# COMMENTS
# COMMENTAIRES

CONFLITS DE RÈGLES DE RATTACHEMENT — RENVOI — PRÊT USURAIRE — LOI DU CONTRAT — QUALIFICATIONS. — La décision rendue par la Cour suprême de la Colombie Britannique dans la cause *Rosencrantz* v. *Union Contractors Ltd. and Thornton*[1] mérite d'être notée par les juristes québecois, car elle traite de plusieurs questions de droit international privé de grande importance dans la jurisprudence et la doctrine canadiennes. D'une part, la décision réaffirme plusieurs principes fondamentaux et d'autre part, elle se prononce sur la solution à donner aux conflits de règles de rattachement qui présentent des problèmes loin d'être résolus au Canada.

Retracons brièvement les faits de la cause. Le demandeur avait avancé la somme de $47,000.00 à la société défenderesse constituée dans la Colombie Britannique et y faisant affaire, qui en contrepartie lui avait remis un billet à ordre d'un montant de $50,000.00 émis à Vancouver et payable là trois mois plus tard. Ce billet ne contenait aucune indication quant au taux d'intérêt, mais les parties s'étaient mises d'accord oralement sur un taux annuel d'environ quatre vingt dix pour cent. La différence de $3,000.00 entre la somme avancée et le montant principal indiqué dans le billet représentait les intérêts payés à l'avance par la défenderesse. A l'échéance, le billet n'ayant pas été honoré, le demandeur avait consenti à recevoir deux nouveaux billets à ordre, émis et payables à Seattle dans l'Etat du Washington, d'un montant total de $50,000.00 et à échéances différentes. Les parties avaient alors stipulé un taux annuel d'intérêt de six pour cent. La société ayant de nouveau fait défaut sur l'un des billets, le demandeur intenta une action en justice afin d'en recouvrer le montant. La société défenderesse combattit les prétentions du demandeur en soutenant que le contrat était régi quant à sa validité par la loi du Washington qui déclare que le taux d'interêt maximum permis ne doit pas excéder douze pour cent et à condition que les parties au contrat se soient mises d'accord à ce sujet par écrit. Il est également interdit à toute

[1] (1960), 23 D.L.R. (2d) 473, 31 W.W.R. 597 (B.C.).

personne, directement ou indirectement, de prendre ou de recevoir des sommes représentant des intérêts plus élevés. Si un taux d'intérêt supérieur à douze pour cent a été directement ou indirectement stipulé, le contrat n'est pas nul, mais dans une action basée sur ce contrat et sur preuve de ce taux, le préteur ne peut obtenir que son capital moins les intérêts échus au taux stipulé. Il doit aussi payer les frais de justice. Si le montant des intérêts a déjà été payé, le préteur à droit à un jugement en sa faveur pour le capital moins deux fois le montant des intérêts payés. Le montant des intérêts échus et non payés doit aussi être déduit du capital.

A ceci le demandeur répondit que même en admettant que la loi du Washinton s'applique, ce qu'il contestait, ces dispositions avaient non seulement un caractère pénal, mais relevaient aussi de la procédure et ne pouvaient donc en aucun cas être appliquées par les tribunaux de la Colombie Britannique.

La Cour soutint le bien fondé du raisonnement de la défenderesse. La loi du Washington s'applique nous dit-elle, car les billets à ordre sont soumis aux règles générales des contrats. Ainsi d'après les règles du droit international privé de la Colombie Britannique il existe dans ce domaine deux présomptions qui indiquent la loi qui régit le contrat en l'absence de stipulation expresse: l'une en faveur de la loi du lieu de conclusion et l'autre en faveur de celle du lieu d'éxécution. Lorsqu'un billet à ordre est émis et payable dans le même lieu, on présumera que la loi de ce lieu régit le contrat, c'est-à-dire ici la loi du Washington, à moins d'indications contraires exprésses.

La position de la Cour en ce qui concerne la détermination de la loi du contrat est conforme à la jurisprudence de toutes les provinces canadiennes qui tend à respecter la volonté des parties et, sauf exception, leur permet de choisir la loi qui gouverne leur relations.[2] En l'absence de stipulation expresse à ce sujet, la Cour se vit obligée de dégager leur volonté implicite à l'aide de présomptions.

Comme en France et dans d'autres pays européens[3] mais moins ouvertement, une partie de la jurisprudence semblerait cependant y voir plutôt une localisation du contrat qu'un choix de la loi, car dans certains cas le juge n'est pas strictement lié par une clause de choix exprès. Il n'existe donc pas de liberté absolue de choix. Ceci explique pourquoi dans les pays anglo-américains

[2] Voir Castel, Private International Law (1960), p. 196 et s.
[3] Voir Batiffol, Traité élémentaire de droit international privé (3e éd., 1959), nos 570-2.

la notion de "*proper law*" a été interprétée de différentes manières par les auteurs et la jurisprudence.[4] Dans la recherche de la volonté présumée des parties, le juge s'aide de présomptions qui sont en fait des indices de volonté: ce sont le lieu de conclusion et le lieu d'éxécution du contrat. La présomption principle en l'absence de volonté clairement exprimée favorise donc le lieu de conclusion du contrat. Cette présomption, sous réserve de preuve contraire, est aussi conforme à la loi fédérale sur les lettres de change qui cependant ne s'applique pas au cas present[5] et à la teneur de l'article 8 du Code civil du Bas-Canada. Lorsque le contrat doit être éxécuté dans un lieu autre que celui de sa conclusion on présumera que la loi du lieu de son exécution a été implicitement choisie par les parties. Le lien avec le systéme juridique du lieu d'éxécution est naturellement très fort, surtout lorsqu'il s'agit de billets à ordre où on a guère d'autre choix qu'entre le lieu d'émission et le lieu de paiement. Dans l'espèce le problème était d'autant plus simple que le billet avait été émis dans l'Etat du Washington et était aussi payable là. On ne pouvait éviter de localiser le contrat dans le Washington où le droit de créance devait se réaliser. Aucun indice particulier de la volonté des parties ne semblait s'opposer à cette solution si ce n'est que la loi ainsi designée était défavorable au prêteur. On pourrait admettre que le prêteur, connaissant le taux d'intérêt permis par la loi du Washington, ait voulu placer son contrat de prêt sous l'empire de la loi de la Colombie Britannique qui admet le taux d'intérêt stipulé. La soi-disant "loi de validité" devient alors un indice de volonté extrinsèque important. En le rejetant d'emblée, le juge semble s'être laissé influencer par ses sentiments personnels, plutôt que par des règles de droit. Si l'on adopte le point de vue que l'objet de la volonté des parties est la localisation du contrat et non le choix de la loi, peu importe que la loi du lieu choisi aille jusqu'à annuler le contrat. Il semble que pour la Cour suprême de la Colombie Britannique, en l'absence de volonté exprésse, la recherche de la volonté présumée à l'aide de présomptions se résume à l'appréciation objective par le juge des différents indices de localisation. Ceci apparait clairement lorsque le juge recherche les faits qui pourraient réfuter la présomption en faveur du lieu de conclusion ou d'exécution du contrat. La Cour suprême détermine la loi ap-

[4] Il n'est pas question ici de passer en revue la doctrine et la jurisprudence canadiennes, il suffira de se rapporter à mon ouvrage precité *supra*, note 2 et Cases Notes and Materials on the Conflict of Laws (1960), p. 757 et s.

[5] S.R.C., 1952, c. 15, arts 160-162.

plicable en tenant compte de la volonté des parties exprimée indirectement par des éléments matériels localisés. Dans certains cas, les tribunaux ont même refusé de donner effet à l'intention expresse des parties lorsque la loi choisie n'avait aucun lien avec les indices généraux ou particuliers du contrat. Comme le montre Westlake,[6] la "*proper law*" du contrat est la loi du pays qui est le plus intimement lié à celui-ci.

La Cour déclare aussi que les règles de conflits de lois de la Colombie Britannique lorsqu'elles désignent une loi étrangère, il s'agit de la loi étrangère interne et non la loi étrangère de conflit. Les tribunaux de cette province doivent rejeter le renvoi possible que la loi étrangère de conflit effectuerait de la cause à la loi de la Colombie Britannique.

La position adoptée par la Cour suprême sur la question des conflits de règles de rattachement est la partie la plus intéressante du jugement. Ce n'est en effet que la deuxième fois qu'un tribunal au Canada s'est prononcé dans ce domaine du droit international privé, chaque fois, dans une situation où l'application de la théorie du renvoi est douteuse. Ceci est d'autant plus surprenant que dans notre pays à structure fédérale, de nombreux systèmes juridiques se côtoient, dont certains possédent des règles de rattachement différentes dans le domaine des personnes et des biens.

En 1894, la Cour suprême du Canada dans la cause *Ross* v. *Ross*,[7] confirmant la Cour d'appel de la province de Quebec sur ce point, avait décidé que lorsque les règles québecoises de conflit de lois désignent une loi étrangère, la cour saisie du litige doit la considérer dans sa totalité, c'est-à-dire les règles du droit interne et les règles de droit international privé de cette loi, et accepter le renvoi qu'elle éffectuerait à la loi québecoise. Les tribunaux de cette province doivent toujours tenir compte de la règle de rattachement étrangère. En l'occurrence, un individu domicilié dans la province de Québec et y possédant des biens meubles et immeubles, de passage à New York avait testé sous la forme olographe. La loi interne de New York prohibe ce genre de testament, tandis que la règle de conflit de cet Etat n'interdit pas à des étrangers de tester selon la forme de leur domicile. La loi québecoise interne, au contraire, admet le testament olographe, mais considère que la forme des actes est régie par la loi du lieu de leur conclusion selon la fameuse formule *locus regit actum*.[8] On se trouve donc en

[6] Private International Law (7e éd., 1925), s. 212.
[7] (1894), 25 S.C.R. 307.
[8] Voir au Canada, Castel, De la forme des actes juridiques et instrumentaires (1957), 35 Can. Bar Rev. 654.

présence d'un conflit négatif de règles de rattachement. La Cour d'appel décida d'abord que la règle *locus regit actum*, incorporée dans l'article 7 du Code civil avait, un caractère impératif et que par conséquent le testament olographe était nul puisqu'il n'était pas conforme à la loi interne du lieu de sa rédaction. Cependant, afin de donner effet aux dernières volontés du défunt, la Cour fut d'avis qu'elle devait considérer la loi étrangère dans son ensemble. La règle new yorkaise de conflit renvoyant à la loi québecoise, lieu de domicile de défunt, devait-on considérer qu'elle aussi visait la loi québecoise dans son ensemble? Afin d'éviter le cercle vicieux, c'est-à-dire une succession infinie de renvois, la Cour d'appel décida d'accepter le renvoi et d'appliquer les dispositions substantielles du droit de la province de Quebec et par conséquent de valider le testament.[9] Cette solution présente l'avantage pratique de faire appliquer par le juge sa propre loi. La Cour suprême du Canada se prononça en faveur du caractère facultatif de la règle *locus regit actum*. Le testament était donc valable sans avoir à recourir à la règle new yorkaise de conflit. Ce n'est qu'incidemment que la majorité des juges de la Cour suprême se déclarèrent en faveur du renvoi tel que préconisé par la Cour d'appel. Le juge Taschereau, au contraire, maintint que lorsque la règle québecoise de conflit désigne une loi étrangère, il s'agit toujours de la loi étrangère interne. L'arrêt de la Cour suprême n'a donc même pas force de précédent dans la province de Québec sur ce point, ce qui explique que la Cour suprême de la Colombie Britannique ait pu adopter un point de vue tout à fait different sans même essayer de distinguer ou de citer *Ross* v. *Ross*. Il faut d'ailleurs s'en féliciter car la règle *locus regit actum* ne devrait pas être sujette au renvoi. Comme le fait remarquer en France M. Batiffol, cette règle est si étroitement adaptée aux intérêts des parties que sa combinaison avec une règle étrangère compromettrait irrémédiablement ces intérêts.[10] La Cour suprême de la Colombie Britannique en se référant à la loi étrangère interne évite le problème du renvoi possible.

Il faut reconnaître que dans le domaine des contrats où l'autonomie de la volonté joue un grand rôle, lorsque les parties au contrat désignent la loi étrangère qui doit le régir, il ne peut s'agir que de la loi interne. Ceci est certainement vrai, si l'on adopte le point de vue que les parties ont toute liberté de choisir la loi qui

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[9] Voir les notes du juge en chef Sir A. Lacoste (1893), 2 B.R. 413.
[10] *Op. cit., supra*, note 3, s. 311.

gouverne leur relations contractuelles.[11] On peut dire que les parties ont de ce fait incorporé les dispositions de la loi étrangère interne dans leur contrat pour en devenir des clauses tacites. Comment imaginer que les contractants aient pu envisager appliquer à leur contrat la loi qui serait indiquée par les règles de conflit de la loi choisie! En Angleterre, les cas où le renvoi, simple ou double, a été admis se réfèrent au statut personnel ou au statut réel. Les tribunaux n'ont jamais appliqué la théorie du renvoi dans le domaine contractuel. Cependant, si l'on admet que l'objet de la volonté des parties est la localisation du contrat et non le choix de la loi compétente, on doit reconnaitre que le problème du renvoi peut se poser. C'est probablement l'interprétation qu'il faut donner aux paroles de Lord Wright dans la cause *Vita Food Products Inc.* v. *Unus Shipping Co.*,[12] quand il déclarait qu'en donnant effet à la loi anglaise choisie par les parties, il devait considérer les règles de conflit anglaises en matière de contrats afin de déterminer la validité d'un connaissement.[13] Dans le domaine contractuel où la primauté de l'autonomie de la volonté est généralement admise, il est rare que la question du renvoi se pose. Dans le cas qui nous occupe, le droit de la Colombie Britannique et celui du Washington admettent une règle de conflit identique et ceci même au regard des présomptions. Il n'y a donc pas de conflit de règles de rattachement. Si la Cour avait appliqué la loi de conflit du Washington, elle n'aurait pas localisé le contrat ailleurs. C'est ce que nous indique la cause *Mirgon* v. *Sherk*[14] citée par la défenderesse et retenue par la Cour. Il est dommage pour la logique de la démonstration qu'une certaine confusion apparaisse dans le raisonnement du juge, car d'une part la règle de conflit du Washington déclare qu'en l'absence de stipulation expresse, un contrat doit être interprété d'après la loi du lieu de son éxécution, et d'autre part que les tribunaux de cet Etat doivent refuser de donner effet à un contrat même valable d'après la loi étrangère compétente s'il est contraire à l'ordre public du for. Cette dernière règle fait échec à l'application normale de la règle de conflit du Washington, elle ne doit donc pas entrer en ligne de compte dans les conflits de règles de rattachement. Tout ce que la Cour aurait dû montrer, c'est que, d'après le droit international privé du Washington, le droit applicable au contrat était celui de cet Etat. Il n'y avait donc

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[11] Falconbridge, Essays on the Conflict of Laws (2e éd., 1954), p. 402 et s.

[12] [1939] A.C. 277 (C.P.), à la p. 292.

[13] *Contra:* Falconbridge, *op. cit.*, *supra*, note 11, p. 404 et s.

[14] (1938), 84 Pac (2d) 362.

pas de renvoi possible. On appliquait alors la loi interne du Washington sans avoir à recourir à l'ordre public, le résultat étant le même dans les deux cas. Il est certain que *Mirgon* v. *Sherk*,[15] la cause invoquée par le juge, est basée sur l'ordre public du Washington

Correctement interprétée, la décision de la Cour suprême de la Colombie Britannique n'a pas la force du précédent en ce qui concerne les conflits de règles de rattachement. Nous sommes d'avis cependant que dans le domaine contractuel, même si l'on adopte la théorie de la "loi d'autonomie" au lieu de celle de "l'autonomie de la volonté",[16] la solution de la Cour est opportune et devrait être suivie par les tribunaux canadiens y compris ceux de la province de Québec. Dans d'autres domaines, on peut se demander ce que sera l'attitude des tribunaux en présence de la décision de la Cour suprême du Canada et des nombreuses décisions anglaises qui sont d'un grand poids dans les provinces de *common law* et qui préconisent le double renvoi. Dans la province de Québec, il est probable que l'arrêt dans la cause *Ross* v. *Ross* sera suivi. Le renvoi ne devrait être accepté dans aucun cas. Il faut se résoudre à reconnaitre qu'au Canada les règles de conflit ont un caractère exclusivement provincial et que par consequent il n'y a aucune raison d'abandonner ces règles au profit de règles étrangères, même si ces dernières n'entrent en jeu qu'en vertu de la loi du for. L'harmonie et l'unification des solutions entre les systèmes juridiques désignés par les faits du litige, contrairement à ce que certains prétendent, ne peuvent être atteintes par le jeu du renvoi. Etroitement lié à la théorie des qualifications, le renvoi ne pourrait aboutir à l'unification des solutions (si telle est sa raison d'être) que par accident, ou si les deux systèmes juridiques en conflit désignaient, l'un la loi interne et l'autre la loi de conflit.[17] Questions pratiques mises a part, ces positions opposées sur la question du renvoi ne peuvent toutes deux être correctes.[18] La désignation de la loi interne a au moins le mérite d'être simple et parfois, surtout en cas de double renvoi, d'éviter des procés longs et coûteux, même si en appliquant la loi interne le juge méconnait la nature réelle de la loi étrangère.

Ayant décidé que la loi interne de l'Etat du Washington s'applique, la Cour affirme que les lois étrangères relatives à l'usure

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[15] *Ibid.*
[16] Voir Batiffol, *op. cit.*, *supra*, note 3, n. 570 et s.
[17] Voir Francescakis, La théorie du renvoi (1958), n. 173 et s.
[18] Voir Castel, *op. cit.*, *supra*, note 4, p. 218, et s.

sont reconnues et appliquées par les tribunaux canadiens si elles régissent le contrat de prêt, mais que par contre les lois pénales étrangères n'ont aucun effect au Canada. N'a pas ce caractère la loi étrangère qui impose une amende au profit de l'emprunteur d'une somme d'argent, dont le taux d'intérêt est usuraire d'après cette loi, lorsqu'elle règit le contrat de prêt. De plus la somme déduite d'un prêt usuraire à titre d'amende, en vertu des dispositions de la loi étrangère qui régit le contrat, ne viole pas l'ordre public international de la Colombie Britannique, bien que la loi du for n'impose pas de telles amendes.

L'interêt suscité par cette prise de position est important, car dans le cas de contrats de prêts de sommes d'argent on a souvent maintenu au Canada que les lois étrangères qui prohibent la perception d'un taux d'intérêt excessif et imposent des sanctions pour en empêcher la pratique sont des lois pénales qui ne sont pas reconnues et appliquées. On considère que la loi pénale étrangère est territoriale. Le problème qui se posait au juge dans l'affaire qui nous occupe était de savoir si les peines imposées au prêteur appartiennent au droit civil ou au droit pénal. Pour résoudre la question, le juge s'est basé sur un arrêt du Conseil privé *Huntingdon* v. *Attrill*,[19] qui tout en déclarant que la *lex fori* détermine exclusivement le caractère public ou privé de la loi étrangère, pose les principes à suivre dans ce domaine: une loi est pénale si elle sert de base à une poursuite en justice au nom et profit de l'état. On s'attache aussi à déterminer si le dommage dont la réparation est poursuivie est un dommage au public ou à un individu. Ici il ne s'agissait pas d'une action publique ou d'imposer une amende au profit de l'Etat du Washington, mais d'une action privée (en fait intentée par celui qui devait encourir la peine imposée par la loi!) avec amende au profit de la société emprunteuse. Le caractère privé de la peine écartait donc le principe que les lois pénales étrangères ne sont pas appliquées en Colombie Britannique. Cette solution est conforme à la pratique établie dans les tribunaux anglo-saxons.[20] On peut se demander si dans l'espèce présente la pénalité imposée par la loi du Washington n'a pas un caractère excessif qui en fasse vraiment une loi pénale. Etant donné le critère adopté par les tribunaux canadiens, même si la peine était excessive, cela ne changerait pas le caractère de la loi étrangère

[19] [1893] A.C. 150 (C.P.).

[20] Voir l'arrêt de la Cour suprême du Canada dans la cause *Laane and Baltser* v. *Estonian State Cargo & Passenger SS Line*, [1949] S.C.R. 530, [1949] 2 D.L.R. 641 où des lois étrangères de nationalisation sont qualifiées de pénales.

puisque l'emprunteur reste le bénéficiaire de l'amende. On pourrait alors soutenir que l'ordre public de la Colombie Britannique fait échec à l'application de cette loi, car le droit de cette province ne sanctionne pas les prêts consentis à un taux usuraire. Quoique la question du caractère excessif de l'amende n'ait pas été soulevée, le juge a néanmoins rejeté l'argument basé sur l'ordre public, probablement parce que nous nous trouvons dans un domaine où l'autonomie de la volonté joue un grand rôle. Cela ne veut pas dire que le juge ignore le rôle joué par l'ordre public. Dans une autre espèce *National Surety Co.* v. *Larsen*[21] il avait déjà été jugé que l'ordre public ne s'oppose pas à l'effet en Colombie Britannique de droits valablement acquis à l'étranger, alors qu'il s'opposerait à leur acquisition dans cette province. Il s'agissait d'un contrat valable d'après la loi du lieu de conclusion qui le régissait, mais illégal en Colombie Britannique. L'attitude des tribunaux de cette province fait preuve de sagesse et de largeur de vues. Si le juge maintenait l'exception d'ordre public invoquée par le défendeur pour faire échec à une demande basée sur la loi étrangère applicable, il en résulterait un déni de justice. Le demandeur devrait alors chercher une juridiction favorable à ses prétentions. La situation serait bien plus grave encore si une défense soulevée par le défendeur était rejetée au nom de l'ordre public, car alors ce dernier pourrait être condamné et avoir ses biens saisis. L'ordre public ne devrait être invoqué que dans les cas où la loi étrangère va directement à l'encontre de la loi locale positive et met en danger l'ordre social du for. D'une manière générale la jurisprudence canadienne n'a pas tendance à abuser de la notion d'ordre public pour faire échec à l'application de la loi étrangère, que ce soit dans le domaine des conflits internes ou internationaux.

Il est intéréssant de noter que dans la présente cause le juge fait allusion à l'ordre public étranger représenté par une décision citée en faveur de la défenderesse et qu'il approuve. Il ne se défend pas de l'appliquer, mais se contente d'observer que l'important est de ne pas violer l'ordre public de la Colombie Britannique. Il nous semble que dans le domaine des contrats où la volonté des parties est quasi souveraine, on pourrait soutenir que les tribunaux devraient dans une certaine mesure donner effet à l'ordre public étranger sur le terrain de l'effet des droits acquis.

Repoussant le dernier argument du demandeur, à savoir que les dispositions de la loi du Washington relevent de la procédure, la Cour traite du problème des qualifications et déclare qu'une

[21] [1929] 4 D.L.R. 918, [1929] 3 W.W.R. 299, 42 B.C.R. 1.

loi étrangère qui diminue le montant de la somme recouvrable par un prêteur en lui soustrayant une amende pour taux usuraire perçue par l'emprunteur relève du fond du droit et non de la procédure et produit ses effets au Canada.

La Cour ayant admis que la loi de l'Etat du Washington régit le contrat de prêt se trouvait devant le problème de classer les dispositions de cette loi en tenant compte de la règle de droit international privé de la Colombie Britannique qui veut que la *lex fori* s'applique en matière de procédure tandis que sur le fond du droit, la loi étrangère est compétente. C'est sans nous indiquer la méthode de son raisonnement et entrer dans le détail, que le juge nous dit que le droit donné à l'emprunteur de percevoir une amende relève du fond du droit, citant à l'appui un arrêt de la Cour suprême du Canada[22] dans lequel il avait été décidé que l'estimation des dommages intérêts recouvrables dans une action en responsabilité contractuelle relevait aussi du fond du droit. La Cour avait-elle qualifié les dispositions de la loi étrangère compétente à la lueur des concepts de la *lex causae* ou de la *lex fori*? Il semble que la Cour suprême du Canada s'était prononcée implicitement en faveur de la *lex causae*, car elle avait analysé la loi étrangère dans son contexte. Dans l'affaire présente, il est permis de douter que la Cour ait adopté la même méthode, car elle a suivi le principe bien établi au Canada que les lois étrangères ou locales, qui empêchent le demandeur d'intenter son action sans affecter pour cela la validité et l'existence du droit créé, ont trait à la procédure. Ici le demandeur pouvait recouvrer la somme prêtée, il était simplement soumis à une amende, sanction qui était intimement liée au fond du droit. Les règles du Washington sont classées dans le statut de l'obligation créée par le contrat et non dans la procédure.[23] D'un autre côté, il n'existe aucune disposition similaire dans le droit de la Colombie Britannique dont la qualification aurait pu servir de modèle à la Cour. On pourrait aussi ajouter que les parties lorsqu'elles avaient choisi la loi du Washington afin de régir leur contrat y avaient pour ainsi dire incorporé les dispositions de cette loi relatives à l'amende.

Il n'est pas question ici de savoir à quel systéme juridique le juge, saisi d'un litige, doit se référer pour en qualifier l'objet, lorsque les systémes juridiques en présence possédent des qualifications différentes qui commandent l'application de règles de conflits différentes. Dans ces cas là, il est bien établi au Canada que le

[22] *Livesley* v. *E. Clemens Horst Co.*, [1924] S.C.R. 605, [1925] 1 D.L.R. 159.

[23] En général voir Castel, *op. cit.*, *supra*, note 2, p. 79 et s.

tribunal saisi qualifie l'objet du litige d'après sa propre loi, la loi du for. Le système juridique qui édicte la règle de conflit en fournit la qualification. Il semble en être autrement en ce qui concerne le problème de l'étendue de l'application de la loi compétente. En effet, non seulement nous sommes dans le domaine de l'autonomie de la volonté, mais nous savons déjà que la loi de l'Etat du Washington s'applique. Comme il s'agit d'une qualification qui ne commande pas la désignation de la loi applicable, il n'y a aucune raison d'appliquer la qualification de la *lex fori*. En fait la règle de conflit de la Colombie Britannique et de l'Etat du Washington en matière de contrat coïncident. La loi étrangère compétente, qui régit le fond du litige a été désignée par les parties. Ce que désire la Cour c'est éliminer les dispositions de cette loi qui relèvent de la procédure. La qualification préalable n'est nécéssaire que pour déterminer l'étendue de l'application de la loi compétente. Pour reprendre l'expression de Robertson[24] il s'agit ici de qualifications secondaires qui devraient être soumises à la *lex causae*. La loi du for qualifie la demande de réclamation contractuelle et désigne en conséquence la loi compétente; il reste encore à qualifier le fond: on appliquera alors la loi étrangère avec ses propres qualifications, car la distinction entre règles de procédure et règles de fond ne relève pas essentiellement du droit international privé dans le sens ordinaire. Le stade de la détermination de la loi compétente est dépassé. Le problème qui se pose est simple: quelles dispositions de la loi compétente s'appliquent à l'aspect de l'affaire gouverné par elle et quels en sont les aspects régis par la loi du for? On éliminera les dispositions de la loi étrangère compétente ayant trait a la procédure et les dispositions de la loi du for se rapportant au fond et *vice versa*. Dans le sens large, on est obligé de reconnaitre qu'il s'agit toujours d'un problème de qualification qui commande l'application d'une règle de conflit secondaire à savoir que les règles de procédure relèvent du for. Cependant, comme nous venons de le montrer, le problème est différent. Le juge ne devrait pas être tenté de classer les dispositions de la loi étrangère compétente dans les catégories de la loi du for, mais les analyser dans leur contexte juridique. Pour des raisons d'ordre public et en vue des difficultés qui résulteraient si on devait appliquer trop librement les règles étrangères de procédure, les tribunaux ont trop souvent tendance à qualifier ces règles comme se rapportant à la procédure. Cette attitude empêche le jeu normal des règles de conflits de lois. En fin de compte ce sont les plaideurs qui en souf-

[24] Characterization in the Conflict of Laws (1940).

frent. L'intérêt des parties est aussi un facteur important à considérer.

Si on soutient le point de vue classique qui favorise la qualification par la *lex fori*,[25] on devrait conseiller aux tribunaux d'adopter une attitude des plus flexibles. La qualification des règles de fond ou de procédure doit être variable selon les buts à atteindre, ce qui dépend en dernière analyse des espèces envisagées à la lueur, non seulement de l'ordre public et de considérations sociales ou économiques, voire politiques, mais surtout des difficultés pratiques qui peuvent se rencontrer dans l'application des dispositions de la loi étrangère compétente. Il est aussi possible d'envisager qu'une règle soit classée dans la procédure dans un cas et non dans un autre. A défaut d'application de la *lex causae*, la qualification d'une règle du droit interne similaire ne devrait pas nécéssairement être appliquée à la règle étrangère. L'application automatique du système interne dans le domaine international est parfois dangereuse. Des règles de qualifications du for distinctes pour le droit interne et pour le droit international privé devraient pouvoir exister côte à côte.

J.-G.C.

* * *

NEGLIGENCE—STANDARD OF CARE—ACT REQUIRING SPECIAL SKILL.—In his judgment in the case of *Stephens & Mathias, trading as Rockland Airways* v. *Miller*, reported *sub nomine Rockland Airways* v. *Miller*,[1] Schatz J. of the Supreme Court of Ontario appears to have concluded that in relation to the tort of negligence, the standard of care to be expected from anyone who performs an act requiring some degree of special skill may vary with the ability and experience of the individual in question.

In the case at bar, the defendant Miller, who had been taught to fly by the plaintiff Mathias, rented an aircraft from Rockland Airways shortly after getting his private pilot's licence. In taking off from Lake Chemong, the aircraft slewed to the right and crashed.

The plaintiffs did not sue under the contract of hire, but claimed only in tort, making certain specific allegations of negligence and

[25] Voir article 6 du Code civil et *Traders Finance Corporation Limited* v. *I. G. Casselman*, [1960] S.C.R. 242, *per* Judson J., à la p. 248 " . . . while it is true that the Manitoba court must characterize this legislation by its own tests of what is procedure and what is substantive law . . .".

[1] [1959] O.W.N. 343.

pleading *res ipsa loquitur*. Schatz J, having found that the plaintiffs had failed to prove the specific acts of negligence which they had alleged, said:[2]

> In considering whether the defendant was guilty of negligence it should be noted that he was comparatively inexperienced, having only shortly before the accident obtained his pilot's licence, and as the plaintiff had trained the defendant he would be expected to be in a position to judge of his competence. Negligence is the doing of something, or the not doing of something which a reasonable and prudent man would not, or would do "in the circumstances". The circumstances here included the fact that the defendant was not what might be termed an experienced pilot and so might not do what should be done to correct the tipping as efficiently as an experienced pilot might do it, *but in the circumstances of his inexperience*,[3] I am convinced he acted as a prudent and reasonable person would do. Consequently, I find that the defendant is not liable on the grounds of *res ipsa loquitur* and the action is dismissed with costs.

Was Miller's inexperience one of the factors which the judge could properly take into account in deciding whether Miller was negligent? Was that inexperience a part of the circumstances which must be considered in deciding whether or not there was negligence?

That the standard of care which the law requires of the reasonable man does not vary with the individual upon whom rests the duty to take care is succinctly stated by Lord Macmillan:[4]

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have in contemplation, and what, accordingly the party sought to be made liable ought to have foreseen. Here there is room for diversity of view .... What to one judge may seem far fetched, may seem to another both natural and probable.

This appears to be equally true where a person exercises any calling or does anything which requires some special skill. In these cases the law requires the reasonable man to exhibit the degree of skill or competence which the act demands.

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[2] Quoted from the original judgment. *Cf.*, *ibid.*, at p. 346.
[3] Italics mine.
[4] *Glasgow Corporation* v. *Muir*, [1943] A.C. 448, at p. 457.

> If a smith pricks my horse with a nail, etc., I shall have my action upon the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought.[5]

The test is whether the defendant had done all that any skilfull person could reasonably be required to do in such a case.[6] If a man undertakes an act which requires a special skill which he does not possess, then he is negligent in undertaking that act without skill. ". . . [A]s the doctor who undertakes to cure my horse must have common skill at least in his business . . .".[7]

"Errors due to inexperience . . . are no defence as against the injured person."[8]

In *Jones* v. *Manchester Corporation*[9] a patient had died under anaesthetic administered by a Dr. Wilkes who had been qualified for five months. In his judgment, Denning L.J. said:

> At the outset, it is important to notice the state of the pleadings. In the Statement of Claim it was alleged that Dr. Wilkes herself was negligent and the Hospital Board were responsible for her negligence because she was acting as their servant, but it was not alleged that anyone else was negligent, nor that the Hospital Board were negligent themselves. In answer to that claim it would be no defence for Dr. Wilkes or the Board to say that she had not sufficient experience to undertake the task, or to say that the surgeon in charge was also to blame. The patient was entitled to receive all the care and skill which a fully qualified and well experienced anesthetist would possess and use. If Dr. Wilkes failed to exercise that care and skill, she would be liable to the patient for the consequence no matter that the Hospital Board knew that she had not sufficient experience for the task and were much to blame for asking her to do it without proper supervision.

The law therefore requires that the reasonable man who undertakes anything that requires some particular skill, such as shoeing a horse or sweeping a chimney or driving a motor car or flying an aircraft, shall have sufficient skill and knowledge to enable him to carry out the task he has undertaken.

Pollock[10] puts the matter thus:

> If a man drives a car he is bound to have the ordinary competence of

[5] From Fitzherbert's *Natura Brevium*, Writ de Trespass sur le Case quoted by Williams J. in *Marshall* v. *The York, Newcastle & Berwick Rly. Coy.* (1851), 11 C.B. 655, at p. 664.

[6] See judgment of Best J. in *Jones* v. *Bird* (1822), 5 B. & Ald. 837, at p. 846.

[7] Per Ellenborough C.J. in *Seare* v. *Prentice* (1807), 8 East 352.

[8] Per Denning L.J. in *Jones* v. *Manchester Corporation*, [1952] 2 Q.B. 852, at p. 871 (C.A.).

[9] *Ibid.*, at p. 852.

[10] On Torts (15th ed., 1951), p. 21; see also Salmon, on Torts (12th ed., 1957), p. 412 *et seq;* Charlesworth on Negligence (3rd ed., 1956), p. 30; Winfield on Torts (6th ed., 1954), pp. 24 and 492.

> a motorist; if he will handle a ship, of a seaman; if he will treat a wound, of a surgeon; if he will lay bricks, of a bricklayer, and so in every case that can be found. Whosoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft and is answerable accordingly. If he fails, it is not an excuse that he did the best that he, being unskilful actually could. He must, at his peril, have "skill reasonably competent to the task he undertakes."

In the absence of contributory negligence or of *volenti non fit injuria*, neither of which was pleaded, the liability of Miller for damage to the aircraft he was flying was surely no more and no less than the liability he would have incurred had he collided with and injured some persons in a boat on the lake during his uncontrolled swing and "tipping" in attempting to take off. One is tempted to speculate as to whether the judge's decision would have been the same in such a case and to wonder if he did not allow his decision to be affected by the fact that the plaintiff Mathias had trained the defendant and should therefore have known his capabilities. However, as the case was pleaded, the knowledge of the plaintiff as to the experience and capacity of the defendant could have no relevance.

I conclude, therefore, that as pleaded, the *Rockland Airways* v. *Miller* case was wrongly decided and that judgment should have been entered for the plaintiff.

ALASTAIR R. PATERSON*

* * *

LEGISLATION — STATE COMPULSORY INSURANCE ACT — AN APPRAISAL. — While the Province of Saskatchewan is large in size its population still does not exceed one million persons. In 1945, when its government first appointed a committee to study the problem of compensation for the victims of automobile accidents, its population was little more than eight hundred thousand. Its experience since that date can be regarded as an experiment in minuscule, of a situation that has been regarded principally as a social problem, and which lawyers have been invited to help solve.

*Basis of the plan*

In Saskatchewan, as elsewhere, the convenience and pleasures of the automobile have been bought at high price in terms of human misery and human life. Losses in terms of income, medical expense and human happiness have been borne not simply by the

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individuals involved, but by society as a whole. The committee which studied the problem at that time was struck by the fact that:

> In six years of war, more than 94,000 Canadian servicemen were killed, wounded and missing. During the same six years, 10,000 Canadians were killed, and 160,000 were injured in traffic accidents in Canada. Road casualties at home were nearly twice Canada's overseas casualties, despite the reduced traffic and lower accident rate resulting from gas rationing.[1]

While Saskatchewan bore a small percentage of the overall loss, the problem was regarded as a real and pressing one. Saskatchewan's economy at that time was basically agricultural. In 1945, less than ten per cent of the licenced motorists carried automobile insurance. The desirability of implementing some insurance scheme which would encompass most, if not all, motorists was at once apparent. Equally apparent was the fact that in this restricted area, experimentation would be relatively easy without seriously affecting "vested interests" or established habit patterns.

In 1932, the Columbia University Council for Research in the Social Sciences, published a report on compensation for automobile accidents, replete with case studies and statistical data, upon which the Saskatchewan committee drew for many of its recommendations. The Columbia committee found the following shortcomings in the operation of the "fault principle of liability" as it then was applied in the courts:

> (1) the imposition on the plaintiff and on the defendant of the burden of producing evidence as to fault, although the accident itself has often hindered or prevented them from obtaining witnesses; (2) the difficulty of ascertaining the facts sought, even where the best evidence is obtainable, because witnesses who are neither trained nor prepared to observe cannot, after the lapse of months or even years, enable a jury, which has no training in fact-finding, to fix the blame for an accident caused by events which succeeded each other in the space of a few seconds; (3) the impossibility of fixing the damages accurately since there are no recognizable criteria of the value of pain or of life or of disability; (4) the delay, especially in the large cities, caused by waiting for trial, and aggravated in some cases by appeal; (5) the heavy cost of attorney's fees which generally range from 25% to 50% of the amount recovered; (6) the financial irresponsibility of many motorists who cause accidents; (7) the burden cast upon the courts and the consequent congestion of all judicial business in large cities due to the volume of motor vehicle accident litigation.[2]

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[1] Report on the Study of Compensation for Victims of Automobile Accidents, Saskatchewan, February 1947, p. 8.

[2] Report by the Committee to Study Compensation for Automobile Accidents to Columbia University, Council for Research in the Social Sciences (1932), p. 137.

The committee concluded that:

> . . . a man injured by an uninsured motorist has little chance of receiving any compensation for his losses . . . . A second outstanding conclusion is that insurance companies pay, in so large a proportion of the cases in which liability insurance is carried, that the principle of liability without fault seems almost to be recognized.[3]

The principle of liability without fault which lies at the basis of the automobile accident insurance scheme which was adopted in Saskatchewan, is not at variance in certain aspects, with the general law of torts. Thus, for example, as early as 1868 in the case of *Rylands* v. *Fletcher*,[4] the House of Lords established the principle that where a person keeps on his land something which, if it escapes, is likely to do harm, that person is liable for any damage, whether he is negligent or not. As *Salmond on Torts*[5] states:

> He who keeps a dangerous animal keeps it at his peril. Every man is bound at his peril to prevent such animals from going at large or from obtaining in any other manner an opportunity of exercising their mischievous instincts. If any harm is done by them, he is liable without any allegation or proof of negligence unless there exists some specific ground for exemption.

Again, the workmen's compensation laws which have been adopted in almost all jurisdictions in the British Commonwealth impose upon an employer the requirement that he contribute annually to a fund, administered by a board and designed to compensate a workman for loss occasioned by accident arising out of and in the course of his employment. These laws abolished the common-law defences of assumption of risk, contributory negligence and common employment. In the Province of Ontario, which pioneered this system of compensation in Canada, the standard of administration has been described as "average justice cheaply and speedily administered".[6]

In its objectives and administration, the Saskatchewan automobile accident insurance scheme follows most closely the principles developed by workmen's compensation boards in Canada. The scheme does not and probably cannot assure "absolute justice" to parties who would normally be plaintiffs and defendants in actions at common law. It merely provides a type of "average justice" for all motorists and persons who might be injured as a result of motor car accidents, but it seeks to provide this rough

[3] *Ibid.*

[4] (1866), L.R. 1 Ex. 265.

[5] (12th ed., 1957), p. 583.

[6] M. C. Shumiatcher, Study of the Workmen's Compensation Board of Ontario (1942).

and ready type of justice speedily and cheaply. In so doing, however, the scheme seeks to preserve, to a certain extent at least, the common-law remedies to which injured persons might resort where compensation under the plan is inadequate. Unlike workmen's compensation statutes, it does not abolish the right of recovery in the courts, substituting for the right to claim damages, the right merely to secure compensation from a fund. The fund, however, has been created to pay compensation in the vast majority of cases where losses have resulted from automobile accidents.

*Insurance under the statute*

The Saskatchewan Automobile Insurance Act, introduced in 1946, provides that "every person is hereby insured" against loss resulting from bodily injury sustained in an accident while driving or riding in a moving motor vehicle in Saskatchewan, or as a result of a collision with or being run over by a motor vehicle, regardless of fault.[7] The certificate of insurance protects not only the person named in the certificate, but any other person in Saskatchewan riding in the vehicle while it is being operated by a properly licenced driver. Any person injured who is not named as an insured is also "deemed to be a party to the contract and to have given consideration therefor" and is protected. The certificate itself protects all persons domiciled in Saskatchewan injured while driving or riding in a vehicle outside Saskatchewan anywhere on the North American continent.[8]

Protection under the Act is coincidental with the licencing of the vehicle and the issue of a driver's licence, the premium being paid at the time that such licences are issued. A resident of the province will lose the protection of the Act only,

(1) where he is under the influence of intoxicating liquor or drugs to such extent as to be incapable of properly controlling the vehicle;

(2) where he drives without a licence or in a vehicle not properly registered; and

(3) where he rides on a part of the vehicle not designed to seat passengers or carry a load.[9]

This coverage is secured under an exclusive provincial insurance fund. All drivers and car owners must pay for government insurance annually, concurrently with their applications for renewal of licences and registrations. The terms of the insurance contract are

[7] S.S., 1946, c. 11, s. 12 (1), now R.S.S., 1953, c. 371, s. 19(1).
[8] R.S.S., 1953, c. 371, s. 19(2). [9] *Ibid.*, ss. 29 and 30.

contained in the statute, and the registration certificate of the driver's licence, coupled with the statute, constitutes the only "policy of insurance". This lapses with the expiration of the licence and registration.[10]

The law is administered by the Saskatchewan Government Insurance Office, a Crown corporation, which was first incorporated by an Act of the legislature for the purpose of writing insurance in competition with private insurance companies. In respect of its functions under The Automobile Accident Insurance Act, however, it is a statutory body, the procedures of which resemble those of an administrative board under workmen's compensation legislation.[11]

*Rates*

The premiums payable under "the insurance policy" vary with the type and age of vehicles. In 1960, the rates on vehicles were fixed as follows:

*Rates on Private Passenger Cars*

| | Wheelbase under 100″ | Wheelbase 100″-120″ | Wheelbase over 120″ |
|---|---|---|---|
| Year Model prior to and incl. 1948 | $ 5.00 | $ 5.00 | $ 5.00 |
| 1949 and 1950 | 7.00 | 12.00 | 12.00 |
| 1951 and 1952 | 9.00 | 15.00 | 15.00 |
| 1953 and 1954 | 15.00 | 20.00 | 25.00 |
| 1955 and 1956 | 20.00 | 25.00 | 30.00 |
| 1957 and later | 30.00 | 35.00 | 40.00 |

*Rates on Farm Trucks*

| | All Models and Weights |
|---|---|
| Prior to and including 1951 | $ 4.00 |
| From 1952 to 1954, incl. | 6.00 |
| 1955 and 1956 | 8.00 |
| 1957 and later | 10.00 |

In addition, a premium of two dollars is payable on each operator's licence. Where a motorist has a bad driving record, the insurance rate is increased. The motorist may contest the insurer's rate before a rates appeal board established under the statute.[12]

[10] *Ibid.*, ss. 3, 4 and 5.

[11] Under s. 21, para. 15 of the Act, *ibid.*, the "insurer" is the Saskatchewan Government Insurance Office.

[12] By s. 5 of the Act, *ibid.*, the rates are fixed by regulation, promulgated by the Lieutenant Governor in Council. See Sask. O. C. 451/60, March 15th, 1960 for 1960 rates.

*Benefits:*

*Personal injury coverage*

The compensation payable regardless of fault to those injured in motor vehicle accidents within Saskatchewan and to Saskatchewan residents riding in Saskatchewan licenced vehicles on North American highways outside of Saskatchewan, are awarded in respect of death or impairment of bodily functions. Where death is caused by a motor vehicle accident within ninety days following the accident or within 120 weeks of total continuous disability, there is payable:

| | |
|---|---|
| For the primary dependent..... | $5,000.00 |
| For each secondary dependent..... | 1,000.00 |
| (to a total aggregate for secondary dependents of $5,000.00) | |

A maximum of $10,000.00 is payable for any one death.[13] In the event of the death of an infant up to the age of eighteen years, the parents are entitled to compensation on the following scale:

| | |
|---|---|
| Up to 6 years.....$ | 100.00 |
| 7 years..... | 200.00 |
| 8 years..... | 300.00 |
| 9 years..... | 400.00 |
| 10 years..... | 500.00 |
| 11 years..... | 600.00 |
| 12 years..... | 700.00 |
| 13 years..... | 800.00 |
| 14 years..... | 900.00 |
| 15 years and over..... | 1,000.00[14] |

*Compensation for impairment of bodily function*

If, within ninety days after an accident, losses have resulted to an insured, of limbs or members, a scale of compensation is provided under the Act. The maximum allowable is $4,000.00 and various disabilities are compensable as a percentage of this sum. These percentages are based upon recognized insurance schedules. For example, payments are made for injuries on the following basis:

For loss of:

| | |
|---|---|
| Both hands by severance at or above the wrists ...$ | 4,000.00 |
| Both feet by severance at or above the ankles..... | 4,000.00 |

[13] This is known as the "Part II Coverage" See s. 23 of the Act, *ibid.*
[14] *Ibid.*, s. 22(3).

| | |
|---|---|
| One hand at or above the wrist and one foot at or above the ankle, by severance | 4,000.00 |
| Entire sight of both eyes, if irrecoverably lost | 4,000.00 |
| Entire sight of one eye, if irrecoverably lost, and one hand at or above the wrist by severance | 4,000.00 |
| Entire sight of one eye, if irrecoverably lost, and one foot at or above the ankle by severance | 4,000.00 |
| One arm by severance at or above the elbow | 2,700.00 |
| One leg by severance at or above the knee | 2,700.00 |
| Either hand by severance at or above the wrist | 2,000.00 |
| Either foot by severance at or above the ankle | 2,000.00 |
| Entire sight of one eye if irrecoverably lost | 2,000.00 |
| Thumb and index finger of either hand at or above the metacarpo-phalangeal joints | 1,000.00 |
| Thumb of either hand at or above the metacarpo-phalangeal joints | 500.00 |

Payment is also made on a percentage basis for the loss of the function of any other joints in limbs and for restricted movement of the spine or for permanent damage to eyes, ears or nose or for loss of teeth or for scarring or disfigurement of the face. In all cases, the percentage of the $4,000.00 payable is governed by the relationship of the particular disability or impairment to the whole body. The $4,000.00 maximum, of course, is a purely arbitrary figure based upon the ability of the scheme to levy premiums and pay benefits.[15]

*Supplementary allowance*

Varying sums up to $2,000.00 are payable to injured persons requiring the attendance of a physician, and supplementary allowances are paid for doctor's bills, hospital bills, x-ray, ambulance service and so on.[16]

*Weekly indemnity*

The object of the payment of a weekly indemnity is to compensate, at least in some measure, victims of motor vehicle accidents who are incapacitated to the extent that they cannot pursue their normal occupations. The rate of indemnity payable is twenty-five dollars per week during the period of such incapacitation, not exceeding 104 consecutive weeks. A housewife may receive twenty-five dollars per week, but for a period not exceeding twelve consecutive weeks, if totally and continuously disabled.

[15] *Ibid.*, s. 20.

[16] *Ibid.*, s. 22(1).

If partially and continuously disabled, the weekly indemnity is half that sum in all cases.[17]

*Third party liability coverage (Bodily injury $10,000.00—$20,000.00; property damage $5,000.00)*

The personal injury benefits already outlined above are not intended as a substitute for public liability. Additional compensation under third party liability, without prejudice to the claims under Part II, being the personal injury section of the Act may be recovered, but the amount paid in personal injury benefits is deducted from any liability award. Thus, any person injured by a Saskatchewan licenced vehicle may claim against the accident fund to the extent of third party liability coverage provided under the Act. Under its provisions, all Saskatchewan motorists are insured against third party bodily injury liability claims up to $10,000.00 per person and $20,000.00 per accident and $5,000.00 for property damage.[18]

Since 1957, the victim of an unidentified hit and run driver may claim under the third party liability if payments under the personal injury section of the Act are not sufficient to cover the loss. Such victim, or his dependents may claim against the Saskatchewan Government Insurance Office for the recovery of death or injury benefits for which the driver could be held legally liable. In the majority of such cases, the claim is simply made upon and dealt with by the Saskatchewan Government Insurance Office; in other instances, actions have been brought in the court in the normal manner to secure recovery. In 1959, this liability was extended to any person who is the victim of the driver of a stolen motor vehicle as well.[19]

*Comprehensive coverage*

Comprehensive coverages against direct and accidental loss of or damage to the insured vehicle and its equipment is provided under the statutory insurance contract.[20] This coverage includes loss as a result of theft, fire, flood, hail, riot, collision and upset. In respect of such claims, there is a $200.00 deductible clause for private passenger cars, the balance being paid by the Government Insurance Office.

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[17] *Ibid.*, s. 21(1). [18] *Ibid.*, Part IV, see s. 37 *et seq.*
[19] *Ibid.*, s. 43 (b), enacted by S.S., 1957, c. 100, s. 9.
[20] This coverage arises under Part III of the Act; see s. 33, *ibid.*

*General*

As already indicated, an injured party still retains his negligence remedy at common law; he may still sue for and recover regular damages, less any amount which was or could have been recovered under the accident compensation remedies.[21] The statute itself remains a compensation scheme, supplementing, in effect, the common-law remedies and derogating from them only to the extent of the compensatory payments to injured parties. While the benefits payable may appear to be rather low, as compared with American standards, it is to be remembered that the premium rates are also low and that the scheme does not seek to do "absolute justice" to a person injured in a motor car accident, but rather, to accord to such person "average justice" cheaply and speedily.

There is no doubt that the Act has provided benefits for many who would have had no redress whatever outside its terms. Even if all motorists were insured privately against motor vehicle liability, there would be no protection in certain cases, as, for instance, against personal injury losses as a result of upset.

*Administration*

The Act requires that a claimant give notice of an accident to the Government Insurance Office, the insurer, within fifteen days of the accident and requires that within sixty days, he submit all available proof as to the extent of the claim, together with a medical certificate from the claimant's physician.[22] The legislation dovetails with other provincial statutes which, for example, require that there be reported to a police officer every accident which involves an apparent loss exceeding the sum of $100.00.[23] Garages and repair shops likewise are required to report to the police any damage to a motor vehicle coming to their attention in the course of their business.[24]

After proof of claim has been made, payment of benefits must begin within sixty days and compensation for loss of income within thirty days.[25] In fact, compensatory payments for loss of income commence sooner. They are not necessarily made regularly,

[21] The right of action against the Saskatchewan Government Insurance Office to recover benefits lawfully due to an insured is also specifically provided. See s. 45, *ibid.*

[22] The statutory conditions are contained in s. 30, *ibid.*, see especially para. 4.

[23] *Ibid.*, ss. 50 and 51. [24] The Vehicles Act, S.S., 1957, c. 93, s. 155.

[25] S. 30, para. 8 of the Automobile Accident Insurance Act, *supra*, footnote 7.

but only as physician's progress reports are received by the insurer. This results in irregular payments and often in considerable hardship to an insured.

Where injury or loss is caused by an unlicenced driver or an unregistered vehicle, or where the driver of the vehicle was intoxicated, the operator or owner remains fully liable.[26] Where the Government Insurance Office pays benefits under the Act, it is, in such instances, subrogated, to the rights of the injured parties to the extent of any compensation payments or other benefits made to the injured party under the statute.[27] Such subrogation proceedings have from time to time been taken by the office and they yield fairly good results.

The roles of the Saskatchewan Government Insurance Office are several. *First*, it acts as an insurer collecting premiums, statistically determining the amounts which must be collected to meet the expected claims and generally making recommendations through the responsible Minister of the Crown to the legislature for variations in benefits and premiums payable. All benefits payable are determined by Acts of the legislature, and premiums are determined by order of the Lieutenant Governor in Council.[28]

*Secondly*, the insurance office employs a large staff of its own adjusters and engages the services of independent adjusters as well, to determine losses. The functions of these adjusters, in no substantial way differ from those used by private insurance companies. To facilitate this procedure, claims centres are established for on-the-spot adjustments.

*Thirdly*, in cases of dispute, the office acts as an administrative tribunal to carry out quasi-judicial functions relating to rates payable by various classes of persons and to determine whether in any particular instance, a person falls within any given class. Appeals may be taken to the Rates Appeal Board consisting of one or more members appointed by the Lieutenant Governor in Council.[29] In the case of a dispute between the office and a claimant of benefits, the matter is referred to a medical consultant of the insurer's choice who makes a determination as to the extent of injuries.[30]

In cases of dissatisfaction, actions may and have been brought in the ordinary courts against the Saskatchewan Government Insurance Office, and the number of these has increased in recent

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[26] *Ibid.*, s. 34.
[27] *Ibid.*, s. 63.
[28] *Ibid.*, ss. 4 and 5.
[29] *Ibid.*, s. 8.
[30] *Ibid.*, s. 2, para. 17.

years. The problems inherent in any large organization and, in particular, in any government-sponsored organization, are apparent in the administration of any such wide and all-embracing scheme. The evils of bureaucracy and red tape are as much present in this scheme in the Province of Saskatchewan as in any other government-administered organization in any part of the world. Frequently, a sense of frustration and futility in dealing with officials of the office arouses the hostility and criticism, both of members of the public and of the legal profession. Being uncontrolled by the forces of competition which are present where numbers of alternate insurance companies seek the patronage of the general public, there is a tendency for employees of the office to become dilatory in its procedures, careless in its assessments and callous in its consideration of claims. While these qualities are obviously not a part of the policy of the office, they are as much present in the administration of the Saskatchewan Government Insurance Office as in the administration of any workmen's compensation scheme administered by a public agency. However, unlike workmen's compensation statutes, there is no attempt to prevent access to the courts by claimants.

The plan aroused considerable hostility in the province and outside the province in its early years. The concept of the scheme has since been generally accepted on the premise that a half a loaf is better than no loaf at all. It will be recalled that before the plan went into effect, the vast majority of Saskatchewan residents were without any type of insurance.

The role of the legal profession in representing claimants is obviously a dual one. *First*, it is to secure to the client the fullest measure of compensation for the injury which he has suffered. *Secondly*, it is to assist in maintaining to the fullest extent possible a measure of fairness and efficiency in the administrative processes of the insurance office. For, just as the lawyer acting as an officer of the court is in a very real sense responsible for the effective administration of the judicial process, so in his role as representative of claimants before an administrative tribunal, his function is to ensure that the administration of statutes affecting the public generally, and his client in particular, be carried out fairly, impartially and expeditiously.

Because of the rigid schedules for compensation that are set out in the statute, the lawyer's role becomes a narrow one. No more than three points arise: *First*, did the injury or loss arise out of, or was it caused by a motor vehicle accident? *Secondly*,

what is the character and extent of the injury or loss? *Thirdly*, what compensation shall be paid? As in workmen's compensation cases, the tendency has been for claimants to rely less and less upon the legal profession in advancing their claims. Payments are generally not large, and as a result, the role of the legal profession in motor vehicle accidents had been reduced to a minor one. The result has been twofold. *First*, the number of lawyers interested in and engaged upon the work of automobile accident insurance claims has declined. *Secondly*, the influence of the legal profession in adjudicating and disposing of such claims has markedly lessened. This has opened the door to arbitrary determinations by the insurance office, its adjusters and officials, to an extent which is distressing to many persons in the legal profession who are aware of the dangers of bureaucracy in government. The public complains from time to time, but such complaints as are heard, while they may find reflection in certain administrative changes, nevertheless are unlikely to effect any material reform in the administrative procedures under the Act. There is some question as to whether these bureaucratic limitations are in the minds of the public more distressing than the delays and uncertainties of litigation. The truth, I think, is that the public has come to regard government as so much a part of Twentieth Century living that individuals accept bureaucratic controls and directions as an inevitable part of their lives as smog and snow. Furthermore, it may well be that the pattern of adjusting and settling claims was so well established by the adjusters and officers of the large private insurance companies many years before the Saskatchewan Government Insurance Office came into being as to brook no change under public control. One of the most valid criticisms of the administration of the Act may be that it has followed too closely the less desirable practices of some of the private insurance companies.

Under the Act, no cash outlay need be made by claimants to retain legal services. This, in itself, is a welcome relief to members of the general public, many of whom (quite mistakenly) grow irritated by the necessity to pay for what they consider they should be able to claim without the intervention of a lawyer. The certainty of small compensation to many, seems better than the hope (so often unrealized) of extravagant damage awards.

From the point of view of the legal profession itself, the loss of litigation in automobile damage actions in Saskatchewan probably does not work so great a hardship as would be the case in American jurisdictions. The acceptance of a brief on a contingency

basis is either prohibited or frowned upon in all Canadian jurisdictions.

The practice of receiving for legal services from twenty-five to fifty per cent of the sums recovered in damage actions does not prevail in any of the provinces of Canada. Legal fees are generally based upon a tariff approved by a committee of judges and while solicitors may recover sums in excess of the tariff, nevertheless, the tariff forms a guide for payment of legal fees and, except in noncontentious matters, they may not be based upon the amount recovered. Thus, except among a very limited number of lawyers, this field of litigation has not been so lucrative in Saskatchewan as in many other jurisdictions.

Except possibly in the Province of Ontario, the jury system has been largely abandoned for all but criminal matters, and it is rarely that any jury is impanelled to assess damages in motor accident cases in Saskatchewan. This may seem strange and irrational, and yet lawyers by and large are content to rely upon the assessment of damages by judges in non-jury trials. The judge is the final arbiter, not only of matters of law, but of all facts as well. Many feel that this retreat from the jury system is having or is likely to have ill effects upon the administration of justice. At the same time, the non-jury system of adjudication has expedited proceedings and has rendered the outcome of litigation more predictable. As a result of the reluctance of solicitors to impanel juries to try automobile damage actions, court calendars are not so crowded as in the United States. Trials may be brought on within a matter of from three to six months and if this does not occur, it is generally because counsel are engaged in other matters. It may also be observed that the medical profession does not produce a class of expert witnesses, some of whom testify only for plaintiffs, and others only for defendants as is the case in some jurisdictions. The same specialization of expert witnesses which characterizes the American procedure does not obtain in Canada and no class of professional medical witnesses has yet arisen.

That the legal profession itself has experienced some loss as a result of the Automobile Accident Insurance Act, there can be no doubt. An area still exists in which litigation may be instituted over and above the compensation payable under the Act. However, such actions are not numerous, since the scale of damages payable generally in such cases is not comparable to those damages payable in the United States of America. Accordingly, litigation is discouraged by the profession.

The vesting of wide and varied powers in the hands of government officials employed by the Saskatchewan Government Insurance Office, obviously gives rise to uneasiness and the fear that an arbitrary and callous attitude may deprive rightful claimants from securing adequate compensation under the Act. The desire to "make the scheme pay" is also likely to have some effect in rendering awards niggardly and inadequate, beyond even the scale fixed by the legislation.

*Results of the Act*

Since 1946, when the fund was first established, it has steadily grown, and the aggregate of premiums collected has materially risen. Premiums earned in the first year, totalled $1,300,000.00. In the year ending December 31st, 1959, this had increased to $4,800,000.00. The surplus which, during the first year was $767,000.00 has increased to a cumulative surplus of $4,780,000.00, though in particular years, losses have been sustained. When losses have occurred, premiums have been increased generally or provision has been made to secure larger premiums for particular drivers, whose records have justified a differential.

Throughout the fourteen years of the Act's history, benefits have slowly increased, but it is hardly likely that the scheme will at any time provide full coverage or constitute anything more than a bare minimum in terms of compensation for injuries and losses suffered.

Complementing the scheme, is the "package policy" which the Saskatchewan Government Insurance Office sells in competition with private insurers. This coverage can be purchased at competitive rates, either from the Saskatchewan Government Insurance Office or, if the insured so desires, from any one of many private line companies. It is interesting to note, that notwithstanding the apparent convenience of dealing with only one insurance company, many residents of the province prefer to purchase their additional insurance from private companies, since it is often felt that the competition to which these companies are subject assures individuals of better and speedier adjustments. In 1959, approximately fifty per cent of the additional automobile insurance written in the province was carried by the Saskatchewan Government Insurance Office and the other fifty per cent by the numerous private insurance companies operating in the province. It is also interesting to note that the premiums payable to the Saskatchewan Government Insurance Office under The Automobile Accident Insurance

Act totalled approximately seven million dollars and that all premiums paid for insurance over and above the coverage under the statute totalled only approximately four million dollars. The rates for "package policy" protection, or for private insurance over and above that provided by the statute are obviously less than would be the case if the statutory insurance did not exist.

It may be appropriate to ask whether universal automobile accident insurance based upon the non-fault principle has had the effect of increasing the number of accidents and the losses resulting from such accidents in Saskatchewan since the inception of the plan in 1946. The following chart provides figures which bear upon this question:

*Saskatchewan Motor Vehicle Statistics*

| | 1945 | 1959 | % Increase |
|---|---|---|---|
| Fatal accidents..... | 43 | 129 | 300% |
| Non-fatal accidents (one or more injuries). | 784 | 2,766 | 352% |
| Accidents resulting in property damage exceeding $100.00..... | 1,527 | 9,413 | 616% |
| Total reported accidents..... | 2,354 | 12,408 | 522% |
| Persons killed..... | 54 | 165 | 355% |
| Persons injured..... | 1,199 | 4,500 | 377% |
| Property Damage .... | $427,342.00 | $5,248,174.00 | 1,251% |
| Total Number of vehicles registered.. | 140,254 | 314,178 | 223% |
| Mileage travelled..... | 570,000,000 approx. | 2,537,598,000 approx. | 445% |

It will be noted that between 1945 and 1959 the number of fatal accidents in the province increased 300% (from 43 to 129); that the number of non-fatal accidents increased approximately 350% (from 784 to 2,766); and the number of accidents resulting in property damage increased 616% (from 1,527 to 9,413). These increases are substantial, but they can be fairly directly related to the increase in the number of vehicles and the number of miles travelled by such vehicles between 1945 and 1959. In this period, the number of vehicles in the province increased by approximately 225% (from 140,254 to 314,178). The number of miles travelled

increased more spectacularly, by approximately 445% (from 570 million to 2,537 million). Most noteworthy of all, however, was the increase in the property damage resulting from motor car accidents. This increased approximately 1,250% (from $427,342.00 to $5,248,174.00). The greatly enhanced cost of motor vehicle accidents in terms of property loss may be attributable in part at least, to the increased cost of fancy motor cars. Repair costs have likewise increased, and where government is known to bear all of these costs, there may well exist among some garages and repair shops at least a subconscious feeling that price is immaterial, and that a public agency is fair prey to a policy of exhorbitant pricing.

From these statistics, it cannot be said that a policy of compensation without fault has increased the number of accidents over the fourteen-year period under review. Neither, of course, has it decreased the rate of accidents. It is not unreasonable to conclude that it has, however, increased the cost of accidents. For while between 1945 and 1959 the number of registered vehicles increased two and one half times and the number of miles travelled by such vehicles increased four and one half times, the cost of such accidents increased twelve and one half times—an inordinately high ratio, considering even the rising cost of motor cars and their repair during that period.

In all fairness, it should be recognized that the plan was not designed to reduce the number of automobile accidents in Saskatchewan; its purpose, rather was to shift the burden of loss from the victims of such accidents to the public generally. That the cost has grown materially, there is no doubt. It may well be axiomatic and worthy of a Northcotte Parkinsons's consideration that in economic terms the greater the number who share an expense, the greater does that expense become. However, the social implications of this "law", and probably of every social insurance measure, insofar as the individual beneficiary is concerned, may well be that a burden shared is a burden lightened.

*Conclusions*

1. The concept of liability without fault is not entirely new to the law of torts. In the case of automobile accidents, where it is almost impossible to determine fault accurately or satisfactorily, the common-law doctrine may usefully be abandoned.

2. The cost of injuries to persons and damages to property, consequent upon the use of automobiles is a social cost which may properly be borne by the public generally through the scheme of

universal insurance paid by the users of motor vehicles, for little difference exists between the cost of building and maintaining highways at public expense on the one hand, and the cost of protecting the public which uses those highways on the other.

3. In Saskatchewan, to a limited extent and within the context of certain minima, the common-law concept of limiting liability to fault, has been abandoned and the cost of paying minimum benefits to the victims of motor car accidents has, in effect, become a social cost. The principle is a desirable one and such shortcomings in the plan as exist, are matters of detail and administration rather than questions of principle.

4. While it is convenient to endow a public agency with authority to levy premiums and pay out benefits, no magic results from such agency carrying out these functions. A similarly beneficial result might be secured by requiring the public to insure with private insurance agencies. This will afford to members of the general public an opportunity of dealing with companies or associations of their own choosing. The cost of such choice, however, might be reflected in higher premiums since selling costs must be added to the costs of protection. Such cost may be regarded as the price of freedom in the choice of an insurer.

5. The tendency toward rigidity in effecting payment for losses sustained, to the fullest possible extent, ought to be avoided, but in the case of minimal universal coverage, the standard of payment should be determined not by the extent of the insurance carried in individual cases, but rather by the claim to which the injury or loss legitimately gives rise.

6. The natural tendency toward centralization and bureaucracy ought to be avoided in any scheme, whether public or private, and this may be accomplished in part by fixing legislative standards to which all insurance policies must adhere, by adopting business rather than civil service practices of administration and by preserving the role of the legal profession in dealing with claims.

7. The public may usefully be encouraged to utilize the services of legal counsel in advancing claims for injury and damage. In order to achieve this end, any schedule for payment of compensation ought to include the payment of attorneys' fees on a basis similar to that which provides for payment of the accounts of physicians, surgeons and other professional persons. As a matter of public policy, it is desirable that the lawyer's role in serving the general public should be preserved and extended, since in any scheme, whether administrative or judicial, the lawyer stands be-

tween the citizen on the one hand, and the state or the great corporation on the other, against arbitrary, capricious and unconscionable action.

MORRIS C. SHUMIATCHER*

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UNIFORM LEGISLATION — DOMICIL — DRAFT STATUTE PREPARED BY CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA. — The draft statute on the law of domicil which has not been finally approved by the Conference of Commissioners on Uniformity of Legislation, is circulated and published at the suggestion of the Conference. At its last session, the Conference considered in detail a draft statute embodying principles agreed upon at an earlier session. After full debate and analysis, it was agreed to refer the draft back to the Commissioners for British Columbia to incorporate the changes made at the session and then to circulate it to members of the legal profession for examination and comment. I shall be glad to receive comments.

In explanation, the proposal attempts to embody the common law except for three major decisions incorporated in the draft statute. The domicil of a married woman is no longer legally that of her husband. Her separate domicil will in fact be, in most cases, that of her husband. But she can, under the draft, acquire a domicil of her own as if she were unmarried. The domicil of an infant is also removed from the area of dependent domicil. The infant is placed in the same position as an adult. Third, the rule that the domicil of origin revives upon loss of domicil of choice is abandoned. The latter remains until a new one is acquired.

From these major decisions, subsidiary results follow. There is no longer any need for the distinction between the domicil of origin and domicil of choice, and the terminology is abandoned. Domicil is defined in the classical formula of residence and intention. Two presumptions are included and these provide the initial answer for new-born infants. The same main rule is applicable to persons who are mentally unsound. There is a provision, however, that if it is in his interest to have his domicil changed, the domicil may be changed by court order.

The principle that a person must have one domicil and no more than one, at all times, is retained.

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*Draft Model Domicil Act.*

1. This Act may be cited as the *Domicil Act.* — Title

2. In this Act, unless the context otherwise requires, "mentally incompetent person" means . . . . — Interpretation

3. (1) Every person has a domicil. — Domicil
   (2) No person has more than one domicil at the same time.
   (3) The domicil of a person shall be determined under the law of the province.
   (4) The domicil of a person continues until he acquires another domicil.

4. (1) Subject to section 5, a person acquires and has a domicil in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.
   (2) Unless a contrary intention appears,
      (a) a person shall be presumed to intend to reside indefinitely in the state and subdivisions where his principal home is situate, and
      (b) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.
   (3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of an international organization.

5. The person or authority in charge of a mentally incompetent person may change the domicil of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident. — Mentally incompetent persons

The Conference meets again in annual session in late August 1961. The Commissioners desire wide publication of this draft so that when the Conference finally adopts a statute for recommendation to the provinces, the proposal may receive as wide acceptance as possible. The object of the changes is not to remove domicil as a basic factor in connecting persons with laws of particular territories, but to remove, in a changed world and for a nation with twelve sets of provincial or territorial laws, some of the anomalies in the existing rules.

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