COMMENTS
COMMENTAIRES

NEGLIGENCE—FORESEEABILITY OF INJURY—THE PASSING OF *Wagon Mound.*—If one relies only upon the number of times the decision of the Privy Council in *Overseas Tank Ships (U.K.) Ltd.* v. *Mort's Dock and Engineering Co. Ltd.*,[1] commonly known as *The Wagon Mound,* has been praised and authoritatively cited, one would think that, far from being dead, the decision is a land mark in the law of negligence. If, however, one looks at what courts do rather than at what they say, one will see that the decision is having no effect on the outcome of cases. Shortly after the Privy Council proclaimed in the judgment of this case that a defendant is liable for only the foreseeable consequences of his acts, other courts soon acknowledged two major exceptions. The first, commonly known as the thin skull rule, is that a tortfeasor must take his victim as he finds him.[2] This means that he is liable for not only foreseeable injury to a person but also unforeseeable damage resulting from an unusual or special susceptibility or weakness on the part of the victim. The second, which will probably be known as the rule in *Hughes* v. *Lord Advocate*,[3] is that neither the precise way in which the injury occurs nor the exact nature of the damage need be foreseeable provided that either the method or the damage is similar to that entailed in the risk. These exceptions are sufficiently broad to weaken seriously the foreseeability rule. It is ironic, however, that the mortal blow to *The Wagon Mound* has been struck by the very court and on the very same set of facts which gave it birth. In the recent decision of the Privy Council in *Overseas Tankship (U.K.), Ltd.* v. *The Miller Steamship Co. Pty. Ltd. and Another*,[4] now designated as *The Wagon Mound (No. 2),* the Privy Council has made a further exception. In this case the Board held that a tortfeasor will be liable for his acts in regard to which he is negligent even though

[1] [1961] A.C. 388, [1961] 2 W.L.R. 126, [1961] 1 All E.R. 404.
[2] *Dulieu* v. *White & Sons,* [1901] 2 K.B. 669, at p. 679.
[3] [1963] A.C. 837, [1963] 2 W.L.R. 779, [1963] 1 All E.R. 705.
[4] [1966] 3 W.L.R. 498, [1966] 2 All E.R. 709.

the damage is highly improbable, if it is foreseeable as possible, and there is no justification for not taking care.

It is submitted that these exceptions have arisen because the reasoning of *The Wagon Mound (No. 1)* is based on false premises, and that these exceptions are sufficiently wide and flexible to almost abrogate the foreseeability rule. This is to say that *The Wagon Mound (No. 1)* has been and will continue to be used to justify only those decisions where the courts would have found liability or no liability irrespective as to what test of remoteness of damages was used.

On October 30th, 1951, the vessel "Wagon Mound", while taking on bunker oil, was moored to a jetty of the Caltex Oil Co. in Morts Bay, Sydney Harbour. Due to the carelessness of employees of the charterers, a large quantity of oil was allowed to spill into the harbour and was carried by the wind and tide to the proximity of the wharf owned by the Morts Dock and Engineering Co. Ltd., at which two vessels, the "Corrimal" and the "Audrey D", were docked and undergoing repairs. When the works manager of the wharf company became aware of the oil he immediately instructed their employees to refrain from using electric torches and oxyacetylene welding equipment. On being assured by the manager of the Caltex Oil Company that they could safely resume their operations, the works manager ordered the men to continue. On November 1st, while work was in progress, the oil on the water suddenly became ignited and the fire spread, doing extensive damage to the wharf and both vessels. Over seven years later the action brought by the Morts Dock company against the "Wagon Mound" charterers was heard by Mr. Justice Kinsella,[5] who found that the fire was caused by drops of molten metal from the welding and cutting operations igniting cotton waste or rag floating in the water, which in turn acted as a wick, igniting the oil.

Counsel for the plaintiff was faced with the difficulty that if he took the position that a risk of fire was foreseeable, contributory negligence would be found in that the plaintiff's works manager ordered work to proceed with full knowledge of the presence of the oil. As at this time New South Wales did not have contributory negligence legislation, the plaintiff would be either barred from recovery or at least could be said to have had the last clear chance to avoid the accident.[6] The plaintiff's counsel, therefore, did not

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[5] [1961] S.R. (N.S.W.) 688.
[6] *Supra*, footnote 4, at p. 509 (W.L.R.).

base his case on foreseeability of fire, but argued it in terms of causation, relying on the authority of *In Re an Arbitration Between Polemis and Furness, Withy and Co. Ltd.*[7] In that case the English Court of Appeal found the charterers of the plaintiff's vessel liable for the loss of the ship through an unforeseeable explosion and fire which resulted from benzine or petrol vapour igniting because of sparks caused by the defendant's servants negligently dropping a plank into the hold. The court based liability on the ground that the dropping of the plank was the direct cause of the fire. Counsel, in applying that case to the facts of the "Wagon Mound", argued that it was foreseeable that the oil would be carried to the plaintiff's wharf where it would congeal on the slipways and interfere in their use, and that the ensuing fire was the direct consequence of this negligence. This argument was accepted both by Mr. Justice Kinsella and the Full Court of the New South Wales Supreme Court,[8] whereupon the defendants appealed to the Privy Council who refused to follow *In re Polemis* and allowed the appeal. The court, after examining the case law supporting the alternative tests of "direct cause" and "foreseeability", concluded that the latter was better law.

The judgment of the Board is based on three fundamental assumptions. The first is that culpability and compensation are the same thing. The second is that foreseeability as the test of the limits of liability logically follows from the fact that foreseeability is the test of whether there is any fault or negligence. The third is that the test of foreseeability gives results which conform to the community standards of morality. The validity of the *Wagon Mound* judgment depends on the correctness of these three assumptions.

The identification of liability with culpability reflects a concept of negligence defined as a breach of a duty to take care.[9] The test of whether or not there is a duty is whether the particular injury for which damages are claimed was foreseeable.[10] If it were not, there can be no duty, consequently no negligence, culpability nor liability. Culpability, negligence, duty, liability, are all made

[7] [1921] 3 K.B. 560.

[8] [1961] S.R. (N.S.W.) 702.

[9] Viscount Simonds treats culpability and negligence (a particular kind of culpability) as synonymous with liability. See *supra*, footnote 1, at pp. 425 and 416 (A.C.). The entire judgment reflects the theory of negligence and reasoning of A. L. Goodhart who, in his essay, Liability for the Consequences of a "Negligent Act", in Essays in Jurisprudence and the Common Law (1937), p. 110, attacks the theory of negligence upon which the reasoning of the judgment of *In re Polemis* is based.

[10] *Supra*, footnote 1, at p. 425 (A.C.).

synonymous, and the problem of remoteness of damages disappears. As stated by Professor Glanville Williams.[11]

> In future broadly speaking, there will not be two questions in the tort of negligence, a question of initial responsibility and one of "proximity", but only one question—was the defendant negligent as regards the damage?

This definition of negligence is tautological in that negligence is being defined as a breach of a duty to use care not to be negligent.[12] Negligence, in short, is defined as being negligent, and questions of duty, culpability, and remoteness are lumped together into one issue to be decided in terms of risk. These, however, are separate problems. The issue of duty is whether the courts will impose a standard of care on the defendant in the circumstances, and is answered in terms of precedent and public policy. The issue of culpability is tackled by establishing a standard of care in terms of the risk and what care ought to be taken in regard to it, and then measuring the defendant's actual conduct against this norm. The problem involved in remoteness is whether there is a sufficient relationship between the culpability (or fault) and any damage which has a cause-effect relationship to the act which is a departure from the norm, to justify in terms of public morality and policy the shifting of the loss from the plaintiff to the defendant.[13] The outcome of this kind of issue will depend upon a multitude of complex factors and policy considerations, one of which will be the degree of conformity between the risk and what actually happened. These varying problems have been traditionally treated in the vast bulk of negligence cases as separate issues. It is highly doubtful if the *Wagon Mound (No. 1)* will reverse this trend.

The second basic assumption, that foreseeability as the test of limits of liability logically follows from the fact that foreseeability is the test of whether there is any fault or negligence, although not expressly stated, is implicit in the judgment.[14] According to Professor Williams,[15]

> If we say that a defendant is in breach of a duty of care because he should have foreseen and guarded against a particular risk, it seems a logical corollary to say that he is not liable for a consequence outside the risk altogether—a consequence in respect of which the defendant was not negligent.

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[11] Williams, The Risk Principle (1961), 77 L.Q. Rev. 179.
[12] Terry, Negligence (1915-1916), 29 Harv. L. Rev. 40.
[13] Smith, Requiem for Polemis (1965), 2 U.B.C. L. Rev. 159.
[14] *Supra*, footnote 1, at p. 425 (A.C.).
[15] *Supra*, footnote 11, at p. 179.

This statement can only be justified by defining liability and culpability in exactly the same manner, that is, as a breach of a duty to take care not to be negligent. The assumption is false because culpability is not identical with liability but is a prerequisite to the latter.

The third assumption that the test of foreseeability gives results which conform to the community standards of morality is to be found in the following passage from the judgment of the Privy Council:[16]

> For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trival foreseeable damage the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

Even though it probably is not in accord with the current ideas of Justice or morality that a person should be held liable for serious unforeseeable damages resulting from a trivial act of negligence, it does not follow that where an individual creates a very serious risk of harm and something unforeseeable develops, that he should not be made liable. It could equally be argued that as between an innocent victim and the person who causes injury, the latter ought to bear the loss if some fault is found on his part. It is probably more accurate to state that the test of foreseeability does not accord with the current ideas of justice or morality because, as between a person having no fault and a person having some fault, this test would sometimes lead to an innocent person bearing the loss.

It is not surprising, therefore, in the light of the false assumptions upon which the *Wagon Mound (No. 1)* is based, that the trend in decisions involving questions of remoteness has been to avoid its application by a variety of techniques.[17] It is a little surprising, however, that the Privy Council was sufficiently ingenious as to create a technique for avoiding the strict application of the foreseeability test on the identical circumstances from which the *Wagon Mound (No. 1)* arose. The owners of the "Corrimal" and the "Audrey D" waited until the action brought by the owners of

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[16] *Supra*, footnote 1, at p. 422 (A.C.).

[17] *Supra*, footnote 13.

the wharf was finally disposed of before proceeding to trial. The case was argued in nuisance and negligence before Mr. Justice Walsh who made the following findings of fact.[18]

> (1) Reasonable people in the position of the officers of the *Wagon Mound* would regard furnace oil as very difficult to ignite upon water.
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> (2) Their personal experience would probably have been that this had very rarely happened.
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> (3) If they had given attention to the risk of fire from the spillage, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances.
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> (4) They would have considered the chances of the required exceptional circumstances happening whilst the oil remained spread on the harbour waters, as being remote.
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> (5) I find that the occurrence of damage to the plaintiff's property as a result of the spillage, was not reasonably foreseeable by those for whose acts the defendant would be responsible.
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> (6) I find that the spillage of oil was brought about by the careless conduct of persons for whose acts the defendant would be responsible.
>
> (7) I find that the spillage of oil was a cause of damage to the property of each of the plaintiffs.
>
> (8) Having regard to those findings, and because of finding (5), I hold that the claim of each of the plaintiffs framed in negligence, fails.

Mr. Justice Walsh found the defendants liable in nuisance, however, on the grounds that nuisance was a different cause of action to which the foreseeability test of remoteness did not apply. The defendants appealed from this judgment directly to the Privy Council, and after the passage of fifteen years from the time of the fire, the wheels of swift justice ground to a halt with that court finally settling the claims of all the parties.

In *Wagon Mound (No. 1)* Mr. Justice Kinsella found it unnecessary to consider the question of nuisance as he found liability in negligence. The Privy Council remitted the case to the Full Court to be dealt with on the issue of nuisance, but the wharf owners proceeded no further with this aspect of their action, probably preferring to await the outcome of the action brought by the ship owners. The basis of the plaintiff's argument was that as negligence was not an essential element for liability in nuisance, it would be illogical to limit recovery to only those damages which are foreseeable. The court considered a number of cases in nuisance and concluded that, although they were not conclusive on the issue, they pointed strongly to the conclusion that there is no difference as to the measure of damages between nuisance

[18] [1963] 1 Lloyd's Rep. 402, at p. 426.

and negligence. The court then examined the issue from the point of view of principle and concluded that the measure of damages is the same in both torts.

This decision, although a land mark in the law of nuisance, raises as many problems as it answers. The logical question to now ask is whether or not there is still a separate tort of nuisance or has it been swallowed by negligence? It seems somewhat incongruous that since the abolition of the system of writs, liability should depend on what label is put on a set of facts. Needed at this point, therefore, is an authoritative statement as to the limits of the action in nuisance. To what extent does it coincide and to what extent is it different from an action in negligence? Although the Privy Council states that foreseeability is the test of damages in *all* actions of nuisance, it does not concede that there is no difference between negligence and nuisance. Rather, it implies the opposite. "It is quite true that negligence is not an essential element in nuisance", the court states. "Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not essential".[19] Again, "And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability . . .".[20] Yet the court states:[21]

> It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none.

If the damages are foreseeable, why would an action not lie in negligence, and if an action lies in negligence, is there any point in distinguishing between the two types of torts? A distinction could be justified if the Privy Council were referring only to public rather than private nuisance, but the statements of the court are clearly meant to apply to both. A distinction might be defended on the basis of whether the relief sought is an injunction or damages or on the basis of whether the nuisance was intentionally made; but if so, this is not made clear in the judgment. The Privy Council at least has seriously weakened the preposterous practice of giving property interests a higher degree of protection that that afforded to personal safety, by putting an end to the notion that there can be liability in nuisance without fault.[22]

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[19] *Supra,* footnote 4, at p. 508 (W.L.R.).
[20] *Ibid.* [21] *Ibid.*, p. 509. [22] *Ibid.*, p. 508.

After disposing of the issue of nuisance, the court then went on to deal with the case as an action in negligence. The decision of principal concern to the court was that of *Bolton* v. *Stone*.[23] The plaintiff in this case had been struck on the head by a cricket ball driven out of the defendant's grounds. The ball, according to the evidence, had been driven over the fence only about six times in the preceding twenty eight years. The House of Lords held that the chances of the ball hitting a passerby, although foreseeable, were so fantastically small that a reasonable man would have been justified in disregarding such a risk. The Privy Council distinguished this case from the facts of the *Wagon Mound* by pointing out that in the latter situation the activity was unlawful while in the situation of *Bolton* v. *Stone*, the activity was justifiable. The court held that:[24]

> But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, *e.g.*, that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be little doubt but that *Bolton* v. *Stone* would have been decided differently. In their lordships' judgment *Bolton* v. *Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognize and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.
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> In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but also it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately.

It is implicit in the above that the Privy Council based liability on more factors than mere foreseeability. In this passage we may note the following mentioned as relevant: the size of the risk, the social utility and legality of the risk creating activity, the degree to which the defendant is felt to be at fault, and the cost of eliminating the risk. It is also implicit in this quote that the court, contrary to

[23] [1951] A.C. 850, [1951] 1 All E.R. 1078.
[24] *Supra*, footnote 4, at p. 511.

Wagon Mound (No. 1) draws a distinction between culpability and liability. By distinguishing *Bolton* v. *Stone* on the grounds that the activity of the defendant in that case was lawful while the activity of the engineer was an offence and unjustifiable carelessness, the court is saying in effect that the defendant is liable because he is culpable. The court found liability on the grounds that although the reasonable man would find the risk of fire as highly improbable, the possibility of it was foreseeable. The effect of this judgment is that where the actual damage may not be reasonably foreseeable, a defendant still may be liable if there is a mere possibility of that damage, and the defendant was negligent in doing the act which caused it. Where, in other words, we have a defendant causing a risk to a plaintiff who is without fault, and there is some fault in regard to the defendant, the defendant ought to bear the loss. This makes a substantial change in the *Wagon Mound* rule in that it limits the application of the test of foreseeability of damage to possibility rather than to probability. The law now, therefore, is little different than it was under *In re Polemis* since almost any kind of damage can be foreseeable as possible.

The Privy Council justified this decision on the grounds that Mr. Justice Walsh came to a different conclusion as to foreseeability on the facts than did Mr. Justice Kinsella in *Wagon Mound (No. 1)*.[25] Mr. Justice Walsh found that, "if they had given attention to the risk of fire from the spillage, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances".[26] Mr. Justice Kinsella, on the other hand, found that, "the defendant did not know, and could not reasonably be expected to have known, that it was capable of being set on fire when spread on water".[27] A comparison of these two sentences alone would lead one to conclude that the courts came to somewhat different conclusions. An examination, however, of other statements of both judges, and the evidence upon which they principally relied, shows no essential difference in the finding of fact. Mr. Justice Kinsella based his decision primarily upon the evidence of the expert witness, Professor Hunter, a chemical engineer at the University of Sydney, and in particular on the following testimony:[28]

> Q.: As you indicated, prior to doing the tests you would not have thought that this oil was a fire hazard? A.: Not a *serious* hazard. Q.: I suppose you would say now in the light of what you know that if you

[25] *Ibid.*, at p. 510.
[26] *Supra*, footnote 18.
[27] *Supra*, footnote 8, at p. 698.
[28] *Ibid.*, at p. 697.

had a quantity of furnace oil of flash point 150°F. to 190°F. beneath a wharf in circumstances where it was of a depth on the water of more than 1/16th of an inch that it would, in your opinion, constitute a fire hazard? A.: I think I can best answer that by putting it this way: the fire hazard under those circumstances depends on the habits of the people working on the wharf rather than the oil itself . . . . Q.: If there is fuel oil not more than 1/16th of an inch then you don't have to consider fire risk, whatever they are doing on the wharf? A.: That is right. Q.: What I suggest is, if you increase the height of it above 1/16th of an inch, there is then something under the wharf that is a fire danger that was not there before? A.: If the oil is there entirely by itself, it does not constitute a fire danger but if it is oil plus floating wicks it is then a fire danger.

Mr. Justice Kinsella drew from this the following conclusion:[29]

This evidence I interpret to mean that before he made his tests and, of course, before he knew of the subject fire, the Professor did not regard floating oil as a *serious* hazard in any circumstances; and that, in the light of knowledge gleaned from his tests, he now regards it as not being dangerous in itself, but capable of being made dangerous by people who are working near it. These latter remarks throw no light on the problem, as they would apply equally to every substance which is capable of being set on fire.

I feel bound, on the evidence to come to the conclusion that, prior to this fire, furnace oil in the open was *generally* regarded as safe, and that, in the light of knowledge at that time, the defendant's servants and agents *reasonably* so regarded it.

The very use of the words, "not a serious hazard" and "reasonably safe" indicate not that fire was impossible but that it was highly improbable, or as stated by Mr. Justice Walsh, the reasonable man "would not have thought of a wharf fire from this cause as anything but a remote possibility".[30] Six years previous in another Australian port a severe wharf fire occurred in which oil spread on water was ignited by "a wick".[31] Although Mr. Justice Kinsella concluded that there was no evidence that the defendants or their agents were aware of that fire, nevertheless the principle of the wick can certainly be taken as common knowledge. It is evident that, taking the judgment as a whole, Mr. Justice Kinsella meant when he stated that the defendants "could not reasonably be expected to have known that it was capable of being set on fire when spread on water", no more than that the risk was not reasonably foreseeable—the indentical conclusion of Mr. Justice Walsh.

Cases decided since *Wagon Mound (No. 1)* dealing with the

[29] *Ibid.*, italics mine.
[30] *Supra*, footnote 18, at p. 414.
[31] *Eastern Asia Navigation Co. Ltd.* v. *Fremantle Harbour Trust Commissioners and the Commonwealth of Australia* (1950-1951), 83 C.L.R. 353.

problem of unforeseeable consequences fall into one of four different categories:

(1) *Wagon Mound* (No. 1) cases,
(2) Thin-skull cases,
(3) *Hughes* v. *Lord Advocate* cases,
(4) Cases where the courts classify as foreseeable events which are clearly not within the risk the creation of which is the basis on which the defendant may be adjudged negligent.

Wagon Mound (No. 1) will be used as justification for a decision where the court would not give damages no matter what test of remoteness was used. An example is a recent British Columbia decision where the judge refused to award damages to a plaintiff for damage to his house by fire as a result of the defendant's negligently cutting down a tree which snapped a high voltage wire causing it to touch the line supplying the plaintiff's house.[32] After citing the *Wagon Mound (No. 1)* as authority, the judge concluded that the two lines becoming entangled and the unexplained failure of an emergency circuit breaker were, "two things which as causes, were . . . more proximate than the falling of the tree".[33]

The thin-skull rule existed, of course, long before the *Wagon Mound (No. 1)* was decided. Since the rule is clearly in conflict with the test of foreseeability, one could question whether it remained good law. In *Smith* v. *Leech Brain & Co. Ltd.*,[34] Lord Parker of the Queen's Bench held that it was not affected by *Wagon Mound (No. 1)* in finding a defendant who created a risk of a small burn liable for the death of a cancer prone plaintiff from a malignancy resulting from the minor injury. Mr. Justice Grant of the Ontario High Court, in *Bates* v. *Fraser*,[35] cited this decision with approval in awarding $3,000.00 damages to a plaintiff who suffered a minor bump on the head as a result of the defendant's negligent driving. The plaintiff, a victim of Parkinson's disease, was suffering from amnesia as the result of a fall several years prior to the accident. Her symptoms had been greatly aggravated by emotional problems which disappeared with the amnesia. The minor injury caused by the defendant restored her memory, and with it, the emotional problems with the result that her condition deteriorated to that prior to the amnesia. Mr. Justice

[32] *Morris* v. *Fraser* (1966), 55 D.L.R. (2d) 93.
[33] *Ibid.*, at p. 97.
[34] [1962] 2 Q.B. 405, [1961] 3 All E.R. 1159.
[35] (1963), 38 D.L.R. (2d) 30.

Parker of the same court awarded a plaintiff extensive damages for the partial paralysis of the right arm and shoulder resulting from an unforeseeable toxic reaction to an anti-tetanus injection necessitated by a bite from the defendant's dog.[36]

A further alternative to a strict application of the *Wagon Mound* rule was furnished by the House of Lords in *Hughes* v. *Lord Advocate*.[37] The servants of the defendants in that case had left four paraffin warning lamps burning near an open manhole covered by a shelter tent. When the plaintiff, a child, knocked one of these into the opening an explosion ensued causing him to fall into the hole where he received severe burns. The trial court and the First Division of the Court of Session on the appeal applied the *Wagon Mound* rule, finding no liability on the basis of expert testimony that it was unforeseeable that paraffin would explode in this manner. The House of Lords reversed this decision, holding that the exact method and nature of the injury need not be foreseeable providing that it is of a similar kind to that entailed in the risk. What is similar depends, of course, on how broad the categories of classification are drawn. Lord Denning in *Stewart* v. *West African Terminals*[38] has classified the crushing of fingers pulled by a moving cable into a pulley as a similar kind of accident to tripping over a cable or straining oneself while lifting it out of the way. In another recent English decision the defendants were found liable for the negligence of their servants in causing unnecessary noise when carrying out a shunting operation, thus startling the plaintiff and causing him to put his hand on a rail where it was run over by a moving wagon, on the grounds that when one startles another by a loud noise it can be anticipated that he may react in a manner which will cause him injury although the precise way is not foreseeable.[39] An Alberta judge held that amputation of part of the plaintiff's feet is the kind of thing one can foresee as a result of the defendant's negligently grabbing a steering wheel of a car in an argument as to destination, but not that the plaintiff's wife will leave him as a result.[40]

The test of foreseeability is not whether the damage is foreseeable as possible, but is whether the risk is such that a duty of care arises to avoid it. It is to be anticipated, therefore, in light

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[36] *Winteringham* v. *Rae* (1966), 55 D.L.R. (2d) 108. See also *Corrie* v. *Gilbert*, [1965] S.C.R. 457.
[37] *Supra*, footnote 3. [38] [1964] 2 Lloyd's Rep. 371, at p. 375.
[39] *Slatter* v. *British Railways Board*, [1966] 2 Lloyd's Rep. 395.
[40] *Lauritzen* v. *Barstead* (1966), 53 D.L.R. (2d) 267.

of such a limited test, that courts will classify as within the risk, events which from the point of view of hindsight could be said to be foreseeable as possible but which are clearly not what one would anticipate happening. For example, the Ontario Court of Appeal held that $1,200.00 paid in accountants' fees as a result of the plaintiff's business records being stolen when the defendant's servant negligently left a mail truck unlocked and unattended, was reasonably foreseeable.[41] The Supreme Court of Canada in reversing an affirmation by the Ontario Court of Appeal of the trial court's finding of no liability for the loss of premises by fire, found it to be reasonably foreseeable that when a garage mechanic, while draining gasoline from the tank of a car, allowed a few drops to vaporize, it would be ignited by the breaking of an electric light when it, after being carelessly brushed to the ground, struck a gasoline can with the spout passing between the wire of the bulb guard which otherwise would have prevented the bulb from breaking.[42] The Supreme Court, also reversing a finding of foreseeability of two lower courts, found it reasonably foreseeable that the plaintiff farm hand would suffer a serious back injury as a result of lifting into place a one hundred to one hundred twenty-five pound barn door which kept falling over because it was not properly suspended.[43] The risk in this case was that the door would fall on someone. It is doubtful that there would have been liability if the plaintiff had suffered this injury in lifting a sack of potatoes or in lifting the door into place in order to properly suspend it. The New Brunswick court found it foreseeable that, as a result of the defendant's failure to keep a proper lookout while driving his truck, he would hit a parked vehicle, causing one of the cows he was carrying to escape and later wander back onto the highway where it would be struck by the plaintiff, thus causing damage to his car.[44] Now that the reasoning in *Wagon Mound (No. 2)* is available as a further technique for avoiding the application of the strict foreseeability rule, courts will no longer find it necessary to hold that situations similar to those in the above mentioned cases are reasonably foreseeable. Instead, they will be able to justify liability on the grounds that the possibility of damage was

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[41] *Theile and Wesmar Ltd.* v. *Rod Sevice (Ottawa) Ltd. and Lawson* (1964), 45 D.L.R. (2d) 503.

[42] *Ayoub* v. *Beaupre* (1964), 45 D.L.R. (2d) 411, [1964] S.C.R. 448.

[43] *Gilchrist* v. *A. & R. Farms Ltd.* (1966), 54 D.L.R. (2d) 707, [1966] S.C.R. 122.

[44] *Buchanan* v. *Oulton* (1965), 51 D.L.R. (2d) 383.

foreseeable and that there was no justification for the conduct which caused the loss.

If the example of Mr. Justice Disbery of the Saskatchewan Queen's Bench in *Shulman* v. *Peterson, Howell and Heather*[45] is followed, we may need to add a fifth category of cases. He found the defendant, whose servant had negligently collided with the plaintiff's vehicle, liable for the expenses incurred in renting a car for fifteen week period because of the unavailability of parts due to an unforeseeable strike. Mr. Justice Disbery rejected the foreseeability test, holding that *Polemis* was still good law in Saskatchewan. Proximate or direct cause gives no objective criteria as a test of remoteness, however, but is a loose ambiguous concept combining naturalistic problems of cause and effect with normative problems of fault. When a judge states that the defendant will or will not be liable because his negligence was or was not the proximate or direct cause of the plaintiff's injury, he is merely stating his conclusion twice rather than giving a reason for his decision.

Whether or not damage is too remote is a value judgment which must be based on a number of factors. Elsewhere I have suggested that the unforeseeable consequence problem arises in negligence from the fact that while fault, experienced as a psychological feeling, varies in intensity—people may be judged to be greatly or only slightly at fault—and while damage or injury is also a matter of degree varying from little to great, liability, by contrast, either is or is not imposed.[46] The similarity between the harm which is foreseeable as likely to result from any act and the harm which does actually result, also is a matter of degree. It may range from a close resemblance to a complete dissimilarity. The degree of similarity will be an important variable affecting the intensity with which a judgment of fault is felt in regard to the negligent actor. Where a marked dissimilarity exists, the fault may not be of a sufficient degree of severity in comparison with the amount of damages to justify in terms of "current ideas of justice or morality", and in terms of conflict in policy of freedom of action and security or compensation, the shifting of the loss from the plaintiff to the defendant. Where in spite of the damages being unforeseeable, the degree of fault is in proportion in regards to seriousness to the amount of damages, the foreseeability test becomes unsatisfactory in that it fails to shift a loss where current

[45] (1966), 57 D.L.R. (2d) 491. [46] *Supra*, footnote 13.

feelings of morality would dictate that it ought to be shifted. Foreseeability or risk, however, is only one of many factors affecting the degree of fault. Many other factors such as the social value of the conduct being carried out, the extent or magnitude of the damage, the kind of damage caused, the degree to which other factors have a cause-effect relationship in regard to the damages, all bear a relationship to the degree of fault. As stated by Professor Fleming:[47] "In the last resort, the practical task of drawing the line where recovery should cease is one which defies a precise verbal definition and formulation in fixed rules."

The difficulty with both foreseeability and causation as tests of remoteness is that the courts are led to apply a pat formula which focuses their attention away from the various factors which are or ought to be relevant to value judgments of this kind. By their seeking an objective test that will remove the difficulty of decision, factors upon which the decision is often ultimately made tend to be driven out of the area of conscious awareness. In regard to physical loss, foreseeability is an inadequate test because it spreads the net too narrowly. Under the thin skull rule, for instance, defendants are made liable for totally unforeseeable damage, and there has been no suggestion that the *Wagon Mound* has changed the law in this regard. If, on the other hand, the loss is of an economic nature, foreseeability spreads the net too widely. In *Weller* v. *Foot and Mouth Disease Research Institute*[48] the court held that the defendant would not be liable for the financial loss suffered by the plaintiff cattle auctioneers due to the defendants' negligence in allowing virus to escape from their premises and infect neighbouring cattle, thus causing the closing of the plaintiff's auction, even though this loss was foreseeable. In another recent English decision the court found the defendant not liable for what is clearly a foreseeable financial loss caused to the plaintiff book publisher as the result of the defendant negligently severing the plaintiff's telephone lines.[49] When the damage is nervous shock, heaven only knows where the line ought to be drawn.

The reasoning of *In re Polemis* is based on a conduct theory of negligence. Having found the conduct negligent, one must enquire as the next link in the chain of reasoning, whether or not the negligent act was the direct cause of the damage. The reason-

[47] Fleming, The Law of Torts (3rd ed., 1965), p. 186.
[48] [1965] 3 All E.R. 560.
[49] *Elliott (Trading as Arlington Books)* v. *Sir Robert McAlpine & Sons Ltd.*, [1966] 2 Lloyd's Rep. 482.

ing of the *Wagon Mound*, on the other hand, is based on negligence defined in terms of a state of mind. The issue then becomes whether the defendant ought to have foreseen the particular consequences of his act. Neither conduct nor states of mind are negligent in themselves, however, but acquire their normative quality from a prior judgment of fault passed on the person involved.[50] A negligent act, or a negligent state of mind, is one performed or existing in a negligent person. If this view of negligence is accepted, neither causation nor foreseeability is necessary as a test of remoteness, but a full examination can be made of the relevant factors.

The *In re Polemis* decision and the test of direct causation is oriented towards recovery for the plaintiff. The *Wagon Mound (No. 1)* decision and the test of foreseeability, on the other hand, is defendant oriented. Although the rule in *In re Polemis* was capable of being carried to unjust extremes, it was within the historical stream of widening liability. The decision of *Wagon Mound (No. 1)* is doomed to failure because it runs contrary to this trend. The decision of *Wagon Mound (No. 2)* coupled with the thin skull rule and the principle of *Hughes* v. *Lord Advocate* will probably make possible a happy social balance between the extremes of both *In re Polemis* and *Wagon Mound (No. 1)*. It is unfortunate, however, that the courts will still be using an artificial test and categories which will not reflect the real basis for the decisions in regard to remoteness. These reasons will still be hidden in verbiage of foreseeability just as they previously were obscured by verbiage of proximate and direct cause. The language of remoteness has changed from that of causation to foreseeability, but the actual results in terms of shifting of loss will be no different. Professor Fleming predicted shortly after *Wagon Mound (No. 1)* was decided that:[51] "We may well . . . have to face the possibility that the actual decision of *In re Polemis* has mysteriously survived the amputation of its accompanying opinion." We also may now well have to face the possibility, in the light of *Wagon Mound (No. 2)*, that the accompanying opinion in *Wagon Mound (No. 1)* has mysteriously survived the amputation of the actual decision.

J. C. SMITH*

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[50] *Supra*, footnote 13.

[51] Fleming, The Passing of Polemis (1961), 39 Can. Bar. Rev. 489, at p. 528.

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NEGLIGENCE—DUTY OF CARE—FORESEEABLE RISK OF INJURY.—In 1941, a somewhat daunted Lord Atkin said that "every person . . . is under a common law obligation to *some* persons in *some* circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care".[1] The fact that the courts will impose limitations in this field has been brought clearly to the fore in two recent decisions that have affirmed that a plaintiff must show that his person or property has been injured before the court will hold that the defendant owed him a duty to take care.

In *Weller & Co. and Another* v. *Foot and Mouth Disease Research Institute*,[2] the defendant allowed the escape of a dangerous virus. In consequence, certain cattle that were nearby and in the possession of the plaintiff, an auctioneer, were infected. The outbreak resulted in a government order closing the cattle market; and, as a consequence, the auctioneers were unable to carry on their business for a period of time.

In *Elliott* v. *Sir Robert McAlpine & Sons, Ltd.*,[3] the plaintiff's telephone was put out of action for a period of time when the defendant carelessly damaged the telephone junction box in the pavement outside of the defendant's premises. The plaintiff was a book publisher, and it was proven that there was a loss of business during the period in question.

Mr. Justice Widgery in the *Weller* case held that the defendant could not be said to have owed a duty of care to anyone except the owner of the cattle, that is, to avoid "the foreseeable fact that the virus might infect cattle in the neighbourhood and cause them to die".[4]

In the *Elliott* case, Judge Herbert of the Westminster County Court, dismissed the action on the authority of the judgment of Mr. Justice Widgery in the *Weller* case, and held that the plaintiff could not recover because there had been no injury to his property,

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[1] *East Suffolk Rivers Catchment Board* v. *Kent*, [1941] A.C. 74, at p. 89. *Cf.* The more definitive and widely-ranging statement in the Speech of Lord Atkin in *Donoghue* v. *Stevenson*, [1932] A.C. 562, at p. 579, 101 L.J. P.C. 119, where he said, in part: ". . . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[2] [1965] 3 All E.R. 560. [3] [1966] 2 Ll. L.R. 482.

[4] *Supra*, footnote 2, at p. 570 (A.C.).

the telephone junction box presumably being the property of the telephone company.

In both of these cases, counsel urged that the decision of the House of Lords in *Hedley, Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*[5] was such that a plaintiff who can show that the defendant owed him a duty of care, can recover all loss that is reasonably foreseeable, whether such damages are for financial loss, or for damage to person or property; but Mr. Justice Widgery said:[6]

> The decision in *Hedley, Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.* does not depart in any way from the fundamental that there can be no claim for negligence in the absence of a duty of care owed to the plaintiff. It recognizes that a duty of care may arise in the giving of advice even though no contract or fiduciary relationship exists between the giver of the advice and the person who may act on it, and having recognized the existence of the duty it goes on to recognize that indirect or economic loss will suffice to support the plaintiff's claim. What the case does not decide is that an ability to foresee indirect or economic loss to another as a result of one's conduct automatically imposes a duty to take care to avoid that loss.
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> In my judgment, there is nothing in *Hedley, Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, to affect the common law principle that a duty of care that arises from a risk of direct injury to person or property is owed only to those whose person or property may foreseeably be injured by a failure to take care. If the plaintiff can show that the duty was owed to him, he can recover both direct and consequential loss that is reasonably foreseeable, and for myself I can see no reason for saying that proof of direct loss is an essential part of his claim. He must, however, show that he was within the scope of the defendant's duty to take care.

The learned trial judge said, in effect, that if there is a duty to take care, the plaintiff may be awarded any type of recoverable damage, including financial loss; but, if the plaintiff has suffered only financial loss (with no injury to person or property), he has no cause of action because no one owes him a duty of care. A potential tortfeasor, therefore, need only have in contemplation those individuals whose persons or property are likely to be affected. Lord Atkin's statement in *Donoghue* v. *Stevenson*[7] is to be re-phrased, ". . . you must take reasonable care to avoid acts or omissions that you can reasonably foresee would be likely to injure your *neighbour's person or property*. Who, then, in law is my neighbour? The answer seems to be—*individuals whose persons or property* are so closely and directly affected by my acts that I

[5] [1963] 2 All E.R. 575. [6] *Supra*, footnote 2, at p. 570.
[7] [1932] All E. Rep. 1, [1932] A.C. 562.

ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question." Is the law to be so?[8]

One must confess some difficulty in following the reasoning of Mr. Justice Widgery. The *Hedley, Byrne* case surely cannot be disposed of by asserting that it was proper in that case to look at the relationship between the parties to determine whether there was a duty of care, but that, in another case, it is essential to look at the type of damage suffered to determine the same question.

It is submitted that if there is justification for confining recovery to certain cases, that justification will have to be put on a different basis.[9]

ROBERT J. HARVEY*

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LABOUR LAW—COLLECTIVE AGREEMENT—RIGHT OF INDIVIDUAL EMPLOYEE TO SUE EMPLOYER.—No one can suggest that Canadian courts are unaware of the pronouncements of English courts and writers in those areas of English law which have been emulated in Canada. Why, then, in those newer areas where Canadian legislation is largely based on American experience, do our courts

[8] *Cf.* The clarion call of Lord Devlin, *supra,* footnote 5, at p. 602: "That is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover all. I am bound to say, my lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle. It just happens to be the line which those who have been driven from the extreme assertion that negligent statements in the absence of contractual or fiduciary duty give no cause of action have in the course of their retreat so far reached." Also Lord Hodson, *ibid.,* at p. 598: "It is difficult to see why liability as such should depend on the nature of the damage."

[9] *Vide, Hedley, Byrne & Heller* in the House of Lords, a masterful submission made by D. M. Gordon, Q.C. in (1965), 2 U.B.C.L. Rev. 113, and consider the basis that the injury was not foreseeable: *Bolton* v. *Stone,* [1951] 1 All E.R. 1078 and *The Wagon Mound (No. 2),* [1966] 2 All E.R. 709.

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maintain a seemingly impenetrable disregard for the views of American courts and writers? It has often been noted that obsolete English tort concepts still burden Canadian labour relations law in spite of their marked inconsistency with the spirit of modern collective bargaining legislation. Now, however, Canadian courts are going even farther and are using old master and servant law, designed solely to regulate individual bargaining, as a justification for imposing restrictive interpretations upon that legislation itself.

The relationship between the rights of the parties to collective bargaining on the one hand and the individual employee on the other hand in the enforcement of the terms of collective agreements is a subtle and difficult one, and has occasioned a vast amount of judicial and extra-judicial comment in the United States over a period of many years.[1] In Canada the matter was not put squarely to the courts until the case of *Re Grottoli* v. *Lock & Son Ltd*[2] in 1963, and it reached the Supreme Court of Canada only a few months ago in *Hamilton Street Railway Co.* v. *Northcott*.[3] In the absence of pertinent Canadian or English authority, the fact that the Canadian courts recently confronted with the problem have not referred even once to the relevant American jurisprudence, but have treated the matter as quite a simple one of master and servant law, speaks ill for the breadth and depth of our courts' deliberations in the field of collective bargaining law.

In *Re Grottoli* v. *Lock & Son Ltd,* McRuer C.J.H.C. allowed an individual plaintiff to maintain a civil action against his former employer for vacation pay allegedly owing under a collective agreement, even though the plaintiff had made no attempt whatever to have his claim dealt with through the agreement's grievance procedure. The judgment is not clear as to the source of the plaintiff's alleged entitlement to any particular amount of vacation pay, but in *Close* v. *Globe and Mail Ltd,*[4] Kelly J.A., who had examined the *Grottoli* appeal book, said that the collective agreement in *Grottoli* "provided for vacation pay at the rate of 4% of earnings".[5] The defendant employer did not contest the plaintiff's claim on its merits, but argued only that the

[1] For a list of the leading articles, see Fleming, The Labor Arbitration Process (1965), p. 107, n.l. The issues are clearly put by Cox, Rights Under a Labor Agreement (1956), 69 Harv. L. Rev. 601 and, Summers, Individual Rights in Collective Agreements and Arbitration (1962), 37 N.Y.U. L. Rev. 362.

[2] (1963), 39 D.L.R. (2d) 128, [1963] 2 O.R. 254 (Ont. H.C.).

[3] (1966), 58 D.L.R. (2d) 708.

[4] (1967), 60 D.L.R. (2d) 105, [1967] 1 O.R. 235 (Ont. C.A.).

[5] *Ibid.*, at p. 107 (D.L.R.).

requirement in section 34(1) of the Ontario Labour Relations Act[6] that every collective agreement contain a provision for binding arbitration of rights disputes was "so broad as to exclude any right of an employee who is employed where a collective bargaining agreement is in force to bring an action against his employer for his wages".[7]

McRuer C.J.H.C. was not prepared to attribute any such exclusiveness to the grievance and arbitration provisions of the collective agreement.

> If I were to adopt this argument it would create rather chaotic conditions with reference to the simple matters of employees who operate under a collective bargaining agreement getting paid promptly and it would also put in the hands of a union that has been certified as a collective bargaining agent extraordinary power over non-members of the union who were employees of the same employer. The union could see fit to assert the claims of the members of the union but not assert the claims of non-members of the union. I cannot believe that the Legislature in enacting this clause intended to give it such a broad meaning.[8]

The collective agreement, in the opinion of McRuer C.J.H.C.:[9]

> . . . does not abrogate the common law relationship of employer and employee in the sense that the employer is required to pay the employee according to the terms laid down in the agreement and that the employee gives his work to the employer on those terms.

It is necessary at this point to inquire as to the basis upon which McRuer C.J.H.C. held the plaintiff employee to be entitled to the collectively agreed percentage of vacation pay as one of the terms of the common law employment relationship. If a term of a collective agreement is to become part of an individual contract of employment that does not expressly incorporate the term,[10] it must somehow have been implicitly incorporated into the individual contract. Canadian courts have in several recent cases clearly given effect to such implicit incorporation.[11] However, if an employee is

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[6] R.S.O., 1960, c. 202, s. 34(1): "Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties resulting from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable."

[7] *Supra,* footnote 2, at pp. 129-130 (D.L.R.).

[8] *Ibid.,* at p. 130.

[9] *Ibid.*

[10] There is some possibility that *Grottoli* was a case of express incorporation, because McRuer C.J.H.C. early in his judgment made a cryptic reference to a "written contract" providing for 4% vacation pay. *Ibid.*, at p. 129. This "written contract" might have been the plaintiff's individual employment contract. It might, on the other hand, have been the collective agreement.

[11] *Nelsons Laundries Ltd.,* v. *Manning* (1965), 51 D.L.R. (2d) 537, 51

held to be legally entitled to the benefit of the substantive terms of a collective agreement (terms concerning wages, hours, vacations, seniority and the like), he should be held bound to comply with the procedural terms of that agreement (terms concerning the agreement's administration, principally the grievance and arbitration provisions). The procedural terms, no less than the substantive ones, are considered by Canadian labour relations legislation to have been negotiated by the employee's bargaining agent on his behalf, and there is no good reason why he should be able to reprobate one category of terms while approbating the other category. There is therefore no justification in law for allowing an individual employee to claim vacation pay under a term of his employment contract derived from the collective agreement without requiring him to comply with the grievance procedure of that agreement.

Narrow questions of contract law aside, can the judgment of McRuer C.J.H.C. in *Re Grottoli* v. *Lock & Son Ltd* find sustenance in policy considerations? In support of his value judgment that the individual employee's interest in maintaining a common law civil action should override the joint interest of the employer and the union in retaining control over the administration of their collective agreement, McRuer C.J.H.C. relied wholly upon feelings of sympathy for an employee who might otherwise have to take the trouble to persuade his union that his grievance was worthy of its attention.

The United States Supreme Court, which has had considerable occasion to deal with problems of this sort, has, in contrast, clearly recognized that healthy industrial relations are promoted by preventing individual employees from using the courts to circumvent collectively agreed grievance procedures or to second-guess properly motivated union decisions not to process particular grievances. In *Republic Steel Corp.* v. *Maddox*,[12] the recent leading case in this area, the majority of the Supreme Court said:[13]

> Union interest in prosecuting employees' grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of

W.W.R. 493 (B.C.S.C.); *Crossman* v. *City of Peterborough* (1966), 58 D.L.R. (2d) 218 (Ont. C.A.); *R.* v. *Fuller ex parte Earles*, [1967] C.C.H. Can. L.L.R., par 14,004 (Ont. H.C.).

[12] (1965), 379 U.S. 650. [13] *Ibid.*, at p. 653.

> remedies available to aggrieved employees. And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

Although most union officers undoubtedly act only on proper and relevant considerations in deciding whether to process the grievances of individuals in the bargaining unit, there is always the danger that personal animosities, internal union politics and other such factors will result in an arbitrary or discriminatory refusal to process a grievance. The individual employee needs a means of ensuring that his bargaining agent will handle his grievances in good faith. As one writer has said:[14]

> It is very easy to become so consumed with concern for flexible management of the collective enterprise that sight is lost of the legitimate interests and expectations of the individual workers . . . the individual does exist apart from the group, and, at least to the extent that the provisions of the collective agreement are clear, he should generally be able to rely upon and expect benefits that the group has promised him.

Simply allowing the individual employee to sue his employer to enforce his rights is, however, much too blunt a solution. It would derogate so substantially from the exclusiveness of the collective agreement's own settlement procedures as to impair very greatly the effectiveness of those procedures, and would thereby frustrate a major and explicit aim of Canadian labour relations legislation. There is perhaps somewhat more to be said for going to the opposite pole and amending that legislation to allow the employee himself to process his grievances all the way through the agreement's procedures,[14A] notwithstanding the opposition of his union and notwithstanding that the agreement may not envisage individuals handling their own grievances. However, it seems all too likely that this approach, rather than benefitting employees, would serve to erode the authority of the bargaining agent and to overburden the grievance machinery with insubstantial complaints. Any hope for the reasonably quick disposition of grievances might thereby be destroyed, to everyone's disadvantage.

The American courts have attacked this problem by imposing upon the union a "duty of fair representation" as a check upon

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[14] Rosen, The Individual Worker in Grievance Arbitration: Still Another Look at the Problem (1964), 24 Maryland L. Rev. 233, at p. 280.

[14A] See Laskin, Collective Bargaining and Individual Rights (1963), 6 Can. Bar J. 278, at p. 283 *et seq.*; *Donnelly* v. *United Fruit Co.* (1963), 40 N.J. 61, 190A 2d 825.

the power it wields over every employee in the bargaining unit through its exclusive bargaining rights.

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[15]

Only bad faith is held to violate the duty of fair representation and to entitle the aggrieved employee to sue the union for damages to remedy the breach. In the absence of proof of bad faith, which is defined very narrowly, the union is allowed to carry out its statutory tasks of collective bargaining and grievance handling within a wide range of discretion. "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes".[16]

The duty of fair representation as originally devised by the American courts was based solely upon the union's statutory status as bargaining agent, a status very similar to that accorded to Canadian unions under Canadian labour relations legislation.[17] The way would therefore appear to be open for Canadian courts to impose such a duty upon unions possessing statutory bargaining rights, and thus to provide some measure of protection to individual employees without running the risks to collective bargaining and to arbitration that lie in allowing employees to bring civil action against their employers.

Seen in the light of recent American jurisprudence, the approach taken in *Re Grottoli* v. *Lock & Son Ltd* looks very barren indeed, in policy as well as in law. Nevertheless, in spite of its outward sterility, the *Grottoli* case has lately brought forth numerous progeny in various Canadian courts, including the Supreme Court of Canada.

The first of the very recent cases applying *Grottoli* is an appellate decision of the New Brunswick Supreme Court, *Woods* v. *Miramichi Hospital*.[18] The collective agreement contained a "just

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[15] *Vaca* v. *Sipes* (1967), 87 S. Ct. 903, at p. 910, per White J.

[16] *Humphrey* v. *Moore* (1964), 375 U.S. 335, at p. 349.

[17] More recently, the United States Supreme Court has held the union's duty of fair representation to arise out of the collective agreement between the union and the employer, as well as from the union's statutory status. Such a holding is, however, dependent upon s. 301 of the Labor Management Relations Act, 61 Stat. 136, which explicitly makes collective agreements enforceable by civil actions and which has no parallel in most Canadian jurisdictions.

[18] (1967), 59 D.L.R. (2d) 290.

cause" clause[19] and grievance and arbitration procedures. The plaintiff employee, alleging that she had been discharged for union activity, sued her former employer for various remedies, including damages, for wrongful dismissal. She had apparently made no attempt to use the grievance procedure. At trial, the defendant employer applied for the dismissal of the action on the ground "that the common law right of the plaintiff to sue had been abrogated by the collective agreement and that any right she had to an action on her contract of employment had become vested in the union".[20]

The defendant's application for dismissal was refused at trial and the refusal was upheld on appeal, with the result, apparently, that the plaintiff's action was allowed to proceed. Ritchie J.A., who concurred in the dismissal of the defendant's appeal, totally overlooked the "just cause" provision of the collective agreement and based his decision on the following untenable assertion:[21]

> The "damages for wrongful dismissal" claim is not a difference concerning the meaning of the collective agreement nor one concerning an alleged violation of it. The plaintiff is asserting a common law right of action.

On the other hand, Bridges C.J.N.B., who wrote the main judgment in the appeal division, at least did not disregard the collective agreement. He quoted the relevant clauses of the agreement, which he thought made it "clear . . . that the dismissal of the plaintiff could have been made the subject of a grievance and a matter for arbitration under the provisions of the collective agreement".[22] However, after quoting from *Re Grottoli* v. *Lock & Son Ltd* as to the effect of section 18(1) of the New Brunswick Labour Relations Act,[23] which is basically similar to section 34(1) of the Ontario Labour Relations Act,[24] the Chief Justice pointed out that he could "find no provision in the collective agreement before us which restricts an employee to the sole remedy of having the subject of his complaint processed as a grievance under the collective agreement".[25] As for section 18(3) of the New Brunswick Act, which reiterates that everyone bound by a col-

[19] Art. 4(2) listed several grounds upon which employees could be discharged without notice. Art. 4(3) provided as follows: "Nothing contained in the foregoing shall be deemed to restrict or limit the right of the Hospital to discharge employees for any other just cause, nor shall it restrict any employee, covered by this agreement from processing a grievance in accordance with this agreement." *Ibid.*, at p. 292.

[20] *Ibid.* [21] *Ibid.*, at p. 297. [22] *Ibid.*, at p. 293.

[23] R.S.N.B., 1952, c. 124. [24] *Supra*, footnote 6.

[25] *Supra*, footnote 18, at p. 295.

lective agreement must indeed comply with that agreement, he held:[26]

> I do not think this provision should be interpreted as restricting the plaintiff to only the remedy of having her dismissal processed as a grievance under the collective agreement and an arbitration held. To hold that it should be so interpreted would mean that an employee, who has been wrongfully dismissed, would be without remedy unless his dismissal was taken up by the union and carried by it to arbitration. I cannot believe it was the intention of the Legislature to vest such powers in a union or to prevent an employee on his dismissal from bringing an action as the the plaintiff has.

The New Brunswick appeal court, then, in the *Miramichi Hospital* case, allowed the bringing of a suit for damages for wrongful dismissal upon considerations identical to those upon which McRuer C.J.H.C. in *Re Grottoli* v. *Lock & Son Ltd* allowed an action for the recovery of vacation pay—the alleged existence of a common law right to the relief claimed, coupled with an unwillingness to require an aggrieved employee to make use of the grievance procedure set out in the collective agreement. In neither case was there any inquiry whether the employee's claim would actually have existed at common law, and in neither case did the courts appear to give much thought to the purposes of collective bargaining legislation or to the dangers inherent in allowing control of the administration of a collective agreement to be wrested from the parties to that agreement.

When the matter of an employee's direct right of action against his employer for breach of the terms of a collective agreement reached the Supreme Court of Canada a few weeks later in *Hamilton Street Railway Co.* v. *Northcott*,[27] it was disposed of in a two-page judgment which disclosed virtually no consideration of legislative intent or of the needs of collective bargaining. The applicable collective agreement stated, in article 26.03, that spare operators in the defendant company's employ would be "guaranteed a minimum of seventy hours' pay at their prevailing rates of pay in each regular fourteen day period", provided that they reported for work when called in and that they did whatever work was assigned to them.

The pay period involved in the dispute ran from December 26th, 1962 to January 7th, 1963. The plaintiff employee, a spare operator, worked on December 26th, was laid off the next day, worked on January 1st pursuant to a pre-layoff arrangement, and

[26] *Ibid.*, at pp. 295-296.

[27] *Supra*, footnote 3.

did not work again until his layoff ended on January 7th. The defendant company paid him only for the number of hours that he actually worked during the December 26th—January 7th pay period, in the belief that the layoff removed its obligation to pay him for seventy hours. Several other employees were in the same position or almost the same position as the plaintiff, and the union brought a grievance claiming that each was entitled to seventy hours' pay. This grievance was brought under the group grievance provision of the agreement,[28] which provided for the processing of union complaints. Although the collective agreement is not set out in the Case on Appeal, it is clear from the evidence that the agreement also contained an individual grievance procedure[29] which imposed a six-day time limit on the filing of individual grievances.

The union's grievance went to arbitration and was upheld by a majority of the arbitration board, of which Fuller C.C.J. was chairman, on the ground that the occurrence of a layoff during a pay period did not disentitle any employee to a full seventy hours' pay if that employee had, by doing at least some work during the pay period, become entitled to the benefit of the seventy-hour guarantee. Counsel for the union did not ask for an award of specific compensation for the affected employees, and the board made it explicit that no such compensation was being ordered. As a result, the arbitration award was not suitable for filing with the Registrar of the Supreme Court of Ontario under section 34(9) of the Ontario Labour Relations Act.[30]

The defendant company apparently refused to give effect to the award. The plaintiff, who had left the company's employ, therefore brought action in Division Court for the difference between seventy hours' pay and the amount he had received for the disputed pay period. In support of his claim, he adduced the collective agreement and the arbitration award. He won in Division Court, in the Ontario Court of Appeal, and in the Supreme Court of Canada, despite the company's argument at each level that the courts had no jurisdiction to entertain the action.

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[28] Art. 8. [29] Art. 6.

[30] *Supra,* footnote 6, s. 34(9): "Where a party, employer, trade union or employee has failed to comply with any of the terms of the decision of an arbitrator or arbitration board, any party, employer, trade union or employee affected by the decision may, after the expiration of fourteen days from the date of the release of the decision or the date provided in the decision for compliance, whichever is later, file in the office of the Registrar of the Supreme Court a copy of the decision, exclusive of the reasons therefor, in the prescribed form, whereupon the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such."

Judson J., who delivered the Supreme Court of Canada's judgment, appeared at first to accept *Re Grottoli* v. *Lock & Son Ltd* wholeheartedly.

> These men have a point conclusively settled in their favour by the arbitration board. They can go before a Court and say, "We are entitled to this money. All that remains is a mere matter of calculation. These are the hours for which we are entitled to be paid—seventy hours minus whatever hours we were paid for and which we actually worked."
>
> This is all that has happened and, in my opinion, the Courts have jurisdiction to determine this matter. This was the precise point decided by McRuer C.J.H.C. in *Re Grottoli* v. *Lock & Son Ltd.*
>
> If one follows the company's argument to its ultimate conclusion it means that no employee can ever sue for wages unpaid. He would have to follow the grievance procedure in the collective agreement and be bound by very stringent time limits. This would be so even though there is no dispute about the wages being due and owing. The collective agreement is not concerned with non-payment of wages. These may be sued for in the ordinary Courts.[31]

Then, however, Judson J. went on to confine *Grottoli* within very narrow limits.

> If, however, the right to be paid depends upon the interpretation of the collective agreement, this is within the exclusive jurisdiction of a board of arbitration appointed under the agreement, but whether this decision comes under grievance procedure under art. VI, with the consequent registration of the equivalent of a judgment or a declaration at the instance of the union under art. VIII, makes no difference. In the one case the individual employees get the equivalent of judgments; in the other case they have declarations of right on which they can sue.[32]

Judson J. appeared in that passage to be drawing a distinction between employee suits in which the employer disputes the employee's interpretation of the collective agreement, on the one hand, and employee suits in which the employer does not question the merits of the employee's claim but merely alleges that the court lacks jurisdiction to hear the action, on the other hand. This, at any rate, is the meaning attributed to Judson J. by the unanimous judgment of the Ontario Court of Appeal in *Close* v. *Globe and Mail Ltd.*[33] After discussing the *Grottoli* and *Hamilton Street Railway* cases in some detail, Kelly J.A., who delivered the Court of Appeal's judgment, said:[34]

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[31] *Supra,* footnote 3, at p. 710.

[32] *Ibid.*

[33] *Supra,* footnote 4.

[34] *Ibid.,* at p. 109 (D.L.R.). With regard to the Rights of Labour Act, R.S.O., 1960, c. 354, Judson J. said at the end of his judgment in *Hamilton Street Railway*: "The citation of a conclusive arbitration award under a collective bargaining agreement as the foundation for a claim for wages is not the same thing as making the collective agreement the subject of any action in any Court." *Supra,* footnote 3, at p. 710.

> It is to be noted that in neither of these cases did the defendant bring into issue the right of the plaintiff, in some forum, to obtain the relief sought; what was in question was whether an employee being a member of a bargaining unit as agent for which a union had entered into a collective bargaining agreement with the employer, had the right of recourse to the Courts for the enforcement of the payment to him of wages which the employer improperly withheld, while admitting them to be due and owing. The foregoing cases have established beyond question that in such circumstances the jurisdiction of the Courts is unaffected by the provisions of a collective bargaining agreement, the *Labour Relations Act* and the *Rights of Labour Act*.

In *Close* v. *Globe and Mail Ltd*, there was clearly a dispute between the plaintiff employee and the defendant employer as to the meaning of the vacation clause of the collective agreement, under which the employee was suing for vacation pay. Both the County Court and the Ontario Court of Appeal declined to hear the action, on the ground that the dispute was one for arbitration alone. In the words of Kelly J.A.:[35]

> To have made any decision involving the interpretation of the collective bargaining agreement would have been an alleged exercise of a jurisdiction which the [County] Court is precluded from exercising.
>
> This Court is equally disqualified from entering upon any interpretation of agreement. That is a question which will have to be decided by resort to the machinery provided in the collective bargaining agreement.

The judgment of Judson J. in *Hamilton Street Railway*, particularly as interpreted by the Ontario Court of Appeal in *Close* v. *Globe and Mail Ltd*, does not appear to leave a great deal of room for the displacement of arbitration by individual employee suits. Employers, in defending such suits, will almost always be able to raise questions of interpretation of the collective agreement. Nevertheless, where the individual right sought to be enforced is one created by the collective agreement or embodied in that agreement, there seems to be no valid reason to leave any scope whatever for litigation. The intent of Canadian labour relations legislation is clearly to withdraw from the courts, and to reserve to the arbitral forum, jurisdiction to decide all questions arising under collective agreements. The concept of incorporation, now relied upon by Canadian courts as the basis of individual rights in collective agreements, can have little meaning unless it is held to require that individual employees take the benefits and burdens not only of the substantive provisions of collective agreements but of the procedural provisions as well. Neither from the view-

[35] *Ibid.*, at p. 109-110 (D.L.R.).

point of legislative policy nor from the viewpoint of the concept of incorporation is there therefore any justification for allowing individual employees to bypass arbitration and to proceed directly in the courts.

Equally, there is no valid reason for permitting individual employees to resort to litigation even where, as in the *Hamilton Street Railway* case, they seek only to have the court place a monetary value on a declaratory arbitration award. The union in the *Hamilton Street Railway* case, when it chose to process the spare operators' complaint as a policy grievance rather than as a number of individual grievances, must have realized that even a favourable award would not confer quantified, enforceable rights upon individual employees. If the union had believed that nothing less than a mandatory award could secure the employer's compliance, it can only be presumed that the union would have framed the grievances as individual ones and proceeded under a different clause of the agreement. It is a legitimate function of a union as exclusive statutory representative of all employees in the bargaining unit to choose on the basis of relevant considerations the procedural alternative which will be followed in each case. For various reasons, unenforceable declarations of right or wrong issued by adjudicative tribunals in the labour relations field are usually observed and applied. If an employer in a particular case will not comply with an arbitrator's declaration, the courts should not, by giving teeth to that declaration, allow themselves to be used by individual employees to supplement or circumvent the procedure chosen by the bargaining agent in the proper exercise of its authority. Rather, the aggrieved employees should be made to fall back upon whatever machinery the collective agreement might provide for the settlement of their claims as individual grievances.

If the parties to the collective agreement have attached time limits to the individual grievance machinery, the courts should not use these time limits to rationalize the judicial displacement of the parties' own settlement procedures. In any event, in the light of current arbitral jurisprudence on the matter of time limits, it is no longer improbable that the arbitral forum itself will provide remedies for individual employees who might have been prejudiced by an employer's refusal to give effect to a purely declaratory award. It appears increasingly unlikely that an arbitrator would allow technical non-compliance with time limits to leave an aggrieved employee without any satisfaction in a situation where

such non-compliance was not the employee's fault and where the employer was from a very early date fully aware of the substance of the grievance.[35]

It is vital to the effective private administration of the collective agreement, and therefore to the entire scheme of Canadian labour relations legislation, that all issues arising from such an agreement be resolved through its own grievance and arbitration procedures rather than through litigation. If any of the utterances of the Supreme Court of Canada in *Hamilton Street Railway Co.* v. *Northcott* are so applied as to impair the exclusiveness of grievance arbitration, Canada's developing system of labour jurisprudence will have suffered an important setback.

B. L. ADELL*

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HUSBAND AND WIFE—DESERTION BY HUSBAND—MATRIMONIAL HOME—RIGHT OF WIFE TO—WHETHER "TITLE TO OR INTEREST IN LAND"—LIS PENDENS.—The decision in *Richarson* v. *Richardson*,[1] by Master Dunn, appears to be correct, but the reasoning, in part, is suspect.

The instant case was an *ex parte* application for an order to allow a deserted wife to obtain a certificate of *lis pendens*, pursuant to the provisions of the Judicature Act,[2] for registration against the title of the matrimonial home, which was registered in the husband's name but which he was apparently threatening to convey to his paramour.

A certificate of *lis pendens* may be obtained, by an *ex parte* application to the court where "any title to or interest in land" is brought into issue, and the Master properly decided that there was no interest in land involved.

The Master, adopted the reasoning of Schroeder J. (as he then was) in *Carnochan* v. *Carnochan*[3] and Roach J.A. in *Re Jollow and Jollow*,[4] both of whom in turn adopted the dictum of Denning L.J. in *Bendall* v. *McWhirter*[5] that a deserted wife has an irrevocable

[35] See, for example, *Re Toronto Civic Employees Union 43 and Toronto Parking Authority* (1967), 17 L.A.C. 37.

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[1] [1966] 2 O.R. 624. [2] R.S.O., 1960, c. 197, s. 38(1).

[3] [1953] O.R. 887, at pp. 894, 895. [4] [1954] O.R. 895, at p. 902.

[5] [1952] 2 Q.B. 466, at p. 477, where *Lee* v. *Lee*, [1952] 1 All E.R. 1299, [1952] 2 Q.B. 489n (C.A.) is cited with approval.

licence to remain in the matrimonial home; but, as the Master said, death, divorce, or an order of the court may revoke the licence.[6] In the same vein, we find the English courts holding that a deserted wife may obtain an injunction to restrain her husband from disposing of the matrimonial home while she and the children live there[7] and that she may also take steps to prevent a sham or fraudulent sale of the matrimonial home by her husband.[8]

In *Bendall* v. *McWhirter*,[9] Denning L.J. propounded the view that where the husband is guilty of misconduct and has deserted his wife, she, by virtue of her status as a married woman, has an "equity" or licence with a special right, which allows her to remain in possession of the matrimonial home, but this is not a legal interest in land. To the same effect are *Street* v. *Denham*,[10] *Jess B. Woodcock & Son, Ltd.* v. *Hobbs*,[11] and *Westminster Bank, Ltd.* v. *Lee*[12] where it is again emphasized that the deserted wife, although having no legal or equitable interest in land, has a licence coupled with an equity which the court will enforce against any successor in title, except a *bona fide* purchaser for value without notice.

In *Thompson* v. *Earthy*,[13] Roxburgh J. rejected this view, and clearly stated that the deserted wife has no legal or equitable interest in the matrimonial property, and her husband can sell the property free and clear of any attaching "equity".

The House of Lords in *National Provincial Bank Ltd.* v. *Ainsworth*[14] has overruled *Bendall* v. *McWhirter*[15] and approved *Thompson* v. *Earthy*.[16] Lord Hodson[17] said that the rights of a deserted wife are personal rights[18] which do not run with the land, and that these rights do not operate as a clog on the land which protect her by operating as a mere equity against everyone except a purchaser for value without notice. If the deserted wife's right is a mere "equity", that by itself, cannot bind successors in title,

[6] *Ibid.*, at p. 626; *Jess B. Woodcock & Son, Ltd.* v. *Hobbs*, [1955] 1 All E.R. 445, at p. 499. Generally, see Power on Divorce (2nd ed., 1964), pp. 548-551.

[7] *Lee* v. *Lee*, *ibid.*, and if the husband wants the property, he should provide his wife with suitable alternative accommodation.

[8] *Ferris* v. *Weaven*, [1952] 2 All E.R. 233.

[9] *Supra*, footnote 5.

[10] [1954] 1 All E.R. 532.

[11] *Supra*, footnote 6.

[12] [1955] 2 All E.R. 883.

[13] [1951] 2 K.B. 596.

[14] [1965] 2 All E.R. 472, [1965] 3 W.L.R. 1. See The End of the Deserted Wife's Equity (1965), 81 L. Q. Rev. 353, and Jeremy S. Williams, The Deserted Wife's Status (1966), 29 Mod. L. Rev. 74.

[15] *Supra*, footnote 5.

[16] *Supra*, footnote 13.

[17] *Supra*, footnote 14, at pp. 480-481 (All E.R.).

[18] Marriage confers on the wife two rights, namely, the right to cohabitation with and support from her husband: per Lord Wilberforce, *ibid.*, at p. 492 (All E.R.).

even with notice, and it is purely personal to the parties.[19] The deserted wife's right is a purely personal claim against her husband "not specifically related to the [matrimonial] house in question, but merely, at its highest, to be provided with a home . . .".[20]

It would seem that while a deserted wife has personal rights against her husband, arising from her status as a wife, she has a claim, legal or equitable, upon the matrimonial property. Also as against third parties, for instance, the purchaser for value, she has no claim against the matrimonial property.

The *Richardson*[21] decision relied upon *Carnochan*[22] and *Re Jollow*[23] and referred with approval to *Jess B. Woodcock & Son, Ltd.* v. *Hobbs*[24] and *Westminster Bank, Ltd.* v. *Lee.*[25] These decisions in turn relied upon the dictum of Denning L.J. in *Bendall* v. *McWhirter*[26] which has been overruled by the House of Lords in *National Provincial Bank Ltd.* v. *Ainsworth.*[27] However, having regard to the reasoning of the House of Lords, the *Richardson*[28] case is correct in holding that a deserted wife has no title to or interest in land, solely by virtue of her status as a deserted wife, and the Master properly decided that a certificate of *lis pendens* should not issue. The reasoning in *Richardson,*[29] if it had followed that of the House of Lords in *National Provincial Bank Ltd.* v. *Ainsworth,*[30] and there is no reason why that approach should not have been followed, would simply have been that a deserted wife has no interest, legal or equitable, in the matrimonial property, and that being so, a certificate of *lis pendens* should not be granted.[31]

Conveyancers should take note that if a wife is to be protected,

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[19] Per Lord Upjohn, *ibid.*, at p. 488 (All E.R.).

[20] Per Lord Wilberforce, *ibid., at* p. 503 (All E.R.). See Laskin, The Deserted Wife's Equity in the Matrimonial Home: A Dissent (1961-62), 14 U. of T.L.J. 67, esp. at p. 73.

[21] *Supra,* footnote 1. [22] *Supra,* footnote 3. [23] *Supra,* footnote 4.
[24] *Supra,* footnote 6. [25] *Supra,* footnote 12. [26] *Supra,* footnote 5.
[27] *Supra,* footnote 14. [28] *Supra,* footnote 1. [29] *Ibid.*

[30] *Supra,* footnote 14. In *Re Jollow, supra,* footnote 4, at p. 903, Roach J.A., said that although *Bendall* v. *McWhirter, supra,* footnote 5, is not binding on an Ontario court, it should be followed.

[31] Apparently *National Provincial Bank Ltd.* v. *Ainsworth, ibid.* was not brought to the attention of the Master; however, he did say that it "would appear" that the right of the deserted wife is one *in personam,* and not *in rem* "and does not create any legal or equitable estate or interest in land": *supra,* footnote 1, at p. 626. Certainly on the authorities cited by the Master, and those which came thereafter (see *National Provincial Bank Ltd.* v. *Ainsworth, ibid.,* at pp. 478, 487, and 499 (All E.R.)) it was open to argument, and it was not clear that the deserted wife's interest in the matrimonial home was purely personal and would not be binding upon third parties, for it was said her right was a licence coupled with an equity. In any event, it does not seem to be satisfactory to classify rights as being either *in personam* or *in rem.*

in anticipation of the marriage taking a turn for the worse (a most unacceptable consideration, sociologically speaking), it would be wise to make her a joint or co-owner or co-lessee with the husband. It seems that, as the law still stands in the Province of Ontario, the deserted wife in possession who is in fact a joint or co-owner with her husband, has a right to retain possession, and cannot be ousted by proceedings under the Partition Act.[32]

After *National Provincial Bank Ltd.* v. *Ainsworth,*[33] we find three decisions of the English courts, which are of interest: *Halden* v. *Halden,*[34] *Bedson* v. *Bedson*[35] and *Re a Debtor, Ex parte The Trustee* v. *Solomon and Another.*[36]

In *Halden* v. *Halden,*[37] the English Court of Appeal gave its blessing to *Lee* v. *Lee.*[38] In this case, the deserted wife remained in the matrimonial home, which was in the name of the husband who had established another abode with his mistress. Lord Denning reasoned that whatever the effect of *National Provincial Bank Ltd.* v. *Ainsworth*[39] may be with respect to the position of third parties (for instance, a subsequent purchaser), it is clear that "if the husband deserts his wife, leaving her in the house, he has not a right to turn her out. She has not to show a legal or equitable interest in herself . . . . He is not entitled to turn her out except by order of the court; and that will not be given in the ordinary way unless he provides alternative accommodation for her".[40] Lord Denning and the English Court of Appeal dealt with the converse situation in *Bedson* v. *Bedson*[41] where the wife deserted the husband, took the children with her, and left the husband in the jointly owned matrimonial property. The court found that as a joint tenant, and in the particular circumstances, the wife had a one-half interest in the property. The court refused the wife's application for a sale of the property and enjoined her from dis-

[32] R.S.O., 1960, c. 287; *Re Jollow and Jollow, supra,* footnote 4. Proceedings could still be taken under s. 12(1) of the Married Women's Property Act, R.S.O., 1960, c. 229; per Lord Upjohn, *National Provincial Bank Ltd.* v. *Ainsworth, supra,* footnote 14, at p. 487 (All E.R.) referring to the equivalent English legislation, s. 17 of The Married Women's Property Act, 1882. *Vide*: *Rush* v. *Rush,* (1960), 24 D.L.R. (2d) 248 (Ont. C.A.) where it was held that partition proceedings instituted by a husband would be stayed, pending an application by the wife (who alleged she was deserted) for possession of the jointly owned matrimonial home, under s. 12(1) of The Married Women's Property Act, *ibid.*

[33] *Ibid.*

[34] [1966] 1 W.L.R. 1481, [1966] 3 All E.R. 412 (C.A.).

[35] [1965] 3 All E.R. 307 (C.A.).

[36] [1966] 3 All E.R. 255.

[37] *Supra,* footnote 34.

[38] *Supra,* footnote 5.

[39] *Supra,* footnote 14.

[40] *Supra,* footnote 34, at p. 1484 (W.L.R.).

[41] *Supra,* footnote 35.

posing of her interest in the property, without leave of the court; and further ordered the husband to pay the wife one pound sterling per week as long as he remained in occupation. Russell L.J. dissented in part, and would have refused (a) to order any payment by the husband to the wife for his occupation, and (b) to grant the injunction, for the wife "has no duty whatever to provide her husband with a home".[42] In the *Solomon*[43] action, Goff J. held that a trustee in bankruptcy was entitled to an order for sale of the matrimonial home, owned jointly by the deserted wife and her bankrupt husband[44] and said the wife is not a contractual licensee, and her right to remain in occupation is purely personal as against her husband, and does not bind the trustee or other successors in title.[45]

From the foregoing we may conclude that in England at least, the deserted spouse, be it male or female, may as against the other spouse remain in occupation of the matrimonial property until alternative accommodation is provided. If the property is jointly owned the deserted spouse may even have to pay for occupying same, and the other spouse may be enjoined from selling his or her interest; and insofar as third parties are concerned, for instance, mortgagees, trustees in bankruptcy, successors in title, they are not affected by the rights of the spouses *inter se*.

As the law presently stands in Ontario, it would appear that if we follow the English line of cases, the deserted spouse will have a right to occupy the matrimonial property, but third parties will not be affected by this right. It is, of course, pertinent and material to consider whether or not the matrimonial property is jointly owned.[46]

Aside from a wife's right to dower (where that right still prevails)[47] in the matrimonial property, if she is not a joint or co-owner of the matrimonial property and has been deserted by her husband, it may be most difficult to protect her right to remain in possesion of the matrimonial home, as against third parties.[48] Notice of the

[42] *Ibid.*, at p. 326.

[43] *Supra*, footnote 36.

[44] In a consent maintenance order, the husband had undertaken to allow his wife to occupy the property rent-free, pay the property expenses, and not dispose of the property without providing for her to live therein or use the same.

[45] The undertakings in the maintenance order were purely personal obligations, and likewise not binding on third parties.

[46] In order to determine whether to proceed under the Partition Act, or the Married Women's Property Act, *supra*, footnote 32; *cf. Re Jollow and Jollow, supra*, footnote 4; *Rush* v. *Rush, supra*, footnote 32 and *Blackhall* v. *Jardine*, [1958] O.W.N. 457 (C.A.).

[47] The Dower Act, R.S.O., 1960, c. 113.

[48] The innocent purchaser without notice, a trustee in bankruptcy, or a mortgagee.

deserted wife's right to remain in possession of the matrimonial property, as between herself and her husband, could be effected by registering against the title of the property, as a deposit,[49] an affidavit or statutory declaration by the wife setting forth the fact of her desertion and her claim to possession as against her husband.[50] There is a need for adequate land registration legislation to permit the deserted wife to effectively register against the title of the matrimonial property notice of her claim to possession as between herself and her husband.

Except in most unusual situations (such as where the spouses are respectively affluent), it is submitted that whether or not the property is jointly owned, the deserted spouse should have the right to remain in occupation of the matrimonial property (or be provided with alternative accommodation), and should not have to pay for occupation thereof; and if the property is jointly owned, the deserting spouse should not be entitled to an order for sale, and should be enjoined from disposing of his or her interest, at least until such time as equal, adequate and alternative accommodation is provided for the deserted spouse; and that the result of *Richardson*[51] is sound, but the reasoning, in light of the recent jurisprudence, must be altered.[52]

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[49] Registry Act, S.O., 1964, c. 102, Part II, as am. by S.O., 1966, c. 136 (formerly being the Custody of Documents Act, R.S.O., 1960, c. 85; repealed by S.O., 1964, c. 17); but *quaere*, whether this would be effective notice by itself? Registry Act., *ibid.*, s. 128(2). For practical purposes, though it might be effective, as it is unlikely that a purchaser's solicitor would feel comfortable in closing a transaction of purchase having perused such a deposit on title.

[50] This could be done where the registry system prevails; but it is unlikely that *caveat* or caution, or any notice could be registered under the land titles system. If the deserted wife has sued and obtained an interim order for alimony this might be included in the deposit: *supra*, footnote 49; and if she has a judgment for alimony, she can register the judgment against the title of the matrimonial property, and may even, in the alimony action itself, obtain a summary order for the sale of the property: Judicature Act, *supra*, footnote 2, s. 78.

[51] *Supra*, footnote 1; and likewise *Re Jollow and Jollow*, *supra*, footnote 4.

[52] All of which might be considered to be, in the words of Roscoe Pound, "more efficacious social engineering": An Introduction to the Philosophy of Law (1959, Yale Paperbound ed.), p. 47. For recent examples of problems which may arise when spouses quarrel about matrimonial property see *Waller* v. *Waller*, [1967] 1 W.L.R. 451 (Ch.D.) (where the purchase price for the property, which was in the husband's name, was paid for by the husband and wife, and the wife was no longer in possession, she obtained an injunction restraining him from selling the property) and *Des Salles D'Epinoix* v. *Des Salles D'Epinoix*, [1967] 1 W.L.R. 553 (C.A.) (where the wife succeeded in preventing the husband from obtaining an injunction to permit him to return to the jointly owned matrimonial home).

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DÉFAUT DE CONSENTEMENT—IMPUISSANCE DU MARI—RÔLE DU JUGE.—Le juge n'est-il pas tenu d'appliquer la loi?

Telle est la question que l'on est amené à se poser, à la lecture de deux décisions récentes de la Cour supérieure en matière d'annulation de mariage. Nous sommes, en effet, en présence de deux affaires dans lesquelles la Cour a délibérément écarté des textes clairs et précis du Code civil, afin d'aboutir à une solution tout à fait contraire à celle qui était souhaitée par le législateur.

Première espèce:[1] Le 5 septembre 1955, M, demandeur, épouse la dame P, défenderesse, en l'Eglise paroissiale de Repentigny. De ce mariage sont issus trois enfants: Viviane née le 7 juillet 1956, Nicole née le 23 juin 1958 et Patrick né le 19 juillet 1961.

Le 29 novembre 1965, le mari demande à la Cour supérieure d'annuler ce mariage, contracté dix ans auparavant, à raison du défaut de consentement de la part de la défenderesse, son épouse. A l'appui de cette demande, le mari fait valoir que "bien avant son mariage, soit depuis l'année 1953, la défenderesse avait souffert de troubles psychiatriques [sic], ce qui avait amené son premier séjour dans un hôpital psychiatrique, du 18 février 1955 au 2 avril 1955";[2] elle souffrait, en fait, de "schizophrénie paranoïde" et devait faire deux nouveaux séjours à l'hôpital, l'un en 1963, l'autre en 1964. Les médecins consultés à la suite de cette maladie mentale, "ont été d'avis *qu'ils doutaient fort* que la défenderesse ait pu être dans un état mental pour donner un consentement en connaissance de cause au moment de son mariage . . .".[3] Sur la foi de ce témoignage dubitatif, la Cour conclut que, lors de la célébration, la défenderesse "était inhabile et n'était pas dans un état mental qui pouvait lui permettre de donner un consentement valide pour contracter mariage",[4] et ainsi annule ledit mariage, en invoquant les articles 115,[5] 116 et 148 du Code civil.

Tout d'abord, écartons l'article 148 qui ne s'applique nullement à cette affaire.

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[1] *M* v. *Dame P* et *Procureur général de la Province de Québec*, [1966] C.S. 475.

[2] *Ibid.*, à la p. 476.

[3] *Ibid.*, à la p. 477. Passage souligné par l'auteur de ce commentaire.

[4] *Ibid.*, à la p. 478.

[5] Cet article qui interdit le mariage aux impubères ne peut être appliqué par analogie aux personnes atteintes de schizophrénie paranoïde. Il semble s'agir d'une erreur d'impression, car à la p. xiv des Rapports judiciaires de Québec, Cour supérieure, on y lit l'observation suivante: "*M* v. *Dame P* et *Procureur général de la Province de Québec*. A la page 477, remplacer le quatrième paragraphe par le suivant: vu les articles 116 et 148 du Code civil."

Celui-ci vise le mariage qui a été contracté sans le consentement libre des deux époux ou de l'un d'eux et qui ne peut être attaqué que par les époux ou celui des deux dont le consentement n'a pas été libre, donc les vices du consentement. Or la dame P ne paraît pas avoir prétendu que son consentement pût être vicié d'une façon ou d'une autre; on ignore, d'ailleurs, ce que la dame P présenta en défense: la délicatesse et la discrétion de ladite défense furent parfaites, semble-t-il.

Seul, donc, pourrait s'appliquer l'article 116. Pour qu'en vertu de ce texte il y ait cause d'annulation de mariage, il est nécessaire que le consentement fasse *entièrement* défaut et que, par conséquent, l'on ait *constaté et prouvé de façon incontestable* l'aliénation, au moment de la célébration du mariage.

La doctrine est unanime. Certes, la Cour réfère à certaines autorités et cite quelques passages de leurs oeuvres: Demolombe,[6] Aubry et Rau,[7] Huc,[8] Loranger,[9] Mignault[10] et bien évidemment "la" jurisprudence, en l'occurrence un jugement de la Cour supérieure de l'excellente année 1916.[11]

En vérité, le passage cité de Demolombe[12] vise, sans autre commentaire, l'époux qui se trouve dans "un état de folie exclusif de toute volonté . . .".

En vérité, le passage cité de Aubry et Rau concerne l'époux qui, bien que n'étant pas interdit, se trouve dans un "état de fureur, de démence ou d'imbécillité . . .".[13]

En vérité, le passage cité de Loranger[14] vise l'époux "qui a exprimé un consentement qu'il ne pouvait pas donner et que, de fait, il n'as pas donné", en d'autres termes le défaut de raison: voilà qui n'est pas compromettant! Le passage cité de Huc[15] ne l'est pas davantage: état qui met l'époux "dans l'impossibilité de donner un consentement".

Enfin, apothéose, la Cour fait dire à Mignault[16] ce que personne ne nie et que tout le monde a répété: "Lorsque le consentement fait absolument défaut, le mariage n'existe point."

Quant à "la" jurisprudence consultée, bavarde mais plus précise, elle invoque, nous dit-on, "l'existence *bien constatée* de

[6] Cours de Code Napoléon, t. 3 (1874), n. 242, par. 3, p. 372 et n. 241, par. 2, p. 370.
[7] Cours de droit civil français, 4e ed., t. 5 (1872), pp. 10 et 13.
[8] Code civil, t. 2 (1892), p. 27.
[9] Commentaire sur le Code civil, t. 2 (1879), n. 70, p. 72.
[10] Le droit civil canadien, t. 1 (1895), p. 344.
[11] *Michaelson, es qualité* v. *Glassford* (1916), 22 Rev. de Juris. 485.
[12] *Op. cit.*, note 6. [13] *Op. cit.*, note 7. [14] *Op. cit.*, note 9.
[15] *Op. cit.*, note 8. [16] *Op. cit.*, note 10.

l'aliénation mentale". Il suffit de se référer au jugement cité[17] pour se persuader que cette décision solidement et remarquablement motivée aurait dû précisément, en notre affaire, inciter la Cour à rejeter l'action. Sans doute eut-il été préférable de l'ignorer. Sans doute aussi eut-il été préférable de citer le passage suivant de Mignault:[18] "Lorsqu'une personne atteinte de folie et, par suite, *absolument privée de raison,* se marie, le mariage qu'en apparence elle contracte, n'a aucune existence légale" ou encore celui-ci de Trudel:[19] "Quiconque consent un mariage dans une *période d'aberration mentale,* qu'elle soit habituelle ou accidentelle, ne donne qu'une apparence de consentement."

Or, M et la dame P ont mené *pendant dix ans* une vie conjugale, qui, sans aucun doute possible, a été voulue et consentie. Quel calvaire, s'il n'en fut pas ainsi! M et la dame P ont—de concert, sans aucun doute—atteint ce que certains considèrent comme le but essentiel ou premier du mariage, à savoir la procréation, et nous pouvons même ajouter que le coq chanta trois fois: en 1956, en 1958 et en 1961. Aucun des époux ne s'en plaignit; aucun défaut, aucun vice de consentement ne furent relevés à cet égard.

Mais, après dix années d'un mariage fécond, l'on vient prétendre en novembre 1965, qu'en 1955, le 2 septembre *très exactement,* le fond le la personnalité de la dame P était déjà atteint à un point tel, que la raison lui faisait défaut. Et l'on nous explique que ce terrible mal qui consiste "dans un processus de désorganisation mentale à évolution *lente* et *très irrégulière*" parcourt plusieurs stades. L'on admet, aussi, qu'il peut "y avoir arrêt, du moins temporaire, dans son développement, grâce aux nouvelles méthodes . . ." [20] et que le patient peut "redevenir calme et même réintégrer la vie en société",[21] autant d'arguments qui augmentent les difficultés à prouver que le consentement n'existait pas au moment où il fut donné et qui auraient dû exiger de la Cour une grande prudence dans son appréciation.

Nous voudrions être assez naïfs pour croire au défaut de consentement de la dame P, lors de son mariage, mais nous n'y parvenons point malgré tous nos efforts et notre bonne volonté. Aucun fait, aucun incident, aucune circonstance ne nous amènent

[17] *Supra,* note 11, à la p. 490.
[18] *Op. cit.,* note 10, p. 416. Passage souligné par l'auteur de ce commentaire.
[19] Traité de droit civil du Québec, t. 1 (1942), p. 357. Passage souligné par l'auteur de ce commentaire.
[20] *Supra,* note 1, à la p. 477. [21] *Ibid.*

à penser que la défenderesse était dépourvue de raison lors de l'échange des consentements. Les médecins consultés n'ont aucunement affirmé de façon catégorique que la défenderesse n'avait pas sa raison lorsqu'elle consentit au mariage: comment l'auraient-ils pu? Ils se contentèrent de "douter" qu'il en fut autrement. Et ce doute médical, fréquent et sage, nous paraît beacoup plus sage que la certitude de la Cour qui supplée, sans autre forme de procès, aux hésitations de l'homme de l'art.

Voici donc un mariage qui fut annulé pour une cause qui ne fut nullement prouvée. Nul ne peut admettre ici "l'existence *bien constatée* de l'aliénation mentale" au moment de la célébration du mariage, contrairement à ce qui fut établi de façon certaine par le Juge Pouliot, dans l'affaire *Michaelson* v. *Glassford*,[22] au résultat d'une analyse méticuleuse des faits et des rapports présentés par des sommités médicales, analyse qui n'exiga pas moins de vingt-cinq pages.

D'ailleurs, la Cour d'Appel, dans *Richer* v. *Pharand*,[23] rejette l'action en annulation, lorsque la maladie dont souffrait l'époux, ne l'empêchait pas de comprendre la gravité du contrat de mariage. Elle juge, dans *Karakofsky* v. *Diner*,[24] que l'annulation ne peut être prononcée sur la seule opinion d'un expert et que celui qui demande l'annulation d'un mariage en se fondant sur l'article 116, doit établir l'absence de consentement *par une preuve de faits qui apporte la conviction chez le juge*.[25] Il est vrai que certains juges sont plus faciles à convaincre que certains autres.

En admettant qu'il y eût réellement défaut de consentement, ce jugement eut été critiquable encore. L'article 116 dispose qu'il n'y a pas de mariage lorsqu'il n'y a pas de consentement, mais n'édicte pas la sanction de ce défaut. Si donc l'on admet la règle ancienne selon laquelle, en matière de mariage, il n'existe pas de nullité sans un texte qui la prononce expressément, on doit recourir à la théorie de l'inexistence et dire non point que ce mariage est nul ou annulable, mais qu'il n'existe pas, car il y manque un élément essentiel.[26] Alors que l'acte annulable existe jusqu'à ce que l'annulation soit prononcée par le juge, et que l'acte devient nul *ab initio* par le jeu de cette fiction qu'est la rétroactivité, l'acte inexistant, comme son nom l'indique, n'a

[22] *Supra*, note 11. [23] [1948] B.R. 16. [24] [1955] B.R. 510.
[25] Voir également *Dugal* v. *St. Julien*, [1963] C.S. 256, jugement motivé prononçant la nullité.
[26] Mignault, *op. cit.*, note 10, p. 416 ne peut s'exprimer autrement: "Le mariage qu'en apparence (la personne absolument privée de raison) contracte, n'a aucune existence légale: il n'existe ni pour ni contre personne."

jamais existé et le juge doit se borner à constater son inexistence. C'est ce qu'il fit dans *Michaelson* v. *Glassford*:[27] "La Cour ne peut faire autrement que de déclarer inexistant l'acte matériel du mariage." L'une des conséquences essentielles de cette distinction sera qu'un mariage nul d'une nullité absolue ou relative pourra être déclaré putatif, lorsque les époux ou l'un des époux ont été de bonne foi lors de la célébration du mariage, alors que le mariage inexistant ne pourra en aucun cas être déclaré putatif, puisqu'il n'a jamais existé.

En conséquence, Viviane, Nicole et Patrick, nés malgré le défaut total de consentement à son mariage de la dame P, devraient être déclarés enfants naturels d'un couple qui, pendant dix ans, a mené une vie conjugale inexistante et non consentie. La Cour ne s'est point embarrassée de pareille argutie; elle a simplement considéré que le mariage était nul et qu'il y avait lieu de déclarer qu'il produisait ses effets civils *en faveur du demandeur et des trois enfants;* ce qui laisse supposer que la malheureuse schyzophrène était aussi de mauvaise foi, au moment où elle donna son consentement. Nous aimerions, alors, savoir si, en vérité, lors de la célébration du mariage, la dame P était schyzophrène ou de mauvaise foi: nous concevons mal qu'elle pût être les deux à la fois.

Deuxième espèce:[28] Les faits sont simples: le 23 juin 1962, la dame S, demanderesse, épousait G, défendeur, en l'église St. Ignace-de-Loyola, à Montréal. Contrat de mariage fut passé devant notaire, mais mariage ne fut point consommé.

Le mari opposa un refus farouche et permanent ("he was very obstinate") à l'épouse qui, en désespoir de cause, exerça, alors, une action en nullité, basée sur l'article 117 du Code civil: "L'impuissance naturelle ou accidentelle existant lors du mariage, le rend nul, mais dans le cas seulement où elle est apparente et manifeste", action qui fut couronnée de succès puisque, sur cette base, le mariage fut annulé.

Au cours du procès, trois témoins furent appelés: un médecin et deux prêtres! Les deux prêtres unanimes nous apprirent que le mari ". . . was frightfully embarrassed and that with all the good will in the world, he just could not get himself to have the physical erection . . .".[29]

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[27] *Supra,* note 11, à la p. 512.
[28] *Dame S* v. *G. and Attorney-General of the Province of Quebec,* [1966] C.S. 388.
[29] *Ibid.,* à la p. 389.

Le médecin qui, à la suite des deux prêtres, examina le mari, "found him to be in his usual robust good health and an extremely powerful man . . . and found that . . . defendant has no abnormality of genetic organs whatsoever",[30] cette impuissance résultant d'un dérangement psychique. A la question de savoir si le défendeur pourrait avoir des relations sexuelles avec une autre femme, ce même médecin répondit: "I cannot answer this . . . I cannot deny this, but I cannot believe it likely."[31]

La Cour, insatisfaite de tels témoignages, fit appel à un psychiatre qui, "after reading the court record, consulting with Dr. P. [le premier médecin], and examining the medical record" lâcha une sentence non dubitative (tous les psychiatres ne se ressemblent pas); aux dires de la Cour: "He believed that defendant is untreatable, that he has the most severe type of disorder psychologically that can be seen." Il est vrai que les termes mêmes du psychiâtre sont les suivants: ". . . I believe he will be an *almost impossible* case to treat" et qu'à la question du juge: "incurable"?, le témoin répondit: "I *can't use* that word", mais il l'utilisa, sans oser l'utiliser, de telle sorte que ce dont nous sommes sûrs, est que le mariage ne fut point consommé.[32]

Peu nous importe, d'ailleurs, que ce mari fut ou non "incurable".

Peu nous importe que ce mari "has a hatred of women, because he has a hatred of the mother who abandoned him . . .".[33]

Le seul point important est le texte de l'article 117: l'impuissance rend nul le mariage *dans les cas seulement où elle est apparente et manifeste.* On sait que le Code napoléon n'a pas reconnu l'impuissance comme cause de nullité du mariage, parce que la constatation de ce vice est délicate et que l'on évite ainsi une procédure que beaucoup considèrent comme immorale et scandaleuse.

En droit Québecois, on a admis cette cause, mais on a atténué la rigueur de cette règle par le fait qu'il y a nullité seulement dans le cas où cette impuissance est apparente et manifeste, c'est-à-dire—comme l'ont soutenu tous les auteurs, de Mignault[34] à Trudel[35]—lorsqu'elle peut se constater par simple inspection de l'individu: la débilité de l'organe ne suffit pas, il doit s'agir de son absence. Sans doute, une telle règle met-elle la victime dans une

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[30] *Ibid.*, à la p. 390.
[31] *Ibid.*, à la p. 391.
[32] *Ibid.*, aux pp. 391-392.
[33] *Ibid.*, à la p. 391.
[34] *Op. cit.*, note 10, p. 357.
[35] *Op. cit.*, note 19, p. 359.

position inconfortable, mais le législateur l'a voulu ainsi: *dura lex sed lex.*

Il est alors quelque peu surprenant de voir la Cour balayer d'un revers de main un principe si clair de notre droit, et déclarer simplement: "Many are of the opinion that in order that impotency be apparent and manifest, it must arise from malformation of sexual organs or the total or partial absence of such organs. Dr. H. [le deuxième médecin] expresses a contrary opinion which appears to the court very logical."[36] Désormais, les psychiatres créent le droit, ainsi en a décidé la Cour, contrairement à une jurisprudence respectueuse des textes du Code civil.[37]

Nous demeurons confondu devant la facilité avec laquelle un tribunal de première instance prononce, dans la même année 1965, à deux mois d'intervalle, deux jugements contraires à la loi. Peut-être ces décisions sont-elles secrètement motivées et les motifs sont-ils valables: mais appartient-il véritablement à la Cour de modifier des règles légales clairement exprimées, n'est-ce pas là plutôt le rôle du législateur?

Comment, alors, expliquer que le Procureur général ne porte pas en appel de telles décisions? N'est-il pas mis obligatoirement en cause, dans de pareilles affaires, afin précisément de veiller à ce que la loi soit exactement appliquée?

Le Code civil a-t-il encore quelque autorité? La mise en cause du Procureur général est-elle vraiment utile?

Si les deux réponses sont négatives, supprimons l'un et l'autre. A moins que l'on ne préfère supprimer le mariage: ainsi disparaîtraient ses victimes.

JEAN PINEAU*

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[36] *Supra,* note 28, à la p. 392.

[37] *W* v. *F,* [1947] C.S. 66; *B* v. *D,* [1949] C.S. 406; *Leibovitch* v. *Beane,* [1952] C.S. 352; *S* v. *M,* [1954] R.L. 346.

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