 15 S.C. 195; *Leclerc* v. *Montreal* (1898), Q.O.R. 15 S.C. 205. As the slightest degree of fault or negligence (*culpa levissima*) (S. 1927. 1. 201; S. 1924. 1. 105) suffices to entail liability in cases of quasi-délict, so the damage must, as far as practicable, be assessed in such cases under the civil law at a figure adequate to give complete compensation to the injured plaintiff. Juris-Class. Civ., art. 1382-3, Délits et quasi-délits, Div. A 1, nos. 2, 8.[2]

With respect, the judgment in the *Brassard* case is also open to question on another ground. In the course of it the court said that the sum of $100 was awarded the plaintiff less as compensation than to sanction the principle that the police may not arrest a man without observing the formalities prescribed by law. It is suggested, on the contrary, that pecuniary awards, in civil suits, are designed solely and exclusively to compensate the victim for the damages suffered and not as a method of sanctioning any principle, unless it be the one that everyone must answer for the consequences of his fault.

It has often been repeated that the judge is more or less in the position of an *arbitre* when it comes to deciding the amount of damages. Nevertheless there is at least one principle by which he must be bound in arriving at his decision, namely that every person, in answering for the consequences of his fault, is liable for all the resulting damages, on the sole condition that they are the immediate and direct consequence of the fault. The tendency of the courts to reduce the damages because of the defendant's good faith, or to award extra damages to sanction some principle, is surely one to be discouraged in the absence of textual authority.

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ADMINISTRATIVE LAW — MANDAMUS — RIGHT OF REGISTRAR TO REFUSE APPROVAL TO INCORPORATION OF COOPERATIVE — MANITOBA.—The decision of the Manitoba Court of Appeal in *Poizer* v. *Ward* [1] is a recent instance of the writing of a blank cheque to an administrative official.

An application was made for letters patent creating a co-operative corporation under the terms of Part VII of the Manitoba Companies' Act.[2] Although all of the requirements of the statute

[2] [1929] S.C.R. 650, at p. 668.
[1] [1947] 4 D.L.R. 316.
[2] R.S.M., 1940, c. 36.

had been complied with, the Registrar of Co-operative Associations rejected the application and refused to give any explanation for this rejection. The reason, which appeared later, was that the application was for incorporation of a hardware business intended to serve farmers, and that none of the applicants were farmers. The Registrar relied on the following provision:

> 129 (3). No co-operative corporation shall be created under this part without the approval of the registrar nor shall any by-laws be filed . . . until he approves thereof . . .

The applicants then sought an order of mandamus to compel the issue of letters patent.

Mr. Justice Dysart held that the Registrar's duty was confined to deciding whether the conditions of incorporation provided in the act had been complied with and that he could not refuse his approval on extraneous grounds.[3] Mandamus was therefore granted.

The Court of Appeal unanimously reversed this decision. Mr. Justice Bergman, who delivered the main judgment, considered the history and various provisions of the statute. He decided that section 129 (3) conferred an absolute discretion on the Registrar to refuse approval on any ground he saw fit, or on no ground at all. He also held that mandamus will not lie to compel exercise of a discretion in any particular way and therefore was not a proper mode of bringing this type of question before the court.

The decision is open to criticism on the authorities as well as on grounds of policy. It provides an occasion for consideration of fundamental problems of statute interpretation and of judicial review of administrative determinations.

It may be questioned whether, as a matter of statute interpretation, the result was proper. Powerful arguments have been advanced in recent years for declining to apply the words of a provision literally, if the result is at variance with the statutory scheme which was apparently contemplated by the legislature.[4]

In this case a single short section, negative in form, was taken to confer tremendous authority on an otherwise powerless official. Since well-known dangers attend the granting of such a discretion, it is unlikely that it would be given unless there was

[3] [1947] 1 W.W.R. 807.

[4] Chafee, The Disorderly Conduct of Words (1942), 20 Can. Bar Rev. 752; Corry, Administrative Law and the Interpretation of Statutes, 1 U. of Tor. L. J. 286; Willis, Statute Interpretation in a Nutshell (1938), 16 Can. Bar Rev. 1. *Cf.* note by Goodhart (1942), 58 L. Q.R. 3, at p. 4.

strong evidence as to its desirability in these circumstances. But no such evidence appears. No hint is given by the statute as to the grounds upon which the Registrar might refuse his approval. No procedure is prescribed for the consideration of applications. These are matters usually provided for in statutes conferring such authority. The Registrar was a minor official and not a man of "high authority and grave responsibility".[5] These are all factors which make it appear unlikely that such a wide power was meant to be given.

Since many conditions of incorporation were imposed elsewhere in the act, it would seem probable that section 129(3) merely gave the Registrar the power to decide whether these conditions had been complied with and that Mr. Justice Dysart correctly interpreted the statute.

But even if a discretion were conferred on the Registrar, it does not follow that he may exercise it without disclosing either his evidence or his reasons. Mr. Justice Bergman relied heavily on *Pure Spring Co.* v. *M. N. R.*,[6] and stated that it was not overruled by *M.N.R.* v. *Wright's Canadian Ropes Ltd.*[7] That conclusion would appear to be completely unfounded. Both cases dealt with section 6(2) of the Income War Tax Act. In the *Pure Spring* case it was held that the Minister need give no reasons nor evidence to support his conclusions and that the onus was on the taxpayer to show that he acted on a wrong principle. In the *Wrights Ropes* case, the Privy Council decided that the Minister need not give reasons; but that if he does not, the court will examine the facts to see if he had before him evidence to support his conclusion.

I have criticized the judgment of the Manitoba court on the basis of the statute and of case material. It is also open to objection on grounds of policy. The decision permits the Registrar to deny to some a substantial privilege accorded to others. To support such a result on the merits, it would be necessary to show that the following steps had been taken so far as practicable in the circumstances: firstly, that the determination was not based on an improper or capricious principle; secondly, that the findings of fact were based on substantial evidence; thirdly, that the applicants knew the case against them and had full opportunity to be heard; and fourthly, that the reasons for decision were stated. Chief Justice McPherson and Mr. Justice Bergman both

[5] *Cf.*, *Liversidge* v. *Anderson*, [1942] A.C. 206, at p. 253 (*per* Lord MacMillan) quoted in *Poizer* v. *Ward*, *supra* at p. 322.
[6] [1947] 1 D.L.R. 501.
[7] [1947] 1 D.L.R. 721.

recognized that the outcome was unsound. They referred to it as "injustice" and "bureaucracy", but held that they were powerless to do anything about it. I would suggest that they could have avoided this result either by applying more realistic principles of statute interpretation, or the decision of the *Wrights Ropes* case.

The court also held that this was not a proper case for mandamus. Mr. Justice Bergman held that the *Wrights Ropes* decision was applicable in statutory appeals but not in mandamus proceedings. In this conclusion, he impliedly differed from Mr. Justice Thorson who stated in the *Pure Spring* case:

> The fact that access is had to the Court by way of an appeal from the assessment and not on an application for certiorari or mandamus does not alter the nature of the Court's duty of supervision or the principles to be applied.[8]

The Manitoba court held that it had no jurisdiction on mandamus proceedings to compel the exercise of the Registrar's discretion in any particular way. Here it failed to follow several decisions which hold that on mandamus the court may determine whether the administrative official was actuated by extraneous considerations.[9]

It may be suggested that the time has arrived for a general overhaul of the methods of obtaining judicial review of administrative decisions. The problem of whether a prerogative writ will lie bears a startling resemblance to the old question whether the proper form of action had been followed. Many such determinations turn on the decision of whether a function is "judicial" or "administrative" or "ministerial". These tests have grown out of the history of the writs and their chief effect seems to be confusion.[10] They obscure what should be the real question before the court — whether the official has acted within the authority and in the way permitted by the statute.

Two possible remedies for this situation may be found. One would be for the courts to entertain actions for *declarations* to determine whether administrative decisions are within the powers granted by the statute. Some authority exists for this course,[11] but it is not likely to be a satisfactory method of review until

[8] [1947] 1 D.L.R. 501 at p. 516.

[9] *The King* v. *Minister of Education*, [1910] 2 K.B. 165; *Rex ex rel McKay* v. *Baker*, [1923] 2 D.L.R. 527; *Rex* v. *London County Council*, [1918] 1 K.B. 68.

[10] *Cf.*, Finkelman, Separation of Powers: A Study in Administrative Law, 1 U. of Tor. L.J. 313, at pp. 321-32.

[11] *Kettenbach Farms Ltd.* v. *Hencke et al.*, [1938] 1 D.L.R. 44 (Alta.); not followed in *Credit Foncier Franco-Canadien* v. *Board of Review*, [1940] 1 D.L.R. 182 (Sask.). *Cf. Dyson* v. *Attorney-General*, [1911] 1 K.B. 410.

one of our highest Courts of Appeal endorses it. The other possible remedy would be the passing of an act providing for appeals against administrative action taken under statutes which do not make special provision regarding review by the courts. The Dominion and the provinces might profitably investigate the entire question of administrative procedure and pass statutes comparable to the United States Administrative Procedure Act.

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INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

The purposes of the Bank are:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its capital, funds raised by it and its other resources.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate post-war years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.

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